

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Appellate Case No. 2015-001633
Common Pleas Case No. 2013-CP-38-01427

RECEIVED
APR 26 2016
SC Court of Appeals

Newtek Small Business Finance, Inc.,.....Respondent,

v.

Kiritkumar H. Mehta,.....Appellant.

RECORD ON APPEAL

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INDEX

Order Granting Summary Judgment to Plaintiff.....	1
Order Denying Defendant's Motion to Reconsider.....	5
Summons and Complaint.....	8
Answer.....	23
Motion for Summary Judgment.....	27
Affidavit Supporting Plaintiff's Motion for Summary Judgment.....	29
Note.....	31
Mortgage.....	37
Guaranty.....	42
Settlement Statement.....	47
Satisfaction of Mortgage.....	49
Motion to Amend and Add Parties.....	51
Summons & Amended Answer, Counterclaim & Third-Party Complaint.....	53
Affidavit of Kiritkumar H. Mehta.....	66
Deed - Quantum Mtg, Corp. to Yogi of Orangeburg, LLC.....	68
Motion to Reconsider.....	73
Memorandum in Support of Motion to Reconsider.....	74
Transcript of Dec. 4, 2014, Hearing.....	79
Transcript of May 27, 2015, Hearing.....	103
Emails from counsel to court.....	128
Return & Memo. of Law in Support of Plaintiff's Motion for Summary Judgment....	129
Purchase & Sale Agreement dated July 31, 2013 (w/o Newtek consent).....	136

Purchase & Sale Agreement dated Aug. 25, 2013.....	149
Satisfaction of Mortgage.....	162
Return to Defendant’s Motion to Reconsider.....	164
Supp. Memo. of Law in Return to Defendant’s Motion to Reconsider.....	172
Defendant’s First Set of Interrogatories to Plaintiff.....	183
Defendant’s First Set of Requests to Plaintiff to Produce.....	188
Defendant’s First Set of Requests to Plaintiff to Admit.....	193
Certificate of Appellant’s Counsel.....	196

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

C/A No.: 2013-CP-38-01427

ORDER GRANTING SUMMARY
JUDGMENT TO PLAINTIFF

Wynne B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2015 FEB 25 PM 2:23

Date of Hearing: December 4, 2014
Presiding Judge: Hon. James B. Jackson
Plaintiff's Counsel: Bryan D. Caskey
Defendant's Counsel: Andrew S. Radeker
Court Reporter: Phyllis Norton

This matter is before the Court by way of Plaintiff's motion for summary judgment, which was filed and served on or about March 10, 2014. On or about December 1, 2014, in opposition to summary judgment, Defendant served an affidavit of Kiritkumar H. Mehta. After reviewing the pleadings of record, the affidavit presented by Defendant, the memorandum of law presented by Plaintiff, and hearing argument of counsel, the Court grants Plaintiff's motion for summary judgment as follows.

FACTS

On February 21, 2007, Krishna of Orangeburg, Inc. made, executed, and delivered a promissory note in the original principal amount of \$725,000.00 to Newtek Small Business Finance, Inc. (hereinafter "Newtek"). These funds were used for the purchase of commercial real estate and a hotel in Orangeburg County. To secure the promissory note, Krishna of Orangeburg, Inc. made, executed, and delivered a purchase money mortgage to Newtek secured by the commercial real estate. As additional security, Defendant (hereinafter "Mehta"); in his individual capacity, made, executed,

and delivered an Unconditional Guarantee, to guarantee full and faithful performance of the terms of the promissory note.

On February 26, 2013, Newtek commenced a foreclosure action against Krishna of Orangeburg, Inc., in which Newtek sought to foreclose its interest in the real estate. Prior to the judgment of foreclosure, Krishna of Orangeburg, Inc. sold the real estate to a third party for the contract price of \$437,000.00. Newtek gave prior approval to this sale and specifically agreed to satisfy its mortgage encumbering the property.

Following the sale, Newtek received the sales proceeds, and credited them towards payment of the amount due under the promissory note. Subsequently, the foreclosure action was dismissed, and Newtek delivered a Satisfaction of Mortgage, which specifically included language regarding Newtek's reservation of rights to seek full payment under the promissory note.

Following Mehta's failure to honor his guarantee, on December 3, 2014, Newtek filed the above-captioned action to enforce the guarantee for the amount remaining under the promissory note.

On February 11, 2014, Mehta filed and served his answer.

On March 10, 2014, Newtek moved for summary judgment, seeking a judgment against Mehta for the outstanding balance owed under the guaranty. On December 1, 2014, in opposition to summary judgment Defendant served an affidavit from Mehta.

The essence of Mehta's affidavit that during the negotiation of the terms and provisions of the short sale, Newtek, through a representative, orally promised Mehta that "there would be no more debt owed". Mehta's asserts that this alleged oral promise now presents a material issue of fact which would preclude summary judgment. The Court disagrees and finds it appropriate to grant summary judgment to Plaintiff as a matter of law.

LAW/ANALYSIS

A trial court may grant a party's motion for summary judgment if 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. *Epstein v. Costal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.* Therefore, for purposes of considering Plaintiff's motion for summary judgment, this Court accepts all statements in Mehta's affidavit to be true. However, even assuming all statements in Mehta's affidavit to be true, the Court finds that the affidavit does not create a material issue of fact precluding summary judgment.

Specifically, the Court finds that the parol evidence rule prohibits the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. See *Estate of Holden v. Holden*, 343 S.C. 267, 539 S.E.2d 703 (2000); *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001).

In the instant case, Mehta's affidavit specifically seeks to contradict the written contract for sale and the associated satisfaction of mortgage regarding the issue of whether Newtek would accept the sales proceeds in full satisfaction of all funds owed.

In this instance, the parties negotiated specific terms of their contract and reduced those terms to writing. The Court finds that one of the specific terms negotiated was whether the remaining balance would be owed following the sale of the property. The written words of the final contract and the accompanying documents show that there was no agreement for Newtek to accept the sale proceeds in full satisfaction of the debt in question, and therefore cannot be contradicted by any alleged prior or simultaneous oral representations. Therefore, the Court finds that summary judgment

must be granted to Plaintiff as a matter of law, and Plaintiff is hereby awarded a deficiency judgment against Defendant.

However, the Court finds that a damages hearing shall be held so as to ascertain the amount of the judgment owed to Plaintiff. Specifically, the Court is concerned about the apparent fact that the real property was subsequently re-sold for a higher amount by the third-party purchaser after the sale in question. The Court finds that Defendant's motion to amend his pleadings is summarily denied.

ORDER OF THE COURT

Based upon the foregoing, the Court finds that Plaintiff is hereby granted summary judgment as to a deficiency judgment against Defendant as a matter of law, for an amount to be determined at a damages hearing, and Defendant's motion to amend his pleadings is denied.

AND IT IS SO ORDERED.

Oranburg, SC
February 18, 2015

o/ OJJC
James B. Jackson
Presiding Judge, First Judicial Circuit
In the Court of Common Pleas

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

C/A No.: 2013-CP-38-01427

ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER

Date of Hearing: May 27, 2015
Presiding Judge: James B. Jackson
Plaintiff's Counsel: Bryan D. Caskey
Defendant's Counsel: Andrew S. Radeker

This matter is before the Court by way of the Defendant's Motion to Reconsider which was timely filed and served on or about March 16, 2015 in response to this Court's Order Granting Summary Judgment to Plaintiff, which was previously entered on February 25, 2015. On or about April 10, 2015 the Defendant filed and served a Return to Defendant's Motion to Reconsider.

After reviewing the pleadings of record, considering the written memoranda of law presented from counsel, hearing oral argument of counsel, and accounting for all relevant factors, the Court denies the Defendant's Motion to Reconsider for the following reasons:

LAW/ANALYSIS

The essence of the Defendant's opposition to summary judgment is provided via an affidavit which alleges that during the negotiation of the terms and provisions of the short sale, the Plaintiff, through a representative, orally promised the Defendant that "there would be no more debt owed". The Defendant asserts that this alleged oral promise now presents a material issue of fact which would preclude summary judgment. The Court disagrees and finds it appropriate to grant summary judgment to Plaintiff as a matter of law.

A trial court may grant a party's motion for summary judgment if 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. *Epstein v. Coastal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.* Therefore, for purposes of considering Plaintiff's motion for summary judgment, this Court accepts all statements in the Defendant's affidavit to be true. However, even assuming all statements in the affidavit to be true, the Court finds that the affidavit does not create a material issue of fact precluding summary judgment.

First, the Court notes that the debt was created by a promissory note made by the Defendant's company, which was secured by both a mortgage and by a guarantee signed by the Defendant, personally. The short sale of the real estate secured by the mortgage was conducted to reduce the amount of the debt owed to the Plaintiff. The Court finds that even if there has been a verbal agreement as alleged, it would not be sufficient to satisfy the deficiency.

The amount due by the Defendant is the result of a personal guarantee of a promissory note. The documents which governed the short sale make no mention of any intent to satisfy the full amount of the debt. It was therefore clear to all parties that the short sale would produce insufficient funds to satisfy the debt owed to the Plaintiff. Accordingly, because of the written promissory note, written guarantee, and written short sale documents, the parol evidence rule prohibits any evidence of a conflicting verbal promise to waive the remaining deficiency.

In addition, the Court finds that an earlier, but unexecuted draft of the short sale documents included a provision to explicitly have the Plaintiff waive the deficiency amount, but that provision was deleted from the final short sale documents that were signed by the Plaintiff. The Court finds this to be clear evidence that it was never the intent of the Plaintiff to satisfy the deficiency upon receipt

of the short sale proceeds, as this specific term was proposed to, and then subsequently rejected by, the Plaintiff.

The Court further notes that it is common practice to require that all deficiencies waived be done so in writing. Based upon the foregoing, the Court will not reconsider its original order granting summary judgment to Plaintiff, as the Court believes summary judgment is appropriate.

AND IT IS SO ORDERED.

5/ CBJ
James B. Jackson
Presiding Judge, First Judicial Circuit
In the Court of Common Pleas

Orangeburg, South Carolina
July 13, 2015

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP-38-1157

RECEIVED FOR RECORD
CLERK OF COURT
2013 DEC -4 PM 12:43

(Please Print)

Submitted By: Bryan D. Caskey

Address: 3100 Devine Street, Columbia, SC 29205

SC Bar #: 75754

Telephone #: (803) 400-1921

Fax #: (803) 400-1951

Other:

E-mail: bryan@fosterlawoffice.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts
☐ Constructions (100)
☒ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20____-CP-_____
☐ Notice/ File Med Mal (230)
☐ Other (299)

- Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

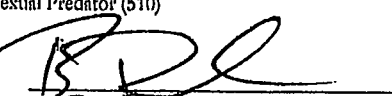
- Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799)

- Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

- Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510)

Submitting Party Signature: 

Date: December 3, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2013-CP-38-0192

SUMMONS

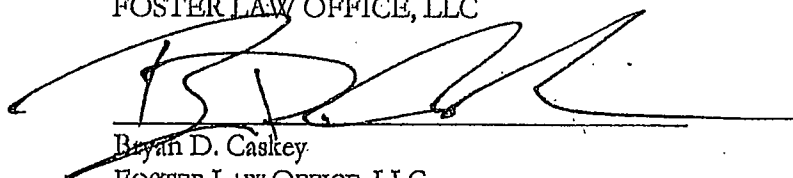
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ORANGEBURG, SC

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TO: THE DEFENDANT, NAMED ABOVE:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is attached hereto and herewith served on you, and to serve a copy of your answer to the same upon the undersigned at 3100 Devine Street, Columbia, SC 29205 within thirty (30) days after the service of same, exclusive of the day of such service. If you fail to do so, the Plaintiff will apply to the Court for the relief demanded therein and judgment will be taken against you by default. Any answer that you serve on the parties to this action must be filed with the Clerk of Court within a reasonable period of time after service.

FOSTER LAW OFFICE, LLC



Bryan D. Caskey

FOSTER LAW OFFICE, LLC

3100 Devine Street

Columbia, South Carolina 29205

(803) 400-1921

(803) 400-1951 Facsimile

bryan@fosterlawoffice.net

COUNSEL FOR PLAINTIFF

December 3, 2013

Columbia, South Carolina

ATTEST: TRUE COPY
Wingja B. Clark
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2013-CF-38-01477

COMPLAINT

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ORANGEBURG, SC
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The Plaintiff, complaining of the above-named Defendant, would respectfully show unto this Honorable Court as follows:

JURISDICTION AND VENUE

1. The Plaintiff, Newtek Small Business Finance, Inc., (hereinafter "Newtek") is a small business lender, making loans throughout South Carolina, including, but not limited to Orangeburg County, South Carolina.
2. Upon information and belief, the Defendant, Kiritkumar H. Mehta, (hereinafter the "Guarantor") is a citizen and resident of Orangeburg County, South Carolina.
3. This Court has exclusive subject matter jurisdiction over the issues raised herein, personal jurisdiction over the parties hereto, and venue is proper in Orangeburg County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(COLLECTION - SUIT ON GUARANTEE)

4. The preceding paragraphs are incorporated by reference as if stated herein verbatim.
5. For value received, Krishna of Orangeburg, Inc. (hereinafter the "Borrower") made, executed, and delivered a certain promissory note (the "Note") dated February 21, 2007, promising thereunder to pay Newtek the principal sum of \$725,000.00 with interest at the

R

rate set forth therein. A true and correct copy of the Note is attached hereto as Exhibit 1 and its terms are incorporated herein by reference.

6. As further consideration for the Note and the debt evidenced thereby, on February 21, 2007, Guarantor made, executed, and delivered unto Newtek a certain Unconditional Guarantee (hereinafter the "Guarantee") whereby the Guarantor guaranteed the full and faithful performance of the terms and obligations of Borrower under the terms of the Note. A true and correct copy of the Guarantee is attached hereto as Exhibit 2, and its terms are incorporated herein by reference.
7. The Borrower is in default under the terms of the Note by reason of its failure to make payments under the Note when due.
8. Neither the Borrower nor the Guarantor has made payments of the amounts due under the Note or the Guarantee. Therefore, the Guarantee is in default.
9. Plaintiff has notified the Guarantor of the Borrower's default and demanded payment, but the Guarantor has failed and refused, and continues to fail and refuse, to cure their contractual default.
10. The Guarantors has waived notice of presentment and demand for payment or performance, and has waived notice of dishonor.
11. There is due and owing on each of the Guaranties, as of November 11, 2013, the amount of \$306,072.36 (the "Balance Due").
12. Interest continues to accrue on the Balance Due after November 11, 2013, at the rate of set forth in the Note. In addition to interest, other charges, advances, and fees may continue to accrue, including reasonable attorneys' fees and costs, as provided for in the Note.
13. Newtek has placed this matter with the undersigned attorneys for collection.

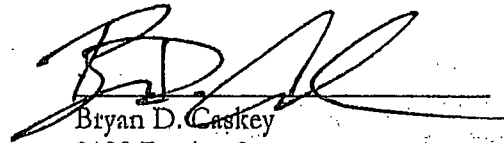
2013-CP38-0427

PRAYER FOR RELIEF

WHEREFORE, Newtek prays that the indebtedness due on the Note and Guarantee, in the liquidated amount of \$306,072.36 be computed, ascertained, and established by this Court, together with all accrued interest, all costs of this action, other costs of collection incurred by Newtek, and reasonable attorneys' fees and costs, and that Newtek be granted judgment against Guarantor in that amount.

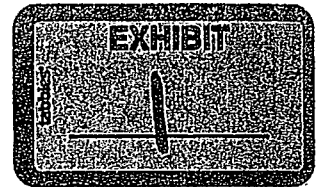
Respectfully Submitted,

FOSTER LAW OFFICE, LLC



Bryan D. Caskey
3100 Devine Street
Columbia, SC 29205
(803) 400-1921
(830) 400-1951 Facsimile
bryan@fosterlawoffice.net
COUNSEL FOR PLAINTIFF

December 3, 2013
Columbia, South Carolina



Loan # 19628



U.S. Small Business Administration

NOTE

SBA Loan #	232-456-8008
SBA Loan Name	Sun Moon Inn
Date	February 21, 2007
Loan Amount	\$725,000.00
Interest Rate	Wall Street Journal Prime + 2.75% Variable Rate
Borrower	Krishna of Orangeburg, Inc.
Operating Company	None
Lender	Newtek Small Business Finance, Inc.

1. PROMISE TO PAY:

In return for the Loan, Borrower promises to pay to the order of Lender the amount of Seven Hundred Twenty-Five Thousand Dollars and No Cents (\$725,000.00), plus interest on the unpaid principal balance, and all other amounts required by this Note.

2. DEFINITIONS:

"Collateral" means any property taken as security for payment of this Note or any guarantee of this Note.

"Guarantor" means each person or entity that signs a guarantee of payment of this Note.

"Loan" means the loan evidenced by this Note.

"Loan Documents" means the documents related to this loan signed by Borrower, any Guarantor, or anyone who pledges collateral.

"SBA" means the Small Business Administration, an Agency of the United States of America.

ATTEST: TRUE COPY
Wingy B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

3. PAYMENT TERMS:

Borrower must make all payments at the place Lender designates. The payment terms for this Note are:

NOTE TERMS:**Repayment Terms:**

The interest rate on the Note will fluctuate. The initial interest rate is eleven percent (11%) per year. This initial rate is the prime rate on the date SBA received the loan application, plus 2.75 %. The initial interest rate must remain in effect until the first change period begins.

Borrower must pay (three (3) payment of interest only on the disbursed principal balance one (1) month from the month this Note is dated, payment must be made on the first calendar day in the month it is due.

The borrower must pay principal and interest payments of \$7,604.06 every month, beginning four (4) months from the month this Note is dated, payments must be made on the first calendar day in the month they are due.

Lender will apply each installment payment first to pay interest accrued to the day Lender received the payment, then to bring principal current, then to pay any late fees, and will apply any remaining balance to reduce principal.

The interest rate will be adjusted every calendar quarter, (the "change period").

"The Prime Rate" is the prime rate in effect on the first business day of the month in which an interest rate change occurs, as published in the Wall Street Journal on the next business day.

The adjusted interest rate will be 2.75 % above the Prime Rate. Lender will adjust the interest rate on the first calendar day of each change period. The change in interest rate is effective on that day whether or not Lender gives Borrower notice of the change.

Lender must adjust the payment amount at least annually as needed to amortize principal over the remaining term of the note.

If SBA purchases the guaranteed portion of the unpaid principal balance, the interest rate becomes fixed at the rate in effect at the time of the earliest uncured payment default. If there is no uncured payment default, the rate becomes fixed at the rate in effect at the time of purchase.

Loan Prepayment:

Notwithstanding any provision in this Note to the contrary:

Borrower may prepay this Note. Borrower may prepay 20 percent or less of the unpaid principal balance at any time without notice. If Borrower prepays more than 20 percent and the Loan has been sold on the secondary market, Borrower must:

- Give Lender written notice;
- Pay all accrued interest; and
- If the prepayment is received less than 21 days from the date Lender receives the notice, pay an amount equal to 21 days interest from the date Lender receives the notice, less any interest accrued during the 21 days and paid under subparagraph b, above.

If Borrower does not prepay within 30 days from the date Lender receives the notice, Borrower must give Lender a new notice.

All remaining principal and accrued interest is due and payable 25 years from date of Note.

Late Charge: If a payment on this Note is more than 10 days late, Lender may charge Borrower a late fee of up to 5% of the unpaid portion of the regularly scheduled payment.

Lender may require Borrower to pay an additional amount into an escrow account for payment of real estate taxes and required insurance related to commercial real estate securing the loan.

Additional payment charges apply. When in any one of the first three years from the date of initial disbursement Borrower voluntarily prepays more than 25% of the outstanding principal balance of the loan Borrower must pay to Lender on behalf of SBA a prepayment fee for that year as follows:

- a. During the first year after the date of initial disbursement, 5% of the total prepayment amount;
- b. During the second year after the date of initial disbursement, 3% of the total prepayment amount; and
- c. During the third year after the date of initial disbursement, 1% of the total prepayment amount.

4. DEFAULT:

Borrower is in default under this Note if Borrower does not make a payment when due under this Note, or if Borrower or Operating Company:

- A. Falls to do anything required by this Note and other Loan Documents;
- B. Defaults on any other loan with Lender;
- C. Does not preserve, or account to Lender's satisfaction for, any of the Collateral or its proceeds;
- D. Does not disclose, or anyone acting on their behalf does not disclose, any material fact to Lender or SBA;
- E. Makes, or anyone acting on their behalf makes, a materially false or misleading representation to Lender or SBA;
- F. Defaults on any loan or agreement with another creditor, if Lender believes the default may materially affect Borrower's ability to pay this Note;
- G. Fails to pay any taxes when due;
- H. Becomes the subject of a proceeding under any bankruptcy or insolvency law;
- I. Has a receiver or liquidator appointed for any part of their business or property;
- J. Makes an assignment for the benefit of creditors;
- K. Has any adverse change in financial condition or business operation that Lender believes may materially affect Borrower's ability to pay this Note;
- L. Reorganizes, merges, consolidates, or otherwise changes ownership or business structure without Lender's prior written consent; or
- M. Becomes the subject of a civil or criminal action that Lender believes may materially affect Borrower's ability to pay this Note.

5. LENDER'S RIGHTS IF THERE IS A DEFAULT:

Without notice or demand and without giving up any of its rights, Lender may:

- A. Require immediate payment of all amounts owing under this Note;
- B. Collect all amounts owing from any Borrower or Guarantor;
- C. File suit and obtain judgment;
- D. Take possession of any Collateral; or
- E. Sell, lease, or otherwise dispose of, any Collateral at public or private sale, with or without advertisement.

6. LENDER'S GENERAL POWERS:

- Without notice and without Borrower's consent, Lender may:
- A. Bid on or buy the Collateral at its sale or the sale of another lienholder, at any price it chooses;
 - B. Incur expenses to collect amounts due under this Note, enforce the terms of this Note or any other Loan Document, and preserve or dispose of the Collateral. Among other things, the expenses may include payments for property taxes, prior liens, insurance, appraisals, environmental remediation costs, and reasonable attorney's fees and costs. If Lender incurs such expenses, it may demand immediate repayment from Borrower or add the expenses to the principal balance;
 - C. Release anyone obligated to pay this Note;
 - D. Compromise, release, renew, extend or substitute any of the Collateral; and
 - E. Take any action necessary to protect the Collateral or collect amounts owing on this Note.

7. WHEN FEDERAL LAW APPLIES:

When SBA is the holder, this Note will be interpreted and enforced under federal law, including SBA regulations. Lender or SBA may use state or local procedures for filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using such procedures, SBA does not waive any federal immunity from state or local control, penalty, tax, or liability. As to this Note, Borrower may not claim or assert against SBA any local or state law to deny any obligation, defeat any claim of SBA, or preempt federal law.

8. SUCCESSORS AND ASSIGNS:

Under this Note, Borrower and Operating Company include the successors of each, and Lender includes its successors and assigns.

9. GENERAL PROVISIONS:

- A. All individuals and entities signing this Note are jointly and severally liable.
- B. Borrower waives all suretyship defenses.
- C. Borrower must sign all documents necessary at any time to comply with the Loan Documents and to enable Lender to acquire, perfect, or maintain Lender's liens on Collateral.
- D. Lender may exercise any of its rights separately or together, as many times and in any order it chooses. Lender may delay or forgo enforcing any of its rights without giving up any of them.
- E. Borrower may not use an oral statement of Lender or SBA to contradict or alter the written terms of this Note.
- F. If any part of this Note is unenforceable, all other parts remain in effect.
- G. To the extent allowed by law, Borrower waives all demands and notices in connection with this Note, including presentment, demand, protest, and notice of dishonor. Borrower also waives any defenses based upon any claim that Lender did not obtain any guarantee; did not obtain, perfect, or maintain a lien upon Collateral; impaired Collateral; or did not obtain the fair market value of Collateral at a sale.

Loan # 19628

10. STATE-SPECIFIC PROVISIONS:

None

Loan # 19628

11. BORROWER'S NAME(S) AND SIGNATURE(S):

By signing below, each individual or entity becomes obligated under this Note as Borrower.

ATTEST/WITNESS:

Robert M. [Signature]

KRISHNA OF ORANGEBURG, INC.

[Signature]
By: Krishakumar H. Mehta
Its President.

4. LENDER'S GENERAL POWERS:

Lender may take any of the following actions at any time, without notice, without Guarantor's consent, and without making demand upon Guarantor:

- A. Modify the terms of the Note or any other Loan Document except to increase the amounts due under the Note;
- B. Refrain from taking any action on the Note, the Collateral, or any guarantee;
- C. Release any Borrower or any guarantor of the Note;
- D. Compromise or settle with the Borrower or any guarantor of the Note;
- E. Substitute or release any of the Collateral, whether or not Lender receives anything in return;
- F. Foreclose upon or otherwise obtain, and dispose of, any Collateral at public or private sale, with or without advertisement;
- G. Bid or buy at any sale of Collateral by Lender or any other lienholder, at any price Lender chooses; and
- H. Exercise any rights it has, including those in the Note and other Loan Documents.

These actions will not release or reduce the obligations of Guarantor or create any rights or claims against Lender.

5. FEDERAL LAW:

When SBA is the holder, the Note and this Guarantee will be construed and enforced under federal law, including SBA regulations. Lender or SBA may use state or local procedures for filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using such procedures, SBA does not waive any federal immunity from state or local control, penalty, tax, or liability. As to this Guarantee, Guarantor may not claim or assert any local or state law against SBA to deny any obligation, defeat any claim of SBA, or preempt federal law.

6. RIGHTS, NOTICES, AND DEFENSES THAT GUARANTOR WAIVES:

To the extent permitted by law,

- A. Guarantor waives all rights to:
 - 1) Require presentment, protest, or demand upon Borrower;
 - 2) Redeem any Collateral before or after Lender disposes of it;
 - 3) Have any disposition of Collateral advertised; and
 - 4) Require a valuation of Collateral before or after Lender disposes of it.
- B. Guarantor waives any notice of:
 - 1) Any default under the Note;
 - 2) Presentment, dishonor, protest, or demand;
 - 3) Execution of the Note;
 - 4) Any action or inaction on the Note or Collateral, such as disbursements, payment, nonpayment, acceleration, intent to accelerate, assignment, collection activity, and incurring enforcement expenses;
 - 5) Any change in the financial condition or business operations of Borrower or any guarantor;
 - 6) Any changes in the terms of the Note or other Loan Documents, except increases in the amounts due under the Note; and
 - 7) The time or place of any sale or other disposition of Collateral;
- C. Guarantor waives defenses based upon any claim that:
 - 1) Lender failed to obtain any guarantee;
 - 2) Lender failed to obtain, perfect, or maintain a security interest in any property offered or taken as Collateral;
 - 3) Lender or others improperly valued or inspected the Collateral;
 - 4) The Collateral changed in value, or was neglected, lost, destroyed, or underinsured;

- 5) Lender impaired the Collateral;
- 6) Lender did not dispose of any of the Collateral;
- 7) Lender did not conduct a commercially reasonable sale;
- 8) Lender did not obtain the fair market value of the Collateral;
- 9) Lender did not make or perfect a claim upon the death or disability of Borrower or any guarantor of the Note;
- 10) The financial condition of Borrower or any guarantor was overstated or has adversely changed;
- 11) Lender made errors or omissions in Loan Documents or administration of the Loan;
- 12) Lender did not seek payment from the Borrower, any other guarantors, or any Collateral before demanding payment from Guarantor;
- 13) Lender impaired Guarantor's suretyship rights;
- 14) Lender modified the Note terms, other than to increase amounts due under the Note. If Lender modifies the Note to increase the amounts due under the Note without Guarantor's consent, Guarantor will not be liable for the increased amounts and related interest and expenses, but remains liable for all other amounts;
- 15) Borrower has avoided liability on the Note; or
- 16) Lender has taken an action allowed under the Note, this Guarantee, or other Loan Documents.

7. DUTIES AS TO COLLATERAL:

Guarantor will preserve the Collateral pledged by Guarantor to secure this Guarantee. Lender has no duty to preserve or dispose of any Collateral.

8. SUCCESSORS AND ASSIGNS:

Under this Guarantee, Guarantor includes heirs and successors, and Lender includes its successors and assigns.

9. GENERAL PROVISIONS:

- A. **ENFORCEMENT EXPENSES.** Guarantor promises to pay all expenses Lender incurs to enforce this Guarantee, including, but not limited to, attorney's fees and costs.
- B. **SBA NOT A CO-GUARANTOR.** Guarantor's liability will continue even if SBA pays Lender. SBA is not a co-guarantor with Guarantor. Guarantor has no right of contribution from SBA.
- C. **SUBROGATION RIGHTS.** Guarantor has no subrogation rights as to the Note or the Collateral until the Note is paid in full.
- D. **JOINT AND SEVERAL LIABILITY.** All individuals and entities signing as Guarantor are jointly and severally liable.
- E. **DOCUMENT SIGNING.** Guarantor must sign all documents necessary at any time to comply with the Loan Documents and to enable Lender to acquire, perfect, or maintain Lender's liens on Collateral.
- F. **FINANCIAL STATEMENTS.** Guarantor must give Lender financial statements as Lender requires.
- G. **LENDER'S RIGHTS CUMULATIVE, NOT WAIVED.** Lender may exercise any of its rights separately or together, as many times as it chooses. Lender may delay or forgo enforcing any of its rights without losing or impairing any of them.
- H. **ORAL STATEMENTS NOT BINDING.** Guarantor may not use an oral statement to contradict or alter the written terms of the Note or this Guarantee, or to raise a defense to this Guarantee.
- I. **SEVERABILITY.** If any part of this Guarantee is found to be unenforceable, all other parts will remain in effect.
- J. **CONSIDERATION.** The consideration for this Guarantee is the Loan or any accommodation by Lender as to the Loan.

10. STATE-SPECIFIC PROVISIONS:

None

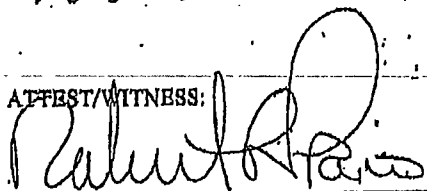
11. GUARANTOR ACKNOWLEDGMENT OF TERMS.

Guarantor acknowledges that Guarantor has read and understands the significance of all terms of the Note and this Guarantee, including all waivers.

12. GUARANTOR NAME(S) AND SIGNATURE(S):

By signing below, each individual or entity becomes obligated as Guarantor under this Guarantee.

ATTEST/WITNESS:

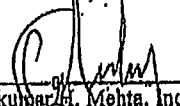


ATTORNEY

02/21/2007

GUARANTOR: Kiritkumar H. Mehta

By:


Kiritkumar H. Mehta, Individually

COPY

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendants.

ANSWER
(JURY TRIAL DEMANDED)

FILED FOR RECORD
WINNIE A. CLARK
CLERK OF COURT
ORANGEBURG, SC

2014 FEB 11 PM 3:10

The Defendant, in answer to the Plaintiff's Complaint, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, the Defendant admits the same upon information and belief.

3. Answering the allegations of paragraph 2 of the Complaint, the Defendant admits the same.

4. The allegations of paragraph 3 of the Complaint state a legal conclusion, to which no response is required.

5. Paragraph 4 of the Complaint does not require an answer.

6. Answering the allegations of paragraphs 5 and 6 of the Complaint, Defendant only admits the documents exist and asserts that the documents say what they say.

Winnie A. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

7. Answering the allegations of paragraph 7, 8 and 9 of the Complaint, the Defendant denies the paragraphs as written.

8. Answering the allegations of 10 of the Complaint, the Defendant admits only that the loan documents say what they say.

9. Answering the allegations of paragraphs 11 and 12 they are denied.

10. Paragraph 13 is admitted upon information and belief.

FOR A SECOND DEFENSE

11. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

12. The Plaintiff entered into a settlement with the borrower on the note subject of this transaction in which the Plaintiff satisfied the mortgage that had secured the note debt in exchange for payment to the Plaintiff of an amount of money that was less than what the Plaintiff claimed to have been owed on the note debt.

13. The property subject of the mortgage was worth more than the note debt amount.

14. The Plaintiff voluntarily relinquished its ability to be compensated fully from the property that was its collateral for the subject note debt.

15. Through its own actions and inactions, the Plaintiff has failed to take reasonable steps to mitigate its damages subject of this case.

16. The Plaintiff's recovery should be barred or lessened by its failure to mitigate its damages.

FOR A THIRD DEFENSE

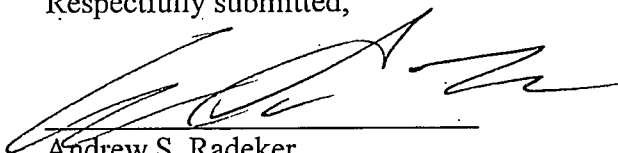
17. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

18. The settlement described above may have released or otherwise extinguished the debt upon which the Plaintiff now sues.

WHEREFORE, the Defendant prays for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action; and
- ~~(c) Grant the Defendant such other and further relief as the court deems just and proper.~~

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700-(facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina
February 6, 2014
11

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

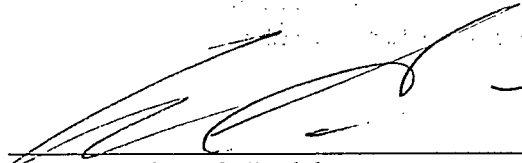
CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendant do hereby certify that I, on the 11th day of February, 2014, served the Defendant's Answer in the above-captioned action upon counsel for the Plaintiff by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Brian D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2014 FEB 14 PM 3:11



Andrew S. Radeker

ATTEST: TRUE COPY

Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT
)

) C/A No.: 13-CP-38-01427
)

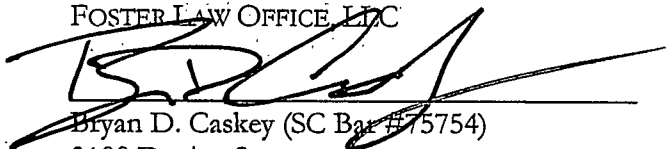
) **MOTION FOR SUMMARY JUDGMENT**
)

2014 MAR 10 PM 1:48
RECORDED
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CLERK
OF COURT
ORANGEBURG, SC

TO: COUNSEL FOR THE DEFENDANT:

Pursuant to Rule 56, SCRPC, Plaintiff moves for summary judgment on its complaint and Defendant's answer to the complaint. There are no material issues of fact in dispute, and Plaintiff is entitled to judgment as a matter of law. This motion is supported by the pleadings, the Affidavit Supporting Plaintiff's Motion for Summary Judgment and the exhibits attached thereto, all of which is incorporated and attached hereto, and such memorandum of law as may be served and filed hereafter.

FOSTER LAW OFFICE, LLC


Bryan D. Caskey (SC Bar #75754)

3100 Devine Street

Columbia, SC 29205

(803) 400-1921

Email: bryan@fosterlawoffice.net

COUNSEL FOR THE PLAINTIFF

Columbia, South Carolina

March 7, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

C/A No.: 13-CP-38-01427

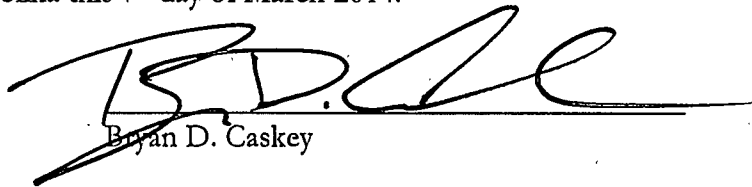
CERTIFICATE OF SERVICE

FILED FOR RECORD
WINNIE B. LARK
CLERK OF COURT
ORANGE COUNTY
2014 MAR 10 PM 1:48

This is to certify that I, Bryan D. Caskey, have this day caused to be served upon the person(s) named below the **Motion for Summary Judgment and Affidavit Supporting Plaintiff's Motion for Summary Judgment (with attached exhibits 1 – 5)** in the foregoing matter by placing a copy of the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Andrew S. Radeker
James C. Harrison, Jr.
Harrison & Radeker, PA
Post Office Box 50143
Columbia, SC 29250

Dated at Columbia, South Carolina this 7th day of March 2014.


Bryan D. Caskey

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

C/A No.: 13-CP-38-01427

**AFFIDAVIT SUPPORTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

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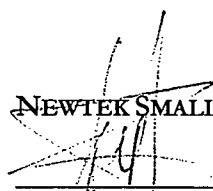
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PERSONALLY appeared before me, the undersigned, who being duly sworn, deposes and says:

1. I am Jose Morales, a Vice President in the Asset Management department of the Plaintiff, Newtek Small Business Finance, Inc ("Lender"). As such, I am authorized to make this affidavit on Lender's behalf. This affidavit is based on my personal knowledge of the subject loan and supporting loan documents forming the basis of this action.
2. On February 21, 2007, Krishna of Orangeburg, LLC ("Borrower") executed a Promissory Note in favor of Lender for Seven Hundred Twenty Five Thousand & 00/100 Dollars (\$725,00.00), plus interest as set forth therein ("Promissory Note"). A true and accurate copy of the Promissory Note is attached hereto as Exhibit 1.
3. In connection with, and to further secure repayment of the Promissory Note, Borrower executed and delivered to Lender a Mortgage ("Mortgage") on certain real property dated February 21, 2007, recorded on February 21, 2007 in the Office of the Register of Deeds for Orangeburg County in Book 1810 at Page 0196. A true and accurate copy of the Mortgage is attached hereto as Exhibit 2.
4. On February 21, 2007, in connection with and to further secure repayment of the Promissory Note, the Defendant, Kiritkumar H. Mehta, ("Guarantor") executed and delivered an Unconditional Guarantee ("Guarantee") to Lender. A true and accurate copy of the Guarantee is attached hereto as Exhibit 3.
5. On February 26, 2013, due to Borrower's failure to make payments when due, Lender commenced a foreclosure action against Borrower, seeking to foreclose on the Mortgage associated with the Promissory Note. This foreclosure action was filed in Orangeburg County Circuit Court and assigned civil action number 2013-CP-38-00264.

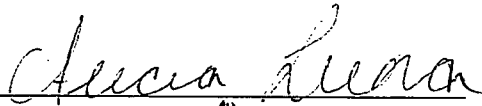
6. On September 24, 2013, in connection with the sale of the property secured by the Mortgage, Lender received Four Hundred Thirty Seven Thousand & 00/100 Dollars (\$437,000.00) in consideration for a satisfaction of the Mortgage, which was duly recorded with the Office of the Register of Deeds for Orangeburg County on October 9, 2013, in Book 2296 at Page 251. A true and accurate copy of the settlement statement is attached hereto as Exhibit 4.
7. However, Lender's Satisfaction of Mortgage explicitly reserved the right to collect any and all deficiency that may still be due and owing on the underlying Promissory Note and any related documents, specifically, but not limited to Guarantees, associated with the Promissory Note. A true and accurate copy of the Satisfaction for Mortgage is attached hereto as Exhibit 5.
8. Although additional interest, fees, and costs continue to accrue on the amount owed, as of March 3, 2014, Lender is currently owed a total of \$315,632.30 from Borrower and Guarantor as follows:
- a. Principal: \$263,385.15
 - b. Interest: \$36,511.56
 - c. Late Fees: \$12,083.56
 - d. Attorneys' Fees and Costs Advanced: \$3,652.00
9. Lender now seeks a judgment against Guarantor, in the total amount set forth above, in addition to the interest, fees, and costs accrued until the entry of judgment, and at the judgment rate thereafter.

FURTHER AFFIANT SAYETH NOT.


NEWTEK SMALL BUSINESS FINANCE, INC.,

By: Jose Morales
Its: Vice President

Sworn to and subscribed before me
this 4 day of March, 2014


Notary Public for NEW YORK
My Commission Expires: May 24, 2016

ALICIA LUNA
Notary Public, State of New York
No. 012161973
Qualified in Orangeburg County
Commission Expires May 24, 2016

Loan # 19628



U.S. Small Business Administration

NOTE

SBA Loan #	232-456-8008
SBA Loan Name	Sun Moon Inn
Date	February 22, 2007
Loan Amount	\$725,000.00
Interest Rate	Wall Street Journal Prime + 2.75% Variable Rate
Borrower	Krishna of Orangeburg, Inc.
Operating Company	None
Lender	Newtek Small Business Finance, Inc.

1. PROMISE TO PAY:

In return for the Loan, Borrower promises to pay to the order of Lender the amount of Seven Hundred Twenty-Five Thousand Dollars and No Cents (\$725,000.00), plus interest on the unpaid principal balance, and all other amounts required by this Note.

2. DEFINITIONS:

"Collateral" means any property taken as security for payment of this Note or any guarantee of this Note.

"Guarantor" means each person or entity that signs a guarantee of payment of this Note.

"Loan" means the loan evidenced by this Note.

"Loan Documents" means the documents related to this loan signed by Borrower, any Guarantor, or anyone who pledges collateral.

"SBA" means the Small Business Administration, an Agency of the United States of America.

ATTEST: TRUE COPY

Winnifred B. Clark
CLERK OF COURT

ORANGEBURG COUNTY, SC

Page 1 of 6

3. PAYMENT TERMS:

Borrower must make all payments at the place Lender designates. The payment terms for this Note are:

NOTE TERMS:**Repayment Terms:**

The interest rate on this Note will fluctuate. The initial interest rate is eleven percent (11%) per year. This initial rate is the prime rate on the date SBA received the loan application, plus 2.75 %. The initial interest rate must remain in effect until the first change period begins.

Borrower must pay (three (3) payment of interest only on the disbursed principal balance one (1) month from the month this Note is dated, payment must be made on the first calendar day in the month it is due.

The borrower must pay principal and interest payments of \$7,604.06 every month, beginning four (4) months from the month this Note is dated, payments must be made on the first calendar day in the month they are due.

Lender will apply each installment payment first to pay interest accrued to the day Lender received the payment, then to bring principal current, then to pay any late fees, and will apply any remaining balance to reduce principal.

The interest rate will be adjusted every calendar quarter, (the "change period").

"The Prime Rate" is the prime rate in effect on the first business day of the month in which an interest rate change occurs, as published in the Wall Street Journal on the next business day.

The adjusted interest rate will be 2.75 % above the Prime Rate. Lender will adjust the interest rate on the first calendar day of each change period. The change in interest rate is effective on that day whether or not Lender gives Borrower notice of the change.

Lender must adjust the payment amount at least annually as needed to amortize principal over the remaining term of the note.

If SBA purchases the guaranteed portion of the unpaid principal balance, the interest rate becomes fixed at the rate in effect at the time of the earliest uncured payment default. If there is no uncured payment default, the rate becomes fixed at the rate in effect at the time of purchase.

Loan Prepayment:

Notwithstanding any provision in this Note to the contrary:

Borrower may prepay this Note. Borrower may prepay 20 percent or less of the unpaid principal balance at any time without notice. If Borrower prepays more than 20 percent and the Loan has been sold on the secondary market, Borrower must:

- a. Give Lender written notice;
- b. Pay all accrued interest; and
- c. If the prepayment is received less than 21 days from the date Lender receives the notice, pay an amount equal to 21 days interest from the date Lender receives the notice, less any interest accrued during the 21 days and paid under subparagraph b, above

If Borrower does not prepay within 30 days from the date Lender receives the notice, Borrower must give Lender a new notice.

All remaining principal and accrued interest is due and payable 25 years from date of Note.

Late Charge: If a payment on this Note is more than 10 days late, Lender may charge Borrower a late fee of up to 5% of the unpaid portion of the regularly scheduled payment.

Lender may require Borrower to pay an additional amount into an escrow account for payment of real estate taxes and required insurance related to commercial real estate securing the loan.

Additional payment charges apply. When in any one of the first three years from the date of initial disbursement Borrower voluntarily prepays more than 25% of the outstanding principal balance of the loan Borrower must pay to Lender on behalf of SBA a prepayment fee for that year as follows:

- a. During the first year after the date of initial disbursement, 5% of the total prepayment amount;
- b. During the second year after the date of initial disbursement, 3% of the total prepayment amount; and
- c. During the third year after the date of initial disbursement, 1% of the total prepayment amount.

4. DEFAULT:

Borrower is in default under this Note if Borrower does not make a payment when due under this Note, or if Borrower or Operating Company:

- A. Falls to do anything required by this Note and other Loan Documents;
- B. Defaults on any other loan with Lender;
- C. Does not preserve, or account to Lender's satisfaction for, any of the Collateral or its proceeds;
- D. Does not disclose, or anyone acting on their behalf does not disclose, any material fact to Lender or SBA;
- E. Makes, or anyone acting on their behalf makes, a materially false or misleading representation to Lender or SBA;
- F. Defaults on any loan or agreement with another creditor, if Lender believes the default may materially affect Borrower's ability to pay this Note;
- G. Fails to pay any taxes when due;
- H. Becomes the subject of a proceeding under any bankruptcy or insolvency law;
- I. Has a receiver or liquidator appointed for any part of their business or property;
- J. Makes an assignment for the benefit of creditors;
- K. Has any adverse change in financial condition or business operation that Lender believes may materially affect Borrower's ability to pay this Note;
- L. Reorganizes, merges, consolidates, or otherwise changes ownership or business structure without Lender's prior written consent; or
- M. Becomes the subject of a civil or criminal action that Lender believes may materially affect Borrower's ability to pay this Note.

5. LENDER'S RIGHTS IF THERE IS A DEFAULT:

Without notice or demand and without giving up any of its rights, Lender may:

- A. Require immediate payment of all amounts owing under this Note;
- B. Collect all amounts owing from any Borrower or Guarantor;
- C. File suit and obtain judgment;
- D. Take possession of any Collateral; or
- E. Sell, lease, or otherwise dispose of, any Collateral at public or private sale, with or without advertisement.

6. LENDER'S GENERAL POWERS:

Without notice and without Borrower's consent, Lender may:

- A. Bid on or buy the Collateral at its sale or the sale of another lienholder, at any price it chooses;
- B. Incur expenses to collect amounts due under this Note, enforce the terms of this Note or any other Loan Document, and preserve or dispose of the Collateral. Among other things, the expenses may include payments for property taxes, prior liens, insurance, appraisals, environmental remediation costs, and reasonable attorney's fees and costs. If Lender incurs such expenses, it may demand immediate repayment from Borrower or add the expenses to the principal balance;
- C. Release anyone obligated to pay this Note;
- D. Compromise, release, renew, extend or substitute any of the Collateral; and
- E. Take any action necessary to protect the Collateral or collect amounts owing on this Note.

7. WHEN FEDERAL LAW APPLIES:

When SBA is the holder, this Note will be interpreted and enforced under federal law, including SBA regulations. Lender or SBA may use state or local procedures for filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using such procedures, SBA does not waive any federal immunity from state or local control, penalty, tax, or liability. As to this Note, Borrower may not claim or assert against SBA any local or state law to deny any obligation, defeat any claim of SBA, or preempt federal law.

8. SUCCESSORS AND ASSIGNS:

Under this Note, Borrower and Operating Company include the successors of each, and Lender includes its successors and assigns.

9. GENERAL PROVISIONS:

- A. All individuals and entities signing this Note are jointly and severally liable.
- B. Borrower waives all suretyship defenses.
- C. Borrower must sign all documents necessary at any time to comply with the Loan Documents and to enable Lender to acquire, perfect, or maintain Lender's liens on Collateral.
- D. Lender may exercise any of its rights separately or together, as many times and in any order it chooses. Lender may delay or forgo enforcing any of its rights without giving up any of them.
- E. Borrower may not use an oral statement of Lender or SBA to contradict or alter the written terms of this Note.
- F. If any part of this Note is unenforceable, all other parts remain in effect.
- G. To the extent allowed by law, Borrower waives all demands and notices in connection with this Note, including presentment, demand, protest, and notice of dishonor. Borrower also waives any defenses based upon any claim that Lender did not obtain any guarantee; did not obtain, perfect, or maintain a lien upon Collateral; impaired Collateral; or did not obtain the fair market value of Collateral at a sale.

Loan # 19628

10. STATE-SPECIFIC PROVISIONS:

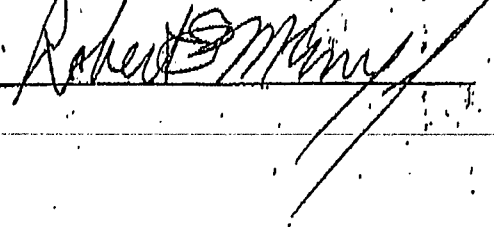
None

Loan # 19628

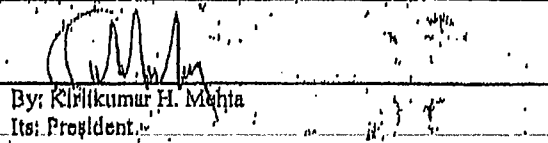
11. BORROWER'S NAME(S) AND SIGNATURE(S):

By signing below, each individual or entity becomes obligated under this Note as Borrower.

ATTEST/WITNESS:



KRISHNA OF ORANGEBURG, INC.


By: Krishakumar H. Mahia
Its: President

Empty rectangular box for additional signatures or notes.

M-BK:01810 PG:0196

FILED Feb 21, 2007 12:00:51 pm
 BOOK 01810
 PAGE 0198 THRU 0200
 INSTRUMENT # 2007001202

FILED
 ORANGEBURG
 COUNTY
 GAIL LANEY
 REGISTER
 OF DEEDS

Gail Laney
 Signature

----- (Space Above This Line For Recording Data) -----

STATE OF SOUTH CAROLINA)
 COUNTY OF Orangeburg) MORTGAGE

Loan # 19628

WHEREAS, Krishna of Orangeburg, Inc. (hereinafter called the "mortgagor"), in and by their certain Note of even date, stands firmly held and bound unto Newtek Small Business Finance, Inc. (hereinafter called the "mortgagee") for the payment of the full and just sum of Seven Hundred Twenty-Five Thousand Dollars and No Cents (\$725,000.00), payable AS IN SAID NOTE, with the entire balance, if not sooner paid, being due February 1, 2032, with interest, as in and by the said note, reference being had thereto, will more fully appear.

NOW, KNOW ALL MEN BY THESE PRESENTS: That the mortgagor, for and in consideration of the debt or sum of money aforesaid, and to better secure its payment to the mortgagee according to the condition of the note, and also in consideration of the further sum of Three (\$3.00) DOLLARS to the mortgagor in hand well and truly paid by the mortgagee at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the mortgagee, its/his successors, heirs and assigns, the real property described as follows:

(For Description See Exhibit A Attached)

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the premises belonging, or in anywise appertaining.

TO HAVE AND TO HOLD, all and singular the premises unto the mortgagee, its/his successors, heirs and assigns forever.

Price Bird Smith
1712 Saint Julian Place
Suite 102
Columbia SC 29204

ATTEST: TRUE COPY

Wingja B. Clark
 CLERK OF COURT

ORANGEBURG COUNTY, SC

AND the mortgagor does hereby bind himself and his heirs and successors to warrant and forever defend all and singular the premises unto the mortgagee, its/his successors, heirs and assigns, from and against himself and his heirs and successors lawfully claiming, or to claim the same, or any part hereof.

AND IT IS AGREED, by and between the parties that the mortgagor, his heirs and successors and assigns, shall keep any building erected on the premises insured against loss and damage by fire for the benefit of the mortgagee, for an amount not less than the sum shown above, with such company as shall be approved by the mortgagee, its/his successors, heirs and assigns, and shall deliver the policy to the mortgagee; and in default thereof, the mortgagee, its/his successors, heirs or assigns may effect such insurance and reimburse themselves under this mortgage for the expense thereof, together with interest thereon at the rate provided in the note from the date of its payment. And it is further agreed, in the event of other insurance and contribution between the insurers, that the mortgagee, its/his successors, heirs and assigns, shall be entitled to receive from the aggregate of the insurance monies to be paid a sum equal to the amount of the debt secured by this mortgage.

AND IT IS AGREED, by and between the parties, that if the mortgagor, his heirs and successors or assigns, shall fail to pay all taxes and assessments upon the premises when they shall first become payable, then the mortgagee, its/his successors, heirs or assigns, may cause the same to be paid, together with all penalties and costs incurred thereon, and reimburse themselves under this mortgage for the sum so paid, with interest thereon at the rate provided in the note from the date of such payment.

AND IT IS AGREED, by and between the parties that upon any default being made in the payment of the note or of the insurance premiums, or of the taxes, or of the assessments hereinabove mentioned, or failure to pay any other indebtedness which constitutes a lien upon the real property when the same shall severally become payable, then the entire amount of the debt secured or intended to be secured hereby shall become due, at the option of the mortgagee, its/his successors, heirs or assigns, although the period for the payment thereof may not then have expired.

AND IT IS AGREED, by and between the parties that should legal proceedings be instituted for the collection of the debt secured hereby, then the mortgagee, its/his successors, heirs or assigns, shall have the right to have a receiver appointed of the rents and profits of the premiums, who after deducting all charges and expenses attending such proceedings, and the execution of the trust as receiver, shall apply the residue of the rents and profits towards the payment of the debt secured hereby.

AND IT IS FURTHER AGREED, by and between the parties that should legal proceedings be instituted for the foreclosure of this mortgage, or should the mortgagee become a party to any action by reason of this mortgage, or should the debt secured hereby be placed in the hands of an attorney at law for collection, by suit or otherwise, all costs and expenses incurred by the mortgagee, including a reasonable attorney's fee, shall



thereupon become due and payable as a part of the debt secured hereby and may be recovered and collected hereunder.

PROVIDED ALWAYS, NEVERTHELESS, and it is the true intent and meaning of the parties, that if the mortgagor does and shall well and truly pay, or cause to be paid, unto the mortgagee, its/his successors, heirs and assigns, the debt or sum of money aforesaid, with interest thereon, and if any shall be due, according to the true intent and meaning of the note and this mortgage, then this mortgage shall cease, determine, and be utterly null and void; otherwise it should remain in full force and virtue.

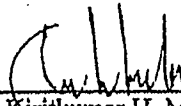
AND IT IS AGREED, by and between the said parties that the mortgagor should hold and enjoy the premises until default of payment shall be made.

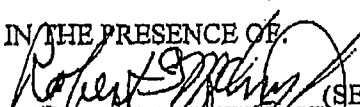
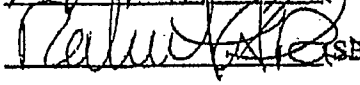
Any reference in this instrument to the plural shall include the singular, and any reference to the neuter shall include the male and female, the male shall include the female, and vice versa.

WITNESS the hand and the seal of the mortgagor.

February 21, 2007

KRISHNA OF ORANGEBURG, INC.


By: Kiritkumar H. Mehta
Its: President

IN THE PRESENCE OF:
 (SEAL)
 (SEAL)

STATE OF SOUTH CAROLINA)

COUNTY OF Orangeburg)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named mortgagor, sign, and seal, and as his act and deed deliver the within written mortgage, and that (s)he with the other witness whose signature appears above, witnessed the execution thereof.

SWORN to before me February 21st, 2007.

[Signature] (SEAL)
Notary Public for

My Commission Expires: 01/18/2009

[Signature]
(witness)

[Signature]

EXHIBIT A

PARCEL ONE:

All that certain piece, parcel or lot of land with the improvements thereon, situate, lying and being in the County of Orangeburg, State of South Carolina, being more particularly shown on a plat for Commercial Capital Corp., Shiva Incorporated of Orangeburg and First American Title Insurance Company by U.S. Surveyor, AES Group, Inc. dated July 6, 1998, and revised on July 23, 1998, July 31, 1998, March 4, 1999, and August 5, 1999, under the seal of John H. Welbourn RLS No. 5773B, shown and designated as parcel "1" containing 1.137 acres and parcel "2", containing 1.227 acres on said plat. Parcel 1 being more particularly described as follows: Beginning at a number 4 rebar set on the right-of-way line of Orange Court at the corner of Parcel 1 and the A.D. Morris property and running along said Morris Line North 32 degrees 34 minutes 00 seconds; West for 170 feet to a masonry nail set in a concrete sidewalk; thence North 52 degrees 07 minutes 45 seconds; East for 281.47 feet along the property lines of A.D. Morris and Elizabeth S. Sykes to a number 4 rebar set; thence along the property line of Elizabeth S. Sykes South 39 degrees 40 minutes 07 seconds; East for a distance of 170 feet to a rail road spike found on the Northeastern right-of-way line of Orange Court; thence along said right-of-way South 52 degrees 15 minutes 00 seconds; West for a distance of 302.47 feet to the point of beginning.

PARCEL TWO:

Beginning at a 1 1/2 inch open end pin found at the corner of the Robert H. Metzendorf property and on the Southwestern right-of-way line of Orange Court and proceeding along said right-of-way North 52 degrees 14 minutes 15 seconds; East for a distance of 262.13 feet to a 1/2 inch open end pin found on said right-of-way at the corner of the Agnes P. Wannamaker property; thence along said Wannamaker property Line South 40 degrees 19 minutes 24 seconds; East for a distance of 83 feet to a number 4 rebar set; thence along said Line North 51 degrees 37 minutes 43 seconds; East for 29.10 feet to a number 4 rebar set at the corner of said Wannamaker property and the property of Whetsell E. McDaniel, et. al.; thence along said McDaniel property line and the property line of Alex B. McLeod South 34 degrees, 48 minutes 38 seconds; East for 107.80 feet to a 3/4 inch open end pin found at corner of said McLeod property and on the Northeastern right-of-way of U.S. Highway 301, designated as John C. Calhoun Drive; thence along said Highway 301 right-of-way South 52 degrees 50 minutes 15 seconds; West 131.77 feet to a point on said right-of-way; thence along said right-of-way South 53 degrees 02 minutes, 16 seconds; West for 165.05 feet to a 1/2 inch open end pin found on said right-of-way at the corner of the Robert H. Metzendorf property; thence along said Metzendorf property line North 35 degrees 29 minutes 16 seconds; West for 186.73 feet to the point of beginning. Old TMS # 0171-14-12-008 and TMS # 0171-14-20-005. New TMS # 0350340 and TMS # 0350360.

U.S. Small Business Administration



U.S. Small Business Administration

UNCONDITIONAL GUARANTEE

SBA Loan #	PLP 232-456-8008
SBA Loan Name	Sun Moon Inn
Guarantor	Kiritkumar H. Mahta
Borrower	Krishna of Orangeburg, Inc.
Lender	Newtek Small Business Finance, Inc.
Date	February 21, 2007
Note Amount	\$725,000.00

FILED FOR RECORD
 WITHIN 72 HOURS
 OF THE DATE OF
 ORIGINATING
 2007 MAR 10 PM 1:48

1. GUARANTEE:

Guarantor unconditionally guarantees payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. Guarantor must pay all amounts due under the Note when Lender makes written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor.

2. NOTE:

The "Note" is the promissory note dated of even date herewith in the principal amount of Seven Hundred Twenty-Five Thousand Dollars and No Cents (\$725,000.00), from Borrower to Lender. It includes any assumption, renewal, substitution, or replacement of the Note, and multiple notes under a line of credit.

3. DEFINITIONS:

"Collateral" means any property taken as security for payment of the Note or any guarantee of the Note.

"Loan" means the loan evidenced by the Note.

"Loan Documents" means the documents related to the Loan signed by Borrower, Guarantor or any other guarantor, or anyone who pledges Collateral.

"SBA" means the Small Business Administration, an Agency of the United States of America.

4. LENDER'S GENERAL POWERS:

Lender may take any of the following actions at any time, without notice, without Guarantor's consent, and without making demand upon Guarantor:

- A. Modify the terms of the Note or any other Loan Document except to increase the amounts due under the Note;
- B. Refrain from taking any action on the Note, the Collateral, or any guarantee;
- C. Release any Borrower or any guarantor of the Note;
- D. Compromise or settle with the Borrower or any guarantor of the Note;
- E. Substitute or release any of the Collateral, whether or not Lender receives anything in return;
- F. Foreclose upon or otherwise obtain, and dispose of, any Collateral at public or private sale, with or without advertisement;
- G. Bid or buy at any sale of Collateral by Lender or any other lienholder, at any price Lender chooses; and
- H. Exercise any rights it has, including those in the Note and other Loan Documents.

These actions will not release or reduce the obligations of Guarantor or create any rights or claims against Lender.

5. FEDERAL LAW:

When SBA is the holder, the Note and this Guarantee will be construed and enforced under federal law, including SBA regulations. Lender or SBA may use state or local procedures for filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using such procedures, SBA does not waive any federal immunity from state or local control, penalty, tax, or liability. As to this Guarantee, Guarantor may not claim or assert any local or state law against SBA to deny any obligation, defeat any claim of SBA, or preempt federal law.

6. RIGHTS, NOTICES, AND DEFENSES THAT GUARANTOR WAIVES:

To the extent permitted by law,

- A. Guarantor waives all rights to:
 - 1) Require presentment, protest, or demand upon Borrower;
 - 2) Redeem any Collateral before or after Lender disposes of it;
 - 3) Have any disposition of Collateral advertised; and
 - 4) Require a valuation of Collateral before or after Lender disposes of it.
- B. Guarantor waives any notice of:
 - 1) Any default under the Note;
 - 2) Presentment, dishonor, protest, or demand;
 - 3) Execution of the Note;
 - 4) Any action or inaction on the Note or Collateral, such as disbursements, payment, nonpayment, acceleration, intent to accelerate, assignment, collection activity, and incurring enforcement expenses;
 - 5) Any change in the financial condition or business operations of Borrower or any guarantor;
 - 6) Any changes in the terms of the Note or other Loan Documents, except increases in the amounts due under the Note; and
 - 7) The time or place of any sale or other disposition of Collateral;
- C. Guarantor waives defenses based upon any claim that:
 - 1) Lender failed to obtain any guarantee;
 - 2) Lender failed to obtain, perfect, or maintain a security interest in any property offered or taken as Collateral;
 - 3) Lender or others improperly valued or inspected the Collateral;
 - 4) The Collateral changed in value, or was neglected, lost, destroyed, or underinsured;

- 5) Lender impaired the Collateral;
- 6) Lender did not dispose of any of the Collateral;
- 7) Lender did not conduct a commercially reasonable sale;
- 8) Lender did not obtain the fair market value of the Collateral;
- 9) Lender did not make or perfect a claim upon the death or disability of Borrower or any guarantor of the Note;
- 10) The financial condition of Borrower or any guarantor was overstated or has adversely changed;
- 11) Lender made errors or omissions in Loan Documents or administration of the Loan;
- 12) Lender did not seek payment from the Borrower, any other guarantors, or any Collateral before demanding payment from Guarantor;
- 13) Lender impaired Guarantor's suretyship rights;
- 14) Lender modified the Note terms, other than to increase amounts due under the Note. If Lender modifies the Note to increase the amounts due under the Note without Guarantor's consent, Guarantor will not be liable for the increased amounts and related interest and expenses, but remains liable for all other amounts;
- 15) Borrower has avoided liability on the Note; or
- 16) Lender has taken an action allowed under the Note, this Guarantee, or other Loan Documents.

7. DUTIES AS TO COLLATERAL:

Guarantor will preserve the Collateral pledged by Guarantor to secure this Guarantee. Lender has no duty to preserve or dispose of any Collateral.

8. SUCCESSORS AND ASSIGNS:

Under this Guarantee, Guarantor includes heirs and successors, and Lender includes its successors and assigns.

9. GENERAL PROVISIONS:

- A. **ENFORCEMENT EXPENSES.** Guarantor promises to pay all expenses Lender incurs to enforce this Guarantee, including, but not limited to, attorney's fees and costs.
- B. **SBA NOT A CO-GUARANTOR.** Guarantor's liability will continue even if SBA pays Lender. SBA is not a co-guarantor with Guarantor. Guarantor has no right of contribution from SBA.
- C. **SUBROGATION RIGHTS.** Guarantor has no subrogation rights as to the Note or the Collateral until the Note is paid in full.
- D. **JOINT AND SEVERAL LIABILITY.** All individuals and entities signing as Guarantor are jointly and severally liable.
- E. **DOCUMENT SIGNING.** Guarantor must sign all documents necessary at any time to comply with the Loan Documents and to enable Lender to acquire, perfect, or maintain Lender's liens on Collateral.
- F. **FINANCIAL STATEMENTS.** Guarantor must give Lender financial statements as Lender requires.
- G. **LENDER'S RIGHTS CUMULATIVE, NOT WAIVED.** Lender may exercise any of its rights separately or together, as many times as it chooses. Lender may delay or forgo enforcing any of its rights without losing or impairing any of them.
- H. **ORAL STATEMENTS NOT BINDING.** Guarantor may not use an oral statement to contradict or alter the written terms of the Note or this Guarantee, or to raise a defense to this Guarantee.
- I. **SEVERABILITY.** If any part of this Guarantee is found to be unenforceable, all other parts will remain in effect.
- J. **CONSIDERATION.** The consideration for this Guarantee is the Loan or any accommodation by Lender as to the Loan.

10. STATE-SPECIFIC PROVISIONS:

None

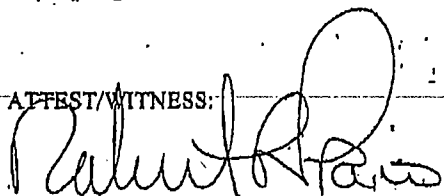
11. GUARANTOR ACKNOWLEDGMENT OF TERMS.

Guarantor acknowledges that Guarantor has read and understands the significance of all terms of the Note and this Guarantee, including all waivers.

12. GUARANTOR NAME(S) AND SIGNATURE(S):

By signing below, each individual or entity becomes obligated as Guarantor under this Guarantee.

ATTEST/WITNESS:

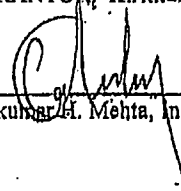


ATTORNEY

02/21/2007

GUARANTOR: Kiritkumar H. Mehta

By:



Kiritkumar H. Mehta, Individually

A. Settlement Statement

U.S. Department of Housing
and Urban Development



OMB Approval No. 2502-0265

B. Type of Loan

1 ☐ FHA 2 ☐ FmHA 3 ☐ Conv. Unins 4 ☐ VA 5 ☐ Conv. Ins. 6. File Number
QUANTUM 7. Loan Number 8. Mortgage Insurance Case Number

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME OF BORROWER: Quantum Mortgage Corporation

ADDRESS OF BORROWER: 6200 Amber Mist Lane, Charlotte, N.C. 28211

E. NAME OF SELLER: Krishna of Orangeburg, Inc.

ADDRESS OF SELLER: 217 Waterford Parkway, Orangeburg, S.C. 29118

F. NAME OF LENDER:

ADDRESS OF LENDER:

G. PROPERTY LOCATION: 826 John C. Calhoun Drive
Orangeburg, S.C. 29115

H. SETTLEMENT AGENT: JIMMIEHOUSE & WALSH ATTORNEYS AT LAW

1436 AMELIA STREET, ORANGEBURG, SC 29118

I. SETTLEMENT DATE: 9/10/2013

J. SUMMARY OF BORROWER'S TRANSACTION

100. GROSS AMOUNT DUE FROM BORROWER	
101. Contract sales price	437,000.00
102. Personal property	
103. Settlement charges to borrower (line 1400)	109,250.00
104.	
105.	
Adjustments for items paid by seller in advance	
106. City/town taxes to	
107. County taxes to	
108. Assessments to	
109.	to
110.	to
111.	to
112.	to

120. GROSS AMOUNT DUE FROM BORROWER 546,250.00

200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER

201. Deposit or earnest money	
202. Principal amount of new loan(s)	
203. Existing loan(s) taken subject to	
204.	
205.	
206. Principal amount of seller financing	
207.	
208.	
209.	
209a	
209b	
Adjustments for items unpaid by seller	
210. City/town taxes to	
211. County taxes to	
212. Assessments to	
213.	to
214.	to
215.	to
216.	to
217.	to
218.	to
219.	to

220. TOTAL AMOUNTS PAID BY OR IN BEHALF OF BORROWER

300. CASH AT SETTLEMENT FROM/TO BORROWER

301. Gross amount due from borrower (line 120) 546,250.00

302. Less amounts paid by/for borrower (line 220)

303. CASH ☒ From ☐ To BORROWER 546,250.00

K. SUMMARY OF SELLER'S TRANSACTION

400. GROSS AMOUNT DUE TO SELLER	
401. Contract sales price	437,000.00
402. Personal property	
403.	
404.	
405.	
Adjustments for items paid by seller in advance	
406. City/town taxes to	
407. County taxes to	
408. Assessments to	
409.	to
410.	to
411.	to
412.	to

420. GROSS AMOUNT DUE TO SELLER 437,000.00

500. REDUCTIONS IN AMOUNT DUE TO SELLER

501. Excess deposit (see instructions)	
502. Settlement charges to seller (line 1400)	
503. Existing loan(s) taken subject to	
504. Payoff of first mortgage loan	437,000.00
Newtek Small Business Finance, Inc.	
505. Payoff of second mortgage loan	
506. Principal amount of seller financing	
507.	
508.	
509.	
509a	
509b	
Adjustments for items unpaid by seller	
510. City/town taxes to	
511. County taxes to	
512. Assessments to	
513.	to
514.	to
515.	to
516.	to
517.	to
518.	to
519.	to

520. TOTAL REDUCTIONS IN AMOUNT DUE SELLER 437,000.00

600. CASH AT SETTLEMENT TO/FROM SELLER

601. Gross amount due to seller (line 420) 437,000.00

602. Less reductions in amount due seller (line 520) 437,000.00

603. CASH ☒ To ☐ From SELLER 0.00

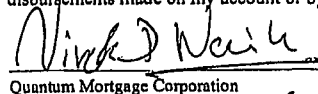
EXHIBIT

4

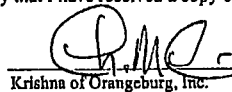
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FILED FOR RECORD
CLERK OF COURT
JIMMIEHOUSE & WALSH
ATTORNEYS AT LAW

L. Settlement Charges			Paid From Borrower's Funds At Settlement	Paid From Seller's Funds At Settlement
700. TOTAL SALES/BROKER'S COM. based on price	437,000.00 @	% =		
Division of Commission (line 700) as follows:				
701.	to			
702.	to			
703. Commission paid at Settlement				
704.	to			
800. Items Payable In Connection With Loan				
801. Loan Origination Fee	% to			
802. Loan Discount	% to			
803. Appraisal Fee	to			
804. Credit Report	to			
805. Lender's Inspection Fee	to			
806. Mortgage Insurance Application Fee	to			
807.	to			
808.	to			
809.	to			
810.	to			
811.	to			
812.	to			
813.	to			
814.	to			
815.	to			
900. Items Required By Lender To Be Paid In Advance				
901. Interest from 9/10/2013 to 10/1/2013 @	/day			
902. Mortgage Insurance Premium for	months to			
903. Hazard Insurance Premium for	years to			
904.	years to			
905.	years to			
1000. Reserves Deposited With Lender				
1001. Hazard insurance	months@	per month		
1002. Mortgage insurance	months@	per month		
1003. City property taxes	months@	per month		
1004. County property taxes	months@	per month		
1005. Annual assessments	months@	per month		
1006.	months@	per month		
1007.	months@	per month		
1008.	months@	per month		
1009.				
1100. Title Charges				
1101. Settlement or closing fee	to			
1102. Abstract or title search	to			
1103. Title examination	to	Horger, Barnwell & Reid	750.00	
1104. Title insurance binder	to			
1105. Document preparation	to			
1106. Notary fees	to			
1107. Attorney's fees	to	James F. Walsh, Jr., Attorney	3,440.00	
(includes above items numbers:				
1108. Title insurance	to			
(includes above items numbers:				
1109. Lender's Coverage:		INS AMT:		
1110. Owner's Coverage:		INS AMT:		
1110a				
1111. Horger, Barnwell and Reid	to		5,000.00	
1112. UPS Fee	to	James F. Walsh, Jr., Attorney	21.00	
1113.	to			
1200. Government Recording and Transfer Charges				
1201. Recording Fees: Deed \$10.00; L-Mortgage(s) ; S-Mortgage(s) ; Releases			10.00	
1202. City/county tax/stamps: Deed \$480.70; L-Mortgage(s) ; S-Mortgage(s)			480.70	
1203. State tax/stamps: Deed \$1,136.20; L-Mortgage(s) ; S-Mortgage(s)			1,136.20	
1204. UCC Release		Orangeburg County Register of Deeds	8.00	
1205. 2 Mortgage Satisfaction		Orangeburg County Register of Deeds	10.00	
1300. Additional Settlement Charges				
1301. Survey	to			
1302. Pest Inspection	to			
1303. Roof Inspection	to			
1304. Delinquent taxes 01731412004000	to	Orangeburg County Treasurer	12,873.30	
1305. Delinquent taxes 01731413004000	to	Orangeburg County Treasurer	42,197.41	
1306. UCC satisfaction with Sec. of State	to	South Carolina Secretary of State	8.00	
1307. Consulting Fee	to	Quantum Mortgage Corporation	43,315.39	
1308.	to			
1309.	to			
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)			109,250.00	

I have carefully reviewed the HUD - 1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD - 1 Settlement Statement.


Quantum Mortgage Corporation

Borrower


Krishna of Orangeburg, Inc.

Seller

Borrower

Seller

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.

LIMEHOUSE & WALSH ATTORNEYS AT LAW

Settlement Agent

9/10/2013 Date

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

QUANTUM

After Recording, please return to:
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205



M-BK: 02296 PG:0251

SATISFACTION OF MORTGAGE

WHEREAS, the debt secured by that certain mortgage of real estate executed by Krishna of Orangeburg, Inc. to Newtek Small Business Finance, Inc., dated February 21, 2007, in the sum of \$725,000.00, was recorded on February 21, 2007, in the Office of the Register of Deeds for Orangeburg County, in Book 1810 Page 0196; The above designated owner/holder is the *bona fide* owner and holder of the described mortgage; that the original mortgage has been lost and cannot be found; that the mortgage has not been assigned, hypothecated, or disposed of otherwise.

NOW THEREFORE, by its signature below, Newtek Small Business Finance, Inc., as the true holder of the Mortgage hereby affirms that by virtue of the payment of Four Hundred and Thirty-Seven Thousand (\$437,000.00) dollars, the Mortgage is hereby satisfied and forever relinquished.

However, this satisfaction shall not, in any manner, constitute a waiver of payment of the underlying and associated Promissory Note. Newtek Small Business Finance, Inc. reserves the right to collect any and all deficiency that may still be due and owing under the underlying and associated Promissory Note and any related documents, specifically, but not limited to Guarantees associated with the Promissory Note.

This 24th day of September, 2013
Newtek Small Business Finance, Inc.
By [Signature]
Jose Morales
Title: [Signature]

Witnesses:

[Signature]
Witness 1

[Signature]
Witness 2

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2014 MAR 10 PM 1:49

FILED Oct 09, 2013 03:05:58 pm
BOOK 02296
PAGE 0251 THRU 0252
INSTRUMENT # 2013003862

FILED
ORANGEBURG
COUNTY
ELAINE G. ALEXANDER
REGISTER
OF DEEDS

[Signature]
Signature

The State of NY)
 County of Nassau)

Personally appeared before me Peter J. Persichetti (Witness 1) and made oath that he/she saw the within
 named Newtek Small Business Finance, Inc. by Jose Morales, sign, seal and as Act and Deed, deliver that
 within written Satisfaction; and that he/she with JOHN M. KRUSE (Witness 2) witnessed the
 execution thereof.

Peter J. Persichetti
 Witness 1 Signature

SWORN to before me this 24th day)

Of September 2013)

Alicia Luna (Seal)

Notary Public for New York
 Commission Expires: May 24, 2016
 The State of NY
 County of Nassau)

ALICIA LUNA
 Notary Public, State of New York
 No. 01LUS10173
 Qualified in Queens County
 Commission Expires May 24, 2016

Personally appeared before me, Jose Morales, who being duly sworn deposes and says that Newtek Small
 Business Finance, Inc. is the *bona fide* owner and holder of a certain Promissory Note and Mortgage, that the
 original mortgage has been lost and cannot be found; that the same has not been assigned hypothecated or
 otherwise disposed of. The deponent has full authority to mark the Mortgage Satisfied and cancelled off
 record.

Jose Morales
 Title: V.P.

SWORN to before me this 24th day)

Of September 2013)

Alicia Luna (Seal)

Notary Public for New York
 Commission Expires: May 24, 2016

ALICIA LUNA
 Notary Public, State of New York
 No. 01LUS10173
 Qualified in Queens County
 Commission Expires May 24, 2016

FILED FOR RECORD
 WINIFRED A. CLARK
 CLERK OF COURT
 ORANGEBURG, SC

2014 MAR 10 PM 1:49

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

MOTION TO AMEND
AND ADD PARTIES

FILED FOR RECEPTION
WILLIAMSON COUNTY
CLERK OF COURT
ORANGEBURG, SC

2014 DEC -4 AM 8:49

YOU WILL PLEASE TAKE NOTICE that the Defendant moves before this Court pursuant to Rules 14, 15, , 20, and 21, SCRCP, as well as pursuant to all other applicable law, for an Order granting him leave to amend his answer to assert counterclaims, add third-party defendants, and assert claims against those third-party defendants in the above-captioned action.

The Defendant so moves on the following grounds:

1. Leave to amend a pleading shall be freely given when justice so requires and the grant of such leave does not work prejudice to the other party. Rule 15, SCRCP, strongly favors amendment, and courts are encouraged to freely grant leave to amend. Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2003).
2. The party opposing amendment has the burden of establishing that the motion should not be granted. Foggie v. CSX Transportation, Inc., 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993).
3. The Defendant has claims that he should be granted leave to amend his pleading to allege.
4. The Plaintiff will be unable to show that amendment will work sufficient prejudice to it for the court to deny the Defendant leave to amend.

ATTEST: TRUE COPY

W. B. Clark
CLERK OF COURT

ORANGEBURG COUNTY, SC

5. The Plaintiff will be unable to show that amendment will work sufficient prejudice to it for the Court to deny the Defendant leave to amend. "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." Stanley, 357 S.C. at 174.
6. The Defendant's proposed amended answer, counterclaim, and third-party complaint is attached hereto.
7. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action.

The undersigned has consulted with opposing counsel in a good faith effort to resolve the matter subject of this motion.

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
December 2, 2014

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendants;

AND

Kiritkumar H. Mehta,

Third-Party Plaintiff,

vs.

Quantum Mortgage Corporation and
Vivek Naik,

Third-Party Defendants

SUMMONS FOR AMENDED ANSWER,
COUNTERCLAIM, AND
THIRD-PARTY COMPLAINT
(JURY TRIAL DEMANDED)

FILED FOR RECORD
WINTER H. CLARK
CLERK OF COURT
ORANGEBURG, SC

2014 DEC -4 AM 8:49

TO THE PARTIES NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Amended Answer, Counterclaim, and Third-Party Complaint, attached hereto, in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Amended Answer, Counterclaim, and Third-Party Complaint upon the subscriber, at his office, P.O. Box 50143, Columbia, South Carolina 29250, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Answer, Counterclaim, and Third-Party Complaint in the time-aforesaid, a judgment by default will be rendered against you for the relief demanded therein.

ATTEST: TRUE COPY

Wingja B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
December 2, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN-THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendants;

AND

Kiritkumar H. Mehta,

Third-Party Plaintiff,

vs.

Quantum Mortgage Corporation and
Vivek Naik,

Third-Party Defendants

AMENDED ANSWER,
COUNTERCLAIM, AND
THIRD-PARTY COMPLAINT
(JURY TRIAL DEMANDED)

2014 DEC - 4 AM 8:47
FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

The Defendant and Third-Party Plaintiff, Kiritkumar H. Mehta, in answer to the Plaintiff's Complaint, as counterclaim, and by way of Third-Party Complaint against the Third-Party Defendants, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, the Defendant admits the same upon information and belief.

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Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

3. Answering the allegations of paragraph 2 of the Complaint, the Defendant admits the same.

4. The allegations of paragraph 3 of the Complaint state a legal conclusion, to which no response is required.

5. Paragraph 4 of the Complaint does not require an answer.

6. Answering the allegations of paragraphs 5 and 6 of the Complaint, Defendant only admits the documents exist and asserts that the documents say what they say.

7. Answering the allegations of paragraph 7, 8 and 9 of the Complaint, the Defendant denies the paragraphs as written.

8. Answering the allegations of 10 of the Complaint, the Defendant admits only that the loan documents say what they say.

9. Answering the allegations of paragraphs 11 and 12 they are denied.

10. Paragraph 13 is admitted upon information and belief.

FOR A SECOND DEFENSE

11. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

12. The affidavit of Kiritkumar H. Mehta attached hereto is incorporated and alleged herein by reference as if here set forth verbatim.

13. The Plaintiff entered into a settlement with the borrower on the note subject of this transaction in which the Plaintiff satisfied the mortgage that had secured the note debt in exchange for payment to the Plaintiff of an amount of money that was less than what the Plaintiff claimed to have been owed on the note debt.

14. The property subject of the mortgage was worth more than the note debt amount.

15. The Plaintiff voluntarily relinquished its ability to be compensated fully from the property that was its collateral for the subject note debt.

16. Through its own actions and inactions, the Plaintiff has failed to take reasonable steps to mitigate its damages subject of this case.

17. The Plaintiff's recovery should be barred or lessened by its failure to mitigate its damages.

FOR A THIRD DEFENSE

18. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

19. The settlement described above may have released or otherwise extinguished the debt upon which the Plaintiff now sues.

20. The representations of the Plaintiff described in the attached affidavit constitute a waiver of the Plaintiff's claim against the Defendant subject of this case.

FOR A FOURTH DEFENSE

21. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

22. The Plaintiff has engaged in such conduct with respect to the loan subject of this action as to make the Plaintiff's hands unclean with regard to the matters subject of this action.

23. This conduct includes, but is not necessarily limited to, that described in the attached affidavit of Kiritkumar H. Mehta.

24. This conduct relates directly to the subject matter of this action.

25. The said conduct has proximately caused the Defendant prejudice and injury.

FOR A FIFTH DEFENSE AND AS COUNTERCLAIM

26. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

27. The Plaintiff had a monetary interest in making the false representation to the Defendant noted in the attached affidavit, including, but not necessarily limited to, the false representation that the sale of the property by the Plaintiff's borrower, Krishna of Orangeburg, Inc., as noted in the affidavit, would extinguish any obligation of the Defendant to the Plaintiff on the Defendant's guaranty subject of this case.

28. The Plaintiff knew or should have known that these representations were false.

29. The Plaintiff owed the Defendant a duty of care to see that it communicated truthfully with him.

30. The Plaintiff breached this duty by communicating falsely with the Defendant. This was a failure to exercise due care and was negligence or recklessness.

31. The Plaintiff should have known that its representation was false.

32. Justifiably, the Defendant relied on this representation.

33. The Defendant has sustained loss and damages as a direct and proximate result of his reliance on the representation.

FOR A SIXTH DEFENSE AND AS COUNTERCLAIM

34. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

35. Actions of the Plaintiff, including, but not necessarily limited to, those stated in this pleading and attached affidavit, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq.

36. The Plaintiff knew or should have known that the said actions were violations of the Unfair Trade Practices Act.

37. The character of these actions is such that they are of the sort that impact the public interest and are capable of repetition, including, but not necessarily limited to, in that the parties involved in perpetrating these actions are or were in the business of, among other things, mortgage financing.

38. The Defendant has suffered damages as a result of these actions.

39. The Defendant is entitled to recover treble damages, reasonable attorney's fees, and costs.

FOR A SEVENTH DEFENSE AND AS COUNTERCLAIM

40. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

41. The Plaintiff and Third-Party Defendants (and possibly others) have combined and conspired for the purpose of injuring the Defendant, discussing, planning, and carrying out plans to get the Defendant to cause Krishna of Orangeburg, Inc., to go through with the short sale transaction subject of the attached affidavit while knowing that it would claim that the Defendant owed the Plaintiff on the guaranty for the balance of the subject debt.

42. Said wrongful acts include acts distinct from the other acts noted herein, may include such other acts as will be determined after a reasonable period of discovery, and were made with actual malice.

43. As a direct and proximate result of said wrongful acts, the Defendant has incurred special damages. The Defendant is entitled to these damages and punitive damages in an amount determined by the trier of fact.

BACKGROUND OF CROSS-CLAIMS AND THIRD-PARTY CLAIMS

44. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

45. Third-Party Defendant Quantum Mortgage Corporation is a North Carolina Corporation that was, but is no longer, registered with the South Carolina Secretary of State to do business in South Carolina.

46. Third-Party Defendant Vivek Naik controls Third-Party Defendant Quantum Mortgage Corporation.

47. Third-Party Defendant Quantum Mortgage Corporation acted through Third-Party Defendant Vivek Naik with regard to the matters subject of this pleading.

48. The affidavit of Kiritkumar H. Mehta attached hereto is incorporated and alleged herein by reference as if here set forth verbatim.

49. The Third-Party Defendants had already arranged the sale of the property involved in this case by Third-Party Defendant Quantum Mortgage Corporation during the time that the Third-Party Defendants were arranging the short sale transaction described in the attached affidavit and knew that Third-Party Defendant Quantum Mortgage Corporation would profit significantly from its sale of the property.

50. The Third-Party Defendants also knew that the Third-Party Plaintiff, Mehta, could have arranged for Krishna of Orangeburg, Inc. to sell the property to Yogi of Orangeburg, Inc. (or its principals or an entity they controlled) for a large enough price to pay off the entire indebtedness owed to the Plaintiff, which would have extinguished any obligation of the Defendant/Third-Party Plaintiff to the Plaintiff on the guaranty subject of this case.

FOR A FIRST THIRD-PARTY CLAIM

51. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

52. The Third-Party Defendants had a monetary interest in making the false representations to the Third-Party Plaintiff noted in the attached affidavit, including, but not necessarily limited to, the false representation that the sale of the property by the Plaintiff's borrower, Krishna of Orangeburg, Inc., as noted in the affidavit, would extinguish any obligation of the Defendant/Third-Party Plaintiff to the Plaintiff on the Defendant/Third-Party Plaintiff's guaranty subject of this case.

53. The Third-Party Defendants knew or should have known that these representations were false.

54. The Third-Party Defendants owed the Third-Party Plaintiff a duty of care to see that they communicated truthfully with him.

55. The Third-Party Defendants breached this duty by communicating falsely with the Third-Party Plaintiff. This was a failure to exercise due care and was negligence or recklessness.

56. The Third-Party Defendants should have known that their representations were false.

57. Justifiably, the Third-Party Plaintiff relied on this representation.

58. The Third-Party Plaintiff has sustained loss and damages as a direct and proximate result of his reliance on the representation.

FOR A SECOND THIRD-PARTY CLAIM

59. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

60. The Third-Party Defendants' representations noted in the attached affidavit were material to the Third-Party Plaintiff's decision to direct Krishna of Orangeburg, Inc. to enter into the short sale transaction noted in the affidavit.

61. Relying on the representations, the Third-Party Plaintiff caused Krishna of Orangeburg, Inc. to enter into and complete the short sale transaction, the Third-Party Plaintiff believing, because of these representations, that this would result in him owing no money to the Plaintiff on the guaranty subject of this case.

62. The Third-Party Defendants made these representations for the purpose of inducing the Third-Party Plaintiff to enter into the short sale transaction.

63. These representations were false.

64. The Third-Party Plaintiff did not know the representations were false, and he could not reasonably have known they were false.

65. The Third-Party Defendants knew that these representations were false.

66. The Third-Party Plaintiff had a right to rely on the Third-Party Defendants' representations.

67. The Third-Party Plaintiff's reliance on the Third-Party Defendants' representations has proximately and consequently caused him injury and damage, such including, but not necessarily limited to, in his exposure to liability to the Plaintiff in the matters subject of this case.

FOR A THIRD THIRD-PARTY CLAIM

68. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

69. The Plaintiff and Third-Party Defendants (and possibly others) have combined and conspired for the purpose of injuring the Defendant, discussing, planning, and carrying out plans to get the Third-Party Plaintiff to cause Krishna of Orangeburg, Inc., to go through with the short sale transaction subject of the attached affidavit while knowing that it would claim that the Defendant owed the Plaintiff on the guaranty for the balance of the subject debt.

70. Said wrongful acts include acts distinct from the other acts noted herein, may include such other acts as will be determined after a reasonable period of discovery, and were made with actual malice.

71. As a direct and proximate result of said wrongful acts, the Third-Party Plaintiff has incurred special damages. The Third-Party Plaintiff is entitled to these damages and punitive damages in an amount determined by the trier of fact.

FOR A FOURTH THIRD-PARTY CLAIM

72. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

73. Actions of the Third-Party Defendants, including, but not necessarily limited to, those stated in this pleading and attached affidavit, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq.

74. The Third-Party Defendants knew or should have known that the said actions were violations of the Unfair Trade Practices Act.

75. The character of these actions is such that they are of the sort that impact the public interest and are capable of repetition, including, but not necessarily limited to, in that the parties involved in perpetrating these actions are or were in the business of, among other things, mortgage financing and the buying and selling of real property.

76. The Third-Party Plaintiff has suffered damages as a result of these actions.

77. The Third-Party Plaintiff is entitled to recover treble damages, reasonable attorney's fees, and costs.

FOR A FIFTH THIRD-PARTY CLAIM

78. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

79. The Third-Party Defendants undertook a duty to the Third-Party Plaintiff with regard to the matters subject of this action and the attached affidavit.

80. This duty was fiduciary in nature.

81. The Third-Party Defendants breached this duty to the Third-Party Plaintiff.

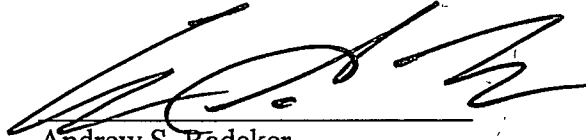
82. This breach proximately caused damage to the Third-Party Plaintiff.

83. The Third-Party Plaintiff is entitled to recover actual and punitive damages from the Third-Party Defendants.

WHEREFORE, the Defendant and Third-Party Plaintiff prays for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Render a verdict or judgment for the Defendant and Third-Party Plaintiff for actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (d) Award the Defendant and Third-Party Plaintiff reasonable attorney's fees;
- (e) Award the Defendant and Third-Party Plaintiff the costs and expenses of this action; and
- (f) Grant the Defendant and Third-Party Plaintiff such other and further relief as the court deems just and proper.

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
December 2, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

AFFIDAVIT OF
KIRITKUMAR H. MEHTA

FILED FOR
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC

2014 DEC -4 PM 3:50

Personally appeared before me Kiritkumar H. Mehta, who, first being duly sworn, deposes and says as follows:

1. My name is Kiritkumar H. Mehta, and I go by the nickname "Chris." I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. On September 10, 2013, the Plaintiff, a company called Quantum Mortgage Corporation, and Krishna of Orangeburg, Inc., of which I am a principal, entered into a short sale transaction in which the entire purchase price of \$437,000.00 from Quantum Mortgage Corporation went to pay debt to the Plaintiff as a short sale. This transaction was arranged by Quantum Mortgage Corporation and the Plaintiff, and Vivek Naik, of Quantum Mortgage Corporation, told me the sale's proceeds would take care of any outstanding debt owed to the Plaintiff, Newtek Small Business Finance. Vivek told me he would handle the sale and satisfaction to ensure no further money was owed to Newtek on my behalf. Vivek assured me that the short sale would satisfy all debt owed to the Plaintiff.
3. Before the closing of the short sale, Jose Morales of Newtek Small Business Finance also told me that as a result of the short sale, there would be no more debt owed to the Plaintiff.
4. I would not have allowed the short sale to occur for that price if I had not believed that the short sale would satisfy all the debt owing to the Plaintiff. I could have

ATTEST: TRUE COPY

Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

gotten the money together to bring the loan current, but, because of these representations, I did not.

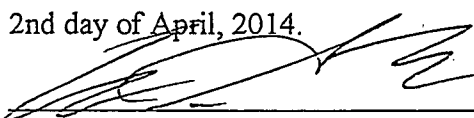
5. On September 24, 2013 it appears the Plaintiff signed a Satisfaction of Mortgage reflecting receipt of the funds of the September 10th sale.
6. Based on the statements by Morales and Vivek, as well as the Plaintiff's receipt of funds from the September 10th sale, I believed any debt or obligation I may have owed to Plaintiff was satisfied.
7. On the same day as the September 10th short sale, Quantum Mortgage sold a portion of the property it bought at the short sale for \$605,000.00, as the attached deed reflects.
8. The value of the property at the time of the September 10th sale was sufficient to satisfy the entire indebtedness owed to Plaintiff.

FURTHER AFFIANT SAYETH NOT.



Kiritkumar H. Mehta

SWORN to before me this
2nd day of April, 2014.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 5/21/2017

TITLE TO REAL ESTATE

State of South Carolina,

County of Orangeburg.

KNOW ALL MEN BY THESE PRESENTS, That Quantum Mortgage Corporation, hereinafter referred to as Grantor, in the State aforesaid, in consideration of the sum of Six Hundred Five Thousand and no/100 (\$605,000.00) Dollars to Grantor paid by Yogi of Orangeburg, LLC, hereinafter referred to as Grantee, in the State aforesaid have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Grantee, whose address is 2805 Bamberg Road, Orangeburg, S.C. 29115 the following described property subject to any restrictions, limitations, conditions or reservations below mentioned, unto the said Grantee, his Heirs and/or Successors and Assigns:

All that certain piece, parcel or lot of land, with buildings and other improvements thereon, situate, lying and being in Consolidated School District 5, City of Orangeburg, County of Orangeburg, State of South Carolina and having the following boundaries and measurements: Beginning at a 1 ½ inch open end pin found at the corner of the Robert H. Metzendorf property and on the Southwestern right-of-way line of Orange Court and proceeding along said right-of-way North 52 degrees 14 minutes 15 seconds East for a distance of 262.13 feet to a ½ inch open end pin found on said right-of-way at the corner of the Agnes P. Wannamaker property; thence along said Wannamaker property Line South 40 degrees 19 minutes 24 seconds East for a distance of 83 feet to a number 4 rebar set; thence along said line North 51 degrees 37 minutes 43 seconds; East for 29.10 feet to a number 4 rebar set at the corner of said Wannamaker property and the property of Whetsell E. McDaniel, et. al.; thence along said McDaniel property line and the property line of Alex B. McLeod South 34 degrees, 48 minutes 38 seconds East for 107.80 feet to a ¾ inch open end pin found at corner of said McLeod property and on the Northeastern right-of-way of U.S. Highway 301, designated as John C. Calhoun Drive; thence along said Highway 301 right-of-way South 52 degrees 50 minutes 15 seconds West 131.77 feet to a point on said right-of-way; thence along said right-of-way South 53 degrees 02 minutes, 16 seconds West for 165.05 feet to an ½ inch open end pin found on said right-of-way at the corner of the Robert H. Metzendorf property; thence along said Metzendorf property line North 35 degrees 29 minutes 16 seconds West for 186.73 feet to the point of beginning.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in any way incident or appertaining.

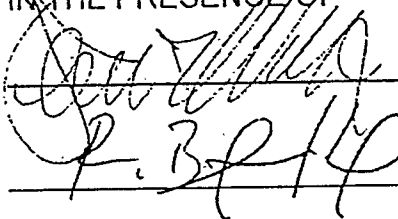
TO HAVE AND TO HOLD, all and singular the premises before mentioned, subject to any restrictions, limitations, conditions or reservations before mentioned, unto the said Grantee, his Heirs and/or Successors and Assigns.

AND I do hereby bind myself, my Heirs and/or Successors and Assigns, Executors, and/or Administrators, to warrant and forever defend all and singular the said premises unto Grantee, his Heirs and/or Successors and Assigns against me and my Heirs and/or Successors and Assigns and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

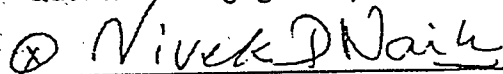
ALL references made herein to the singular shall include the plural, all references made herein to the masculine shall include the feminine and the neuter.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal this 10th day of September, 2013.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF


R. B. P. H. P.

Quantum Mortgage Corporation

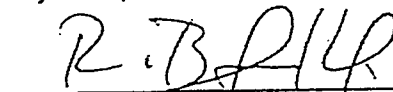

By: Vivek Naik
Its: President

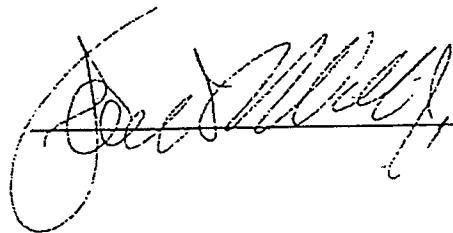
STATE OF SOUTH CAROLINA

County of Orangeburg

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within-named Grantor(s) sign, seal and, as his act and deed, deliver the within-written Deed for the uses and purposes therein mentioned, and that deponent, with the other subscribing witness, witnessed the execution thereof.

SWORN to before me this 10th
day of September, 2013.


Notary Public of South Carolina
My Commission Expires: _____



(Hotdocs)

TITLE TO REAL ESTATE

GRANTOR:

Quantum Mortgage Corporation

GRANTEE:

Yogi Of Orangeburg, LLC

Return to (check appropriate space): _____

Yogi Of Orangeburg, LLC

James F. Walsh, Jr.
P. O. Box 627

AFFIDAVIT Date of Transfer of Title

1. I have read the information on this Affidavit and I understand such information.

3. Check one of the following: The DEED is

- (If exempt, please skip items 4-6, and go to item 7 of this affidavit.)

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.

5. Check YES or NO to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is \$.

6. The DEED Recording Fee is computed as follows:

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Buyer.

Grantor, Grantee, or Legal Representative
Connected with this transaction

ROA 70

1525
0245

D-BK: 01525 PG:0245

Sworn to and Subscribed to before me
this 10 day of Aug, 2013.

D. B. P. / P
Notary Public for the State of South Carolina
My commission expires 11/17/17

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

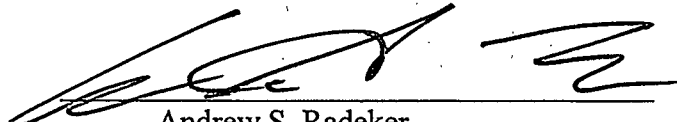
Defendant.

CERTIFICATE OF SERVICE

2014 DEC-4 AM 9:49
FILED OF RECORD
MINI-CLERK
CLERK OF COURT
ORANGEBURG, SC

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendant do hereby certify that I, on the 2nd day of December, 2014, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Brian D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205



Andrew S. Radeker

ATTEST: TRUE COPY

Wingia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

MOTION TO RECONSIDER

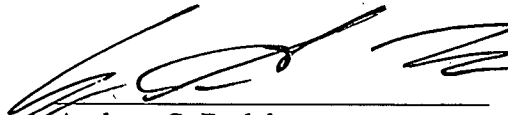
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WENNIFA B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2015 MAR 19 AM 11:40

YOU WILL PLEASE TAKE NOTICE that the Defendant moves before this Court pursuant to Rules 52 and 59, SCRCP, as well as pursuant to all other applicable law, for an Order reconsidering, altering, clarifying, or amending Order of the Honorable James B. Jackson, Jr. filed February 25, 2015¹, which granted summary judgment in the Plaintiff's favor as to liability and which denied the Defendant's motion to amend and add parties in the above-captioned action, on the grounds shown in the attached memorandum, which is incorporated herein by reference as if here set forth verbatim.

Pursuant to Rule 11, SCRCP, there is no duty of consultation prior to this motion, as this is a motion to reconsider and such consultation would have served no useful purpose.

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
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Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
March 16, 2015

Winnif B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

¹ The undersigned received written notice of the entry of this Order on March 6, 2015.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER

FILED FOR RECORD
WILLIAM B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2015 MAR 19 AM 11:40

The Defendant hereby submits this memorandum in support of his motion in the above-captioned action for an order that reconsiders and/or alters or amends this court's order filed February 25, 2015¹, which granted summary judgment in the Plaintiff's favor as to liability and which denied the Defendant's motion to amend and add parties.

THE COURT SHOULD HAVE GRANTED THE MOTION TO AMEND

The court summarily denied the Defendant's motion to amend, which sought to assert additional defenses and counterclaims and to add third-party defendants. The matters subject of the motion to amend overlap with the reasons why summary judgment should not have been granted, as discussed below; however, the court should have granted the motion to amend and/or to add parties regardless of whether the motion for summary judgment was granted.

Leave to amend a pleading shall be freely given when justice so requires and the grant of such leave does not work prejudice to the other party. Rule 15, SCRCP, strongly favors amendment, and courts are encouraged to freely grant leave to amend. Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2003). The party opposing amendment has the burden of establishing that the motion should not be granted. Foggie v. CSX Transportation, Inc., 313

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Wingy B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

¹ The undersigned received written notice of the entry of this order on March 6, 2015.

S.C. 98, 103, 431 S.E.2d 587, 590 (1993). “The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it.” Stanley, 357 S.C. at 174.

The Plaintiff did not establish sufficient prejudice in this case for the court to deny the motion. Had the motion been granted, the Plaintiff would have had sufficient time to gird itself to meet the issues presented by the proposed amended pleading. It is not as though the case were on the cusp of trial. Granting the motion would have allowed the pleadings to reflect the issues that the facts of the case present; this is the purpose of a motion to amend.

To deny this motion was error, and the court should reconsider that decision.

THE COURT SHOULD HAVE DENIED SUMMARY JUDGMENT

The Defendant’s affidavit showed that both Vivek Naik and an employee of the Plaintiff, Jose Morales, represented to the Defendant that as a result of the short sale, there would be no more debt owed to the Plaintiff (and, thus, no liability for the Defendant on the guaranty subject of this case). While the Plaintiff argued (and the court ruled) that the parole evidence rule precludes the introduction of this evidence, that is wrong, for at least three reasons.

The parole evidence rule is a poorly named rule of law, since it is not a rule of evidence at all but, rather, one of the substantive law of contract construction. The rule is applicable in cases where a party argues that the terms of a contract are *different from* what is contained in an integrated writing. E.g., Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001) (“Where the terms of [a] written guaranty are clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms, in the absence of fraud, accident, or mistake in its procurement”). “When a contract is *silent* as to a particular matter, parole evidence is admissible

to reveal the parties' true intent." Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct. App. 2005) (emphasis added).

"The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of *substantive contract law*." Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003) (emphasis added).

"Neither the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud." Frewil, LLC v. Price, Op. No. 5293 (S.C. Ct. App. filed Feb. 4, 2015) (Shearouse Adv. Sh. No. 5 at 36, 39)(quoting Slack v. James, 364 S.C. 609, 616, 614 S.E.2d 636, 640 (2005)).

First, the contract document between the Plaintiff and Krishna of Orangeburg, Inc. – not the Defendant, importantly – used to memorialize the agreement is silent as to whether the short sale would satisfy or eliminate the remaining debt on the note. Accordingly, parol evidence on that point is admissible. Second, the Defendant was not actually a party to that agreement. Third, the Defendant sought to amend to allege tort causes of action against the Plaintiff, and the parol evidence rule is inapplicable in the tort context.

While the Plaintiff may argue that reliance by the Defendant on Mr. Morales' statements would not be reasonable, reliance and its reasonableness are questions of fact. Id. at 39-40. As there was at least a scintilla of evidence in the record as to each element of the counterclaims the Defendant sought to assert, the court should have denied summary judgment (and granted the motion to amend, as discussed above). The parol evidence rule is not a bar to the evidence offered in opposition to the Plaintiff's summary judgment motion.

Further, discovery in this case had just begun when the motion hearing was held. Since the parties had focused their efforts on settlement and had not focused on discovery, the

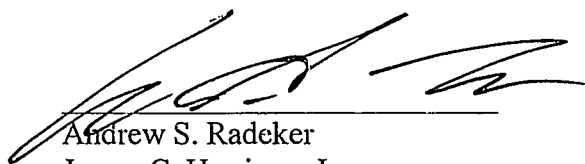
Defendant had not had a full and fair opportunity to conduct discovery at the time of the motion hearing. (The parties had reached a settlement, subject to the approval of the Small Business Administration; however, the SBA did not approve the settlement. That is the only reason that this is an ongoing case.) "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (internal quotation marks omitted); accord Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002); Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

The Defendant also hereby incorporates all arguments he made at the hearing on the motions for summary judgment and to amend and add parties.

CONCLUSION

The court erred in its ruling. The court should reconsider and undo its previous ruling.

Respectfully submitted,



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drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)
ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
March 16, 2015

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

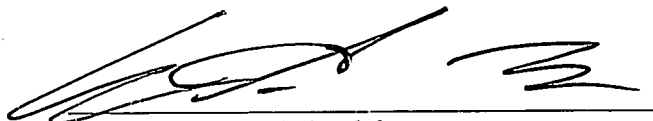
CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendant, do hereby certify that I, on the 16th day of March, 2015, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

The Hon. James B. Jackson, Jr.
Special Circuit Judge
P.O. Drawer 9000
Orangeburg, SC 29116

Brian D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC
2015 MAR 19 AM 11:40



Andrew S. Radeker

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Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Newtek Small Business	)	
Finance, Inc.,	)	CASE NO. 2013-CP-38-01427
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
Kirtikumar H. Mehta,	)	
	)	
DEFENDANT.	)	
	)	

December 4, 2014

Orangeburg, South Carolina

B E F O R E:

The Honorable James B. Jackson, Jr.

A P P E A R A N C E S:

Bryan D. Caskey, Esquire
For the Plaintiff

Andrew Sims Radeker, Esquire
For the Defense

Phyllis Norton, CVR *Nationally Certified Verbatim Court Reporter*
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E XMOTIONS

-- 3

EXHIBITS - None ProfferedCERTIFICATION OF TRANSCRIPT

-- 25

Look for an original signature in blue ink on the certification sheet to verify that the court reporter has certified the transcript you are viewing.

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 MR. CASKEY: If I can approach.

2 THE COURT: Sure.

3 MR. CASKEY: This is just a memorandum of law.

4 (WHEREUPON, document provided to the court.)

5 THE COURT: Okay.

6 MR. CASKEY: Mr. Radeker I think has made this a

7 contested summary judgment motion so.

8 THE COURT: That is typical of Mr. Radeker. He likes
9 to contest things.

10 Drew, who do you represent?

11 MR. RADEKER: I represent the defendant, Kirrkumar
12 Mehta. He goes by Chris. So if I say Chris Mehta that is
13 who I am talking about.

14 THE COURT: That is fine. I am just trying to make
15 sure I have got the players right.

16 Bryan, you represent Newtek?

17 MR. CASKEY: That is correct, Your Honor.

18 THE COURT: All right. Whose motion is this?

19 MR. CASKEY: Your Honor, it is my motion for summary
20 judgment.

21 THE COURT: Okay.

22 MR. CASKEY: And I'm not sure the best way the court
23 wants to take this, just in the most economical way. Mr.
24 Radeker does have a pending motion. I guess he filed it
25 just Monday or earlier this week to amend his pleadings.

1 And they have got an affidavit which essentially opposes our
2 motion for summary judgment. I am prepared to ---

3 THE COURT: Does one affect the other? I mean I guess
4 if I grant summary judgment that would affect it, right?

5 MR. RADEKER: So, yes, I would say that they -- if one
6 does affect the other. I mean we -- we would ask for the
7 motion to amend to get heard at least while we are here
8 today just in the interest of judicial economy. I mean we
9 are here at court and have a court reporter and have a judge
10 so.

11 THE COURT: I mean that is fine with me if it is all
12 right with you?

13 MR. CASKEY: If you don't grant my motion for summary
14 judgment then I am fine to go forward on amending the
15 pleadings.

16 THE COURT: That's what I figured. I mean, you know,
17 again, so I mean that is pretty liberally granted; so let's
18 just hear your motion for summary judgment and then we will
19 go from there.

20 MR. CASKEY: I am hoping to convince you to end the
21 case today.

22 THE COURT: Well ---

23 MR. CASKEY: Your Honor, just to give you a little bit
24 of background. I have handed up a memorandum. This case
25 arises out of a promissory note that Mr. - I call him Chris

1 as well - that Chris, his company, got from Newtek. They
2 borrowed \$725,000. He borrowed it through his company,
3 Krishna of Orangeburg. That was done in February of 2007.
4 He borrowed \$725,000. With that money he bought a piece of
5 commercial real estate with a hotel on it.

6 THE COURT: Okay.

7 MR. CASKEY: In connection with that promissory note my
8 client got a mortgage. We got a purchase money mortgage
9 securing the real estate. We also got an unconditional
10 guarantee from Mr. Mehta because he was the individual
11 guaranteeing the loan standing behind his corporation.

12 Subsequently in 2013 we commenced a foreclosure action
13 to basically enforce the mortgage because the note had
14 fallen into default.

15 Prior to that foreclosure action coming to completion
16 an agreement was reached to sell property in a private sale
17 as opposed to a judicial sale. And in that private sale
18 there were not enough funds to fully pay off the total
19 amount owed under the promissory note. The contract sales
20 price was \$437,000. That was an arrangement that Mr. Mehta
21 through his company had reached and basically they asked
22 Newtek to consent to that short sale.

23 They specifically negotiated over the terms of that
24 sale. That is actually attached as exhibits one and two to
25 my memorandum. You will see the first exhibit is what they

1 sent over to Newtek specifically asking him to agree to it.

2 The only really relevant portion of that long contract
3 is the very last page of Exhibit 1 which I will hold up for
4 you here. It should be -- get through all of the schedules.
5 It is Schedule 5. It is an unsigned Schedule 5. You will
6 notice it says consent of the lender.

7 The reason that it is unsigned by my client is we
8 rejected this proposed contract. We specifically rejected
9 it because the last line of the consent says additionally
10 upon receipt of the 437,000 lender shall specifically
11 release and discharge Kirit Mehta and any other guarantors
12 of the loan from any other liability under the note, loan
13 agreement, and documents.

14 They wanted a full release and waiver of the
15 deficiency. Newtek said no, we are not executing that.
16 Therefore, Exhibit 2, the actual contract, the one that was
17 signed and consented to by my client that was the subject of
18 the sale, if you go through that Schedule 5 that Schedule 5
19 does not contain that language. It was a specifically
20 negotiated term that does not appear in the final executed
21 contract.

22 I would also bring to the court's attention the merger
23 clause and nonreliance clause. And really the reason I am
24 leading up to this is because Mr. Radeker's client on Monday
25 of this week produced an affidavit, and their -- in my

1 opinion their material fact that they believe would preclude
2 summary judgment is they say prior to this contract going
3 through that my client Newtek orally represented, orally
4 promised to Mr. Mehta, that we would waive the deficiency
5 and that don't worry about the writing of the contract,
6 don't worry about what the documents actually say, we are
7 going to make an oral representation to you that we are
8 waiving the deficiency and we are not going to seek
9 anything. That's ---

10 THE COURT: Do I have that affidavit?

11 MR. CASKEY: That is in his affidavit, Your Honor. It
12 is actually Paragraph 3 of his affidavit where he says
13 before the closing of the short sale Jose Morales of Newtek
14 Small Business Finance also told me that as a result of the
15 short sale that there would be no more debt owed to the
16 plaintiff.

17 THE COURT: I have got it right here.

18 MR. CASKEY: That in my opinion forms the crux of their
19 opposition to the summary judgment. I think that is
20 certainly a fact in dispute. However, I would certainly say
21 that is not a material fact in dispute for the reasons I
22 have outlined in my memorandum. I can go through those for
23 you briefly.

24 First of all, there is a merger clause. In the sixth
25 page of the agreement the parties specifically say: This

1 instrument, meaning the contract that they have all entered
2 into, constitutes the entire agreement between the parties
3 and no party shall be bound by any terms, conditions,
4 statements or representations or written not contained
5 herein. Each party hereby acknowledges that executing this
6 agreement he or she has not been induced, persuaded or
7 motivated by any promise or representation made by the other
8 party unless expressly set forth herein. All negotiations,
9 statements, and preliminary instruments by the parties or
10 their representatives are merged in this instrument.

11 It is actually both a merger clause and a nonreliance
12 clause. They are specifically saying everything is merged
13 into this agreement. Because it went through a lengthy
14 negotiation in which many terms were negotiated. So to
15 clarify and make very clear what the agreement was it said
16 that the four corners of this document set forth our
17 agreement and nobody can rely on anything outside of the
18 agreement. Very common. It's why we have contracts
19 typically.

20 What they are seeking to do is barred by the parole
21 evidence rule. That is why we have the parole evidence
22 rule. You can't come back and say hey I know we had a
23 contract for you to sell me a car for a thousand dollars but
24 prior to executing the contract you really said it was going
25 to be \$500, I need \$500 back. That is why the parole

1 evidence rule has been around for a long time. That is why
2 it exists. This is the textbook example of why the parole
3 evidence rule is a rule. That is a rule of evidence.

4 And accordingly, this oral representation is both
5 precluded by the merger clause, it is precluded by the
6 nonreliance clause, and it is precluded by the parole
7 evidence rule.

8 It is clear that it was a specific term that was
9 negotiated, rejected by my client, and did not form the
10 basis of the contract that was actually executed.

11 There is a very good case -- there's a lot of cases
12 about parole evidence rule. I found a very good case that
13 Justice Ginsburg ---

14 THE COURT: Very good meaning it supports your
15 position, right?

16 MR. CASKEY: There are a lot. I found a very good one
17 that -- the nice thing about being a lawyer is that I can
18 find judges who are more eloquent than I am and can say
19 things a lot better than I can. And Justice Ginsburg did
20 exactly that. In 1988 before she was put on the Supreme
21 Court they had a very similar case with a vigorously
22 negotiated term of a long contract about some steak houses,
23 and it was exactly the same fact pattern. One party said
24 hey we had this oral representation that y'all weren't going
25 to change over the Sizzler's to these Rustler's and y'all

1 have defrauded us and we want to kind of, you know, step
2 over the contract and use this oral representation. And
3 what Justice Ginsberg says is that the plaintiffs cannot
4 overcome the written instrument here by invoking any kind of
5 fraud in the inducement exception to the parole evidence
6 rule.

7 I am sure that Mr. Radeker is going to say that his
8 client was defrauded by this statement and this is a vast
9 exception to the parole evidence rule. But the exception
10 for a party who has been induced to enter by fraudulent
11 misrepresentation is an exception. However, you can't
12 stretch or inflate that to a way that it would severely
13 undermine the policy of the parole evidence rule.

14 We don't have a contract that was put under Mr. Mehta's
15 nose and forced him to sign in any kind of duress. There
16 was no time crunch. He was represented by counsel. It was
17 long negotiations. There is no fraud or trickery here. So
18 there is no exception that can be made to the parole
19 evidence rule by claiming there is some kind of fraud or
20 misrepresentation.

21 That kind of dovetails into their cause of action they
22 have alleged in their amended complaint. They said well we
23 have a cause of action for -- he doesn't really specifically
24 enumerate it or delineate it, but to me it looks like
25 negligent misrepresentation is what his cause of action is.

1 And if I am mischaracterizing that, I apologize.

2 But you cannot have negligent misrepresentation on a
3 mere promise. The case law is very clear. An oral promise
4 cannot be negligent misrepresentation. And South Carolina
5 law is clear on that. And quoting from a recent district
6 case using South Carolina law a claim for negligent

7 misrepresentation cannot ordinarily be based on unfulfilled
8 promises or statements as to future events.

9 The court held that evidence of a mere broken promise
10 is not sufficient to prove negligent misrepresentation
11 anymore than it is sufficient to prove fraudulent
12 misrepresentation.

13 So obviously for purposes of summary judgment here
14 today I am assuming that everything in their affidavit is
15 true. I have to. We certainly don't agree that we said
16 this or that Newtek said this, but obviously I have to
17 accept that it is true and still defeat that. I think I
18 have done that.

19 Even if everything in Mr. Mehta's affidavit is true it
20 cannot form the basis of negligent misrepresentation. It is
21 a mere promise. And it cannot form the basis of any kind of
22 fraud or defeat an oral contract. If you could, these
23 contracts wouldn't be worth the paper they are written on.
24 You have a merger clause. You have got a nonreliance
25 clause. That is why we have these things.

1 I can go into the Unfair Trade Practices Act if the
2 court likes, but it is pretty clear to me they have also
3 served an unfair trade practices against my client for this
4 allusory promise. But I think the case law is pretty clear
5 you can't get an Unfair Trade Practices Act when the parties
6 are in contract with each other. My client is his client's
7 lender essentially. And there is no affect of the public
8 interest. It is clear that you can't get unfair trade
9 practices for every slight against somebody. There is no
10 showing that this is, you know, affecting the public
11 interest.

12 And I would be happy to expound on that. But I think I
13 have become long-winded enough.

14 THE COURT: Okay. Mr. Radeker.

15 MR. RADEKER: Thank you, Your Honor. And to -- for
16 efficiency sake I will take up the motion to amend stuff
17 probably after we get done talking about this.

18 But just by way of background to note in so far as it
19 does impact the summary judgment motion our motion to amend
20 and to add parties is to add a company called Quantum
21 Mortgage Corporation. And a guy named Vivek Naik, that is
22 his company. They are the people who arranged this
23 transaction and to assert claims against them. But the
24 counterclaims that would be asserted in the amended pleading
25 are negligent misrepresentation, violation of Unfair Trade

1 Practices Act, and civil conspiracy.

2 On the summary judgment motion I wanted to note, first
3 of all, we are just getting into discovery in this case. It
4 is not that we have been dilatory in sitting on hands.
5 Actually we thought for a long time that we had this case
6 settled subject to the approval of the SBA. The SBA did not
7 approve the settlement, and so that is why we are here. But
8 it is not like we have just been sitting around.

9 THE COURT: How is the SBA involved?

10 MR. RADEKER: So it is a -- SBA guaranteed loan was the
11 underlying loan, as I understand it.

12 MR. CASKEY: That is correct, Your Honor.

13 MR. RADEKER: The way that Newtek works they are a
14 lender and all of their loans are backed by the SBA, the
15 government essentially. So if they are not repaid in full
16 and there is some offer in compromise submitted because the
17 government is the ultimate backstop they kind of have a say
18 in whether or not you can compromise the debt.

19 To the extent we are talking about settlement
20 negotiations they did make an offer of settlement. It was
21 ultimately rejected by SBA. And I don't think we need to go
22 into it more than that.

23 THE COURT: That's fine. I ---

24 MR. RADEKER: The only reason ---

25 THE COURT: I was more curious than anything.

1 MR. RADEKER: The only reason I bring it up is to note
2 that the fact that discovery is really just getting under
3 way now ---

4 THE COURT: I understand what you are saying.

5 MR. RADEKER: That is why that is only getting underway
6 now.

7 THE COURT: I understand.

8 MR. RADEKER: So here we have got a situation in which
9 Mr. Mehta is the principal of Krishna of Orangeburg which
10 went through this underlying short-sale transaction.

11 Now the property in the underlying translation turns
12 out it was worth well enough money to pay off this debt in
13 full. It was resold by Quantum Mortgage Corporation which
14 bought it on the same day as the transaction for \$605,000.
15 So there was value there sufficient to pay off what the
16 entire indebtedness was at the time.

17 So what we've got here is a situation in which the guy
18 from Quantum Mortgage, Vivek Naik, tells my client hey this
19 is going to pay off your debt in full; and so does Jose
20 Morales, an employee of the plaintiff. Relying on that, he
21 goes through this transaction.

22 I note this about the text of this document. First of
23 all, there's no affidavit or anything explaining anymore
24 about the previous negotiations other than what is in Mr.
25 Mehta's affidavit. But if you look at the Schedule 5 that

1 is signed by Newtek Small Business Finance, not by Mr. Mehta
2 or anyone from Krishna of Orangeburg, it doesn't say that
3 going through with the transaction won't extinguish the
4 debt. So it is not like we are popping up here trying to
5 contradict what is in the document. This is something else.

6 In the parole evidence rule all it -- all it bars is
7 look -- it is saying our deal orally was "X", the document
8 says "Y", which is different from that. It doesn't bar the
9 introduction of stuff that simply says this isn't addressed
10 in the document but here are the oral terms that deal with
11 that. So I would note that.

12 He tells him that, you know, this will wipe out the
13 debt. And so relying on that he goes through with the
14 transaction. Mr. Mehta's affidavit says that he would not
15 have allowed the short sale to occur for that price if he
16 had not believed the short sale would satisfy all of the
17 debt owing to the plaintiff, that he could have gotten the
18 money together to bring the loan current; but because of the
19 representations that it would satisfy all of the debt he did
20 not, thinking that he was going to be getting rid of this
21 problem, the very problem that he has been sued upon here
22 today.

23 You know, as far as the merger clause is concerned if
24 our motion to amend is granted any merger clause is not
25 going to bar introduction of any evidence or anything as it

1 relates to a tort cause of action like negligent
2 misrepresentation.

3 What are the fact issues here. Well, number one is was
4 there a failure to mitigate damages on the part of the
5 plaintiff. The plaintiff has a duty to mitigate its
6 damages. And they could have gone through with the
7 foreclosure and likely recovered all of their debt out of
8 the sale of the subject property but didn't do that
9 considering the subject property was worth an amount
10 sufficient to pay off the entire indebtedness. But they
11 chose to do this instead.

12 There's a fact issue as to whether there was a waiver
13 or settlement of any of the remaining debt in connection
14 with the transaction, you know, and what if any affect will
15 avert it on the counterclaims if the motion to amend is
16 granted have on the outcome here.

17 As to the negligent misrepresentation cause of action
18 I -- you know, respectively to my opponent I think the
19 plaintiff has kind of cherry-picked a little bit from the
20 law.

21 Everybody picks out the statements from cases that
22 support their position. So that is not an attack or
23 anything, but as I remember my negligent misrepresentation
24 and fraud law it's if you make a statement that is for the
25 purpose of inducing somebody to go through with a

1 transaction even if it is a statement about something that
2 will happen in the future that is an exception that defeats
3 the general rule that statements about what will happen in
4 the future can't be the basis of such a tort. And that is
5 what we have got here. Given that all we have got to show
6 is a scintilla of evidence sufficient to defeat summary
7 judgment I think we have that.

8 If the court agrees that the plaintiff is entitled to
9 summary judgment, which I don't think that the court should,
10 even at that point the plaintiff would be entitled to
11 summary judgment on liability but not damages.

12 Looking at the summary judgment motion and the
13 affidavit given in support of it, there is no statement as
14 to how this interest figure is calculated. Interest is at a
15 variable rate per the contract documents so there is no way
16 to tell how this figure was arrived at.

17 The same thing with late fees; there is no calculation,
18 no way to tell how a figure was arrived at.

19 THE COURT: What ---

20 MR. RADEKER: And the same thing ---

21 THE COURT: I haven't even looked at the complaint yet.
22 What is the -- what is the amount of the complaint -- or the
23 judgment?

24 MR. RADEKER: Hold on just a moment. I will get that
25 out.

1 THE COURT: I probably have it in the file.

2 MR. RADEKER: The complaint seeks judgment for
3 \$306,072.36.

4 MR. CASKEY: That's correct.

5 MR. RADEKER: And the affidavit submitted in support of
6 the summary judgment motion says that lender is currently

7 owed a total of \$315,632.30. So those are those two
8 documents.

9 I would note that our motion to amend it adds those
10 counterclaims, but the defenses that we plead are
11 essentially the same defenses that were pled in our answer.
12 We pled that going through with this transaction may have
13 extinguished this debt as the result of a settlement and
14 that the plaintiff just failed to mitigate his damages.

15 And so we would note there are fact issues about all of
16 those things. I am trying to think if there is anything
17 else to say.

18 Going to the reasonableness of Mr. Mehta's belief that
19 this \$437,000 paid to Newtek was accepted as a payoff of the
20 first mortgage I would point to an attachment to the
21 plaintiff's summary judgment motion, Plaintiff's Exhibit 4
22 which is a settlement statement. And on it it says payoff
23 of first mortgage loan, Newtek Small Business Finance, Inc.,
24 \$437,000 on it.

25 It doesn't say accepted partial payment or paid in

1 exchange for release of lien. It says payoff.

2 But in any event, if the court feels that it is going
3 to have to determine credibility between is what is what Mr.
4 Mehta is saying believable then the court already knows at
5 that point that summary judgment can't be granted because if
6 it is a question of credibility that is a question for the

7 fact finder and not for the court on summary judgment. And
8 so we would ask that the summary judgment motion be denied.

9 MR. CASKEY: May I briefly respond, Your Honor?

10 THE COURT: I mean I have to -- I mean I think I have
11 to accept as you said ---

12 MR. CASKEY: I agree.

13 THE COURT: --- as you said what it true in these
14 affidavits.

15 MR. CASKEY: I am not disputing what he says.

16 THE COURT: The question is ---

17 MR. CASKEY: Does it matter.

18 THE COURT: --- does the oral agreement change the
19 terms of the written agreement.

20 MR. CASKEY: And a few points here. I think their
21 theory they would have the court believe is somehow Newtek
22 in some way conspired to get less money from a sale of the
23 real estate than they could have. That to me makes no
24 sense.

25 I would think that my client would always want to get

1 the most money back possible, so I'm not sure what the
2 logical benefit of engaging in a civil conspiracy to get
3 less money ---

4 THE COURT: That doesn't concern me.

5 MR. CASKEY: I don't -- that -- I am not even following
6 that. But ---

7 THE COURT: That doesn't concern me too much. Because
8 basically what that means is Quantum, whoever they are,
9 outsmarted all of you.

10 MR. CASKEY: Right, and any ---

11 THE COURT: They are the only ones that made any money
12 out of this thing, right?

13 MR. CASKEY: That is correct. Any claims ---

14 THE COURT: And they found a buyer that y'all couldn't
15 find.

16 MR. CASKEY: And any claims they would like to make
17 against Quantum or any other third parties, Mr. Vivek, they
18 are certainly, you know, not precluded from bringing those
19 if they feel they have been ---

20 THE COURT: They can bring that in a separate action
21 too.

22 MR. CASKEY: That is exactly right. I would bring the
23 court's attention to the satisfaction of mortgage that was
24 entered.

25 The satisfaction of mortgage specifically in bold

1 letters at the very bottom says: However, this satisfaction
2 shall not in any manner constitute a waiver of payment of
3 the underlying and associated promissory note. Newtek Small
4 Business Finance, Inc., reserves the right to collect any
5 and all deficiency that may still be due and owing under the
6 underlying associate promissory note and related documents
7 specifically but not related to the guarantees associated
8 with the promissory note.

9 The entire transaction contemplated getting what could
10 be gotten out of the real estate and then subsequently
11 seeing what could be done.

12 Coming in here and saying we have got this oral
13 representation is to me very very thin. I believe for
14 purposes of the summary judgment even accepting it it does
15 not change the ultimate facts.

16 And I'm honestly not really trying to cherry-pick any
17 of the language. It is a specific case about negligent
18 misrepresentation. I don't think you can have negligent
19 misrepresentation when parties are in privity of contract.
20 You can't have a ---

21 THE COURT: Which case is that now?

22 MR. CASKEY: That is on the fifth page of my
23 memorandum. It is the Winburn v. Insurance Company of North
24 America holding that evidence of a mere broken promise is
25 not sufficient to prove negligent misrepresentation.

1 I don't have this in my memorandum. But I can also
2 provide subsequently to the court that parties in privity of
3 contract do not have tort liability against each other, they
4 have contract liability to each other.

5 Both of us have clients that are in privity of
6 contract. My client is his client's lender. He has

7 guaranteed the loan. There can't be a tort claim brought
8 against either party out of these contracts.

9 THE COURT: Now the original answer does not contain
10 any counterclaims?

11 MR. RADEKER: That is correct, Your Honor. Just on
12 the ---

13 THE COURT: So you are asking to add counterclaims.

14 MR. RADEKER: Just on the defenses. We were -- didn't
15 want to make people angry. We were hoping we could work it
16 out.

17 MR. CASKEY: And to the issue they have raised, you
18 know, contesting the amount of the debt, I am happy to
19 provide an accounting. If we get to the stage where we
20 agree the debt is owed and we are going to enter summary
21 judgment I am happy to do whatever the court likes or
22 whatever will satisfy Mr. Radeker about the amount of the
23 debt.

24 THE COURT: Well, I mean I agree with him. I mean I
25 think the summary judgment can really only be on liability.

1 And I think that, you know, in terms of the interest,
2 attorney fees, any of that kind of stuff, a hearing would
3 have to be held before the court or a master or somebody.

4 MR. CASKEY: Subsequent motion.

5 THE COURT: Yeah.

6 MR. CASKEY: Yeah.

7 THE COURT: All right. I think I have got everything
8 from you. Let me read over these memorandums and affidavits
9 and case law. And I mean it seems to me that the real
10 question is, you know, can you change that written contract
11 by the subsequent oral agreement and ---

12 MR. CASKEY: He is actually asserting it is a prior
13 oral agreement.

14 (WHEREUPON, short conference held off the record.)

15 THE COURT: All right. Thank you.

16 MR. RADEKER: Your Honor, is ---

17 THE COURT: I'm sorry.

18 MR. RADEKER: On the motion -- we had another motion,
19 that motion to amend.

20 THE COURT: I will decide both of them. I mean
21 again ---

22 MR. RADEKER: Okay.

23 THE COURT: --- I am going -- if I deny summary
24 judgment I am pretty sure I would let you amend. I mean
25 counterclaims concern me. How old is this case?

1 MR. CASKEY: It is 2013 but late in 2013. I will --
2 here, let me look at the complaint.

3 MR. RADEKER: Let's see. We filed this action on ---

4 MR. CASKEY: A year ago today.

5 MR. RADEKER: --- December 3rd. So it is one year and
6 one day.

7 THE COURT: There you go. All right.

8 MR. CASKEY: Do you want proposed orders or ...?

9 THE COURT: Let me -- I will probably send you a letter
10 and tell somebody to draft me an order. I mean I understand
11 your motion. I mean and I think I can decide that as well.

12 MR. RADEKER: Thank you, Your Honor. I just didn't
13 want anybody to think I let it go.

14 THE COURT: No. And I understand that.

15 (Whereupon the hearing concluded.)

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF ORANGEBURG C/A. No. 2013-CP-38-01427
3 Newtek Small Business)
4 Finance, Inc.,)
5 Plaintiff,)
6 vs.)
7 Kiritkumar H. Mehta,)
8 Defendant.)
9

MOTION HEARING

Wednesday, May 27, 2015

1:25 p.m to 1:52 p.m.

15 The hearing before the Honorable James B.
16 Jackson, Master-in-Equity for Orangeburg County,
17 was taken at 151 Docket Street, Third Floor,
18 Orangeburg, South Carolina on the 27th day of
19 May, 2015 before Cassandra E. Vance, Court
20 Reporter and Notary Public in and for the State
21 of South Carolina.
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APPEARANCES:

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INDEX

PAGE

Certificate.....26

EXHIBITS

PAGE

(There were no exhibits marked during the hearing.)

1 THE COURT: All right. We're now on the
2 record in the case of Newtek Small Business
3 Finance, Inc., versus Mehta, M-E-H-T-A. I'm not
4 going to try the first name.

5 Newtek, the Plaintiff, is represented by
6 Mr. Brian Caskey, and Mr. Mehta is represented by
7 Andrew Radeker.

8 I previously issued an order granting
9 Summary Judgment to the Plaintiff, an order that
10 was filed February 25th, 2015. Mr. Radeker made
11 a timely motion for me to reconsider that order.

12 And I believe Mr. Caskey's made a return to
13 that and so we're ready to proceed on
14 Mr. Radeker's Motion to Reconsider. Be glad to
15 hear from you, Mr. Radeker.

16 MR. RADEKER: Thank you, Your Honor.
17 Jumping right to the meat of it since both
18 parties have submitted briefs ahead of time, the
19 linchpin of the Court's decision was the parol
20 evidence rule, which is a rule of substantive
21 contract law that says that prior or
22 contemporaneous negotiations, contemporaneous or
23 prior to an integrated writing forming the
24 substance of the parties' contract, cannot be
25 used to vary the terms of that contract. And

1 that really in the order, that's the basis for
2 the decision granting Summary Judgment.

3 We would take issue with that in basically
4 three particulars. Here, we're talking about a
5 short sale agreement that was between Krishna of
6 Orangeburg, Inc., and Newtek; not between
7 Mr. Mehta and Newtek.

8 So I would say the parol evidence rule would
9 simply be inapplicable. We're not talking about
10 a party to that agreement trying to come in and
11 vary the terms because Mr. Mehta was not a party
12 to that agreement. Also --

13 THE COURT: Which -- tell me which agreement
14 you're talking about again.

15 MR. RADEKER: The short sale agreement. I
16 think most of the documents concerning that are
17 attached to the Memorandum in Support of the
18 Plaintiff's Motion for Summary Judgment that they
19 filed.

20 But, in any event, I mean, looking at it,
21 you can tell who the agreement is between and
22 it's between Krishna of Orangeburg, Inc., and
23 Newtek. And Mr. Mehta is not a party to that.

24 Furthermore, the parol evidence rule is
25 inapplicable to tort causes of action. We've got

1 as recently as February 4th of this year, our
2 Court of Appeals quoting a Supreme Court case
3 from 2005 in saying that neither the parole
4 evidence rule, nor a merger clause in a contract
5 prevents one from proceeding on tort theories of
6 negligent misrepresentation and fraud.

7 And one of the things that we sought to
8 amend our pleadings to assert was a claim for
9 negligent misrepresentation.

10 Basically, the background facts, as Your
11 Honor may recall, are that we had presented an
12 affidavit from Mr. Mehta in which he stated both
13 that a third party, Vivek Naik, and a
14 Mr. Morales, an employee of Newtek, both told him
15 that if it went through the short sale
16 transaction that it would wipe away the remaining
17 debt. Since this is a suit on the guaranty of
18 that debt, it's pretty material to the outcome of
19 the case whether it was really wiped out or not.

20 So that's basically, you know, the theory
21 that we presented was you misrepresented that
22 fact to us.

23 Now, in the Plaintiff's return to our Motion
24 for Reconsideration, they state in there, "Well,
25 that's just a statement as to future events that

1 can't be actionable."

2 One, there's an exception to the rule that
3 the statement of --

4 THE COURT: My party balloon.

5 MR. RADEKER: -- prediction of the future
6 can't be actionable --- yeah, I was wondering
7 about the balloon.

8 THE COURT: Sorry about that.

9 MR. RADEKER: That's all right. So,
10 congratulations, it's your birthday -- was made
11 when the promisor has at the time of the
12 statement no intention of keeping the agreement.

13 Here, you know, Newtek knew its position was
14 that the debt would still exist, that it would
15 consider Mr. Mehta to be liable on the guaranty
16 for the balance. It would be pretty disingenuous
17 for them to take a position and say, "Oh, we
18 didn't know that when we said it," because
19 they're sitting here suing him for it now.

20 Also, that blanket statement, that
21 statements about what's to occur in the future
22 really isn't applicable to this. This is a
23 statement of what's really existing fact. Saying
24 this statement is true: If you do action A, that
25 is, cause Krishna of Orangeburg to enter into

1 this agreement, we will do action B, and that is
2 that we will -- that will wipe away the debt that
3 you've got. That's a statement of present or
4 existing fact. And so on that point, I'd say
5 they're incorrect.

6 Also, the documents that embody the short
7 sale agreement do not speak to the question of
8 whether going through the short sale transaction
9 will wipe away the remainder balance of the debt.
10 They just don't say one way or the other.

11 And the parol evidence rule, when it is
12 applicable, doesn't apply to something that the
13 written agreement is silent about. And that's
14 what we've got here.

15 So for those three reasons, I would say that
16 the reason that the Court articulated in its
17 order as being the basis for its ruling, that
18 that decision was reached in error.

19 Also, as noted at the previous hearing, and
20 we filed the discovery that we sent so the record
21 would reflect, that discovery had really just
22 begun at the time of this previous hearing.

23 Now, in the return to our motion, the
24 Plaintiff says, "Well, yes, you know, settlement
25 negotiations were going on and we had" -- you

1 know, as I noted before, we actually had reached
2 a settlement. SBA just didn't approve it.

3 And they said, "But -- well, that didn't
4 prevent you from conducting discovery before
5 that."

6 ~~We're not saying that something technically~~
7 prevented us from serving discovery before then.
8 What we are saying is, it's not like we were
9 being dilatory and just sitting on our hands and
10 said, "Oh, we've got a Summary Judgment hearing
11 coming up, let's serve some discovery."

12 What happened is we had a good reason for
13 not pursuing discovery beforehand. We all did.
14 You know, we served discovery -- actually, you
15 know, we still won't have answers to that
16 discovery. We hadn't made a motion to compel or
17 anything. You know, some of that may depend on
18 whether that gets answered or objected to as
19 irrelevant based on the outcome of this hearing.

20 But, in any event, we hadn't had a full and
21 fair opportunity to conduct discovery at the time
22 of the hearing of this motion. And the case law
23 says that Summary Judgment shouldn't be granted
24 until the party opposing the motion has had such
25 an opportunity.

1 Also, I would say this, the order basically
2 summarily denies the Motion to Amend in what
3 appears to be the theory that given this ruling
4 in granting Summary Judgment for the Plaintiff,
5 that basically saying the Court would have
6 ~~granted Summary Judgment regardless of whether~~
7 the amendment has been done is just futile.
8 There's no reason to grant the Motion to Amend.

9 We would say that the record ought to
10 reflect what the issues were and basically we
11 were all arguing, you know, whether Summary
12 Judgment should be granted as if the pleadings
13 had been amended.

14 Also, the question of whether to add third
15 parties like Quantum Mortgage was Vivek Naik's
16 company, and Mr. Naik as parties, I don't think
17 that should depend upon whether Summary Judgment
18 on liability is granted for the Plaintiff such
19 that even if the Court didn't change its ruling
20 in other respects.

21 Basically our theory is, you guys did a lot
22 to put us where we are now. So if we're going to
23 be found liable to this, it's your lies that have
24 been basically brought us to where we are today
25 so that we ought to be allowed to pursue that for

1 the economy of the Court in the same action.

2 I mean, the Court didn't grant Summary
3 Judgment on the whole shebang, if you will; only
4 on liability. So there's still going to have to
5 be a trial in any event. So it's not like we're
6 saying like, "Oh, if you bring these guys in,
7 there'll have to be a trial; if you don't, there
8 won't be." So there's going to have to be one in
9 any case.

10 And so we would note for those reasons that
11 we believe the Court should reconsider its ruling
12 and we rest on our memorandum as to anything that
13 I have left out today.

14 THE COURT: Well, let me ask you this,
15 Mr. Radeker. I guess this is my concern with
16 this whole thing.

17 Everything that's in writing says that we
18 didn't waive any deficiency judgment. And the
19 only thing that you've got opposing that is what
20 your client says is some verbal agreement that
21 they reached, which is different than everything
22 that's in here that's in writing.

23 So, I mean --

24 MR. RADEKER: Here's what I --

25 THE COURT: -- how could I let you get past

1 Summary Judgment with that?

2 MR. RADEKER: Here's what I'd say about
3 that. The writing -- the writings about the
4 short sale agreement, they don't say that we are
5 maintaining our rights to seek deficiency.

6 THE COURT: But as you said, your client
7 wasn't part of that.

8 MR. RADEKER: So it's just silent as to it.

9 THE COURT: Well, your party wasn't -- your
10 client wasn't a party to the short sale
11 agreement. So why would it say anything about
12 whether they're seeking a deficiency against your
13 client or not?

14 MR. RADEKER: But it might say something
15 about whether they're maintaining that Krishna of
16 Orangeburg, Inc., still owes the debt. And if
17 Krishna of Orangeburg, Inc., doesn't owe it,
18 there's nothing for Mr. Mehta to guarantee
19 anymore. It doesn't -- it just simply doesn't
20 speak to that at all.

21 But what we do have is Mr. Mehta's affidavit
22 that says that among the people who told me this
23 is a man who worked for the Plaintiff, Newtek.

24 And -- well, I guess what I'd say is this:
25 Is that when the Court is saying, "How can I

1 believe that? Is that credible?" If the Court
2 is asking itself such questions, then the Court
3 really already knows that as a matter of Summary
4 Judgment, Summary Judgment is not proper because
5 credibility issues would be for the finding of
6 fact.

7 THE COURT: Even if I believe that there's
8 an existing verbal agreement, how could that
9 overcome the written agreement?

10 MR. RADEKER: Well, for a few reasons. One,
11 those representations are made to Mr. Mehta, to
12 him as an individual, as well as to him as
13 Krishna of Orangeburg, but as to him as an
14 individual the parol evidence rule's simply not
15 going to come into play.

16 Also, the written agreement simply doesn't
17 speak to the truth of what Mr. Mehta says in his
18 affidavit is said by these people. It doesn't
19 say, "Hey, this debt is going to survive this.
20 Whatever remains is going to continue to be
21 owed."

22 And that's what the parol evidence rule
23 talks about is, if the written agreement says one
24 thing and the parties say, "Well, the real
25 agreement we reached beforehand was the opposite

1 of that or different from that," then the parole
2 evidence rule comes into play.

3 We've got case law in this state and I
4 quoted in the memorandum Keith versus River
5 Consulting that states that when a contract is
6 silent as to a particular matter, parol evidence
7 is admissible to reveal the true intent.

8 And so we would note that the parol evidence
9 rule is not what is going to carry the day for
10 the Plaintiff on the law, we believe, and so we
11 would ask the Court to reconsider its ruling.

12 THE COURT: Thank you, sir.

13 Mr. Caskey?

14 MR. CASKEY: Please the Court, Your Honor.
15 Just to address several issues. First, they're
16 trying to claim that Mr. Mehta was not a party to
17 this deal, but they're also saying that he was
18 involved in this deal by being told certain
19 things and that the corporation is not him.

20 The corporation is him. He's -- he is the
21 corporation. So let's dispense with whether or
22 not he was in the loop. It doesn't make sense
23 that they would be making these alleged
24 statements to him if he was not part of the deal.
25 They wouldn't have to say anything to him if he

1 wasn't part of the deal. He is the corporation.
2 He's the sole member.

3 So I think we can dispense with the whole
4 "he wasn't involved, he wasn't here." He is
5 Mehta and he is Krishna. It's the same thing. I
6 think his counsel's even just said.

7 So, specifically, counsel has really taken
8 the position that the language of the agreement
9 is silent and it is not. That is just not the
10 case.

11 You can see the schedule five, Consent of
12 the Lender. There's actually two schedule fives.
13 This was an arm's length, highly negotiated
14 agreement.

15 There's a Consent of the Lender that is, in
16 fact, blank. It is not signed by the lender.
17 And it is not signed by the lender because the
18 last sentence says, "Lender shall specifically
19 release and discharge Kirit Mehta and any other
20 guarantors of the loan from any other liability
21 whatsoever under the note, loan agreement, and
22 loan documents."

23 This term was specifically proposed. It was
24 specifically rejected; hence, it is not signed.

25 You can flip over. There is another

1 schedule five, Consent of the Lender, which is,
2 in fact, signed by the lender; signed by Jose
3 Morales, the villan who's made all these alleged
4 statements.

5 And it specifically says, "If the sale
6 contemplated by the agreement is closed on or
7 before the closing date set forth in the
8 agreement and seller is not in bankruptcy, lender
9 agrees to release all of its liens affecting the
10 property upon receipt of an amount equal to
11 \$437,000. The amount due to lender shall not be
12 reduced by prorations, attorney's fees, closing
13 costs, taxes, or other fees or charges. Upon
14 receipt by lender of 437,000, lender shall
15 release its mortgage lien on the subject
16 premises."

17 They specifically negotiated cutting
18 Mr. Mehta loose. That specific term was
19 rejected; that's why it's not signed.

20 THE COURT: See, I'm not -- I've got the one
21 that's not signed, but I don't think I have the
22 one -- or at least I can't find it quickly
23 here -- the one that was signed.

24 MR. CASKEY: Are you looking at what was
25 attached to my thick memorandum --

1 THE COURT: Yes.

2 MR. CASKEY: -- supporting?

3 THE COURT: Yes.

4 MR. CASKEY: If you keep flipping through,
5 it's about that (indicating) many pages through
6 it.

7 MR. RADEKER: On mine it's like three pages
8 from the back, which may --

9 MR. CASKEY: Yeah, it may be easier to tell
10 you --

11 MR. RADEKER: If you start there --

12 MR. CASKEY: -- if you start at the back, it
13 is -- one, two -- three from the back.

14 THE COURT: I don't have -- three from the
15 back is schedule one "E" and then there's
16 schedule four. This is all like title insurance
17 stuff.

18 MR. CASKEY: Keep going. Then you've got to
19 get to schedule B, section two. Your Honor, I'll
20 be happy just to hand you up my copy, if
21 that's ...

22 THE COURT: Yeah, I'm going to have to have
23 it because it looks like I --

24 MR. CASKEY: That's fine.

25 THE COURT: I can't seem to find it.

1 MR. CASKEY: That's why I have extra copies.
2 That's the signed version.

3 THE COURT: Thank you.

4 MR. CASKEY: You'll notice the only
5 difference between the signed version and the
6 unsigned version is in the unsigned version
7 they're saying release him of everything. In the
8 unsigned version it simply says we're releasing
9 the mortgage lien. It was a specifically crafted
10 negotiation.

11 They specifically proposed the term, it was
12 rejected, and that document was signed. It could
13 not be more crystal clear.

14 Additionally, if you'll look at the
15 mortgage, the satisfaction of the mortgage, which
16 is the following page --

17 THE COURT: Right.

18 MR. CASKEY: -- it also explicitly reserves
19 the right. And the amount owed to the lender
20 shall not be reduced by any other charges.

21 So to say that even as a premise, counsel's
22 argument is that it's not clear. Well, it's
23 explicitly clear; couldn't be any more explicitly
24 clear.

25 So I think the parol evidence rule is

1 exactly on point. This is exactly why we have
2 the parol evidence rule, so people don't
3 negotiate this long written document with a
4 merger clause and it says "no other agreements
5 outside this are to be construed." You have

6 what's the four corners of the document. And
7 they're now seeking to overturn the entire
8 meaning of the agreement through this allegation.

9 Additionally, there is no tort liability
10 between these parties. My client is creditor;
11 his client is a debtor. It's a creditor/debtor
12 relationship.

13 The duty that a creditor and a debtor have
14 to each other are governed by the documents.
15 They're contracts together: The guarantor,
16 guaranty, the note, the mortgage, all of these
17 documents are their relationship.

18 The Court has previously held that there is
19 no tort duty between a creditor and a debtor.
20 You can't sue your creditor in tort for anything.
21 You're specifically limited to contract actions
22 based on the duty in the contract.

23 The only duties between two parties are
24 created by contracts and, therefore, you cannot
25 have a contract that therefore supports a tort

1 claim of negligent misrepresentation.

2 And I quote from Tadlock Painting versus
3 Maryland, which is a 1996 case and then cited
4 previously: The law is well-settled that a
5 breach of contractual duties does not give rise
6 to an action in tort for negligence.

7 Courts throughout South Carolina and around
8 the country have said mortgage servicers do not
9 owe a non-contractual duty to borrowers. There
10 is no duty of care between a mortgagee and a
11 mortgagor.

12 Absent any kind of special circumstances,
13 the relationship between a mortgagee and a
14 mortgagor or a guaranty and a guarantor is simply
15 that of the contract. It's debtor/creditor.

16 And servicers don't owe any borrowers a duty
17 of care in the context of any work-out
18 conditions, promising things that may happen in
19 the future.

20 Specifically, courts -- the federal courts
21 in Georgia, which have been cited here in South
22 Carolina and around the country have said,
23 because of the relationship between servicers and
24 the borrowers, they consist primarily of
25 debtor/credit relationships and, therefore, there

1 is no duty in tort that sounds in tort.

2 Accordingly, they're going forward on a
3 negligent misrepresentation. One of the elements
4 of a negligent misrepresentation is a duty of
5 care not to make a negligent statement. There is

6 not duty of care.

7 Even if my client misrepresented himself,
8 which he did not, which we vigorously disputed,
9 which we have to assume for the sake of Summary
10 Judgment that he did, it does not matter.

11 He does not have a duty to tell -- I know
12 that sounds cold and calculating, but the law
13 says he does not have a duty of being truthful.
14 That's just -- they don't have that relationship.

15 And so as an additional sustaining ground,
16 they cannot prove this element. The element does
17 not exist.

18 And so that's what this whole thing is
19 about. He's saying that you didn't communicate
20 truthfully with me. The documents don't bear
21 that out whatsoever. My client doesn't have a
22 duty to be truthful with him, anyway.

23 Regarding their Unfair Trade Practices Act,
24 again, I'd rest on my brief. There is no case
25 law that supports Unfair Trade Practices sounding

1 in contract. You have to show that you have
2 something that is unethical, immoral, oppressive,
3 a practice that is deceptive and tends to deceive
4 the public. You cannot have unfair trade
5 practices simply out of a private cause of
6 action.

7 I'd be happy to address any other issues if
8 the Court is inclined to reverse its decision or
9 otherwise go forward. But, finally, he said
10 that, you know, through the economy of the
11 judicial process we need to keep these other
12 parties in; that would be the opposite of the
13 economy.

14 We have a clear debtor/credit relationship.
15 We need to ascertain the amount of the damages.
16 If Mr. Mehta feels that there's other third
17 parties that did him wrong, he's free to pursue
18 them in any other action he likes. We don't need
19 to be a part of it. My client doesn't need to be
20 a part of that. But we don't have any liability
21 to him for all of the reasons I've just said.

22 And I'd be happy to answer any questions the
23 Court has.

24 THE COURT: (Indicating.)

25 MR. RADEKER: Thank you, Your Honor.

1 Hitting a few things just from my notes as I went
2 through. Obviously, the corporation is not
3 Mr. Mehta. Mr. Mehta's not the corporation.
4 Even if he's the sole shareholder or officer,
5 it's a different jural entity.

6 The Plaintiff hasn't made any corporate veil
7 piercing allegations or anything trying to say,
8 "Oh, you really are Krishna of Orangeburg."

9 The schedule five Consent of the Lender form
10 that is mentioned, does not say that any
11 deficiency or debt will survive the transaction.
12 It just doesn't speak to that at all. That's the
13 difference between it and the one before.

14 Even so, the parol evidence rule would not
15 apply to tort causes of action, anyway.

16 On the Unfair Trade Practices Act cause of
17 action, obviously, Newtek is the lender and it's
18 got opportunities to engage in like behavior in
19 the future and misrepresent what it's going to do
20 in short sale transactions.

21 Also, there's no law or rule that says that
22 someone simply because they have a credit or
23 debtor relationship with someone can't commit say
24 the tort of negligent misrepresentation or
25 another tort to them.

1 And this notion that they don't have a duty
2 to be truthful to Mr. Mehta is -- that's
3 incorrect. The law is that such a duty, the duty
4 not to negligently misrepresent to someone,
5 arises in a transaction in which someone has what
6 they call a "pecuniary interest" in the case law,
7 just a financial interest, a monetary interest.

8 THE COURT: Was this a negligent
9 misrepresentation or is this an intentional
10 misrepresentation?

11 I mean, here's what I -- here's what this
12 looks like to me. This looks like to me that
13 Mr. Radeker loans me a hundred dollars, asks me
14 to sign a promissory note agreeing to repay the
15 hundred dollars, but then tells me, says, "Look,
16 Jay, you know, sign this note, but you really
17 don't have to pay me back, okay?"

18 To me, this is sort of what this is, okay?
19 And so what do you do with that sort of thing? I
20 mean, I sign a promissory note, but I'm told that
21 it really doesn't mean anything.

22 I mean, to me, that's kind of what we have
23 here. So what -- so what do we do with it?

24 You know, you've got a writing, but yet, you
25 know, you got a verbal understanding that's

1 totally the opposite of what the writing is.

2 And I just -- I guess before I've come down
3 on the side that you've got to go with the
4 writing. And, you know, I'll look at what you've
5 got and maybe I'm wrong, but -- I mean, am I

6 seeing it wrong? I mean, that's kind of what --
7 where we are.

8 MR. CASKEY: I think that's exactly right
9 is, you've got a writing, you've got something
10 that clearly contradicts it, and you can't
11 contradict it.

12 THE COURT: And I understand the nuances of
13 what you're saying that it -- and, again, it can
14 always be better. You'd have a worse argument if
15 it said right here, "You still owe the
16 deficiency," okay? And it doesn't say that, you
17 know? But it certainly implies that, the
18 difference between the two.

19 MR. CASKEY: And it does say, "Shall not be
20 reduced" and the mortgage satisfaction does
21 explicitly say it.

22 THE COURT: I understand. But I -- you
23 know, I don't know. Let's go off the record a
24 minute.

25 (Off the Record)

1 THE COURT: You want to say anything else on
2 the record? I mean, I --

3 MR. CASKEY: I don't have anything else for
4 the record. I have just a supplemental
5 memorandum about the duty of care, about the
6 plethora of case law that you could read until it
7 makes you go to sleep about duty of care.

8 THE COURT: Well, I'm going to look at the
9 cases. I'm going to look at the case you cited
10 to.

11 MR. RADEKER: Sure.

12 MR. CASKEY: I mean, I'll hand it up. Here
13 it is, just a copy of it.

14 MR. RADEKER: Thanks.

15 (The hearing concluded at 1:52 p.m.)
16
17
18
19
20
21
22
23
24
25

Bryan Caskey

From: Bryan Caskey <bryan@fosterlawoffice.net>
Sent: Thursday, October 30, 2014 11:03 AM
To: 'Drew Radeker'; 'Judge James B. Jackson (jb.jackson@orangeburgcounty.org)'
Cc: 'Renee Wingard (Rwingard@orangeburgcounty.org)'; 'Jim Harrison'; 'Taylor Smith'
Subject: RE: Newtek Small Business, etc. v. Mehta, 2013CP3801427

Judge Jackson:

Unfortunately, the settlement has fallen through, as SBA has rejected the offer after careful consideration.

Accordingly, my motion for summary judgment needs to be rescheduled.

Kindest Regards,

Bryan D. Caskey
Foster Law Office, LLC

From: Drew Radeker [mailto:Drew@harrisonfirm.com]
Sent: Tuesday, June 10, 2014 1:41 PM
To: Judge James B. Jackson (jb.jackson@orangeburgcounty.org)
Cc: Renee Wingard (Rwingard@orangeburgcounty.org); Bryan Caskey (bryan@fosterlawoffice.net); Jim Harrison; Taylor Smith
Subject: Newtek Small Business, etc. v. Mehta, 2013CP3801427

Judge Jackson:

Please be advised that this case has settled, pending SBA approval of the settlement. Accordingly, both parties agree that there is no need for the hearing set for June 19 in this matter.

Thank you. Unless I hear otherwise from the court, I will assume there will not be a hearing held in this case on June 19. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

Drew Radeker

HARRISON & RADEKER, P.A.

ATTORNEYS AT LAW

*Real Estate / Property Disputes · Foreclosure · Media Law · Zoning · Criminal Defense · Appeals
Personal Injury · Consumer Law · Mediation/Arbitration · False Arrest · Commercial Litigation*

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terms was whether Newtek would waive its right to pursue any deficiency following the sale. Specifically, Newtek was presented with a draft contract containing waiver language, which Newtek rejected. (*See Proposed Contract* – Exhibit 1). After serious negotiations, the parties reached a final agreement that was lengthy, detailed, and comprehensive.

Despite requests from Mehta, Newtek refused to waive its right to collect any remaining amount owed under the Promissory Note and related Guarantee, and Mehta's requested language was not included in the final, executed contract. (*See Executed Contract* – Exhibit 2). In this contract, to avoid any potential misunderstandings and to make clear that the only understanding between the parties was that expressed in the contract, the parties agreed as follows:

Entire Agreement. This instrument constitutes the entire agreement between the parties, no party shall be bound by any terms, conditions, statements, or representations or written not contained herein. Each party hereby acknowledges that executing this Agreement he or she has not been induced, persuaded, or motivated by any promise or representation made by the other party, unless expressly set forth herein. All negotiations, statements, and preliminary instruments by the parties or their representatives are merged in this instrument.

(Contract, p. 6 ¶ 9(b)).

Following the sale, Newtek received the sales proceeds, and credited them towards payment of the amount due under the promissory note. Subsequently, the foreclosure action was dismissed, and Newtek delivered a Satisfaction of Mortgage, which specifically included language regarding Newtek's reservation of rights to seek full payment under the promissory note. (*See Satisfaction of Mortgage* – Exhibit 3).

Following Mehta's failure to honor his guarantee, on December 3, 2014, Newtek filed this action to enforce the guarantee for the amount remaining under the promissory note. On February 11, 2014, Mehta filed and served his answer in which he vaguely claimed that the settlement of the foreclosure action "may have released or otherwise extinguished the debt". (*See Defendant's Answer*, p. 3, ¶ 18).

On March 10, 2014, Newtek moved for summary judgment, seeking a judgment against Mehta for the outstanding balance owed under the guaranty. On December 1, 2014, in opposition to summary judgment Defendant served an affidavit from Mehta.

The essence of Mehta's affidavit is an allegation that, during the negotiation of the terms and provisions of the short sale, Newtek, through a representative, orally promised Mehta that "there would be no more debt owed". (See *Affidavit of Kirtkumar H. Mehta* p. 1, ¶ 3). Mehta's position appears to be that this alleged oral promise now presents a material issue of fact which would preclude summary judgment. However, as set detailed below, Newtek asserts that summary judgment is appropriate, even assuming, the existence of this alleged oral promise.

LAW/ANALYSIS

(Standard for Summary Judgment)

A trial court may grant a party's motion for summary judgment if 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. *Epstein v. Costal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.*

Accordingly, although Newtek denies that it made any oral promise to forego collection of the remaining balance due under the note and guaranty, for the purposes of this summary judgment motion, Newtek must concede this allegation to be true. However, even assuming this allegation to be true does not create a material issue of fact precluding summary judgment.

I. Any oral promise not included in the final contract cannot be used to contradict the written provisions of the contract.

The well-settled parol evidence rule precludes the alleged promise from being introduced as evidence. Specifically, the parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. *See Estate of Holden v. Holden*, 343 S.C. 267, 539 S.E.2d 703 (2000); *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App.2001).

The rationale and policy underlying the parol evidence rule was succinctly explained by Justice Ginsburg, as follows: "Were we to permit plaintiff's use of the defendant's prior representations to defeat the clear words and purpose of the Final Agreement's integration clause 'contracts would not be worth the paper on which they are written.'" *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 270 U.S. App. D.C. 251 (C.A. D.C., 1988).

The instant case is a textbook example of the situation that the parol evidence rule was created to prevent. In this instance, the parties negotiated specific terms of their contract and reduced those terms to writing. One of the specific terms negotiated was whether the remaining balance would be owed following the sale of the property. The written words of the contract and the accompanying documents are crystal clear in the fact that no waiver was given. Mehta now seeks to overturn the clear meaning of the entire agreement through his allegation of a prior oral promise.

We have here the case of a party with the capacity and opportunity to read a written contract, who was represented by counsel, who executed the contract, not under any emergency, and whose signature was not obtained by trick or artifice. Accordingly, if the parol evidence rule is to retain vitality, there cannot later be a claim fraud in the inducement, as an unfulfilled promise cannot be the basis for negligent misrepresentation, much less fraud.

Due to the fact that the parol evidence rule precludes the use of this promise to contradict the contract, and the parties clearly agreed not to rely on any representations not contained in the contract, Mehta has not raised an issue of genuine material fact which alters the application of the law. Accordingly, this Court should grant summary judgment to Plaintiff.

II. Defendant cannot meet the elements of negligent misrepresentation.

In his proposed amended pleading, Mehta alleges that Newtek, misrepresented to Mehta that it would forgive all debt associated with the promissory note.

However, such a statement, even if true, cannot support a claim for negligent misrepresentation. Statements concerning a future event—such as the future waiver of a debt—cannot form the basis of negligent misrepresentation. “[A] claim for negligent misrepresentation ‘cannot ordinarily be based on unfulfilled promises or statements as to future events.’” *Osborn v. Univ. Med. Associates of Med. Univ. of S. Carolina*, 278 F. Supp. 2d 720, 735 (D.S.C. 2003) (quoting *Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 439 S.E.2d 283, 285 (Ct.App.1993)); see also *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 442, 339 S.E.2d 142, 147 (Ct. App. 1985) (holding that “[e]vidence of a mere broken promise is not sufficient to prove negligent misrepresentation any more than it is sufficient to prove fraudulent misrepresentation”). As a result, even if Newtek promised Mehta it would forgive any debt, such a statement does not support Mehta’s claim for negligent misrepresentation.

This has two implications, which are both fatal to Mehta’s case. First, Mehta is precluded from using the fraud exception to the parol evidence rule as discussed above. Second, Mehta cannot meet the elements of negligent misrepresentation.

III. Defendant’s cause of action for Unfair Trade Practices fails as a matter of law.

Finally, Mehta alleges that Newtek committed an unfair trade practice in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20, et seq. (“UTPA”) by making an oral

promise. However, there is no evidence Newtek acted unfairly or deceptively. "A trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 325, 396 S.E.2d 105, 108 (Ct. App. 1989), *rev'd, in part, on other grounds*, 422 S.E.2d 103 (S.C. 1992).

Additionally, Mehta has no evidence that Newtek's alleged promise to him affects the public interest. The UTPA is not available to address a private wrong where the public interest is unaffected. *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1987); *see also Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) ("Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest."). As the Fourth Circuit has noted:

While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were the rule otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act.

Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc., 974 F.2d 502, 507-08 (4th Cir. 1992).

Allegations of a claim under the UTPA must be bolstered by specific factual evidence to survive summary judgment: "To sustain a cause of action under the []UTPA, the plaintiffs must establish, by specific facts, that members of the public were adversely affected" *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574, 584 (D.S.C. 2003). "Without proof of specific facts disclosing that . . . members of the public were adversely affected by the [unfair conduct] or that they were likely to be, all we are left with is a speculative claim of adverse public impact and that will not suffice for recovery under the UTPA." *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994) (rejecting a UTPA claim where the plaintiff did not introduce any evidence of specific facts to show any member of the public was adversely affected by his transaction) (internal citations omitted) (emphasis added). Because Mehta cannot prove any deceptive or unfair actions by Newtek or that

the alleged conduct affected the public interest, their claim fails and Mehta is entitled to summary judgment.

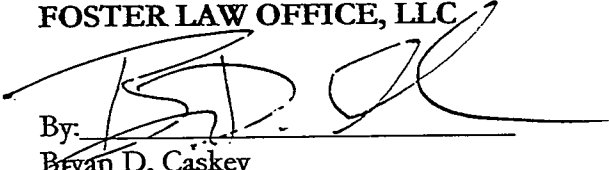
PRAYER FOR RELIEF

Based upon the foregoing, the Plaintiff prays for an Order of the Court as follows:

- A. Granting Summary Judgment to Plaintiff; and
 - B. Denying Defendant's Motion to Amend.
-

Respectfully Submitted,

FOSTER LAW OFFICE, LLC



By: _____

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COUNSEL FOR THE PLAINTIFF

December 4, 2014
Columbia, South Carolina



STATE OF SOUTH CAROLINA

PURCHASE AND SALE AGREEMENT

COUNTY OF ORANGEBURG

THIS PURCHASE AND SALE AGREEMENT (the "Agreement") is made and entered into this 31st day of July, 2013, by and between Krishna of Orangeburg, Inc., ("Seller") and Quantum Mortgage Corporation, ("Purchaser").

1. **PURCHASE AND SALE.** Subject to the terms and conditions of this Agreement, and for and in consideration of the mutual covenants and agreements contained herein, Seller agrees to sell to Purchaser, and Purchaser agrees to purchase from Seller all of the following (collectively, the "Property"):

- (a) The description of the land ("Land") is set forth in Schedule 1(a) attached hereto and incorporated by reference.
- (b) All buildings and improvements located upon the Land and known as the Sun Moon Hotel, including, without limitation, all mechanical, electrical, heating, air conditioning and plumbing fixtures, systems and equipment.
- (c) All furniture, fixtures and equipment located on or used in connection with the operation of the Sun Moon Hotel located on John C. Calhoun Drive, Orangeburg, South Carolina except as excluded on attached Schedule 1(c).
- (d) All inventory and consumable supplies located on or used in connection with the operation of the Property (the "Inventory"). Seller covenants that the inventory will be reasonably adequate and sufficient for the current operations of the hotel in accordance with standards of the industry.
- (e) All Service Contracts as set forth in Schedule 1(e) for the providing of services to the Sun Moon Hotel of Orangeburg, South Carolina. The Purchaser specifically assumes all obligations of the Service Contracts accruing on or after the Closing Date.

The sale of the Property shall be a sale of assets only, and not indebtedness, accounts payable, liabilities or obligations of Seller, of whatever kind or nature, whether actual or contingent, whether incurred prior to or after the date hereof or prior to or after the Closing Date, and Purchaser shall in no event be or become liable for any such indebtedness, accounts payable, liabilities or obligations, except for (i) any obligations to provide hotel accommodations and services pursuant to confirmed reservations made for periods subsequent to the Closing Date, disclosed to Purchaser in writing and made in accordance with, and as permitted by the terms of this Agreement, and (ii) any

A handwritten signature in black ink, appearing to be "N. S. W." with a stylized flourish below it.

specific indebtedness, accounts payable, liabilities or obligations (including the Service Contracts as hereinafter described) expressly assumed by Purchaser herein or in any Schedule hereto or in any other document executed by Purchaser and delivered at or in connection with the Closing.

Notwithstanding anything contained herein to the contrary, the Purchaser shall have the right to terminate this Contract without cause upon three (3) days written notice anytime prior to August 26, 2013.

2. **PURCHASE PRICE AND METHOD OF PAYMENT.** The purchase price for the Property is Four Hundred Thirty-seven Thousand and no/100 Dollars (\$437,000.00) to be paid in cash at Closing.

3. **COVENANTS, REPRESENTATIONS AND WARRANTIES OF SELLER.** Seller hereby covenants, represents and warrants to Purchaser that the following facts are, as of the date hereof, and will be, as of the date of Closing, true and correct:

- (a) Seller has good and marketable title to the Property, subject to no mortgage or security interest lien that will not be satisfied at Closing and subject to no liens or encumbrances except as disclosed in Schedule 3(a).
- (b) The execution and delivery of, and the performance of all obligations under, this Agreement by Seller do not and will not require any consent or approval of any person and do not and will not result in a breach of, or constitute a default under, any indenture, loan or credit agreement, mortgage, deed of trust or other agreement or instrument to which Seller is a party or the Property is subject, or violate any law, statute, regulations, judgment, decree or ruling of any governmental body to which Seller or the Property is bound.
- (c) The Property has full and free access to and from all public highways, streets and roads adjacent thereto, and there are no facts or conditions known to Seller which would result in termination of such access.
- (d) All bills for service, work done or material furnished with respect to the Property have been paid in full or will be paid in full and discharged by the date and time of Closing. Seller shall hold Purchaser harmless and indemnify Purchaser (including payment of attorneys' fees) from and against all liens against the Property which may result from Seller's failure to pay for such services, work done or materials furnished to the Property.
- (e) To the best of Seller's knowledge, the Property is not in direct or indirect violation of any local, state or federal law, rule or regulation pertaining to environmental regulation, contamination or cleanup (collectively,

"Environmental Laws"), including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601, et. seq. and 40 CFR Section 302.1, et. seq., the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901, et. seq., the Federal Water Pollution Control Act (33 U.S.C. Section 1251, et. seq. and 40 CFR Section 116.1, et. seq.) and the Hazardous Waste Transportation Act (49 U.S.C. Section 1801, et. seq.), and the regulations promulgated pursuant to said laws, all as amended.

- (f) To the best of Seller's knowledge, neither the Seller nor any of its agents or employees directly or indirectly has stored, processed, or disposed of on or released or discharged from or onto the Property (including underground contamination) any hazardous, toxic or harmful substances, wastes, materials, pollutants or contaminants (including, without limitation, asbestos, polychlorinated byphenyls, petroleum products, flammable explosives, radioactive materials, infectious substances or raw materials (which include hazardous constituents) or any other substances or materials which are including under or regulated by Environmental Laws (collectively, "Hazardous Substances"), and, to the knowledge of Seller (after diligent inquiry), no other persons directly or indirectly have stored, processed or disposed of or released or discharged from or onto the Property (Including underground contamination) any Hazardous Substances.
- (g) To the best of Seller's knowledge, the Property is not subject to any private or governmental lien or judicial or administrative notice or action relating to Hazardous Substances.
- (h) To the best of Seller's knowledge, the Property has never been used as a landfill or waste dump and there are no underground storage tanks on the Property.
- (i) Public utilities (water, electricity, sanitary sewerage and telephone) and any easements necessary therefor sufficient to operate the Property for its current use are available and will be available at Closing.
- (j) That between the date of this Agreement and the closing date, Seller will operate and maintain his business in the usual course, and will specifically refrain from disposing of any assets, creating any liens, entering into any contracts, or making any unusual payments or distributions to himself, or employees, other than any action, or those enumerated, that may arise in the normal and usual course of business as conducted on a day-to-day basis.

- (k) To best of Seller's knowledge, payroll and other taxes incurred by Seller will be paid or provided for as of the date of closing, and that all tax returns required to be made by Seller have been properly filed as provided by law. There are no unfunded or funded retirement or pension plans.
- (l) Except for the claims of Newtek Small Business Finance, Inc, there is no litigation or claims of any nature whatsoever pending or threatened against Seller, that Seller does not know or have reasonable grounds to know of any basis for any such action, and that no material fact regarding Seller has been omitted which would reasonably affect a prudent investor's decision to purchase the property and assets being sold to Buyer herein.

4. **TITLE.** The title to be delivered by the Seller to the Purchaser will be a good marketable record title, in fee simple, free and clear of all liens and encumbrances, except as set forth in Schedule 4, by general warranty deed, in form acceptable to the counsel for the Purchaser.

5. **PRORATION, DEED STAMPS, TAXES, SELLER'S COSTS.** The Seller shall not incur any costs including back taxes, deed stamps, transfer fees or other expenses that shall reduce the amount due to the Seller. The net payment to the Seller is Four Hundred Thirty-seven Thousand and no/100 Dollars (\$437,000.00) which shall be paid in full to the Seller's first lien holder Newtek Small Business Finance, Inc. Lender's consent is set forth in Schedule 5.

6. **CLOSING - CLOSING DOCUMENTS.**

- (a) The Closing shall occur at the offices of Limehouse and Walsh, 1436 Amelia Street, Orangeburg, South Carolina on or before August 26, 2013.
- (b) Seller shall deliver to Purchaser the following items at Closing:
 - (i) General Warranty Deed with documentary stamps in recordable form conveying good and marketable fee simple title to the Land and improvements.
 - (ii) An instrument assigning to Purchasers the Service Contracts pertaining to the Property under which Purchasers shall assume such Contracts from and after the Date of Closing.
 - (iii) A Bill of Sale conveying title to all personal property transferred hereunder, free and clear of all liens and encumbrances.
 - (iv) Any other items or documents reasonably required to effectuate the transaction.

(v) A South Carolina Department of Revenue Tax Compliance Letter.

(c) Purchasers shall deliver the cash payment provided for in Section 2 which shall be distributed as provided herein.

7. **RISKS OF LOSS.** Risk of loss or other damage to said premises and the responsibility and control of same shall remain with the Seller until delivery of the deed. In the event of such loss or damage, the Purchaser may, at its option, either (a) terminate this Agreement and in such event receive any and all monies paid as Earnest Money or (b) accept the deed with Seller's right to insurance, if any.

8. **RELEASE.** Seller does hereby release and hold Buyer and all of its employees and officers harmless from any and all claims arising out of or in connection with the subject property including without limitation to any claims related to sale, financing, or operation of the hotel through the date of closing.

9. **MISCELLANEOUS PROVISIONS.**

(a) Notices. Any notice, consent, approval, waiver, and election which any party shall be required or permitted to make or give under this contract shall be in writing and shall be deemed to have been sufficiently made or given on the second business day following dispatch if delivered to a reputable commercial overnight carrier (such as Federal Express), addressed to the respective parties at the addresses below:

TO SELLER: Krishna of Orangeburg, Inc.
217 Waterford Parkway
Orangeburg, SC 29118

With a copy to: Robert R. Horger, Esquire
Horger, Bamwell & Reid, LLP
PO Drawer 329
Orangeburg, SC 29116-0329

TO PURCHASER: Quantum Mortgage Corporation
6200 Amber Mist Lane
Charlotte, NC 28211

With a copy of: James F. Walsh, Jr., Esquire
1436 Amelia Street
Orangeburg, SC 29115

Either party, may from time to time, change the address to which notices shall be

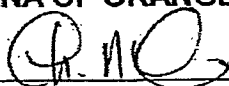
sent by like notice given to the other party hereto, except that no party may change its address to other than a street address. Any notice given that does not conform to this paragraph shall be effective only upon receipt.

- (b) Entire Agreement. This instrument constitutes the entire agreement between the parties, no party shall be bound by any terms, conditions, statements, or representations oral or written not contained herein. Each party hereby acknowledges that executing this Agreement he or she has not been induced, persuaded, or motivated by any promise or representation made by the other party, unless expressly set forth herein. All negotiations, statements and preliminary instruments by the parties or their representatives are merged in this instrument.
- (c) Time of Essence. Time is of the essence of this Agreement
- (d) AS-IS Purchase. As of Closing, Purchasers shall have inspected the Property and shall know that, except for the representations, warranties and covenants contained herein and in the documents executed at Closing, Purchasers are buying the Property AS-IS with no warranty of merchantability, fitness or otherwise.

IN WITNESS WHEREOF, the parties have executed this Agreement the year and date herein above written.

SELLER

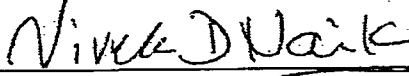
KRISHNA OF ORANGEBURG, INC.

By: 

Its:

PURCHASER

QUANTUM MORTGAGE CORPORATION

By: 

Its: EX - V.P.

Schedule 1(a)

PROPERTY DESCRIPTION

PARCEL ONE:

All that certain piece, parcel or lot of and with the improvements thereon, situate, lying and being in the County of Orangeburg, State of South Carolina, being more particularly shown on a plat for Commercial Capital Corp., Shiva Incorporated of Orangeburg and First American Title Insurance Company by U.S. Surveyor, AES Group, Inc. dated July 6, 1998, and revised on July 23, 1998, July 31, 1998, March 4, 1999, and August 5, 1999, under the seal of John H. Welbourn RLS No. 5773B, shown and designated as parcel "1" containing 1.137 acres and parcel "2", containing 1.227 acres on said plat. Parcel 1 being more particularly described as follows: Beginning at a number 4 rebar set on the right-of-way line of Orange Court at the corner of Parcel 1 and the A.D. Morris property and running along said Morris Line North 32 degrees 34 minutes 00 seconds: West for 170 feet to a masonry nail set in a concrete sidewalk; thence North 52 degrees 07 minutes 45 seconds; East for 281.47 feet along the property lines of A.D. Morris and Elizabeth S. Sykes to a number 4 rebar set; thence along the property line of Elizabeth S. Sykes South 39 degrees 40 minutes 07 seconds; East for a distance of 170 feet to a rail road spike found on the Northeastern right-of-way line of Orange Court; thence along said right-of-way South 52 degrees 15 minutes 00 seconds; West for a distance of 302.47 feet to the point of beginning.

PARCEL TWO:

Beginning at a 1 1/2 inch open end pin found at the corner of the Robert H. Metzendorf property and on the Southwestern right-of-way line of Orange Court and proceeding along said right-of-way North 52 degrees 14 minutes 15 seconds; East for a distance of 262.13 feet to a 1/2 inch open end pin found on said right-of-way at the corner of the Agnes P. Wannamaker property; thence along said Wannamaker property Line South 40 degrees 19 minutes 24 seconds; East for a distance of 83 feet to a number 4 rebar set; thence along said Line North 51 degrees 37 minutes 43 seconds; East for 29.10 feet to a number 4 rebar set at the corner of said Wannamaker property and the property of Whetsell E. McDaniel, et. al.; thence along said McDaniel property line and the property line of Alex B. McLeod South 34 degrees, 48 minutes 38 seconds; East for 107.80 feet to a 3/4 inch open end pin found at corner of said McLeod property and on the Northeastern right-of-way of U.S. Highway 301, designated as John C. Calhoun Drive; thence along said Highway 301 right-of-way South 52 degrees 50 minutes 15 seconds; West 131.77 feet to a point on said right-of-way; thence along said right-of-way South 53 degrees 02 minutes, 16 seconds; West for 165.05 feet to a 1/2 inch open end pin found on said right-of-way at the corner of the Robert H. Metzendorf property; thence along said Metzendorf property line North 35 degrees 29 minutes 16 seconds; West for 186.73 feet to the point of beginning. Old TMS # 0171-14-12-008 and TMS # 0171-14-20-005, New TMS # 0350340 and TMS # 0350360.

Schedule 1(c)

EXCLUSIONS FROM PERSONAL PROPERTY

NONE

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Schedule 1(e)

SERVICE CONTRACTS TO BE ASSIGNED AND ASSUMED BY PURCHASERS

NONE

NSN
(C)

**Schedule 3(a) and Schedule 4
TITLE EXCEPTIONS**

Title Exceptions - *ATTACHED*

NDN
CP

SCHEDULE B - SECTION I REQUIREMENTS

The following are the requirements to be complied with:

1. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.
2. Proper instrument(s) creating the estate or interest to be insured must be executed and duly filed for record to-wit:
 - (a) Duly authorized general warranty deed, under seal, from Krishna of Orangeburg, Inc. vesting fee-simple title in Quantum Mortgage Corporation.
3. Receipt of completed Purchaser's or Borrower's Notice Disclosure and Acknowledgement Form (Form No. SC-118 may be used for this purpose).
4. Receipt of satisfactory affidavits from the owner and general contractor, if any, evidencing completion of the improvements and payment of all bills incurred. (Form SC-39-64 may be used for this purpose.)
5. Evidence satisfactory to the Company as to the status of the rights of parties in possession. (Form SC-39-33 may be used for this purpose.)
6. Evidence satisfactory to the Company that all taxes have been withheld and paid to the South Carolina Department of Revenue in accordance with South Carolina Code Section 12-8-580 and other, as amended.
7. Evidence satisfactory to the Company that all legal entities involved in the transaction are valid and subsisting under the laws of their respective domicile state, and that all necessary actions have been taken under applicable law and the constitutional documents of the respective entities, such that their actions, by and through their officers, agents or representatives are valid and enforceable.
8. Cancellation and release of record of the following mortgages from:
 - (a.) Krishna of Orangeburg, Inc. to Newtek Small Business Finance, Inc., dated 2/21/2007, recorded in Book 1810, page 196.
 - (b.) Krishna of Orangeburg, Inc. to Quantum Mortgage Corporation, dated 9/27/12, recorded in Book 2225, page 119, last assigned to DNP Investments, Family Limited Partnership, dated 11/9/2012, recorded in Book 2235 page 253.
9. Filing of proper termination of record of UCC Financing Statement from Krishna of Orangeburg, Inc. to Newtek Small Business Finance, Inc. recorded 2/21/2007 in Mortgage Book 1810 page 201.
10. Payment of taxes for the year 2011 and 2012, plus any penalties and interest and payment to redeem property from Tax Sale.
11. The Company requires a satisfactory dismissal of the law suit styled Newtek Business Finance, Inc. vs. Krishna of Orangeburg, Inc. and Dilip Patel, Docket No. 2013-LP-38-00067 and release of Lis Pendens filed February 26, 2013.

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SCHEDULE B - SECTION II EXCEPTIONS

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by this commitment.
2. Taxes for the year 2013, which are a lien, but not yet due and payable, and taxes for subsequent years.
3. Any lien, or right to a lien, for labor, services, or material heretofore or hereafter furnished.
4. Unrecorded underground easements, or claims thereof, not apparent from an inspection of the land.
5. Rights or claims of parties in possession and easements or claims of easements not shown by the public records, boundary line disputes, overlaps, encroachments, and any matters not of record which would be disclosed by an accurate survey and inspection of the land.

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Schedule 5

CONSENT OF THE LENDER

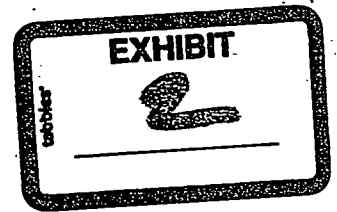
The Property is subject to certain liens and encumbrances benefitting Newtek Small Business Finance, Inc. ("Lender"). If the sale contemplated by the Agreement is closed on or before the Closing Date set forth in the Agreement and Seller is not in bankruptcy, Lender agrees to release all of its liens affecting the property upon the receipt of an amount equal to Four Hundred Thirty Seven Thousand and no/100 Dollars (\$437,000.00). The amount due to Lender shall not be reduced by prorations, attorneys' fees, closing costs, taxes or other fees or charges. Upon receipt by Lender of \$437,000.00 Lender shall satisfy the Seller's Note and Mortgage and release any and all guarantees related to Seller's loan. Additionally, upon receipt of \$437,000.00, Lender shall specifically release and discharge Kirit Mehta and any other guarantors of the loan from any other liability whatsoever under the Note, Loan Agreement and other loan documents.

WE CONSENT AS OUTLINED ABOVE:

NEWTEK SMALL BUSINESS FINANCE, INC.

By: _____
Its:

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STATE OF SOUTH CAROLINA

PURCHASE AND SALE AGREEMENT

COUNTY OF ORANGEBURG

THIS PURCHASE AND SALE AGREEMENT (the "Agreement") is made and entered into this 26th day of August, 2013, by and between Krishna of Orangeburg, Inc., ("Seller") and Quantum Mortgage Corporation, ("Purchaser").

1. **PURCHASE AND SALE.** Subject to the terms and conditions of this Agreement, and for and in consideration of the mutual covenants and agreements contained herein, Seller agrees to sell to Purchaser, and Purchaser agrees to purchase from Seller all of the following (collectively, the "Property"):

- (a) The description of the land ("Land") is set forth in Schedule 1(a) attached hereto and incorporated by reference.
- (b) All buildings and improvements located upon the Land and known as the Sun Moon Hotel, including, without limitation, all mechanical, electrical, heating, air conditioning and plumbing fixtures, systems and equipment.
- (c) All furniture, fixtures and equipment located on or used in connection with the operation of the Sun Moon Hotel located on John C. Calhoun Drive, Orangeburg, South Carolina except as excluded on attached Schedule 1(c).
- (d) All inventory and consumable supplies located on or used in connection with the operation of the Property (the "Inventory"). Seller covenants that the inventory will be reasonably adequate and sufficient for the current operations of the hotel in accordance with standards of the industry.
- (e) All Service Contracts as set forth in Schedule 1(e) for the providing of services to the Sun Moon Hotel of Orangeburg, South Carolina. The Purchaser specifically assumes all obligations of the Service Contracts accruing on or after the Closing Date.

The sale of the Property shall be a sale of assets only, and not indebtedness, accounts payable, liabilities or obligations of Seller, of whatever kind or nature, whether actual or contingent, whether incurred prior to or after the date hereof or prior to or after the Closing Date, and Purchaser shall in no event be or become liable for any such indebtedness, accounts payable, liabilities or obligations, except for (i) any obligations to provide hotel accommodations and services pursuant to confirmed reservations made for periods subsequent to the Closing Date, disclosed to Purchaser in writing and made in accordance with, and as permitted by the terms of this Agreement, and (ii) any

NSW 8/26/2013

(Signature)

specific indebtedness, accounts payable, liabilities or obligations (including the Service Contracts as hereinafter described) expressly assumed by Purchaser herein or in any Schedule hereto or in any other document executed by Purchaser and delivered at or in connection with the Closing.

Notwithstanding anything contained herein to the contrary, the Purchaser shall have the right to terminate this Contract without cause upon three (3) days written notice anytime prior to September 10, 2013.

2. **PURCHASE PRICE AND METHOD OF PAYMENT.** The purchase price for the Property is Four Hundred Thirty-seven Thousand and no/100 Dollars (\$437,000.00) to be paid in cash at Closing.

3. **COVENANTS, REPRESENTATIONS AND WARRANTIES OF SELLER.** Seller hereby covenants, represents and warrants to Purchaser that the following facts are, as of the date hereof, and will be, as of the date of Closing, true and correct:

- (a) Seller has good and marketable title to the Property, subject to no mortgage or security interest lien that will not be satisfied at Closing and subject to no liens or encumbrances except as disclosed in Schedule 3(a).
- (b) The execution and delivery of, and the performance of all obligations under, this Agreement by Seller do not and will not require any consent or approval of any person and do not and will not result in a breach of, or constitute a default under, any indenture, loan or credit agreement, mortgage, deed of trust or other agreement or instrument to which Seller is a party or the Property is subject, or violate any law, statute, regulations, judgment, decree or ruling of any governmental body to which Seller or the Property is bound.
- (c) The Property has full and free access to and from all public highways, streets and roads adjacent thereto, and there are no facts or conditions known to Seller which would result in termination of such access.
- (d) All bills for service, work done or material furnished with respect to the Property have been paid in full or will be paid in full and discharged by the date and time of Closing. Seller shall hold Purchaser harmless and indemnify Purchaser (including payment of attorneys' fees) from and against all liens against the Property which may result from Seller's failure to pay for such services, work done or materials furnished to the Property.
- (e) To the best of Seller's knowledge, the Property is not in direct or indirect violation of any local, state or federal law, rule or regulation pertaining to environmental regulation, contamination or cleanup (collectively,

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"Environmental Laws"), including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601, et. seq. and 40 CFR Section 302.1, et. seq., the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901, et. seq., the Federal Water Pollution Control Act (33 U.S.C. Section 1251, et. seq. and 40 CFR Section 116.1, et. seq.) and the Hazardous Waste Transportation Act (49 U.S.C. Section 1801, et. seq.), and the regulations promulgated pursuant to said laws, all as amended.

- (f) To the best of Seller's knowledge, neither the Seller nor any of its agents or employees directly or indirectly has stored, processed, or disposed of on or released or discharged from or onto the Property (including underground contamination) any hazardous, toxic or harmful substances, wastes, materials, pollutants or contaminants (including, without limitation, asbestos, polychlorinated biphenyls, petroleum products, flammable explosives, radioactive materials, infectious substances or raw materials (which include hazardous constituents) or any other substances or materials which are including under or regulated by Environmental Laws (collectively, "Hazardous Substances"), and, to the knowledge of Seller (after diligent inquiry), no other persons directly or indirectly have stored, processed or disposed of or released or discharged from or onto the Property (Including underground contamination) any Hazardous Substances.
- (g) To the best of Seller's knowledge, the Property is not subject to any private or governmental lien or judicial or administrative notice or action relating to Hazardous Substances.
- (h) To the best of Seller's knowledge, the Property has never been used as a landfill or waste dump and there are no underground storage tanks on the Property.
- (i) Public utilities (water, electricity, sanitary sewerage and telephone) and any easements necessary therefor sufficient to operate the Property for its current use are available and will be available at Closing.
- (j) That between the date of this Agreement and the closing date, Seller will operate and maintain his business in the usual course, and will specifically refrain from disposing of any assets, creating any liens, entering into any contracts, or making any unusual payments or distributions to himself, or employees, other than any action, or those enumerated, that may arise in the normal and usual course of business as conducted on a day-to-day basis.

1700 8/26/2013



- (k) To best of Seller's knowledge, payroll and other taxes incurred by Seller will be paid or provided for as of the date of closing, and that all tax returns required to be made by Seller have been properly filed as provided by law. There are no unfunded or funded retirement or pension plans.

- (l) Except for the claims of Newtek Small Business Finance, Inc, there is no litigation or claims of any nature whatsoever pending or threatened against Seller, that Seller does not know or have reasonable grounds to know of any basis for any such action, and that no material fact regarding Seller has been omitted which would reasonably affect a prudent investor's decision to purchase the property and assets being sold to Buyer herein.

4. TITLE. The title to be delivered by the Seller to the Purchaser will be a good marketable record title, in fee simple, free and clear of all liens and encumbrances, except as set forth in Schedule 4, by general warranty deed, in form acceptable to the counsel for the Purchaser.

5. PRORATION, DEED STAMPS, TAXES, SELLER'S COSTS. The Seller shall not incur any costs including back taxes, deed stamps, transfer fees or other expenses that shall reduce the amount due to the Seller. The net payment to the Seller is Four Hundred Thirty-seven Thousand and no/100 Dollars (\$437,000.00) which shall be paid in full to the Seller's first lien holder Newtek Small Business Finance, Inc. Lender's consent is set forth in Schedule 5.

6. CLOSING - CLOSING DOCUMENTS.

- (a) The Closing shall occur at the offices of Limehouse and Walsh, 1436 Amelia Street, Orangeburg, South Carolina on or before September 10, 2013.

- (b) Seller shall deliver to Purchaser the following items at Closing:

- (i) General Warranty Deed with documentary stamps in recordable form conveying good and marketable fee simple title to the Land and improvements.
- (ii) An instrument assigning to Purchasers the Service Contracts pertaining to the Property under which Purchasers shall assume such Contracts from and after the Date of Closing.
- (iii) A Bill of Sale conveying title to all personal property transferred hereunder, free and clear of all liens and encumbrances.

NEW 8/26/2013

(iv) Any other items or documents reasonably required to effectuate the transaction.

(v) A South Carolina Department of Revenue Tax Compliance Letter.

(c) Purchasers shall deliver the cash payment provided for in Section 2 which shall be distributed as provided herein.

7. **RISKS OF LOSS.** Risk of loss or other damage to said premises and the responsibility and control of same shall remain with the Seller until delivery of the deed. In the event of such loss or damage, the Purchaser may, at its option, either (a) terminate this Agreement and in such event receive any and all monies paid as Earnest Money or (b) accept the deed with Seller's right to insurance, if any.

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With a copy to: Robert R. Horger, Esquire
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PO Drawer 329
Orangeburg, SC 29116-0329

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Charlotte, NC 28211

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Orangeburg, SC 29115

NAJ 8/26/2013

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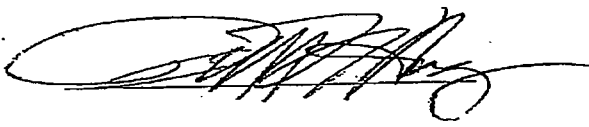
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- (c) Time of Essence. Time is of the essence of this Agreement
- (d) AS-IS Purchase. As of Closing, Purchasers shall have inspected the Property and shall knowlege that, except for the representations, warranties and covenants contained herein and in the documents executed at Closing, Purchasers are buying the Property AS-IS with no warranty of merchantability, fitness or otherwise.

IN WITNESS WHEREOF, the parties have executed this Agreement the year and date herein above written.

SELLER

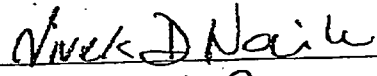
KRISHNA OF ORANGEBURG, INC.

By: 
Its:

Mary Kay Oliver

PURCHASER

QUANTUM MORTGAGE CORPORATION

By: 
Its:

Mary Kay Oliver

EX. V.P.

Schedule 1(a)

PROPERTY DESCRIPTION

PARCEL ONE:

All that certain piece, parcel or lot of and with the improvements thereon, situate, lying and being in the County of Orangeburg, State of South Carolina, being more particularly shown on a plat for Commercial Capital Corp., Shiva Incorporated of Orangeburg and First American Title Insurance Company by U.S. Surveyor, AES Group, Inc. dated July 6, 1998, and revised on July 23, 1998, July 31, 1998, March 4, 1999, and August 5, 1999, under the seal of John H. Welbourn RLS No. 5773B, shown and designated as parcel "1" containing 1.137 acres and parcel "2", containing 1.227 acres on said plat. Parcel 1 being more particularly described as follows: Beginning at a number 4 rebar set on the right-of-way line of Orange Court at the corner of Parcel 1 and the A.D. Morris property and running along said Morris Line North 32 degrees 34 minutes 00 seconds: West for 170 feet to a masonry nail set in a concrete sidewalk; thence North 52 degrees 07 minutes 45 seconds; East for 281.47 feet along the property lines of A.D. Morris and Elizabeth S. Sykes to a number 4 rebar set thence along the property line of Elizabeth S. Sykes South 39 degrees 40 minutes 07 seconds; East for a distance of 170 feet to a rail road spike found on the Northeastern right-of-way line of Orange Court; thence along said right-of-way South 52 degrees 15 minutes 00 seconds; West for a distance of 302.47 feet to the point of beginning.

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NWJ 8/26/2013

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Schedule 1(c)

EXCLUSIONS FROM PERSONAL PROPERTY

None

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CNY

Schedule 1(e)

SERVICE CONTRACTS TO BE ASSIGNED AND ASSUMED BY PURCHASERS

None

486 8/26/2013
CJW

**Schedule 3(a) and Schedule 4
TITLE EXCEPTIONS**

See Attached

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SCHEDULE B - SECTION I REQUIREMENTS

The following are the requirements to be complied with:

1. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.
2. Proper instrument(s) creating the estate or interest to be insured must be executed and duly filed for record to-wit:
(a) Duly authorized general warranty deed, under seal, from Krishna of Orangeburg, Inc. vesting fee simple title in Quantum Mortgage Corporation.
3. Receipt of completed Purchaser's or Borrower's Notice Disclosure and Acknowledgement Form (Form No. SC-118 may be used for this purpose).
4. Receipt of satisfactory affidavits from the owner and general contractor, if any, evidencing completion of the improvements and payment of all bills incurred. (Form SC-39-64 may be used for this purpose.)
5. Evidence satisfactory to the Company as to the status of the rights of parties in possession. (Form SC-39-33 may be used for this purpose.)
6. Evidence satisfactory to the Company that all taxes have been withheld and paid to the South Carolina Department of Revenue in accordance with South Carolina Code Section 12-8-580 and other, as amended.
7. Evidence satisfactory to the Company that all legal entities involved in the transaction are valid and subsisting under the laws of their respective domicile state, and that all necessary actions have been taken under applicable law and the constitutional documents of the respective entities, such that their actions, by and through their officers, agents or representatives are valid and enforceable.
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10. Payment of taxes for the year 2011 and 2012, plus any penalties and interest and payment to redeem property from Tax Sale.
11. The Company requires a satisfactory dismissal of the law suit styled Newtek Business Finance, Inc. vs. Krishna of Orangeburg, Inc. and Dilip Patel, Docket No. 2013-LP-38-00067 and release of Lis Pendens filed February 26, 2013.

File Number: 2013-42

SCHEDULE B - SECTION II EXCEPTIONS

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by this commitment.
2. Taxes for the year 2013, which are a lien, but not yet due and payable, and taxes for subsequent years.
3. Any lien, or right to a lien, for labor, services, or material heretofore or hereafter furnished.
4. Unrecorded underground easements, or claims thereof, not apparent from an inspection of the land.
5. Rights or claims of parties in possession and easements or claims of easements not shown by the public records, boundary line disputes, overlaps, encroachments, and any matters not of record which would be disclosed by an accurate survey and inspection of the land.

ALTA Commitment Schedule B - Section II - Exceptions

This commitment was printed on July 31, 2013 at N/A

Valid only if Insuring Provisions and Schedules A and B are attached.

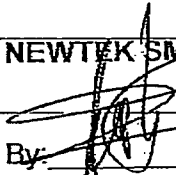
Schedule 5

CONSENT OF THE LENDER

The Property is subject to certain liens and encumbrances benefitting Newtek Small Business Finance, Inc. ("Lender"). If the sale contemplated by the Agreement is closed on or before the Closing Date set forth in the Agreement and Seller is not in bankruptcy, Lender agrees to release all of its liens affecting the property upon the receipt of an amount equal to Four Hundred Thirty Seven Thousand and no/100 Dollars (\$437,000.00). The amount due to Lender shall not be reduced by prorations, attorneys' fees, closing costs, taxes or other fees or charges. Upon receipt by Lender of \$437,000.00 Lender shall release its mortgage lien on the subject premises.

WE CONSENT AS OUTLINED ABOVE:

NEWTEK SMALL BUSINESS FINANCE, INC.

By: 

Its:

Jose Morales, V.P.

After Recording, please return to:
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205



M-BK: 02296 PG:0251

SATISFACTION OF MORTGAGE

WHEREAS, the debt secured by that certain mortgage of real estate executed by Krishna of Orangeburg, Inc. to Newtek Small Business Finance, Inc., dated February 21, 2007, in the sum of \$725,000.00, was recorded on February 21, 2007, in the Office of the Register of Deeds for Orangeburg County, in Book 1810 Page 0196; The above designated owner/holder is the *bona fide* owner and holder of the described mortgage; that the original mortgage has been lost and cannot be found; that the mortgage has not been assigned, hypothecated, or disposed of otherwise.

NOW THEREFORE, by its signature below, Newtek Small Business Finance, Inc., as the true holder of the Mortgage hereby affirms that by virtue of the payment of Four Hundred and Thirty Seven Thousand (\$437,000.00) dollars, the Mortgage is hereby satisfied and forever relinquished.

However, this satisfaction shall not, in any manner, constitute a waiver of payment of the underlying and associated Promissory Note. Newtek Small Business Finance, Inc. reserves the right to collect any and all deficiency that may still be due and owing under the underlying and associated Promissory Note and any related documents, specifically, but not limited to Guarantees associated with the Promissory Note.

This 24th day of September, 2013

Newtek Small Business Finance, Inc.

By [Signature] (L.S.)
Jose Morales
Title: V.P.

Witnesses:

[Signature]
Witness 1

[Signature]
Witness 2

FILED
WITH
CLERK
OF COURT
ORANGE
BURG
SC

2014 MAR 10 PM 1:50

FILED Oct 09, 2013 03:05:58 pm
BOOK 02296
PAGE 0251 THRU 0252
INSTRUMENT # 2013003862
Clairine G. Alexander
Signature

FILED
ORANGEBURG
COUNTY
ELAINE G. ALEXANDER
REGISTER
OF DEEDS

ATTEST: TRUE COPY
Wingia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY

The State of NY)
 County of Queens)

Personally appeared before me Peter J. Persicelle (Witness 1) and made oath that he/she saw the within
 named Newtek Small Business Finance, Inc. by Jose Morales, sign, seal and as Act and Deed, deliver that
 within written Satisfaction; and that he/she with JOHN M. KRUSE (Witness 2) witnessed the
 execution thereof.

Peter J. Persicelle
 Witness 1 Signature

SWORN to before me this 24th day)

Of September 2013)

Cherise Leona (Seal)

Notary Public for New York
 Commission Expires: May 24, 2016
 The State of NY
 County of Queens)

ALICIA LUNA
 Notary Public, State of New York
 No. 01LU6110173
 Qualified in Queens County
 Commission Expires May 24, 2016

Personally appeared before me, Jose Morales, who being duly sworn deposes and says that Newtek Small
 Business Finance, Inc. is the *bona fide* owner and holder of a certain Promissory Note and Mortgage, that the
 original mortgage has been lost and cannot be found; that the same has not been assigned hypothecated or
 otherwise disposed of. The deponent has full authority to mark the Mortgage Satisfied and cancelled off
 record.

Jose Morales
 Title: V.P.

2014 MAR 10 PM 1:50
 FILED FOR RECORD
 VINCE A. CLARK
 CLERK OF COURT
 ORANGEBURG, SC

SWORN to before me this 24th day)

Of September 2013)

Cherise Leona (Seal)

Notary Public for New York
 Commission Expires: May 24, 2016

ALICIA LUNA
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ATTEST: TRUE COPY
Wing B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

C/A No.: 13-CP-38-01427

RETURN TO DEFENDANT'S MOTION TO
RECONSIDER

2015 FEB 10 PM 12:39

The Plaintiff, by and through its undersigned counsel, in return and opposition to Defendant's motion to reconsider would show unto this Court as follows:

BACKGROUND/PROCEDURAL POSTURE

On February 21, 2007, Krishna of Orangeburg, Inc. made, executed, and delivered a promissory note in the original principal amount of \$725,000.00 to Plaintiff. The funds were used for the purchase of commercial real estate and a hotel in Orangeburg County. To secure the promissory note, Krishna of Orangeburg, Inc. made, executed, and delivered a purchase money mortgage to Plaintiff secured by the commercial real estate. As additional security, Defendant (hereinafter "Mehta"), in his individual capacity, made, executed, and delivered an Unconditional Guarantee, to guarantee full and faithful performance of the terms of the promissory note.

On February 26, 2013, Plaintiff commenced a foreclosure action against Krishna of Orangeburg, Inc., in which Plaintiff sought to foreclose its interest in the real estate. Prior to the judgment of foreclosure, Krishna of Orangeburg, Inc. sold the real estate to a third party for the contract price of \$437,000.00. Plaintiff approved this sale and agreed specifically to satisfy its mortgage encumbering the property. In seeking Plaintiff's consent for this sale, one of the explicitly negotiated terms was whether Plaintiff would waive its right to pursue any deficiency following the sale.

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ATTEST: TRUE COPY

Wingja B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

Specifically, Plaintiff was presented with a draft contract containing waiver language, which Plaintiff rejected. After further negotiations, the parties reached a final agreement that was lengthy, detailed, and comprehensive.

Despite requests from Mehta, Plaintiff refused to waive its right to collect any remaining amount owed under the Promissory Note and related Guarantee, and Mehta's requested language was not included in the final, executed contract. In this contract, to avoid any potential misunderstandings and to make clear that the only understanding between the parties was that expressed in the contract, the parties agreed as follows:

Entire Agreement. This instrument constitutes the entire agreement between the parties, no party shall be bound by any terms, conditions, statements, or representations or written not contained herein. Each party hereby acknowledges that executing this Agreement he or she has not been induced, persuaded, or motivated by any promise or representation made by the other party, unless expressly set forth herein. All negotiations, statements, and preliminary instruments by the parties or their representatives are merged in this instrument.

(Contract, p. 6 ¶ 9(b).

Following the sale, Plaintiff received the sales proceeds, and credited them towards payment of the amount due under the promissory note. Subsequently, the foreclosure action was dismissed, and Plaintiff delivered a Satisfaction of Mortgage, which specifically included language regarding Plaintiff's reservation of rights to seek full payment under the promissory note. Following Mehta's failure to honor his guarantee, on December 3, 2013, Plaintiff filed this action to enforce the guarantee for the amount remaining under the promissory note. On February 11, 2014, Mehta filed and served his answer in which he vaguely claimed that the settlement of the foreclosure action "may have released or otherwise extinguished the debt".

On March 10, 2014, Plaintiff moved for summary judgment, seeking a judgment against Mehta for the outstanding balance owed under the guaranty. On December 1, 2014, in opposition to summary judgment Defendant served an affidavit from Mehta.

The essence of Mehta's affidavit is an allegation that, during the negotiation of the terms and provisions of the short sale, Newtek, through a representative, orally promised Mehta that "there would be no more debt owed".

This sole allegation comprises the entirety of Mehta's basis for opposing summary judgment and an amendment of his pleadings. Mehta's position is that this alleged oral promise now presents a material issue of fact which would preclude summary judgment, and also creates other causes of action against Plaintiff. However, as set detailed below, Newtek asserts that summary judgment is appropriate, even assuming, the existence of this alleged oral promise, and that no cause of action is appropriate.

LAW/ANALYSIS

A trial court may grant a party's motion for summary judgment if 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. *Epstein v. Costal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.*

Accordingly, although Newtek denies that it made any oral promise to forego collection of the remaining balance due under the note and guaranty, for the purposes of this summary judgment motion, Newtek must concede this allegation to be true. However, even assuming this allegation to be true does not create a material issue of fact precluding summary judgment.

I. The Court correctly found that an alleged oral promise not included in the final contract cannot be used to contradict the written provisions of the contract.

The well-settled parol evidence rule precludes the alleged promise from being introduced as evidence. Specifically, the parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. *See*



Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000); *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App.2001).

The rationale and policy underlying the parol evidence rule was succinctly explained by Justice Ginsburg, as follows: "Were we to permit plaintiff's use of the defendant's prior representations to defeat the clear words and purpose of the Final Agreement's integration clause 'contracts would not be worth the paper on which they are written.'" *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 270 U.S. App. D.C. 251 (C.A. D.C., 1988).

The instant case is a textbook example of the situation that the parol evidence rule was created to prevent. In this instance, the parties negotiated specific terms of their contract and reduced those terms to writing.¹

One of the specific terms negotiated was whether a deficiency balance would be owed following the short sale of the property. The written words of the contract and the accompanying documents are crystal clear in the fact that no waiver was given. Mehta now seeks to overturn the clear meaning of the entire agreement through his allegation of a contemporaneous oral promise.

Mehta now argues that the contract is "silent" as to the issue of whether the short sale would satisfy the debt. This is incorrect, as the mortgage satisfaction specifically states that Plaintiff "reserves the right to collect any and all deficiency owed" and the contract specifically excludes any other promises in any other capacity through its non-reliance and merger clause.

We have here the case of a party with the capacity and opportunity to read a written contract, who was represented by counsel, who executed the contract, not under any emergency, and whose signature was not obtained by trick or artifice. Accordingly, if the parol evidence rule is to retain

¹ Mehta alleges that he was not one of the parties to the contract, but rather, that Mehta's company was a party. However, Mehta is the sole owner of his company and also attempted to negotiate for a release of his personal guarantee on his own behalf. Accordingly, it is clear that Mehta was a real party in interest to the negotiations, and did in fact sign the contract at issue.



vitality, there cannot later be a claim fraud in the inducement, as an unfulfilled promise cannot be the basis for negligent misrepresentation, much less fraud.

The Court in finding as a matter of law, that the alleged promise, even if made, cannot be used to contradict the contract, correctly applied the parol evidence rule. Accordingly, this Court correctly granted summary judgment to Plaintiff.

II. The Court properly denied Mehta's motion to amend his pleadings.

Although leave to amend should be "freely given" the Court of Appeals for South Carolina has held that it may be denied where the proposed amendment would be futile. *See Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997) (the Court of Appeals upheld a dismissal of medical malpractice action without granting leave to amend the complaint as the circumstances showed that no amendment could be made to the complaint which would allow for a viable cause of action); *See also Jennings v. Jennings*, 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010) (circuit court did not err in refusing to grant a party leave to amend his complaint to add a defendant where no liability extended to that defendant).

Mehta additionally asserts that the Court incorrectly denied his motion to amend his pleadings. In his proposed amended pleading, Mehta alleges that Newtek, misrepresented to Mehta that it would forgive all debt associated with the promissory note.

However, such a statement, even if true, cannot support a claim for negligent misrepresentation. Statements concerning a future event—such as the future waiver of a debt—cannot form the basis of negligent misrepresentation. "[A] claim for negligent misrepresentation 'cannot ordinarily be based on unfulfilled promises or statements as to future events.'" *Osborn v. Univ. Med. Associates of Med. Univ. of S. Carolina*, 278 F. Supp. 2d 720, 735 (D.S.C. 2003) (quoting *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 439 S.E.2d 283, 285 (Ct. App. 1993)); *see also Winburn v. Insurance Co. of North America*, 287 S.C. 435, 442, 339 S.E.2d 142, 147 (Ct. App. 1985) (holding that "[e]vidence of a



mere broken promise is not sufficient to prove negligent misrepresentation any more than it is sufficient to prove fraudulent misrepresentation"). As a result, even if Newtek promised Mehta it would forgive any debt, such a statement does not support Mehta's claim for negligent misrepresentation.

This has two implications, which are both fatal to Mehta's case. First, Mehta is precluded from using the fraud exception to the parol evidence rule as discussed above. Second, Mehta cannot meet the elements of negligent misrepresentation.

Accordingly, it would be futile to allow Mehta to amend his pleadings to allege such a cause of action, and the Court correctly denied this motion.

III. Defendant's cause of action for Unfair Trade Practices fails as a matter of law.

Finally, Mehta alleges that Newtek committed an unfair trade practice in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20, et seq. ("UTPA") by making an oral promise. However, there is no evidence Newtek acted unfairly or deceptively. "A trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 325, 396 S.E.2d 105, 108 (Ct. App. 1989), *rev'd, in part, on other grounds*, 422 S.E.2d 103 (S.C. 1992).

Additionally, Mehta has no evidence that Newtek's alleged promise to him affects the public interest. The UTPA is not available to address a private wrong where the public interest is unaffected. *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1987); *see also Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) ("Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest").

As the Fourth Circuit has held:

"While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were the rule otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act."

Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc., 974 F.2d 502, 507-08 (4th Cir. 1992).

Allegations of a claim under the UTPA must be bolstered by specific factual evidence to survive summary judgment: "To sustain a cause of action under the []UTPA, the plaintiffs must establish, by specific facts, that members of the public were adversely affected . . ." *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574, 584 (D.S.C. 2003). "Without proof of specific facts disclosing that . . . members of the public were adversely affected by the [unfair conduct] or that they were likely to be, all we are left with is a speculative claim of adverse public impact and that will not suffice for recovery under the UTPA." *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994) (rejecting a UTPA claim where the plaintiff did not introduce any evidence of specific facts to show any member of the public was adversely affected by his transaction) (internal citations omitted) (emphasis added). Because Mehta cannot prove any deceptive or unfair actions by Newtek or that the alleged conduct affected the public interest, their claim fails and Mehta is entitled to summary judgment.

Accordingly, it would be futile to allow Mehta to amend his pleadings to allege such a cause of action, and the Court correctly denied this motion.

As to the causes of action that Mehta alleges against the third party defendants, the Plaintiff takes no position on such a matter other than Mehta is free to pursue and litigate any claims against other parties in other litigation not involving Plaintiff.

IV. Defendant cannot rely on his failure to engage in discovery as a bar to summary judgment.

This action has been pending since December 3, 2013. However, it was not until the eve of the summary judgment hearing that Mehta served discovery in a veiled attempt to create the illusion

that he had not had the opportunity to engage in full and fair discovery. In point of fact, nothing could be further from the truth.

While the parties have been engaged in settlement negotiations, nothing has precluded the Mehta from engaging in discovery. The fact that the Mehta elected not to engage in any discovery whatsoever until the eve of the hearing on Plaintiff's motion for summary judgment should not operate to create an issue in dispute to delay summary judgment.

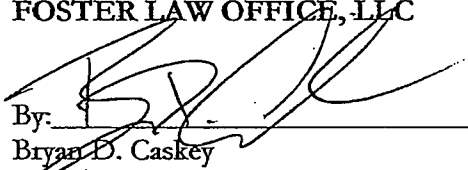
Further, it is not necessary to even undertake an analysis of the discovery issue, as the sole allegation in Mehta's alleged counterclaims has already been shown to be irrelevant as a matter of law, and the Court has assumed the truth of the allegation for purposes of summary judgment. Accordingly, further discovery will have no additional value other than to delay the resolution of this action and harass the Plaintiff.

PRAYER FOR RELIEF

Based upon the foregoing, the Plaintiff prays for an Order of the Court denying Defendant's motion to reconsider without oral argument.

Respectfully Submitted,

FOSTER LAW OFFICE, LLC

By: 

Bryan D. Caskey

3100 Devine Street

Columbia, SC 29205

(803) 400-1921

(803) 400-1951 Facsimile

bryan@fosterlawoffice.net

COUNSEL FOR THE PLAINTIFF

April 3, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT
)
) C/A No.: 13-CP-38-01427
)
)
)

) SUPPLEMENTAL MEMORANDUM OF LAW IN
) RETURN TO DEFENDANT'S MOTION TO
) RECONSIDER
)
)
)

The Plaintiff, by and through its undersigned counsel, in return and opposition to Defendant's motion to reconsider would show unto this Court as follows:

BACKGROUND/PROCEDURAL POSTURE

On February 21, 2007, Krishna of Orangeburg, Inc. made, executed, and delivered a promissory note in the original principal amount of \$725,000.00 to Plaintiff. The funds were used for the purchase of commercial real estate and a hotel in Orangeburg County. To secure the promissory note, Krishna of Orangeburg, Inc. made, executed, and delivered a purchase money mortgage to Plaintiff secured by the commercial real estate. As additional security, Defendant (hereinafter "Mehta"), in his individual capacity, made, executed, and delivered an Unconditional Guarantee, to guarantee full and faithful performance of the terms of the promissory note.

On February 26, 2013, Plaintiff commenced a foreclosure action against Krishna of Orangeburg, Inc., in which Plaintiff sought to foreclose its interest in the real estate. Prior to the judgment of foreclosure, Krishna of Orangeburg, Inc. sold the real estate to a third party for the contract price of \$437,000.00. Plaintiff approved this sale and agreed specifically to satisfy its mortgage encumbering the property. In seeking Plaintiff's consent for this sale, one of the explicitly negotiated terms was whether Plaintiff would waive its right to pursue any deficiency following the sale.

Specifically, Plaintiff was presented with a draft contract containing waiver language, which Plaintiff rejected. After further negotiations, the parties reached a final agreement that was lengthy, detailed, and comprehensive.

Despite requests from Mehta, Plaintiff refused to waive its right to collect any remaining amount owed under the Promissory Note and related Guarantee, and Mehta's requested language was not included in the final, executed contract. In this contract, to avoid any potential misunderstandings and to make clear that the only understanding between the parties was that expressed in the contract, the parties agreed as follows:

Entire Agreement. This instrument constitutes the entire agreement between the parties, no party shall be bound by any terms, conditions, statements, or representations or written not contained herein. Each party hereby acknowledges that executing this Agreement he or she has not been induced, persuaded, or motivated by any promise or representation made by the other party, unless expressly set forth herein. All negotiations, statements, and preliminary instruments by the parties or their representatives are merged in this instrument.

(Contract, p. 6 ¶ 9(b).

Following the sale, Plaintiff received the sales proceeds, and credited them towards payment of the amount due under the promissory note. Subsequently, the foreclosure action was dismissed, and Plaintiff delivered a Satisfaction of Mortgage, which specifically included language regarding Plaintiff's reservation of rights to seek full payment under the promissory note. Following Mehta's failure to honor his guarantee, on December 3, 2013, Plaintiff filed this action to enforce the guarantee for the amount remaining under the promissory note. On February 11, 2014, Mehta filed and served his answer in which he vaguely claimed that the settlement of the foreclosure action "may have released or otherwise extinguished the debt".

On March 10, 2014, Plaintiff moved for summary judgment, seeking a judgment against Mehta for the outstanding balance owed under the guaranty. On December 1, 2014, in opposition to summary judgment Defendant served an affidavit from Mehta.

The essence of Mehta's affidavit is an allegation that, during the negotiation of the terms and provisions of the short sale, Newtek, through a representative, orally promised Mehta that "there would be no more debt owed".

This sole allegation comprises the entirety of Mehta's basis for opposing summary judgment and an amendment of his pleadings. Mehta's position is that this alleged oral promise now presents a material issue of fact which would preclude summary judgment, and also creates other causes of action against Plaintiff. However, as set detailed below, Newtek asserts that summary judgment is appropriate, even assuming, the existence of this alleged oral promise, and that no cause of action is appropriate.

LAW/ANALYSIS

A trial court may grant a party's motion for summary judgment if 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. *Epstein v. Costal Timber Co., Inc.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Id.*

Accordingly, although Newtek denies that it made any oral promise to forego collection of the remaining balance due under the note and guaranty, for the purposes of this summary judgment motion, Newtek must concede this allegation to be true. However, even assuming this allegation to be true does not create a material issue of fact precluding summary judgment.

I. The Court correctly found that an alleged oral promise not included in the final contract cannot be used to contradict the written provisions of the contract.

The well-settled parol evidence rule precludes the alleged promise from being introduced as evidence. Specifically, the parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. *See*

Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000); *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App.2001).

The rationale and policy underlying the parol evidence rule was succinctly explained by Justice Ginsburg, as follows: "Were we to permit plaintiff's use of the defendant's prior representations to defeat the clear words and purpose of the Final Agreement's integration clause 'contracts would not be worth the paper on which they are written.'" *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 270 U.S. App. D.C. 251 (C.A. D.C., 1988).

The instant case is a textbook example of the situation that the parol evidence rule was created to prevent. In this instance, the parties negotiated specific terms of their contract and reduced those terms to writing.¹

One of the specific terms negotiated was whether a deficiency balance would be owed following the short sale of the property. The written words of the contract and the accompanying documents are crystal clear in the fact that no waiver was given. Mehta now seeks to overturn the clear meaning of the entire agreement through his allegation of a contemporaneous oral promise.

Mehta now argues that the contract is "silent" as to the issue of whether the short sale would satisfy the debt. This is incorrect, as the mortgage satisfaction specifically states that Plaintiff "reserves the right to collect any and all deficiency owed" and the contract specifically excludes any other promises in any other capacity through its non-reliance and merger clause.

We have here the case of a party with the capacity and opportunity to read a written contract, who was represented by counsel, who executed the contract, not under any emergency, and whose signature was not obtained by trick or artifice. Accordingly, if the parol evidence rule is to retain

¹ Mehta alleges that he was not one of the parties to the contract, but rather, that Mehta's company was a party. However, Mehta is the sole owner of his company and also attempted to negotiate for a release of his personal guarantee on his own behalf. Accordingly, it is clear that Mehta was a real party in interest to the negotiations, and did in fact sign the contract at issue.

vitality, there cannot later be a claim fraud in the inducement, as an unfulfilled promise cannot be the basis for negligent misrepresentation, much less fraud.

The Court in finding as a matter of law, that the alleged promise, even if made, cannot be used to contradict the contract, correctly applied the parol evidence rule. Accordingly, this Court correctly granted summary judgment to Plaintiff.

II. No Tort Liability Due to Nature of the Parties

Further, as an additional sustaining ground on the issue of why the Defendant cannot maintain a negligent misrepresentation action is that the Plaintiff owes no duty of care to the Defendant.

The only duties between the two parties are one of creditor and debtor, created by contract, and such contractual duties cannot support a tort claim for negligent misrepresentation. "[T]he law is well-settled that a breach of contractual duties does not give rise to an action in tort for negligence." *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 503 n.5, 473 S.E.2d 52, 55 n.5 (1996); *see also Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie.")

This Court has previously held that a mortgage servicer does not owe a non-contractual duty to a borrower. *Land v. Green Tree Servicing*, No. 8:14-1165, 2014 WL 5527854 (D.S.C. Oct. 31, 2014); *see also Toney v. LaSalle Bank National Ass'n*, 896 F. Supp. 2d 455 (D.S.C. 2012) (no duty of care existed from a mortgagee to a mortgagor).² *Accord Brown v. C&S Real Estate Servs.*, 314 S.C. 463, 467-68, 446 S.E.2d 463, 466 (Ct. App. 1994) (citing *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d

²Pursuant to Local Rule 7.05, a copy of all unpublished opinions are attached as Exhibit 5 to this Motion.

786, 790 (1986))³. (“[A]bsent special circumstances, the relationship between mortgagee and mortgagor is that of a debtor/creditor.”).

Similarly, courts across the country have held that a servicer does not owe a borrower a duty of care in the context of workout discussions and reviewing a borrower for a loan modification. *See, e.g., Sanders v. U.S. Bank Nat’l Ass’n*, Nos. 1:13-cv-3192, 1:13-cv-3315 (N.D. Ga. Nov. 19, 2013) (holding that “[a]ny duty related to the servicing of Plaintiff’s loan arises from the loan transaction,” and because there were no duties owed independent of the loan documents, a borrower’s claim for negligence against a loan servicer was dismissed); *Weinstein v. Mortgage Capital Associates, Inc.*, Nos. 2:10-CV-01551, 2:10-CV-1562, 2011 WL 90085 (D. Nev. Jan. 11, 2011) (dismissing a claim against a servicer because “a loan servicer owes no duties to the borrower beyond those set out in the relevant agreements”); *McNeely v. Wells Fargo Bank, N.A.*, No. 2:13-CV-25114, 2014 WL 7005598, at *6 (S.D. W.Va. Dec. 10, 2014) (“because the relationship between [the servicer] and plaintiffs consists of service customarily provided by a servicer to a borrower,” no special relationship existed, and thus there was no duty); *Lesavoy v. JP Morgan Chase Bank, N.A.*, No. C 14-2226 PJH, 2015 WL 534020, at *4 (N.D. Cal. Feb. 9, 2015) (“merely engaging in the loan modification process is a traditional money lending activity,” and thus does not trigger any duty of care); *Leuras v. BAC Home Loan Servicing, LP*,

³The South Carolina Supreme Court has been very reluctant to recognize or create new duties of care that would expand the scope of traditional tort liability. *E.g., Huggins*, 355 S.C. at 332, 585 S.E.2d at 276-77 (holding that credit card issuers have no duty to protect potential victims of identity theft); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 586 S.E.2d 586 (2003) (declining to recognize a general duty of care from an independent insurance adjuster or insurance adjusting company to the insured); *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003) (holding that a school owes no duty of care to a student in giving advice concerning the courses the student should take); *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997) (holding that the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them); *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992) (holding that the South Carolina Public Service Authority had no duty to discover and warn of a latent hazardous condition on land that it leased to another).

221 Cal. App. 4th 49 (Cal. Ct. App. 2013) (a loan servicer owes no duty of care to the borrower in servicing the loan, specifically including loan modification and workout discussions and foreclosure).

Quite simply, the Plaintiff owed no duty of care to see that he communicated truthful information. The only duties between the parties were that defined by contract as the relationship is one of debtor and creditor. The duty of care to communicate truthfully is an essential element of the Defendant's claim. Because the Defendant cannot meet this element, the Defendant's claim fails as a matter of law.

As a result, the Plaintiff is entitled to summary judgment on the Defendant's proffered claim of negligent misrepresentation.

Further, there is no liability for negligent misrepresentation as to "matters which plaintiff could ascertain on his own in the exercise of due diligence." *Quaill Hill, LLC*, 387 S.C. at 240, 692 S.E.2d 499, 508 (2010) (quoting *AMA Mgt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 88, 874 (Ct. App. 1992)). The Defendant alleges that he was told his entire mortgage debt would be waived, but he was on notice that no such provision made it into the final version of the short-sale agreement, and that explicit language to the contrary was contained in the mortgage satisfaction. Because the Defendant cannot prove the necessary elements of a claim for negligent misrepresentation, the Plaintiff is entitled to summary judgment.

III. The Court properly denied Mehta's motion to amend his pleadings.

Although leave to amend should be "freely given" the Court of Appeals for South Carolina has held that it may be denied where the proposed amendment would be futile. *See Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997) (the Court of Appeals upheld a dismissal of medical malpractice action without granting leave to amend the complaint as the circumstances showed that no amendment could be made to the complaint which would allow for a viable cause of action); *See also Jennings v. Jennings*, 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010) (circuit court did not err in refusing

to grant a party leave to amend his complaint to add a defendant where no liability extended to that defendant).

Mehta additionally asserts that the Court incorrectly denied his motion to amend his pleadings. In his proposed amended pleading, Mehta alleges that Newtek misrepresented to Mehta that it would forgive all debt associated with the promissory note.

However, such a statement, even if true, cannot support a claim for negligent misrepresentation. Statements concerning a future event—such as the future waiver of a debt—cannot form the basis of negligent misrepresentation. “[A] claim for negligent misrepresentation ‘cannot ordinarily be based on unfulfilled promises or statements as to future events.’” *Osborn v. Univ. Med. Associates of Med. Univ. of S. Carolina*, 278 F. Supp. 2d 720, 735 (D.S.C. 2003) (quoting *Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 439 S.E.2d 283, 285 (Ct.App.1993)); see also *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 442, 339 S.E.2d 142, 147 (Ct. App. 1985) (holding that “[e]vidence of a mere broken promise is not sufficient to prove negligent misrepresentation any more than it is sufficient to prove fraudulent misrepresentation”). As a result, even if Newtek promised Mehta it would forgive any debt, such a statement does not support Mehta’s claim for negligent misrepresentation.

This has two implications, which are both fatal to Mehta’s case. First, Mehta is precluded from using the fraud exception to the parol evidence rule as discussed above. Second, Mehta cannot meet the elements of negligent misrepresentation.

Accordingly, it would be futile to allow Mehta to amend his pleadings to allege such a cause of action, and the Court correctly denied this motion.

IV. Defendant’s cause of action for Unfair Trade Practices fails as a matter of law.

Finally, Mehta alleges that Newtek committed an unfair trade practice in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20, et seq. (“UTPA”) by making an oral

promise. However, there is no evidence Newtek acted unfairly or deceptively. "A trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 325, 396 S.E.2d 105, 108 (Ct. App. 1989), *rev'd, in part, on other grounds*, 422 S.E.2d 103 (S.C. 1992).

Additionally, Mehta has no evidence that Newtek's alleged promise to him affects the public interest. The UTPA is not available to address a private wrong where the public interest is unaffected.

Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1987); *see also Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) ("Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest.").

As the Fourth Circuit has held:

"While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were the rule otherwise, every ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act."

Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc., 974 F.2d 502, 507-08 (4th Cir. 1992).

Allegations of a claim under the UTPA must be bolstered by specific factual evidence to survive summary judgment: "To sustain a cause of action under the []UTPA, the plaintiffs must establish, by specific facts, that members of the public were adversely affected" *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574, 584 (D.S.C. 2003). "Without proof of specific facts disclosing that . . . members of the public were adversely affected by the [unfair conduct] or that they were likely to be, all we are left with is a speculative claim of adverse public impact and that will not suffice for recovery under the UTPA." *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994) (rejecting a UTPA claim where the plaintiff did not introduce any evidence of specific facts to show

any member of the public was adversely affected by his transaction) (internal citations omitted) (emphasis added). Because Mehta cannot prove any deceptive or unfair actions by Newtek or that the alleged conduct affected the public interest, their claim fails and Mehta is entitled to summary judgment.

Accordingly, it would be futile to allow Mehta to amend his pleadings to allege such a cause of action, and the Court correctly denied this motion.

As to the causes of action that Mehta alleges against the third party defendants, the Plaintiff takes no position on such a matter other than Mehta is free to pursue and litigate any claims against other parties in other litigation not involving Plaintiff.

V. Defendant cannot rely on his failure to engage in discovery as a bar to summary judgment.

This action has been pending since December 3, 2013. However, it was not until the eve of the summary judgment hearing that Mehta served discovery in a veiled attempt to create the illusion that he had not had the opportunity to engage in full and fair discovery. In point of fact, nothing could be further from the truth.

While the parties have been engaged in settlement negotiations, nothing has precluded the Mehta from engaging in discovery. The fact that the Mehta elected not to engage in any discovery whatsoever until the eve of the hearing on Plaintiff's motion for summary judgment should not operate to create an issue in dispute to delay summary judgment.

Further, it is not necessary to even undertake an analysis of the discovery issue, as the sole allegation in Mehta's alleged counterclaims has already been shown to be irrelevant as a matter of law, and the Court has assumed the truth of the allegation for purposes of summary judgment. Accordingly, further discovery will have no additional value other than to delay the resolution of this action and harass the Plaintiff.

PRAYER FOR RELIEF

Based upon the foregoing, the Plaintiff prays for an Order of the Court denying Defendant's motion to reconsider.

Respectfully Submitted,

FOSTER LAW OFFICE, LLC

By: 

Bryan D. Caskey

3100 Devine Street

Columbia, SC 29205

(803) 400-1921

(803) 400-1951 Facsimile

bryan@fosterlawoffice.net

COUNSEL FOR THE PLAINTIFF

May 26, 2015

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

DEFENDANT'S FIRST SET OF
INTERROGATORIES TO PLAINTIFF

2014 DEC -4 AM 9:54
FILED FOR RECORD
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA

The Defendant, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, hereby propounds and serves for answer the following Interrogatories, to wit:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case.
2. Indicate whether written or recorded statements have been taken from the witnesses and who has possession of such statements.
3. Set forth a list of all photographs, plats, sketches, and any and all other documents in possession of the Plaintiff or counsel that relate to any claim or defense in the case.
4. List the names and address of any expert witnesses whom the Plaintiff proposes to use as a witness at the trial of the case and set forth a description of the subjects about which the Plaintiff believes such experts may testify at the trial of the case, as well as the opinion the Plaintiff believes the expert intends to offer and the basis for each such opinion.
5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform the Defendant of the important facts known to or observed by such witness.

ATTEST: TRUE COPY

Wingy B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

ROA 183

6. For each person who had any involvement in the negotiation leading up to and/or the closing of the short sale transaction involved in this case, state the person's name, last known address, and telephone and email contact information, state all states in which the person has been admitted to practice law, state the date(s) of such admission, state the company the person worked for at the time of the person's involvement in the matter, and set forth in detail what the person did in connection with the matter.

~~7. Itemize each amount the Plaintiff claims is a part of the debt subject of this action, giving for each such amount its exact dollar figure, its nature, and the date the Plaintiff claims it became part of the debt. This itemization is to include, but not be limited to, an itemization of all principal and interest.~~

8. Set forth each of the payments that has been made toward the debt subject of this action, stating for each such payment its amount, the date it was received, by whom it was received, and how it was applied to the loan or otherwise treated.

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

10. State the involvement of the Small Business Administration (SBA) with regard to the debt subject of this action.

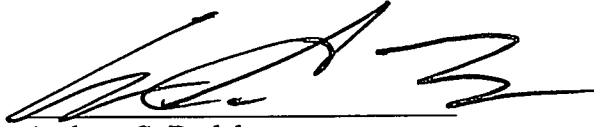
~~11. Set forth an itemized statement of all damages claimed to have been sustained by the Plaintiff.~~

12. For each of the Plaintiff's claims in this action, state the facts that support the claim.

13. For each of the Plaintiff's defenses to the Defendant's counterclaims in this action, state the facts that support the defense.

14. For each allegation of the Defendant's pleadings in this action that the Plaintiff denies, set forth the facts that support the denial.
15. For each admission requested of the Plaintiff in this action that the Plaintiff denies, set forth the facts that support the denial.
16. Identify all correspondence, documents, notes, or other records of the communications between Plaintiff and Defendant concerning the subject(s) of this action.
17. Identify all of Plaintiff's employees or other representatives with whom Defendant or his representatives had any communications concerning the facts, claims, and defenses alleged in this action.
18. State how it is that the Plaintiff acquired whatever interest it has in the note subject of this action, including the manner of acquisition and the chain, if any, of ownership between the original party and the Plaintiff.
19. Describe all communications between Plaintiff and the Defendant concerning any matter subject of this action. Identify any documents that support the answer to this interrogatory.
20. State each of the valuation(s) the Plaintiff has placed on the property subject of this action, identifying each valuation by the date thereof.

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
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(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
December 2, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

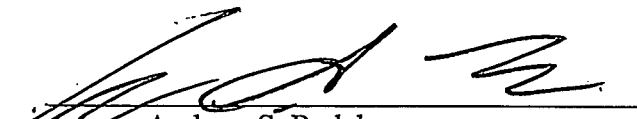
Defendant.

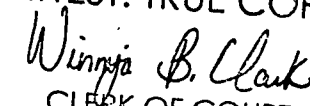
CERTIFICATE OF SERVICE

2014 DEC -4 AM 8:54
FILED FOR RECORD
WINTER 7, 2014
CLERK OF COURT
ORANGEBURG, SC

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendant do hereby certify that I, on the 2nd day of December, 2014, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Brian D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205


Andrew S. Radeker

ATTEST: TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

DEFENDANT'S FIRST SET OF
REQUESTS TO PLAINTIFF
TO PRODUCE

2014 DEC - 4 AM 8:55
FILED FOR RECORD
CLERK OF COURT
ORANGEBURG COUNTY, SC

The Defendant, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, hereby requests the Plaintiff to produce the documents listed below for inspection and copying at the offices of Harrison & Radeker, P.A., 923 Calhoun Street, Columbia, South Carolina.

The word "documents" means the meaning thereof as defined in the South Carolina Rules of Civil Procedure and also means any tangible thing of any nature whatsoever and any expression and/or impression contained in, captured in, and/or conveyed by any medium, physical or electronic or otherwise, of any nature whatsoever, including, but not limited to, all writings of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including, without limitation, punch cards, printout sheets, correspondence, memoranda, notes, notebooks, magazines, diaries, calendars, appointment book registers, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, worksheets, books, agreements, contracts, purchase orders, acknowledgments, invoices, authorizations, budgets, analysis, projections, interoffice and intraoffice communications, notations of any sort of conversations, telephone calls, meetings, or other communications, bulletins, printed matter, computer printouts, teletypes, telefaxes, all drafts, alterations, modifications, changes and amendments of any of the foregoing, graphic or oral records or representations of any kind, (including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotapes, recordings, and motion pictures), and any electronic, mechanical or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs (of all types), disks (of all types), recordings, and computer memories). In

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Wingy B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

all instances in which originals and/or non-identical copies are not available, "document" also means identical copies of original documents and copies of non-identical copies.

NOTE: These requests shall be deemed continuing and thus require supplemental production pursuant to Rule 26(e) of the South Carolina Rules of Civil Procedure.

The documents to be produced are the following:

1. All documents and statements identified in answer to any interrogatories in this case.
2. All documents and statements subject of any interrogatories in this case:
3. All exhibits the Plaintiff intends to use at the trial of this case and any hearing herein.
4. Any and all statements and other documents, whether written, recorded, or otherwise, concerning the claims and defenses in the present litigation.
5. A copy of any and all written or recorded statements made by any witness in this case.
6. Any and all photographs, slides, video tape, motion pictures, film, data, data compilations, plats, sketches or diagrams associated with this litigation.
7. A copy of all documents concerning the relationship of the Small Business Administration (SBA) to the loan, guaranty, and debt involved in this case.
8. A copy of all documents showing or relating to communications between the Plaintiff and the Small Business Administration (SBA) about the matters subject of this case.
9. A copy of all documents, whether recorded or unrecorded, concerning assignment or other transfer of the claimed mortgage, note, and/or loan subject of this action and any interest therein.
10. A copy of all documents concerning the closing of the short sale transaction involved in this case and the negotiations leading up to that closing.
11. A copy of each document referred to in the pleadings in this action.
12. A copy of all bills for attorneys' services by the Plaintiff's attorneys in this action.
13. A thorough, readable payment history, understandable by an average member of the general public with average financial experience, for the debt subject of this action.
14. All documents concerning each and every modification or, forbearance agreement relating to, or other agreement altering (permanently or temporarily) the rights and obligations of the parties to the note and mortgage subject of this action.

15. All documents provided to or received by any witness to the facts of this case (to include all persons named as witnesses by any party).
16. All documents concerning any witness to the facts of this case (to include all persons named as witnesses by any party).
17. Produce all documents relevant to any claim or defense received from any third party, regardless of whether or not a subpoena was utilized, since commencement of this action.
18. ~~Produce a privilege log for each document withheld on any claim of privilege which~~ includes at least the following:
 - a. date the document was created;
 - b. author(s) of the document;
 - c. description of the document, to include its nature (e.g. letter, memo, statement, draft of letter, report, etc.) and its subject matter;
 - d. original intended recipient, if any, of the document; and
 - e. all actual recipients of the document.

If any document is withheld under a claim of privilege, please identify each such document and the privilege claimed. If any document requested is no longer in your possession or subject to your custody or control, please state whether it is missing or lost, destroyed, transferred to others or otherwise disposed of. For each document no longer in your custody or control, please describe it fully, and give the name and address of any individual currently possessing it or else any individual familiar with its contents.

You are required to produce the documents for inspection as they are kept in the usual course of business or you are required to organize and label them to correspond with the categories of the request.

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
December 2, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

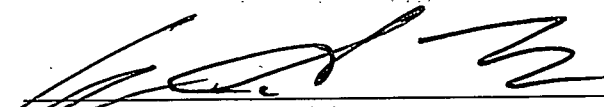
Defendant.

CERTIFICATE OF SERVICE

2014 DEC -4 AM 10:53
FILED FOR RECORD
CLERK OF COURT
ORANGEBURG

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendant do hereby certify that I, on the 2nd day of December, 2014, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Brian D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205


Andrew S. Radeker

ATTEST: TRUE COPY
Wingji B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

DEFENDANT'S FIRST SET OF
REQUESTS TO PLAINTIFF TO
ADMIT

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG
DEC - 4 PM 8:55

The Defendant, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby propounds and serves on the Plaintiff the following Requests to Admit, to wit:

1. The Plaintiff communicated with Vivek Naik in coordinating the short sale transaction with Krishna of Orangeburg, Inc., that is involved in this case.
2. The Plaintiff communicated with Quantum Mortgage Corporation in coordinating the short sale transaction with Krishna of Orangeburg, Inc., that is involved in this case.
3. The Plaintiff communicated with the Defendant, Kiritkumar H. Mehta, in coordinating the short sale transaction with Krishna of Orangeburg, Inc., that is involved in this case.
4. Before the closing of the short sale, an employee of Newtek Small Business Finance told the Defendant that, as a result of the short sale, there would be no more debt owed to the Plaintiff.
5. That employee was Jose Morales.
6. The value of the property at the time of the closing of the short sale was sufficient to satisfy the entire indebtedness owed to Plaintiff.

WINGYIA B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC

Respectfully submitted,



Andrew S. Radeker
James C. Harrison, Jr.
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drew@harrisonfirm.com (email)
jim@harrisonfirm.com (email)

ATTORNEYS FOR DEFENDANT
AND THIRD-PARTY PLAINTIFF

Columbia, South Carolina
December 2, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,

Plaintiff,

vs.

Kiritkumar H. Mehta,

Defendant.

CERTIFICATE OF SERVICE

RECEIVED
APR 26 2016
SC Court of Appeals

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendant do hereby certify that I, on the 2nd day of December, 2014, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Brian D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205



Andrew S. Radeker

ATTEST, TRUE COPY

Winnie B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

RECEIVED

APR 26 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Appellate Case No. 2015-001633
Common Pleas Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,.....Respondent,

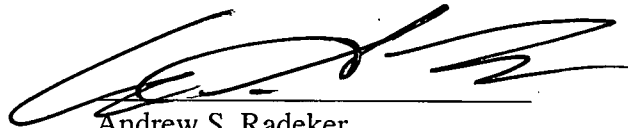
v.

Kiritkumar H. Mehta,.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included
by any of the parties and not any other material.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

April 6, 2016