

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Marvin H. Dukes, III, Master In Equity

Appellate Case No. 2016-000537

RECEIVED
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SC Court of Appeals

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

Respondent,

v.

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

Of Whom

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

Appellants.

RECORD ON APPEAL
VOLUME II

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INDEX TO RECORD ON APPEAL
VOLUME II

Appellate Case No. 2016-000537

Memorandum in Opposition to Motion for Summary Judgment dated February 25, 2015(with Exhibits)	351
Exh. A - Deposition of J. Christopher Lindgren and 30(b)(6) Deposition of Black Diamond, LLC (Pgs. 22-29; 37-38; 53-55; 57-64; 105-107; 115-120)	362
Exh. B - Deposition of Joseph B. Fraser, III (Pgs. 9-16; 26-27, Ex. 2) .	395
Exh. C - Deposition of Baker Wilkins (Pgs. 13-14)	411
Exh. D - Various Emails/Documentation	417
Exh. E - Order and Final Judgment(Maybank v. BBT)	495
TD Bank's Reply to Defendants' Memorandum in Opposition to Summary Judgment dated March 23, 2015 (with Exhibits A, B, & C)	528
TD Bank's Memorandum in Support of its Motion to Strike Defendants' Jury Trial Demand dated March 24, 2015 (with Exhibit A)	565
Motion for Reconsideration (Order to Strike) dated July 6, 2015	581
Motion for Reconsideration (Summary Judgment) dated September 21, 2015	585
TD Bank's Memorandum in Opposition to Defendants' Motion for Reconsideration of the Court's Order Striking Defendants' Jury Trial Demand dated September 22, 2015	590
Memorandum in Support of Defendants' Motion for Reconsideration	597
Exh. 1 - Excerpt from Memorandum in Opposition to Motion for Summary Judgment Pages 1-5 (Duplicate - See Record P. 351)	
Email from Michael Bogle to Judge Dukes attaching Supreme Court's dismissal of Petition for Rehearing in BADD dated January 14, 2016	607
Bates # BD000346-47, J. Christopher Lindgren Deposition dated July 22, 2013	608

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
TD BANK, N.A., Successor by)
Merger to Carolina First Bank,)
)
Plaintiff,)
)
v.)
)
BLACK DIAMOND, LLC, J.)
CHRISTOPHER LINDGREN,)
DAVID A. BROSMAN, JULIE H.)
KING and THE GREENERY, INC.,)
)
Defendants.)
)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2012-CP-07-0944

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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

The Defendants, Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman, by and through their undersigned counsel, oppose the Plaintiff's Motion for Summary Judgment. For the reasons discussed below, this motion should be denied.

STANDARD

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). "Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the

evidence must be viewed in the light most favorable to the nonmoving party.” Hancock, 381 S.C. at 329-30, 673 S.E.2d at 802. In considering a motion for summary judgment, the Court neither makes factual determinations nor considers the merits of competing testimony. David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 250, 626 S.E. 2d 1, 5 (2006); see also S.C. Prop. & Cas. Guar. Ass’n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (“At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.”) In Hancock, the South Carolina Supreme Court clarified conflicting case law regarding the level of evidence required to withstand a motion for summary judgment, 381 S.C. at 330-31, 673 S.E.2d at 803. Specific to the causes of action at issue here, as the non-moving parties, the Defendants are required only to show “a mere scintilla of evidence in order to withstand a motion for summary judgment.” Id. Plaintiff has failed to meet its burden because the Defendants have provided the Court with far more than a “mere scintilla of evidence.”

The Defendants have submitted to the court and attach hereto as Exhibits “A”, “B” and “C” deposition excerpts from the depositions of J. Christopher Lindgren (which is also the 30(b)(6) deposition of Black Diamond, L.L.C.), Joseph B. Fraser, III and Baker Wilkins. The Plaintiff has also submitted with its memorandum many of the same pages of Lindgren’s deposition but did not include the following pages submitted by the Defendants: 22 through 25 and 115 through 120. The Plaintiff has not submitted any pages from Fraser or Wilkins’ depositions. Defendants have also submitted and attach hereto as Exhibit “D” a compilation of documents produced by Plaintiff in this case.

In pages 22 through 25 of Lindgren's deposition, he testified to the Plaintiff's failure to approve a transaction to sell a portion of the collateral to Ceagull Investments, LLC, a pattern of unfair dealings and the appropriating of funds from the operating accounts of Black Diamond, LLC. In pages 114 through 120, Lindgren testified to misrepresentations made by an officer of the Plaintiff concerning requests for documentation, Black Diamond, LLC's account and contact with the property manager.

Fraser, through Ceagull Investments, LLC, entered into a memorandum of understanding or letter of intent with Black Diamond, LLC to purchase a portion of the collateral for \$1,325,000.00. A copy of this document is attached to Fraser's deposition and to this memorandum in Exhibit "B". According to Fraser, a condition was "yes-or-no approval from the bank... and never got a response, so we never went forward with it." (Fraser depo. p.10).

Similarly, Wilkins, the real estate agent involved, testified to the letter of intent between Ceagull Investments, LLC and Black Diamond, LLC and the fact that the Plaintiff never responded: "And once the price was done, his brother, Simon Fraser,...was waiting on the response from TD Bank to accept the offer or give the mortgage lien release...and that's as far as we got." (Wilkins depo. pp. 13-14).

ARGUMENT

The Plaintiff claims that the counterclaims of the Defendants fail as a matter of law. The Defendants dispute this assertion.

I. Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing

The Plaintiff claims that because the notes and guaranties had been breached, the Defendants cannot seek to recover under the same. The Plaintiff forgets, however, that there had been no breach of the forbearance agreements by the Defendants at the time of Ceagull Investments' offer and the letter of intent. The implied covenant of good faith and fair dealing exists even in connection with forbearance agreements. Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 672 S.E. 2d 816 (Ct. App. 2009) (there exists in every contract an implied covenant of good faith and fair dealing).

A. Cross-Collateralization of the Loans and Appointment of a Property Manager.

The Plaintiff alleges that because the cross-collateralization of the two loans took place more than three years prior to the date of the Defendants' counterclaims, any such claim is barred by the three year statute of limitations. The applicable statute of limitations; however, is just as likely to be the twenty year statute of limitations for sealed instruments such as the mortgages and modifications in this case. See S.C. Code Ann. §15-3-520.

The Plaintiff also claims that any breach alleged by the Defendants was waived by execution of the forbearance agreements. Again, however, the breach arising from the Plaintiff's failure to respond to the Ceagull Investments' offer and letter of intent was subsequent to the execution of the forbearance agreements and caused real and measurable damages.

B. Interference with Property Manager's Contract.

The Plaintiff is again confused about timing. The interference with the property

manager occurred after execution of the forbearance agreements. Bank documents obtained in discovery buttress Lindgren's testimony that Plaintiff represented that the property manager would be just that, a property manager, not a receiver, and that the relationship would be between the property manager and Black Diamond, LLC, not the Plaintiff. See Ex. D at 3351. Nevertheless, Plaintiff internally regarded the property manager as a receiver and treated him as such. See Ex. D at 6699. By way of example, Plaintiff directed the property manager in regard to payment of bills, Ex. D at 7032, 8504, collecting rents, Ex. D at 9446, and evicting tenants, Ex. D at 9448. In recognition of Plaintiff's de facto assumption of control, the property manager rendered "confidential" reports to the Plaintiff casting the property owner (to whom the property manager owed fiduciary duties) in a negative light and urged the bank to formally take over control of the property, Ex. D at 9600, all the while having lunch discussions with bank representatives about doing more business with Plaintiff and putting its own client, Black Diamond, LLC, in receivership. Ex. D at 9668.

C. Plaintiff's Failure to Even Respond to Request for Partial Release of Mortgage.

The Defendants have submitted testimony from three witnesses establishing that the Plaintiff never even responded to the request for a partial release pursuant to the letter of intent. The Plaintiff has mis-characterized its actions as a deliberate election not to release its mortgage - an election it apparently shared with nobody. The Defendants do indeed argue that the Plaintiff has a duty to consider and respond to the request. Certainly, the implied covenant of good faith and fair dealing requires no less.

Interestingly, the Plaintiff cites no South Carolina authority for its claim that lenders have no cognizable legal duty to consider or approve loss mitigation or loan modification requests. The Plaintiff cites authority from North Carolina and New

Hampshire. In residential foreclosure situations, the South Carolina Supreme Court has imposed a duty and process for the consideration of loss mitigation. See Administrative Order No. 2011-05-02-01.

Lindgren emailed the Offer/LOI to Plaintiff's representative, Mike Rose, on October 14, 2010. Ex. D at 6711 - 16. Lindgren followed up with Rose several times. Ex. D at 6597, 5846 and 5877. Finally, on December 2, 2010, Rose responded with an email beginning: "I have responded to you on a number of occasions, both via the phone and emails..." Lindgren has testified about this email, noting that nearly every sentence is a lie. (Lindgren depo. pp. 62-64) Plaintiff has produced thousands of pages of documents. There is not one email from Rose, or anyone at the bank for that matter, to Lindgren addressing the Ceagull offer. Moreover, there is no evidence in the bank files that any bank employee besides Rose even knew of the offer, much less that the bank actively considered the merits of the proposed sale. To the contrary, instead of dealing with his customer in good faith, on the same day he finally responded to Lindgren, Rose was secretly soliciting offers on the property from others. Ex. D at 5899. And in connection with that effort, again without disclosure to Black Diamond, LLC, Plaintiff sought and received the property manager's assistance in valuing the property.

D. Interference with Tenants

The Plaintiff's interference with tenants is simply further evidence of its disregard for the implied covenant of good faith and fair dealing.

II. Breach of Fiduciary Duty

The Plaintiff argues that there is no fiduciary relationship, claiming the relationship is merely a typical arms length business relationship between a debtor and a mortgage holder. In this case, however, the Plaintiff has directed the property manager. The property manager owes a fiduciary duty to its principal. See Fender

v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985); Tate v. Marco, 27 S.C. 493, 4 S.C. 71 (1887). By directing the property manager, the Plaintiff has stepped into the property manager's shoes and, correspondingly, into its fiduciary duties. See 10 S.C. Jur. Banks and Banking §170 (Banks must recognize that once they establish a control relationship in a debtor's business, by rights in the loan agreement, or otherwise, they may be found to have a fiduciary obligation to the debtor).

III. Negligent Misrepresentation

The Plaintiff asserts that the only misrepresentation identified by the Defendants was that of a loan officer, Mike Rose, that Black Diamond "could select a [property] manager we were most comfortable with." (Lindgren depo. p.27). This is not the only misrepresentation. For example, Lindgren testified as to another misrepresentation by the loan officer: "My understanding was they were going to respond to the terms of the deal and advise us whether or not we could go to contract." (Lindgren depo. p. 61): "[H]e told me that he would respond. He never responded either affirmatively or negatively." (Lindgren depo. p. 63). This misrepresentation, moreover, was made after execution of the forbearance agreements, rendering the Plaintiff's argument inapplicable.

Another misrepresentation, also subsequent to the forbearance agreement, was that related to the property manager's status as property manager not receiver. Plaintiff secretly directed and controlled the property manager, all the while asserting that the property manager was Black Diamond's agent, not that of the bank. This misrepresentation was persistent and ongoing.

IV. Duress

The Plaintiff asserts that duress is not recognized as a cause of action in South

Carolina, citing Troutman v. Facetglas, Inc., 281 S.C. 598, 316 S.E. 2d 424 (Ct. App. 1984). The Defendants maintain that the circumstances of this case justify the embrace of economic duress.

The Plaintiff alleges that the only instances of "duress" or "coercion" were the cross-collateralization of the loans and the requirement of the retention of a property manager. The Plaintiff should also include the "passive aggressive" failure of the Plaintiff to even consider the Ceagull Investments deal and respond. Again, this failure to even consider and respond occurred after the execution of the forbearance agreements, rendering the Plaintiff's argument inapplicable.

V. Interference with Prospective Economic Relations

The Plaintiff claims that its purported "election not to release its mortgage" was the "proper pursuit of its own contractual rights" and, therefore, there can be no finding of intentional interference with prospective contractual relations. If there was an "election" it was by secret ballot as three witnesses have testified that the Plaintiff failed and refused to even respond. As discussed above, there is no evidence that the Plaintiff actively considered the Ceagull proposal or that a conscious decision on the merits was made or conveyed to the bank's customer. The Defendants had a buyer in 2010 that was willing to pay \$125,000.00 more for less property than the current contract with Cross Outreach. Also, had the Ceagull Investments deal closed, all of the interest on \$1,325,000.00 less the commission and closing costs would have been saved over a period of years.

Again, the Plaintiff has cited no South Carolina authority for the proposition that it has no cognizable duty to consider or approve loss mitigation. Again, in the present case, this duty arguably requires no more than complying with the implied covenant of good faith and fair dealing. The Plaintiff owed the Defendants nothing

less. Moreover, had the Plaintiff approved the Ceagull Investments deal back in 2010, it would have been to its own benefit, not just to the benefit of the Defendants!

VI. Unfair Trade Practices

The Plaintiff cites to trial court opinions that purportedly hold the South Carolina Unfair Trade Practices Act ("SCUTPA") is inapplicable to banks regulated by the Federal Reserve. Other trial courts, however, have rejected an argument based upon a generalized banking industry exemption to the SCUTPA. See, e.g., Maybank v. BB&T Corporation, et al., C.A. No. 2001-CP-23-8578 (Order and Final Judgment dated November 10, 2014, a copy of which is attached hereto as Exhibit "E"). The SCUTPA exemption only excludes from the SCUTPA "those actions or transactions which are allowed or authorized by a regulatory agency or other statutes." Id.

We are again confronted with the Plaintiff's failure to even respond to a request for loss mitigation. The Plaintiff again misconstrues its action as a deliberate and considered decision not to release its mortgage. It was instead a secret decision it shared with nobody. The potential for repetition is obvious. This procedure of secret and unannounced alleged rejections of requests creates a potential for repetition, adversely affecting the public interest.

CONCLUSION

For the reasons set forth above, the Defendants request that this Court deny the Plaintiff's Motion for Summary Judgment, allow this matter to proceed to trial on all claims and issues, and for such other and further relief as may be just and proper.

[Signature Page to Follow]

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Hilton Head Island, South Carolina
This 25th day of February, 2015.

2015 FEB 26 PM 11:30
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07- 00944

CIVIL ACTION NO. 2012-CP-07- 00944

Plaintiff,

V.

CERTIFICATE OF MAILING

Defendants.

The undersigned, Elaine H. Montgomery, hereby certifies that on the 25 day of February, 2015, she deposited a copy of the *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment with Exhibits* to counsel for the Plaintiff in the United States mail with sufficient postage prepaid to:

Michael J. Bogle, Esquire
Womble Carlyle Sandridge & Rice, LLC
Post Office Box 10208
Greenville, SC 29603

Elaine H. Montgomery
Elaine H. Montgomery

Sworn to and Subscribed Before Me
this 25th day of February, 2015.

Notary Public for South Carolina

My Commission expires: 7/20/2017

2015 FEB 26 PM 4:50
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OFFICE

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IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

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

Plaintiff,

vs.

CIVIL ACTION NUMBER
2012-CP-07-0944

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

Defendants.

COPY

-----/

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

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POST OFFICE BOX 7349 HILTON HEAD, SC 29938
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I N D E X

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

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DOCUMENTARY EVIDENCE

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

REPORTER'S NOTE: PLAINTIFF'S EXHIBIT

NUMBER 1 WAS PREMARKED
BY THE COURT REPORTER

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2 ensued.)

3 BY MR. BOGLE:

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

9 A Yes.

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

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

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

20 A Cgull.

21 MR. HAIGHT: That's spelled with a

22 C?

23 THE WITNESS: Right.

24 BY MR. BOGLE:

25 Q Do you remember when that offer was

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

4 A It was September of 2010.

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

8 A There was a pattern of unfair dealing.

9 Q What do you mean by that?

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

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

17 A APEG, that's right.

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

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

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

4 A Yes.

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

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

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

12 A Because they didn't have enough.

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

15 A Property taxes.

16 Q All right, go ahead.

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

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

22 A Yes.

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

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

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

8 A Right.

9 Q And when would this have been?

10 A February 2012.

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

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

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

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

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

19 A Yes.

20 Q How did they get paid?

21 A Sometime thereafter TD Bank paid them.

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

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2 A Right.

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

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

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

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

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

21 A Under the circumstances, yes.

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

2 A Yes.

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

5 A Yes.

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

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

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

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

16 Q Can you give me an example?

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

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1 throw Bosley on us.

2 Q What manager did you select?

3 A Charter One Commercial.

4 Q Are they local?

5 A Yes.

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

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

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

12 A Yes.

13 Q How were the terms --

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

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

19 A They weren't.

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

24 A Roughly equal but a little more.

25
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2 far as things that you believe TD Bank did
3 wrong; not responding to the Cgull offer,
4 misappropriation of funds out of a operating
5 account and misleading statements by Mike Rose
6 as to your ability to appoint a manager that you
7 were comfortable with?

8 MR. HAIGHT: Object to the form.

9 BY MR. BOGLE:

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

13 A Yes.

14 Q Okay. Can you tell me about it?

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

18 Q And what do you mean by that?

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

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

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

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

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2 Q A demand for a cross-collateralization
3 agreement?

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

6 Q Yes.

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

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

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

25 Q Okay. And I am going to ask you for

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

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

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

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

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

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

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

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

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2 MR. BOGLE: Okay.

3 THE WITNESS: This was in-house.

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

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

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

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

12 MR. SIMONS: Yes.

13 BY MR. BOGLE:

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

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

19 MR. BOGLE: Okay.

20 (Whereupon, the witness examines
21 document.)

22 BY MR. BOGLE:

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

25 A There was a letter of intent. Before

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

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

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

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

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

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

9 A What's a Bates stamp?

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

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

14 BY MR. BOGLE:

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

21 A It is.

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

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2 mortgage?

3 A No.

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

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

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

14 A Can you rephrase that.

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

21 MR. HAIGHT: Object to the form.

22 THE WITNESS: No.

23 BY MR. BOGLE:

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

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

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

9 A Uh-huh (affirmative).

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

15 MR. HAIGHT: Object to the form.

16 BY MR. BOGLE:

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

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

22 A No.

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

25 A Because we asked for a partial release

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

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

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

12 Q Okay.

13 A And -- okay, go ahead.

14 Q No, go ahead and finish.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 Q Well, I'm asking you now.

23 A Not that I can recall right now.

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

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

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

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

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

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

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

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

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

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

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

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

21 A Yes.

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

25 A Before and after until -- frankly, I

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

6 Q July 28, 2010.

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

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

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

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

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

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

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

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

25 Q Would there have been any other

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

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

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

13 A Eventually.

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

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

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

24 A Yes.

25 Q Was that written or oral?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

117

2 A Oral.

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

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

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

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

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

18 (Whereupon, a short break
19 ensued.)

20 BY MR. BOGLE:

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

25 A Correct.

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

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

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

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

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

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

22 Q Who did you ask?

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

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

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

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

12 A Or Rob Pierson.

13 Q Somebody in Bill Bosley's --

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

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

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2 A Sure.

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

5 A Yes.

6 Q What did he say?

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

10 Q Did you ask for a copy?

11 A Yes.

12 Q And you were not provided one?

13 A No.

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

16 A A few thousand bucks.

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

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

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

25 A Not that I can recall right now.

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EXHIBIT "B"

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

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

8 Plaintiff,

9 vs.

CIVIL ACTION NUMBER
2012-CP-07-0944

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

16 Defendants.

COPY

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

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1 HASelden - FRASER (DIRECT EXAMINATION)

2 BY MR. HASelden:

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

6 A Yes.

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

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

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

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

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

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

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

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

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

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

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

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

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

21 BY MR. HASELDEN:

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

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

2 Have you seen this document before?

3 A Yes.

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

6 A Yes.

7 Q -- with regard to the subject property?

8 A Yes.

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

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

25 Q Well, had the suite numbers been

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1 HASelden - FRASER (DIRECT EXAMINATION)

2 established at that point?

3 A No.

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

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

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

18 A Yes, sir.

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

21 A Yes, sir.

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

24 A Yes.

25 Q And the section below that,

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

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

6 A That's correct.

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

13 A Yes.

14 Q Who relayed that to you?

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

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

19 A No.

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

22 A No.

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

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

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

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

11 A Yes.

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

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

24 A Yes.

25 Q Who had you spoken with?

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

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

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

8 A Well, Ceagull Investments, not --

9 Q Excuse me.

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

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

16 A That.

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

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

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

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

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1 HASelden - FRASER (DIRECT EXAMINATION)

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

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

6 A Probably Baker.

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

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

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

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

25 Q Did Baker relay anything else to you

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1 HASELDEN - FRASER (DIRECT EXAMINATION)

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

4 A Not that I recollect.

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

7 A No.

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

11 A Correct.

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

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

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

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 CHARTER I
COMMERCIAL, INC.

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

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

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

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

Condition of the Building: "As Is"

Purchase Price: \$1,200,000 ~~1,450,000~~ SEC 9/10/10 # 1,325,000

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

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

1541 Fording Island Road • Hilton Head Island, SC 29926
Work (843) 837-4460 • Mobile (843) 247-2470 • Fax (843) 837-4461 • Toll Free (888) 837-4460
baker@charter1commercial.com • www.charter1commercial.com



BW 000024

Seller's Documents:

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

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

Financing Contingency:

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

Due Diligence:

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

Signage:

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

Site Work/Parking:

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

Closing:

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

Broker:

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

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

Seagull Investments, LLC

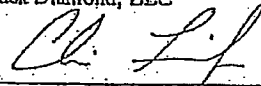


By: Joseph B. Fraser, III, Manager

Date:

9/2/10

Black Diamond, LLC



By: Chris Lindgren, Manager

Date:

9/9/10

Highlighted Parking Area to be completed by Purchaser

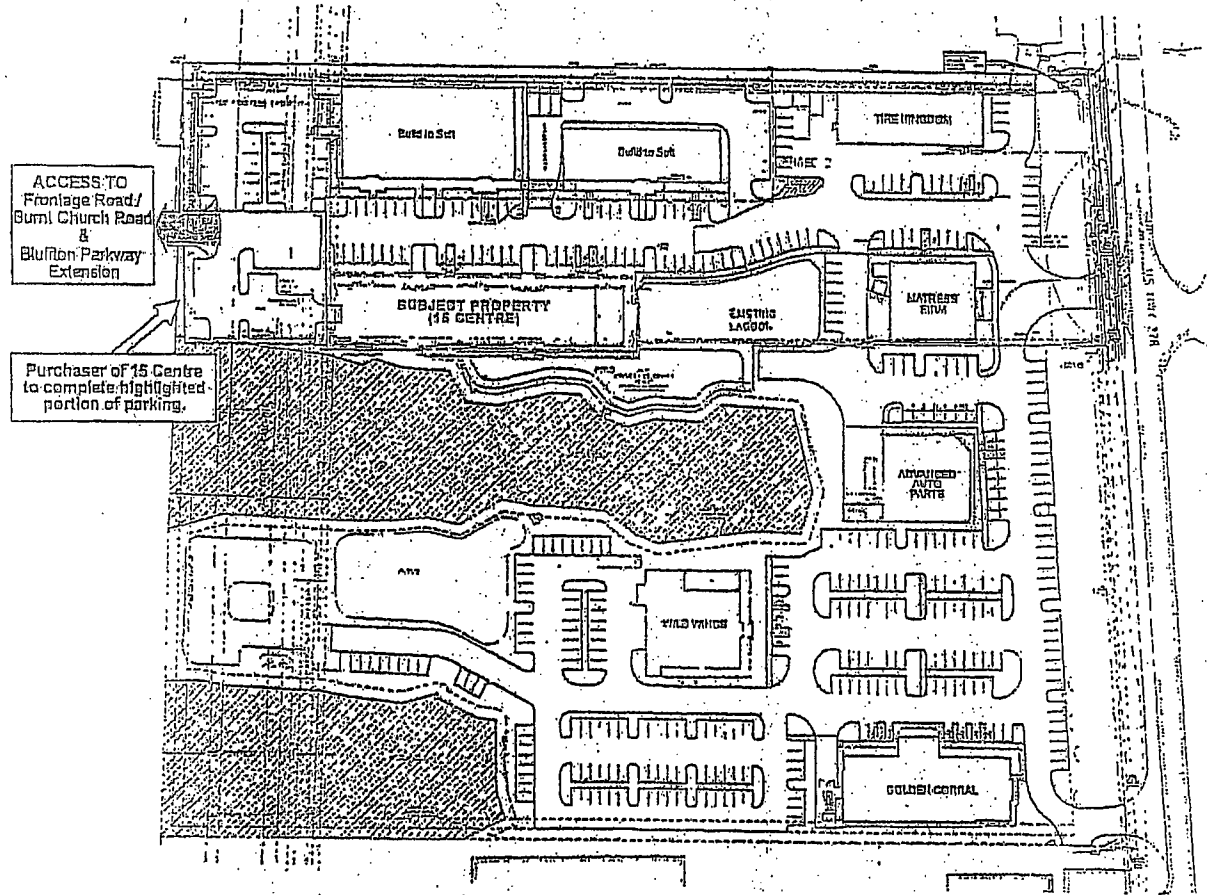


EXHIBIT "C"

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

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

8 Plaintiff;

9 vs.

CIVIL ACTION NUMBER
2012-CP-07-0944

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

16 Defendants.

COPY

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

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1
2 APPEARANCES OF COUNSEL:

3
4 FOR THE PLAINTIFF:

5 BROOKS A. HASELDEN, ESQUIRE
6 Womble Carlyle Sandridge & Rice, L.L.P.
7 550 South Main Street, Suite 400
8 Post Office Box 10208
9 Greenville, South Carolina 29601
10 864.239.5950
11 bhaselden@wcsr.com
12 mbogle@wcsr.com
13 yfortner@wcsr.com

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

16 KEATING K. SIMONS, III, ESQUIRE
17 Simons & Dean
18 147 Wappoo Creek Drive
19 Suite 604
20 Charleston, South Carolina 29412
21 843.762.9132
22 klsimons@simonsanddean.com
23 debbie@simonsanddean.com

24 FOR THE DEFENDANT DAVID A. BROSMAN:

25 EHRICK K. HAIGHT, JR., ESQUIRE
Minor, Haight & Arundell, P.C.
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Suite 203, Village At Wexford
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rick@mhalawfirm.com
elaine@mhalawfirm.com

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1 HASELDEN - WILKINS (DIRECT EXAMINATION)

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

8 MR. SIMONS: Objection.

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

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1 HASELDEN - WILKINS (DIRECT EXAMINATION)

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

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

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1 HASELDEN - WILKINS (DIRECT EXAMINATION)

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

18 BY MR. HASELDEN:

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

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

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EXHIBIT "D"

Message

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

Tom:

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

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

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

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

Thanks in advance for assistance with this matter.

Call me if you have any questions or comments.

Mike

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

mike.rose@carolinafirst.com

864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax

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BLACK DIAMOND003351

**Bank****ENVIRONMENTAL REVIEW MEMORANDUM****Introduction**

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

Documents Reviewed

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

Property Description

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

Transaction Information

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

STATUS AND RECOMMENDATIONS:**Prior to Closing:**

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

Comments:**Post Closing:**

- ☒ Further Actions Recommended
 ☐ Other—see comments below

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

BLACK DIAMOND007641

☐ Further Investigations Recommended

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

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

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

Estimated Costs for Recommended Actions: \$

Recommended Escrow Amount: \$

Stipulations for Escrow Release:

Message

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

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

Thanks.
Michael

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

Message

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

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

Request Id: 457936

Request Date: 8/24/2010 10:50:13 AM

Customer Name: BLACK DIAMOND LLC

Account Number: 5120783655

Late/Prepayment Fees Due: 9277.54

Late/Prepayment Fees Waived: 9277.54

Requestor Name: Louise Zimmerman

Requestor EMail: Louise.Zimmerman@carolinafirst.com

Request Type: Late Fee Waiver Request

Request Desc.: Please remove late fee of \$9277.54 from loan 5120783655. Thanks!

Assigned To: N/A

Status: Pending Approval

Status Details:

Date Completed: N/A

Thanks,

Maintenance Log

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BLACK DIAMOND003589

Problem Loan - Approval Form

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

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

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

Loan & Collateral Details:

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

LOANS	Loan	Loan Number	Commitmt. Amount	Loan Type	Days Past Due	Current Balance		Current Balance		Current Balance
	1	5120783655	\$1,827,049	440	42	\$ 1,827,049		\$ 1,827,049		\$ 1,827,049
2							\$ -		\$ -	
3	5121066531	\$3,076,400	460	32	\$ 3,076,400		\$ 3,076,400		\$ 3,076,400	
4							\$ -		\$ -	
TOTAL						\$ 4,903,449		\$ 4,903,449		\$ 4,903,449

ASSETS	Loan	Collateral Description	Source of Value	Gross Value	Less: Ineligibles	Net Value	Adv. Rate	Collateral Value	Liquid. Rate	Liquidation Value
			Retail Building	5/19/2010	\$ 2,475,000		\$ 2,475,000	80%	\$ 1,980,000	
						\$ -		\$ -		\$ -
		Retail	5/19/2010	\$ 4,840,000		\$ 4,840,000	80%	\$ 3,872,000		\$ -
						\$ -		\$ -		\$ -
TOTAL						\$ 7,315,000		\$ 5,852,000		\$ -
PRIORITY LIENS (include details in Background & Rationale below)						\$ -		\$ -		\$ -
EXCESS/(SHORTFALL)						\$ 2,411,551		\$ 948,551		\$ (4,903,449)

Request:

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

Background & Rationale:

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

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

Alternatives:

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

Approved by:

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

Loan Operations Use Only:

Name:	Action:	Date:

Message

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

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

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

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

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

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

MICHAEL REPP

Executive Vice President
Executive Credit Officer

CAROLINA FIRST BANK

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

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

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

W. Dixon Woodward
South Coast President
Carolina First Bank

BLACK DIAMOND006699

Message

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

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

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

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or a free copy of the Acrobat reader please visit:

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

October 14, 2010

To: Mike Rose

From: Chris Lindgren

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

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

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

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

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

BLACK DIAMOND006712



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

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

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

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

Condition of the Building: "As Is"

Purchase Price: ~~\$1,280,000~~ 1,450,000 ~~1,325,000~~ *SEL 9/10/10* *9/21/10*

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

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

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

BLACK DIAMOND006713

Seller's Documents:

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

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

Financing Contingency:

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

Due Diligence:

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

Signage:

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

Site Work/Parking:

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

Closing:

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

Broker:

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

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

Geagull Investments, LLC

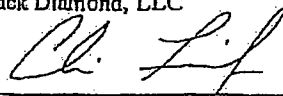


By: Joseph B. Fraser, III, Manager

Date:

9/2/10

Black Diamond, LLC

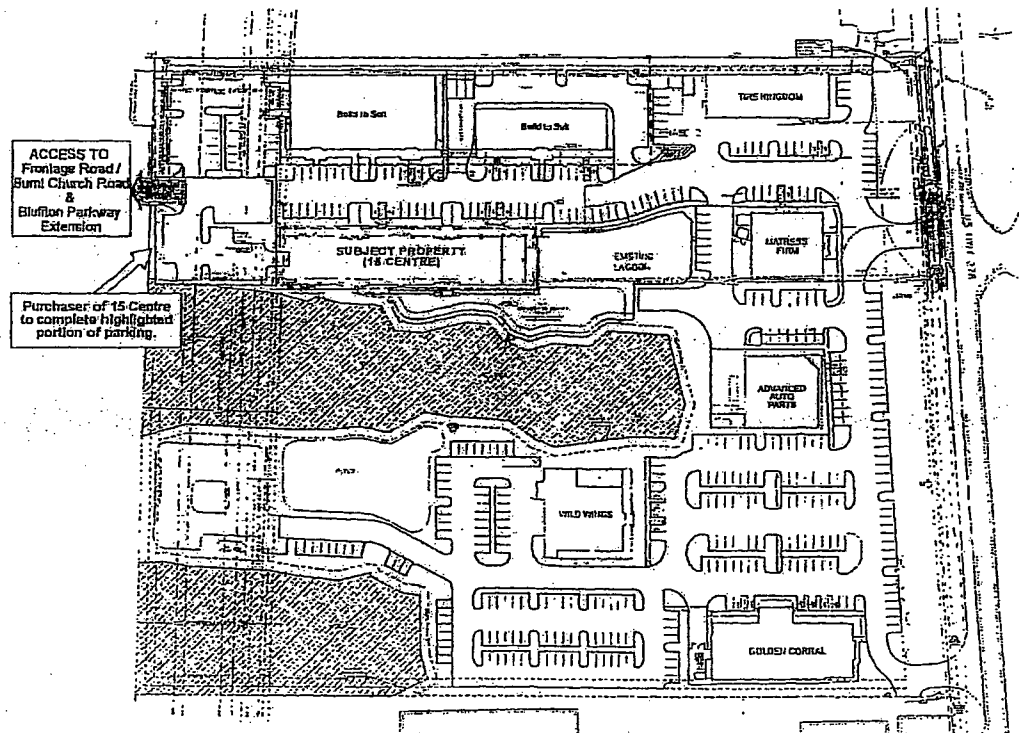


By: Chris Lindgren, Manager

Date:

9/9/10

Highlighted Parking Area to be completed by Purchaser



BLACK DIAMOND006716

Message

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

Chris:

When do you have time to discuss?

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
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-----Original Message-----

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

Please open the attached document.

This document was sent to you using an HP Digital Sender.

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

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BLACK DIAMOND006645

Message

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

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

WILLIAM M. SMOOT, JR.

Vice President

CAROLINA FIRST BANK

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

p. 843.341.4526

f. 843.341.4535

William.Smoot@carolinafirst.com

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

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

Will:

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

Thanks.

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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Message

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

Bill:

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

Thanks.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank

40 Calhoun Street
Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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BLACK DIAMOND006392

Message

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

Mike:

Confidential

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

Call me if you have any questions.

Bill

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

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

Bill,

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

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

BLACK DIAMOND006397

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

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

Thanks,

Rob

Message

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

Mike:

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

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

I look forward to hearing from you.

Chris

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

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

I trust this email finds you well.

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

Black Diamond

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

Riva Ridge

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

Guarantors

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

BLACK DIAMOND006597

- Personal Global Cash Flow statement.

Also please confirm Mr. Brosman's contact information.

Thanks in advance for your assistance with this request.

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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Message

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

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

Thanks.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank
40 Calhoun Street
Charleston, South Carolina 29401
864.351.8673 Mobile
843.727.8428 Direct
843.723.7296 Fax
mike.rose@carolinafirst.com
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-----Original Message-----

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

Mike:

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

Thanks,

Chris

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BLACK DIAMOND005846

Message

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

Mike:

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

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

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

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

Baker Wilkins

843.247.2470

baker@charter1commercial.com

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



Baker,

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

Joe

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

BLACK DIAMOND005877

Fax (843) 815-4748

BLACK DIAMOND005878



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

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

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

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

Condition of the Building: "As Is"

Purchase Price: ~~\$1,200,000~~ 1,450,000 ~~SEC 9/9/10~~ \$1,325,000

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

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

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

BLACK DIAMOND005879

Seller's Documents:

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

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

Financing Contingency:

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

Due Diligence:

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

Signage:

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

Site Work/Parking:

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

Closing:

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

Broker:

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

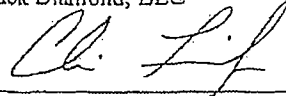
This is a non-binding term sheet which provides the business terms for Purchaser's attorney, Simon Fraser with Fraser and Allen, P.A., to complete the Purchaser Agreement. By both parties agreeing to these terms with signatures below, it confirms that the referenced building will not be sold or leased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

Ceagull Investments, LLC


By: Joseph B. Fraser, III, Manager

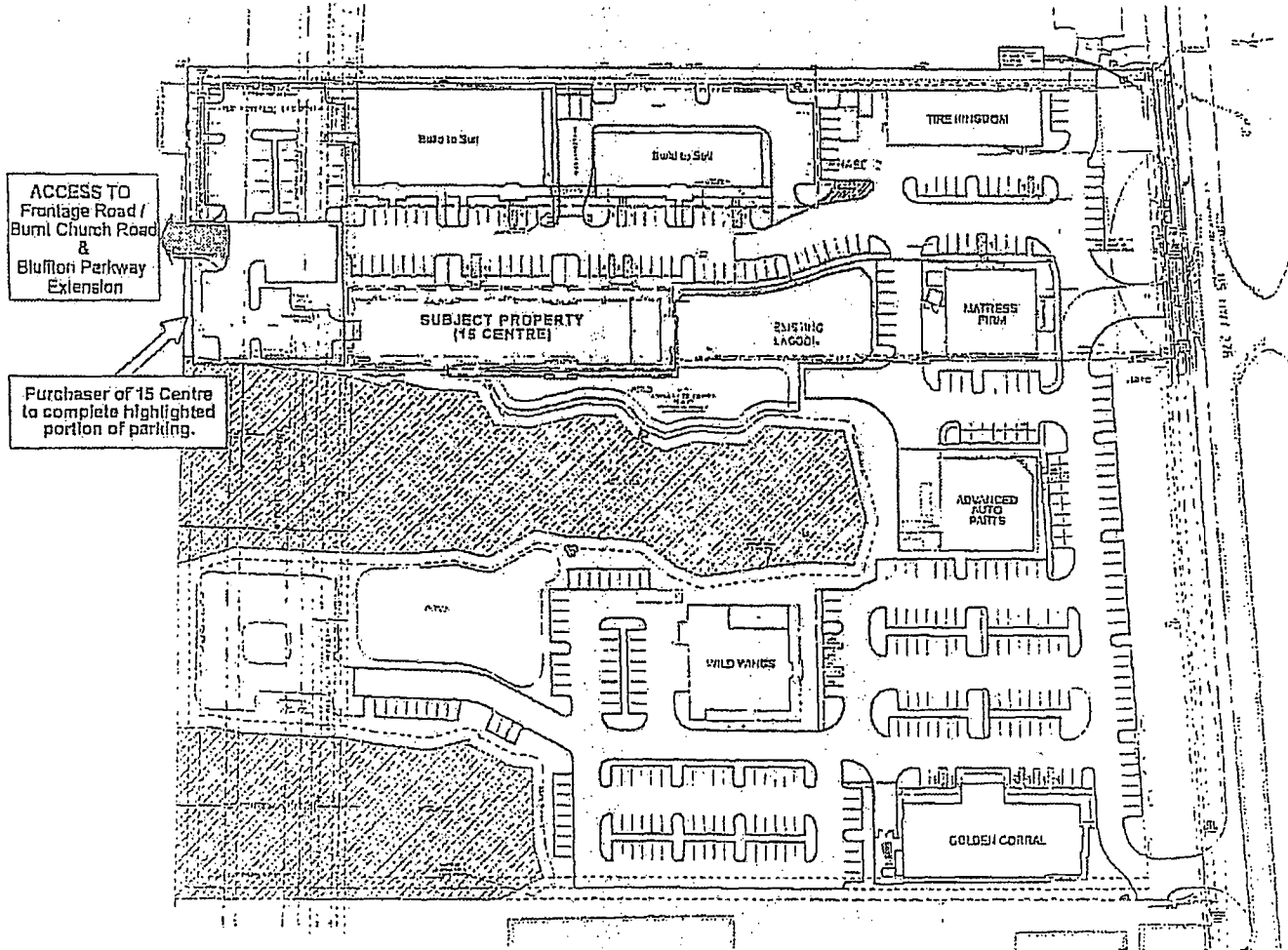
Date: 9/2/10

Black Diamond, LLC


By: Chris Lindgren, Manager

Date: 9/9/10

Highlighted Parking Area to be completed by Purchaser



Message

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

Chris:

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

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

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

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

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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BLACK DIAMOND005893

Message

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

Attached please find the following:

- Black Diamond – Appraisals

Redacted - Non-Responsive

The others will be sent in a separate email.

Thanks.

Mike

MICHAEL C. ROSE
Senior Vice President
Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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

BLACK DIAMOND005899

Mike,

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

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

Redacted - Non-Responsive

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

Thank you,
Jason

Jason Long

Blanchard & Calhoun Commercial

2743 Perimeter Parkway

Building 100, Suite 370

Augusta, GA 30909

(706) 854-6708 Direct Line

(706) 722-5565 Office

(706) 722-6960 Fax

(706) 513-5355 Mobile

jlong@bcccommercial.com



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BLACK DIAMOND005900

Message

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

Mike,

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

Redacted - Non-Responsive

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

Thanks,

Jason

Jason Long

Blanchard & Calhoun Commercial

2743 Perimeter Parkway

Building 100, Suite 370

Augusta, GA 30909

(706) 854-6708 Direct Line

(706) 722-5565 Office

(706) 722-6960 Fax

(706) 513-5355 Mobile

jlong@bccommercial.com



BLACK DIAMOND005761

Message

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

Mike,

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

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

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

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

Let's discuss at your convenience.

Tom

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

Message

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

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

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

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

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

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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BLACK DIAMOND005762

March 28, 2011

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

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

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

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

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

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

- Office/Showroom/Warehouse - Hagemeyer

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

Sperry Van Ness is a registered broker of Sperry Van Ness International Corporation.
Our agents are independently owned and operated.

Location: Bluffton/Hwy 278

Building Condition: Excellent – Built in 2000

Size: 20,000 sq. ft.

Rent: \$10 per sq. ft. NNN

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

Rent Reduction: 35%

- Retail: Edwin Watts Golf

Location: Bluffton/Hwy 278 & Buckingham Plantation Drive

Building Condition: Excellent – Built in 2000

Size: 7,000 sq. ft.

Rent: \$15 per sq. ft. NNN

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

Rent Reduction: 25%

- Office/Warehouse: Unit 501 Bluffton Park Industry Suites

Location: Red Cedar St/Bluffton

Building Condition: Excellent - Built in 2005

Size: 3,300 sq. ft.

Rent: \$10.00 per sq. ft. NNN

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

Rent Reduction: 33%

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

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

Market Valuation:

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

Recent comparable property sales in the Bluffton Market include the following:

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

- Use: Enmark
- 1.8 Acres: Buckwalter Pkwy
Price: \$850,000 (\$472.22 per acre)
Date of Sale: 4/22/10
Use: Parker's Convenience Store
- 1.18 Acres: Bluffton Pkwy
Price: \$375,000 (\$317,796 per acre)
Date of Sale: 8/18/09
Use: Car Wash

With the exception of the 23.39 acre site on Hwy 278 and the 1.8 acre Buckwalter Pkwy property, all other properties were developed sites with curb cuts, deceleration lanes, and water/ sewer. Appropriate site development costs need to be applied to undeveloped property. Given current comparable sales, a developer might project the following revenues from the sale of this asset:

Sales Revenue:

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

Expenses:

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

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

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

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

*Parcel purchasers will assume the cost of site work.

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

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

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

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

Market Valuation:

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

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

Development Costs:

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

Sale Calculation:

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

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

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

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

Development Costs:

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

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

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

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

Best regards,

Tom DeMint CCIM

REQUEST FOR CHANGE OF STATUS FORM

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

State/Region: South Carolina / South Coast Date: 8.9.11
 Officer #: 9233 Officer Name: Mike Rose Officer Mailstop: 563-022-000
 Officer Phone #: 843-769-2494 Relationship Name: Relationship #: 2827475
 (full # w/area code)
 Borrower Name: (one borrower per form) Black Diamond Customer Number: (one number per form) 2827475
 Note Balance(s): (use '\$' between multiple amounts) \$4,746,073 Note Number(s): (use commas between multiple note numbers) 9001; 9002
 (Enter Shadow Balance. If note does not have a shadow side, enter Bank Balance.)
 Aggregate Exposure: \$4,858,493

Category	Current	Change To
Borrower Risk Rating - Small Business	()	()
Facility Risk Rating - Small Business	()	()
Borrower Risk Rating - Commercial (for changes to/from 9A or 9B) This is for approval signature purposes ONLY. Upon approval, requesting officer MUST make BRR downgrade/upgrade change in Maestro.	()	()
Accrual Status (Note: If loan is being placed on Non-Accrual, it will be downgraded per policy to Small Business 08 or Commercial 9A or Commercial Charge-off 9B.)	()	()
Impaired Status (User Reg 5-1) Note: If loan is being placed on Non-Accrual, it will be classified as an Impaired loan per policy. E = Bankruptcy, F = Delinquency Note, G = Forbearance Agreement, H = Non-Accrual, I = Default, unlikely to pay, J = Repossession, K = Troubled Debt Restructure (TDR), L = Return to Performing, M = Restructured, P = Foreclosure	()	()
If you are placing the loan/lease on non-performing, do you want to remove the automatic debit for the monthly payments? If yes, ACH will be cancelled and this will eliminate payments from being erroneously posted to the system.	()	()
CHOOSE ONE (Required for Risk Rating Substandard or Worse): ☐ Prevent all funds advances. ☐ Do not accept any payments. ☐ Prevent all funds advances and do not accept any payments. ☐ Require an approval before funds can be disbursed. ☐ Not applicable		
Primary Officer Number (Small Business: 5 digits, All other: 4 digits)	()	()
Secondary Officer Number (Workout)	()	9233
Class Code - Commercial 77 = Commercial	()	()
Class Code - Small Business 10 = Legacy TD Banknorth (everything booked prior to June 27, 2009), 20 = TD Bank - North Center (anything booked after June 27, 2009), 30 = TD Bank - Legacy Commerce (everything booked prior to September 26, 2009) and 40 = TD Bank - South Center (everything booked after September 26, 2009)	()	()
Class Code - Workout 80 = SBA Workout - Commercial, 81 = SBA Workout - Small Business, 84 = Workout - Commercial, 85 = Workout - Small Business	()	()
Small Business Transfer ONLY (User Reg 2-7) (Format: 8, followed by 3 numerals, a dash, and 3 letters; for example, 8999-SNP)	()	()
Tied to SWAP? (If Yes, email Derivatives Operations at DerivativesOperations@tdbanknorth.com.)	()	()

Message

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

FYI - See below.

Thanks,

Mike

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

Michael.Rose@td.com

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

Matt,

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

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

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

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

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

BLACK DIAMOND008156

Looking forward to catching up with Mike tomorrow some time.

Thanks.

Rob

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

Rob,

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

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

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

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

Dear Mr. Trent,

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

Thank You,

BLACK DIAMOND008157

Holly Dixon

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

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Message

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

Rob:

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

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

The total amount is \$2,050.00.

Please call if you have any questions.

Please note new email address and direct dial telephone number.

Thanks.

Mike

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

BLACK DIAMOND007032

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 8/9/2011 4:10:29 PM
To: Rob Pearson [rpearson@bosleygroup.com]
Subject: INVIOCE ATTACHED for PAYMENT: Black Diamond Updated Appraisal
Attachments: Inv_44149_from_ATLANTIC_APPRAISALS_LLC_B11-070C_080411052412.pdf

Rob:

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

Please note new email address and direct dial telephone number.

Thanks.

Mike

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

BLACK DIAMOND008504

Message

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

Gentlemen,

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

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

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

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

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

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

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

BLACK DIAMOND008515

Thank you.

Rob

Message

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

Mike,

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

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

Thanks and have a nice weekend.

Rob

BLACK DIAMOND008558

Message

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

Quinn:

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

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

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

Here are a few more facts regarding this matter:

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

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

BLACK DIAMOND007000

Please note new email address and direct dial telephone number.

Thanks.

Mike

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

REQUEST FOR CHANGE OF STATUS FORM

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

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

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

Michael.Rose@td.com

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

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

To: Rose, Michael

Subject: Black Diamond

Mike,

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

Your thoughts?

Thanks.

Rob

BLACK DIAMOND007031

Message

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

Mike,

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

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

Redacted - Non-Responsive

Anything you can share with us would be helpful.

Thanks.

Rob

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

Rob:

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

Mike

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

Michael.Rose@td.com

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

BLACK DIAMOND009446

Message

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

Please proceed with legal action to evict.

I will check on the status of the other matter.

Thanks,

Mike

Michael Rose

TD Bank, N.A.

SC3-022-000

Direct - 843-769-2494

Mobile - 864-351-8673

Michael.Rose@td.com

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

Sent: Wednesday, January 18, 2012 11:45 AM

To: Rose, Michael

Subject: RE: Black Diamond

Mike,

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

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

Redacted - Non-Responsive

Anything you can share with us would be helpful.

Thanks.

Rob

BLACK DIAMOND009448

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

Rob:

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

Mike

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

Michael.Rose@td.com

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

Mike,

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

Your thoughts?

Thanks.

Rob

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

BLACK DIAMOND009449

Message

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

Mike:

The attached letter was delivered to Holly Dixon yesterday.

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

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

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

Is TD planning on taking any further action on this?

Bill

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

All Sperry Van Ness Offices Independently Owned and Operated

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

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

BLACK DIAMOND009481

Message

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

Rob:

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

Mike

Michael Rose

TD Bank, N.A.

SC3-022-000

Direct - 843-769-2494

Mobile - 864-351-8673

Michael.Rose@td.com

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

Mike,

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

Your thoughts?

Thanks.

Rob

Message

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

Mike,

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

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

Thanks.

Rob

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

Hi Rob:

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

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

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

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

Please give me a call to discuss.

Thanks,

Chris

BLACK DIAMOND009531

Message

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

Mike,

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

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

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

Thanks for your guidance.

Rob

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

CAROLINA FIRST
HILTON HEAD ISLAND, SC 29926

2527

VOID

67-219/539 01389

2/23/12

PAY TO THE
ORDER OF

BLACK DIAMOND, LLC

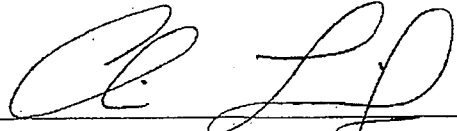
\$49,000-

FORTY NINE THOUSAND

DOLLARS

ED. BEAUFORT COUNTY PROP. TAXES
2011 - PARK

MEMO


SIGNATURE AREA CONTAINS A KNIGHT & FINGERPRINT CHECK WORDING

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

BLACK DIAMOND LLC

2527

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

BLACK DIAMOND LLC

2527

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

REORDER 015 • U.S. PATENT NO. 5538290, 5675505, 5841189, 5705253, 5934264, 6036000

BLACK DIAMOND009533

Message

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

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

Mike

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

Michael.Rose@td.com

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

Mike,

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

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

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

Thanks for your guidance.

Rob

BLACK DIAMOND009534

Delivery Report

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

Your message

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

This is an automatically generated Delivery Status Notification.

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

rpearson@bosleygroup.com

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BLACK DIAMOND009535

Message

From: Rose, Michael [/O=TDSECURITIES/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=US-MROSE]
Sent: 2/23/2012 4:48:52 PM
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Direct - 843-769-2494
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Michael.Rose@td.com

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Sent: Thursday, February 23, 2012 4:25 PM
To: Rose, Michael
Subject: Black Diamond Payment

Mike,

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

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

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

Thanks for your guidance.

Rob

BLACK DIAMOND009536

Message

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

Good question.

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

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

Rob

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

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

Mike

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

Michael.Rose@td.com

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

Mike,

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

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

BLACK DIAMOND009537

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

Thanks for your guidance.

Rob

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

Message

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

Mike,

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

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

Does this plan work for you?

Thanks.

Rob

BLACK DIAMOND009539

Message

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

Rob:

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

Mike

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

Michael.Rose@td.com

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

Mike,

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

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

Does this plan work for you?

Thanks.

Rob

BLACK DIAMOND009540

Message

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

Mike,

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

Thanks.

Rob

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

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

Mike

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

Michael.Rose@td.com

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

Mike,

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

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

Thanks for you assistance.

BLACK DIAMOND009600

Message

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

Mike,

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

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

Thanks for you assistance.

Rob

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

Rob:

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

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

Dee

Message

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

Mike,

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

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

Rob:

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

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

Let me know.

Thanks,

Chris

BLACK DIAMOND009614

Message

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

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

Mike

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

Michael.Rose@td.com

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

Mike,

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

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

Thanks for you assistance.

Rob

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

Rob:

BLACK DIAMOND009612

Message

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

Mike:

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

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

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

Bill

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

All Sperry Van Ness Offices Independently Owned and Operated

BLACK DIAMOND009618

Message

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

Gentlemen,

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

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

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

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

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

Thanks for listening.

Rob

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

Hi Rob:

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

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

Thanks again for your help,

Chris

Message

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

Thank you for the update.

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

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

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

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

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

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

Redacted - Non-Responsive

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

Gentlemen,

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

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

BLACK DIAMOND009641

Message

From: chrislindgren@cs.com [chrislindgren@cs.com]
Sent: 4/10/2012 10:42:39 AM
To: Rose, Michael [Michael.Rose@td.com]
Subject: Black Diamond

Mike:

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

Please advise.

Thanks,

Chris

Message

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

Mike,

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

Redacted - Non-Responsive

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

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

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

Thanks for listening...

Rob

BLACK DIAMOND009668

Message

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

Mike,

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

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

Thanks.

Rob

Message

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

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

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

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

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

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

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

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

In summary:

When can she receive a lease to consider?

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

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

When will she get any answers to her questions?

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

Thank you.

Rob Pearson

Chief Financial Officer

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

BLACK DIAMOND009716

EXHIBIT "E"

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

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

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

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2011-CP-23-8578

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 NOV 19 AM 9 49

ORDER AND FINAL JUDGMENT

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

Background and Summary

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

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

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

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

Analysis

Motion for Judgment Notwithstanding the Verdict

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

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

I. South Carolina Unfair Trade Practices Act.

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

A. Legal background.

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

B. Discussion.

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

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

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

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

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

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

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

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

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

directed verdict on this ground. *See In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001). I further find that Defendants' argument is based upon an erroneous interpretation of the record and the stipulated fact that these Defendants were not registered as broker-dealers with the SEC or the State of South Carolina. I also find that, even under Defendants' general regulation theory, their unfair and deceptive business practices as exposed in this case were not authorized or required by banking regulations. I find Defendants failed to meet their burden to present evidence proving an exemption from the UTPA and that Defendants presented no evidence that the two VPFCs sold to Mr. Maybank were initial public offerings of securities or were even securities as contemplated by the exemption recognized in *Rhoades* and *Ward*. Finally, the jury rejected any argument that Defendants were entitled to an exemption, and I concur with that finding.

II. Punitive Damages.

Prior to addressing Defendants' argument that a so-called exculpatory clause insulates them from punitive damages, I will first evaluate Defendants' arguments for JNOV on the common law causes of action and the propriety of the jury's award of punitive damages.

A. Common Law Causes of Action.

Defendants contend that judgment should be entered in their favor on the common law claims of breach of contract, breach of fiduciary duty, constructive fraud, and negligent misrepresentation. I find that there is ample evidence from which this very reasonable and thoughtful jury could have rendered its verdict. I further find that, for each element on the causes of action submitted to the jury, there was sufficient evidence upon which a reasonable jury could return a verdict for Mr. Maybank on these causes of action. I therefore deny Defendants' motion.

B. *Review of the Jury's punitive damages award.*

I must consider whether punitive damages are warranted and, if so, whether the amount is appropriate based on (1) the degree of reprehensibility of Defendants' conduct; (2) the disparity between actual or potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009). I find the punitive damages award is constitutional and proper.

1. Reprehensibility.

In evaluating reprehensibility, "perhaps the most important indicium of the reasonableness," I must consider whether (1) the harm was physical or economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Id.* at 587, 686 S.E.2d at 185. I find ample, clear and convincing evidence supporting the jury's finding of reprehensibility. The harm was economic, and Defendants demonstrated indifference to and/or reckless disregard for Mr. Maybank's financial health and well-being, as well as the safety of his irreplaceable retirement assets.

I find clear and convincing evidence of Mr. Maybank's financial vulnerability as a 74-year old, soon-to-be retiree, which was known to Defendants who were acting as his advisor and fiduciary. Defendants' conduct was not an isolated incident but instead involved repeated acts of indifference to Mr. Maybank and others. Defendants' representatives were financially incentivized to sell alternative investment strategies, which they viewed as a fee-generating

"revenue opportunity" for BB&T.² BB&T sold Mr. Maybank a strategy based upon a VPFC which was speculative, costly, and unsuitable, and anchored by a complex derivative product that actually increased risk, rather than minimizing it. BB&T further increased the risk by using the cash generated to fund a 100% equity "Aggressive Growth" portfolio. Defendants' self-serving strategy moved Mr. Maybank's assets from a non-fee generating account to accounts that provided Defendants and their incentivized employees with an up-front fee of \$32,614 as well as a stream of annual management fees.

The evidence showed that, in 2009, Defendants compounded their initial flawed and self-serving advice by recommending the roll-over of the first VPFC into a second VPFC, which they presented to clients as the "ideal choice." Instead, the roll-over was "ideal" only for Defendants, as it generated additional up-front transaction and annual management fees. For their faithless and self-serving advice, Defendants charged Mr. Maybank a fee of \$43,655. Mr. Maybank was locked into Defendants' self-serving scheme of fee-producing, costly roll-overs that over time would deplete a client's assets. I find that Defendants' conduct was not isolated, but part of a scheme to generate fees and bonuses for Defendants and its representatives without regard to the best interests of Mr. Maybank, their principal to whom they owed fiduciary duties.

² Defendants' internal sales practices were demonstrated at trial. For example, Exhibits 55, 89, 92, 100, 103, 104, and 106, taken together, show that Defendants initiated a sales program to generate revenue through the sale of alternative (derivative) products and associated strategies, while the needs and best interests of Mr. Maybank were sacrificed by untrained, bonus-driven representatives incentivized to sell products. Exhibit 92 in fact calls it a "revenue opportunity":

Pre-Paid Variable Forwards

- Revenue Opportunity
 - Up-front fee of 50-100 basis points
 - Annual management fees up 1% or more
 - This could generate well over \$100K over 3 years

See also Ex. 100 (same). These exhibits, along with other exhibits and testimony in the record, support the reasonable conclusion that the motivation to sell the VPFC strategy was for the substantial revenues that it generated, not because it was in Mr. Maybank's best interest.

Based on these examples and the record as a whole, I find that the evidence shows that Defendants acted with malice, trickery, or deceit rather than mere accident. I find that the jury could have reasonably found that Defendants, notwithstanding their position as Mr. Maybank's fiduciary, breached their duties in at least one or more of the following ways:

- i. By failing to perform an individualized analysis of the suitability of the investment strategy for Mr. Maybank;
- ii. By failing to perform a thorough financial analysis or to develop a comprehensive financial plan;
- iii. By failing to advise Mr. Maybank about the significant conflict of interest against providing advice about BB&T Corporation stock;
- iv. By failing to advise Mr. Maybank about the reasonable amount of annual revenue to be generated by BB&T's investment strategy and to counsel him about restricting his spending to the assured income level;
- v. By misrepresenting that BB&T had expertise in VPFCs and the associated strategy;
- vi. By permitting untrained and misinformed representatives to sell a product and strategy which they were unqualified to sell;
- vii. By failing to explain that the strategy substantially increased Mr. Maybank's investment risk;
- viii. By failing to explain that the strategy placed the client into a never-ending cycle of periodic and costly roll-overs;
- ix. By failing to fully explain the true costs of this complex strategy and the derivative contract upon which it was based;
- x. By misrepresenting to Mr. Maybank that his best interests were being served when, in actuality, the strategy was nothing more than a fee-driven sales program for Defendants and their representatives;
- xi. By failing to place Mr. Maybank's best interest ahead of the interest of BB&T; and
- xii. By representing that the VPFC and associated strategy would protect Mr. Maybank's retirement savings, when in actuality it substantially increased the risk of loss.

I concur and find that Defendants' conduct was reprehensible and warrants the imposition of punitive damages as awarded by the jury.

2. *Ratio between actual and punitive damages.*

The ratio between the award of \$5 million in punitive damages and the award of \$3.1 million in actual damages is 1.61 to 1. This ratio is at the low, or readily sustainable, end of the reasonableness spectrum. See, e.g., *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (upholding a 7.69 to 1 ratio where improper safeguards by bank permitted co-

conservator to steal a child's funds); *Mitchell*, 385 S.C. at 593-94, 686 S.E.2d at 188 (ratio of 9.2 to 1 in insurance bad faith case).³ Based on the Defendants' conduct, I find the ratio of punitive to actual damages to be both reasonable and proportionate to the harm suffered by Mr. Maybank.

I further consider "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.* at 588, 686 S.E.2d at 185. I find that a \$5,000,000 punitive damages award is likely to deter Defendants from similar conduct in the future and will likely encourage better training of employees, result in improved suitability analysis and increased competence of investment advice, and lead to true protection of a client's irreplaceable retirement assets. Further, I find that the award is reasonably related to the financial harm likely to result from such conduct, which can be significant and large as seen in Mr. Maybank's case. The potential harm to a senior citizen of self-serving and deceitful investment advice can be catastrophic, leading to financial ruin and a life of dependency in a person's twilight years. Corporations managing money for South Carolina's elderly citizens must know that their conduct and advice must be faithful, prudent, trustworthy, non-conflicted, and free from deceit, tricks, and misrepresentations. Finally, based on the record, including but not limited to the testimony and evidence of Mr. Maybank's expert witness Dr. Oliver Wood, I find that Defendants have the ability to pay the punitive damages award.

³ South Carolina courts have upheld ratios across the spectrum in cases involving "merely" economic harm. *See, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (3.6 to 1 ratio for conversion, trespass, and civil conspiracy); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) (ratio of 5.087 to 1 upheld against vehicle manufacturer when defective switch destroyed owners' home and personal belongings); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.9 to 1 ratio on an intentional interference with contract claim); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (affirming a 28 to 1 ratio for breach of contract and bad faith insurance claim).

3. *The difference between punitive damages and civil penalties.*

Lastly, I find that there are no comparable civil penalties that are applicable to Defendants' breaches of their fiduciary duties, misrepresentations, and fraudulent actions to Mr. Maybank. See, e.g., *Cody P.*, 395 S.C. at 632, 720 S.E.2d at 484. As discussed above, I find consideration of the punitive awards in comparable cases to be appropriate. Like *Cody P.*, this case involves economic harm caused by a bank's failure to safeguard a client's funds. The reprehensibility is greater here because the bank in *Cody P.* merely failed to prevent misconduct by a third party; the harm in this case was caused by Defendants' own intentional and deliberate misconduct, which was found by the jury to be grossly negligent, reckless, and/or willful and to constitute constructive fraud, breaches of fiduciary duty, and breaches of the contract. The ratio here is lower than in *Cody P.*, which upheld a 7.69 to 1 ratio despite a lack of any findings of intentional wrongdoing by that bank defendant. I therefore find that the award of punitive damages by this jury is reasonable, especially in comparison with comparable cases.

4. *Conclusion.*

I find that the punitive damages award by this jury is supported by clear and convincing evidence; that Defendants' conduct is reprehensible; and that the award is directly proportionate to the harm caused by Defendants. I therefore affirm the award of punitive damages.

C. *The exculpatory clause does not apply.*

I find that the exculpatory clause contained in the WMA does not preclude the award of punitive damages. In pretrial proceedings, Defendants' corporate representative, Mr. Ross Walters, admitted that the WMA had been incorrectly drafted by their lawyers, that it had been tendered to Mr. Maybank despite these errors, and that no one had explained or disclosed the errors to Mr. Maybank, even though Defendants were then his fiduciary. Defendants'

counterclaim for reformation also constituted an admission of the errors in the contract. I denied Plaintiff's motion for partial summary judgment because the real terms of the parties' agreement were in doubt based on Defendants' own admissions and actions. At trial, the question of the real and enforceable terms of the contract remained hotly contested. Consequently, I found that the determination of the terms of the WMA was a question of fact for the jury to decide. The jury considered the contract, the evidence of record, argument of counsel, and the Court's charges and rejected Defendants' version of the events and characterizations of their conduct. The jury also awarded punitive damages and therefore determined that the exculpatory clause did not preclude an award of such damages.

I further find that, as a matter of law, the exculpatory clause is inapplicable to Defendants' misconduct under the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation.⁴ The exculpatory clause applies only "with respect to [Bank and Investment Advisor's] services under this Agreement." I find that the services as described in Sections I, II, and III of the contract do not include making misrepresentations or material omissions of relevant information or failing to disclose or concealing material information. Thus, as a matter of law, I find that the common law causes of

⁴ While Defendants argue that the exculpatory clause is unambiguous and its terms are derived from the clear intent of the parties, I note that the clause is in the very same form agreement that Defendants sought to reform by mutual mistake. When it came to their admitted breach of the WMA, Defendants contended that certain language in the contract should be amended to support their favored construction even though they drafted the erroneous contract. Defendants' counterclaim for reformation is denied because there is no evidence of mutual mistake. Although they had the burden of proving mutual mistake by clear and convincing evidence, Defendants failed to prove that they were entitled to reformation. See *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987). Defendants own actions demonstrate that the contract terms and applications are in doubt, and the rules of contract construction therefore require the exculpatory clause to be narrowly interpreted in favor of the client and against BB&T, which drafted the contract. See *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993).

action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation arise outside of the "services" set forth in the WMA. Defendants provided no authority for the proposition that they may be relieved from intentional, reckless, and fraudulent conduct.

I find that BB&T Corporation and Mr. Maybank are not in equal bargaining positions, particularly where there is a form agreement drafted and presented by a multi-billion dollar fiduciary to an individual client. South Carolina courts have gone to "extremes" to avoid enforcing exculpatory clauses where the parties have substantially different bargaining power. *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990); *see also Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2009). I find that enforcement of the exculpatory clause in the WMA would be against public policy. I therefore deny Defendants' motion to construe the so-called exculpatory clause so as to bar the jury's award of punitive damages.

I further find that the exculpatory clause is unenforceable here because BB&T was Mr. Maybank's fiduciary when the misconduct occurred and the WMA was executed. As his fiduciary, BB&T had an absolute duty of disclosure and the obligation to ensure that Mr. Maybank understood the terms of the entire WMA, including the exculpatory clause. Further, Mr. Maybank had an absolute right to rely upon BB&T's representations and to expect that his fiduciary would fully disclose any terms adverse to his interests, which they admittedly failed to do. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (fiduciaries have absolute obligation of disclosure of material facts and, clients have right to rely upon the representations by their fiduciaries). The evidence demonstrated that Mr. Maybank was not provided a copy of the WMA—and, necessarily, the exculpatory clause—until nearly two weeks after the failed investment strategy was set into motion through the first VPFC,

and even then the adverse terms of the exculpatory clause were not discussed with him. When presented with the full contract, and all of the evidence and circumstances surrounding the execution of the WMA, the jury found that punitive damages were warranted. I find that the exculpatory clause is unenforceable based on the jury's findings and my own weighing of the evidence.

III. BB&T Corporation.

A. *The Court properly exercised jurisdiction over BB&T Corporation.*

This Court properly exercised personal jurisdiction over BB&T Corporation. "A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's ... transacting any business in this State ... [or] entry into a contract to be performed in whole or in part by either party in this State." S.C. Code Ann. § 36-2-803(A)(1), (7). BB&T Corporation's General Counsel expressly authorized the investment strategy recommended to Mr. Maybank in South Carolina, which permitted Mr. Maybank to continue to hold a concentrated position in BB&T stock even though it was a conflict of interest for BB&T Corporation to make representations and give advice regarding its own stock.⁵ Without the approval and validation of the transaction by BB&T Corporation, the strategy would not have been implemented and the fee opportunity would have been lost for Defendants.⁶ I therefore reject Defendants' argument that BB&T Corporation was "a mere

⁵ BB&T Corporation knowingly and willingly authorized, approved, and facilitated an investment relationship with a South Carolina resident involving the ownership of and dividends from BB&T Corporation stock. That alone establishes minimum contacts sufficient to support exercising personal jurisdiction over BB&T Corporation. *Fields v. INA Filtration Corp.*, 292 S.C. 614, 618, 358 S.E.2d 160, 163 (Ct. App. 1987) ("The length and duration of the nonresident's activity in this State need only be minimal when the plaintiff lives in this State and the cause of action arose out of the defendant's activities in this State").

⁶ Defendants ignore the Corporation's critical role in establishing duties to clients and customers of its subsidiaries. BB&T Corporation promulgated a Code of Ethics governing its

holding company for other BB&T entities and that none of its employees had any direct involvement with Mr. Maybank,” and instead find that the character and circumstances of the corporation’s actions and the State’s interest weigh in favor of exercising personal jurisdiction.

B. Defendant waived any objections to the exercise of jurisdiction over BB&T Corporation.

BB&T Corporation waived its right to seek dismissal. The defense of personal jurisdiction “may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.” *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Simply articulating the defense in an answer without promptly advancing it may waive that defense. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990). BB&T Corporation made only a perfunctory defense under Rule 12(h)⁷ by stating in the Answer that it “reserves its objection based on the Court’s lack of *in personam* jurisdiction.” See Ans. 1st Am. Compl. p.1. BB&T Corporation then fully participated in litigating this case without advancing that objection or otherwise moving for dismissal at any time until shortly before trial. See *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (defendant forfeited defense of personal jurisdiction by not moving to assert it until four years after filing answer). I find that BB&T Corporation waived the defense by “provid[ing] no more than a bald assertion in [the] answer that the court lacked personal jurisdiction” and then proceeded to participate in discovery, make court appearances, and file numerous pleadings without ever again presenting the defense. I therefore deny Defendants’ motions for JNOV, new trial, and new trial *nisi remittitur* on this ground.

subsidiaries intended to enhance the operations of the corporation and its subsidiaries by ensuring that these entities “continue to earn our client’s trust and respect by always upholding the highest standards of ethical and professional conduct in all that we do.” See Ex. 6, BB&T Code of Ethics, § I (“The Code applies equally to all employees of BB&T and its subsidiaries.”).

⁷ Rule 12(h), SCRCPP, merely “specifies the minimum steps that a party must take in order to preserve [the] defense, not the outer limits of a possible waiver.” *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998).

IV. Statute of Limitations

The statute of limitations does not bar Mr. Maybank's causes of actions and Defendants' motion on this ground is denied. "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (citation omitted).

V. Insufficient Evidence of Damages

Defendants argue that Mr. Maybank did not present sufficient evidence on damages. However, the jury clearly found damages were warranted based on the testimony of Mr. Maybank as well as his expert witnesses, Dr. Craig McCann and Professor John Freeman. Although Defendants may disagree with the weight given to the evidence, my responsibility is limited to determining if any evidence existed to support the verdict. I deny Defendants' motion on this ground because I find the damages are fully supported by ample evidence.

VI. Grounds for JNOV

Defendants argue over 40 additional grounds⁸ in their motion for JNOV, *see* Mot. pp.18-24, Nos. 12-54, that I find forfeited because they were neither advanced in Defendants' 31 page written directed verdict motion nor argued orally to the Court. "[A] motion for JNOV must be based on the same grounds as those raised in a motion for a directed verdict motion made at the close of all the evidence." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). However, I further have considered each of these issues to the extent the substance can be gleaned from the conclusory arguments and I find that they do not warrant granting JNOV. I therefore deny Defendants' motion on these and all other additional grounds.

⁸ Regardless of the number, I deny each of the additional grounds as meritless.

Motion for New Trial Absolute

Although a new trial absolute may be granted if the verdict is excessive or inadequate, “[t]he jury’s determination of damages ... is entitled to substantial deference.” *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). I have considered the testimony and reasonable inferences therefrom most favorable to Mr. Maybank as the nonmoving party. I deny Defendants’ motion because I find the evidence presented at trial fully supports the jury’s verdict and further find that the verdict is neither grossly excessive nor the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.⁹

I. Challenges to the Court’s evidentiary rulings.

I find that Defendants have not established that any of the challenged evidentiary rulings were erroneous because, in each instance, the evidence was relevant and properly admissible. *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006). I further find that Defendants failed to show the challenged rulings were unfairly prejudicial. *See Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). I therefore deny the motion on these grounds.

II. Challenges to the Court’s Jury Instructions.

Defendants also assign error to the Court’s compilation and delivery of jury charges following the close of evidence. I find that Defendants made no valid contemporaneous objections. *See Murray v. Bank of Am., N.A.*, 354 S.C. 337, 346, 580 S.E.2d 194, 199 (Ct. App. 2003). I further find that, after careful review, the instructions adequately charge the applicable law in this case. I therefore deny Defendants’ motion on this ground.

⁹ Defendants assert, by my count, 54 distinct grounds in support of their motion for new trial absolute. To the extent a ground is not specifically discussed, it is denied. Additionally, to the extent a ground is identical to one raised in the JNOV motion, I expressly incorporate those rulings to the extent applicable in denying the motion for new trial absolute.

III. Challenges to the Jury Verdict Form.

I find that Defendants' challenge to various parts of the jury verdict form is without merit and has been waived. The verdict form I ultimately adopted and submitted to the jury was, with minor exception, the form proposed by Defendants. The return of a general verdict for a total amount of damages on all causes of action means that each cause of action independently supports the entire award of actual damages. I find that Defendants waived any objection related to the verdict form and deny their motion on this ground. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995).

IV. Thirteenth Juror Doctrine.

Defendants also seek to have this Court grant a new trial as the thirteenth juror. I decline to interfere with the jury's verdict because I find that the record fully supports the verdict. I observed the jury to be very diligent, thoughtful and attentive in its work. After two weeks of receiving testimony and documentary evidence, listening attentively to arguments of counsel and jury charges, and deliberating for two days, the jury found Defendants' conduct was in violation of law, reprehensible, and otherwise deserving of punishment. Defendants' motion for a new trial on this ground is denied.¹⁰

New Trial Nisi Remittitur

I deny Defendants' motion for a new trial *nisi remittitur* because I find there is no compelling reason to reduce the jury's verdict. Based on the evidence, applicable law, and the arguments of the parties, I find that the jury's verdict is fully supported by the evidence and is not excessive, arbitrary, or capricious. Having closely observed the evidence and the jury over the course of the two week trial, I find the verdict was based on neither emotion nor improper

¹⁰ Because I find no merit to Defendants' motion for new trial absolute, I deny relief on any and all grounds raised in that motion not specifically discussed in this Order.

sentiment and was supported by the evidence of record. I accept and concur with the jury's finding that Defendants' conduct was reprehensible, which justifies and supports the award of actual and punitive damages. I therefore deny the motion for new trial *nisi remittitur*.

Treble Damages under the Unfair Trade Practices Act

Mr. Maybank moves to treble the jury's award of actual damages on the UTPA verdict because Defendants' conduct was willful or knowing. S.C. Code Ann. § 39-5-140(a). Conduct is willful if a reasonable person could have ascertained that their conduct violated the UTPA. *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986). Relying on and incorporating here the evidence discussed above, which I find supports the jury's verdict under the UTPA, I further find that, having observed the testimony at trial and reviewed the evidence, Defendants' conduct in employing an unfair or deceptive method, act, or practice in commerce was both willful and knowing. I therefore treble the actual damages of \$3,100,000 to \$9,300,000.

Election of Remedies

Defendants moved to require Mr. Maybank to elect between recovery of punitive damages awarded by the jury on the common law causes of action and treble damages under the UTPA. I find no election is required because, as stated, the evidence supported at least three theories for relief under the UTPA that were separate and distinct from the theories supporting the common law claims: 1) BB&T's presentation of a deceptive and misleading form contract that the Bank had no intention of fulfilling as written; 2) use of a form letter purporting to provide Mr. Maybank with personalized research and analysis of the investment strategy but that in fact was a generic, fill-in-the-blank form document in which Defendants pre-cleared the use of these risky investment strategies; and 3) Defendants' deceptive letter to at least 130 clients in

which it misrepresented that a fee refund was made to reflect BB&T's corporate values when in actuality it obscured its legal liability for having charged those fees at all. In contrast, the jury found for Mr. Maybank on the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation and awarded \$5 million in punitive damages on those claims.¹¹ Each of these causes of action was based on a breach of the professional duties, trusted advisor status, and fiduciary duties undertaken by Defendants as Mr. Maybank's fiduciary and was fully supported by evidence admitted at trial. The jury found that Defendants' conduct was reprehensible and warranted punishment based on evidence that Defendants provided imprudent, unsuitable, uninformed, deceitful, and reckless advice and made misrepresentations to Mr. Maybank while acting as his fiduciary.

Taken in the light most favorable to the non-moving party, the record supports a reasonable conclusion that Defendants' liability under the UTPA is separate from that for the common law causes of action. See *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45 ("Election of remedies is not applicable where there are two separate causes of action, each based on different facts.") (citing *Jones v. Winn-Dixie Greenville*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995) (holding that "the principle [of election of remedies] has no application where two separate causes of action, each based on different facts, exists.")). Moreover, the UTPA by its clear and unambiguous language is "cumulative and supplementary to all powers and remedies otherwise provided by law." S.C. Code Ann. § 39-5-160. I find that the common law causes of action for which punitive damages were awarded were based on evidence demonstrating Defendants'

¹¹ The verdict form differentiated the causes of action for which punitive damages could be awarded from those that could not, including the UTPA cause of action, providing in pertinent part as follows: "12. If you answer Yes to Questions 2 [Breach of Fiduciary Duty], 3, 6, 7, 8 [Constructive Fraud], or 9 [Negligent Misrepresentation], do you find by clear and convincing evidence that the acts of the defendant(s) warrant payment of punitive damages" The jury also was instructed as to the standards for imposing punitive damages.

imprudent, unsuitable, and risky investment advice to Mr. Maybank, representations to him that the recommended strategy would protect his assets and was well-researched and tailored to his specific investment needs. In contrast, Defendants' practice of presenting the false and deceptive contracts and letters to Mr. Maybank, while deliberately hiding their falsity, is an independent, separate unfair and deceptive business practice. I therefore deny Defendants' motion to require election because, based on the facts and Defendants' actions in this case, there is no double recovery for a single wrong. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45.¹²

I deny Defendants' motion for election of remedies on all other grounds. Many of these grounds were not raised at trial. For instance, although pled in their Answer, Defendants waived their arguments on the economic loss rule by failing to raise it in any of their eight summary judgment motions, or during trial in their 31-page motion for directed verdict. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (post-trial motion cannot be used to raise an issue that could have been raised at trial). Regardless, I reject their argument on the economic loss rule, which in South Carolina is primarily limited to the products liability arena. See *Kennedy v. Columbia Lumber Mfg. Co.* 299 S.C. 335, 345-46, 384 S.E.2d 730 (1989). Moreover, even Defendants' cited authority expressly rejects the economic loss rule when Defendants owe an independent duty. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995). Defendants acted to become Mr. Maybank's fiduciary and well knew that he would suffer economic losses if they breached their duties to him.

¹² See also, e.g., *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding both punitive and treble damages).

I also reject Defendants' argument that the claims for constructive fraud and negligent misrepresentation are inconsistent. I expressly instructed the jury that Mr. Maybank was not entitled to multiple damages based on the number of causes of action:

The plaintiff has asserted multiple causes of action against the defendant. In other words, the plaintiff believes he is entitled to recover against the defendant under multiple, different legal theories. If you find that the plaintiff has met their burden of proof as to more than one cause of action and you consider awarding damages, you should not increase the amount of actual damages simply based on the number of different causes of action, if any, upon which you find the plaintiff has prevailed.

Following these instructions, the jury in this case returned a verdict against Defendants for \$3.1 million on all causes of action on a verdict form proposed by Defendants. I therefore deny Defendants' motion on this ground.¹³ I also deny Defendant's motion to require Mr. Maybank to elect a single cause of action on which to proceed because I find that there is no possibility of double recovery of actual damages in this case. *See Taylor*, 324 S.C. at 203, 479 S.E.2d at 44-45 (election of remedies is the act of choosing between inconsistent remedies allowed by law on the same set of facts).¹⁴

Motion for Attorneys' Fees and Costs under the Unfair Trade Practices Act

Mr. Maybank has moved for an award of attorneys' fees of \$3,317,868.70 and costs of \$306,264.10. *See* S.C. Code Ann. § 39-5-140(a). In rendering my decision, I have relied upon my own knowledge and observations in the case as well as the affidavits submitted by Mr.

¹³ This conclusion is not changed by the fact that the jury returned a single award of \$3.1 million on five causes of action, including the UTPA violation. The jury's award of a single amount of actual damages is not indicative of a finding that no distinct damages flow from the jury's determination of a violation of the UTPA. To the contrary, a general verdict form is indicative of the fact that any or all of the causes of action returned by the jury sustain the full amount of the actual damages. The question is not whether there is a separate award of damages for that violation, but whether separate facts and actions of the Defendants support each of the treble and punitive damage awards.

¹⁴ To the extent not expressly addressed in this Order, Defendants' arguments nevertheless are denied.

Maybank, including the affidavit of Professor John Freeman.¹⁵ Although Plaintiff's request for attorneys' fees and costs is reasonable, I nevertheless find it appropriate to reduce the total hours and costs by 20% in order to limit the fees to the UTPA claim. I therefore award as reasonable and appropriate attorneys' fees of \$2,654,295 and costs of \$245,011.¹⁶

I. Introduction and background.

The specific award of attorneys' fees and costs is left to the discretion of this Court, and must be determined using a lodestar analysis. *Layman v. State*, 376 S.C. 434, 444, 457-58, 658 S.E.2d 320, 325, 332-33 (2008). This analysis requires determining a reasonable hourly rate and hours worked and then considering any exceptional circumstances justifying an enhancement of the lodestar figure. *Id.* at 458-61, 658 S.E.2d at 33-35. This requires considering the following: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Id.* at 458, 658 S.E.2d at 333 (citing *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760).

I start with my familiarity with this extremely complicated case and the fine, well-prepared, and knowledgeable counsel representing both sides. The parties appeared before me on four separate occasions to resolve pre-trial issues and dispositive motions, with most hearings lasting several hours. These motions involved substantial written submissions, which I observed

¹⁵ I find Professor Freeman's affidavit to be appropriate and consistent with the parameters of expert testimony established by the case law. *See, e.g., Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008). Professor Freeman is qualified to render an opinion assisting the Court in exercising its discretion. *See* Rule 702, SCRE. I therefore deny the motion to strike Professor Freeman's affidavit.

¹⁶ Defendants filed two additional post-trial motions beyond the deadline of July 10, 2014, seeking to compel the submission of additional documentation from Mr. Maybank in support of his request for attorneys' fees and costs under the UTPA, as well as to postpone consideration of the motion for attorneys' fees, costs, and treble damages. I have considered these motions, find them to be without merit, and therefore deny them.

to be of the highest quality. The trial itself lasted two weeks, during which time I closely observed Mr. Maybank's counsel first-hand. Finally, the parties appeared before me on August 19 to argue post-trial motions. I have reviewed the fee affidavit of Plaintiff's counsel detailing the hours worked by each attorney and submitting their current hourly market rates. I also have reviewed the cost affidavit detailing the costs and expenses paid and advanced in the litigation.

II. Reasonableness factors.

A. *The nature, extent, and difficulty of the case.*

I find that the nature, extent, and difficulty of this case weighs heavily in favor of awarding attorneys' fees. Although this case was extremely difficult to litigate, involving complex investment products and strategies, both sides were represented by excellent attorneys who were strong advocates for their clients. Plaintiffs in investment litigation, like here, are often single individuals bringing claims against well financed, multi-billion dollar institutions with the very best defense lawyers available. The difficulty of an individual plaintiff litigating against a multi-billion dollar corporate entity is enormous. Moreover, as true here, the subject matter of investment cases is often quite complicated, providing counsel with the enormous challenge of explaining the issues and investment strategies and products in clear and understandable ways. Due to these factors, litigating this jury trial required substantial experience, knowledge, and expertise by Mr. Maybank's counsel, requiring them to know and understand the complicated legal and factual issues involved and to present those issues in a manner comprehensible to lay persons. Mr. Maybank's counsel were excellent in this regard.

B. *The time necessarily devoted to the case.*

Advancing this case to trial involved successfully gaining remand to this court following Defendants' removal to federal court, extensive discovery including 32 depositions, review of

60,000 pages of discovery, and responding to eight substantive motions for summary judgment. In light of this immense and time-intensive task, I find that the time identified by Plaintiff's counsel was fairly expended in the development of the core set of facts that supported all of the claims.¹⁷ According to Mr. Willoughby's affidavit, almost 6,700 hours have been devoted to handling Mr. Maybank's case through June 30, 2014, excluding post-trial issues. As was their right, Defendants vigorously defended each point and issue in this case. In light of the comprehensive, "challenge every issue" defense employed by Defendants, which I observed firsthand, I find Mr. Maybank's counsel were required to invest time and resources in mounting an effective response. I therefore find the time devoted by Mr. Maybank's counsel in litigating this case was necessary, essential, and reasonable. The fact that Mr. Maybank's counsel produced a successful result weighs heavily in favor of the requested attorneys' fees.

However, the UTPA verdict is the only one for which attorneys' fees and costs are recoverable. Plaintiff's counsel asserts and Professor Freeman opined that the amount of fees allocable to this cause of action cannot be separately determined because all of the causes of action are based upon a core set of intertwined facts and no deduction to the fee request is warranted based on the amount of time expended by Mr. Maybank's counsel. *See Hensley v. Eckhart*, 461 U.S. 424, 435 (1983) (noting that, in litigation based on "a common core of facts," an attorney's time "will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis") and *Austin*, 387 S.C. at 57, 691 S.E.2d at 153 (declining to dissect a counsel's fee affidavit where violations under the statutory claim were

¹⁷ Defendants were Mr. Maybank's trusted fiduciary. As a consequence, all of their activities were inextricably intertwined. I find that it was necessary to conduct discovery and extensive pretrial work to understand all facets of the parties' lengthy and complex fiduciary relationship and delineate which acts and conduct of Defendants constituted violations of which causes of action.

based on the same body of evidence underlying the claims for fraud and constructive fraud). I find that the causes of action are based upon a core set of common and intertwined facts.¹⁸ However, out of an abundance of caution, I find that a 20% reduction in the number of hours will fairly reflect the time expended by Plaintiffs' counsel in investigating, developing, advancing, and litigating the UTPA claim while at the same time protecting Defendants against being charged for work that did not serve to develop the UTPA claim. *See Layman*, 376 S.C. at 460, 658 S.E.2d at 333 (reducing total hours by percentage). The implementation of this reduction is set forth below.

C. Professional standing of counsel.

Both Mr. Willoughby's firm and Mr. Bannister's firm have high standing and regard in the legal community and are respected members of the South Carolina Bar and the Richland and Greenville County Bars, respectively. I saw first-hand the high level of written and oral advocacy demonstrated by Mr. Maybank's counsel throughout this complex case. Litigating and trying this case involved the command of thousands of documents, numerous lay and expert witnesses, the experience and expertise of knowing the specialized area of investment strategies and products and the law related thereto, and the ability to conduct effective legal combat with a team of highly skilled attorneys for the defense. Despite the complexities of this case, Plaintiff's counsel litigated it with an exceptionally high degree of competence and skill. I therefore find

¹⁸ As an example that the work on the UTPA claim continued throughout the pendency of this case from start to finish, a key document that formed one of the foundations of the UTPA claim as presented to the jury was not produced by Defendants until late on the Friday before the trial began on Monday, June 16, 2014. Ex. 91.

the professional standing of Mr. Maybank's counsel militates heavily in favor of the award of attorneys' fees.¹⁹

D. Contingency of compensation.

The fee arrangement in this case was blended, with a reduced hourly fee coupled with a contingency if beneficial results were obtained. This blended fee recognizes the significant risk and difficulty of litigating such a complex case. Although this arrangement required Mr. Maybank to bear a significant portion of ongoing litigation expenses, the law firms shared a substantial portion of the entire burden. The "contingency of compensation" factor is *not* a check to see whether a contingency contract exists, but rather to consider whether the plaintiff can pay the fees if a beneficial result is not obtained. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) ("In making this determination, the abilities of the parties to pay, their respective financial conditions, and the effect of the attorney's fees on each party's standard of living are also to be considered."). Because this case involved substantial financial losses by Mr. Maybank, there was a substantial risk that he would be unable to pay even the reduced rate as the case progressed through protracted litigation²⁰ Consequently, Plaintiff's counsel bore a significant risk in light of the complexity of the issues and the uncertainty of success. Plaintiff's counsel also incurred a significant opportunity risk because they devoted substantial time and effort to this case at reduced rates versus those that could be obtained on

¹⁹ As with most issues in this case, Defendants did not concede the professional standing of Mr. Maybank's counsel.

²⁰ Mr. Maybank testified that Mr. David Fisher, a senior executive with Defendants, ridiculed and attempted to intimidate him for even contemplating making a claim, saying words to the effect of "You are an embarrassment to yourself, it will be expensive, and it will end badly." From the time devoted to this case as reflected in Mr. Willoughby's affidavit, BB&T indeed made sure it was most expensive to litigate this case.

other work. I find that the risk to Plaintiffs' counsel of not being fully and fairly compensated was substantial and that this factor weighs in favor of awarding attorneys' fees.

E. *Beneficial results obtained.*

Plaintiff's counsel obtained beneficial results for Mr. Maybank, which is "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). The success achieved was a direct result of the facts developed and the legal theories advanced by seasoned and experienced counsel with expertise in investment strategies and products. Counsel's trial advocacy with the jury was exceptional and their professionalism toward this Court and their respect for the judicial process noteworthy. The effective presentation by Mr. Maybank's counsel coupled with well-developed evidence of deception and unfair business practices resulted in one of the largest jury verdicts in Greenville County to date. I find that the fifth factor heavily militates in favor of the reasonable attorneys' fee awarded herein.

F. *Customary legal fees for similar services.*

I find that the legal fees requested in this case are in line with the legal fees customarily charged for similar services in this type of litigation in Greenville and this State. Moreover, for the reasons detailed below, I find this case exhibits the type of exceptional circumstances warranting the application of a multiplier to the fee request.

III. *Hours worked, billing rates, and propriety of a multiplier.*

The amount of time devoted to this case by Mr. Maybank's counsel is entirely reasonable given the complexity and difficulty of the issues involved in this case and the comprehensive defense. I find that the rates submitted by Mr. Willoughby and his team are reasonable, customary, and appropriate in Greenville and in this State given the complexity of this case and

investment-related cases in general, as well as the professional standing of Mr. Maybank's counsel. The reasonableness of the rates is supported by the expert testimony of Professor Freeman, who opined that the current hourly rates charged by Mr. Maybank's counsel are actually *below* fair market levels for the specialized type of legal work involved in this case. I find that this evidence militates in favor of the use of a multiplier, as discussed below.

IV. Calculation of fee award.

With these findings in mind, I calculate the lodestar fee²¹ in this case as follows:

	Hourly Rate	Hours Expended	20% Reduction	Adjusted Hours	Totals
<u>Willoughby & Hoefler, P.A.</u>					
Mitchell Willoughby	\$500.00	1,792.10	(358.42)	1,433.68	\$716,840.00
Elizabeth Zeck	\$400.00	691.80	(138.36)	553.44	\$221,376.00
ElizabethAnn Loadholt Carroll	\$400.00	514.10	(102.82)	411.28	\$164,512.00
Tracey C. Green	\$400.00	76.80	(15.36)	61.44	\$24,576.00
Chad N. Johnston	\$300.00	2,361.90	(472.38)	1,889.52	\$566,856.00
John W. Roberts	\$300.00	103.30	(20.66)	82.64	\$24,792.00
Andrew MacLeod	\$300.00	25.70	(5.14)	20.56	\$6,168.00
<u>Bannister, Wyatt & Stalvey, LLC</u>					
Bruce Bannister	\$325.00	90.00	(18.00)	72.00	\$23,400.00
Jim Bannister	\$450.00	20.75	(4.15)	16.60	\$7,470.00
Alex Stalvey	\$300.00	46.00	(9.20)	36.80	\$11,040.00
Luke Burke	\$250.00	12.50	(2.50)	10.00	\$2,500.00
Total Fee Award for Attorneys					\$1,769,530.00

I find that enhancing the lodestar calculation of \$1,769,530 in attorneys' fees with a multiplier is necessary in order to reflect the exceptional circumstances in recovering damages under the UTPA in this case. See *Layman*, 658 S.E.2d at 334 (citing *Blum v. Stenson*, 465 U.S.

²¹ Mr. Willoughby's fee affidavit lists Attorney Luke Burke's hourly rate as \$400.00; however, based on the attachment B to the fee affidavit, the Court finds that the listed rate was a scrivener's error and the rate should be \$250.00, which is reflected in the lodestar calculation.

886, 897 (1984) (recognizing that an enhanced lodestar award may be justified “in some cases of exceptional success”).

Based on my familiarity with the nature, extent, and difficulty of this complex case, I find the quality of service rendered by Mr. Maybank’s counsel was superb and that the success achieved was “exceptional.” In undertaking this difficult case in the face of a substantial risk of receiving compensation, Mr. Maybank’s counsel exposed unfair and deceptive business practices by Defendants against clients whom they served as trusted fiduciary as well as their misrepresentations to conceal those acts. I find all of these factors constitute significant and exceptional circumstances that warrant applying a multiplier of 1.5 to the current hourly rates to reflect the difficulty and exceptional circumstances of this case:

Base Attorneys’ Fees:	\$1,769,530.00
Multiplier:	x 1.5
Total Attorneys’ Fees:	\$2,654,295.00

I therefore find that, based on the exercise of my informed discretion, Plaintiff is entitled to attorneys’ fees of \$2,654,295 as a reasonable and a fair reflection of the exceptional circumstances involved in recovering damages under the UTPA.

V. Award of costs.

Mr. Maybank also is entitled to costs reasonably incurred in litigating and trying the UTPA claim. *See* S.C. Code Ann. § 39-5-140(a). Mr. Maybank’s counsel submitted a cost affidavit detailing the costs and expenses actually paid and advanced in pursuit of the litigation, requesting costs of \$306,264.10. This Court has broad discretion to award costs to the prevailing party. *Peterson v. Nat’l R.R. Passenger Corp*, 365 S.C. 391, 402, 618 S.E.2d 903, 908 (2005). Extending beyond the recovery of costs allowed as a matter of course to a prevailing party, fee-

shifting statutes like the UTPA contemplate reimbursement of all reasonable expenses incurred. *See Layman*, 376 S.C. at 461, 658 S.E.2d at 334.

After reviewing the affidavit and costs claimed by Mr. Maybank, I find the costs and expenses incurred, while significant, were reasonable in the context of this case. As Professor Freeman testified, expenses such as expert witness fees, online research, electronic document hosting fees, and trial preparation expenses are common, if not required, in cases of this size and complexity. The copying charges, while substantial, also are reasonable given that this case involved more than 60,000 pages of documents. Because the facts supporting the substantive claims were largely intertwined and developed throughout the lengthy discovery process, I find that no reduction of the costs and expenses is required due to Mr. Maybank's failure to win on every claim advanced. I also note that the costs of the expert witness of the Family Insurance Trust have already been excluded due to the lack of success in recovering damages for the trust. However, I find that the total amount should be further reduced by 20% to limit costs to the UTPA claim alone. I therefore award \$245,011 ($\$306,264 \times (1 - .20)$) in costs and expenses as reasonable and appropriate.

Prejudgment Interest

Mr. Maybank also has moved for an award of prejudgment interest based on the jury's award of actual damages under S.C. Code Ann. § 34-31-20(A). I find that Mr. Maybank's damages were not a sum certain as required by S.C. Code Ann. § 34-31-20(A) and I therefore deny Mr. Maybank's motion for prejudgment interest on that ground.

NOW, THEREFORE, based upon the foregoing findings and conclusions, IT IS
HEREBY ORDERED, ADJUDGED AND DECREED that

1. Defendants' motions for Judgment Notwithstanding the Verdict, New Trial Absolute, New Trial *Nisi Remittitur*, and Election of Remedies are **DENIED**;

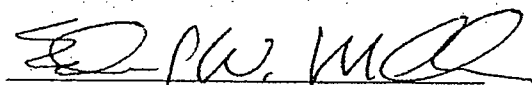
2. All other motions advanced by Defendants are also **DENIED**.

3. Plaintiff's motions for Treble Damages and for Attorneys' Fees and Costs are
GRANTED.

4. Plaintiff's motion for prejudgment interest is **DENIED**.

5. Judgment in favor of Plaintiff Francis P. Maybank is hereby **ENTERED** against
all Defendants in the amount of **Seventeen Million, One Hundred Ninety Nine Thousand,
Three Hundred Six Dollars (\$17,199,306)**.

AND IT IS SO ORDERED.



The Honorable Edward W. Miller
Business Court Judge
Thirteenth Judicial Circuit

Greenville, South Carolina
This 10 day of October, 2014

NOVEMBER

A Certified Copy
Paul B. Wislizenus
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 11/10/14

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

TD BANK'S REPLY TO
DEFENDANT'S MEMORANDUM IN
OPPOSITION TO ITS SUMMARY
JUDGMENT MOTION

TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, has moved the Court to grant it summary judgment on Defendant Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman's (collectively, "**Defendants**") counterclaims against it, which all fail as a matter of law. In reply to Defendants' Memorandum in Opposition to the Bank's Summary Judgment Motion, TD Bank reiterates that Defendants' counterclaims are nothing more than unfounded gripes about actions the Bank took in accordance with the parties' loan contracts and a proposed short sale of commercial, mortgaged property that the Bank was under absolutely no duty to consider or accept. It also submits the following:

A. Defendants' Breach of Contract Counterclaim¹ Fails as a Matter of Law Because There Is No Legal or Evidentiary Support for that Cause of Action.

Defendants' breach of contract counterclaim, which is based on the Bank's cross-collateralization of loans, the property manager's management of the mortgaged properties, and the Bank's refusal to agree to a short sale of one of the commercial, mortgaged properties,² fails as a matter of law because the Bank acted in accordance with the express language of the contracts in question and had no duty to modify the parties' contracts and agree to a short sale.

1. Cross-Collateralization of Loans and the Property Manager:

Under South Carolina law, it is not a breach of contract for a party to do precisely what a contract permits it to do. See, e.g., Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do"). In this case, the loan contracts, which Black Diamond executed, specifically granted the Bank the right to: (1) cross-collateralize Black Diamond's loans, \$2,000,000 Note, at ¶ 10, and (2) appoint a property manager with "all rights and responsibilities of a court-appointed receiver, including [] the collection of rents," Forbearance Agreements, at ¶6(F). See \$2,000,000 Note, at ¶ 10 ("This Loan is cross-collateralized and cross-defaulted with Loan #5121066531"). Because the

¹ Defendants have asserted a separate "claim" for breach of the covenant of good faith and fair dealing; however, as explained in the Bank's Memorandum in Support of its Summary Judgment Motion, South Carolina law does not recognize an independent cause of action for breach of the implied covenant of good faith and fair dealing. As a result, Defendants' "counterclaim" for such fails as a matter of law.

² Defendants vaguely assert that the Bank also breached a "contract" because they "interfere[d] with tenants." Def's. Memo in Opp., at 6. However, they never provide any detail about or evidence about such alleged interference. Id. In deposition testimony, Defendants testified that the Bank communicated with the property manager about a tenant who was behind in rent and had been paying rent directly to Defendants, instead of the property manager. The Forbearance Agreements granted the property manager the ability to collect rent, see Forbearance Agreements, at ¶ 6(F) (providing the property manager with the right to collect rent), and there is nothing improper about the Bank's communicating with the property manager about that duty. As a result, to the extent that the breach of contract counterclaim is based on the Bank's alleged tenant interference, it is subject to summary judgment.

Bank merely did “what [the] provisions of the contract[s] expressly gave [it] the right to do,” the Bank’s cross-collateralization of the loans and its selection of a property manager, whom it “regarded” as a “receiver,” Defs. Memo in Opp., at 5, do not constitute a breach of contract.³

Defendants argue that the Bank “interfered” with the property manager because: (1) the Bank “directed the property manager in regard to payment of bills, collecting rents, and evicting tenants” and (2) the property manager acted like a “receiver,” and not just a “property manager.” Defs.’ Memo in Opp., at 5. However, once again, Defendants argue that the Bank’s actions, which are specifically authorized by contract, are somehow a breach of the contract. Defendants expressly agreed in the Forbearance Agreements that:

Lender, Borrower, Mr. Lindgren and the Substitute Guarantor shall enter into a management agreement whereby the management of Borrower shall be turned over to a manager to be designated by Lender, and which manager shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage

Forbearance Agreements, at ¶ 6(F) (emphasis added). Defendants may regret agreeing to the above language, but the Bank’s actions in accordance with that language do not constitute a breach of contract. Adams, at 277, 465 S.E.2d at 85.

³ Additionally, the three year statute of limitations for breach of contract claims, S.C. Code Ann. § 15-3-530, long since time-barred any cause of action based on the cross-collateralization, which occurred in 2008. See, e.g., S.C. Code Ann. § 15-3-530 (providing a three year statute of limitations for “an action upon a contract”).

Notably, Defendants’ argument that it “is just as likely” that S.C. Code Ann. § 15-3-520’s twenty year statute of limitations for sealed instruments applies to their breach of contract counterclaim is meritless because the counterclaim itself is not based on the mortgages or foreclosure of the mortgages.

2. Short Sale Proposal:

Defendants' contention that the Bank is somehow liable for breach of contract for failing to agree to Defendants' request for a short sale of mortgaged commercial property also fails as a matter of law because the Bank had no duty (contractual or otherwise) to consider or agree to such a request. See, e.g., James v. Vanderbilt Mortgage, C.A. No. 3:11CV498-MOC-DSC, 2012 WL 441170, *4 (W.D.N.C. Jan. 23, 2012) (attached hereto as **Exhibit A**) (finding that a lender had no duty to "forgo its rights under the terms of the loan to foreclose" on property). The parties' loan contracts did not require the Bank to agree to a short sale, and, as courts across the country have recognized, the duty of good faith and fair dealing does not "extend to obligate a party to accept a material change in the terms of its contract" or to restructure or otherwise modify its contract. Rosemont Gardens Funeral Chapel-Cemetery, Inc. v. Trustmark Nat. Bank, 330 F. Supp. 2d 801, 810 (S.D. Miss. 2004).⁴ The Rosemont court noted that:

"By urging [a] court to find that [a] Bank had a good faith duty to affirmatively cooperate in [borrowers'] efforts to restructure [a] loan agreement, in effect the [borrowers] ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract-a free-floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms."

⁴ See also id. (citing: Bank of America N.T. & S.A. v. McMahon, 8 F.3d 25, 1993 WL 366663, *3 (9th Cir.1993) (attached hereto as **Exhibit B**) (holding that "the covenant of good faith and fair dealing is not breached when a lender takes a 'hard line' in loan repayment negotiations" since "[c]ontracts are enforceable at law according to their terms"); Glenfed Financial Corp., Commercial Finance Div. v. Penick Corp., 276 N.J.Super. 163, 176, 647 A.2d 852, 858 (N.J.Super.A.D.1994) (lender's refusal to exercise greater forbearance "would not constitute a lack of good faith because the loan agreement imposed no obligation upon [the lender] to grant a waiver of [borrower's] defaults under any circumstances. A creditor's duty to act in good faith does not extend to foregoing its right to accelerate upon default or otherwise compromising its contractual rights in order to aid its debtor.")).

Rosemont, at 810.

Notably, Defendants cite no support for their argument that the Bank somehow had a duty to modify its contract with them, and they merely argue that the “South Carolina Supreme Court has imposed a duty and process for the consideration of loss mitigation” in “residential” foreclosure situations. Defs.’ Memo in Opp., at 6 (emphasis added). Significantly, however, the Supreme Court’s imposition of such a requirement in the residential context, but not in the commercial, further derails Defendants’ argument because the Court could have, but chose not to, impose such a mitigation requirement in the commercial arena. See In re Mortgage Foreclosure Actions, 396 S.C. 209, 209, 720 S.E.2d 908 (2011) (“[t]he program applied to residential loans”) (emphasis added).⁵

In short, Defendants’ breach of contract counterclaim fails as a matter of law because the Bank’s actions regarding the cross-collateralization and the property manager were in complete accord with the parties’ contracts, and the Bank was under no duty to modify its contractual rights and accept a short sale of mortgaged, commercial property. Consequently, the Court should grant the Bank summary judgment on the counterclaim.

⁵ Defendants’ counterclaims for interference with prospective economic relations and unfair trade practices, which are based on the Bank’s refusal to accept the proposed short sale, also fail as a matter of law because the Bank had no duty to consider or accept a change to its contractual rights.

What’s more, in regard to the interference claim, the Bank’s failure to accept a short sale in no way constitutes interference with an “improper purpose” or by “improper method,” as required by that cause of action. Brown v. Stewart, 348 S.C. 33, 55, 557 S.E.2d 676, 688 (Ct. App. 2001) (Setting forth the claim’s requisite elements). By insisting on Defendants’ compliance with their contracts with the Bank, the Bank in no way acted improper. See, e.g., United Educational Distr., LLC v. Edu. Testing Serv., 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002) (“[T]here can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party”) (emphasis added).

B. Defendants' Breach of Fiduciary Duty Claim Also Fails as a Matter of Law Because the Bank Owed No Such Duty to Them, and, Even If They Did, There Is No Evidence of Any Breach of that Duty.

South Carolina law does not ordinarily impose a fiduciary duty on banks, whose "normal relationship" with a customer is "one of creditor-debtor and is not fiduciary in nature." Regions Bank v. Schmauch, 354 S.C. 648, 670-71, 582 S.E.2d 432, 444 (Ct. App. 2003). Defendants argue that the Bank's relationship with them converted into a fiduciary one because the Bank "directed the property manager," who "owe[d] a "fiduciary duty to its principal." Defs. Memo. In Opp., at 6. Defendants offer nothing but unsupported, conclusory speculation that the Bank somehow "directed" the property manager. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture"). Nonetheless, even if that was the case, Defendants' breach of fiduciary duty counterclaim still fails as a matter of law because the Bank's activities, as set forth above, were in accord with its contractual rights to cross-collateralize the loans, appoint a property manager with the rights and powers of a receiver, and to insist on Defendants' full performance under the loan contracts. As the South Carolina Court of Appeals has noted, "[i]t is difficult to discern how a breach of a fiduciary duty can occur where a contract, upon which the fiduciary duty is based, specifically allows for the action now alleged to be a breach of fiduciary duty." Am. Bankers Life Assur. Co. of Florida v. Frederick, 315 S.C. 97, 101, 431 S.E.2d 636, 639 (Ct. App. 1993). Consequently, Defendants' breach of fiduciary duty claim is subject to summary judgment.

C. Defendants' Negligent Misrepresentation Counterclaim Also Fails as a Matter of Law Because It Is Unsupported by Any Evidence.

Defendants gripe that the Bank misrepresented that they could pick a property manager that they were comfortable with, that the property manager would be a "property manager, not

receiver,” and that the Bank would respond about the possible short-sale. Defs.’ Memo in Opp., at 7. However, Defendants’ first two assertions are flatly contradicted by the terms of the parties’ contracts, and there is absolutely no evidence that Defendants ever suffered any damage as a result of the purported misrepresentations. As noted above, the Forbearance Agreements expressly provide for the appointment of a property manager “to be designated by Lender” and to have “all rights and responsibilities of a court-appointed receiver.” Forbearance Agreements, at ¶ 6(F). Defendants, who were represented by counsel, executed the Forbearance Agreements and therefore are charged with having read those contracts and they are barred from complaining of “misrepresentation of [the] contents of [those] written instrument[s]” as the “truth” about the property manager’s appointment and rights “could have been ascertained by reading the instrument[s].” DeHart v. Dodge City of Spartanburg, Inc., 311 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct. App. 1993). Additionally, Defendants have offered no evidence to establish the requisite elements of a negligent misrepresentation claim — for instance, they point to no evidence that the Bank had a “pecuniary interest” in making the alleged misrepresentations, that they “justifiably relied on the representations,” or that they suffered any pecuniary loss as the proximate result of relying upon such representations.” Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323-24, 450 S.E.2d 59, 62 (Ct. App. 1994) (setting forth the elements of the claim). Therefore, the negligent misrepresentation counterclaim fails as a matter of law.

D. Defendant’s Unfair Trade Practices Counterclaim Fails as a Matter of Law Because that Cause of Action Is Inapplicable to the Bank and There Is No Evidence that the Bank’s Alleged Failure to Respond to a Short Sale Offer In Any Way Affected the Public Interest.

Defendants’ unfair trade practices claim fails as a matter of law because the cause of action is inapplicable to a federally regulated bank, like TD Bank. See Lands Inn, Inc. v. BB&T of South Carolina, 2:98-158-23 (D.S.C. Apr. 12, 1999) (attached hereto as **Exhibit C**). It also

fails because there is no evidence that the Bank's alleged wrongdoing — failing to consider and/or accept a proposed short sale — affected the public interest. "A plaintiff bringing a private cause of action under the UTPA must allege and prove the defendant's actions adversely affected the public interest. "Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim." Robertson v. First Union Nat. Bank, 350 S.C. 339, 350-52, 565 S.E.2d 309, 315-16 (Ct. App. 2002). In this case, the Bank's conduct of failing to modify its contracts with Defendants undoubtedly only affects the parties to those contracts and does not impact the public interest. As a result, Defendants' unfair trade practices counterclaim is subject to summary judgment.

CONCLUSION

For the reasons set forth in the Bank's Memorandum in Support of its Summary Judgment Motion and above, the Bank respectfully requests that the Court grant it summary judgment on all of Defendants' counterclaims.

This 18 day of March 2015
Greenville, South Carolina



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Exhibit A

2012 WL 441170

Only the Westlaw citation is currently available.

United States District Court,
W.D. North Carolina,
Carolina Charlotte.

Betty JAMES and Willie James, Plaintiff,

v.

VANDERBILT MORTGAGE AND
FINANCE, INC., and Deidre D.
Deflorentis, Substitute Trustee, Defendant.

Civil No. 3:11CV498-MOC-
DSC. | Jan. 23, 2012.

Attorneys and Law Firms

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Charlotte, NC, for Plaintiff.

Thomas Carlton Younger, III, Joseph Samuel Dowd, Nelson
Mullins Riley & Scarborough LLP, Raleigh, NC, for
Defendant.

MEMORANDUM AND RECOMMENDATION AND ORDER

DAVID S. CAYER, United States Magistrate Judge.

*1 **THIS MATTER** is before the Court on Defendant
Vanderbilt Mortgage and Finance, Inc.'s "Motion to
Dismiss" (document # 7), as well as the parties' briefs and
exhibits. See documents 8, and 10-12.

This matter was referred to the undersigned Magistrate Judge
pursuant to 28 U.S.C. § 636(b)(1), and this Motion is now ripe
for the Court's consideration.

Having fully considered the arguments, the record, and
the applicable authority, the undersigned respectfully
recommends that Defendant's Motion be *granted*, as
discussed below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, who are husband and wife, seek damages and
declaratory relief on state law claims arising from their

inability to repay a home mortgage loan made to them by
Defendant Vanderbilt Mortgage and Finance, Inc.

On December 30, 2008, Plaintiffs closed on a loan to finance
their purchase of a manufactured home for \$56,061.00.
Plaintiffs owned a parcel of unencumbered land in Union
County, North Carolina on which they intended to place the
home.

During the closing, Plaintiffs completed and signed a loan
application, verifying that the information contained therein
was "true, accurate and complete." Plaintiffs allege that the
application overstated their financial status by containing
inflated values for some of their assets or listing assets that
they did not own. However, there is no allegation nor any
indication in the record that Defendant contributed to or
was aware of these inaccuracies. Plaintiffs also executed a
Promissory Note which was secured by a Deed of Trust. The
Note required monthly payments of \$1,107.66, based on an
annual percentage rate of 11.74 percent.

At the time the parties consummated the loan, Willie James
(age 69) and Betty James (age 64) were receiving \$835 and
\$853 respectively in Social Security benefits. Betty James
also earned an average of \$172.50 per week from a part-time
job. The monthly principal and interest payment on the loan
consumed forty-eight percent of Plaintiffs' total income.

Plaintiffs allege that they made the monthly payments for six
months, through October 2009. At about that time, Willie
James began to experience health problems and incurred
medical bills. Additionally, Betty James' part-time job was
reduced from twentyseven and a half hours per week to only
six to seven hours per week. As a result, Plaintiffs "began
having trouble making payments," and "they began trying to
work with Vanderbilt to save their home." "Complaint" ¶ 35
(document # 1). Plaintiffs contend that Defendant refused to
cooperate with them in addressing their inability to make the
monthly payments.

On February 1, 2011, Defendant DeFlorentis, the Substitute
Trustee on the Deed of Trust, instituted a foreclosure
proceeding in Union County Superior Court. After several
continuances, a foreclosure hearing was held on July 28,
2011, at which time the Clerk of Court entered an Order of
Foreclosure. The foreclosure sale was set for October 25,
2011.

*2 On September 20, 2011, Plaintiffs filed their Complaint in Union County Superior Court. Plaintiffs assert claims against Defendant Vanderbilt for declaratory relief, breach of the implied duty of good faith and fair dealing, violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen.Stat. § 75-1.1 ("UDTPA"), and violation of North Carolina's Rate Spread Home Loan Statute, N.C. Gen.Stat. § 24-1.1F, *et. seq.* ("Rate Spread Statute").

On October 6, 2011, Defendant Vanderbilt removed the state proceeding to the United States District Court for the Western District of North Carolina, asserting the existence of diversity subject matter jurisdiction. Said removal has not been challenged and appears proper.¹

After the Complaint was filed, Defendant voluntarily postponed the foreclosure sale.

On November 17, 2011, Defendant filed its Motion to Dismiss which has been fully briefed and is ripe for determination.

II. DISCUSSION

A. Standard of Review

In reviewing a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563. A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1960 (2009), *quoting Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

In *Iqbal*, the Supreme Court articulated a two-step process for determining whether a complaint meets this standard. First, the court identifies allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. 129 S.Ct. at 1951. "Threadbare recitals of the elements of a

cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1951 (allegation that government officials adopted challenged policy "because of" its adverse effects on protected group was conclusory and not assumed to be true), *citing Twombly*, 550 U.S. at 554-55. Although the pleading requirements stated in "Rule 8 [of the Federal Rules of Civil Procedure] mark[] a notable and generous departure from the hyper-technical, code-pleading regime of a prior era ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1950.

*3 Second, to the extent there are well-pleaded factual allegations, the court should assume their truth and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 1951. "Determining whether a complaint contains sufficient facts to state a plausible claim for relief 'will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* at 1950. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-that the pleader is entitled to relief,' " and therefore should be dismissed. *Id.*, *quoting Fed.R.Civ.P. 8(a)(2)*. In other words, if after taking the complaint's well-pleaded factual allegations as true, a lawful alternative explanation appears a "more likely" cause of the complained of behavior, the claim for relief is not plausible. *Id.* at 1951-52.

B. Rate Spread Statute Claim

North Carolina's Rate Spread Statute provides as follows:

(c) No lender shall make a rate spread home loan unless the lender reasonably and in good faith believes at the time the loan is consummated that one or more of the obligors, when considered individually or collectively, has the ability to repay the loan according to its terms and to pay applicable real estate taxes and hazard insurance premiums....

(1) A lender's analysis of an obligor's ability to repay a rate spread home loan according to the loan terms and to pay related real estate taxes and insurance premiums shall be based on a consideration of the obligor's credit history, current and expected income, current obligations, employment status, and other financial resources other than the obligor's equity in the real property that secures repayment of the rate spread home loan.

(2) In determining an obligor's ability to repay a rate spread home loan, the lender shall take reasonable steps to verify

the accuracy and completeness of information provided by or on behalf of the obligor using tax returns, payroll receipts, bank records, reasonable alternative methods, or reasonable third-party verification....

(4) A lender's analysis of an obligor's ability to repay a rate spread loan may utilize reasonable commercially recognized underwriting standards and methodologies, including automated underwriting systems, provided the standards and methodologies comply with the provisions of this section.

N.C. Gen.Stat. § 24-1.1F (2008).

The Complaint contains only conclusory allegations and fails to set forth specific facts which, if proven, would amount to a violation of N.C. Gen.Stat. § 24-1.1F. Plaintiffs have not alleged any facts showing that Defendant lacked a reasonable and good faith belief that they could repay the loan at the time it was consummated. Plaintiffs do not allege any particular type or source of information that Defendant failed to consider in making the loan. Rather, they allege that Defendant considered their sources of income at the time the loan was made. Taking the facts alleged in the Complaint as true, Plaintiffs' ability to repay the loan did not deteriorate until six months after the loan was made. The statute expressly applies to the lender's knowledge "at the time the loan is consummated." N.C. Gen.Stat. § 24-1.1F(c).

*4 Plaintiffs allege that at the time the loan was made, they were *able* to make the monthly mortgage payments. Plaintiffs also allege that they subsequently became unable to repay the loan because "Mr. James' health began failing," which resulted in increased medical bills, and Mrs. James' work hours were reduced. Complaint at ¶¶ 33-34. Accepting the facts in the Complaint as true, both of these events occurred (1) after the parties closed on the subject loan transaction and (2) were the proximate cause of their inability to make their monthly payments. Defendant could not be expected to consider these unforeseen circumstances in determining Plaintiffs' ability to repay the loan at the time it was consummated.

Plaintiffs further allege that their loan application contained incorrect "Asset Information." They have failed to allege any facts showing that Defendant was aware of or responsible for these inaccuracies.

For these reasons, the undersigned respectfully recommends that Defendant's Motion to Dismiss be *granted* as to Plaintiffs' Rate Spread Statute claim.

C. Good Faith and Fair Dealing Claim

Plaintiffs cite no legal authority for their claim that Defendant violated its implied duty of good faith and fair dealing in performance of the loan contract by making a usurious loan under the Rate Spread Statute and by refusing to modify the terms of the loan once it became apparent that Plaintiffs could not make the monthly payments.

It is a basic principal of contract law that parties to an enforceable contract must "act in good faith and ... make reasonable efforts to perform [their] obligations under the agreement." *Maglinoe v. Aegis Family Health Ctrs.*, 168 N.C.App. 49, 56, 607 S.E.2d 286, 291 (2005).

Concerning Plaintiffs' argument that the loan violates the Rate Spread Statute, their allegations are insufficient for the reasons discussed above in Section II. B.

Plaintiffs' second argument, that Defendant had a legally recognized duty to modify the terms of the loan, amounts to a request that the Court re-write the terms of the loan. *See Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo.Ct.App.1994) (holding that the duty to act in good faith "does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions," nor does the duty of good faith "inject substantive terms into the parties' contract"); *see also General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1041-42 (6th Cir.1990); *Serfecz v. Jewel Food Stores*, 1994 U.S. Dist. LEXIS 12239 (N.D.Ill. Aug. 30, 1994) ("Where the disputed issue in a contract is governed by express terms, however, there is no gap to be filled, and the parties' behavior is assessed according to the express provisions, without resort to an implied covenant of good faith and fair dealing"); *Barnes v. St. Joseph's Hosp.*, 601 N.W.2d 587, 591 (N.D.1999); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo.1995); *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841, 863 (Idaho 1991); *East Penn Sanitation, Inc. v. Grinnell Haulers, Inc.*, 294 N.J.Super. 158, 682 A.2d 1207, 1213 (N.J.Super.Ct.App.Div.1996); *Badgett v. Security State Bank*, 116 Wash.2d 563, 807 P.2d 356, 360 (Wash.1991); 17A Am.Jur.2d Contracts § 370. Applying these legal principles, the undersigned concludes that Defendant had no duty to

forgo its rights under the terms of the loan to foreclose on the property.

*5 For these reasons, Plaintiffs have failed to state a claim for breach of the implied duty of good faith and fair dealing. The undersigned respectfully recommends that this claim also be *dismissed*.

D. Claims for Unfair and Deceptive Trade Practices and Declaratory Relief

Having failed to establish any underlying claims against Defendant, Plaintiffs' claims for unfair and deceptive trade practices and for declaratory relief must also fail. Accordingly for the same reasons discussed in Sections II. B and C. above, the undersigned respectfully recommends that Plaintiffs' claims for unfair and deceptive trade practices and for declaratory relief be *dismissed*.

III. ORDER

IT IS ORDERED that all further proceedings in this action, including *all* discovery, are **STAYED** pending the District Judge's ruling on this Memorandum and Recommendation and Order.

IV. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that Defendant Vanderbilt

Mortgage and Finance, Inc.'s "Motion to Dismiss" (document # 7) be **GRANTED** and that the Complaint be **DISMISSED WITH PREJUDICE**.

V. NOTICE OF APPEAL RIGHTS

The parties are hereby advised that, pursuant to 28 U.S.C. § 636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen (14) days after service of same. Failure to file objections to this Memorandum with the District Court constitutes a waiver of the right to de novo review by the District Judge. *Diamond v. Colonial Life*, 416 F.3d 310, 315–16 (4th Cir.2005); *Wells v. Shriners Hosp.*, 109 F.3d 198, 201 (4th Cir.1997); *Snyder v. Ridenour*, 889 F.2d 1363, 1365 (4th Cir.1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140, 147 (1985); *Diamond*, 416 F.3d at 316; *Page v. Lee*, 337 F.3d 411, 416 n. 3 (4th Cir.2003); *Wells*, 109 F.3d at 201; *Wright v. Collins*, 766 F.2d 841, 845–46 (4th Cir.1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir.1984).

The Clerk is directed to send copies of this Memorandum and Recommendation and Order to counsel for the parties; *and to the Honorable Max O. Cogburn, Jr.*

SO ORDERED AND RECOMMENDED.

Footnotes

- 1 The citizenship of Defendant DeFlorentis, the substitute trustee, is not relevant to the Court's analysis for removal because she is a nominal defendant in this action who is not considered for purposes of diversity jurisdiction. "[T]he general rule is that the citizenship of the real parties in interest is determinative for purposes of diversity jurisdiction." Diversity of citizenship is not determined by reference to the nominal or formal parties; 'rather, there must be complete diversity between the real and substantial parties in interest.' " *Sutton Woodworking Machine Co., Inc. v. Nova Tech., Inc.*, 328 F.Supp.2d 601, 604 (M.D.N.C.2004) (quoting *Roche v. Lincoln Prop.Co.*, 373 F.3d 610, 615 (4th Cir.2004)). See also *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) ("Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.") "A nominal party has no personal stake in the outcome of the litigation and is not necessary to an ultimate resolution." *Dempsey v. Transouth Mortgage Corp.*, 88 F.Supp.2d 482, 484 (W.D.N.C.1999). As the *Dempsey* court held, the substitute trustee in an action is merely a nominal party and does not defeat diversity jurisdiction. *Dempsey*, 88 F.Supp.2d at 484. The substitute trustee holds title to the land described in the deed of trust "for the sole benefit of the real parties in interest." *Id.* The substitute trustee does "not have nor does it now have any interest in this suit." *Id.* Further, "the complaint contains no factual allegations against [the substitute trustee]." *Id.*

Exhibit B

8 F.3d 25

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

BANK OF AMERICA N.T. & S.A.,
Plaintiff-Counter-Defendant-Appellee,

v.

Patrick R. McMAHON, and Kathleen
(INDA) McMahon, Defendants-
Counter-Claimants-Appellants.

BANK OF AMERICA N.T. & S.A.,
Plaintiff-Counter-Defendant-Appellant,

v.

Patrick R. McMAHON, and Kathleen (Inda)
McMahon, Defendant-Counter-Claimant-Appellees.

Nos. 92-15758, 92-15759. | Argued and
Submitted Aug. 12, 1993. | Decided Sept. 21, 1993.

Appeal from the United States District Court, for the
District of California, D.C. Nos. CV-89-02783-CAL(A,
CV-89-02783-CAL(A. Charles A. Legge, District Judge,
Presiding

D.Cal.

AFFIRMED IN PART, VACATED AND REMANDED IN
PART.

Before: KOZINSKI, THOMPSON, and T.G. NELSON,
Circuit Judges.

MEMORANDUM *

I. BANK'S SUMMARY JUDGMENT MOTION

A. Waiver

*1 The McMahons claim that they are relieved of their obligation to pay the mortgage debt because Fay DeJesus told Patrick McMahon during a telephone conversation that if he made an immediate payment on November 19 or 20, 1986,

the account would not be sent to "collections." Accordingly, they contend that the Bank "waived" its right to collect the debt. We disagree.

It is true that the Bank "lost" the November 20th payment and failed to record that installment. It is also true that the account was thereafter sent to the loan adjustment department. However, the November 20th payment covered only the August installment. At the time that payment was made, the McMahons' account was still due and owing for the September, October and November installments. Therefore, the Bank had the right to perform its internal accounting procedure by sending the loan to the adjustment department and charging off a portion of that loan. Moreover, the Bank did *not* accelerate the loan at that time, although the McMahons were in default and it had the right to do so under the terms of the mortgage and note.

Even if the Bank somehow "waived" its right to perform an internal accounting procedure, it did not waive its right to accelerate the loan at a future date. The promissory note specifically provided that if default occurred and the Bank did not accelerate and require immediate payment of the balance of the loan, the Bank would still have the right to do so if default occurred at a later time. The McMahons were in default again on November 1, 1988, when the Bank finally did accelerate the loan.

B. Negligence

The McMahons next contend that because the Bank mishandled their account, they are relieved of liability. Although the Bank failed to record the November 20, 1986, payment, its mishandling of the account as to that one monthly payment in 1986 does not change the fact that the McMahons were in default in 1988.¹ Nor did it impair the Bank's right to accelerate.

The McMahons also argue that the Bank improperly obtained duplicate insurance and that when they were in default in September and October, 1986, it was because they were "protesting" the additional insurance premium. This argument lacks merit. Even assuming that the Bank improperly obtained duplicate insurance, the Bank did not accelerate the loan in 1986 when the McMahons were "protesting" the added insurance premium. When the Bank accelerated the loan in November, 1988, the McMahons had fallen into default again and the Bank was not charging them additional premiums. Therefore, they were no longer

"in protest" when the default, which resulted in this action, occurred.

C. Mitigation of Damages/Commercially Reasonable Sale

We reject the McMahons' contention that the Bank is not entitled to recover the full amount awarded by the district court because it failed to mitigate damages. In *Stevens v. F/V Bonnie Doon*, 655 F.2d 206 (9th Cir.1981), we held that the plaintiffs' recovery should not be reduced as a result of any deterioration that occurred during the boat's eighteen-month lawful detention. *Id.* at 209 ("[D]amages resulting from deterioration of the boat during its period of lawful detention cannot be recovered for the same reason that lost profits due to detention cannot be recovered.").

*2 This principle applies with equal force in the present case. The McMahons are attempting to reduce the Bank's recovery to reflect the deterioration which occurred during The Lady Kathleen's lawful detention. As the district court found, deterioration of the idle boat was mainly the result of the McMahons' own delay. Accordingly, the district court properly refused to reduce the Bank's recovery for deterioration resulting from the boat's lawful detention.

The McMahons also argue that the foreclosure sale was not commercially reasonable. We conclude that the McMahons waived this claim by failing to object to the sale pursuant to Local Admiralty Rule 610-14(c) for the Northern District of California which provides that "[i]f within three days ... no written objection is filed, the sale shall stand confirmed as of course, without the necessity of any affirmative action thereon by the court...." See *Redwood Empire Prod. Credit Assoc. v. O/S Coos Bay*, 776 F.2d 876 (9th Cir.1986). In *Redwood*, we held that a foreclosure sale on a preferred ship mortgage was confirmed as a matter of law, and thus not subject to collateral attack seventeen months after confirmation, because the defendants failed to object within the time provided by the local Admiralty Rule. *Id.* at 877.

Similarly, in this case, no objection was made until the McMahons opposed the Bank's summary judgment motion in January, 1992, approximately seventeen months after the sale. The McMahons could have prevented confirmation of the sale as a matter of law by objecting within the limit provided by the rule. See *id.* Because no timely objection was made to the sale, the district court properly rejected the McMahons' untimely objection. See *id.*

II. MCMAHONS' SUMMARY JUDGMENT MOTION

A. Negligence

1. Fair Credit Reporting Act

The McMahons contend that the Bank violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, *et seq.*, when it willfully and maliciously reported the charge-off to credit reporting agencies. The McMahons waived this issue.

We will not reverse a district court on the basis of a theory not raised below. *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 615 n. 1 (9th Cir.1990) (issue waived when party fails to raise issue in response to defendant's summary judgment motion), *aff'd*, 112 S.Ct. 2072 (1992); see also *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546 n. 15 (9th Cir.1991), *cert. denied*, 112 S.Ct. 1603 (1992).

The McMahons did not raise this specific FCRA claim in the district court. In their counterclaim, the McMahons alleged that the Bank negligently reported the charge-off; in their points and authorities in support of summary judgment, they argued that the Bank erroneously charged-off the loan. Nowhere during the proceedings in the district court did the McMahons contend that the Bank violated the specific provisions of FCRA. Rather, their claim appeared to be based upon a general negligence theory. The first mention of FCRA is in the Bank's opposition to the McMahons' motion for summary judgment, presumably in an attempt to foreclose potential argument on that issue. It is only in the McMahons' opening brief to this court that they raise the issue of a FCRA violation. Hence, because the McMahons did not give the district court an opportunity to rule on this claim, we deem it waived.

2. Insurance

*3 The McMahons have been compensated for any injury they suffered as a result of the Bank obtaining duplicate insurance. The Bank refunded a portion of the premium charged to their account (\$1,790) and the district court denied the Bank's recovery of the remaining amount (\$1,407). Therefore, because they have not shown any other damages proximately caused by the duplicate insurance, the district court properly dismissed the negligence claim as it pertained to the insurance issue.

3. Failure to Credit November, 1986, Payment

It is beyond dispute that the Bank failed to properly credit the McMahons' account when they made the August, 1986, installment in November, 1986. However, as noted above, their account was still due and owing for the September, October and November installments and the Bank did *not* accelerate the loan at that time. The McMahons have not established any damages caused by the Bank's mishandling of their August installment.

4. Statute of Limitations

Although it is not clear from the record that the district court relied upon the statute of limitations in dismissing the McMahons' counterclaims, we need not reverse the judgment. Even assuming that the district court did rely upon the statute of limitations, and that such reliance was improper, we may consider any ground supported in the record in affirming the summary judgment ruling, *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1556 (9th Cir.1991), even if the district court relied upon an impermissible ground or incorrect reasoning. *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir.1987). As noted in the previous sections, the record supports alternative grounds for affirming the district court's denial of the McMahons' motion for summary judgment and dismissal of their counterclaim.

B. Implied Covenant of Good Faith and Fair Dealing

There is an implied covenant of good faith and fair dealing in every contract. *Vale v. Union Bank*, 151 Cal.Rptr. 784, 787 (1979). However, the covenant of good faith and fair dealing is not breached when a lender takes a "hard line" in loan repayment negotiations. *Price v. Wells Fargo Bank*, 261 Cal.Rptr. 735, 742 (Cal.App. 1 Dist.1989). "Contracts are enforceable at law according to their terms." *Id.*

Similarly, in the present case, the Bank did not breach the implied covenant of good faith and fair dealing; rather, it merely sought to enforce the agreement according to its terms. The Bank was patient in its dealings with the McMahons and gave them every opportunity to comply with the terms of the contract. The Bank did not accelerate the loan until 1988 following several years of late and missed payments.

III. BANK'S ATTORNEYS' FEES CLAIM

An award of attorneys' fees is within the discretion of the district court and will not be disturbed unless the district court has abused its discretion. *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1384 (9th Cir.1984).

*4 Both the promissory note and preferred ship mortgage permit recovery of attorneys' fees incurred as a result of the Bank's collection efforts. The district court judge made the following statements when he reduced the attorneys' fee award from \$39,911.05 to \$20,000:

I don't fault the Bank for the expenditure of that quantity of time, because obviously this has been a difficult credit, and Mr. McMahon has been asserting rights, rightly or wrongly, quite vigorously over a period of time. But still, in looking at the amount involved, and the length of time, and the fact that Mr. McMahon is in proper, I am making that reduction.

From these statements, we cannot determine whether the district court properly exercised its discretion in reducing the attorneys' fees award. The fact that the McMahons were in *proper* would not justify a reduction of the fee award. Nor would the amount involved justify a reduction, unless the attorneys' services were improper in relation to the size of the debt. We do not understand the court's reference to "the length of time." Therefore, we remand to permit the court to explain more fully the reasons for its reduction of the Bank's attorneys' fees.

IV. MCMAHONS' REQUEST FOR ATTORNEYS' FEES

The McMahons seek attorneys' fees on appeal. They raised this claim in their *reply brief* and base this request upon terms of the "loan agreement." Neither the provisions of the promissory note nor the mortgage permit the McMahons to obtain attorneys' fees. Notwithstanding the fact that the McMahons have not stated an appropriate basis for their attorneys' fee request, they waived this claim because they failed to include in their *opening brief* a short statement of authority. See Circuit Rule 39-1.6.

AFFIRMED in part; order setting attorneys' fees VACATED and REMANDED for further proceedings. When the district court sets fees for proceedings in that court, it shall also set

a reasonable fee for the Bank's efforts in this court, and enter an amended judgment.

Parallel Citations

1993 WL 366663 (Table)

Footnotes

- * This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.
- 1 The court has considered the McMahons' Supplemental Letter Brief and the Bank's Reply thereto. As the Bank points out, whether there existed a genuine issue of material fact as to a second lost payment for July, 1986, was not raised before the district court. Accordingly, we decline to consider this issue on appeal.

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Exhibit C

FILED

APR 12 1999

LARRY W. PROPPS, CLERK
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Lands Inn, Inc.,

Plaintiff,

v.

Branch Banking and Trust
Company of South Carolina,

Defendant.

C.A. No. 2:98-158-23

ORDER

L. BACKGROUND

This case revolves around a claim by plaintiff that defendant breached a promise to issue a loan to finance a hotel construction project that plaintiff was planning.

Plaintiff has owned and operated a Comfort Inn motel in Mount Pleasant, South Carolina since 1995. In January of 1997, plaintiff entered a contract to purchase a tract of land across the street from its Comfort Inn, apparently with the intention of eventually constructing another hotel (specifically, a MainStay Suites) on that lot. Defendant financed the purchase of this property with a \$500,000 loan ("the acquisition loan"). It appears undisputed that defendant knew of plaintiff's intention to construct a hotel on the property. Plaintiff accepted the commitment for the acquisition loan from defendant on March 25, 1997, and the loan was closed on April 3, 1997.

Plaintiff alleges that, during February and March of 1997, as the details of the acquisition loan were being formulated, the parties discussed the prospect of defendant issuing a loan to finance the construction of the MainStay Suites. According to plaintiff, a

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25

number of defendants' internal documents contain details about plaintiff's proposed construction project that reflect the occurrence of such discussions. Plaintiff also alleges that certain representatives of defendant verbally stated that defendant would make the construction loan at the appropriate time. Plaintiff further alleges that, as a condition on its promise to make the construction loan, defendant asked plaintiff to refinance its outstanding loans on the Comfort Inn (which were, at the time, held by Anchor Bank) with defendant, and to move all of its Comfort Inn accounts from Anchor Bank to defendant. These accounts included the Comfort Inn's operating account, payroll account, and credit card processing.

On April 4, 1997, defendant executed a commitment letter providing for the refinancing of plaintiff's two Anchor Bank loans ("the refinance loan"), and plaintiff accepted it on April 11. On April 17, Anchor Bank agreed to match defendant's terms as to the refinance loan in an effort to keep the loans from being moved. According to plaintiff, defendant responded by promising over the phone to make the MainStay construction loan if plaintiff went through with the refinancing. Plaintiff did go through with the refinancing, and incurred over \$88,000 in pre-payment penalties to Anchor Bank, as well as an origination fee and closing costs to defendant. The parties closed the refinance loan on May 14, 1997.

Plaintiff alleges that, after the closing of the refinance loan, it was told over the phone by representatives of defendant that they were in the process of drafting a commitment letter for the MainStay Suites construction loan. Plaintiff also claims that defendant's internal documents reflect that the terms for such a loan were being memorialized. It is undisputed, however, that there was not a written agreement between the parties that obligated defendant

to provide the loan.

On June 18, 1997, defendant informed plaintiff that it would not be funding the MainStay construction loan. Plaintiff alleges that defendant refused to fund that loan at least in part because it had decided to provide a construction loan for a Sleep Inn on a tract of land adjacent to the one on which plaintiff wished to build its MainStay Suites, and defendant wanted to allow Sleep Inn to open sooner so that it would have a competitive advantage over the MainStay Suites.

Plaintiff's complaint states nine causes of action: (1) Violation of the Federal Bank Tying Act; (2) Tortious Interference with Contract; (3) Tortious Interference with Prospective Contractual Advantage; (4) Breach of Covenant of Good Faith and Fair Dealing; (5) Fraud/Misrepresentation; (6) Breach of Contract; (7) Negligence; (8) Unfair Trade Practices; and (9) Breach of Contract Accompanied by Fraudulent Act. Defendant has moved for summary judgment on all claims.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. Perini Corp.

v. Perini Constr., Inc., 915 F.2d 121, 123-124 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." Teunsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)), cert. denied, 116 S. Ct. 190 (1995). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." Celotex, 477 U.S. at 327.

III. ANALYSIS

A. S.C. Code § 37-10-107

Initially, defendant argues that all of plaintiff's claims should be dismissed pursuant to S.C. Code Ann § 37-10-107 (Law. Co-op. Supp. 1998), which reads as follows, in pertinent part:

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

- (a) to lend or borrow money;
- (b) to defer or forbear in the repayment of money; or
- (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case

a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
- (d) negligent misrepresentation.

5
This provision, also known as the "Bank Statute of Frauds," bars any action based on an alleged promise to lend money when the plaintiff has not received a writing, signed by the party to be charged, outlining the terms and specifications of the agreement. In this case, it is absolutely undisputed that plaintiff never received any writing signed by an agent of defendant in which defendant promised to fund a construction loan for the MainStay Suites. Plaintiff claims to have received oral assurances to that effect, and also points to various internal documents of defendant (some of them memoranda which are signed by certain agents of defendant) which include some of the specifications of the MainStay project and information about the type of construction loan that it would require. Plaintiff argues that, when considered collectively, these documents contain the necessary details and terms of the construction loan. However, even if this were true, and even though some of the documents had been signed by employees of defendant, the fact remains that plaintiff never received a single writing signed by defendant that memorialized the terms of the loan. Thus,

these documents cannot satisfy § 37-10-107.

Plaintiff also claims that this case falls under three other exceptions to the § 37-10-107. First, it claims that the statute provides an exception for fraud, i.e. intentional misrepresentation. Plaintiff cites no cases from any jurisdiction to support its contention, but instead focuses on subsection (2)(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiff then argues that since the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. In response, defendant notes that the issue has yet to be addressed by any South Carolina appellate court, but cites to several orders from South Carolina trial courts which have held that actions based on allegations of fraud are precluded. See Derrick v. Branch Banking and Trust Company of South Carolina, 96-CP-42-2095 (S.C. Ct. Cm. Pl. 9/8/98) (Judge Thomas Ervin). Defendant also cites to several cases from other jurisdictions with statutes similar to § 37-10-107 that have reached similar conclusions. See Horseshoe Entertainment, L.P. v. General Electric Capital Corp., 990 F. Supp. 737, 743 (E.D. Mo. 1997); Fleming Irrigation, Inc. v. Pioneer Bank & Trust Co., 661 So.2d 1035, 1039 (La. App. 1995); Klem v. First Nat'l Bank of Chicago, 655 N.E.2d 1211, 1213 (Ill. App. 1995); First Nat'l Bank in Stanton v. McBride Chevrolet, Inc., 642 N.E.2d 138, 142 (Ill. App. 1994); Norwest Bank Lakewood, Nat'l Ass'n v. GCC Partnership, 886 P.2d 299, 302 (Colo. App. 1994). Thus, this court concludes that plaintiff's allegations of fraud do not remove its claims from the coverage of § 37-10-107.

Secondly, plaintiff focuses on subsection 2(c) of the statute, and claims that it has

engaged in sufficient "part performance" of the alleged agreement to escape the application of § 37-10-107. Specifically, plaintiff argues that its decision to go forward with the Comfort Inn refinance loan and to move all of its business from Anchor Bank to defendant "can only be explained" by defendant's alleged promise to provide the construction loan in return. It appears that plaintiff is relying on an oral representation allegedly made by one of defendant's agents (Lars Anderson) to plaintiff on April 17, 1997, to the effect that defendant would provide the construction loan if plaintiff went forward with the Comfort Inn refinance loan. It is undisputed, however, that plaintiff had already executed and signed a commitment letter with respect to the refinance loan and moved all of its accounts to defendant before April 17, 1997.

The only event which took place after April 17, 1997 was the actual closing of the refinance loan, which took place on May 14, 1997. Plaintiff claims that it could have, and would have, walked away from the commitment letter that it had previously executed had it not received an oral promise from Lars Anderson on April 17 to provide the construction loan. If not for the promise, plaintiff contends, it would have been illogical for it to go forward with the closing of the refinance loan, which plaintiff knew would cost it an \$88,000 pre-payment fee, along with an origination fee and closing costs. Defendant, on the other hand, argues that plaintiff's decision to close the refinance loan could be explained by a number of other reasons. Specifically, defendant argues that plaintiff still would have incurred the \$16,000 loan origination fee for the refinance loan (a contention which plaintiff disputes), and that plaintiff simply may have elected to go forward with the refinance loan because it had already signed the commitment letter for it, and intended to keep its "moral"

obligation.

This represents something of a close question to the court. As stated above, the issue of whether plaintiff could have backed out of the signed commitment letter without incurring a fee or penalty of any kind is unclear. However, defendant has raised another point which strikes the court as salient. Under the "part performance" exception to § 37-10-107, the actions which are claimed to constitute "part performance" must "relate clearly and unequivocally to the agreement, exclusive of any other relation between the parties touching the agreement." Southern National Bank of South Carolina v. McLean, Unpublished Opinion No. 95-UP-292 (S.C. Ct. App. 11/9/95) (citing Player v. Chandler, 382 S.E.2d 891, 894 (S.C. 1989)). In this case, while the issue of whether defendant promised that it would make the construction loan if plaintiff closed the refinance loan is disputed, it is undisputed that defendant would not have made the construction loan if plaintiff did not close the refinance loan. Furthermore, plaintiff acknowledged at the hearing on this motion that it could not have sought the construction loan from Anchor Bank either, as it would have exceeded Anchor Bank's lending limits. Thus, in order to even have a chance of acquiring a loan to construct the MainStay project, plaintiff had to close the refinance loan with defendant. This, however, does not amount to a situation which "clearly and unequivocally" points to a promise by defendant that it would make the loan -- thus, the "part performance" exception to the statute is not satisfied.

Plaintiff's third argument need not detain the court long. Plaintiff argues that, if § 37-10-107 is given the interpretation urged by defendant, it is unconstitutional because it "creates special protections for banks and deprives citizens of their due process rights."

However, plaintiff does not cite a single authority to support its contention that the statute, even under such an interpretation, would represent anything more than a provision that was lawfully adopted by a state government and that is rationally related to the legitimate government interest of protecting banks from false claims based on alleged oral promises to lend money. Thus, this argument must fail as well.

Even if the alleged agreement somehow could be removed from the coverage of § 37-10-107, there are several other reasons that plaintiff's claims must fail. Those reasons will now be discussed in turn.

B. The Parol Evidence Rule

Defendant also asserts that plaintiff's claim must fail because it is based on an alleged oral agreement that conflicts with a subsequent writing. According to defendant, the "written document" in this case is the documentation surrounding the closing of the Comfort Inn refinance loan, which contained no mention of any conditions or promises on the part of defendant regarding the MainStay construction loan. Plaintiff, on the other hand, contends that it is not seeking to vary the terms of an existing written contract, and that it has no problem with the terms of the refinance loan per se. However, the arguments offered in its brief and at oral argument essentially boil down to the same assertion again and again -- that it would not have closed the refinance loan if it had not been promised the MainStay construction loan (i.e., its agreement to the refinance loan was conditioned on defendant's alleged promise to make the construction loan). In short, plaintiff repeatedly asserts that the refinance loan and the construction loan were bound up in essentially the same transaction -- yet the written document memorializing the refinance loan reflects no such arrangement.

9
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Plaintiff then asserts that the parol evidence rule does not apply, since the oral representations made by defendant were fraudulent, and cites authorities from various jurisdictions for the proposition that a contract induced by fraud is voidable. On this issue, the South Carolina Supreme Court has recognized the general rule that parol evidence is admissible to show fraud in the inducement of a writing, but not to show the existence of (or enforce) oral warranties or promises that are extrinsic to the writing. Bradley v. Hullander, 249 S.E.2d 486, 499 (S.C. 1978). See also Gilliland v. Elmwood Properties, 391 S.E.2d 577, 579-81 (S.C. 1990) (reaffirming the Bradley rule, and holding that parol evidence may be used to prove defendant's counterclaim for negligent misrepresentation, but may not be used to prove defendant's counterclaim for breach of contract).

Plaintiff appears to argue that, since defendant's oral representations were fraudulent, the parol evidence rule does not apply. This is not entirely correct. In such a situation, the rule would not bar the introduction of parol evidence to prove a claim for fraud, or in an action for rescission of the contract. See Bradley, supra. However, the allegedly fraudulent nature of defendant's oral representations does not change the fact that evidence of oral representations is still not admissible to vary the terms of the contract. Therefore, to the extent plaintiff's claims are based on a breach of contract theory (that is, on an attempt to enforce an alleged agreement, not an attempt to rescind the agreement), the parol evidence rule bars evidence of defendant's oral representations.

C. Plaintiff's Fraud Claim

Defendant argues that plaintiff cannot show two of the necessary elements of a fraud claim: (1) that plaintiff had a right to rely on any oral representations made by defendant, and

10
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(2) that any actionable representation exists. Thus, argues defendant, plaintiff's fraud claim must fail.

Defendant's first argument is based on the rule that when there is no confidential or fiduciary relationship, and the situation involves an arm's length transaction between mature, educated parties, there is no right to rely. Florentine Corporation v. PEDA L. Inc., 339 S.E.2d 112, 114 (S.C. 1985). While Florentine recognized that determination of the right to rely is often fact-specific and should be made on a case-by-case basis, it was quite clear in holding that in the circumstances described above, no right to rely exists. In this case, there is nothing to suggest that the transaction was anything other than an arm's length deal between two sophisticated corporations, and there is no evidence that a fiduciary relationship existed between the parties. Indeed, the South Carolina Supreme Court has recognized that generally no such relationship exists between a bank and its customers. Burwell v. South Carolina Nat'l Bank, 340 S.E.2d 786 (S.C. 1985).

Defendant's position is supported further by First Savings Bank, FSB v. Capital Investors, Inc., 450 S.E.2d 83 (S.C. App. 1994), rev'd in part on other grounds, 459 S.E.2d 307 (S.C. 1995), in which the court held that the guarantors of a note, who were sophisticated parties, could not reasonably have relied on a bank employee's oral representation that they would not be held liable in the event of a default by the borrower, since such a representation contradicted the written guaranty agreement. Id. at 86. Similarly, this case involves a sophisticated party attempting to claim that it had a right to rely on a representation which was not contained in the written agreement between the parties. Moreover, plaintiff could have easily determined from reading the document that the representation in question was

not a part of the written agreement, and the bank owes no duty to explain to a sophisticated party that which it could learn from reading the document itself. Id. (citing Citizens and Southern Nat'l Bank v. Lanford, 443 S.E.2d 549 (S.C. 1994), for the proposition that a bank has no duty to explain to an individual what he could learn by simply reading the document).

Plaintiff has cited no authority to contradict these rules, or their applicability in this case. In fact, the only authorities cited by plaintiff on this issue are a number of old cases (the most recent of which was decided in 1954) for the general proposition that the issue of the right to rely is typically a fact-intensive inquiry which should be left to a jury. However, given the clear statements in more recent cases such as Florentine and First Savings Bank regarding the absence of a right to rely in situations such as this one, plaintiff's fraud claim must fail.

Defendant's second argument with regard to plaintiff's fraud claim asserts that no actionable representation exists. Specifically, defendant notes that plaintiff has singled out two "representations" in particular -- the alleged representation that defendant "would make" the MainStay construction loan if plaintiff moved its Comfort Inn loans and accounts to defendant, and the "concealment" of the fact that defendant also was financing the nearby Sleep Inn project. As to the latter, defendant asserts that the Sleep Inn loan had not been presented to defendant for consideration until August of 1997, some two months after the rejection of the MainStay construction loan. Plaintiff has not disputed this assertion by defendant.

As to the former "representation," defendant argues that, even if the representation actually was made, it was a statement as to a future event (i.e., that defendant "would make"

the loan), and thus not actionable. Plaintiff counters this argument on two fronts. First, it argues that a statement that defendant "would make" the construction loan was tantamount to saying that the loan had been approved, which was not true at the time -- thus, the statement was a lie at the time it was made. Second, plaintiff argues that, even if the statement is not equated with a representation that the loan had already been approved, it was nonetheless a statement of "present intention" on the part of defendant which was untrue.

Plaintiff's second argument is particularly weak, as it has pointed to no evidence of any kind to indicate that defendant (specifically, Lars Anderson) intentionally misrepresented defendant's present intentions regarding the construction loan at the time he allegedly told plaintiff that it "would make" the loan. Plaintiff's first argument is somewhat stronger, given an apparent course of dealing between the parties in which plaintiff similarly had been told, with regard to the acquisition and refinance loans, that defendant "would make" the loan only when the loans had, in fact, been approved. Nevertheless, as discussed supra, even if this statement constitutes a false representation on defendant's part, plaintiff had no legal right to rely on it -- thus, its fraud claim should fail.

D. Plaintiff's Claims for Interference with Contractual Relations

A cause of action for tortious interference with contractual relations requires five elements: (1) a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) absence of justification; and (5) damages. DeBerry v. McCain, 274 S.E.2d 293, 296 (S.C. 1981). Defendant argues that, in this case, there is no breach of contract upon which to base such an action. Plaintiff responds by arguing that defendant induced plaintiff to refinance the outstanding Comfort Inn loans, thereby causing

a "breach" of its loan agreement with Anchor Bank. Specifically, plaintiff argues that the "breach" in question was caused by the fact that, in refinancing the Comfort Inn loans, plaintiff's loans with Anchor Bank were paid off early, thus resulting in a prepayment penalty.

This would appear to fall short of a "breach of contract." In refinancing its existing Comfort Inn loans, plaintiff did not refuse to adhere to the terms of its existing loan agreement with Anchor Bank. Plaintiff knew that the terms of that agreement dictated that a prepayment penalty would be incurred if it paid off the loan early -- nevertheless, plaintiff went ahead with the refinancing and voluntarily payed the prepayment penalty. This is not a breach of the loan agreement with Anchor Bank -- in fact, it reflects direct adherence to its terms by plaintiff.

Even if this did constitute a breach, however, it would not support an action for tortious interference with contractual relations. In Threlkeld v. Christoph, 312 S.E.2d 14, 16 (S.C. Ct. App. 1984), the court pointed out that, in order to subject the defendant to liability for inducing the breach of a contract between the plaintiff and a third party, the plaintiff must also show that "the outsider [i.e., the defendant] intentionally induced the third person not to perform his contract with the plaintiff. . . ." (citing Childress v. Abeles, 84 S.E.2d 176 (N.C. 1954) (Emphasis added). In this case, it was not the third person (i.e., Anchor Bank) who allegedly breached the contract in question, but plaintiff itself. Thus, the alleged "breach" cannot support such an action.

E. Plaintiff's Negligence Claim

Defendant asserts (and plaintiff does not dispute) that where the duty which has

14
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allegedly been violated is one that arises from a contract, there is no legal justification to support a claim of negligence. Forfire Village, Inc. v. Black & Veatch, Inc., 404 S.E.2d 912, 917-18 (S.C. Ct. App. 1991). In this case, the only duty asserted by plaintiff is one that allegedly arose from an agreement between the parties -- thus, it cannot support an action for negligence.

F. Plaintiff's Claim under the Unfair Trade Practices Act ("UTPA")

Defendant argues that the UTPA does not apply to the actions of a lender in failing to give a loan to which it had allegedly committed. Defendant's argument is based on Anderson v. Citizens Bank, 365 S.E.2d 26 (S.C. Ct. App. 1987), in which the court held:

The State Board of Financial Institutions regulates the banking practices of Citizens Bank pursuant to Section 34-1-10 to -130, Code of Laws of South Carolina, 1976. The Board has extensive regulatory authority over banking practices, including the power to initiate criminal prosecutions against banks that violate a statute or regulation. Sections 34-1-60, 34-1-90, 34-1-100, Code of Laws of South Carolina, 1976. Therefore, under the "general activity" test of State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539 (1980), the actions of Citizens Bank in connection with the Graham loan are exempt from the provisions of the Unfair Trade Practices Act pursuant to Section 39-5-40(a), Code of Laws of South Carolina, 1976.

Id. at 33.

Defendant points out that, in the case of Ward v. Dick Dyer and Associates, Inc., 403 S.E.2d 310 (S.C. 1991), the South Carolina Supreme Court rejected the "general activity" test referred to in Anderson, and overruled Anderson to the extent that its holding was based on that test. Id. at 313. However, the Anderson court had articulated an alternate basis for its holding in a footnote, which read as follows:

Cf. 15 U.S.C. § 57a(f)(1) (1985), which provides that unfair and deceptive practices by banks are regulated under rules of the Federal Reserve System,

not under the Federal Trade Commission Act. See also Fed. Trade Comm'n v. Winters Nat'l Bank & Trust Co., 601 F.2d 395 (6th Cir. 1979). The South Carolina Unfair Trade Practices Act states that the legislature intends the courts to be guided by federal interpretations of the Federal Trade Commission Act in construing Section 39-5-20(a). See Section 39-5-20(b), Code of Laws of South Carolina, 1976.

Anderson, 365 S.E.2d at 33 n.1.

Defendant has attached to its memorandum several orders from state trial courts indicating that, despite the partial overruling of Anderson, the UTPA is not applicable in cases involving banking industry and banking practices, as they are generally subject to extensive regulation at both the state and federal levels. See, e.g., Southern Nat'l Bank of South Carolina v. McLean, No. 93-CP-26-2589 (S.C. Ct. Cm. Pl. 9/27/94), aff'd by Unpublished Opinion No. 95-UP-292 (S.C. Ct. App. 11/9/95). Plaintiff has offered no arguments or countervailing authority in response to these arguments by defendant.

G. Plaintiff's Claim under the Federal Anti-Tying Act

Under 12 U.S.C. § 1972, a bank is prohibited from conditioning the provision of any service on a customer's agreement to obtain some additional services from the bank (other than those customarily associated with the service that the bank has been asked by the customer to provide), or to refrain from obtaining those additional services from another bank. In this case, plaintiff claims that defendant violated this provision by requiring plaintiff to move its business to defendant and to "stop doing business with Anchor Bank."

As to plaintiff's first assertion, defendant responds by arguing that requiring plaintiff to move its accounts to defendant was not a practice that is "unusual in the banking industry," as a plaintiff must show in an action under the Anti-Tying statute. Pappas v.

NCNB Nat'l Bank of North Carolina, 653 F. Supp. 699, 705 (M.D.N.C. 1987). Specifically, defendant argues that it is not uncommon in the banking industry for commercial lenders to require borrowers to place their accounts with the lending institution. In support of this assertion, defendant notes that the commitment letters involved in plaintiff's previous relationship with Anchor Bank contained similar requirements.

Regarding plaintiff's second assertion, defendant asserts (and plaintiff does not dispute) that defendant never asked or required plaintiff to "stop doing business with Anchor Bank." Even taking plaintiff's assertions as true, the most that defendant required of plaintiff was that it move its Comfort Inn loans and accounts to defendant as a condition precedent to the issuance of the MainStay construction loan. Defendant never asked or required plaintiff to refrain from doing business with Anchor Bank completely — indeed, plaintiff has never even made an allegation to this effect.

IV. CONCLUSION

It is therefore,

ORDERED, for the foregoing reasons, that defendant's motion for summary judgment is **GRANTED**.

AND IT IS SO ORDERED.



Patrick Michael Duffy
United States District Judge

Charleston, South Carolina
April 12th, 1999

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 19th day of March, 2015, (s)he e-mailed a copy of the attached **TD BANK'S REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO ITS SUMMARY JUDGMENT MOTION** by electronic mail.

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2015 MAR 23 PM 3:24
JENNIFER ROSENBAUM
CLERK OF COURT
SOUTH CAROLINA
JUDICIAL BRANCH

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

**TD BANK'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO
STRIKE DEFENDANTS' JURY TRIAL
DEMAND**

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, "Defendants") because Defendants are not entitled to and waived any right to a jury trial in this case. Not only did Defendants contractually waive any right to a jury trial, see Motion to Strike, but they also are not entitled to a jury trial on the Bank's equitable claims against them or on their permissive counterclaims. In support of its Motion, TD Bank submits the following:

BRIEF BACKGROUND

The above-captioned lawsuit is a foreclosure action, which is equitable in nature and in which TD Bank seeks to (1) foreclose on mortgages that Defendant Black Diamond, LLC ("Black Diamond") executed in its favor and (2) recover any deficiency after the foreclosure sale from J. Christopher Lindgren and David A. Brosman (collectively, "the Guarantors"), who guaranteed Black Diamond's debts to the bank. See Compl.

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

Black Diamond and the Guarantors have filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. Defendants' counterclaims do not dispute the execution or the enforceability of the loan documents which are subject to the Bank's foreclosure and deficiency claims, and, the counterclaims are based on alleged events that occurred after the execution of those contracts and/or on the Bank's refusal to agree to a short sale of commercial property that Black Diamond mortgaged to it.

ANALYSIS

I. Defendants Are Not Entitled to a Jury Trial on the Bank's Equitable Foreclosure and Deficiency Claims Against Them.

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are "not entitled, as a matter of right, to a jury trial." Carolina First Bank v. BADD, LLC, No. 2013-000107, 2015 WL 340791, *1 (Jan. 28, 2015) (attached hereto as **Exhibit A**). See also S.C. R. Civ. P. Rule 71(a) ("Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53") (emphasis added). In BADD, the South Carolina Supreme Court recently confirmed that guarantors, who are parties to a foreclosure action "for the purpose of collecting a deficiency," are not entitled to a jury trial on that claim because deficiency judgments are "incidental to the main relief sought" in a foreclosure action. BADD, at *2. In so holding, the BADD court relied on S.C. Code Ann. § 29-3-660, which specifically permits a court to award a deficiency judgment against a guarantor in a foreclosure action. Section 29-3-660 provides:

In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action

and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

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

As noted above, the above-captioned lawsuit is a foreclosure action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the Guarantors. See Compl. As a result, Black Diamond is not entitled to a jury trial on the Bank's foreclosure action against it, BADD, at *1, and the Guarantors, whom "the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged," are not entitled to a jury trial on the Bank's claim against them because "a party does not have a right to a jury trial" on a deficiency claim, id., at *2.

II. In this Equitable Action, Defendants Are Not Entitled to a Jury Trial on Their Permissive Counterclaims against the Bank.

A defendant is "entitled to a jury trial on his counterclaims in an equitable action," like this one, "only if the counterclaims are legal and compulsory." Id., at *3. "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." Id. (emphasis added). As a result, in BADD, a foreclosure action in which the bank sought a deficiency against a guarantor, the South Carolina Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the guaranty agreement's enforceability was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that “the execution of the guaranty agreements was the ‘transaction or occurrence’ that gave rise to [the guarantor’s] inclusion in the Bank’s foreclosure complaint.” Id. (emphasis added). Thus, in order to be compulsory, the guarantor’s counterclaims had to have a logical relationship with the guaranty agreement’s execution or enforceability. The BADD court found that the guarantor’s counterclaims were based on “an alleged conspiracy between the Bank” and a third party to “induce [the debtor’s] default” on the underlying notes and the Bank’s alleged breach of the covenant of good faith and fair dealing, which were “implied in the note, mortgage, and guaranty agreements,” by virtue of the “purported conspiracy.” Id., at *3. The Court held that the counterclaims did not have a “logical relationship to either the execution or enforceability of the guaranty agreements,” and it noted that the claims instead “presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable.” Id. As a result, the counterclaims were permissive and did not entitle the guarantor to a jury trial.

Like the BADD guarantor’s counterclaims, Defendants’ legal counterclaims are permissive in nature and do not entitle Defendants to a jury trial because they bear no “logical relationship” with the transaction that gave rise to the Bank’s foreclosure and deficiency action against them — the execution of the notes, mortgages, and guaranty agreements. Defendants have asserted the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. As with the BADD counterclaims, none of Defendants’ legal counterclaims “affect the execution or enforceability” of the loan

documents. Instead, they are premised on events that occurred after the execution of those documents, such as the Bank's refusal to accept a short sale of one of the mortgaged commercial properties. See, e.g., Brosman Answer and Counterclaim, at ¶ 27; Black Diamond and Lindgren Answer and Counterclaim, at ¶ 27. Importantly, Defendants, in their Memorandum in Opposition to the Bank's Summary Judgment Motion, confirmed that their counterclaims are based on alleged events that occurred "subsequent" to the execution of the parties' loan documents. See e.g., Defs' Memo in Opp., at 4-5 (Alleging that the purported breach of contract was "subsequent to" and "after" the execution of the forbearance agreements"). Consequently, Defendants' legal counterclaims against the Bank are permissive and do not entitle Defendants to a jury trial.

CONCLUSION:

For the reasons set forth above and in the Bank's Motion to Strike Defendants' Jury Trial Demand, the Bank respectfully requests that the Court strike Defendants' demand for a jury trial in this equitable foreclosure action in which Defendants waived their right to a jury trial and have not asserted any compulsory, legal counterclaims.

[Signature Page to Follow]

This 18 day of March 2015
Greenville, South Carolina



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Merger to Carolina First Bank*

Exhibit A

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Carolina First Bank, n/k/a TD Bank, NA, Petitioner,

v.

BADD, L.L.C., William McKown, and Charles A.
Christenson, Defendants,

of whom BADD, L.L.C. and William McKown are
Respondents.

BADD, L.L.C. and William McKown, Third-Party
Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2013-000107

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27486
Heard December 10, 2014 – Filed January 28, 2015

REVERSED

Thomas Wm. McGee, III, C. Mitchell Brown, Allen
Mattison Bogan, all of Nelson Mullins Riley &
Scarborough, L.L.P., of Columbia, for Petitioner.

Richard R. Gleissner, of Gleissner Law Firm, L.L.C., of
Columbia, for Respondents.

JUSTICE PLEICONES: In this mortgage foreclosure action, the Court granted Carolina First Bank's ("the Bank") petition for a writ of certiorari to review the Court of Appeals' decision in *Carolina First Bank v. BADD, L.L.C.*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012), which held William McKown¹ is entitled to a jury trial. We disagree and therefore reverse the decision of the Court of Appeals.

Procedural History

BADD, L.L.C. ("BADD"), purchased three warehouse units in Myrtle Beach. To finance the transaction, BADD executed two promissory notes. A personal guaranty was also executed by McKown, who was a member of BADD. After BADD defaulted, the Bank brought this foreclosure action and included McKown as a party pursuant to S.C. Code Ann. § 29-3-660 (2007) based on his status as a guarantor.

In McKown's amended answer and counterclaim, he demanded a jury trial because the Bank sought a money judgment for the breach of a guaranty arrangement. McKown further sought an accounting and a determination that the guaranty agreement was unconscionable. McKown then asserted two counterclaims—(1) civil conspiracy and (2) breach of contract—both based on an alleged conspiracy.

¹ While BADD also joined McKown in his demand for a jury trial, the Court of Appeals' decision turns on McKown's right to a jury trial. Therefore, we address the merits of that decision with respect to McKown.

between the Bank and William Rempher. Finally, McKown asserted third-party claims against Rempher.²

The Bank moved for an order of reference. The circuit granted the motion, referring the matter in its entirety to the master-in-equity.

The Court of Appeals reversed, holding McKown was entitled to a jury trial because the Bank's claim on the guaranty agreement was a separate and distinct legal claim.³ *Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 620.

We granted the Bank's petition for a writ of certiorari to review the Court of Appeals' decision.

Issue Presented

Did the Court of Appeals err in finding McKown was entitled to a jury trial?

Standard of Review

Whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo, owing no deference to the Court of Appeals' decision. See *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

² There is no question these third-party claims are permissive and do not entitle McKown to a jury trial. See *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims are permissive and a party waives his right to a jury trial by asserting them in a foreclosure action).

³ The Court of Appeals also found McKown was entitled to a jury trial based on his counterclaims, but that finding relied on the threshold holding that the Bank's action on the guaranty agreement was separate and distinct from the foreclosure action. See *Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 621.

Law/Analysis

The Court of Appeals held that when a lender exercises its statutory right to join a guarantor as a party to a foreclosure action in order to seek a deficiency judgment, the guarantor has a right to a jury trial. The Bank contends this was error. We agree.

I. Guarantor's Right To A Jury Trial When A Bank Seeks A Deficiency Judgment Pursuant to § 29-3-660.

The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14. Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state constitution. *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). "Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

McKown was joined as a party to the foreclosure action pursuant to S.C. Code Ann. § 29-3-660 (2007). Section 29-3-660 provides:

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

(Emphasis supplied). This statute is derived, in part, from the Act of 1791, which vests exclusive jurisdiction in courts of equity for foreclosure actions. *See, e.g., Williams v. Beard*, 1 S.C. 309, 324 (1870) (discussing the Act of 1791 and the role it played in vesting courts of equity with jurisdiction to decide mortgage-related disputes). The power to render a deficiency judgment is included within the

jurisdiction of courts of equity. *See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 342, 242 S.E.2d 407, 409 (1978) (recognizing that a deficiency judgment is incidental to the relief sought in a foreclosure action and that the Act of 1791 integrated the two for purposes of characterizing the action as equitable); *see also* 27 S.C. Jur. *Mortgages* § 103 (1996) ("Mortgage foreclosures are partly in rem . . . and partly in personam . . . ; however, the strict distinction between such designations was abandoned by the Act of 1791. . . . The court's in personam jurisdiction to enter a deficiency judgment does not alter the equitable character of the [foreclosure] action.").

Here, it is clear the Bank included McKown as a party to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged. The Bank's action does not alter the equitable character of the action. *See Perpetual Bldg. & Loan Ass'n of Anderson*, 270 S.C. at 342, 242 S.E.2d at 409. Likewise, § 29-3-660 states, in part, that it is for the court to adjudge a deficiency. This statute, with its origins pre-dating the enactment of our Constitution, illustrates that a party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment. *See also* 27 S.C. Jur. *Mortgages* § 103 (stating mortgage foreclosure proceedings are regulated by statutes, and those statutes should be substantially followed). We therefore hold McKown is not entitled to a jury trial solely based on the Bank's inclusion of him as a party pursuant to § 29-3-660.

Accordingly, we reverse the Court of Appeals' holding that McKown was entitled to a jury trial solely based on the Bank's inclusion of McKown as a party to obtain a possible deficiency judgment. That holding conflicts with § 29-3-660, which confers upon *the court* the power to adjudge a deficiency.

Having determined McKown is not entitled to a jury trial for the reason relied on by the Court of Appeals, we address whether McKown is entitled to a jury trial based on his counterclaims. We do so in the interest of judicial economy as this issue was not addressed squarely by the Court of Appeals.

II. McKown's Right To A Jury Trial Based On His Civil Conspiracy And Breach of Contract Counterclaims.

The Bank argues the Court of Appeals erred because McKown's counterclaims, while legal, are permissive and thus, McKown waived his right to a jury trial by

asserting them in this equitable suit. We agree.

McKown is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory. *See* Rule 13(a), SCRCP. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06 (finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note).

Given this framework, we determine whether McKown's legal counterclaims are compulsory.

a. Civil Conspiracy

McKown's civil conspiracy counterclaim is based on an alleged conspiracy between the Bank and Rempher. McKown contended that two years after the execution of the notes and guarantees, Rempher was substituted in Christensen's place as a member of BADD and began collecting rents from the income-producing warehouse units. Allegedly, Rempher had an ownership interest in other warehouse units not purchased by BADD and as a result, conspired with the Bank to induce BADD's default by directing potential tenants away from renting the properties. McKown further claimed Rempher intentionally failed to make payments on the note even though sufficient funds were available because Rempher wanted to purchase the three warehouse units at a below market value, foreclosure sale.

Here, the execution of the guaranty agreements was the "transaction or occurrence" that gave rise to McKown's inclusion in the Bank's foreclosure complaint. McKown's civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06; *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270–71, 449 S.E.2d 580, 582–83 (Ct. App. 1994), *aff'd in part*,

vacated on other grounds, 320 S.C. 532, 486 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). In other words, the civil conspiracy claim presumes the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable. We therefore hold McKown waived his right to a jury trial by asserting the civil conspiracy counterclaim in a foreclosure action because the claim is permissive as it does not arise out of the same transaction or occurrence as the execution of the guaranty agreements. *See Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (stating a defendant waives his right to a jury trial by asserting a permissive counterclaim in an equitable action).

b. Breach of Contract

The breach of contract claim is based on an allegation that Rempher agreed to obtain financing for the three units BADD mortgaged. The only allegation specific to the Bank is that the Bank breached its covenant of good faith and fair dealing implied in the note, mortgage, and guaranty agreements based on the Bank's purported conspiracy with Rempher. Again, the "transaction or occurrence" for the purpose of determining the compulsory character of McKown's counterclaim is the execution of the guaranty agreements. McKown's "breach of covenant of good faith and fair dealing" claim depends on a purported conspiracy that took place, if at all, two years after the guarantees had been executed. This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements. We therefore hold McKown waived his right to a jury trial by asserting a permissive counterclaim in the foreclosure action. *Cf. Advance Int'l, Inc.*, 316 S.C. at 270-71, 449 S.E.2d at 582-83.

Conclusion

We reverse the Court of Appeals as McKown is not entitled to a jury trial solely because the Bank exercised its statutory right to join him as a party in the event of a deficiency judgment. We further hold McKown is not entitled to a jury trial based on his counterclaims, which, while legal, are permissive. McKown waived his right to a jury trial by asserting permissive counterclaims in an equitable action. Accordingly, the effect of our decision affirms the circuit court's decision, which referred this matter in its entirety to the master-in-equity.

The Court of Appeals decision is therefore

REVERSED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 19th day of March, 2015, (s)he e-mailed a copy of the attached **TD BANK'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' JURY TRIAL DEMAND** by electronic mail.

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2015 MAR 24 PM 12:55
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CLERK OF COURT
BEAUFORT COUNTY, S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

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

Plaintiff,)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

MOTION FOR RECONSIDERATION
PURSUANT TO RULE 59, S.C.R.C.P.

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YOU WILL PLEASE TAKE NOTICE that Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman, by and through their undersigned counsel, on the tenth (10th) day after service of this motion or as soon thereafter as the parties may agree or the Court may provide, will move before the Beaufort County Master-in-Equity for an Order altering or amending the Order signed by The Honorable Marvin H. Dukes, on June 10, 2015 and received by the undersigned on June 25, 2015 (hereinafter sometimes referred to as the "Order") pursuant to Rule 59 of the South Carolina Rules of Civil Procedure or such other rules as may then and there be applicable. A copy of the Order is attached hereto as Exhibit "A."

As grounds for requesting that the Order be altered or amended, the Defendants respectfully submit the following:

- 1) The Supreme Court of South Carolina has granted a petition for rehearing in Carolina First Bank v. BADD, LLC, _____ S.C. _____, _____ S.E.2d _____ (2015WL340791) (2015), the decision upon which this Court's decision rests.

The first and second findings in the Court's Order Granting TD Bank's Motion to Strike Defendants' Jury Trial Demand dated June 10, 2015 rest entirely upon Carolina First Bank

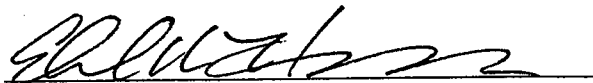
v. BADD, LLC, _____ S.C. _____, _____ S.E.2d _____ (2015WL340791) (2015). On April 9, 2015, the Supreme Court granted a petition for rehearing in BADD. The Defendants urge similar rehearing and reconsideration by this Court once the Supreme Court has rendered its final decision in BADD.

- 2) The findings by this Court, including that of a contractual waiver, failed to consider the arguments made by Defendants that the jury waivers do not extend to the counterclaims and that the Plaintiff is barred from enforcing them because of its conduct.

The Court found that Defendants are not entitled to a jury trial of the Plaintiff's foreclosure and its deficiency claims against them, and also that Defendants are not entitled to a jury trial on their counterclaims. The Court also found in its third and alternative finding that Black Diamond waived its right to a jury trial. In so doing, the Court ignored the Defendants' argument that even if the contractual jury waivers are otherwise applicable, the Plaintiff should be barred from enforcing them because of its conduct.

Based on the foregoing, the Defendants respectfully request that the Order dated June 10, 2015 be reconsidered and rescinded, and that the Defendants be allowed to proceed to a jury trial on the merits.

Respectfully submitted,



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Attorneys for Black Diamond, LLC and
J. Christopher Lindgren

This 6th day of July, 2015.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

TD BANK, N.A., Successfully by)
Merger to Carolina First Bank,)

Plaintiff,)

v.)

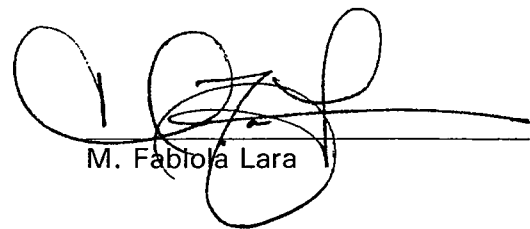
CERTIFICATE OF SERVICE

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

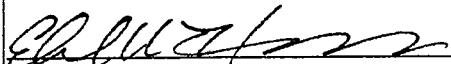
Defendants.)

The undersigned hereby certifies that on the 6th day of July, 2015 she served a copy of the attached *Motion Slip and Motion for Reconsideration* upon counsel for the Plaintiff by depositing a true and accurate copy thereof in the United States mail with sufficient postage prepaid to:

Michael Bogle, Esquire
Womble Carlyle Sandridge & Rice, LLC
Post Office Box 10208
Greenville, SC 29603


M. Fabiola Lara

Sworn to and Subscribed before me
this 6th day July, 2015.



Notary Public for South Carolina

My Commission expires: 7/20/2017

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
TD BANK, N.A., Successor by)
Merger to Carolina First Bank,)
Plaintiff,)
v.)
BLACK DIAMOND, LLC, J.)
CHRISTOPHER LINDGREN,)
DAVID A. BROSMAN, JULIE H.)
KING and THE GREENERY, INC.,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

MOTION FOR RECONSIDERATION
PURSUANT TO RULE 59, SCRPC

2015 SEP 22 PM 12:05
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman, by and through their undersigned counsel, on the tenth (10th) day after service of this motion or as soon thereafter as the parties may agree or the Court may provide, will move before the Beaufort County Master-in-Equity for an Order altering or amending the Order signed by The Honorable Marvin H. Dukes, III, and received by the undersigned, on September 11, 2015 (hereinafter sometimes referred to as the "Order") pursuant to Rule 59 of the South Carolina Rules of Civil Procedure or such other rules as may then and there be applicable. A copy of the Order is attached hereto as Exhibit "A."

As grounds for requesting that the Order be altered or amended, the Defendants respectfully submit the following:

- 1) In dismissing Defendants' counterclaim as to breach of contract and breach of the duty of good faith and fair dealing with respect to Plaintiff's failure to consider and/or approve a bona fide offer to purchase a portion of the collateral, the Court based its opinion on the contractual obligations contained solely in the promissory notes and failed to rule upon the following:

- a) whether Plaintiff undertook responsibility for the management of the properties, either directly or through its agent, pursuant to the forbearance agreements; and, if so,
 - b) whether Plaintiff's failure to give due consideration of a bona fide offer to purchase a portion of the collateral was a breach of its duty of good faith and fair dealing under said forbearance agreements.
2. The Court erred in ruling that Plaintiff need not give any consideration to, or approve, a bona fide offer of purchase when Defendants produced evidence that the offer was an arms length transaction, for fair market value, the property was ultimately sold for less than the offer, and that Defendants suffered substantial harm due to Plaintiff's lack of good faith and fair dealing.
3. The Court neglected to consider whether the non-specific language of the cross-collateralization and cross default provision contained in the Promissory Note dated July 25, 2008, created a duty on the part of the Plaintiff to accept partial satisfaction of the indebtedness before commencing an action to recover against the remaining collateral.
4. The Court erred in dismissing Defendants' fiduciary duty claims because:
- a. Plaintiff expressly conditioned the forbearance agreement on its ability, either directly or through its approved agent, to manage the real property secured by its mortgages;
 - b. Plaintiff selected a property manager and negotiated and approved the management contract;
 - c. By assuming direction and control over the property manager with respect to

its management of the property, Plaintiff voluntarily entered into a fiduciary relationship in favor of Defendants;

d. By virtue of the foregoing relationship, Plaintiff owed a fiduciary duty to Defendants; and

e. Plaintiff breached its fiduciary duties by failing to consider and/or approve the bona fide offer to purchase the property; interfering with tenant relationships; and otherwise failing to manage the property in a manner consistent with such fiduciary responsibilities.

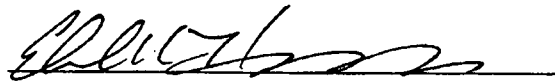
5. The Court erred in dismissing Defendants' claim under the South Carolina Unfair Trade Practices Act ("SCUTPA") because Plaintiff's interference with the property management; abuse of its fiduciary relationship; as well as its failure to consider and/or approve the bona fide offer to purchase a portion of the collateral; are evidence of unfair and deceptive business procedures and practices that are capable of repetition by Plaintiff.
6. The Court misapprehended the law in exempting Plaintiff from the provisions of SCUTPA as neither the SCUTPA or state law provides for a general banking exemption when the alleged actions do not involve Federally regulated behavior.
7. The Court erred in finding Defendants' counterclaim for duress failed as a matter of law because South Carolina common law does allow a party to a contract to void an amendment or contract executed under duress and, therefore, Defendants are entitled to recover the reasonable and proximate damages sustained as a result of such improperly obtained amendment or contract.

Based on the foregoing, the Defendants respectfully request that the Order dated September 11, 2015 be reconsidered and rescinded, and that the Defendants be allowed to proceed to a jury trial on the merits.

[Signature Page Follows]

TD BANK, N.A. v. BLACK DIAMOND, LLC et al.
CIVIL ACTION NO. 2012-CP-07-0944
Motion for Reconsideration Pursuant to Rule 59, SCRC

Respectfully submitted,



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Attorneys for David A. Brosman

And:

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Attorneys for Black Diamond, LLC and
J. Christopher Lindgren

This 21st day of September, 2015.

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TD BANK, N.A., Successfully by)
Merger to Carolina First Bank,)

Plaintiff,)

v.)

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

Defendants.)

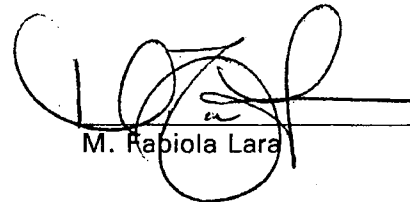
IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

CERTIFICATE OF SERVICE

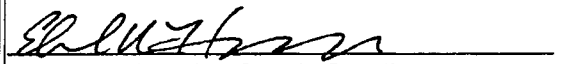
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JERRI ANN ROSEHEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The undersigned hereby certifies that on the 21st day of September, 2015 she served a copy of the attached *Motion Slip and Motion for Reconsideration* upon counsel for the Plaintiff by depositing a true and accurate copy thereof in the United States mail with sufficient postage prepaid to:

Michael Bogle, Esquire
Womble Carlyle Sandridge & Rice, LLC
Post Office Box 10208
Greenville, SC 29603


M. Rapiola Lara

Sworn to and Subscribed before me
this 21st day September, 2015.


Notary Public for South Carolina
My Commission expires: 7/20/2017

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

Plaintiff,

v.

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

Defendants.

2015 SEP 22 PM 3:26
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

BEAUFORT COUNTY, S.C. No. 2012-CP-07-0944
CLERK OF COURT

**TD BANK'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR RECONSIDERATION
OF THE COURT'S ORDER STRIKING
DEFENDANTS' JURY TRIAL
DEMAND**

TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank") submits the following Memorandum in Opposition to Defendants Black Diamond, LLC ("Black Diamond"), J. Christopher Lindgren ("Lindgren"), and David A. Brosman's ("Brosman") (collectively, "Defendants") Motion for Reconsideration of the Court's June 10, 2015, Order Striking Defendants' jury trial demand ("the Order"). In short, the Court should deny Defendants' Motion because the Order is in accord with South Carolina law, there has not been any "intervening change in controlling law," and the Motion improperly "seeks to have the Court rethink what the Court ha[s] already thought through," Dockins v. Benchmark Commc'ns, 180 F.R.D. 294, 295 (D.S.C. 1998).

BRIEF FACTUAL BACKGROUND:

This is a commercial foreclosure action involving loan documents, including Notes, Mortgages, and Guaranty Agreements, that Defendants executed in favor of TD Bank. Alleging that Black Diamond is in default under the Notes, TD Bank seeks to foreclose on the Mortgages and recover any deficiency after the foreclosure sale from the Guarantors. In response to the

Complaint, Defendants filed numerous counterclaims against TD Bank, including ones for negligent misrepresentation, interference with prospective economic relations; and breach of contract and of the covenant of good faith and fair dealing to the extent such a claim is *not* based on the cross-collateralization of the loans or the Bank's decision not to consent to the proposed short-sale.¹ Defendants requested a jury trial on all of the claims and counterclaims in this matter.

TD Bank subsequently moved the Court to strike Defendants' jury trial demand, asserting that Defendants are not entitled to and/or waived any right to a jury trial in this case. Following a March 24, 2015, hearing on the Bank's Motion, and after review of the Bank's supporting memorandum and Brosman's Memorandum in Opposition to the Motion, the Court granted TD Bank's Motion. In doing so, the Court held that:

1. Defendants are not entitled to a jury trial on the Bank's foreclosure and deficiency claims against them as foreclosure actions are equitable in nature and, in accordance with S.C. Code Ann. § 29-3-660, deficiency judgments are incidental to such equitable actions;
2. Defendants' counterclaims are permissive and therefore do not entitle Defendants to a jury trial in this equitable action;
3. Black Diamond contractually waived its right to a jury trial.

Defendants now move the Court to reconsider the Order because: (1) the South Carolina Supreme Court recently granted a petition for rehearing in a case that the Order cites, Carolina First Bank v. BADD, LLC, No. 207486, 2015 WL 340791 (Jan. 28, 2015), and (2) the Court "failed to consider the arguments made by Defendants that the jury trial waivers do not extend to

¹ The Court has granted TD Bank summary judgment on Defendants' other counterclaims for: (1) breach of contract and of the covenant of good faith and fair dealing, to the extent that claim is based on the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short-sale; (2) breach of fiduciary duty; (3) duress; and (4) unfair trade practices.

the counterclaims and that the Plaintiff is barred from enforcing them because of its conduct.”

Motion for Reconsideration.

STANDARD OF REVIEW

Rule 59(e) of the South Rules of Civil Procedure, which is “substantially” the same as the Federal Rule,” permits a court to “alter or amend [a] judgment.” S.C. R. Civ. P. 59(e); id., at Notes (stating that “Rule 59 is substantially the Federal Rule”). However, “[r]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” In re Cable & Wireless, PLC, 332 F. Supp.2d 896, 899-900 (E.D. Va. 2004). Rule 59 “permits a court to amend a judgment within ten days for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” E.E.O.C. v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997). “Motions under Rule 59 are limited in scope and are not to be used to ‘rehash’ the same arguments and facts previously presented.” Dockins v. Benchmark Commc'ns, 180 F.R.D. 294, 295 (D.S.C. 1998) (“A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court rethink what the Court ha[s] already thought through-rightly or wrongly”).

ARGUMENT:

I. The Court Should Deny Defendants’ Motion for Reconsideration as the Order Is Supported by South Carolina Law.

The Order is well supported by existing South Carolina statutory and case law, and therefore the Court should deny Defendants’ Motion for Reconsideration. Defendants argue that, because the Order cites the BADD decision, the Court should automatically reconsider the Order in light of the Supreme Court’s April 9, 2015 grant of a petition for rehearing. Such an argument is baseless because the state supreme court has not overturned BADD (which is still good law),

and, even putting BADD aside, the Order is in accord with binding and controlling South Carolina law.

A. Under Controlling South Carolina Law, Defendants Are Not Entitled to a Jury Trial on TD Bank's Equitable Foreclosure and Deficiency Claims Against Them.

As the South Carolina Rules of Civil Procedure and state case law recognize, foreclosure actions, like this one, are equitable in nature, and, as a result, parties to such an action are not entitled to a jury trial as a matter of right. See, e.g., Rule 71(a), SCRPC (“Actions to foreclose liens . . . shall be tried by the court”); Wachovia Bank, Nat. Ass’n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440-41 (2014) (“A mortgage foreclosure is an action in equity. . . . In equity the parties are not entitled, as a matter of right, to a trial by jury”) (internal citations omitted). Furthermore, South Carolina statutory and case law dictate that deficiency claims against third parties, like TD Bank’s against Lindgren and Brosman, are part and parcel of equitable foreclosure actions and are to be decided *by the court*, not a jury. In fact, S.C. Code Ann. § 29-3-660 provides that a deficiency claim against “*any person other than the mortgagor*” is part of a foreclosure action and is to be “adjudge[d]” by the court. S.C. Code Ann. § 29-3-660 (emphasis added). See also Welborn v. Cobb, 92 S.C. 384, 389-90, 75 S.E. 691, 693 (1912) (internal citations omitted) (holding that an action against a third party guarantor and for foreclosure of real property was “on the equity side of the Court”).²

² See also Fed’l Land Bank of Columbia v. Davant, 292 S.C. 172, 178, 355 S.E.2d 293, 296 (Ct. App. 1987) (“Section 29-3-660 specifically authorizes the entry of a deficiency judgment when the mortgage debt remains unsatisfied after sale of the mortgaged premises,” recognizing that “a judgment for deficiency is merely incidental to the relief sought in a foreclosure action.”) (internal citations omitted); Perpetual Bldg. & Loan Assn. v. Braun, 270 S.C. 338, 341, 242 S.E.2d 407, 408 (1978) (“The United States Supreme Court in Shepherd v. Pepper, 133 U.S. 626, 10 S.Ct. 438, 33 L.Ed. 706 (1890), held a decree for a deficiency to be a necessary incident of a foreclosure suit in equity.”); Am.Jur. 2d Mortgages § 692 (“[I]n the absence of a statute construed as providing otherwise, a defendant in a mortgage-foreclosure suit has no absolute

Because the Order's holding that Defendants are not entitled to a jury trial on the Bank's equitable foreclosure and deficiency claims against them is well supported by and in accord with binding South Carolina precedent and statutes, the Court should deny the Motion for Reconsideration.

B. Defendants Are Not Entitled to a Jury Trial on Their Counterclaims Because Binding South Carolina Precedent Defines Such Counterclaims as Permissive.

The Order holds that Defendants' counterclaims are permissive and therefore do not entitle Defendants to a jury trial. Putting BADD aside, such a finding still is in accordance with binding South Carolina case law, and, as a result, the Court should deny Defendants' Motion for Reconsideration. It is well-settled under South Carolina law that "[i]f the complaint is equitable" – as it is in this case – "and the counterclaim is legal and permissive, the defendant waives his right to a jury trial." Blackburn, at 328, 755 S.E.2d at 441. "By definition a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). Furthermore, in order to be compulsory, a counterclaim must have a "logical relationship" with the underlying claims. Id.

In regard to foreclosure actions, South Carolina courts (other than BADD), including the South Carolina Supreme Court in DAV Corp., have held that legal counterclaims are *permissive*, and not compulsory, if they do not impact the enforceability of the underlying note. See, e.g., id. The DAV plaintiff filed an action to foreclose "on a note and mortgage given" by the defendant "to finance the purchase of real property." DAV Corp., at 516, 381 S.E.2d at 904. The defendant counterclaimed for breach of two separate oral agreements regarding the purchase of

right to a jury trial of the issues of fact bearing upon the plaintiff's right to recover a deficiency judgment against him or her.").

the defendant's interest in a joint venture agreement. The DAV court held that such a counterclaim did not "affect the enforceability of" or bear a "logical relationship" with the underlying note, and, therefore was "permissive." Id., at 518-19, 381 S.E.2d at 905. Like the DAV counterclaim, Defendants' remaining counterclaims against the Bank do not "affect the enforceability of" or bear a logical relationship with the underlying loan documents. Notably, as Defendants have acknowledged, the counterclaims are all premised on events that occurred after the execution of the loan documents. See Defs. Memo in Opp. to Bank's Motion to Strike Jury Trial Demand, at 4-5 (asserting that TD Bank's purported acts in furtherance of the counterclaims were "subsequent to" and "after" the execution of the forbearance agreements") (relevant portion attached hereto as Exhibit 1). Consequently, as the Order held, and in accordance with controlling South Carolina precedent, the counterclaims are permissive and do not entitle Defendants to a jury trial. As a result, the Court should deny Defendants' Motion for Reconsideration.

II. Defendants' Attempts to Reargue the Contractual Waiver of Any Right to a Jury Trial Is Improper and Cannot Be a Basis for Reconsideration of the Order.

In regard to the Order's finding that Black Diamond waived any right to a jury trial when it executed the \$3.5 Million Note, Defendants argue that the Court "ignored" their counterarguments. Motion for Reconsideration, at 2. However, such an assertion is improper for a Rule 59 Motion to Reconsider as Defendants already raised and the Court already rejected those very arguments.³ As courts have recognized, "[a] litigant may not use Rule 59 to re-litigate

³ Nonetheless, the Order's finding that Black Diamond waived any right to a jury trial in this matter is in accord with South Carolina law, which allows a party to "waive the right to a jury trial by contract," Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). As noted in the Order, pursuant to the \$3.5 Million Note, Black Diamond, pursuant to a conspicuous paragraph in capital letters above the signature line, agreed to waive any right to a jury trial in "any action" "relating directly or indirectly" to "any acts or omissions of lender or

issues already decided by the court[, and] [i]t is an improper use of the motion to reconsider to ask the Court to rethink what the Court . . . already thought through – rightly or wrongly.” Cable & Wireless, 332 F. Supp.2d at 899-900 (citing Clapper v. Chesapeake Conference of Seventh-Day Adventists, No. 97-2648, 1998 WL 904528, *3 (4th Cir. Dec. 29, 1998) (“The Rule 59(e) motion may not be used to re-litigate old matters”)).⁴

CONCLUSION:

For the reasons explained above, the Court should deny Defendants’ Motion for Reconsideration of the Court’s Order Striking Defendants’ Jury Trial Demand.

This 18th day of September 2015
Greenville, South Carolina



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

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

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Attorneys for Plaintiff TD Bank, N.A.,

Successor by Merger to Carolina First Bank

borrower.” \$3.5 Million Note. See Blackburn, at 321, 755 S.E.2d 437 (enforcing a similar jury trial waiver in loan documents). Such a waiver clearly encompasses the claims and counterclaims in this matter.

⁴ Because Federal Rule 59 is substantially similar to Rule 59 of the South Carolina Rules of Civil Procedure, these cases are applicable. Rule 59, S.C.R.C.P. (“This Rule is substantially the Federal Rule”).

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2012-CP-07-0944

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
RECONSIDERATION

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SOUTH CAROLINA

The Defendants, Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman, by and through their undersigned counsel, file this Memorandum in support of their motion for reconsideration of this Court's Order dated September 11, 2015 (the "Order"). For the following reasons, the Court's Order granting summary judgment in favor of Plaintiff on various counterclaims by Defendants should be rescinded.

STANDARD

"Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 329-30, 802. In considering a motion for summary judgment, the Court neither makes factual determinations nor considers the merits of competing testimony. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E. 2d 1, 5 (2006); see also *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) ("At the summary judgment

stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.”). In *Hancock*, the South Carolina Supreme Court clarified conflicting case law regarding the level of evidence required to withstand a motion for summary judgment. *Id.* at 330-31, 803. Specific to the causes of action at issue here, as the non-moving parties, the Defendants are required only to show “a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Id.* Plaintiff is not entitled to summary judgment because the Defendants have provided the Court with far more than a “mere scintilla of evidence.”

ARGUMENT

- I. **Plaintiff breached its covenant of good faith and fair dealing when, after assuming control over the management of the collateral, it failed to give consideration to a bona fide offer to purchase, the approval of which would have substantially mitigated its damages.**

The Order granted summary judgment to Plaintiff on Defendants' counterclaims for breach of contract and of the covenant of good faith and fair dealing, “to the extent that claim is based on the cross collateralization of the loans” and the Plaintiff’s failure “to agree to a proposed short sale.” [Order, p.9]. However, it is unclear whether or not this Court intended to grant summary judgment to Plaintiff on Defendants' counterclaim for breach of contract and the covenant of good faith and fair dealing to the extent such claims arose out of the forbearance agreements or the cross collateralization and cross default language contained in the Modification of Mortgage. An implied covenant of good faith and fair dealing exists in every contract. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E. 2d 816 (Ct. App. 2009). The Court’s findings do not address whether Plaintiff’s failure to give any consideration at all to what was indisputably a bona fide offer to purchase a portion of the collateral for its then fair market value, constituted a breach of such duty.

This Court appeared to be persuaded by Plaintiff’s reliance on foreign authority for the proposition that a mortgagee does not owe a mortgagor any duty to mitigate its damages and therefore has no duty to give consideration to a short sale. However, to the extent it relied upon

such authority in concluding Plaintiff did not owe Defendants a duty of good faith and fair dealing, that reliance is misplaced.

At the time the offer was received, the Defendants were not in default under the forbearance agreements. To hold that Plaintiff did not have a duty to respond to the Defendants regarding a release of the collateral attendant with a sale is tantamount to holding that a mortgagee can capriciously interfere with the transfer of encumbered property by simply ignoring any request for release of the collateral. Even if Plaintiff were under no obligation to mitigate its damages, which Defendants contest, Plaintiff still had a duty to give consideration to the requested release and communicate with Defendants regarding the terms, if any, upon which Plaintiff would consent to the sale. Our Supreme Court has recognized, at least with respect to home loans, that mortgagees do owe borrowers a duty to treat in good faith. See: *Supreme Court of South Carolina Administrative Order 2011-05-02-01*. While said Administrative Order is not directly applicable to a commercial transaction, it nevertheless suggests that a duty of good faith and fair dealing exists within the context of mortgage contracts.

As for loss mitigation, our courts have consistently held that the duty to mitigate losses applies to contracts. *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956). The reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when conflicting evidence is presented. *Chastain v. Owens Carolina, Inc.*, 310 S.C. 417 at 420, 426 S.E.2d 834, at 836; *Hinton v. Designer Ensembles, Inc.*, 335 S.C. 305, 320, 516 S.E.2d 665, 672 (Ct.App.1999) overruled on other grounds by *Hinton v. Designer Ensembles, Inc.* 343 S.C. 236, 246, 540 S.E.2d 94, 99 (2000); *Cisson Constr., Inc. v. Reynolds & Assocs., Inc.*, 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct.App.1993); *McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 511, 354 S.E.2d 405, 408 (Ct.App.1987). Under the summary judgment standard, the Court should give every benefit of

the doubt to the non-moving party. *Watters v. Terminix Service, Inc.*, 376 S.C. 632, 635, 658 S.E.2d110, 111 (Cl. App. 2008).

Recognizing these principles, the court in *Cisson* nevertheless determined it need not weigh the reasonableness of a mortgagee's decision to decline partial payment by a third party guarantor on a defaulted note. The court looked to 22 *Am. Jur. 2d Damages* §506 (1988), for guidance on this issue and concluded that the mortgagee did not have to pursue its remedies against the collateral before seeking to recover as against a guarantor. This case is distinguishable from *Cisson* in the following particulars.

As discussed above, when the bona fide offer was received and relayed to Plaintiff for consideration, the Defendants were not in default under the forbearance agreements. Importantly, Plaintiff was not being asked to forego a remedy to which it was entitled or to modify or restructure the loan as in *Cisson*. Rather, it was being asked to give fair and objective consideration to a purchase offer on only a portion of the collateral securing the loan for purposes of a partial release. The Defendants submitted testimony from three witnesses establishing that the Plaintiff never even responded to the request for a partial release pursuant to the letter of intent. Conversely, Plaintiff produced no evidence that anyone with authority to approve the purchase even knew of the offer, much less that Plaintiff actively considered the merits of the proposed sale. To the contrary, the evidence indicates Plaintiff's agent was secretly soliciting offers on the property from others without disclosure to Defendant Black Diamond.

Such solicitation is evidence of the fact that Plaintiff was in control over the collateral via its hand-picked property manager at the time the offer was received, creating at least a question of fact as to the relationship and duties by and among the parties. As discussed below, Defendants presented evidence of a fiduciary relationship arising out of Plaintiff's direct involvement in the management of the collateral property.

Furthermore, the cross collateralization and cross default language contained in the Modification of Mortgage (the "Modification") by and between Plaintiff and Defendant Black Diamond was silent as to the methods and procedures to be followed in the event of a request for a partial release of the collateral. Given the absence of specific language in the Modification, there is at least a question of fact as to whether (a) Plaintiff acted reasonably in failing to even consider a partial release of the collateral; (b) there was adequate collateral remaining to secure the outstanding indebtedness; or (c) the offer was reflective of the fair market value of the collateral. Plaintiff's failure to give consideration to the offer is particularly suspect given that it ultimately accepted a less attractive offer after generating considerable fees, charges and other damages, which ultimately forced Defendants into default of the forbearance agreements.

In light of the forgoing, the reasonableness of Plaintiff's actions in this particular case; whether a breach of its duty of good faith and fair dealing occurred; and whether Plaintiff owed a duty to mitigate its losses are clearly questions of fact for a jury. Therefore, the findings set forth in I(B) and that portion of the Order relating thereto, should be rescinded. Alternatively, Defendants ask this Court to revise its Order to clarify whether the decision rendered applies to all claims for breach of good faith and fair dealing arising out of the forbearance agreements or the Modification of Mortgage, or both.

II. Defendants presented sufficient evidence regarding Plaintiff's exertion of control over the property manager to overcome summary judgment as to its claim of breach of fiduciary duty.

The Court correctly cited *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003), for the proposition that a fiduciary duty does not arise between a bank and its customer in the ordinary creditor-debtor relationship. However, Defendants presented more than a "mere scintilla" of evidence to support their claim that Plaintiff departed from that normal relationship in this case. *Hancock, Supra*. "Summary judgment should not be granted even

when there is no dispute as to the evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Gignilliat v. Gignilliat, Savits & Bettis, LLP*, 382 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

When Plaintiff intervened in the management of the collateral and other business operations of Defendant Black Diamond, its relationship to the company was altered. This is evident in the forbearance agreements, which were conditioned, in part, on Plaintiff and Defendants entering into a management agreement whereby management of Defendant Black Diamond would be turned over to a manager designated by Plaintiff. [*Plaintiff's Mot. for Sum. Judgment, Ex. E, Para. 6(F)*]. The forbearance agreements further provided that the manager would have all the rights and responsibilities of a receiver. *Id.*

Ultimately, Defendant Black Diamond did enter into a contract with a property manager, selected and approved by Plaintiff for this purpose and the evidence clearly illustrates that Plaintiff internally regarded the property manager as a receiver and treated him as such. In recognition of Plaintiff's de facto assumption of control, the property manager rendered "confidential" reports to the Plaintiff, casting the property owner (to whom the property manager owed fiduciary duties) in a negative light and urged the bank to formally take over control of the property, all the while having lunch discussions with bank representatives about doing more business with Plaintiff and putting its own client, Defendant Black Diamond, in receivership.

It is clear that the property manager owed a fiduciary duty to its principal, Defendant Black Diamond. See *Fender v. Fender*, 285 S.C. 260, 329 S.E.2d 430 (1985); *Tate v. Marco*, 27 S.C. 493, 4 S.C. 71 (1887). The evidence further indicates that Plaintiff stepped into the property manager's shoes and, correspondingly, into its fiduciary duties. See: 10 S.C. *Jur. Banks and Banking* §170 (Banks must recognize that once they establish a control relationship in a debtor's business, by rights in the loan agreement, or otherwise, they may be found to have a fiduciary obligation to the debtor). Whether or not its exertion of control over the property

manager was sufficient to impute a fiduciary duty to Plaintiff is a question of fact for the jury. Further, in considering the allegations of breach of fiduciary duty, the Court should have construed all ambiguities, conclusions, and inferences in evidence against the Plaintiff in this case. *Folkens v. Hunt*, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

III. Summary judgment on Defendants' claim under the SCUTPA was inappropriate for two reasons: a) Defendants presented sufficient evidence of Plaintiff's unfair and deceptive business practices capable of repetition; and b) there is no prophylactic banking exemption under the SCUTPA.

The Court declined to accept that Plaintiff's failure to treat in good faith regarding loss mitigation, as well as its exertion of control over the collateral and business operations of Defendant Black Diamond pursuant to the forbearance agreements, was capable of repetition. As with the issue of fiduciary duty discussed above, the Court appears to have substituted its own view of the weight and sufficiency of the evidence rather than construing all ambiguities, conclusions, and inferences against the Plaintiff in this case.

Further, the Court incorrectly reads a blanket exception for banking institutions into the South Carolina Unfair Trade Practices Act ("SCUTPA"). Although there is some authority for exempting certain banking activities from the SCUTPA, other courts have rejected the argument that a generalized banking industry exemption exists. See, e.g., *Maybank v. BB&T Corporation, et al.*, C.A. No. 2001-CP-23-8578 (Order and Final Judgment dated November 10, 2014). The SCUTPA exemption only excludes from the SCUTPA "those actions or transactions which are allowed or authorized by a regulatory agency or other statutes." *Id.* Absent express statutory language to the contrary and under the facts applicable in this case, Plaintiff's activities fall outside the scope of federal banking regulations.

IV. The Court misapprehended the law with respect to Defendants' claims for duress.

The Court accepted Plaintiff's assertion that duress is not recognized as a cause of action in South Carolina, citing *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E. 2d 424 (Ct. App. 1984). However, *Troutman* does not stand for the proposition that economic duress

cannot be an independent cause of action. Rather than proscribe all claims based on economic duress, our Supreme Court left the door open, merely stating there was "no compelling reason under the facts and circumstances of this case to extend the law of intentional torts in South Carolina to embrace economic duress." *Id.* at 603. The Court's decision not to allow a cause of action for economic duress in *Troutman* was further influenced by the fact that claimant could not prove the necessary elements of the cause of action.

In the case of *Wurtz v. Fleischman*, 89 Wis. (2d) 291, 278 N.W. (2d) 266 (Wis. App. 1979), *rev'd on other grounds*, which is quoted in *Troutman*, the elements of the tort of economic duress are set forth as follows: (1) a person used his superior bargaining position unreasonably or unjustifiably, (2) by wrongful conduct, generally threats, (3) the conduct or threats caused the injury, (4) the victim would not have acquiesced in the absence of wrongful threats, (5) resultant damages, and (6) the victim had no adequate legal remedy available to protect his interests at the time it was threatened.

Defendants have alleged that the cross collateralization language, the forbearance agreements, the property management agreement and the ultimate sale of a portion of the collateral were all obtained under duress. Specifically, Defendants presented evidence that they had absolutely no choice but to accede to Plaintiff's demands or face financial ruin. Applying the foregoing test to the facts of this case, it is clear that if the evidence presented by Defendants is presumed to be true, as it must be for purposes of summary judgment, the foregoing test is met. Plaintiff's superior bargaining power is obvious. Similarly, that Defendants would not have acquiesced to the dictatorial terms if they had any other recourse is also apparent. The resulting damage, that Defendants were forced to sell the collateral for considerably less than the original offer, thereby incurring greater personal liability is also established. Whether or not Plaintiff's wrongful conduct constituted a general threat is a jury question. As the Court misapprehended the ruling in *Troutman* and a jury question exists under the recognized test for establishing a claim for economic duress, summary judgment was inappropriate.

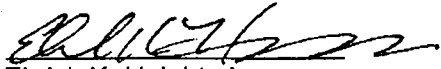
Even if, under the facts of this case, Defendants cannot avail themselves of a cause of action for economic duress, South Carolina does recognize a cause of action for reformation of a contract or modification obtained through duress. *Willms Trucking Company, Inc. v. JW Construction Co., Inc.*, 314 S.C. 170, 442 S.E.2d 197 (1994). In *Willms*, the Court permitted a claim for duress, even in the absence of a special pleading and without demand for reformation of the contract. Therefore, Defendants respectfully request that in the alternative, the Order be revised to clarify that they may still maintain an action for reformation and recovery of damages incident thereto.

The three year statute of limitations imposed by S.C. Code Ann. §15-3-530, does not preclude the relief requested here as the cross collateralization language, forbearance agreements, property management agreement and contract of sale were all executed less than three years prior to the commencement of this action.

CONCLUSION

For the reasons set forth above, the Defendants request that this Court deny the Plaintiff's Motion for Summary Judgment, allow this matter to proceed to trial on all claims and issues, and for such other and further relief as may be just and proper.

MINOR, HAIGHT & ARUNDELL, P.C.

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and J. Christopher Lindgren

Hilton Head Island, South Carolina
This 2nd day of October, 2015.

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TD BANK, N.A., Successfully by)
Merger to Carolina First Bank,)

Plaintiff,)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

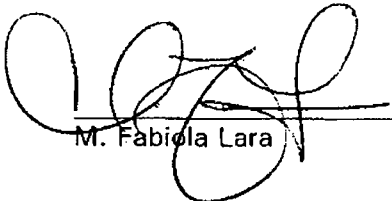
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CLERK OF COURT
SOUTH CAROLINA
JUDICIAL CIRCUIT

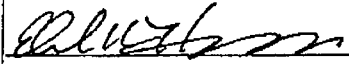
The undersigned, M. Fabiola Lara, hereby certifies that on the 2nd day of October, 2015, she deposited a copy of the *Memorandum in Support of Defendants' Motion for Reconsideration* to counsel of record in the United States mail with sufficient postage prepaid to:

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Womble Carlyle Sandridge & Rice, LLC
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Keating L. Simons, III, Esq.
SIMONS & DEAN
147 Wappoo Creek Drive, Ste. 604
Charleston, SC 29412


M. Fabiola Lara

Sworn to and Subscribed before me
this 2nd day October, 2015.


Notary Public for South Carolina

My Commission expires: 7/20/2017

Church, Susan

From: Bogle, Michael
Sent: Thursday, January 14, 2016 5:26 PM
To: 'McLeod, Heather'
Cc: Rick Haight; Custer, Clay; Church, Susan; 'Keating L. Simons, III'; 'Debbie Coffey for Keating L. Simons III'; Elaine Montgomery
Subject: RE: TD Bank vs. Black Diamond; 12-944
Attachments: Order.pdf

Thanks, Heather.

One issue that came up at our last hearing was the status of the Supreme Court's decision in *Carolina First v. BADD*, upon which TD Bank relied (in part) in support of its Motion to Strike Jury Trial Demand – as I'm sure the court is aware, the Supreme Court ultimately decided to adhere to its original opinion in that case and dismissed the Petition for Rehearing. Attached is a copy of the Order.

Please let me know if Judge Dukes has any questions or wishes to discuss. Thanks,

Michael

Michael James Bogle
Womble Carlyle Sandridge & Rice, LLP

550 South Main Street
Suite 400
Greenville, SC 29601

Phone: 864-255-5426
Fax: 864-239-5865
Email: mbogle@wcsr.com

12/13/11

Fwd: Black Diamond - Loan #xxx-xxx-3655

From: chrislindgren <chrislindgren@cs.com>

To: BakerWilkins <BakerWilkins@charter1commercial.com>

Subject: Fwd: Black Diamond - Loan #xxx-xxx-3655

Date: Wed, Dec 8, 2010 2:35 pm

—Original Message—

From: Rose, Mike <Mike.Rose@carolinafirst.com>

To: 'chrislindgren@cs.com' <chrislindgren@cs.com>

Cc: Trent, Matt' <MTrent@wcsr.com>

Sent: Thu, Dec 2, 2010 5:53 am

Subject: Black Diamond - Loan #xxx-xxx-3655

Chris:

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

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

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

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

Mike

MICHAEL C. ROSE

Senior Vice President

Carolina First Bank

40 Calhoun Street

Charleston, South Carolina 29401

864.351.8673 Mobile

843.727.8428 Direct

843.723.7296 Fax

mike.rose@carolinafirst.com

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

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

12/13/11

Fwd: Black Diamond - Loan #xxx-xxx-3655

delivering the message to the intended recipient, please note that any dissemination, distribution, copying or the taking of any action in reliance upon the message is strictly prohibited. If you have received this communication in error, please notify the sender immediately.

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

Sent: Wednesday, December 01, 2010 11:19 PM

To: Rose, Mike

Subject: Fwd:

Mike:

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

—Original Message—

From: Baker Wilkins <BakerWilkins@charter1commercial.com>

To: chrislindgren@cs.com

Cc: natrackett@brozexport.com

Sent: Wed, Dec 1, 2010 3:26 pm

Subject: FW:

Chris –

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

Baker Wilkins

843.247.2470

baker@charter1commercial.com

From: Joe Fraser [mailto:JFraser@Fraser-Construction.net]

Sent: Friday, September 10, 2010 2:51 PM

To: Baker Wilkins

Subject:



Baker,

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

Joe

BD000347

RECEIVED

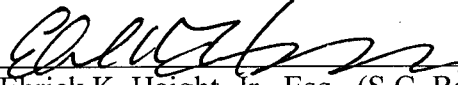
OCT 11 2016

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal (Volumes I & II) contains all material proposed to be included by any of the partes and not any other material.

October 4, 2016.


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