

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

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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 I

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2015 JUN 11 PM 1:36
C.A. No. 2012-CP-07-0944

**ORDER GRANTING TD BANK'S
MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND**

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, "Defendants"), asserting that Defendants are not entitled to and/or waived any right to a jury trial in this case. On March 24, 2015, the Court held a hearing on the Bank's Motion. After review of the Bank's Motion and its supporting Memorandum, Defendant David A. Brosman's Memorandum in Opposition to that Motion, and hearing arguments from counsel, the Court GRANTS TD Bank's Motion for the reasons set forth below.

BACKGROUND:

This is a commercial foreclosure action involving:

- Two promissory notes that Defendant Black Diamond, LLC ("Black Diamond") executed in favor of the Bank: (1) a Promissory Note for \$3.5 Million ("the \$3.5 Million Note"), and (2) a Promissory Note for \$2 Million ("the \$2 Million Note") (collectively, "the Notes");

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

- Mortgages on two parcels of Beaufort County, South Carolina real property that Black Diamond provided to the Bank to secure the Notes (“the Mortgages”); and
- Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, “the Guarantors”) executed in favor of the Bank and which guaranteed Black Diamond’s payment of the Notes.

TD Bank alleges that Black Diamond is in default under the Notes, and it seeks to foreclose on the Mortgages that Black Diamond executed in its favor and recover any deficiency after the foreclosure sale from the Guarantors, who guaranteed Black Diamond’s debts to the Bank. Compl.

In response to the Complaint, Black Diamond and the Guarantors filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. Black Diamond and the Guarantors have requested a jury trial of all the claims and counterclaims in this matter.

FINDINGS:

I. Defendants Are Not Entitled to a Jury Trial on the Bank’s Equitable Foreclosure and Deficiency Claims Against Them.

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are “not entitled, as a matter of right, to a jury trial.” Carolina First Bank v. BADD, LLC, No. 2013-000107, 2015 WL 340791, *1 (Jan. 28, 2015). See also S.C. R. Civ. P. Rule 71(a) (“Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53”). In BADD, the South Carolina Supreme Court recently confirmed that guarantors, who are parties to a foreclosure action “for the purpose of collecting a deficiency,” are not entitled to a jury trial on that claim because deficiency judgments are “incidental to the main relief sought” in a foreclosure action. BADD,

at *2. In so holding, the BADD court relied on S.C. Code Ann. § 29-3-660,² which specifically grants a court the ability to award a deficiency judgment against a guarantor in a foreclosure action.

As noted above, this is a foreclosure action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the Guarantors. See Compl. As a result, Black Diamond is not entitled to a jury trial on the Bank's foreclosure action against it, BADD, at *1, and the Guarantors, whom "the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged," are not entitled to a jury trial on the Bank's claim against them because "a party does not have a right to a jury trial" on a deficiency claim, id., at *2.

II. Furthermore, Defendants Are Not Entitled to a Jury Trial on Their Permissive Counterclaims against the Bank.

The Court finds that, because Defendants asserted *permissive* counterclaims against the Bank in this equitable action, they are not entitled to a jury trial on those claims. A defendant is "entitled to a jury trial on his counterclaims in an equitable action," like this one, "only if the counterclaims are legal and compulsory." Id., at *3. "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." Id. As a result, in BADD, a foreclosure action in which the bank sought a

² S.C. Code Ann. § 29-3-660 provides: "In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases."

deficiency against a guarantor, the South Carolina Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the guaranty agreement's enforceability was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that "the execution of the guaranty agreements was the 'transaction or occurrence' that gave rise to [the guarantor's] inclusion in the Bank's foreclosure complaint." Id. (emphasis added). Thus, in order to be compulsory, the guarantor's counterclaims had to have a logical relationship with the guaranty agreement's execution or enforceability. The BADD court found that the guarantor's counterclaims were based on "an alleged conspiracy between the Bank" and a third party to "induce [the debtor's] default" on the underlying notes and the Bank's alleged breach of the covenant of good faith and fair dealing, which were "implied in the note, mortgage, and guaranty agreements," by virtue of the "purported conspiracy." Id., at *3. The Court held that the counterclaims did not have a "logical relationship to either the execution or enforceability of the guaranty agreements," and it noted that the claims instead "presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." Id. As a result, the counterclaims were permissive and did not entitle the BADD guarantor to a jury trial.

Like the BADD guarantor's counterclaims, Defendants' legal counterclaims against TD Bank are permissive in nature and do not entitle Defendants to a jury trial because they bear no "logical relationship" with the transaction that gave rise to the Bank's foreclosure and deficiency action against them — the execution of the notes, mortgages, and guaranty agreements. Defendants have asserted the following counterclaims against the Bank: breach of the covenant

of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. As with the BADD counterclaims, none of Defendants' legal counterclaims "affect the execution or enforceability" of the loan documents. Instead, they are premised on events that occurred after the execution of those documents, such as the Bank's refusal to accept a short sale of one of the mortgaged commercial properties. See, e.g., Brosman Answer and Counterclaim, at ¶ 27; Black Diamond and Lindgren Answer and Counterclaim, at ¶ 27. Importantly, Defendants, in Brosman's Memorandum in Opposition to the Bank's Summary Judgment Motion, confirmed that their counterclaims are based on alleged events that occurred "subsequent" to the execution of the parties' loan documents." See e.g., Def's Memo in Opp., at 4-5 (Alleging that the purported breach of contract was "subsequent to" and "after" the execution of the forbearance agreements.") Consequently, the Court finds that Defendants' legal counterclaims against the Bank are permissive and do not entitle Defendants to a jury trial.

Because Defendants are not entitled to a jury trial on the Bank's foreclosure claims against them or on their counterclaims against the Bank, the Court grants the Bank's motion to strike Defendants' demand for a jury trial.

III. Alternatively, the Court Also Finds that Black Diamond Contractually Waived Its Right to a Jury Trial.

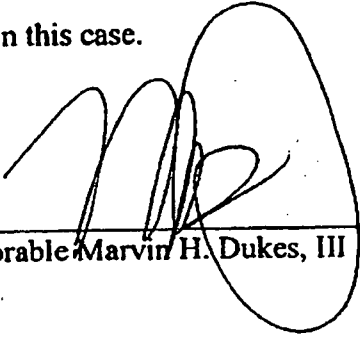
As an alternative ground for granting the Bank's motion to strike Defendants' jury trial demand, the Court also finds that Black Diamond contractually waived any right to a jury trial when it executed the \$3.5 Million Note. Under South Carolina law, "[a] party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). In this case, the \$3.5 Million Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

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

\$3.5 Million Note (emphasis added). As noted above, the claims and counterclaims at issue in this action relate directly to the \$3.5 Million Note, which the Bank asserts that Black Diamond is in default under, and the alleged "acts or omissions" of the Bank and Black Diamond. Therefore, per the plain, ordinary meaning of the \$3.5 Million Note's language, Black Diamond waived any right to a jury trial in this lawsuit.³

WHEREFORE, the Court GRANTS TD Bank's Motion to Strike Defendants' request for a jury trial on all claims and counterclaims in this case.

This 17 day of June 2015
Beaufort, South Carolina



The Honorable Marvin H. Dukes, III

³ The Court also finds that the Guarantors waived any right to a jury trial because the Guaranty Agreements clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the Guarantors unequivocally waived such a right in "any action," like this one, regarding the Notes and/or the "relationship between" the Bank and Black Diamond. See, e.g., Lindgren Guaranty of \$3.5 Million Note, at ¶ 21; Brosman Guaranty of \$3.5 Million Note, at ¶ 17; Brosman Guaranty of \$2 Million Note, at ¶ 17. See also Lindgren Guaranty of \$2 Million Note, at ¶ 9 (providing that Lindgren consents to "any waiver" of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter).

CERTIFICATE OF SERVICE

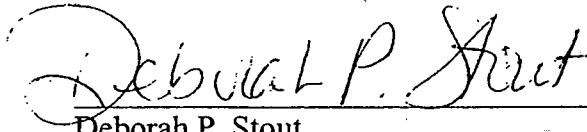
The undersigned hereby certifies that, on the 22nd day of June, 2015, she served a copy of the **Order Granting TD Bank's Motion to Strike Defendants' Jury Trial Demand** by depositing same in the United States Mail, proper first class postage affixed, and via email addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es).

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

2015 SEP 11 PM 3: 58

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

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

TERESA H. ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Plaintiff,

v.

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

Defendants.

**ORDER GRANTING TD BANK'S
MOTION FOR SUMMARY
JUDGMENT ON DEFENDANT'S
CLAIMS FOR BREACH OF
CONTRACT; BREACH OF
FIDUCIARY DUTY; DURESS; AND
UNFAIR TRADE PRACTICES**

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to grant it summary judgment on Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman's¹ (collectively, "Defendants") counterclaims, contending that there are no genuine issues of material fact as to any such claims. On March 24, 2015, the Court held a hearing on the Bank's Summary Judgment Motion.

After review of the Bank's Motion and its supporting Memorandum, Defendants' Memorandum in Opposition, and hearing arguments from counsel, the Court, for the reasons set forth below, **GRANTS** TD Bank summary judgment on Defendants' breach of contract and of the covenant of good faith and fair dealing claim as it relates to the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale; breach of fiduciary duty; duress; and unfair trade practices, but it **DENIES** the Bank's Motion for Summary Judgment on Defendants' remaining counterclaims.

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not made claims against the Bank.

BACKGROUND:

This is a commercial foreclosure action involving:

- Two promissory notes that Defendant Black Diamond, LLC ("**Black Diamond**") executed in favor of the Bank: (1) a January 2008 Promissory Note for \$3.5 Million ("**the \$3.5 Million Note**"), and (2) a July 2008 Promissory Note for \$2 Million ("**the \$2 Million Note**") (collectively, "**the Notes**");
- Mortgages on two parcels of Beaufort County, South Carolina real property that Black Diamond provided to the Bank to secure the Notes ("**the Mortgages**"); and
- Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, "**the Guarantors**") executed in favor of the Bank and which guaranteed Black Diamond's payment of the Notes.

Pursuant to the terms of the \$2 Million Note, the Notes are cross-collateralized. \$2 Million Note, at ¶ 10. In particular, the \$2 Million Note provides: "This Loan is cross-collateralized and cross defaulted with [the \$3.5 Million Note] in the name of Black Diamond, LLC in the amount of \$3,500,000.00 dated January 25, 2008 secured by real estate mortgage." Id.

TD Bank alleges that Black Diamond is in default under the Notes, and it seeks to foreclose on the Mortgages that Black Diamond executed in its favor and recover any deficiency after the foreclosure sale from the Guarantors, who guaranteed Black Diamond's debts to the Bank. Compl.

In response to the Complaint, Black Diamond and the Guarantors filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; negligent misrepresentation; duress; interference with prospective economic relations; and unfair trade practices. Those counterclaims are all based on the following allegations: (1) that the Bank coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager; (2) that TD Bank interfered with the property manager's contract; (3) that TD Bank elected not to agree to a September 2010

proposed short sale (which entailed a release of its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note); and (4) that TD Bank interfered with tenants. Answer and Counterclaims.

FINDINGS:

I. TD Bank Is Entitled to Summary Judgment on Defendants' Claim for Breach of Contract and of the Covenant of Good Faith and Fair Dealing to the Extent that Cause of Action Is Based on the Bank's Cross-Collateralization of the Notes and the Bank's Refusal to Consent to a Short Sale.

To the extent that Defendants' counterclaim for breach of contract and covenant of good faith and fair dealing² is based on the Bank's cross-collateralizing of the Loans and its refusal to consent to a September 2010 proposed short sale, the Court grants TD Bank summary judgment because there are no material questions of fact and the Bank is entitled to judgment as a matter of law as the statute of limitations bars any breach based on the July 2008 cross-collateralization and South Carolina law imposes no duty on a Bank to modify loan documents.

A. Cross-Collateralization of Loans:

Defendants contend that the Bank breached the Notes by cross-collateralizing them in July 2008. However, the statute of limitations for such a claim lapsed before Defendants filed their breach of contract counterclaim. S.C. Code Ann. § 15-3-530 provides a three year statute of limitation for breach of contract claims. The discovery rule determines the date of accrual for such a legal claim, and, under that rule, Defendant's breach of contract claim based on the cross-collateralization of the Notes accrued on the date Defendants "either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." Maier v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). In this case,

² South Carolina does not recognize a cause of action for the breach of the covenant of good faith and fair dealing that is independent and separate from a breach of contract cause of action. See, e.g., RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

Defendants admit that the Notes were cross-collateralized and allegedly breached in July 2008. See Lindgren Depo., at 50:111 (acknowledging the loans were cross-collateralized in July 2008). Furthermore, the very text of the \$2 Million Note, which was executed in July 2008, expressly states that the Note is “cross-collateralized and cross defaulted with” the \$3.5 Million Note, and Defendants are charged with knowledge of that Note’s provisions. See e.g., generally, York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013 (A “party who signed a contract is deemed to have read and understood ‘the effect’ of the contract”). However, Defendants did not file their counterclaim based on that cross-collateralization until April 2012 (for Black Diamond and Lindgren) and May 2012 (for Brosman) — over three years after they knew of the cross-collateralization and the alleged breach. As a result, to the extent Defendants’ breach of contract cause of action is based on the cross-collateralization of the Notes, the statute of limitation bars the claim and TD Bank is entitled to summary judgment on it as a matter of law.

B. Proposed Short-Sale:

Additionally, the Bank is entitled to summary judgment on Defendants’ breach of contract claim to the extent that cause of action is based on the Bank’s refusal to release its mortgage in conjunction with a September 2010 proposed sale of the property for an amount less than that owed by Defendants on the Notes. Defendants contend that the Bank had a duty to not only consider a loss mitigation / short sale proposal, but to also approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support or establish such an alleged duty, which essentially would rewrite the terms of the parties loan documents. In fact, other courts have held that banks had no legal duty to consider or approve loss mitigation or loan modification requests. See, e.g., James v.

Vanderbilt Mortgage, 2012 WL 441170, *4 (W.D.N.C. Jan. 23, 2012), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012) (holding that the lender had “no duty to forgo its rights under the terms of the loan to foreclose on the property”); Mudge v. Bank of Am., N.A. and TD Bank, N.A., 2013 WL 6095561, *3 (D.N.H. Nov. 20, 2013) (noting that a short sale “necessarily rewrites the terms of the parties’ mortgage agreement,” and the covenant of good faith and fair dealing in a loan document “cannot be used to require the lender to modify or restructure the loan”).

As a result, to the extent Defendants’ breach of contract claim is based on the breach of that non-existent duty, it fails as a matter of law.

II. The Bank Also Is Entitled to Summary Judgment on Defendants’ Breach of Fiduciary Duty Claim Because There Is No Evidence that the Bank Either Owed Bank Owed No Fiduciary Duty to Defendants.

The Court also grants TD Bank summary judgment on Defendants’ breach of fiduciary claim, which fails as a matter of law because there is no evidence that the Bank owed a fiduciary duty to Defendants or that the Bank breached such a purported duty.

To establish a claim for breach of fiduciary duty, Defendants must establish: (1) that the Bank owed them a fiduciary duty; (2) that the Bank breached that duty; and (3) that Defendants have suffered damages as a proximate result of that breach. See generally Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). However, “South Carolina holds [that] the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature,” id., at 671, 582 S.E.2d at 444, and Defendants have presented

no evidence to establish that the parties departed from the normal debtor-mortgage holder relationship or that the Bank assumed any kind of a fiduciary duty to Defendants whereby Defendants believed that the Bank was acting, not "in [its] own behalf, but in the interests of [Defendants]," Burwell v. S. Carolina Nat. Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). Additionally, even if such a fiduciary relationship existed, Defendants have not established that the Bank breached any purported fiduciary duty to them.

Consequently, the Court grants the Bank summary judgment on Defendants' breach of fiduciary duty counterclaim.

III. Defendants' Counterclaim for Duress Fails as a Matter of Law.

The Court also grants the Bank's Motion for Summary Judgment on Defendants' duress claim because South Carolina does not recognize such a cause of action. See, e.g., 8 S.C. Jur. Extortion, Blackmail and Threats § 25 ("South Carolina law does not recognize a cause of action for economic duress"). In Troutman v. Facetglas, Inc., 281 S.C. 598, 603, 316 S.E.2d 424, 427 (Ct. App. 1984), the South Carolina Court of Appeals found "no compelling reason . . . to extend the law of intentional torts in South Carolina to embrace economic duress."

Alternatively, even if South Carolina recognized such a claim, summary judgment nonetheless would be appropriate as there is no legal authority that the Bank's conduct constitutes duress. Defendants contend that the Bank's cross-collateralization of the loans in the \$2 Million Note and the requirement for a property manager in the parties' Forbearance Agreements, Lindgren Depo., at 50-53; 104-07; 111, constitute duress. However, both of those practices are standard throughout the loan industry and there is no authority that such actions are wrongful or amount to coercive conduct. Additionally, to the extent that Defendants' duress

claim is based on the cross-collateralization of the loans, the applicable statute of limitations, S.C. Code Ann. § 15-3-530, bars such a cause of action.

For the reasons explained above, the Court grants the Bank summary judgment on Defendants' counterclaim for duress.

IV. The Court Also Grants the Bank Summary Judgment on Defendants' UTPA Claim.

The Court grants the Bank summary judgment on Defendants' UTPA counterclaim because the UTPA does not apply to private transactions like the ones involved in this case, where there is no evidence of adverse effect on the public interest. The South Carolina Supreme Court has refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). A mere breach of contract cannot constitute a violation of the SCUPTA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct. App. 1987). Moreover, "conduct which only affects the parties to the transaction provides no basis for a UTPA claim" Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Here, we have nothing more than a dispute between parties to a private loan transaction as documented in the loan documents. The sole act or practice of the Bank identified by

Defendants as purportedly affecting the public interest was its decision not to release its mortgage to accommodate the September 2010 proposed short sale. Such a decision is dependent on a number of unique factors, including the property in question, the terms of the subject loan documents and the amounts owed on the notes secured by the property, and is a matter solely and uniquely between Plaintiff and Defendants, not affecting the public interest. See, e.g., Drs. Steuer & Latham, P.A. v. Nat'l Med. Enterprises, Inc., 672 F. Supp. 1489, 1522 (D.S.C. 1987) aff'd, 846 F.2d 70 (4th Cir. 1988) (granting summary judgment based on absence of a showing of harm to the public interest); Jefferies v. Phillips, 316 S.C. 523, 527-28, 451 S.E.2d 21, 23 (Ct. App. 1994) ("To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. This adverse effect on the public must be proved by specific facts. . . . Jefferies introduced no evidence of specific facts which show any member of the public was adversely affected by this transaction. Without this showing, Phillips' conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.").

Alternatively, the Bank, which is federally regulated, is exempt from the provisions of the UTPA; as a result, Defendants' UTPA counterclaim fails a matter of law. The application of the UTPA is drawn from the interpretation of 15 U.S.C. 45(a)(1), the corollary federal statute granting authority to the Federal Trade Commission ("FTC") to regulate and prohibit unfair methods of competition and unfair and deceptive acts affecting commerce. See S.C. Code § 39-5-20 (providing that "[i]t is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)),

as from time to time amended"). Banks are specifically exempt from the Federal Trade Commission's (the "FTC") power to regulate and prohibit unfair competition and unfair or deceptive acts that affect commerce. See 15 U.S.C. 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, *except banks* . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (emphasis added). Thus, because the UTPA looks to the FTC for guidance regarding the applicability and enforcement of the provisions of the UTPA, federally regulated banks are likewise exempt from the provisions of the UTPA. See, e.g., Lands Inn, Inc. v BB&T of South Carolina, 2:98-158-23 (D.S.C. Apr. 12, 1999); JJH Transport, LLC and Joel Herring v. BB&T of South Carolina, 2006-CP-21-1814 (S.C. Court Common Pleas, Florence County); BB&T of South Carolina v. Eartha Marshall, 2003-CP-40-3272 (S.C. Court Common Pleas, Richland County).

Accordingly, summary judgment should be granted and Defendants' UTPA claim should be dismissed.

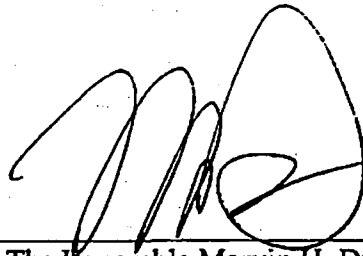
CONCLUSION:

WHEREFORE, the Court **GRANTS** TD Bank summary judgment on Defendants' counterclaims for: (1) breach of contract and of the covenant of good faith and fair dealing, to the extent that claim is based on the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale; (2) breach of fiduciary duty; (3) duress; and (4) unfair trade practices. However, the Court **DENIES** the Bank's Motion to Summary Judgment on Defendants' remaining counterclaims for: (1) negligent misrepresentation; (2) interference with prospective economic relations; and (3) breach of contract and of the covenant of good faith and

fair dealing to the extent such a claim is *not* based on the cross-collateralization of the loans or the Bank's decision not to consent to the proposed short sale.

IT IS SO ORDERED.

This 11 day of July 2015

A handwritten signature in black ink, consisting of stylized, overlapping loops and curves, positioned above a horizontal line.

The Honorable Marvin H. Dukes, III

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-07-00944

TD BANK, NA, ET AL.

BLACK DIAMOND LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAME BEFORE ME ON DEFENDANTS DAVID A. BROSSMAN, BLACK DIAMOND LLC AND J. CHRISTOPHER LINDGREN'S TWO MOTION FOR RECONSIDERATION, FILED 7/7/2015 AND 9/22/2015. AFTER HEARING FROM ALL PARTIES, I HEREBY DENY BOTH MOTIONS FOR RECONSIDERATION.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code

Date

2/11/16

For Clerk of Court Office Use Only

This judgment was entered on the 11 day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 11 day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

JAMES M. TRENT

CLAYTON M. CUSTER

MICHAEL J. BOGLE

ATTORNEY(S) FOR THE PLAINTIFF(S)

KEATING L. SIMONS III

EHRIK K. HAIGHT JR.

ATTORNEY(S) FOR THE DEFENDANT(S)

mmh STAFF

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

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

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-07-_____

COMPLAINT

(Foreclosure, Non-Jury, Deficiency
Demanded)

2012 MAR -6 PM 12:17
CLERK OF COURT
BEAUFORT COUNTY, S.C.

COMPLAINT

(Foreclosure, Non-Jury, Deficiency Demanded)

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

HAMP

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

Jurisdiction

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

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

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

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

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

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

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

The Loans

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

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

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

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

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

The Guaranties

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

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

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

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

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

The Mortgages

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

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

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

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

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

Assignments of Leases and Rents

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

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

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

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

Released Property

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

Other Liens or Interests

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

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

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

Maturity and Default

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

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

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

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

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

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

FOR A FIRST CAUSE OF ACTION
(FORECLOSURE OF MORTGAGE)

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

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

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

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

FOR A SECOND CAUSE OF ACTION
(FORECLOSURE OF MORTGAGE)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Wherefore, Plaintiff Prays

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

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

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

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

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

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

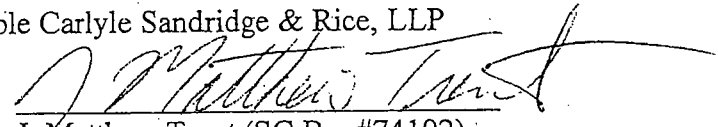
F. That Plaintiff be granted judgment, jointly and severally, against Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman in the amount of any deficiency remaining after such sale of the Property.

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

March 2, 2012

Womble Carlyle Sandridge & Rice, LLP

By:


J. Matthew Trent (SC Bar #74192)

Brian J. Fisher (SC Bar 78196)

550 South Main Street, Suite 400

Greenville, South Carolina 29601

Phone: (864) 255-5400

Fax: (864) 255-5440

Email: mtrent@wcsr.com

Attorneys for Plaintiff

LIST OF EXHIBITS

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

EXHIBIT "A"

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

SEP 30 2010

ARTICLES OF MERGER

Corporation - Domestic
Filing Fee - \$110.00

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

TYPE OR PRINT CLEARLY IN BLACK INK

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

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

- (a) Name of the corporation: TD Bank, National Association
Complete either (1) or (2), whichever is applicable.

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

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

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

- (b) Name of the corporation: Carolina First Bank
Complete either (1) or (2), whichever is applicable.

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

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

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

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

100930-0074 FILED: 09/30/2010
CAROLINA FIRST BANK
Filing Fee: \$110.00 ORIG

Mark Hammond

South Carolina Secretary of State



Name of Corporation TD Bank, National Association

Date: September 30, 2010

TD Bank, National Association

Name of the Surviving Corporation

Signature and Office

Bharat B. Masrani, President and CEO

Type or Print Name and Office

Filing Checklist

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

[Signature Page to Bank Merger Articles of Merger]

AGREEMENT AND PLAN OF MERGER

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

WITNESSETH:

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

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

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

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

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

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

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

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

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

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

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

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

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

7. **Effects of the Merger.**

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

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

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

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

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

8. Effect on Shares of Stock.

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

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

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

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

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

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

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

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

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

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

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

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

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

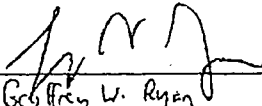
19. **Covenants.** During the period from the date of this Agreement and Plan of Merger and continuing until the Effective Time, each of the parties hereto agrees to use all reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable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

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

[Signature page follows]

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

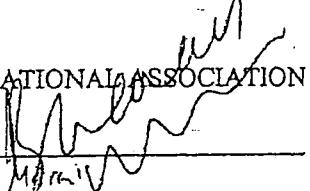
Attest:

By: 

Name: Geoffrey W. Ryan

Title: Senior Vice President + Asst. Secretary

TD BANK, NATIONAL ASSOCIATION

By: 

Name: Shant M. M. M.

Title: President + CEO

Attest:

By: _____

Name:

Title:

CAROLINA FIRST BANK

By: _____

Name:

Title:

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

Attest:

TD BANK, NATIONAL ASSOCIATION

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

Attest:

CAROLINA FIRST BANK

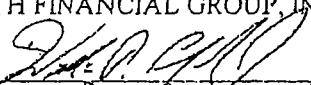
By: Ruth Ann Brown
Name: RUTH ANN BROWN
Title: Exec. Assistant

By: [Signature]
Name: WILLIAM P. CRAWFORD, JR.
Title: EVP + Gen. Counsel

Unanimous Written Consent of Sole Shareholder of Carolina First Bank

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

THE SOUTH FINANCIAL GROUP, INC.

By: 

Name: WILLIAM P. CRAWFORD, JR

Title: EVP and Gen. Counsel

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

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

TD BANK US HOLDING COMPANY

By: _____

Name: _____

Title: _____

Unanimous Written Consent of Sole Shareholder of Carolina First Bank

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

THE SOUTH FINANCIAL GROUP, INC.

By: _____
Name: _____
Title: _____

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

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

TD BANK US HOLDING COMPANY

By: _____
Name: *Shirley A. [Signature]*
Title: *President*

EXHIBIT "B"

\$3,500,000.00

PROMISSORY NOTE

January 25, 2008

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

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

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

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

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

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

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

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

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

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

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

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

WITNESSES:

Dee Heaton
RS

BORROWER: BLACK DIAMOND, LLC

By: Red Rocks LLC, Member

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

HILTONHEAD-#569512-V1
199999.00600

EXHIBIT "C"

FORBEARANCE AGREEMENT
Black Diamond, LLC - Loan No.: 5121066531

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

RECITALS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Loan Modifications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

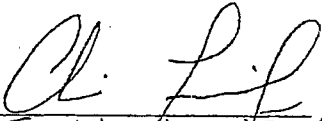
12. Miscellaneous. Except as expressly amended by this Agreement, the Loan Documents and the obligations evidenced thereby shall continue, unmodified and unchanged. This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous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

[SIGNATURE PAGE TO FOLLOW]

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

BORROWER:

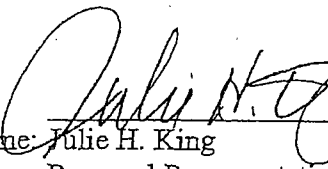
BLACK DIAMOND, LLC

By: 

Name: J. Chris Lindgren

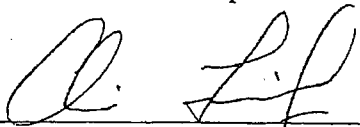
Title: manager

THE ESTATE OF HERB G. KING

By: 

Name: Julie H. King

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


J. Christopher Lindgren, individually

LENDER:

CAROLINA FIRST BANK

By: _____

Name: Michael R. Renault

Title: Senior Vice President

EXHIBIT "D"

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
5120783655	BLACK DIAMOND, LLC		07/25/08	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$2,000,000.00	CAROLINA FIRST BANK PRIME	5.0%	07/25/11	Commercial

Creditor Use Only

PROMISSORY NOTE
(Commercial - Single Advance)
RENEWAL NOTE

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

LENDER:

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

BORROWER:

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

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

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

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

Note Date	Note Number	Note Amount
December 17, 2007	# 5120783655	\$2,000,000.00

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

3. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$2,000,000.00 (Principal) plus interest from July 25, 2008 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

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

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

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

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

BLACK DIAMOND, LLC
South Carolina Promissory Note
SC14pr1379206022000005648013072408H

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BLACK DIAMOND, LLC
South Carolina Promissory Note
SC/4for1379200022000005846013072408N

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BORROWER:

BLACK DIAMOND, LLC

By RED ROCKS, LLC, MANAGER

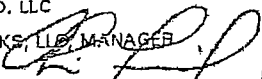
By  (Seal)
J. CHRISTOPHER LINDGREN, MANAGER

EXHIBIT "E"

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

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

RECITALS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Loan Modifications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[SIGNATURE PAGE TO FOLLOW]

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

BORROWER:

BLACK DIAMOND, LLC

By: Ch. Lindgren

Name: J. Chris Lindgren

Title: Manager

THE ESTATE OF HERB G. KING

By: Julie H. King

Name: Julie H. King

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

Ch. Lindgren
J. Christopher Lindgren, individually

LENDER:

CAROLINA FIRST BANK

By: _____

Name: Michael R. Renault

Title: Senior Vice President

EXHIBIT "F"

GUARANTY
(Continuing Debt - Unlimited)

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

LENDER:

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

BORROWER:

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

GUARANTOR:

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

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

- A. **Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. **Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. **Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

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

A promissory note or other agreement, No. 5120783855, dated July 25, 2008, from BLACK DIAMOND, LLC (Borrower) to you, in the amount of \$2,000,000.00.

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

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

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

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

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

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

J. CHRISTOPHER LINDGREN
South Carolina Guaranty
SC/4jor1378200022000005848013072408Y

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Page 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

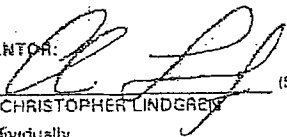
18. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to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

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

20. **ADDITIONAL TERMS.** THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 523-80-2104. THIS GUARANTOR'S DATE OF BIRTH IS 08/13/1958

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

GUARANTOR:


J. CHRISTOPHER LINDGREN

(Seal)

Individually

EXHIBIT "G"

UNCONDITIONAL GUARANTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dundress Head

By: J. CHRISTOPHER LINDGREN

BCN

HILTONHEAD-86695172-V1
199999.00600

EXHIBIT "H"

UNCONDITIONAL GUARANTY AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed this 30th day of July, 2010.

IN THE PRESENCE OF:

(Witness 1)

(Witness 2)

GUARANTOR:

Print Name: David A. Brosman

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

NOTICE ADDRESS:

PO Box 22120

N. Hwy 14 and Is. 5C

29925

EXHIBIT "T"

UNCONDITIONAL GUARANTY AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed this 30th day of July, 2010.

IN THE PRESENCE OF:

[Signature]
(Witness 1)

[Signature]
(Witness 2)

GUARANTOR:

[Signature]
Print Name: David A. Brosman

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

NOTICE ADDRESS:

P D Box 22120
Milton Mass 021
56 29925

EXHIBIT "J-1"

130
T
McN
9-59

BEAUFORT COUNTY SC - ROD
BK 02877 PGS 0655-0667
FILE NUM 2008005943
01/30/2008 11:44:35 AM
REC'D BY S SMITH RCPT# 528405
RECORDING FEES 19.00

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF BEAUFORT)

**FIRST MORTGAGE
AND SECURITY AGREEMENT**

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

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

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

1. THE MORTGAGED PROPERTY

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

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

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

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

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

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

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

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

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

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

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

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

2. THE LOAN

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

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

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

3. BORROWER'S COVENANTS, REPRESENTATIONS AND AGREEMENTS

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

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

c. Taxes and Fees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. **INSURANCE.**

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

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

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

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

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

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

i. there exists no Event of Default or any event or condition which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default;

ii. the Borrower presents sufficient evidence to the Bank that there are sufficient funds from the insurance proceeds and from equity funds, if needed, to completely restore or repair the damaged property as well as to maintain relevant debt service coverages and other operating expenses;

iii. all parties having existing or expected possessory interests in the Premises (excluding resident apartment tenants) agree in a manner satisfactory to the Bank that they will continue or extend their interests and arrangements for the contract terms then in effect following the restoration or repair;

iv. all parties having operating, management or franchise interests in, and arrangements concerning, the Premises agree that they will continue their interests and arrangements for the contract terms then in effect following the restoration or repair;

v. all parties having commitments to provide financing with respect to the Premises, to purchase Borrower's interest in full or in part in the Premises or to purchase the Loan agree in a manner satisfactory to the Bank that their commitments will continue in full force and effect and, if necessary, the expiration of such commitments will be extended by the time necessary to complete the restoration or repair;

vi. the Borrower presents sufficient evidence to the Bank that the damaged property will be restored prior to the maturity date of the Loan;

vii. the Bank will not incur any liability to any other person as a result of such use or release of insurance proceeds;

viii. the insurance proceeds shall be held by the Bank and disbursed substantially in accordance with the disbursement procedures under the Loan Agreement as if such proceeds were Loan proceeds as repair or restoration progresses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. FORECLOSURE

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

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

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

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

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

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

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

(1) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property;

(2) insure or keep the Premises insured;

(3) manage and operate the Premises and exercise all the rights and powers of Borrower in its name or otherwise, with respect to the same;

(4) enter into agreements with others to exercise the powers herein granted

Bank:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. GENERAL CONDITIONS.

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

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

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

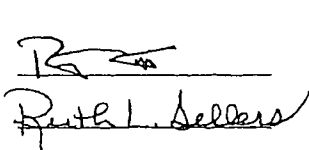
d. Imposition of Tax. In the event of the passage of any state, federal, municipal or other governmental law, order, rule or regulation, in any manner changing or modifying the laws now in force governing the taxation of debts secured by mortgages or the manner of collecting taxes so as to affect adversely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

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

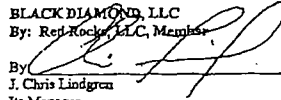
f. Headings. The captions and headings herein are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope of this Mortgage nor the intent of any provision hereof.

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

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


Ruth L. Sellers

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

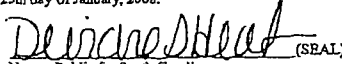

By: J. Chris Lindgren
Its Manager

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

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

Witness my official seal this the 25th day of January, 2008.


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

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EXHIBIT "A"

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

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

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

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

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

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

4
9 RW
McNair
1646

2754 p 2297

(Reference Document Book 2677, Page 655)

BEAUFORT COUNTY SC - ROD
BK 02764 PGS 2297-2300
FILE NUM 2008050998
08/12/2008 11:33:08 AM
REC'D BY R WEBB RCPT# 558188
RECORDING FEES 9.00

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
MORTGAGE MODIFICATION AGREEMENT
("Agreement")

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

WITNESSETH:

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

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

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

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

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

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

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Louise Zimmerman
(Witness)

Taniqua Atkins
(Witness)

MORTGAGOR /BORROWER:

BLACK DIAMOND, LLC

By: RED ROCKS, LLC, MANAGER

By: J. Chris Lindgren (SEAL)
J. Chris Lindgren, Manager

(Corporate Seal)

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

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

[SEAL]

EXHIBIT J-2

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

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

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

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

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

EXHIBIT "K-1"

BEAUFORT COUNTY SC - ROD
BK 01884 PGS 0842-0849
FILE NUM 2003087585
12/12/2003 11:59:23 AM
REC'D BY C SEABROOK RCPT# 205849
RECORDING FEES 14.00

Am

Space Above This Line For Recording Data

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

MORTGAGE

(With Future Advance Clause)

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

MORTGAGOR:

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

LENDER:

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

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

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

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

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

BLACK DIAMOND LLC
South Carolina Mortgage
SC/4XXXdrth0092390003874045112603Y

©1998 Bankers Systems, Inc., St. Cloud, MN **EX-100**

Initials *KA*
Page 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Payments. Mortgagor fails to make a payment in full when due.

B. Insolvency or Bankruptcy. Any legal entity obligated on the Secured Debts makes an assignment for the benefit of creditors or become insolvent, either because its liabilities exceed its assets or it is unable to pay its debts as they become due; or it petitions for protection under federal, state or local bankruptcy, insolvency or debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 60 days.

C. Business Termination. Mortgagor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. Mortgagor fails to perform any condition or to keep any promise or covenant of this Security Instrument.

E. Other Documents. A default occurs under the terms of any other transaction document.

F. Other Agreements. Mortgagor is in default on any other debt or agreement Mortgagor has with Lender.

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

H. Judgment. Mortgagor fails to satisfy or appeal any judgment against Mortgagor.

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

J. Name Change. Mortgagor changes Mortgagor's name or assumes an additional name without notifying Lender before making such a change.

K. Property Transfer. Mortgagor transfers all or a substantial part of Mortgagor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

L. Property Value. The value of the Property declines or is impaired.

M. Material Change. Without first notifying Lender, there is a material change in Mortgagor's business, including ownership, management, and financial conditions.

N. Insecurity. Lender reasonably believes that Lender is insecure.

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

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

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

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

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

Mortgagor represents, warrants and agrees that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MORTGAGOR:

BLACK DIAMOND LLC

By [Signature] (Seal)

BY RED ROCKS LLC, J CHRISTOPHER LINDGREN ITS MANAGER

(Witness)

(Witness)

PROBATE.

(Business or Entity)

State OF SC, County OF Beaufort ss.

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

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

Notary Public for South Carolina

Witness

My commission expires:

Sept. 5, 2011

EXHIBIT "A"

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

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

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

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

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9
McNair

BEAUFORT COUNTY SC - ROD
BK 02754 PGS 2301-2304
FILE NUM 2008060899
08/12/2008 11:33:08 AM
REC'D BY R WEBB RCPT# 558198
RECORDING FEES 9.00

2754 p 2301

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

MODIFICATION OF MORTGAGE

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

MORTGAGOR:

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

LENDER:

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

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

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

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

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

The Security Instrument is modified as follows:

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

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

(a) Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A renewal note or other agreement, No. 5120783655, dated July 25, 2008, from Mortgagor to Lender, with a loan amount of \$2,000,000.00 and maturing on July 25, 2011.

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

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

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

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

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

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

MORTGAGOR:

BLACK DIAMOND, LLC

By RED ROCKS, LLC, MANAGER

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

[Signature: Louise Zimmerman]
(Witness)
[Signature: J. Atkins]
(Witness)

LENDER:

Carolina First Bank

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

[Signature: Louise Zimmerman]
(Witness)
[Signature: J. Atkins]
(Witness)

STATE OF SC)
) ACKNOWLEDGMENT
COUNTY OF BEAUFORT) under SC Code §30-5-30(C)

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

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

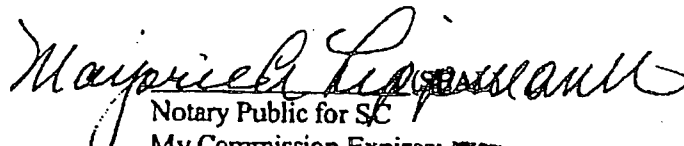

Notary Public for SC
My Commission Expires: ~~MY COMMISSION EXPIRES JULY 21, 2010~~

EXHIBIT "A"

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

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

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

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

EXHIBIT "K-2"

Legal description from mortgage:

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

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

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

LESS and EXCEPT:

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

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

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

ALSO, LESS and EXCEPT:

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

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

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

ALSO, LESS and EXCEPT:

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

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

Proposed reformed legal description:

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

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

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

LESS and EXCEPT:

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

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

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

ALSO, LESS and EXCEPT:

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

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

ALSO, LESS and EXCEPT:

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

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

EXHIBIT "L"

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REC'D BY S SMITH RCPT# 528405
ASSIGNMENT RECORDING FEES 10.00

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

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

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

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

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

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

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

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

3. WARRANTIES AND REPRESENTATIONS OF THE ASSIGNOR.

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

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

4. **MISCELLANEOUS.**

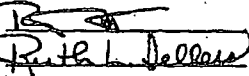
- a. The covenants and obligations herein undertaken by the parties shall be binding upon and inure to the benefit of the respective heirs, successors and assigns of the parties.
- b. This Assignment may be amended only in writing signed by the parties.
- c. This Assignment shall be interpreted and construed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

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

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

WITNESSES:


Ruth L. DeLoach

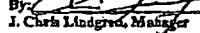
STATE OF SOUTH CAROLINA }

COUNTY OF BEAUFORT }

ASSIGNOR:

BLACK DIAMOND, LLC

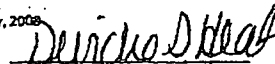
By: Red Rock, LLC Member

By: 
J. Chris Lindgren, Manager

ACKNOWLEDGMENT

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

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


Deirdre D. Heat
Notary Public for South Carolina
My Commission Expires: 9-5-2011

NOTED: 01/25/08 11:11 AM
WWW.DIGEST

EXHIBIT "A"

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

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

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

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

EXHIBIT "M"

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

ASSIGNMENT OF LEASES AND RENTS

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

ASSIGNOR:

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

LENDER:

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

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

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

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

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

BLACK DIAMOND, LLC
South Carolina Assignment of Leases and Rents
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Page 1

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

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

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

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

B. Rents, issues and profits, including but not limited to security deposits, minimum rents, percentage rent, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have regarding the Property (Rents).

C. The term Property as used in this Assignment shall include the following described real property

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

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

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

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

5. COLLECTION OF RENTS. Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. Assignor will not collect in advance any Rents due in future lease periods, unless Assignor first obtains Lender's written consent.

Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds. When Lender so directs, Assignor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses.

Assignor agrees that this Assignment is immediately effective between Assignor and Lender and effective as to third parties on the recording of this Assignment.

6. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Assignor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Assignment or any other document relating to the Secured Debts. Assignor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Assignment. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. In addition, to the extent permitted by the United States Bankruptcy Code, Assignor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interests in connection with any bankruptcy proceedings initiated by or against Assignor.

7. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public.

health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Assignor represents, warrants and agrees that:

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

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

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

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

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

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

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

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

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

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

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

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

8. **CONDEMNATION.** Assignor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Assignor authorizes Lender to intervene in Assignor's name in any of the above described actions or claims. Assignor assigns to Lender the proceeds of any award or claim for damages connected with a

condemnation or other taking of all or any part of the Property. Such proceeds will be considered payment and will be applied as provided in this Assignment. This assignment of proceeds is subject to the terms of any mortgage, deed of trust, security agreement or other lien document.

9. APPOINTMENT OF A RECEIVER. On or after an Assignor's default, Assignor agrees to Lender making an application to the court for an appointment of a receiver for the benefit of Lender to take possession of the Property and the Leases, with the power to receive, collect and apply the Rents. Any Rents collected will be applied as the court authorizes to pay taxes, to provide insurance, to make repairs and to pay costs or any other expenses relating to the Property, the Leases and Rents, and any remaining sums shall be applied to the Secured Debts. Assignor agrees that this appointment of a receiver may be without giving bond, without reference to the then-existing value of the Property, and without regard to the insolvency of any person liable for any of the Secured Debts.

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

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

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

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

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

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

12. WARRANTIES AND REPRESENTATIONS. Assignor makes to Lender the following warranties and representations which will continue as long as this Assignment is in effect:

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

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

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

D. **Title.** Assignor has good title to the Leases, Rents and Property and the right to assign, grant, bargain, convey and mortgage to Lender as additional security the Leases and Rents, and no other person has any right in the Leases and Rents.

E. **Recordation.** Assignor has recorded the Leases as required by law or as otherwise prudent for the type and use of the Property.

F. **Default.** No default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Assignor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Assignor or any party to the Lease defaults or fails to observe any applicable law, Assignor will promptly notify Lender.

G. **Lease Modification.** Assignor has not sublet, modified, extended, canceled, or otherwise altered the Leases, or accepted the surrender of the Property covered by the Leases (unless the Leases so require)

H. **Encumbrance.** Assignor has not assigned, compromised, subordinated or encumbered the Leases and Rents.

13. COVENANTS. Assignor agrees to the following covenants:

A. Rent Abatement and Insurance. When any Lease provides for an abatement of Rents due to fire, flood or other casualty, Assignor will insure against this risk of loss with a policy satisfactory to Lender. Assignor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

B. Copies of Leases. Assignor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.

C. Right To Rents. Immediately after the execution of this Assignment, Assignor will notify all current and future tenants and others obligated under the Leases of Lender's rights to the Leases and Rents, and will request that they immediately pay all future Rents directly to Lender when Assignor or Lender asks them to do so.

D. Accounting. When Lender requests, Assignor will provide to Lender an accounting of Rents, prepared in a form acceptable to Lender, subject to generally accepted accounting principles and certified by Assignor or Assignor's accountant to be current, accurate and complete as of the date requested by Lender.

E. Lease Modification. Assignor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's written consent.

F. Encumbrance. Assignor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent.

G. Future Leases. Assignor will not enter into any future Leases without prior written consent from Lender. Assignor will execute and deliver such further assurances and assignments as to these future Leases as Lender requires from time to time.

H. Personal Property. Assignor will not sell or remove any personal property on the Property, unless Assignor replaces this personal property with like kind for the same or better value.

I. Prosecution and Defense of Claims. Assignor will appear in and prosecute its claims or defend its title to the Leases and Rents against any claims that would impair Assignor's interest under this Assignment and, on Lender's request, Assignor will also appear in any action or proceeding on behalf of Lender. Assignor agrees to assign to Lender, as requested by Lender, any right, claims or defenses which Assignor may have against parties who supply labor or materials to improve or maintain the leaseholds subject to the Leases and/or the Property.

J. Liability and Indemnification. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses or damages due to Lender's gross negligence or intentional torts. Otherwise, Assignor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

K. Leasehold Estate. Assignor will not cause or permit the leasehold estate under the Leases to merge with Assignor's reversionary interest, and agrees that the Leases shall remain in full force and effect regardless of any merger of the Assignor's interests and of any merger of the interests of Assignor and any party obligated under the Leases.

L. Insolvency. Lender will be the creditor of each tenant and of anyone else obligated under the Leases who is subject to an assignment for the benefit of creditors, an insolvency, a dissolution or a receivership proceeding, or a bankruptcy.

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

A. Payments. Assignor fails to make a payment in full when due.

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

C. Business Termination. Assignor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. Assignor fails to perform any condition or to keep any promise or covenant in this Assignment.

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

F. Other Agreements. Assignor is in default on any other debt or agreement Assignor has with Lender.

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

H. Judgment. Assignor fails to satisfy or appeal any judgment against Assignor.

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

J. Name Change. Assignor changes Assignor's name or assumes an additional name without notifying Lender before making such a change.

K. Property Transfer. Assignor transfers all or a substantial part of Assignor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

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

M. Material Change. Without first notifying Lender, there is a material change in Assignor's business, including ownership, management, and financial conditions.

N. Insecurity. Lender determines in good faith that a material adverse change has occurred in Assignor's financial condition from the conditions set forth in Assignor's most recent financial statement before the date of this Assignment or that the prospect for payment or performance of the Secured Debts is impaired for any reason.

15. REMEDIES. After Assignor defaults, and after Lender gives any legally required notice and opportunity to cure the default, Lender may at Lender's option do any one or more of the following.

A. Acceleration. Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due.

B. Additional Security. Lender may demand additional security or additional parties to be obligated to pay the Secured Debts.

C. Sources. Lender may use any and all remedies Lender has under South Carolina or federal law or in any document relating to the Secured Debts.

D. Insurance Benefits. Lender may make a claim for any and all insurance benefits or refunds that may be available on Assignor's default.

E. Payments Made On Assignor's Behalf. Amounts advanced on Assignor's behalf will be immediately due and may be added to the Secured Debts.

F. Rents. Lender may terminate Assignor's right to collect Rents and directly collect and retain Rents in Lender's name without taking possession of the Property and to demand, collect, receive, and sue for the Rents, giving proper receipts and releases. In addition, after deducting all reasonable expenses of collection from any collected and retained Rents, Lender may apply the balance as provided for by the Secured Debts.

G. Entry. Lender may enter, take possession, manage and operate all or any part of the Property; make, modify, enforce or cancel or accept the surrender of any Leases; obtain or evict any tenants or licensees; increase or reduce Rents; decorate, clean and make repairs or do any other act or incur any other cost Lender deems proper to protect the Property as fully as Assignor could do. Any funds collected from the operation of the Property may be applied in such order as Lender may deem proper, including, but not limited to, payment of the following: operating expenses, management, brokerage, attorneys' and accountants' fees, the Secured Debts, and toward the maintenance of reserves for repair or replacement. Lender may take such action without regard to the adequacy of the security, with or without any action or proceeding, through any person or agent, or receiver to be appointed by a court, and irrespective of Assignor's possession.

The collection and application of the Rents or the entry upon and taking possession of the Property as set out in this section shall not cure or waive any notice of default under the Secured Debts, this Assignment, or invalidate any act pursuant to such notice. The enforcement of such remedy by Lender, once exercised, shall continue for so long as Lender shall elect, notwithstanding that such collection and application of Rents may have cured the original default.

H. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies Lender does not give up any other remedy. Lender does not waive a default if Lender chooses not to use a remedy. BA

electing not to use any remedy, Lender does not waive Lender's right to later consider the event a default and to use any remedies if the default continues or occurs again.

16. TERM. This Assignment will remain in full force and effect until the Secured Debts are paid or otherwise discharged and Lender is no longer obligated to advance funds under any loan or credit agreement which is a part of the Secured Debts. If any or all payments of the Secured Debts are subsequently invalidated, declared void or voidable, or set aside and are required to be repaid to a trustee, custodian, receiver or any other party under any bankruptcy act or other state or federal law, then the Secured Debts will be revived and will continue in full force and effect as if this payment had not been made.

17. CO-SIGNERS. If Assignor signs this Assignment but is not otherwise obligated to pay the Secured Debts, Assignor does so only to assign Assignor's interest in the Property to secure payment of the Secured Debts and Assignor does not agree by signing this Assignment to be personally liable on the Secured Debts. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

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

19. OTHER TERMS. The following are applicable to this Assignment:

A. **Additional Terms.** This Agreement (along with all deposit accounts, mortgages, security agreements, pledge agreements and any and all other security instruments and items of collateral that I have at any time in the past given to you or that I may at any time in the future give to you) shall secure any and all of the obligations that I currently owe you or that I may at any time in the future owe you.

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

21. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Assignor's obligations under this Assignment are independent of the obligations of any other Assignor. Lender may sue each Assignor individually or together with any other Assignor. Lender may release any part of the Property and Assignor will still be obligated under this Assignment for the remaining Property. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Assignor agrees that Lender and any party to this Assignment may extend, modify or make any change in the terms of this Assignment or any evidence of debt without Assignor's consent. Such a change will not release Assignor from the terms of this Assignment. Lender may assign all or part of Lender's rights under this Assignment without Assignor's consent. If Lender assigns this Assignment, all of Assignor's covenants, agreements, representations and warranties contained in this Assignment will benefit Lender's successors and assigns. The duties of this Assignment will bind the successors and assigns of Assignor.

22. AMENDMENT, INTEGRATION AND SEVERABILITY. This Assignment may not be amended or modified by oral agreement. No amendment or modification of this Assignment is effective unless made in writing and executed by Assignor and Lender. This Assignment and any other documents relating to the Secured Debts are the complete and final expression of the agreement. If any provision of this Assignment is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

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

24. NOTICE, FINANCIAL REPORTS, ADDITIONAL DOCUMENTS AND RECORDING TAXES. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Assignor will be deemed to be notice to all Assignors. Assignor will inform Lender in writing of any change in Assignor's name, address or other application information. Assignor will provide Lender any financial statements or information Lender requests. All financial statements and information Assignor gives Lender will be correct and complete. Assignor agrees to pay all expenses, charges and taxes in connection with the preparation and recording of this Assignment. Assignor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Assignor's obligations under this

Assignment and to confirm Lender's lien status on any Property, and Assignor agrees to pay all expenses, charges and taxes in connection with the preparation and recording thereof. Time is of the essence.

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

ASSIGNOR:

BLACK DIAMOND, LLC

By RED ROCKS, LLC

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

(Witness)

(Witness)

ACKNOWLEDGMENT.

(Business or Entity)

State of South Carolina County of Beaufort SS.

I, MARJORIE A. LIPPMAAN a notary public for South Carolina hereby certify that J. CHRISTOPHER LINDGREN, MANAGER of RED ROCKS, LLC a Limited Liability Company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 31st day of May, 2007.

[Signature]
Signature of Notary Public

My commission expires: ~~EXPIRATION DATE~~ JULY 24, 2010

EXHIBIT "A"

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

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

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

EXHIBIT "N"

15703-010

BEAUFORT COUNTY SC - ROD
 BK 00003 PGS 0223-0224
 FILE NUM 2003097596
 12/12/2003 11:59:23 AM
 REC'D BY C SEABROOK RCPT# 205849
 RECORDING FEES 8.00

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

MAHESH THAKAR - HILTON HEAD MAIN - BR#390

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Carolina First Bank
 PO Box 7317
 Hilton Head Island, SC 29938

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

BLACK DIAMOND LLC

OR

1b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

1c. MAILING ADDRESS

117 WILLIAM HILTON PARKWAY

CITY

HILTON HEAD ISLAND

STATE

SC

POSTAL CODE

29926

COUNTRY

USA

1d. TAX ID #: SSN OR EIN

57-1110469

ADD'L INFO RE
ORGANIZATION
DEBTOR1e. TYPE OF ORGANIZATION
Limited Liability
Company

1f. JURISDICTION OF ORGANIZATION

South Carolina

1g. ORGANIZATIONAL ID #, if any

☒ NONE2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

2c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

2d. TAX ID #: SSN OR EIN

ADD'L INFO RE
ORGANIZATION
DEBTOR

2e. TYPE OF ORGANIZATION

2f. JURISDICTION OF ORGANIZATION

2g. ORGANIZATIONAL ID #, if any

☐ NONE3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

CAROLINA FIRST BANK

OR

3b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

3c. MAILING ADDRESS

62 NEW ORLEANS RD, PO BOX 7317

CITY

HILTON HEAD ISLAND

STATE

SC

POSTAL CODE

29938

COUNTRY

USA

4. This FINANCING STATEMENT covers the following collateral: ASSIGNMENT OF LEASES, INCOME, SALES CONTRACTS, DEVELOPMENT AND BUILDING CONTRACTS, PERMITS

5. ALTERNATIVE DESIGNATION (if applicable): ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING6. ☐ This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (optional)

8. OPTIONAL FILER REFERENCE DATA

FILING OFFICE COPY - NATIONAL UCC FINANCING STATEMENT (FORM UCC1) (REV. 07/29/98)

Bankers Systems, Inc., St. Cloud, MN Form UCC-1-LAZ 5/30/2001

EXHIBIT 'A'

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

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

1
8 AW
Carolina
St

BEAUFORT COUNTY SC - ROD
BK 00008 PG 1827
FILE NUM 2008086076
10/23/2008 11:23:01 AM
REC'D BY R WEBB RCPT# 665193
RECORDING FEES 8.00

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

LAUREN M BERTSCHE 864-255-8903

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

CAROLINA FIRST BANK
ATTN: LAUREN BERTSCHE, SC 971-63
PO BOX 1029
GREENVILLE, SC 29602

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE #

2003097596 FILED 12/12/03 BK 00003 PG 0223 BEAUFORT CO

1b. This FINANCING STATEMENT AMENDMENT is
to be filed (for record) (or recorded) in the
REAL ESTATE RECORDS.

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☒ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.

4. ☐ ASSIGNMENT (full or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☐ Secured Party of record. Check only one of these two boxes.

Also check one of the following three boxes and provide appropriate information in items 6 and/or 7.

☐ CHANGE name and/or address: Please refer to the detailed instructions
in regard to changing the name/address of a party.

☐ DELETE name: Give record name
to be deleted in item 6a or 6b.

☐ ADD name: Complete item 7a or 7b, and also item 7c;
also complete items 7e-7g (if applicable).

6. CURRENT RECORD INFORMATION

6a. ORGANIZATION'S NAME

OR BLACK DIAMOND LLC

6b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

7. CHANGED (NEW) OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME

OR 7b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

7c. MAILING ADDRESS

117 WILLIAM HILTON PARKWAY

CITY HILTON HEAD ISLAND

STATE SC

POSTAL CODE 29926

COUNTRY

7d. SEE INSTRUCTIONS

ADDL INFO RE

7e. TYPE OF ORGANIZATION

7f. JURISDICTION OF ORGANIZATION

7g. ORGANIZATIONAL ID #, if any

DEBTOR

LLC

SOUTH CAROLINA

☒ NONE

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral: ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.

CONTINUE THE SAME AS ORIGINAL UCC-1

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.

9a. ORGANIZATION'S NAME

OR CAROLINA FIRST BANK

9b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

10. OPTIONAL FILER REFERENCE DATA

5121066531/5120783655/5990783481/947MLD 10/17/08

FILING OFFICE COPY — UCC FINANCING STATEMENT AMENDMENT (FORM UCC3) (REV. 05/22/02)

EXHIBIT "O"

McNair - PP-PUC

115703-00904-03

(Black Diamond)

3-18-05
BC
455

Prepared by:

McNair Law Firm, P.A.
Shelter Cove Executive Park, Suite 400
23-B Shelter Cove Lane
Post Office Drawer J
Hilton Head Island, SC 29938
(843) 785-2171

BEAUFORT COUNTY SC - ROD
BK 02151 PGS 0258-0280
FILE NUM 2005038222
05/18/2005 02:00:57 PM
REC'D BY R WEBB RCPT# 331648
RECORDING FEES 8.00

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

PARTIAL RELEASE OF MORTGAGE & UCC
(Ref: Bk 1884, Page 642 & UCC Book 3, Page 223)

WHEREAS, on or about the 9th day of December, 2003, Black Diamond, LLC (Mortgagor) caused to be executed and delivered a certain Note in the original principal amount of \$1,460,000.00 in favor of Carolina First Bank (hereinafter "Lender"), which said Note is secured by a Mortgage recorded on December 12, 2003, in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 1884 at Page 642, further secured by a UCC-1 Financing Statement recorded on December 12, 2003, in UCC Book 3 at Page 223.

KNOW ALL MEN BY THESE PRESENTS, that Lender for valuable consideration in hand paid, the receipt and sufficiency whereof is hereby acknowledged, does hereby release and fully discharge from the lien of the above described Mortgage the property described in Exhibit "A" attached hereto and incorporated herein.

This Partial Release of Mortgage shall not in any way affect or impair the right of Lender to retain under said Mortgage as security for the sum remaining due thereon, or any sum subsequently advanced, all the premises therein conveyed and not hereby released.

IN WITNESS WHEREOF, the undersigned has caused this Partial Release of Mortgage to be executed and effective this 16th day of May, 2005.

WITNESSES:

CAROLINA FIRST BANK (SEAL)

Mahesh Mishra
(Witness #1)

Margaret A. Lippmann
(Witness #2/Notary)

BY: [Signature]
Name & Title BRUNN LARSON SRP
its authorized officer

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGEMENT

I, MARTORIE A. LIPPMANN, do hereby certify that
W. BUZZY LAWSON, an authorized officer of Carolina First Bank, on behalf
of the Bank, personally appeared before me this day and acknowledged the due execution of the
foregoing instrument.

Witness my hand and official seal this 16th day of May, 2005.

Martorie A. Lippmann (SEAL)
Notary Public for South Carolina
My Commission Expires: ~~MY COMMISSION EXPIRES~~ JULY 23, 2009

EXHIBIT "A"

PARCEL ONE:

ALL that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit T of The 1188 Centre Horizontal Property Regime, and being more particularly shown and described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004, and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1627, et seq., and Plat Book 98 at Page 43, and First Amendment to Master Deed recorded in Book 2074 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at Page 85, and all further amendments thereto.

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

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

PARCEL TWO:

ALL that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit R of The 1188 Centre Horizontal Property Regime, and being more particularly shown and described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004, and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1627, et seq., and Plat Book 98 at Page 43, and First Amendment to Master Deed recorded in Book 2074 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at Page 85, and Third Amendment to Master Deed recorded in Book 2112 at Page 2073, and all further amendments thereto.

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

EXHIBIT "P"

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

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

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

ALSO, LESS and EXCEPT:

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

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

EXHIBIT "Q"

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Mancin
14901

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

2982 p 2246
MORTGAGE

THIS MORTGAGE IS MADE THIS 4th day of August, 2010, between the Mortgagor, Black Diamond, LLC (herein "Borrower") and the Mortgagee, Julie H. King, whose address is c/o Principal Developers, Inc., 117 William Hilton Parkway, Suite H, Hilton Head, South Carolina 29926 (herein "Lender").

WHEREAS, Borrower is indebted to Lender in the principal sum of \$271,450.03, which indebtedness is evidenced by Borrower's note dated effective July 30, 2010, (herein "Note"), providing for monthly installments of interest, with the balance of the indebtedness, if not sooner paid, due and payable on July 30, 2015

NOW, KNOW ALL MEN, that in consideration of the above described indebtedness and sum of money and, in order to secure Lender: (a) the repayment of the indebtedness evidenced by the Note, with interest thereon; (b) the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage; and (c) the performance of the covenants and agreements of Borrower herein contained, Borrower has granted, bargained, sold, mortgaged and released and by these presents does grant, bargain, sell, mortgage and release to Lender and Lender's successors and assigns the following described property:

PARCEL 1:

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

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

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

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

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

ALSO, PARCEL 2:

Also, ALL those certain pieces, parcels, or lots of land situated, lying, and being in Bluffton Township, Beaufort County, South Carolina consisting of 129,584 square feet and 71,305 square feet, respectively, more or less, and being shown and described as "Future Phase Property N/F The Greenery, Inc. Tax Parcel 600-40-42; 129,584 square feet" and "Future Phase Property 71,305 square feet" on a Plat entitled "A Plat of the 1188 Centre Horizontal Property Regime Phase 1 and 3" said Plat prepared by Ward Edwards, Inc. Said Plat

HILTONHEAD 724952v2

Book2982/Page2246

BEAUFORT COUNTY SC-ROD
BK 02982 PGS 2246-2251
DATE: 08/18/2010 12:22:53 PM
INST # 2010043153 RCPT# 025691

original dated November 6, 2003 at last revised February 14, 2005 and recorded in the Beaufort County records in Plat Book 105 at Page 85.

The property described above is a portion of the property conveyed to Black Diamond, LLC by deed of The Greenery, Inc. dated November 17, 2003, and recorded in the Beaufort County records in Book 1884 at Page 641.

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

TO HAVE AND TO HOLD unto Lender and Lender's heirs, successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Mortgage; and all of the foregoing, together with said property (or the leasehold estate if this Mortgage is on a leasehold) is herein referred to as the "Property."

Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property, that the Property is unencumbered, and that Borrower will warrant and defend generally the title to the Property against all claims and demands, subject to any declarations, easements or restrictions listed in a schedule of exceptions to coverage in any title insurance policy or certificate of title insuring Lender's interest in the Property.

GENERAL COVENANTS: Borrower and Lender covenant and agree as follows:

1. **Payment of Principal and Interest.** Borrower shall promptly pay when due the principal of and interest on the indebtedness evidenced by the Note, prepayment and late charges as provided in the Note, and the principal of and interest on any Future Advances secured by this Mortgage.
2. **Application of Payments.** Unless applicable law provides otherwise, all payments received by Lender under the Note and paragraph shall be applied by Lender first to interest payable on the Note, then to the principal of the Note.
3. **Charges; Liens.** Borrower shall pay prior to delinquency all taxes, assessments and other charges, fines and impositions attributable to the Property which may attain a priority over this Mortgage, and leasehold payments or ground rents, if any. Borrower shall promptly furnish to Lender all notices of amounts due under this paragraph, and in the event Borrower shall make payment directly, Borrower shall promptly furnish to Lender upon request receipts evidencing such payments. Except for the Senior Mortgages identified below, Borrower shall promptly discharge any lien which has priority over this Mortgage; provided, the Borrower shall not be required to discharge any such lien so long as Borrower shall agree in writing to the payment of the obligation secured by such lien in a manner acceptable to Lender, or shall in good faith contest such lien by, or defend enforcement of such lien in, legal proceedings which operate to prevent the enforcement of the lien or forfeiture of the property or any part thereof.
4. **Hazard Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, flood, hazards included within the term "extended coverage," and such other hazards as Lender may require and in such amounts and for such periods as Lender may require; provided, that Lender shall not require that the amount of such coverage exceed that amount of coverage required to pay the sums secured by this Mortgage. All premiums on insurance policies shall be paid by Borrower, when due, directly to the insurance carrier. All insurance policies and renewals thereof shall be in form acceptable to Lender and shall include a standard mortgagee clause in favor of and in form acceptable to Lender. Lender shall have the right to hold the policies and renewals thereof, and Borrower shall promptly furnish to Lender all renewal notices and all receipts of paid premiums. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Subject to the terms of the Senior Mortgages identified below, unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security of this Mortgage is not thereby impaired. If such restoration or repair is not economically feasible or if the security of this Mortgage would be impaired, the insurance proceeds shall be applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower. If the Property is abandoned by Borrower, or if Borrower fails to respond to Lender within 30 days from the date notice is mailed by Lender to Borrower that the insurance carrier offers to settle a claim for insurance benefits, Lender is authorized to collect and apply the insurance proceeds at Lender's option either to restoration or repair of the Property or to the sums secured by this Mortgage.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in Paragraph 1 hereof or change the amount of such installments. If under Paragraph 10 hereof the Property is acquired by Lender, all right, title and interest of Borrower in and to any insurance policies and in and to the proceeds thereof resulting from

damage to the Property prior to the sale or acquisition shall pass to Lender to the extent of the sums secured by this Mortgage immediately prior to such sale or acquisition.

5. **Preservation and Maintenance of Property.** Borrower shall keep the Property in good repair and shall not commit waste or permit impairment or deterioration of the Property

6. **Protection of Lender's Security.** If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, including, but not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankrupt or decedent, then Lender at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums and take such action as is necessary to protect Lender's interest, including, but not limited to, disbursement of reasonable attorney's fees and entry upon the Property to make repairs.

Any amounts disbursed by Lender pursuant to this Paragraph 6, with interest thereon, shall become additional indebtedness of Borrower secured by this Mortgage. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof, and shall bear interest from the date of disbursement at the rate payable from time to time on outstanding principal under the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate permissible under applicable law. Nothing contained in this Paragraph 6 shall require Lender to incur any expense or take any action hereunder.

7. **Inspection.** Lender may make or cause to be made reasonable entries upon and inspections of the Property, provided that Lender shall give Borrower notice prior to any such inspection specifying reasonable cause therefor related to Lender's interest in the Property.

8. **Condemnation.** Subject to the terms of the Senior Mortgages identified below, the proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the property, or in part thereof, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower. In the event of a partial taking of the Property, unless Borrower and Lender otherwise agree in writing, there shall be applied to the sums secured by this Mortgage such proportion of the proceeds as is equal to that proportion which the amount of the sums secured by this Mortgage immediately prior to the taking bears to the fair market value of the Property immediately prior to the date of taking, with the balance of the proceeds paid to Borrower.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date such notice is mailed, Lender is authorized to collect and apply the proceeds, at Lender's option, either to restoration or repair of the Property or to the sums secured by this Mortgage.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in Paragraph 1 hereof or change the amount of such installments.

9. **Transfer of the Property.** If all or any part of the Property or an interest therein is sold or transferred by Borrower or if possession is given to the Property by Borrower to a third party via a land contract, or agreement for deed or other similar instrument, without Lender's prior written consent, excluding: (a) the creation of a lien or encumbrance subordinate to this Mortgage, (b) a transfer by devise, descent or by operation of law upon the death of a joint tenant; or (c) the grant of any lease in the ordinary course of business, Lender may, at Lender's option, declare all sums secured by this Mortgage to be immediately due and payable.

10. **Acceleration; Remedies.** Upon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by this Mortgage, Lender prior to acceleration shall mail notice to Borrower as provided in Paragraph 14 hereof specifying: (a) the breach; (b) the action required to cure such breach; (c) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (d) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage, foreclosure by judicial proceeding and sale of the property. If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Mortgage to be immediately due and payable without further demand and may foreclose this Mortgage by judicial proceeding. Lender shall be entitled to collect in such proceeding all expenses of foreclosure, including, but not limited to, reasonable attorneys fees, and costs of documentary evidence, abstracts and title reports, all of which shall be additional sums secured by this Mortgage.

11. **Assignment of Rents; Appointment of Receiver.** As additional security hereunder, Borrower hereby assigns to Lender the rents of the Property, provided that Borrower shall, prior to acceleration under Paragraph 10 hereof or abandonment of the Property, have the right to collect and retain such rents as they become due and payable.

Upon acceleration under Paragraph 10 hereof or abandonment of the Property, Lender shall be entitled to have a receiver appointed by a court to enter upon, take possession of and manage the Property and to collect the rents of the Property, including those past due. All rents collected by the receiver shall be applied first to

payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Mortgage. The receiver shall be liable to account only for those rents actually received.

12. **Release.** Upon payment of all sums secured by this Mortgage, this Mortgage shall become null and void, and Lender shall release this Mortgage without charge to Borrower. Borrower shall pay all costs of recordation, if any. In addition, in the event that there is a sale of a portion of the Property, it is understood that the holder of the Senior Mortgages referenced below will likely receive the available net proceeds from such sale. Borrower shall be entitled to receive a partial release of this mortgage from Lender for no additional consideration so long as this mortgage is not in default.

13. **Senior Mortgages.** This mortgage is junior in priority to that first mortgage in favor of Carolina First Bank in the original principal amount of \$3,500,000, said mortgage dated January 25, 2008, and recorded in Mortgage Book 2677, at Page 655, as modified and/or amended from time to time, including that Mortgage Modification Agreement recorded in Book 2754, at Page 2297, and to a mortgage in favor of Carolina First Bank in the principal amount of \$2,000,000 as recorded in Book 1884, at Page 642, as modified and/or amended from time to time, including that Modification of Mortgage recorded in Book 2754, at Page 2301 (collectively, the "Senior Mortgages"). This mortgage shall be subordinate in all respects to the Senior Mortgages, and, unless approved by Carolina First Bank as holder of the Senior Mortgages, Lender shall not be entitled to enforce any rights and remedies available to Lender with respect to this mortgage until the obligations secured by the Senior Mortgages have been paid and/or performed in full and the Senior Mortgages have been satisfied.

14. **Miscellaneous Provisions.**

14.01 Any extension of the time for payment or modification of amortization of the sums secured by this Mortgage granted by Lender to Borrower or any successor in interest of Borrower shall not operate to release, in any manner, the liability of the original Borrower and Borrower's successors in interest. Lender shall not be required to commence proceedings against such successor or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Mortgage by reason of any demand made by the original Borrower and Borrower's successors in interest.

14.02 Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law shall not be a waiver of or preclude the exercise of any such right or remedy. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the indebtedness secured by this Mortgage.

14.03 All remedies provided in this Mortgage are distinct and cumulative to any other right or remedy under this Mortgage or afforded by law or equity, and may be exercised concurrently, independently or successively.

14.04 The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Lender and Borrower. All covenants and agreements of Borrower shall be joint and several. The captions and headings of the paragraphs of this Mortgage are for convenience only and are not to be used to interpret or define the provisions hereof.

14.05 Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Mortgage shall be given by mailing such notice by certified mail addressed to Borrower at the address of Borrower as provided herein, and (b) any notice to Lender shall be given by certified mail, return receipt requested, to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Mortgage shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

14.06 This Mortgage shall be governed by the laws of South Carolina. In the event that any provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Mortgage and the Note are declared to be severable.

14.07 Borrower shall be furnished a copy of the Note and of this Mortgage at the time of execution or after recordation hereof.

14.08 This Mortgage was prepared in the Office of McNair Law Firm, P.A., P.O. Drawer 3, Hilton Head Island, SC 29938.

IN WITNESS WHEREOF, Borrower has executed this Mortgage, effective the month, day and year first above written.

Signed, sealed and delivered in the presence of:

BLACK DIAMOND, LLC

By: RED ROCKS, LLC

By: J. Chris Lindgren,

Cathy B. Lindgren
STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

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

Witness my hand and official seal this the 4th day of August, 2010.

Cary S. Griffin (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: _____

Cary S. Griffin
Notary Public of South Carolina
My Commission Expires
December 28, 2014

JOINDER/CONSENT

The undersigned Carolina First Bank, as the holder of the Senior Mortgages referenced herein, joins in and consents to the granting of this mortgage by Borrower to Lender, and for no other reason.

WITNESSES:

[Signature]
[Signature]

CAROLINA FIRST BANK

By: *[Signature]*

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public, do hereby certify that Carolina First Bank by William M. Smoot Jr., its VICE PRESIDENT personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 13th day of August, 2010.

[Signature] (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: 09/27/2012

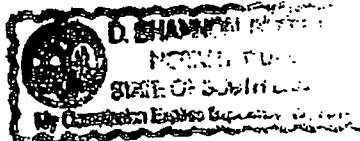


EXHIBIT "R"

August 10, 2011

VIA U.S. MAIL

Black Diamond, LLC
P.O. Box 23164
Hilton Head Island, South Carolina 29925

Mr. Christopher Lindgren
P.O. Box 21345
Hilton Head Island, South Carolina 29925

Mr. David A. Brosman
P.O. Box 22120
Hilton Head Island, South Carolina 29925

Re: **DEMAND FOR PAYMENT; Loan No. 5120783655 in the original principal amount of \$2,000,000.00 (the "Loan")**

Dear Sirs:

This firm represents Carolina First Bank with respect to the above referenced Loan. Reference is hereby made to the Promissory Note (Commercial – Single Advance) Renewal Note of Black Diamond, LLC ("Borrower") to the order of Carolina First Bank ("Lender"), dated as of July 25, 2008, in the original maximum principal amount of \$2,000,000.00 (the "Note"), that certain Forbearance Agreement, dated as of July 28, 2010 (the "Forbearance Agreement") and all loan documents evidencing, securing, guaranteeing or executed in connection with the Loan (collectively with the Note and the Forbearance Agreement, the "Loan Documents").

Reference is hereby made to the Unconditional Guaranty Agreement of David A. Brosman, dated as of July 28, 2010, in favor of Lender in connection with the Loan.

Reference is hereby made to the Unconditional Guaranty of J. Christopher Lindgren, dated as of January 25, 2008, in favor of Lender in connection with the Loan.

The Note has matured as of July 25, 2011. As of August 11, 2011, the following amounts are outstanding in connection with the Loan:

Principal:	\$1,773,311.39	
Interest:	\$15,477.68	(per diem: \$270.92257)

Total payoff through August 11, 2011: \$1,788,789.07

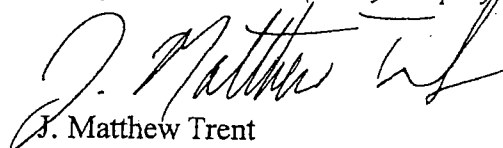
Immediate payment of the foregoing total amount is hereby demanded of Borrower and the above referenced guarantors, jointly and severally, together with accrued interest as and from August 11, 2011.

Lender has not agreed to any modification or extension of the Loan or to any forbearance with respect to the exercise of its rights and remedies under the Loan Documents, except as expressly set forth in the Forbearance Agreement. Please be advised that any prior or future discussions or communications between Lender, Borrower and the guarantors or their respective representatives or counsel regarding the above matters shall not cause a modification or extension of the Loan Documents or an agreement by Lender to forbear in exercising its rights and remedies, establish a custom or practice, or waive, limit or condition Lender's rights and remedies under the Loan Documents. Any agreement by Lender, including any agreement to forbear following an event of default, to modify the Loan Documents or waive any rights or remedies, must be in writing and signed by an authorized representative of Lender. No oral or implied agreement of any kind with respect thereto will be recognized or enforceable.

Lender expressly reserves all of its rights and remedies under the Loan Documents and any other right or remedy available to Lender at law or in equity.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company


J. Matthew Trent

cc: Mr. Michael C. Rose (e-mail)

EXHIBIT "S"

WOMBLE
CARLYLE
SANDRIDGE
& RICE

A PROFESSIONAL LIMITED
LIABILITY COMPANY

550 South Main Street, Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5400
Fax: (864) 255-5440
www.wcsr.com

J. Matthew Trent
Direct Dial: (864) 255-5411
Direct Fax: (864) 239-5861
E-mail: mtrent@wcsr.com

September 13, 2011

VIA U.S. MAIL

Black Diamond, LLC
Post Office Box 23164
Hilton Head Island, South Carolina 29925

Mr. Christopher Lindgren
P.O. Box 21345
Hilton Head Island, South Carolina 29925

Mr. David A. Brosman
P.O. Box 22120
Hilton Head Island, South Carolina 29925

Re: DEMAND FOR PAYMENT; NOTICE OF DEFAULT; Original Loan No.
5121066531/Current Loan No. 2827475-9001 in the original principal amount of
\$3,500,000.00 (the "x9001 Loan")

Dear Sirs:

This firm represents TD Bank, N.A., successor by merger to Carolina First Bank ("Lender"), with respect to the above referenced x9001 Loan. Reference is hereby made to the Promissory Note of Black Diamond, LLC ("Borrower") to the order of Lender, dated as of January 25, 2008, in the original maximum principal amount of \$3,500,000.00 (the "Note"), as modified by that certain Forbearance Agreement, dated as of July 28, 2010 (the "Forbearance Agreement"), and all loan documents evidencing, securing, guaranteeing or executed in connection with the x9001 Loan (collectively with the Note and the Forbearance Agreement, the "x9001 Loan Documents").

Reference is hereby made to the Unconditional Guaranty Agreement of David A. Brosman, dated as of July 28, 2010, in favor of Lender in connection with the x9001 Loan.

Reference is hereby made to the Unconditional Guaranty of J. Christopher Lindgren, dated as of January 25, 2008, in favor of Lender in connection with the x9001 Loan.

The x9001 Loan is cross-defaulted with loan no. 2827475-9002 (original loan no. 5120783655) in the original principal amount of \$2,000,000.00 from Lender to Borrower (the "x9002 Loan"). The x9002 Loan matured as of July 25, 2011 and demand for payment thereof was made as of August 11, 2011. As of the date hereof, Borrower has failed to repay the x9002 Loan to Lender. The failure to pay the x9002 Loan within five (5) days of the date of demand for payment constitutes an event of default under the x9001 Loan.

As of the date hereof, the following amounts are due and payable in connection with the x9001 Loan:

Principal:	\$2,984,477.74	
Interest:	\$26,064.11	(per diem: \$455.96187)
Late Charges:	\$1,124.98	
Fees:	\$6,907.48	

Total payoff through September 13, 2011: \$3,018,574.31

Immediate payment of the foregoing total amount is hereby demanded of Borrower and the above referenced guarantors, jointly and severally, together with accrued interest as and from the date hereof.

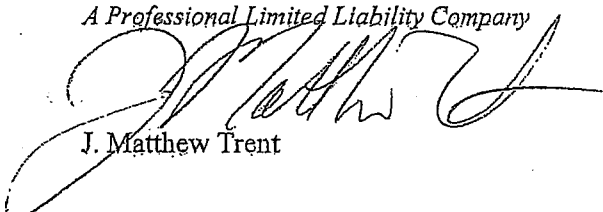
Please be advised that any prior or future discussions or communications between Lender, Borrower and the guarantors or their respective representatives or counsel regarding the above matters shall not cause a modification or extension of the x9001 Loan Documents or an agreement by Lender to forbear in exercising its rights and remedies, establish a custom or practice, or waive, limit or condition Lender's rights and remedies under the x9001 Loan Documents. Any agreement by Lender, including any agreement to forbear following an event of default, to modify the x9001 Loan Documents or waive any rights or remedies, must be in writing and signed by an authorized representative of Lender. No oral or implied agreement of any kind with respect thereto will be recognized or enforceable.

Lender expressly reserves all of its rights and remedies under the x9001 Loan Documents and any other right or remedy available to Lender at law or in equity.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE

A Professional Limited Liability Company


J. Matthew Trent

cc: Mr. Michael C. Rose (via email)

EXHIBT "T"

B36-PP-#WTR

#15703-010

3-5

B36

3850

360

BEAUFORT COUNTY SC - ROD

BK 01884 PGS 0639-0641

FILE NUM 2003097594

12/12/2003 11:59:23 AM

REC'D BY C SEABROOK RCPT# 205840

RECORDING FEES 10.00

County Tax 1,595.00

State Tax 3,770.00

Tax Map #: R600-040-000-0042-0000

RECORDED

2004 Jan -13 04:46 PM

Shawn G. Burris
BEAUFORT COUNTY AUDITOR

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

**TITLE TO REAL ESTATE
DEED OF GENERAL WARRANTY**

KNOW ALL MEN BY THESE PRESENTS, THAT **THE GREENERY, INC., a South Carolina corporation** ("Grantor"), in the State aforesaid for and in consideration of the sum of One Million Four Hundred Fifty Thousand (\$1,450,000.00) Dollars, to it in hand paid at and before the sealing of these presents by **BLACK DIAMOND, L.L.C.**, of Post Office Box 23164, Hilton Head Island, SC 29925 ("Grantee") the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto **BLACK DIAMOND, L.L.C.**, its Successors and Assigns forever, the following described property, to wit:

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

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

ADD DMP Record 1/12/2004 11:18:11 AM
BEAUFORT COUNTY TAX MAP REFERENCE

Dist	Map	SMap	Parcel	Block	Week
R600	040	000	0042	0000	00

THIS being a portion of the property conveyed from Aileen C. Lau n/k/a Aileen C. Dickinson to The Greenery, Inc. by Deed dated February 14, 1994 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on February 21, 1994 in Book 685 at Page 2526.

THIS further being the same property conveyed to The Greenery, Inc., a South Carolina corporation, by Deed from The Greenery, Inc., a North Carolina corporation, dated March 7, 2002 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 1553 at page 1968 on March 12, 2002.

TMS #: R600-040-000-0042-0000

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in any wise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto **BLACK DIAMOND, L.L.C.**, its Successors and Assigns forever.

AND Grantor does hereby bind itself, its Successors, Assigns, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto Grantee, its Successors and Assigns, against Grantor and Grantor's Heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

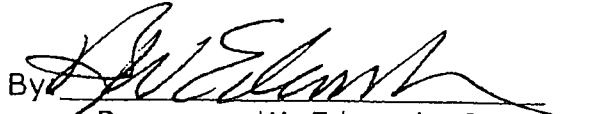
Whenever the context so requires herein to the neuter gender shall include the masculine and/or feminine gender, and the singular number shall include the plural.

WITNESS Grantor's Hand and Seal this 17th day of November, 2003.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

THE GREENERY, INC.,
A South Carolina corporation


Witness

By 
Berryman W. Edwards, Sr.

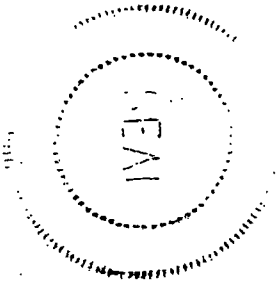

Notary

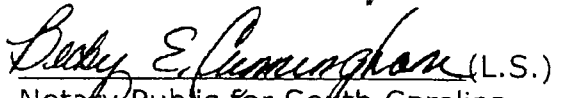
STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of South Carolina, do hereby certify that The Greenery, Inc., a South Carolina corporation, by Berryman W. Edwards, its Officer, personally appeared before me this day who acknowledged the due execution of the foregoing instrument and represented that (s)he, had full authority to so act.

Witness my hand and official seal on the 17th day of November, 2003.



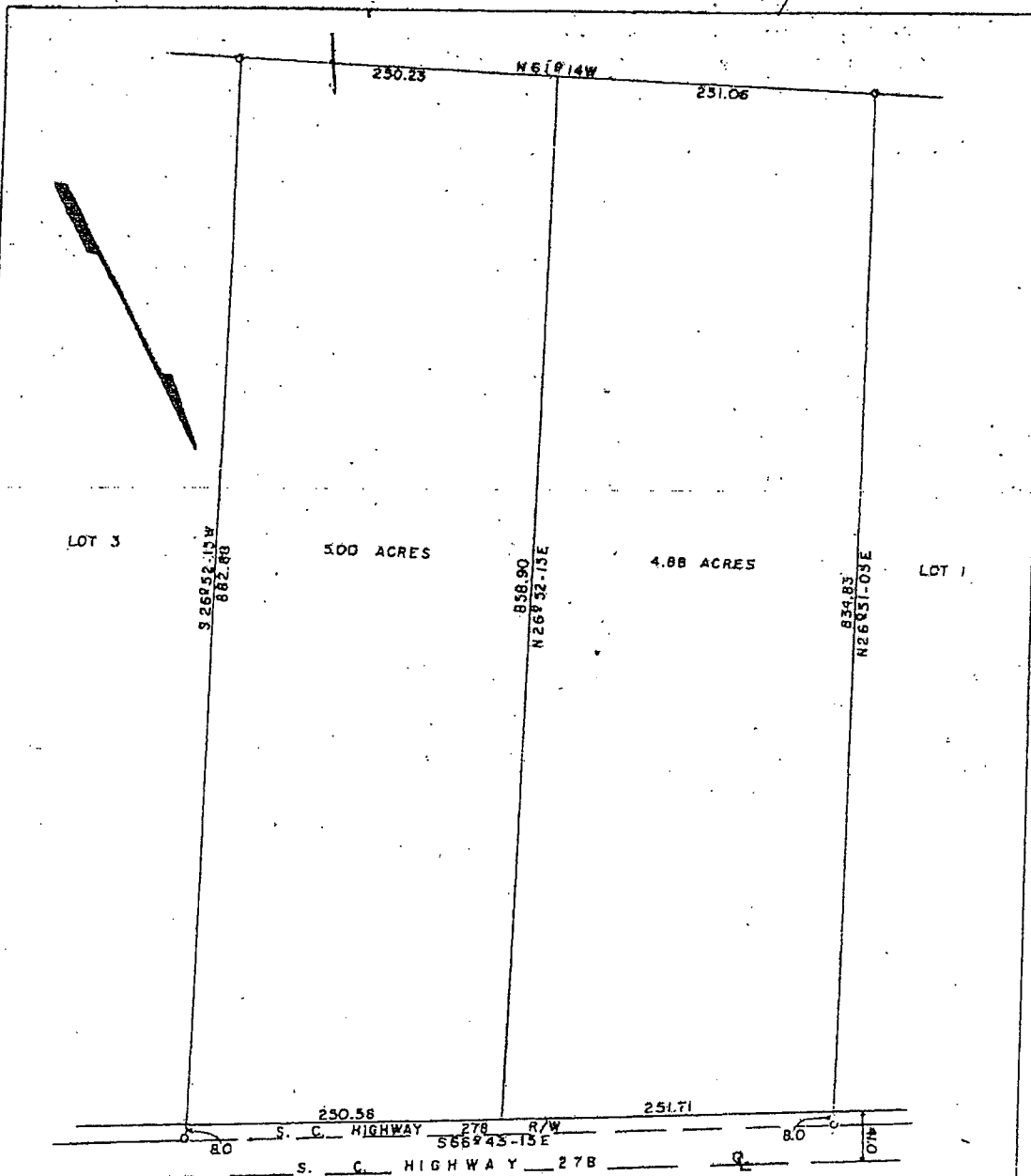
 (L.S.)
Notary Public for South Carolina
My commission expires: 12-31-09

Prepared without benefit of title examination

This Deed was prepared by the Law Offices of
William M. Bowen, P.A.
P.O. Drawer 6128
Hilton Head Island, South Carolina 29938
843 842 5000

EXHIBIT "U"

31 p 181



PLAT PREPARED FOR

AILEEN C. LAU

PLAT BOOK 31
PAGE 181
DATE 12/3/83

DIVISION OF LOT 2, BLUFFTON TOWNSHIP, ACCORDING
TO A PLAT BY R. D. TROGDON, JR., AS RECORDED IN
THE OFFICE OF THE CLERK OF COURT FOR BEAUFORT
COUNTY, SOUTH CAROLINA, IN DEED BOOK 220 AT PAGE 1302.

NOT SURVEYED THIS DATE

SCALE 1" = 100'

SEPTEMBER 22, 1983

R. D. Trogdon Jr.
R. D. TROGDON, JR.
R.L.S. 2712

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

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

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

**ANSWER AND COUNTERCLAIM
OF BLACK DIAMOND, LLC AND
J. CHRISTOPHER LINDGREN**

Plaintiff,

(Jury Trial Demanded)

vs.

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

Defendants.

Black Diamond, LLC and J. Christopher Lindgren answering the complaint of the Plaintiff herein allege and show unto this Honorable Court as follows:

1. They deny every allegation of the Complaint not expressly admitted herein.
2. The allegations of Paragraph 1 set forth conclusions of law to which they make no response except to admit that the subject property is commercial in nature.
3. They lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2, therefore, deny the same and demand proof thereof.
4. They admit the allegations of Paragraphs 3, 4, 5 and 6.
5. They admit, upon information and belief, the allegations of Paragraph 7.
6. The allegations of Paragraph 8 set forth conclusions of law to which they make no response except to admit that the subject property is located in Beaufort County.
7. Answering the allegations of Paragraphs 9 through 13, they admit only that two loans

were made and modified, demand production of and crave reference to the original documents concerning said loans, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

8. Answering the allegations of Paragraphs 14 through 17, they admit only that various guaranty forms were executed, demand production of and crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

9. They deny the allegations of Paragraph 18.

10. Answering the allegations of Paragraphs 19 through 22, they admit only that mortgages were given, demand production of and crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

11. Answering the allegations of Paragraphs 23 through 26, they admit only that assignments were given, demand production of and crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

12. They admit the allegations of Paragraph 27, 28, and 29.

13. Answering the allegations of Paragraphs 30 through 34, they admit only that Plaintiff issued demands for payment and that payment has not been made as demanded, crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

AS TO THE FIRST CAUSE OF ACTION

14. Answering the allegations of Paragraph 35 they repeat and incorporate by reference their preceding responses.

15. They deny the allegations of Paragraphs 36, 37, and 38.

AS TO THE SECOND CAUSE OF ACTION

16. Answering the allegations of Paragraph 39 they repeat and incorporate by reference their preceding responses.

17. They deny the allegations of Paragraphs 40, 41, 42, and 43.

AS TO THE THIRD CAUSE OF ACTION

18. Answering the allegations of Paragraph 44 they repeat and incorporate by reference their preceding responses.

19. They lack knowledge or information sufficient to form a belief as to the truth of the factual allegations of Paragraphs 45 through 52, therefore deny the same, and deny that Plaintiff is entitled to the relief sought.

FOR A SECOND DEFENSE

20. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff has failed to join indispensable parties and/or all real parties in interest.

FOR A THIRD DEFENSE

21. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff is not the true holder and owner of the subject notes and mortgages.

FOR A FOURTH DEFENSE

22. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff has failed to meet conditions precedent to maintaining this action.

FOR A FIFTH DEFENSE

23. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff has failed to mitigate damages and any recovery should be barred or reduced thereby.

FOR A SIXTH DEFENSE

24. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff's claims are barred by waiver and/or estoppel.

FOR A SEVENTH DEFENSE

25. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff's claims are barred by the doctrine of unclean hands.

FOR A FIRST COUNTERCLAIM
(Breach of Covenant of Good Faith and Fair Dealing)

26. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

27. Plaintiff has engaged in a pattern and course of conduct with the purpose and effect of injuring and damaging Defendants and improperly enriching itself. Among other things, Plaintiff

has employed its superior bargaining and economic position to coerce Defendants into cross-collateralization agreements, to improperly take advantage of the death of a member of Black Diamond, LLC, to coerce Defendants into contracting with a property manager, to thereafter interfere with the contract entered into with the property manager and to direct him in his performance to the benefit of the Plaintiff and the detriment of Defendants, to refuse to timely respond to requests for approval of sales of property which resulted in the loss of a sale and corresponding injury and damage to Defendants, to interfere with tenants, causing a loss of rentals and corresponding decrease in property values, and to otherwise interfere with Defendants' ability to realize value on the subject properties and thereby repay the Plaintiff.

28. By virtue of its agreements with Defendants, including those at issue herein, Plaintiff owed a duty to Defendants to deal with them fairly and good faith. The Bank has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

29. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

30. Plaintiff has breached the contracts and agreements that were established between the parties resulting in foreseeable, actual, substantial damages to Defendants.

FOR A THIRD COUNTERCLAIM
(Breach of Fiduciary Duty)

31. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

32. Plaintiff induced Defendants to repose special trust and confidence in it and

Defendants reasonably and justifiably did so. In consequence thereof Plaintiff in equity and good conscience was duty bound to act in good faith and with due regard to the interests of Defendants. Plaintiff has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants.

FOR A FOURTH COUNTERCLAIM
(Negligent Misrepresentation)

33. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

34. Throughout their relationship the Plaintiff made to Defendants various promises, assurances, and representations, upon which Defendants reasonably relied, which were negligently made in that they were knowingly false and/or Plaintiff, through its agents and employees, failed to exercise care to determine the truth or falsity thereof. As a direct and proximate result of the negligence of Plaintiff the Defendants have suffered actual, substantial damages.

FOR A FIFTH COUNTERCLAIM
(Duress)

35. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

36. In the course of its dealings with Defendants Plaintiff threatened to and did in fact seek to enforce its legal rights in bad faith, delayed various actions to its advantage and to the detriment of Defendants, and through other actions, committed the tort of duress, as a direct and proximate result of which the Defendants have suffered actual, substantial damages.

FOR A SIXTH CAUSE OF ACTION
(Interference with Prospective Economic Relations)

37. Defendants repeat and incorporate herein all other allegations of this Answer and

Counterclaim.

38. Defendants had an opportunity to sell a portion of the subject property. Plaintiff intentionally interfered with and prevented the sale by improper means and for an improper purpose thereby causing injury and damage to Defendants.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices)

39. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

40. The acts and practices of Plaintiff in its dealings with Defendants constituted wilful or knowing violation of the South Carolina Unfair Trade Practices Act, affect the public in that they are capable of repetition and have in fact been repeated with others, and Defendants are entitled to actual damages, treble damages, and attorneys fees.

WHEREFORE, having fully responded to Plaintiff's Complaint, Defendants Black Diamond, LLC and J. Christopher Lindgren pray for a jury trial on all issues so triable, pray that the complaint be dismissed with prejudice, with costs and fees being awarded to Defendants, that they have judgment on their counterclaim for actual damages, treble damages, and attorneys fees, and for such other and further relief as this Honorable Court may deem just and proper.

Charleston, SC

April 23, 2012



KEATING L. SIMONS, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132

ATTORNEY FOR DEFENDANTS
BLACK DIAMOND, LLC AND
CHRISTOPHER LINDGREN

CERTIFICATE OF SERVICE

I, Debra F. Evans, a paralegal with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Answer and Counterclaim of Black Diamond, LLC and J. Christopher Lindgren upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

James Matthew Trent, Esquire
Womble, Carlyle, Sandridge & Rice, PLLC
PO Box 10208
Greenville, SC 29603

This 23rd day of April, 2012.

SIMONS & DEAN

BY: Debra F. Evans

Debra F. Evans, Paralegal

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

ANSWER AND COUNTERCLAIM OF
DAVID A. BROSMAN

(Jury Trial Demanded)

Defendant David A. Brosman ("Brosman") answering the Complaint of the Plaintiff herein alleges and shows onto this Honorable Court as follows:

1. Brosman denies each and every allegation of the Complaint not expressly admitted herein.
2. The allegations of Paragraph 1 of the Complaint set forth conclusions of law to which Brosman makes no response except to admit that the subject property is commercial in nature.
3. Brosman lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint and, therefore, denies the same and demands proof thereof.
4. Brosman admits the allegations of Paragraphs 3, 4, 5 and 6 of the Complaint.
5. Brosman admits, upon information and belief, the allegations of Paragraph 7 of the Complaint.
6. The allegations of Paragraph 8 of the Complaint set forth conclusions of law

to which Brosman makes no response except to admit that the subject property is located in Beaufort County.

7. Answering the allegations of Paragraphs 9 through 13 of the Complaint, Brosman admits only that two loans were made and modified, demands production of and craves reference to the original documents concerning said loans, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

8. Answering the allegations of Paragraphs 14 through 17 of the Complaint, Brosman admits only that various guaranty forms were executed, demands production of and craves reference to the original documents concerning same, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

9. Brosman denies the allegations of Paragraph 18 of the Complaint.

10. Answering the allegations of Paragraphs 19 through 22 of the Complaint, Brosman admits only that mortgages were given, demands production of and craves reference to the original documents concerning same, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

11. Answering the allegations of Paragraphs 23 through 26 of the Complaint, Brosman admits only that mortgages were given, demands production of and craves reference to the original documents concerning same, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

12. Brosman admits the allegations of Paragraph 27, 28 and 29 of the Complaint upon information and belief.

13. Answering the allegations of Paragraphs 30 through 34 of the Complaint, Brosman admits only that Plaintiff issued demands for payment and that payment has not been made as demanded, craves reference to the original documents concerning same,

denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

AS TO THE FIRST CAUSE OF ACTION

14. Answering the allegations of Paragraph 35 of the Complaint, Brosman repeats and incorporates by reference his preceding responses.

15. Brosman denies the allegations of Paragraphs 36, 37 and 38 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

16. Answering the allegations of Paragraph 39 of the Complaint, Brosman repeats and incorporates by reference his preceding responses.

17. Brosman denies the allegations of Paragraphs 40, 41, 42 and 43 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

18. Answering the allegations of Paragraph 44 of the Complaint, Brosman repeats and incorporates by reference his preceding responses.

19. Brosman lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations of Paragraphs 45 through 52 of the Complaint and, therefore, denies the same, and denies that Plaintiff is entitled to the relief sought.

FOR A SECOND DEFENSE

20. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff has failed to join indispensable parties and/or all real parties in interest.

FOR A THIRD DEFENSE

21. Further answering the Complaint and as and for an affirmative defense thereto

Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff is not the true holder and owner of the subject notes and mortgages.

FOR A FOURTH DEFENSE

22. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff has failed to meet conditions precedent to maintaining this action.

FOR A FIFTH DEFENSE

23. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff has failed to mitigate damages and any recovery should be barred or reduced thereby.

FOR A SIXTH DEFENSE

24. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff's claims are barred by waiver and/or estoppel.

FOR A SEVENTH DEFENSE

25. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff's claims are barred by the doctrine of unclean hands.

FOR A FIRST COUNTERCLAIM
(Breach of Covenant of Good Faith and Fair Dealing)

26. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

27. Plaintiff has engaged in a pattern and course of conduct with the purpose and

effect of injuring and damaging the primary Defendants, including Brosman, and improperly enriching itself. Among other things, Plaintiff has employed its superior bargaining and economic position to coerce Defendants into cross-collateralization agreements, to improperly take advantage of the death of a member of Defendant Black Diamond, LLC, to coerce Defendants into contracting with a property manager, to thereafter interfere with the contract entered into with the property manager and to direct him in his performance to the benefit of the Plaintiff and the detriment of Defendants, including Brosman, to refuse to timely respond to requests for approval of sales of property which resulted in the loss of a sale and corresponding injury and damage to Defendants, including Brosman, to interfere with tenants, causing a loss of rentals and corresponding decrease in property values, and to otherwise interfere with Defendants' ability to realize value on the subject properties and thereby repay the Plaintiff.

28. By virtue of its agreements with Defendants, including those at issue herein, Plaintiff owed a duty to Defendants to deal with them fairly and good faith. The Bank has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants, including Brosman.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

29. Brosman repeat and incorporate herein all other allegations of this Answer and Counterclaim.

30. Plaintiff has breached the contracts and agreements that were established between the parties resulting in foreseeable, actual, substantial damages to Defendants, including Brosman.

FOR A THIRD COUNTERCLAIM
(Breach of Fiduciary Duty)

31. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

32. Plaintiff induced Defendants to repose special trust and confidence in it and Defendants reasonably and justifiably did so. In consequence thereof Plaintiff in equity and good conscience was duty bound to act in good faith and with due regard to the interests of Defendants. Plaintiff has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants, including Brosman.

33. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

34. Throughout their relationship the Plaintiff made to Defendants various promises, assurances, and representations, upon which Defendants reasonably relied, which were negligently made in that they were knowingly false and/or Plaintiff, through its agents and employees, failed to exercise care to determine the truth or falsity thereof. As a direct and proximate result of the negligence of Plaintiff, the Defendants, including Brosman, have suffered actual, substantial damages.

FOR A FIFTH COUNTERCLAIM
(Duress)

35. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

36. In the course of its dealings with Defendants, Plaintiff threatened to and did in fact seek to enforce its legal rights in bad faith, delayed various actions to its advantage and to the detriment of Defendants, and through other actions, committed the tort of duress, as a direct and proximate result of which the Defendants, including Brosman, have suffered

actual, substantial damages.

FOR A SIXTH CAUSE OF ACTION
(Interference with Prospective Economic Relations)

37. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

38. Defendants had an opportunity to sell a portion of the subject property. Plaintiff intentionally interfered with and prevented the sale by improper means and for an improper purpose thereby causing injury and damages to Defendants, including Brosman.

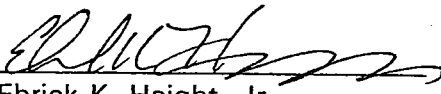
FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices)

39. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

40. The acts and practices of Plaintiff in its dealings with the Defendants constituted wilful or knowing violation(s) of the South Carolina Unfair Trade Practices Act, affect the public in that they are capable of repetition and have in fact been repeated with others, and Defendants, including Brosman, are entitled to actual damages, treble damages, and attorneys fees.

WHEREFORE, having fully responded to Plaintiff's Complaint, David A. Brosman prays for a jury trial on all issues so triable, prays that the Complaint be dismissed with prejudice, with costs and fees being awarded to said Defendant, that Brosman have judgment on his counterclaim for actual damages, treble damages, and attorney's fees, and for such other and further relief as this Honorable Court may deem just and proper.

MINOR, HAIGHT & ARUNDELL, P.C.

By: 

Ehrick K. Haight, Jr.

P. O. Drawer 6067

Hilton Head Island, SC 29938

(843) 785-8040

Attorneys for Defendant David A. Brosman

Hilton Head Island, South Carolina
This 18th day of May, 2012.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

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

Plaintiff,

v.

CERTIFICATE OF MAILING

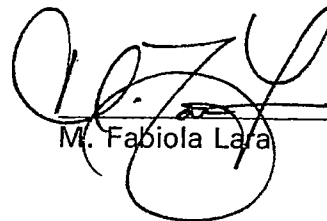
BLACK DIAMOND, LLC, J.
CHRISTOPHER LINDGREN, DAVID)
A. BROSMAN, JULIE H. KING)
and THE GREENERY, INC.,)

Defendants.

The undersigned M. Fabiola Lara hereby certifies that on the 18th day of May, 2012 she served a copy of the attached Answer and Counterclaim of Defendant David A. Brosman upon counsel of record by depositing true and accurate copies thereof in the United States mail with sufficient postage prepaid to:

J. Matthew Trent, Esquire
Womble Carlyle Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412



M. Fabiola Lara

SWORN TO AND SUBSCRIBED before me
this 18th day of May, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 7/20/2017

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 N.A.'S REPLY TO
DEFENDANTS' ANSWER AND
COUNTERCLAIM

12 MAY 24 PM 1:46
JEREMY ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Plaintiff TD Bank, N.A., Successor by Merger to Carolina First Bank ("TD Bank"), by and through the undersigned counsel, and for a Reply to Defendants Black Diamond, LLC and J. Christopher Lindgren's (collectively, the "Borrowers") Answer and Counterclaim (the "Counterclaim"), states as follows:

FOR A FIRST DEFENSE

(Failure to State Facts Sufficient to Constitute a Cause of Action)

The Counterclaim fails to state facts sufficient to constitute a cause of action upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

(General Denial)

TD Bank denies all allegations not hereinafter specifically admitted. As to the correspondingly numbered Paragraphs to the Counterclaim, TD Bank responds as follows:

AS TO THE BORROWERS' FIRST DEFENSE

1. No response is required as to Paragraph 1 of the Counterclaim. To the extent a response is required, denied.
2. No response is required as to Paragraph 2 of the Counterclaim. To the extent a response is required, denied.
3. No response is required as to Paragraph 3 of the Counterclaim. To the extent a response is required, denied.
4. No response is required as to Paragraph 4 of the Counterclaim. To the extent a response is required, denied.
5. No response is required as to Paragraph 5 of the Counterclaim. To the extent a response is required, denied.
6. No response is required as to Paragraph 6 of the Counterclaim. To the extent a response is required, denied.
7. No response is required as to Paragraph 7 of the Counterclaim. To the extent a response is required, denied.
8. No response is required as to Paragraph 8 of the Counterclaim. To the extent a response is required, denied.
9. No response is required as to Paragraph 9 of the Counterclaim. To the extent a response is required, denied.
10. No response is required as to Paragraph 10 of the Counterclaim. To the extent a response is required, denied.
11. No response is required as to Paragraph 11 of the Counterclaim. To the extent a response is required, denied.

12. No response is required as to Paragraph 12 of the Counterclaim. To the extent a response is required, denied.

13. No response is required as to Paragraph 13 of the Counterclaim. To the extent a response is required, denied.

14. No response is required as to Paragraph 14 of the Counterclaim. To the extent a response is required, denied.

15. No response is required as to Paragraph 15 of the Counterclaim. To the extent a response is required, denied.

16. No response is required as to Paragraph 16 of the Counterclaim. To the extent a response is required, denied.

17. No response is required as to Paragraph 17 of the Counterclaim. To the extent a response is required, denied.

18. No response is required as to Paragraph 18 of the Counterclaim. To the extent a response is required, denied.

19. No response is required as to Paragraph 19 of the Counterclaim. To the extent a response is required, denied.

AS TO THE BORROWERS' SECOND DEFENSE

20. TD Bank denies the allegations in Paragraph 20.

AS TO THE BORROWERS' THIRD DEFENSE

21. TD Bank denies the allegations in Paragraph 21.

AS TO THE BORROWERS' FOURTH DEFENSE

22. TD Bank denies the allegations in Paragraph 22.

AS TO THE BORROWERS' FIFTH DEFENSE

23. TD Bank denies the allegations in Paragraph 23 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' SIXTH DEFENSE

24. TD Bank denies the allegations in Paragraph 24.

AS TO THE BORROWERS' SEVENTH DEFENSE

25. TD Bank denies the allegations in Paragraph 25.

AS TO THE BORROWERS' FIRST COUNTERCLAIM

26. As to Paragraph 26 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 25 of the Counterclaim as if fully restated herein.

27. TD Bank denies the allegations in Paragraph 27.

28. TD Bank denies the allegations in Paragraph 28 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' SECOND COUNTERCLAIM

29. As to Paragraph 29 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 28 of the Counterclaim as if fully restated herein.

30. TD Bank denies the allegations in Paragraph 30 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' THIRD COUNTERCLAIM

31. As to Paragraph 31 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 30 of the Counterclaim as if fully restated herein.

32. TD Bank denies the allegations in Paragraph 32 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' FOURTH COUNTERCLAIM

33. As to Paragraph 33 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 32 of the Counterclaim as if fully restated herein.

34. TD Bank denies the allegations in Paragraph 34 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' FIFTH COUNTERCLAIM

35. As to Paragraph 35 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 34 of the Counterclaim as if fully restated herein.

36. TD Bank denies the allegations in Paragraph 36 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' SIXTH COUNTERCLAIM

37. As to Paragraph 37 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 36 of the Counterclaim as if fully restated herein.

38. TD Bank denies the allegations in Paragraph 38 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' SEVENTH COUNTERCLAIM

39. As to Paragraph 39 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 38 of the Counterclaim as if fully restated herein.

40. TD Bank denies the allegations in Paragraph 40 and denies that the Borrowers are entitled to any of the relief prayed for therein.

AS TO THE BORROWERS' PRAYER FOR RELIEF

TD Bank denies that the Borrowers are entitled to any of the relief prayed for in the final, unnumbered paragraph on page 7 of the Counterclaim.

FOR A THIRD DEFENSE
(Waiver)

TD Bank states that the Borrowers have waived their claims against TD Bank through their conduct.

FOR A FOURTH DEFENSE
(Assumption of the Risk)

The Borrowers' claims against TD Bank are barred because the Borrowers knew and understood the cost, risk and potential rewards of borrowing money from TD Bank and therefore assumed the risk associated with entering into the subject loan transaction.

FOR A FIFTH DEFENSE
(Unclean Hands)

The Borrowers' claims against TD Bank are barred because of the Borrowers' own conduct and/or the equitable doctrine of unclean hands.

FOR A SIXTH DEFENSE
(Laches)

The Borrowers' claims against TD Bank are barred, in whole or in part, under the doctrine of laches.

FOR A SEVENTH DEFENSE
(Waiver and/or Estoppel)

The Borrowers' claims against TD Bank are barred in whole or in part, under the doctrines of waiver and/or estoppel.

FOR A EIGHTH DEFENSE
(Set off/Recoupment)

TD Bank would show that the Borrowers have been advanced a sum of money, and the Borrowers have promised to repay the money in full, with interest at a standard rate. Accordingly, TD Bank is informed and believes that the Borrowers are not entitled to the affirmative relief sought in their Counterclaim. However, if the Court were to grant such relief,

TD Bank is informed and believes it is entitled to repayment of the sum of money advanced, plus interest, as a recoupment and/or setoff against such relief, and TD Bank would also be entitled to an order of this Court recognizing and declaring TD Bank's equitable right to repayment in full, plus interest.

FOR A NINTH DEFENSE
(Speculative Damages)

The Borrowers' claim for damages is speculative and therefore disallowed under South Carolina law.

FOR A TENTH DEFENSE
(Failure to Mitigate)

The Borrowers are legally obligated to mitigate their damages. Upon information and belief TD Bank can show that the Borrowers have failed to mitigate their damages and are therefore barred from recovery based on this failure.

FOR A ELEVENTH DEFENSE
(Good Faith)

TD Bank has at all times acted in good faith and in compliance with any laws and contracts and are informed and believe that Borrowers' Counterclaim should therefore be dismissed in its entirety.

FOR A TWELFTH DEFENSE
(Compliance with Applicable Law)

TD Bank would show that any actions taken and/or procedures followed concerning the Borrowers were taken in good faith, in a reasonable manner and that said actions and/or procedures were authorized by contract or law, reasonable in time and manner, and the Borrowers are therefore precluded from recovery against TD Bank on their Counterclaim.

FOR A THIRTEENTH DEFENSE
(Failure to Perform)

Further answering the Counterclaim and without waiving any other defenses, TD Bank states that the Borrowers failed to perform under the promissory note and mortgage, and therefore, the Borrowers' Counterclaim must be dismissed.

FOR A FOURTEENTH DEFENSE
(Compliance with the Note and Mortgage)

TD Bank incorporates by reference all of the terms, conditions, exclusions, exceptions and limitations of the promissory notes between the Borrowers and TD Bank and would show that it performed all of its obligations under the subject loan documents and/or in procuring any alleged loan documents. TD Bank further pleads the terms and conditions of the subject loan documents as a complete defense and bar to this action.

FOR A FIFTEENTH DEFENSE
(Prior Breach)

The Borrowers' claims are barred by their prior breach of the subject loan documents with TD Bank.

FOR A SIXTEENTH DEFENSE
(Punitive/Treble Damages Improper)

The Borrowers' Counterclaim fails to set forth a claim for punitive/treble damages upon which relief may be granted.

FOR A SEVENTEENTH DEFENSE
(Punitive/Treble Damages Improper)

To the extent the Borrowers' Counterclaim asserts a demand for punitive/treble damages, TD Bank specifically incorporates by reference any and all standards of limitations regarding the determination and/or enforceability of punitive/treble damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996); *Cooper*

Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003).

FOR A EIGHTEENTH DEFENSE
(Punitive/Treble Damages Improper)

To the extent that the Borrowers' Counterclaim seeks punitive/treble damages, TD Bank affirmatively pleads the following in regard to punitive/treble damages:

- (a) An award of punitive/treble damages in this civil action would amount to a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution;
- (b) An award of punitive/treble damages in this civil action would violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution;
- (c) The criteria used for determining whether and in what amount punitive/treble damages may be awarded are impermissible, vague, imprecise and inconsistent and, therefore, violate the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the South Carolina Constitution;
- (d) An award of punitive/treble damages in this civil action would amount to an excessive fine in violation of the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution; and
- (e) The Borrowers' claim for punitive/treble damages is barred by the "double jeopardy" clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

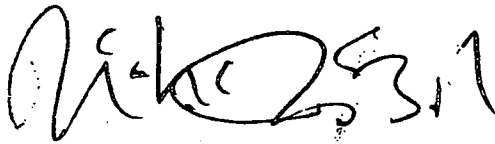
FOR A NINETEENTH DEFENSE
(Reservation and Non-Waiver)

TD Bank reserves the right to amend its Reply, if same becomes appropriate after full investigation and discovery.

WHEREFORE, TD Bank prays as follows:

- 1) That the Court enter judgment in favor of TD Bank on its Complaint;
- 2) That the Borrowers have and recover nothing of TD Bank, and that the Counterclaim be dismissed with prejudice;
- 3) That the costs of this action be taxed to the Borrowers;
- 4) That the Court award TD Bank's attorneys' fees as permitted by law; and
- 5) That the Court order such other and further relief as it deems just and proper.

This 22nd day of May, 2012
Greenville, South Carolina



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

Email: mbogle@wcsr.com

J. Matthew Trent (S.C. Bar No. 74192)

Email: mtrent@wcsr.com

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

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Womble Carlyle Sandridge & Rice, LLP

Post Office Box 10208

Greenville, SC 29603-0208

Telephone: (864) 255-5421

Fax: (864) 239-5852

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

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 22nd day of May, 2012, a copy of the attached **TD BANK N.A.'S REPLY TO DEFENDANTS' ANSWER AND COUNTERCLAIM** was served by electronic mail *and* by causing to be deposited a copy of the same via United States First Class Mail, postage prepaid, addressed to the following:

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412

Email: ksimons@simonsanddean.com

*Attorney for Defendants Black Diamond, LLC
and J. Christopher Lindgren*

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938

Email: rick@mhalawfirm.com

Attorney for David A. Brosman

12 MAY 24 PM 1:46
JEREMY ANNE ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Susan Church

Susan Church, Legal Assistant
WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company
550 S. Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29603
(864) 255-5400

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 N.A.'S REPLY TO
DEFENDANT'S ANSWER AND
COUNTERCLAIM

2012 JUN 11 PM 1:40
CLERK OF COURT
BEAUFORT COUNTY, S.C.
JIM ROSENEAU

Plaintiff TD Bank, N.A., Successor by Merger to Carolina First Bank ("TD Bank"), by and through the undersigned counsel, and for a Reply to Defendant David A. Brosman's (the "Borrower") Answer and Counterclaim (the "Counterclaim"), states as follows:

FOR A FIRST DEFENSE

(Failure to State Facts Sufficient to Constitute a Cause of Action)

The Counterclaim fails to state facts sufficient to constitute a cause of action upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

(General Denial)

TD Bank denies all allegations not hereinafter specifically admitted. As to the correspondingly numbered Paragraphs to the Counterclaim, TD Bank responds as follows:

AS TO THE BORROWER'S FIRST DEFENSE

1. No response is required as to Paragraph 1 of the Counterclaim. To the extent a response is required, denied.

2. No response is required as to Paragraph 2 of the Counterclaim. To the extent a response is required, denied.

3. No response is required as to Paragraph 3 of the Counterclaim. To the extent a response is required, denied.

4. No response is required as to Paragraph 4 of the Counterclaim. To the extent a response is required, denied.

5. No response is required as to Paragraph 5 of the Counterclaim. To the extent a response is required, denied.

6. No response is required as to Paragraph 6 of the Counterclaim. To the extent a response is required, denied.

7. No response is required as to Paragraph 7 of the Counterclaim. To the extent a response is required, denied.

8. No response is required as to Paragraph 8 of the Counterclaim. To the extent a response is required, denied.

9. No response is required as to Paragraph 9 of the Counterclaim. To the extent a response is required, denied.

10. No response is required as to Paragraph 10 of the Counterclaim. To the extent a response is required, denied.

11. No response is required as to Paragraph 11 of the Counterclaim. To the extent a response is required, denied.

12. No response is required as to Paragraph 12 of the Counterclaim. To the extent a response is required, denied.

13. No response is required as to Paragraph 13 of the Counterclaim. To the extent a response is required, denied.

14. No response is required as to Paragraph 14 of the Counterclaim. To the extent a response is required, denied.

15. No response is required as to Paragraph 15 of the Counterclaim. To the extent a response is required, denied.

16. No response is required as to Paragraph 16 of the Counterclaim. To the extent a response is required, denied.

17. No response is required as to Paragraph 17 of the Counterclaim. To the extent a response is required, denied.

18. No response is required as to Paragraph 18 of the Counterclaim. To the extent a response is required, denied.

19. No response is required as to Paragraph 19 of the Counterclaim. To the extent a response is required, denied.

AS TO THE BORROWER'S SECOND DEFENSE

20. TD Bank denies the allegations in Paragraph 20.

AS TO THE BORROWER'S THIRD DEFENSE

21. TD Bank denies the allegations in Paragraph 21.

AS TO THE BORROWER'S FOURTH DEFENSE

22. TD Bank denies the allegations in Paragraph 22.

AS TO THE BORROWER'S FIFTH DEFENSE

23. TD Bank denies the allegations in Paragraph 23 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S SIXTH DEFENSE

24. TD Bank denies the allegations in Paragraph 24.

AS TO THE BORROWER'S SEVENTH DEFENSE

25. TD Bank denies the allegations in Paragraph 25.

AS TO THE BORROWER'S FIRST COUNTERCLAIM

26. As to Paragraph 26 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 25 of the Counterclaim as if fully restated herein.

27. TD Bank denies the allegations in Paragraph 27.

28. TD Bank denies the allegations in Paragraph 28 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S SECOND COUNTERCLAIM

29. As to Paragraph 29 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 28 of the Counterclaim as if fully restated herein.

30. TD Bank denies the allegations in Paragraph 30 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S THIRD COUNTERCLAIM

31. As to Paragraph 31 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 30 of the Counterclaim as if fully restated herein.

32. TD Bank denies the allegations in Paragraph 32 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S FOURTH COUNTERCLAIM

33. As to Paragraph 33 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 32 of the Counterclaim as if fully restated herein.

34. TD Bank denies the allegations in Paragraph 34 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S FIFTH COUNTERCLAIM

35. As to Paragraph 35 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 34 of the Counterclaim as if fully restated herein.

36. TD Bank denies the allegations in Paragraph 36 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S SIXTH COUNTERCLAIM

37. As to Paragraph 37 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 36 of the Counterclaim as if fully restated herein.

38. TD Bank denies the allegations in Paragraph 38 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S SEVENTH COUNTERCLAIM

39. As to Paragraph 39 of the Counterclaim, TD Bank incorporates herein by reference its responses to Paragraphs 1 through 38 of the Counterclaim as if fully restated herein.

40. TD Bank denies the allegations in Paragraph 40 and denies that the Borrower is entitled to any of the relief prayed for therein.

AS TO THE BORROWER'S PRAYER FOR RELIEF

TD Bank denies that the Borrower is entitled to any of the relief prayed for in the final, unnumbered paragraph on page 7 of the Counterclaim.

FOR A THIRD DEFENSE

(Waiver)

TD Bank states that the Borrower has waived his claims against TD Bank through his conduct.

FOR A FOURTH DEFENSE
(Assumption of the Risk)

The Borrower's claims against TD Bank are barred because the Borrower knew and understood the cost, risk and potential rewards of borrowing money from TD Bank and therefore assumed the risk associated with entering into the subject loan transaction.

FOR A FIFTH DEFENSE
(Unclean Hands)

The Borrower's claims against TD Bank are barred because of the Borrower's own conduct and/or the equitable doctrine of unclean hands.

FOR A SIXTH DEFENSE
(Laches)

The Borrower's claims against TD Bank are barred, in whole or in part, under the doctrine of laches.

FOR A SEVENTH DEFENSE
(Waiver and/or Estoppel)

The Borrower's claims against TD Bank are barred in whole or in part, under the doctrines of waiver and/or estoppel.

FOR A EIGHTH DEFENSE
(Set off/Recoupment)

TD Bank would show that the Borrower has been advanced a sum of money, and the Borrower has promised to repay the money in full, with interest at a standard rate. Accordingly, TD Bank is informed and believes that the Borrower is not entitled to the affirmative relief sought in his Counterclaim. However, if the Court were to grant such relief, TD Bank is informed and believes it is entitled to repayment of the sum of money advanced, plus interest, as a recoupment and/or setoff against such relief, and TD Bank would also be entitled to an order of

this Court recognizing and declaring TD Bank's equitable right to repayment in full, plus interest.

FOR A NINTH DEFENSE
(Speculative Damages)

The Borrower's claim for damages is speculative and therefore disallowed under South Carolina law.

FOR A TENTH DEFENSE
(Failure to Mitigate)

The Borrower is legally obligated to mitigate his damages. Upon information and belief TD Bank can show that the Borrower has failed to mitigate his damages and is therefore barred from recovery based on this failure.

FOR A ELEVENTH DEFENSE
(Good Faith)

TD Bank has at all times acted in good faith and in compliance with any laws and contracts and is informed and believes that the Borrower's Counterclaim should therefore be dismissed in its entirety.

FOR A TWELFTH DEFENSE
(Compliance with Applicable Law)

TD Bank would show that any actions taken and/or procedures followed concerning the Borrower were taken in good faith, in a reasonable manner and that said actions and/or procedures were authorized by contract or law, reasonable in time and manner, and the Borrower is therefore precluded from recovery against TD Bank on his Counterclaim.

FOR A THIRTEENTH DEFENSE
(Failure to Perform)

Further answering the Counterclaim and without waiving any other defenses, TD Bank states that the Borrower failed to perform under the promissory note and mortgage, and therefore, the Borrower's Counterclaim must be dismissed.

FOR A FOURTEENTH DEFENSE
(Compliance with the Note and Mortgage)

TD Bank incorporates by reference all of the terms, conditions, exclusions, exceptions and limitations of the promissory notes between the Borrower and TD Bank and would show that it performed all of its obligations under the subject loan documents and/or in procuring any alleged loan documents. TD Bank further pleads the terms and conditions of the subject loan documents as a complete defense and bar to this action.

FOR A FIFTEENTH DEFENSE
(Prior Breach)

The Borrower's claims are barred by his prior breach of the subject loan documents with TD Bank.

FOR A SIXTEENTH DEFENSE
(Punitive/Treble Damages Improper)

The Borrower's Counterclaim fails to set forth a claim for punitive/treble damages upon which relief may be granted.

FOR A SEVENTEENTH DEFENSE
(Punitive/Treble Damages Improper)

To the extent the Borrower's Counterclaim asserts a demand for punitive/treble damages, TD Bank specifically incorporates by reference any and all standards of limitations regarding the determination and/or enforceability of punitive/treble damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996); *Cooper*

Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003).

FOR A EIGHTEENTH DEFENSE
(Punitive/Treble Damages Improper)

To the extent that the Borrower's Counterclaim seeks punitive/treble damages, TD Bank affirmatively pleads the following in regard to punitive/treble damages:

- (a) An award of punitive/treble damages in this civil action would amount to a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution;
- (b) An award of punitive/treble damages in this civil action would violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution;
- (c) The criteria used for determining whether and in what amount punitive/treble damages may be awarded are impermissible, vague, imprecise and inconsistent and, therefore, violate the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the South Carolina Constitution;
- (d) An award of punitive/treble damages in this civil action would amount to an excessive fine in violation of the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution; and
- (e) The Borrower's claim for punitive/treble damages is barred by the "double jeopardy" clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

FOR A NINETEENTH DEFENSE
(Reservation and Non-Waiver)

TD Bank reserves the right to amend its Reply, if same becomes appropriate after full investigation and discovery.

WHEREFORE, TD Bank prays as follows:

- 1) That the Court enter judgment in favor of TD Bank on its Complaint;
- 2) That the Borrower have and recover nothing of TD Bank, and that the Counterclaim be dismissed with prejudice;
- 3) That the costs of this action be taxed to the Borrower;
- 4) That the Court award TD Bank's attorneys' fees as permitted by law; and
- 5) That the Court order such other and further relief as it deems just and proper.

This 7th day of June, 2012
Greenville, South Carolina



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

Email: mbogle@wcsr.com

J. Matthew Trent (S.C. Bar No. 74192)

Email: mtrent@wcsr.com

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

Email: cwrenn@wcsr.com

Womble Carlyle Sandridge & Rice, LLP

Post Office Box 10208

Greenville, SC 29603-0208

Telephone: (864) 255-5421

Fax: (864) 239-5852

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

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 7th day of June, 2012, a copy of the attached TD BANK N.A.'S REPLY TO DEFENDANTS' ANSWER AND COUNTERCLAIM was served by electronic mail *and* by causing to be deposited a copy of the same via United States First Class Mail, postage prepaid, addressed to the following:

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412

Email: ksimons@simonsanddean.com

*Attorney for Defendants Black Diamond, LLC
and J. Christopher Lindgren*

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 2993

Email: rick@mhalawfirm.com

Attorney for David A. Brosman

BEAUFORT COUNTY, S.C.
CLERK OF COURT

2012 JUN 11 PM 1:40

Susan Church

Susan Church, Legal Assistant
WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company
550 S. Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29603
(864) 255-5400

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

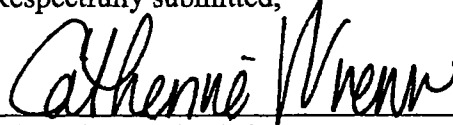
2014 FEB 25 PM 12:54
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TD Bank, N.A., Successor by Merger to Carolina First Bank, ("**TD Bank**" or "**Plaintiff**"), moves the Court to enter summary judgment in TD Bank's favor pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as there is no genuine issue of material fact as to Plaintiff's affirmative claims for relief asserted herein, nor as to the counterclaims asserted against TD Bank by Defendants Black Diamond, LLC; J. Christopher Lindgren; and David A. Brosman (collectively, "**Defendants**"), and therefore, Plaintiff is entitled to judgment as a matter of law both on its affirmative claims for relief as well as against Defendants' counterclaims.

TD Bank's Motion is supported by, without limitation, the pleadings, discovery, statutory and common law of the State of South Carolina, and any Memorandum of Law and/or affidavit(s) to be filed in support hereof, in addition to any other evidence that may be submitted to the Court at the hearing on this Motion or otherwise.

[Signature Line to Follow]

Respectfully submitted,



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

Email: mbogle@wcsr.com

J. Matthew Trent (S.C. Bar No. 74192)

Email: mtrent@wcsr.com

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

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Greenville, SC 29603-0208

Telephone: (864) 255-5421

Fax: (864) 239-5852

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

This 21st day of February, 2014
Greenville, South Carolina

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of February, 2014, I did serve a copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** by forwarding the same first-class mail, proper postage affixed, addressed to the person hereinafter named, at the place and address stated below, which is the last known address:

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for David A. Brosman

Susan Church

Susan Church, Assistant to Michael J. Bogle

2014 FEB 25 PM 12:54
CLERK OF COURT
JUDICIAL DISTRICT
OF THE 1ST CIRCUIT
JANUARY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
No.: 2012-CP-07-0944

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

Plaintiff,

v.

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

Defendants.

MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND

FILED
AUG 19 PM 12:35
CLERK OF COURT
BEAUFORT COUNTY, S.C.
JIM ROSENEAU

Plaintiff TD Bank, N.A., Successor by Merger to Carolina First Bank, (“**Plaintiff**” or “**the Bank**”), pursuant to Rule 39 of the South Carolina Rules of Civil Procedure, moves the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, “**Defendants**”) as Defendants waived any right to a jury trial in this case. In support of this Motion, the Bank submits the following:

1. This lawsuit revolves around Defendants’ breach of loan documents executed in favor of the Bank. Specifically, it involves the following loan documents:
 - a. Two promissory notes that Defendant Black Diamond, LLC (“**Black Diamond**”) executed in favor of the Bank: (1) a Promissory Note for \$3.5 Million, which is attached as Exhibit A (“**the \$3.5 Million Note**”), and (2) a Promissory Note for \$2 Million that is attached as Exhibit B (“**the \$2 Million Note**”) (collectively, “**the Notes**”).

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

- b. Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, "the Guarantors") executed in favor of the Bank and which guaranteed Black Diamond's payment of the Notes.
2. Under South Carolina law, "[a] party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002) (also noting that "terms in a contract provision must be construed using their plain, ordinary and popular meaning").
3. Pursuant to the Notes and the Guaranty Agreements, Black Diamond and the Guarantors expressly, unambiguously and contractually waived any right to a jury trial in this case.
4. **Black Diamond's Waiver of Jury Trial:**

- a. By executing the \$3.5 Million Note, Black Diamond waived its right to demand a jury trial in this case as that Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

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

(emphasis added).

- b. Per the plain, ordinary meaning of the above language, Black Diamond waived any right to a jury trial in this lawsuit as the case plainly is based on Black Diamond's action of defaulting under and breaching the Notes.

5. Guarantors' Waiver of Jury Trial:

- a. Like Black Diamond, the Guarantors contractually waived any right to a jury trial in this case.
- b. The Guaranty Agreements that are attached as Exhibits C-E clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the Guarantors unequivocally waived such a right.
- c. For example, Lindgren's Guaranty of the \$3.5 Million Note states:

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

(emphasis added). See, e.g., Ex. C (Lindgren Guaranty of \$3.5 Million Note), at ¶ 21. See also Ex. D (Brosman Guaranty of \$3.5 Million Note), at ¶ 17; Ex. E (Brosman Guaranty of \$2 Million Note), at ¶ 17.²

- d. Pursuant to the simple construction of the Guaranty Agreements' language, the Guarantors waived any right to a jury trial in this matter, which

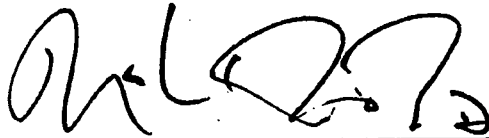
² Lindgren's Guaranty of the \$2 Million Note, which is attached as Exhibit E, provides that Lindgren consents to "any waiver" of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter. Ex. F, at ¶ 9.

indisputably "arise[s] out of the loans, the obligations, the conduct [or] the relationship between [the Bank and Black Diamond] and/or [Black Diamond and the Guarantors]."

6. Because Black Diamond and the Guarantors unequivocally waived any right to a jury trial in this matter, the Bank respectfully requests that the Court strike their request for a jury trial and that it decide any and all issues of law and fact in this case.

The Bank bases this Motion upon the applicable rules, statutes and case law. Additionally, it supports this Motion with the pleadings filed and the discovery in this case and any additional affidavits or supporting memoranda that it may file with this Court at or before the hearing on this Motion.

This 15th day of August, 2014
Greenville, South Carolina



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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 15th day of August, 2014, (s)he mailed a copy of the attached **DEFENDANT'S MOTION TO STRIKE DEFENDANTS' JURY DEMAND** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Keating L. Simmons, III
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Attorney for David A. Brosman

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*

2014 AUG 19 PM 12:35
JENNIFER ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.



Susan Church
Assistant to Michael J. Bogle

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
MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

breach of contract is an action at law").

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

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

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

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

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

claims arising from or related to the guaranties.

C. Many of the Defendants' counterclaims arise in connection with obligations imposed by law, not any obligation imposed by the loan documents, or any other contract between them and TD Bank.

The Defendants' counterclaims for breach of fiduciary duty, duress, tortious interference with prospective economic relations, and for unfair trade practices do not exist with regard to the notes, the mortgages, the guaranties or any other loan document. They are not actions "arising in connection therewith." Any claim that all of the counterclaims arise from a contract between the Defendants and TD Bank is misplaced. Such a claim is contrary to applicable South Carolina law.

The Defendants' counterclaims arise from duties imposed by law, not by any related contract. "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance" *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E. 2d 650, 656 (2006). The Defendants' tort claims arise from TD Bank's legal relationship to them. *S. Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E. 2d 324, 325 (1986). These duties arise independently from any contractual relationship between the parties. See *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E. 2d 85, 89 (1995) (noting that tort claims arise from a duty that is separate and distinct from the contract between the parties).

The Defendants' claim for breach of fiduciary duty arises as a matter of law from the special circumstances created by the parties' business relationship. One standing in a fiduciary relationship to another is subject to liability to the other for harm resulting from a breach of duty imposed by that relationship. *Moore v. Moore*, 360 S.C. 241, 253, 599, S.E. 2d 467, 473 (Ct. App. 2004). The tort of duress allows for damages to an aggrieved party in order "to prevent a stronger party from presenting an unreasonable choice of alternatives to a weaker party in a bargain

situation." *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E. 2d 424 (Ct. App. 1984). Likewise, the Defendants' claims for tortious interference arise from TD Banks's duty to not interfere unjustly with the Defendants' relationships with other parties. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E. 2d 835, 837 (1993). Finally, the Defendants' unfair trade practices claim also arises as a matter of law. That claim arises in connection with TD Bank's breach of its statutory duty to refrain from acts that are offensive to public policy, immoral, unethical, or oppressive. See *Bessinger v. BI-LO, Inc.*, 366 S.C. 426, 432, 622 S.E. 2d 564, 567 (Ct. App. 2005).

If a cause of action is equitable and an asserted counterclaim is legal and compulsory, the counterclaimant is entitled to a jury trial. *Wachovia v. Blackburn*, 407 S.C. 321, 755 S.E. 2d 437 (2014). Here, the Defendants' counterclaims are both legal and compulsory. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim and does not require the presence of a third party. *Rule 13(a), SCRPC, N. Carolina Fed Sav & Loan Ass'n v. DAV Corp*, 298 S.C. 514, 517, 381 S.E. 2d 903, 905 (1989). Here, the interactions between the parties include both legal and contractual obligations, but the related facts are largely the same. Res judicata and/or issue preclusion would potentially bar a subsequent suit on the legal counterclaims if they were not pled. Therefore, the Defendants are entitled to a jury trial on those counterclaims.

II. EVEN IF THE CONTRACTUAL JURY WAIVERS ARE OTHERWISE APPLICABLE, TD BANK SHOULD BE BARRED FROM ENFORCING THEM BECAUSE OF ITS OUTRAGEOUS CONDUCT.

This is no ordinary foreclosure action. Although TD Bank has pleaded its case as a routine foreclosure action, the Defendants have demonstrated the reality of this matter through their Answers and Counterclaims. The deposition testimony, moreover, clearly demonstrates TD Bank's outrageous conduct. The Defendants have alleged defenses for failure to mitigate, waiver and/or estoppel, and unclean hands. All should

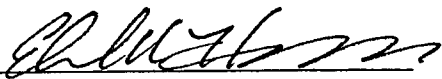
justify barring TD Bank from enforcing the waivers.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity," *Pearson v. Hilton Head Hosp.* 400 S.C. 281, 290, 733 S.E. 2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F. 3d 411, 417-418 (4th Cir. 2000)). To allow a party to disregard its obligations under a contract while claiming the benefits of the contract would disregard equity. The improper nature of TD Bank's conduct is unprecedented in normal business relationships. Given TD Bank's disregard for the terms of the contract, as a general matter, and its disregard for the duty of good faith and fair dealing, in particular, equity dictates that the jury waivers at issue should be avoided.

CONCLUSION

TD Bank's Motion to Strike Defendants' Jury Trial Demand should be denied and this case should remain on the jury trial roster.

MINOR, HAIGHT & ARUNDELL, P.C.

By: 
Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorneys for Defendant
David A. Brosman

Hilton Head Island, South Carolina
This 12th day of January, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina
First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF SUMMARY
JUDGMENT**

2015 JAN 13 AM 10:08
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TD Bank, N.A., Successor by Merger to Carolina First Bank ("Plaintiff"), moves the Court to enter summary judgment in its favor as to all counterclaims asserted by Defendants Black Diamond, LLC; J. Christopher Lindgren; and David A. Brosman, as there are no genuine issues of material fact as to any such claims. This Memorandum is meant to supplement the previously-filed Motion for Summary Judgment and any arguments that may be presented at the hearing on this matter.

INTRODUCTION AND BACKGROUND FACTS

This is a commercial foreclosure action involving two loans totaling \$5.5 million made by Plaintiff for the benefit of Defendant Black Diamond, LLC ("Black Diamond"), secured by two parcels of property located in Beaufort County, South Carolina. The first loan was in the original principal amount of \$3,500,000.00, as evidenced by a January 25, 2008 promissory note (the "\$3,500,000 Note", attached to the Complaint as Exhibit B) mortgage (the "\$3,500,000 Mortgage", attached to the Complaint as Exhibit J) and assignment of leases and rents (the "\$3,500,000 Assignment of Leases and Rents", attached to the Complaint as Exhibit L). The

second loan was in the original principal amount of \$2,000,000.00, as evidenced by a July 25, 2008 promissory note (the "\$2,000,000 Note", attached to the Complaint as Exhibit D), December 9, 2003 mortgage (the "\$2,000,000 Mortgage", attached to the Complaint as Exhibit K) and May 21, 2007 assignment of leases and rents (the "\$2,000,000 Assignment of Leases and Rents", attached to the Complaint as Exhibit M). Both the \$3,500,000 Note and the \$2,000,000 Note (collectively, the "Notes") were originally secured by personal guaranty agreements executed by Defendant J. Christopher Lindgren ("Lindgren") and Herb G. King ("King"). (Lindgren Guaranty Agreement corresponding to the \$2,000,000 Note, attached to the Complaint as Exhibit F; Lindgren Guaranty Agreement corresponding to the \$3,500,000 Note, attached to the Complaint as Exhibit G.) Following the death of King, Defendant David A. Brosman ("Brosman") was substituted as the second guarantor of the two loans. (Brosman Guaranty Agreement corresponding to the \$2,000,000 Note, attached to the Complaint as Exhibit I; Brosman Guaranty Agreement corresponding to the \$3,500,000 Note, attached to the Complaint as Exhibit H.)

As of July 2010, both Notes were in default due to payment defaults and the death of one of the guarantors (King). (See \$3,500,000 Forbearance Agreement, p. 1; \$2,000,000 Forbearance Agreement, p. 1; Lindgren Deposition, pp. 97-98 (acknowledging that, at the time of the Forbearance Agreements, the loans were in default due to missed payments).¹) As such, two forbearance agreements were entered into by the parties on July 28, 2010 (the "\$3,500,000 Forbearance Agreement", attached to the Complaint as Exhibit C, and the "\$2,000,000 Forbearance Agreement", attached to the Complaint as Exhibit E; collectively the "Forbearance Agreements"), whereby Plaintiff agreed to, among other things: (1) forbear from exercising its

¹ Cited portions of Lindgren's deposition will be collectively attached hereto as Exhibit 1.

default rights and remedies under the loan documents; (2) release the Estate of King from the personal guaranty agreements executed by King; and (3) accept certain modifications of the Notes, including the transfer of King's membership interest in Black Diamond to Lindgren and the subsequent transfer of a fifty percent membership interest in Black Diamond from Lindgren to Brosman. (Forbearance Agreements, p. 1.²) In return, Black Diamond and both guarantors agreed to, among other things: (1) maintain a payment reserve account equal to two months of principal and interest payments; (2) enter into a management agreement whereby the management of Black Diamond shall be turned over to a manager to be designated by Plaintiff and shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Plaintiff of all debt service requirements, and the day-to-day management of Black Diamond and the property encumbered by the \$3,500,000 Mortgage and \$2,000,000 Mortgage (collectively, the "Mortgages"); and (3) a representation that they have no claims, defenses, counterclaims or rights of setoff or recoupment against Plaintiff related to the loans. Black Diamond was represented by counsel, The McNair Law Firm, in the negotiation of the Forbearance Agreements. (See Exhibit 2, correspondence from Black Diamond's counsel related to preparation and execution of the Forbearance Agreements.)

The \$2,000,000 Note matured on July 25, 2011 and demand for payment was made by letter dated August 10, 2011 (attached to the Complaint as Exhibit R). The failure of Black Diamond to pay its obligations under the \$2,000,000 Note constitutes an event of default under the Notes. (See \$2,000,000 Note, ¶ 10.) Notice of default and demand for payment of the \$3,500,000 Note was made by letter dated September 13, 2011 (attached to the Complaint as

² As the terms of the \$3,500,000 Forbearance Agreement and \$2,000,000 Forbearance Agreement are almost identical, citations to the "Forbearance Agreements" will refer to that page or paragraph of both the Forbearance Agreements.

Exhibit S). Black Diamond has failed to make payment to Plaintiff in accordance with the terms of both Notes. (Lindgren Deposition, pp. 108-09.)

Plaintiff filed the present action on or about March 2, 2012. On April 23, 2012, Black Diamond and Lindgren filed an Answer and Counterclaim, asserting claims against Plaintiff for Breach of Covenant of Good Faith and Fair Dealing; Breach of Contract, Breach of Fiduciary Duty, Negligent Misrepresentation, Duress, Interference with Prospective Economic Relations, and Unfair Trade Practices. On May 18, 2012, Brosman filed an Answer and Counterclaim, identical in substance to that filed by Black Diamond and Lindgren.

ARGUMENT

The counterclaims of Black Diamond, Lindgren and Brosman (collectively, "Defendants") are all based on the following allegations: (1) that Plaintiff coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager; (2) that Plaintiff interfered with the property manager's contract; (3) that Plaintiff elected not to release its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note; and (4) that Plaintiff interfered with tenants. (Answer and Counterclaims, ¶ 27.) For the reasons set forth below, none of these claims are actionable under South Carolina law.

I. BREACH OF CONTRACT AND BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

Defendants have asserted a claim for breach of covenant of good faith and fair dealing, however South Carolina does not recognize an independent cause of action separate from breach of contract. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) ("The implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract."). Further, it is undisputed that

Defendants are in breach of the terms of the Notes and guaranty agreements, thereby breaching their contracts with Plaintiff. (Lindgren Deposition, p. 108 (acknowledging default under the Notes and guaranty agreements).) "One seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time, able, ready and willing to perform it." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C.469, 487, 514 S.E. 2d 126, 135 (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)). Since Defendants admit they breached the terms of the Notes and Guaranty Agreements, they cannot seek to recover damages under the same for breach of contract or any incident related to that type of claim. Accordingly, Defendants' breach of contract claims fail as a matter of law and Plaintiff is entitled to summary judgment.

Alternatively, Defendants' breach of contract claims fail because Defendants failed to prove the necessary elements to sustain such claims. To prove a claim for breach of contract, a party must establish at a minimum: (1) a binding agreement entered into by the parties, (2) a breach of that agreement; and, (3) damage suffered was a direct and proximate result of the breach. Fuller v. Eastern Fire Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 609 (1962). The relative rights and obligations between the parties in the present action are defined by the terms of the loan documents, which together constitute the entirety of the parties' contractual relationship.

A. **Cross-Collateralization of the Loans and Appointment of a Property Manager**

The first purported "breach" alleged by Defendants in support of their breach of contract claims is that Plaintiff coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager. (Answer and Counterclaim, ¶ 27; Lindgren Deposition, pp. 50-53; 104-05.) Neither claim has any merit whatsoever. The cross-collateralization of the loans is specifically set forth in the \$2,000,000 Note executed by Black Diamond on July 25, 2008:

THIS LOAN IS CROSS-COLLATERALIZED AND CROSS
DEFAULTED WITH LOAN #5121066531 IN THE NAME OF
BLACK DIAMOND LLC IN THE AMOUNT OF \$3,500,000.00
DATED JANUARY 25, 2008 SECURED BY REAL ESTATE
MORTGAGE.

(\$2,000,000 Note, ¶ 10.) Because the cross-collateralization of the two loans took place more than three years prior to the date of Defendants' counterclaims, any claim based on the same is barred by the applicable statute of limitation set forth in S.C. Code Ann. § 15-3-530. (See Lindgren Deposition, pp. 50, 111 (acknowledging the loans were cross-collateralized in July 2008).)

Next, the retention of a property manager is specifically identified in the Forbearance Agreements as a condition precedent to Plaintiff's agreement to forbear from exercising its default rights and remedies under the loan documents:

Lender, Borrower, Mr. Lindgren and the Substitute Guarantor shall enter into a management agreement whereby the management of Borrower shall be turned over to a manager to be designated by Lender, and which manager shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage (the "Management Agreement"). The Management Agreement shall be subject to the approval of Lender as to both form and substance, and any default by Borrower, Mr. Lindgren the Substitute Guarantor or any other party with respect to such Management Agreement shall be a default under the Loan Documents and shall entitle Lender to pursue all rights and remedies of Lender set forth therein. All fees and expenses of such manager shall be paid by Borrower.

(Forbearance Agreements, ¶ 6(F).) Contemporaneous with the execution of the Forbearance Agreements, Defendants were in default due to payment defaults and the death of one of the guarantors (King). (Forbearance Agreements, p. 1; Lindgren Deposition, pp. 97-98.) Defendants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96.) Defendants were represented by counsel in the negotiation and execution of the Forbearance

Agreements. (Exhibit 2.) The Forbearance Agreements contained an integration clause, specifically providing that:

This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound.

(Forbearance Agreements, ¶ 12.) Finally, in the Forbearance Agreements, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff's agreement to forbear, represented that they "have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment." (Forbearance Agreements, ¶ 7.) Accordingly, any purported "breach" alleged by Defendants taking place contemporaneous with or prior to the execution of the Forbearance Agreements was waived by the execution of such documents and cannot give rise to a claim against Plaintiff in the present action.

B. Interference with Property Manager's Contract

Defendants' next purported "breach" is that Plaintiff interfered with the contract with the property manager appointed pursuant to the Forbearance Agreements to manage Black Diamond and the subject properties. (Answer and Counterclaim, ¶ 27.) First, the Forbearance Agreements specifically state that the property manager is to be "designated by [the] Lender," that the management agreement "shall be subject to the approval of Lender as to both form and substance," and that the manager "shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered

by the Mortgage.” (Forbearance Agreements, ¶ 12.) Thus, it is anticipated in the Forbearance Agreements – executed by Defendants – that Plaintiff had the exclusive right to select the property manager and would be involved in the management of Black Diamond and the property going forward.

Regardless, when asked in depositions about Plaintiff’s alleged interference with the property manager, Defendants were able to identify only two instances: (1) where Plaintiff directed the property manager to pay an invoice related to the foreclosure proceeding from rents (see Lindgren Deposition, pp. 37-41) and (2) where the property manager notified Plaintiff that a tenant was late on the payment of rent and had been paying rent directly to Defendants, rather than to the property manager, in violation of the Forbearance Agreements (see Lindgren Deposition, pp. 42-49). Neither instance amounts to any improper action by Plaintiff, rather both are consistent with the property manager’s authority pursuant to the Forbearance Agreements, having “all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage.” (Forbearance Agreements, ¶ 12.) Further, neither instance resulted in any damages to Defendants, thus cannot give rise to claims against Plaintiff in the present action.

Furthermore, it is very clear from Lindgren’s testimony that the complaint about the property manager has nothing to do with Plaintiff’s contact with the manager, rather the management company that was appointed to manage Black Diamond and the property. (See Lindgren Deposition, pp. 27-36.) Lindgren had wanted to hire Charter One Commercial to manage the property, but Plaintiff opted for another local management company. (Id.) The Forbearance Agreements clearly state, however, that “management of Borrower shall be turned

over to a manager to be *designated by Lender.*” (Forbearance Agreements, ¶ 12 (emphasis added).) Regardless, as discussed above, Defendants are barred from raising issues that were agreed to in the Forbearance Agreements as a basis for claims in the present lawsuit. Defendants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96.) Defendants were represented by counsel in the negotiation and execution of the Forbearance Agreements. (Exhibit 2.) The Forbearance Agreements contained an integration clause. (Forbearance Agreements, ¶ 12.) Finally, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff’s agreement to forbear, represented that they “have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment.” (Forbearance Agreements, ¶ 7.) Accordingly, breach of contract cannot be based on these allegations and summary judgment should be granted.

C. Bank’s Election Not to Give Partial Release of Mortgage for Short Sale

Defendants’ next example of a “breach” by Plaintiff is the bank’s election not to release its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note. (Answer and Counterclaim, ¶ 27; Lindgren Deposition, pp. 54-64.) This claim relates to a September 2010 letter of intent between Caegull Investments, LLC and Black Diamond to sell one of the two parcels of property for the gross amount of \$1,325,000, subject to a number of conditions. (See Exhibit 3, Letter of Intent.) The letter of intent was never reduced to contract. At the time, roughly \$1,800,000 was owed on the corresponding note (though the Notes were cross-collateralized, thus the total outstanding debt, not just that owed on the corresponding note, was secured by this parcel of property). (See

Lindgren Deposition, p. 54.) Defendants' claim is dependent upon a false premise that Plaintiff had some underlying duty to not only consider a loss mitigation/short sale proposal (if a letter of intent can even be construed as such), but to approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support this premise, and Defendants' claims based on this purported "breach" therefore fail as a matter of law.

Regardless of the particular circumstances at issue in this case, Defendants' claim fails because lenders have no cognizable legal duty to consider or approve loss mitigation or loan modification requests. As the United States District Court for the Western District of North Carolina explained:

Plaintiffs' second argument, that Defendant had a legally recognized duty to modify the terms of the loan, amounts to a request that the Court re-write the terms of the loan. See Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1363 (Colo. Ct. App. 1994) (holding that the duty to act in good faith "does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions," nor does the duty of good faith "inject substantive terms into the parties' contract"); see also General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1041-42 (6th Cir. 1990); Serfecz v. Jewel Food Stores, 1994 U.S. Dist. LEXIS 12239 (N.D. Ill. Aug. 30, 1994) ("Where the disputed issue in a contract is governed by express terms, however, there is no gap to be filled, and the parties' behavior is assessed according to the express provisions, without resort to an implied covenant of good faith and fair dealing"); Barnes v. St. Joseph's Hosp., 601 N.W.2d 587, 591 (N.D. 1999); Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995); Idaho First National Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P.2d 841, 863 (Idaho 1991); East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 682 A.2d 1207, 1213 (N.J. Super. Ct. App. Div. 1996); Badgett v. Security State Bank, 116 Wash.2d 563, 807 P.2d 356, 360 (Wash. 1991); 17A Am.Jur.2d Contracts § 370. Applying these legal principles, the undersigned concludes that Defendant had no duty to forgo its rights under the terms of the loan to foreclose on the property.

James v. Vanderbilt Mortgage, 2012 WL 441170 at *4 (W.D.N.C. Jan. 23, 2012) (magistrate judge's memorandum and recommendation), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012); see also Mudge v. Bank of America, N.A. and TD Bank, N.A., 2013 WL 6095561 at *3 (D.N.H. Nov. 20, 2013) (holding that where a mortgage agreement did not contain a provision conferring discretion on the lender to allow the borrower to conduct a short sale, a breach of covenant of good faith and fair dealing claim fails as a matter of law) (both the James and Mudge decisions are collectively attached hereto as Exhibit 4). The court in Mudge went on to state:

Even if the complaint had alleged that the second mortgage agreement gave TD Bank the discretion to permit a short sale and that TD Bank had exercised that discretion unreasonably, the claim for breach of the implied covenant of good faith and fair dealing would still be dismissed. As TD Bank points out in its motion to dismiss, a short sale in real estate, where a lender accepts less than it is owed to secure its note, necessarily rewrites the terms of the parties' mortgage agreement. 'The covenant of good faith and fair dealing in a loan agreement cannot be used to require the lender to modify or restructure the loan.'

Id. (citing Moore v Mortg. Elec. Registration Sys., Inc., 848 F. Supp.2d 107, 129 (D.N.H. 2012)).

South Carolina courts have similarly held that, absent a fiduciary duty, a bank has no duty of care to its customer. As the South Carolina Court of Appeals held in Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (2003), "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." 354 S.C. at 671, 582 S.E.2d at 444. Here, Defendants do not contend that Plaintiff was their fiduciary, nor is there evidence to support the existence of a fiduciary relationship. The relationship between Plaintiff and Defendants was that of creditor and debtor, and there can thus be no argument that

Plaintiff had any unwritten duty to consider Defendants' loss mitigation/short sale proposals, much less within some arbitrary timeframe unilaterally set by Defendants.

As creditor and debtor, the parties' relative rights and obligations are defined by the provisions of the loan documents, under which Plaintiff was not contractually obligated to consider Defendants' loss mitigation/short sale proposals.³ Accordingly, Plaintiff's decision not to release its mortgage cannot give rise to a claim against Plaintiff in the present action.

D. Interference with Tenants

Defendants' final example of a "breach" by Plaintiff is its purported interference with tenants. (Answer and Counterclaim, ¶ 27; Lindgren Deposition, pp. 42-49.) The only instance identified by Defendants was Plaintiff's communications with the property manager about a tenant who was behind on rent and had been paying rent directly to Defendants, rather than to the property manager, in violation of the Forbearance Agreements. (Lindgren Deposition, pp. 42-49)

First, as discussed above, the Forbearance Agreements specifically state that the property manager is to be "designated by [the] Lender," that the management agreement "shall be subject to the approval of Lender as to both form and substance," and that the manager "shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage." (Forbearance Agreements, ¶ 12.) Thus, it is anticipated in the Forbearance Agreements that Plaintiff had the exclusive right to select the property manager and would be stay informed of the management of Black Diamond and the property going forward. Second, the \$3,500,000 Assignment of Leases

³ Additionally, the September 2010 letter of intent (to which Plaintiff was not a party) acknowledged that Plaintiff's agreement to release its mortgage was a necessary prerequisite to the deal coming to fruition. (Exhibit 3, p. 1.)

and Rents and \$2,000,000 Assignment of Leases and Rents (collectively, the "Assignments of Leases and Rents"), expressly authorize Plaintiff, at its option, to communicate with tenants directly or through a third party about a number of issues, namely the payment of rent, upon the default of the borrower. (\$2,000,000 Assignment of Leases and Rents, ¶ 15(F-G); \$3,500,000 Assignment of Leases and Rents, ¶ 4(F).) Thus, Defendants' allegations do not support a claim against Plaintiff in the present action.

II. BREACH OF FIDUCIARY DUTY

Plaintiff is entitled to summary judgment on Defendants' breach of fiduciary duty counterclaim because it did not owe Defendants a fiduciary duty and because Defendants have not shown a breach of any such duty. To establish a claim for breach of fiduciary duty, Defendants must prove: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damages proximately resulting from the wrongful conduct. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements of a breach of fiduciary duty claim). "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Davis v. Greenwood Sch. Dist., 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). Furthermore, "as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed on him." Regions Bank v. Schmauch, 354 S.C. 648, 670-71, 582 S.E.2d 432, 444 (Ct. App. 2003). Moreover, "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature." Id. at 671, 582 S.E.2d at 444. Defendants bear the burden of establishing a

prima facie case as to each element of the breach of fiduciary duty cause of action. See generally, Baughman, 306 S.C. at 116, 410 S.E.2d at 545-46.

Here, Defendants and Plaintiff were not in a fiduciary relationship. Rather, the relationship is a typical arms length business relationship between a debtor and a mortgage holder. Because the normal relationship between a bank and a debtor is not fiduciary in nature, Defendants bear the burden of marshalling evidence showing the relationship between Plaintiff and Defendants was something other than a standard arms length relationship. Schmauch at 670-71, 582 S.E.2d at 444. To this end, Defendants can present no evidence that the relationship was anything other than a "normal relationship between a bank and its customer." Id. Therefore, the general South Carolina rule that no fiduciary duty exists between a bank and its customer applies. Because Defendants offer no evidence tending to show a fiduciary duty owed by Plaintiff, summary judgment should be granted and this Court should dismiss Defendants' breach of fiduciary duty claim.

Furthermore, even if this Court were to find Plaintiff owed Defendants a fiduciary duty, the claim fails because Defendants have not established any actionable breach on the part of Plaintiff, as set forth in section I above. Accordingly, summary judgment should be granted in favor of Plaintiff on this claim.

III. NEGLIGENT MISREPRESENTATION

"To state a claim for negligent misrepresentation, the plaintiff must allege: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a

pecuniary loss as the proximate result of his reliance upon the representation.” Kelly v. S. Carolina Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323-24, 450 S.E.2d 59, 62 (Ct. App. 1994).

The only representation of Plaintiff identified by Defendants was that of a bank loan officer that Black Diamond “could select a [property] manager we were most comfortable with.” (Lindgren Deposition, p. 27.) As discussed in section I above, however, the Forbearance Agreements specifically state that the property manager is to be “designated by [the] Lender” and that the management agreement “shall be subject to the approval of Lender as to both form and substance.” (Forbearance Agreements, ¶ 12.) Further, the Forbearance Agreements contained an integration clause, specifically providing that:

This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound.

(Forbearance Agreements, ¶ 12.) Finally, in the Forbearance Agreements, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff’s agreement to forbear, represented that they “have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment.” (Forbearance Agreements, ¶ 7.) Accordingly, any alleged oral statements contrary to the express terms of the Forbearance Agreements cannot give rise to a claim against Plaintiff.

IV. DURESS

Defendants’ next claim for duress is not recognized as a cause of action in South Carolina. See Troutman v. Facetglas, Inc., 281 S.C. 598, 603, 316 S.E.2d 424, 427 (Ct. App. 1984) (“We see no compelling reason under the facts and circumstances of this case to extend

the law of intentional torts in South Carolina to embrace economic duress.”). Regardless, even if such a claim did exist, Defendants have failed to establish any actionable basis for the same. Looking to the Wisconsin decision that our Court of Appeals in Troutman discussed but chose not to adopt, in order to establish a claim for economic duress, a party “must show that (1) a person used his superior bargaining position unreasonably or unjustifiably, (2) by wrongful conduct, generally threats, (3) the conduct or threats caused the injury, (4) the victim would not have acquiesced in the absence of wrongful threats, (5) resultant damages, and (6) the victim had no adequate legal remedy available to protect his interests at the time it was threatened.” Id. (citing Wurtz v. Fleischman, 278 N.W.2d 266 (Wis. App. 1979), rev’d on other grounds, 293 N.W.2d 155 (1980)). The only instances of “duress” or “coercion” identified by Defendants were the cross-collateralization of the loans in the \$2,000,000 Note and the requirement of the retention of a property manager as set forth in the Forbearance Agreements. (Lindgren Deposition, pp. 50-53, 104-07, 111.) At the outset, there is absolutely no authority standing for the proposition that either the cross-collateralization of loans or the execution of a forbearance agreement is wrongful or amounts to coercive conduct. Both practices are standard throughout the loan industry.

Furthermore, as set forth in section I above, the cross-collateralization of the loans took place in July 2008, more than three years prior to Defendants’ counterclaims in this litigation, thus a claim based on the same is barred by the applicable statute of limitation set forth in S.C. Code Ann. § 15-3-530. (See Lindgren Deposition, pp. 50, 111 (acknowledging the loans were cross-collateralized in July 2008).) Finally, the Forbearance Agreements were executed by the parties while the loan was in default. (Forbearance Agreements, p. 1; Lindgren Deposition, pp. 97-98 (acknowledging that, at the time of the Forbearance Agreements, the loans were in default

due to missed payments).) Defendants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96.) Defendants were represented by counsel in the negotiation of the Forbearance Agreements. (Exhibit 2.) The Forbearance Agreements contained an integration clause. (Forbearance Agreements, ¶ 12.) Finally, in the Forbearance Agreements, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff's agreement to forbear, represented that they "have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment." (Forbearance Agreements, ¶ 7.) Accordingly, Defendants' claim for duress fails and summary judgment should be granted.

V. INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS

The elements of the tort of intentional interference with prospective contractual relations are (1) the intentional interference with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the plaintiff. Brown v. Stewart, 348 S.C. 33, 55, 557 S.E.2d 676, 688 (Ct. App. 2001); Love v. Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994). Importantly, "there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the *proper pursuit of its own contractual rights* with a third party." United Educational Distributors, LLC v. Educational Testing Service, 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002) (emphasis added).

In support of their claim for interference with prospective economic relations, Defendants raise Plaintiff's election not to release its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note. (Answer and

Counterclaim, ¶ 27; Lindgren Deposition, pp. 54-64.) As outlined in section I above, this claim relates to a September 2010 letter of intent between Caegull Investments, LLC and Black Diamond to sell one of the two parcels of property for the gross amount of \$1,325,000, subject to a number of conditions. (See Exhibit 3.) The letter of intent was never reduced to contract. At the time, roughly \$1,800,000 was owed on the corresponding note (though the Notes were cross-collateralized, thus the total outstanding debt – not just that owed on the corresponding note – was secured by this parcel of property). (See Lindgren Deposition, p. 54.)

As addressed in section I above, Defendants' claim is dependent upon a false premise that Plaintiff had some underlying duty to not only consider a loss mitigation/short sale proposal (if a letter of intent can even be construed as such), but to approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support this premise, and Defendants' claims arising out of this purported "breach" therefore fail as a matter of law. Lenders have no cognizable legal duty to consider or approve loss mitigation, loan modification or short sale requests. See James v. Vanderbilt Mortgage, 2012 WL 441170 at *4 (W.D.N.C. Jan. 23, 2012) (magistrate judge's memorandum and recommendation), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012); see also Mudge v. Bank of America, N.A. and TD Bank, N.A., 2013 WL 6095561 at *3 (D.N.H. Nov. 20, 2013) (holding that where a mortgage agreement did not contain a provision conferring discretion on the lender to allow the borrower to conduct a short sale, a breach of covenant of good faith and fair dealing claim fails as a matter of law); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (absent a fiduciary duty, which does not exist in a creditor-debtor relationship, a bank has no duty of care to its customer).

As creditor and debtor, the parties' relative rights and obligations are defined by the provisions of the loan documents, under which Plaintiff was not contractually obligated to consider Defendants' loss mitigation/short sale proposal. Accordingly, as Plaintiff's actions were consistent with the loan documents, there was no improper purpose or improper methods involved in Plaintiff's decision with regard to the Caegull Investments letter of intent and summary judgment should be granted as to this cause of action.

VI. UNFAIR TRADE PRACTICES

Defendants' claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") is futile because federally regulated banks, like Plaintiff, are exempt from the provisions of the SCUTPA. The application of the SCUTPA is drawn from the interpretation of 15 U.S.C. 45(a)(1), the corollary federal statute granting authority to the Federal Trade Commission ("FTC") to regulate and prohibit unfair methods of competition and unfair and deceptive acts affecting commerce. See S.C. Code § 39-5-20 (providing that "[i]t is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended"). Banks are specifically exempt from the Federal Trade Commission's (the "FTC") power to regulate and prohibit unfair competition and unfair or deceptive acts that affect commerce. See 15 U.S.C. 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, *except banks* . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (emphasis added). Thus, because the SCUTPA looks to the FTC for guidance regarding the applicability

and enforcement of the provisions of the SCUTPA, federally regulated banks are likewise exempt from the provisions of the SCUTPA.

Moreover, in Anderson v. Citizens Bank, 294 S.C. 387, 399, 365 S.E.2d 26, 33 (Ct. App. 1987), the Court of Appeals held that the SCUTPA did not apply to banks because, under the "general activity" test set forth in McLeod v. Rhoades, 275 S.C. 104, 267 S.E. 2d 539 (1980), banks were already regulated by state and federal agencies:

The State Board of Financial Institutions regulates the banking practices of Citizens Bank pursuant to Section 34-1-10 to -130, Code of Laws of South Carolina, 1976. The Board has extensive regulatory authority over banking practices, including the power to initiate criminal prosecutions against banks that violate a statute or regulation. Sections 34-1-60, 34-1-90, 34-1-100, Code of Laws of South Carolina, 1976. Therefore, under the "general activity" test of State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E. (2d) 539 (1980), the actions of Citizens Bank in connection with the Graham loan are exempt from the provisions of the Unfair Trade Practices Act pursuant to Section 39-5-40(a), Code of Laws of South Carolina, 1976. See NCNB Nat'l. Bank of North Carolina v. Tiller, 814 F. (2d) 931 (4th Cir. 1987).

Anderson v. Citizens Bank, 294 S.C. at 399, 365 S.E.2d at 33. In 1990, the Supreme Court rejected the "general activity" test from Rhoades and overruled Anderson "to the extent that the result was based upon the 'general activity' test." Ward v. Dick Dyer & Assoc., 304 S.C. 152, 157, 403 S.E.2d 310, 313 (1991). However, the Anderson court included an additional sustaining ground for holding that the SCUTPA did not apply to lenders that was upheld by the Court:

Cf. 15 U.S.C. 57a(f)(1) (1985), which provides that unfair and deceptive practices by banks are regulated under rules of the Federal Reserve System, not under the Federal Trade Commission Act. See also Fed. Trade Comm'n. v. Winters Nat'l. Bank & Trust, Co., 601 F. (2d) 395 (6th Cir. 1979). The South Carolina Unfair Trade Practices Act states that the legislature intends the courts to be guided by federal interpretations of the Federal Trade

Commission Act in construing Section 39-5-20(a). See Section 39-5-20(b), Code of Laws of South Carolina, 1976.

Anderson, 294 S.C. at 399, 365 S.E.2d at 33. Various trial courts in South Carolina have since held the SCUTPA is inapplicable to banks regulated by the Federal Reserve, reasoning that the partial overruling of Anderson left the alternate rationale intact. See Lands Inn, Inc. v BB&T of South Carolina, 2:98-158-23 (D.S.C. Apr. 12, 1999); JJH Transport, LLC and Joel Herring v. BB&T of South Carolina, 2006-CP-21-1814 (S.C. Court Common Pleas, Florence County); BB&T of South Carolina v. Eartha Marshall, 2003-CP-40-3272 (S.C. Court Common Pleas, Richland County) (the Lands Inn, JJH Transport and BB&T decisions are collectively attached hereto as Exhibit 5). These opinions ground their SCUTPA exemption for federally regulated banks on Anderson and the text of the SCUTPA itself, and the Federal Trade Commission's exemption of banks in 15 U.S.C. 45(a)(2). Accordingly, the Court should grant Plaintiff summary judgment as to Defendants' SCUTPA claim.

In the alternative, Defendants' SCUTPA claim fails because the SCUTPA does not apply to private transactions where there is no evidence of adverse effect on the public interest. The South Carolina Supreme Court has refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). A mere breach of contract

cannot constitute a violation of the SCUPTA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct. App. 1987). Moreover, "conduct which only affects the parties to the transaction provides no basis for a UTPA claim" Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Here, we have nothing more than a dispute between the two parties to a private loan transaction as documented in the loan documents. The sole act or practice of Plaintiff identified by Defendants as purportedly affecting the public interest was Plaintiff's decision not to release its mortgage to accommodate the Caegull Investments letter of intent short sale proposal. Such a decision is dependent on a number of unique factors, including the property in question, the terms of the subject loan documents and the amounts owed on the notes secured by the property, and is a matter solely and uniquely between Plaintiff and Defendants, not affecting the public interest.⁴ See, e.g., Drs. Steuer & Latham, P.A. v. Nat'l Med. Enterprises, Inc., 672 F. Supp. 1489, 1522 (D.S.C. 1987) aff'd, 846 F.2d 70 (4th Cir. 1988) (granting summary judgment based on absence of a showing of harm to the public interest); Jefferies v. Phillips, 316 S.C. 523, 527-28, 451 S.E.2d 21, 23 (Ct. App. 1994) ("To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. This adverse effect on the public must be proved by specific facts. . . . Jefferies introduced no evidence of specific facts which show any member of the public was adversely affected by this transaction.

⁴ When questioned at deposition, Defendants claimed the conduct of Plaintiff (not releasing its mortgage) was at issue in another matter, identified only as "APEG." (Lindgren Deposition, pp. 126-27.) Presumably, Defendants were referring to another action wherein the borrowers were represented by the same counsel, TD Bank, N.A. v. Atlantic Private Equity Group, LLC, Civil Action No. 2011-CP-07-00588. Notably, however, such an issue was never raised in that litigation, noticeably absent from the borrower and guarantors' counterclaims against the bank. (See Exhibit 6, Answer and Counterclaim of APEG defendants.)

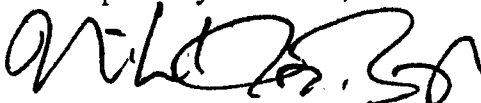
Without this showing, Phillips' conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.").

Accordingly, summary judgment should be granted and Defendants' UTPA claim should be dismissed.

CONCLUSION

For the reasons set forth above, Plaintiff requests this Court grant its Motion for Summary Judgment as to Defendants' counterclaims, and for such other relief as may be requested in the previously-filed Motion for Summary Judgment as well as at oral argument.

Respectfully submitted,



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January 9, 2015
Greenville, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 9th day of January, 2015, he mailed a copy of the attached **PLAINTIFF'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT** by electronic mail *and* by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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LLC and J. Christopher Lindgren*



Michael J. Bogle (S.C. Bar No. 71125)

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CLERK OF COURT
AUF DER COUNTY, S.C.



Exhibit 1

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.

-----/

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.

BOGLE - LINDGREN (DIRECT EXAMINATION)

A Right.

Q Now, is it your position that TD Bank did not have the right to take the reserve amount in the account or that their taking the entire amount out was improper?

A Certainly taking the entire amount out was improper, and again it was within a day of finding out that I was a witness in a case against them.

Q Okay. How do you believe -- how is it your understanding that the bank found out about you being a witness in the other case in February of 2012?

A They were notified by, I guess, counsel.

Q Okay. Do you believe that it would be improper -- or let me restate that. Do you believe that it was improper of TD Bank to take the amount of the reserve from the account?

A Under the circumstances, yes.

Q Do you believe that under the forbearance agreement the bank is entitled to pull out what is in the reserve account upon the default of the borrower?

BOGLE - LINDGREN (DIRECT EXAMINATION)

throw Bosley on us.

Q What manager did you select?

A Charter One Commercial.

Q Are they local?

A Yes.

Q And did you actually agree and sign a written contract with Charter One Commercial?

A I don't recall at the present time, but we'd come to terms, certainly.

Q And submitted those terms to the bank and they were rejected?

A Yes.

Q How were the terms --

A Well, I'm not sure that they rejected the terms as much as they rejected our choice.

Q Okay. How were the terms with Charter One Commercial different than those with Bill Bosley's group?

A They weren't.

Q Were the fees that are charged by Bill Bosley greater or less than or roughly equal to the fees that would have been charged by Charter One Commercial?

A Roughly equal but a little more.

BOGLE - LINDGREN (DIRECT EXAMINATION)

A Yes.

Q But you believe it was inappropriate in that circumstance?

A Yes.

Q Okay. So we talked about the Cgull offer, we talked about the appropriation of funds; what else? Is there anything else that you believe TD Bank did that was wrong?

A The contact representative we had, Mike Rose, consistently misled us.

Q All right. How do you believe he misled you?

A By saying he was going to do X and didn't; he would do Y instead.

Q Can you give me an example?

A For example, notwithstanding the fact that the bank had the right to appoint the manager under the agreement, the forbearance agreement, he advised that we could select a manager we were most comfortable with and led us to believe that. We went into negotiations with the manager we selected, and after we come to terms with that manager, were told that they weren't going to allow it and they were going to

BOGLE - LINDGREN (DIRECT EXAMINATION)

Q Roughly equal or a little more?

A Roughly equal but a little more. I mean, they're roughly equal but it was a little bit more.

Q And this is my fault for forgetting my original question. Do you mean to indicate that the fees charged by Bill Bosley's group might be a little more than what would have been charged by Charter One?

A Slightly.

Q Okay. And what fees would those be, just the general management fee?

A Yes.

Q Is that the percentage that the manager takes of rents and leases?

A Yes.

Q Do you remember, sitting here today, what those percentages were with Charter One?

A Well, it was about \$2,000 a month.

Q Is that just -- but it's not a flat fee; it's a percentage, right?

A It's a flat fee up to a certain level of renter volume and then it's a percentage above that, and the rental volume didn't get

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
2 enough above the threshold to have a kicker for
3 the extra volume.

4 Q Is that under the arrangement with Bill
5 Bosley?

6 A Both.

7 Q It would have been the same for both?

8 A Yes. Bosley's threshold is 2,200.

9 Q Is that monthly?

10 A Yes.

11 Q And does Bosley's group, do they take
12 2,200 a month off the top until the rents get to
13 a certain amount and then they take a percentage
14 on top of that?

15 A Yes.

16 Q So the minimum he's going to get or his
17 group is going to get for management of the
18 properties is 2,200 per month?

19 A Yes, plus \$750 for landscaping.

20 Q Is this a cost that he's contracted
21 with a third party, I assume, for the
22 landscaping?

23 A No.

24 Q He does landscaping in-house?

25 A Yes.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q Would Charter One have had a similar
3 landscaping charge?

4 A No.

5 Q Would landscaping have been left to
6 you?

7 A Yes.

8 Q And do you normally contract with a
9 third party to do landscaping?

10 A Yes, but we also at the inception of
11 this had our own crew.

12 Q Were they on payroll with one of your
13 companies?

14 A Yes.

15 Q Which company?

16 A Rockmoor.

17 Q And would you typically pass along a
18 certain set cost for landscaping costs from Red
19 Rocks to whatever business entity it was
20 performing the landscaping for?

21 A Yes.

22 Q And how much would that have been per
23 month?

24 A I think we were charging 225 a month.

25 Q And your understanding was that if

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Charter One had contracted -- or had the bank
3 allowed Charter One to contract with you for
4 management of the Black Diamond property, that
5 Charter One would have allowed you to continue
6 that landscaping arrangement with Red Rocks?

7 A Red Rocks, yes, because they were our
8 agent.

9 Q Are there any other differences in cost
10 between Charter One and Bill Bosley's
11 organization?

12 A The thing is that Bosley not only does
13 landscaping in-house, they do handyman
14 maintenance, those sorts of things; and, again,
15 that would normally be handled by -- to the
16 extent we had a crew, by my crew or by Red
17 Rocks' or Rockmoor's crew. Instead they're
18 handled by -- I think it's called Bosley
19 Handyman Services.

20 Q And is that billed on a per-occurrence
21 basis?

22 A Yes.

23 Q Do you have any idea how much -- what
24 the total of those maintenance handyman costs
25 have been since arrangement with Bill Bosley?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 A I don't know for sure.

3 Q More than 5,000, less than 5,000?

4 A I'm not sure. It's probably more than
5 5,000 but I'm not sure.

6 Q Is that a number that you could go back
7 and get for us?

8 A Yes.

9 Q And how is this -- do you get monthly
10 bills from Bill Bosley's organization?

11 A We get monthly statements.

12 Q That's what I meant. Because the
13 money, the bill or the money is taken out from
14 the rents that are received; correct?

15 A Correct.

16 Q And so you can see charges for
17 landscaping or handyman maintenance included on
18 these statements?

19 A In arrears, about 45 days in arrears.

20 Q And so Bill Bosley would have this
21 information as well?

22 A Yes. The bank has it as well.

23 Q Any other difference in cost between
24 Charter One and Bill Bosley's organization?

25 A No, but differences in services and

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
2 terms, leasing services.

3 Q What do you mean by that?

4 A I mean Charter One has, in my view, a
5 much more comprehensive leasing operation than
6 Bosley, i.e., it's more likely that Charter One
7 will land a tenant than Bosley, in my view.

8 Q Are there any specific tenants that you
9 believe would have -- well, first of all, are
10 there any unleased parcels or buildings within
11 this Black Diamond property?

12 A Yes.

13 Q How much square footage?

14 A I'm not sure because of a dearth of
15 information from Bosley. I could find out but
16 I'm not kept up to speed on that.

17 Q Have you made any attempts to ask?

18 A About that specifically, not recently.

19 Q Is that information you can determine
20 from the statements that you receive?

21 A We could back-door it.

22 Q Okay. I assume the statements have an
23 accounting of the rent or the lease money that
24 is coming in every month; is that right?

25 A Yes.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q And then it also deducts the amount or
3 indicates the amount that's being charged for
4 the services that they're providing, right?

5 A Yes.

6 Q Okay. Are there any tenants that you
7 believe -- any specific tenants that you believe
8 would be leasing property within the Black
9 Diamond property had Charter One been retained
10 as property manager?

11 A I can't say specifically that anybody
12 would have leased it but for Bosley. I suspect
13 that we would have -- more likely would have had
14 more leasing success.

15 Q Okay. What's your opinion of Bill
16 Bosley's organization's reputation in the real
17 estate community?

18 A Not highly respected.

19 Q And you believe Charter One is more
20 respected as a commercial manager?

21 A Yes.

22 Q Have you had any experience with using
23 Charter One in the past?

24 A Yes.

25 Q Which projects?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 A Blackfoot.

3 Q And was this an arrangement that was
4 forced on you by a bank or was this something
5 that you did and thought would better the
6 property?

7 A No, they were the manager when I bought
8 the property.

9 Q And you retained them instead of
10 managing the property through one of your other
11 entities?

12 A Yes, because of the complexities
13 involved.

14 Q And Blackfoot, I believe, was -- what
15 were they in the business of doing?

16 A It's a four-story office building mid
17 Island.

18 Q Okay. And that's the one that's the
19 subject of the deed in lieu?

20 A Right.

21 Q So one of your entities did not serve
22 as the property manager for that company;
23 correct?

24 A No.

25 Q All right. So we've talked about as

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

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;

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
 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

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
 2 wasn't payment made and that our contract,
 3 according to Mr. Rose which is the case, was
 4 between us and Bosley and that he had nothing to
 5 do with it and he didn't want to know anything
 6 about it.

7 Q Do you know whether the bank is
 8 requiring Bosley to make reports or communicate
 9 directly with it as opposed to with Black
 10 Diamond, or is it possible that that's what Bill
 11 Bosley's organization is doing?

12 A I know that Bosley has told me the bank
 13 has told him to do that.

14 Q Do you know who at the bank has told
 15 him to do that?

16 A Mike Rose.

17 Q Is it your understanding -- if I
 18 represent to you Mike Rose has left the bank
 19 probably about a year ago is --

20 A Why?

21 Q Well, unfortunately I ask the questions
 22 in the deposition, but Mike Rose left the bank
 23 about a year ago. Do you know if there's been
 24 any other direction or who at the bank has been
 25 directing Bill Bosley since he left?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 A There is somebody who the management
 3 report is addressed to.

4 Q Roper Jenkins?

5 A I think it's Jenkins, yes. That is the
 6 reports we see are not even addressed to us,
 7 they're addressed to Jenkins with a copy to us
 8 after we ask for it.

9 Q And so your impression that the manager
 10 is reporting exclusively to TD Bank to your
 11 detriment comes from a discussion you had with
 12 Bill Bosley who told you that he was directed by
 13 the bank to report directly to the bank and not
 14 work with you?

15 MR. SIMONS: Objection.

16 THE WITNESS: Can you rephrase the
 17 question.

18 BY MR. BOGLE:

19 Q Can you tell me what your basis is
 20 again for your contention that the bank is
 21 interfering with the relationship between you
 22 and the property manager?

23 A Well, documentation that shows that the
 24 bank's advisor directed them to do certain
 25 things such as pay invoices --

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q Okay, we'll stop with that. What
 3 documents show that?

4 A A couple e-mails that we were copied on
 5 that apparently weren't supposed to be copied
 6 on.

7 Q And what were those invoices that were
 8 the subject of those e-mails?

9 A One was an appraisal ordered by the
 10 bank that we weren't aware of that we were
 11 charged -- that Mike Rose sent the invoice to
 12 Bosley to pay.

13 Q Do you know the time frame that this
 14 would have been?

15 A I don't know right now but I can find
 16 out very easily.

17 Q Okay. Do you have copies of these
 18 e-mails that you could --

19 A I've got copies of some e-mails, yes.

20 Q These e-mails in particular directing
 21 Bosley to pay these invoices, are these e-mails
 22 that you could pull up and --

23 A I believe so. I'd have to check.

24 Q If we would took a five-minute break,
 25 is that something you could get for us?

BOGLE - LINDGREN (DIRECT EXAMINATION)

A I could see if I could find it, yes. I mean, I'm not sure exactly where it would be, but I can try and find it.

Q Okay, we'll come back to that at the next break.

Okay. That was the first instance that you were reviewing for me and I stopped you from continuing. So how else are you determining that TD Bank has been directing the property manager to the detriment of Black Diamond?

A Other than e-mails?

Q Other than that appraisal invoice.

A Well, an e-mail that Mike Rose sent asking Bosley did he do anything with respect to something that Bosley informed him of.

Q I didn't understand that, I'm sorry. Can you --

A Rephrase it?

Q Yes, sorry.

A That's all right. We were copied on an e-mail unintentionally by Bosley that sent information to Mike Rose, was addressed to Mike Rose, and it was a detailed e-mail about several items; and Mike Rose's e-mail back that we,

BOGLE - LINDGREN (DIRECT EXAMINATION)

again, unintentionally received a copy of, asked what he should do about this, you know, i.e., what action did Mike Rose have to take with respect to the information that's coming back to him from Bosley, again, without us being advised of any of this.

Q Did this have to do with the invoice that was being paid?

A No, this had to do with tenants and things like that.

Q Okay. Do you remember specifically what tenant it was about?

A It was Holly Dixon.

Q Was this about the payment of rent by Holly Dixon?

A Yes, I believe so.

Q Okay. And do you have copies of those e-mails?

A Yes.

Q And is that something you believe you could pull up we if we took a break?

A I think I could find it in five or ten minutes.

Q And was the substance of these e-mails,

BOGLE - LINDGREN (DIRECT EXAMINATION)

was it Mike Rose directing Bill Bosley to collect rents directly from Holly Dixon as opposed to sending them to you or through Black Diamond?

A Was it Mike Rose who -- no, Mike Rose didn't say that, at least to my recollection.

Q Okay. Other than just generally being about Holly Dixon and the collection of rent from Holly Dixon or from her company, do you recall the specifics of what was contained in those e-mails, or would you have to look at the e-mails?

A Let me look at them.

MR. BOGLE: Can we go off the record for a second.

(Whereupon, a short break ensued.)

BY MR. BOGLE:

Q I have been supplied with several e-mails from Mr. Lindgren and he was about to tell me about the context of these e-mails.

A The way we found out about the e-mail I referred to that was sent to Mike Rose was that Bill Bosley thought it was sent from Holly, so

BOGLE - LINDGREN (DIRECT EXAMINATION)

he sent us a copy of the one that he thought was from Holly but it was actually from his employer, Rob Pierson, to Mike Rose about Holly and so then I finally got put in the chain a little bit.

Q Okay. And what exactly do you believe -- I'm reading these e-mails now so excuse me for the delay, but what do you believe that TD Bank did that was improper with regard to Holly Dixon or the handling of her rent?

A Well, it's not so much that as it's the fact that the bank is directing Bosley what to do and that Bosley, as they explained to us, is reporting directly to the bank without advising us on leasehold matters.

Q Has Bill Bosley ever refused to give information to you upon your request?

A Yes. Well, refused in the sense that he didn't give it to me. He didn't say I refused.

Q Okay. What information has he not given to you after a request?

A A variety of things.

Q What would that be?

BOGLE - LINDGREN (DIRECT EXAMINATION)

A Explanations for certain actions he's taken.

Q Like what?

A Payment of invoices, you know, copies of letters sent to tenants.

Q Anything else?

A Not that I can recall right now, but I can certainly supply those.

Q Okay. Do you believe that you've been financially -- or that Black Diamond or you personally have been financially harmed by Bill Bosley's refusal to explain payments of invoices or copies of letters sent to tenants?

A Yes.

Q How so?

A By I think tenant relations have been affected. I think not knowing what's going on, we might be able to come up with a better idea than the way things have been handled without us knowing about them. You know, all that could be monetized.

Q Do you believe that it was improper of Bill Bosley's organization to ask the bank or to bring to the bank's attention the fact that rent

BOGLE - LINDGREN (DIRECT EXAMINATION)
money to Bosley.

Q Okay. And do you remember how much these checks were for?

A Which checks?

Q The checks from Holly Dixon, were these \$10,000 payments?

A There was a couple, I think, \$10,000 payments.

Q And that's her monthly lease?

A No.

Q Okay. Why would they be -- do you know what her monthly lease is?

A Not right now, no. I could ask Bosley.

Q Why was she submitting \$10,000 checks if that wasn't the amount of her rent?

A She would pay what she said she could pay.

Q Okay. And are you aware that under the loan documents that the bank is entitled to direct tenants to pay the bank directly or a third party that the bank appoints upon an event of default?

MR. SIMONS: Objection.

MR. BOGLE: You can answer.

BOGLE - LINDGREN (DIRECT EXAMINATION)

was not being paid directly to them but was being paid to Black Diamond instead?

A Can you rephrase that.

Q As I understand it, there was some confusion in the fall of 2011 with Holly Dixon or on the part of Holly Dixon as to where she was supposed to pay her rent, whether she was supposed to pay it to Black Diamond directly or you directly or whether she was supposed to pay Bill Bosley's organization. Is that your understanding as well?

A My understanding is she refused to pay Bosley because she said she couldn't stand dealing with him.

Q Did she actually make payments to you?

A She -- to me personally?

Q You personally or Black Diamond.

A She made a couple of payments to Black Diamond.

Q What did you do with those payments?

A Well, just like we did with a lot of payments that we received from tenants who paid us instead of Black Diamond, we either forwarded them to Bosley or we deposited them and we sent

BOGLE - LINDGREN (DIRECT EXAMINATION)

THE WITNESS: Can you rephrase it?

MR. BOGLE: I sure can.

BY MR. BOGLE:

Q Are you aware that the -- is it your understanding that the loan documents authorize the bank to instruct tenants to pay the bank directly as opposed to Black Diamond upon an event of default by Black Diamond?

A I understand that they can do an assignment of rents, I believe; and in that event that the rents be paid to the bank and -- so yes.

Q Okay. Are there any other examples of the improper direction of the property manager by TD Bank?

A Yes, but specifically not that I can recall right at this second.

Q And just so I have my -- and I'm not trying to restate your testimony, but the things that you have gone over with me as examples of improper direction of the property manager by TD Bank are e-mails from the bank to Bill Bosley directing him to pay invoices; correct?

A Yes.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q Okay. E-mails from the property
3 manager directly to the bank about the Holly
4 Dixon rent situation; correct?

5 A Yes, and other matters.

6 Q Okay. What other matters were there
7 other than rent? Were these repairs that were
8 addressed in this e-mail?

9 A Well, it's not just this e-mail.

10 Q What else is it?

11 A Other e-mails that I can, like I said,
12 provide you later.

13 Q Okay. What else do you believe that TD
14 Bank has done wrong in this case?

15 A With respect to Bosley?

16 Q With respect to you.

17 A Well, I felt a little bit of undue
18 influence with respect to the
19 cross-collateralization requirement.

20 Q When did you feel this undue influence?

21 A July 2008.

22 Q And July 2008 was the date of one of
23 the notes in this case; correct?

24 A Two of them.

25 Q All right. Well, I understand there

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 was a January 2008 3.5 million dollar note --

3 A (Nods head in the affirmative.)

4 Q -- and then a July 2008 2 million
5 dollar note; is that your understanding?

6 A Yes. The July 2008 \$3,500,000 note was
7 modified in July 2008 for
8 cross-collateralization, which Black Diamond had
9 no incentive to do but for the bank demanding it
10 with respect to the 2 million dollar loan that
11 they said they were going to foreclose on if
12 Black Diamond didn't agree to a
13 cross-collateralization, notwithstanding the
14 fact that the loans were current.

15 Q Okay. How was the bank threatening to
16 foreclose if the loan was current?

17 A Well, they said they wouldn't renew it,
18 i.e., I mean, it would term out and it would be
19 foreclosable.

20 Q Okay. And the note, was it a one-year
21 note or a three-year note that was coming due in
22 2008?

23 A For the 2 million dollar loan?

24 Q Yes.

25 A I believe it was a December 2007 note

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 that was coming due in July 2008.

3 Q Okay. And is it your understanding
4 that it's within the discretion of the bank as
5 to whether they want to extend the note or call
6 it due at the end of its term?

7 A Yes.

8 Q Do you feel that the bank was acting --
9 would have been acting improperly if they had
10 elected to not renew the note?

11 A Yes.

12 Q Why do you feel that that would have
13 been improper for the bank to do?

14 A Because it was a good loan. Improper
15 in a business sense.

16 Q Okay. So it would have been, in your
17 opinion, unwise in a business sense, but you do
18 acknowledge that there's nothing that requires a
19 bank to renew a loan past its term?

20 A Yes.

21 Q And in that same sense do you feel
22 there's anything improper with a bank asking for
23 a cross-collateralization agreement in
24 conjunction with the renewal of a loan?

25 A They didn't ask.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

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

BOGLE - LINDGREN (DIRECT EXAMINATION)
 specifics of that because the reason for this deposition, I'm trying to collect information if this case were to go to trial so that I know what and can better understand what your allegations are in your cross-claim. So specifically what do you feel Mike Rose or the bank did that was in bad faith during the course of this loan?

A When we submitted the Cgull contract letter of intent for the acquisition of the majority of the 1188 Center tract, not responding, not addressing the issue despite repeated phone calls and e-mails. The fact of the matter is the bank would have been put in a much better position had it consented to the contract because the amount at risk, the amount of the loan would have been reduced by 1,325,000 less a commission, so call it 1,250,000. So they would have gone from \$1,800,000 to 1,250,000. Their exposure would have been 550,000 instead of a million eight. The property didn't have any income. Their loan-to-value would have reduced from, I think, 72 percent to about 42 percent. I think it's

BOGLE - LINDGREN (DIRECT EXAMINATION)
 bad faith the fact that they didn't take what was clearly in their best business interest and just not even address it and not respond to us, because if it hadn't been in their best business interest, I can maybe understand a little more that maybe it wasn't bad faith; but the fact of the matter was is that it was clearly in their economic and banking interest to do the transaction and they never even gave us the first indication of whether they would consent to it or why they wouldn't if they didn't, no response at all.

Q And what you were asking them to do was a partial release of the mortgage?

A Partial release of the collateral and to pay down -- and mortgage, yes.

Q Okay. And I am showing you -- Keating, did you Bates-stamp the documents before you sent them out or did my office do that?

MR. SIMONS: I don't believe we did. What tab are you going to?

MR. BOGLE: Tab 50. And these are -- it says tab 50 of documents that were produced to the bank by Mr.

BOGLE - LINDGREN (DIRECT EXAMINATION)
 Lindgren in response to the bank's discovery requests. And specifically I'm referring to documents that have been Bates stamped BD000346 and 347, which would be a December 2, 2010 e-mail. Is that what you have, Keating?

MR. SIMONS: I am looking at an e-mail December 1, 2010 at the top, and an e-mail in the middle December 1, 2010, and an e-mail at the bottom December 10, 2010.

MR. HAIGHT: You're looking at one apart.

MR. BOGLE: Yeah, go one after.

MR. SIMONS: Fifty-one?

MR. BOGLE: Yeah.

MR. SIMONS: December 8?

MR. BOGLE: Yes. That's 51 for you?

MR. SIMONS: Yeah. Well, all I can tell you is, is that this is not the binder that your copies were made from.

BOGLE - LINDGREN (DIRECT EXAMINATION)

MR. BOGLE: Okay.

THE WITNESS: This was in-house.

MR. SIMONS: Got you. The tab numbers may be off.

MR. BOGLE: All right. Well, you're on -- I guess it's tab 51?

MR. SIMONS: It's an e-mail from Mike Rose to Mr. Lindgren and others.

MR. BOGLE: Dated December 2, 2010?

MR. SIMONS: Yes.

BY MR. BOGLE:

Q And, again, BD000346 and 347. Can you take a look at that for me. And if you don't mind, if I can come around --

MR. SIMONS: I'll tell you what, he can look at it here, that's fine.

MR. BOGLE: Okay.

(Whereupon, the witness examines document.)

BY MR. BOGLE:

Q Was there a contract in place for the purchase of this property?

A There was a letter of intent. Before

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
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

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
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

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
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?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

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

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
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.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

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

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
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.**

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Well, are there any other instances of
3 bad acts or wrongful acts by the bank that
4 you're alleging in your counterclaims, other
5 than what we have previously talked about?

6 A Not that I can recall right now.

7 **Q Okay. And just so I can recap, not**
8 **responding to the Cgull offer in bad faith in**
9 **connection with that; correct?**

10 **MR. SIMONS:** Object.

11 **MR. BOGLE:** You can answer.

12 **MR. SIMONS:** Object. There's no
13 reason to recap. You're just getting
14 him to say other than what we have
15 already talked about for two hours.

16 **BY MR. BOGLE:**

17 **Q All right. Who's your current**
18 **employer?**

19 A Rockmoor, Inc.

20 **Q Rockmoor, Inc.?**

21 A (Nods head in the affirmative.)

22 **Q And how long has that been your**
23 **employer?**

24 A Twenty-three years.

25 **Q Okay. And that's the physical location**

BOGLE - LINDGREN (DIRECT EXAMINATION)
complies.)

BY MR. BOGLE:

Q Okay, thank you.

And Exhibit 1-B, this is a five-year note so it would have gone through 2013; is that right?

A Yes.

Q And if you flip to tab J-1 and J-2, is J-1 what would have been the corresponding mortgage to the 3.5 million dollar note -- or 3.5 million dollar loan?

A It appears so, yes.

Q And if you flip to the end, is that your signature on Exhibit J-1?

A Yes.

Q And again your signature is as the manager of Red Rocks, L.L.C.?

A Yes.

Q Which is the manager for Black Diamond; correct?

A Yes.

Q If you can turn over to Exhibit 1-D, as in dog, do you recognize this document?

(Whereupon, the witness examines

BOGLE - LINDGREN (DIRECT EXAMINATION)
of Red Rocks as the manager of Black Diamond?

A Yes.

Q And if you can flip over to tab 1-C within Exhibit 1, is this a copy of the forbearance agreement that we've discussed in your deposition?

A (Examines document.) Yes.

Q And actually there's two forbearance agreements, right? This is the one that corresponds to the 3.5 million dollar note; is that right?

A Yes.

Q And is this signed by you?

A Yes.

Q On behalf of Black Diamond?

A Yes.

Q And at the time this -- at the time the document at tab 1-C within Exhibit 1 was signed, the corresponding loan was in default; is that correct?

MR. SIMONS: Objection.

MR. BOGLE: You can answer.

THE WITNESS: I believe so.

BY MR. BOGLE:

BOGLE - LINDGREN (DIRECT EXAMINATION)
the document.)

BY MR. BOGLE:

Q Asked differently; is Exhibit 1-D, is that the 2 million dollar renewal note that is at issue in this case?

A It appears so, yes.

Q Okay. And did you sign that note in Exhibit 1-D?

A Yes.

Q And, again, it's signed by Red Rocks, L.L.C.?

A Yes.

Q As the manager of Black Diamond?

A Correct.

Q And this 2 million dollars, this was used for the -- originally, the original 2 million was used for the purchase and development of tract three?

A Yes.

Q And if you can flip over to tab one, K-1 within Exhibit 1, is this mortgage that corresponds to the 2 million dollar note?

A (Examines document.) Yes.

Q Okay. Is this signed by you on behalf

BOGLE - LINDGREN (DIRECT EXAMINATION)

Q Okay. And if you can look at tab 40 within the documents that were produced by you to the bank -- I'll show it to you. And those documents have been marked BB000288, 289 and 290. If you flip to the second page of this letter, is it your understanding that that, the 3.5 million dollar loan was in default for two reasons; the first being the death of one of the guarantors, and the second being a missed payment from June of 2010; does that sound accurate?

A The first part of your question is about the death, because I think that was a technical default under the documents.

Q And Mr. King had passed away by July 2010, right?

A Yes.

Q And then is it your understanding that Black Diamond had missed a payment on that 3.5 million dollar note?

A This doesn't refer to the 3.5 million dollar note.

Q You are correct. Missed a payment on the 2 million dollar note; correct?

1 **BOGLE - LINDGREN (DIRECT EXAMINATION)**
 2 A I believe so.
 3 Q Okay. And is it your understanding the
 4 bank would have had the right to accelerate the
 5 balance of the loan at that time under the loan
 6 documents?
 7 A Yes.
 8 Q And that it elected not to by signing
 9 this forbearance agreement with you; is that
 10 right?
 11 A That's my understanding.
 12 Q And if you click back over to -- or
 13 turn back over to tab 1-C within Exhibit 1,
 14 which is that forbearance agreement; if you look
 15 at paragraph C-3 within that agreement.
 16 A C-3?
 17 Q Or, excuse me, 5C-3.
 18 A Page three?
 19 Q Yeah, page three. That one of the
 20 things that Black -- would you agree that one of
 21 the things that Black Diamond agreed to do is
 22 maintain a reserve account?
 23 A Yes.
 24 Q And is this the -- this would have been
 25 the reserve account that we discussed earlier?

1 **BOGLE - LINDGREN (DIRECT EXAMINATION)**
 2 A Yes.
 3 Q And you understood at the time of
 4 signing this agreement that if there was an
 5 event of default, that the bank had the option
 6 to pull the money out of this reserve account
 7 and transfer it over to balance the loan?
 8 MR. SIMONS: Objection.
 9 BY MR. BOGLE:
 10 Q What was your understanding of this
 11 reserve account and what would be done with the
 12 reserve account upon a default of Black Diamond?
 13 A Upon a default --
 14 Q Of the loan.
 15 A Can you rephrase that.
 16 Q What was your understanding of the
 17 purpose of this reserve account and what could
 18 be done with the reserve account upon an event
 19 of default?
 20 A What sort of default? I mean, any
 21 default?
 22 Q A missed payment.
 23 A My understanding is -- or was that if
 24 there was a missed payment, that they could
 25 apply the funds in this account to satisfy that

1 **BOGLE - LINDGREN (DIRECT EXAMINATION)**
 2 payment.
 3 Q Okay. If you can flip over to tab 1-E
 4 within Exhibit 1, is this the second forbearance
 5 agreement that we've previously talked about?
 6 A Yes.
 7 Q And does this forbearance agreement
 8 correspond to the 2 million dollar note?
 9 A Yes.
 10 Q And is that your signature at the back
 11 of that forbearance agreement on behalf of Black
 12 Diamond?
 13 A Yes.
 14 Q And does this forbearance agreement at
 15 tab 1-E similarly establish the creation of a
 16 reserve account?
 17 A Yes.
 18 Q And does this forbearance agreement
 19 have a paragraph requiring that a property
 20 manager be appointed?
 21 A Can you point me?
 22 Q In paragraph 6-F.
 23 A Can you rephrase the question.
 24 Q Was it your understanding when you
 25 signed this forbearance agreement that you were

1 **BOGLE - LINDGREN (DIRECT EXAMINATION)**
 2 obligating Black Diamond to enter into a
 3 contract with a management, property management
 4 company?
 5 A Yes.
 6 Q Okay. And this is what we discussed
 7 earlier with how Bill Bosley came to be the
 8 property manager in this piece of property;
 9 correct?
 10 A This is how he became, yes.
 11 Q It's routed in this agreement?
 12 A Yes.
 13 Q And there's a similar clause within the
 14 other forbearance agreement at tab 1-C; is that
 15 correct?
 16 A Yes.
 17 Q If you can flip over to -- take a look
 18 at tab 1-F in Exhibit 1. Is this a copy of the
 19 guaranty that you -- personal guaranty that you
 20 executed guaranteeing the 2 million dollar note
 21 or 2 million dollar loan to TD Bank?
 22 A It appears so.
 23 Q And what is your understanding of a
 24 personal guaranty?
 25 MR. SIMONS: Objection.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 THE WITNESS: Can you restate the
3 question.

4 BY MR. BOGLE:

5 Q What is your understanding of the
6 obligation that you're signing up for when you
7 execute a personal guaranty?

8 MR. SIMONS: Again, object just
9 for the record.

10 MR. BOGLE: You can answer.

11 THE WITNESS: That as a guarantor
12 in the event that the borrower
13 defaults, that the guarantor steps into
14 the shoes of the borrower with respect
15 to the obligations.

16 BY MR. BOGLE:

17 Q And did you sign the guaranty which is
18 at tab 1-F within Exhibit 1?

19 A Yes.

20 Q All right. And then tab 1-G within
21 Exhibit 1, is this the personal guaranty which
22 corresponds to the 3.5 million dollar loan from
23 TD Bank?

24 A (Examines documents.) These are
25 different forms. Yes.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q And is that guaranty signed by you as
3 well?

4 A Yes.

5 Q If you flip over to tab 1-H and 1-I
6 within Exhibit 1, do these appear to be the
7 guaranties signed by Dr. Brosman with regard to
8 this property?

9 A With respect to both properties?

10 Q Yes, sir.

11 A They appear to be so.

12 Q And then tabs 1-L and 1-M within
13 Exhibit 1, do those appear to be the assignment
14 of lease and rents for the two loans that we've
15 talked about?

16 A Yes.

17 Q And are both of those documents signed
18 by you on behalf of Black Diamond?

19 A By me on behalf of Red Rocks as manager
20 of Black Diamond, yes.

21 Q So all the loan documents that we've
22 reviewed other than the two guaranties that were
23 signed by Dr. Brosman, you admit to have signed
24 all the relevant loan documents, including the
25 two notes and the two mortgages and the two

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
2 assignments of rents and leases?

3 A Yes.

4 Q And you signed both of the personal
5 guaranties as well?

6 A Yes.

7 Q Earlier you had discussed that you felt
8 you were under duress in executing some of the
9 documents, some of these loan documents. Can
10 you tell me which loan documents you feel like
11 you were under duress in signing?

12 A The July 2000 date modification of both
13 loans.

14 Q And this was the renewal of the 2
15 million dollar loan where they also amended the
16 3.5 million dollar loan that
17 cross-collateralized the two?

18 A Yes.

19 Q Do you feel there was any undue
20 influence in having you sign the two forbearance
21 agreements?

22 A No.

23 Q What about the two personal guaranties?

24 A Back to the forbearance agreements, to
25 answer the question about whether there was

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 undue influence, yes, I thought it was
3 heavy-handed under the circumstances.

4 Q What parts of the agreements did you
5 feel were heavy-handed?

6 A The appointment of the manager;
7 basically taking -- or attempting to take
8 complete control of the property through
9 requiring us to enter into an agreement with a
10 manager who wasn't actually working as our
11 agent, notwithstanding his contractual
12 obligations but was working as an agent for the
13 bank.

14 Q And at the time you signed the
15 agreements, did you understand that the bank had
16 the authority to appoint a manager that it had
17 approved?

18 A I understood that the bank would
19 approve the management agreement of the manager
20 that we enter into the management agreement
21 with.

22 Q And this is based on the representation
23 of Mike Rose that we discussed earlier?

24 A Yes, plus the fact in the forbearance
25 agreement, I believe it says that they would

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
2 approve the management agreement, and the
3 management agreement was actually -- I was told
4 by Mike Rose this is the management agreement
5 that you have to sign. We couldn't negotiate
6 it. And, believe me, there were a lot of terms
7 in there that I wasn't happy with.

8 Q I'm sorry, do you mean Mike Rose told
9 you you had to sign that forbearance agreement?

10 A No, that management agreement that was
11 referred to in the forbearance agreement. When
12 I received the management agreement after he
13 told us it had to be Bosley, I said, well,
14 there's several things in here that I'm not
15 comfortable signing and he says, well, you sign
16 that management agreement or else -- or there's
17 no negotiation.

18 Q You had talked earlier about there
19 being a representation from Mike Rose that you
20 would get to select the management company?

21 A Yes.

22 Q Did that happen before or after the
23 forbearance agreement was signed, or do you
24 recall?

25 A Before and after until -- frankly, I

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
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

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
2 manager that would be designated by the lender?

3 A No. Again, let me be clear. I'm not
4 sure -- during the course of the negotiation or
5 the review of the forbearance agreement, it was
6 my clear understanding that we would have a
7 right to appoint a manager that we thought would
8 do a good job.

9 Q Okay. The note that's attached at tab
10 1-B within Exhibit 1, is it fair to say that the
11 full balance of that 3.5 million dollars has not
12 been repaid to TD Bank?

13 A Yes.

14 Q And the note which is at tab 1-E --
15 excuse me, the note which is at tab 1-D within
16 Exhibit 1, is it fair to say that the entire
17 amount of that 2 million dollars has not been
18 repaid to the bank?

19 A Yes.

20 Q And when you were answering both those
21 questions, that would be accurate for both Black
22 Diamond and you personally, that Black Diamond
23 has not repaid those amounts and neither have
24 you personally?

25 A No.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q Okay. And, to your knowledge, neither
3 has Dr. Brosman?

4 A To my knowledge, no.

5 Q If you can look at tab two which is in
6 Exhibit 1, which is your answer that you filed
7 in this matter, I'm going to ask you a couple of
8 questions on some of the defenses that you
9 asserted; and some of these are legal defenses
10 so your response might be I don't know. But on
11 page three of your answer, at the bottom, For a
12 Second Defense, one of the defenses is "that
13 plaintiff has failed to join indispensable
14 parties and/or all real parties in interest".
15 Second from the bottom; do you see that?

16 A Yes.

17 Q As you sit here today, are there any
18 other parties that you can think of that are not
19 in the lawsuit that need to be?

20 A Not that I'm aware of but --

21 Q I mean, obviously, you'll defer to your
22 attorney, but that you're aware of, are there
23 any parties that are missing?

24 A No. I defer to my attorney but the
25 answer is no.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q If you can read the first counterclaim,
3 paragraph 27, which is on page four and goes
4 over to page five; if you read that for me to
5 yourself and then let me know when you're
6 finished.

7 A (Examines document.) Okay.

8 Q Did this refresh your memory or make
9 you remember any additional instances of bad
10 acts or wrongful conduct by the bank in this
11 matter, other than what we've discussed today?

12 A My answer is still the same. I don't
13 recall any others at the present time.

14 Q And you have additional counterclaims
15 you've asserted. Other than breach of the
16 covenant of good faith and fair dealing, you
17 asserted claims for breach of contract, breach
18 of fiduciary duty, negligent misrepresentation,
19 duress, interference with respective economic
20 relations and unfair trade practices. Did any
21 of those causes of action jog your memory as to
22 additional bad acts or wrongful acts committed
23 by the bank in this matter, other than what we
24 talked about today?

25 A My answer is still at this time I don't

1 BOGLE - LINDGREN (DIRECT EXAMINATION)
2 recall any additional specifics.

3 Q Okay. Going back to paragraph 27
4 within your answer, the second sentence says,
5 Among other things, plaintiff has employed its
6 superior bargaining and economic position to
7 coerce defendants into cross-collateralization
8 agreements, improperly take advantage of the
9 death of a member of Black Diamond, L.L.C. to
10 coerce defendants into contracting with a
11 property manager. Do you see that?

12 A Uh-huh (affirmative). Yes.

13 Q All right. If we take those -- let's
14 take those one by one. Would the coercion of
15 the defendants into cross-collateralization
16 agreements, that would have taken place prior to
17 the July 28, 2010 forbearance agreement, right?

18 A Yes.

19 Q Okay. And I believe you said that
20 would have taken place in 2008?

21 A Right.

22 Q Improperly taking advantage of the
23 death of a member of Black Diamond, L.L.C., is
24 that -- what is that referring to, or what do
25 you believe that's referring to?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 A Well, again, I'll rely on counsel for
3 this one, but it was a technical default and
4 that's it.

5 Q Okay. And would any advantage that the
6 bank tried to assert following the death of Mr.
7 King, would that have happened prior to the July
8 28, 2010 forbearance agreement?

9 A Yes, because --

10 MR. SIMONS: I'm going to object
11 to the form.

12 THE WITNESS: I'm not sure.

13 BY MR. BOGLE:

14 Q Okay. And the coercion of defendants
15 into contracting with a property manager, would
16 that be the provision within the forbearance
17 agreement that obligates Black Diamond to
18 contract with a property manager?

19 A Yes.

20 Q That's what you're referring to in
21 that?

22 A And the other parol evidence that went
23 along with that, you know, the assertions and
24 conversations with Mike Rose about the property
25 manager and the form that would take.

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 Q That's the first time I've had a
3 deponent bring out parol evidence in a
4 deposition. I like it. I guess that's what
5 happens when you depose a lawyer.

6 A I was hoping I used it correctly.

7 Q And the parol evidence that you
8 referred to, did that happen -- did those
9 discussions take place before or after the
10 execution of the forbearance agreement, or do
11 you recall?

12 A Before and after, as I stated earlier.

13 Q Okay. We just talked about the
14 representations of Mike Rose as to the property
15 manager. Have there been any other
16 representations, affirmative representations by
17 the bank that you believe were false?

18 A With respect to?

19 Q This property and this loan, these
20 loans.

21 A You mean by anybody in the bank other
22 than Mike Rose?

23 Q Yes, sir.

24 A There were several more by Mike Rose,
25 but I can't recall the specifics right now, but

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 answer.

3 THE WITNESS: Can you restate it.

4 BY MR. BOGLE:

5 Q Do you have any evidence that the acts
6 and practices of the bank in its dealings with
7 you have been repeated by the bank with others?

8 A Yes.

9 Q What is that?

10 A For one example, the APEG case.

11 Q Okay. What do you know about that?

12 MR. SIMONS: Objection.

13 BY MR. BOGLE:

14 Q What do you know about that that you
15 have not obtained from discussions with your
16 attorney?

17 A Anecdotal items from other people in
18 the community and from a couple of the
19 principals in that case.

20 Q And do you -- all the things that we
21 have talked about today, the examples of
22 wrongful conduct by the bank in its dealings
23 with Black Diamond, which of those, if any, do
24 you feel have been repeated in the APEG case?

25 A Again, anecdotally, my understanding is

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 that there was a property that was -- a similar
3 fact pattern where there was a property to be
4 sold that was not consented to by the bank and
5 that it caused the same sort of issues that we
6 have in our case.

7 Q Are you aware of any other wrongful
8 conduct in that case by the bank?

9 A Not other than what I've discussed with
10 my attorney. Well, I'm sorry, let me say this:
11 The same sorts of things I've mentioned about
12 Mr. Rose I've heard ad nauseum from the
13 principals in the other case.

14 Q Okay. And so you've had face-to-face
15 or over-the-phone discussions with the
16 principals in the other case?

17 A Not face to face but anecdotally and
18 over the phone, yes.

19 Q Okay. There was a phone conversation
20 between you and the principals of APEG?

21 A I'm trying to think if I saw them as a
22 party or if I talked to them on the phone. I
23 don't recall right now.

24 Q But you have spoken with them on one
25 occasion about their case?

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 A Yes.

3 Q And when you say you understand things
4 anecdotally, what do you mean by that?

5 A Just what people in the community, in
6 the real estate and business community said they
7 heard that TD Bank was doing.

8 Q Okay. And other than not consenting to
9 a sale and the conduct of Mike Rose, have there
10 been any other specific examples of conduct by
11 TD Bank in the APEG case that you find wrongful?

12 A That I find wrongful?

13 Q (Nods head in the affirmative.)

14 A Not that I can think of right now.

15 Q Okay. Are you aware of any other
16 parties other than APEG -- well, scratch that.

17 Other than the APEG matter, are you
18 aware of any other instances where the acts and
19 practices of TD Bank which you have alleged and
20 talked about today in your deposition have
21 adversely affected another member of the public?

22 A Yes.

23 Q Can you tell me about that?

24 A I know that -- or I understand that
25 Mike Rose asked local realtors to give him

1 BOGLE - LINDGREN (DIRECT EXAMINATION)

2 analysis on property and their understanding of
3 the value and ask for, I believe, reports on the
4 value of a property with an eye towards
5 marketing. I think was something that was
6 already owed, the bank had taken over, and he
7 got those reports from representatives in the
8 community and used them and then give the
9 listing to somebody else after leading them to
10 believe that by giving that information, that
11 they would get the listing.

12 Q Okay. Did that type of conduct ever
13 happen in your case?

14 A No. You asked me if I knew of anybody
15 else in the community.

16 Q Okay.

17 A Again, my understanding of the question
18 was have I heard anything else in the community
19 about wrongdoing by TD Bank. That was my
20 answer.

21 Q If you can flip over to tab six within
22 Exhibit 1, I'll represent to you these are your
23 responses to the bank's discovery requests in
24 this case. If you look at interrogatory number
25 one where it asks for the names of witnesses or

Exhibit 2

Message

From: Renault, Michael R. [/O=TSFG/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=MRR18220]
Sent: 8/5/2010 4:08:13 PM
To: 'ZuckermanB@gtlaw.com' [ZuckermanB@gtlaw.com]; julieking61@aol.com; mtrent@wcsr.com
Subject: Black Diamond Management Agreement

I just spoke with Walter Nester at McNair (covering in Cary's absence). Chris has signed the management agreement and is forwarding it to Tom DeMint at Sperry Van Ness for his signature. My understanding is that Tom will begin his management role ASAP.

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

-----Original Message-----

From: ZuckermanB@gtlaw.com [mailto:ZuckermanB@gtlaw.com]
Sent: Thursday, August 05, 2010 9:24 AM
To: Renault, Michael R.; CGriffin@MCNAIR.NET
Cc: chrislindgren@cs.com; julieking61@aol.com; mtrent@wcsr.com
Subject: RE: Black Diamond/Julie King Mortgage

Julie King concurs that the management agreement should be implemented now. Thanks. Ben.

P. Benjamin Zuckerman
Shareholder
Greenberg Traurig, P.A. | 5100 Town Center Circle, Suite 400 | Boca
Raton, FL 33486
Tel (561) 955-7606 | Fax 561.367.6306 | Cell 561.706.3209
ZuckermanB@gtlaw.com | www.gtlaw.com

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DELAWARE * DENVER * FORT LAUDERDALE * HOUSTON * LAS VEGAS * LONDON * *
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* SHANGHAI * SILICON VALLEY * TALLAHASSEE * TAMPA * TYSONS CORNER *
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From: Renault, Michael R. [mailto:Michael.Renault@carolinafirst.com]
Sent: Thursday, August 05, 2010 7:25 AM

To: 'Griffin, Cary'
Cc: 'J. Chris Lindgren (chrislindgren@cs.com)'; 'julieking61@aol.com';
Zuckerman, P. Benjamin (Shld-Boca-LT); mtrent@wcsr.com
Subject: RE: Black Diamond/Julie King Mortgage
Importance: High

I understand although I am still disappointed we didn't get this matter wrapped up yesterday (as I think all of us are).

With that said, however, my understanding from Cary in a phone call yesterday with Matt Trent is that the management agreement is ready to be signed. Therefore, that document needs to be signed ASAP so that Sperry Van Ness/Bosley Asset Management can assume management of the property immediately. The cash flow from the property needs to be controlled so the loan payments can resume being paid in a timely fashion.

Please advise as to when the management agreement can be signed.

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

-----Original Message-----

From: Griffin, Cary [mailto:CGriffin@MCNAIR.NET]
Sent: Wednesday, August 04, 2010 7:20 PM
To: Renault, Michael R.
Cc: 'J. Chris Lindgren (chrislindgren@cs.com)'; 'julieking61@aol.com';
'ZuckermanB@gtlaw.com'; mtrent@wcsr.com
Subject: RE: Black Diamond/Julie King Mortgage

I did not get back until about 6:50- and I told Julie that there would be some delay. Dr Brosman wants a little bit of time to review the documents, including a new operating agreement. Hence I believe we likely will be into next week before this can be finalized--that is my best guess at this point. I will be out of town tomorrow and Friday and will be checking in on my blackberry from time to time..sorry--

CSG

-----Original Message-----

From: Renault, Michael R. [mailto:Michael.Renault@carolinafirst.com]
Sent: Wednesday, August 04, 2010 4:39 PM
To: Griffin, Cary
Cc: mtrent@wcsr.com; 'ZuckermanB@gtlaw.com'
Subject: RE: Black Diamond/Julie King Mortgage

Just spoke to Julie and she will be at your office at 6pm. I gave her your after hours number as well. Her cell number is 816.0667 if you need her.

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

-----Original Message-----

From: Griffin, Cary [mailto:CGriffin@MCNAIR.NET]
Sent: Wednesday, August 04, 2010 4:32 PM

To: Renault, Michael R.
Cc: mtrent@wcsr.com; 'ZuckermanB@gtlaw.com'
Subject: RE: Black Diamond/Julie King Mortgage

I will be meeting with Chris and Dr B. before 5 yes-- would you call Julie and find out if she would be available to meet later today --or if not today then I can arrange to have her meet with Walter Nester in the morning.. I should be back in my office by 6 tonight--and can be reached at my afterhours number --341-4915 CSG

-----Original Message-----

From: Renault, Michael R. [mailto:Michael.Renault@carolinafirst.com]
Sent: Wednesday, August 04, 2010 4:06 PM
To: 'Trent, Matt'; Griffin, Cary
Subject: RE: Black Diamond/Julie King Mortgage

Thanks for the extra push this afternoon for all of our sakes.

Cary - have you been able to line up Lindgren and Brosman for this afternoon?

Also, I have an e-mail and voicemail into Tom Demint and Bill Bosley to get a copy of the Leasing Agreement ASAP. I will forward as soon as I have it. Unless Matt advises otherwise, I think we close this afternoon (if possible) regardless of the leasing agreement because the management piece is more important although as we discussed we need to get the leasing agreement in place too.

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

-----Original Message-----

From: Trent, Matt [mailto:MTrent@wcsr.com]
Sent: Wednesday, August 04, 2010 3:58 PM
To: 'Griffin, Cary'
Cc: Renault, Michael R.
Subject: RE: Black Diamond/Julie King Mortgage

Looks good. Thanks.

-----Original Message-----

From: Griffin, Cary [mailto:CGriffin@MCNAIR.NET]
Sent: Wednesday, August 04, 2010 3:47 PM
To: Trent, Matt
Subject: FW: Black Diamond/Julie King Mortgage

Matt--your change made--note however that there are now 2 mortgaged parcels as discussed; are you going to send me any changes to the BD forbearance agreement and the final Sheridan Forbearance agreement?

-----Original Message-----

From: Kilgore, Carlene On Behalf Of Griffin, Cary
Sent: Wednesday, August 04, 2010 3:24 PM
To: 'Ben Zuckerman Esquire (zuckermanB@gtlaw.com)'
Cc: 'J. Chris Lindgren (chrislindgren@cs.com)'; Griffin, Cary
Subject: Black Diamond/Julie King Mortgage

Carlene B. Kilgore PLS
Administrative Assistant to Cary S. Griffin ckilgore@mcnair.net McNair
Law Firm, P.A. Hilton Head Island Office | Shelter Cove Executive Park,
23-B Shelter Cove Lane | Suite 400 | Hilton Head Island, SC 29928
843 785 2171 Main | 843 686 5991 Fax

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-----Original Message-----
<http://www.gtlaw.com/>

Exhibit 3

CHARTER I
COMMERCIAL, INC.

To: Chris Lindgren
 Date: September 2, 2010
 From: Baker Wilkins
 Re: 15 Centre Building

Purchaser: Conhill Investments, LLC and/or Assigns
 12-B Arjay Way, Suite 200
 Post Office Box 1171
 Bluffton SC 29910

Seller: Black Diamond, LLC
 55 Main Street
 Hilton Head Island, SC 29926

Location: 15 Centre Drive
 Bluffton, SC 29910
 Unit T13, 1188 Centre Horizontal Property Regime

Condition of the Building: "As Is"

Purchase Price: \$1,200,000 ~~1,450,000~~ ~~1,325,000~~ ~~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 McNeil Law Firm Escrow Account.

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 Fordway 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



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.

Congull Investments, LLC

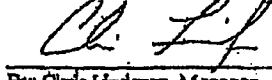


By: Joseph B. Fraser, III, Manager

Date:

9/2/10

Black Diamond, LLC



By: Chris Lindgren, Manager

Date:

9/9/10

Exhibit 4

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

Stephanie M. Ceccato, Legal Services of Southern Piedmont,
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.*

2013 WL 6095561
United States District Court,
D. New Hampshire.

John J. MUDGE, Jr. and Lisa Mudge

v.

BANK OF AMERICA, N.A. and TD Bank, N.A.

Civil No. 13-cv-421-JD. | Nov. 20, 2013.

Attorneys and Law Firms

Peter G. McGrath, McGrath Law Firm PA, Concord, NH, for
John J. Mudge, Jr. and Lisa Mudge.

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Laconia, NH, Edmond J. Ford, Richard K. McPartlin, Ford &
Associates Inc., Portsmouth, NH, for Bank of America, N.A.
and TD Bank, N.A.

ORDER

JOSEPH A. DiCLERICO, JR., District Judge.

*1 John and Lisa Mudge brought suit in state court against Bank of America, N.A. ("Bank of America") and TD Bank, N.A. ("TD Bank") alleging claims that arose from the defendants' conduct in handling the Mudges' mortgages and in attempting to foreclose on their home. TD Bank removed the case to this court and moves to dismiss the claims against it. The Mudges object.

Background

Sometime prior to 2009, John and Lisa Mudge entered into a loan with Bank of America which was secured by a mortgage on the Mudges' home at 57 Sterling Avenue in Hooksett, New Hampshire. Also sometime prior to 2009, the Mudges entered into a loan with TD Bank which was secured by a second mortgage on the Mudges' home.¹

The Mudges eventually had difficulty making their mortgage payments and wanted to proceed with a short sale of their home.² The Mudges allege that TD Bank, as holder of the second mortgage, "initially agreed to permit a short sale and led Plaintiffs to believe that they would cooperate in scheduling same." Compl. ¶ 40. The Mudges allege that

despite TD Bank's initial indication that it would permit a short sale, TD Bank did not respond to their short sale request package, and the Mudges were unable to proceed with a short sale.

Standard of Review

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move to dismiss on the ground that the plaintiff's complaint fails to state a claim on which relief can be granted. In assessing a complaint for purposes of a motion to dismiss, the court "separate[s] the factual allegations from the conclusory statements in order to analyze whether the former, if taken as true, set forth a plausible, not merely conceivable, case for relief." *Juarez v. Select Portfolio Servicing, Inc.*, 708 F.3d 269, 276 (1st Cir.2013) (internal quotation marks omitted). "If the facts alleged in [the complaint] allow the court to draw the reasonable inference that the defendants are liable for the misconduct alleged, the claim has facial plausibility." *Id.* (internal quotation marks omitted).

Discussion

The Mudges bring claims against TD Bank for breach of the covenant of good faith and fair dealing (Count V), breach of contract (Count VI), and negligent misrepresentation (Count VII).³ TD Bank moves to dismiss all of the Mudges' claims against it.

A. Breach of Contract

The Mudges allege that TD Bank breached the second mortgage agreement by failing to follow New Hampshire underwriting and closing requirements, failing to "perform properly and in good faith," "fail[ing] to honor verbal promises," "fail[ing] to recognize or credit certain payments, refus[ing] reasonable short sale offers, and fail[ing] to respond in good faith." Compl. ¶¶ 47-49. TD Bank moves to dismiss on the grounds that the Mudges' allegations are too vague and conclusory to state a claim. In response, the Mudges simply assert that they adequately pleaded their claims in Counts V, VI, and VII.⁴

*2 Under New Hampshire law, "a breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." *Axenix, Inc. v. Turner Constr. Co.*, 164 N.H. 659, 668 (2013) (internal

quotation marks and citation omitted). Although the Mudges allege that TD Bank was required to and failed to follow the New Hampshire underwriting and closing requirements associated with their agreement,⁵ they do not explain what the underwriting and closing requirements were or in what ways TD Bank failed to follow them. They also contend that TD Bank failed to perform properly and failed to honor promises but provide no facts to support those charges. Further, it is far from clear how such actions would constitute breach of a written agreement. The Mudges also allege that TD Bank "failed to recognize or credit certain payments," but they do not explain what payments they made to TD Bank, when they made them, or provide any details about TD Bank's alleged failure to credit those payments. Such allegations are insufficient to survive a motion to dismiss.

The Mudges' breach of contract claim fails to provide enough facts "to raise a right to relief above the speculative level" *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir.2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Instead, the Mudges' allegations in support of their breach of contract claim are mere "naked assertions devoid of further factual enhancement [which] need not be accepted." *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir.2011) (internal quotation marks and citation omitted); see also *Katz v. Pershing, LLC*, 672 F.3d 64, 73 (1st Cir.2012) ("If the factual allegations in a complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal.") (internal quotation marks and citation omitted). Accordingly, the Mudges' claim for breach of contract is dismissed.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

The Mudges allege in Count V that TD Bank breached the implied covenant of good faith and fair dealing in the second mortgage agreement. In support, they allege that TD Bank did not cooperate in arranging and scheduling a short sale of their home. TD Bank argues that allowing a short sale to take place requires modifying the terms of the agreement entered into between itself and the Mudges, and that the implied covenant of good faith and fair dealing does not require a party to modify or restructure a loan.

"In every agreement, there is an implied covenant that the parties will act in good faith and fairly with one

another." *Birch Broad. Inc. v. Capitol Broad. Corp., Inc.*, 161 N.H. 192, 198 (2010). "The duty of good faith and fair dealing applies, however, only when the agreement grants a contracting party discretion in performing his duties under the agreement and an unreasonable exercise of that party's discretion causes harm to the other contracting party." *Ruivo v. Wells Fargo Bank, N.A.*, 2012 WL 5845452, at *3 (D.N.H. Nov. 19, 2012). Thus, when a contracting party exercises his or her discretion under an agreement, the covenant of good faith and fair dealing "prohibits behavior inconsistent with the parties' agreed-upon common purpose and justified expectations as well as with common standards of decency, fairness and reasonableness." *Id.* (internal quotation marks and citations omitted).

*3. The Mudges appear to allege that TD Bank breached the covenant of good faith and fair dealing in the second mortgage agreement by refusing to permit or otherwise facilitate a short sale of the Mudges' home. Neither the complaint nor the Mudges' objection, however, asserts that the second mortgage agreement confers discretion on TD Bank to allow the Mudges to conduct a short sale. See *Douglas v. U.S. Bank Nat'l Ass'n*, 2013 WL 1890728, at *6 (D.N.H. May 6, 2013) ("[P]etitioners 'do not identify any particular grant of discretion in the mortgage that they believe was exercised unreasonably.'" (quoting *Moore v. Mortg. Elec. Registration Sys., Inc.*, 848 F.Supp.2d 107, 129 (D.N.H.2012))); see also *Ruivo*, 2012 WL 5845452, at *3 ("Ruivo claims that Wells Fargo unreasonably exercised discretion granted to it under the loan agreement, but she does not point to any specific provision in the agreement to support her claim."). Even assuming that the second mortgage agreement specifically granted TD Bank discretion to permit a short sale, "neither the complaint nor the [Mudges' objection] articulates how that discretion was exercised unreasonably, so as to frustrate the parties' agreed-upon common purpose, justified expectations, or common standards of decency." *Moore*, 848 F.Supp.2d at 129.

In addition, even if the complaint had alleged that the second mortgage agreement gave TD Bank the discretion to permit a short sale and that TD Bank had exercised that discretion unreasonably, the claim for breach of the implied covenant of good faith and fair dealing would still be dismissed. As TD Bank points out in its motion to dismiss, a short sale in real estate, where a lender accepts less than it is owed to secure its note,⁶ necessarily rewrites the terms of the parties' mortgage agreement. "[T]he covenant of good faith and fair dealing in a loan agreement cannot be used to require the lender to modify

or restructure the loan.”⁷ *Moore*, 848 F.Supp.2d at 130; see also *Douglas*, 2013 WL 1890728, at *6 (“[I]t is undisputed that the Douglasses got their loan, which means, necessarily, that they received the full value of their agreement. That the Douglasses later found themselves unable to repay their loan, and may have benefitted from a loan modification, does nothing to undermine the fact that, in the first instance, they received the loan they bargained for, which was the full value of their agreement.”).

Accordingly, the Mudges' claim for breach of the implied covenant of good faith and fair dealing is dismissed.

C. Negligent Misrepresentation

The Mudges allege a claim for negligent misrepresentation against TD Bank in Count VII. Under New Hampshire law, the elements of a negligent misrepresentation claim are “a negligent misrepresentation of a material fact by the defendant and justifiable reliance by the plaintiff.” *Wyle v. Lees*, 162 N.H. 406, 413 (2011). Negligence is based on “the duty of one who volunteers information to another not having equal knowledge, with the intention that he will act upon it, to exercise reasonable care to verify the truth of his statements before making them.” *Id.* A misrepresentation is made when a defendant knew or should have known that his statements were false. *Id.* In addition, the misrepresentation must have caused the plaintiff harm or injury, or stated in other terms, the plaintiff must have reasonably relied on the misrepresentation to his detriment. See *id.*; *Snierston v. Scruton*, 145 N.H. 73, 78 (2000); *BAE Sys. Info. & Elec. Sys. Integration Inc. v. SpaceKey Components, Inc.*, 2011 WL 5040705, at *14 (D.N.H. Oct. 24, 2011).

*4 In supporting their negligent misrepresentation claim, the Mudges allege that they were damaged by TD Bank's “untimely responses to [the Mudges'] short sale request.” Compl. ¶ 54. They also assert in a vague and conclusory manner that TD Bank is liable for “misleading Plaintiffs and failing to adequately communicate,” *id.* at ¶ 53, and that the Mudges were “misled when [TD Bank] made numerous material promises and failed to perform,” *id.* at ¶ 54. Even taken in a light favorable to the Mudges, those

allegations do not contain a representation at all, let alone a misrepresentation. See, e.g., *Akwa Vista, LLC v. NRT, Inc.*, 160 N.H. 594, 601 (2010) (to prevail on a claim for negligent misrepresentation a plaintiff must first show “that the defendants made a representation.”). Instead, the Mudges' allege that TD Bank *never responded* to the Mudges' short sale request. See Compl. ¶ 43.

To the extent the Mudges intended to base their negligent misrepresentation claim on their allegations that TD Bank initially agreed to permit a short sale, led them to believe that they would cooperate in scheduling the short sale, and ultimately failed to facilitate the sale, see *id.* at ¶¶ 40–43, those allegations do not state a claim. The Mudges do not allege that TD Bank knew or should have known that representations about allowing and cooperating in scheduling a short sale were false. Nor do they explain how, even if the statements were misrepresentations, the Mudges' reasonable reliance on those statements caused any injury.⁸ Accordingly, the Mudges' claim for negligent misrepresentation against TD Bank (Count VII) is dismissed.⁹

D. Amendment

As part of their objection to TD Bank's motion to dismiss, the Mudges argue that “[t]he appropriate cure would be merely an amendment of the Complaint, not to dismiss the matter entirely.” Because parties cannot combine objections with requests for affirmative relief, the court will not consider the request to amend. See LR 7. 1(a)(1).

Conclusion

For the foregoing reasons, TD Bank's motion to dismiss the claims against it (document no. 4) is granted. Counts V, VI, and VII are dismissed.

SO ORDERED.

Parallel Citations

2013 DNH 159

Footnotes

- 1 The complaint does not specify when the Mudges obtained the loans or the amount of either loan.
- 2 The complaint contains additional allegations concerning Bank of America's conduct. Those allegations are omitted from the background section of this order because they are not relevant to the Mudges' claims against TD Bank.

- 3 The remaining claims are alleged against Bank of America only.
- 4 Because the Mudges are represented by counsel, they are not entitled to any special consideration that might be afforded pro se parties. The court cannot be expected either to divine or provide legal theories on behalf of any party.
- 5 The Mudges allege in Count VI that "the parties have entered into an agreement regarding financing pursuant to the terms of their mortgage, and an original mortgage agreement and other contracts." Compl. ¶ 46. It appears, however, that the only agreement between TD Bank and the Mudges is the second mortgage agreement.
- 6 "A 'short sale' in real estate occurs when the outstanding loans against a property are greater than what the property is worth and the lender agrees to accept less than it is owed to permit a sale of the property that secures its note." *Stevens v. C.I.R.*, 2008 WL 2264452, at *1 n. 1 (T.C. June 3, 2008)
- 7 In their objection to TD Bank's motion to dismiss, the Mudges assert that TD Bank "failed to properly consider the modification and short sale request."
- 8 For example, had TD Bank simply stated that it would not permit the Mudges to conduct a short sale, the Mudges would have the same injury as they currently have. Therefore, they have not alleged that a misrepresentation caused any harm or injury.
- 9 Because the complaint fails to allege a claim for negligent misrepresentation, the court need not decide whether the economic loss doctrine would bar that claim, if it had been sufficiently alleged.

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Exhibit 5

FILED

APR 12 1999

LARRY W. PROPER, 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

I. 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

pm

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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." Teamsters 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.

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,

those 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-CJ-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 Staunton 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."

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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.

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

(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. PEDAL, 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

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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. Foxfire 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,

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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

CERTIFIED A TRUE COPY

STATE OF SOUTH CAROLINA *Crime* IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE CLERK OF COURT C.P. & G.S. C/A No: 2006-CP-21-1814

JJH TRANSPORT, LLC AND JOEL
HERRING,

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY OF SOUTH CAROLINA,

Defendants

FILED
2007 MAY 24 AM 9:42
CLERK OF COURT
C.P. & G.S.
FLORENCE COUNTY, SC

ORDER ON AMENDED MOTION TO DISMISS

This matter came before the Court on the Motion to Dismiss pursuant to Rules 12(b)(6) and (8), SCRCP, of Branch Banking and Trust Company of South Carolina ("BB&T").

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The Motion to Dismiss sought the dismissal of all causes of action as to Joel Herring, pursuant to Rule 12(b)(8), SCRCP, on the grounds that a prior pending action was pending between the same parties involving the same claims as alleged herein. The Motion to Dismiss further sought the dismissal of the First and Second Causes of action, alleging negligence, the Fourth Cause of Action, alleging conspiracy, the Fifth Cause of Action, alleging a violation South Carolina Unfair Trade Practices Act and the Sixth Cause of Action, alleging intentional infliction of emotional distress.

MOTION TO AMEND

At the hearing in this matter, the Plaintiff presented to the Court a Motion to Amend and a proposed Second Amended Complaint. Arguments at the hearing and subsequent written submissions by the Plaintiff have relied upon the Second Amended Complaint. With the consent

of counsel and to avoid unnecessary further pleadings, this Court has considered the Second Amended Complaint in the determination of this Motion. As a preliminary matter, the Court grants the Motion to Amend dated January 8, 2007. The Amended Motion to Dismiss is construed by the Court as addressing the Second Amended Complaint and a further motion specifically directed to that pleading shall not be required. In addition, the Court determines that the previously filed Answer to Amended Complaint is sufficiently responsive to the Second Amended Complaint with any material facts added in the Second Amended Complaint to be considered denied without further answer.

RULE 12(b)(8) – PRIOR PENDING ACTION

Rule 12(b)(8), SCRCP, specifically provides for dismissal of an action or claim if “another action is pending between the same parties for the same claim”.

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BB&T argues that the appropriate standard to be applied in determining the applicability of Rule 12(b)(8), SCRCP, was set forth by the Court of Appeals in *Corbett v. City of Myrtle Beach*¹ where the Court was evaluating the propriety of a suit brought by a wife for intentional infliction of emotional distress subsequent to the filing of two previous wrongful death actions. The Court dismissed the third action, even though on a separate legal theory, finding that the “claim involves the same parties and is based upon the same facts and circumstances as the first two civil actions.”

On July 12, 2006, BB&T filed its Complaint for foreclosure in Marion County in Civil Action No. 2006-CP-33-251 against Sawgrass Timber & Chip, LLC and Joel Herring (the “Foreclosure Action”). The Foreclosure Action was served on August 29, 2006. On October 25, 2006, Plaintiff’s counsel herein, as attorney for Sawgrass Timber & Chip, LLC and Joel Herring served an Answer and Counterclaim in the Foreclosure Action which Answer and Counterclaim

asserted, on behalf of Joel Herring, each cause of action alleged in the Complaint in this action (along with others). The Complaint in this action was not filed until October 30, 2006, five days after the service of the Answer and Counterclaims in the Foreclosure Action. The Complaint in this action, as it relates to Herring, clearly involves the same parties and is based upon the same facts and circumstances as the Counterclaims. Each of the claims alleged herein on behalf of Joel Herring were, therefore, the subject of a "another action pending between the same parties for the same claim" at the time of the filing of the Complaint in this action and would be barred under the *Corbett* standard.

In his initial written presentation to the Court, Joel Herring attempts to distinguish the Counterclaims in the Marion action from his claims in this action by asserting that Mr. Herring's status is different in the two cases ("as guarantor and principal of Sawgrass" in the Marion Counterclaims and "as principal of JJH" in this case) and that the damages sought are different in the two actions. These alleged distinctions, however, are not sufficient to allow the two cases to continue under the *Corbett* standard.

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In further Court submissions the Plaintiff concedes that *Corbett* is the only case decided under Rule 12(b)(8), SCRPC but cites the Court to *Connecticut Nat'l Bank v. Wilson*,² decided under what the Plaintiff describes as the "precursor" of Rule 12(b)(8) and asks the Court to apply an allegedly "more restrictive" standard established under that "precursor." The "precursor" to Rule 12(b)(8), SC Code Ann. §Section 10-642 (utilizing the numbering system in effect at the time) provided "The defendant may demur to the complaint when it shall appear upon the face thereof that: (3) There is another action pending between the same parties for the same cause." When the current Rules of Civil Procedure were adopted the wording was changed from the

¹ 336 S.C. 601, 610 (S.C. Ct. App. 1999)

² 284 S.C. 415, 326 S.E.2d 657 (S.C. 1985)

specific "cause" to a more general "claim." This would appear to be the rationale behind the less restrictive interpretation as found in *Corbett*. However, even if the more restrictive standard of *Connecticut Nat'l Bank* is applied, dismissal would be appropriate. Each of the cases under the former SC Code §Section 10-642, including *Connecticut Nat'l Bank*, cite 1 C.J.S. *Abatement and Revival* § 39 as authority for the standard set out³. As quoted in *Connecticut Nat'l Bank* that standard is:

Generally speaking, in order that one of two pending actions may be urged in abatement of the other, the actions must be identical or substantially so, that is, they must be between the same parties (infra §§ 56-62), based on the same cause of action, involve the same issues (infra § 40), and be capable of authorizing the same relief (infra § 43).

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As it relates to Joel Herring and his claims in the Marion and Florence actions, the parties are the same, the causes of action are identical and the issues involved are identical. The underlying authority behind the South Carolina cases under the former statute clearly states that the standard is met if the Court in the first action is "capable of authorizing the same relief." The Court in Marion County is capable of granting to Joel Herring any and all relief to which he might be entitled under each of the causes of action pled in that Court (which, as previously set forth, are the same causes of action later pled in Florence County).

In addition, even under the old more restrictive statute, courts would apply the statute and abate (the term used for the action at the time) the second suit even if they were not identical. In *McConnell v Williams*⁴ the Court applied abatement in a case stating:

"the object of the two suits and the relief sought are not absolutely identical. At the same time the issues are so interrelated that the ends of justice will be best served by allowing the first suit to proceed and by withholding action in the second suit."

³ *McConnell v. Williams* 252 S.C. 573; 167 S.E.2d 429 (SC 1969); South Carolina Public Service

The issues in the two cases, as they relate to Joel Herring, are, in the Court's opinion, clearly so interrelated that the ends of justice will be best served by allowing the first suit to proceed (the Counterclaims in the Marion action) and by withholding action, through dismissal, in the second suit (this action). Although the Court understands the argument that Herring is seeking redress and damages for wrongs allegedly incurred in different capacities in the two actions, the court sees no practical way to separate the claims into two distinct pieces of litigation in two counties.

The claims of Joel Herring are, therefore, dismissed and Joel Herring is, as a result, dismissed as a Plaintiff and party herein.

RULE 12(b)(6) -- NEGLIGENCE

BB&T moves to dismiss the First and Second Causes of Action on the basis that "the Plaintiff has failed to state facts sufficient to constitute a cause of action for negligence as, as a matter of law, no duty exists between the Plaintiff JJH Transport, LLC and BB&T under the facts alleged."

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At issue in this case is the existence of a legal duty. BB&T asserts that "absolutely no relationship exists between the Plaintiff, JJH Trucking, LLC and the alleged tort-feasor, BB&T, from which any duty to act can or does arise" and seeks a dismissal of the first and second causes of action as a result.

At this point in the litigation, the Motion to Dismiss is denied as to these two causes of action.⁵

⁴ Commission V. City Of Rock Hill 268 S.C. 405; 234 S.E.2d 228 (SC 1977)
⁵ 252 S.C. 573; 167 S.E.2d 429 (S.C. 1969).

In denying the Motion to Dismiss at this stage, the Court is specifically not ruling on the existence or not of any specific duty as a matter of law. The Court's ruling is simply that, at this pleading stage, the Second Amended Complaint is sufficient. BB&T shall be free to raise its legal arguments raised herein in a later filed Motion for Summary Judgment as to the facts as actually developed in the case should it deem it appropriate.

RULE 12(b)(6) – CONSPIRACY

BB&T moves to dismiss the Fourth Cause of Action on the basis that "the Plaintiff has failed to state facts sufficient to constitute a cause of action for conspiracy in regard to the sale of the 'chipper' as there is no allegation that either Plaintiff had any interest in that piece of equipment." BB&T relies upon *Todd v. South Carolina Farm Bureau Mutual Insurance Company*⁶ as support for its motion.

The Court, at this stage, finds that Plaintiff's allegations are sufficient to survive a Motion to Dismiss and the motion is, therefore, denied as to the Fourth Cause of Action.⁷

RULE 12(b)(6) – UNFAIR TRADE PRACTICES

BB&T moves to dismiss the Fifth Cause of Action on the basis that, "the Plaintiff has failed to state facts sufficient to constitute a cause of action as S.C. Code Ann. §39-5-20 is not applicable to the transaction sued upon as this transaction is exempt from the provisions thereof pursuant to S.C. Code Ann. §39-5-40 and/or from the facts alleged in the Complaint that the activity complained of is no more than a private contractual dispute between the parties hereto which does not affect the public interest of the State of South Carolina and/or the activities complained of are not within the coverage of S.C. Code Ann. §39-5-20."

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The argument of BB&T has, essentially, two components, that the activity complained of is not trade or commerce as covered by the act and/or that BB&T, as a federally insured financial institution, is exempt from the Act.

As to the first component of BB&T's argument, it asserts that the gravamen of the Plaintiff's Complaint against BB&T is that BB&T improperly converted the Plaintiff's

⁶ 276 S.C. 284; 278 S.E.2d 607 (S.C. 1981).

⁷ The Court's ruling as to the Fourth Cause of action is not intended to preclude BB&T from raising the issues raised in its Motion to Dismiss in an appropriate Motion for Summary Judgment. The Court, specifically, is not determining that the alleged "special damages" are legally sufficient.

equipment in the process of collecting upon debts owed to it by a third party. The Court agrees with this interpretation of the Second Amended Complaint.

In *Connolly v. Peebles Life Insurance Co.*,⁸ the Court of Appeals refused to apply the UTPA to a debt collection situation holding that there were limitations to what constituted trade and commerce as defined in S.C. Code Ann. §39-5-10. The *Connolly* court was faced with a conversion claim arising from the borrower's assertion that it had fully paid a note and mortgage and that it should, therefore, have been marked paid and returned. The Court reversed a jury verdict based on UTPA against the lender stating:

We recognize that the unfair trade practices act should be given a liberal construction. See *Paces Ferry Dodge, Inc. v. Thomas*, 174 Ga.App. 642; 331 S.E.2d 4 (1985) (interpreting the Georgia Fair Business Practice Act OCGA §§10-1-391 *et seq.*). Still, the unfair trade practices act should not be held to apply where it is clearly not applicable.

Here, the conversion of the note and mortgage by People's Life, an assignee, was unconnected with the "advertising, offering for sale, sale or distribution of any services and any property, ... and any other article, commodity or thing of value" S.C. Code of Laws §39-5-10(b) (1976). Being unconnected with a transaction constituting either trade or commerce, People's Life's conversion of Connolly's note and mortgage, while admittedly unfair, is simply not the kind of "unfair or deceptive method, act or practice declared unlawful by [Section] 39-5-20" and we so hold.

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In the case before the Court finds *Connolly* applicable and controlling. The alleged conversion of the Plaintiff's equipment is unconnected with the "advertising, offering for sale, sale or distribution of any services and any property, ... and any other article, commodity or thing of value" and is simply not the kind of "unfair or deceptive method, act or practice declared unlawful by [Section] 39-5-20".

⁸ 294 S.C. 355, 364 S.E.2d 475 (Cl. App. 1988) 7

BB&T further argues that even if the Plaintiff's claims could be found to fall within the general coverage of S.C. Code Ann. §39-5-20, this section has been held to be inapplicable to actions involving a federally insured bank. In *Anderson v. Citizens Bank*,⁹ the Court of Appeals, relying on *McLeod v. Rhoades*,¹⁰ which had held securities transactions were exempt from UTPA, and upon an interpretation of the Federal Trade Commission Act, held that the UTPA did not apply to the actions of a lender in failing to give a loan to which it was claimed to have committed. The Court stated:

The State Board of Financial Institutions regulates the banking practices of Citizens Bank pursuant to Section 34-1-10 to -130, Code of Laws of South Carolina, 1976. The Board has extensive regulatory authority over banking practices, including the power to initiate criminal prosecutions against banks that violate a statute or regulation. Sections 34-1-60, 34-1-90, 34-1-100, Code of Laws of South Carolina, 1976. Therefore, under the "general activity" test of *State ex rel. McLeod v. Rhoades*, 275, S.C. 104, 267 S.E.2d 539 (1980), the actions of Citizens bank in connection with the Graham loan are exempt from the provisions of the Unfair Trade Practices Act pursuant to Section 39-5-40(a), Code of Laws of South Carolina, 1976. See *NCNB Nat'l Bank of North Carolina v. Tiller*, 814 F.2d (4th Cir.1987). [FN1] Accordingly, we affirm the ruling of the trial judge.

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The Court further noted in its footnote:

FN1. 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.

S.C. Code Ann. §39-5-20 (b) specifically provides: "It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given

⁹ 294 S.C. 387, 365 S.E.2d 26 (S.C.App. 1987)

¹⁰ 275 S.C. 104, 267 S.E.2d 539 (1980)

by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." This Court need go no further than the federal statute alone to determine its applicability against insured banking institutions. In 15 U.S.C. 45(a)(2), the Federal Act specifically sets forth the extent of the ability of the Federal Trade Commission to regulate banking institutions as follows:

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), credit unions described in section 18(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

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In 1990, the Supreme Court rejected the "general activity" test of *Rhoades* in *Ward v. Dick Dyer and Associates, Inc.*,¹¹ and overruled *Anderson* but only to the extent that the result was based upon the "general activity" test of *Rhoades*. The separate finding of *Anderson* (stated in the footnote) that banks were not subject to the coverage of S.C. Code Ann. §39-5-20 was not disturbed. The Court further notes that subsequent to *Anderson* and *Ward*, lower courts across the State (including the United States District Court for the District of South Carolina) have continued to find that S.C. Code Ann. §39-5-20 is inapplicable to activities of banking institutions.¹²

In arguing its point, the Plaintiff cites two cases, *Beattie v Nations Credit Financial Services Corporation*¹³, an unpublished opinion of the Fourth Circuit and *In re Daniel*¹⁴ as

¹¹ 304 S.C. 152, 403 S.E.2d 310 (S.C. 1991)

¹² Southern National Bank of South Carolina v. Cochran, No. 95-CP-04-352 (Amended Order Dismissing Defendants' Counterclaims and Referring Foreclosure Action to the Master-in-Equity); Southern National Bank of South Carolina v. McLean, No. 93-CP-26-2589 (Order Granting Summary Judgment); Inabinet v. Kuchler, No. 94-CP-10-0411 (Order Granting Motion to Dismiss)

¹³ 65 Fed. Appx 893 (4th Cir 2003)

¹⁴ 137 B.R. 884 (Bank. D.S.C. 1992)

support for its proposition that the Unfair Trade Practices Act applies to banks such as BB&T and covers the activity complained of.

In citing *Beattie*, the Plaintiff states that "The Fourth Circuit has specifically found that mortgagees are not exempt from liability under the South Carolina Unfair Trade Practices Act based upon its pursuit of collection or foreclosure activities." This statement is an apparent attempt to cite *Beattie* for the two propositions: that mortgagees are subject to the Act and that collection or foreclosure activities fall under the coverage of the Act.

The first part of this statement is technically correct to the extent that NationsCredit, the named defendant in the case, (a mortgagee) was found to be subject to the Act. There was, however, no indication that NationsCredit was a bank (as opposed to a mortgage company which is not subject to the federal exclusion argued by BB&T) and no mention was made of *Anderson v. Citizens Bank*¹⁵. It is, therefore, probable that the Fourth Circuit did not address the argument that *Anderson* had an independent holding that was not overruled by *Ward v Dick Dyer & Associates, Inc.*¹⁶ as presented to this Court and supported by numerous South Carolina opinions as any such argument would not have applied under the facts of that case as it does not appear to have involved a bank¹⁷.

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¹⁵ 294 S.C. 387, 365 S.E.2d 26 (S.C.App. 1987)

¹⁶ 304 S.C. 152, 403 S.E.2d 310 (S.C. 1991)

¹⁷ This is particularly true since the *Beattie* opinion, also did not mention the earlier fourth Circuit opinion of *NCNB National Bank of North Carolina v Tiller* 814 F.2d 931 (4th Cir 1987) in which the Fourth Circuit had previously held that banks were exempt from the South Carolina Unfair Trade Practices Act; Appellants also take exception to the dismissal of their claim that NCNB violated the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 (1976) *et seq.* However, the Unfair Trade Practices Act does not apply to actions permitted under law or administered by any regulatory body or officer acting under the statutory authority of the United States of America. S.C. Code § 39-5-40(a) (1976). Congress has given the Board of Governors of the Federal Reserve System authority to promulgate and enforce regulations to define and prevent unfair or deceptive acts or practices by banks. 15 U.S.C. § 57a(f) (Supp. 1986). Pursuant to this statute, the Comptroller of the Currency has established a formal complaint and investigation procedure to deal with alleged unfair or deceptive acts or practices by national banks. This regulation of the banking industry by Congress is sufficient to come within the exception to the Unfair Trade Practices Act established by S.C. Code § 39-5-40(a). See, *McCleod v. Rhoades*, 275 S.C. 104, 267

The second part of the Plaintiff's reliance on *Beattie*, that it supports a finding that collection or foreclosure activities fall within the coverage of the Act, is unfounded and not a correct statement of *Beattie*. In fact, *Beattie* found that the activities complained of (false reports to credit bureaus that a mortgage was in foreclosure) were not unlawful trade practices covered by the Act.¹⁸

Plaintiff, finally, cites the case of *In re Daniel*¹⁹ for the proposition that "it is an unfair or deceptive act or practice to disregard the law of proper repossession."²⁰ *Daniel* involved the repossession of a mobile home by a finance company (not a bank) in which the representative of the finance company began repossession of a mobile home after being told not to, after representing that he would not and while the debtor's child was still in the mobile home. It should be noted that the Court did not find the repossession itself as the matter triggering the Act but deceptive acts occurring in connection with the repossession:

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The SCUTPA may be violated if there is a representation that had the capacity or effect or tendency to deceive. Clarkson v. Orion Exterminating Co., Inc., 761 F.2d 189, 191 (4th Cir. 1985). It does not need to be shown that the deception was intentional. Id. The bankruptcy court's finding that LeMaster's statements deceived Daniel into believing that the mobile home would not be taken is not clearly erroneous. The bankruptcy court did not err in finding that the acts were sufficiently deceptive to be a violation of the SCUTPA.²¹

As previously stated , the gravamen of the Plaintiff's Complaint against BB&T is that BB&T improperly converted the Plaintiff's equipment in the process of collecting upon debts owed to it by a third party and that BB&T knew it was doing so. There is no allegation that any

S.E.2d 539 (1980) (transactions in question are regulated by the Securities Exchange Commission and the South Carolina Uniform Securities Act, and are therefore exempt from the coverage of the Unfair Trade Practices Act.)

¹⁸ Supporting BB&T's argument made in its prior brief relying upon *Connolly v. Peoples Life Insurance Co.*, 294 S.C. 355, 364 S.E.2d 475 (Ct. App. 1988)

¹⁹ 137 B.R. 884 (D.S.C. 1992).

²⁰ Plaintiff's memorandum at page 14.

²¹ *Daniel*, *supra*.

deceptive statement or act took place. To the extent that *Daniel* might be argued to extend to such a situation, it would conflict with the controlling South Carolina authority set forth in *Connolly*.

As a result of the foregoing, the Court finds that the Fifth Cause of Action should be dismissed.

RULE 12(b)(6) – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

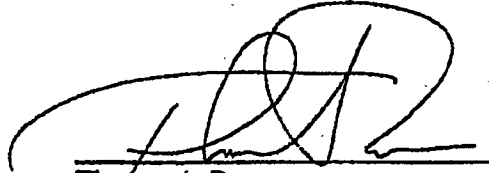
BB&T moves to dismiss the Sixth Cause of Action on the basis that "the Plaintiff has failed to state facts sufficient to constitute a cause of action for intentional infliction of emotional distress and/or extreme and outrageous conduct." The Court has dismissed Joel Herring as a party to this action.

The Court views the Sixth Cause of Action as a cause of action which is personal to Mr. Herring which is not pled on behalf of the corporation and, as a result, subject to dismissal pursuant to Rule 12(b)(6).

It is, therefore ORDERED, ADJUDGED and DECREED as follows:

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1. The Motion to Amend is granted and the Second Amended Complaint is deemed filed and served with no further responsive pleadings required thereto on behalf of the Defendant;
 2. The Second Amended Complaint is dismissed as to all causes of action pled on behalf of Joel Herring and Joel Herring is dismissed as a party hereto.
 3. The Fifth (Unfair Trade Practices) and Sixth (Intentional Infliction of Emotional Distress) Causes of Action of the Second Amended Complaint pled on behalf of JJH Transport, LLC are hereby dismissed.

4. This action shall continue on behalf of JJH Transport, LLC as to the remaining causes of action.



Thomas A. Russo
Circuit Court Judge

Florence South Carolina
May ~~12~~, 2007
23, 2007

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FLORENCE COUNTY, SC

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
C/A No. 2003-CP-40-3272

BRANCH BANKING & TRUST
COMPANY OF SOUTH CAROLINA,

Plaintiff,

vs.

EARTHA MARSHALL.

Defendant, Third
Party Plaintiff,

vs.

DANIEL GOLDSTEIN AND JAMES
CHRIS ALEXANDER,

Third Party Defendants

ORDER GRANTING SUMMARY JUDGMENT

This matter is before the Court upon the Motion for Summary Judgment filed by Branch Banking and Trust Company of South Carolina ("BB&T") on July 1, 2004. Having heard arguments of counsel and considered the record before the Court, the Court finds as follows:

GENERAL BACKGROUND

This action was initiated as an action for foreclosure of a Mortgage given by Eartha Marshall ("Marshall") to BB&T dated August 20, 2001 covering certain real property at 5883 Ames Road ("Property"). In response to the foreclosure action, Marshall answered the allegations of the Complaint by admitting the execution of the Note and the Mortgage on August

20, 2001 and the modification thereof on August 2, 2002. The response also contained Counterclaims/ Third Party Claims which asserted certain affirmative claims as to BB&T, the Seller of the Property to Marshall (Chris Alexander, "Alexander") and a second individual involved in a related transaction who represented the Seller in this transaction (Danny Goldstein, "Goldstein"). The Counterclaims/ Third Party Claims first assert a cause of action for fraud as to the Goldstein and Alexander assert causes of action for Negligence and for violation of the South Carolina Unfair Trade Practices Act as to BB&T. The claim for fraud as to the individuals is not addressed or involved in the pending motions.

Appropriate Standard

The Supreme Court of South Carolina has clearly set forth the standard to apply in this court's determination of this Motion:

In reviewing the grant of a summary judgment motion, we apply the same standard which governs the trial court under Rule 56(c), S.C.R.C.P.: summary judgment is proper when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." See 10 Wright & Miller, Federal Practice and Procedure § 2716, p. 643 (1983); SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982). This standard "mirrors" the standard for a directed verdict under Rule 50(a), S.C.R.C.P. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986); see also Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984).

In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. SSI Medical Services, supra; Standard Fire, supra. The court then applies the standard set out in Rule 56(c):

[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 the party's case,

and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); see also *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case," *Celotex* 477 U.S. at 325, 106 S.Ct. at 2554, 91 L.Ed.2d at 275. The moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323, 106 S.Ct. at 2553, 91 L.Ed.2d at 274. (Emphasis in original). Once moving party carries its initial burden, opposing party must, under Rule 56(e), "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original). Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings. See *SSI Medical Services*, supra; *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Cl.App.1988).

[Baughman v. American Tel. and Tel. Co. 410 S.E.2d 537,545 , 306 S.C. 101 (S.C. 1991)].

Following this standard it is, therefore, incumbent upon BB&T to have in the record before the Court facts sufficient to meet each element of the cause of action pled for foreclosure and for Marshall to have in the record before this court facts sufficient to meet each element of

the counterclaims. The Court must, therefore, examine the record before it. That record consists of the Affidavit of Randy Fox filed with the Motion for Summary Judgment, the deposition testimony of Marshall and the Affidavit of Marshall filed prior to the hearing in this matter as well as certain documents of public record relied upon by Marshall.

UNDISPUTED AND UNCONTESTED FACTS

As to the facts leading up to the transaction in question, the deposition and affidavit of Marshall and the public records (which constitute the only evidence before the Court) establish the following undisputed facts:

1. Ms. Marshall is a high school graduate with nine months of business education who, at one time, was a licensed real estate agent in the State of South Carolina. (Deposition of Marshall at pages 16 and 30).
2. For a period of "six or seven months" prior to the events at issue in this action, Marshall had been watching a series of "in-commercials"¹ on television which dealt with "how you can get involved in buying real estate, and you could supplement your income." (Deposition of Marshall, Page 74).
3. As a result of watching these programs, "[Marshall] saw a way that we could supplement our retirement by getting involved in real estate." (Deposition of Marshall, Page 76).
4. In following up on her desire to "[get] involved in real estate", Marshall contacted Goldstein and Alexander² as a result of information provided to Marshall by her daughter. (Deposition of Marshall, Pages 77 and 80, Affidavit of Marshall).

¹ The Court presumes that the reference was intended to be what have come to be known as "info-mercials" or like terms.

² In reviewing the Marshall Affidavit, it would appear that Marshall claims that she "met" both Alexander and Goldstein. However, in her deposition testimony, she expressly testified that she had "never met Chris [Alexander]" and had talked to him prior to the date of the deposition (Deposition of Marshall Pages 77 and 189). This

5. Prior to the events in question in this action, Marshall's husband had met Alexander and/or Goldstein in July, 2001.
6. The first time that Marshall met Goldstein was at the Property in August 2001 (Deposition of Marshall, Pages 83 and 84).
7. While at the Property, Goldstein "shared ... how much -- all of this was done at Amcs Road -- how much money that -- the way this investment operated, you know, how its done. ... There was so much money that is involved that you will get to fix the house up." (Deposition of Marshall at Page 84 and 85). As later stated in her Affidavit, Marshall describes the information obtained as follows: "They mentioned to me that they could help me invest in real estate without having to put any money down. They told me that they had several properties in need of repair that could be used to rent, but not to worry about the money necessary for the repairs because they could get me approximately Eleven Thousand Dollars (\$11,000) out of the closing. Additionally, they told me that it was easy to supplement our income through this process of buying homes and fixing them with the money from the closing, and then renting them for a profit." (Affidavit of Marshall) (Deposition of Marshall Pages 96 and 97).
8. Marshall "believed that this was a great way to invest" and "trusted Goldstein and Alexander." (Affidavit of Marshall).
9. Marshall viewed the property for a period of "about a half an hour or so" (Deposition of Marshall, Page 87) and concluded "After he showed us the house and explained to us what would need to be done, what would need to be replaced -- I think we had to replace

discrepancy is not material for the purposes of the determination of the Motion before the Court. However, as other claims are pending before the Court as to which this issue may be relevant, the Court expressly notes that it is making no finding as to this factual circumstance.

a refrigerator and the stove, and the linoleum in the kitchen needed replacing. Well, there was -- quite a bit of work needed to be done, but according to what we had noticed on television, that you can fix them up, so the work -- you know what the house looked like then, we figured that we could fix it up so someone could rent it." (Deposition of Marshall, Page 86).

10. After viewing the house, Marshall recognized that "some work needed to be done" but that "that's what the money was for, to fix the house up, so there was no problem there." (Deposition of Marshall Page 87 and 88). Marshall described the house as being "livable" at the time of her initial inspection. (Deposition of Marshall, Page 89).

11. Marshall and Goldstein agreed upon a price of \$68,000 for the property which Marshall believed to be a fair price for the property based upon what she had seen when she looked at the Property. (Deposition of Marshall, Page 115).

12. In determining that the loan could be paid from the rentals of the Property, "no one told [Marshall] anything that led [Marshall] to believe that [Marshall] could use the rents from the property to pay the loan." (Deposition of Marshall Pages 123 and 124). She was "getting a lot of" her information from the "in-commercials" as she described the programs she had watched on television. (Deposition of Marshall Pages 123 and 124).

13. As to her own efforts regarding investigation into the value of the property, Marshall testified as follows: "Q. What investigation did you do to determine that the \$68,000 that you agreed to pay for the property was a fair price for the property? A. I did not investigate it because I assumed that was a legit price because it was told to me by a certified broker. So why would I think that it wasn't true? No, I did not investigate it?"

On August 20, 2001, a closing took place at the offices of White and White, attorneys as to which the following is undisputed:

1. The Note and Mortgage which are the subject of this action were executed. (Affidavit of Randy Fox, Deposition of Marshall).
2. The closing statement for the purchase of the Property shows the receipt by Marshall of "Seller Concessions" of \$16,800 and further reflects that Marshall received \$5,194.76 in cash from the closing and that, additionally, \$5,826.01 was paid on obligations which she owed to third parties on her behalf. (Exhibit 3 to Deposition of Marshall). The combined total of these amounts either actually received by or paid on Marshall's behalf \$11,020.77.

As to the involvement of BB&T up to and through the point of the closing, there is no dispute as to the following as testified to by Marshall or set forth in her Affidavit:

1. "Q. Did you talk to anyone at BB&T about the Ames Road property either at or before the closing on the Ames Road Property? A. No. (Deposition of Marshall Page 113)
2. "Q. Okay. You didn't rely on anything that BB&T told you about either the property or the closing itself in deciding to go through with the closing, did you? A. Because we didn't - we didn't have any correspondence with them and all, so , no, they didn't - no there was nothing." (Deposition of Marshall Pages 113 and 114)
3. "Q. Did BB&T do or say anything to you before the closing that led you to conclude that \$68,000 was a fair price for the property, yes or no? A. No.

Q. Okay. A. There was no BB&T. why would they contact me before the closing? I was not a client.

4. In connection with the closing Marshall testified: " We didn't even know that BB&T was the Bank."

Paragraph 11 of the Answer and Counterclaim alleges: "The property which is the subject of this action was grossly overvalued by an appraisal shown to Mrs. Marshall by Goldstein and Alexander." The Court, in determining the state of facts as it relates to this crucial allegation first notes that Marshall specifically testified in her deposition and it is not disputed that she had not seen the appraisal which valued the property at \$68,000. (Deposition of Marshall at Pages 139 and 140). As a result, the allegations as to being shown an appraisal are unsupported in the record before the Court. However, in her Affidavit Marshall states that she was told that the property appraised for \$68,000. This testimony directly contradicts Marshall's earlier deposition testimony where she concedes that "I didn't get into that about the appraisal because I assumed he was a broker, and that it was already appraised." (Deposition of Marshall Pages 196 and 197, 200-201). In reviewing this contradictory testimony, the Court notes that our Supreme Court has recently discussed and adopted the "competing affidavit" rule to allow the Court to disregard factual disputes created by a parties own sworn statements if those statements are a "sham." [Cothran v. Brown 357 S.C. 210, 592 S.E.2d 629 (SC 2004). In Cothran, the Supreme Court directed the trial courts as follows:

In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation

between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted

In reviewing the contradictory filings of Marshall, the Court finds no explanation for the contradictory statements as to pre-sale knowledge of the appraisal and representations regarding the appraisal. The Court further finds that based on the allegations of the Counterclaims and the matters pled by Marshall, the issue as to whether she saw or was told of an appraisal prior to her agreeing to purchase the property is a critical issue as to which Marshall clearly had access prior to the time of the taking of her deposition. The Court further finds that the subject was covered in several places and in detail at the time of the deposition and that her answers at that time were certain, direct and do not appear to have been confused. On the other hand, the Affidavit containing the contradictory statements was executed on the Sunday before this hearing and served just two days prior to the hearing. As a result, the Court finds that the portions of the Affidavit of Marshall which contradict her earlier testimony that she did not see and was not told of the appraisal at the time of the closing should not be considered by the Court and that the record before this Court establishes that Marshall was told the asking price, determined on her own that that price was fair and proceeded with the purchase with no further investigation as set forth above.

Subsequent to the closing of the sale of the Property, in March 2002, Marshall had the Property appraised in connection with attempts to have the Note which is the subject of this action refinanced. That appraisal indicated the fair market value of the property to be \$48,000, disclosed the prior sale of the Property of \$19,000 (which was the purchase by Alexander) and

indicated a fair rental value for the property of \$470 per month. The appraisal further described the property as "Quality and overall condition is good." (Exhibit 7 to Deposition of Marshall).

On August 2, 2002 (5 months after Marshall received and read the March 2002 appraisal) Marshall executed a Note Modification Agreement renewing and extending the Note (which was then due and payable). (Exhibit 8 to Deposition of Marshall).

On June 3, 2003 a second appraisal of the Property was obtained by or on behalf of Marshall. That appraisal indicated the value of the Property had declined to \$22,500 and that the Property was "not marketable due to the physical condition" and described the general condition as " poor physical condition both interior and exterior." (Exhibit 10 to Marshall Deposition).

The Affidavit of Randy Fox filed with the motion for Summary Judgment contains the following testimony which is uncontested in the record before this Court:

1. Attached hereto as Exhibit D is a copy of an appraisal of the property securing Note 1 (5883 Ames Road) which is the subject of Mortgage 1 valuing said property at the amount of \$68,000.00. A review of this appraisal does not indicate anything that on the face of the appraisal would have caused the loan officer to question the findings contained therein.
2. Attached hereto as Exhibit E is a closing statement dated August 20, 2001 for the transaction involving Note 1 indicating that Eartha Marshall received \$5,194.76 from the closing in cash and that an additional sum of \$5,326.01 was paid on her behalf.
3. As to the Note 2 transaction, BB&T's files contain a Contract of Sale indicating that the property was to be purchased "where-is- as is" and that purchaser (Eartha Marshall) was to receive \$13,000 "at closing for repairs." In

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a loan of this amount, it would not have been the policy of BB&T to require that sums such as described in the Contract of Sale to be escrowed or otherwise accounted for.

4. With the adoption of a practice prior to August 20, 2001 of having all real estate loans closed by attorneys (normally chosen by the Borrower as in the case of both Notes 1 and 2 as evidenced by the closing transmittals indicating that the Borrower had selected White and White, attached hereto as Exhibits K and L), it was not unusual for a loan officer to not personally meet a borrower in a real estate loan transaction, especially where the transaction involved a loan broker such as in the case of both Notes 1 and 2, Capital Trust Mortgage Group. At the time that the loans evidenced by Notes 1 and 2 were made, there was no policy of BB&T in place that would have required a personal meeting between the loan officer and the borrower.
5. At the time of the loans evidenced by Notes 1 and 2, loan officers, based upon there knowledge and experience, were given individual loan authority. Loans made below the authority amount were not individually reviewed by any other bank officer. This practice is consistent with the custom and practice in the banking industry.
6. A review of the loan files relating to Notes 1 and 2 indicated that the loan officer had obtained the information which was necessary to properly underwrite the loan as the loan file contained a credit report (obtained through the BB&T system), showing an acceptable Beacon Score of 628, an appraisal

of the property which supported the amount loaned and other financial information of the Borrower (including tax returns and a loan application).

7. In connection with business loans for the purchase of real estate (such as a purchase for investment as was the case with Note 1), it is not the practice or policy of BB&T to verify or assure that its Borrower is making a good business deal or wise purchase. BB&T conducts a sufficient investigation, through personal inspection, third party appraisal or other means to determine that the collateral to be received has a sufficient value to support the loan being made. In fact, BB&T, to some degree, relies upon its customers decision to make a purchase of real estate as evidence of the existence of this value and of their belief in their ability to repay the loan. Appraisals and other activity in the underwriting process are not undertaken to protect the Borrower and/or to insure that the Borrower is making a good business decision. Those activities are undertaken to protect the interest of BB&T.
8. Under the terms of the loan as evidenced by Notes 1 and 2, BB&T policy did not require an independent third party appraisal. The appraisals utilized, as indicated on their face, was not acquired by or for BB&T. Given the amount of the loan, reliance on an appraisal prepared for and obtained by a third party was not a violation of any internal policy of BB&T.
9. In a loan of the type evidenced by Notes 1 and 2, it is not required that the loan officer review and/or analyze the contract of sale involved. This is particularly true where an appraisal is in existence which supports the loan amount.

10. At the time of the loans evidenced by Notes 1 and 2, BB&T had in place and followed policies for the supervision and review of small business lenders which were consistent with the normal practices in the banking industry.
11. Note 1, as modified, required payments in the amount of \$432.60 per month beginning on September 10, 2002 and continuing thereafter until August 10, 2007 at which time the Note was due and payable, in full. The payments were not made as agreed and by letter dated June 4, 2003, BB&T, pursuant to the rights granted to it in the Note, declared the entire balance due thereunder to be immediately due and payable.
12. As of June 17, 2004, the balance due under Note 1 is \$64,791.97 and that amount is accruing interest at the rate of 9% per day [sic] [BB&T Prime Rate plus 5%].
13. On June 27th, 2003, Eartha Marshall wrote a letter to BB&T in which she indicated that her failure to pay BB&T was as a result of her inability to collect rentals on the properties and no other reason was given.
14. The Notes further provide that in the event of default, BB&T is entitled to an award of its attorney's fees and specifically provides that those fees shall be 15% of the amounts due at the time of acceleration or other action by BB&T.
15. At the time of the acceleration by BB&T, the amount due under Note 1 was \$60,923.26. Based upon that amount the attorney's fees provided in the Note would be \$9,138.49.
16. There is no evidence contained in the files of BB&T related to this matter that Eartha Marshall ever complained to BB&T or brought the matters alleged in

the Counterclaim to BB&T's attention prior to the filing of the Counterclaim
in this action.

DISCUSSION AND CONCLUSIONS OF LAW

ENFORCEMENT OF THE NOTES AND FORECLOSURE OF THE MORTGAGES

The execution of the Note, Mortgage and Modification and the default under the terms thereof is not contested.

Assuming that the Court determines that judgment is appropriate in favor of BB&T as to its Note and Mortgage, the Court must determine the appropriate amount of judgment. There is no dispute as to the principal and interest due. The only outstanding matter, therefore, would be the appropriate amount of attorneys' fees. That amount is set by the parties agreements, the loan documents. The Note provides:

"the undersigned agrees to pay , in addition to the principal and interest, all costs of collection, including reasonable attorneys' fees which the undersigned agrees shall be equal to 15% of the principal and interest outstanding at the time of acceleration or other action by Lender to collect the sums due hereunder."

The South Carolina Supreme Court has specifically held that "[w]ith regard to [Notes] which provide for attorneys' fees at a specific rate in the event collection becomes necessary, it is a well established principle of law that where there is a contract providing for such, the amount of attorneys fees is governed by the contract." [Dedes v. Strickland, 414 S.E.2d 134, 137 (S.C. 1992); accord, The Citizens and Southern National Bank of South Carolina v. Easton, et al., 310 S.C. 458, 427 S.E.2d 640 (1993) wherein the Court stated "Since the guarantees provided for attorney's fees at a specific rate, we hold it was error to deny such fees" citing Dedes, supra.]. The Dedes case makes it clear that no determination of reasonableness is required as the Court in Dedes, after reviewing the notes with specific amounts addressed the necessity for showing reasonableness when the note provided only for reasonable fees with no fixed amount. The

Court of Appeals has specifically stated the current law in this area in *Nationsbank v. Scott Farm*, 320 S.C. 299, 465 S.E.2d 98 (S.C. App. 1995) when the Court stated:

In South Carolina, where a contractual obligation provides only that a party is to pay "reasonable attorneys fees" the amount is unliquidated and, therefore, requires a finding on the reasonableness of the award. On the other hand, where a contractual provision in a Note provides for attorneys fees at a specific rate, the amount of attorneys fees is governed by the contract (citations omitted). We find that the trial court properly determined the attorneys fees by looking to the terms of the contract.

It is, therefore, clear that the attorneys fees to be awarded in this matter are governed by the contracts of the parties, the loan documents and are, appropriately, 15% of the amounts due as of the time of the filing of this action.

The Court, therefore, finds that absent the establishment of a defense thereto, BB&T is entitled to enforcement of the Note and Mortgage and that the amount due thereon is \$64,791.97 as of June 17, 2004 plus interest at BB&T's Prime Rate plus 5% from that date to the date of judgment plus attorney's fees in the amount of \$9,138.49.

THE COUNTERCLAIMS

1. Marshall, by the signing of the Modification and the renewal of the Note as a result thereof waived any right to make the claims alleged in this case.

"The settled statement of law that the renewal of a note with knowledge of defenses to the original document operates as a waiver of any right to subsequently assert those defenses is directly applicable to this case. Although over one hundred years old, the principles enunciated in *Grier v. Wallace*, 7 S.C. 182 (1876), remain sound law today. In *Grier*, the surety on a renewal note given to replace a note for the purchase of slaves was held estopped from asserting the unsoundness of the slaves at the time of purchase as a defense to a suit on a renewal note. The court held the purchaser estopped because:

[b]y giving a new note for the old one, twelve years after the purchase, with the respondent, Wallace, as surety upon the same, thereby acknowledging the former transaction as a valid one, and the consideration as a good and valuable one by a higher

guarantee, to wit: security in case of failure on the part of the principal. This was a new contract, the former note having been parted with as it was extinguished.

Id. at 184. An annotation on this subject in 35 A.L.R. 1258, supplemented in 72 A.L.R. 600, [FN8] gathers numerous cases from other jurisdictions which concur with this holding. This court finds these annotations both helpful and persuasive. Typical of these cases is Stephens v. Citizens & Southern Nat'l Bank, 170 Ga.App. 793, 318 S.E.2d 216 (1984). In Stephens, the appellant signed a guaranty agreement guaranteeing payment of a note of a co-worker to C & S. The co-worker subsequently defaulted and C & S called on the guarantor. The guarantor thereupon executed a new note. Upon the guarantor's default, C & S brought suit to recover on the new note and the guarantor answered and counterclaimed setting forth defenses of failure *516 of consideration and fraud. The trial court granted C & S summary judgment and the Court of Appeals affirmed, holding:

FN8. Renewal of bill or note as precluding defense[s] available against the original, 35 A.L.R. 1258 & 72 A.L.R. 600.

'The renewal of a note ... in order to obtain an extension of time for payment, done with knowledge of defenses ... works an estoppel to urge, against the subsequently executed instrument, the defenses of which the maker had knowledge at the time.'

Id. 318 S.E.2d at 217 (citations omitted). All of defendants' asserted defenses, save one, existed prior to the execution of the Modification Agreements. Defendants should not have signed the Modification Agreements if they wanted to preserve their defenses to a potential foreclosure action.

[Resolution Trust Corporation v. Palmetto Fort Of Mt. Pleasant 831 F.Supp. 510 (D.S.C. 1993)].

As in *Palmetto Fort* and the cases cited therein, Marshall executed Modification Agreements at a time when she knew what, if anything, had occurred that she was later going to claim as a basis for this action. The essence of the claims in this matter revolve around the assertion that the Property was overpriced. Marshall had an appraisal in March 2002 indicating a value of \$20,000 less than her purchase price and reciting the earlier purchase by her seller for \$18,000.00. She

could have chosen to attack this transaction at that the time of the modification and did not. Having chosen to take advantage of the extension in loan terms she cannot now go back and assert the claim which existed at that time. This bars all claims made at this time.

2. There is a complete lack of evidence to support the affirmative claims pled in the Counterclaims

As indicated in the initial portions of this Order, it was incumbent upon Marshall to place evidence before the court to allow the Court to find facts supporting each and every element of the causes of action pled. She has failed to do so. "In order to prove negligence, the plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages." [Doe v. Marion 2004 WL 2380971, Court of Appeals Opinion No. 3879 (October, 2004)]. "Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." [Id.]. "The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court." [Murray v Bank of America 354 S.C. 337, 580 S.E.2d 194 (S.C. Appeals 2003)] . "Ordinarily, the common law imposes no duty on a person to act." [Id.] "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance."

The Counterclaim alleges that BB&T owed Marshall a duty to undertake certain acts or actions in connection with this transaction. Initially, there is no evidence before the Court that the duties alleged exist in that there is no evidence of any standard of activity in the banking industry which was not followed by BB&T. To the contrary, the Affidavit of Randy Fox asserts that certain of the duties alleged either are not normally undertaken in the banking industry

and/or that the than existing standards were followed. In essence Marshall is asking this Court to impose upon a lender, such as BB&T, an affirmative duty to examine and ratify the bona fides of a business transaction that its customer has entered into. This Court refuses to take this step in the absence of any authority existing for the imposition of such a duty.

Even assuming a duty existed as alleged in the Complaint, the existence of which is not supported on this record, Marshall testified that she agreed to the purchase of the Property for the asking price with no input from or reliance upon any action by BB&T. In view of such state of facts, the Court is unable to see how any action or inaction of BB&T could possibly be the proximate cause of any loss suffered by Marshall. Based upon the undisputed testimony, she had already committed herself to the transaction before ever dealing with BB&T. Lastly, although the allegation is made that the Property was sold for a "grossly overvalued" price as indicated by the appraisal existing at the time, there is no evidence in the record as to the value of the property at the time of the sale in 2001 other than Marshall's own testimony that she felt that \$68,000 was a fair price for the Property. The subsequent appraisals do not purport to evidence a value of the Property in August 2001 and there is no evidence in the record of that value. The subsequent appraisals establish only that the value of the Property dropped by \$22,500 during the period of March 2002, to June of 2003, a period during which Marshall had sole control over the Property. As a final point, Marshall admits in her testimony that she knowingly made the decision to purchase the Property based upon the statement to her that the asking price was \$68,000 and that she thought that price was fair at the time. She concedes that she undertook no independent investigation of the value of the Property to assure herself that she was making a good business deal. The Court specifically finds that this lack of action on the part of Marshall is and was the proximate cause of her loss, if any.

On the facts of this case, Marshall takes the position that BB&T should have protected her from her own business inexperience even though she had no contact whatsoever with BB&T prior to the closing of the transaction in question. Marshall has provided no authority to this Court to support such an obligation on the part of a lender in a commercial transaction and this Court refuses to adopt such an obligation.

3. The South Carolina Unfair Trade Practices Act is not applicable to the transactions involved in this action as they are exempt therefrom

S.C. Code Ann. §39-5-20, commonly known as the Unfair Trade Practices Act ("UTPA") declares unlawful, "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

In Anderson v. Citizens Bank,³ the Court of Appeals, relying on McLeod v. Rhoades,⁴ which had held securities transactions were exempt from UTPA, and upon an interpretation of the Federal Trade Commission Act, held that the UTPA did not apply to the actions of a lender in failing to give a loan to which it was claimed to have committed. The Court stated:

The State Board of Financial Institutions regulates the banking practices of Citizens Bank pursuant to Section 34-1-10 to -130, Code of Laws of South Carolina, 1976. The Board has extensive regulatory authority over banking practices, including the power to initiate criminal prosecutions against banks that violate a statute or regulation. Sections 34-1-60, 34-1-90, 34-1-100, Code of Laws of South Carolina, 1976. Therefore, under the "general activity" test of *State ex rel. McLeod v. Rhoades*, 275, S.C. 104, 267 S.E.2d 539 (1980), the actions of Citizens bank in connection with the Graham loan are exempt from the provisions of the Unfair Trade Practices Act pursuant to Section 39-5-40(a), Code of Laws of South Carolina, 1976. See *NCNB Nat'l Bank of North Carolina v. Tiller*,

³294 S.C. 387, 365 S.E.2d 26 (S.C.App. 1987)

⁴275 S.C. 104, 267 S.E.2d 539 (1980)

814 F.2d (4th Cir.1987). [FN1] Accordingly, we affirm the ruling of the trial judge.

The Court further noted in its footnote:

FN1. 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.

In 1990, the Supreme Court in Ward v. Dick Dyer and Associates, Inc.,⁵ rejected the "general activity" test of Rhoades and overruled Anderson but only to the extent that the result was based upon the "general activity" test. Anderson, however, has a separate basis for its decision as stated in the footnote cited above and, as a result, is still valid law.

A number of Courts have analyzed the findings of Anderson and the effect of Ward on the findings of that case and determined that the partial overruling of Anderson left its secondary findings and conclusions intact. [See, e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina, Case No. 2:98-158-23, United States District Court for the District of South Carolina (1999) and cases cited therein; Branch Banking and Trust Company of South Carolina v. Derrick Wells; Civil Action No. 03-CP-43-193, Order dated June 24, 2004 (in which Judge King ruled in a case based upon a similar transaction by a different purchaser with the same seller)]. The UTPA is, therefore, inapplicable to the case before the Court due to the statutory exclusion.

⁵ 304 S.C. 152, 403 S.E.2d 310 (S.C. 1991)

The Court further finds that the dispute between the parties is a private dispute that does not involve the public interest of the people of the State of South Carolina.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. There is due to the Plaintiff on the Note and Mortgage note set forth in the Complaint the sum of \$64,791.97 as of June 17, 2004 plus interest thereon through the date of this Order at the rate set forth in the Note⁶ plus attorney's fees in the amount of \$9,138.49⁷ for a total judgment of \$73,930.46 as of June 17, 2004 ("Total Debt").
2. The "Total Debt" and later accrued interest thereon constitutes the total judgment debt due the Plaintiff and shall bear continue to bear interest hereafter at the judgment rate of interest.
3. That this matter is hereby referred to the Master in Equity for Richland County for the purpose of the conduct of the sale ordered herein and for such other and further matters as may arise herein including the issuance of a Writ of Assistance and the hearing of any issues involving appraisal proceedings under S.C. Code Ann. §29-3-360 with any appeal from any action of the Master in Equity to be to the Court of Appeals.
4. That the Defendant liable for the aforesaid mortgage debt shall, on or before the date of sale of the property hereinafter described, pay to the Plaintiff or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with accrued interest thereon and the costs and disbursements of this action.
5. That on default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, be sold by the Master in Equity at

⁶ The Prime rate of the plaintiff plus 5%.

⁷ As established in the record before the Court, the Note provided for the award of reasonable attorney's fees and, in the Note, the defendant agreed that 15% of the amounts due at the time of acceleration or other action by the Plaintiff would be a reasonable fee.

public auction at the Richland County Courthouse, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in the such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

A. FOR CASH: The Clerk of Court shall require a deposit of 5% on the amount of the bid (in cash or equivalent), same to be applied to the purchase price only upon compliance with the bid, but in case of non-compliance within twenty days, same to be forfeited and applied to the costs and Plaintiff's debt.

B. The sale shall be subject to taxes and assessments, existing easements, and easements and restrictions of record.

C. Plaintiff's Mortgage constitutes a first priority on the subject property.

D. Purchaser to pay for Deed Stamps and costs of recording the Deed.

6. If Plaintiff be the successful bidder at the said sale for a sum not exceeding the amount of costs, disbursements, expenses, and the indebtedness of the Plaintiff in full, Plaintiff may pay to the Master in Equity only the amount of the costs, disbursements, and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

7. As a personal or deficiency judgment is demanded, the bidding will remain open for a period of thirty (30) days after the date of sale as provided by law in such cases. However, the plaintiff reserves its right to waive deficiency up to the time of the sale.

8. That the Master in Equity shall, by advertisement according to law, give notice of the time and place of sale and the terms thereof, and shall execute to the Purchaser or Purchasers a deed to the premises sold. The Plaintiff, or any other party to this action, may become a

purchaser at such sale, and if, upon such sale being made, the Purchaser or Purchasers should fail to comply with the terms thereof within twenty days after date of sale, then the Master in Equity may advertise the said premises for sale on the next or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

9. That the Master in Equity shall apply the proceeds of the sale as follows:

FIRST: To payment of the amount of the costs and expenses of this action, including any Guardian ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff or Plaintiffs attorneys of the amount of Plaintiffs Total Debt and interest thereon, or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus will be held pending further order of the Court.

10. It is further ORDERED, ADJUDGED, AND DECREED that in the event the successful bidder is other than the Defendants in possession herein, the Sheriff of Richland County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, to put the successful bidder or his assigns in full, quiet, and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

11. It is further ORDERED, ADJUDGED, AND DECREED that, in addition to all parties deemed by law to have received constructive notice of this action, all Defendants and all persons whomsoever claiming under them be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold or any part thereof.

12. It is further ORDERED, ADJUDGED, AND DECREED that the Deed of conveyance made pursuant to said sale shall contain only the names of the first named Plaintiff, the Defendants who were the titleholder titleholders of the mortgaged property at the time of filing of the Notice of Pendency of the within action, and the Grantee, and the recording office is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said Deed.

13. The Master in Equity shall retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance and hearing any issues involving appraisal proceedings under Section 29-3-680, et seq., South Carolina Code of Laws (1976), as amended.

14. Upon conclusion of the sale called for herein (and only upon its conclusion), the Master in Equity is directed to release of record the mortgage lien[s] being foreclosed after the Order Confirming Sale and Disbursements has been executed and filed, which mortgage lien is described as follows:

That certain mortgage given by Bartha Marshall to Branch Banking And Trust Company of South Carolina dated August 20, 2001, and recorded in the appropriate office for Richland County on September 4, 2001, in Book 562 at page 1493.

15. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or lot of land, with improvements thereon, lying, being in Harlem Heights, a development located in the Northeast suburbs of the City of Columbia, in the County of Richland in the State of South Carolina, known as 5883 Arnes Road and shown and designated as Lot # 27 on a plat of Harlem Heights and Harlem Heights Extension, property of Bright L. Stevenson, made by James C. Covington, CE, dated September 13, 1945 and recorded in the Office of the Clerk of Court for Richland County in Plat Book K at Page 64. Reference to said plat is hereby craved for a more complete and accurate description thereof.

Property Address – 5883 Ames Road, Columbia, SC
TMS No. R11714-03-15

16. IT IS FURTHER ORDERED, that if the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-referenced property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will be rescheduled for the next available sales day.

17. The Counterclaims of the defendant are dismissed, with prejudice.



Paul M. Burch, Presiding Judge

Columbia, South Carolina
November 2004.
March 9, 2006

Exhibit 6

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TD BANK, N.A.,)

Plaintiff,)

v.)

ATLANTIC PRIVATE EQUITY GROUP,)
LLC, JERRY T. CALDWELL, TERRY L.)
ROHLFING, AND PALMETTO DUNES)
PROPERTY OWNERS ASSOCIATION,)

Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-00588

**ANSWER AND COUNTERCLAIM
OF DEFENDANTS ATLANTIC PRIVATE
EQUITY GROUP, LLC, JERRY T.
CALDWELL AND TERRY L.
ROHLFING**

(Jury Trial Demanded)

The Defendants Atlantic Private Equity Group, LLC, Jerry T. Caldwell, and Terry L. Rohlffing, answering the complaint of the plaintiff herein, allege and say as follows:

1. They deny every allegation of the complaint not expressly admitted.
2. They lack knowledge or information sufficient to admit or deny the allegations of paragraphs 1 and 2, therefore deny the same and demand strict proof thereof.
3. They admit the allegations of paragraphs 3 through 5.
4. They admit upon information and belief the allegations of paragraph 6.
5. They admit the allegations of paragraph 7.
6. They admit only so much of paragraph 8 as alleges that a loan was made to Defendant Atlantic Private Equity Group, LLC ("APEG") and deny all other allegations of this paragraph.
7. They admit only so much of paragraph 9 as alleges that Defendant Caldwell signed a guaranty and deny all other allegations of this paragraph.
8. They admit only so much of paragraph 10 as alleges that Defendant Rohlffing signed a guaranty and deny all other allegations of this paragraph.

9. They admit only so much of paragraph 11 as alleges that APEG executed a mortgage and deny all other allegations of this paragraph.
10. They admit only so much of paragraph 12 as alleges that APEG executed an assignment and deny all other allegations of this paragraph.
11. The allegations of paragraph 13 constitute conclusions of law to which they make no response. They deny any factual allegations against them included in this paragraph.
12. They admit, upon information and belief, the allegations of paragraphs 14 through 17.
13. The allegations of paragraph 18 constitute conclusions of law to which they make no response. They deny any factual allegations against them included in this paragraph.
14. Answering the allegations of paragraph 19 they crave reference to the original note and deny any allegations inconsistent therewith.
15. They admit only so much of paragraph 20 as alleges that the loan made to APEG has not been fully repaid.
16. They admit only so much of paragraph 21 as alleges that the letter attached as Exhibit G was mailed to APEG.
17. Answering the allegations of paragraph 22 they crave reference to the original documents and deny any allegations inconsistent therewith.
18. They lack knowledge or information sufficient to admit or deny the allegations of paragraph 23, therefore deny the same and demand strict proof thereof.

DEFENSES AND COUNTERCLAIMS

STATEMENT OF FACTS

19. Defendants repeat and incorporate herein by reference the foregoing allegations.
20. Defendant APEG was and is engaged in the business of acquiring and developing real estate and in the course of its business has purchased numerous tracts and parcels of real property valued in the millions of dollars. Defendant APEG, through its members Defendants Caldwell and Rohlfing, (collectively "APEG") became a customer of Plaintiff's alleged predecessor Carolina First ("the Bank") in 2004. At that time, and continuously thereafter, APEG was aggressively solicited by Bank representatives and officers to borrow more and more money from the Bank.
21. Bank representatives and officers repeatedly assured APEG that it stood ready to fund any

current and future needs. Based upon these promises and representations they encouraged APEG to rely on the Bank as its primary or exclusive lender.

22. When APEG sought to borrow money on longer terms, the Bank encouraged APEG to utilize shorter term loans, with Bank representatives and officers promising that the loans would be renewed as and when needed.
23. Based upon the Bank's representations and promises APEG did come to rely upon the Bank almost exclusively for its borrowing needs. Since 2004 APEG has borrowed over \$24,000,000.00 from the Bank in the course of funding various real estate developments.
24. Since 2004, in keeping with the promises and representations of its representatives and officers, the Bank routinely renewed APEG's loans, including the one at issue herein.
25. Also since 2004, up until the actions complained of herein, APEG always repaid the Bank as agreed and was never in default of any obligation to the Bank. APEG has been an excellent customer. During this period, APEG has repaid principal to the Bank of at least \$18,000,000.00, and paid interest to the Bank of approximately \$4,500,000.00.
26. During this period, based upon the promises and representations of the Bank's representatives and officers and the pattern and course of conduct established with respect to renewals of the short term loans encouraged by the Bank, APEG did not establish alternate funding sources or other banking relationships. To the contrary, APEG justifiably came to repose trust and confidence in the Bank, to become dependent upon it for funding and economic survival, and as it turns out to become vulnerable to a sudden, arbitrary change in the Bank's conduct.
27. In or about 2010, after years of excellent payment records and repaying all loans as agreed, all of APEG's loans, including the one at issue herein, were abruptly called for repayment. Upon information and belief, the Bank did this even though it knew, through its representatives and officers, that APEG could not simply repay the loans, that it would have to refinance them, but that alternative financing sources for the types of loans involved were not available. This abrupt calling for millions of dollars in debt to be immediately repaid and the Bank's subsequent collection activity substantially prevented APEG from acquiring alternative financing. These actions on the part of the Bank have or will proximately cause the failure of APEG, resulting in substantial damages to it and its members.

28. The loans made to APEG were secured by real property and were based upon conservative loan-to-value ratios. At the times the Bank called APEG's loans it had obtained new appraisals, but even after the Bank obtained new appraisals, the aggregate underlying collateral values still exceeded the Bank's outstanding loan balances. The updated appraised values were done by appraisers engaged by the Bank, not by the borrower, so, if anything, the values were probably lower than values that would have been established by appraisers not influenced by the Bank. Inasmuch as the Bank's loans remained adequately secured and APEG has always paid as agreed, the Bank's abrupt calling of the loans was arbitrary, in bad faith, and done with the purpose and intent of injuring and damaging APEG, or at the least, with no regard for APEG's interests or well-being.
29. As was known or reasonably foreseeable to the Bank, APEG was unable to repay or refinance the various loans with the Bank. The Bank initiated collection activities seeking to enforce the remedies allegedly available to it under the various loan documents. These activities were likewise characterized by bad faith, a disregard of APEG's interests, and a purpose and intent of injuring and damaging APEG. Among other things, the Bank has utilized cross-default provisions to force the sale of APEG assets at below-market prices; to manipulate the timing of calling and defaulting of loans to its advantage; and, to apply APEG's equity in projects to other loans which the Bank would not explain or disclose.
30. After initiating various collection activities the Bank requested a proposal from APEG to address the situation. APEG submitted a proposal to the Bank that, among other things, included additional collateral to the Bank to provide additional security to the loans. Even though APEG made good faith efforts to improve the Bank's collateral position and to otherwise address its concerns, the Bank, in another example of its evident bad faith and disregard of or intent to injure APEG's interests, failed to respond in any way, positively or negatively.
31. In one of the APEG loans the real property securing the debt has already been taken by foreclosure and the property bought by the Bank at a value grossly under the reasonable fair market value of the property, and the Bank is now pursuing deficiency judgments against Defendants. If it succeeds in its course of action the Bank will have obtained the property at below-market value and also judgments for the alleged deficiency, inflated by the Bank's

below-market bid for the property. Through this mechanism the Bank will have aggregated to itself value far in excess of the amounts actually due on the loan, representing a double-recovery, thereby unreasonably and in bad faith enhancing its financial position to the detriment and ultimate destruction of APEG. Upon information and belief, this represents a corporate strategy or policy that is not only capable of repetition but has in fact been repeated in other cases involving other borrowers.

FOR A SECOND DEFENSE

32. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior allegations and further allege upon information and belief that Plaintiff has failed to join indispensable parties and/or all real parties in interest.

FOR A THIRD DEFENSE

33. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior allegations and further allege upon information and belief that Plaintiff is not the true holder and owner of the subject notes and mortgages.

FOR A FOURTH DEFENSE

34. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior allegations and further allege upon information and belief that Plaintiff has failed to meet conditions precedent to maintaining this action.

FOR A FIFTH DEFENSE

35. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior allegations and further allege upon information and belief that Plaintiff has failed to mitigate damages and any recovery should be barred or reduced thereby.

FOR A SIXTH DEFENSE

36. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior allegations and further allege upon information and belief that Plaintiff's claims are barred by waiver and/or estoppel.

FOR A SEVENTH DEFENSE

37. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior allegations and further allege upon information and belief that Plaintiff's claims are barred by the doctrine of unclean hands.

of the Bank the Defendants have suffered actual, substantial damages.

FOR A FIFTH COUNTERCLAIM

(Duress)

46. Defendants repeat and incorporate herein the foregoing allegations.
47. In the course of its dealings with Defendants the Bank threatened to and did in fact seek to enforce its legal rights in bad faith, delayed various actions to its advantage and to the detriment of Defendants, and through other actions, committed the tort of duress, as a direct and proximate result of which the Defendants have suffered actual, substantial damages.

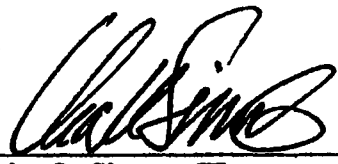
FOR A SIXTH CAUSE OF ACTION

(Unfair Trade Practices)

48. Defendants repeat and incorporate herein the foregoing allegations.
49. The acts and practices of the Bank in its dealings with Defendants constituted wilful or knowing violation of the South Carolina Unfair Trade Practices Act and Defendants are entitled to actual damages, treble damages, and attorneys fees.

WHEREFORE, having fully answered the complaint of the Plaintiff herein, Defendants pray for a jury trial on all issues so triable, that the complaint be dismissed, that Defendants have judgment against Plaintiff for actual damages in such amount as may be determined by a jury, for treble damages, for attorneys fees, and for costs.

Charleston, SC
March 23 2011


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