

THE STATE OF SOUTH CAROLINA
In The Court of *Appeals*

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

Marvin H. Dukes, III, Master In Equity

RECEIVED

APR 28 2016

SC Court of Appeals

Appellate Case No. 2016-000537

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

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; and David A. Brosman are

Appellants.

APPELLANTS' RETURN TO MOTION TO DISMISS

Ehrick K. Haight, Jr., Esq.
Stacey S. Collins, Esq.
MINOR, HAIGHT & ARUNDELL, P.C.
Post Office Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorneys for Appellant David A. Brosman

Keating L. Simons, III, Esq.
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132
Attorney for Appellants Black Diamond, LLC
and J. Christopher Lindgren

Appellants, Black Diamond, LLC (“Black Diamond”), J. Christopher Lindgren (Lindgren) and David A. Brosman (“Brosman”)(when referred to in the collective, “Appellants”), responding to the Motion to Dismiss filed by Respondent, TD Bank N.A., Successor by Merger to Carolina First Bank (“TD Bank”), submit the following memorandum in opposition thereto.

BACKGROUND FACTS¹

In 2010, Black Diamond suffered the death of one of its members. Amidst this uncertainty and the financial hardship it caused, Black Diamond was unable to pay the balance of the \$2,000,000 Note at maturity and defaulted. At the time of the default, both the \$2,000,000 and \$3,500,000 Notes were cross-collateralized and cross-defaulted. Jointly, the Notes were secured by Mortgages on a large commercial/retail development in Bluffton, South Carolina (the “Business Park”). A portion of Business Park included a 4.51 acre tract comprised of three lots, two of which were previously sold and released from the Mortgages. The remaining lot, Unit CC, contained approximately 61,500 sq. feet of undeveloped pad sites and an approximately 14,550 sq. foot unfinished commercial/retail building (the “Shell Building”). TD Bank agreed not to foreclose on Mortgages in exchange for the execution of the Forbearance Agreements and Brosman’s Guaranties. At the time the Forbearance Agreements and Brosman’s Guaranties were executed, the outstanding balances on the Notes were roughly \$3,145,000 and \$1,857,000 respectively. (Complaint, Ex. C, ¶2 and E, ¶2). On September 2, 2010, less than two months after the execution of the Forbearance Agreements, Black Diamond received a bona fide offer from Ceagull Investments, LLC for the purchase of the Shell Building in the amount of

¹ TD Bank’s identification of the documents and procedural posture of the case is largely accurate and do not bear repetition here. Appellants shall endeavor to refer to the documents referenced therein by the same abbreviations for clarity.

\$1,325,000 (the “Offer”)(See: Memo. Opp. Summ. Jmt., Ex. B, Depo. Fraser, Ex. 2). Importantly, Black Diamond was not in default of its obligations under the Forbearance Agreements at the time the Offer was received and TD Bank’s Notes were secured not just by the Shell Building, but the undeveloped pad sites on Unit CC, and Black Diamond’s other property within the Business Park.

Appellants contend that TD Bank acted unreasonably by ignoring their request to partition Unit CC to accommodate the sale of the Shell Building. They further argue that TD Bank created a de facto receivership over the Business Park through its appointment and control of the property manager and that in doing so, altered its lender/borrower relationship, giving rise to a fiduciary duty under the laws governing agency. As a result of the foregoing allegations, Appellants sustained damages when TD Bank forced the sale of Unit CC for \$125,000 less than the original Offer on the Shell Building portion alone. Appellants brought a number of counterclaims against TD Bank, including breach of contract², breach of covenant of good faith and fair dealing, breach of fiduciary duty, duress, and unfair trade practices. (See Appellants’ Answers). The trial court, mischaracterizing the Offer as a “short sale” (rather than a partition and partial release), granted summary judgment as to the foregoing counterclaims by Order dated September 11, 2015 (the “Summary Judgment Order”). The trial court left intact Appellants’ counterclaims for negligent misrepresentation and interference with economic relations.

In addition to the documents identified in TD Banks’ Motion, Appellants filed a Memorandum in Opposition to Motion to Strike Defendants’ Jury Trial Demand (attached hereto

² The trial court granted TD Bank summary judgment on Appellants’ counterclaim for breach of contract and breach of covenant of good faith “as it relates to the cross collateralization of the loans and the Bank’s decision not to agree to a proposed short sale.” (Summ. Jmt. Order, p.1).

as Exhibit 1), Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (attached hereto as Exhibit 2) and Motion for Reconsideration Pursuant to Rule 59, SCRCP (attached hereto as Exhibit 3).

ARGUMENT

I. THE ORDER STRIKING APPELLANTS' JURY TRIAL DEMAND IS IMMEDIATELY APPEALABLE BECAUSE THE COUNTERCLAIMS ASSERTED WERE BOTH LEGAL AND COMPULSORY. FURTHER, THE WAIVER LANGUAGE RELIED UPON BY TD BANK WAS INSUFFICIENT TO BAR THE COUNTERCLAIMS ASSERTED IN THIS CASE.

A. APPELLANTS' RIGHT TO A JURY TRIAL IS NOT PRECLUDED MERELY BECAUSE THE COMPLAINT IS BASED IN EQUITY.

When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury while equitable issues are for the judge. *Floyd v. Floyd*, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). Furthermore, either party may demand a trial by jury of any issue triable by jury. See Rule 38 (b), SCRCP. The trial court should either order separate trials of the legal and equitable claims, or order the claims be tried before a jury in a single proceeding. Rule 42(b), SCRCP; *Wachovia v. Blackburn*, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014).

B. THE ORDER STRIKING APPELLANTS' JURY TRIAL DEMAND IS IMMEDIATELY APPEALABLE BECAUSE THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE COUNTERCLAIMS WERE NEITHER LEGAL NOR COMPULSORY.

When the underlying complaint is equitable, as it is here, any counterclaims asserted must be both legal and compulsory to warrant a jury trial. *Wachovia, Id.*. In *First-Citizens Bank and Trust Co. of South Carolina v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991), our Supreme Court directly addressed this issue on similar facts. In that case, the plaintiff bank had brought an equitable action for declaratory judgment. The defendant in *First-Citizens*, like the Appellants

in this case, brought counterclaims for breach of fiduciary duty and breach of contract, alleging monetary damages.³ Finding that the counterclaims were undisputedly legal in nature, the Supreme Court next addressed the crucial question of whether the counterclaims were compulsory or permissive. *Id.* 298, 223.

By definition, a counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim. Rule 13(a), SCRPC. Finding that the counterclaims bore a logical relationship to the underlying trust which was the subject of the bank's equitable claim, the court in *First-Citizens* found them to be compulsory in nature and not subject to the jurisdiction of the master-in-equity. Here, as in *First-Citizens*, the Appellants' legal counterclaims arise out of the same documents on which TD Bank bases its equitable claim for foreclosure and therefore bear a similar logical relationship.

Instead, the trial court, relying upon *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015), determined that Appellants' counterclaims were permissive in nature. Specifically, it found they bore no "logical relationship" with the execution of the notes, mortgages, and guaranty agreements. (Jury Strike Order, p. 4). However, the facts of this case are easily differentiated from those in *BADD*.

In *BADD*, the bank's alleged breach of its implied covenant of good faith took place, if at all, two years after the guarantees had been executed. As a result, the court determined the claims did not "arise out of the underlying transaction or occurrence" or "affect the execution or enforceability of the guaranty agreements." *Id.* at 296, 110. TD Bank's breach on the other

³ Appellants counterclaims for breach of duty of good faith and fair dealing, breach of contract, breach of fiduciary duty, duress and violation of South Carolina Unfair Trade Practices Act ("SCUTPA") all seek monetary damages and are therefore legal in nature.

hand, occurred a few weeks after it required Appellants to execute the Forbearance Agreements. Clearly there is a sufficient nexus between the breach of good faith and the enforceability of the Forbearance Agreements and the Guaranties to render the counterclaims compulsory. In fact, the overlapping legal and contractual obligations would likely bar a subsequent suit on Appellants' counterclaims if they were not brought in connection with this action under theories of res judicata and/or issue preclusion.

Additionally, the trial court did not give due consideration to the relationship between the Forbearance Agreements, the Notes and the contemporaneous execution of Brosman's Guaranties. It is not in dispute that the Forbearance Agreements served to modify the Notes. (See Complaint, ¶10 & 12). Importantly, the Appellants were not in default under the Forbearance Agreements at the time of TD Bank's alleged breaches. (See Complaint, Ex. R and S). Indeed, the evidence suggests that but for TD Bank's actions, this foreclosure action would not even be necessary. The facts further show that at the time the Forbearance Agreements were executed, TD Bank knew the Shell Building and the undeveloped pad sites were being marketed for sale and that TD Bank previously permitted the partition and partial release of other portions of the collateral securing the Notes and Mortgages. (Complaint, ¶27, Ex. O). Ergo, TD Bank was aware of the need for, and by its prior course of dealing sanctioned, partial releases of the collateral. Based on the foregoing, it was reasonable for Black Diamond to rely upon TD Bank to give due consideration to its request to partition and sell off the Shell Building. The evidence shows, however, that TD Bank gave the Offer no consideration at all. It also suggests it may have clandestinely pursued opportunities to develop the property on its own behalf, ordering

appraisals, environmental assessments and broker's opinion of value, all at Appellant Black Diamond's expense.⁴

C. TO THE EXTENT VALID JURY TRIAL WAIVERS EXIST, SUCH WAIVERS DO NOT ENCOMPASS THE COUNTERCLAIMS.

In *Wachovia*, the Supreme Court addressed how jury trial waivers fit into the analytical framework for determining the trial of legal and equitable issues. *Wachovia*, 329, 441. If the complaint is equitable, as it is here, and the counterclaims are legal and compulsory, as argued above, then Appellants are entitled to a jury trial "unless a valid jury trial waiver exists that encompasses the counterclaim." *Id.*, 330, 442. So the questions before this court are two-fold. Does a valid jury trial waiver exist and if so, does it encompass the counterclaims? Both questions must be answered affirmatively with respect to all of the Appellants in this case. Since the jury trial waivers, to the extent they exist, vary considerably in language and scope, they are discussed separately below.

AS TO BLACK DIAMOND AND LINDGREN

There is no jury trial waiver language in the \$2,000,000 Note, Lindgren's Guaranty thereof, either of the Mortgages, or the Forbearance Agreements. So, strictly construing the documents, Black Diamond and Lindgren cannot be said to have waived their right to a jury trial with respect to claims arising out of the \$2,000,000 loan. 50 C.J.S. Juries § 90 at 797 (1947) ("Waiver of a jury trial, however, will not be implied in doubtful cases, and, in order to create a waiver by implication, unequivocal acts are necessary; further, it has been held that the waiver must of necessity be an intentional act."). Nevertheless, the trial court, looking solely to the

⁴ As the Record on Appeal has yet to be established, please see Plaintiff's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, specifically, pp. 22-22, 26-27, 37-38, 53-55, and 58-64 of the deposition of J. Christopher Lindgren attached thereto.

excessively broad jury trial waiver provision contained in the \$3,500,000 Note and Lindgren's Guaranty thereof, denied Black Diamond and Lindgren the right to a jury trial.

Even if the jury trial waiver in the \$3,500,000 Note and Lindgren's Guaranty thereof could be extended to claims arising under the \$2,000,000 Note, the waiver would not bar a jury trial of Black Diamond's and Lindgren's counterclaims arising out of the Forbearance Agreements, which were not contemplated by the parties at the time the original waiver was executed. To extend the waivers to future agreements would violate public policy. In *Fisher v. Stevens*, 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct. App. 2003), this Court recognized that an exculpatory agreement could contravene public policy if it were excessively broad. In *Fisher*, the court was faced with an exculpatory clause that purported to absolve the defendant from any injury to the plaintiff. *Id.* Extending the jury waiver provision in the \$3,500,000 Note, to effectively waive the right to a jury in claims arising out of TD Bank's intentional bad acts, such as breaches of: contract, fiduciary duty, covenant of good faith and fair dealing, and duty to mitigate, is equally egregious.

AS TO BROSMAN

Brosman's Guaranties are far more limited than the jury trial waiver found in the \$3,500,000 Note. Those Guaranties state, in relevant part, that he "...waives any right to a trial by jury in any action arising from or relating to this guaranty."⁵ (Jury Strike Order, p. 6, Footnote 3). From the language, it is far from clear that Brosman was intentionally waiving his right to a jury trial for any and all claims he may have had against TD Bank. See *Sunamerica Financial Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 179, 383 S.E.2d 8, 10 (Ct. App. 1989) (citing 47

⁵ See e.g. Brosman's Guaranties at ¶17.

Am.Jur.2d Jury § 81 at 696 (1969) (waiver of a jury trial must be the result of an intentional act and the intention to waive the right must plainly appear).

AS TO ALL GUARANTORS

Without addressing the foregoing distinctions or discussing how the absence of the waiver in the \$2,000,000 Note and Mortgage impact upon his liability in this case, the trial court simply ruled that Appellants had waived his right to a jury trial lock, stock and barrel. In the Jury Strike Order, the court found that the Guarantors “waived any right to a jury trial because the Guaranty Agreements...waived such right in any “action,” like this one, regarding the Notes and/or the “relationship between” the Bank and Black Diamond.” To paint with such a broad brush and attribute the quoted language to the Guarantors, when that specific language is absent from their respective documents runs counter to the rule of law on this subject. Recognizing that the right to a trial by jury is a substantial right, our courts give such provisions rigorous scrutiny. *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2D 637, 638 (1992).

II. AN ORDER GRANTING SUMMARY JUDGMENT IS APPROPRIATE FOR IMMEDIATE APPELLATE REVIEW UNDER S.C. CODE ANN. §14-3-330 AND IS NOT RENDERED UNAPPEALABLE BECAUSE IT HAS NOT BEEN CERTIFIED UNDER RULE 54(B), SCRCP.

An order which is immediately appealable by statute is not rendered unappealable because it has not been certified under Rule 54(b). *Lebovitz v. Mudd*, 289 S.C. 476, 347 S.E.2d 94 (1986), *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330.” *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). Under S.C. Code Ann. § 14-3-330, the Supreme Court shall

review upon appeal in two relevant categories. Specifically, it may review any intermediate order involving the merits and an order affecting a substantial right. S.C. Code Ann. § 14-3-330 (1)(2) and (3).

Because the trial court's order disposed of Appellants' counterclaims for breach of fiduciary duty, breach of covenant of good faith and fair dealing, duress and violations of the SCUTPA in their entirety and left their claim for breach of contract only partially intact, it clearly impacts on the merits of the case and is immediately appealable under S.C. Code Ann. § 14-3-330 (1). *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) ("To involve the merits of a case, the order must finally determine some substantial matter forming the whole or a part of some cause of action or defense." (internal quotation marks and citation omitted)). To affect a substantial right, the order must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action. *Id.*

"An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). See also: *Link, Supra* 6, 179. When the trial court granted TD Bank summary judgment on the foregoing counterclaims, it removed the issues of agency and self-dealing from the case and materially undermined Appellants' remaining breach of contract claim. These issues form an integral part of the litigation and are separate and distinct from the allegations relating to Appellants' surviving claims. Since the order effectively forecloses Appellants from contesting

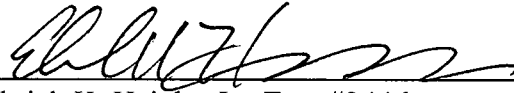
the case on its merits, it of necessity affects a substantial right and is appealable. *McLaughlin v. Strickland*, 279 S.C. 513, 516, 309 S.E.2d 787, 790 (Ct. App. 1983).

TD Bank's argument that the underlying facts supporting Appellants' various counterclaims were pled together in Appellants' Answers and are therefore identical is not accurate. For example, Appellants' breach of fiduciary duty claim involves allegations that the property manager was acting as TD Bank's agent and therefore any duty he owed to Black Diamond could be imputed to his principal. Appellants' breach of covenant of good faith and fair dealing, on the other hand, hinges upon contractual interpretation, namely TD Bank's duty to give reasonable consideration to a request for partition under the terms of Notes and Mortgages. The facts involving duress stem from TD Bank's exploitation of the death of one of Black Diamond's members, and involve another wholly different line of inquiry. While there may be some overlap with the facts supporting TD Bank's violations of SCUTPA, the Court should still consider the matter on appeal. Even if only one of the issues is appealable, the Court should consider all of the issues because "(t)his Court reviews interlocutory orders when they contain other appealable issues." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002).

CONCLUSION

The Court should deny TD Bank's Motion to Dismiss because the Summary Judgment Order goes to the merits of the case and affects a substantial right and is therefore immediately appealable under S.C. Code Ann. §14-3-330, whether or not the judgment was certified under Rule 54(b). Additionally, Appellants are entitled to appeal the Jury Strike Order because the counterclaims were both legal and compulsory and not otherwise waived by Appellants.

April 26, 2016
Hilton Head Island, South Carolina



Ehrick K. Haight, Jr., Esq. #2446
Stacey S. Collins, Esq. #73360
MINOR, HAIGHT & ARUNDELL, P.C.
Post Office Drawer 6067
Hilton Head Island, South Carolina 29938
(843) 785-8040
Attorneys for Appellant David Brosman

Keating L. Simons, III, Esq.
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Appellants Black Diamond,
LLC and J. Christopher Lindgren

Appellate Case No. 2016-000537

RECEIVED
APR 28 2016
SC Court of Appeals

EXHIBIT 1

TO APPELLANTS' RETURN TO RESPONDENT'S
MOTION TO DISMISS

(Memo. in Opposition to Motion to Strike)

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,)

Plaintiff,)

MEMORANDUM IN OPPOSITION TO
MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND

v.)

BLACK DIAMOND, LLC, J.)

CHRISTOPHER LINDGREN,)

DAVID A. BROSMAN, JULIE H.)

KING and THE GREENERY, INC.,)

Defendants.)

2015 JAN 13 AM 8:00
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Defendant David A. Brosman, by and through his undersigned counsel, submits this memorandum in opposition to the Plaintiff's Motion to Strike Defendants' Jury Trial Demand. The Plaintiff, TD Bank, N.A., Successor by Merger to Carolina First Bank (hereinafter sometimes referred to as "TD Bank"), claims that the Defendants, including Dr. Brosman, have waived any right to a jury trial in this case. Dr. Brosman disputes this position and prays the motion be denied.

ARGUMENT

I. THE DEFENDANTS ARE ENTITLED TO A JURY TRIAL ON THEIR LEGAL COUNTERCLAIMS IF THE CONTRACTUAL JURY WAIVERS DO NOT EXTEND TO THE COUNTERCLAIMS.

A defendant in a foreclosure action is entitled to a jury trial on legal counterclaims in the absence of a valid waiver. Here, the jury waivers do not apply to the non-contractual counterclaims, including but not necessarily limited to those for breach of fiduciary duty, duress, tortious interference with prospective economic relations, and unfair trade practices.

A. Legal counterclaims in an equitable action may require a jury trial.

"Whether a party is entitled to a jury trial is a question of law " *Wachovia Bank Nat Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E. 2d 437, 441 (2014), reh'g denied (Apr. 2, 2014) (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E. 2d 771, 772 (2010)).

Although a foreclosure action is an action in equity, "counterclaims-including those raised in equitable actions-may, at times, be entitled to a jury trial." *Id.* 407 S.C. at 328, 755 S.E. 2d at 441. As the South Carolina Supreme Court recently explained, "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists *that encompasses the counterclaim.* " *Id.* 407 S.C. at 330, 755 S.E. 2d at 441-442 (Italics added). If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Id. 407 S.C. at 330, 755 S. E. 2d at 442

To be valid and enforceable, a jury waiver must be an intentional act and the intention to waive the related right must plainly appear. *Sunamerica Fin. Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 179, 383 S.E. 2d 8, 10 (Ct. App. 1989) (citing 47 Am Jur

2d Jury § 81 at 696 (1969). The right to trial by jury is a substantial right, therefore, contractual jury waiver provisions are strictly construed using their plain, ordinary, and popular meaning. *Beach Co. v. Twillman, Ltd*, 351 S.C. 56, 64, 566 S.E. 2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E. 2d 637, 638 (1992), and *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E. 2d 367, 369 (1994)). "Waiver of a jury trial will not be implied in doubtful cases, and, in order to create a waiver by implication, unequivocal acts are necessary, further, it has been held that the waiver must of necessity be an intentional act. " *Id.* (quoting *50 C J S Juries § 90 at 797 (1947)*), *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E. 2d 902, 904 (Ct. App. 1993) (In absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed).

B. The Defendants are entitled to a jury trial on their legal counterclaims that were not waived beforehand in the loan documents.

The Defendants asserted counterclaims that are jury issues. Among other things, the Defendants have pleaded breach of fiduciary duty, duress, tortious interference with prospective economic relations and unfair trade practices. *Carolina First Bank v. BADD, LLC*, 400 S.C. 343, 733 S.E. 2d 619 (Ct. App. 2012) (A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action), *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E. 2d 771, 773 (2010) (An action seeking damages for breach of fiduciary duty is an action at law), *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E. 2d 597, 602 (Ct. App. 2012) ("An action in tort for damages is an action at law"), *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E. 2d 620, 622 (Ct. App. 2012) ("An action to construe a contract is an action at law"), *Ahrens v. State*, 392 S.C. 340, 347-348, 709 S.E. 2d 54, 58 (2011) ("An action seeking damages for

breach of contract is an action at law").

The contractual jury trial waivers of Dr. Brosman in the Guaranties read as follows:

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.

The jury waiver at issue in *Wachovia Bank v. Blackburn*, 407 S.C. 321, 325-326, 755 S.E. 2d 437, 439 (2014) provides contrast. In that case, the jury waiver provided:

Waiver of Jury Trial To the extent permitted by applicable law, each of Borrower ... and ... Bank knowingly, voluntarily, and intentionally waives any right each may have to a trial by jury in respect of any litigation based on, or arising out of, under or in connection with this Note, the Loan Documents, or any agreement contemplated to be executed *in connection with this Note, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto*. This provision is a material inducement to Bank to accept this Note.... *Id.* (all caps removed, some italics added).

This jury waiver goes beyond the loan documents and includes, more broadly, "any course of conduct, course of dealing or actions of any party with respect hereto." Relying on that language, the Supreme Court concluded that the sales transaction that preceded the loan was included in the loan's jury waiver provision. *Id.* 407 S.C. at 332, 755 S.E. 2d at 443. For that reason, the Court concluded that the waiver applied to the defendants' counterclaims. *Id.* The jury waivers signed by Dr. Brosman do not include language that extends the waivers beyond the terms of the guaranties. TD Bank, moreover has the burden of trying to show that each of the counterclaims falls squarely within the terms of the waivers. The waivers do not make any reference to the course of conduct or course of dealing between the parties, nor do they refer to "actions of any party" with respect to the course of conduct and course of dealing. Accordingly, the jury waivers here must be construed strictly to

claims arising from or related to the guaranties.

C. Many of the Defendants' counterclaims arise in connection with obligations imposed by law, not any obligation imposed by the loan documents, or any other contract between them and TD Bank.

The Defendants' counterclaims for breach of fiduciary duty, duress, tortious interference with prospective economic relations, and for unfair trade practices do not exist with regard to the notes, the mortgages, the guaranties or any other loan document. They are not actions "arising in connection therewith." Any claim that all of the counterclaims arise from a contract between the Defendants and TD Bank is misplaced. Such a claim is contrary to applicable South Carolina law.

The Defendants' counterclaims arise from duties imposed by law, not by any related contract. "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance" *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E. 2d 650, 656 (2006). The Defendants' tort claims arise from TD Bank's legal relationship to them. *S. Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E. 2d 324, 325 (1986). These duties arise independently from any contractual relationship between the parties. See *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E. 2d 85, 89 (1995) (noting that tort claims arise from a duty that is separate and distinct from the contract between the parties).

The Defendants' claim for breach of fiduciary duty arises as a matter of law from the special circumstances created by the parties' business relationship. One standing in a fiduciary relationship to another is subject to liability to the other for harm resulting from a breach of duty imposed by that relationship. *Moore v. Moore*, 360 S.C. 241, 253, 599, S.E. 2d 467, 473 (Ct. App. 2004). The tort of duress allows for damages to an aggrieved party in order "to prevent a stronger party from presenting an unreasonable choice of alternatives to a weaker party in a bargain

situation." *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E. 2d 424 (Ct. App. 1984). Likewise, the Defendants' claims for tortious interference arise from TD Banks's duty to not interfere unjustly with the Defendants' relationships with other parties. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E. 2d 835, 837 (1993). Finally, the Defendants' unfair trade practices claim also arises as a matter of law. That claim arises in connection with TD Bank's breach of its statutory duty to refrain from acts that are offensive to public policy, immoral, unethical, or oppressive. See *Bessinger v. BI-LO, Inc.*, 366 S.C. 426, 432, 622 S.E. 2d 564, 567 (Ct. App. 2005).

If a cause of action is equitable and an asserted counterclaim is legal and compulsory, the counterclaimant is entitled to a jury trial. *Wachovia v. Blackburn*, 407 S.C. 321, 755 S.E. 2d 437 (2014). Here, the Defendants' counterclaims are both legal and compulsory. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim and does not require the presence of a third party. *Rule 13(a), SCRPC, N. Carolina Fed Sav & Loan Ass'n v. DAV Corp*, 298 S.C. 514, 517, 381 S.E. 2d 903, 905 (1989). Here, the interactions between the parties include both legal and contractual obligations, but the related facts are largely the same. Res judicata and/or issue preclusion would potentially bar a subsequent suit on the legal counterclaims if they were not pled. Therefore, the Defendants are entitled to a jury trial on those counterclaims.

II. EVEN IF THE CONTRACTUAL JURY WAIVERS ARE OTHERWISE APPLICABLE, TD BANK SHOULD BE BARRED FROM ENFORCING THEM BECAUSE OF ITS OUTRAGEOUS CONDUCT.

This is no ordinary foreclosure action. Although TD Bank has pleaded its case as a routine foreclosure action, the Defendants have demonstrated the reality of this matter through their Answers and Counterclaims. The deposition testimony, moreover, clearly demonstrates TD Bank's outrageous conduct. The Defendants have alleged defenses for failure to mitigate, waiver and/or estoppel, and unclean hands. All should

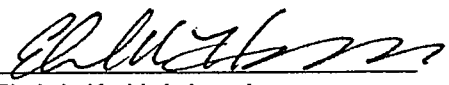
justify barring TD Bank from enforcing the waivers.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity, " *Pearson v. Hilton Head Hosp.* 400 S.C. 281, 290, 733 S.E. 2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F. 3d 411, 417-418 (4th Cir. 2000)). To allow a party to disregard its obligations under a contract while claiming the benefits of the contract would disregard equity. The improper nature of TD Bank's conduct is unprecedented in normal business relationships. Given TD Bank's disregard for the terms of the contract, as a general matter, and its disregard for the duty of good faith and fair dealing, in particular, equity dictates that the jury waivers at issue should be avoided.

CONCLUSION

TD Bank's Motion to Strike Defendants' Jury Trial Demand should be denied and this case should remain on the jury trial roster.

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 12th day of January, 2015.

Appellate Case No. 2016-000537

EXHIBIT 2

TO APPELLANTS' RETURN TO RESPONDENT'S
MOTION TO DISMISS

(Memo. in Opposition to Motion for Summary Judgment)

REC.

APR 28 20.

Court of Appeals

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
CIVIL ACTION NO.: 2012-CP-07-0944

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

2015 FEB 26 PM 1:30
JENNIFER ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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.

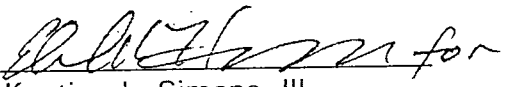
We are again confronted with the Plaintiff's failure to even respond to a request for loss mitigation. The Plaintiff again misconstrues its action as a deliberate and considered decision not to release its mortgage. It was instead a secret decision it shared with nobody. The potential for repetition 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.

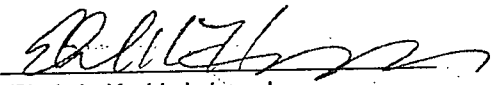
[Signature Page to Follow]

SIMONS & DEAN

By:  for
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 29th day of February, 2015.

2015 FEB 26 PM 1:30
JESSICA AM ROSENBAU
DEPUTY CLERK OF COURT
BEAUFORT COUNTY, S.C.

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

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.

Elizabeth

Notary Public for South Carolina

My Commission expires: 7/20/2017

2015 FEB 26 PM 4:30
JERRY ANN ROUSSEAU
SEAFOOD COMPANY S.C.
11 FPK OFFICE

EXHIBIT "A"

1
2 IN THE COURT OF COMMON PLEAS
3 FOURTEENTH JUDICIAL CIRCUIT
4 STATE OF SOUTH CAROLINA
5 COUNTY OF BEAUFORT

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

8 Plaintiff,

9
10 vs.

CIVIL ACTION NUMBER
2012-CP-07-0944

11
12
13 BLACK DIAMOND, L.L.C.; J. CHRISTOPHER LINDGREN;
14 DAVID A. BROSMAN; JULIE H. KING; and
15 THE GREENERY, INC.,

16 Defendants.
-----/

COPY

17 The deposition of J. CHRISTOPHER
18 LINDGREN AND THE 30(b)(6) DEPOSITION OF BLACK
19 DIAMOND, L.L.C., a witness in the above-entitled
20 cause, taken pursuant to Notice and agreement,
21 before Cathy M. Knoettner, Certified Court
22 Reporter and Notary Public, at 5 Dunmore Court,
23 Suite 200, Hilton Head Island, South Carolina,
24 on the 22nd day of July, 2013, commencing at or
25 about the hour of 12:20 p.m.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - 843-525-9600 - 912-232-6161

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

MICHAEL J. BOGLE, ESQUIRE
Womble, Carlyle,
Sandridge & Rice, L.L.P.
550 South Main Street
Suite 400
Post Office Box 10208
Greenville, South Carolina 29601
mbogle@wcsr.com

FOR THE DEFENDANTS BLACK DIAMOND, L.L.C. AND
J. CHRISTOPHER LINDGREN:

KEATING K. SIMONS, III, ESQUIRE
Simons & Dean
147 Wappoo Creek Drive
Suite 604
Charleston, South Carolina 29412
klsimons@simonsanddean.com

FOR THE DEFENDANT DAVID A. BROSMAN:

EHRICK K. HAIGHT, JR., ESQUIRE
Minor, Haight & Arundell, P.C.
The Village At Wexford
The Clarendon Building
Hilton Head, South Carolina 29928
rick@hmalawfirm.com

I N D E X

	<u>PAGE</u>
EXHIBIT INDEX	3
OPENING REMARKS AND STIPULATIONS	4
DIRECT EXAMINATION: By Mr. Bogle	4
CERTIFICATE	152

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - 843-525-9600 - 912-232-6161

DOCUMENTARY EVIDENCE

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
PX-1	Binder of documents	
PX-2	Aerial photograph	8
PX-3	Purchase and Sale Agreement between Fuqua Development, L.L.C. and Black Diamond, L.L.C., dated July 2012	78
PX-4	E-mail string with attached documents	123
PX-5	E-mail string one-page document	125

REPORTER'S NOTE: PLAINTIFF'S EXHIBIT

NUMBER 1 WAS PREMARKED
BY THE COURT REPORTER

2 ensued.)

3 BY MR. BOGLE:

4 Q Before the break, I was asking you
5 whether you were aware that Black Diamond, as
6 well as you individually and Dr. Brosman
7 individually had filed counterclaims against the
8 bank and you had indicated they had; correct?

9 A Yes.

10 Q What do you contend -- and we'll get
11 into the specifics of these, but what do you
12 contend that TD Bank or its predecessor Carolina
13 First Bank did wrong to either harm Black
14 Diamond, you or Dr. Brosman?

15 A Well, several things. One, not
16 responding to requests to approve a transaction
17 to sell a portion of the collateral.

18 Q Okay. And this was an offer by -- what
19 was the name of the entity?

20 A Cgull.

21 MR. HAIGHT: That's spelled with a

22 C?

23 THE WITNESS: Right.

24 BY MR. BOGLE:

25 Q Do you remember when that offer was

2 received? Was it in the fall of 2010; does that
3 sound right?

4 A It was September of 2010.

5 Q All right. What else do you believe
6 that TD Bank did that was wrong in their
7 relationship with you or Black Diamond?

8 A There was a pattern of unfair dealing.

9 Q What do you mean by that?

10 A Well, different things. One which was
11 an instance where they appropriated funds out of
12 my account after they found out that I was a
13 witness in another case where TD Bank was, I
14 guess, a counterclaim defendant.

15 Q Do you know what case that was? Was
16 that the APEG?

17 A APEG, that's right.

18 Q And that was news to me when I got the
19 discovery response. Can you tell me a little
20 more about what account that was, what happened?

21 A Well, we had a Black Diamond operating
22 account at TD Bank and we deposited \$49,000 in
23 the account. That account also had a reserve of
24 approximately \$71,000 to cover two months debt
25 service on the two loans.

2 Q And was this set up pursuant to the
3 forbearance agreements?

4 A Yes.

5 Q Okay. And TD Bank, what did they do in
6 that account?

7 A We wrote a check, after we deposited
8 \$49,000, to Bosley the manager for 49,000 to pay
9 taxes and --

10 Q Let me stop you right there. Why were
11 you paying money to Bosley to pay taxes?

12 A Because they didn't have enough.

13 Q Okay. Was he handling the taxes, the
14 business taxes for Black Diamond?

15 A Property taxes.

16 Q All right, go ahead.

17 A There was not enough funds within the
18 account to pay the taxes when they were due.

19 Q So there was roughly 71,000 in the
20 account and that was for the two months reserve;
21 correct?

22 A Yes.

23 Q And you deposited an additional 49,000
24 into the account at the request of Bill Bosley's
25 group to pay the property taxes?

2 A Not at their request; at our behest to
3 enable them to pay them. We requested Bosley,
4 when we wrote them a check, to in turn pay the
5 taxes.

6 Q Okay. So the account then had 120,000,
7 give or take, right?

8 A Right.

9 Q And when would this have been?

10 A February 2012.

11 Q Okay. So the account had 120,000 in
12 it, and what happened next?

13 A It disappeared. I mean, they took it.

14 Q Okay. So TD Bank took 70,000 out?

15 A A hundred and twenty, and they bounced
16 the check.

17 Q How did the -- did the property taxes
18 eventually get paid?

19 A Yes.

20 Q How did they get paid?

21 A Sometime thereafter TD Bank paid them.

22 Q Okay. So we talked about not
23 responding to the Cgull offer and we talked
24 about appropriating funds out of a Black
25 Diamond, L.L.C. operating account; correct?

2 A Right.

3 Q Now, is it your position that TD Bank
4 did not have the right to take the reserve
5 amount in the account or that their taking the
6 entire amount out was improper?

7 A Certainly taking the entire amount out
8 was improper, and again it was within a day of
9 finding out that I was a witness in a case
10 against them.

11 Q Okay. How do you believe -- how is it
12 your understanding that the bank found out about
13 you being a witness in the other case in
14 February of 2012?

15 A They were notified by, I guess,
16 counsel.

17 Q Okay. Do you believe that it would be
18 improper -- or let me restate that. Do you
19 believe that it was improper of TD Bank to take
20 the amount of the reserve from the account?

21 A Under the circumstances, yes.

22 Q Do you believe that under the
23 forbearance agreement the bank is entitled to
24 pull out what is in the reserve account upon the
25 default of the borrower?

2 A Yes.

3 Q But you believe it was inappropriate in
4 that circumstance?

5 A Yes.

6 Q Okay. So we talked about the Cgull
7 offer, we talked about the appropriation of
8 funds; what else? Is there anything else that
9 you believe TD Bank did that was wrong?

10 A The contact representative we had, Mike
11 Rose, consistently misled us.

12 Q All right. How do you believe he
13 misled you?

14 A By saying he was going to do X and
15 didn't; he would do Y instead.

16 Q Can you give me an example?

17 A For example, notwithstanding the fact
18 that the bank had the right to appoint the
19 manager under the agreement, the forbearance
20 agreement, he advised that we could select a
21 manager we were most comfortable with and led us
22 to believe that. We went into negotiations with
23 the manager we selected, and after we come to
24 terms with that manager, were told that they
25 weren't going to allow it and they were going to

throw Bosley on us.

Q What manager did you select?

A Charter One Commercial.

Q Are they local?

A Yes.

Q And did you actually agree and sign a written contract with Charter One Commercial?

A I don't recall at the present time, but we'd come to terms, certainly.

Q And submitted those terms to the bank and they were rejected?

A Yes.

Q How were the terms --

A Well, I'm not sure that they rejected the terms as much as they rejected our choice.

Q Okay. How were the terms with Charter One Commercial different than those with Bill Bosley's group?

A They weren't.

Q Were the fees that are charged by Bill Bosley greater or less than or roughly equal to the fees that would have been charged by Charter One Commercial?

A Roughly equal but a little more.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

37

2 far as things that you believe TD Bank did
3 wrong; not responding to the Cgull offer,
4 misappropriation of funds out of a operating
5 account and misleading statements by Mike Rose
6 as to your ability to appoint a manager that you
7 were comfortable with?

8 MR. HAIGHT: Object to the form.

9 BY MR. BOGLE:

10 Q Are there any other things that you
11 believe that TD Bank did wrong other than those
12 three instances that I discussed?

13 A Yes..

14 Q Okay. Can you tell me about it?

15 A Another example is the ongoing
16 direction of our manager by TD Bank to the
17 exclusion of us, being Black Diamond.

18 Q And what do you mean by that?

19 A Just a consistent pattern of TD Bank
20 giving direction to the manager in terms of
21 managing the property, directing the manager to
22 pay invoices that we're not aware of that TD
23 Bank submits to the manager and the manager
24 consistently since inception advising us that
25 they work for the bank, not with us;

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - 843-525-9600 - 912-232-6161

1 notwithstanding the fact we have a bilateral
2 management agreement to which the bank isn't a
3 party. You know, Bosley is our agent
4 contractually, they're not the bank's agent, and
5 it's been a very frustrating experience because
6 we're not aware of things happening, whereas the
7 bank is. And the manager was directed by the
8 bank, Mike Rose, to report directly to the bank
9 and not to advise us, is my understanding,
10 because we've found out -- unintentionally we
11 were copied on some e-mails, that sort of thing.
12 Plus, again, the manager consistently telling us
13 that they weren't accountable to us, that they
14 were accountable to the bank only.

15
16 Q And these are things that Bill Bosley's
17 organization, the manager, has told you, not
18 things that the bank has told you; is that
19 accurate?

20 A Yes. In fact, Mike Rose told me after
21 he had advised us that we were not able to
22 select the preferable manager or the preferred
23 manager, he advised us that he would absolutely
24 have no contact with our manager unless there
25 was an issue, a bank issue came up because there

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q A demand for a cross-collateralization agreement?

A Do I think there's anything wrong with that?

Q Yes.

A I think that they need to respond to inference with respect to the 3.5 million dollar loan that had never had that provision and they opened that loan back up and had required -- demanded it, notwithstanding the fact that that was never a component of that loan.

Q All right. Anything else that you believe TD Bank did wrong in this matter?

A Well, there are a variety of examples of unfair or bad faith on the part of Mike Rose. I can't recall the specifics right now, but there were a variety of things. And it's just a pattern of bad faith, never taking into consideration our position, always with an eye towards, from our perspective, trying to cause harm, not trying -- not necessarily to the bank's benefit but just to our detriment, my opinion.

Q Okay. And I am going to ask you for

1 specifics of that because the reason for this
2 deposition, I'm trying to collect information if
3 this case were to go to trial so that I know
4 what and can better understand what your
5 allegations are in your cross-claim. So
6 specifically what do you feel Mike Rose or the
7 bank did that was in bad faith during the course
8 of this loan?
9

10 A When we submitted the Cgull contract
11 letter of intent for the acquisition of the
12 majority of the 1188 Center tract, not
13 responding, not addressing the issue despite
14 repeated phone calls and e-mails. The fact of
15 the matter is the bank would have been put in a
16 much better position had it consented to the
17 contract because the amount at risk, the amount
18 of the loan would have been reduced by 1,325,000
19 less a commission, so call it 1,250,000. So
20 they would have gone from \$1,800,000 to
21 1,250,000. Their exposure would have been
22 550,000 instead of a million eight. The
23 property didn't have any income. Their
24 loan-to-value would have reduced from, I think,
25 72 percent to about 42 percent. I think it's

2 bad faith the fact that they didn't take what
3 was clearly in their best business interest and
4 just not even address it and not respond to us,
5 because if it hadn't been in their best business
6 interest, I can maybe understand a little more
7 that maybe it wasn't bad faith; but the fact of
8 the matter was is that it was clearly in their
9 economic and banking interest to do the
10 transaction and they never even gave us the
11 first indication of whether they would consent
12 to it or why they wouldn't if they didn't, no
13 response at all.

14 Q And what you were asking them to do was
15 a partial release of the mortgage?

16 A Partial release of the collateral and
17 to pay down -- and mortgage, yes.

18 Q Okay. And I am showing you -- Keating,
19 did you Bates-stamp the documents before you
20 sent them out or did my office do that?

21 MR. SIMONS: I don't believe we
22 did. What tab are you going to?

23 MR. BOGLE: Tab 50. And these
24 are -- it says tab 50 of documents that
25 were produced to the bank by Mr.

1 BOGLE -- LINDGREN (DIRECT EXAMINATION) 57

2 MR. BOGLE: Okay.

3 THE WITNESS: This was in-house.

4 MR. SIMONS: Got you. The tab
5 numbers may be off.

6 MR. BOGLE: All right. Well,
7 you're on -- I guess it's tab 51?

8 MR. SIMONS: It's an e-mail from
9 Mike Rose to Mr. Lindgren and others.

10 MR. BOGLE: Dated December 2,
11 2010?

12 MR. SIMONS: Yes.

13 BY MR. BOGLE:

14 Q And, again, BD000346 and 347. Can you
15 take a look at that for me. And if you don't
16 mind, if I can come around --

17 MR. SIMONS: I'll tell you what,
18 he can look at it here, that's fine.

19 MR. BOGLE: Okay.

20 (Whereupon, the witness examines
21 document.)

22 BY MR. BOGLE:

23 Q Was there a contract in place for the
24 purchase of this property?

25 A There was a letter of intent. Before

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - 843-525-9600 - 912-232-6161

1 we could go to contract, a letter of intent
2 required the bank to -- requires before we
3 incurred all the expense, that they would
4 consent to a release.
5

6 Q Okay. And what was Mike Rose's
7 response to your request that they approve the
8 letter of intent?

9 A I phoned him in September of 2008 and
10 let him know that we had the letter of intent.
11 He said, explain it to me; I did. He said, can
12 you send me a copy. I did in September of 2008.
13 Didn't hear from him for a few weeks. I called
14 him again and said, is there any response; do
15 you have any questions about the letter of
16 intent. He said, can you send it to me again
17 and can you give me an explanation of how this
18 impacts the property that is going to be left
19 over -- what's being sold and what's being left
20 over, how does that impact that property.

21 So I sent him the letter of intent
22 again, along with a short summary of the
23 transaction and how it would benefit the
24 property and the collateral that was remaining.
25 And then after that sent him e-mails and phone

1 BOGLE - LINDGREN (DIRECT EXAMINATION) 59

2 calls up until -- which would have been my last
3 e-mail to him before this December 8th e-mail,
4 saying give us a response, give us a response.
5 He never responded.

6 Q All right. I'm going to show you in
7 the documents that were produced by you, it's
8 tab 45. The document is BD000328 and 329.

9 A What's a Bates stamp?

10 MR. SIMONS: Just a document ID
11 number.

12 MR. BOGLE: These are the numbers
13 at the bottom that are on my copy.

14 BY MR. BOGLE:

15 Q Is this -- and I'm showing you Bates
16 stamp BD000328, 329, 330, 331 and 332. Again,
17 this is tab 45 from the documents that have been
18 produced to us. Is this a copy of the letter of
19 explanation and the offer that you just
20 referenced?

21 A It is.

22 Q And is it your position that it was not
23 in -- or is it your position that it was not in
24 the bank's discretion to refuse to consent to a
25 release of -- a partial release of their

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - 843-525-9600 - 912-232-6161

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

60

2 mortgage?

3 A No.

4 Q Okay. It's your position from a
5 business sense that --

6 A They never did consent. They never
7 responded.

8 Q Okay. And is it fair to say the
9 response of Mike Rose in the December 2, 2010
10 e-mail, which we looked at, was that when a
11 contract was negotiated, that the bank would
12 then make a determination as to the partial
13 release of the mortgage?

14 A Can you rephrase that.

15 Q Is it your understanding the position
16 of the bank was -- with regard to this Cgull
17 offer was that when a contract was signed, they
18 would make a decision as to whether to release
19 or to partially release their mortgage on the
20 property?

21 MR. HAIGHT: Object to the form.

22 THE WITNESS: No.

23 BY MR. BOGLE:

24 Q What do you understand their position
25 to have been?

2 A My understanding was they were going to
3 respond to the terms of the deal and advise us
4 whether or not we could go to contract.

5 Q If you look back at the document that's
6 been marked, that's in tab 50, as BD000346,
7 which is that December 2nd e-mail from Mike
8 Rose, which I think you're looking at.

9 A Uh-huh (affirmative).

10 Q It says in there that the bank expects
11 to be repaid in full when the loan matures on
12 July 25, 2011. As for the potential sales
13 contract we are negotiating, as I previously
14 mentioned to you --

15 MR. HAIGHT: Object to the form.

16 BY MR. BOGLE:

17 Q -- if and when asked for a partial
18 release from the current mortgage, the bank will
19 consider the same.

20 Is that your understanding of the
21 bank's position with regard to the Cgull offer?

22 A No.

23 Q Okay. How is it different from what's
24 written there?

25 A Because we asked for a partial release

2 repeatedly and never received a response. When
3 he says if and when you ask for a partial
4 release, we asked for it repeatedly.

5 Q But there was never a sales contract
6 that was signed; correct?

7 A There was a signed letter of intent
8 that one of the prerequisites of was the bank
9 would have to indicate it would consider a
10 release, and we never received any response from
11 the bank.

12 Q Okay.

13 A And -- okay, go ahead.

14 Q No, go ahead and finish.

15 A Let's take this e-mail from Mr. Rose
16 line by line. The first sentence says, I have
17 responded to you on a number of occasions --
18 that's a lie -- both via phone and e-mails --
19 that's a lie -- regarding this matter, regarding
20 the bank's position; that's a lie. We never
21 knew the bank's position.

22 I can only assume you did not like the
23 bank's response to your request -- that's a lie
24 because we never received a response. That's a
25 lie.

2 I'm sure the bank -- you know, his
3 punitive way of responding because he is put on
4 the spot and is covering his tail on this was to
5 say the bank is going to require repayment.
6 Sure, that's their right, but they told us -- he
7 told me that he would respond. He never
8 responded either affirmatively or negatively.

9 Okay. If one asked for a partial
10 release -- well, a lie because he was asked for
11 a partial release on several occasions.

12 In addition, I've made several requests
13 for current financial information on the
14 operations of the subject properties and each
15 guarantor. That's true.

16 To date I have not received any
17 documents that were requested and required by
18 your loan documents. That's a lie. He received
19 everything he requested from us, plus he was
20 receiving all the Bosley reports on a monthly
21 basis so he knew everything about the
22 collateral. That's a lie.

23 By not providing the requested
24 information as prescribed (sic) in the loan
25 documents, you are in default with all your

2 loans. Well, that's a lie because we provided
3 all the information.

4 If the requested and required documents
5 are not received shortly, the bank will actively
6 default interest rate on all its loans to Black
7 Diamond. Well that's, pardon me, a load of crap
8 because he received everything.

9 Okay. And then, again, another
10 punitive -- his ultimate sentence about his, you
11 know, confirming to us that he has no intent to
12 renew any loans in six months since, seven
13 months since, this is what it is.

14 And then, as always, I'm available to
15 discuss this matter with you at any time.
16 That's a lie.

17 Q Okay. Any other instances of bad faith
18 other than what we've just talked about
19 regarding the Cgull offer?

20 A Not that I can recall right now, but
21 there are several that I can provide later.

22 Q Well, I'm asking you now.

23 A Not that I can recall right now.

24 Q Okay. A couple other -- we'll go back
25 into some of these issues you identified.

2 undue influence, yes, I thought it was
3 heavy-handed under the circumstances.

4 Q What parts of the agreements did you
5 feel were heavy-handed?

6 A The appointment of the manager;
7 basically taking -- or attempting to take
8 complete control of the property through
9 requiring us to enter into an agreement with a
10 manager who wasn't actually working as our
11 agent, notwithstanding his contractual
12 obligations but was working as an agent for the
13 bank.

14 Q And at the time you signed the
15 agreements, did you understand that the bank had
16 the authority to appoint a manager that it had
17 approved?

18 A I understood that the bank would
19 approve the management agreement of the manager
20 that we enter into the management agreement
21 with.

22 Q And this is based on the representation
23 of Mike Rose that we discussed earlier?

24 A Yes, plus the fact in the forbearance
25 agreement, I believe it says that they would

2 approve the management agreement, and the
3 management agreement was actually -- I was told
4 by Mike Rose this is the management agreement
5 that you have to sign. We couldn't negotiate
6 it. And, believe me, there were a lot of terms
7 in there that I wasn't happy with.

8 Q I'm sorry, do you mean Mike Rose told
9 you you had to sign that forbearance agreement?

10 A No, that management agreement that was
11 referred to in the forbearance agreement. When
12 I received the management agreement after he
13 told us it had to be Bosley, I said, well,
14 there's several things in here that I'm not
15 comfortable signing and he says, well, you sign
16 that management agreement or else -- or there's
17 no negotiation.

18 Q You had talked earlier about there
19 being a representation from Mike Rose that you
20 would get to select the management company?

21 A Yes.

22 Q Did that happen before or after the
23 forbearance agreement was signed, or do you
24 recall?

25 A Before and after until -- frankly, I

1 don't recall specifically when I received the
2 management agreement, but I believe it was
3 before and after the forbearance agreement.
4 What's the date of the forbearance agreement?
5

6 Q July 28, 2010.

7 A My answer stands. I don't recall the
8 exact timing but we were operating under the
9 impression in redoing the forbearance agreement,
10 discussing the terms that were, frankly,
11 adhesion from our perspective that we had the
12 right to appoint the manager or enter into a
13 management agreement because that's why we
14 negotiated with Charter One. And I'm not sure
15 when we signed that relative to the negotiations
16 with Charter One.

17 Q Did you understand that the forbearance
18 agreement obligated Black Diamond to enter into
19 a management agreement whereby Black Diamond
20 would turn over all management responsibilities
21 to a manager to be designated by the lender?

22 A I'm sorry, can you restate that?

23 Q Was it your understanding in signing
24 the forbearance agreement that Black Diamond was
25 agreeing to the appointment of a property

2 you can remember, as you sit here today, that
3 you believe were false.

4 A I spoke with Mike Rose on many
5 occasions, and as I just stated, I don't recall
6 one time he told me something that wasn't a
7 misrepresentation.

8 Q But as you sit here today, you can't
9 recall any other specific instances?

10 A For example, asking me two and three
11 times for financial documentation after I
12 already sent it two and three times; using that
13 as an excuse for bootstrapping some action
14 against us, you know, freezing our account when
15 we -- for example, when we'd deposit money not
16 only with the -- with respect to the \$49,000 we
17 discussed and the money being swept out of
18 there, but there were other examples of --
19 making an eight thousand dollar deposit, for
20 example, having that be frozen in a check
21 balance because he froze it without ever telling
22 us and then telling us that he made a mistake,
23 which was not true because he did it
24 intentionally; my opinion.

25 Q Would there have been any other

instances where money has been taken by the bank out of that account that was not returned other than the amount we previously talked about?

A There are other examples where checks were not honored, notwithstanding the fact funds were in there because he had put a hold on the account. Any money that came out of the account went back in with the exception of what we talked about.

Q Okay. So all other instances would have been made whole eventually?

A Eventually.

Q Okay. Anything else; any other misrepresentations or representations by the bank or Mr. Rose you feel were false?

A Well, again, you know, asserting to us that he hadn't had any contact with the manager, not only the appointment of the manager but the ongoing contact with the manager --

Q Let me stop you there. Did he ever -- was there ever a representation by Mike Rose that he had no contact with the manager?

A Yes.

Q Was that written or oral?

2 A Oral.

3 Q Okay. When did he make that
4 representation?

5 A He made the representation to us before
6 the appointment of the manager that he would not
7 have any contact, and thereafter he said he had
8 no contact in that he would not have any contact
9 because it wasn't his job, at the same time that
10 we're getting copies of e-mails going back and
11 forth.

12 Q Okay. And those are the e-mails that
13 you showed me earlier?

14 A Yeah, and some others that, I think,
15 are out there.

16 MR. BOGLE: Can we go off the
17 record for a second.

18 (Whereupon, a short break
19 ensued.)

20 BY MR. BOGLE:

21 Q Earlier in your deposition you had
22 referenced some invoices that showed where the
23 bank had submitted certain items for payment to
24 Bill Bosley's group; is that right?

25 A Correct.

2 Q Can you tell me a little more about
3 that, about what those invoices were for?

4 A One invoice was for an appraisal
5 conducted by Atlantic Appraisals.

6 Q And do you remember the time frame that
7 would have occurred?

8 A I could tell you by asking my
9 bookkeeper. I don't recall right now, but it
10 was after the 2010 appraisal. There was another
11 appraisal commissioned in the last 18 months by
12 the bank, again without our knowledge.
13 Apparently the appraisal was conducted and done
14 and sent to the bank. The appraisal was
15 conducted by Atlantic Appraisals for the bank,
16 and the bank sent the invoice for the appraisal
17 to Bosley to pay. We found out about it from
18 reading the monthly reports.

19 Q Was it listed as a line item of an
20 expense coming out?

21 A Right. So we asked what it was --

22 Q Who did you ask?

23 A Bosley. If it wasn't Mr. Bosley, Bill
24 Bosley, it would be Rob Pierson who is his -- I
25 guess is his accountant. We were advised that

2 the bank had conducted an appraisal and they
3 were directed by Mike Rose to pay the invoice.

4 We asked for a copy of the appraisal
5 since we were paying for it, you know,
6 derivatively, and we were told, no, Bosley said
7 that the bank said no, that we could not have a
8 copy of the appraisal and that -- I think they
9 used the term if you want it, it's tough.

10 Q Okay. This was coming from Bill
11 Bosley?

12 A Or Rob Pierson.

13 Q Somebody in Bill Bosley's --

14 A Yeah. The bank would not turn it over
15 and then so the invoice was paid. And then
16 there was another invoice for an environmental
17 study that, again, we picked up as a line item
18 in the Bosley reports. We asked about that and
19 we never received any information on it from
20 Bosley or the bank and never received a copy of
21 the report. And to this day I don't know what
22 it was for, but it was -- I think it was a few
23 thousand bucks.

24 Q Did you ask -- when I say Bill Bosley,
25 I mean his organization.

2 A Sure.

3 Q Did you ask Bill Bosley's organization
4 what that environmental study was for?

5 A Yes.

6 Q What did he say?

7 A They said they didn't know. I said,
8 why did you pay it. They said, because Mike
9 Rose told us to.

10 Q Did you ask for a copy?

11 A Yes.

12 Q And you were not provided one?

13 A No.

14 Q And do you remember how much that
15 environmental study cost, ballpark?

16 A A few thousand bucks.

17 Q Okay. What about the appraisal by
18 Atlantic?

19 A I think it was 4,500. And, again, we
20 asked for a copy of that appraisal and were told
21 no.

22 Q Any other line items or any other line
23 items that you believe were improperly paid by
24 Bill Bosley at the direction of TD Bank?

25 A Not that I can recall right now.

EXHIBIT "B"

1
2 IN THE COURT OF COMMON PLEAS
3 FOURTEENTH JUDICIAL CIRCUIT
4 STATE OF SOUTH CAROLINA
5 COUNTY OF BEAUFORT

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

8 Plaintiff,

9 vs.

CIVIL ACTION NUMBER
2012-CP-07-0944

10
11
12 BLACK DIAMOND, L.L.C.; J.
13 CHRISTOPHER LINDGREN; DAVID A.
14 BROSMAN; JULIE H. KING; and
15 THE GREENERY, INC.,

16 Defendants.

COPY

17 -----/
18 The deposition of JOSEPH B. FRASER, III,
19 a witness in the above-entitled cause, taken
20 pursuant to Notice and agreement, before Cathy
21 M. Knoettner, Certified Court Reporter and
22 Notary Public, at Coastal Court Reporting, Inc.,
23 One Corpus Christi Place, Suite 107, Hilton Head
24 Island, South Carolina, on the 18th day of June,
25 2014, commencing at or about the hour of
10:10 a.m.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

1

2

APPEARANCES OF COUNSEL:

3

4

FOR THE PLAINTIFF:

5

6

7

8

9

BROOKS A. HASELDEN, ESQUIRE
Womble Carlyle Sandridge & Rice, L.L.P.
550 South Main Street, Suite 400
Post Office Box 10208
Greenville, South Carolina 29601
864.239.5950
bhaselden@wcsr.com
mbogle@wcsr.com
yfortner@wcsr.com

10

FOR THE DEFENDANTS BLACK DIAMOND, L.L.C. AND
J. CHRISTOPHER LINDGREN:

11

12

13

14

15

KEATING K. SIMONS, III, ESQUIRE
Simons & Dean
147 Wappoo Creek Drive
Suite 604
Charleston, South Carolina 29412
843.762.9132
klsimons@simonsanddean.com
debbie@simonsanddean.com

16

FOR THE DEFENDANT DAVID A. BROSMAN:

17

18

19

20

21

22

23

24

25

EHRICK K. HAIGHT, JR., ESQUIRE
Minor, Haight & Arundell, P.C.
1000 William Hilton Parkway
Suite 203, Village At Wexford
Post Office Drawer 6067
Hilton Head, South Carolina 29938
843.785.8040
rick@mhalaawfirm.com
elaine@mhalaawfirm.com

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 BY MR. HASELDEN:

3 Q You're here today regarding a
4 memorandum of understanding you entered into
5 with Chris Lindgren and Black Diamond; correct?

6 A Yes.

7 Q I know that was 2010, several years
8 ago. What -- give me your background
9 recollection of the facts surrounding that.

10 A Sometime in 2010, Baker Wilkins came to
11 me and said he had an idea and wanted to know if
12 I thought it made sense. I believe that they
13 had the building that we're discussing here
14 listed and he had had conversation with a couple
15 of different medical practices that were looking
16 for new office space and wanted to know if I
17 would be interested, as would Ceagull
18 Investments, L.L.C., to buy it and develop it
19 and lease it to those medical practices. I put
20 together a pro forma. We met with Dr. Scott
21 Cummings, who is the primary medical practice
22 that we were considering, put together a pro
23 forma, and I think we might have even -- I think
24 we had some basic architectural floor plan work
25 done -- although I don't have any copies of.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 anything -- and made a proposal to Chris to buy
3 the property. I think the proposal was the memo
4 that I have shared with, I think, all of you,
5 which was in September. We made an offer
6 with -- I think it had probably a 120-day due
7 diligence period factored into it.

8 Chris counter-offered and we countered
9 back, and we both agreed on a price, which was
10 initialed on the memorandum. And one of the
11 conditions in the memo was that we had to have
12 the bank's approval. The approval from the bank
13 that was verbally committed or relayed to me was
14 that the bank approved the deal provided -- and
15 this is from memory but provided that the
16 loan-to-value ratio, I believe, of the remaining
17 property would not be below some benchmark.

18 My response to that was that I could
19 not go forward without a yes-or-no approval from
20 the bank and relayed that back through Baker and
21 never got a response, so we never went forward
22 with it.

23 Q In the early stages of those
24 conversations you had with Baker Wilkins, those
25 occurred in July-August 2010?

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 A I don't know but it would have been in
3 the three months before September, I would
4 guess.

5 Q And did you talk to Dr. Cummings
6 directly or was that all through Baker?

7 A Initially it was through Baker, but I
8 met with Dr. Cummings and Baker and, I think,
9 one of Dr. Cummings' partners just to talk about
10 what program they would need to get an idea of
11 what the upfit cost would be. We did not have a
12 written or firm commitment from them because we
13 never got that far in the process. We really
14 couldn't go to them to get them to commit to a
15 lease until we controlled the property.

16 MR. HASELDEN: Let's mark this as
17 Exhibit 2, please.

18 (Whereupon, Plaintiff's Exhibit
19 Number 2 was marked for
20 identification.)

21 BY MR. HASELDEN:

22 Q Mr. Fraser, what I've handed you that's
23 marked as Exhibit 2 to your deposition is
24 entitled Charter I Commercial, Inc. It's a
25 memorandum to Chris Lindgren from Baker Wilkins.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 Have you seen this document before?

3 A Yes.

4 Q Is this the memorandum of understanding
5 you entered into with Black Diamond --

6 A Yes.

7 Q -- with regard to the subject property?

8 A Yes.

9 Q All right. I want to walk through this
10 just so I understand it. You said Ceagull
11 Investments would have been the purchaser. The
12 seller is Black Diamond. The location, what --
13 right there at the bottom it says Unit TBD. Do
14 you know what Unit TBD is?

15 A 1188 Centre Horizontal Property Regime
16 is that entire building, so I think the Unit TBD
17 really, frankly, didn't need to be there, but
18 what we didn't know at the time we made offer
19 was how many separate suites we would end up
20 with in that building. So Unit To Be
21 Determined, TBD, is just saying that the number
22 of suites or the suite numbers are not
23 identified. So, I mean, that's really not
24 material to anything.

25 Q Well, had the suite numbers been

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 established at that point?

3 A No.

4 Q So it could have been one suite; it
5 could have been five suites subdivided at your
6 discretion if you purchased it?

7 A Well, the building had some number of
8 entry doors so the logical -- we don't have a
9 copy of the building plan, but I think it was
10 set up for a maximum of maybe four or five
11 separate entrances, but it could have been
12 divided -- I mean, it could have been one tenant
13 or two or five.

14 Q Okay. And here by purchase price,
15 these are your -- I take it when you were going
16 back and forth with Mr. Lindgren, you submitted
17 at 1.2 --

18 A Yes, sir.

19 Q -- and he scratched that out and wrote
20 one four-five?

21 A Yes, sir.

22 Q And you scratched that out and wrote
23 one three-two-five, and you both agreed on that?

24 A Yes.

25 Q And the section below that,

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 mortgage/lien release, this is the provision you
3 were just discussing requiring that the bank
4 provide written confirmation to release its lien
5 from the property in order for you to proceed?

6 A That's correct.

7 Q And you stated a moment ago that you
8 had been relayed a verbal -- it had been relayed
9 to you that the bank had made a verbal
10 commitment to release the property based on
11 certain financial circumstances and conditions
12 at a related property; is that correct?

13 A Yes.

14 Q Who relayed that to you?

15 A I don't remember for sure but I think
16 it was Baker.

17 Q Do you have any independent knowledge
18 or recollection about any verbal commitment?

19 A No.

20 Q And you don't recall the explicit terms
21 that were related to you?

22 A No.

23 Q Let's go to the second page, Bates
24 labeled 000025. With regard to this document,
25 who drafted this document?

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 A Myself. I don't remember for sure, but
3 usually what happens when I'm dealing with Baker
4 is I will give him a draft that he will then
5 refine put on their letterhead, which I suspect
6 that he did in this case. I'm sure that he
7 showed it to me before we sent it out.

8 Q Okay. So you would have reviewed this
9 before and confirmed it as a final document to
10 be sent over as an offer?

11 A Yes.

12 Q Going down to the financing contingency
13 on page two, Bates number 25, so the
14 financing -- I'm going to read this to you and
15 you can stop me if I'm wrong. The purchaser
16 shall have 150 days from the date the purchase
17 agreement is fully executed, the financing
18 contingency period, to obtain financing
19 acceptable to the purchaser.

20 Had you spoken with any banks or any
21 other financial institutions or lending
22 institutions regarding financing for this
23 project?

24 A Yes.

25 Q Who had you spoken with?

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 A At that point I had spoken to Savannah
3 Bank who had -- I believe at that point they had
4 the mortgage on our office building in Bluffton
5 and also spoke with Wachovia.

6 Q Do you do this a lot? Does Fraser
7 Construction do these type of deals a lot?

8 A Well, Ceagull Investments, not --

9 Q Excuse me.

10 A -- Fraser Construction. Not a lot, but
11 we have a couple of buildings that we own and
12 have developed and, you know, over the years
13 I've done a good bit of development.

14 Q What would you consider financing
15 acceptable to the purchaser?

16 A That.

17 Q Is that just in your subjective view or
18 Ceagull Investments' subjective view?

19 A The way this was written, it absolutely
20 was.

21 Q And that would all depend on what your
22 ultimate return might be for your investment?

23 A It would depend on whether or not it
24 made sense, was -- yeah, it would have to be
25 profitable.

1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 communication with them, but we never found
3 another building that we thought was suitable.

4 Q That was a conversation you would have
5 had or Baker would have had?

6 A Probably Baker.

7 Q Do you know whether those doctors that
8 you had discussed renting the space to are still
9 in their current locations?

10 A Cummings is not. They've moved into a
11 new office. Drayer, I think, is still in their
12 old location but they were able to get the
13 spaces next to it and expand. And Lowcountry, I
14 don't know about.

15 Q What conversations after September did
16 you have with Baker or Chris Lindgren about this
17 property?

18 A I don't remember having any
19 conversations with Chris. My conversations with
20 Baker, I don't specifically remember, but I'm
21 sure that I told him that without the banks'
22 approval without a contingency, that we weren't
23 going to spend any money and I couldn't -- you
24 know, I wasn't going to move forward.

25 Q Did Baker relay anything else to you

1 HASelden - FRASER (DIRECT EXAMINATION)

2 about any type of commitment the bank made to
3 release the lien?

4 A Not that I recollect.

5 Q And you wouldn't purchase this building
6 without the lien released; correct?

7 A No.

8 Q And you didn't reduce anything to
9 writing with the doctors or any other
10 prospective tenants with this property; correct?

11 A Correct.

12 Q Is there anything during the course of
13 these questions that you remembered that you
14 wanted to add to what we discussed?

15 A Two things. One of things that made
16 this building attractive was that the Bluffton
17 Parkway was under construction, which was what
18 the additional site work that we would be
19 responsible for would connect to, which would
20 give the building access from a road other than
21 278 and would be very convenient. So that made
22 the building very attractive to us and to the
23 doctors.

24 The second thing is just, you know, a
25 general comment on the terms. There isn't

 CHARTER I
COMMERCIAL, INC.

To: Chris Lindgren
Date: September 2, 2010
From: Baker Wilkins
Re: 15 Centre Building

Purchaser: Coughlin Investments, LLC and/or Assigns
12-B Arley Way, Suite 200
Post Office Box 1171
Bluffton SC 29910

Seller: Black Diamond, LLC
69 Main Street
Hilton Head Island, SC 29926

Location: 15 Centre Drive
Bluffton, SC 29910
Unit TBD, 1188 Centre Horizontal Property Regime

Condition of the Building: "As Is"

Purchase Price:

\$1,200,000

~~1,450,000~~ ²⁰⁰ _{219,100} \$ 1,325,000

Earnest Money:

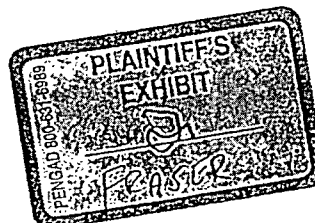
\$10,000 to be paid upon 3 days after executing the purchase agreement prepared by Simon Fraser. Earnest Money will be held with McNair Law Firm Escrow Account.


9/10/10

Mortgage/Lien Release:

Prior to execution of the Purchase Agreement, Seller to provide written confirmation from any mortgage or other lien holders that they will release the property from their liens for no more than the net proceeds due from this transaction.

1544 Fording Island Road • Hilton Head Island, SC 29926
Work (843) 837-4460 • Mobile (843) 247-2470 • Fax (843) 837-4461 • Toll Free (888) 837-4460
baker@chartercommercial.com • www.chartercommercial.com



Seller's Documents:

Within 10 Days from Purchase Agreement being executed by both parties, Seller agrees to provide Purchaser with all pertinent documents in its possession pertaining to the subject Property including but not limited to:

1. Property Survey and Building Plans
2. Environmental studies
3. Engineering reports
4. Any easement documents
5. Any correspondence from the County and/or other regulatory agencies relating to the development or operation of the Property.
6. Existing Master Deed including all covenants, restrictions, etc...for the development.
7. Estimated Budgets and Financial statement for building / development

Financing Contingency:

Purchaser shall have One Hundred Fifty (150) days from the date the Purchase Agreement is fully executed, the Financing Contingency Period, to obtain financing acceptable to Purchaser. During this time Purchaser's lender will be ordering an appraisal and this contract is contingent on the appraised value equaling to or greater than the Purchase Price.

Due Diligence:

Purchaser shall have One Hundred Twenty (120) days from the effective date of the Purchase Agreement, the Due Diligence Period, to inspect the Property, review Seller's Documents, obtain executed leases with prospective tenants, meet with and/or talk with Seller to discuss the Property and conduct any and all other investigations of the Property it deems appropriate, provided, however, that Purchaser will not in any way alter or cause any damage to the Property during its inspections without the prior consent of the Seller. Purchaser may terminate the Purchase Agreement for any reason during the Due Diligence period.

Signage:

The parties acknowledge that signage is subject to and controlled by the Beaufort County sign ordinances. Subject to these ordinances, Purchaser will be allowed a panel on the Highway 278 monument, signage on each end of the building, signage above the entry doors facing the parking lot and signage on a Bluffton Parkway monument when the Bluffton Parkway is constructed.

Site Work/Parking:

Purchaser will finish the site work and parking area highlighted on the attached site plan. Any further parking area will be completed by the owner of the building pads. Purchaser shall have a total of 60 parking spaces for a parking ratio of 4.5 spaces per 1,000 sq. ft. as highlighted on the attached site plan. The Master Deed will address any roads needed to gain access to Frontage Roads and the Bluffton Parkway Extension.

Closing:

Closing is to occur on or before 30 days from the date that Financing and Due Diligence Periods are satisfied.

Broker:

Both Parties acknowledge that Charter 1 Commercial, Inc. is representing the Seller in this transaction. In the event of a closing, Charter 1 Commercial, Inc. shall be the only broker to be paid a commission of 7% out of the proceeds at closing.

This is a non-binding term sheet which provides the business terms for Purchaser's attorney, Simon Fraser with Fraser and Allen, P.A., to complete the Purchaser Agreement. By both parties agreeing to these terms with signatures below, it confirms that the referenced building will not be sold or leased to another entity for thirty days from the date this term sheet is signed by both parties. It is acknowledged that Cary Griffin with McNair Law firm will be representing the Seller in this transaction.

Cengull Investments, LLC

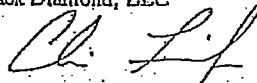


By: Joseph B. Fraser, III, Manager

Date:

9/2/10

Black Diamond, LLC



By: Chris Lindgren, Manager

Date:

9/9/10

Highlighted Parking Area to be completed by Purchaser

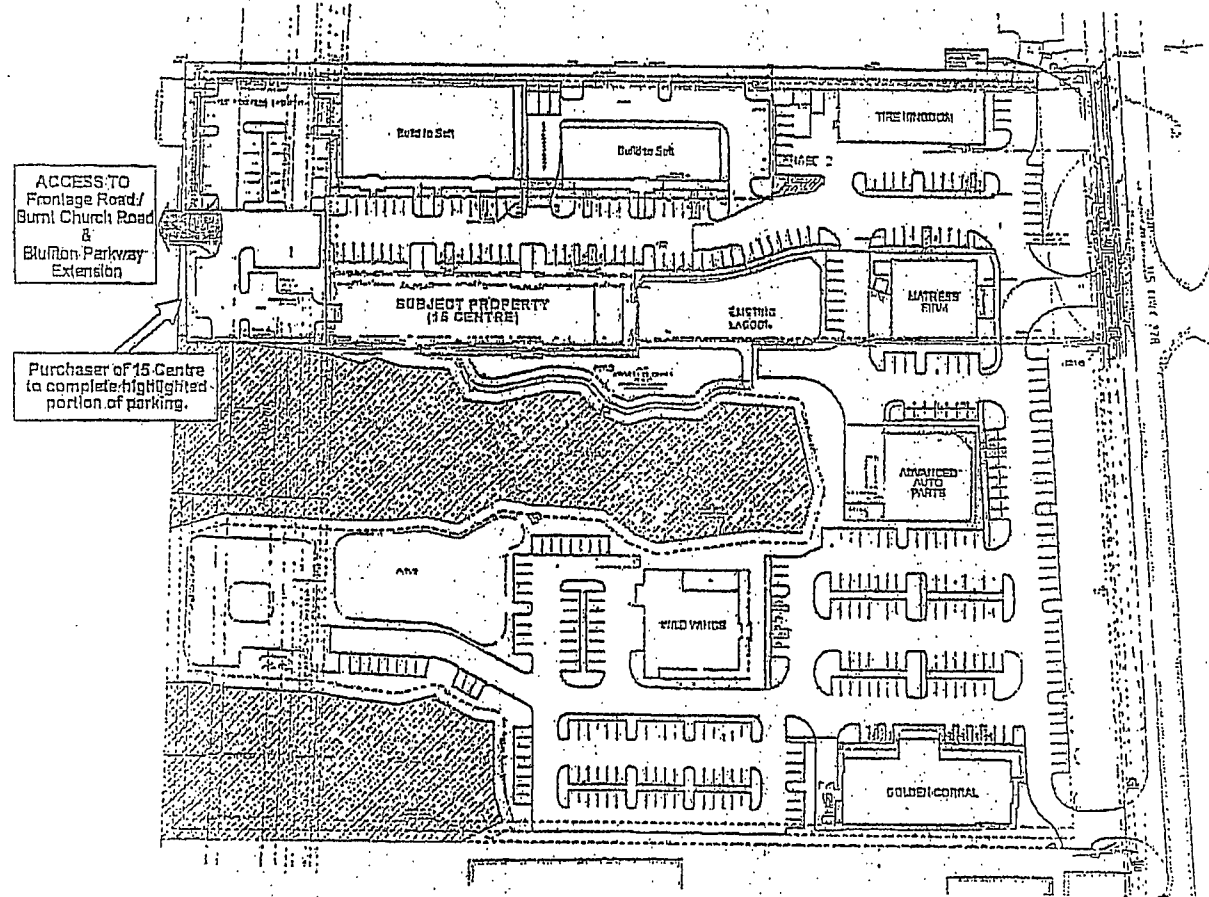


EXHIBIT "C"

1
2 IN THE COURT OF COMMON PLEAS
3 FOURTEENTH JUDICIAL CIRCUIT
4 STATE OF SOUTH CAROLINA
5 COUNTY OF BEAUFORT

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

8 Plaintiff;

9 vs.

CIVIL ACTION NUMBER
2012-CP-07-0944

10
11
12 BLACK DIAMOND, L.L.C.; J.
13 CHRISTOPHER LINDGREN; DAVID A.
14 BROSMAN; JULIE H. KING; and
15 THE GREENERY, INC.,

16 Defendants.

COPY

17 -----/
18 The deposition of BAKER WILKINS, a
19 witness in the above-entitled cause, taken
20 pursuant to Notice and agreement, before Cathy
21 M. Knoettner, Certified Court Reporter and
22 Notary Public, at Coastal Court Reporting, Inc.,
23 One Corpus Christi Place, Suite 107, Hilton Head
24 Island, South Carolina, on the 18th day of June,
25 2014, commencing at or about the hour of
11:35 a.m.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

1
2 APPEARANCES OF COUNSEL:

3 FOR THE PLAINTIFF:

4 BROOKS A. HASELDEN, ESQUIRE
5 Womble Carlyle Sandridge & Rice, L.L.P.
6 550 South Main Street, Suite 400
7 Post Office Box 10208
8 Greenville, South Carolina 29601
9 864.239.5950
bhaselden@wcsr.com
mbogle@wcsr.com
yfortner@wcsr.com

10 FOR THE DEFENDANTS BLACK DIAMOND, L.L.C. AND
11 J. CHRISTOPHER LINDGREN:

12 KEATING K. SIMONS, III, ESQUIRE
13 Simons & Dean
14 147 Wappoo Creek Drive
15 Suite 604
16 Charleston, South Carolina 29412
17 843.762.9132
18 klsimons@simonsanddean.com
19 debbie@simonsanddean.com

20 FOR THE DEFENDANT DAVID A. BROSMAN:

21 EHRICK K. HAIGHT, JR., ESQUIRE
22 Minor, Haight & Arundell, P.C.
23 1000 William Hilton Parkway
24 Suite 203, Village At Wexford
25 Post Office Drawer 6067
Hilton Head, South Carolina 29938
843.785.8040
rick@mhalawfirm.com
elaine@mhalawfirm.com

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

1 HASELDEN - WILKINS (DIRECT EXAMINATION)

2 Q With regard to Joe Fraser's deal in
3 particular that we're here to talk about, give
4 me your background on how that transaction or
5 proposed transaction originated through the time
6 period when Chris indicated to you that he was
7 not pleased with the response from the bank?

8 MR. SIMONS: Objection.

9 THE WITNESS: I'd like to preface
10 it and say this was several years ago,
11 and I've been involved in a lot of
12 transactions since, but that's my
13 recollection is Palmetto Medical Group,
14 which my primary contact was Scott
15 Cummings, was looking for sites and we
16 ended up -- and they really liked the
17 site where -- I'm going to refer to it
18 as 1188 as being the subject building.
19 And it was more space than they needed
20 so they were not looking to buy the
21 building. And at some point in time I
22 talked to Joe Fraser to see if he would
23 be, because he does -- we also work for
24 him on medical space that he owns; and
25 since he's a contractor it made sense

1 HASELDEN - WILKINS (DIRECT EXAMINATION)

2 that he would be the logical person to
3 come in and buy the building and build
4 it out and do a lease an option to
5 purchase since he's been amenable to
6 that on his other properties, and
7 that's what the doctors were looking
8 for. And they had two -- I believe it
9 was two other tenants in addition to
10 their practice that would take the
11 building. One of them may have been
12 Drayer, I don't remember.

13 So Joe was interested and we met
14 at the building several times, went
15 through it. Joe put together a pro
16 forma and plans, and we met with the
17 doctors and everything looked pretty
18 good. So Joe made an offer in the form
19 of a letter of intent and we went back
20 and forth with Chris on price, and I
21 believe we ended up at a million three
22 or a million three twenty-five. And
23 the thing that Joe didn't want to do is
24 go forward with spending a lot of money
25 unless he knew he could buy the

1 HASELDEN - WILKINS (DIRECT EXAMINATION)

2 property and it was
3 cross-collateralized with Black
4 Diamond, he had a mortgage lien or a
5 lease. I actually prepared -- the
6 letter of intent was on my letterhead.
7 The mortgage lien release paragraph
8 came from his attorney which we
9 inserted in the letter of intent. And
10 once the price was done, his brother,
11 Simon Fraser, was going to be his
12 attorney, and Simon was waiting on the
13 response from TD Bank to accept the
14 offer or give the mortgage lien release
15 prior to him preparing the contract,
16 and that's as far as we got. Does that
17 answer what you're --

18 BY MR. HASELDEN:

19 Q Thank you. The doctors came to you and
20 you went to Mr. Fraser. Did you have any
21 written or signed agreements with the doctors?

22 A No. No, we typically don't do buyer's
23 broker agreements with folks. If they want to
24 work with us, they can work with us. If they
25 don't want to work with us, they don't have to.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - FAX 843-785-5837

EXHIBIT "D"

/

Message

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 7/23/2010 1:13:48 PM
To: 'Tom DeMint - Sperry Van Ness' [tdemint@svn.com]
CC: Renault, Michael R. [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MRR18220]; Woodward, Dixon [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=DWOODWARD24313214]
Subject: Black Diamond LLC - Property Management and Leasing

Tom:

The Borrower, Black Diamond LLC, and the Guarantors have agreed in principal to a Bank designated Property Manager for the commercial properties we discussed. The effective date of this assignment is August 1, 2010. The engagement will initially run through July 2011. This is to be a Property Manager assignment and not a receivership assignment. As such, the Management and Leasing Agreements will be between SVN and the Borrower, Black Diamond LLC.

Please prepare the documents for the Owner's review and signature (I will forward the appropriate signing boxes to you as soon as I receive the same from our attorney). Please send me copies of the documents when they are completed.

The Borrower will be communicating with the current tenants that a new Management Company will be taking over effective August 1, 2010 and that August rents should be remitted to the new Management Company.

I would like to request that you open the bank account for this assignment with us.

Thanks in advance for assistance with this matter.

Call me if you have any questions or comments.

Mike

Michael C Rose
Senior Vice President
Commercial Real Estate
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401

mike.rose@carolinafirst.com

864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for

BLACK DIAMOND003351



Bank

ENVIRONMENTAL REVIEW MEMORANDUM

Introduction

Project: Black Diamond LLC
Property Address: 1200 Fording Island Road Bluffton, SC
Tax Parcel ID: Map , Lot ; Other ID:
To: Michael Rose, Special Assets, Charleston, SC
From: Anthony Scacifero 908-237-4719
Date of Review: 08/10/2011
RIMS #: 11-004720
Borrower: Black Diamond LLC
Loan #: 2827475-9001

Documents Reviewed

Report Type: Limited Site Assessment (Phase II) Proposal
Report Prepared By: HRP
Report Complete:
Reliance Letter Provided? (for Third Party Prepared Reports)
Prior Environmental Due Diligence? Yes
Prior Review by Environmental Department? Yes
Comments: The Phase I review can be found in RIMS under a separate internal task under the same RIMS account number.
Report Date: 08/10/2011
Report Prepared For: TD Bank
N/A
Date: 07/28/2011
Date: 08/05/2011

Property Description

Property Type: Industrial - Industrial-Business Park
Property Status: Existing
Year Built: 1988
Current Use: retail / industrial
Proposed Use: same
Primary Improvement Size: 101106.00 SF
Water Supply: - select -
Heat Source: ☐ Oil ☐ Natural Gas ☐ Electric ☐ Steam ☐ Propane ☐ Waste Oil ☐ Wood ☐ Heat Pump ☐ Other
Property Description: 101106, SF, Industrial, Industrial-Business Park
Additional Property Description:
Year Last Renovated:
Historic/Past Use:
Site Size: 9.45 Acres
Sewer System: - select -

Transaction Information

Loan Purpose: Workout
Amt of Original Loan: New:
Pending/Recent Sale?: No
SBA Involvement?: No
Total Loan Amt: \$3,001,482
If Yes, Has Borrower Signed Disclosure Form? - select -
Participation Loan?: 0
If Yes, Agent Bank: 0

STATUS AND RECOMMENDATIONS:

Prior to Closing:

- | | |
|--|---|
| ☐ Cancelled (no fee) | ☐ Cancelled (partial fee) |
| ☐ No Further Action Required | ☒ No Significant Pre-Foreclosure Issues |
| ☐ New LESS, PESS, Ph. I or Ph. II Needed | ☐ Reliance Letter |
| ☐ Further Actions Recommended | ☐ Other—see comments below |
| ☐ Establish Environmental Escrow/Holdback | ☐ Further Investigations Recommended |

Comments:

Post Closing:

- ☒ Further Actions Recommended ☐ Other—see comments below

The above comments are intended for the sole use of TD Bank, NA for the strict purpose of assisting in making decisions in the course of doing business, and except where required by law, should not be made available to outside parties, including the Borrower. Neither legal advice nor valuation opinions are expressed herein.

☐ Further Investigations Recommended

Comments: At the request of Andrew Bailey on 08/05/2011, a Phase II LSA Proposal was submitted by HRP to address the recommendations for further actions related to the *de minimis* conditions and business environmental risks identified on the subject property during the Phase I ESA. These actions included:

- | | |
|--|----------|
| • Conducting an asbestos survey of the water damaged materials - | \$800 |
| • Removal and disposal of mold-impacted building materials in Building 6 - | \$600 |
| • Completion of an inventory of all hazardous chemicals stored for future disposal - | \$800 |
| • Excavation and disposal of stained soil at the northeastern corner of Building 6 - | \$8,450 |
| Total - | \$10,650 |

HRP's August 10, 2011 Proposal adequately addresses the remedial actions and investigations presented above, and is hereby approved. It is recommended that the borrower be made aware of these conditions and engage HRP or another suitable environmental firm directly. However, TD Bank should engage HRP to complete this work when, and if, title to the property is acquired through a foreclosure action.

Estimated Costs for Recommended Actions: \$

Recommended Escrow Amount: \$

Stipulations for Escrow Release:

Message

From: Renault, Michael R. [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MRR18220]
Sent: 8/24/2010 8:30:08 AM
To: Zimmerman, Louise D. [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=LDZ18230]
Subject: Black Diamond & Riva Ridge

Please do a maintenance log to waive the late fees for both Black Diamond loans as well as the Riva Ridge loans. Send to me for approval.

Thanks.
Michael

Michael R. Renault
Senior Vice President
Commercial Banking Manager
Carolina First Bank
40 Calhoun Street
Charleston, SC 29401
843.727.8461 - office
843.422.4534 - cell
843.723.7296 - fax
michael.renault@carolinafirst.com

Message

From: MaintLog@thesouthgroup.com [MaintLog@thesouthgroup.com]
Sent: 8/24/2010 10:50:13 AM
To: Zimmerman, Louise D. [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=LDZ18230]; Renault, Michael R. [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MRR18220]
Subject: MaintLog - Pending Approval 8/24/2010 10:50:13 AM

MaintLog - Pending Approval 8/24/2010 10:50:13 AM

Request Id: 457936
Request Date: 8/24/2010 10:50:13 AM
Customer Name: BLACK DIAMOND LLC
Account Number: 5120783655
Late/Prepayment Fees Due: 9277.54
Late/Prepayment Fees Waived: 9277.54
Requestor Name: Louise Zimmerman
Requestor EMail: Louise.Zimmerman@carolinafirst.com
Request Type: Late Fee Waiver Request
Request Desc.: Please remove late fee of \$9277.54 from loan 5120783655. Thanks!
Assigned To: N/A
Status: Pending Approval
Status Details:
Date Completed: N/A

Thanks,
Maintenance Log
Copyright 2010, The South Technology Group

Problem Loan - Approval Form

This form is to be used for documenting and approving maintenance requests to a loan identified as a problem asset. Use Actual Amounts.

Client Profile: ☒ Watch Loan ☐ Troubled Debt Restructure ☐ Litigation ☐ Bankruptcy ☐ Foreclosure

Borrower:	Black Diamond	Relationship Manager:	Mike Rose	Date:	9/27/10
Borr. Location:	Bluffton, SC	Rel. Manager #:	90	Exp. Strategy:	Out
Nature of Bus.:	RE Development	Market/Region:	HH/SC	Current RR:	12 - OLEM
TIN/SSN:	57-1110469	Current Deposits:	\$123,272	TCE:	\$5,000,351

Loan & Collateral Details:

☐ Check if spreadsheet attached. Use spreadsheet if more than 4 loans. Include request details (billing, RRs, etc.)

LOANS	Loan	Loan Number	Commitmt. Amount	Loan Type	Days Past Due	Current Balance		Current Balance		Current Balance
	1	5120783655	\$1,827,049	440	42	\$ 1,827,049		\$ 1,827,049		\$ 1,827,049
	2							\$ -		\$ -
	3	5121066531	\$3,076,400	460	32	\$ 3,076,400		\$ 3,076,400		\$ 3,076,400
	4							\$ -		\$ -
	TOTAL					\$ 4,903,449		\$ 4,903,449		\$ 4,903,449
ASSETS	Loan	Collateral Description	Source of Value	Gross Value	Less: Ineligibles	Net Value	Adv. Rate	Collateral Value	Liquid. Rate	Liquidation Value
		Retail Building	5/19/2010	\$ 2,475,000		\$ 2,475,000	80%	\$ 1,980,000		\$ -
						\$ -		\$ -		\$ -
		Retail	5/19/2010	\$ 4,840,000		\$ 4,840,000	80%	\$ 3,872,000		\$ -
						\$ -		\$ -		\$ -
	TOTAL					\$ 7,315,000		\$ 5,852,000		\$ -
PRIORITY LIENS (include details in Background & Rationale below)						\$ -		\$ -		\$ -
EXCESS/(SHORTFALL)						\$ 2,411,551		\$ 948,551		\$ (4,903,449)

Request:

☐ Accrual Status:	☐ Charge-Off:	☒ Risk Rating Change:	☐ Troubled Debt Restructure:
☐ Place in non-accrual	Loan:	Loan:	☐ Into TDR: ☐ Out of TDR:
Loan(s):	1) Type: Amount:	1) Type: Downgrade ☐ Facility ☐ Obligor ☒ 13	Loan: Type Loan: Type
☐ Return to accrual	2) Type: Amount:	2) Type: Downgrade ☐ Facility ☐ Obligor ☒ 13	1) 1)
Loan(s):	3) Type: Amount:	3) Type: ☐ Obligor ☐ Facility	2) 2)
☐ Full Pmt. Expected?	4) Type: Amount:	4) Type: ☐ Obligor ☐ Facility	3) 3)
☐ Interest Collected?	Debt forgiveness?		4) 4)
Amount(s):	Continue billing?		
☐ Continue billing?			
☐ Other Request:			

Background & Rationale:

Explain the cause of the problem and provide the specifics and rationale behind the request. Provide further calculation details if necessary.

Relationship is being downgraded to a 13 due to its past due status as a result of issues with rent collection.

Alternatives:

Discuss possible alternatives that were considered and the reason that they they were not chosen at this time.

Approved by:

Name (& Initials if required)	Title:	Date:
Mike Rose <i>[Signature]</i>	Special Asset Officer	9/27/10
Jeff Mumm		

Loan Operations Use Only:

Name:	Action:	Date:

Message

From: Woodward, Dixon [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=DWOODWARD24313214]
Sent: 9/28/2010 2:01:38 PM
To: Repp, Mike S. [/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=msr13738]; Rose, Mike
[/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=mcr13622]
Subject: RE: Black Diamond

We do have receiver. Tom Demint at Sperry Van Ness. He is working to collect various rents.

We are going take a look at these and see what would say that the loss would be.

W. Dixon Woodward
South Coast President
Carolina First Bank
40 Calhoun St. Suite 100
Charleston, SC 29401
(843) 727-8460 (office)
(843) 408-3120 (cell)

From: Repp, Mike S.
Sent: Tuesday, September 28, 2010 1:37 PM
To: Woodward, Dixon; Rose, Mike
Subject: RE: Black Diamond

Don't we have receiver in place and aren't the rents sufficient to cover debt service? Do we have doubt about the collectibility of principal and interest? If you think this goes NAL, what is the estimated loss?

MICHAEL REPP

Executive Vice President
Executive Credit Officer

CAROLINA FIRST BANK

104 S. Main Street, Greenville, SC 29601
p. 864.298.6097
f. 864.421-1307
michael.repp@carolinafirst.com

From: Woodward, Dixon
Sent: Tuesday, September 28, 2010 8:58 AM
To: Repp, Mike S.
Subject:

Looks like we are moving Black Diamond to a 13. If still time, Mike recommends some level of a mark on this one. Maybe not the "big one" but certainly some extra in case if there is a tolerance for that at this point.

W. Dixon Woodward
South Coast President
Carolina First Bank

Message

From: CHRIS LINDGREN [chrislindgren@cs.com]
Sent: 10/14/2010 9:06:49 AM
To: Rose, Mike [/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=mcr13622]
Subject: Black Diamond shell bldg.
Attachments: Black_Di.pdf
Flag: Follow up

Please open the attached document.
This document was sent to you using an HP Digital Sender.

Digital Sender Model:	HP 9100C
Digital Sender Name:	10.0.0.50
Document type:	B/W Document
Number of pages:	5
Sent by:	CHRIS LINDGREN <chrislindgren@cs.com>
Attachment File Format:	Adobe PDF

To view this document you need to use the Adobe Acrobat Reader.
For more information on the HP Digital Sender, Adobe Circulate,
or a free copy of the Acrobat reader please visit:

<http://www.digitalsender.hp.com/reader-en>

October 14, 2010

To: Mike Rose

From: Chris Lindgren

Re: Black Diamond 15,053 SF Shell Building Located Adjacent to the 1188 Centre HPR.

Black Diamond has received a letter of intent from Joe Fraser, of Ceagull Investments, LLC, to acquire the referenced shell building. A copy of the executed letter of intent follows.

You'll note that the price is \$1,325,000 and is for the shell only. The price does not include the balance of the continuous acreage and improvements owned by Black Diamond. The agreement requires the Purchaser to finish the site work and parking area highlighted on the site plan attached as an exhibit. The Purchaser's work will also include site work to connect the parcel to the Bluffton Parkway extension. This site work will greatly benefit the balance of the contiguous property that is owned by Black Diamond and that is not subject to the agreement.

As a condition precedent to executing a formal Purchase Agreement, Seller is required "to provide confirmation from any mortgage or other lien holders that they will release the property from their liens for no more than the net proceeds due from this transaction."

Please review the letter of intent and advise how you would like to proceed. I look forward to hearing from you.



To: Chris Lindgren
Date: September 2, 2010
From: Baker Wilkins
Re: 15 Centre Building

Purchaser: Ceagull Investments, LLC and/or Assigns
12-B Arley Way, Suite 200
Post Office Box 1171
Bluffton SC 29910

Seller: Black Diamond, LLC
89 Main Street
Hilton Head Island, SC 29926

Location: 15 Centre Drive
Bluffton, SC 29910
Unit TBD, 1188 Centre Horizontal Property Regime

Condition of the Building: "As Is"

Purchase Price: ~~\$1,200,000~~ 1,450,000 ~~1,325,000~~ *SEE 9/9/10* *9/21/10*

Earnest Money: \$10,000 to be paid upon 3 days after executing the purchase agreement prepared by Simon Fraser. Earnest Money will be held with McNair Law Firm Escrow Account. *9/10/10*

Mortgage/Lien Release: Prior to execution of the Purchase Agreement, Seller to provide written confirmation from any mortgage or other lien holders that they will release the property from their liens for no more than the net proceeds due from this transaction.

1544 Fording Island Road • Hilton Head Island, SC 29926
Work (843) 837-4460 • Mobile (843) 247-2470 • Fax (843) 837-4461 • Toll Free (888) 837-4460
baker@chartercommercial.com • www.chartercommercial.com

BLACK DIAMOND006713

Seller's Documents:

Within 10 Days from Purchase Agreement being executed by both parties, Seller agrees to provide Purchaser with all pertinent documents in its possession pertaining to the subject Property including but not limited to:

1. Property Survey and Building Plans
2. Environmental studies
3. Engineering reports
4. Any easement documents
5. Any correspondence from the County and/or other regulatory agencies relating to the development or operation of the Property.
6. Existing Master Deed including all covenants, restrictions, etc...for the development.
7. Estimated Budgets and Financial statement for building / development

Financing Contingency:

Purchaser shall have One Hundred Fifty (150) days from the date the Purchase Agreement is fully executed, the Financing Contingency Period, to obtain financing acceptable to Purchaser. During this time Purchaser's lender will be ordering an appraisal and this contract is contingent on the appraised value equaling to or greater than the Purchase Price.

Due Diligence:

Purchaser shall have One Hundred Twenty (120) days from the effective date of the Purchase Agreement, the Due Diligence Period, to inspect the Property, review Seller's Documents, obtain executed leases with prospective tenants, meet with and/or talk with Seller to discuss the Property and conduct any and all other investigations of the Property it deems appropriate, provided, however, that Purchaser will not in any way alter or cause any damage to the Property during its inspections without the prior consent of the Seller. Purchaser may terminate the Purchase Agreement for any reason during the Due Diligence period.

Signage: The parties acknowledge that signage is subject to and controlled by the Beaufort County sign ordinances. Subject to these ordinances, Purchaser will be allowed a panel on the Highway 278 monument, signage on each end of the building, signage above the entry doors facing the parking lot and signage on a Bluffton Parkway monument when the Bluffton Parkway is constructed.

Site Work/Parking: Purchaser will finish the site work and parking area highlighted on the attached site plan. Any further parking area will be completed by the owner of the building pads. Purchaser shall have a total of 60 parking spaces for a parking ratio of 4.5 spaces per 1,000 sq. ft. as highlighted on the attached site plan. The Master Deed will address any roads needed to gain access to Frontage Roads and the Bluffton Parkway Extension.

Closing: Closing is to occur on or before 30 days from the date that Financing and Due Diligence Periods are satisfied.

Broker: Both Parties acknowledge that Charter I Commercial, Inc. is representing the Seller in this transaction. In the event of a closing, Charter I Commercial, Inc. shall be the only broker to be paid a commission of 7% out of the proceeds at closing.

This is a non-binding term sheet which provides the business terms for Purchaser's attorney, Simon Fraser with Fraser and Allen, P.A., to complete the Purchaser Agreement. By both parties agreeing to these terms with signatures below, it confirms that the referenced building will not be sold or leased to another entity for thirty days from the date this term sheet is signed by both parties. It is acknowledged that Cary Griffin with McNair Law firm will be representing the Seller in this transaction.

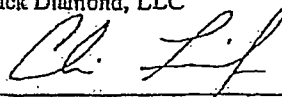
Ceagull Investments, LLC



By: Joseph B. Fraser, III, Manager

Date: 9/2/10

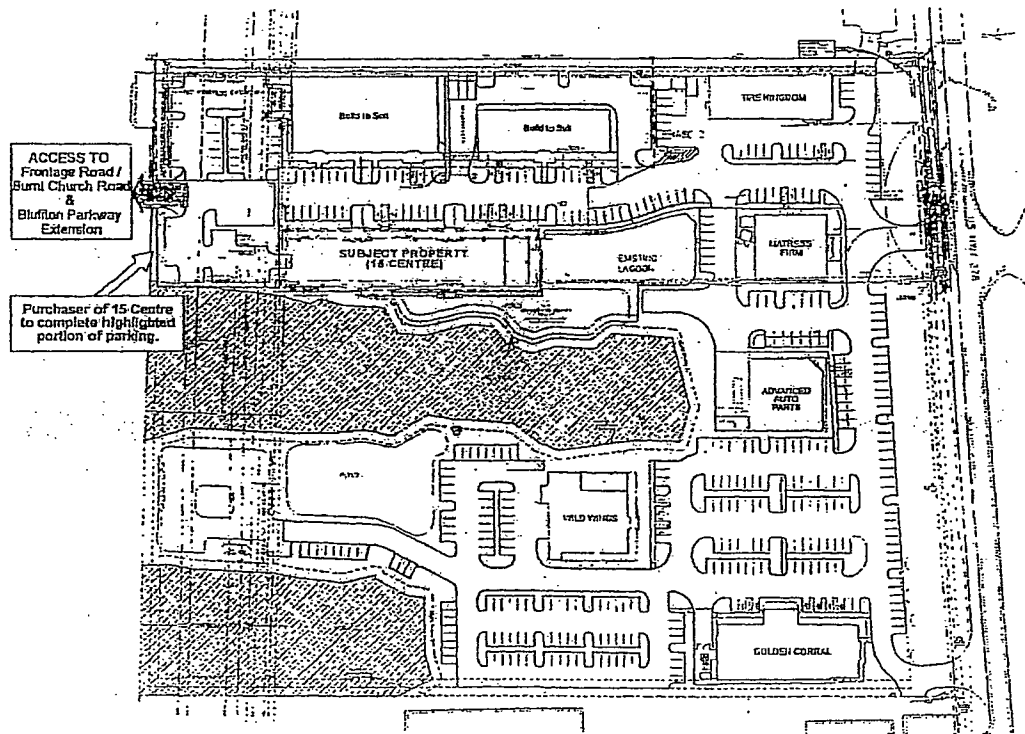
Black Diamond, LLC



By: Chris Lindgren, Manager

Date: 9/9/10

Highlighted Parking Area to be completed by Purchaser



Message

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 10/18/2010 2:28:38 PM
To: 'CHRIS LINDGREN' [chrislindgren@cs.com]
Subject: RE: Black Diamond shell bldg.
Attachments: Rose, Mike.vcf

Chris:

When do you have time to discuss?

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

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

From: CHRIS LINDGREN [mailto:chrislindgren@cs.com]
Sent: Thursday, October 14, 2010 9:07 AM
To: Rose, Mike
Subject: Black Diamond shell bldg.

Please open the attached document.
This document was sent to you using an HP Digital Sender.

Digital Sender Model: HP 9100C
Digital Sender Name: 10.0.0.50
Document type: B/W Document
Number of pages: 5
Sent by: CHRIS LINDGREN <chrislindgren@cs.com>
Attachment File Format: Adobe PDF

To view this document you need to use the Adobe Acrobat Reader.
For more information on the HP Digital Sender, Adobe Circulate,
or a free copy of the Acrobat reader please visit:

<http://www.digitalsender.hp.com/reader-en>

CONFIDENTIALITY NOTICE: This email, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you received this email and are not the intended recipient, please inform the sender by email reply and destroy all copies of the original message.

Message

From: Smoot, William [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=WSMOOT]
Sent: 11/8/2010 4:37:38 PM
To: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Subject: RE: Watch Reports - Black Diamond

Mike, I have updated some of the Black Diamond report including information about the 2009 tax return and financial performance, the risk rating change to 13, and current note balance information. I did not have any updated personal financials on the guarantors or collateral updates to make. All that should remain to complete are your strategy comments.

WILLIAM M. SMOOT, JR.

Vice President

CAROLINA FIRST BANK

P.O. Box 7317, Hilton Head, SC 29938

p. 843.341.4526

f. 843.341.4535

William.Smoot@carolinafirst.com

Carolina First is a trade name of TD Bank, N.A.

From: Rose, Mike
Sent: Tuesday, November 02, 2010 8:13 AM
To: Smoot, William
Cc: Sharp, Scott E; Johnston, Thomas
Subject: Watch Reports - Black Diamond

Will:

Please complete a watch report for Black Diamond and I will add the strategy section or action steps.

Thanks.

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS
CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged
and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for

BLACK DIAMOND006190

Message

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 11/15/2010 10:48:01 AM
To: 'W.M. Bosley' [bosleyb@svn.com]
Subject: Black Diamond Update and Rent Roll
Attachments: Rose, Mike.vcf

Bill:

Can you have someone give me a call to discuss the current status of the Black Diamond property? I have a conference call later this week and I need an update to share.

Thanks.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

Message

From: W.M. Bosley [bosleyb@svn.com]
Sent: 11/15/2010 12:03:02 PM
To: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
CC: 'Tom DeMint' [tdemint@svn.com]
Subject: FW: Black Diamond Update
Attachments: Black Diamond Rent Roll 11 15.pdf

Mike:

Confidential

Please see the report below from Rob Pearson, my CFO. I certainly conquer with his frustrations in dealing with both the tenants at Black Diamond and Nat and Chris. I also know that Tom DeMint is having his own frustrations with this account.

Call me if you have any questions.

Bill

William L. Bosley, CCIM, CPM | Managing Director
Sperry Van Ness | Bosley Asset-Property Management
1536 Fording Island Road, Suite 201
Hilton Head Island, SC 29926
Telephone: 843-837-8500 | Fax: 843-837-8506
Email: bosleyb@svn.com | wlb@bosleygroup.com
Asset Management Website: www.svnbosleyasset.com
Sales & Leasing Website: www.svnisavhh.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Monday, November 15, 2010 11:49 AM
To: Bill Bosley
Subject: Black Diamond Update

Bill,

From a financial perspective there are still several issues regarding our management of the Black Diamond property that remain a concern.

1. There is an enormous lack of cooperation from the Timeless Interiors owner who only pays a portion of her rent directly to a representative from Red Rocks (Nat or Chris) when they push her to pay. She has not responded to our efforts and literally 'goes into hiding' when Lloyd attempts to visit her to procure the rent money due. She made a large payment last week in excess of \$28,000 after we continued to inform Nat and Chris that today's payment to Carolina First could not be made without her payment. Nat delivered the check to our office last Wednesday, November 10th. Her check had a handwritten note on its stub indicating she is paid through November which does not agree with our records. As far as we can determine she still has an \$8,751 balance due.

2. Club Car has continued to make payments directly to the landlord, not our office. We have made contact with them on several occasions, and likely due to their size, it has taken time to change the address to send the rent check. It is now our understanding directly from Club Car our office will receive their rent check. In conversations with them we have been informed that they are to pay an amount of \$407 per month for tenant improvements which we had not been informed of by the landlord. We have been told by Nat that their November rent check went directly to Red Rocks which used the check to pay back the \$8000 they used towards making the 10/25 Carolina First payment last month. Nat informed us that we will be receiving from his office a check representing the difference between the Club Car rent check (approx. \$12,000) and the \$8000 Red Rocks needed to reimburse the CF Reserve Account which they control. When we had not received this check I sent an email to the Red Rocks CFO in the middle of last week informing her of my conversation with Nat and asked her to forward the check onto us. As of today we have not received the check.
3. It has been extremely challenging to provide good service to this account (account for all rents, make timely payables payments, produce complete and timely monthly financials) with this 'hybrid' approach to managing, collecting, and disbursing funds. As you know when we were presented with a \$5000 check from Red Rocks to start up this account I had concerns whether this was the exact amount of money required to be transferred to us from this account. When I subsequently requested from Chris and Nat an accounting for the transfer of funds they were holding on behalf of Black Diamond I was informed that the \$5000 was the correct amount as they had to pay bills from any money they had collected.

If there are any questions you have regarding the above or other financial matters just let me know.

Thanks,

Rob

Message

From: chrislindgren@cs.com [chrislindgren@cs.com]
Sent: 11/16/2010 11:57:08 AM
To: Rose, Mike [/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=mcr13622]
Subject: Re: Black Diamond - Borrower and Guarantor Current Financial Information

Mike:

I'm traveling this week but I'll put the info. together when I return to Hilton Head.

Any update on the release price for the LOI on the Black Diamond shell building?

I look forward to hearing from you.

Chris

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

From: Rose, Mike <Mike.Rose@carolinafirst.com>
To: 'CHRIS LINDGREN' <chrislindgren@cs.com>
Cc: Ducote, Carla <Carla.Ducote@carolinafirst.com>
Sent: Mon, Nov 15, 2010 11:58 am
Subject: Black Diamond - Borrower and Guarantor Current Financial Information
Chris:

I trust this email finds you well.

Please forward to me the following information so I can update your files:

Black Diamond

- Copy of 2009 Federal Tax Return;
- Copy of Income Statement and Balance Sheet as of 9/30/2010;
- Evidence that Real Estates are paid current;
- Evidence that sufficient insurance coverage is in place; and
- Current copy of the rent roll for the subject properties.

Riva Ridge

- Copy of 2009 Federal Tax Return;
- Copy of Income Statement and Balance Sheet as of 9/30/2010;
- Evidence that Real Estates are paid current;
- Evidence that sufficient insurance coverage is in place;
- Copy of listing agreement; and
- Sales activity.

Guarantors

- Current signed and dated Personal Financial Statement;
- Complete copy of 2009 Federal Tax Return plus all K-1s;
- Developer Property Schedule;

- Personal Global Cash Flow statement.

Also please confirm Mr. Brosman's contact information.

Thanks in advance for your assistance with this request.

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

CONFIDENTIALITY NOTICE: This email, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you received this email and are not the intended recipient, please inform the sender by email reply and destroy all copies of the original message.

Message

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 11/22/2010 12:33:46 PM
To: 'chrislindgren@cs.com' [chrislindgren@cs.com]
Subject: RE: Black Diamond shell building
Attachments: Rose, Mike.vcf

Please give me a call later today to discuss and provide a status update.

Thanks.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

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

From: chrislindgren@cs.com [mailto:chrislindgren@cs.com]
Sent: Monday, November 22, 2010 12:33 PM
To: Rose, Mike
Subject: Black Diamond shell building

Mike:

The prospective buyer for the shell building is getting anxious because we haven't been able to respond to him regarding the release. Could you please let us know a determination?

Thanks,

Chris

CONFIDENTIALITY NOTICE: This email, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you received this email and are not the intended recipient, please inform the sender by email reply and destroy all copies of the original message.

Message

From: chrislindgren@cs.com [chrislindgren@cs.com]
Sent: 12/1/2010 11:19:24 PM
To: Rose, Mike [/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=mcr13622]
Subject: Fwd:
Attachments: 1188_Center_Offer_Memorandum_9.10.10.pdf

Mike:

Notwithstanding several e-mails and phone calls, it's now been nearly 3 months without having received an answer from you regarding this matter. It's difficult to repeatedly tell the buyer that we haven't received a response from Carolina First and, as you can see, it might now be too late.

Chris

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

From: Baker Wilkins <BakerWilkins@charter1commercial.com>
To: chrislindgren@cs.com
Cc: natrackett@brozexport.com
Sent: Wed, Dec 1, 2010 3:26 pm
Subject: FW:
Chris -

Joe just called again to follow up on the release from Carolina First. Needless to say he's a little concerned he sent this back on September 10, 2010 and Carolina First has not provided what he needs to move forward so he is looking at alternative locations for these docs.

Baker Wilkins
843.247.2470
baker@charter1commercial.com

From: Joe Fraser [<mailto:JFraser@Fraser-Construction.net>]
Sent: Friday, September 10, 2010 2:51 PM
To: Baker Wilkins
Subject:



Baker,
Attached is a copy of the offer memorandum with the price revised to \$1,325,000. I hope it is acceptable as it is the most I am willing to offer.
Joe

Joseph B. Fraser III LEED® AP
Phone (843) 815-4747

BLACK DIAMOND005877

Fax (843) 815-4748

 CHARTER I
COMMERCIAL, INC.

To: Chris Lindgren
Date: September 2, 2010
From: Baker Wilkins
Re: 15 Centre Building

Purchaser: Cengull Investments, LLC and/or Assigns
12-B Arley Way, Suite 200
Post Office Box 1171
Bluffton SC 29910

Seller: Black Diamond, LLC
89 Main Street
Hilton Head Island, SC 29926

Location: 15 Centre Drive
Bluffton, SC 29910
Unit TBD, 1188 Centre Horizontal Property Regime

Condition of the Building: "As Is"

Purchase Price: \$1,280,000 ~~1,450,000~~ 1,325,000 *SEC 9/9/10*

Earnest Money: \$10,000 to be paid upon 3 days after executing the purchase agreement prepared by Simon Fraser. Earnest Money will be held with McNeir Law Firm Escrow Account. *9/10/10*

Mortgage/Lien Release: Prior to execution of the Purchase Agreement, Seller to provide written confirmation from any mortgage or other lien holders that they will release the property from their liens for no more than the net proceeds due from this transaction.

1544 Fording Island Road • Hilton Head Island, SC 29926
Work (843) 837-4460 • Mobile (843) 247-2470 • Fax (843) 837-4461 • Toll Free (888) 837-4460
baker@charter1commercial.com • www.charter1commercial.com

BLACK DIAMOND005879

Seller's Documents:

Within 10 Days from Purchase Agreement being executed by both parties, Seller agrees to provide Purchaser with all pertinent documents in its possession pertaining to the subject Property including but not limited to:

1. Property Survey and Building Plans
2. Environmental studies
3. Engineering reports
4. Any easement documents
5. Any correspondence from the County and/or other regulatory agencies relating to the development or operation of the Property.
6. Existing Master Deed including all covenants, restrictions, etc...for the development.
7. Estimated Budgets and Financial statement for building / development

Financing Contingency:

Purchaser shall have One Hundred Fifty (150) days from the date the Purchase Agreement is fully executed, the Financing Contingency Period, to obtain financing acceptable to Purchaser. During this time Purchaser's lender will be ordering an appraisal and this contract is contingent on the appraised value equaling to or greater than the Purchase Price.

Due Diligence:

Purchaser shall have One Hundred Twenty (120) days from the effective date of the Purchase Agreement, the Due Diligence Period, to inspect the Property, review Seller's Documents, obtain executed leases with prospective tenants, meet with and/or talk with Seller to discuss the Property and conduct any and all other investigations of the Property it deems appropriate, provided, however, that Purchaser will not in any way alter or cause any damage to the Property during its inspections without the prior consent of the Seller. Purchaser may terminate the Purchase Agreement for any reason during the Due Diligence period.

Signage:

The parties acknowledge that signage is subject to and controlled by the Beaufort County sign ordinances. Subject to these ordinances, Purchaser will be allowed a panel on the Highway 278 monument, signage on each end of the building, signage above the entry doors facing the parking lot and signage on a Bluffton Parkway monument when the Bluffton Parkway is constructed.

Site Work/Parking:

Purchaser will finish the site work and parking area highlighted on the attached site plan. Any further parking area will be completed by the owner of the building pads. Purchaser shall have a total of 60 parking spaces for a parking ratio of 4.5 spaces per 1,000 sq. ft. as highlighted on the attached site plan. The Master Deed will address any roads needed to gain access to Frontage Roads and the Bluffton Parkway Extension.

Closing:

Closing is to occur on or before 30 days from the date that Financing and Due Diligence Periods are satisfied.

Broker:

Both Parties acknowledge that Charter I Commercial, Inc. is representing the Seller in this transaction. In the event of a closing, Charter I Commercial, Inc. shall be the only broker to be paid a commission of 7% out of the proceeds at closing.

This is a non-binding term sheet which provides the business terms for Purchaser's attorney, Simon Fraser with Fraser and Allen, P.A., to complete the Purchaser Agreement. By both parties agreeing to these terms with signatures below, it confirms that the referenced building will not be sold or leased to another entity for thirty days from the date this term sheet is signed by both parties. It is acknowledged that Cary Griffin with McNair Law firm will be representing the Seller in this transaction.

Ceagull Investments, LLC

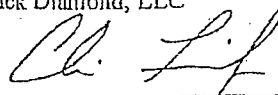


By: Joseph B. Fraser, III, Manager

Date:

9/2/10

Black Diamond, LLC

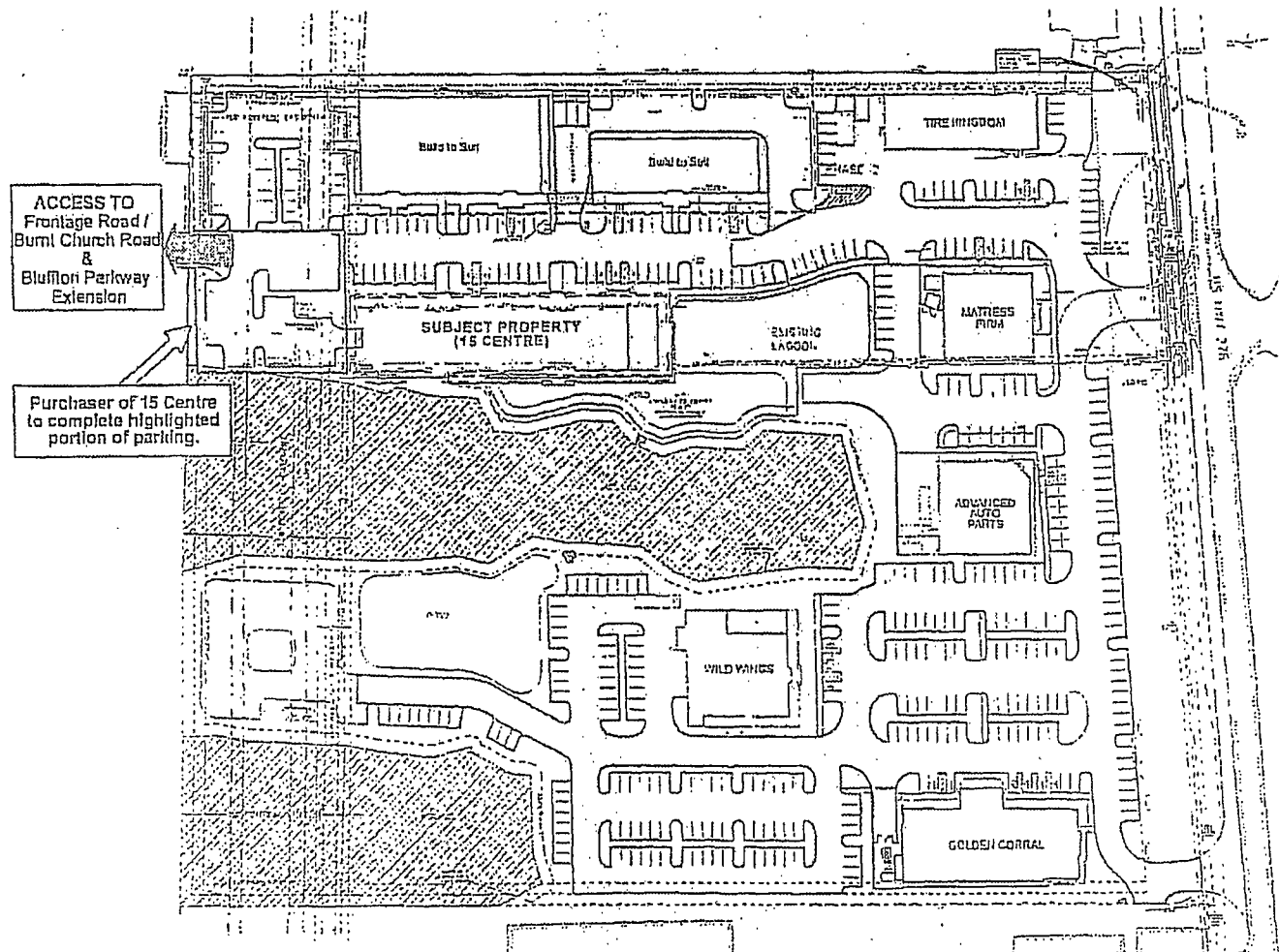


By: Chris Lindgren, Manager

Date:

9/9/10

Highlighted Parking Area to be completed by Purchaser



Message

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 12/2/2010 8:53:56 AM
To: 'chrislindgren@cs.com' [chrislindgren@cs.com]
CC: 'Trent, Matt' [MTrent@wcsr.com]
Subject: Black Diamond - Loan #xxx-xxx-3655
Importance: High
Sensitivity: Company Confidential

Chris:

I have responded to you on a number of occasions, both via the phone and emails, regarding this matter regarding the Bank's position. I can only assume you did not like the Bank's response to your request. The Bank expects to be repaid in full will the loan matures July 25, 2011. As for the potential sales contract you are negotiating, as I mentioned to you previously, if and when asked for a partial release from the current mortgage the Bank when consider the same.

In addition, I have made several requests for current financial information on the operations of the subject properties and each guarantor. To date, I have not received any documents that were requested and required by your loan documents. By not providing the requested information as prescribe in the loan documents you are **in default** with all your loans. If the requested and required documents are not received shortly the Bank will activate the default interest rate on all its loans to Black Diamond.

Also, please consider this email your notice that the Bank does not intent to re-new or extent the term and conditions of loan which matures July 25, 2011.

As always I am available to discuss this matter with you at any time.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

Message.

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 12/2/2010 2:41:32 PM
To: 'Jason Long' [JLong@BCCommercial.com]
CC: Vic Mills [VicM@BCCommercial.com]; John Mills [jmills@BCCommercial.com]
Subject: Black Diamond and [Redacted - Non-Responsive]
Attachments: APPRAISAL - 5121066531 - 571110469 - 6-1-10 - BLACK DIAMOND LLC - 4,840,000 -.PDF; APPRAISAL - 5121066531 - 571110469 - 6-2-10 - BLACK DIAMOND LLC - 2,475,000 -.PDF; [Redacted - Non-Responsive]
[Redacted - Non-Responsive]

Attached please find the following:

- Black Diamond – Appraisals

[Redacted - Non-Responsive]

The others will be sent in a separate email.

Thanks.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

From: Jason Long [mailto:JLong@BCCommercial.com]
Sent: Thursday, December 02, 2010 2:00 PM
To: Rose, Mike
Cc: Vic Mills; John Mills
Subject: Hilton Head & [Redacted - Non-Responsive]

BLACK DIAMOND005899

Mike,

I hope you had a nice Thanksgiving. I just spoke to Vic Mills and he said that you and he discussed several assets that we should look at. Will you please forward information (asset summary, appraisal, etc.) on the following assets that you discussed:

1. Black Diamond/Chris Lindgren (Bluffton, SC)

Redacted - Non-Responsive

Please let me know if you have any questions. We look forward to receiving information on these assets and giving you our assessment/valuation of each.

Thank you,
Jason

Jason Long

Blanchard & Calhoun Commercial
2743 Perimeter Parkway
Building 100, Suite 370
Augusta, GA 30909
(706) 854-6708 Direct Line
(706) 722-5565 Office
(706) 722-6960 Fax
(706) 513-5355 Mobile
jlong@bcccommercial.com



CONFIDENTIALITY NOTICE: This email, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you received this email and are not the intended recipient, please inform the sender by email reply and destroy all copies of the original message.

Message

From: Jason Long [JLong@BCCommercial.com]
Sent: 1/18/2011 3:57:21 PM
To: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
CC: John Mills [jmills@BCCommercial.com]
Subject: Black Diamond and **Redacted - Non-Responsive**
Attachments: image001.jpg

Mike,
Good talking with you today. As we discussed, our offer on the Black Diamond asset in Bluffton is \$1.6MM.

Redacted - Non-Responsive

Please let us know your thoughts on these two offers at your convenience.

Thanks,
Jason

Jason Long

Blanchard & Calhoun Commercial
2743 Perimeter Parkway
Building 100, Suite 370
Augusta, GA 30909
(706) 854-6708 Direct Line
(706) 722-5565 Office
(706) 722-6960 Fax
(706) 513-5355 Mobile
jlong@bccommercial.com



Message

From: Tom DeMint [demintt@svn.com]
Sent: 2/2/2011 4:33:55 PM
To: Rose, Mike [/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=mcr13622]
Subject: Black Diamond: O'Reilly's Auto Parts

Mike,

Diversified Development, Inc. (Columbia, SC) offered to purchase the 7,000 sq. ft. warehouse building fronting Hwy 278 in The Black Diamond Complex under the following terms and conditions:

- Price: \$700,000
- Use: O'Reilly's Auto Parts Store
- Earnest Money: \$20,000
- Due Diligence Period: 90 days
- Closing: 30 days after the end of the due diligence period.

The property was put under contract on August 6, 2010 – the purchaser asked for a sixty day extension of the due diligence period to get a final executed lease from O'Reilly's Auto Parts. The Seller declined and indicated that he was raising the price to \$900,000.

Will Batson of Diversified Development continues to contact me on a weekly basis regarding the purchase of this property.

Let's discuss at your convenience.

Tom

Tom DeMint CCIM
Sperry Van Ness
1536 Fording Island Rd, Suite 201
Hilton Head Island, SC 29926
Office: 843-837-3754 ext. 16
Cell: 843-816-7191
Fax: 843-837-8506
tdemint@svn.com

Message

From: Rose, Mike [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MCR13622]
Sent: 2/17/2011 4:01:45 PM
To: Woodward, Dixon [/O=TSFG/OU=First Administrative Group/cn=Recipients/cn=dwoodward24313214]
Subject: Black Diamond and Possible Upgrade

I thought a little more about your question relative to upgrading Black Diamond. Even though the loans are paid current and we have the 2 month payment reserve account I would not suggest it because of the following:

- There have been no new leases executed in the last 6 months;
- The major tenant, Timeless Interiors, is an issue (collecting rents and they are on a month to month lease);
- The Borrower and Guarantors have not provided operating results, financial statements or tax returns (all have been requested numerous times);
- Chris L. has a number of other issues from what I am told, his world is following in around him;
- The current DSCR is less than 1:1; and
- The RE Taxes have not been paid.

I believe there is a greater possibility of these loans following off the cliff in the next 6 to 12 months than being rehabilitated.

Please give me a call if you have any additional questions or thoughts.

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

Carolina First Bank is a trade name of TD Bank, N.A.

THIS ELECTRONIC MESSAGE, INCLUDING ANY ACCOMPANYING DOCUMENTS, IS CONFIDENTIAL, intended for the sole use of the addressee(s), and may contain information that is privileged and exempt from disclosure under applicable law. If you are neither the intended recipient nor responsible for delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

March 28, 2011

Mr. Michael Rose
Carolina First TD Bank
40 Calhoun Street
Charleston, SC 29401

Re: Broker Opinion of Value: Prepared by Tom DeMint CCIM
Black Diamond Business Park

- Tract A
Land: 9.23 Acres
Improvements: Eleven Office/Warehouse Buildings - 101,106 sq. ft.
DMP # R600-040-000-0006, 0033, 034A
- Tract B
Land: 4.46 Acres
Improvements: 15,053 sq. ft. "shell" building
DMP: Part of DMP#R600-040-000-0021-0000

Tract A is comprised of three adjacent parcels located at 1200 Fording Island Road (Hwy 278) in Bluffton, SC. The site is irregular in shape with approximately 362 feet of frontage on Fording Island Road which creates very attractive retail/office opportunities. In addition, the extension of the Bluffton Parkway (under construction) along the rear of the property will provide a second access point and better exposure in the future. There is a 150' power line easement at the rear of property which restricts the use of 1.343 acres for vertical improvements. However, parking and retention systems are generally permitted in this easement area. The property is zoned Commercial Regional (CR) which will permit a full range of retail, office, and service uses.

The property is improved with 11 light industrial metal buildings totaling 101,106 sq. ft. and has 14 independent tenants at the present time - 10,000 sq ft. is vacant. Total annual rental revenue at this time is projected at \$575,918 and C.A.M, taxes, and insurance are approximately \$135,000 resulting in a net operating income of \$440,918. However, 72,500 sq. ft. of the leases are on month to month agreements or have termination dates within the next twelve months. Timeless Interiors is the largest tenant occupying 49,000 sq. ft. with \$196,303 in annual rent (34% of the total). Timeless Interiors has been chronically late in rent payments over the past six months and certainly presents a risk for lost revenue. In addition, the buildings that Timeless Interior occupies have substantial deferred maintenance issues, and replacing them with an alternative tenant in the current market would probably require extensive renovations.

Market rents over the past thirty six months have dropped dramatically across the retail, office, and service sectors. Examples include the following:

- Office/Showroom/Warehouse - Hagemeyer

1536 Fording Island Road, Suite 201 Hilton Head Island, SC 29926 843-837-3754 Fax: 843-837-8506 www.svnsavhh.com www.svn.com
2 East Bryan Street, Suite 100 Savannah, GA 31401 912-353-4101 Fax: 912-790-7576 www.svnsavhh.com www.svn.com

Sperry Van Ness is a member of the Sperry Van Ness Group, a division of Sperry Van Ness Group, Inc. All rights reserved. This document is confidential and its use is restricted to the intended recipient only. If you are not the intended recipient, please do not disseminate, copy, or otherwise use this information. If you have received this document in error, please notify the sender immediately.

Location: Bluffton/Hwy 278

Building Condition: Excellent – Built in 2000

Size: 20,000 sq. ft.

Rent: \$10 per sq. ft. NNN

Tenant moved in 2010 to a location on Simmonsville Rd. at rent of \$7.80 per sq. ft. (modified gross) saving \$4.20 per sq. ft.

Rent Reduction: 35%

- Retail: Edwin Watts Golf

Location: Bluffton/Hwy 278 & Buckingham Plantation Drive

Building Condition: Excellent – Built in 2000

Size: 7,000 sq. ft.

Rent: \$15 per sq. ft. NNN

Tenant will open 4/1/11 – former tenant was paying \$20 per sq. ft.

Rent Reduction: 25%

- Office/Warehouse: Unit 501 Bluffton Park Industry Suites

Location: Red Cedar St/Bluffton

Building Condition: Excellent - Built in 2005

Size: 3,300 sq. ft.

Rent: \$10.00 per sq. ft. NNN

Unit is fully conditioned and was leased to The Island Packet – now advertised for lease at \$8.00 per sq. ft (modified gross) representing a reduction of \$4 per sq. ft.

Rent Reduction: 33%

These examples are a much higher construction quality than the subject, but graphically illustrate the negotiated rent reductions occurring in the market across all asset classes.

Income Valuation: Given the current tenant mix, term of leases, building conditions, rental history, and market condition, a prudent buyer would discount Income by 35% to offset expected rent reductions and defaults. In addition, a purchaser may add a reserve for capital replacement due to the age and condition of the existing buildings. A reasonable allowance would be 4% of rental revenue. The resulting NOI would be adjusted to \$268,960 - applying a capitalization rate of 10% would project an approximate value of \$2,690,000.

Market Valuation:

The existing improvements are not consistent with the highest and best use of this property and as the market recovers over the next four years, consideration should be given to utilizing the site for retail/office/lodging uses which would have great visibility from Hwy 278 and the Bluffton Pkwy. Recent comparable property sales in the Bluffton Market include the following:

- 1.7 Acres: Hwy 278 at The Best Buy Center
Price: \$921,000 (\$541,764 per acre)
Date of Sale: 7/28/10
Use: Auto Zone
- 23.39 Acres: Hwy 278 at Willow Run
Price: \$4,200,000 (\$187,584 per acre)
Date of Sale: 3/18/10
Use: Investment Purchase
- 1.61 Acres: Hwy 278 at Island West (corner)
Price: \$1,000,000 (\$621,118 per acre)
Date of Sale: 11/2/10

Use: Enmark

- 1.8 Acres: Buckwalter Pkwy

Price: \$850,000 (\$472.22 per acre)

Date of Sale: 4/22/10

Use: Parker's Convenience Store

- 1.18 Acres: Bluffton Pkwy

Price: \$375,000 (\$317,796 per acre)

Date of Sale: 8/18/09

Use: Car Wash

With the exception of the 23.39 acre site on Hwy 278 and the 1.8 acre Buckwalter Pkwy property, all other properties were developed sites with curb cuts, deceleration lanes, and water/ sewer.

Appropriate site development costs need to be applied to undeveloped property.

Given current comparable sales, a developer might project the following revenues from the sale of this asset:

Sales Revenue:

1.5 Acre Commercial Parcel: Hwy 278	\$600,000 per acre	\$900,000
1.5 Acre Commercial Parcel: Hwy 278	\$600,000 per acre	\$900,000
.5 Acre Commercial Parcel: Hwy 278	\$600,000 per acre	\$300,000
2.5 Acre Lodging Parcel: Interior	\$400,000 per acre	\$1,000,000
1.5 Acre Commercial Parcel: Bluffton Pkwy Ext.	\$350 per acre	\$525,000
1.5 Acre Commercial Parcel: Bluffton Pkwy Ext.	\$350,000 per acre	\$525,000
Total Sales:		\$4,150,000

Expenses:

Land Costs: 9.23 Acres	\$2,500,000
Demolition	\$400,000
Interest	\$300,000
Sales Costs: (Commissions)	\$166,000
Total Development Costs	\$3,366,000
Developer Profit (23% of Costs)	\$784,000

In summary, a prudent developer would be willing to pay **\$2,500,000** for the property to achieve a reasonable profit.

*Cost of demolition and clearing - \$400,000

*Assumes 2 year sales cycle and \$300,000 in interest costs

*Parcel purchasers will assume the cost of site work.

*Efficient use of the land can be achieved by selling pad sites with common parking to eliminate interior setbacks and buffers.

Utilizing a discounted income model for the existing use and a development scenario based on the highest and best future use, a current sale value for the 9.23 acres can be estimated in a range of **\$2,500,000 to \$2,700,000.**

Tract B is composed of 4.436 acres (2.975 usable acres) improved with a 15,053 sq. ft. "shell" building with parking and a retention pond sized to accommodate the entire site. Approved site plans show the

capability to construct two additional pad sites supporting a 13,628 sq. ft. building footprint and 6,963 sq. ft. building footprint for a total of 20,591 sq. ft. The property has no direct road frontage and limited exposure from Hwy 278. The existing building is structural steel-frame construction with metal studs and has a stucco and aluminum store front exterior. The roof is a combination of metal covering on pitched areas and built-up membrane on the flat portion. The interior of the building is unfinished with a concrete slab apron around the perimeter and exposed ground in the middle to allow for the installation of necessary utilities. There are entrance doors on both sides of the building allowing for varied suite configurations if desired. The Bluffton Parkway Extension is under construction and will provide some visibility for future retail/office uses. A purchaser of this property would likely secure a tenant for the existing building and sell or develop the remaining pads.

Market Valuation:

Rents for Class A office space in the Hilton Head/Bluffton Market have dropped significantly over the past three years. One Belfair Place is an 18,000 sq. ft. Class A office building located in Belfair Towne Village which had rental rates of \$21 per sq. ft. NNN in 2007 – the landlord is now offering \$15 per sq. ft. NNN. The former Alltel Building (4,427 sq. ft.) on Hwy 278 was leasing for \$21 per sq. ft. NNN and is now advertised at \$15 per sq. ft. NNN. Medical office space at Plantation Business Park was leasing for \$19 per sq. ft. (modified gross) in 2007 and is now leasing at \$12 per sq. ft. (modified gross). The Bridge Center on Hwy 278 is offering to lease 13,500 sq. ft. in a new building for \$13 per sq. ft. NNN with a \$20 per sq. ft. tenant improvement allowance.

We estimate that a tenant improvement package for the 15,053 sq. ft. building would approximate \$40 per sq. ft. to achieve a rent of \$15 per sq. ft. Since existing office/retail buildings in the market can now be purchased at under \$100 per sq. ft., we would believe that a developer would not want to exceed \$100 per sq. ft. on new construction costs. The valuation calculation would be as follows:

Development Costs:

Tenant Improvements (\$40 per sq. ft.)	\$602,120
Land & Building (\$60 per sq. ft.)	\$903,180
Cost of Sale (4% fee)	\$82,189
Total Costs:	\$1,587,489

Sale Calculation:

Rent: (15,053 sq. ft. x \$15 NNN)	\$225,780
Vacancy: 7%	\$15,805
Reserves: (4%)	\$9,031
NOI:	\$200,944
Capitalization (10%)	\$2,009,440
Cost of Sale: (4%)	\$80,000
Net Proceeds:	\$1,929,440

Developer Profit: (21% of Costs)	\$341,951
---	------------------

If a developer was willing to pay \$60 per sq. ft. (\$752,650) for the existing improvements (1.25 acres for pad and parking) and sell the improved and leased building at a 10% cap, he would realize a developer profit of \$341,951. Given current market rents for office and retail space, we project a sale value in a range of \$750,000 for the existing building and 1.25 acres.

The sale value of the remaining 1.72 acres can be determined with a development model reflecting a three year hold period until market demand would support a \$17 per sq. ft. rent

Development Costs:

Land (1.72 acres)	\$200,000
Interest Carry: 7%	\$42,000
Building: 13,628 sq. ft. \$110 per sq.ft.	\$1,499,080 (includes all hard, soft costs, TI)
Building: 6,963 sq. ft. \$110 per sq. ft.	\$765,930 (includes all hard, soft costs, TI)
Total:	\$2,507,010

Rents: 13,628 sq. ft. /\$17 per sq. ft. NNN	\$231,676
6,963 sq. ft. /\$17 per sq. ft. NNN	\$118,371
Total Rents:	\$350,047
Less Vacancy: 7%	\$24,503
Net Rents:	\$325,544
Reserves (4%)	\$13,022
NOI	\$312,522
Sale (10% capitalization)	\$3,125,220
Less: 4% cost of sale	\$125,000
Net Proceeds	\$3,000,000
Developer Profit:	\$492,990 (20%)

This model indicates that a prudent developer would be willing to purchase the remaining land for \$200,000 with a plan to postpone development until market rents recover.

In summary, the projected sale value of the 4.434 acre property with a 15,053 sq. ft. "shell" building would be in a range of \$1,100,000.

Best regards,

Tom DeMint CCIM

REQUEST FOR CHANGE OF STATUS FORM

Form pertains to: ☒ Shaw ☐ Leaseworks ☐ ACBS ☐ Pop Plus ☐ IM/AM

State/Region: South Carolina / South Coast Date: 8.9.11
 Officer #: 9233 Officer Name: Mike Rose Officer Mailstop: SC3-022-000
 Officer Phone #: 843-769-2494 Relationship Name: Relationship #: 2827475
 Borrower Name: (one borrower per form) Black Diamond Customer Number: (one number per form) 2827475
 Note Balance(s): (use '\$' between multiple amounts) \$4,746,073 Note Number(s): (use commas between multiple note numbers) 9001; 9002
 (Enter Shadow Balance. If note does not have a shadow side, enter Bank Balance.) \$4,858,193
 Aggregate Exposure: \$4,858,193

Category	Current	Change To
Borrower Risk Rating - Small Business	()	()
Facility Risk Rating - Small Business	()	()
Borrower Risk Rating - Commercial (for changes to/from 9A or 9B). This is for approval signature purposes ONLY. Upon approval, requesting officer MUST make BRR downgrade/upgrade change in Maestro.	()	()
Accrual Status (Note: If loan is being placed on Non-Accrual, it will be downgraded per policy to Small Business 08 or Commercial 9A or Commercial Charge-off 9B.)	()	()
Impaired Status (User Reg 6-4) Note: If loan is being placed on Non-Accrual, it will be classified as an Impaired loan per policy. E = Bankruptcy, F = Delinquency Note, G = Forbearance Agreement, H = Non-Accrual, I = Default, unlikely to pay, J = Repossession, K = Troubled Debt Restructure (TDR), L = Return to Performing, M = Restructured, P = Foreclosure	()	()
If you are placing the loan/lease on non-performing, do you want to remove the automatic debit for the monthly payments? If yes, ACH will be cancelled and this will eliminate payments from being erroneously posted to the system.	()	()
CHOOSE ONE (Required for Risk Rating Substandard or Worse): ☐ Prevent all funds advances. ☐ Do not accept any payments. ☐ Prevent all funds advances and do not accept any payments. ☐ Require an approval before funds can be disbursed. ☐ Not applicable		
Primary Officer Number (Small Business: 6 digits, All other: 4 digits)	()	()
Secondary Officer Number (Workout)	()	9233
Class Code - Commercial 77 = Commercial	()	()
Class Code - Small Business 10 = Legacy TD Banknorth (everything booked prior to June 27, 2009), 20 = TD Bank - North Center (anything booked after June 27, 2009), 30 = TD Bank - Legacy Commerce (everything booked prior to September 26, 2009) and 40 = TD Bank - South Center (everything booked after September 26, 2009)	()	()
Class Code - Workout 80 = SBA Workout - Commercial, 81 = SBA Workout - Small Business, 84 = Workout - Commercial, 85 = Workout - Small Business	()	()
Small Business Transfer ONLY (User Reg 2-7) (Format: 8, followed by 3 numerals, a dash, and 3 letters; for example, 8999-SNP)	()	()
Tied to SWAP? (If Yes, email Derivatives Operations at DerivativesOperations@tdbanknorth.com.)	()	

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 8/4/2011 10:43:24 AM
To: Kariyk, Kathryn [Kathryn.Kariyk@td.com]
Subject: FW: Payment on lease (Bosley Group)

FYI - See below.

Thanks,

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Wednesday, August 03, 2011 5:23 PM
To: 'Trent, Matt'
Cc: Rose, Michael; 'W.M. Bosley'; 'Tom Demint'; 'Lloyd Miller'
Subject: RE: Payment on lease (Bosley Group)

Matt,

Mike Rose forwarded to me your email and requested I call him to discuss the related matters. I put a call into Mike this morning and he just wrote asking to catch up tomorrow which is fine with me (any time after 8 a.m.-843-837-8500 ext 18).

Literally, for the very first time earlier today, I talked to Holly Dixon on the telephone in Bill Bosley's absence. She explained the same things she said in her email about having an agreement to pay \$10,000 per week, having an adjustment to her rent approved for the 'crystal building', and having paid \$10,000 to Nat Rackett the day before the bank's Assignment of Rent letter was received by her.

We never received the \$10,000 she is referring to as she said she gave it to Nat. I told her we cannot credit her account unless she can provide us with a cancelled check or receipt. Previously, she had explained to our office that she needed a statement from us that she was paid through April before she would ever make another payment. Our records show her paid through most of March, having received the last payment from her on March 22nd.

I believe there was a discussion months ago about a reduction in her rent if she signed lease(s) presented to her by Tom DeMint. She never signed and therefore we had no authority to lower her monthly rent. She may be referring to the building proposed in the lease as the 'crystal building' for some reason.

We did repair some roof leaks a while ago and do not know of any current issue regarding same. She told me today that she had been complaining to Nat for months about pot holes and there was never any response. She apparently took matters in her own hands and had someone recently fill in potholes with a blue sealant.

Looking forward to catching up with Mike tomorrow some time.

Thanks.

Rob

From: Trent, Matt [mailto:MTrent@wcsr.com]
Sent: Wednesday, August 03, 2011 4:53 PM
To: 'Rob Pearson'
Cc: 'Rose, Michael'
Subject: FW: Payment on lease (Bosley Group)

Rob,

I received the message below from Holly Dixon of Timeless Interiors. I will let her know that she needs to contact the property management company with respect to any issues that she may be having with her leased premises (e.g. leaks/pot holes). I will also inform her that rent is expected to be paid as set forth in the lease, not \$10,000 weekly payments.

I am not familiar with the "crystal building". Do you know what this is?

Matthew Trent
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street, Suite 400
Greenville, South Carolina 29601
p (864) 255-5411
f (864) 239-5861

From: Timeless Interiors [mailto:mail@timelessinteriorshiltonhead.com]
Sent: Monday, August 01, 2011 5:54 PM
To: Trent, Matt
Subject: Payment on lease (Bosley Group)

Dear Mr. Trent,

I understand you will be receiving my payments on leased buildings, however I need to have the leaks in the front building repaired and have recently filled in all the pot holes in parking lot. I need confirmation or invoice showing the \$10,000.00 I paid 2 weeks ago and my agreement with Black Diamond is to pay \$10,000.00 a week, is that acceptable with you? Please let me know when you have received this. Also do you have the adjusted rate on the crystal building from 5 months ago. I have not received this with your last correspondence.

Thank You,

Holly Dixon

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

CONFIDENTIALITY NOTICE: This electronic mail transmission has been sent by a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of the inadvertent transmission. There is no intent on the part of the sender to waive any privilege, including the attorney-client privilege, that may attach to this communication. Thank you for your cooperation.

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 8/4/2011 12:38:03 PM
To: Rob Pearson [rpearson@bosleygroup.com]
CC: Ducote, Carla [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-CDUCOTE]
Subject: ESA Invoice for Black Diamond
Attachments: 20110804122838326.pdf

Rob:

When there are funds available the attached invoice needs to be paid.

An updated ESA is part of the assignment of rents and leases and foreclosure process.

The total amount is \$2,050.00.

Please call if you have any questions.

Please note new email address and direct dial telephone number.

Thanks.

Mike

Michael Rose
TD Bank, N. A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673
Michael.Rose@td.com

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 8/9/2011 4:10:29 PM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: INVIOCE ATTACHED for PAYMENT: Black Diamond Updated Appraisal
Attachments: Inv_44149_from_ATLANTIC_APPRAISALS_LLC_811-070C_080411052412.pdf

Rob:

When there are funds available please pay the attached invoice for an updated appraisal report recently ordered by the Bank.

Please note new email address and direct dial telephone number.

Thanks.

Mike

Michael Rose
TD Bank, N. A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673
Michael.Rose@td.com

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 8/10/2011 5:15:19 PM
To: Rose, Michael [Michael.Rose@td.com]; 'Trent, Matt' [MTrent@wcsr.com]
CC: bosleyb@svn.com; 'Tom Demint' [demintt@svn.com]; 'Lloyd Miller' [lmiller@bosleygroup.com]
Subject: Conversation with Holly Dixon-Timeless Interiors
Attachments: Black Diamond Timeless Statement per Nat.pdf

Gentlemen,

Late yesterday afternoon I was asked by Tom DeMint, who Ms. Holly Dixon should be directed to regarding her rent payments. He provided me with her phone number and I returned her call. During our telephone conversation she told me:

1. She has had numerous water leaks in the 'front building' causing damage to her inventory.
2. Finally some landscaping maintenance had been done after she had complained to Nat Rackett for months about the situation.
3. She wants rent concessions due to the difficult economic times she is facing. Her clients are very slow in paying, demanding less profitable terms and she needs to discuss what can be done to lower her monthly obligations. With whom should she discuss possible rent concessions?
4. She had a check for \$10,000 but needed an address to send it to. I provided her with our PO Box number and she said she would mail it right away.
5. She had received from Nat R. a statement (attached) showing her \$10,000 payment to Nat in July. She had previously told me she had paid \$10,000 to Nat and requested a receipt from him. I asked her to forward it on to me.
6. The statement she provided is an eye-opener to me on many levels. Nat is evidently receiving payments from at least this one tenant, recording payments on a ledger somewhere, and providing the tenant with a statement showing a balance, charges and payments. When comparing the \$18,424.20 opening balance on the statement she was provided by Nat to our Rent Roll as of 5/31/11, there is a difference of \$20,710.60. The disparity is likely comprised of a combination of reduced rent amounts that are not documented in the leases we were originally provided by Nat and perhaps, other payments received by Nat.

Our Rent Roll for the 5/31/11 period indicated an outstanding balance of \$39,134.80 or \$20,710.60 higher than what Nat's records indicate.

In a comparison of monthly rental amounts due from each of her four units, three of them are in synch with our records but Unit 1206 is not:

	Nat	Our Records
Unit 1204-A	3500	3500
Unit 1204-B	2917	2917
Unit 1204-G	7024.60	7024.60
Unit 1206	875	2917

If the rent reduction difference for Unit 1206 had been provided to the tenant by the landlord without our notification five months ago, and if she made another \$10,000 payment directly to Nat prior to May 31, then the \$20,710.60 difference between our 5/31/11 opening balances is reduced to \$500. This is only one of many possible explanations of the difference between their set of books and ours.

Once you all have had a chance to review this it might be helpful to have a discussion regarding the current situation at Black Diamond.

Thank you.

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 8/26/2011 5:02:32 PM
To: Rose, Michael [Michael.Rose@td.com]; carlos.tovar@td.com
Subject: Black Diamond Loan Invoices
Attachments: Black Diamond TD Invoices 8 11.pdf

Mike,

The Black Diamond/Red Rocks CFO Dee Heaton, in response to my request earlier this week, forwarded to our office the latest TD Loan Invoices (attached) for the two Black Diamond loans. I could use your assistance in determining how we should apply the available funds.

We currently hold approximately \$35,000 unencumbered dollars in the Black Diamond account which can all be used towards the two notes. What is your preference regarding the amounts going to each of these obligations?

Thanks and have a nice weekend.

Rob

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 9/6/2011 4:41:28 PM
To: Baldree, Quinn [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-QBALDRE]
CC: Woodward, Dixon [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-WWOODWA]; Renault, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MRENAUL]; Johnston, Thomas [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-TJOHNST2]
Subject: UPDATE: Julie King's Offer to Purchase Black Diamond Note

Quinn:

I wanted to give you a quick update on discussions with Julie King regarding the purchase of the Black Diamond notes. Here are a few bullet points:

- We began discussions in earnest after the executed CA was returned following the last round of watch meetings;
- She initially had interest in both loans both when she made her offer it was only for one note (warehouses);
- The offer was for less than \$2 million;
- I advised her at the time of the offer that our interest was in selling both notes but would ask the question if one note could be sold and provide confirmation of my findings. "The Bank's position is to sell both notes.";
- She asked we reconsider we did but the Bank's position did not change;
- She offered to purchase the warehouse note of \$2.2 million (current balance is just short of \$3 million), it was rejected;
- Today we spoke and she mentioned amounts of \$2.2 million, for the warehouse note, and she thinks the unfinished building is worth around \$350,000; and
- She said she was not interested in paying retail for the notes.

My sense is that her offer will need to be in the 4+ area to get serious talks going regarding the notes.

Here are a few more facts regarding this matter:

- As you know Ms King has a recorded second behind our mortgages on these properties;
- Her loan docs were signed about the time our FBA was signed. Within 60 days the Borrower and Guarantors were in default under her note;
- She has tried to work something out with the Borrower and Guarantors but has been unsuccessful; and
- Recent appraisals valued the warehouses at \$3.6 million and the unfinished building at \$1.35 million.

Please give me a call if you have any questions or comments.

Please note new email address and direct dial telephone number.

Thanks.

Mike

Michael Rose

TD Bank, N. A.

SC3-022-000

Direct - 843-769-2494

Mobile - 864-351-8673

Michael.Rose@td.com

REQUEST FOR CHANGE OF STATUS FORM

Form pertains to: ☒ Shaw ☐ Leaseworks ☐ ACBS ☐ Pep Plus ☐ IM/AM

State/Region: South Carolina / South Coast Date: 10/17/11
 Officer #: 9233 Officer Name: Mike Rose Officer Mailstop: SC3-022-000
 Officer Phone #: 843-769- Relationship Name: Black Diamond LLC Relationship #: 162525
 Borrower Name: 2494 Customer Number: 2827475
 (one borrower per form) Black Diamond LLC
 Note Balance(s): (use '\$' between multiple amounts) Note Number(s): (use commas between multiple note numbers)
 (Enter Shadow Balance. If note does not have a shadow side, enter Bank Balance.) \$4,740,684.71 9001, 9002
 Aggregate Exposure: \$4,740,684.71
 Does loan have a shadow record in Shaw? (No)

Category	Current	Change To
Borrower Risk Rating – Small Business Only	()	()
Facility Risk Rating – Small Business Only	()	()
Borrower Risk Rating – Commercial Only TD Bank Officers: This is for approval signature purposes ONLY. Upon approval, requesting officer MUST make BRR downgrade/upgrade change in Maestro.	(9A)	()
Accrual Status (Note: if loan is being placed on Non-Accrual, it will be downgraded per policy to Small Business 08 or Commercial 9A or Commercial Charge-off 9B.)	(Accrual)	(Non-Accrual)
Impaired Status (User Reg 5-1) Note: If loan is being placed on Non-Accrual, it will be classified as an impaired loan per policy. A = Forbearance Agreement, B = Bankruptcy, F = Foreclosure, O = Repossession, R = Fully Resolved, T = Transfer to Recovery	()	()
If you are placing the loan/lease on non-performing, do you want to remove the automatic debit for the monthly payments? If yes, ACH will be cancelled and this will eliminate payments from being erroneously posted to the system.		()
CHOOSE ONE (Required for Risk Rating Substandard or Worse): ☐ Prevent all funds advances. ☐ Do not accept any payments. ☐ Prevent all funds advances and do not accept any payments. ☐ Require an approval before funds can be disbursed. ☒ Not applicable		
Secondary Officer Number (Workout)	()	()
Class Code – Commercial 77 = Commercial	()	()
Class Code – Small Business 10 = Legacy TD Banknorth (everything booked prior to June 27, 2009), 20 = TD Bank – North Center (anything booked after June 27, 2009), 30 = TD Bank – Legacy Commerce (everything booked prior to September 26, 2009) and 40 = TD Bank – South Center (everything booked after September 26, 2009)	()	()
Class Code – Workout 80 = SBA Workout – Commercial, 81 = SBA Workout – Small Business, 84 = Workout – Commercial, 85 = Workout – Small Business	()	()
Small Business Transfer ONLY (User Reg 2-7) (Format: 8, followed by 3 numerals, a dash, and 3 letters; for example, 8999-SNP)	()	()
Tied to SWAP? (If Yes, email Derivatives Operations at DerivativesOperations@tdbanknorth.com.)	(No)	

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]

Sent: Wednesday, January 18, 2012 10:58 AM

To: Rose, Michael

Subject: Black Diamond

Mike,

Earlier today we served Timeless Interiors, Holly Dixon, with a 3 day notice. She called Lloyd Miller from our office and explained that she has paid directly to Chris Lindgren \$20,000 in cash, a check for \$10,000 and very recently another check for \$10,000 for which she is going to try to stop payment. Lloyd reminded her that she has been ordered to pay the property management company directly. She responded that Chris makes a big fuss in her business and won't leave until he gets paid. She is going to get as much documentation that she can for the payments she made (i.e. copies of checks that have cleared the bank, receipts from Chris's office) and forward them on to Lloyd.

Your thoughts?

Thanks.

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 1/18/2012 11:45:00 AM
To: Rose, Michael [Michael.Rose@td.com]
Subject: RE: Black Diamond

Mike,

She knows she is wrong in paying Chris directly but he, according to her, demands rent be paid immediately from her. According to what she told Lloyd, Chris then takes off on a nice vacation for 3 weeks.

Do you want us to go ahead and start the legal process of eviction even though she 'says' she paid? It will get nasty but we can handle nasty. At least during this process the truth, hopefully, will come out regarding whether that amount of money, particularly the cash, were paid/received by Holly/Chris.

Redacted - Non-Responsive

Anything you can share with us would be helpful.

Thanks.

Rob

From: Rose, Michael [mailto:Michael.Rose@td.com]
Sent: Wednesday, January 18, 2012 11:34 AM
To: Rob Pearson
Subject: RE: Black Diamond

Rob:

Tell her it does not count unless she pays you the rent.

Mike

Michael Rose

TD Bank, N.A.

SC3-022-000

Direct - 843-769-2494

Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Wednesday, January 18, 2012 10:58 AM

BLACK DIAMOND009446

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 1/18/2012 11:48:06 AM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: RE: Black Diamond

Please proceed with legal action to evict.

I will check on the status of the other matter.

Thanks,

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Wednesday, January 18, 2012 11:45 AM
To: Rose, Michael
Subject: RE: Black Diamond

Mike,

She knows she is wrong in paying Chris directly but he, according to her, demands rent be paid immediately from her. According to what she told Lloyd, Chris then takes off on a nice vacation for 3 weeks.

Do you want us to go ahead and start the legal process of eviction even though she 'says' she paid? It will get nasty but we can handle nasty. At least during this process the truth, hopefully, will come out regarding whether that amount of money, particularly the cash, were paid/received by Holly/Chris.

Redacted - Non-Responsive

Anything you can share with us would be helpful.

Thanks.

Rob

From: Rose, Michael [mailto:Michael.Rose@td.com]

Sent: Wednesday, January 18, 2012 11:34 AM

To: Rob Pearson

Subject: RE: Black Diamond

Rob:

Tell her it does not count unless she pays you the rent.

Mike

Michael Rose

TD Bank, N.A.

SC3-022-000

Direct - 843-769-2494

Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]

Sent: Wednesday, January 18, 2012 10:58 AM

To: Rose, Michael

Subject: Black Diamond

Mike,

Earlier today we served Timeless Interiors, Holly Dixon, with a 3 day notice. She called Lloyd Miller from our office and explained that she has paid directly to Chris Lindgren \$20,000 in cash, a check for \$10,000 and very recently another check for \$10,000 for which she is going to try to stop payment. Lloyd reminded her that she has been ordered to pay the property management company directly. She responded that Chris makes a big fuss in her business and won't leave until he gets paid. She is going to get as much documentation that she can for the payments she made (i.e. copies of checks that have cleared the bank, receipts from Chris's office) and forward them on to Lloyd.

Your thoughts?

Thanks.

Rob

This message and any attachments may contain confidential or privileged information and are intended only for the use of the intended recipients of this message. If you are not the intended recipient of this message, please notify the sender by return email, and delete this and all copies of this message and any attachments from your system. Any unauthorized disclosure, use, distribution, or reproduction of this message or any attachments is prohibited and may be unlawful.

BLACK DIAMOND009449

Message

From: William Bosley [wlb@bosleygroup.com]
Sent: 1/20/2012 10:22:02 AM
To: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
CC: Robert Pearson User [rpearson@bosleygroup.com]; 'Tom DeMint' [Tdemint@svn.com]
Subject: FW: Timeless Interiors
Attachments: Timeless Interiors Rent Request.pdf

Mike:

The attached letter was delivered to Holly Dixon yesterday.

I just hung up the telephone with Holly and she says that Chris comes by her shop regularly, insists that he is still in control of the property and insists on her paying him the rent.

She claims she paid him by check this time and that she will produce a copy of the cancelled check.

I don't know whether Chris is sending you the funds directly (I doubt it) but he is definitely encouraging Holly to pay him versus the instructions to each tenant that was delivered by TD's legal counsel (a copy is attached above).

Is TD planning on taking any further action on this?

Bill

William L. Bosley, CCIM, CPM | President
Sperry Van Ness | Bosley Asset-Property Management
1536 Fording Island Road, Suite 201
Hilton Head Island, SC 29926
Telephone: 843-837-8500 | Fax: 843-837-8506
Email: bosleyb@svn.com | wlb@bosleygroup.com
Asset Management Website: www.svnbosleyasset.com
Sales & Leasing Website: www.svnsavhh.com

All Sperry Van Ness Offices Independently Owned and Operated

From: Laura Carter [mailto:lcarter@bosleygroup.com]
Sent: Thursday, January 19, 2012 2:13 PM
To: Rob Pearson; William Bosley
Cc: Michael Rose; J. Matthew Trent; Lloyd Miller
Subject: Timeless Interiors

Please note the attached document delivered to Timeless Interiors on January 19th.

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 1/18/2012 11:34:27 AM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: RE: Black Diamond

Rob:

Tell her it does not count unless she pays you the rent.

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Wednesday, January 18, 2012 10:58 AM
To: Rose, Michael
Subject: Black Diamond

Mike,

Earlier today we served Timeless Interiors, Holly Dixon, with a 3 day notice. She called Lloyd Miller from our office and explained that she has paid directly to Chris Lindgren \$20,000 in cash, a check for \$10,000 and very recently another check for \$10,000 for which she is going to try to stop payment. Lloyd reminded her that she has been ordered to pay the property management company directly. She responded that Chris makes a big fuss in her business and won't leave until he gets paid. She is going to get as much documentation that she can for the payments she made (i.e. copies of checks that have cleared the bank, receipts from Chris's office) and forward them on to Lloyd.

Your thoughts?

Thanks.

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/23/2012 2:54:40 PM
To: Rose, Michael [Michael.Rose@td.com]
Subject: FW: Black Diamond Taxes

Mike,

After you have read this please call me (843-837-8500 ext 18)

The \$49,000 rings a bell....

Thanks.

Rob

From: chrislindgren@cs.com [mailto:chrislindgren@cs.com]
Sent: Thursday, February 23, 2012 11:49 AM
To: rpearson@bosleygroup.com
Cc: natrackett@yahoo.com
Subject: Black Diamond Taxes

Hi Rob:

Thanks for sending the financials for January. It's good to see cash flow improved, insurance payments were made, and there's a positive bank balance!

As you know, the Black Diamond Beaufort County property taxes are still due and it's imperative they be paid as soon as possible, certainly before the March 5% penalty takes effect. The taxes are a total of \$63,425.81.

We just deposited \$49,000+ in our Black Diamond TD bank account to pay the majority of the taxes. This leaves a balance due of approximately \$14,000- that difference should be plugged with funds in your BD account.

Last year we paid the taxes to the County directly out of our TD BD account. We could do that again or we could hand deliver you a check for the \$49,000 just deposited. Our preference is to give you a check and let you handle it.

Please give me a call to discuss.

Thanks,

Chris

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/23/2012 4:24:48 PM
To: Rose, Michael [Michael.Rose@td.com]
Subject: Black Diamond Payment
Attachments: img07540[1].pdf

Mike,

Attached please find a copy of the check Nat Racket just hand delivered to me. It appears they would like this \$49,000 check applied to their Beaufort County property taxes.

I asked Nat to provide us with all of the tax bills as we do not receive them and I don't want to miss any that I might pick out from the Beaufort County website.

Do you have a problem with us depositing the check into the Black Diamond operating acct that we manage, and using those funds plus additional operating funds to pay the taxes?

Thanks for your guidance.

Rob

BLACK DIAMOND LLC
P.O. BOX 23164
Hilton Head Island, SC 29925

CAROLINA FIRST
HILTON HEAD ISLAND, SC 29926
VOID 67-219/539 01389

2527

2/23/12

PAY TO THE
ORDER OF

BLACK DIAMOND, LLC

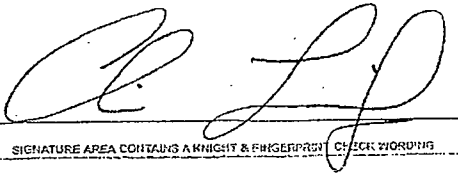
\$49,000

FORTY NINE THOUSAND

DOLLARS

BD. BEAUFORT COUNTY PROP. TAXES
2011 - PARK

MEMO


SIGNATURE AREA CONTAINS A KNIGHT & FINGERPRINT CHECK WORDING

ABSENCE OF PINK U.S. PATENT NUMBERS UNDER SIGNATURE INDICATES CHECK IS FRAUDULENT. PATENT NUMBERS ARE PRINTED WITH HEAT SENSITIVE INK & WILL DISAPPEAR WHEN BLOWING OR RUBBING

BLACK DIAMOND LLC

2527

FOR REORDERS CALL AMERICAN COMPUTER FORMS, INC. (305)663-3335 OR FAX (305)663-6748 JOH009LC38

BLACK DIAMOND LLC

2527

FOR REORDERS CALL AMERICAN COMPUTER FORMS, INC. (305)663-3335 OR FAX (305)663-6748 JOH009LC38

REORDER 915 • U.S. PATENT NO. 5532290, 5672505, 5841183, 5705253, 5934364, 6036000

BLACK DIAMOND009533

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 2/23/2012 4:48:52 PM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: RE: Black Diamond Payment

This is check is drawn off the Black Diamond LLC account and made out to Black Diamond LLC, how does that work?

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Thursday, February 23, 2012 4:25 PM
To: Rose, Michael
Subject: Black Diamond Payment

Mike,

Attached please find a copy of the check Nat Racket just hand delivered to me. It appears they would like this \$49,000 check applied to their Beaufort County property taxes.

I asked Nat to provide us with all of the tax bills as we do not receive them and I don't want to miss any fthat I might pick out from the Beaufort County website.

Do you have a problem with us depositing the check into the Black Diamond operating acct that we manage, and using those funds plus additional foperating funds to pay the taxes?

Thanks for your guidance.

Rob

Delivery Report

From: postmaster@TDBF-APDPW-CP10.TDBFG.COM [postmaster@TDBF-APDPW-CP10.TDBFG.COM]
Sent: 2/23/2012 4:48:55 PM
To: rpearson@bosleygroup.com
Subject: Relayed: Black Diamond Payment
Attachments: RE: Black Diamond Payment

Your message

To: Rob Pearson
Subject: RE: Black Diamond Payment
Sent: 2/23/2012 4:48:52 PM

This is an automatically generated Delivery Status Notification.

Your message has been successfully relayed to the following recipients, but the requested delivery status notifications may not be generated by the destination.

rpearson@bosleygroup.com

NOTICE: Confidential message which may be privileged. Unauthorized use/disclosure prohibited. If received in error, please go to www.td.com/legal for instructions.
AVIS : Message confidentiel dont le contenu peut être privilégié. Utilisation/divulgarion interdites sans permission. Si reçu par erreur, prière d'aller au www.td.com/francais/avis_juridique pour des instructions.

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 2/23/2012 4:48:52 PM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: RE: Black Diamond Payment

This is check is drawn off the Black Diamond LLC account and made out to Black Diamond LLC, how does that work?

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Thursday, February 23, 2012 4:25 PM
To: Rose, Michael
Subject: Black Diamond Payment

Mike,

Attached please find a copy of the check Nat Racket just hand delivered to me. It appears they would like this \$49,000 check applied to their Beaufort County property taxes.

I asked Nat to provide us with all of the tax bills as we do not receive them and I don't want to miss any that I might pick out from the Beaufort County website.

Do you have a problem with us depositing the check into the Black Diamond operating acct that we manage, and using those funds plus additional foperating funds to pay the taxes?

Thanks for your guidance.

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/23/2012 5:16:29 PM
To: Rose, Michael [Michael.Rose@td.com]
Subject: RE: Black Diamond Payment

Good question.

The check is drawn on the TD account that you control (reserve acct) and we are being asked to deposit it in the TD Operating acct that we control.

Does that help or does that make it even more confusing. We can't wait until a receiver is appointed for this property!

Rob

From: Rose, Michael [mailto:Michael.Rose@td.com]
Sent: Thursday, February 23, 2012 4:49 PM
To: Rob Pearson
Subject: RE: Black Diamond Payment

This is check is drawn off the Black Diamond LLC account and made out to Black Diamond LLC, how does that work?

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Thursday, February 23, 2012 4:25 PM
To: Rose, Michael
Subject: Black Diamond Payment

Mike,

Attached please find a copy of the check Nat Racket just hand delivered to me. It appears they would like this \$49,000 check applied to their Beaufort County property taxes.

I asked Nat to provide us with all of the tax bills as we do not receive them and I don't want to miss any that I might pick out from the Beaufort County website.

BLACK DIAMOND009537

Do you have a problem with us depositing the check into the Black Diamond operating acct that we manage, and using those funds plus additional foperating funds to pay the taxes?

Thanks for your guidance.

Rob

This message and any attachments may contain confidential or privileged information and are intended only for the use of the intended recipients of this message. If you are not the intended recipient of this message, please notify the sender by return email, and delete this and all copies of this message and any attachments from your system. Any unauthorized disclosure, use, distribution, or reproduction of this message or any attachments is prohibited and may be unlawful.

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/24/2012 9:14:20 AM
To: Rose, Michael [Michael.Rose@td.com]
Subject: Black Diamond check

Mike,

We are required to get funds presented to us on behalf of our clients deposited into the bank within 1 work day of receipt.

So we need to deposit the \$49,000 check hand delivered to us yesterday by Black Diamond from their 'reserve' account into the 'operating' account today. Whether or not TD accepts it or not is up to TD. Once the check is deposited we will use it to pay the Beaufort County property taxes.

Does this plan work for you?

Thanks.

Rob

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 2/24/2012 9:27:44 AM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: RE: Black Diamond check

Rob:

The check is written off the same account it is being deposited into?

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Friday, February 24, 2012 9:14 AM
To: Rose, Michael
Subject: Black Diamond check

Mike,

We are required to get funds presented to us on behalf of our clients deposited into the bank within 1 work day of receipt.

So we need to deposit the \$49,000 check hand delivered to us yesterday by Black Diamond from their 'reserve' account into the 'operating' account today. Whether or not TD accepts it or not is up to TD. Once the check is deposited we will use it to pay the Beaufort County property taxes.

Does this plan work for you?

Thanks.

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/29/2012 3:11:26 PM
To: Rose, Michael [Michael.Rose@td.com]
Subject: RE: Black Diamond, LLC

Mike,

No I did not tell them the check was returned because we have yet to receive the returned check to us in the mail. We normally wait until we get that information before contacting the tenant/client.

Thanks.

Rob

From: Rose, Michael [mailto:Michael.Rose@td.com]
Sent: Wednesday, February 29, 2012 3:02 PM
To: Rob Pearson
Subject: RE: Black Diamond, LLC

Did you tell the check they gave you was returned by the Bank?

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Wednesday, February 29, 2012 9:50 AM
To: Rose, Michael
Subject: FW: Black Diamond, LLC

Mike,

What can be done to expedite the change of control away from Black Diamond? They are now asking us to return the start up money they provided to us when they transferred the account to us. I had originally asked Chris how they came up with the amount of money they transferred and he merely said that the amount they gave to us was all that was left in the account after they had paid the bills, there was no accounting.

Every day this is getting a little more bizarre. Their CFO wants us to pay them back the money they initially provided and they want proof that we paid the taxes which as you know has not yet occurred.

Thanks for your assistance.

BLACK DIAMOND009600

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/29/2012 9:49:33 AM
To: Rose, Michael [Michael.Rose@td.com]
Subject: FW: Black Diamond, LLC

Mike,

What can be done to expedite the change of control away from Black Diamond? They are now asking us to return the start up money they provided to us when they transferred the account to us. I had originally asked Chris how they came up with the amount of money they transferred and he merely said that the amount they gave to us was all that was left in the account after they had paid the bills, there was no accounting.

Every day this is getting a little more bizarre. Their CFO wants us to pay them back the money they initially provided and they want proof that we paid the taxes which as you know has not yet occurred.

Thanks for your assistance.

Rob

From: Dee Heaton [mailto:dsheaton@yahoo.com]
Sent: Tuesday, February 28, 2012 3:27 PM
To: Rob Pearson
Subject: Black Diamond, LLC

Rob:

Thanks for sending the missing Payables Journal Report and General Ledger Report for December. We're reviewing the reports and will get back to you with any questions.

In the meantime, please prepare a check payable to Black Diamond for 13,000 to repay Balance Sheet line item 3110, Loans from Owner. Let me know when it's ready and I'll pick it up.

Dee

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 2/29/2012 3:21:27 PM
To: Rose, Michael [Michael.Rose@td.com]
Subject: FW: Professional fees

Mike,

Chris is now going back over Sept 11's financials, which he has had for 4-5 months, and asking questions. I have no problems answering the questions, just taking a lot of needless time.

From: chrislindgren@cs.com [mailto:chrislindgren@cs.com]
Sent: Wednesday, February 29, 2012 3:16 PM
To: rpearson@bosleygroup.com
Subject: Professional fees

Rob:

In September, 2011, the detailed P&L shows professional fees of \$5,450. This is apparently comprised of a check #1107 for \$3,400 to Atlantic Appraisals and a check #1103 for \$2050 to HRP Associates.

What were these checks for? Who is HRP Associates and what did they do?

Let me know.

Thanks,

Chris

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 2/29/2012 3:04:03 PM
To: Rob Pearson [rpearson@bosleygroup.com]
CC: Trent, Matt [MTrent@wcsr.com]
Subject: RE: Black Diamond, LLC

The Attorney is moving as fast as possible regarding this matter.

Mike

Michael Rose
TD Bank, N.A.
SC3-022-000
Direct - 843-769-2494
Mobile - 864-351-8673

Michael.Rose@td.com

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Wednesday, February 29, 2012 9:50 AM
To: Rose, Michael
Subject: FW: Black Diamond, LLC

Mike,

What can be done to expedite the change of control away from Black Diamond? They are now asking us to return the start up money they provided to us when they transferred the account to us. I had originally asked Chris how they came up with the amount of money they transferred and he merely said that the amount they gave to us was all that was left in the account after they had paid the bills, there was no accounting.

Every day this is getting a little more bizarre. Their CFO wants us to pay them back the money they initially provided and they want proof that we paid the taxes which as you know has not yet occurred.

Thanks for you assistance.

Rob

From: Dee Heaton [mailto:dsheaton@yahoo.com]
Sent: Tuesday, February 28, 2012 3:27 PM
To: Rob Pearson
Subject: Black Diamond, LLC

Rob:

Message

From: William Bosley [wlb@bosleygroup.com]
Sent: 3/2/2012 8:55:08 AM
To: Rose, Michael [Michael.Rose@td.com]
CC: Robert Pearson User [rpearson@bosleygroup.com]; 'Tom DeMint' [tdemint@svn.com]; MTrent@wcsr.com
Subject: Black Diamond

Mike:

First, just so you know Nat Racket (who works for Chris Lindgren) came by looking for a check yesterday. He didn't get one.

Lloyd Miller on my staff just came into my office and shared an unbelievable story. Lloyd received a telephone call last evening from Brooks with KPM Flooring who is one of the tenants at Black Diamond. Brooks told Lloyd that someone on his staff (KPM) was approached yesterday by an unknown person asking if his the rent for March had been paid yet and demanding payment. This person also stated that KPM might want to start looking for alternative space as the Landlord planned to bulldoze Black Diamond and sell the land. Lloyd assured Brooks that his rent needed to be paid to TD care of us and that the rumors of bulldozing were not true.

I believe the person involved had to be Nat or Chris.

Bill

William L. Bosley, CCIM, CPM | President
Sperry Van Ness | Bosley Asset-Property Management
1536 Fording Island Road, Suite 201
Hilton Head Island, SC 29926
Telephone: 843-837-8500 | Fax: 843-837-8506
Email: bosleyb@svn.com | wlb@bosleygroup.com
Asset Management Website: www.svnbosleyasset.com
Sales & Leasing Website: www.svnsvnhh.com

All Sperry Van Ness Offices Independently Owned and Operated

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 3/22/2012 2:54:05 PM
To: Rose, Michael [Michael.Rose@td.com]; 'Trent, Matt' [MTrent@wcsr.com]
CC: 'William Bosley' [bosleyb@svn.com]
Subject: FW: 2011 Statements and Tax Returns

Gentlemen,

Any known date yet when the Receivership might be appointed for the Black Diamond LLC property? We continue to get multiple inquiries every day from Chris which we are responding to as currently required by our management agreement.

When you read his email below you can assume there will be a lot more of our resources required to respond to his team of auditors.

He continues to express concerns why an appraisal and an engineering report were ordered without his authorization (TD Bank approved the invoices and sent them to us to process for payment). He now wants to see the reports. Can you share those reports with us so that we can forward them on to him?

He wants to know why we made a loan payment of \$20,000 to TD Bank in November, 2011 when there was no specific invoice for it(they were behind in making payments on the loan at the time and still are).

I know you don't want to be bothered with this but responding to his inquiries, which is often met with his not being satisfied with the truthful and complete answers we provide, is taking up a larger than warranted amount of our staff's time.

Thanks for listening.

Rob

From: chrislindgren@cs.com [mailto:chrislindgren@cs.com]
Sent: Thursday, March 22, 2012 2:13 PM
To: rpearson@bosleygroup.com
Cc: natrackett@yahoo.com
Subject: 2011 Statements and Tax Returns

Hi Rob:

Our accountants are in the process of preparing the 2011 annual statements and tax returns for Black Diamond, LLC. They have several questions that I will be forwarding to you for responses. Your prompt replies will be appreciated.

Also, they have indicated that they may wish to audit all Black Diamond accounts managed by you. In the event they decide to do so, please advise what days and times are most convenient for you.

Thanks again for your help,

Chris

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 3/23/2012 11:19:50 AM
To: 'Trent, Matt' [MTrent@wcsr.com]; Rose, Michael [Michael.Rose@td.com]
CC: 'William Bosley' [bosleyb@svn.com]
Subject: RE: 2011 Statements and Tax Returns

Thank you for the update.

From: Trent, Matt [mailto:MTrent@wcsr.com]
Sent: Friday, March 23, 2012 11:15 AM
To: 'Rob Pearson'; 'Rose, Michael'
Cc: 'William Bosley'
Subject: RE: 2011 Statements and Tax Returns

Chris has been served with the foreclosure complaint and the application for the appointment of a receiver. We will be notifying him of the hearing date for the receiver shortly.

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Thursday, March 22, 2012 3:17 PM
To: Trent, Matt; 'Rose, Michael'
Cc: 'William Bosley'
Subject: RE: 2011 Statements and Tax Returns

Has Chris Lindgren been notified of this action or will the appointment of a receiver be a 'surprise'?

From: Trent, Matt [mailto:MTrent@wcsr.com]
Sent: Thursday, March 22, 2012 3:10 PM
To: 'Rob Pearson'; 'Rose, Michael'
Cc: 'William Bosley'
Subject: RE: 2011 Statements and Tax Returns

April 3 is the date of the receiver hearing for both Black Diamond and

Redacted - Non-Responsive

From: Rob Pearson [mailto:rpearson@bosleygroup.com]
Sent: Thursday, March 22, 2012 2:54 PM
To: 'Rose, Michael'; Trent, Matt
Cc: 'William Bosley'
Subject: FW: 2011 Statements and Tax Returns

Gentlemen,

Any known date yet when the Receivership might be appointed for the Black Diamond LLC property? We continue to get multiple inquiries every day from Chris which we are responding to as currently required by our management agreement.

When you read his email below you can assume there will be a lot more of our resources required to respond to his team of auditors.

Message

From: chrislindgren@cs.com [chrislindgren@cs.com]

Sent: 4/10/2012 10:42:39 AM

To: Rose, Michael [Michael.Rose@td.com]

Subject: Black Diamond

Mike:

It's now been more than two weeks since I sent the Sembler contract for your review and comment. So far, I haven't heard anything from you, written or otherwise.

Please advise.

Thanks,

Chris

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 4/19/2012 9:41:14 AM
To: Rose, Michael [Michael.Rose@td.com]
Subject: Black Diamond Financials and Rent Roll
Attachments: img00042[1].pdf

Mike,

Attached please find the requested Black Diamond Financials and Rent Roll.

Redacted - Non-Responsive

Had a very productive lunch yesterday with TD Bankers Shannon Stephens and Jason Stevens, along with one of our current clients. Seems like we will be doing more business together in the very near future.

What is the latest with the court appointing a receiver to the two properties?

We are currently dealing with a very awkward situation. A financially sound tenant, Bluffton Fire Dept.(BFD), has their lease ending soon. They want to expand into the space that Chris just gave away, for zero rent. The tenant who received the 'free space' said he would go to another 'free space' if someone needed his current space. BFD said they will be looking for new space if the landlord can't commit to giving them the new space by this Friday. BFD wants to pay the same amount they are now, get the expanded space, and would be willing to sign a multi-year lease at the current monthly lease amount. Tom DeMint said he would take that deal, on behalf of the landlord, all day long in this market. If a receiver were appointed he or she could make this decision. Now our office is trying to deal with Chris who just put his tenant in the space a month ago, for zero rent. Just an fyi...

Thanks for listening...

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 4/25/2012 3:09:38 PM
To: Rose, Michael [Michael.Rose@td.com]
CC: 'William Bosley' [bosleyb@svn.com]; 'Lloyd Miller' [lmiller@bosleygroup.com]
Subject: Black Diamond issues
Attachments: img00331[1].pdf

Mike,

Attached please find the items you requested regarding Black Diamond: 12/31/11 Bal Sheet, 12/11 P&L, listing of 2012 payments to TD (total \$122,000 through today).

Lloyd Miller in our office mentioned that we are waiting for TD's attorneys to draft new leases for Timeless Interiors. Could you provide us with a status update on this?

Thanks.

Rob

Message

From: Rob Pearson [rpearson@bosleygroup.com]
Sent: 4/25/2012 4:42:01 PM
To: Rose, Michael [Michael.Rose@td.com]
CC: 'William Bosley' [bosleyb@svn.com]; 'Lloyd Miller' [lmiller@bosleygroup.com]; 'Tom DeMint' [tdemint@svn.com]
Subject: Conversation with Holly Dixon 4/25/12

Holly Dixon called regarding her frustrations in continuing her tenancy at Black Diamond. She had been told the bank's attorneys were writing a renewal lease for her. This started 3-4 months ago. She has not seen a lease.

Chris Lindgren is calling her on a regular basis wanting to make arrangements with her for a lease. She is wondering why she didn't negotiate with him 3-4 months ago instead of still not having a lease in her hand today.

She asked if we had anything to do with the lease for the new tenant (I sent the lease to Mike earlier today). The recycling truck is parked 24 hours a day in a spot that makes it difficult for Holly's deliveries and other normal business operations.

Holly could go to Chris now, based on what the recycling guy did, negotiate a lease for nothing but is trying to play by the rules.

She was told that she would be reimbursed for the electricity she continues to pay for that is being generated by a neighboring unit. She wants to just have it shut off. Is it ok for her to do that?

She desperately wants to know the bank contact person so she can talk directly to the bank and is frustrated that we have not shared that with her (to my knowledge).

She has asked for copies of emails from us to TD requesting a lease be written. She is afraid that she will be presented with another demand to vacate in 30 day letter even though she is making rent payments on a more regular basis.

In summary:

When can she receive a lease to consider?

When will she get reimbursed for the electrical usage her neighbor continues to draw but she pays?

When will the truck get moved that interferes with her business?

When will she get any answers to her questions?

She wants to do business with the party that will 'survive', not Chris, but is so frustrated with the situation. Is there somehow she can begin to get these issues resolved?

Thank you.

Rob Pearson

Chief Financial Officer

Sperry Van Ness/Bosley Asset Management LLC
1536 Fording Island Road Suite 201
Hilton Head Island, SC 29926
Telephone: 843-837-8500 Fax: 843-837-8506

EXHIBIT "E"

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS

) FOR THE THIRTEENTH JUDICIAL CIRCUIT

FRANCIS P. MAYBANK,
and JANE H.P. MAYBANK, as
TRUSTEE for the FRANCIS
P. MAYBANK FAMILY
INSURANCE TRUST,

Plaintiffs,

vs.

BB&T CORPORATION,
BRANCH BANKING AND TRUST
COMPANY, Successor in merger to
BRANCH BANKING AND TRUST
COMPANY OF SC, and
STERLING CAPITAL
MANAGEMENT, LLC, Successor in
merger to BB&T ASSET
MANAGEMENT LLC

Defendants.

Civil Action No. 2011-CP-23-857

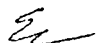
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2011 NOV 10 AM 9 49

ORDER AND FINAL JUDGMENT

This matter is before the Court on post-trial motions of Plaintiff Francis P. Maybank and Defendants BB&T Corporation, Branch Banking and Trust Company ("BB&T Bank"), and Sterling Capital Management, LLC (referred to as its predecessor entity, "BB&T Asset Management") (collectively referred to as "BB&T" or "Defendants").

Background and Summary

This case was tried before a jury for two weeks beginning June 16, 2014. After deliberating Friday, June 27 and Monday, June 30, the jury awarded Mr. Maybank actual damages of \$3,100,000 and punitive damages of \$5,000,000 for breach of contract, breach of



fiduciary duty, constructive fraud, negligent misrepresentation, and a violation of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. §§ 39-5-10 *et seq.* The jury did not return a verdict for any claims of the Francis P. Maybank Family Insurance Trust. I observed the jury and found the panel to be attentive, thoughtful, diligent, and deliberate in its consideration of the evidence presented during this lengthy trial.

Plaintiff moved post-trial for attorneys' fees and costs and to treble actual damages under the UTPA, and for prejudgment interest. Defendants moved substantively for judgment notwithstanding the verdict ("JNOV"), new trial absolute, or, in the alternative, new trial *nisi remittitur*. Defendants also sought to require Mr. Maybank to elect a remedy. Following an August 19, 2014 hearing, I took the issues under advisement.

After careful review of the verdict and the parties' post-trial motions and argument of counsel, I deny Defendants' motions for JNOV, new trial absolute, and new trial *nisi remittitur*. I find that the award of punitive damages in the amount of \$5,000,000 is appropriate. I treble the actual damage award of \$3,100,000 to \$9,300,000 because I find Defendants' conduct, which the jury found to be an unfair and deceptive business practice in violation of the UTPA, was knowing and willful. I find that no election is required because Defendants' unfair and deceptive conduct in violation of the UTPA was separate and distinct from that supporting the common law causes of action for which punitive damages were awarded. I therefore find Plaintiff is entitled to both treble and punitive damages. I award \$2,654,295 in attorneys' fees and \$245,011 in costs. I deny the motion for prejudgment interest.

Analysis

Motion for Judgment Notwithstanding the Verdict

I deny Defendants' motion for JNOV because the evidence supports the jury's verdict in favor of Mr. Maybank. "A motion for JNOV may be granted *only if no reasonable jury could*

have reached the challenged verdict.” Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) (emphasis added). In ruling on the motion, I view the evidence and the reasonable inferences in the light most favorable to the non-moving party. *RTF Mgmt. Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, 732 S.E.2d 166 (2012). To the extent a ground for relief in the JNOV motion is not addressed below, I expressly deny relief on that ground.

I. South Carolina Unfair Trade Practices Act.

I find that the evidence showed actions by Defendants other than the sale of a security, that Defendants’ activities are not exempt from the UTPA, and that Defendants failed to prove their entitlement to any exemption under the UTPA.

A. Legal background.

UTPA’s prohibitions do not apply to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.” S.C. Code Ann. § 39-5-40(a). This exemption requires a case-by-case analysis of the alleged misconduct. See *Ward v. Dick Dyer*, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991) (“The exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes.”). Section 39-5-40 also imposes “the burden of proving exemption . . . upon the person claiming the exemption.”

B. Discussion.

I find that the jury’s verdict that Defendants violated the UTPA was supported by at least three separate instances of unfair and deceptive business practices by Defendants, none of which involved a public offering, registration, or sale of a security, and all of which are separate from the bases of liability for the common law causes of action.

I first find that the jury reasonably could conclude that Defendants violated the Act by their admitted misuse of their form Wealth Management Agreement ("WMA"). There was evidence that Defendants knew when they presented the WMA to Mr. Maybank that it contained deliberate misrepresentations and that BB&T would not fulfill the promised duties, which were the basis of the bargain and the crux of the fiduciary relationship. The evidence also showed that Defendants presented the same form document to all clients of the Wealth Management Division from at least 2006 into 2009. BB&T's corporate representative admitted that Defendants did not notify Mr. Maybank or any customer that the WMA would not be fulfilled as promised.

I further find that the evidence showed Defendants misled Mr. Maybank and approximately 130 other customers regarding a fee refund. Although BB&T's letter claimed that the fee refund was "a reflection of [BB&T's] corporate values," Ex. 50, evidence showed that the fee refund resulted from criticism by the Securities and Exchange Commission ("SEC") of charging transaction-based "broker-esque" fees by BB&T Asset Management, which was not a registered broker-dealer. The jury reasonably could have concluded that Defendants' statements unfairly, deliberately, and deceptively hid the truth about BB&T's actions, and was designed to lull clients into complacency, discouraging investigation of BB&T's business practices and allowing BB&T to possibly avoid civil liability.

I also find that the evidence showed that Defendants knowingly misrepresented that an individualized assessment of Mr. Maybank's financial situation had been performed. *See* Ex. 7 (August 11, 2006 General Counsel "Approval Letter"). Although Mr. Maybank relied upon the Approval Letter, believing it to be specifically tailored for him, the letter was merely a "fill-in-the-blank" form letter extolling the suitability of the variable prepaid forward contract ("VPFC") for concentrated positions in BB&T stock, no matter the client's financial situation. *Cf.* Ex. 91.

I find Defendants' use of this form letter deliberately, unfairly, and deceptively misrepresented the services provided to Mr. Maybank and other customers because promising specialized or individualized treatment while actually providing only stock services violates the UTPA. See *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270-71, 536 S.E.2d 399, 407 (Ct. App. 2000).

I find the jury verdict was supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive practices in each of these three ways and that Defendants failed to meet their burden to prove that each of these practices involved a security or securities transaction and was authorized under laws administered by any regulatory body or permitted by any other South Carolina law.

I further reject Defendants' argument based upon a generalized banking industry exemption to the UTPA. *Ward*, 304 S.C. at 155, 403 S.E.2d at 312.¹ However, the UTPA exemption only excludes "from the UTPA those actions or transactions which are allowed or authorized by a regulatory agency or other statutes." See *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (citing *Ward*). I further find that Defendants' unfair and deceptive practices were not authorized by any federal or state securities acts or regulations. I also find that Defendants' argument fails to acknowledge that they were not registered to sell securities as broker-dealers; that they presented no evidence that the VPFC was a registered security much less that it was an initial public offering of a security; and that the jury rejected Plaintiffs' claim for recovery under the Uniform Securities Act.

Defendants waived any argument that BB&T Asset Management and BB&T Bank are exempt from the UTPA by operating in regulated industries because they did not move for a

¹ *Ward* involved an exemption to the UTPA, but not for the banking industry. The Court overruled its prior holding in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), which had applied a general activity test.

directed verdict on this ground. See *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001). I further find that Defendants' argument is based upon an erroneous interpretation of the record and the stipulated fact that these Defendants were not registered as broker-dealers with the SEC or the State of South Carolina. I also find that, even under Defendants' general regulation theory, their unfair and deceptive business practices as exposed in this case were not authorized or required by banking regulations. I find Defendants failed to meet their burden to present evidence proving an exemption from the UTPA and that Defendants presented no evidence that the two VPFCs sold to Mr. Maybank were initial public offerings of securities or were even securities as contemplated by the exemption recognized in *Rhoades* and *Ward*. Finally, the jury rejected any argument that Defendants were entitled to an exemption, and I concur with that finding.

II. Punitive Damages.

Prior to addressing Defendants' argument that a so-called exculpatory clause insulates them from punitive damages, I will first evaluate Defendants' arguments for JNOV on the common law causes of action and the propriety of the jury's award of punitive damages.

A. Common Law Causes of Action.

Defendants contend that judgment should be entered in their favor on the common law claims of breach of contract, breach of fiduciary duty, constructive fraud, and negligent misrepresentation. I find that there is ample evidence from which this very reasonable and thoughtful jury could have rendered its verdict. I further find that, for each element on the causes of action submitted to the jury, there was sufficient evidence upon which a reasonable jury could return a verdict for Mr. Maybank on these causes of action. I therefore deny Defendants' motion.

B. *Review of the Jury's punitive damages award.*

I must consider whether punitive damages are warranted and, if so, whether the amount is appropriate based on (1) the degree of reprehensibility of Defendants' conduct; (2) the disparity between actual or potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009). I find the punitive damages award is constitutional and proper.

1. Reprehensibility.

In evaluating reprehensibility, "perhaps the most important indicium of the reasonableness," I must consider whether (1) the harm was physical or economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Id.* at 587, 686 S.E.2d at 185. I find ample, clear and convincing evidence supporting the jury's finding of reprehensibility. The harm was economic, and Defendants demonstrated indifference to and/or reckless disregard for Mr. Maybank's financial health and well-being, as well as the safety of his irreplaceable retirement assets.

I find clear and convincing evidence of Mr. Maybank's financial vulnerability as a 74-year old, soon-to-be retiree, which was known to Defendants who were acting as his advisor and fiduciary. Defendants' conduct was not an isolated incident but instead involved repeated acts of indifference to Mr. Maybank and others. Defendants' representatives were financially incentivized to sell alternative investment strategies, which they viewed as a fee-generating

"revenue opportunity" for BB&T.² BB&T sold Mr. Maybank a strategy based upon a VPFC which was speculative, costly, and unsuitable, and anchored by a complex derivative product that actually increased risk, rather than minimizing it. BB&T further increased the risk by using the cash generated to fund a 100% equity "Aggressive Growth" portfolio. Defendants' self-serving strategy moved Mr. Maybank's assets from a non-fee generating account to accounts that provided Defendants and their incentivized employees with an up-front fee of \$32,614 as well as a stream of annual management fees.

The evidence showed that, in 2009, Defendants compounded their initial flawed and self-serving advice by recommending the roll-over of the first VPFC into a second VPFC, which they presented to clients as the "ideal choice." Instead, the roll-over was "ideal" only for Defendants, as it generated additional up-front transaction and annual management fees. For their faithless and self-serving advice, Defendants charged Mr. Maybank a fee of \$43,655. Mr. Maybank was locked into Defendants' self-serving scheme of fee-producing, costly roll-overs that over time would deplete a client's assets. I find that Defendants' conduct was not isolated, but part of a scheme to generate fees and bonuses for Defendants and its representatives without regard to the best interests of Mr. Maybank, their principal to whom they owed fiduciary duties.

² Defendants' internal sales practices were demonstrated at trial. For example, Exhibits 55, 89, 92, 100, 103, 104, and 106, taken together, show that Defendants initiated a sales program to generate revenue through the sale of alternative (derivative) products and associated strategies, while the needs and best interests of Mr. Maybank were sacrificed by untrained, bonus-driven representatives incentivized to sell products. Exhibit 92 in fact calls it a "revenue opportunity":

Pre-Paid Variable Forwards

- Revenue Opportunity
 - Up-front fee of 50-100 basis points
 - Annual management fees up 1% or more
 - This could generate well over \$100K over 3 years

See also Ex. 100 (same). These exhibits, along with other exhibits and testimony in the record, support the reasonable conclusion that the motivation to sell the VPFC strategy was for the substantial revenues that it generated, not because it was in Mr. Maybank's best interest.

Based on these examples and the record as a whole, I find that the evidence shows that Defendants acted with malice, trickery, or deceit rather than mere accident. I find that the jury could have reasonably found that Defendants, notwithstanding their position as Mr. Maybank's fiduciary, breached their duties in at least one or more of the following ways:

- i. By failing to perform an individualized analysis of the suitability of the investment strategy for Mr. Maybank;
- ii. By failing to perform a thorough financial analysis or to develop a comprehensive financial plan;
- iii. By failing to advise Mr. Maybank about the significant conflict of interest against providing advice about BB&T Corporation stock;
- iv. By failing to advise Mr. Maybank about the reasonable amount of annual revenue to be generated by BB&T's investment strategy and to counsel him about restricting his spending to the assured income level;
- v. By misrepresenting that BB&T had expertise in VPFCs and the associated strategy;
- vi. By permitting untrained and misinformed representatives to sell a product and strategy which they were unqualified to sell;
- vii. By failing to explain that the strategy substantially increased Mr. Maybank's investment risk;
- viii. By failing to explain that the strategy placed the client into a never-ending cycle of periodic and costly roll-overs;
- ix. By failing to fully explain the true costs of this complex strategy and the derivative contract upon which it was based;
- x. By misrepresenting to Mr. Maybank that his best interests were being served when, in actuality, the strategy was nothing more than a fee-driven sales program for Defendants and their representatives;
- xi. By failing to place Mr. Maybank's best interest ahead of the interest of BB&T; and
- xii. By representing that the VPFC and associated strategy would protect Mr. Maybank's retirement savings, when in actuality it substantially increased the risk of loss.

I concur and find that Defendants' conduct was reprehensible and warrants the imposition of punitive damages as awarded by the jury.

2. Ratio between actual and punitive damages.

The ratio between the award of \$5 million in punitive damages and the award of \$3.1 million in actual damages is 1.61 to 1. This ratio is at the low, or readily sustainable, end of the reasonableness spectrum. See, e.g., *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (upholding a 7.69 to 1 ratio where improper safeguards by bank permitted co-

conservator to steal a child's funds); *Mitchell*, 385 S.C. at 593-94, 686 S.E.2d at 188 (ratio of 9.2 to 1 in insurance bad faith case).³ Based on the Defendants' conduct, I find the ratio of punitive to actual damages to be both reasonable and proportionate to the harm suffered by Mr. Maybank.

I further consider "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.* at 588, 686 S.E.2d at 185. I find that a \$5,000,000 punitive damages award is likely to deter Defendants from similar conduct in the future and will likely encourage better training of employees, result in improved suitability analysis and increased competence of investment advice, and lead to true protection of a client's irreplaceable retirement assets. Further, I find that the award is reasonably related to the financial harm likely to result from such conduct, which can be significant and large as seen in Mr. Maybank's case. The potential harm to a senior citizen of self-serving and deceitful investment advice can be catastrophic, leading to financial ruin and a life of dependency in a person's twilight years. Corporations managing money for South Carolina's elderly citizens must know that their conduct and advice must be faithful, prudent, trustworthy, non-conflicted, and free from deceit, tricks, and misrepresentations. Finally, based on the record, including but not limited to the testimony and evidence of Mr. Maybank's expert witness Dr. Oliver Wood, I find that Defendants have the ability to pay the punitive damages award.

³ South Carolina courts have upheld ratios across the spectrum in cases involving "merely" economic harm. *See, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (3.6 to 1 ratio for conversion, trespass, and civil conspiracy); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) (ratio of 5.087 to 1 upheld against vehicle manufacturer when defective switch destroyed owners' home and personal belongings); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.9 to 1 ratio on an intentional interference with contract claim); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (affirming a 28 to 1 ratio for breach of contract and bad faith insurance claim).

3. *The difference between punitive damages and civil penalties.*

Lastly, I find that there are no comparable civil penalties that are applicable to Defendants' breaches of their fiduciary duties, misrepresentations, and fraudulent actions to Mr. Maybank. *See, e.g., Cody P.*, 395 S.C. at 632, 720 S.E.2d at 484. As discussed above, I find consideration of the punitive awards in comparable cases to be appropriate. Like *Cody P.*, this case involves economic harm caused by a bank's failure to safeguard a client's funds. The reprehensibility is greater here because the bank in *Cody P.* merely failed to prevent misconduct by a third party; the harm in this case was caused by Defendants' own intentional and deliberate misconduct, which was found by the jury to be grossly negligent, reckless, and/or willful and to constitute constructive fraud, breaches of fiduciary duty, and breaches of the contract. The ratio here is lower than in *Cody P.*, which upheld a 7.69 to 1 ratio despite a lack of any findings of intentional wrongdoing by that bank defendant. I therefore find that the award of punitive damages by this jury is reasonable, especially in comparison with comparable cases.

4. *Conclusion.*

I find that the punitive damages award by this jury is supported by clear and convincing evidence; that Defendants' conduct is reprehensible; and that the award is directly proportionate to the harm caused by Defendants. I therefore affirm the award of punitive damages.

C. *The exculpatory clause does not apply.*

I find that the exculpatory clause contained in the WMA does not preclude the award of punitive damages. In pretrial proceedings, Defendants' corporate representative, Mr. Ross Walters, admitted that the WMA had been incorrectly drafted by their lawyers, that it had been tendered to Mr. Maybank despite these errors, and that no one had explained or disclosed the errors to Mr. Maybank, even though Defendants were then his fiduciary. Defendants'

counterclaim for reformation also constituted an admission of the errors in the contract. I denied Plaintiff's motion for partial summary judgment because the real terms of the parties' agreement were in doubt based on Defendants' own admissions and actions. At trial, the question of the real and enforceable terms of the contract remained hotly contested. Consequently, I found that the determination of the terms of the WMA was a question of fact for the jury to decide. The jury considered the contract, the evidence of record, argument of counsel, and the Court's charges and rejected Defendants' version of the events and characterizations of their conduct. The jury also awarded punitive damages and therefore determined that the exculpatory clause did not preclude an award of such damages.

I further find that, as a matter of law, the exculpatory clause is inapplicable to Defendants' misconduct under the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation.⁴ The exculpatory clause applies only "with respect to [Bank and Investment Advisor's] services under this Agreement." I find that the services as described in Sections I, II, and III of the contract do not include making misrepresentations or material omissions of relevant information or failing to disclose or concealing material information. Thus, as a matter of law, I find that the common law causes of

⁴ While Defendants argue that the exculpatory clause is unambiguous and its terms are derived from the clear intent of the parties, I note that the clause is in the very same form agreement that Defendants sought to reform by mutual mistake. When it came to their admitted breach of the WMA, Defendants contended that certain language in the contract should be amended to support their favored construction even though they drafted the erroneous contract. Defendants' counterclaim for reformation is denied because there is no evidence of mutual mistake. Although they had the burden of proving mutual mistake by clear and convincing evidence, Defendants failed to prove that they were entitled to reformation. See *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987). Defendants own actions demonstrate that the contract terms and applications are in doubt, and the rules of contract construction therefore require the exculpatory clause to be narrowly interpreted in favor of the client and against BB&T, which drafted the contract. See *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993).

action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation arise outside of the "services" set forth in the WMA. Defendants provided no authority for the proposition that they may be relieved from intentional, reckless, and fraudulent conduct.

I find that BB&T Corporation and Mr. Maybank are not in equal bargaining positions, particularly where there is a form agreement drafted and presented by a multi-billion dollar fiduciary to an individual client. South Carolina courts have gone to "extremes" to avoid enforcing exculpatory clauses where the parties have substantially different bargaining power. *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990); *see also Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2009). I find that enforcement of the exculpatory clause in the WMA would be against public policy. I therefore deny Defendants' motion to construe the so-called exculpatory clause so as to bar the jury's award of punitive damages.

I further find that the exculpatory clause is unenforceable here because BB&T was Mr. Maybank's fiduciary when the misconduct occurred and the WMA was executed. As his fiduciary, BB&T had an absolute duty of disclosure and the obligation to ensure that Mr. Maybank understood the terms of the entire WMA, including the exculpatory clause. Further, Mr. Maybank had an absolute right to rely upon BB&T's representations and to expect that his fiduciary would fully disclose any terms adverse to his interests, which they admittedly failed to do. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (fiduciaries have absolute obligation of disclosure of material facts and, clients have right to rely upon the representations by their fiduciaries). The evidence demonstrated that Mr. Maybank was not provided a copy of the WMA—and, necessarily, the exculpatory clause—until nearly two weeks after the failed investment strategy was set into motion through the first VPFC,

and even then the adverse terms of the exculpatory clause were not discussed with him. When presented with the full contract, and all of the evidence and circumstances surrounding the execution of the WMA, the jury found that punitive damages were warranted. I find that the exculpatory clause is unenforceable based on the jury's findings and my own weighing of the evidence.

III. BB&T Corporation.

A. *The Court properly exercised jurisdiction over BB&T Corporation.*

This Court properly exercised personal jurisdiction over BB&T Corporation. "A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's ... transacting any business in this State ... [or] entry into a contract to be performed in whole or in part by either party in this State." S.C. Code Ann. § 36-2-803(A)(1), (7). BB&T Corporation's General Counsel expressly authorized the investment strategy recommended to Mr. Maybank in South Carolina, which permitted Mr. Maybank to continue to hold a concentrated position in BB&T stock even though it was a conflict of interest for BB&T Corporation to make representations and give advice regarding its own stock.⁵ Without the approval and validation of the transaction by BB&T Corporation, the strategy would not have been implemented and the fee opportunity would have been lost for Defendants.⁶ I therefore reject Defendants' argument that BB&T Corporation was "a mere

⁵ BB&T Corporation knowingly and willingly authorized, approved, and facilitated an investment relationship with a South Carolina resident involving the ownership of and dividends from BB&T Corporation stock. That alone establishes minimum contacts sufficient to support exercising personal jurisdiction over BB&T Corporation. *Fields v. INA Filtration Corp.*, 292 S.C. 614, 618, 358 S.E.2d 160, 163 (Ct. App. 1987) ("The length and duration of the nonresident's activity in this State need only be minimal when the plaintiff lives in this State and the cause of action arose out of the defendant's activities in this State").

⁶ Defendants ignore the Corporation's critical role in establishing duties to clients and customers of its subsidiaries. BB&T Corporation promulgated a Code of Ethics governing its

holding company for other BB&T entities and that none of its employees had any direct involvement with Mr. Maybank,” and instead find that the character and circumstances of the corporation’s actions and the State’s interest weigh in favor of exercising personal jurisdiction.

B. Defendant waived any objections to the exercise of jurisdiction over BB&T Corporation.

BB&T Corporation waived its right to seek dismissal. The defense of personal jurisdiction “may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.” *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Simply articulating the defense in an answer without promptly advancing it may waive that defense. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990). BB&T Corporation made only a perfunctory defense under Rule 12(h)⁷ by stating in the Answer that it “reserves its objection based on the Court’s lack of *in personam* jurisdiction.” See Ans. 1st Am. Compl. p.1. BB&T Corporation then fully participated in litigating this case without advancing that objection or otherwise moving for dismissal at any time until shortly before trial. See *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (defendant forfeited defense of personal jurisdiction by not moving to assert it until four years after filing answer). I find that BB&T Corporation waived the defense by “provid[ing] no more than a bald assertion in [the] answer that the court lacked personal jurisdiction” and then proceeded to participate in discovery, make court appearances, and file numerous pleadings without ever again presenting the defense. I therefore deny Defendants’ motions for JNOV, new trial, and new trial *nisi remittitur* on this ground.

subsidiaries intended to enhance the operations of the corporation and its subsidiaries by ensuring that these entities “continue to earn our client’s trust and respect by always upholding the highest standards of ethical and professional conduct in all that we do.” See Ex. 6, BB&T Code of Ethics, § I (“The Code applies equally to all employees of BB&T and its subsidiaries.”).

⁷ Rule 12(h), SCRCF, merely “specifies the minimum steps that a party must take in order to preserve [the] defense, not the outer limits of a possible waiver.” *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998).

IV. Statute of Limitations

The statute of limitations does not bar Mr. Maybank's causes of actions and Defendants' motion on this ground is denied. "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (citation omitted).

V. Insufficient Evidence of Damages

Defendants argue that Mr. Maybank did not present sufficient evidence on damages. However, the jury clearly found damages were warranted based on the testimony of Mr. Maybank as well as his expert witnesses, Dr. Craig McCann and Professor John Freeman. Although Defendants may disagree with the weight given to the evidence, my responsibility is limited to determining if any evidence existed to support the verdict. I deny Defendants' motion on this ground because I find the damages are fully supported by ample evidence.

VI. Grounds for JNOV

Defendants argue over 40 additional grounds⁸ in their motion for JNOV, *see* Mot. pp.18-24, Nos. 12-54, that I find forfeited because they were neither advanced in Defendants' 31 page written directed verdict motion nor argued orally to the Court. "[A] motion for JNOV must be based on the same grounds as those raised in a motion for a directed verdict motion made at the close of all the evidence." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). However, I further have considered each of these issues to the extent the substance can be gleaned from the conclusory arguments and I find that they do not warrant granting JNOV. I therefore deny Defendants' motion on these and all other additional grounds.

⁸ Regardless of the number, I deny each of the additional grounds as meritless.

Motion for New Trial Absolute

Although a new trial absolute may be granted if the verdict is excessive or inadequate, “[t]he jury’s determination of damages ... is entitled to substantial deference.” *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). I have considered the testimony and reasonable inferences therefrom most favorable to Mr. Maybank as the nonmoving party. I deny Defendants’ motion because I find the evidence presented at trial fully supports the jury’s verdict and further find that the verdict is neither grossly excessive nor the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.⁹

I. Challenges to the Court’s evidentiary rulings.

I find that Defendants have not established that any of the challenged evidentiary rulings were erroneous because, in each instance, the evidence was relevant and properly admissible. *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006). I further find that Defendants failed to show the challenged rulings were unfairly prejudicial. *See Fields v. Reg’l Med. Ctr., Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). I therefore deny the motion on these grounds.

II. Challenges to the Court’s Jury Instructions.

Defendants also assign error to the Court’s compilation and delivery of jury charges following the close of evidence. I find that Defendants made no valid contemporaneous objections. *See Murray v. Bank of Am., N.A.*, 354 S.C. 337, 346, 580 S.E.2d 194, 199 (Ct. App. 2003). I further find that, after careful review, the instructions adequately charge the applicable law in this case. I therefore deny Defendants’ motion on this ground.

⁹ Defendants assert, by my count, 54 distinct grounds in support of their motion for new trial absolute. To the extent a ground is not specifically discussed, it is denied. Additionally, to the extent a ground is identical to one raised in the JNOV motion, I expressly incorporate those rulings to the extent applicable in denying the motion for new trial absolute.

III. Challenges to the Jury Verdict Form.

I find that Defendants' challenge to various parts of the jury verdict form is without merit and has been waived. The verdict form I ultimately adopted and submitted to the jury was, with minor exception, the form proposed by Defendants. The return of a general verdict for a total amount of damages on all causes of action means that each cause of action independently supports the entire award of actual damages. I find that Defendants waived any objection related to the verdict form and deny their motion on this ground. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995).

IV. Thirteenth Juror Doctrine.

Defendants also seek to have this Court grant a new trial as the thirteenth juror. I decline to interfere with the jury's verdict because I find that the record fully supports the verdict. I observed the jury to be very diligent, thoughtful and attentive in its work. After two weeks of receiving testimony and documentary evidence, listening attentively to arguments of counsel and jury charges, and deliberating for two days, the jury found Defendants' conduct was in violation of law, reprehensible, and otherwise deserving of punishment. Defendants' motion for a new trial on this ground is denied.¹⁰

New Trial *Nisi Remittitur*

I deny Defendants' motion for a new trial *nisi remittitur* because I find there is no compelling reason to reduce the jury's verdict. Based on the evidence, applicable law, and the arguments of the parties, I find that the jury's verdict is fully supported by the evidence and is not excessive, arbitrary, or capricious. Having closely observed the evidence and the jury over the course of the two week trial, I find the verdict was based on neither emotion nor improper

¹⁰ Because I find no merit to Defendants' motion for new trial absolute, I deny relief on any and all grounds raised in that motion not specifically discussed in this Order.

sentiment and was supported by the evidence of record. I accept and concur with the jury's finding that Defendants' conduct was reprehensible, which justifies and supports the award of actual and punitive damages. I therefore deny the motion for new trial *nisi remittitur*.

Treble Damages under the Unfair Trade Practices Act

Mr. Maybank moves to treble the jury's award of actual damages on the UTPA verdict because Defendants' conduct was willful or knowing. S.C. Code Ann. § 39-5-140(a). Conduct is willful if a reasonable person could have ascertained that their conduct violated the UTPA. *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986). Relying on and incorporating here the evidence discussed above, which I find supports the jury's verdict under the UTPA, I further find that, having observed the testimony at trial and reviewed the evidence, Defendants' conduct in employing an unfair or deceptive method, act, or practice in commerce was both willful and knowing. I therefore treble the actual damages of \$3,100,000 to \$9,300,000.

Election of Remedies

Defendants moved to require Mr. Maybank to elect between recovery of punitive damages awarded by the jury on the common law causes of action and treble damages under the UTPA. I find no election is required because, as stated, the evidence supported at least three theories for relief under the UTPA that were separate and distinct from the theories supporting the common law claims: 1) BB&T's presentation of a deceptive and misleading form contract that the Bank had no intention of fulfilling as written; 2) use of a form letter purporting to provide Mr. Maybank with personalized research and analysis of the investment strategy but that in fact was a generic, fill-in-the-blank form document in which Defendants pre-cleared the use of these risky investment strategies; and 3) Defendants' deceptive letter to at least 130 clients in

which it misrepresented that a fee refund was made to reflect BB&T's corporate values when in actuality it obscured its legal liability for having charged those fees at all. In contrast, the jury found for Mr. Maybank on the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation and awarded \$5 million in punitive damages on those claims.¹¹ Each of these causes of action was based on a breach of the professional duties, trusted advisor status, and fiduciary duties undertaken by Defendants as Mr. Maybank's fiduciary and was fully supported by evidence admitted at trial. The jury found that Defendants' conduct was reprehensible and warranted punishment based on evidence that Defendants provided imprudent, unsuitable, uninformed, deceitful, and reckless advice and made misrepresentations to Mr. Maybank while acting as his fiduciary.

Taken in the light most favorable to the non-moving party, the record supports a reasonable conclusion that Defendants' liability under the UTPA is separate from that for the common law causes of action. *See Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45 ("Election of remedies is not applicable where there are two separate causes of action, each based on different facts.") (citing *Jones v. Winn-Dixie Greenville*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995) (holding that "the principle [of election of remedies] has no application where two separate causes of action, each based on different facts, exists.")). Moreover, the UTPA by its clear and unambiguous language is "cumulative and supplementary to all powers and remedies otherwise provided by law." S.C. Code Ann. § 39-5-160. I find that the common law causes of action for which punitive damages were awarded were based on evidence demonstrating Defendants'

¹¹ The verdict form differentiated the causes of action for which punitive damages could be awarded from those that could not, including the UTPA cause of action, providing in pertinent part as follows: "12. If you answer Yes to Questions 2 [Breach of Fiduciary Duty], 3, 6, 7, 8 [Constructive Fraud], or 9 [Negligent Misrepresentation], do you find by clear and convincing evidence that the acts of the defendant(s) warrant payment of punitive damages" The jury also was instructed as to the standards for imposing punitive damages.

imprudent, unsuitable, and risky investment advice to Mr. Maybank, representations to him that the recommended strategy would protect his assets and was well-researched and tailored to his specific investment needs. In contrast, Defendants' practice of presenting the false and deceptive contracts and letters to Mr. Maybank, while deliberately hiding their falsity, is an independent, separate unfair and deceptive business practice. I therefore deny Defendants' motion to require election because, based on the facts and Defendants' actions in this case, there is no double recovery for a single wrong. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45.¹²

I deny Defendants' motion for election of remedies on all other grounds. Many of these grounds were not raised at trial. For instance, although pled in their Answer, Defendants waived their arguments on the economic loss rule by failing to raise it in any of their eight summary judgment motions, or during trial in their 31-page motion for directed verdict. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (post-trial motion cannot be used to raise an issue that could have been raised at trial). Regardless, I reject their argument on the economic loss rule, which in South Carolina is primarily limited to the products liability arena. See *Kennedy v. Columbia Lumber Mfg. Co.* 299 S.C. 335, 345-46, 384 S.E.2d 730 (1989). Moreover, even Defendants' cited authority expressly rejects the economic loss rule when Defendants owe an independent duty. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995). Defendants acted to become Mr. Maybank's fiduciary and well knew that he would suffer economic losses if they breached their duties to him.

¹² See also, e.g., *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding both punitive and treble damages).

I also reject Defendants' argument that the claims for constructive fraud and negligent misrepresentation are inconsistent. I expressly instructed the jury that Mr. Maybank was not entitled to multiple damages based on the number of causes of action:

The plaintiff has asserted multiple causes of action against the defendant. In other words, the plaintiff believes he is entitled to recover against the defendant under multiple, different legal theories. If you find that the plaintiff has met their burden of proof as to more than one cause of action and you consider awarding damages, you should not increase the amount of actual damages simply based on the number of different causes of action, if any, upon which you find the plaintiff has prevailed.

Following these instructions, the jury in this case returned a verdict against Defendants for \$3.1 million on all causes of action on a verdict form proposed by Defendants. I therefore deny Defendants' motion on this ground.¹³ I also deny Defendant's motion to require Mr. Maybank to elect a single cause of action on which to proceed because I find that there is no possibility of double recovery of actual damages in this case. *See Taylor*, 324 S.C. at 203, 479 S.E.2d at 44-45 (election of remedies is the act of choosing between inconsistent remedies allowed by law on the same set of facts).¹⁴

Motion for Attorneys' Fees and Costs under the Unfair Trade Practices Act

Mr. Maybank has moved for an award of attorneys' fees of \$3,317,868.70 and costs of \$306,264.10. *See* S.C. Code Ann. § 39-5-140(a). In rendering my decision, I have relied upon my own knowledge and observations in the case as well as the affidavits submitted by Mr.

¹³ This conclusion is not changed by the fact that the jury returned a single award of \$3.1 million on five causes of action, including the UTPA violation. The jury's award of a single amount of actual damages is not indicative of a finding that no distinct damages flow from the jury's determination of a violation of the UTPA. To the contrary, a general verdict form is indicative of the fact that any or all of the causes of action returned by the jury sustain the full amount of the actual damages. The question is not whether there is a separate award of damages for that violation, but whether separate facts and actions of the Defendants support each of the treble and punitive damage awards.

¹⁴ To the extent not expressly addressed in this Order, Defendants' arguments nevertheless are denied.

Maybank, including the affidavit of Professor John Freeman.¹⁵ Although Plaintiff's request for attorneys' fees and costs is reasonable, I nevertheless find it appropriate to reduce the total hours and costs by 20% in order to limit the fees to the UTPA claim. I therefore award as reasonable and appropriate attorneys' fees of \$2,654,295 and costs of \$245,011.¹⁶

I. Introduction and background.

The specific award of attorneys' fees and costs is left to the discretion of this Court, and must be determined using a lodestar analysis. *Layman v. State*, 376 S.C. 434, 444, 457-58, 658 S.E.2d 320, 325, 332-33 (2008). This analysis requires determining a reasonable hourly rate and hours worked and then considering any exceptional circumstances justifying an enhancement of the lodestar figure. *Id.* at 458-61, 658 S.E.2d at 33-35. This requires considering the following: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Id.* at 458, 658 S.E.2d at 333 (citing *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760).

I start with my familiarity with this extremely complicated case and the fine, well-prepared, and knowledgeable counsel representing both sides. The parties appeared before me on four separate occasions to resolve pre-trial issues and dispositive motions, with most hearings lasting several hours. These motions involved substantial written submissions, which I observed

¹⁵ I find Professor Freeman's affidavit to be appropriate and consistent with the parameters of expert testimony established by the case law. *See, e.g., Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008). Professor Freeman is qualified to render an opinion assisting the Court in exercising its discretion. *See* Rule 702, SCRE. I therefore deny the motion to strike Professor Freeman's affidavit.

¹⁶ Defendants filed two additional post-trial motions beyond the deadline of July 10, 2014, seeking to compel the submission of additional documentation from Mr. Maybank in support of his request for attorneys' fees and costs under the UTPA, as well as to postpone consideration of the motion for attorneys' fees, costs, and treble damages. I have considered these motions, find them to be without merit, and therefore deny them.

to be of the highest quality. The trial itself lasted two weeks, during which time I closely observed Mr. Maybank's counsel first-hand. Finally, the parties appeared before me on August 19 to argue post-trial motions. I have reviewed the fee affidavit of Plaintiff's counsel detailing the hours worked by each attorney and submitting their current hourly market rates. I also have reviewed the cost affidavit detailing the costs and expenses paid and advanced in the litigation.

II. Reasonableness factors.

A. *The nature, extent, and difficulty of the case.*

I find that the nature, extent, and difficulty of this case weighs heavily in favor of awarding attorneys' fees. Although this case was extremely difficult to litigate, involving complex investment products and strategies, both sides were represented by excellent attorneys who were strong advocates for their clients. Plaintiffs in investment litigation, like here, are often single individuals bringing claims against well financed, multi-billion dollar institutions with the very best defense lawyers available. The difficulty of an individual plaintiff litigating against a multi-billion dollar corporate entity is enormous. Moreover, as true here, the subject matter of investment cases is often quite complicated, providing counsel with the enormous challenge of explaining the issues and investment strategies and products in clear and understandable ways. Due to these factors, litigating this jury trial required substantial experience, knowledge, and expertise by Mr. Maybank's counsel, requiring them to know and understand the complicated legal and factual issues involved and to present those issues in a manner comprehensible to lay persons. Mr. Maybank's counsel were excellent in this regard.

B. *The time necessarily devoted to the case.*

Advancing this case to trial involved successfully gaining remand to this court following Defendants' removal to federal court, extensive discovery including 32 depositions, review of

60,000 pages of discovery, and responding to eight substantive motions for summary judgment. In light of this immense and time-intensive task, I find that the time identified by Plaintiff's counsel was fairly expended in the development of the core set of facts that supported all of the claims.¹⁷ According to Mr. Willoughby's affidavit, almost 6,700 hours have been devoted to handling Mr. Maybank's case through June 30, 2014, excluding post-trial issues. As was their right, Defendants vigorously defended each point and issue in this case. In light of the comprehensive, "challenge every issue" defense employed by Defendants, which I observed firsthand, I find Mr. Maybank's counsel were required to invest time and resources in mounting an effective response. I therefore find the time devoted by Mr. Maybank's counsel in litigating this case was necessary, essential, and reasonable. The fact that Mr. Maybank's counsel produced a successful result weighs heavily in favor of the requested attorneys' fees.

However, the UTPA verdict is the only one for which attorneys' fees and costs are recoverable. Plaintiff's counsel asserts and Professor Freeman opined that the amount of fees allocable to this cause of action cannot be separately determined because all of the causes of action are based upon a core set of intertwined facts and no deduction to the fee request is warranted based on the amount of time expended by Mr. Maybank's counsel. *See Hensley v. Eckhart*, 461 U.S. 424, 435 (1983) (noting that, in litigation based on "a common core of facts," an attorney's time "will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis") and *Austin*, 387 S.C. at 57, 691 S.E.2d at 153 (declining to dissect a counsel's fee affidavit where violations under the statutory claim were

¹⁷ Defendants were Mr. Maybank's trusted fiduciary. As a consequence, all of their activities were inextricably intertwined. I find that it was necessary to conduct discovery and extensive pretrial work to understand all facets of the parties' lengthy and complex fiduciary relationship and delineate which acts and conduct of Defendants constituted violations of which causes of action.

based on the same body of evidence underlying the claims for fraud and constructive fraud). I find that the causes of action are based upon a core set of common and intertwined facts.¹⁸ However, out of an abundance of caution, I find that a 20% reduction in the number of hours will fairly reflect the time expended by Plaintiffs' counsel in investigating, developing, advancing, and litigating the UTPA claim while at the same time protecting Defendants against being charged for work that did not serve to develop the UTPA claim. See *Layman*, 376 S.C. at 460, 658 S.E.2d at 333 (reducing total hours by percentage). The implementation of this reduction is set forth below.

C. Professional standing of counsel.

Both Mr. Willoughby's firm and Mr. Bannister's firm have high standing and regard in the legal community and are respected members of the South Carolina Bar and the Richland and Greenville County Bars, respectively. I saw first-hand the high level of written and oral advocacy demonstrated by Mr. Maybank's counsel throughout this complex case. Litigating and trying this case involved the command of thousands of documents, numerous lay and expert witnesses, the experience and expertise of knowing the specialized area of investment strategies and products and the law related thereto, and the ability to conduct effective legal combat with a team of highly skilled attorneys for the defense. Despite the complexities of this case, Plaintiff's counsel litigated it with an exceptionally high degree of competence and skill. I therefore find

¹⁸ As an example that the work on the UTPA claim continued throughout the pendency of this case from start to finish, a key document that formed one of the foundations of the UTPA claim as presented to the jury was not produced by Defendants until late on the Friday before the trial began on Monday, June 16, 2014. Ex. 91.

the professional standing of Mr. Maybank's counsel militates heavily in favor of the award of attorneys' fees.¹⁹

D. *Contingency of compensation.*

The fee arrangement in this case was blended, with a reduced hourly fee coupled with a contingency if beneficial results were obtained. This blended fee recognizes the significant risk and difficulty of litigating such a complex case. Although this arrangement required Mr. Maybank to bear a significant portion of ongoing litigation expenses, the law firms shared a substantial portion of the entire burden. The "contingency of compensation" factor is *not* a check to see whether a contingency contract exists, but rather to consider whether the plaintiff can pay the fees if a beneficial result is not obtained. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) ("In making this determination, the abilities of the parties to pay, their respective financial conditions, and the effect of the attorney's fees on each party's standard of living are also to be considered."). Because this case involved substantial financial losses by Mr. Maybank, there was a substantial risk that he would be unable to pay even the reduced rate as the case progressed through protracted litigation²⁰. Consequently, Plaintiff's counsel bore a significant risk in light of the complexity of the issues and the uncertainty of success. Plaintiff's counsel also incurred a significant opportunity risk because they devoted substantial time and effort to this case at reduced rates versus those that could be obtained on

¹⁹ As with most issues in this case, Defendants did not concede the professional standing of Mr. Maybank's counsel.

²⁰ Mr. Maybank testified that Mr. David Fisher, a senior executive with Defendants, ridiculed and attempted to intimidate him for even contemplating making a claim, saying words to the effect of "You are an embarrassment to yourself, it will be expensive, and it will end badly." From the time devoted to this case as reflected in Mr. Willoughby's affidavit, BB&T indeed made sure it was most expensive to litigate this case.

other work. I find that the risk to Plaintiffs' counsel of not being fully and fairly compensated was substantial and that this factor weighs in favor of awarding attorneys' fees.

E. *Beneficial results obtained.*

Plaintiff's counsel obtained beneficial results for Mr. Maybank, which is "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). The success achieved was a direct result of the facts developed and the legal theories advanced by seasoned and experienced counsel with expertise in investment strategies and products. Counsel's trial advocacy with the jury was exceptional and their professionalism toward this Court and their respect for the judicial process noteworthy. The effective presentation by Mr. Maybank's counsel coupled with well-developed evidence of deception and unfair business practices resulted in one of the largest jury verdicts in Greenville County to date. I find that the fifth factor heavily militates in favor of the reasonable attorneys' fee awarded herein.

F. *Customary legal fees for similar services.*

I find that the legal fees requested in this case are in line with the legal fees customarily charged for similar services in this type of litigation in Greenville and this State. Moreover, for the reasons detailed below, I find this case exhibits the type of exceptional circumstances warranting the application of a multiplier to the fee request.

III. *Hours worked, billing rates, and propriety of a multiplier.*

The amount of time devoted to this case by Mr. Maybank's counsel is entirely reasonable given the complexity and difficulty of the issues involved in this case and the comprehensive defense. I find that the rates submitted by Mr. Willoughby and his team are reasonable, customary, and appropriate in Greenville and in this State given the complexity of this case and

investment-related cases in general, as well as the professional standing of Mr. Maybank's counsel. The reasonableness of the rates is supported by the expert testimony of Professor Freeman, who opined that the current hourly rates charged by Mr. Maybank's counsel are actually *below* fair market levels for the specialized type of legal work involved in this case. I find that this evidence militates in favor of the use of a multiplier, as discussed below.

IV. Calculation of fee award.

With these findings in mind, I calculate the lodestar fee²¹ in this case as follows:

	Hourly Rate	Hours Expended	20% Reduction	Adjusted Hours	Totals
<u>Willoughby & Hoefer, P.A.</u>					
Mitchell Willoughby	\$500.00	1,792.10	(358.42)	1,433.68	\$716,840.00
Elizabeth Zeck	\$400.00	691.80	(138.36)	553.44	\$221,376.00
ElizabethAnn Loadholt Carroll	\$400.00	514.10	(102.82)	411.28	\$164,512.00
Tracey C. Green	\$400.00	76.80	(15.36)	61.44	\$24,576.00
Chad N. Johnston	\$300.00	2,361.90	(472.38)	1,889.52	\$566,856.00
John W. Roberts	\$300.00	103.30	(20.66)	82.64	\$24,792.00
Andrew MacLeod	\$300.00	25.70	(5.14)	20.56	\$6,168.00
<u>Bannister, Wyatt & Stalvey, LLC</u>					
Bruce Bannister	\$325.00	90.00	(18.00)	72.00	\$23,400.00
Jim Bannister	\$450.00	20.75	(4.15)	16.60	\$7,470.00
Alex Stalvey	\$300.00	46.00	(9.20)	36.80	\$11,040.00
Luke Burke	\$250.00	12.50	(2.50)	10.00	\$2,500.00
Total Fee Award for Attorneys					\$1,769,530.00

I find that enhancing the lodestar calculation of \$1,769,530 in attorneys' fees with a multiplier is necessary in order to reflect the exceptional circumstances in recovering damages under the UTPA in this case. See *Layman*, 658 S.E.2d at 334 (citing *Blum v. Stenson*, 465 U.S.

²¹ Mr. Willoughby's fee affidavit lists Attorney Luke Burke's hourly rate as \$400.00; however, based on the attachment B to the fee affidavit, the Court finds that the listed rate was a scrivener's error and the rate should be \$250.00, which is reflected in the lodestar calculation.

Per

886, 897 (1984) (recognizing that an enhanced lodestar award may be justified "in some cases of exceptional success").

Based on my familiarity with the nature, extent, and difficulty of this complex case, I find the quality of service rendered by Mr. Maybank's counsel was superb and that the success achieved was "exceptional." In undertaking this difficult case in the face of a substantial risk of receiving compensation, Mr. Maybank's counsel exposed unfair and deceptive business practices by Defendants against clients whom they served as trusted fiduciary as well as their misrepresentations to conceal those acts. I find all of these factors constitute significant and exceptional circumstances that warrant applying a multiplier of 1.5 to the current hourly rates to reflect the difficulty and exceptional circumstances of this case:

Base Attorneys' Fees:	\$1,769,530.00
Multiplier:	x 1.5
Total Attorneys' Fees:	\$2,654,295.00

I therefore find that, based on the exercise of my informed discretion, Plaintiff is entitled to attorneys' fees of \$2,654,295 as a reasonable and a fair reflection of the exceptional circumstances involved in recovering damages under the UTPA.

V. Award of costs.

Mr. Maybank also is entitled to costs reasonably incurred in litigating and trying the UTPA claim. See S.C. Code Ann. § 39-5-140(a). Mr. Maybank's counsel submitted a cost affidavit detailing the costs and expenses actually paid and advanced in pursuit of the litigation, requesting costs of \$306,264.10. This Court has broad discretion to award costs to the prevailing party. *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 402, 618 S.E.2d 903, 908 (2005). Extending beyond the recovery of costs allowed as a matter of course to a prevailing party, fee-

shifting statutes like the UTPA contemplate reimbursement of all reasonable expenses incurred.

See Layman, 376 S.C. at 461, 658 S.E.2d at 334.

After reviewing the affidavit and costs claimed by Mr. Maybank, I find the costs and expenses incurred, while significant, were reasonable in the context of this case. As Professor Freeman testified, expenses such as expert witness fees, online research, electronic document hosting fees, and trial preparation expenses are common, if not required, in cases of this size and complexity. The copying charges, while substantial, also are reasonable given that this case involved more than 60,000 pages of documents. Because the facts supporting the substantive claims were largely intertwined and developed throughout the lengthy discovery process, I find that no reduction of the costs and expenses is required due to Mr. Maybank's failure to win on every claim advanced. I also note that the costs of the expert witness of the Family Insurance Trust have already been excluded due to the lack of success in recovering damages for the trust. However, I find that the total amount should be further reduced by 20% to limit costs to the UTPA claim alone. I therefore award \$245,011 ($\$306,264 \times (1 - .20)$) in costs and expenses as reasonable and appropriate.

Prejudgment Interest

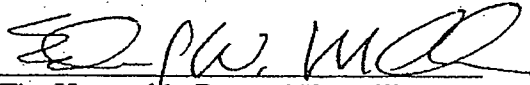
Mr. Maybank also has moved for an award of prejudgment interest based on the jury's award of actual damages under S.C. Code Ann. § 34-31-20(A). I find that Mr. Maybank's damages were not a sum certain as required by S.C. Code Ann. § 34-31-20(A) and I therefore deny Mr. Maybank's motion for prejudgment interest on that ground.

NOW, THEREFORE, based upon the foregoing findings and conclusions, IT IS

HEREBY ORDERED, ADJUDGED AND DECREED that

1. Defendants' motions for Judgment Notwithstanding the Verdict, New Trial Absolute, New Trial *Nisi Remittitur*, and Election of Remedies are **DENIED**;
2. All other motions advanced by Defendants are also **DENIED**.
3. Plaintiff's motions for Treble Damages and for Attorneys' Fees and Costs are **GRANTED**.
4. Plaintiff's motion for prejudgment interest is **DENIED**.
5. Judgment in favor of Plaintiff Francis P. Maybank is hereby **ENTERED** against all Defendants in the amount of **Seventeen Million, One Hundred Ninety Nine Thousand, Three Hundred Six Dollars (\$17,199,306)**.

AND IT IS SO ORDERED.


The Honorable Edward W. Miller
Business Court Judge
Thirteenth Judicial Circuit

Greenville, South Carolina
This 10 day of October, 2014

NOVEMBER

A Certified Copy
Paul B. Wiseman
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 11/10/14

Appellate Case No. 2016-000537

EXHIBIT 3

TO APPELLANTS' RETURN TO RESPONDENT'S MOTION
TO DISMISS

(Motion for Reconsideration)

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.

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

Defendants.

MOTION FOR RECONSIDERATION
PURSUANT TO RULE 59, SCRCP

2015 JUL -7 PM 3:33

YOU WILL PLEASE TAKE NOTICE that Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman, by and through their undersigned counsel, on the tenth (10th) day after service of this motion or as soon thereafter as the parties may agree or the Court may provide, will move before the Beaufort County Master-in-Equity for an Order altering or amending the Order signed by The Honorable Marvin H. Dukes, on June 10, 2015 and received by the undersigned on June 25, 2015 (hereinafter sometimes referred to as the "Order") pursuant to Rule 59 of the South Carolina Rules of Civil Procedure or such other rules as may then and there be applicable. A copy of the Order is attached hereto as Exhibit "A."

As grounds for requesting that the Order be altered or amended, the Defendants respectfully submit the following:

- 1) The Supreme Court of South Carolina has granted a petition for rehearing in Carolina First Bank v. BADD, LLC, _____ S.C. _____, _____ S.E.2d _____ (2015WL340791) (2015), the decision upon which this Court's decision rests.

The first and second findings in the Court's Order Granting TD Bank's Motion to Strike Defendants' Jury Trial Demand dated June 10, 2015 rest entirely upon Carolina First Bank

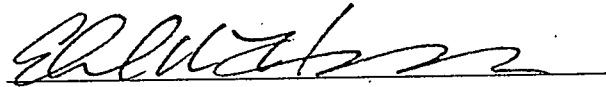
v. BADD, LLC, _____ S.C. _____, _____ S.E.2d _____ (2015WL340791) (2015). On April 9, 2015, the Supreme Court granted a petition for rehearing in BADD. The Defendants urge similar rehearing and reconsideration by this Court once the Supreme Court has rendered its final decision in BADD.

- 2) The findings by this Court, including that of a contractual waiver, failed to consider the arguments made by Defendants that the jury waivers do not extend to the counterclaims and that the Plaintiff is barred from enforcing them because of its conduct.

The Court found that Defendants are not entitled to a jury trial of the Plaintiff's foreclosure and its deficiency claims against them, and also that Defendants are not entitled to a jury trial on their counterclaims. The Court also found in its third and alternative finding that Black Diamond waived its right to a jury trial. In so doing, the Court ignored the Defendants' argument that even if the contractual jury waivers are otherwise applicable, the Plaintiff should be barred from enforcing them because of its conduct.

Based on the foregoing, the Defendants respectfully request that the Order dated June 10, 2015 be reconsidered and rescinded, and that the Defendants be allowed to proceed to a jury trial on the merits.

Respectfully submitted,



Ehrick K. Haight, Jr.
MINOR, HAIGHT & ARUNDELL, P.C.
Post Office Drawer 6067
Hilton Head Island, South Carolina 29938
(843) 785-8040
Attorneys for David A. Brosman

And:

Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Black Diamond, LLC and
J. Christopher Lindgren

This 6th day of July, 2015.

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., Successfully by)
Merger to Carolina First Bank,)

Plaintiff,)

v.)

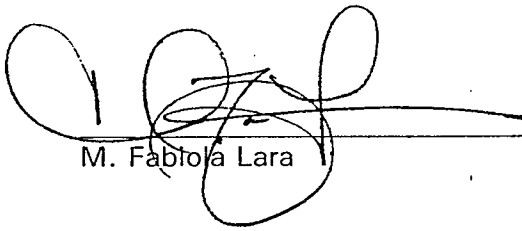
CERTIFICATE OF SERVICE

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

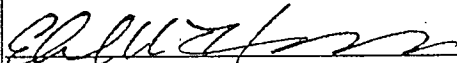
Defendants.)

The undersigned hereby certifies that on the 6th day of July, 2015 she served a copy of the attached *Motion Slip and Motion for Reconsideration* upon counsel for the Plaintiff by depositing a true and accurate copy thereof in the United States mail with sufficient postage prepaid to:

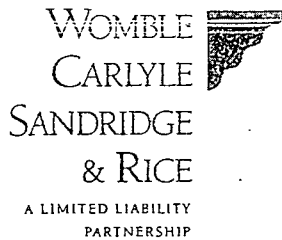
Michael Bogle, Esquire
Womble Carlyle Sandridge & Rice, LLC
Post Office Box 10208
Greenville, SC 29603


M. Fabiola Lara

Sworn to and Subscribed before me
this 6th day July, 2015.


Notary Public for South Carolina

My Commission expires: 7/20/2017



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

June 22, 2015

Keating L. Simons, III, Esq.
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412

Ehrick K. Haight, Jr., Esq.
P.O. Drawer 6067
Hilton Head Island, SC 29938

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-07-0944

Dear Counselors,

Attached for service upon you please find the filed **Order Granting TD Bank's Motion to Strike Defendants' Jury Trial Demand.**

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

Michael J. Bogle, Esq.

Enclosure

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
No. 2012-CP-07-0944

**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,

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.

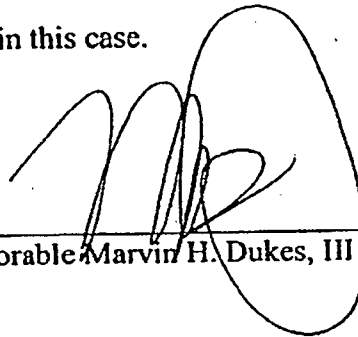
As an alternative ground for granting the Bank's motion to strike Defendants' jury trial demand, the Court also finds that Black Diamond contractually waived any right to a jury trial when it executed the \$3.5 Million Note. Under South Carolina law, "[a] party may waive the right to a jury trial by 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

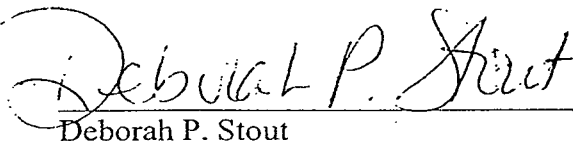
The undersigned hereby certifies that, on the 22nd day of June, 2015, she served a copy of the **Order Granting TD Bank's Motion to Strike Defendants' Jury Trial Demand** by depositing same in the United States Mail, proper first class postage affixed, and via email addressed to the person(s) hereinafter 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

THE STATE OF SOUTH CAROLINA
In The Court of *Appeals*

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

Marvin H. Dukes, III, Master In Equity

Appellate Case No. 2016-000537

RECEIVED

APR 28 2016

SC Court of Appeals

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

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; and David A. Brosman are

Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Return to Respondent's Motion to Dismiss with Exhibits on the Respondent, TD Bank, N.A., by depositing a copy of it in the United States Mail, postage prepaid, to his attorney of record, Michael J. Bogle, Esq. on April 26, 2016, addressed to Womble, Carlyle, Sandridge & Rice, L.P., Post Office Box 10208, Greenville, SC 29603.

April 26, 2016.



Ehrick K. Haight, Jr., Esq.

Stacey S. Collins, Esq.

MINOR, HAIGHT & ARUNDELL, P.C.

Post Office Drawer 6067

Hilton Head Island, SC 29938

(843) 785-8040

Attorneys for Appellant David A. Brosman

MINOR, HAIGHT & ARUNDELL, P.C.

ATTORNEYS and COUNSELORS AT LAW

JOHN W. MINOR, JR. (1940-2003)
EHRICK K. HAIGHT, JR.
ROBERT J. ARUNDELL*

1000 WILLIAM HILTON PARKWAY, SUITE 203
CLARENDON BUILDING - VILLAGE AT WEXFORD
POST OFFICE DRAWER 6067

TELEPHONE (843) 785-8040
FACSIMILE (843) 785-3506
MHALAWFIRM.COM

STACEY S. COLLINS**

HILTON HEAD ISLAND, SOUTH CAROLINA 29938

* ALSO A MEMBER OF THE NORTH CAROLINA BAR
** ALSO A MEMBER OF THE GEORGIA BAR

MEMBER, AMERICAN BAR ASSOCIATION
MEMBER, HHI CHAMBER OF COMMERCE

April 26, 2016

Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

APR 28 2016

SC Court of Appeals

Re: TD Bank, N.A. v. Black Diamond, LLC et al.
Appellate Case No. 2016-000537

Dear Ms. Kitchings:

Enclosed please find Appellants original Return to Motion to Dismiss with Exhibits and Proof of Service. Also enclosed are six (6) sets of copies of the same.

With kind regards, I remain

Yours very truly,
MINOR, HAIGHT & ARUNDELL, P.C.



Ehrick K. Haight, Jr., Esq. #2446
Stacey S. Collins, Esq. #73360
Post Office Drawer 6067
Hilton Head Island, South Carolina 29938
(843) 785-8040
Attorneys for Appellant David A. Brosman

Enclosures

cc: Michael J. Bogle, Esq.
Keating L. Simons, III, Esq.