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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2015-001149

RECEIVED

DEC 14 2015

SC Court of Appeals

PNC Bank, N.A., successor to RBC Bank (USA),

Respondent,

v.

Liberty Cottages, LLC; GW Dorchester, LLC;  
USS Clarksville, LLC; Liberty Cottages Land, LLC;  
Royal Beach Properties, LLC; The Brothers of SC, LLC;  
Deborah Rice-Marko a/k/a Deborah G. Rice-Marko;  
Evan R. Marko and John E. Marko, Jr.,

Appellants.

**RECORD ON APPEAL – VOLUME IV**

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1 Q. That about covers it, huh?

2 A. I'd have to check the math. I think it  
3 started around '94, so.

4 Q. Okay. That's pretty much all I --

5 A. '94.

6 Q. Were you ever involved with a group called  
7 the Blair Group?

8 A. I was not.

9 Q. Okay. All right. When you left Bank of  
10 America, what was with your position then?

11 A. Relationship manager, commercial relationship  
12 manager.

13 Q. What is a commercial relationship manager?

14 A. A relationship manager, you go out, for  
15 commercial and industrial clients, generate business,  
16 full service represent the bank, go out --

17 Q. Pretty much PR?

18 A. -- prospect -- yeah.

19 Q. Okay.

20 A. Prospect clients, maintain relationships,  
21 build relationships.

22 Q. And when --

23 A. Commercial side.

24 Q. And when you went over to RBC, did you have a  
25 similar position?

1 A. Same role.

2 Q. All right. And tell me about what position  
3 you went to after that.

4 A. After RBC?

5 Q. Yeah -- no. I mean after the commercial  
6 relationship manager, what did you do -- were you with  
7 RBC the whole time as a commercial relationship manager?

8 A. Various titles, I was always on the  
9 production side of the bank. I was always producing --  
10 you know, generating revenue, I guess you could call it.  
11 Titles varied throughout that time for relationship  
12 manager, commercial relationship manager. I was in a  
13 hybrid relationship manager for a role -- and what I  
14 mean by that is I was doing commercial real estate-type  
15 lending as well as with C&Is, what we called commercial  
16 and industrial-type lending. At one point I had a  
17 market executive title just to kind of represent the  
18 market but still was in a producing role as a  
19 relationship manager under that role as well.

20 Q. Okay. When you produced a client, would that  
21 client continue to have a relationship throughout the  
22 relationship with the bank or would you hand them off to  
23 somebody else?

24 A. Most of mine, for the most part, I would  
25 manage the relationships. Always periods of time when

1 different segments of the bank where a relationship  
2 could move to a different area of the bank.

3 Q. In your position with RBC, how did you come  
4 to form a relationship with Ms. Rice-Marko?

5 A. Inherited a relationship from an existing  
6 relationship manager. Todd Brown was the relationship  
7 manager. He moved into a managerial role, I believe, at  
8 the time, so I assumed that relationship along with some  
9 others to represent the bank.

10 Q. Okay. How many others did you assume at that  
11 time?

12 A. I'm not sure the exact number. Had a  
13 portfolio, if you combined it all together, varied from,  
14 you know, as low as 75 million loans to as high as 200.

15 Q. And when you assumed that position with  
16 relationship to Ms. Rice-Marko, did you also assume that  
17 same relationship with her sons, John and Evan?

18 A. I did. We kind of considered that one  
19 relationship.

20 Q. Okay. And how many loans did Ms. Rice-Marko  
21 have with the bank at that time?

22 A. I'd have to go back to see, but . . . I'd  
23 have to look at some dates to refresh my memory but at  
24 least five or six, maybe upwards of eight or so at the  
25 end, but I think the total loans amount from -- I can't

1 remember -- in the middle of maybe 8 or 10 million up to  
2 as much as 20 million, I believe.

3 Q. Let me go back a minute, if I could. I kind  
4 of went quickly from your work history and your  
5 relationship with Ms. Rice-Marko, but I wanted to go  
6 through something else before that.

7 Do you understand that today you're appearing  
8 not only as a fact witness to testify as to facts that  
9 you are aware of but also as a representative of the  
10 bank? You understand that?

11 A. I do.

12 Q. And you understand that we commonly refer to  
13 that as 30(b)(6) --

14 A. Uh-huh.

15 Q. -- deposition because that's the pertinent  
16 portion of the rule that deals with those depositions?

17 A. Yeah.

18 Q. Do you understand that?

19 And do you understand that even though you  
20 might not have personal information about some of the  
21 subjects that I might ask of you, you still are required  
22 to give me an answer with regard to those, a truthful  
23 answer with regard to those?

24 MR. KNOWLTON: Objection.

25 BY MR. HANNA:

1 foundation.

2 A. No. I can't talk about -- I'm not in the  
3 workout side of the group. I don't know if it helps or  
4 hurts. I do know it helps and is common with some  
5 borrowers --

6 BY MR. HANNA:

7 Q. It helps who?

8 A. -- to give them some solutions.

9 I mean, in this -- clearly, in this instance,  
10 it helped her get out of default and pay the million  
11 eight.

12 Q. Was this --

13 A. Well, actually, we didn't even pay the  
14 million eight. We just kind of moved to a  
15 cross-collateralization so she didn't have to pay the  
16 million eight.

17 Q. Was this the only solution that you offered  
18 to the family was cross-collateralization and  
19 cross-default?

20 A. Yeah, like we -- I believe I just said  
21 earlier, -- you could pull it up -- but I think we  
22 talked about a lot of what-if solutions. You know, can  
23 you do this, can you do that; and ultimately it led to  
24 this. It took some time, but . . .

25 Q. But --

1 MR. KNOWLTON: Let him finish.

2 Were you finished with your answer?

3 THE WITNESS: Yeah.

4 BY MR. HANNA:

5 Q. That was not my question.

6 A. Okay. I'm sorry, what was the question?

7 Q. The question was what other options did you  
8 offer them other than cross-collateralization and  
9 cross-default?

10 A. I don't think I legally offered any other  
11 options. We had some discussions. Ultimately, the only  
12 thing that was documented and put in front of her that  
13 was signed was this.

14 Q. In fact, you told her that unless she  
15 cross-collateralized, unless the family  
16 cross-collateralized and cross-defaulted everything, you  
17 were going to send her to a bad place, didn't you?

18 MR. KNOWLTON: Object to the form and  
19 foundation.

20 A. No. I mean, I don't know.

21 BY MR. HANNA:

22 Q. And, in fact, you told her you would put her  
23 in bankruptcy if she didn't?

24 MR. KNOWLTON: Object to the form of the  
25 question.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
18 WITNESS: William H. Harrington, Jr. (PNC Bank)

19 DATE: Wednesday, January 28, 2015

20 TIME: 9:48 a.m.

21 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
22 151 Meeting Street, Suite 600  
23 Charleston, South Carolina

24 TAKEN BY: Attorneys for the Defendants

25 REPORTED BY: HEATHER M. CURLIN  
Registered Professional Reporter

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26 ALSO PRESENT: Ms. Deborah Rice-Marko  
27 Mr. John Marko, Jr.  
28 Mr. Evan Marko

29 (INDEX AT REAR OF TRANSCRIPT)

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1 (The deponent reserves the right to read and  
2 sign the deposition transcript.)

3 - - - - -

4 WILLIAM H. HARRINGTON, JR., having been  
5 previously sworn, testified as follows:

6 MR. KNOWLTON: Bill, before we start, let me  
7 just say we'll reserve the right to read and sign. And  
8 I'll just say that for all the witnesses, we're going to  
9 reserve that right. And Mr. Harrington, as we've  
10 indicated to you, Bobby, before, is being designated as  
11 a 30(b)(6) witness for Topic Number 5, "The  
12 circumstances leading to and the reasons for the  
13 decision to enter into the forbearance agreement dated  
14 July, 2011."

15 EXAMINATION

16 BY MR. STEPP:

17 Q. Good morning, Mr. Harrington. We have met  
18 before. I have taken your deposition individually  
19 before, but today I'm here to ask you some questions as  
20 the designee of PNC Bank with respect to the issue that  
21 Mr. Knowlton just stated, which is the circumstances  
22 leading to and the reasons for the decision to enter  
23 into the forbearance agreement dated in July 2011.

24 You're knowledgeable about the forbearance  
25 agreement and what led up to it?

1 A. Yes, I am.

2 Q. As far as you know, are you the person most  
3 knowledgeable about that subject?

4 A. I think --

5 MR. KNOWLTON: Object to the form of that  
6 question. Go ahead.

7 BY MR. STEPP:

8 Q. You can answer the question if you  
9 understand.

10 A. I probably am.

11 Q. Okay. You're not aware of anybody that you  
12 believe would have greater knowledge than you on that  
13 subject?

14 A. I'm not.

15 Q. Okay. What was your position vis-a-vis the  
16 loans to the -- Debbie Rice-Marko and her family in July  
17 2011?

18 A. I was assigned as the asset manager to that  
19 relationship.

20 Q. All right. And tell me what asset manager  
21 means. What were your duties and responsibilities?

22 A. To manage the credits. To try to come to  
23 some workout solution that was agreeable to the bank and  
24 the borrowers.

25 Q. Okay. What was the status of the loans --

1 Q. Okay. You weren't here yesterday and I'm not  
2 asking you to know what somebody else said, but I -- it  
3 is my understanding as a result of some questions that  
4 we asked yesterday that part of what nonaccrual status  
5 means is that the bank no longer believes a collection  
6 of full amount of principal and interest is going to  
7 happen. Is that consistent with your understanding?

8 A. That is my understanding.

9 Q. Okay. Look back on Harrington 1, if you  
10 would, about a third of the way down, lines -- I guess  
11 it's 27, 28. It says, "BRR." You see that?

12 A. Yes.

13 Q. Borrower risk rating, is that what that  
14 means?

15 A. I think -- I think that's what it stood for.

16 Q. Are you familiar with the system over here  
17 that says "3 plus M"? Do you know what that means?

18 A. Not anymore.

19 Q. Okay. Were borrower risk ratings something  
20 that you assigned, dealt with, or modified as part of  
21 your responsibilities in the special loan group?

22 A. Yes.

23 Q. Okay. How did you interact with borrower  
24 risk ratings, and what did you do?

25 A. As I recall, on a credit of this size, we

1 formulas for calculation, we would have written off  
2 three and a half million dollars at that particular  
3 time.

4 Q. So the bank's estimation at that point was  
5 that if foreclosure had been pursued as a remedy at that  
6 point, the bank would have taken a three and a half  
7 million dollar loss?

8 A. That's fair to say, yes.

9 Q. Okay.

10 (Exhibit No. 3 was marked.)

11 BY MR. STEPP:

12 Q. Okay. This is Exhibit 3, Harrington Number  
13 3. This is the forbearance agreement itself; is that  
14 correct, Mr. Harrington?

15 A. Yes, sir.

16 Q. You have seen this document previously, I  
17 believe?

18 A. I have.

19 Q. And on numbered page 18 towards the back,  
20 that's your signature?

21 A. It is that.

22 Q. Okay. And the approval process, I mean, I  
23 gather the AR -- the ARTR discussed in the e-mail we  
24 were just looking at was approved and you were  
25 authorized to move forward to enter into the forbearance

1 agreement, correct?

2 A. Yes.

3 Q. Do you know who prepared the agreement?

4 A. Who prepared the --

5 Q. The forbearance agreement?

6 A. Forbearance agreement.

7 Q. Yeah.

8 A. Somebody at Nelson Mullins. I think the  
9 primary -- the primary attorney was Nate Fuller, if I  
10 recall correctly, but it could -- could have been  
11 someone else, but that's what I recall.

12 Q. Were you involved, were you sort of the  
13 client contact for the preparation of the forbearance  
14 agreement?

15 A. Yes.

16 Q. Okay. Let's look at Exhibit 3.

17 MR. KNOWLTON: Bobby, I'm just -- just want  
18 to be sure we're sticking to the topic, because as I  
19 read your topic, it deals with the circumstances leading  
20 up to the decisions to enter into the forbearance  
21 agreement. I'm not sure going -- you need to connect  
22 this back to the topic. I'm not going to stop you, but  
23 I'm going to keep you to the topic.

24 MR. STEPP: Well, I would think the terms of  
25 the forbearance agreement would be one of the reasons

1 that the bank entered into it, was to obtain these  
2 terms. But that's going to be my question.

3 MR. KNOWLTON: Well, you've already had a  
4 personal deposition of him on this agreement. I read  
5 this pretty literally the way you wrote it to be the  
6 decision to enter into the agreement, not the terms of  
7 the forbearance agreement itself or the negotiation or  
8 the actual agreement itself.

9 MR. STEPP: Well, let me ask the witness this  
10 question.

11 BY MR. STEPP:

12 Q. Was one of the reasons to enter into the  
13 forbearance agreement to obtain the terms of the  
14 borrowers to the terms of the forbearance agreement?

15 A. I'm sorry, could you repeat that?

16 Q. Yeah, let me try that again. Was one of the  
17 reasons you wanted to enter into the forbearance  
18 agreement was to get the borrowers to agree to its  
19 terms?

20 A. That was one of the reasons, yes.

21 Q. Okay. So the terms of the forbearance  
22 agreement itself would be one of the reasons that it was  
23 entered into, correct?

24 MR. KNOWLTON: Object to the form.  
25 That's . . .

1 A. That would have been one of the reasons, yes.

2 BY MR. STEPP:

3 Q. Okay. All right. Then I'd like to go  
4 through the terms with you.

5 MR. KNOWLTON: Bobby, I am going to stop you  
6 because this is not about the terms of the forbearance  
7 agreement.

8 MR. STEPP: Are you going to instruct him not  
9 to answer?

10 MR. KNOWLTON: I am. We're going to stick to  
11 the scope of your topic and --

12 MR. STEPP: Well, then I'm going to make a  
13 record on it.

14 MR. KNOWLTON: That's fine. Go ahead.

15 MR. STEPP: The witness has testified that  
16 one of the reasons -- quite reasonably, I would say,  
17 that one of the reasons that the bank entered into the  
18 forbearance agreement was to obtain the borrower's  
19 promises that are contained within the forbearance  
20 agreement. And I think it is perfectly within the topic  
21 as designated to inquire about those terms. But if  
22 you're instructing him not to answer, then, so be it,  
23 but I don't think it's an appropriate instruction, I  
24 don't think it's within the scope of the rules, and I  
25 will expect your motion within five days and I'm not

1 going to waive it.

2 Let's take a break.

3 MR. KNOWLTON: Before we take a break, I will  
4 say that your reasoning on that is circular. Your topic  
5 is the circumstances leading to and the reasons for the  
6 decision to enter into this agreement. It is not about  
7 the agreement itself. I will allow limited questions on  
8 the agreement itself, but I'm not going to let you  
9 redepote him.

10 MR. STEPP: I'm not going to be limited in  
11 any way. You make your motion. You've instructed him  
12 not to answer. I've made my record. That's all I have  
13 to say.

14 MR. KNOWLTON: All right. That's fine.

15 (A brief break transpired.)

16 MR. KNOWLTON: Before the break, we talked  
17 about the topic and my objection about your questions  
18 going outside the topic, beyond the scope of the topic.  
19 I'm going to let you, just in the spirit of compromise,  
20 I'm -- because I know you don't want to lay your  
21 blueprint of where you're heading, but if you want to  
22 ask him about parts of the agreement that deal with the  
23 business reasons that he recommended, but this was a  
24 document drafted by counsel that incorporated things  
25 that probably were not -- were attorney-client driven

1 and driven by counsel and beyond his scope. But if you  
2 want to ask him about business terms that carried  
3 through from his recommendations, I'm okay with, and  
4 we're just going to have to tread a fine line as we go.

5 MR. STEPP: Well, Frank, I appreciate that.  
6 I do. But I'm not sure that I'm willing to accept that  
7 limitation, and I will tell you why. The topic is  
8 reasons to enter into the forbearance agreement. That's  
9 not restricted to business reasons of which this witness  
10 has personal knowledge. He is a 30(b)(6) designee with  
11 respect to any and all reasons that the bank entered  
12 into the agreement. And so I don't want to get into an  
13 examination of the agreement and then us get into a  
14 wrangle about what I can ask him and what I can't ask  
15 him. I mean, if I can examine him in full about the  
16 agreement, then, fine, I appreciate that. I'll do it.  
17 But if your position is that there will be some things I  
18 can ask him and some things I can't, frankly --

19 MR. KNOWLTON: I don't know --

20 MR. STEPP: -- I just as soon pass.

21 MR. KNOWLTON: I don't know what you're going  
22 to ask. I'm willing to allow you to try, and if we can  
23 work through it, that's fine. But, you know, he's not a  
24 lawyer, he didn't draft the document, and your topic  
25 didn't say you wanted a witness on the forbearance

1 agreement itself. It was the circumstances leading up  
2 to and entering into the agreement. But having said  
3 that, in trying to compromise with you, I'm willing to  
4 try to allow you to go forward on the forbearance  
5 agreement, there just may come a time when I just have  
6 to say -- or specific questions where I say, I'm sorry,  
7 that's beyond the scope. I'm willing to try it.

8 MR. STEPP: All right. Well, we'll try.

9 BY MR. STEPP:

10 Q. All right. You have the agreement in front  
11 of you, Mr. Harrington?

12 A. I do.

13 Q. Okay. Look at page 3, if you would, Section  
14 1.3. Was one of the reasons that PNC wanted to enter  
15 into the forbearance agreement with the Debbie  
16 Rice-Marko family to obtain an acknowledgment of  
17 default?

18 A. I would guess that legally it was. It  
19 certainly wasn't the primary reason for entering the  
20 agreement.

21 Q. Well, did you ever have any interaction with  
22 anybody to say this should not be part of the agreement?

23 A. Not that I recall, no.

24 Q. Look over on page 4, Section 1.6. Was one of  
25 the reasons that RBC wanted to enter into the

1 forbearance agreement to obtain further  
2 cross-collateralization as provided in Section 1.6 of  
3 the document?

4 A. Again, it would have been not the primary  
5 reason but one of the reasons, yes.

6 Q. Okay. Look on page 5, if you would, Section  
7 2.4. Was one of the reasons that RBC wanted to enter  
8 into the forbearance agreement to obtain the waivers  
9 that are part of Section 2.4 of the agreement?

10 A. I wouldn't know that. I think that my  
11 understanding is that's a typical -- and always included  
12 in forbearance agreements that I have seen. So that  
13 didn't enter my consideration.

14 Q. Well, but if it is typical in forbearance  
15 agreements that you have seen, then it's consistent, to  
16 your understanding, of what the bank requires in a  
17 forbearance agreement?

18 A. It is consistent, yes.

19 Q. Okay. Page 6, Section 2.5, same thing,  
20 waiver of trial by jury?

21 A. I think that is --

22 Q. One of --

23 A. Sorry.

24 Q. I'm sorry, go ahead.

25 A. I think that is consistent with what we see.

1 Q. And one of the reasons that RBC wants to  
2 enter into a forbearance agreement?

3 A. I can't really say that.

4 Q. So you don't -- you don't -- not withstanding  
5 the fact that this forbearance agreement contains a  
6 waiver of trial by jury, you don't think that's one of  
7 the reasons that RBC entered into the agreement?

8 A. It was not part of my consideration, I know  
9 that.

10 Q. Okay. So if there had been a request to take  
11 that out, it would have been okay with you to take it  
12 out?

13 MR. KNOWLTON: Object to the form.

14 A. I really can't say that. I would -- I  
15 would've -- if there had been a request to take that  
16 out, I would have -- I would have looked at it closely  
17 and had to get approval to change anything that I  
18 consider just boilerplate in the agreement.

19 BY MR. STEPP:

20 Q. Did you look at any time in the run-up to the  
21 execution of the forbearance agreement, did you ever  
22 look at a document called the RBC Legal Reference  
23 Manual? Do you know what that is?

24 A. No, I do not. I did not look at it, and I'm  
25 not -- not aware of it.

1 Q. All right. I'm just going to -- I'm not  
2 going to mark it if you haven't seen it, but I'm going  
3 to show you the cover page of it. Is that anything  
4 you've ever seen before?

5 A. No, it's not.

6 Q. Okay. So it's fair to say you did not  
7 consult the RBC Centura Legal Reference Manual in your  
8 consideration of the forbearance agreement for the  
9 Debbie Rice-Marko loans?

10 A. I did not.

11 Q. Okay. Do you know whether Mr. Hartmann or  
12 Mr. Ficych or anybody else that you are interacting with  
13 in connection with the decision to enter into the  
14 forbearance agreement looked at the legal reference  
15 manual?

16 A. I do not know if they did.

17 Q. Okay. All right. Look on back to Exhibit --  
18 the manual or whatever -- I mean -- I'm sorry -- the  
19 agreement, Exhibit 3, I guess. Page 8, Section 4.2.  
20 This says, "Notwithstanding anything in the loan  
21 documents to the contrary, on or after the effective  
22 date, the borrowers shall make payments in respect of  
23 the obligations and installments on the first day of  
24 each month commencing July 15, 2011 in the amount of  
25 \$33,000, et cetera."

1 Do you see that?

2 A. Yes, I do.

3 Q. All right. Was that promise to make the  
4 payment of 33,000 a month one of the reasons that the  
5 bank decided to enter into the forbearance agreement?

6 A. Yes, it was.

7 Q. Okay. Next, Section 4.3, Marketing of  
8 collateral requires the borrower to keep all  
9 nonrevenue-producing real property actively marketed for  
10 sale. Was that one of the reasons the bank wanted to  
11 enter into the forbearance agreement?

12 A. Yes, it was.

13 Q. All right. Look over on the next page, page  
14 9, Section 4.8. "Financial Reporting. Within six  
15 months from the previous statement date on file with the  
16 bank, a detailed financial statement, et cetera."

17 Is that financial reporting covenant one of  
18 the reasons that the bank entered into the forbearance  
19 agreement?

20 A. Yes.

21 Q. And prior to the forbearance agreement, what  
22 contractual obligations did the borrowers have to  
23 provide financial information to the bank?

24 A. Specifically, I can't answer. I know that  
25 normally that would be a part of any loan agreements or

1 commitment letters that we do require certain financial  
2 reporting, but I never looked at that specifically.

3 Q. Okay. I'm sorry. Look back on page 7.  
4 Article 3, Release. Was obtaining a release from the  
5 borrowers one of the reasons that the bank wanted to  
6 enter into the forbearance agreement?

7 A. Not really, no.

8 Q. Is this consistent with terms of other  
9 forbearance agreements that you've seen?

10 A. Yes, sir, it is.

11 Q. Do you know whether RBC, as a matter of  
12 policy, would enter into a forbearance agreement that  
13 did not contain a release?

14 MR. KNOWLTON: Object to form and foundation.

15 BY MR. STEPP:

16 Q. If you know.

17 A. I do not know.

18 Q. Okay. Were you ever involved -- when you  
19 were the account manager for the Debbie Rice-Marko  
20 relationship, were you ever involved in a decision  
21 whether to exit or maintain the relationship?

22 A. I would -- I would say yes.

23 Q. All right. Tell me about when you gave  
24 consideration to that in connection with the forbearance  
25 agreement.

1 A. I'm not sure I can relate the two.

2 Q. All right.

3 A. In our analysis of the relationship, you  
4 know, we didn't -- while we always hope for a positive  
5 outcome, the value of the collateral had dropped so much  
6 there was financial hardship on the borrower, it didn't  
7 seem likely that things would come back to normal. So  
8 we would have -- we would have considered that an exit  
9 relationship in one respect, not to the point that we  
10 were getting ready to blow it up but just that we didn't  
11 see that it was going to come back to be a relationship  
12 that the bank would seek.

13 Q. And would that decision to characterize this  
14 as an exit relationship have taken place about the same  
15 time the loans went in nonaccrual status?

16 A. That's likely, yes.

17 Q. Okay. Those are consistent with each other,  
18 are they not?

19 A. They can be, yes.

20 Q. Okay. Do you have a recollection -- well,  
21 let me ask you this. Were you present when the  
22 forbearance agreement was signed by the borrowers?

23 A. No, I was not.

24 Q. Do you recall any discussion at the time it  
25 was signed about a possible fourth mortgage on Debbie

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF DORCHESTER

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-18-825

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 (Caption continued on page 2)

17 D E P O S I T I O N

18 WITNESS: William H. Harrington, Jr.

19 DATE: Wednesday, May 7, 2014

20 TIME: 9:44 a.m.

21 LOCATION: Nelson Mullins Riley & Scarborough  
22 5 Exchange Street  
23 Charleston, South Carolina

24 TAKEN BY: Attorneys for the Defendants

25 REPORTED BY: HEATHER M. CURLIN  
Professional Court Reporter

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1 STATE OF SOUTH CAROLINA  
COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON  
3 PNC Bank, N.A., successor to RBC  
Bank (USA),  
4  
Plaintiff(s),  
5  
vs. C/A No: 2013-CP-10-2624  
6  
Liberty Cottages, LLC; GW  
7 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
8 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
9 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
10 E. Marko, Jr.,  
11 Defendant(s).

12 STATE OF SOUTH CAROLINA  
COURT OF COMMON PLEAS  
13 COUNTY OF FLORENCE  
14 PNC Bank, N.A., successor to RBC  
Bank (USA),  
15  
Plaintiff(s),  
16  
vs. C/A No: 2013-CP-21-1193  
17  
Liberty Cottages, LLC; GW  
18 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
19 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
20 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
21 E. Marko, Jr.,  
22 Defendant(s).

23  
24  
25

1 administrator, whoever it was, if a loan was in special  
2 assets under your jurisdiction, did the credit  
3 administrator have the authority to make a decision and  
4 approve a strategy for either resolving the issues or  
5 exiting the relationship?

6 A. Yes.

7 Q. Okay. Now, during this time, I mean, from  
8 2006 to 2010 at least, what was the bank's objective,  
9 your objective sitting in special assets when these  
10 loans came to your attention, what did you want to try  
11 to accomplish? What was your first goal?

12 MR. KNOWLTON: Object to the form.

13 BY MR. STEPP:

14 Q. You can answer the question if you  
15 understand.

16 A. Could you repeat the question?

17 Q. Sure. I'm trying to figure out when a loan  
18 came to you in your capacity as a special assets  
19 manager -- was that the right term?

20 A. Yes, sir.

21 Q. Close enough, anyway. In your position, was  
22 it your goal to try to resolve the issues and return the  
23 credit to the line of business? Was that the first  
24 goal?

25 A. That was --

1 MR. KNOWLTON: Same objection.

2 A. That was the first goal.

3 BY MR. STEPP:

4 Q. Okay. And is it fair to say that you would  
5 make every effort that you considered reasonable or  
6 necessary to try to accomplish that before considering  
7 strategies to exit the relationship?

8 A. We would consider all strategies. If we  
9 could salvage the credit, that would be our first  
10 objective.

11 Q. Okay. And how did you -- how did you make  
12 decisions or recommendations about how to salvage a  
13 credit? I mean, if a borrower came to you and said,  
14 well, you know, look, the market is bad, I know that  
15 we've got a maturity date looming, if you gave me  
16 another year, I think I might be able to sell the asset  
17 or something like that, how did you evaluate those  
18 conditions to enable you to make a recommendation  
19 upstream about what to do?

20 MR. KNOWLTON: Object to the form.

21 A. Obviously, every situation was different. In  
22 the example that you're using, I would evaluate, first  
23 of all, if the borrower had the ability to continue to  
24 service the debt for the period of time they were  
25 requesting a renewal. And I think in most cases, if

1 they did have the ability to service the debt, we would  
2 try to work with them to give them time to market the  
3 property to see what -- if they could accomplish that.

4 BY MR. STEPP:

5 Q. Okay. Okay. I got a little sidetracked and  
6 I want to just try to complete your sort of employment  
7 history, if I can. You became a banking officer of  
8 special assets in 2006. And do you continue in that  
9 sort of position today?

10 A. Yes, I do.

11 Q. Okay. And what is your title today?

12 A. Assistant vice president.

13 Q. Okay. And today you're employed by PNC Bank;  
14 is that correct?

15 A. That is correct.

16 Q. And your responsibilities still include  
17 special assets?

18 A. Yes.

19 Q. All right. Do you have any greater area of  
20 supervision or responsibility today than you did in  
21 2006?

22 A. I'm not sure I understand the question.

23 Q. Yeah. Are you basically in the same position  
24 that you were in in 2006, or have your duties or  
25 responsibilities been expanded since 2006?

1           A.     With RBC, if a loan went into nonaccrual  
2 status, no further bills were mailed to the borrower.  
3 If -- and in Debbie's case, if one loan went into -- I  
4 mean not her specific -- this was just not for her but  
5 for every borrower in the bank, if one of the credits  
6 went into nonaccrual status, every credit that she was  
7 associated with would also go into nonaccrual.

8           Q.     Okay. And do you have any recollection today  
9 about when or if the Debbie Rice-Marko loans went into  
10 nonaccrual status?

11          A.     I do not remember when it happened. Based on  
12 this e-mail, my guess would be sometime in mid to late  
13 2010.

14          Q.     But you're assuming that based on the fact  
15 that no invoice was rendered; is that correct?

16          A.     That is correct. And I really just don't  
17 recall when it happened.

18          Q.     Okay. Do you recall that when you took over  
19 these loans when they were assigned to you that they had  
20 been restructured so that they were all  
21 cross-collateralized with cross-default provisions?

22          A.     I can't say that I recall that. That would  
23 not be unusual, but I just -- specifically, I don't  
24 know.

25          Q.     So you don't really know whether they were or

1 forth could be, we started an ongoing negotiation as to  
2 what we could do. And the end result was the  
3 forbearance agreement.

4 Q. Okay. I have some information that the loans  
5 were assigned to you in May of 2010. I'm not asking you  
6 to accept that, but does that -- do you have even a  
7 general recollection of when you first had responsibility  
8 for these loans?

9 A. If they were assigned in May of 2010, I  
10 don't -- I don't know exactly when it was, but that  
11 sounds about right.

12 Q. Okay. And so during the period preceding the  
13 fore- -- May of 2010 or whenever it was up to the  
14 execution of the forbearance agreement, were you trying  
15 to study these accounts or these credits so that you  
16 could make a recommendation, like you told me earlier,  
17 about either restoring the credit to the line of  
18 business or making a recommendation about exiting the  
19 relationship?

20 A. Did you ask if I was doing that prior to it  
21 being assigned to me?

22 Q. No. I'm trying to ask --

23 A. Once it was --

24 Q. Once it was assigned to you -- between the  
25 time it was assigned to you and the time the forbearance

1 agreement was executed, is that what you were doing?

2 A. I would have been analyzing what we had, what  
3 our situation was, what her situation was, and trying to  
4 determine the best outcome.

5 Q. Okay. And what conclusions did you draw  
6 about these credits during that period?

7 A. Well, I determined that on most of the  
8 credits, as I recall, the loan balances were higher than  
9 the appraised values. Debbie sent information to me  
10 showing the cash flows from the income-producing  
11 properties, and that was sort of our starting point as  
12 far as determining her ability to service any level of  
13 debt for any period of time. It was based on the cash  
14 flows. As I recall, I think where we ended up was that  
15 we pretty much made this agreement based on her  
16 information and what she stated she could pay.

17 Q. You say this agreement; you mean the  
18 forbearance agreement, Exhibit 2?

19 A. That -- I'm sorry. Yes, that's correct.

20 Q. That's fine. Okay. Well, the -- let me call  
21 your attention to -- well, let me -- you have to go all  
22 the way back into the exhibits, but do you recall that  
23 the forbearance agreement was for a two-year period?

24 A. Yes, sir, I think that is correct.

25 Q. Yeah. Look on page 4, Article II, and it

1 says, Section 2.1, forbearance covenant. It's got the  
2 date July 15th, 2013. Do you see that?

3 A. Yes, I do.

4 Q. And the execution date back on page 1 is July  
5 15th, 2011, correct?

6 A. Yes, sir.

7 Q. And was it the -- was it the purpose of this  
8 agreement to permit the borrowers during this two-year  
9 period to try to liquidate the collateral and generate  
10 cash to repay the bank, if not in whole at least in  
11 part?

12 MR. KNOWLTON: Object to the form.

13 A. The purpose -- the bank's purpose of this  
14 forbearance agreement was to collect what money we could  
15 and give the borrowers time to try to liquidate the  
16 collateral on their own as opposed to the bank starting  
17 foreclosure proceedings and trying to liquidate it  
18 ourselves.

19 BY MR. STEPP:

20 Q. Why didn't you want to liquidate it  
21 yourselves?

22 MR. KNOWLTON: Object to the form.

23 A. If we have a willing and cooperative  
24 borrower, my experience has been that they are able to  
25 get a higher sales price for the properties than we can

1       communicated?

2                   MR. KNOWLTON: Object to the form.

3           A.     I don't recall specifically. I would --  
4       maybe an e-mail. I just don't know.

5       BY MR. STEPP:

6           Q.     Okay. What was the first contact you had --  
7       you personally had with anybody at PNC regarding any of  
8       the loans that were in your portfolio to administer?

9           A.     I'm not -- I'm not certain. I -- it could  
10       have possibly been that we were asked to forward  
11       information to some location within RBC that would have  
12       been made available to PNC. Specifically when it  
13       happened, how it happened, I don't know.

14          Q.     Okay.

15                   MR. STEPP: Let's mark this Exhibit 3.

16                   (Exhibit No. 3 was marked.)

17       BY MR. STEPP:

18          Q.     Take a look at what we've marked as Exhibit  
19       3, please, Mr. Harrington. This is a copy of an e-mail  
20       from you to Debbie Rice-Marko. You recognize the  
21       Christmas<sup>4</sup> e-mail address as being her e-mail address?

22          A.     I do.

23          Q.     Okay. Take a minute and read that.

24          A.     I've read it.

25          Q.     Okay. This is in January -- January 23rd of

1 2012, and you write to Debbie, "Debbie, I need your help  
2 regarding info requested by PNC. I need rent rolls for  
3 The Brothers and ROA, parents, King Street. Thanks for  
4 your help."

5 Tell me why you sent this e-mail.

6 A. I would think I sent this e-mail because that  
7 information had been requested and I either did not have  
8 it or -- I probably didn't have it or couldn't find it  
9 if I did.

10 Q. Okay. So does this -- does this refresh your  
11 recollection about being requested at some point or that  
12 PNC at some point was doing due diligence on some of the  
13 loans within your responsibility?

14 A. Yes.

15 Q. Okay. All right. And do you know when that  
16 began? This e-mail is January 23rd, 2012, but do you  
17 know when that would have begun?

18 A. I don't recall when it began, but . . .

19 Q. Okay. As of January 23rd, 2012, as far as  
20 you were aware, were the borrowers in compliance with  
21 the forbearance agreement?

22 A. Yes.

23 Q. Now let me show you another one, which I  
24 should have marked at the same time. I'm sorry.

25 (Exhibit No. 4 was marked.)

1 BY MR. STEPP:

2 Q. Exhibit 4 is two e-mails, one from Debbie  
3 Rice-Marko to you, same date, January 23rd, 2012, and  
4 she says, "You will have it later today, do you know  
5 what they are considering?" And then you respond that  
6 same day, "No, this is just routine due diligence prior  
7 to closing."

8 Do you see that?

9 A. Yes.

10 Q. And by closing, you're talking about the  
11 closing between PNC and RBC?

12 A. Yes, that's correct.

13 Q. All right. Now, had anybody raised --  
14 anybody from PNC raised any issues with you about the  
15 status of the Debbie Rice-Marko loans?

16 A. Not that I recall.

17 Q. Do you remember having any conversations with  
18 anybody at PNC about these specific loans as a part  
19 of -- in this due diligence period?

20 A. At some point, I did have a conversation  
21 regarding all of my credits that I managed --

22 Q. Okay.

23 A. -- which certainly included this.

24 Q. All right. Tell me about that. When did  
25 that happen, as best you can recall?

1           A.     I don't remember the timeline. I think we  
2 provided information such as this that PNC had  
3 requested. Then at some point I -- at some point prior  
4 to closing -- no. I think after the closing; probably  
5 the week of March the 5th, I sat in a room with PNC  
6 people and discussed all of my credits. I also had a --  
7 phone conversations with Liz Paulson, and at some point  
8 she visited my office. The dates, the timeline there,  
9 I'm just not clear on.

10          Q.     Okay. Well, let's try to deconstruct that a  
11 little bit. When was the closing between RBC and PNC?

12          A.     It would have been March 2nd, 2012, as I  
13 recall.

14          Q.     Okay. And you recall that shortly thereafter,  
15 the week of March 5th, you had an in-person meeting with  
16 some people from PNC to review all of your portfolio?

17          A.     Yes. It was -- it was either the week of  
18 March the 5th or the following week --

19          Q.     Okay.

20          A.     -- because I spent those two weeks in Raleigh.

21          Q.     Okay. So you were in Raleigh for two weeks,  
22 and you were there because of transition issues; is that  
23 correct?

24          A.     Yes, that's correct.

25          Q.     And so did you have just the one meeting

1 Rice-Marko on the phone? Did y'all speak?

2 A. Yes.

3 Q. Was that a fairly routine occurrence?

4 A. I think so.

5 Q. Do you recall a conversation you had with her  
6 on March 19, 2012 relative to the PNC purchase of RBC?

7 A. Do I recall the conversation?

8 Q. Yes, sir.

9 A. No, sir, I do not.

10 Q. Do you recall calling Debbie Rice-Marko and  
11 telling her that PNC Bank had a different way of looking  
12 at things and spoke a different language?

13 A. I don't specifically recall that.

14 Q. All right. Might you have had such a  
15 conversation with her along those lines?

16 MR. KNOWLTON: Object to the form.

17 A. It's possible.

18 BY MR. STEPP:

19 Q. Yeah. Do you recall ever telling to Debbie  
20 Rice-Marko in March of 2012 or otherwise that based upon  
21 what you knew, you didn't think PNC would have entered  
22 into the forbearance agreement?

23 A. No, I don't -- I don't -- I don't recall  
24 saying that. I know that one of the early messages we  
25 were hearing from PNC was that they liked very

1 short-term forbearance or extensions in the -- in the 90  
2 to 180-day range as opposed to a two-year type thing.

3 Q. Uh-huh. Weren't you -- after you met with  
4 PNC, weren't you concerned that they were going to take  
5 a tougher stance with Debbie Rice-Marko than RBC had  
6 taken up until that time?

7 MR. KNOWLTON: Object to the form.

8 A. Could you repeat that, please?

9 BY MR. STEPP:

10 Q. Yeah. Were you concerned that when PNC took  
11 over that they were going to be tougher for Debbie to  
12 deal with than RBC had been?

13 MR. KNOWLTON: Same objection.

14 A. I -- I didn't really know what -- what it  
15 would be. I -- my concern would have been that anyone,  
16 you know, Debbie and anybody I dealt with, if they had  
17 an agreement in place, that they needed to perform under  
18 that agreement. If -- you know, if they didn't, then I  
19 think the outcome would have been the same regardless of  
20 who was -- whether it was PNC or RBC.

21 BY MR. STEPP:

22 Q. Okay. So along those lines, didn't you tell  
23 Debbie in March of 2012 that if PNC could find a reason  
24 to default her under the forbearance agreement they  
25 would do so?

1 design an exit strategy, but I don't believe you were  
2 ever asked the question in the DRM loans was that the  
3 case. When you got them, was that still -- did you have  
4 both options, or had y'all already decided you were at  
5 an exit strategy at that time?

6 A. No. Both options would have been available.

7 Q. And that would have been up to you and your  
8 manager to decide which way to go?

9 A. That's correct.

10 Q. Was it ever determined that you had given  
11 up -- while you had those loans under your supervision,  
12 was it ever determined that you were in an exit strategy  
13 and not a rehabilitative mode anymore?

14 A. Yes.

15 Q. When did that happen?

16 A. I -- I couldn't tell you when it happened,  
17 but as it evolved, it -- it was pretty apparent to my  
18 way of looking at the credits that I couldn't see  
19 anything that was going to change to improve the  
20 situation other than the sale of the properties.

21 Q. Would that have been before or after the  
22 forbearance agreement was executed?

23 A. Probably before.

24 Q. All right. And that would, of course, have  
25 been before PNC bought out RBC; is that right?

1 A. That is correct.

2 Q. Okay. Did you -- when you were taken over by  
3 PNC, did you inform PNC that you were in an exit mode  
4 with the DRM loans?

5 MR. KNOWLTON: Object to the form and  
6 foundation.

7 MR. HANNA: Can I ask what the objection is?

8 MR. KNOWLTON: I don't think he said -- yeah,  
9 I will. I don't think he testified that the loans were  
10 in an exit strategy mode. I think he testified from his  
11 personal opinion that an exit strategy was -- that the  
12 loans were moving into an exit strategy.

13 BY MR. HANNA:

14 Q. Okay. Let me clarify that then. When PNC  
15 took over, had they been placed in the exit strategy  
16 mode? I understand the objection of the question is the  
17 question was whether or not you were thinking about it  
18 or if you had actually done it. I understood that you  
19 had actually placed them in exit strategy before the  
20 forbearance agreement was executed. Is that the case?

21 A. RBC did not have -- we didn't report things  
22 the same way that we do at PNC. So there -- and by  
23 that, I mean on my PNC relationship, there is a specific  
24 question as to is it an exit or retained. We did not  
25 have that with RBC. So in my mind, you know, I mean,

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF DORCHESTER

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

Plaintiff(s),

5

vs. C/A No: 2013-CP-18-825

6

Liberty Cottages, LLC; GW  
7 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
8 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
9 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
10 E. Marko, Jr.,

Defendant(s).

11

12 (Caption continued on page 2)

13 D E P O S I T I O N

14 WITNESS: Stephen Wursta, Jr.

15 DATE: Wednesday, May 7, 2014

16 TIME: 1:34 p.m.

17 LOCATION: Nelson Mullins Riley & Scarborough  
5 Exchange Street  
18 Charleston, South Carolina

19 TAKEN BY: Attorneys for the Defendants

20 REPORTED BY: HEATHER M. CURLIN  
Professional Court Reporter

21 - - - - -

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1 STATE OF SOUTH CAROLINA  
COURT OF COMMON PLEAS

2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
Bank (USA),

4  
Plaintiff(s),

5 vs. C/A No: 2013-CP-10-2624

6  
7 Liberty Cottages, LLC; GW  
Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
8 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
9 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
10 E. Marko, Jr.,

11 Defendant(s).

12 STATE OF SOUTH CAROLINA  
COURT OF COMMON PLEAS

13 COUNTY OF FLORENCE

14 PNC Bank, N.A., successor to RBC  
Bank (USA),

15  
Plaintiff(s),

16 vs. C/A No: 2013-CP-21-1193

17  
18 Liberty Cottages, LLC; GW  
Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
19 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
20 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
21 E. Marko, Jr.,

22 Defendant(s).

23

24

25

1 there a special office or department that's housed  
2 there?

3 A. I work on the second floor of a branch.

4 Q. Okay. And I think where we started was you  
5 told me that essentially your duties and responsibilities  
6 have been the same for about five years now?

7 A. Yes, sir.

8 Q. So since about 2009?

9 A. Yes, sir.

10 Q. Is that right?

11 Okay. And so how would you describe what  
12 those duties and responsibilities are?

13 A. I manage a portfolio of loans.

14 Q. But the loan portfolios that you manage are  
15 somehow impaired or troubled or in default?

16 A. Some are, some are not.

17 Q. Okay. Who decides what loans are assigned to  
18 you to manage?

19 A. My manager.

20 Q. And who is that?

21 A. Mark Scafidi, S-C-A-F-I-D-I.

22 Q. S-C-A-F-I-D-I. Okay. And do you know what  
23 criteria Mr. Scafidi uses to determine what loans are  
24 assigned to you to manage?

25 A. No.

1 Q. When a loan is assigned to you to manage, are  
2 you given instructions or objectives or does it just  
3 land on your desk one day?

4 A. It -- it comes through an Internet site, says  
5 that it's now assigned to me.

6 Q. Okay. And does that Internet site tell you  
7 why it has been assigned to you?

8 A. No.

9 Q. Okay. Well, what do you do when a loan is  
10 assigned to you? How do you go about determining what  
11 it is you're supposed to do?

12 A. There's protocol in the policies and  
13 procedure manual. Um . . .

14 Q. Okay. Are you done? I don't want to  
15 interrupt you. I'm sorry.

16 A. I'm done.

17 Q. Tell me about this policy and procedure  
18 manual. Is it a policy and procedure manual for asset  
19 resolution team or for the bank as a whole? What is it?

20 A. There's an intranet site that posts the  
21 policies and procedures maybe all of them -- all of them  
22 for the corporation.

23 Q. Okay.

24 A. And we do a word search.

25 Q. Okay. Well, I guess I'm obviously not

1 understanding something. I mean, you're -- as a member  
2 of the asset resolution team, is it your responsibility  
3 to deal with impaired or troubled loans?

4 A. Yes.

5 Q. Okay. Well, what kind of loans that are not  
6 impaired or in trouble come to your attention, and why  
7 do they come to your attention?

8 A. Please ask the question again.

9 Q. Yeah. To put it in context, I think I asked  
10 you before, at least this is what I took away, maybe I'm  
11 wrong, but I asked you if the loans that you managed  
12 were troubled or impaired in some way, and you said, I  
13 think, not all of them. And so what I'm trying to find  
14 out is why is it that a loan that's not troubled or  
15 impaired would be assigned to you to manage?

16 A. Because it's a commercial real estate  
17 transaction and someone feels that I'm best, you know --  
18 you know, experienced and knowledgeable and capable of  
19 dealing with that loan or relationship.

20 Q. And what is it when you manage a loan or a  
21 relationship that's not troubled, I mean, are these  
22 loans performing?

23 A. Yes, sir.

24 Q. What do you do to manage a loan that's  
25 performing?

1           A.     I obtain the document files and financial  
2 files and make sure that we're in compliance with loan  
3 documents and that it -- I understand the business and  
4 operation and all that's involved with a loan.

5           Q.     Well, how does that differ from what you do  
6 if the loan is impaired or troubled?

7           A.     That process doesn't differ. It's a matter  
8 of strategy and execution.

9           Q.     Okay. So if I'm understanding you correctly,  
10 in your present position as part of the asset resolution  
11 team, you manage loans, a portfolio of loans, some of  
12 which are in default, some of which are not, some of  
13 which are troubled, some of which are not, some of which  
14 are impaired, some of which are not. Is that --

15          A.     That's correct.

16          Q.     -- correct?

17                 Okay. And do you have a certain geographic  
18 responsibility? Do you have a dollar amount  
19 responsibility? Or how -- who -- how is it decided what  
20 comes to your desk as opposed to one of your colleagues?

21          A.     Again, I don't know how it's decided it comes  
22 to me as opposed to someone else.

23          Q.     Okay. How many people are in a position  
24 similar to the position that you occupy?

25          A.     I don't know.

1 Q. Well, are there any others?

2 A. Yes.

3 Q. How many do you know of?

4 A. Approximately 20.

5 Q. Okay. And are they located throughout the  
6 service area for PNC, or are they all in one place?

7 A. Throughout the service area.

8 Q. Okay. What is the service area for PNC?

9 A. I would say the Midwest, Northeast, Mid  
10 Atlantic, and Southeast United States.

11 (Reporter interjection.)

12 BY MR. STEPP:

13 Q. Okay. Midwest, Northeast, Mid Atlantic, and  
14 Southeast?

15 A. Yes, sir.

16 Q. Okay. Were you involved in any consideration  
17 or discussions within PNC about the acquisition of RBC?

18 A. Yes.

19 Q. Tell me what role or responsibility you had  
20 in that regard.

21 A. I was asked to do due diligence on the  
22 commercial real estate portfolio.

23 Q. Okay. Who participated with you in doing  
24 that due diligence?

25 A. Probably 30 other people.

1 Q. Okay. How did that work? Were you just  
2 asked to look at certain loans or did you look at  
3 certain offices or how was it split up?

4 A. Boxes of files and everyone was asked to work  
5 as much and as hard and as fast as they could to get  
6 through the boxes.

7 Q. So boxes of files were just delivered to you  
8 and they went --

9 A. They were -- they were delivered to a site,  
10 remote site, and we flew in to do our due diligence.

11 Q. Okay. So when you flew into the site, did  
12 you just start at one end of the table and somebody else  
13 started at the other end of the table, or did you  
14 already know what was there and make some decision about  
15 who was going to do what?

16 A. There was no decision as to who was going to  
17 do what.

18 Q. Okay. When did that process take place?

19 A. I believe November two thousand -- December  
20 2011.

21 Q. Okay. Do you know when the agreement between  
22 PNC and RBC was signed?

23 A. I do not.

24 Q. Okay. Do you know when the transaction  
25 closed?

1 A. March 3rd, 2012.

2 Q. Okay.

3 A. I believe.

4 Q. All right. Now, when you set out to do due  
5 diligence on a commercial real estate loan portfolio,  
6 what are you trying to do? What are you trying to find  
7 out or what are you looking for?

8 A. We open the files and try to quickly assess  
9 the financial condition of the -- you know, the borrower  
10 and the guarantors and understand the market and  
11 determine if the risk rating is appropriate.

12 Q. Okay. Were you familiar with the RBC risk  
13 rating system?

14 A. I wasn't familiar with it.

15 Q. Okay. So what did you do? Just try to  
16 assign a risk rating to the loans you reviewed based  
17 upon the RBIC criteria -- I'm sorry, the --

18 A. Yes, sir.

19 Q. -- PNC criteria?

20 A. Yes, sir.

21 Q. That's a yes?

22 A. Yeah.

23 Q. And did you have a way to compare your rating  
24 to the rating that RBC had?

25 A. Yes.

1 A. Yes.

2 Q. Is that right?

3 A. (Witness nods head.)

4 Q. And so if you got these loans in May of 2012,  
5 in August of 2012, more or less, sometime in there, you  
6 would have -- you would have filled out this form and  
7 made a selection whether to exit or retain, correct?

8 A. That's correct.

9 Q. And in August of 2012, the first time that  
10 you filled out that form and got the drop-down box, you  
11 selected exit --

12 A. Correct.

13 Q. -- correct?

14 A. That's correct.

15 Q. Okay. In June of 2012 -- you took over the  
16 relationship in May. In June of 2012, do you remember  
17 calling Ms. Rice-Marko to try to get some information  
18 about the loans and the properties?

19 A. In June 2012, yes.

20 Q. Okay. And do you remember what you asked --  
21 I mean, I assume you introduced yourself and that sort  
22 of stuff, correct?

23 A. Yes.

24 Q. And how did you describe yourself to  
25 Ms. Rice-Marko at that time?

1           A.     As experienced and knowledgeable in  
2 commercial real estate.

3           Q.     Okay. And what information were you looking  
4 for at that point?

5           A.     Federal tax returns and personal financial  
6 statements on the borrowers and guarantors along with  
7 the operating statements for the different entities.

8           Q.     Okay. And had you -- you had examined the  
9 files and found that not to be included in the files?

10          A.     Correct.

11          Q.     Or there was some information, but it was out  
12 of date?

13          A.     I had no federal tax returns for any of the  
14 party -- borrowers or guarantors, and I had 2011 personal  
15 financial statements.

16          Q.     Okay. All right. And did Ms. Rice-Marko  
17 provide you with the information you requested?

18          A.     Not until November of 2013.

19          Q.     So your testimony is that you asked Debbie  
20 Rice-Marko in June of 2012 for information that she did  
21 not provide to you?

22          A.     Correct.

23          Q.     All right. Did you write her a letter and  
24 tell her you didn't have it or anything else?

25          A.     I think I spoke to her on the 6th of June and

1 A. No, sir.

2 Q. Okay. And you say no information came from  
3 PNC, correct?

4 A. That's correct.

5 Q. Do you agree it would be inappropriate for  
6 PNC to provide information on Ms. Rice-Marko's loans to  
7 Mr. Nix or to any other third party?

8 A. Absolutely.

9 MR. KNOWLTON: Object to the form and  
10 foundation.

11 BY MR. STEPP:

12 Q. I'm sorry, what was your answer?

13 A. Absolutely.

14 Q. You agree, absolutely?

15 A. We do not disclose confidential information.

16 Q. Okay. Thank you.

17 (Exhibit No. 6 was marked.)

18 (Discussion off the record.)

19 BY MR. STEPP:

20 Q. Okay. Exhibit 6 is a letter from Terri  
21 Gardner at Nelson Mullins to Scott Hale dated June 28,  
22 2012 with a copy to you. Do you see that?

23 A. Yes.

24 Q. And have you -- I mean it shows you getting a  
25 copy though. Have you seen this letter before?

1 her about the letter after you got a copy? I'm not  
2 asking you what the communication was --

3 MR. KNOWLTON: It's yes or no.

4 BY MR. STEPP:

5 Q. -- I'm asking you whether there were any.

6 A. No.

7 Q. Okay. Now, in July of 2012, did you and  
8 Ms. Paulson come to Charleston to meet with Debbie  
9 Rice-Marko?

10 A. We did.

11 Q. And tell me a little more about Ms. Paulson,  
12 who she is and what her responsibilities are.

13 A. Liz Paulson was an account manager, recently  
14 promoted to be a manager, and she was assigned some of  
15 the portfolio along the coast of Virginia and North and  
16 South Carolina. And, in fact, she was my manager for --  
17 under this relationship. So I had two managers, one for  
18 some of the portfolio and another manager for the loans  
19 along the East Coast of the United States. She is no  
20 longer with the bank. I can't tell you when she left.

21 Q. Okay. You said that for a while you had two  
22 managers, Ms. Paulson being one. And, I mean, was --  
23 did you report -- I guess I don't understand how the two  
24 managers for one portfolio worked. How did you know who  
25 to tell what to?

1           A.     For those loans and relationships in that  
2     portion of the portfolio that I reported to Liz and  
3     other loans and relationships, I reported to Mark  
4     Scafidi.

5           Q.     All right. And so what part of the portfolio  
6     did you report to Ms. Paulson about?

7           A.     The loans that were assigned to me in  
8     Virginia and North and South Carolina.

9           Q.     Okay. I'm sorry. We've gotten off. I'm  
10    just talking about the Debbie Rice-Marko loans.

11          A.     Oh.

12          Q.     Did you report to her exclusively on the  
13    Debbie Rice-Marko loans?

14          A.     Yes.

15          Q.     I'm sorry. Okay. So Mr. Scafidi -- at some  
16    point, did she replace Mr. Scafidi as the person to whom  
17    you reported about the Rice-Marko loans?

18          A.     Scafidi replaced Liz Paulson.

19          Q.     Okay. All right. It's the other way around.

20          A.     Very complicated.

21          Q.     All right. Well, what was the purpose of you  
22    and Ms. Paulson coming to Charleston in July of 2012?

23          A.     I initiated the meeting because I wanted to  
24    meet Ms. Marko and see the properties, but more  
25    importantly, to meet her and develop some rapport and

1 ask her personally to provide the information.

2 Q. And this was the -- you were coming to ask  
3 her for the same information that was in the June 28th  
4 letter; is that right?

5 A. Yes.

6 Q. And had you gotten any response from her to  
7 the June 28th letter at the time you had the meeting in  
8 Charleston?

9 A. Yes.

10 Q. What was that?

11 A. She was not going to provide the information.

12 Q. And did she tell you that she was concerned  
13 that the information she had previously provided had  
14 been released to third parties?

15 A. I don't recall that.

16 Q. Do you recall her telling you that in  
17 Charleston?

18 A. No, I do not.

19 Q. Do you recall having any conversation with  
20 her at all about the confidentiality of the information  
21 and any efforts that the bank would undertake to protect  
22 it?

23 A. I -- I don't recall that.

24 Q. Okay. I mean, you don't recall that the  
25 reason that Debbie Rice-Marko was telling you that she

1 wouldn't give you this stuff which had been provided  
2 previously was because she was concerned that it was  
3 getting outside of the bank?

4 MR. KNOWLTON: Object to the form and  
5 foundation.

6 A. No. She mentioned it wasn't provided because  
7 she had provided previously to other bankers and that  
8 information was used against her.

9 BY MR. STEPP:

10 Q. But you understood her to be talking about  
11 somebody other than PNC?

12 A. Yes.

13 Q. Okay. But you do recall her saying that?

14 A. I do.

15 Q. Okay. And what was your response to that?

16 A. She's required, you know, pursuant to the  
17 documents to provide it; we have an obligation to keep  
18 it confidential; and I can't help or work or advocate or  
19 do for her or do my job without -- without it.

20 Q. Okay. Is it your testimony that you made  
21 some -- gave Ms. Rice-Marko some assurance that the bank  
22 would keep the information confidential?

23 A. I believe I did.

24 Q. Okay. And what was the form of that  
25 assurance?

1           A.     That -- I -- I've been doing this for 30  
2 years; I'm experienced and knowledgeable; I have the  
3 confidence of senior management; I've never, to my  
4 knowledge, done anything immoral or unethical or  
5 illegal. I mean, that's what we do as a bank. I mean,  
6 you provide information, and it's my duty to keep it  
7 confidential.

8           Q.     Do you remember discussing with Ms. Rice-Marko  
9 that the information that Kenneth Nix appeared to have  
10 could only have come from PNC?

11          A.     My -- I don't recall having any conversation  
12 about Kenneth Nix at my meeting with Deborah Rice-Marko  
13 in July.

14          Q.     Okay. Do you remember in the meeting in  
15 Charleston at the conclusion after you discussed the  
16 financial information and Ms. Rice-Marko said she was  
17 not going to provide it -- you remember that part, she  
18 said she wasn't going to do it?

19          A.     Yes.

20          Q.     And do you remember Ms. Paulson said to her  
21 that, well, we can do this the easy way or we can do it  
22 the hard way? Do you remember that?

23          A.     I recall that.

24          Q.     Ms. Paulson was upset at the end of that  
25 meeting, wasn't she?

1 sign that we understand and follow, and if we wanted a  
2 full printout of the -- this, we can do so. So I  
3 haven't seen this printed form because I haven't printed  
4 it.

5 Q. Okay.

6 A. But I've always taken the training and I've  
7 always signed off and this code does apply to me.

8 Q. You've had a chance to review this code, have  
9 you not, with your attorney?

10 A. Briefly.

11 Q. All right. Do you need more time to read it?

12 A. No.

13 Q. All right. Do you agree with everything  
14 that's in there? Do you agree that you're bound by that  
15 code?

16 MR. KNOWLTON: Object to the form.

17 A. I agree that I'm bound by the code.

18 BY MR. HANNA:

19 Q. On page 19, I want to direct your attention  
20 to a question and answer in the right-hand column, and  
21 then I have a question or two for you about it.

22 A. Okay.

23 Q. Is that your understanding of PNC's policy  
24 with regard to confidential information?

25 A. It's a question and answer.

1 Q. But is that your understanding of the policy,  
2 that it can only be divulged under those circumstances?

3 A. I -- I'm not sure I understand the question.

4 Q. I asked you --

5 A. Would you please --

6 Q. -- what is your --

7 A. I mean, the problem -- that's a question and  
8 answer, you know --

9 Q. I'll rephrase it --

10 A. -- example in the margin of the -- of a, you  
11 know, multipage policy.

12 Q. I'll rephrase it for you, if I might.

13 MR. KNOWLTON: One quick question -- one  
14 quick second.

15 MR. HANNA: Sure.

16 (There was a pause in the proceeding.)

17 BY MR. HANNA:

18 Q. According to the answer to the question, "I  
19 am not sure when I am to disclose confidential  
20 information outside of PNC. Is there a procedure I need  
21 to follow?" The answer says, "You may never disclose  
22 confidential information unless," and then it cites  
23 three times when you can do it. It says, "The  
24 individual organization to which the information relates  
25 gives written consent."

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
18 WITNESS: Robert G. Radermacher (PNC Bank)

19 DATE: Tuesday, January 27, 2015

20 TIME: 10:07 a.m.

21 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
22 151 Meeting Street, Suite 600  
23 Charleston, South Carolina

24 TAKEN BY: Attorneys for the Defendants

25 REPORTED BY: HEATHER M. CURLIN  
Registered Professional Reporter

-----

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USS CLARKSVILLE, LLC; LIBERTY LAND COTTAGES, LLC;  
ROA, LLC; ROYAL BEACH PROPERTIES, LLC; and DEBORAH  
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MARKO, JR.; THE BROTHERS OF SC, LLC; and GW  
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22 ALSO PRESENT: Ms. Deborah Rice-Marko  
23 Mr. John Marko, Jr.  
24 Mr. Evan Marko  
25 Mr. Stephen Wursta, Jr.

(INDEX AT REAR OF TRANSCRIPT)

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1 (The deponent reserves the right to read and  
2 sign the deposition transcript.)

3 - - - - -

4 ROBERT G. RADERMACHER, having been previously  
5 sworn, testified as follows:

6 EXAMINATION

7 BY MR. STEPP:

8 Q. Good morning, Mr. Radermacher. We met just a  
9 few minutes ago before the deposition, but since we're  
10 on the record, I'll reintroduce myself. I'm Bobby  
11 Stepp. I represent some of the defendants in this case,  
12 Debbie Rice-Marko and some of her entities; and we are  
13 gathered today for the purpose of taking what we lawyers  
14 call a 30(b)(6) deposition of PNC Bank. And you've been  
15 designated as someone to testify as a part of that  
16 process. Do you understand that?

17 A. Yes.

18 Q. Okay. During the course of the deposition, I  
19 may ask you questions that you don't understand. If so,  
20 just tell me you don't understand it and I'll try to  
21 rephrase it or restate it in a way that you do  
22 understand it. If you don't tell me you don't  
23 understand it, I'll assume that your answer is your --  
24 that you understood the question and that your answer  
25 was responsive. Is that fair?

1 A. Okay.

2 Q. If you have any questions during the course  
3 of the deposition, please direct them to me. As a  
4 general matter, you're not entitled to consult with the  
5 bank's counsel during the course of the deposition, or  
6 if you do, I would be entitled to inquire about the  
7 subject matter of that conversation.

8 A. I understand.

9 Q. Okay. I don't think we're going to be a long  
10 time, but if you need to take a break, let me know and  
11 we'll do that. Okay?

12 A. Okay. Thank you.

13 Q. All right. Give me your full name, please,  
14 sir.

15 A. It's Robert G. Radermacher.

16 Q. And you are employed with RBC Bank?

17 A. No.

18 Q. I'm sorry. With PNC Bank?

19 A. With PNC Bank. Yes.

20 Q. I beg your pardon. I'll make that mistake  
21 again --

22 A. Okay.

23 Q. -- I can assure you. Correct me.

24 A. PNC Bank.

25 Q. All right. You're employed with PNC Bank?

1 A. Yes, sir.

2 Q. What is your position with PNC Bank?

3 A. I'm executive vice president in the PNC real  
4 estate group.

5 Q. Okay.

6 A. Primary function, though, is to be a credit  
7 policy and credit risk area.

8 Q. Okay. Now, help me sort of put your position  
9 into the hierarchy of the bank. To whom do you report  
10 as executive vice president?

11 A. I report to another executive vice president,  
12 his name is Kim McNeil.

13 Q. Ken?

14 A. Kim. Kim.

15 Q. Okay. Kim McNeil. Okay.

16 A. Correct.

17 Q. And who reports to you in your capacity  
18 as . . .

19 A. I have four credit officers located  
20 throughout the footprint of PNC that report to me.

21 Q. Okay. Is Mr. Wursta one of them?

22 A. No, sir.

23 Q. Okay. What is your reporting relationship,  
24 if any, with Mr. Wursta?

25 A. The team that I'm responsible for provides

1 request?

2 A. That is correct.

3 Q. All right. Look over on the next page, if  
4 you would. Under 3 -- well, in this document, we looked  
5 at -- on the first page, there's a Number 1 that says  
6 "Applies to"; and there's a Number 2, "Purpose"; and now  
7 Number 3 on page 2 says "Policy." So this is the actual  
8 policy relating to nonaccrual loans; is that correct?

9 A. Yes.

10 Q. Okay. And 3.1.1 says, "A commercial loan or  
11 lease must be placed on nonaccrual status when any one  
12 of the following conditions exist, regardless of the  
13 risk rating or regulatory classification." And then  
14 there follows a series of bullets, the first one of  
15 which is, "Payment in full of the interest or principal  
16 under the contractual terms of the loan is not  
17 expected." Correct?

18 A. Correct.

19 Q. So if the bank no longer believes that it  
20 will receive payment in full of the interest or  
21 principal pursuant to the terms of the loan itself,  
22 it -- that loan must be placed on nonaccrual status at  
23 that point; is that correct?

24 A. That's correct.

25 Q. And is this one of those policies for which

1 lenient repayment terms." Who decides if it's  
2 excessively lenient?

3 A. I guess it's up to the credit officer or --  
4 now, there are guidelines within the TDR policies and  
5 procedures that, you know, indicate what characteristics  
6 of a modification would be outside of being market and  
7 being excessively lenient.

8 Q. Okay. But I gather from this that a loan  
9 could be considered a troubled debt restructuring and  
10 yet not be designated as nonaccrual?

11 A. That is correct, provided that we can justify  
12 that the contractual obligation of the modified loan is  
13 fully collectible and it's performing under the terms of  
14 the modification agreement.

15 Q. Is the decision about whether the loan is  
16 fully collectible, is that based in part on the value of  
17 the collateral?

18 A. Yes.

19 Q. So if a bank -- if PNC concludes --  
20 designates a loan as nonaccrual, then that would -- then  
21 that designation is a determination both that the loan  
22 is not going to be repaid according to its terms and  
23 that the collateral would be insufficient to fully repay  
24 the bank with accrued principal and interest?

25 A. Yes. It would also include any guaranties

1 that you may have had on the -- within the loan  
2 agreement itself. Again, the contract that we have, the  
3 loan agreement, the guaranty agreement, combination of  
4 collateral plus any sort of wherewithal and capacity and  
5 willingness of the guarantor to chip in, again, makes  
6 the determination as to whether or not you have an  
7 overall shortfall.

8 Q. Okay.

9 A. Potentially. Potentially.

10 Q. Yeah. So the third thing would be for a loan  
11 designated as nonaccrual that the guarantors are not  
12 good for it either?

13 A. That is correct.

14 Q. Okay. All right. Let's look down the bottom  
15 of the page, and I think this is what you were telling  
16 me about, 3.1.3?

17 A. Uh-huh.

18 Q. It says, "Upon identification as nonaccrual,  
19 the problem loan will immediately be administered in  
20 accordance with the, quote, Administering the Loan, the  
21 Asset Resolution Team's Role on Watchlist Credits  
22 procedure."

23 A. Correct.

24 Q. So is that a way of saying it's assigned to  
25 ART at that point?

1 A. Correct.

2 Q. And of course, doubtful and loss would always  
3 be nonaccrual status?

4 A. Correct.

5 Q. So if something is classified as nonaccrual,  
6 is designated nonaccrual, then the exit classification  
7 is automatic?

8 A. Yes.

9 Q. Is that correct?

10 A. (Witness nods head.)

11 Q. Okay. All right, sir.

12 All right. Are there any exceptions to this  
13 policy? Is it -- if the conditions under -- any of the  
14 conditions under 4.1 are met that would require transfer  
15 to ART, would there be any circumstances under which a  
16 loan would not be transferred to ART?

17 A. Well, in Bullet Point 2 it indicates one of  
18 the exceptions that we would have with respect to the  
19 chief credit officer.

20 Q. Okay. Any other exception that you're aware  
21 of?

22 A. Not that I'm aware of outside of that.

23 Q. All right.

24 A. The second -- the other bullet -- the third  
25 bullet point also has that same written approval of the

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
18 WITNESS: Karyn Stiller (PNC Bank)

19 DATE: Thursday, January 29, 2015

20 TIME: 9:48 a.m.

21 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
22 151 Meeting Street, Suite 600  
23 Charleston, South Carolina

24 TAKEN BY: Attorneys for the Defendants

25 REPORTED BY: HEATHER M. CURLIN  
Registered Professional Reporter

-----

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27 ALSO PRESENT: Ms. Deborah Rice-Marko  
28 Mr. John Marko, Jr.  
29 Mr. Evan Marko  
30 Mr. Stephen Wursta, Jr.

31 (INDEX AT REAR OF TRANSCRIPT)

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1 (The deponent reserves the right to read and  
2 sign the deposition transcript.)

3 - - - - -

4 KARYN STILLER, having been previously sworn,  
5 testified as follows:

6 MR. KNOWLTON: And, Heather, we reserve the  
7 right to read and sign.

8 MR. HANNA: If y'all are going to do that,  
9 Frank, I think the position I'm going to take is to  
10 require all the deponents to read and sign, so don't  
11 have to worry about whether you waive it later on or  
12 not.

13 MR. KNOWLTON: Well, we never waive it, so I  
14 mean . . .

15 MR. HANNA: I'm going to require that they  
16 read and sign. I think under the rules, I can require  
17 that.

18 MR. KNOWLTON: You can require my -- but I  
19 don't -- that's fine, I would never waive that anyway.  
20 I don't think that's something you can impose on me, but  
21 that's fine. We disagree yet again on the rules, but  
22 that's okay.

23 MR. HANNA: Karyn, are you ready?

24 Have you placed her under oath yet?

25 EXAMINATION

1 BY MR. HANNA:

2 Q. Karyn, your full name for me, please, ma'am?

3 A. Karyn Stiller.

4 Q. And your present address?

5 A. 224 Windermere Court, Murray, PA.

6 Q. And you are employed by whom?

7 A. PNC Bank.

8 Q. And how long have you been with PNC?

9 A. It's about six years.

10 Q. It's my understanding that you now hold the  
11 position of VP ART senior asset manager; is that  
12 correct?

13 A. That is incorrect.

14 Q. All right. Did you ever hold that position?

15 A. I did.

16 Q. And when did you hold that position?

17 A. Approximately three years ago.

18 Q. June 8 of 2000- -- excuse me, June 2008 to  
19 January of 2011 sound right?

20 A. Sounds about right.

21 Q. And I apologize for my reading this  
22 incorrectly. You now hold the position of director of  
23 PNC Capital Markets; is that correct?

24 A. Correct.

25 Q. Tell me what the director of PNC Capital

1 Q. Ms. Stiller, we took a break and gave your  
2 attorney a chance to talk to you about the questions  
3 that we had posed to you before. Did y'all discuss  
4 anything other than that?

5 A. Just that I needed to answer the questions.

6 Q. Are you prepared to answer my question?

7 A. Yes.

8 MR. KNOWLTON: Would you reask the question?

9 BY MR. HANNA:

10 Q. Okay. In doing your job as a loan sale  
11 advisor, do you feel that you are bound by any rules  
12 with regard to confidentiality of the information of  
13 your clients and customers?

14 MR. KNOWLTON: Object to the form and  
15 foundation.

16 Please answer.

17 A. There -- I follow the guidelines set forth  
18 for the bank for confidentiality.

19 BY MR. HANNA:

20 Q. And what are those guidelines?

21 A. It depends on the context.

22 Q. All right. What factors determined what the  
23 rule is?

24 MR. KNOWLTON: Object to the form.

25 A. In my role and with what I do, I -- I'm just

1 trying to phrase this the way I want it to be  
2 interpreted.

3 Information that the bank has is I am -- I --  
4 what I -- in my role, what I do is protect the  
5 information that the bank has from people who -- it's  
6 just I -- you know, that's why we have confidentiality  
7 agreements, because in selling the notes, the  
8 information is such that we require people who want to  
9 buy the notes to maintain that information in  
10 confidence.

11 BY MR. HANNA:

12 Q. Does PNC have any written rules with regard  
13 to confidentiality?

14 MR. KNOWLTON: Object to the form and  
15 foundation.

16 A. I'm sure somewhere within the organization.

17 BY MR. HANNA:

18 Q. Again, you're a 30(b)(6) designee.

19 MR. KNOWLTON: Misstates the topic.

20 MR. HANNA: Pardon?

21 MR. KNOWLTON: Objection. Misstates her  
22 role. Rule 30(b)(6) does not cover this.

23 MR. HANNA: As I understand it, she is here  
24 today to testify about the marketing of the loans.

25 BY MR. HANNA:

1 MR. HANNA: I've got a clean copy, if you  
2 need it.

3 MR. STEPP: Well, I've got it. Let's just  
4 mark it.

5 (Exhibit No. 6 was marked.)

6 BY MR. STEPP:

7 Q. Exhibit 6, Ms. Stiller, I think you looked at  
8 while Mr. Hanna was examining you. I just want to make  
9 it a part of the record. This is an example of the  
10 confidentiality agreement that the potential investors  
11 for the Debbie Rice-Marko loans had to sign; is that  
12 correct?

13 A. This appears to be that confidentiality  
14 agreement.

15 Q. This one happens to be the one signed by  
16 Summit Investment Management, LLC, correct?

17 A. That's what it appears.

18 Q. Were all the others in the same format, same  
19 form?

20 A. Yes.

21 Q. I think you said that --

22 MR. KNOWLTON: Bobby, this has got the  
23 joinder attached, so I think that shouldn't be a part of  
24 this exhibit.

25 MR. STEPP: I think that's probably right.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC BANK, N.A., SUCCESSOR TO RBC BANK (USA),  
4 Plaintiffs,

5 vs. CASE NO. 2013-CP-10-2624

6 LIBERTY COTTAGES, LLC; GW DORCHESTER, LLC;  
7 USS CLARKSVILLE, LLC; LIBERTY COTTAGES LAND, LLC;  
8 ROA, LLC; ROYAL BEACH PROPERTIES, LLC;  
9 THE BROTHERS OF SC, LLC; DEBORAH RICE-MARKO a/k/a  
10 DEBORAH G. RICE-MARKO; EVAN R. MARKO AND  
11 JOHN E. MARKO, JR.,  
12 Defendants.

D E P O S I T I O N

13 WITNESS: William C. Barksdale, Jr.  
14 DATE: April 1, 2015  
15 TIME: 10:03 a.m.  
16 LOCATION: Law Offices of  
17 Sowell Gray Stepp & Laffitte, LLC  
18 1310 Gadsden Street  
19 Columbia, South Carolina  
20 TAKEN BY: Attorneys for the Defendants  
21 REPORTED BY: Carolyn M. Beam  
22 Court Reporter

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14 DEBORAH RICE-MARKO A/K/A DEBORAH G.  
15 RICE-MARKO:

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22 (Via Phone)

23 Also Present:  
24 Deborah Rice-Marko  
25 Evan Marko  
John Marko

(INDEX AT REAR OF TRANSCRIPT)

1           STIPULATION: It is stipulated by counsel  
2 that this deposition is being taken in accordance  
3 with the South Carolina Rules of Civil Procedure,  
4 and that the deponent reserves the right to read  
5 and sign the deposition transcript.

6           WILLIAM C. BARKSDALE, JR., being first  
7 duly sworn, testified as follows:

8                           EXAMINATION

9 BY MR. STEPP:

10           Q. Mr. Barksdale, I'm Bobby Stepp. I  
11 represent some of the defendants in the case. On  
12 the telephone there is Bill Hanna, who represents  
13 the remaining defendants in this case. I'm going  
14 to ask you some questions today regarding your  
15 opinions as an expert for the plaintiff in this  
16 case. And Mr. Hanna may well have some questions  
17 for you as well.

18                   All right. If I ask you a question  
19 that you don't understand, which is entirely  
20 possible, if you would let me know that, I'll try  
21 to restate it or rephrase it in a way that you do  
22 understand it.

23           A. Right.

24           Q. Okay? If I don't hear from you, I'll  
25 assume that you understood it. Fair?

1 A. Fair.

2 Q. All right. If you want to take a  
3 break, let me know. If you have any questions  
4 about the proceedings, you need to direct them, in  
5 the first instance, to me. There might be  
6 circumstances under which you're permitted to  
7 confer with Mr. McGee, but start by asking me any  
8 questions you have. Okay?

9 A. I'll do that.

10 Q. All right.

11 A. Do that.

12 Q. Very good. Mr. Barksdale, you have  
13 been retained as an expert witness for the  
14 plaintiff, PNC Bank in this case; is that correct?

15 A. That's correct.

16 Q. Would you tell me the area or areas in  
17 which you regard yourself as an expert for purposes  
18 of this case?

19 A. For the purposes of this case -- you  
20 have a copy of my report.

21 Q. Yeah.

22 A. I stated that in the -- in the first  
23 paragraph. Expert in commercial lending,  
24 commercial real-estate lending, commercial loan  
25 workout as well as general banking matters.

1 BY MR. STEPP:

2 Q. Okay. So, in your experience, in your  
3 career, personal financial information of borrowers  
4 has been treated as confidential by all the banks  
5 with which you've been associated?

6 MR. MCGEE: Object to the form.

7 THE WITNESS: Generally speaking,  
8 personal financial information or any financial  
9 information is held -- held in confidence in a  
10 confidential credit file.

11 BY MR. STEPP:

12 Q. Okay. Well, why -- why is that?

13 A. Well, they've got -- the bank has that  
14 information and they want to keep that customer and  
15 they don't want to spread that information around.  
16 I mean, it's just not something that you -- you  
17 would want published.

18 BY MR. STEPP:

19 Q. Yeah. A bank would have a hard time  
20 getting business, in your experience -- well, let  
21 me put it this way: Would a bank have a hard time  
22 attracting and keeping customers, in your  
23 experience, if it routinely published their  
24 confidential financial information to third  
25 parties?

1 certainly.

2 BY MR. STEPP:

3 Q. When I say, Mr. Barksdale -- let me  
4 withdraw that question and try to address  
5 Mr. McGee's concern, if I can. When we say  
6 personal financial information, do you know what  
7 I'm talking about?

8 A. I understand personal financial  
9 statements.

10 Q. Tell me what you understand it to be?

11 A. It's a listing of a person's assets,  
12 liabilities and equity.

13 Q. Okay.

14 A. At one point in time.

15 Q. Okay. Now, what about -- just -- just  
16 to pursue that a minute or two, what about  
17 information on a loan application that's not,  
18 strictly speaking, a financial statement? Would  
19 that also be confidential, in your view?

20 A. Loan applications would be  
21 confidential. But in the consumer area, you've got  
22 the -- the -- the Fannie Mae, Freddie Mac forms  
23 that have to go in for all the mortgage loans. And  
24 it has a section in there for financial  
25 information.

1 Q. Right.

2 A. It's abbreviated, but it's, you know,  
3 it still -- it still goes into the marketplace, if  
4 those loans are going to be sold.

5 Q. A loan application contains, among  
6 other things, financial information of the  
7 borrower, or the prospective borrower?

8 A. Yeah, in commercial loans, normally you  
9 don't necessarily have a formal loan application.  
10 But the officer has a checklist of things that they  
11 need to get from the borrower in order to  
12 underwrite the loan correctly.

13 Q. Right. And --

14 A. One of the forms that a bank receives.

15 Q. And in a commercial loan, they might  
16 acquire a personal financial statement, among other  
17 things, correct?

18 A. Yes.

19 Q. And so that personal financial  
20 statement would be treated as confidential by the  
21 bank?

22 A. Generally speaking, yes, I mean,  
23 financial statements are -- are -- are  
24 confidential, as far as the bank is concerned, on  
25 loan relationships.

1 Q. Okay. What about tax return of the  
2 borrower? Would that also be confidential?

3 A. Yes.

4 Q. Okay. If there was -- if the borrower  
5 submitted an appraisal of the collateral, would  
6 that also be confidential?

7 A. Generally, borrowers don't submit  
8 appraisals of the collateral. If you're going to  
9 do a real estate loan, the borrower pays for the  
10 real estate appraisal, but the bank orders the  
11 appraisal.

12 Q. Well, what if -- what if the bank does  
13 submit an appraisal in support of its application?

14 A. That the bank --

15 Q. No, that the borrower submits it. I'm  
16 sorry.

17 A. Well, that is not something that --  
18 that the bank should consider at all. They should  
19 -- they should get their appraisal.

20 Q. Well, but if the borrower submits the  
21 borrower's own appraisal to the bank, should the  
22 bank treat that appraisal as confidential?

23 A. Well, are you talking about real  
24 estate?

25 Q. Yes.

1 A. Are you talking about --

2 Q. I'm talking about real estate.

3 A. Real estate only. Not an appraisal of  
4 the equipment or --

5 Q. Okay.

6 A. -- any -- any -- any personal property  
7 or any of those kinds of things.

8 Q. All right. So if it's an appraisal of  
9 real estate, the bank should order an --

10 A. It becomes part of the file. Yes, you  
11 hold it confidential. But you wouldn't want to  
12 spread it around. But you'd want to get your own  
13 appraisal.

14 Q. Right. I understand that. But you --  
15 but the bank wouldn't be at liberty to take the  
16 borrower's appraisal and just give it to a third  
17 party, would the bank?

18 A. I think that would be inappropriate.

19 Q. Okay. What about a rent-roll or  
20 information, if there was -- if it's an  
21 income-producing property, subject to rental  
22 income, if the borrower submitted a rent-roll,  
23 would that also be confidential?

24 A. Well, it would probably be part of the  
25 appraisal, if it's a commercial piece of property.

1 They would want it evaluated on the basis of  
2 income.

3 Q. And -- and when the bank has that  
4 rent-roll, it should keep it confidential, if the  
5 bank --

6 A. It should be a part of their file.

7 Q. Okay. All right. Now, after a loan is  
8 made, would -- would the payment history be  
9 regarded by the bank as confidential?

10 A. That would be bank records, which would  
11 be confidential bank records.

12 Q. Okay. The -- the loan balance,  
13 confidential, part of the bank records?

14 A. Yeah, unless it's -- unless it's part  
15 of the recorded documents, you know, mortgage or  
16 agreements or something like that.

17 Q. Okay.

18 A. But then that was going to change, so  
19 there you are.

20 Q. Right. So, I mean, but the mortgage,  
21 the recorded documents, it's going to have the  
22 original loan amount. But it's not going to have  
23 the balance at any given time reflected?

24 A. That's correct.

25 Q. That's correct, okay. And so the -- so

1 bank puts the information on a website and makes it  
2 available to certain third parties, can -- can --  
3 is the bank permitted to do that, if it gets a  
4 confidentiality agreement from people that are  
5 going to access the information?

6 A. Well, in this instance, that is exactly  
7 what happened. And the bank was in the process of  
8 testing the water on the sale of -- the possibility  
9 of sale of -- of negotiable instruments. And  
10 negotiable instruments can be sold, as you well  
11 know, on a regular basis. So and that -- that  
12 didn't occur until 2013.

13 Q. My -- my question is this: I mean, I'm  
14 -- I thought we had established so far that the  
15 bank may come into possession of information  
16 regarding the collateral or the borrower that the  
17 bank would regard as confidential, correct?

18 A. Correct.

19 Q. Okay. Then if the bank regards it as  
20 confidential, it should not disclose it to third  
21 parties, correct?

22 MR. MCGEE: Object to the form.  
23 Misstates testimony.

24 THE WITNESS: In the normal course of  
25 business, correct.

1 BY MR. STEPP:

2 Q. All right. So when a bank decides --  
3 can -- can a bank then release the information to a  
4 third party if it just gets the third party to sign  
5 a confidentiality agreement?

6 A. You would have to get the  
7 confidentiality agreement if you were going to  
8 release any -- any information.

9 Q. Okay. So releasing information to a  
10 party without a confidentiality agreement would be  
11 bad?

12 A. Yes, I would say that would be bad.

13 Q. Okay. Now, is the confidentiality  
14 agreement itself sufficient to protect the bank's  
15 duty to -- to preserve the bank's duty to protect  
16 the information?

17 MR. MCGEE: Object to the form.

18 BY MR. STEPP:

19 Q. In other words, can I just say, I'll --  
20 I can give this to anybody, as long as they promise  
21 to keep it a secret?

22 MR. MCGEE: Same objection.

23 THE WITNESS: That's not the way it  
24 happened here. It -- there was an analysis done.  
25 And they -- they -- they offered the opportunity

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

2 COUNTY OF FLORENCE

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-21-1193

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 WITNESS: Kenneth L. Nix

18 DATE: Wednesday, April 9, 2014

19 TIME: 10:09 a.m.

20 LOCATION: Womble Carlyle Sandridge & Rice  
21 5 Exchange Street  
22 Charleston, South Carolina

23 TAKEN BY: Attorneys for the Defendants

24 REPORTED BY: HEATHER M. CURLIN  
25 Professional Court Reporter

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21 MARKO, JR.; THE BROTHERS OF SC, LLC; and GW  
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28 BY: JOHN C. HAWK, IV, ESQUIRE  
29 5 Exchange Street  
30 Charleston, South Carolina 29401  
31 843.720.4626  
32 jhawk@wcsr.com

1 we know what you mean. I know it's hard; if you can,  
2 avoid uh-huhs and huh-uhs. Those don't translate very  
3 well into the transcript.

4 A. I'll do my best.

5 Q. I appreciate that. And I'll try to -- if I  
6 think it's unclear, I'll try to ask a follow-up  
7 question. If you want to take a break at some point,  
8 we'll do that. Okay?

9 A. Yes, sir.

10 Q. I think you gave the court reporter your full  
11 name, but just repeat it for me, please.

12 A. Kenneth Lance Nix.

13 Q. Okay. How old are you, Mr. Nix?

14 A. 33.

15 Q. And where are you employed?

16 A. Land South of Charleston.

17 Q. All right. Tell me a little bit about Land  
18 South of Charleston. What kind of a company is that?

19 A. We are a real estate group. We have a  
20 brokerage side. We buy and sell loans, notes.

21 Q. Do you buy and sell real estate as well?

22 A. Yes, sir.

23 Q. Do you have any sort of license, broker's  
24 license, real estate license?

25 A. Yes, sir. I'm broker in charge of Land South

1 of Charleston.

2 Q. Okay. So as a real estate broker, do you  
3 list properties for sale?

4 A. Personally, no.

5 Q. Does Land South list properties?

6 A. I do have one agent that has a listing.

7 Q. Okay. But listing properties for sale is not  
8 really --

9 A. Is not our main forte.

10 Q. All right. Tell me what the main forte of  
11 Land South is, please.

12 A. The main forte of Land South is to develop,  
13 slash, re- -- for lack of better terms, take distressed  
14 assets, work with them to make them positive assets.

15 Q. When you say distressed assets, tell me what  
16 you mean by that.

17 A. They -- well, also commercial development in  
18 real estate, not just distressed. We do a number of  
19 things.

20 Q. Okay. Well, I --

21 A. Our main forte is to make money. That's what  
22 we work at every morning.

23 Q. Okay.

24 A. We work with real estate of all kinds. We've  
25 worked with planes, buses, a number of things. We -- a

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
18 WITNESS: Daniel B. "Trey" Morrison, III  
19 DATE: Wednesday, March 11, 2015  
20 TIME: 10:15 a.m.  
21 LOCATION: Womble Carlyle Sandridge & Rice, LLP  
22 5 Exchange Street  
23 Charleston, South Carolina  
24 TAKEN BY: Attorneys for the Plaintiff  
25 REPORTED BY: HEATHER M. CURLIN  
Registered Professional Reporter

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12 ROA, LLC; ROYAL BEACH PROPERTIES, LLC; and DEBORAH  
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32 jhawk@wcsr.com

1 Ms. Rice-Marko, and I know at the break you were able to  
2 look through this dep- -- this affidavit, rather.

3 A. Right.

4 Q. I'm not going to go into the whole affidavit  
5 unless you want to, but there's a specific reference to  
6 you on page 11 in Paragraph 39. Do you see that?

7 A. Yes, I do.

8 Q. And this is -- Ms. Rice-Marko is talking  
9 about Mr. Ken Nix --

10 A. Uh-huh.

11 Q. -- but midway through that paragraph, she  
12 states, "On February 27th, 2013, Trey Morrison contacted  
13 Drew Chaplin, who is the leasing agent and one of the  
14 tenants of the BB&T building in Florence, which secured  
15 the loan of The Brothers of SC to PNC."

16 Do you see that?

17 A. I do.

18 Q. And is that the call that you referred to  
19 earlier today?

20 A. Yes.

21 Q. Okay. And she goes on to say that, "Morrison  
22 identified himself as working for a company that targets  
23 distressed assets and told Chaplin that he had detailed,  
24 nonpublic information about the building."

25 Do you see that?

1 A. I do.

2 Q. And did you say those things to Mr. Chaplin?

3 A. I don't remember saying those things to him.

4 MR. STEPP: I'm sorry, what was that?

5 THE WITNESS: I don't remember saying that.

6 BY MR. KNOWLTON:

7 Q. Did you have detailed, nonpublic information  
8 about the BB&T building?

9 A. Like I said, all I can remember having was  
10 the addresses --

11 Q. Okay.

12 A. -- which is how I ended up at the building.

13 Q. All right. And would you have said that you  
14 worked for a company that targets distressed assets?

15 A. I don't remember saying that.

16 Q. Okay. Is that how you characterize Summits'  
17 business?

18 A. That's not how I would normally address  
19 somebody that I was calling about a building, but I  
20 can't -- I don't remember the conversation with him.

21 Q. Right. Is that terminology you typically  
22 used in your day-to-day business?

23 A. No.

24 Q. No?

25 A. No.

1 calling off the sign that he had for sale or for lease  
2 on the building.

3 Q. Okay. And Mr. Morrison [sic] marked  
4 Mr. Chaplin's affidavit as an exhibit, Exhibit Number 7.  
5 You do recall having a conversation with Drew Chaplin,  
6 and do you have any reason to doubt that that  
7 conversation took place on February 27, 2013?

8 A. Yeah, I don't know the exact date, but so no,  
9 I'm not sure what the exact date was.

10 Q. Okay. But you don't remember the specifics  
11 of the conversation?

12 A. No. I just remember calling off the sign.  
13 Like I said, I don't remember the specifics.

14 Q. Do you have any reason to believe that  
15 Mr. Chaplin is mistaken in what he put in his affidavit?

16 A. I can't speak for him. I don't know.

17 Q. All right. So you just don't know one way or  
18 the other?

19 A. Do not know.

20 Q. You don't recall the conversation? This  
21 could have happened or it might not have happened, you  
22 can't say one way or the other?

23 A. I can't say. Right. I make 500 -- not -- 50  
24 calls a day, you know, so I don't know two years ago.

25 Q. It's been three and a half years --

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs. C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
18 WITNESS: Stephen Wursta, Jr. (PNC Bank)

19 DATE: Wednesday, January 28, 2015

20 TIME: 1:33 p.m.

21 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
22 151 Meeting Street, Suite 600  
23 Charleston, South Carolina

24 TAKEN BY: Attorneys for the Defendants

25 REPORTED BY: HEATHER M. CURLIN  
Registered Professional Reporter

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26  
27 ALSO PRESENT: Ms. Deborah Rice-Marko  
28 Mr. John Marko, Jr.  
29 Mr. Evan Marko

30 (INDEX AT REAR OF TRANSCRIPT)

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1 that are described in Exhibit 6 as being material events  
2 of default?

3 MR. MCGEE: Object to the form. Legal  
4 conclusion.

5 A. We identified the defaults under the  
6 forbearance agreement.

7 BY MR. STEPP:

8 Q. Do you distinguish between material and  
9 nonmaterial defaults, or as I believe you told me  
10 previously, a default is a default?

11 A. A default is a default.

12 Q. All right. And that continues to be your  
13 assessment of it, correct?

14 A. That's correct.

15 MR. MCGEE: Object to the form.

16 BY MR. STEPP:

17 Q. I gather that the \$20 million was not paid  
18 within ten days of the date of that letter; is that  
19 correct?

20 A. That's correct.

21 Q. So look, then, at Wursta Number 7. This is a  
22 letter dated February 15, 2013 to, I think, the same  
23 addressees as Exhibit 6, correct?

24 A. Appears to be.

25 Q. Why was this letter sent?

1           A.     My understanding is that it was sent to  
2 provide notice of payment default, which was not  
3 addressed in the November 2012 letter.

4           Q.     Well, in the November letter there had not --  
5 no payment default existed at the time the November  
6 letter was written; is that correct?

7           A.     That's correct.

8           Q.     But there were other defaults referenced as  
9 we just went through, correct?

10          A.     That's correct.

11          Q.     And in your view, you didn't distinguish  
12 between those defaults and any other kind of default,  
13 correct?

14          A.     A default -- we identified a default at a  
15 given point in time.

16          Q.     Okay. But for some reason, notwithstanding  
17 that fact, did PNC feel it necessary to send a second  
18 letter of default in February referencing nonpayment?

19          A.     The decision to send this letter was, again,  
20 a collective conversation between me, my manager, our  
21 in-house counsel, and outside counsel. And it was  
22 determined that -- to send the letter, and we did.

23          Q.     Okay. Who made -- would the decision to send  
24 the November letter, Exhibit 6, who made that decision?

25          A.     Again, it was a collective

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT

PNC Bank, N.A., successor to RBC ) Civil Action No. 2013-CP-10-2624  
Bank (USA), )  
 )  
Plaintiff, )

vs. )

Liberty Cottages, LLC; GW )  
Dorchester, LLC; USS Clarksville, )  
LLC; Liberty Cottages Land, LLC; )  
ROA, LLC; Royal Beach Properties, )  
LLC; The Brothers of SC, LLC; )  
Deborah Rice-Marko a/k/a Deborah G. )  
Rice-Marko; Evan R. Marko and John )  
E. Marko, Jr., )  
 )  
Defendants. )

**PLAINTIFF'S MOTION TO STRIKE**  
**DEFENDANTS' JURY DEMAND &**  
**REFER CASE TO**  
**MASTER-IN-EQUITY**

FILED  
2015 JAN 26 PM 2:15  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

**TO: ROBERT E. STEPP, ESQUIRE, ATTORNEY FOR DEFENDANTS LIBERTY COTTAGES, LLC; USS CLARKSVILLE, LLC; LIBERTY COTTAGES LAND, LLC; ROA, LLC; ROYAL BEACH PROPERTIES, LLC; AND DEBORAH RICE-MARKO A/K/A DEBORAH G. RICE-MARKO; AND**

**WILLARD D. HANNA, JR., ESQUIRE, ATTORNEY FOR DEFENDANTS GW DORCHESTER, LLC, THE BROTHERS OF SC, LLC, EVAN R. MARKO, AND JOHN E. MARKO, JR.:**

YOU WILL PLEASE TAKE NOTICE that Plaintiff PNC Bank, National Association, successor to RBC Bank (USA) ("PNC"), hereby moves pursuant to Rules 39 and 53(b) of the South Carolina Rules of Civil Procedure to strike the jury demand of Defendants Liberty Cottages, LLC, GW Dorchester, LLC, USS Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, Deborah Rice-Marko a/k/a Deborah G. Rice-Marko, Evan R. Marko, and John E. Marko, Jr. (collectively, "Defendants") and have this case referred to the Master-in-Equity for Charleston County.

Plaintiffs have filed counterclaims in this action and have demanded a jury trial. The demand should be stricken for two reasons. First, Defendants' counterclaims are related to the subject loan documents and, therefore, Defendants expressly and irrevocably waived their right to a jury trial on those claims in said documents. Second, to the extent Defendants claim that their counterclaims are not related to the subject loan documents, such claims are permissive and Defendants have waived their right to a jury trial on those claims by asserting them in this equitable foreclosure action. Because Defendants are not entitled to a jury trial on those claims, this matter is appropriate for referral to the Master-in-Equity for Charleston County.

PNC's Motion will be further based on pleadings filed with the Court, discovery served by the parties to this action, relevant affidavits, other documents as permitted by the Rules, and the Memorandum of Law, which will be filed and served under separate cover.

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January 23, 2015.

**CERTIFICATE OF SERVICE**

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for PNC Bank, N.A., successor to RBC Bank (USA), do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

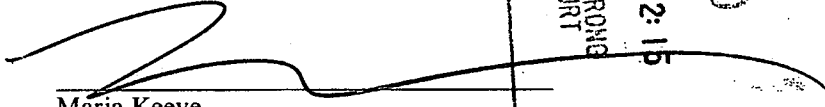
Document(s):

Plaintiff's Motion to Strike Defendants' Jury Demand & Refer Case to Master-In-Equity

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Maria Keeve  
Administrative Assistant

FILED  
2015 JAN 26 PM 2:15  
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CLERK OF COURT  
BY \_\_\_\_\_

\* Jan. 23 2015

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT

PNC Bank, N.A., successor to RBC ) Civil Action No. 2013-CP-10-2624  
 Bank (USA), )  
 )  
 Plaintiff, )

vs. )

Liberty Cottages, LLC; GW )  
 Dorchester, LLC; USS Clarksville, )  
 LLC; Liberty Cottages Land, LLC; )  
 ROA, LLC; Royal Beach Properties, )  
 LLC; The Brothers of SC, LLC; )  
 Deborah Rice-Marko a/k/a Deborah G. )  
 Rice-Marko; Evan R. Marko and John )  
 E. Marko, Jr., )  
 )  
 Defendants. )

**PLAINTIFF'S MEMORANDUM IN**  
**SUPPORT OF ITS MOTION TO**  
**STRIKE DEFENDANTS' JURY**  
**DEMAND & REFER CASE TO**  
**MASTER-IN-EQUITY**

Plaintiff PNC Bank, National Association, successor to RBC Bank (USA) ("PNC"), hereby respectfully submits its Memorandum in Support of its Motion to Strike the Jury Demand of Defendants Liberty Cottages, LLC, GW Dorchester, LLC, USS Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, Deborah Rice-Marko a/k/a Deborah G. Rice-Marko ("D. Rice-Marko"), Evan R. Marko ("E. Marko"), and John E. Marko, Jr. ("J. Marko") (collectively, "Defendants") and Refer this Case to the Master-in-Equity for Charleston County:

**FACTUAL AND PROCEDURAL BACKGROUND**

Collectively, Defendants have nine loans with PNC. See generally Complaint. The loans were all cross-defaulted and cross-collateralized through modifications in February 2008 and January 2009, and after eight of the nine loans matured in 2010, through a Forbearance

Agreement in July 2011, which renewed each of the loans. Id. Upon Defendants' default on the Forbearance Agreement, PNC brought the instant action to foreclose three mortgages of property in Charleston County, an action in Dorchester County to foreclose one mortgage of property in Dorchester County, and an action in Florence County to foreclose one mortgage of property in Florence County. Id.; see also Order to Transfer and Consolidate filed June, 11, 2014. The Dorchester and Florence actions have now been consolidated with this Charleston County action. Id.

Defendants' nine loans are described in more detail as follows:

- (1) "Royal Beach Loan:" loan to D. Rice-Marko on May 19, 2000, in the original principal amount of \$2,500,000, which was subsequently assumed by Royal Beach Properties, LLC. This loan was renewed and/or modified on May 18, 2001, April 14, 2002, May 11, 2004, May 19, 2005, March 23, 2006, April 17, 2007, July 18, 2007, August 26, 2008, January 26, 2009, January 26, 2010, February 19, 2010, and July 15, 2011. This loan is guaranteed by D. Rice-Marko, E. Marko, and J. Marko.
- (2) "Brothers Loan # 1:" loan to The Brothers of NC, LLC, on August 7, 2001, in the original principal amount of \$1,100,000. This loan was renewed and/or modified on July 18, 2002, August 11, 2003, August 9, 2004, August 22, 2005, August 30, 2006, August 28, 2007, August 26, 2008, July 29, 2009, January 29, 2010, and July 15, 2011. Because The Brothers of NC, LLC, merged into The Brothers of SC, LLC, on August 3, 2004, subsequent renewals and/or modifications were made to The Brothers of SC, LLC. This loan is guaranteed by E. Marko and J. Marko.
- (3) "DRM Loan:" loan to D. Rice-Marko on January 13, 2005, in the original principal amount of \$5,000,000. This loan was renewed and/or modified January 11, 2007, January 26, 2009, January 26, 2010, February 23, 2010, and July 15, 2011.
- (4) "Clarksville Loan:" loan to D. Rice-Marko on January 24, 2005, in the original principal amount of \$550,400, which was subsequently assumed by USS Clarksville, LLC. This loan was renewed and/or modified on August 30, 2006, March 22, 2007, February 25, 2008, January 26, 2009, January 26, 2010, February 23, 2010, and July 15, 2011. This loan is guaranteed by D. Rice-Marko.

- (5) "ROA Loan # 1:" loan to ROA, LLC, on June 24, 2005, in the original principal amount of \$1,763,000. This loan was renewed and/or modified on August 30, 2006, February 26, 2007, March 22, 2007, February 25, 2008, January 26, 2009, January 26, 2010, February 24, 2010, and July 15, 2011. This loan is guaranteed by D. Rice-Marko and Liberty Cottages Land, LLC.
- (6) "Dorchester Loan:" loan to Evelyn D. Rice on November 18, 2005, in the original principal amount of \$2,350,000, which was subsequently assumed by GW Dorchester, LLC. This loan was renewed and/or modified on December 28, 2006, January 16, 2008, February 26, 2008, July 27, 2009, January 22, 2010, and July 15, 2011. This loan is guaranteed by D. Rice-Marko, E. Marko, and J. Marko.
- (7) "Liberty Cottages Loan:" loan to Liberty Cottages, LLC, on March 22, 2007, in the original principal amount of \$2,500,000. This loan was renewed and/or modified on February 25, 2008, January 26, 2009, January 26, 2010, February 23, 2010, and July 15, 2011. This loan is guaranteed by D. Rice-Marko, E. Marko, and J. Marko.
- (8) "ROA Loan # 2:" loan to ROA, LLC, on November 9, 2007, in the original principal amount of \$3,920,000. This loan was renewed and/or modified July 15, 2011. This loan is guaranteed by D. Rice-Marko.
- (9) "Brothers Loan # 2:" loan to The Brothers of SC, LLC, on October 11, 2007, in the original principal amount of \$4,900,000. This loan was renewed and/or modified on January 26, 2009, January 21, 2010, and July 15, 2011. This loan is guaranteed by E. Marko and J. Marko.

Defendants GW Dorchester, LLC, The Brothers of SC, LLC, E. Marko, and J. Marko (collectively, "Brothers Defendants") and Defendants Liberty Cottages, LLC, USS Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC, Royal Beach Properties, LLC, and D. Rice-Marko (collectively, "DRM Defendants") each filed an Amended Answer and Counterclaim, asserting identical counterclaims for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) breach of the purported duty of confidentiality; (4) civil conspiracy; (5) negligence/gross negligence; and (6) negligent misrepresentation. See generally Amended Answers and Counterclaims. The DRM Defendants asserted an additional counterclaim for

violation of South Carolina's Unfair Trade Practices Act. See DRM Defendants' Amended Answer and Counterclaim.

Defendants' counterclaims are all based on two sets of allegations. See generally Amended Answers and Counterclaims. First, Defendants allege that PNC did not work with them in good faith on their January 2009 loan modifications and July 2011 Forbearance Agreement and, more specifically, should not have required the cross-collateralization and cross-default provisions as part of those modifications. Id. Defendants also allege that PNC disclosed their confidential information to third-parties to their detriment. Id.

Defendants demanded a jury trial in this action. Id. PNC filed the instant Motion to strike Defendants' jury demand and have this case referred to the Master-in-Equity for Charleston County.

#### LEGAL ANALYSIS

As an initial matter, Defendants have waived any rights they may have had to a jury trial on their counterclaims in this foreclosure action. Because Defendants' counterclaims are related to the subject loan documents, Defendants expressly and irrevocably waived their right to a jury trial on those claims in said documents. Secondly, it is well-established that there is no right to a jury trial for an equitable foreclosure action. Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)) ("[T]here is no right to trial by jury for equitable actions."); N.C. Federal Savings and Loan Ass'n v. DAV Corp., 298 S.C. 514, 514, 381 S.E.2d 903, 904 (1989) (referring to foreclosure proceeding as equitable). Thus, to the extent Defendants contend that their counterclaims are not related to the subject loan documents (a contention with which PNC disagrees), such claims are permissive and Defendants have

waived their right to a jury trial on those claims by asserting them in this equitable foreclosure action. Therefore, Defendants are not entitled to a jury trial in this matter, and the case should be referred to the Master-in-Equity.

**I. Defendants' counterclaims are related to the subject loan documents and, therefore, Defendants expressly and irrevocably waived any rights they may have had to a jury trial on those claims in the subject loan documents.**

It is well-established that a party may waive its right to a jury trial by contract. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002); Leasing Service Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986). Because the right to a jury trial is a substantial right, jury waiver provisions should be strictly construed. Id. Nevertheless, jury waiver provisions must be given effect according to their "plain, ordinary and popular meaning." Id. Further, the Supreme Court of South Carolina recently held that jury waiver provisions in a note and guaranty were valid and enforceable even though the borrowers claimed to be unaware of the waivers until after litigation began. See Wachovia Bank v. Blackburn, et al., Opinion No. 27359, at \*9 (S.C. Feb. 26, 2015), attached hereto as **Exhibit A** and incorporated herein by reference. The Court in *Blackburn* explained that by signing the note and guaranty, the borrowers knowingly and voluntarily executed the jury waiver provisions contained therein. *Id.* at \*9-10.

In the present case, Defendants **repeatedly** waived their right to a jury trial in this matter. A chart of the jury trial waivers agreed to by Defendants for each of the subject loans with the supporting documentation is attached to this Memorandum as **Exhibit B** and is incorporated herein. Defendants began waiving their jury trial rights as early as 2001 for some of the loans, much earlier than the January 2009 and July 2011 modifications of which they now complain. See Ex. A. Over the years, Defendants waived their jury trial rights in at least

84 loan documents. Id. Moreover, the jury trial waivers consistently appeared in their loan documents with bold, underline, or capital lettering in a conspicuous manner. Id. Defendants' jury trial waivers generally waived their right to a trial by jury in any action or proceeding arising from or related to the subject notes, mortgages, and guarantees. Id. Defendants' allegations that PNC did not work with them in good faith on their loan modifications and Forbearance Agreement and disclosed their confidential information to third-parties are clearly related to the subject loan documents. As such, because Defendants' counterclaims are all related to the subject loan documents, Defendants waived their right to a jury trial on these claims repeatedly in said loan documents.

**II. To the extent Defendants contend that their counterclaims are not related to the subject loan documents, Defendants waived any rights they may have had to a jury trial on those claims by asserting them in this equitable foreclosure action.**

As stated above, all of Defendants' counterclaims relate to the loan documents. To the extent Defendants contend that their counterclaims are not related to the subject loan documents, Defendants have waived their right to a jury trial on these claims by asserting them in this equitable foreclosure action because such claims would be permissive counterclaims. In an equitable foreclosure action, a counterclaim must be compulsory in order for a defendant to have a jury trial right on such claim. White, 384 S.C. 606, 682 S.E.2d 498 (citing C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). Where a defendant asserts a counterclaim which is not compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. See DAV Corp., 298 S.C. at 516, 381 S.E.2d at 904; Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and

counterclaims, holding, “[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial”).

Under South Carolina law, “a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” See DAV Corp., 298 S.C. at 518, 381 S.E.2d at 905 (citing Rule 13(a), SCRPC). Counterclaims asserted in a foreclosure proceeding are permissive unless they are logically related to the enforceability of the promissory note. Id. (adopting “logical relationship” test to determine whether counterclaims were permissive). The South Carolina Supreme Court recently clarified the distinction between permissive and compulsory counterclaims asserted in a foreclosure action, holding that such counterclaims are permissive unless they arise out of the same transaction or occurrence as the execution of the loan documents and also attack the enforceability of the said documents. See Carolina First Bank, n/k/a TD Bank, N.A. v. BADD, L.L.C., et al., Opinion No. 27486, at \*6-7 (S.C. Jan. 28, 2015), attached hereto as **Exhibit C** and incorporated herein by reference.

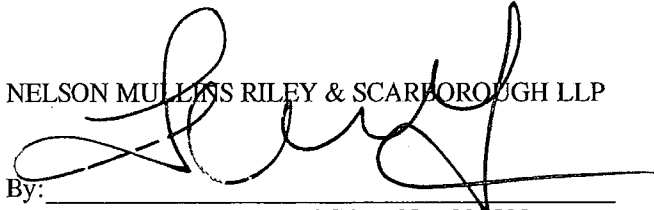
By definition, if the counterclaims are not related to the subject loan documents, they cannot be compulsory. Therefore, these counterclaims are permissive, and Defendants have waived their right to a jury trial by asserting them in this equitable foreclosure action.

#### CONCLUSION

Based on the foregoing, Defendants are not entitled to a jury trial in this matter, and PNC hereby requests that this Honorable Court enter an Order striking Defendants’ jury demand and referring this case to the Master-in-Equity for Charleston County.

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Attorneys for PNC Bank, National Association, successor to  
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Columbia, South Carolina

April 7, 2015.

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Wachovia Bank, National Association, Petitioner,

v.

William E. Blackburn; Judith Blackburn; Tammy S.  
Winner; Watson E. Felder; Gary F. Ownbey and South  
Island Plantation Association, Inc., Defendants,

Of Whom William E. Blackburn; Judith Blackburn are,  
Respondents,

v.

Winyah Bay Holdings, LLC; Source One Properties,  
LLC; and Waterpointe Realty, LLC, Third Party  
Defendants.

Appellate Case No. 2011-203088

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Georgetown County  
Larry B. Hyman, Jr., Circuit Court Judge

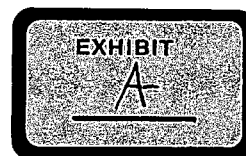
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Opinion No. 27359  
Heard December 5, 2013 – Filed February 26, 2014

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**REVERSED IN PART, AFFIRMED IN PART**

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Robert C. Byrd and Alyson Smith Podris, both of Parker, Poe, Adams, & Bernstein, LLP, both of Charleston, for Petitioner.

Glenn V. Ohanesian, of Ohanesian & Ohanesian, of Myrtle Beach, for Respondents.

**CHIEF JUSTICE TOAL:** Wachovia Bank, National Association (Wachovia), appeals the court of appeals' decision reversing the circuit court's determination that William and Judith Blackburns' (collectively, Respondents) counterclaims in a mortgage foreclosure suit were within the scope of a jury trial waiver signed by Respondents. We reverse in part and affirm in part.

#### **FACTS/PROCEDURAL BACKGROUND**

On July 23, 2005, Winyah Bay Holdings, LLC (the Seller), held an event aimed at selling marsh-front lots located in South Island Plantation, an affluent, to-be-built housing development in Georgetown County. The Seller conducted the sale by lottery, using balls and numbers like the South Carolina Education Lottery,<sup>1</sup> and geared the event toward on-the-spot sales. To facilitate same-day sales, the Seller had Wachovia and two unrelated realty and marketing companies (the Realtors) set up booths to promote financing the lot sales. Respondents allege that the Seller, the Realtors, and Wachovia further enticed potential buyers by promising that "day docks, roads, infrastructure, pool [sic], marsh walks, and other amenities would be in place within 18 months of the lottery." Respondents claim that these promises induced them into participating in the lottery.<sup>2</sup>

Over six months later, on February 14, 2006, Respondent William Blackburn delivered a promissory note to Wachovia in the amount of \$463,967 to finance the purchase of one of the South Island Plantation lots. The note was secured by a mortgage and unconditional personal guaranties executed by Tammy Winner, Watson Felder, and Respondents.<sup>3</sup>

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<sup>1</sup> It is a misdemeanor under South Carolina law to sell houses or land by lottery. S.C. Code Ann. § 16-19-10 (2003).

<sup>2</sup> Although unclear from the Appendix, Respondents presumably signed the sales contract on July 23, 2005, the day of the event.

<sup>3</sup> On October 12, 2007, Felder conveyed his interest in the property to Gary

The note and guaranties contained virtually identical jury trial waivers:

**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 . . . .

(Italic emphasis added).

Beginning in July 2008, Respondents failed to make payments on the note. Therefore, on November 13, 2008, Wachovia filed a foreclosure action. In its complaint, Wachovia stated that the note was in default, that they had accelerated the balance of the loan, and that they were thus entitled to judgment against the defendants in the amount of \$473,747.24.

Respondents answered, asserting counterclaims against Wachovia, cross-claims against the South Island Plantation Association, Incorporated (the Homeowners' Association), and a third-party complaint against the Seller and the Realtors. At issue here are the counterclaims against Wachovia, which include claims for negligent misrepresentation, promissory estoppel, breach of contract/breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud/fraud in the inducement, breach of contract/negligence, breach of contract, civil conspiracy, illegality of contract, and violations of the South Carolina Unfair Trade Practices Act (the SCUTPA).<sup>4</sup>

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Ownbey. Respondents received assignments of rights from Winner and Felder to pursue their claims both individually and as assignees. As such, Winner, Felder, and Ownbey are not parties to this appeal.

<sup>4</sup> As to the cross-claims and third-party complaint, the circuit court found that, because Respondents chose to raise those claims in a non-jury foreclosure

The gravamen of the counterclaims was that Wachovia "was an agent of, partner of, joint venture [sic] with, or conspirator with" the Seller and the Realtors such that the allegedly wrongful actions of the Seller and the Realtors were "imputed to" Wachovia. According to Respondents, Wachovia, the Seller, and the Realtors "artificially inflated [property values] through collusion by the parties" and promised that various amenities would be in place within eighteen months of the lottery. Respondents contended that the amenities were not completed in a timely manner as promised, and that they were damaged by the delays.<sup>5</sup> Respondents demanded a jury trial on their counterclaims, requesting monetary damages and rescission of the sales and loan contracts as a remedy for their claims.

Wachovia moved to strike the jury demand and refer the entire matter to the master-in-equity, arguing that Respondents contractually waived their right to a jury trial by executing the note and guaranties, all of which included the jury trial waivers. The circuit court granted Wachovia's motion, holding that the language of the waivers in the loan documents encompassed Respondents' counterclaims, and that Respondents knowingly and voluntarily waived their right to a jury trial through the clear and unambiguous waivers.<sup>6</sup>

Respondents appealed, arguing, *inter alia*, that (1) their jury trial waivers were not knowingly and voluntarily entered into and that (2) South Carolina's so-called "outrageous and unforeseeable torts exception" to arbitration agreements applied to jury trial waivers as well, thus determining whether the sales transaction was "significantly related" to the loan transactions, and whether the counterclaims fell within the scope of the contractual jury trial waiver provisions.

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proceeding, they had waived any right to a jury trial on those claims. Respondents did not appeal this ruling.

<sup>5</sup> According to Respondents, the amenities were in place as of the spring of 2008; however, Respondents did not miss a payment until July 2008.

<sup>6</sup> Respondents also argued that the waivers were unconscionable and that the circuit court could order a jury trial in its discretion pursuant to Rule 39(b), SCRPC. However, the circuit court did not rule on these issues in its order, and there is no indication in the Appendix that Respondents ever filed a motion to reconsider prior to their initial appeal to the court of appeals. See Rule 59, SCRPC. As such, these issues are not preserved, and we will not address them further. See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

The court of appeals affirmed in part and reversed in part. *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 590, 716 S.E.2d 454, 460 (Ct. App. 2011). It held that, although the circuit court correctly found that the waivers were knowing and voluntary, the outrageous and unforeseeable torts exception was "instructive" in determining that the counterclaims were not significantly related to the loan transactions. *Id.* at 584–90, 590 n.9, 716 S.E.2d at 457–60, 460 n.9. Further, the court of appeals found that the counterclaims involved only the sales transaction, and the jury trial waivers only applied to the loan transactions. *Id.* at 588–90, 716 S.E.2d at 459–60. Therefore, the court of appeals found that Respondents' counterclaims were outside the scope of the jury trial waivers and, thus, Respondents were entitled to a jury trial on those claims. *Id.* This appeal followed.

#### ISSUES

- I. Whether the circuit court and court of appeals applied the correct law regarding counterclaims brought in response to an equitable action?
- II. Whether the jury trial waivers were knowingly and voluntarily executed by Respondents?

#### STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976). However, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.* at 15, 690 S.E.2d at 772–73.

#### ANALYSIS

##### I. Counterclaims in an Equitable Action

Wachovia's foreclosure action is an action in equity. *Hayne Fed. Credit Union*, 327 S.C. at 248, 489 S.E.2d at 475. "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218

S.E.2d 242, 243 (1975). However, counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial. As we have previously explained:

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) 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. In that case, the proper procedure 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.

*Johnson v. S.C. Nat'l Bank (Johnson II)*, 292 S.C. 51, 55–56, 354 S.E.2d 895, 897 (1987) (citation omitted) (internal quotation marks omitted), *modifying C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301–02, 350 S.E.2d 191, 193 (1986); *see also N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) (utilizing the same rules as *Massengale* and *Johnson II*, but focusing on the difference between permissive and compulsory counterclaims).

Because the issue of jury trial waivers has not arisen in subsequent cases involving this analytical framework, we have not had the opportunity to address where such waivers might fit into the framework. We take the opportunity now to modify the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims.

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) 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. 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.

As will be discussed, *infra*, this case is unusual in that the dispositive issue is whether the claims are permissive or compulsory; therefore, we address that issue first.

"By definition, a counterclaim is compulsory only if it arises out of the same

transaction or occurrence as the opposing party's claim." *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332–33 (Ct. App. 2012) (quoting *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991)); see also Rule 13(a), SCRCP.<sup>7</sup> Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(b), SCRCP.

Respondents argued consistently throughout the litigation that the sales and loan transactions were *separate transactions*, and that the wrongs done to them were related solely to various torts committed in the sales transaction. They therefore asserted that the jury trial waivers found in the loan documents—which applied to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party" involving the note or the guaranties—only applied to torts committed during the loan transactions, but not to those committed during the sales transaction. Thus, Respondents claimed that the jury trial waivers they executed in connection with the loan documents did not bar their counterclaims related to the sales transaction. However, Respondents simultaneously argued that their counterclaims were *compulsory*, *i.e.*, that they arose out of the same transaction or occurrence as Wachovia's loan foreclosure action.

We find it unnecessary to determine whether the claims were permissive or compulsory because, in either event, Respondents are not entitled to a jury trial.

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<sup>7</sup> We have previously adopted the "logical relationship" test to determine whether a counterclaim is compulsory under this definition. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518, 381 S.E.2d at 905. Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333; see also *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 518–19, 381 S.E.2d at 905. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 518–19, 381 S.E.2d at 905 (finding counterclaims involving breach of an oral agreement purporting to modify a note that the bank was foreclosing on were logically related to the enforceability of the note and thus were compulsory); *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333 (determining a counterclaim alleging a note was unconscionable was logically related to the enforceability of the note and thus was compulsory).

For example, if we found that, as Respondents contended, the sales transaction was separate from the loan transactions, then by definition the counterclaims would be permissive. Wachovia's action is a foreclosure action centered entirely on obligations created by the loan documents. If the sale was separate from the loan, then the counterclaims involving the sale did not "aris[e] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRPC. Therefore, because Respondents raised such permissive counterclaims in an equitable action, they waived their right to a jury trial on the claims. *See Johnson II*, 292 S.C. at 55, 354 S.E.2d at 897.

On the other hand, if we found that the sales and loan transactions were all one continuous transaction or occurrence such that the counterclaims could possibly be considered compulsory under Rule 13(a), SCRPC, the jury trial waivers necessarily apply. Respondents waived their right to a jury trial for any claim related to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party" involving the loan documents. Therefore, if we view the sales and loan transaction as one continuous transaction, the sales transaction falls squarely within the coverage of the waiver provisions.

Accordingly, as stated, *supra*, whether the counterclaims were legal or equitable makes no difference *in this instance*. To the extent any of Respondents' counterclaims were equitable in nature, they did not have a right to a jury trial on those claims. *Id.* To the extent any of Respondents' counterclaims were legal—regardless of whether the claims were permissive or compulsory—Respondents waived their right to a jury trial, either through the waiver provisions or because they raised their permissive claims in an equitable action. Respondents may only avoid this result if the contractual jury trial waivers executed in connection with the loan documents are invalid and unenforceable. Therefore, we turn next to that issue.

## II. Knowing and Voluntary Waivers

Both the court of appeals and the circuit court found that the jury trial waivers were enforceable because Respondents executed them knowingly and voluntarily. We agree and find the waivers enforceable.

"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) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). However, although the right to a trial by jury is a substantial right, and we "strictly construe" such waivers, *id.* at 64, 566 S.E.2d at

866, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977)). Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. *Id.* at 663-64, 582 S.E.2d at 440 (citing several of this Court's cases). "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." *Id.* at 664, 582 S.E.2d at 440 (citing *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)).

By signing the note and guaranty, Respondents are charged with having read their contents; therefore, although they assert via affidavit that they were "not aware of any jury trial waiver clause until the motion to strike [their] request for jury trial was made by" Wachovia, they cannot avoid the effects of the waivers merely by arguing that they were unaware that such provisions were included in the note and guaranty.<sup>8</sup> See *Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440. We therefore find the waivers enforceable and applicable to any of Respondents' counterclaims that are legal and compulsory.

#### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals is affirmed in part and reversed in part. We affirm the portion of the judgment finding that the waivers were executed knowingly and voluntarily; however, we reverse the portion finding that the outrageous and unforeseeable torts exception to arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.

**PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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<sup>8</sup> Further, the waivers here are conspicuous and unambiguous. Unlike the other provisions in the note and guaranties, the waivers are printed in all capital letters and have a bold heading called "**WAIVER OF JURY TRIAL.**" They are located at the very end of the six-page document, directly above the signature line, thus making the conspicuous font even more noticeable, even at a quick glance.

**JURY TRIAL WAIVERS**

**Royal Beach Loan**

Origination Date: 5/19/00

Original Principal Amount: \$2,500,000

Original Borrower: Deborah Rice-Marko

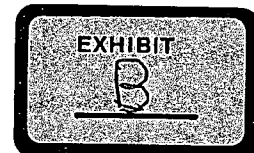
Assuming Borrower: Royal Beach Properties, LLC

Guarantors: Deborah Rice-Marko, Evan R. Marko, and John E. Marko, Jr.

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
3/23/06	Modification Agreement	D. Rice-Marko	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>1</sup> as herein modified.	DRM Transcript 185:5-7 and 189:1-190:1 (Plaintiff's Exhibit 13)
8/30/06	Modification Agreement	D. Rice-Marko	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>2</sup> as herein modified.	DRM Transcript 188:23-25 and 190:2-16 (Plaintiff's Exhibit 15)
7/18/07	Modification Agreement	D. Rice-Marko	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from	DRM Transcript 194:10-22 (Plaintiff's Exhibit 17)

<sup>1</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>2</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.



			or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>3</sup> as herein modified.	
8/26/08	Assignment and Assumption Agreement	D. Rice-Marko  Royal Beach Properties, LLC	Section 12. <u>Waiver of Jury Trial.</u> Assignor and Assignee to the extent permitted by law, waive any right to a trial by jury in any action arising from or related to this Agreement and they each waive any right to a trial by jury in any action arising from or related to the Contract. <sup>4</sup>	DRM Transcript 199:7-22 (Plaintiff's Exhibit 19)
8/26/08	Modification Agreement	Royal Beach Properties, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>5</sup> as herein modified.	DRM Transcript 204:3-13 (Plaintiff's Exhibit 20)
8/26/08	Unconditional Guaranty Agreement	D. Rice-Marko	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>6</sup> . . .	DRM Transcript 213:9-214:11 (Plaintiff's Exhibit 22)
2/19/10	Change in Terms Agreement	Royal Beach Properties, LLC	<b>JURY WAIVER.</b> Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or	D. Rice-Marko and Royal Beach Properties, LLC's

<sup>3</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>4</sup> "Contract" is defined in the Assignment and Assumption Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>5</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>6</sup> "Customer" is defined in the Unconditional Guaranty Agreement as Royal Beach Properties, LLC.

			<b>Borrower against the other.</b>	Responses to Plaintiff's Second Requests for Admission Nos. 84-85
7/15/11	Forbearance Agreement	Royal Beach Properties, LLC; D. Rice-Marko; E. Marko; J. Marko	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86) EM Transcript 277:21-23 and 284:15-20 (Plaintiff's Exhibit 57) JM Transcript 301:23-302:14 and 311:16-312:14 (Plaintiff's Exhibit 33)
7/15/11	Amended and Restated Promissory Note	Royal Beach Properties, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	DRM Transcript 474:25-7 (Plaintiff's Exhibit 89)
7/15/11	Modification of Mortgage	Royal Beach	9. <u>General Terms.</u> . . . Mortgagor, to the extent permitted by law,	DRM Transcript

		Properties, LLC	waives any right to a trial by jury in any action arising from or related to each Modified Mortgage.	477:13-478:10 (Plaintiff's Exhibit 90)
7/15/11	Continuing Guaranty Agreement	D. Rice-Marko; E. Marko; J. Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>7</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)  EM Transcript 312:14-17 (Plaintiff's Exhibit 59)  JM Transcript 334:7-13 and 335:16-336:21 (Plaintiff's Exhibit 35)

<sup>7</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

**JURY TRIAL WAIVERS**

**Brothers Loan # 1**

Origination Date: 8/7/01

Original Principal Amount: \$1,100,000

Original Borrower: The Brothers of NC, LLC

Assuming Borrower: The Brothers of SC, LLC

Guarantors: Evan R. Marko and John E. Marko, Jr.

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
12/28/01	Unconditional Guaranty Agreement	J. Marko	Section 9. Miscellaneous. . . . 6. <u>Jury, Venue, Jurisdiction.</u> . . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement and/or any of the Obligations of Customer <sup>8</sup> . . . .	JM Transcript 84:13-15 and 86:13-87:9 (Plaintiff's Exhibit 4)
8/30/06	Modification Agreement	The Brothers of SC, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>9</sup> as herein modified.	DRM Transcript 243:19-244:13 (Plaintiff's Exhibit 30)
8/30/06	Unconditional Guaranty Agreement	E. Marko	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any	EM Transcript 157:1-3 and 158:6-13 (Plaintiff's Exhibit 15)

<sup>8</sup> "Customer" is defined in the Unconditional Guaranty Agreement as The Brothers of NC, LLC. The Brothers of SC, LLC, is the successor in interest to The Brothers of NC, LLC, by merger.

<sup>9</sup> "Contract" is defined in the Modification Agreement as The Brothers' Promissory Note and all security documents with respect to that note.

			action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>10</sup> . . .	
8/30/06	Unconditional Guaranty Agreement	J. Marko	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>11</sup> . . .	JM Transcript 118:3-8 and 118:22-119:21 (Plaintiff's Exhibit 12)
8/28/07	Modification Agreement	The Brothers of SC, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>12</sup> as herein modified.	EM Transcript 160:21-23 and 163:24-164:4 (Plaintiff's Exhibit 17)  JM Transcript 121:13-122:21 (Plaintiff's Exhibit 13)
8/26/08	Modification Agreement	The Brothers of SC, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>13</sup> as herein modified.	EM Transcript 166:24-167:12 (Plaintiff's Exhibit 18)  JM Transcript 123:19-124:16 (Plaintiff's Exhibit 14)
7/15/11	Forbearance Agreement	The Brothers of SC, LLC; E. Marko;	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES	EM Transcript 277:21-23 and 284:15-20 (Plaintiff's Exhibit 57)

<sup>10</sup> "Customer" is defined in the Unconditional Guaranty Agreement as The Brothers of SC, LLC.

<sup>11</sup> "Customer" is defined in the Unconditional Guaranty Agreement as The Brothers of SC, LLC.

<sup>12</sup> "Contract" is defined in the Modification Agreement as The Brothers' Promissory Note and all security documents with respect to that note.

<sup>13</sup> "Contract" is defined in the Modification Agreement as The Brothers' Promissory Note and all security documents with respect to that note.

		J. Marko	HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	JM Transcript 301:23-302:14 and 311:16-312:14 (Plaintiff's Exhibit 33)
7/15/11	Amended and Restated Promissory Note	The Brothers of SC, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	JM Transcript 340:1-6 and 341:18-342:7 (Plaintiff's Exhibit 37)
7/15/11	Modification of Mortgage	The Brothers of SC, LLC	9. <u>General Terms</u> . . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to each Modified Mortgage.	JM Transcript 344:20-346:19 (Plaintiff's Exhibit 38)
7/15/11	Continuing Guaranty Agreement	E. Marko; J. Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or	EM Transcript 312:14-17 (Plaintiff's

			related to this Guaranty or any of the Liabilities. <sup>14</sup>	Exhibit 59) JM Transcript 334:7-13 and 335:16-336:21 (Plaintiff's Exhibit 35)
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<sup>14</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

## JURY TRIAL WAIVERS

### DRM Loan

Origination Date: 1/13/05

Original Principal Amount: \$5,000,000

Borrower: Deborah Rice-Marko

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
8/30/06	Modification Agreement	D. Rice-Marko	Section 10. <b>Waiver of Jury Trial.</b> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>15</sup> as herein modified.	DRM Transcript 251:3-15 (Plaintiff's Exhibit 33)
1/11/07	Renewal Note	D. Rice-Marko	Section 5.6. <b>Jury and Jurisdiction.</b> . . . Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Note.	DRM Transcript 252:14-22 (Plaintiff's Exhibit 34)
1/11/07	Modification Agreement	D. Rice-Marko	Section 10. <b>Waiver of Jury Trial.</b> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>16</sup> as herein modified.	DRM Transcript 254:9-16 (Plaintiff's Exhibit 35)
1/26/09	Modification	D. Rice-	Section 10. <b>Waiver of Jury Trial.</b>	DRM

<sup>15</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>16</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

	Agreement	Marko	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>17</sup> as herein modified.	Transcript 369:1-21 and 373:22-374:2 (Plaintiff's Exhibit 72)
2/23/10	Change in Terms Agreement	D. Rice- Marko	JURY WAIVER. Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.	DRM Transcript 385:19-386:4 (Plaintiff's Exhibit 74)
7/15/11	Forbearance Agreement	D. Rice- Marko	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86)

<sup>17</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

			EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	
7/15/11	Amended and Restated Promissory Note	D. Rice-Marko	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	DRM Transcript 486:21-487:23 (Plaintiff's Exhibit 91)
7/15/11	Continuing Guaranty Agreement	D. Rice-Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>18</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)

<sup>18</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

## JURY TRIAL WAIVERS

### Clarksville Loan

Origination Date: 6/24/05

Original Principal Amount: \$550,400

Original Borrower: Deborah Rice-Marko

Assuming Borrower: USS Clarksville, LLC

Guarantors: Deborah Rice-Marko

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
6/24/05	Promissory Note	D. Rice-Marko	BORROWER WAIVES HER RIGHT TO A JURY TRIAL WITH RESPECT TO ANY ACTION OR CLAIM ARISING OUT OF ANY DISPUTE IN CONNECTION WITH THIS NOTE, ANY RIGHTS OR OBLIGATIONS HEREUNDER OR THE PERFORMANCE OR ENFORCEMENT OF ANY SUCH RIGHTS OR OBLIGATIONS.	DRM Transcript 255:13-23 (Plaintiff's Exhibit 36)
6/24/05	Mortgage, Security Agreement and Financing Statement	D. Rice-Marko	33. Waiver of Jury Trial. THE MORTGAGOR WAIVES HER RIGHT TO A JURY TRIAL WITH RESPECT TO ANY ACTION OR CLAIM ARISING OUT OF ANY DISPUTE IN CONNECTION WITH THIS AGREEMENT, ANY RIGHTS OR OBLIGATIONS HEREUNDER OR THE PERFORMANCE OR ENFORCEMENT OF ANY SUCH RIGHTS OR OBLIGATIONS. . . .	DRM Transcript 258:11-21 (Plaintiff's Exhibit 37)
8/30/06	Modification Agreement	D. Rice-Marko	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related	DRM Transcript 261:10-17 (Plaintiff's Exhibit 38)

			to the Contract, <sup>19</sup> as herein modified.	
3/22/07	Assignment and Assumption Agreement	D. Rice-Marko  USS Clarksville, LLC	Section 12. <u>Waiver of Jury Trial.</u> Assignor and Assignee to the extent permitted by law, waive any right to a trial by jury in any action arising from or related to this Agreement and they each waive any right to a trial by jury in any action arising from or related to the Contract. <sup>20</sup>	DRM Transcript 262:12-22 (Plaintiff's Exhibit 39)
3/22/07	Mortgage, Assignment of Rents and Security Agreement	USS Clarksville, LLC	15.8 <u>Jury; Venue; Jurisdiction.</u> . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Mortgage.	DRM Transcript 263:24-264:3 and 265:22-266:8 (Plaintiff's Exhibit 40)
3/22/07	Modification Agreement	USS Clarksville, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>21</sup> as herein modified.	DRM Transcript 266:12-267:15 (Plaintiff's Exhibit 41)
3/22/07	Unconditional Guaranty Agreement	D. Rice-Marko	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>22</sup> . . .	DRM Transcript 270:20-271:1 (Plaintiff's Exhibit 42)

<sup>19</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>20</sup> "Contract" is defined in the Assignment and Assumption Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>21</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

<sup>22</sup> "Customer" is defined in the Unconditional Guaranty Agreement as USS Clarksville, LLC.

2/25/08	Modification Agreement	USS Clarksville, LLC	Section 11. <b>Waiver of Jury Trial. Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract,<sup>23</sup> as herein modified.</b>	DRM Transcript 272:12-17 (Plaintiff's Exhibit 43)
2/23/10	Change in Terms Agreement	USS Clarksville, LLC	<b>JURY WAIVER. Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.</b>	D. Rice-Marko and USS Clarksville, LLC's Responses to Plaintiff's Second Requests for Admission Nos. 76-77
7/15/11	Forbearance Agreement	USS Clarksville, LLC; D. Rice-Marko	<b>Section 2.5 Waiver of Trial by Jury. IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND,</b>	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86)

<sup>23</sup> "Contract" is defined in the Modification Agreement as D. Rice-Marko's Promissory Note and all security documents with respect to that note.

			ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	
7/15/11	Amended and Restated Promissory Note	USS Clarksville, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	DRM Transcript 488:15-489:16 (Plaintiff's Exhibit 92)
7/15/11	Continuing Guaranty Agreement	D. Rice-Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>24</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)

<sup>24</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

**JURY TRIAL WAIVERS**

**ROA Loan # 1**

Origination Date: 6/24/05

Original Principal Amount: \$1,763,000

Borrower: ROA, LLC

Guarantors: Deborah Rice-Marko and Liberty Cottages Land, LLC

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
6/24/05	Promissory Note	ROA, LLC	BORROWER WAIVES ITS RIGHT TO A JURY TRIAL WITH RESPECT TO ANY ACTION OR CLAIM ARISING OUT OF ANY DISPUTE IN CONNECTION WITH THIS NOTE, ANY RIGHTS OR OBLIGATIONS HEREUNDER OR THE PERFORMANCE OR ENFORCEMENT OF ANY SUCH RIGHTS OR OBLIGATIONS.	DRM Transcript 274:18-24 (Plaintiff's Exhibit 44)
6/24/05	Unconditional Guaranty of Payment	D. Rice-Marko	Section 23. <u>Wavier of Right to Jury Trial.</u> GUARANTOR WAIVES TRIAL BY JURY WITH RESPECT TO ANY ACTION, CLAIM, SUIT OR PROCEEDING ON OR ARISING OUT OF THIS GUARANTY OR THE OBLIGATIONS EVIDENCED HEREBY.	DRM Transcript 277:21-278:3 (Plaintiff's Exhibit 45)
8/30/06	Assumption Agreement	ROA, LLC D. Rice-Marko	Section 6. <u>Waiver of Jury Trial.</u> Assignor and Borrower to the extent permitted by law, waive any right to a trial by jury in any action arising from or related to this Agreement and they each waive any right to a trial by jury in any action arising from or related to the Security Documents.	DRM Transcript 279:11-280:7 (Plaintiff's Exhibit 46)
3/22/07	Mortgage	ROA, LLC	15.8 Jury; Venue; Jurisdiction. . . . Mortgagor, to the extent permitted by law, waives any right to a trial	DRM Transcript 283:25-285:5

			by jury in any action arising from or related to this Mortgage.	(Plaintiff's Exhibit 49)
3/22/07	Modification Agreement	ROA, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>25</sup> as herein modified.	DRM Transcript 286:18-287:5 (Plaintiff's Exhibit 50)
3/22/07	Modification Agreement	ROA, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>26</sup> as herein modified.	DRM Transcript 289:19-290:3 (Plaintiff's Exhibit 51)
2/25/08	Modification Agreement	ROA, LLC	Section 11. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>27</sup> as herein modified.	DRM Transcript 291:19-24 (Plaintiff's Exhibit 52)
2/25/08	Unconditional Guaranty Agreement	Liberty Cottages Land, LLC	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to	DRM Transcript 292:18-293:9 (Plaintiff's Exhibit 53)

<sup>25</sup> "Contract" is defined in the Modification Agreement as ROA, LLC's Promissory Note and all security documents with respect to that note.

<sup>26</sup> "Contract" is defined in the Modification Agreement as ROA, LLC's Promissory Note and all security documents with respect to that note.

<sup>27</sup> "Contract" is defined in the Modification Agreement as ROA, LLC's Promissory Note and all security documents with respect to that note.

			<b>this Guaranty Agreement or any of the Obligations of Customer<sup>28</sup> . . .</b>	
1/26/09	Modification Agreement	ROA, LLC	Section 10. <b>Waiver of Jury Trial. Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract,<sup>29</sup> as herein modified.</b>	DRM Transcript 361:6-362:14 (Plaintiff's Exhibit 69)
2/24/10	Change in Terms Agreement	ROA, LLC	<b>JURY WAIVER. Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.</b>	DRM Transcript 367:18-368:9 (Plaintiff's Exhibit 71)
7/15/11	Forbearance Agreement	ROA, LLC; D. Rice-Marko; Liberty Cottages Land, LLC	<b>Section 2.5 Waiver of Trial by Jury. IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL</b>	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86)

<sup>28</sup> "Customer" is defined in the Unconditional Guaranty Agreement as ROA, LLC.

<sup>29</sup> "Contract" is defined in the Modification Agreement as ROA, LLC's Promissory Note and all security documents with respect to that note.

			WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	
7/15/11	Amended and Restated Promissory Note	ROA, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	DRM Transcript 490:19-491:9 (Plaintiff's Exhibit 93)
7/15/11	Continuing Guaranty Agreement	D. Rice-Marko; Liberty Cottages Land, LLC	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>30</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)

<sup>30</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

## JURY TRIAL WAIVERS

### Dorchester Loan

Origination Date: 11/18/05

Original Principal Amount: \$2,350,000

Original Borrower: Evelyn D. Rice

Assuming Borrower: GW Dorchester, LLC

Guarantors: Deborah Rice-Marko, Evan R. Marko, and John E. Marko, Jr.

<b>Date</b>	<b>Loan Document</b>	<b>Signatory</b>	<b>Jury Trial Waiver Language (Emphasis in Original)</b>	<b>Discovery Responses or Deposition Testimony Admitting Signature</b>
11/18/05	Promissory Note	Evelyn D. Rice	Section 5.6. <u>Jury and Jurisdiction.</u> . . . <u>Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Note.</u>	DRM Transcript 304:22-306:1 (Plaintiff's Exhibit 54)
11/18/05	Mortgage, Assignment of Rents and Security Agreement	Evelyn D. Rice	Section 15.8 <u>Jury; Venue; Jurisdiction.</u> . . . <u>Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Mortgage.</u>	DRM Transcript 311:10-22 (Plaintiff's Exhibit 55)
8/30/06	Modification Agreement	Evelyn D. Rice	Section 10. <u>Waiver of Jury Trial.</u> <u>Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract,<sup>31</sup> as herein modified.</u>	DRM Transcript 317:7-318:1 (Plaintiff's Exhibit 57)
8/30/06	Modification Agreement	Evelyn D. Rice	Section 10. <u>Waiver of Jury Trial.</u> <u>Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from</u>	DRM Transcript 319:2-15 (Plaintiff's

<sup>31</sup> "Contract" is defined in the Modification Agreement as Evelyn D. Rice's Promissory Note and all security documents with respect to that note.

			or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>32</sup> as herein modified.	Exhibit 58)
8/30/06	Assignment and Assumption Agreement	GW Dorchester, LLC  Evelyn D. Rice	Section 12. <u>Waiver of Jury Trial.</u> Assignor and Assignee to the extent permitted by law, waive any right to a trial by jury in any action arising from or related to this Agreement and they each waive any right to a trial by jury in any action arising from or related to the Contract. <sup>33</sup>	DRM Transcript 314:11-315:2 (Plaintiff's Exhibit 56)
12/28/06	Modification Agreement	GW Dorchester, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>34</sup> as herein modified.	DRM Transcript 321:25-322:20 (Plaintiff's Exhibit 58A)
2/26/08	Modification Agreement	GW Dorchester, LLC	Section 11. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>35</sup> as herein modified.	EM Transcript 206:11-14 (Plaintiff's Exhibit 35)  JM Transcript 188:15-189:2 (Plaintiff's Exhibit 21)

<sup>32</sup> "Contract" is defined in the Modification Agreement as Evelyn D. Rice's Promissory Note and all security documents with respect to that note.

<sup>33</sup> "Contract" is defined in the Assignment and Assumption Agreement as Evelyn D. Rice's Promissory Note and all security documents with respect to that note.

<sup>34</sup> "Contract" is defined in the Modification Agreement as Evelyn D. Rice's Promissory Note and all security documents with respect to that note.

<sup>35</sup> "Contract" is defined in the Modification Agreement as Evelyn D. Rice's Promissory Note and all security documents with respect to that note.

7/27/09	Modification Agreement	GW Dorchester, LLC	Section 11. <b>Waiver of Jury Trial.</b> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>36</sup> as herein modified.	DRM Transcript 393:2-12 (Plaintiff's Exhibit 78)
7/27/09	Unconditional Guaranty Agreement	D. Rice- Marko	9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>37</sup> . . .	DRM Transcript 394:13-15 (Plaintiff's Exhibit 79)
1/22/10	Change in Terms Agreement	GW Dorchester, LLC	<b>JURY WAIVER.</b> Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.	DRM Transcript 395:25-396:10 (Plaintiff's Exhibit 80)
7/15/11	Forbearance Agreement	GW Dorchester, LLC; D. Rice- Marko; E. Marko; J. Marko	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86)  EM Transcript 277:21-23 and 284:15-20 (Plaintiff's Exhibit 57)  JM Transcript 301:23-302:14 and 311:16- 312:14 (Plaintiff's Exhibit 33)

<sup>36</sup> "Contract" is defined in the Modification Agreement as Evelyn D. Rice's Promissory Note and all security documents with respect to that note.

<sup>37</sup> "Customer" is defined in the Unconditional Guaranty Agreement as GW Dorchester, LLC.

			EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	
7/15/11	Amended and Restated Promissory Note	GW Dorchester, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	DRM Transcript 491:19-492:10 (Plaintiff's Exhibit 94)
7/15/11	Modification of Mortgage	GW Dorchester, LLC	9. <u>General Terms</u> . . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to each Modified Mortgage.	DRM Transcript 492:19-493:16 (Plaintiff's Exhibit 95)
7/15/11	Continuing Guaranty Agreement	D. Rice- Marko; E. Marko; J. Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>38</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)  EM Transcript 312:14-17 (Plaintiff's Exhibit 59)  JM Transcript 334:7-13 and 335:16-336:21 (Plaintiff's Exhibit 35)

<sup>38</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

**JURY TRIAL WAIVERS**

**Liberty Cottages Loan**

Origination Date: 3/22/07

Original Principal Amount: \$2,500,000

Borrower: Liberty Cottages, LLC

Guarantors: Deborah Rice-Marko, Evan R. Marko, and John E. Marko, Jr.

<b>Date</b>	<b>Loan Document</b>	<b>Signatory</b>	<b>Jury Trial Waiver Language (Emphasis in Original)</b>	<b>Discovery Responses or Deposition Testimony Admitting Signature</b>
3/22/07	Construction Loan Agreement	Liberty Cottages, LLC	Section 8.14. <u>Jury, Venue, Jurisdiction.</u> . . . Borrower: (1) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Loan Agreement and any of the other Loan Documents . . .	DRM Transcript 325:6-326:10 (Plaintiff's Exhibit 59)
3/22/07	Commercial Promissory Note	Liberty Cottages, LLC	Section 5.6. <u>Jury and Jurisdiction.</u> . . . Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Note.	DRM Transcript 328:14-24 (Plaintiff's Exhibit 60)
3/22/07	Unconditional Guaranty Agreement	D. Rice-Marko	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer . . .	DRM Transcript 332:1-6 (Plaintiff's Exhibit 61)
2/25/08	Modification Agreement	Liberty Cottages, LLC	Section 11. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or	DRM Transcript 336:16-337:3 (Plaintiff's Exhibit 62)

			<b>proceeding arising from or related to the Contract,<sup>39</sup> as herein modified.</b>	
2/25/08	Mortgage, Assignment of Rents and Security Agreement	Liberty Cottages Land, LLC	Section 15.8. <u>Jury; Venue; Jurisdiction.</u> . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Mortgage.	DRM Transcript 338:2-19 (Plaintiff's Exhibit 63)
2/25/08	Unconditional Guaranty Agreement	Liberty Cottages Land, LLC	9.10. Jury, Venue, Jurisdiction. . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>40</sup> . . .	DRM Transcript 340:15-23 and 341:8-19 (Plaintiff's Exhibit 64)
1/26/09	Modification Agreement	Liberty Cottages, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>41</sup> as herein modified.	DRM Transcript 397:15-398:7 (Plaintiff's Exhibit 81)
2/23/10	Change in Terms Agreement	Liberty Cottages, LLC	<b>JURY WAIVER.</b> Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.	DRM Transcript 402:8-17 (Plaintiff's Exhibit 83)
7/15/11	Forbearance Agreement	Liberty Cottages, LLC; D. Rice-Marko; E. Marko;	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86)

<sup>39</sup> "Contract" is defined in the Modification Agreement as Liberty Cottages, LLC's Commercial Promissory Note and all security documents with respect to that note.

<sup>40</sup> "Customer" is defined in the Unconditional Guaranty Agreement as Liberty Cottages, LLC.

<sup>41</sup> "Contract" is defined in the Modification Agreement as Liberty Cottages, LLC's Commercial Promissory Note and all security documents with respect to that note.

		J. Marko	TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	EM Transcript 277:21-23 and 284:15-20 (Plaintiff's Exhibit 57)  JM Transcript 301:23-302:14 and 311:16-312:14 (Plaintiff's Exhibit 33)
7/15/11	Amended and Restated Promissory Note	Liberty Cottages, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	DRM Transcript 495:2-14 (Plaintiff's Exhibit 96)
7/15/11	Modification of Mortgage	Liberty Cottages Land, LLC	9. <u>General Terms</u> . . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to each Modified Mortgage.	DRM Transcript 496:6-19 (Plaintiff's Exhibit 97)
7/15/11	Continuing Guaranty Agreement	D. Rice-Marko; E. Marko; J. Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>42</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)

<sup>42</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

				EM Transcript 312:14-17 (Plaintiff's Exhibit 59)  JM Transcript 334:7-13 and 335:16-336:21 (Plaintiff's Exhibit 35)
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**JURY TRIAL WAIVERS**

**ROA Loan # 2**

Origination Date: 11/9/07

Original Principal Amount: \$3,920,000

Borrower: ROA, LLC

Guarantor: Deborah Rice-Marko

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
11/9/07	Loan Agreement	ROA, LLC	Section 10.6. <u>Jury, Venue, Jurisdiction.</u> . . . Borrower: (1) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Loan Agreement and any of the other Loan Documents . . .	DRM Transcript 342:25-343:5 (Plaintiff's Exhibit 65)
11/9/07	Commercial Promissory Note	ROA, LLC	Section 5.6. <u>Jury and Jurisdiction.</u> . . . Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Note.	DRM Transcript 349:11-350:8 (Plaintiff's Exhibit 66)
11/9/07	Mortgage, Assignment of Rents and Security Agreement	ROA, LLC	Section 15.8. <u>Jury; Venue; Jurisdiction.</u> . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Mortgage.	DRM Transcript 352:13-15 and 353:25-354:2 (Plaintiff's Exhibit 67)
11/9/07	Unconditional Guaranty Agreement	D. Rice-Marko	Section 9.10. <u>Jury, Venue, Jurisdiction.</u> . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>43</sup> . . .	DRM Transcript 355:6-22 (Plaintiff's Exhibit 68)
1/26/09	Modification Agreement	ROA, LLC	Section 10. <u>Waiver of Jury Trial.</u> Borrower, to the extent permitted by law, waives any right to a trial	DRM Transcript 403:16-404:4

<sup>43</sup> "Customer" is defined in the Unconditional Guaranty Agreement as ROA, LLC.

			by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract, <sup>44</sup> as herein modified.	(Plaintiff's Exhibit 84)
7/15/11	Forbearance Agreement	ROA, LLC; D. Rice-Marko	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	DRM Transcript 409:16-411:10 (Plaintiff's Exhibit 86)
7/15/11	Amended and Restated Promissory	ROA, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding	DRM Transcript 498:3-13

<sup>44</sup> "Contract" is defined in the Modification Agreement as ROA, LLC's Promissory Note and all security documents with respect to that note.

	Note		arising from or related to this Note.	(Plaintiff's Exhibit 98)
7/15/11	Modification of Mortgage	ROA, LLC	9. <u>General Terms</u> . . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to each Modified Mortgage.	DRM Transcript 498:25-499:12 (Plaintiff's Exhibit 99)
7/15/11	Continuing Guaranty Agreement	D. Rice-Marko	To the extent permitted by law, Guarantor waives any right to a trial by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>45</sup>	DRM Transcript 470:9-471:24 (Plaintiff's Exhibit 88)

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<sup>45</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

**JURY TRIAL WAIVERS**

**Brothers Loan # 2**

Origination Date: 10/11/07

Original Principal Amount: \$4,900,000

Borrower: The Brothers of SC, LLC

Guarantors: Evan R. Marko and John E. Marko, Jr.

Date	Loan Document	Signatory	Jury Trial Waiver Language (Emphasis in Original)	Discovery Responses or Deposition Testimony Admitting Signature
10/11/07	Loan Agreement	The Brothers of SC, LLC	Section 10.6. <u>Jury, Venue, Jurisdiction.</u> . . . Borrower: (1) <b>to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Loan Agreement and any of the other Loan Documents<sup>46</sup></b> . . .	EM Transcript 219:15-18 and 223:1-15 (Plaintiff's Exhibit 43)  JM Transcript 204:11-23 and 210:20-211:12 (Plaintiff's Exhibit 22)
10/11/07	Promissory Note	The Brothers of SC, LLC	Section 5.6. <u>Jury and Jurisdiction.</u> . . . Borrower, <b>to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Note.</b>	EM Transcript 224:13-225:11 (Plaintiff's Exhibit 44)  JM Transcript 213:16-214:2 and 215:20-216:18 (Plaintiff's Exhibit 23)
10/11/07	Mortgage	The Brothers of SC, LLC	15.8 <u>Jury; Venue; Jurisdiction.</u> . . . Mortgagor, <b>to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Mortgage.</b>	EM Transcript 231:15-24 (Plaintiff's Exhibit 45)  JM Transcript

<sup>46</sup> "Loan Documents" are defined in the Loan Agreement as The Brothers of SC, LLC's Promissory Note and all security documents with respect to that note.

				217:22-218:20 (Plaintiff's Exhibit 24)
10/11/07	Unconditional Guaranty Agreement	E. Marko	Section 9.10. <u>Jury, Venue, Jurisdiction</u> . . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>47</sup> . . . .	EM Transcript 234:8-21 (Plaintiff's Exhibit 47)
10/11/07	Unconditional Guaranty Agreement	J. Marko	Section 9.10. <u>Jury, Venue, Jurisdiction</u> . . . . Guarantor: (a) to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Guaranty Agreement or any of the Obligations of Customer <sup>48</sup> . . . .	JM Transcript 220:25-221:3 and 221:19-222:11 (Plaintiff's Exhibit 25)
1/26/09	Modification Agreement	The Brothers of SC, LLC	Section 10. <u>Waiver of Jury Trial</u> . Borrower, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Modification Agreement and waives any right to a trial by jury in any action or proceeding arising from or related to the Contract <sup>49</sup> , as herein modified.	EM Transcript 242:15-22 (Plaintiff's Exhibit 49)  JM Transcript 260:19-261:1 and 262:7-22 (Plaintiff's Exhibit 30)
1/21/10	Change in Terms Agreement	The Brothers of SC, LLC	<b>JURY WAIVER.</b> Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the Other.	EM Transcript 266:11-24 and 267:22-268:4 (Plaintiff's Exhibit 53)  JM Transcript 270:16-271:3 and 272:25-273:17 (Plaintiff's

<sup>47</sup> "Customer" is defined in the Unconditional Guaranty Agreement as The Brothers of SC, LLC.

<sup>48</sup> "Customer" is defined in the Unconditional Guaranty Agreement as The Brothers of SC, LLC.

<sup>49</sup> "Contract" is defined in the Modification Agreement as The Brothers of SC, LLC's Promissory Note and all security documents with respect to that note.

				Exhibit 32)
7/15/11	Forbearance Agreement	The Brothers of SC, LLC; E. Marko; J. Marko	<i>Section 2.5 Waiver of Trial by Jury.</i> IN RECOGNITION OF THE HIGHER COSTS AND DELAY WHICH MAY RESULT FROM A JURY TRIAL, THE PARTIES HERETO WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT HERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.	EM Transcript 277:21-23 and 284:15-20 (Plaintiff's Exhibit 57)  JM Transcript 301:23-302:14 and 311:16-312:14 (Plaintiff's Exhibit 33)
7/15/11	Amended and Restated Promissory Note	The Brothers of SC, LLC	Borrower, to the extent permitted by law, waives any right to a trial by jury in any action or proceeding arising from or related to this Note.	JM Transcript 350:17-24 and 351:21-352:8 (Plaintiff's Exhibit 41)
7/15/11	Modification of Mortgage	The Brothers of SC, LLC;	9. <u>General Terms</u> . . . . Mortgagor, to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to each Modified Mortgage.	JM Transcript 355:2-356:8 (Plaintiff's Exhibit 42)
7/15/11	Continuing Guaranty	E. Marko; J. Marko	To the extent permitted by law, Guarantor waives any right to a trial	EM Transcript 312:14-17

	Agreement		by jury in any action arising from or related to this Guaranty or any of the Liabilities. <sup>50</sup>	(Plaintiff's Exhibit 59)  JM Transcript 334:7-13 and 335:16-336:21 (Plaintiff's Exhibit 35)
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<sup>50</sup> "Liabilities" is defined in the Continuing Guaranty Agreement as all obligations and indebtedness to PNC by D. Rice-Marko, GW Dorchester, LLC, Liberty Cottages, LLC, ROA, LLC, Royal Beach Properties, LLC, The Brothers of SC, LLC, and USS Clarksville, LLC.

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Carolina First Bank, n/k/a TD Bank, NA, Petitioner,

v.

BADD, L.L.C., William McKown, and Charles A.  
Christenson, Defendants,

of whom BADD, L.L.C. and William McKown are  
Respondents.

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BADD, L.L.C. and William McKown, Third-Party  
Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2013-000107

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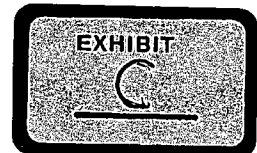
**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Horry County  
Steven H. John, Circuit Court Judge

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Opinion No. 27486  
Heard December 10, 2014 – Filed January 28, 2015



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**REVERSED**

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Thomas Wm. McGee, III, C. Mitchell Brown, Allen  
Mattison Bogan, all of Nelson Mullins Riley &  
Scarborough, L.L.P., of Columbia, for Petitioner.

Richard R. Gleissner, of Gleissner Law Firm, L.L.C., of  
Columbia, for Respondents.

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**JUSTICE PLEICONES:** In this mortgage foreclosure action, the Court granted Carolina First Bank's ("the Bank") petition for a writ of certiorari to review the Court of Appeals' decision in *Carolina First Bank v. BADD, L.L.C.*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012), which held William McKown<sup>1</sup> is entitled to a jury trial. We disagree and therefore reverse the decision of the Court of Appeals.

#### **Procedural History**

BADD, L.L.C. ("BADD"), purchased three warehouse units in Myrtle Beach. To finance the transaction, BADD executed two promissory notes. A personal guaranty was also executed by McKown, who was a member of BADD. After BADD defaulted, the Bank brought this foreclosure action and included McKown as a party pursuant to S.C. Code Ann. § 29-3-660 (2007) based on his status as a guarantor.

In McKown's amended answer and counterclaim, he demanded a jury trial because the Bank sought a money judgment for the breach of a guaranty arrangement. McKown further sought an accounting and a determination that the guaranty agreement was unconscionable. McKown then asserted two counterclaims—(1) civil conspiracy and (2) breach of contract—both based on an alleged conspiracy between the Bank and William Rempher. Finally, McKown asserted third-party claims against Rempher.<sup>2</sup>

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<sup>1</sup> While BADD also joined McKown in his demand for a jury trial, the Court of Appeals' decision turns on McKown's right to a jury trial. Therefore, we address the merits of that decision with respect to McKown.

<sup>2</sup> There is no question these third-party claims are permissive and do not entitle

The Bank moved for an order of reference. The circuit granted the motion, referring the matter in its entirety to the master-in-equity.

The Court of Appeals reversed, holding McKown was entitled to a jury trial because the Bank's claim on the guaranty agreement was a separate and distinct legal claim.<sup>3</sup> *Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 620.

We granted the Bank's petition for a writ of certiorari to review the Court of Appeals' decision.

#### **Issue Presented**

Did the Court of Appeals err in finding McKown was entitled to a jury trial?

#### **Standard of Review**

Whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo, owing no deference to the Court of Appeals' decision. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

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McKown to a jury trial. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims are permissive and a party waives his right to a jury trial by asserting them in a foreclosure action).

<sup>3</sup> The Court of Appeals also found McKown was entitled to a jury trial based on his counterclaims, but that finding relied on the threshold holding that the Bank's action on the guaranty agreement was separate and distinct from the foreclosure action. *See Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 621.

## Law/Analysis

The Court of Appeals held that when a lender exercises its statutory right to join a guarantor as a party to a foreclosure action in order to seek a deficiency judgment, the guarantor has a right to a jury trial. The Bank contends this was error. We agree.

### I. Guarantor's Right To A Jury Trial When A Bank Seeks A Deficiency Judgment Pursuant to § 29-3-660.

The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14. Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state constitution. *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). "Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

McKown was joined as a party to the foreclosure action pursuant to S.C. Code Ann. § 29-3-660 (2007). Section 29-3-660 provides:

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

(Emphasis supplied). This statute is derived, in part, from the Act of 1791, which vests exclusive jurisdiction in courts of equity for foreclosure actions. *See, e.g., Williams v. Beard*, 1 S.C. 309, 324 (1870) (discussing the Act of 1791 and the role it played in vesting courts of equity with jurisdiction to decide mortgage-related disputes). The power to render a deficiency judgment is included within the jurisdiction of courts of equity. *See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 342, 242 S.E.2d 407, 409 (1978) (recognizing that a

deficiency judgment is incidental to the relief sought in a foreclosure action and that the Act of 1791 integrated the two for purposes of characterizing the action as equitable); *see also* 27 S.C. Jur. *Mortgages* § 103 (1996) ("Mortgage foreclosures are partly in rem . . . and partly in personam . . . ; however, the strict distinction between such designations was abandoned by the Act of 1791. . . . The court's in personam jurisdiction to enter a deficiency judgment does not alter the equitable character of the [foreclosure] action.").

Here, it is clear the Bank included McKown as a party to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged. The Bank's action does not alter the equitable character of the action. *See Perpetual Bldg. & Loan Ass'n of Anderson*, 270 S.C. at 342, 242 S.E.2d at 409. Likewise, § 29-3-660 states, in part, that it is for the court to adjudge a deficiency. This statute, with its origins pre-dating the enactment of our Constitution, illustrates that a party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment. *See also* 27 S.C. Jur. *Mortgages* § 103 (stating mortgage foreclosure proceedings are regulated by statutes, and those statutes should be substantially followed). We therefore hold McKown is not entitled to a jury trial solely based on the Bank's inclusion of him as a party pursuant to § 29-3-660.

Accordingly, we reverse the Court of Appeals' holding that McKown was entitled to a jury trial solely based on the Bank's inclusion of McKown as a party to obtain a possible deficiency judgment. That holding conflicts with § 29-3-660, which confers upon *the court* the power to adjudge a deficiency.

Having determined McKown is not entitled to a jury trial for the reason relied on by the Court of Appeals, we address whether McKown is entitled to a jury trial based on his counterclaims. We do so in the interest of judicial economy as this issue was not addressed squarely by the Court of Appeals.

## II. **McKown's Right To A Jury Trial Based On His Civil Conspiracy And Breach of Contract Counterclaims.**

The Bank argues the Court of Appeals erred because McKown's counterclaims, while legal, are permissive and thus, McKown waived his right to a jury trial by asserting them in this equitable suit. We agree.

McKown is entitled to a jury trial on his counterclaims in an equitable action only

if the counterclaims are legal and compulsory. *See* Rule 13(a), SCRPC. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06 (finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note).

Given this framework, we determine whether McKown's legal counterclaims are compulsory.

#### a. Civil Conspiracy

McKown's civil conspiracy counterclaim is based on an alleged conspiracy between the Bank and Rempher. McKown contended that two years after the execution of the notes and guarantees, Rempher was substituted in Christensen's place as a member of BADD and began collecting rents from the income-producing warehouse units. Allegedly, Rempher had an ownership interest in other warehouse units not purchased by BADD and as a result, conspired with the Bank to induce BADD's default by directing potential tenants away from renting the properties. McKown further claimed Rempher intentionally failed to make payments on the note even though sufficient funds were available because Rempher wanted to purchase the three warehouse units at a below market value, foreclosure sale.

Here, the execution of the guaranty agreements was the "transaction or occurrence" that gave rise to McKown's inclusion in the Bank's foreclosure complaint. McKown's civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06; *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270–71, 449 S.E.2d 580, 582–83 (Ct. App. 1994), *aff'd in part, vacated on other grounds*, 320 S.C. 532, 486 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). In other words, the civil conspiracy claim presumes the enforceability of the guaranty

agreements because the allegations, if true, would not render the guarantees unenforceable. We therefore hold McKown waived his right to a jury trial by asserting the civil conspiracy counterclaim in a foreclosure action because the claim is permissive as it does not arise out of the same transaction or occurrence as the execution of the guaranty agreements. *See Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (stating a defendant waives his right to a jury trial by asserting a permissive counterclaim in an equitable action).

#### **b. Breach of Contract**

The breach of contract claim is based on an allegation that Rempher agreed to obtain financing for the three units BADD mortgaged. The only allegation specific to the Bank is that the Bank breached its covenant of good faith and fair dealing implied in the note, mortgage, and guaranty agreements based on the Bank's purported conspiracy with Rempher. Again, the "transaction or occurrence" for the purpose of determining the compulsory character of McKown's counterclaim is the execution of the guaranty agreements. McKown's "breach of covenant of good faith and fair dealing" claim depends on a purported conspiracy that took place, if at all, two years after the guarantees had been executed. This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements. We therefore hold McKown waived his right to a jury trial by asserting a permissive counterclaim in the foreclosure action. *Cf. Advance Int'l, Inc.*, 316 S.C. at 270-71, 449 S.E.2d at 582-83.

#### **Conclusion**

We reverse the Court of Appeals as McKown is not entitled to a jury trial solely because the Bank exercised its statutory right to join him as a party in the event of a deficiency judgment. We further hold McKown is not entitled to a jury trial based on his counterclaims, which, while legal, are permissive. McKown waived his right to a jury trial by asserting permissive counterclaims in an equitable action. Accordingly, the effect of our decision affirms the circuit court's decision, which referred this matter in its entirety to the master-in-equity.

The Court of Appeals decision is therefore

**REVERSED.**

**TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.**

CERTIFICATE OF SERVICE

I the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for PNC Bank, N.A., successor to RBC Bank (USA), do hereby certify that I have served all counsel in this action with a copy of the document(s) herein below specified via United States Mail, postage prepaid to the following address(es):

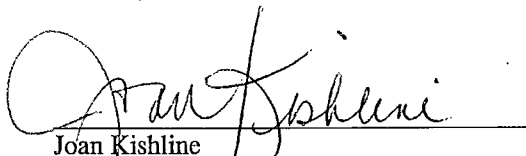
Document(s):                   Plaintiff's Memorandum in Support of Its Motion to Strike Defendants' Jury Demand & Refer Case to Master-in-Equity;

  Plaintiff's Memorandum in Support of Its Motion for Summary Judgment;

  Plaintiff's Memorandum in Opposition to Defendants' Joint Motion to Quash Subpoenas Duces Tecum and/or for a Protective Order.

Counsel Served:               Robert E. Stepp  
  William H. Jordan  
  Benjamin R. Gooding  
  Sowell Gray Stepp & Laffitte, LLC  
  P. O. Box 11449  
  Columbia, SC 29211

Willard D. Hanna, Jr.  
Hanna Law, P.A.  
1661 Glens Bay Road  
Surfside Beach, SC 29575

  
Joan Kishline  
Administrative Assistant

Columbia, South Carolina  
April 7, 2015

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
PNC Bank, N.A., successor to RBC )  
Bank (USA), )  
Plaintiffs, )  
vs. )  
Liberty Cottages, LLC; GW )  
Dorchester, LLC; USS Clarksville, )  
LLC; Liberty Cottages Land, LLC; )  
ROA, LLC; Royal Beach Properties, )  
LLC; The Brothers of SC, LLC; )  
Deborah Rice-Marko a/k/a Deborah G. )  
Rice-Marko; Evan R. Marko and John )  
E. Marko, Jr., )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT  
Civil Action No. 2013-CP-10-2624

**MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO STRIKE JURY DEMAND  
AND REFER TO MASTER-IN-EQUITY**

2015 MAY -4 PM 12:43  
JULIE J. ARMSTRONG  
CLERK OF COURT  
FILED

**I. INTRODUCTION**

The history of the banking relationship between the parties to this action is extensive and complicated. But out of the complexities, a clear narrative emerges. In the midst of a drastic economic downturn, the bank seized on a covenant violation in a non-real estate loan to force the Defendants to cross-collateralize and cross-default previously unrelated loans. These unrelated loans were neither due nor in default. Previously, without exception, the bank consistently had recognized the loans as independent and not subject to cross-collateralization or cross-default.

Thereafter, having already determined that its strategy was to exit the relationship, the bank entered into a forbearance agreement pursuant to which it obtained further cross-collateralization of the loans; higher rates, additional guaranties, and other more lender-favorable terms and releases. During the forbearance period, the bank drained as much cash as possible from the Defendants, improving the bank's position, but monopolizing the Defendants' cash flow and impairing significantly the Defendants' ability to refinance or sell the subject

properties. Having obtained higher rates and more favorable terms from the Defendants through the forbearance agreement, the bank strategized a way to get out of the agreement, finding its escape in the form of a declaration of technical default as a result of the Defendants' alleged failure to provide financial information. Throughout the course of the relationship, the bank acted in bad faith, misrepresented material facts to Defendants, disclosed Defendants' confidential information to third parties, and breached agreements into which it entered. Despite its misconduct, Plaintiff now relies upon the very contracts it procured through bad faith and misrepresentation, the very contracts Plaintiff itself has breached, to argue Defendants have waived their constitutionally-protected right to a jury trial. For the reasons set forth below, Defendants are entitled to a jury trial in this matter, and Plaintiff's motion must be denied.

## II. STATEMENT OF FACTS

In 2005, Defendant Deborah Rice-Marko ("Defendant Rice-Marko") opened a line of credit with Plaintiff PNC Bank, N.A.'s ("PNC" or "Plaintiff") predecessor, RBC Bank ("RBC"). (Compl. ¶ 87; Affidavit of Deborah Rice-Marko<sup>1</sup> ¶ 1; Deposition of Deborah Rice-Marko<sup>2</sup> p. 246, line 8 – p. 247, line 8.) In 2007, Defendant Rice-Marko increased the amount of the line of credit and the line of credit was secured by a pledge of securities, including stock in Wachovia Bank. (Rice-Marko Aff. ¶ 3; RBC Loan Agreement: Revolving Line of Credit<sup>3</sup>.) By late 2007, Defendant Rice-Marko and entities she controlled had four real estate loans and the line of credit with RBC. (Rice-Marko Aff. ¶ 4.) The loans were independent of one another and the bank's loan documents historically were drafted to exclude any cross default or cross collateralization terms. (Rice-Marko Aff. ¶ 4; see also, Loan Documents attached as Exhibits to Complaint.) By the end of 2007, Defendant The Brothers of SC, LLC ("Brothers of SC"), an entity owned by Defendants Evan R. Marko and John E. Marko, Jr., had two real estate loans unrelated and separate from the loans Defendant Rice-Marko and her entities had. (Rice-Marko Aff. ¶ 5.) The

<sup>1</sup> Defendant Deborah Rice-Marko's Affidavit was filed with this Court on May 20, 2014.

<sup>2</sup> Relevant portions of the Deposition of Deborah Rice-Marko are attached hereto as **Exhibit A**.

<sup>3</sup> A copy of the January 2007 RBC Loan Agreement: Revolving Line of Credit is attached hereto as **Exhibit B**.

bank maintained separate files for the Defendants' various loans and did not consider the loans to be related. (Deposition of Stephen Draper<sup>4</sup> p. 17, lines 13-22.)

In the second half of 2007, the value of Wachovia stock began to decline. (Rice-Marko Dep. p. 250, lines 12-15; Rice-Marko Aff. ¶ 6.) At the request of RBC, Defendant Rice-Marko agreed to draw on a home equity line of credit secured by her personal residence in order to reduce the balance of the line of credit and maintain an agreeable loan-to-value ratio. (Rice-Marko Dep. p. 35, line 23 – p. 36, line 4; Rice-Marko Aff. ¶ 6.) In March of 2008, Defendant Rice-Marko pledged more than 23,000 additional shares of Wachovia stock to the RBC line of credit. (Rice-Marko Aff. ¶ 7; E-mail correspondence between Donald J. Horres and Michael Baker dated March 17-18, 2008<sup>5</sup>.)

Wachovia's stock again declined in June of 2008, leading to margin calls from RBC. (Rice-Marko Aff. ¶ 9-10; Letter from Michael Baker to Deborah Rice-Marko dated September 26, 2008<sup>6</sup>.) In response to the margin calls, Defendant Rice-Marko drew on other lines of credit that she, or entities she owned, had financed through RBC. (Rice-Marko Aff. ¶ 9.) Defendant Rice-Marko also used proceeds from her late mother's life insurance policies. (Rice-Marko Aff. ¶ 10.) In sum, Defendant Rice-Marko reduced the outstanding balance of the line of credit from \$5.3 million in June 2008 to \$1.8 million in January 2009. (Rice-Marko Aff. ¶ 10.)

In the fall of 2008, RBC began to plot to enhance its security and its overall position with respect to the line of credit by requiring Defendants to cross-collateralize and cross-default their previously unrelated existing loans, loans that were not in default and that reflected substantial equity in the real estate that secured them. The sole purpose of this required modification was to obtain more favorable terms for the bank. On September 30, 2008, Stephen Draper wrote to Michael Baker that RBC "need[s] to consider all options to bring our Wachovia exposure to a

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<sup>4</sup> Relevant portions of the Deposition of Stephen Draper are attached hereto as **Exhibit C**.

<sup>5</sup> A copy of the March 17-18, 2008 e-mail correspondence between Donald J. Horres and Michael Baker (DRM 000346) is attached hereto as **Exhibit D**.

<sup>6</sup> A copy of Michael Baker's September 26, 2008 letter to Deborah Rice-Marko (DRM 000330) is attached hereto as **Exhibit E**.

cross collateralized position with other available collateral to improve our overall collateral position.” (9/30/08 E-mail from Stephen Draper to Michael Baker<sup>7</sup>.) In October 2008, RBC informed Defendant Rice-Marko of its desire to restructure all of the loans so that they were cross-collateralized. (Rice-Marko Aff. ¶ 13; see also, e.g., E-mail from Michael Baker to Deborah Rice-Marko dated October 3, 2008<sup>8</sup>.)

In response, Defendant Rice-Marko suggested an alternative method by which RBC could further secure the line of credit. Namely, Defendant Rice-Marko suggested that RBC finance a shopping center she desired to purchase in Asheville, North Carolina that would have provided substantial additional equity and would have produced additional income to help with payments on the line of credit. (Rice-Marko Dep. p. 651, lines 18-25.) While there were significant delays in RBC’s consideration of Defendant Rice-Marko’s request (See 11/6/08 E-mail from Michael Baker to Defendant Rice-Marko<sup>9</sup>), RBC ultimately denied the request. (Rice-Marko Dep. p. 653, lines 5-8.)

Ultimately, the only option RBC offered to the Defendants was to cross-collateralize and cross-default all of the existing loans. (Deposition of Michael Baker<sup>10</sup> p. 35, lines 7-13; see also 11/24/2008 Business Banking Transaction Request<sup>11</sup>.) RBC sent Defendant Rice-Marko loan modification documents in December 2008. (Rice-Marko Aff. ¶ 14.) Those documents included much more favorable language for the lender, including rate increases, higher fees, synchronization of all loan maturity dates, unlimited guaranties, and cross-collateralization and cross-default for Defendant Rice-Marko’s loans and for her children’s previously unrelated loans. (Rice-Marko Aff. ¶ 14; see also Loan Documents attached to Complaint.) The loan

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<sup>7</sup> A copy of the 9/30/08 E-mail from Stephen Draper to Michael Baker (PNC\_Rice-Marko\_20390) is attached hereto as **Exhibit F**.

<sup>8</sup> A copy of Michael Baker’s October 3, 2008 e-mail to Deborah Rice-Marko (DRM000378) is attached hereto as **Exhibit G**.

<sup>9</sup> A copy of the 11/6/08 E-mail from Michael Baker to Defendant Rice-Marko (DRM000380) is attached hereto as **Exhibit H**.

<sup>10</sup> Relevant portions of the Deposition of Michael Baker are attached hereto as **Exhibit I**.

<sup>11</sup> A copy of the 11/24/2008 Business Banking Transaction Request (PNC\_Rice-Marko\_47020 – 47064) is attached hereto as **Exhibit J**.

documents also required additional quarterly payments of \$100,000 to be applied to the line of credit. (Rice-Marko Aff. ¶ 14; see also Loan Documents attached to Complaint.)

While Defendant Rice-Marko was opposed to the proposed modification, Michael Baker, a representative of RBC, informed Defendant Rice-Marko that RBC would not renew any of her outstanding loans or the loans of her family members if she did not agree to the bank's newly demanded loan terms. (Rice-Marko Aff. ¶ 15-16.) According to Baker, failure to renew the notes would ultimately result in bankruptcy for Defendant Rice-Marko and her sons. (Rice-Marko Aff. ¶ 16.) Defendant Rice-Marko requested that the loan be referred to RBC's workout department, but Baker misrepresented to her that there was not an internal workout group within RBC. (Rice-Marko Aff. ¶ 17.) Defendant Rice-Marko advised RBC that she could not afford to make the \$100,000 quarterly payments. (Rice-Marko Aff. ¶ 18.) She was assured that RBC would work with her if she had trouble making the payments. (Rice-Marko Aff. ¶ 18.)

By threatening Defendant Rice-Marko with the bankruptcy of her children, and by threatening Defendant Rice-Marko's children with the financial ruin of their mother, the bank left the Defendants with no choice but to agree to RBC's demands. (Rice-Marko Aff. ¶ 18.) Indeed, RBC had informed Defendant Rice-Marko that no alternative solution was available (Rice-Marko Aff. ¶ 18) and the bank did not propose any other solutions. (Baker Dep. p. 35, lines 7-13.) In fact, Michael Baker informed Defendant Rice-Marko that the bank's proposed revisions were non-negotiable. (See January 6, 2009 E-mail from Michael Baker to Defendant Rice-Marko<sup>12</sup> stating "[t]he documents will need to be standard" and that he "can't get approval to modify documents in this type restructure situation"; see also Rice-Marko Dep. p. 640, lines 15-20; Rice-Marko Aff. ¶ 16.)

Defendant Rice-Marko made three \$100,000 payments over the course of 2009, but could not afford to make the final \$100,000 payment in December of that year. (Rice-Marko Aff. ¶ 19.) Defendant Rice-Marko requested that RBC work with her, as the bank had previously assured

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<sup>12</sup> A copy of Michael Baker's January 6, 2009 E-mail (DRM 000394) is attached hereto as Exhibit K.

her it would. (Rice-Marko Aff. ¶¶ 18-19.) The bank's response was to request a fourth mortgage on Defendant Rice-Marko's personal residence. (Rice-Marko Dep., p. 668, line 7 – p. 669, line 4.)

In May 2010, the loans were transferred to RBC's Asset Resolution Group for the purpose of a workout. (Rice-Marko Aff. ¶ 20.) This was the very group RBC had previously informed Defendant Rice-Marko did not exist. (Rice-Marko Aff. ¶ 20.) According to its own policy, the goal of RBC's workout group was "to be a best-in-class professional workout/restructuring group that is viewed by clients as being understanding, creative, and fair in providing solutions." (RBC Bank Policy Manual<sup>13</sup>.) As Defendant Rice-Marko would soon find out, however, RBC's Asset Resolution Group was not focused on working with the Defendants to find a creative business solution, but was focused on maximizing the amount of cash the bank obtained from the Defendants, making the contractual terms much more advantageous to the bank, and, ultimately, exiting the relationship.

In June 2011, PNC entered into an agreement to purchase RBC. (Rice-Marko Aff. ¶ 22.) At about the same time, RBC requested that Defendants execute a forbearance agreement for all of the loans. (Rice-Marko Aff. ¶ 23.) Believing they had no alternative, Defendants agreed to the Forbearance Agreement<sup>14</sup>, pursuant to which all of the loans matured simultaneously in July 2013. (Rice-Marko Aff. ¶ 23.) The Forbearance Agreement was executed on July 15, 2011. (Forbearance Agreement.)

RBC's motivation for entering into the Forbearance Agreement is clear. Through the Forbearance Agreement, RBC obtained an acknowledgment of default, further cross-collateralization of the once independent loans, waivers of defenses, and waivers of the right to a jury trial. (30(b)(6) Deposition of PNC Bank (Harrington)<sup>15</sup> p. 51, line 13 – p. 52, line 25.)

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<sup>13</sup> A copy of the relevant portions of the RBC Bank Policy Manual (PNC\_Rice-Marko\_134078) is attached hereto as **Exhibit L**.

<sup>14</sup> A copy of the Forbearance Agreement is attached hereto as **Exhibit M**.

<sup>15</sup> Relevant portions of the 30(b)(6) Deposition of PNC Bank (Harrington) are attached hereto as **Exhibit N**.

Moreover, under the Forbearance Agreement, RBC would receive payments of \$33,000 per month (PNC 30(b)(6) Dep. (Harrington) p. 55, lines 3-6) thus giving the bank a chance “to collect what money [it] could” during the forbearance period. (Deposition of Bill Harrington<sup>16</sup> p. 47, lines 7-18.) RBC used the Forbearance Agreement as an opportunity to greatly enhance its position with no expectation that the Forbearance Agreement would serve as a solution to the Defendants’ financial hardships. (See, e.g., February 27, 2011 E-mail from Larry Ficych (RBC) to Rick Hartmann (RBC)<sup>17</sup> stating Defendant Rice-Marko is “in a position to achieve higher returns on these assets than the Bank would in a foreclosure action.”)

In fact, as is now evident, at the time RBC entered into the Forbearance Agreement, it had every intention of exiting the banking relationship with Defendants. As Bill Harrington confirmed during his deposition, before the Forbearance Agreement, it was determined that RBC was in an exit strategy. (Harrington Dep. p. 80, lines 10-23.) That RBC wanted to exit the relationship is further evidenced by the fact that, well prior to the execution of the Forbearance Agreement, the Defendants’ loans were on non-accrual status. (Harrington Dep. p. 40, lines 8-13.) As Harrington confirmed, nonaccrual status signifies that “the bank no longer believes a collection of full amount of principal and interest is going to happen.” (PNC 30(b)(6) Dep. (Harrington) p. 20, lines 1-8.) Harrington confirmed that RBC’s decision to exit the relationship happened around the same time as when the Defendants’ loans went on nonaccrual status. (PNC 30(b)(6) Dep. (Harrington) p. 57, lines 13-16.)

In connection with PNC’s agreement to purchase RBC, PNC conducted due diligence on RBC’s outstanding loans, including Defendants’ loans. (Deposition of Stephen Wursta<sup>18</sup> p. 20, line 16 – p. 21, line 20.) The due diligence involved assessing the financial condition of the borrowers and the guarantors. (Wursta Dep. p. 22, lines 4-11.) On January 23, 2012, during the due diligence period, Harrington asked Defendant Rice-Marko for financial information that

<sup>16</sup> Relevant portions of the Deposition of Bill Harrington are attached hereto as **Exhibit O**.

<sup>17</sup> A copy of Larry Ficych’s February 27, 2011 E-mail (PNC\_Rice-Marko\_01228) is attached hereto as **Exhibit P**.

<sup>18</sup> Relevant portions of the Deposition of Stephen Wursta are attached hereto as **Exhibit Q**.

PNC was requesting. (1/23/12 E-mail Chain between Bill Harrington and Debbie Rice-Marko<sup>19</sup>; Harrington Dep. p. 55, line 25 – p. 56, line 14.) Harrington explained that the request was “routine due diligence.” (1/23/12 E-mail Chain between Bill Harrington and Debbie Rice-Marko; Harrington Dep. p. 57, lines 2-12.) Defendant Rice-Marko provided the requested information. Although PNC’s “appetite for information” was “insatiable” (e-mail from Larry Ficych dated 1/22/12<sup>20</sup>), PNC did not request additional information regarding the Defendants’ loans during the due diligence period.

PNC completed the acquisition of RBC in March of 2012. (Rice-Marko Aff. ¶ 26.) Shortly after closing, Harrington attended a meeting with PNC representatives during which he discussed all of his credits. (Harrington Dep. p. 58, lines 10-20.) Shortly thereafter, Harrington called Defendant Rice-Marko and warned her that PNC did not like the Forbearance Agreement and that PNC would be looking for a reason to declare a default. (Rice-Marko Aff. ¶ 25.) Harrington specifically mentioned the failure to provide financial information as an issue that PNC might seize on to declare a technical default. (Rice-Marko Aff. ¶ 25.)

It is evident that PNC did not like the Forbearance Agreement (see, e.g., August 2012 PNC Special Assets Report<sup>21</sup> (“terms of the Forbearance Agreement only require, for all loans, a monthly payment of \$33,000”)) and was looking for a way to exit the relationship from the moment it acquired RBC in March 2012. As Harrington stated during his deposition, PNC “liked very short-term forbearance or extensions in the – in the 90 to 180-day-range as opposed to a two-year type thing.” (Harrington Dep. p. 74, line 19 – p. 75, line 2.) Moreover, like RBC, PNC had determined shortly after its acquisition of RBC that Defendants’ loans were nonaccrual loans and had decided its strategy would be to exit the relationship. (August 2012 PNC Special Assets

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<sup>19</sup> A copy of the 1/23/12 E-mail from Bill Harrington to Debbie Rice-Marko is attached hereto as **Exhibit R**.

<sup>20</sup> A copy of the 1/22/12 E-mail from Larry Ficych (PNC\_Rice-Marko\_055991) is attached hereto as **Exhibit S**.

<sup>21</sup> A copy of the August 2012 PNC Special Assets Report (PNC\_Rice-Marko\_15236) is attached hereto as **Exhibit T**.

Report; 30(b)(6) Deposition of PNC Bank (Radermacher)<sup>22</sup> p. 36, lines 19-24; p. 40, lines 19-25; p. 69, lines 5-8.) As noted in the August 2012 PNC Special Assets Report, PNC's strategy was simple: "Determine when we can terminate the forbearance agreement." (August 2012 PNC Special Assets Report (PNC\_Rice-Marko\_15239).)

In June of 2012, at PNC's request, Defendant Rice-Marko provided the bank with substantial financial and other information relating to the properties. (Rice-Marko Aff. ¶ 27.) Shortly thereafter, Defendant Rice-Marko learned that PNC, in its effort to market the properties for sale, had disclosed the confidential information Defendant Rice-Marko had provided to third parties. (Rice-Marko Aff. ¶ 28-29.) PNC requested additional financial information from Defendant Rice-Marko. (Wursta Dep. p. 33, line 15 – p. 34, line 7.) Despite its knowledge of Defendant Rice-Marko's concerns over the breach of confidentiality, PNC never offered to maintain the confidentiality of the financial information it was requesting. (Rice-Marko Aff. ¶ 30-31.) In July of 2012, Stephen Wursta and Elizabeth Paulson met with Defendant Rice-Marko and, among other things, again asked her for financial information. (Wursta Dep. p. 55, lines 7-10.) When Defendant Rice-Marko voiced her concerns regarding the confidentiality of those documents, the Bank's representatives told Defendant Rice-Marko they could "do this the easy way" or "the hard way." (Wursta Dep. p. 59, lines 20-23; Rice-Marko Aff. ¶ 31.)

With Defendant Rice-Marko concerned about the confidentiality of her financial information and unwilling to provide it to the bank without the bank's reasonable assurance that confidentiality would be maintained, PNC found its opportunity to get out of the Forbearance Agreement. On November 26, 2012, PNC issued a default letter to Defendant Rice-Marko, claiming she was in technical default under the Forbearance Agreement for failure to provide requested financial information. (Rice-Marko Aff. ¶ 33; November 26, 2012 Default Letter<sup>23</sup>.) At

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<sup>22</sup> Relevant portions of the the 30(b)(6) Deposition of PNC Bank (Radermacher) are attached hereto as **Exhibit U**.

<sup>23</sup> A copy of the November 26, 2012 default letter is attached hereto as **Exhibit V**.

that time, no payment default existed (30(b)(6) Deposition of PNC Bank (Wursta)<sup>24</sup> p. 74, lines 4-7.) The default letter accelerated the debt and demanded payment, within ten days, of \$20,065,815. (November 26, 2012 Default Letter.) Defendants were unable to pay the amount demanded and, on February 15, 2013, PNC issued a second default letter for Defendants' failure to pay the amount demanded. (Rice-Marko Aff. ¶ 35; February 15, 2013 Default Letter<sup>25</sup>.)

Having further modified the loan documents to include various waivers of Defendants' rights, cross-collateralization and cross-default provisions, and synchronized maturity dates, the Bank used a non-material and technical default to accelerate the full balance of all the loans within ten days. This happened exactly as RBC's representative Bill Harrington had warned Defendant Rice-Marko it would when he suggested that the Bank did not like the Forbearance Agreement and may seize on the failure to provide financial information to declare a technical default. (Rice-Marko Aff. ¶ 25.) Once Defendants were unable to pay the full balance in ten days, the bank used that failure to pay as the basis for a second default letter and, ultimately, the trigger for this litigation.

In May of 2013, PNC filed complaints<sup>26</sup> in Charleston, Dorchester, and Florence Counties seeking to foreclose on the related pieces of real property located in those counties and seeking to collect on personal guaranties associated with the notes and mortgages at issue. Defendants answered and counterclaimed, contesting PNC's right to foreclose on the properties and collect on the personal guaranties, and contending that PNC, through its bad faith, misrepresentations, breaches of the agreements, and other misconduct, is precluded from enforcing the subject agreements and is liable to Defendants for actual and punitive damages. (See Amended Answer & Counterclaims; Rice-Marko Aff.) Defendants asserted breach of contract, breach of covenant of good faith and fair dealing, breach of duty of confidentiality,

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<sup>24</sup> Relevant portions of the 30(b)(6) Deposition of PNC Bank (Wursta) are attached hereto as **Exhibit W**.

<sup>25</sup> A copy of the February 15, 2013 default letter is attached hereto as **Exhibit X**.

<sup>26</sup> On June 10, 2014, this Court transferred the Dorchester and Florence County cases and consolidated the cases for purposes of case administration and trial.

conspiracy, negligence, misrepresentation/fraud, and unfair trade practice causes of action in their counterclaim. (Amended Answer & Counterclaims, ¶¶ 44-97.) In June of 2014, the courts entered orders pursuant to which the legal claims and the equitable claims were bifurcated, the three cases were consolidated for the purpose of resolving the legal claims, and the equitable claims were stayed pending resolution of the claims at law.<sup>27</sup>

Because Defendants assert legal counterclaims, Defendants demanded a jury trial. PNC now asks this Court, based upon boilerplate<sup>28</sup> jury trial waivers<sup>29</sup> contained in the subject agreements, to strike Defendants' jury trial demand. PNC's request must be denied.

### III. ARGUMENT

#### A. Defendants Have Asserted Legal Counterclaims Which Give Rise to the Right to a Jury Trial.

The right to trial by jury is a fundamental right in South Carolina. See Wright v. Colleton County School Dist., 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990). The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. CONST. ART. I, § 14; see also Rule 38(a), SCRPC. "The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted). "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Parties are entitled

<sup>27</sup> The Charleston County Order to Transfer and Consolidate dated June 10, 2014 is attached hereto as **Exhibit Y**, the Florence County Consent Order Transferring Venue dated June 5, 2014 is attached hereto as **Exhibit Z**, and the Dorchester County Consent Order Transferring Venue dated June 18, 2014 is attached hereto as **Exhibit AA**.

<sup>28</sup> RBC's own Legal Reference Manual refers to the "waiver of a jury trial" as a "boilerplate" provision. (p. 12). A copy of the Legal Reference Manual is attached hereto as **Exhibit BB**. See also PNC 30(b)(6) Dep. (Harrington) p. 53, line 18 (referring to waiver of jury trial as "boilerplate").

<sup>29</sup> The loan documents provided that Defendants "to the extent permitted by law, waive[d] any right to a trial by jury in any action arising from or related to" the contract. (See, e.g., Ex. A to Complaint (emphasis added).) The Forbearance Agreement also contained a clause purporting to waive the rights to a jury trial. (See Forbearance Agreement § 2.5.)

to jury trials, however, for actions arising at law. See, e.g., Bateman v. Rouse, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004).

While “[a] mortgage foreclosure is an action in equity,” U.S. Bank Trust Nat’l Ass’n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (internal quotation marks omitted), “counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial.” Wachovia Bank, Nat. Ass’n v. Blackburn, 407 S.C. 321, 328; 755 S.E.2d 437, 441 (2014). The South Carolina Supreme Court recently explained the framework used to determine whether a matter consisting of claims and counterclaims is triable by a judge or a jury:

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. 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. at 329-330, 755 S.E.2d at 441-42.

In this case, while the complaint is equitable, the counterclaims are legal. As stated above, Defendants have asserted, in part, counterclaim causes of action for breach of contract, conspiracy, negligence, negligent misrepresentation, and unfair trade practices. Each of these causes of action is an action at law. See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (“An action for breach of contract is an action at law.”); Gynecology Clinic, Inc. v. Cloer, 334 S.C. 555, 514 S.E.2d 592 (1999) (“An action for civil conspiracy is an action at law.”); Bundrick v. E. Richland Cty Pub. Serv. Dist., 2005 WL 7083866 at \*1, No. 2005-UP-225 (S.C. Ct. App., March 31, 2005) (“A suit based on negligence is an action at law.”); Payne v. Holiday Towers, Inc., 283 S.C. 210, 215, 321 S.E.2d 179, 182 (Ct. App. 1984) (holding cause of action for unfair trade practice is “in the nature of an action at law for recovery of money damages.”)

**1. This Court Does Not Need to Determine Whether Defendants’ Counterclaims are Permissive or Compulsory because the Legal and Equitable Claims Have Been Bifurcated.**

In its motion, Plaintiff argues, in part, that Defendants are not entitled to a jury trial because Defendants’ counterclaims “are permissive and Defendants have waived their right to a jury trial on those claims by asserting them in this equitable foreclosure action.” (Mot. p. 2.) As is set forth in Section III.A.2 below, contrary to Plaintiff’s contention, Defendants’ counterclaims clearly are compulsory. However, the Court does not even need to reach the issue of whether Defendants’ counterclaims are compulsory or permissive because the only claims pending before this Court are claims at law, claims which give rise to the right to a jury trial.

Plaintiff commenced three separate foreclosure actions—one in Charleston County, one in Florence County, and one in Dorchester County. Defendants filed counterclaims in each of those foreclosure actions. In June of 2014, each of the courts entered an order pursuant to which the courts bifurcated the legal claims and the equitable claims, consolidated the cases for the purpose of resolving the legal claims, and stayed the equitable claims pending resolution of the claims at law. (See Orders attached as Exhibits X, Y, and Z.) As a result of those orders, the only matters before this Court are the claims at law. Accordingly, this Court does not need to

determine the permissive or compulsory nature of the counterclaims, but simply must decide whether the jury trial waivers contained in the loan documents are sufficient to waive Defendants' right to a jury trial on the claims at law.

**2. If the Court Decides it Must Determine Whether Defendants' Counterclaims are Compulsory or Permissive, the Counterclaims are Compulsory.**

If the Court inquires into whether Defendants' counterclaims are compulsory or permissive, it should determine the counterclaims are compulsory. Rule 13(a), SCRPC, provides that "a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." See also Wachovia, 407 S.C. at 330, 755 S.E.2d at 442. The South Carolina Supreme Court has adopted the "logical relationship" test for determining whether a counterclaim is compulsory under Rule 13(a). N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Under this test, a counterclaim is compulsory if there is "*any logical relationship between the claim and the counterclaim.*" Id. (emphasis added). "If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." Wachovia Bank, 407 S.C. at 330, 755 S.E.2d at 442, note 7 (citing N.C. Fed., 298 S.C. at 518-19, 381 S.E.2d at 905).

In this case, Plaintiff has asserted eighteen causes of action sounding in property foreclosure and collection on guaranties. (Complaint ¶¶17-200.) Those causes of action arise from agreements entered into by the parties over the course of a banking relationship that began approximately fifteen years ago. Defendants' counterclaims plainly bear a "logical relationship" to Plaintiff's claims because, through their counterclaims, Defendants argue that Plaintiff's misconduct renders it unable to enforce the contracts it seeks to enforce. The relationship between the claim and counterclaim is apparent: the counterclaim calls into question the validity of the claim.

Defendants argue that Plaintiff has breached the contracts between the parties. (Complaint ¶¶ 44-49.) Defendants further argue Plaintiff breached the covenants of good faith and fair dealing contained within those contracts. (Complaint ¶¶ 50-58.) Defendants claim Plaintiff, in its contractual dealings with Defendants, conspired with others for the purpose of injuring Defendants. (Complaint ¶¶ 68-73.) Defendants claim Plaintiff was negligent, in part, by coercing Defendants to execute modified agreements, in misrepresenting contractual remedies available to Defendants, and in leading Plaintiff to execute one or more agreements with which Plaintiff never intended to comply. (Complaint ¶¶ 60-90.) And Defendants allege Plaintiff violated South Carolina's Unfair Trade Practices Act by taking advantage of Defendants throughout the course of the parties' contractual relationship. (Complaint ¶¶ 91-97.) As a result of all of this misconduct, Defendants assert that all "duties or responsibilities of Defendants to Plaintiff [should be] discharged and that all agreements between Plaintiff and Defendants, including but not limited to all notes, guaranties, and mortgages, [should be declared] null and void." (Complaint p. 19.) There is no question there is a logical relationship between the claims and the counterclaims.

Because Defendants' counterclaims are claims at law and because they are compulsory counterclaims, Defendants' counterclaims give rise to the right to a jury trial. Thus, Defendants are entitled to a jury trial "unless a valid jury trial waiver exists that encompasses the counterclaim." Wachovia Bank, 407 S.C. at 329-330, 755 S.E.2d at 441-42.

**B. The Jury Trial Waivers Cannot Apply to Defendants' Counterclaim Because the Counterclaim Questions the Enforceability of the Contracts that Contain the Jury Trial Waivers.**

The right to trial by jury is a fundamental right in South Carolina and "any abridgement of that right is subject to strict scrutiny." Lane v. Gilbert Const. Co., Ltd., 383 S.C. 590, 600, 681 S.E.2d 879, 884 (S.C. 2009) (citing City of Beaufort v. Holcombe, 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006)). While a party may waive the right to a jury trial by contract, such a waiver must be strictly construed as the right to trial by jury is a substantial right. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002); see also N. Charleston

Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). As the court recognized in AttorneyFirst LLC v. Ascension Entertainment, 144 Fed. Appx. 283, 290 (4th Cir. 2005), “[a] waiver of the right to trial by jury will not be lightly implied [and because] the right of jury trial is fundamental, courts must indulge every reasonable presumption against waiver.” The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication. Keels, 315 S.C. at 342, 433 S.E.2d at 904.

This case centers around the enforceability of the loan documents and the related contracts entered into between the parties. Plaintiff seeks to foreclose on mortgages and collect on personal guaranties. Defendants assert that Plaintiff—by its egregious and willful misconduct—is precluded from enforcing the subject agreements and is liable to Defendants for money damages. Plaintiff, in filing the instant motion and arguing that Defendants “expressly and irrevocably waived their right to a jury trial,” seeks a ruling from this Court on the case’s central issue: the enforceability of the contracts.

Such a ruling at this point in the litigation is both premature and prejudicial to Defendants. If the Court grants Plaintiff the relief it requests, denying Defendants the right to a jury trial, and the trier of fact ultimately determines that the subject contracts are unenforceable, then there was no valid waiver of the right to a jury trial, and Defendants will have been wrongfully denied the constitutionally-protected right.

Other courts have recognized this predicament. For example, in Fed. Housecraft, Inc. v. Faria, the court held that a party defending a breach of contract action by challenging the validity of the contract is entitled to a jury trial on the enforceability of the contract, despite the existence of a jury trial waiver. 216 N.Y.S.2d 113, 114 (N.Y. App. 1961). In so holding, the court noted that “[o]therwise the party seeking such a trial would be at a disadvantage in having to proceed to trial without a jury by virtue of the waiver provision in an agreement which may be void in its entirety.” Id. The court found that this problem “may be avoided by the simple expedient of requiring a jury trial as to the defense of fraud before the remaining issues are litigated.” Id.

Other courts recognize a similar rule. See, e.g., C&C Wholesale, Inc. v. Fusco Mgmt. Corp., 564 So.2d 1259, 1261 (Fl. Ct. App. 1990) (recognizing that a defendant's allegations that a lease as a whole is not legally enforceable would impact the waiver of jury trial contained within the lease).


The same analysis applies in this case. Plaintiff should not be able to deny Defendants the constitutionally-protected right to a jury trial based upon provisions in contracts, the very enforceability of which is at the heart of this case. This Court should protect Defendants' substantial right and deny Plaintiff's motion.

#### **IV. CONCLUSION**

Defendants are entitled to a jury trial as the legal causes of action asserted in their counterclaims. Accordingly, this Court should deny Plaintiff's Motion to Strike Jury Demand and Refer to Master-in-Equity.

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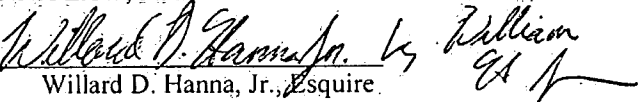
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and Deborah Rice-Marko a/k/a Deborah G. Rice-  
Marko*

-and-

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LLC*

April 8, 2015

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON ) IN THE NINTH JUDICIAL CIRCUIT

PNC Bank, N.A., successor to RBC, ) Civil Action No. 2013-CP-10-2624  
Bank (USA), )

Plaintiffs, )

vs. )

Liberty Cottages, LLC; et al. )

Defendants. )

**CERTIFICATE OF SERVICE**

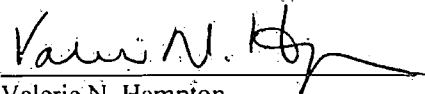
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2015 MAY -4 PM 12:43  
JULIE A. ARISTON  
CLERK OF COURT  
BY \_\_\_\_\_

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendants Liberty Cottages, LLC, USS Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC, Royal Beach Properties, LLC, and Deborah Rice-Marko a/k/a/ Deborah G. Rice-Marko, do hereby certify that I have caused to be served on counsel for the plaintiff in these actions the originals of the documents specified below by hand delivery to the following address:

**Documents:** Memorandum in Opposition to Plaintiff's  
Motion to Strike Jury Demand and refer to Master-in-Equity

**Counsel Served:** Frank B. B. Knowlton, Jr., Esquire  
T. William McGee, Esquire  
Tara C. Sullivan, Esquire  
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*Attorneys for Plaintiff*

  
Valerie N. Hampton

April 8, 2015  
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PNC Bank, N.A., successor to RBC  
Bank (USA),

Plaintiffs,

vs.

Liberty Cottages, LLC; GW  
Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
E. Marko, Jr.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) IN THE NINTH JUDICIAL CIRCUIT

) Civil Action No. 2013-CP-10-2624.

) **DOCUMENTS TO FILE UNDER SEAL**  
) **PURSUANT TO JUDGE NICHOLSON**  
) **ORDER**

**EXHIBITS TO DEFENDANTS' JOINT MEMORANDUM OF  
LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE  
JURY DEMAND AND REFER TO MASTER-IN-EQUITY**

Robert E. Stepp  
William H. Jordan  
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# EXHIBIT A

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 WITNESS: Deborah Rice-Marko, Volume I

18 DATE: Monday, July 14, 2014

19 TIME: 10:13 a.m.

20 LOCATION: Nelson Mullins Riley & Scarborough  
21 151 Meeting Street, Suite 600  
22 Charleston, South Carolina

23 TAKEN BY: Attorneys for the Plaintiff

24 REPORTED BY: HEATHER M. CURLIN  
25 Registered Professional Reporter

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26 COMPUSCRIPTS, INC.  
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31 1-888-988-0086  
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1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF:

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12  
13 ATTORNEYS FOR THE DEFENDANTS LIBERTY COTTAGES, LLC;  
14 USS CLARKSVILLE, LLC; LIBERTY LAND COTTAGES, LLC;  
15 ROA, LLC; ROYAL BEACH PROPERTIES, LLC; and DEBORAH  
16 RICE-MARKO a/k/a DEBORAH G. RICE-MARKO:

17  
18 SOWELL GRAY STEPP & LAFFITTE, LLC  
19 BY: ROBERT E. STEPP, ESQUIRE  
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24  
25 ATTORNEYS FOR THE DEFENDANTS EVAN R. MARKO; JOHN E.  
MARKO, JR.; THE BROTHERS OF SC, LLC; and GW  
DORCHESTER, LLC:

18 HANNA LAW, PA  
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24  
25 ALSO PRESENT: Evan Marko  
John E. Marko, Jr.  
Stephen Wursta, Jr.

(INDEX AT REAR OF TRANSCRIPT)

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- 1 Q. So the loan balance hasn't changed?
- 2 A. No, sir.
- 3 Q. Okay. And are there other mortgages on that  
4 house?
- 5 A. Yes, sir.
- 6 Q. Okay. Who has the other mortgages?
- 7 A. RBC, PNC, if you will, has a line of credit.
- 8 Q. And how much is the balance of that?
- 9 A. As I recall, it's 650,000.
- 10 Q. Okay. Does anyone else have a mortgage on  
11 the property?
- 12 A. Yes, sir.
- 13 Q. All right. Who is the next in line?
- 14 A. White Lion Capital.
- 15 Q. And what's the balance of that mortgage?
- 16 A. In excess of \$2 million.
- 17 Q. And tell me about that -- well, let me go  
18 back to that. Any other mortgagees on the property?
- 19 A. No, sir, not that I'm aware.
- 20 Q. Okay. So that's all the debt on the Battery  
21 house?
- 22 A. That's my recollection, yes.
- 23 Q. And you had a home equity line of credit on  
24 there with PNC/RBC?
- 25 A. Yes, sir.

1 Q. And what did you use that money for, the  
2 \$650,000?

3 A. To reduce the principal balance on the line  
4 of credit debt with RBC.

5 Q. Okay. The Royal Beach loan or was that the  
6 business line of credit?

7 A. The line of credit debt that's the subject of  
8 the complaint, Deborah Rice-Marko.

9 Q. Right. And White Lion, who is White Lion?

10 A. White Lion is an LLC owned by my sons.

11 Q. And did they -- did this entity loan you  
12 money?

13 A. Yes.

14 Q. And it was \$2 million?

15 A. I don't know how much money they loaned me  
16 over a period of time.

17 Q. Well, you have a mortgage of \$2 million, so  
18 what I'm trying to get at is they loaned you \$2 million  
19 and took a mortgage back?

20 A. Yes, they've loaned me over \$2 million over a  
21 period time.

22 Q. Okay.

23 A. My recollection.

24 Q. And do you have a note with White Lion?

25 A. I don't recall.

1 Q. Okay. At what point in time do you recall  
2 that John and Evan would have signed in their own  
3 capacity for The Brothers' loans?

4 A. I don't know.

5 Q. Okay.

6 (Exhibit No. 31 was marked.)

7 BY MR. KNOWLTON:

8 Q. Ms. Rice-Marko, shifting gears, we're going  
9 to start talking about another one of the loans that are  
10 outstanding, and this is a personal loan of yours. I've  
11 handed you what's been marked as Exhibit Number 31 to  
12 your deposition. It's a promissory note from you to the  
13 bank dated January 13, 2005. Do you see that?

14 A. Yes.

15 Q. In the amount of \$5 million. Do you see  
16 that?

17 A. Yes.

18 Q. And what was the purpose of this loan?

19 A. My recollect --

20 Q. Is this the line of credit that you talked  
21 about earlier? I will direct you to page 2, about the  
22 middle of the page, where it says "line of credit."

23 A. We've got two questions on the table. Which  
24 would you like for me to answer?

25 Q. Well, answer the second one. Is this a

1 business line of credit that you had with the bank?

2 A. The purpose of this loan was for personal and  
3 investment activities.

4 Q. Okay. What were the personal and investment  
5 activities?

6 A. Investment in commercial properties,  
7 investment -- or purchasing stock or just -- I can't  
8 recall specifically, but those in general.

9 Q. It's set up as a line of credit. Did you  
10 take a draw of \$5 million at the outset, or did you take  
11 a little bit over time?

12 A. I don't recall.

13 Q. Okay. That is your signature at the bottom  
14 of the page?

15 A. Appears to be a copy of.

16 Q. Okay. And at some point in time, the money  
17 was advanced to you? Was it --

18 A. Yes.

19 Q. Okay. And you can't specifically agree -- or  
20 recall what you did with the money?

21 A. No, sir, I have no tracing of the funds at  
22 this time.

23 Q. But you did agree to repay that money  
24 pursuant to this note, correct?

25 MR. STEPP: Object to the form.

1 securities, according to the collateral description, was  
2 \$5,688,433.86?

3 A. Brokerage account, A. G. Edwards, in the name  
4 of Deborah G. Rice-Marko dated January 12th of '5,  
5 having a value of \$5,688,433. Yes.

6 Q. This was mostly Wachovia stock that was in  
7 this account?

8 A. As I recall, yes, mostly.

9 Q. Okay.

10 A. I can't say with any specificity whether any  
11 other stock, but yes, mostly.

12 Q. And when did the Wachovia stock start to  
13 decline; do you recall?

14 A. My recollection is the end -- last quarter of  
15 2007.

16 Q. Okay. And do you recall whether you were  
17 represented by counsel when you signed this document?

18 A. No, sir.

19 Q. You don't recall?

20 A. I do not recall, no, sir.

21 (Exhibit No. 33 was marked.)

22 BY MR. KNOWLTON:

23 Q. Ms. Rice-Marko, I'm handing you what has been  
24 marked as Exhibit Number 33 to your deposition. This  
25 looks like a modification agreement dated August 30,

1 the loans through the very same thing that you're  
2 complaining about that were in these documents that had  
3 not yet been signed, cross-default,  
4 cross-collateralization --

5 A. Yes.

6 Q. -- to name two of them?

7 A. If I understand your question, Mr. Baker was  
8 using the threat of foreclosure for related and  
9 unrelated loans that were not in default that had no  
10 contractual tie or relationship.

11 Q. Did he draw a distinction between loans that  
12 were maturing or that would mature and refusal to review  
13 those loan terms versus foreclosure based on  
14 cross-default and cross-collateralization?

15 A. As I recall, Mr. Baker said that by not  
16 signing those documents in January of 2009 as they were  
17 presented, with no negotiation, would result in the bank  
18 no longer renewing loans as they would come due and,  
19 therefore, they would go in default and force us into  
20 bankruptcy.

21 Q. Okay. So he didn't actually use the words  
22 "cross-collateralization," did he?

23 A. Mr. Baker told me that he would not renew the  
24 loans as they became matured and foreclose on those  
25 loans. His first -- as I recall, his first use of

1 loans."

2 Do you see that?

3 A. Yes.

4 Q. Okay. What was the 1031 exchange that you  
5 refer to here?

6 A. I'm sorry; what do you mean what was the  
7 1031?

8 Q. Right.

9 A. Are you talking about what was --

10 Q. What property was involved there?

11 A. What was the replacement property, or what  
12 was the sold? I'm not understanding, sir.

13 Q. Well, I don't want to characterize it any way  
14 other than how you've characterized it. You've  
15 characterized it as the bank's refusal to finance the  
16 acquisition of a replacement property as part of a 1031  
17 exchange, and I want to ask you what you mean by that.

18 A. You're asking what was the replacement  
19 property? It was a shopping center located in  
20 Asheville, North Carolina. The name of the center, as I  
21 recall, was Rutledge Commons. And I had identified that  
22 as a replacement property which would have provided  
23 about a million two over -- equity over the required  
24 guidelines of RBC and would have thrown off income to  
25 help with payments.

1 A. I did.

2 Q. From whom?

3 A. I seem to recall the response came from  
4 Mr. Baker in November, I believe it was, of 2008.

5 Q. And what was the response?

6 A. I can't recall the exact wording, but it was,  
7 no, we would not finance -- or finance the acquisition  
8 of the property.

9 Q. And did he explain why?

10 A. I don't recall.

11 Q. Was it in writing or was it orally?

12 A. I recall there was an e-mail, but I don't  
13 recall the context or the e-mail.

14 Q. Okay. And who owned the Asheville Commons  
15 property?

16 A. I don't recall.

17 Q. How were you going to -- I'm trying to  
18 understand how -- you were going to buy the Asheville  
19 shopping center and then replace that as the collateral  
20 for the loan and take out the Wachovia stock?

21 A. There was, as I said, about a million two,  
22 according to the guidelines of RBC, additional equity in  
23 that property. As I recall RBC guidelines, they would  
24 finance 80 percent, I believe, of the purchase price and  
25 85 percent of the appraisal. It could be reversed. I

1 you if you signed the 2009 loan modifications, right?

2 A. Yes. I believe that's correct.

3 Q. And the context of the "work with you" was in  
4 the context of these quarterly principal payments,  
5 correct?

6 A. As my recollection, yes.

7 Q. And sometime after you signed the 2009 loan  
8 modifications, you began to have difficulty or perceived  
9 that you were going to have difficulty making all of  
10 those principal curtailment payments, correct?

11 A. I perceived I would have difficulty prior to  
12 signing them.

13 Q. Okay. You thought --

14 A. And after they were signed, I then instituted  
15 action to meet with the lenders to come up with a  
16 mutually beneficial or agreeable alternative.

17 Q. Thank you. And that led to the meeting at  
18 your house?

19 A. Yes.

20 Q. Okay. And you can't recall what alternatives  
21 you suggested to the bank?

22 A. Not as I sit here today, no.

23 Q. Okay. But did the bank offer any solutions  
24 to you?

25 A. After several months, as I recall, yes.

1 Q. What were their solutions?

2 A. As I recall, a fourth mortgage on my home.

3 Q. Anything else?

4 A. Not that I recall at this time.

5 Q. Okay. So do you recall that you did provide  
6 alternatives to the bank, or do you just not recall  
7 whether you had provided alternatives or not?

8 A. I don't recall what alternatives were  
9 discussed.

10 Q. Okay. There could have been other  
11 alternatives discussed, you just don't recall?

12 A. Yes. I would think there may have been, but  
13 today, sitting here, I cannot tell you.

14 Q. Okay. Other than the fourth mortgage, were  
15 there any other alternatives that you can think of  
16 today?

17 A. That the bank offered?

18 Q. Either you or the bank.

19 A. I can't think of any that I offered today,  
20 but that's the only alternative that I seem to recall  
21 the bank offered.

22 Q. Okay. And after the fourth mortgage idea was  
23 suggested by the bank, what happened?

24 A. I explained to the bank that there was a  
25 third mortgage and that the third mortgage had a

# **EXHIBIT B**

Customer No. \_\_\_\_\_  
Loan No. \_\_\_\_\_

Attachments to Loan Agreement  
Attachment 1 – Definitions  
Attachment 2 – Collateral

## RBC Centura

### LOAN AGREEMENT; REVOLVING LINE OF CREDIT

**THIS LOAN AGREEMENT; REVOLVING LINE OF CREDIT** ("Loan Agreement"), entered into as of January \_\_, 2007 ("Effective Date"), by and between DEBORAH G. RICE-MARKO (whether one or more, "Borrower"), with a mailing address of 32 South Battery, Charleston, South Carolina 29401, and RBC CENTURA BANK, a North Carolina banking corporation ("Bank"), with a mailing address of Post Office Box 1220, Rocky Mount, North Carolina 27802-1220.

Borrower wishes to obtain credit extensions under the credit facility described below ("Credit Facility"), and Bank desires to extend such credit to Borrower for use by Borrower in its business. This Agreement sets forth the terms and conditions on which Bank will advance credit to Borrower.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Borrower and Bank hereby agree as follows:

#### Section 1. Definitions and Use of Terms.

For the purposes of this Loan Agreement, capitalized terms shall have the meaning given to them in Attachment 1 to this Loan Agreement or elsewhere herein, as applicable, and if any capitalized terms are not defined in either Attachment 1 or elsewhere in this Loan Agreement, such terms shall have the meaning given to them in the Uniform Commercial Code ("UCC") in effect from time to time in the jurisdiction whose laws govern this Loan Agreement. In using and applying the various terms, provisions and conditions in this Loan Agreement and the other Loan Documents, the rules of construction contained in Attachment 1 shall apply.

#### Section 2. Credit Facility.

2.1. **Purpose.** The purpose of the Credit Facility is as follows: fund personal and company investment activities. Advances under the Credit Facility may not be used for any other purpose without the prior written consent of Bank, which may be granted in Bank's sole and absolute discretion.

2.2. **Credit Facility.** Subject to and upon the terms and conditions of this Agreement and provided that no Default Condition or Event of Default has occurred and is continuing, at any time and from time to time from the Effective Date through the Maturity Date, Bank will make available to Borrower a Credit Facility under which Borrower may request and Bank agrees to make advances ("Advance" or "Advances") to Borrower. All Advances made under and pursuant to this Loan Agreement shall be evidenced by the Note. The aggregate amount of outstanding Advances shall not exceed at any time the Committed Credit Line. If no Default Condition or Event of Default has occurred and is continuing, amounts borrowed under the Credit Facility may be repaid and reborrowed at any time prior to the Maturity Date.

2.3. **Interest Rate/Repayment.** The outstanding principal balance of each one of and all of the Advances shall bear interest, and principal and interest shall be repayable in accordance with the terms of the Note, together with the fees, premiums, charges and cost and expenses provided for in the Note. Unless otherwise provided in this Loan Agreement or the other Loan Documents, the monetary obligations Borrower now owes and the monetary obligations that arise in the future and are owing by Borrower to Bank under this Loan Agreement and the other Loan Documents (exclusive of the Note) shall be payable by Borrower upon demand of Bank, with interest thereon at the highest contract rate of interest under the Note; and, like the amounts due and owing under the Note, the same shall be secured by the Collateral.

2.4. **Overadvances.** Notwithstanding anything to the contrary in the Note or any of the other Loan Documents, if, at any time, the aggregate amount of the outstanding Advances under the Credit Facility exceeds the maximum amount of Advances that are permitted to be outstanding at any one time, as provided in this Section 2.2., the Borrower shall immediately pay to Bank, in cash, the amount of such excess.

RALEIGH/438126 v.2 04/15/05

DRM 000697

2.5. Disbursements. Unless Bank consents to a different procedure or process, or makes available to Borrower a different procedure or process, whenever Borrower desires an Advance, Borrower shall notify Bank (which notice shall be irrevocable) by facsimile transmission or telephone no later than 10:00 a.m. eastern time, on the Business Day on which Borrower desires the Advance to be made. Each notification by facsimile transmission shall include such information as Bank may require at the time of the request, and each notification shall be signed by a Responsible Officer or a designee thereof. Each notification by telephone shall include such information as Bank may require at the time of the request, and each notification by telephone shall be followed within one Business Day by a facsimile transmission which meets the criteria regarding a facsimile transmission. Bank shall be entitled to rely on any telephonic notice given by a person who Bank reasonably believes to be a Responsible Officer or a designee thereof. Bank shall not have any liability to Borrower or any other person for its failure to make an Advance on the date requested by Borrower, unless such failure is the result of willful misconduct or gross negligence of Bank; and if Bank's failure is a result of willful misconduct or gross negligence, its liability shall be limited to the lesser of actual damages or the amount of the Advance that was not made on the date requested - Bank shall not be liable for indirect, speculative, consequential or punitive damages and losses. If Borrower maintains its operating deposit account with Bank, Bank will credit the amount of the Advance to such account. If Borrower does not maintain its operating deposit account with Bank, Bank will issue to Borrower for deposit in its operating deposit account a bank check or other negotiable instrument drawn on Bank in the amount of the Advance.

### Section 3. Collateral.

As security for the payment of the Credit Facility and the other obligations evidenced by and arising under any one or more of this Loan Agreement and the other Loan Documents, the Credit Facility and such other obligations shall be secured by and Bank is hereby granted a lien and security interest in the property and property rights ("Collateral") described on Attachment 2, together with the proceeds, products, accessions, additions, replacements and substitutions thereto and thereof. Bank's lien and security interest in the Collateral is and shall be a perfected first priority lien and security interest, subject only to the Permitted Encumbrances. The Credit Facility and such other obligations may also be secured by property and property rights described in some of the other Loan Documents, and such property and property rights shall be included in and a part of the Collateral.

### Section 4. Conditions to Advances.

4.1. Conditions to Advances. The obligation of Bank to make each Advance, including the initial Advance, is subject to all of the conditions and requirements set forth in this Section 4.1 being satisfied and completed, or the satisfaction and completion thereof waived by Bank:

(a) Bank shall have received fully executed and, if necessary, recorded or filed, originals of the Loan Documents required by (1) the Commitment, (2) this Loan Agreement and (3) Bank and its counsel;

(b) Bank shall have received the supporting documentation required by the Commitment and by Bank and its counsel, and all of the other terms and conditions listed in the Commitment and elsewhere in this Loan Agreement shall have been satisfied;

(c) Bank shall have a perfected, first priority lien and security interest in all of the Collateral, subject only to the Permitted Encumbrances;

(d) The representations and warranties made by Borrower which are contained herein and those which are contained in any loan application, certificate, financial statement, document or other record furnished at any time to Bank in connection with Bank's underwriting of the Credit Facility, or furnished at any time to Bank in connection with the Commitment, this Loan Agreement or the Credit Facility, shall be correct on and as of the Effective Date, as if made on and as of such date, and on and as of the date of each Advance;

(e) No Default Condition or Event of Default shall have occurred and be continuing at the time of each Advance, or after an Advance;

(f) Borrower shall have paid to Bank all fees and costs and expenses to be paid by Borrower at or before any Advance, as provided in the Commitment, in this Loan Agreement or in any of the other Loan Documents; and

(g) All other information and documents contemplated by this Loan Agreement shall be received by Bank in form and substance satisfactory to Bank and its counsel, and Bank and its counsel shall otherwise be satisfied that all matters required to be performed in connection with this transaction or any Advance have been performed in such

a manner that an Advance can be made under the Credit Facility, the lien and security position of Bank perfected in the Collateral and that no event exists which will jeopardize the Credit Facility and the prospect of payment of the Credit Facility.

4.2. Failure to Satisfy Conditions. If all of the conditions in Section 4.1 are not met to Bank's satisfaction, or waived by Bank, Bank may, at its option, (1) withhold making an Advance until the conditions are met, (2) make an Advance and require that any unsatisfied conditions are satisfied as conditions subsequent to an Advance or (3) terminate its obligation to make Advances under the Credit Facility; and such action by Bank shall not constitute a termination of this Loan Agreement, shall not constitute a termination of Borrower's obligations under this Loan Agreement and the other Loan Documents and shall not adversely affect or impair Bank's security interests or liens in the Collateral. A waiver by Bank of a condition must be in writing to be effective and a waiver as to one or more conditions shall not constitute a waiver as to other conditions.

#### Section 5. Representations and Warranties.

5.1. Representations and Warranties. In order to induce the Bank to enter into this Loan Agreement and to make the Credit Facility available to Borrower, Borrower hereby makes the following representations and warranties:

(a) The financial statements delivered by Borrower to Bank in connection with Borrower's application for the Credit Facility, including the related schedules and notes thereto, (1) are complete, accurate and correct and present fairly the financial condition of Borrower at such date, (2) have been prepared in accordance with GAAP applied consistently throughout the periods involved, and (3) since the date thereof, there have been no material adverse changes in any one or more of the business, operations, assets and financial condition of Borrower;

(b) If Borrower is an Organization, Borrower (1) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (2) has the power, authority and the legal right to own and operate its property, to lease the property it operates and to conduct the business as presently conducted and as proposed to be conducted, as represented to Bank, and (3) is in compliance with all Requirements of Law, except in those instances where the failure to comply therewith does not and will not, in the aggregate, have a material adverse impact on any one or more of the business, operations, property and financial condition of Borrower and does not and will not materially adversely affect the ability of Borrower to perform its obligations under the Loan Documents;

(c) If Borrower is an Organization, Borrower has the power, authority and the legal right (1) to make, deliver and perform under the Loan Documents, (2) to borrow hereunder and has taken all action to authorize the borrowings on the terms and conditions of the Loan Documents, including the Note, (3) to authorize the execution, delivery and performance of the Loan Documents to which it is a party and (4) to pledge and mortgage its property as contemplated by the Loan Documents;

(d) The Loan Documents, including the Note, have or will be duly executed and delivered on or before the time of the initial Advance;

(e) The Loan Documents when executed and delivered will constitute legal, valid and binding obligations of Borrower, enforceable in accordance with their terms and not subject to rescission, invalidation, nullification and other avoidance;

(f) Borrower, and each of the other owners of the Collateral and each of the other owners of interests therein, if any, have good and marketable title in fee simple in and to the Collateral owned by each, free and clear of any and all liens, security interests, claims, demands, off-sets, contingencies and other outstanding interests, both legal and equitable, except for the Permitted Encumbrances;

(g) All of the Collateral and all other property of Borrower that is necessary for the full use and enjoyment of the Collateral is in material compliance with all Requirements of Law, including zoning, subdivision and environmental rules and regulations, and will be operated in such manner to remain in material compliance with all Requirements of Law until the Credit Facility is paid and satisfied in full;

(h) Borrower operates its business and owns its assets only under the name of Borrower;

(i) Borrower (1) is not a person whose property or interest in property is blocked or subject to blocking pursuant to Section 1 of Executive Order 13224 of September 23, 2001 Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (66 Fed. Reg. 49079 (2001)),

(2) does not engage in any dealings or transactions prohibited by Section 2 of such executive order, or is not otherwise associated with any such person in any manner violative of Section 2, and (3) is not a person on the list of Specially Designated Nationals and Blocked Persons or subject to the limitations or prohibitions under any other U.S. Department of Treasury's Office of Foreign Assets Control regulation or executive order; and

(j) Without limiting Borrower's representation and warranty in Section 5.1(b) and (g) above, Borrower is in compliance, in all material respects, with (1) the Trading with the Enemy Act, as amended, and each of the foreign assets control regulations of the United States Treasury Department (31 CFR, Subtitle B, Chapter V, as amended) and any other enabling legislation or executive order relating thereto, and (2) the Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act of 2001).

5.2. Continuing Representations and Warranties. Borrower's representations and warranties contained in Section 5.1 above and elsewhere in this Loan Agreement and the other Loan Documents shall be deemed continuing representations and warranties that survive (1) the execution and delivery of this Loan Agreement and any other Loan Documents, (2) any inspections and examinations at any time made by Bank and any made on behalf of Bank and (3) each Advance made by Bank under the Credit Facility.

#### Section 6. Covenants.

6.1. Affirmative Covenants. Borrower covenants and agrees with Bank as follows:

- (a) Borrower shall use all Advances only for the purposes stated in this Loan Agreement;
- (b) Borrower shall pay when due all amounts now owing to Bank under the Note, this Loan Agreement and the other Loan Documents, and Borrower shall pay when due all amounts which may in the future become owing to Bank under the Note, this Loan Agreement and the other Loan Documents;
- (c) Borrower shall promptly perform or otherwise abide by or adhere to all non-monetary obligations of Borrower hereunder and under the Note and the other Loan Documents – both present non-monetary obligations and non-monetary obligations which may arise in the future;
- (d) Borrower shall furnish to Bank and Borrower shall cause others to furnish to Bank, at the sole cost and expense of Borrower, such financial and other information respecting the business, assets, operations and financial condition of Borrower as the Bank may from time to time request, including, without limitation, the following at the times indicated:
  - (i) As soon as practicable, but in any event not later than 90 days after the end of each calendar year after the Effective Date, the personal financial statement of Borrower, in a form acceptable to Bank.
- (e) Borrower shall maintain proper books and records in which full, true, accurate and correct entries, in conformity with GAAP and all Requirements of Law, shall be made of all material dealings and transactions in relation to Borrower's business and activities;
- (f) Borrower shall permit Bank, and Borrower shall permit Bank's representatives, to visit and inspect any of the Collateral and any of the other property owned or used by Borrower in its business, and Borrower shall permit Bank, and shall permit Bank's representatives, to examine and make abstracts from any of Borrower's books and records at any reasonable time and as often as may reasonably be desired;
- (g) Borrower shall keep and maintain the Collateral consisting of real property and tangible personal property in good working order and condition and make all needful and proper repairs, replacements, additions and improvements thereto as are necessary;
- (h) Borrower shall keep and maintain in full force and effect insurance coverages against such risk of loss as Bank may require from time to time, including, without limitation, insurance coverages against risk of loss to the Collateral, and all such insurance coverages shall be with companies, in amounts and contain terms and conditions satisfactory in all respects to Bank;
- (i) Borrower shall maintain, protect and preserve the security interest of Bank in the Collateral and the lien position of Bank in the Collateral, including, without limitation, the filing of "claims" under insurance policies within the time periods required under such policies and the filing of appropriate notices, claims and pleadings in any condemnation actions; and

(j) On demand of Bank, Borrower shall do or undertake any act and execute and deliver any additional documents consistent with the Commitment and the Loan Documents reasonably required by Bank to secure the Credit Facility, confirm and perfect the lien and security interest of Bank in the Collateral and to comply with the Commitment and the Loan Documents, including, but not limited to, additional financing statements, new and replacement notes, security documents and agreements supplementing, extending and otherwise modifying the Note, this Loan Agreement and any of the other Loan Documents, and certificates as to the amount of the Indebtedness evidenced by the Note from time to time.

6.2. Negative Covenants. Borrower covenants and agrees with Bank as follows:

(a) Borrower shall not change its name and Borrower shall not operate under a name other than its current name;

(b) If Borrower is an Organization, (1) Borrower shall not offer to, and Borrower shall not sell, transfer, issue, convey, dispose of or distribute any equity interests in Borrower, debt instruments of Borrower or combinations of equity and debt in Borrower, (2) Borrower shall not offer to, and Borrower shall not sell, transfer, issue, convey, dispose of or distribute any option, warrant and other similar or dissimilar right to acquire an equity interest in Borrower, a debt instrument of Borrower or combinations of equity and debt in Borrower, (3) Borrower shall not permit and Borrower shall not recognize any transfer, conveyance, alienation or other disposition of any interest or right in Borrower by any equity holder or other person, including, without limitation, any transfer of any stock or other securities in Borrower, any transfer of any equity interest in Borrower, any transfer of a debt interest in Borrower or any transfer of some other position in Borrower, (4) Borrower shall not enter into any one or more of the following – merger, consolidation, asset acquisition, stock acquisition, syndication, liquidation of assets, reorganization or recapitalization, or reclassification of capital stock or other equity interests, (5) Borrower shall not change, modify, amend or otherwise reconstitute its organizational structure, its properties or its businesses, and (6) Borrower shall not form, create or otherwise cause to be formed or created any subsidiaries;

(c) Except Indebtedness in respect of the Credit Facility and other Indebtedness owing to Bank, Borrower shall not (1) create any Indebtedness, (2) incur or otherwise become obligated on any Indebtedness, (3) assume any Indebtedness, (4) refinance any Indebtedness, (5) suffer to exist any Indebtedness against it or (6) draw upon any Indebtedness (for the purposes of this Section 6.2(c) only, Indebtedness does not include short-term unsecured trade credit incurred in the ordinary course of business to maintain or acquire normal levels of inventory and supplies, or for maintenance and service contracts for services necessary or appropriate to Borrower);

(d) Except for (1) liens for taxes not yet due or which are being contested in good faith and by appropriate proceedings if adequate reserves with respect thereto are maintained in accordance with GAAP and (2) liens and security interests in favor of Bank, Borrower shall not and Borrower shall not permit others to encumber the Collateral, or any part thereof or interest therein, with any one or more of the following – a lien (inclusive of real property, personal property and mixed real and personal property liens), a security interest, a governmental assessment or lien (inclusive of a federal tax lien), a charge, a levy, an attachment, an order of seizure or any other similar or dissimilar claim;

(e) Except for the sale of inventory in the ordinary course of business and the sale of equipment in the ordinary and normal replacement program for equipment under which Bank's first priority lien and security interest continues in the replacement equipment, Borrower shall not voluntarily and Borrower shall not involuntarily through its direct actions or inactions, or indirectly through the actions or inactions of others, do any one or more of the following – sell, transfer, lease, liquidate, franchise, license, dispose of or part with possession or control of all or any part of or interest in (whether legal or equitable) any of the Collateral or all of the Collateral;

(f) Borrower shall not directly and Borrower shall not indirectly purchase or otherwise acquire, and Borrower shall not directly and Borrower shall not through another person carry or otherwise hold any "margin stock" within the meaning of Regulation U of the Board of Governors of the Federal Reserve System and any interpretations or rulings thereunder, and Borrower shall not "speculate" in or "hedge" in any stock, futures, commodity, index and other similar markets, or undertake any other activity that is not in the ordinary course of business of Borrower as that business has been disclosed to Bank; and

(g) Borrower shall not use any of the Advances or any portions thereof, directly or indirectly, for any payments to any governmental official or employee, political party, official of a political party, candidate for

political office, or anyone else acting in an official capacity, in order to obtain, retain or direct business or obtain any improper advantage, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended.

6.3. Financial Maintenance Covenants. Borrower covenants and agrees with Bank that Borrower shall maintain:

(a) Permitted Investments. The investments in the Brokerage Account (as defined in Attachment 3) must be acceptable to Bank in its sole discretion.

(b) No Margin. The Brokerage Account must at all times be a non-margin brokerage account

(c) Margin Call. If at any time the outstanding principal balance on the Loan is equal to or greater than 85% of the market value of the securities held as collateral in the Brokerage Account, and such ratio of principal to market value continues for five consecutive business days, then the Borrower shall either (i) make a mandatory prepayment on the Loan, (ii) deposit additional funds or securities in the Brokerage Account, or (iii) pledge additional cash or other assets satisfactory to Bank, as necessary to cause the outstanding principal balance on the Loan to be less than 85% of the market value of (i) the securities held as collateral in the Brokerage Account, plus (ii) the market value of any additional collateral pledged. Bank shall give Borrower 10 business days written notice in which to respond to a margin call as set forth above.

(d) Sale of Collateral. Bank may not sell or cause the sale of collateral as a result of a margin call unless (i) Bank shall have first given Borrower 10 days prior written notice that fair market value of the Brokerage Account (plus any additional collateral pledged) has fallen below the level required by the preceding subsection (c), (ii) Borrower shall have failed within such 10 days to make the mandatory prepayment or pledge of additional collateral provided for by the preceding subsection (c), and (iii) Bank shall have given the Borrower 10 days prior written notice of Bank's intention to sell collateral; provided, however, this notice of sale may be given simultaneously with the notice that the fair market value of the Collateral has fallen below the level required by the preceding subsection. (e). In addition to the foregoing, Bank shall have all other rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, at law, in equity, or otherwise.

(e) Release of Collateral. So long as there shall occurred no Event of Default hereunder, upon Borrower's request, Bank will release a portion of the assets in the Brokerage Account so long as after giving effect to such release, the ratio of the outstanding principal balance on the Loan to the fair market value of the securities in the Brokerage Account (plus any additional collateral pledged) is not less than that required by the preceding subsection (c). In addition, Borrower shall have the right to vote the stock in the Brokerage Account, to exchange it or any part thereof for other readily marketable securities acceptable to Bank or cash of at least equivalent value which shall continue to be held in the Brokerage Account, to collect and receive all cash dividends paid on the assets in the Brokerage Account and unless otherwise restricted herein, to exercise all other rights the Borrower may have with respect to the collateral. Upon default, the foregoing provisions shall not apply and the Borrower may not withdraw any assets in the Brokerage Account without the prior written consent of Bank

6.4. Materiality of Covenants. Borrower covenants and agrees with Bank that until the later of (1) payment in full of the Credit Facility and all other amounts owing to Bank under the Loan Documents or (2) termination of Bank's obligation to make disbursements under the Credit Facility, Borrower will fully and promptly do, perform, abide by and adhere to each and every one of the covenants set forth in this Section 6. Borrower acknowledges to Bank and agrees that the breach or default by Borrower of any of the covenants in this Section 6 is and the same shall be material.

#### Section 7. Events of Default; Remedies.

7.1. Events of Default. The occurrence of any one or more of the following events shall constitute an "Event of Default" under this Loan Agreement:

(a) the occurrence of any event of default or default condition under the Note, including, without limitation, Borrower's failure to pay when due the principal of or interest on the Note, or any other sums due thereunder, whether fees, charges, premiums or costs and expenses;

(b) Borrower's breach of or default under any of the terms, conditions, covenants or provisions contained in this Loan Agreement or in any of the other Loan Documents;

(c) the actual or threatened demolition, injury or waste to the Collateral, or any material part thereof or interest therein, which, in the sole opinion of Bank, may impair its value, or the actual or threatened decline in value of the Collateral or any material part thereof;

(d) Borrower's assets, or any material part or portion thereof or interest therein, are attached, seized, subjected to a writ or distress warrant, or are levied upon, or come into the possession of any trustee, receiver or person acting in a similar capacity and such attachment, seizure, writ or distress warrant or levy has not been removed, discharged or rescinded within ten (10) days, or if Borrower is enjoined, restrained or in any way prevented by court order from continuing to conduct all or any material part of its business affairs, or if a judgment or other claim becomes a lien or encumbrance upon any material portion of Borrower's assets or Borrower's interest therein, or if a notice of lien, levy or assessment is filed of record with respect to any of Borrower's assets or Borrower's interest therein by any Governmental Authority, and the same is not paid within ten (10) days after Borrower receives notice thereof, provided that none of the foregoing shall constitute an Event of Default where such action or event is stayed or an adequate bond has been posted pending a good faith contest by Borrower;

(e) the insolvency of Borrower or any person obligated for payment of the Credit Facility or any parts or portions thereof, or the appointment of a receiver for, or the filing of a petition of bankruptcy by or against Borrower or any person obligated for payment of the Credit Facility or any parts or portions thereof;

(f) Borrower's default under the terms of any instrument or other agreement to which this Loan Agreement or any of the other Loan Documents is subordinate or which is subordinate to this Loan Agreement or any of the other Loan Documents;

(g) any false statement, misrepresentation or withholding of facts by Borrower or any other person in any loan application or other document provided by Borrower or any other person to Bank or its representatives, including, without limitation, any misrepresentation made in this Loan Agreement, or in any presentation made by Borrower or any other person to Bank or its representatives, as to any matter relied upon by Bank in evaluating whether to extend financing to Borrower;

(h) default by Borrower under any other Indebtedness or other obligation now owing or which hereafter arises and is owing to Bank, or default by any of Borrower's affiliates or subsidiaries under any Indebtedness or other obligation now owing or which hereafter arises and is owing to Bank; or

(i) a determination by Bank that the prospect of payment or performance by Borrower or any other person under any one or more of the Loan Documents is insecure or that a material adverse change in the financial condition of Borrower or any person obligated for payment of the Credit Facility or any parts or portions thereof has occurred since the Effective Date.

**7.2. Rights and Remedies.** If a Default Condition or an Event of Default shall occur under this Loan Agreement, in addition to any other right and remedy which may be available to Bank and without limiting any other right and remedy granted to Bank in the Loan Documents, which rights and remedies are fully exercisable by Bank as and when provided in such other Loan Documents, Bank shall have the rights and remedies set forth below in Sections 7.2.1 through 7.2.3., any and all of which Bank may exercise at its election, without notice of its election and without demand - subject, however, to applicable notice or grace periods, if any.

**7.2.1. Acceleration of Maturity.** Bank may, at its option, accelerate and declare immediately due and payable the Note, as well as any of and all of the other Indebtedness and obligations owing under this Loan Agreement and the other Loan Documents that are not already due hereunder and that are not already due thereunder. In addition to the foregoing, Bank may from time to time and at any time proceed to protect and enforce its rights and remedies under any one or more of the Loan Documents (including its absolute and unconditional right to recover full payment of any and all of the obligations owing by Borrower, as well as those owing by other persons to Bank) by any one or more of the following: judicial and non-judicial foreclosure proceedings as against all or any part of the Collateral, without regard to the situs of such Collateral; suits in equity; actions at law; and other appropriate legal, equitable and administrative proceedings to enforce full payment.

**7.2.2. Limit, Moratorium or Termination of Advances.** Bank may, at its option, at any time or times, immediately and without prior notice to Borrower or any other person, limit, declare a moratorium on or terminate Bank's obligation to make any Advance or Advances under this Loan Agreement; and such action by Bank shall not constitute a termination of this Loan Agreement, shall not constitute a termination of Borrower's obligations under

this Loan Agreement and the other Loan Documents and shall not adversely affect or impair Bank's security interests or liens in the Collateral.

**7.2.3. Set-off and Recoupment.** To the extent not prohibited by applicable Requirements of Law, Bank may, at its option and at any time or times without prior notice to Borrower, set-off and apply toward payment of the Credit Facility and other amounts now owing and amounts which may become owing by Borrower under the Loan Documents, and otherwise exercise its rights of recoupment, as to any and all (1) balances and deposits of Borrower held by Bank, (2) Indebtedness and other obligations at any time owing to or for the credit and account of Borrower by Bank, and (3) Indebtedness and other obligations at any time owing to or for the credit and account of Borrower by any of Bank's affiliates or subsidiaries.

**7.3. Discontinuance of Proceedings; Position of Parties Restored.** If Bank shall have proceeded to enforce any right and remedy under the Loan Documents by foreclosure, entry or otherwise and such proceedings shall have been discontinued or abandoned for any reason, or such proceedings shall have resulted in a final determination adverse 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 proceedings had occurred or had been taken.

**7.4. Demand Note.** Notwithstanding anything else in this Loan Agreement to the contrary, if any Note is payable on demand by Bank, then, in such event, there are no conditions precedent to Bank's right to demand payment of such Note, in whole or in part, at any time and from time to time, without prior notice, until the entire unpaid balance outstanding under such Note, including, without limitation, principal, interest, fees, premiums, charges and costs and expenses, are paid in full. Also, there are no conditions precedent to Bank exercising any of and all of its other rights and remedies at such time or times as it deems necessary or appropriate to recover full payment of the Note, including, without limitation, the exercise of any of and all of its rights and remedies set forth in this Section 7, the exercise of any of and all of its other rights and remedies granted to it under the Loan Documents and the exercise of any of and all of its rights and remedies at law and in equity.

#### **Section 8. Miscellaneous.**

**8.1. Incorporation of Exhibits.** All exhibits, supplements, schedules, addenda and other attachments to this Loan Agreement are by this reference incorporated herein and made a part hereof. The captions herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Loan Agreement nor the intent of any provision hereof.

**8.2. Amendments.** Subject to the exercise by Bank of its rights and remedies as set forth in this Loan Agreement and without limiting any of such rights and remedies, this Loan Agreement may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Bank, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

**8.3. Assignment.** The terms, provisions and conditions in this Loan Agreement shall be binding upon and inure to the benefit of the heirs, successors, assigns and personal representatives of the parties hereto; provided, however, Borrower shall not assign this Loan Agreement and any of its rights, interests, duties and obligations hereunder (inclusive of the proceeds of the Credit Facility and other moneys to be advanced under or on account of this Loan Agreement) in whole or in part without the prior written consent of Bank. It is expressly recognized and agreed that Bank may assign or transfer this Loan Agreement, the Note and any other Loan Documents, in whole or in part, to any person and, in the event of such assignment, Bank shall thereafter be relieved of all liability hereunder to the extent of the assignment or transfer. Borrower waives and will not assert against any transferee or assignee of Bank any claims, defenses, set-offs and rights of recoupment which Borrower could assert against Bank, except defenses which Borrower cannot waive.

**8.4. Power of Attorney.** Borrower does hereby irrevocably constitute and appoint Bank its true and lawful attorney with full power of substitution, for it and in its name, place and stead, to execute, deliver and file such agreements, documents, notices, statements and records, to include, without limitation, financing statements, and to do and undertake such other acts as Bank, in its sole discretion, deems necessary or advisable to effect the terms and conditions of this Loan Agreement and to otherwise protect and preserve the security of the lien and security interests in the Collateral, and Bank's interests therein. The foregoing appointment is and the same shall be coupled with an interest in favor of Bank.

8.5. Payment of Expenses. Without limiting any other provision of this Loan Agreement relating to Borrower's payment of costs and expenses incurred by Bank and those incurred by others on behalf of Bank, but in addition thereto, whether or not the Credit Facility is made available to Borrower or any Advances made thereunder, Borrower shall pay to Bank, on demand, each and all of any costs and expenses incurred by Bank, incurred by others on behalf of Bank and incurred by Bank for Borrower: (1) in order to meet Bank's requirements in connection with the Credit Facility, (2) in connection with making the Credit Facility available to Borrower and (3) in connection with the enforcement of Bank's rights and remedies under the Loan Documents. All of the foregoing costs and expenses shall be paid with interest thereon at the highest contract rate prescribed in the Note from the date paid or incurred by or on behalf of Bank until such costs and expenses are paid by Borrower. All sums so paid and expended by Bank, and the interest thereon, shall be added to and be secured by Bank's lien and security interests in the Collateral.

8.6. Jurisdiction. This Loan Agreement shall be deemed to have been executed and delivered in the State of South Carolina, regardless of where the signatories may be located at the time of execution. This Loan Agreement and the other Loan Documents shall be governed by and construed in accordance with the substantive laws of the aforesaid jurisdiction, excluding, however, the conflict of law and choice of law provisions thereof. Notwithstanding the foregoing, to the extent any of the Collateral is located in another jurisdiction or other jurisdictions, the laws of the jurisdictions in which the Collateral is located shall govern with respect to Bank's and Borrower's rights in and to Collateral located in such other jurisdictions and Bank's remedies relative thereto. Borrower to the extent permitted by law, waives any right to a trial by jury in any action arising from or related to this Loan Agreement and any of the other Loan Documents.

8.7. Cumulative Rights, etc. The rights, powers and remedies of Bank under this Loan Agreement shall be in addition to all rights, powers and remedies given to Bank by virtue of any applicable laws and regulations, those given in equity, those given to Bank under the other Loan Documents and those given under any other agreement, all of which rights, powers and remedies shall be cumulative and may be exercised by Bank from time to time and at any number of times successively, concurrently and alternatively without impairing Bank's rights under this Loan Agreement and under any of the other Loan Documents.

8.8. No Waiver. No delay or forbearance by Bank in exercising any and all of its rights and remedies under this Loan Agreement and those under any of the other Loan Documents, and no delay or forbearance of Bank in exercising any and all rights and remedies otherwise afforded by law and in equity, shall operate as a waiver thereof or preclude the exercise thereof during the continuance of any Default Condition or Event of Default as set forth herein or in the event of any subsequent Default Condition or Event of Default hereunder.

8.9. Execution in Counterparts. This Loan Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement, and in making proof of this Loan Agreement, it shall not be necessary to produce or account for more than one such counterpart.

8.10. Notices. All notices, certificates and other communications hereunder shall be deemed given if in writing and either delivered in person, or mailed by certified mail to the mailing address given herein, return receipt requested, postage prepaid, or sent by reliable overnight delivery service addressed to the mailing addresses given herein. Any notice, certificates or other communication given as provided in the preceding sentence of this Section shall be deemed effective: (1) upon the date received or refused by the party to whom sent via personal delivery; (2) if sent by certified mail, 3 Business Days after deposit in the United States mail; and (3) if by overnight delivery service, the next Business Day after deposit with the overnight delivery service for "next business day delivery". Borrower and the Bank may, by written notice given hereunder, designate a different address where communications should be sent and Bank may require that all communications sent to it be sent electronically or in some other non-tangible medium.

8.11. Time of Essence. Time is of the essence for the performance of all of Borrower's covenants and agreements set forth in this Loan Agreement and in each of the other Loan Documents.

8.12. Term of Loan Agreement. This Loan Agreement shall become effective on the Effective Date and shall continue in full force and effect until the occurrence of both the (1) payment in full of all amounts now outstanding and which may in the future be outstanding under the Credit Facility and payment in full of all other amounts now owing and which may in the future be owing to Bank under the Loan Documents, and (2) termination of Bank's obligation to make Advances under of the Credit Facility.

The undersigned have executed this Loan Agreement as of the Effective Date.

BANK:

RBC CENTURA BANK

By: \_\_\_\_\_

Michael E. Baker

Title: Banking Officer

Witness:

Print Name: \_\_\_\_\_

BORROWER:

Deborah M. Rice-Marko  
Print Name: DEBORAH G. RICE-MARKO

Witness:

Donald J. Herres  
Print Name: Donald J. Herres

Attachment 1  
to  
Loan Agreement  
(Definitions and Use of Terms)

A. Definitions.

"Business Day" means any day, other than a Saturday or Sunday, when Bank is open to conduct a general banking business.

"Collateral" shall have the meaning set forth in Section 3 of this Loan Agreement.

"Commitment" means Bank's commitment letter to Borrower dated November 13, 2006.

"Committed Revolving Line" means Advances of up to \$6,500,000.00.

"Default Condition" means the occurrence or existence of an event or condition which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default.

"Effective Date" means the date of this Loan Agreement, and it is the date on which Borrower and Bank are deemed to have executed this Loan Agreement.

"Event of Default" means an Event of Default as defined in Section 7.

"GAAP" means generally accepted accounting principles.

"Governmental Authority" means any nation or government, any state or other political subdivision thereof, and any person exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

"Indebtedness" means with respect to any person, all indebtedness, obligations and liabilities of such person for money borrowed, all indebtedness of such person for the acquisition of property, all indebtedness secured by any lien on the property of such person whether or not such indebtedness is the personal obligation of such person, all liability of such person by way of endorsements (other than for collection or deposit of negotiable instruments in the ordinary course of business), all indebtedness of such person under agreements relating to derivatives transactions (e.g. interest rate swaps, caps, floors or collar transactions, or other similar transactions made pursuant to an International Swap Dealers Association, Inc. Master Agreement or similar agreement), all contingent obligations, all capitalized leases, all synthetic leases and all other items which in accordance with generally accepted accounting principles are classified as liabilities on a balance sheet, provided, however, Indebtedness shall not include any consumer credit as defined under the Federal Reserve Board's Regulation Z (Truth-in-Lending)(12 CFR 226 et. seq.).

"Loan Agreement" means this Loan Agreement: Revolving Line of Credit, as amended, supplemented, modified, extended and restated from time to time.

"Loan Documents" means the Commitment, this Loan Agreement, the Note and any other instruments, documents, statements and agreements evidencing or securing the Credit Facility (as amended, supplemented, modified, extended and restated from time to time), which may include, without limitation, deeds to secure debts, security deeds, mortgages, deeds of trust, assignments, security agreements, pledge agreements, guaranty agreements, control agreements and financing statements.

"Maturity Date" means January 15, 2009.

"Note" means the promissory note of Borrower in favor of Bank evidencing the Credit Facility, together with any amendments, modifications, extensions, renewals, substitutions and replacements thereto or therefor.

"Permitted Encumbrances" means liens, security interests, encumbrances, easements and other matters listed as exceptions to the title to the Collateral on Attachment 2, or in any of the other Loan Documents, all of which must be approved in writing by Bank prior to Funding.

"Requirements of Law" means any law, treaty, rule, regulation, ordinance, determination of an arbitrator, order of a court or determination, advisory opinion, order, guideline, finding or requirement of any other Governmental Authority, as amended, supplemented and in effect from time to time, in each case applicable to and binding upon such person or

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1.2.3. Calculation of Interest. All interest payable under this Note shall accrue daily on the basis of the actual number of days elapsed and a year of three hundred sixty-five (365) days. In computing the number of days during which interest accrues, the day on which funds are initially advanced shall be included regardless of the time of day such advance is made, and the day on which funds are repaid shall be included unless repayment is credited prior to close of business. Payments in federal funds, immediately available in the place designated for payment, received by Bank prior to 2:00 p.m. local time at said place of payment, shall be credited as if received prior to close of business on the day the funds are immediately available; while other payments, at the option of Bank, may not be credited until such payments are immediately available to Bank, in federal funds, in the place designated for payment, prior to 2:00 p.m. local time at said place of payment on a day on which Bank is open for business.

1.2.4. Variable Rate: Calculation of Interest.

1.2.4.1. Variable Rate. This is a variable rate note. Any change in the rate of interest payable under this Note will equal the change in the variable rate index to which such rate is tied, but the rate at which interest accrues under this Note shall never exceed the maximum contract rate which may be charged to and collected from Borrower on the loan evidenced by this Note under applicable law. Bank shall have no obligation to notify Borrower of adjustments in the rate of interest payable under this Note. Adjustments to the rate of interest will be effective on the first day of the calendar month next following any change in the variable rate index, with the rate being adjusted to reflect the most recent change in the variable rate index.

1.2.4.2. Calculation of Interest. All interest payable under this Note shall be accrue daily and be calculated on the basis of the actual number of days elapsed and a year of three hundred sixty-five (365) days. In computing the number of days during which interest accrues, the day on which funds are initially advanced shall be included regardless of the time of day such advance is made, and the day on which funds are repaid shall be included unless repayment is credited prior to close of business. Payments in federal funds, immediately available in the place designated for payment, received by Bank prior to 2:00 p.m. local time at said place of payment, shall be credited as if received prior to close of business on the day the funds are immediately available; while other payments, at the option of Bank, may not be credited until such payments are immediately available to Bank, in federal funds, in the place designated for payment, prior to 2:00 p.m. local time at said place of payment on a day on which Bank is open for business.

Article II. Payment Terms.

Section 2.1. Interest Payment Terms. Payments under this Note include an interest component and a principal component. The principal component is set forth in Section 2.2 below. The interest component shall be paid as follows: interest shall be payable monthly, in arrears, beginning February 15, 2007, and continuing on the same calendar day of each consecutive month thereafter until the Maturity Date, when all accrued but unpaid interest is due and payable in full.

Section 2.2. Principal Payment Terms: Maturity Date. As stated in Section 2.1 above, payments under this Note include an interest component and a principal component. The interest component is set forth in Section 2.1 above. The principal component shall be paid as follows: principal shall be payable in one single payment on January 15, 2009 (the "Maturity Date").

Section 2.3. Prepayment. This Note may be prepaid in whole, or in part without premium or notice.

Section 2.4. Application of Payments. All payments made on this Note shall be applied first to payment of all late fees, charges, premiums and costs and expenses due but unpaid under this Note, then to accrued but unpaid interest and finally to principal, in the inverse order of the payment dates therefor, unless Bank determines in its sole discretion to apply payments in a different order or applicable law requires a different application of payments. The partial prepayment of this Note, if permitted, shall not result in a payment holiday or any other deferral of any regularly scheduled payments under this Note, all of which shall be made as and when the same are scheduled to be paid.

**Attachment 2**  
to  
**Loan Agreement**  
**(Description of Collateral)**

**A. Collateral Description.**

AG Edwards Brokerage Account, account number 5336-8893, in the name of Deborah G. Rice-Marko, together with (i) all investment property now owned by Deborah G. Rice-Marko and contained in said account and otherwise related or assigned thereto and all investment property hereafter arising and owned by Deborah G. Rice-Marko and contained in said account and otherwise related or assigned thereto, including (in all instances) certificated and uncertificated securities, security entitlements, securities accounts, commodity contracts and commodity accounts, and (ii) all other now existing and hereafter arising property and property rights and benefits associated with and related to or arising from said account and any property and property interests contained therein and related or assigned thereto, including, without limitation, all general intangibles and all interest, cash, monies, payments, distributions, dividends and other proceeds.

**B. Permitted Encumbrances. None.**

**Attachment 3**  
**To**  
**Loan Agreement**  
(Changes to Loan Agreement)

The Loan Agreement is amended as follows:

1. Section 2.5 of the Loan Agreement is deleted in its entirety and the following Section 2.5 is substituted in its stead:

"2.5 Disbursements. Unless Bank consents to a different procedure or process, or makes available to Borrower a different procedure or process, whenever Borrower desires an Advance, Borrower shall notify Bank (which notice shall be irrevocable) by facsimile transmission, by email, or telephone no later than 10:00 a.m. eastern time, on the Business Day on which Borrower desires the Advance to be made. Each notification by facsimile transmission or email shall include such information as Bank may require at the time of the request, and each notification shall be signed or authenticated by a Responsible Officer or a designee thereof. Each notification by telephone shall include such information as Bank may require at the time of the request, and each notification by telephone shall be followed within one Business Day by a facsimile transmission or email which meets the criteria regarding a facsimile transmission or email. Bank shall be entitled to rely on any telephonic notice given by a person who Bank reasonably believes to be a Responsible Officer or a designee thereof. Bank shall not have any liability to Borrower or any other person for its failure to make an Advance on the date requested by Borrower, unless such failure is the result of willful misconduct or gross negligence of Bank; and if Bank's failure is a result of willful misconduct or gross negligence, its liability shall be limited to the lesser of actual damages or the amount of the Advance that was not made on the date requested -- Bank shall not be liable for indirect, speculative, consequential or punitive damages and losses. If Borrower maintains its operating deposit account with Bank, Bank will credit the amount of the Advance to such account. If Borrower does not maintain its operating deposit account with Bank, Bank will issue to Borrower for deposit in its operating deposit account a bank check or other negotiable instrument drawn on Bank in the amount of the Advance."

2. Subsection 4.1(a) of the Loan Agreement is deleted in its entirety and the following Subsection 4.1(a) is substituted in its stead:

"(a) Bank shall have received fully executed and, if necessary, recorded or filed, originals of the Loan Documents required by (1) the Commitment and (2) this Loan Agreement and (3) Bank;"

3. Subsection 5.1(a) of the Loan Agreement is deleted in its entirety and the following Subsection 5.1(a) is substituted in its stead:

"(a) The financial statements delivered by Borrower to Bank in connection with Borrower's application for the Credit Facility, including the related schedules and notes thereto, (1) are complete, accurate and correct and present fairly the financial condition of Borrower at such date, (2) have been prepared in accordance with sound accounting principles applied consistently throughout the periods involved, and (3) since the date thereof, there have been no material adverse changes in any one or more of the business, operations, assets and financial condition of Borrower;"

4. Subsection 5.1(b), subsection 5.1(c), and subsection 5.1(h) of the Loan Agreement are deleted in their entirety.

5. Subsection 6.1(e) of the Loan Agreement is deleted in its entirety and the following Subsection 6.1(a) is substituted in its stead:

"(e) Borrower shall maintain proper books and records in which full, true, accurate and correct entries, in conformity with sound accounting principles, shall be made of all material dealings and transactions in relation to Borrower's business and activities;"

6. Subsection 6.2(a) of the Loan Agreement is deleted in its entirety and the following Subsection 6.2(a) is substituted in its stead:

"(a) Without prior notice to Bank, Borrower shall not change its name and Borrower shall not operate under a name other than its current name;"

7. Subsection 6.2(c) of the Loan Agreement is deleted in its entirety

8. Subsection 6.2(f) of the Loan Agreement is deleted in its entirety and the following Subsection 6.2(f) is substituted in its stead:

"(f) Borrower shall not directly and Borrower shall not indirectly, with proceeds of the Loan, purchase or otherwise acquire, and Borrower shall not directly and Borrower shall not through another person with or as a result of the use of proceeds of the Loan carry or otherwise hold any "margin stock" within the meaning of Regulation U of the Board of Governors of the Federal Reserve System and any interpretations or rulings thereunder, and Borrower shall not directly or indirectly with proceeds of the Loan "speculate" in or "hedge" in any stock, futures, commodity, index and other similar markets, or undertake any other activity that is not in the ordinary course of business of Borrower as that business has been disclosed to Bank; and"

9. Subsection 6.3(d) of the Loan Agreement is deleted in its entirety and the following Subsection 6.2(d) is substituted in its stead:

"(d) Sale of Collateral. Bank may not sell or cause the sale of collateral as a result of a margin call unless (i) Bank shall have first given Borrower 10 business days prior written notice that fair market value of the Brokerage Account (plus any additional collateral pledged) has fallen below the level required by the preceding subsection (c), (ii) Borrower shall have failed within such 10 business days to make the mandatory prepayment or pledge of additional collateral provided for by the preceding subsection (c), and (iii) Bank shall have given the Borrower 10 business days prior written notice of Bank's intention to sell collateral; provided, however, this notice of sale may be given simultaneously with the notice that the fair market value of the Collateral has fallen below the level required by the preceding subsection. (c). In addition to the foregoing, Bank shall have all other rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, at law, in equity, or otherwise."

10. Subsection 7.1(g) of the Loan Agreement is deleted in its entirety and the following Subsection 7.1(g) is substituted in its stead:

"(g) any false statement, material misrepresentation or withholding of facts by Borrower or any other person in any loan application or other document provided by Borrower or any other person to Bank or its representatives, including, without limitation, any misrepresentation made in this Loan Agreement, or in any presentation made by Borrower or any other person to Bank or its representatives, as to any matter relied upon by Bank in evaluating whether to extend financing to Borrower;"

11. Section 7.2.1 of the Loan Agreement is deleted in its entirety and the following Section 2.5 is substituted in its stead:

"7.2.1 Acceleration of Maturity. Bank may, at its option, accelerate and declare immediately due and payable the Note, as well as any of and all of the other Indebtedness and obligations owing under this Loan Agreement and the other Loan Documents that are not already due hereunder and that are not already due thereunder. In addition to the foregoing, Bank may from time to time and at any time proceed to protect and enforce its rights and remedies under any one or more of the Loan Documents (including its absolute and unconditional right to recover full payment of any and all of the obligations owing by Borrower, by any one or more of the following: judicial and non-judicial foreclosure proceedings as against all or any part of the Collateral, without regard to the situs of such Collateral; suits in equity; actions at law; and other appropriate legal, equitable and administrative proceedings to enforce full payment"

12. Section 7.2.3 of the Loan Agreement is deleted in its entirety.

13. Section 8.5 of the Loan Agreement is deleted in its entirety and the following Section 2.5 is substituted in its stead:

"8.5 Payment of Expenses. Without limiting any other provision of this Loan Agreement relating to Borrower's payment of costs and expenses incurred by Bank and those incurred by others on behalf of

Bank, but in addition thereto, whether or not the Credit Facility is made available to Borrower or any Advances made thereunder, Borrower shall pay to Bank, on demand within 10 business days after written notice by Bank to Borrower, each and all of any costs and expenses incurred by Bank, incurred by others on behalf of Bank and incurred by Bank for Borrower: (1) in order to meet Bank's requirements in connection with the Credit Facility, (2) in connection with making the Credit Facility available to Borrower and (3) in connection with the enforcement of Bank's rights and remedies under the Loan Documents. All of the foregoing costs and expenses shall be paid with interest thereon at the highest contract rate prescribed in the Note from the date paid or incurred by or on behalf of Bank until such costs and expenses are paid by Borrower. All sums so paid and expended by Bank, and the interest thereon, shall be added to and be secured by Bank's lien and security interests in the Collateral.

14. The Bank shall not exercise any remedy resulting from the occurrence of an Event of Default described in Section 7.1(a) of the Loan Agreement, unless the event of default or default condition under the Note, or the act, omission, or occurrence giving rise to such event of default or default condition, shall have continued unremedied beyond applicable cure and/or notice period, if any, set forth in the Note.

15. The Bank shall not exercise any remedy resulting from the occurrence of an Event of Default described in Section 7.1(b) of the Loan Agreement that is or arises from the failure of the Borrower to perform a monetary obligation, unless the Bank shall have first given the Borrower notice of such failure, and such failure shall have continued unremedied for ten (10) business days thereafter.

16. The Bank shall not exercise any remedy resulting from the occurrence of an Event of Default described in Section 7.1(b) of the Loan Agreement that is or arises from the failure of the Borrower to perform a obligation other than an obligation of the payment of money, unless the Bank shall have first given the Borrower notice of such failure, and such failure shall have continued unremedied for a period of thirty (30) days after written notice thereof is given by the Bank to the Borrower; provided, however, that if such breach or default does not arise from an obligation, covenant or agreement for the payment of money and is susceptible of being cured by the Borrower, but not reasonably within thirty (30) days, no default shall be deemed to have occurred so long as the Borrower commences cure within such thirty (30) days and diligently pursues such cure to completion and such cure is completed within ninety (90) days.

17. The Bank shall not exercise any remedy resulting from the threatened (but not actual) demolition, injury, or waste to the Collateral as described in Section 7.1(c) of the Loan Agreement, if within ten business (10) days after demand by the Bank the Borrower shall have provided adequate assurance acceptable to the Bank in its sole discretion that no such demolition, injury, or waste to the Collateral will occur.

18. The Bank shall not exercise any remedy resulting from the occurrence of an Event of Default described in Section 7.1(f) of the Loan Agreement, unless the default under the instrument or agreement giving rise to such Event of Default shall have continued unremedied thereafter beyond any applicable cure and/or notice period set forth in the instruments or other agreements referred to in Section 7.1(f);

19. The Bank shall not exercise any remedy resulting from the occurrence of an Event of Default described in Section 7.1(h) of the Loan Agreement, unless the default under other Indebtedness or other obligation shall have continued unremedied thereafter beyond any cure and/or notice period set forth in the documents or instruments evidencing or giving rise to such other Indebtedness or obligation.

20. The occurrence of a default or event of default under any indebtedness or other obligation now or hereafter owing by Borrower to Bank other than the Note shall not constitute an Event of Default under or within the meaning of this Loan Agreement.

21. Any provision or stipulation to the effect that reasonable attorneys' fees shall be fifteen percent (15%) or other fixed percentage of the outstanding balance owing by Borrower under the Note is hereby amended so as to delete reference to such fixed percentage, such that Bank shall be entitled to recover reasonable attorneys' fees but without reference to such fixed percentage.

22. In addition to any other Events of Default set forth herein, Borrower will be in default if Borrower fails to respond to a margin call as and when provided by Section 6.3(c), subject to the grace and cure periods set forth in Section 6.3(e).

RALEIGH/438126 v.2 04/15/03

DRM 000713

# EXHIBIT C

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT  
3 PNC BANK, N.A., successor )  
to RBC BANK (USA), )  
4 )  
Plaintiffs, )  
5 ) Civil Action  
No. )  
6 vs. )  
) 2013-CP-10-2624  
7 LIBERTY COTTAGES, LLC; GW )  
DORCHESTER, LLC; USS )  
8 CLARKSVILLE, LLC; LIBERTY )  
COTTAGES LAND, LLC; ROA, )  
9 LLC; ROYAL BEACH )  
PROPERTIES, LLC; THE )  
10 BROTHERS OF SC, LLC; )  
DEBORAH RICE-MARKO a/k/a )  
11 DEBORAH G. RICE-MARKO; )  
EVAN R. MARKO and JOHN E. )  
12 MARKO, JR., )  
) Defendants. )  
13 )

D E P O S I T I O N

14  
15 WITNESS: STEPHEN DRAPER  
16 DATE: Wednesday, February 11, 2015  
17 TIME: 10:05 a.m.  
18 LOCATION: Nelson, Mullins, Riley & Scarborough  
4140 Parklake Avenue  
19 Raleigh, North Carolina  
20 TAKEN BY: Attorneys for the Defendants  
21 REPORTED BY: Cynthia S. Boyd, RPR  
Court Reporter  
22

23 -----  
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1 APPEARANCES:

2

3 COUNSEL FOR THE PLAINTIFFS:

4 NELSON MULLINS RILEY & SCARBOROUGH  
5 BY: T. WILLIAM MCGEE, Esq.  
6 P.O. Box 11070  
7 Columbia, SC 29211-1070  
8 803.255.9431  
9 billy.mcgee@nelsonmullins.com

7

8 COUNSEL FOR DEFENDANTS LIBERTY COTTAGES,  
9 LLC; USS CLARKSVILLE, LLC; LIBERTY LAND  
10 COTTAGES, LLC; ROA, LLC; ROYAL BEACH  
11 PROPERTIES, LLC; and DEBORAH RICE-MARKO a/k/a  
12 DEBORAH G. RICE-MARKO:

10

11 SOWELL GRAY STEPP & LAFFITTE, LLC  
12 BY: ROBERT E. STEPP, Esq.  
13 1310 Gadsden Street  
14 P.O. Box 11449  
15 Columbia, SC 29211  
16 803.231.7836  
17 rstepp@sowellgray.com

14

15 COUNSEL FOR DEFENDANTS EVAN R. MARKO,  
16 JOHN E. MARKO, JR., THE BROTHERS OF SC, LLC  
17 and GW DORCHESTER, LLC:

17

18 (Via speakerphone)  
19 HANNA LAW, PA  
20 WILLARD D. HANNA, JR., Esq.  
21 1661 Glenns Bay Road  
22 Surfside Beach, SC 29575  
23 803.771.8900

20

21 ALSO PRESENT:

21

22 DEBORAH RICE-MARKO  
23 EVAN R. MARKO  
24 JOHN E. MARKO, JR.

23

24

25 (INDEX AT REAR OF TRANSCRIPT)

25

1 line side. What is the line side?

2 A. The line would be the production side, the  
3 folks, the relationship managers.

4 Q. So they were interested generally in doing  
5 as much business as they could originate?

6 A. Yes.

7 Q. And on the credit side, you had to worry  
8 about some aggregate limit issues; is that correct?

9 A. Yes.

10 Q. But if I understand you correctly, you did  
11 not consider John and Evan to be part of the same  
12 household with Debbie?

13 A. I don't believe they were because I recall  
14 keeping a separate file for each household when we  
15 were keeping hard copy files. I remember there  
16 being a separate file for John Marko, and that  
17 leads me to believe that there was a separate  
18 household that was established at that time. But  
19 once there was a cross collateralization, then  
20 there were issues related to aggregation that they  
21 would have been brought in and considered as part  
22 of the same household.

23 Q. Well, that's where I was leading up to.  
24 Did there come a time when they were regarded as  
25 the same household?

# **EXHIBIT D**

Subj: RBC RBC Pledged Account  
Date: 6/10/2008 10:28:39 A.M. Eastern Daylight Time  
From: michael.baker@rbc.com  
To: dmchristmas@aol.com  
Cc: dmchristmas@aol.com  
Debbie and Don- I really appreciate you taking care of this in such a timely manner.

Please accept this email as confirmation that the Line of Credit is within Margin as of 6/10/08. We will continue to monitor the Loan per the Loan Agreement dated January, 11, 2007.

Thank you,  
Michael

Michael E. Baker  
Market Executive  
RBC Centura Bank  
100 Calhoun Street, Suite 200  
Charleston, SC 29403  
Office: (843) 690-3700  
Fax: (843) 690-3745  
Mobile: (843) 224-1862

---

From: Doni Horro (mailto:dhorres@dmrsc.com)  
Sent: 2008, March, 18 4:36 PM  
To: Baker, Michael (RBC Centura Bank)  
Cc: Christmas@aol.com  
Subject: RBC Pledged Account

Michael,

Per your letter dated March 12, 2008, as of today, March 16, 2008, we have increased the assets in the A.G. Edwards- RBC pledged account in an amount to meet the 85% margin requirement. The closing stock price today for the Wachovia stock was \$28.14. As reported to you Friday, March 14, 2008, we move another 23,282 shares of Wachovia to the pledged account. This brought the total number of shares of Wachovia stock in the RBC Pledged Account to 207,988 with a value today of \$5,862,810.46. Today, we have transferred \$80,000 in cash into the RBC pledged account for a total account value of \$6,432,810.46. The margin requirement is \$6,270,087.06.

We value our relationship with you and RBC and thank you for your help this matter.

Donald J. Horro  
OFO  
Diversified Resource Management, Inc.  
433 King Street  
Charleston, SC 29403  
843.577.3800  
Fax 843.577.2800

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Monday, June 24, 2013 AOL: Christmas4

DRM 000346

# **EXHIBIT E**



RBC  
Centura

100 Calhoun St.  
Charleston, SC 29401

September 26, 2008

Deborah G. Rice-Marko  
438 King Street  
Charleston SC, 29401

Re: Margin Call for Loan #0002059533-113

Dear Debbie:

This office has analyzed the current value of brokerage account #5336-8893 / Deborah G. Rice-Marko Pledgor. Based on this office's analysis, the Borrower is not in compliance with the following requirement in Loan Agreement dated January 11, 2007.

Section 6.3 (C): Margin Call. If at any time the outstanding principal balance on the Loan is equal to or greater than 85% of the market value of the securities held as collateral in the Brokerage Account, and such ratio of principal to market value continues for five consecutive business days, then the Borrower shall either (i) make a mandatory prepayment on the Loan, (ii) deposit additional funds or securities in the Brokerage Account, or (iii) pledge additional cash or other assets satisfactory to Bank, as necessary to cause the outstanding principal balance on the Loan to be less than 85% of the market value of (i) the securities held as collateral in the Brokerage Account, plus (ii) the market value of any additional collateral pledged. Bank shall give Borrower 10 business days written notice in which to respond to a margin call as set forth above.

The principal balance on the loan was greater than 85% of the market value of the securities held as collateral from September 22, 2008 through September 26, 2008. The trading price at the close of business on September 26 was \$10.00.

If you have any questions or comments regarding this letter, please call me at 958-3706.

Sincerely,

Michael E. Baker  
Market Executive

DRM 000330

# EXHIBIT G

Subj: RE: appt today  
Date: 10/30/2008 11:23:12 A.M. Eastern Daylight Time  
From: michael.baker@rbc.com  
To: Christmas4@aol.com

That would be good, I'm actually going to be in your area for lunch with another client and can come by around 1:30? Let me know if that's ok.

As you can imagine, there are additional eyes (committee) on this banking relationship right now due to the \$2.0MM+ unsecured portion of the line of credit. I had a conference call with Rick yesterday after our meeting and wanted to share some of that feedback.

I need to demonstrate the cash flow coverage of all the properties you have financed with RBC. I'm to present this with the Asheville included and without the Asheville property included. For example, I will roll in the income and expenses of all properties (Kiswah, Park West, King Street, Asheville - and also roll in B&T building b/c it has good income). I will also need to show your "initial" projected cash flow coverage from now forward. This is what you have provided for FY2008 and I assume that the Nov/Dec months show what this coverage will be? How long can you cover all expenses without a property sale - those type scenarios?

The strategy if approved will be to cross all of the properties you have with RBC as a "collateral pool" initially during this shortfall period. The restructure would include all RBC financed properties.

I'm going to present this next week. As I thought, I will need updated personal financial statements even if they are "draft" form and not exact dollar amounts (even on Evan and John Jr, b/c that exposure is closely tied to the relationship although not legally). I'm really only looking at the major assets/liabilities anyway.

I will discuss in more detail when we meet today.

I appreciate your understanding and certainly feel bad about this unfortunate situation.

Thanks

Michael E. Baker  
Market Executive  
RBC Bank  
100 Culhoun Street, Suite 200  
Cherleston, SC 29401  
Office: (843) 888-3708  
Fax: (843) 888-3746  
Mobile: (843) 824-1682



RBC Bank

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---

From: Christmas4@aol.com [mailto:Christmas4@aol.com]  
Sent: 2008, October, 03 10:13 AM  
To: Baker, Michael (RBC Bank)  
Subject: appt today

Dear Michael  
I hope you are feeling better than yesterday...I am worried about you...please dont despair everything will be fine...everyday is a better day for us all

We have more materials for your review may we bring them over right after lunch  
thanks  
debbie

---

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Thursday, July 30, 2009 AOL: Christmas4

DRM 000378

# EXHIBIT H

Subj: RE: any word on asheville?  
Date: 11/06/2008 4:53:39 P.M. Eastern Standard Time  
From: michael.baker@rbc.com  
To: Christmas4@aol.com

Debbie~ I apologize that I cannot get an answer for you. I've yet again requested a response to the strategy I've proposed which includes the financing of Asheville and addressing the \$3.5MM line of credit which is in default. I hope to have a response soon and again apologize.

**Michael E. Baker**  
Market Executive  
RBC Bank  
100 Calhoun Street, Suite 200  
Charleston, SC 29401  
Office: (843) 958-3706  
Fax: (843) 958-3746  
Mobile: (843) 224-1662



RBC Bank

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---

**From:** Christmas4@aol.com [mailto:Christmas4@aol.com]  
**Sent:** 2008, November, 06 11:49 AM  
**To:** Baker, Michael (RBC Bank)  
**Subject:** any word on asheville?

michael I have not been pursuing other lenders on asheville because I thought that this was the perfect match with the cross collateralization etc..however we are getting dangerously close to my 6 mo closing date...should I need to find other financing...can you please tell me if rbc will be financing this at the 85% itv that we need so as to use the \$1,200,000 additional equity to secure the lcc debt  
hope you daughter is well  
thanks  
debbie

---

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Thursday, July 30, 2009 AOL: Christmas4

DRM 000380

# EXHIBIT I

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON  
3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),  
5 Plaintiff(s),  
6 vs. C/A No: 2013-CP-10-2624  
7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,  
15 Defendant(s).

## D E P O S I T I O N

14 30(b)(6)  
15 WITNESS: Michael E. Baker (PNC Bank)  
16 DATE: Tuesday, January 27, 2015  
17 TIME: 1:35 p.m.  
18 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
19 151 Meeting Street, Suite 600  
20 Charleston, South Carolina  
21 TAKEN BY: Attorneys for the Defendants  
22 REPORTED BY: HEATHER M. CURLIN  
23 Registered Professional Reporter

24 -----  
25 COMPUSCRIPTS, INC.  
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1-888-988-0086  
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1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF:

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22 ALSO PRESENT: Ms. Deborah Rice-Marko  
23 Mr. John Marko, Jr.  
24 Mr. Evan Marko  
25 Mr. Stephen Wursta, Jr.

24

(INDEX AT REAR OF TRANSCRIPT)

25

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1 MR. KNOWLTON: Let him finish.

2 Were you finished with your answer?

3 THE WITNESS: Yeah.

4 BY MR. HANNA:

5 Q. That was not my question.

6 A. Okay. I'm sorry, what was the question?

7 Q. The question was what other options did you  
8 offer them other than cross-collateralization and  
9 cross-default?

10 A. I don't think I legally offered any other  
11 options. We had some discussions. Ultimately, the only  
12 thing that was documented and put in front of her that  
13 was signed was this.

14 Q. In fact, you told her that unless she  
15 cross-collateralized, unless the family  
16 cross-collateralized and cross-defaulted everything, you  
17 were going to send her to a bad place, didn't you?

18 MR. KNOWLTON: Object to the form and  
19 foundation.

20 A. No. I mean, I don't know.

21 BY MR. HANNA:

22 Q. And, in fact, you told her you would put her  
23 in bankruptcy if she didn't?

24 MR. KNOWLTON: Object to the form of the  
25 question.

# **EXHIBIT K**

Subj: RE: RW: Rico-Marke  
Date: 1/6/2009 11:08:40 A.M. Eastern Standard Time  
From: michael.baker@rbc.com  
To: Christmas4@aol.com

Double- The full amount has to go to principal. This loan is now \$2MM unsecured. Where are you with the cross-collateralization documents? The documents will need to be standard as Mark has presented. I can't get approval to modify documents in his type restructure situation.

What is a good time for me to call?

From: Christmas4@aol.com [mailto:Christmas4@aol.com]  
Sent: 2009 January 06 11:08 AM  
To: Baker, Michael (RBC Bank)  
Subject Re: RW: Rico-Marke

I need to check the amt...it is different than the amt the broker gave me, also we need to allocate the amt to the interest payment I will check it and call you

In a message dated 1/6/2009 11:07:18 A.M. Eastern Standard Time, michael.baker@rbc.com writes:

Here is the letter I forwarded to Denise. I'll give you a call. Hope you enjoyed the Holidays.

From: Baker, Michael (RBC Bank)  
Sent: 2009 January 06 9:51 AM  
To: 'Bunton, Denise'  
Cc: Keenan, Ashley  
Subject RE: RW: Rico-Marke

Thank you Denise. Please let me know when the wire is sent.

**Michael E. Baker**  
Market Executive  
RBC Bank  
100 Calhoun Street, Suite 200  
Charleston, SC 29401  
Office: (843) 956-3700  
Fax: (843) 956-3746  
Mobile: (843) 224-1602



RBC Bank

Let's do something great.

This email may be privileged and/or confidential and the sender does not waive any related rights and obligations. Any distribution, use or copying of this email or the information it contains by other than an intended recipient is unauthorized. If you received this email in error, please advise me immediately.

From: Bunton, Denise [mailto:denise.bunton@wachoviasec.com]  
Sent: 2009 January 06 8:48 AM  
To: Baker, Michael (RBC Bank)  
Subject RE: Rico-Marke

\$1,687,807.38

**Denise B. Bunton**  
Sr. Client Associate  
Wachovia Securities, LLC  
324 W. Wauchope Ave.  
Suite 301  
Greensboro, NC 27408  
336-474-0523  
336-478-4782 fax

This information is obtained from internal and external sources considered to be reliable, but is not necessarily complete and its accuracy is not guaranteed by Wachovia Securities. Any opinions expressed are subject to change without notice and are not necessarily those of Wachovia Securities. Historical performance is no guarantee of future results and there is no implied guarantee of future results. Any quoted prices and yields are subject to change. Neither the information nor any opinion expressed constitutes a solicitation for the purchase or sale of any security referred to herein.

From: Baker, Michael (RBC Bank) [mailto:michael.baker@rbc.com]  
Sent: Monday, January 05, 2009 3:57 PM  
To: Bunton, Denise  
Subject RE: Rico-Marke

Denise- Please let me know the total amount of cash in the account and I'll include in the letter along with wiring instructions.

Thank you.

**Michael E. Baker**  
Market Executive  
RBC Bank  
100 Calhoun Street, Suite 200

Thursday, July 30, 2009 AOL: Christmas4

DRM 000394

# **EXHIBIT N**

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

Plaintiff(s),

5

vs.

C/A No: 2013-CP-10-2624

6

Liberty Cottages, LLC; GW  
7 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
8 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
9 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
10 E. Marko, Jr.,

Defendant(s).

11

12

13 D E P O S I T I O N

14 30(b)(6)

15 WITNESS: William H. Harrington, Jr. (PNC Bank)

16

17 DATE: Wednesday, January 28, 2015

18

19 TIME: 9:48 a.m.

20

21 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
151 Meeting Street, Suite 600  
Charleston, South Carolina

22

TAKEN BY: Attorneys for the Defendants

23

24 REPORTED BY: HEATHER M. CURLIN  
Registered Professional Reporter

25

-----  
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12 USS CLARKSVILLE, LLC; LIBERTY LAND COTTAGES, LLC;  
13 ROA, LLC; ROYAL BEACH PROPERTIES, LLC; and DEBORAH  
14 RICE-MARKO a/k/a DEBORAH G. RICE-MARKO:

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26 ALSO PRESENT: Ms. Deborah Rice-Marko  
27 Mr. John Marko, Jr.  
28 Mr. Evan Marko

29 (INDEX AT REAR OF TRANSCRIPT)

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1 Q. Okay. You weren't here yesterday and I'm not  
2 asking you to know what somebody else said, but I -- it  
3 is my understanding as a result of some questions that  
4 we asked yesterday that part of what nonaccrual status  
5 means is that the bank no longer believes a collection  
6 of full amount of principal and interest is going to  
7 happen. Is that consistent with your understanding?

8 A. That is my understanding.

9 Q. Okay. Look back on Harrington 1, if you  
10 would, about a third of the way down, lines -- I guess  
11 it's 27, 28. It says, "BRR." You see that?

12 A. Yes.

13 Q. Borrower risk rating, is that what that  
14 means?

15 A. I think -- I think that's what it stood for.

16 Q. Are you familiar with the system over here  
17 that says "3 plus M"? Do you know what that means?

18 A. Not anymore.

19 Q. Okay. Were borrower risk ratings something  
20 that you assigned, dealt with, or modified as part of  
21 your responsibilities in the special loan group?

22 A. Yes.

23 Q. Okay. How did you interact with borrower  
24 risk ratings, and what did you do?

25 A. As I recall, on a credit of this size, we

1 agreement itself. It was the circumstances leading up  
2 to and entering into the agreement. But having said  
3 that, in trying to compromise with you, I'm willing to  
4 try to allow you to go forward on the forbearance  
5 agreement, there just may come a time when I just have  
6 to say -- or specific questions where I say, I'm sorry,  
7 that's beyond the scope. I'm willing to try it.

8 MR. STEPP: All right. Well, we'll try.

9 BY MR. STEPP:

10 Q. All right. You have the agreement in front  
11 of you, Mr. Harrington?

12 A. I do.

13 Q. Okay. Look at page 3, if you would, Section  
14 1.3. Was one of the reasons that PNC wanted to enter  
15 into the forbearance agreement with the Debbie  
16 Rice-Marko family to obtain an acknowledgment of  
17 default?

18 A. I would guess that legally it was. It  
19 certainly wasn't the primary reason for entering the  
20 agreement.

21 Q. Well, did you ever have any interaction with  
22 anybody to say this should not be part of the agreement?

23 A. Not that I recall, no.

24 Q. Look over on page 4, Section 1.6. Was one of  
25 the reasons that RBC wanted to enter into the

1     forbearance agreement to obtain further  
2     cross-collateralization as provided in Section 1.6 of  
3     the document?

4             A.     Again, it would have been not the primary  
5     reason but one of the reasons, yes.

6             Q.     Okay. Look on page 5, if you would, Section  
7     2.4. Was one of the reasons that RBC wanted to enter  
8     into the forbearance agreement to obtain the waivers  
9     that are part of Section 2.4 of the agreement?

10            A.     I wouldn't know that. I think that my  
11     understanding is that's a typical -- and always included  
12     in forbearance agreements that I have seen. So that  
13     didn't enter my consideration.

14            Q.     Well, but if it is typical in forbearance  
15     agreements that you have seen, then it's consistent, to  
16     your understanding, of what the bank requires in a  
17     forbearance agreement?

18            A.     It is consistent, yes.

19            Q.     Okay. Page 6, Section 2.5, same thing,  
20     waiver of trial by jury?

21            A.     I think that is --

22            Q.     One of --

23            A.     Sorry.

24            Q.     I'm sorry, go ahead.

25            A.     I think that is consistent with what we see.

1 Q. And one of the reasons that RBC wants to  
2 enter into a forbearance agreement?

3 A. I can't really say that.

4 Q. So you don't -- you don't -- not withstanding  
5 the fact that this forbearance agreement contains a  
6 waiver of trial by jury, you don't think that's one of  
7 the reasons that RBC entered into the agreement?

8 A. It was not part of my consideration, I know  
9 that.

10 Q. Okay. So if there had been a request to take  
11 that out, it would have been okay with you to take it  
12 out?

13 MR. KNOWLTON: Object to the form.

14 A. I really can't say that. I would -- I  
15 would've -- if there had been a request to take that  
16 out, I would have -- I would have looked at it closely  
17 and had to get approval to change anything that I  
18 consider just boilerplate in the agreement.

19 BY MR. STEPP:

20 Q. Did you look at any time in the run-up to the  
21 execution of the forbearance agreement, did you ever  
22 look at a document called the RBC Legal Reference  
23 Manual? Do you know what that is?

24 A. No, I do not. I did not look at it, and I'm  
25 not -- not aware of it.

1 Do you see that?

2 A. Yes, I do.

3 Q. All right. Was that promise to make the  
4 payment of 33,000 a month one of the reasons that the  
5 bank decided to enter into the forbearance agreement?

6 A. Yes, it was.

7 Q. Okay. Next, Section 4.3, Marketing of  
8 collateral requires the borrower to keep all  
9 nonrevenue-producing real property actively marketed for  
10 sale. Was that one of the reasons the bank wanted to  
11 enter into the forbearance agreement?

12 A. Yes, it was.

13 Q. All right. Look over on the next page, page  
14 9, Section 4.8. "Financial Reporting. Within six  
15 months from the previous statement date on file with the  
16 bank, a detailed financial statement, et cetera."

17 Is that financial reporting covenant one of  
18 the reasons that the bank entered into the forbearance  
19 agreement?

20 A. Yes.

21 Q. And prior to the forbearance agreement, what  
22 contractual obligations did the borrowers have to  
23 provide financial information to the bank?

24 A. Specifically, I can't answer. I know that  
25 normally that would be a part of any loan agreements or

1 A. I'm not sure I can relate the two.

2 Q. All right.

3 A. In our analysis of the relationship, you  
4 know, we didn't -- while we always hope for a positive  
5 outcome, the value of the collateral had dropped so much  
6 there was financial hardship on the borrower, it didn't  
7 seem likely that things would come back to normal. So  
8 we would have -- we would have considered that an exit  
9 relationship in one respect, not to the point that we  
10 were getting ready to blow it up but just that we didn't  
11 see that it was going to come back to be a relationship  
12 that the bank would seek.

13 Q. And would that decision to characterize this  
14 as an exit relationship have taken place about the same  
15 time the loans went in nonaccrual status?

16 A. That's likely, yes.

17 Q. Okay. Those are consistent with each other,  
18 are they not?

19 A. They can be, yes.

20 Q. Okay. Do you have a recollection -- well,  
21 let me ask you this. Were you present when the  
22 forbearance agreement was signed by the borrowers?

23 A. No, I was not.

24 Q. Do you recall any discussion at the time it  
25 was signed about a possible fourth mortgage on Debbie

# EXHIBIT O

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF DORCHESTER

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),  
5 Plaintiff(s),

6 vs. C/A No: 2013-CP-18-825

7 Liberty Cottages; LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,  
15 Defendant(s).

16 (Caption continued on page 2)

17 D E P O S I T I O N

18 WITNESS: William H. Harrington, Jr.  
19 DATE: Wednesday, May 7, 2014  
20 TIME: 9:44 a.m.  
21 LOCATION: Nelson Mullins Riley & Scarborough  
22 5 Exchange Street  
23 Charleston, South Carolina  
24 TAKEN BY: Attorneys for the Defendants  
25 REPORTED BY: HEATHER M. CURLIN  
Professional Court Reporter

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1 STATE OF SOUTH CAROLINA  
COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON  
3 PNC Bank, N.A., successor to RBC  
Bank (USA),  
4  
Plaintiff(s),  
5  
vs. C/A No: 2013-CP-10-2624  
6  
Liberty Cottages, LLC; GW  
7 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
8 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
9 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
10 E. Marko, Jr.,  
11  
Defendant(s).

12 STATE OF SOUTH CAROLINA  
COURT OF COMMON PLEAS  
13 COUNTY OF FLORENCE  
14 PNC Bank, N.A., successor to RBC  
Bank (USA),  
15  
Plaintiff(s),  
16  
vs. C/A No: 2013-CP-21-1193  
17  
Liberty Cottages, LLC; GW  
18 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
19 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
20 Deborah Rice-Marko a/k/a Deborah G.  
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Defendant(s).

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26 ALSO PRESENT: Stephen Wursta  
27 Evan Marko  
28 John E. Marko  
29 Deborah Rice-Marko

30 (INDEX AT REAR OF TRANSCRIPT)

31

1           A.     With RBC, if a loan went into nonaccrual  
2 status, no further bills were mailed to the borrower.  
3 If -- and in Debbie's case, if one loan went into -- I  
4 mean not her specific -- this was just not for her but  
5 for every borrower in the bank, if one of the credits  
6 went into nonaccrual status, every credit that she was  
7 associated with would also go into nonaccrual.

8           Q.     Okay. And do you have any recollection today  
9 about when or if the Debbie Rice-Marko loans went into  
10 nonaccrual status?

11          A.     I do not remember when it happened. Based on  
12 this e-mail, my guess would be sometime in mid to late  
13 2010.

14          Q.     But you're assuming that based on the fact  
15 that no invoice was rendered; is that correct?

16          A.     That is correct. And I really just don't  
17 recall when it happened.

18          Q.     Okay. Do you recall that when you took over  
19 these loans when they were assigned to you that they had  
20 been restructured so that they were all  
21 cross-collateralized with cross-default provisions?

22          A.     I can't say that I recall that. That would  
23 not be unusual, but I just -- specifically, I don't  
24 know.

25          Q.     So you don't really know whether they were or

1 says, Section 2.1, forbearance covenant. It's got the  
2 date July 15th, 2013. Do you see that?

3 A. Yes, I do.

4 Q. And the execution date back on page 1 is July  
5 15th, 2011, correct?

6 A. Yes, sir.

7 Q. And was it the -- was it the purpose of this  
8 agreement to permit the borrowers during this two-year  
9 period to try to liquidate the collateral and generate  
10 cash to repay the bank, if not in whole at least in  
11 part?

12 MR. KNOWLTON: Object to the form.

13 A. The purpose -- the bank's purpose of this  
14 forbearance agreement was to collect what money we could  
15 and give the borrowers time to try to liquidate the  
16 collateral on their own as opposed to the bank starting  
17 foreclosure proceedings and trying to liquidate it  
18 ourselves.

19 BY MR. STEPP:

20 Q. Why didn't you want to liquidate it  
21 yourselves?

22 MR. KNOWLTON: Object to the form.

23 A. If we have a willing and cooperative  
24 borrower, my experience has been that they are able to  
25 get a higher sales price for the properties than we can

1 communicated?

2 MR. KNOWLTON: Object to the form.

3 A. I don't recall specifically. I would --  
4 maybe an e-mail. I just don't know.

5 BY MR. STEPP:

6 Q. Okay. What was the first contact you had --  
7 you personally had with anybody at PNC regarding any of  
8 the loans that were in your portfolio to administer?

9 A. I'm not -- I'm not certain. I -- it could  
10 have possibly been that we were asked to forward  
11 information to some location within RBC that would have  
12 been made available to PNC. Specifically when it  
13 happened, how it happened, I don't know.

14 Q. Okay.

15 MR. STEPP: Let's mark this Exhibit 3.

16 (Exhibit No. 3 was marked.)

17 BY MR. STEPP:

18 Q. Take a look at what we've marked as Exhibit  
19 3, please, Mr. Harrington. This is a copy of an e-mail  
20 from you to Debbie Rice-Marko. You recognize the  
21 Christmas<sup>4</sup> e-mail address as being her e-mail address?

22 A. I do.

23 Q. Okay. Take a minute and read that.

24 A. I've read it.

25 Q. Okay. This is in January -- January 23rd of

1 2012, and you write to Debbie, "Debbie, I need your help  
2 regarding info requested by PNC. I need rent rolls for  
3 The Brothers and ROA, parens, King Street. Thanks for  
4 your help."

5 Tell me why you sent this e-mail.

6 A. I would think I sent this e-mail because that  
7 information had been requested and I either did not have  
8 it or -- I probably didn't have it or couldn't find it  
9 if I did.

10 Q. Okay. So does this -- does this refresh your  
11 recollection about being requested at some point or that  
12 PNC at some point was doing due diligence on some of the  
13 loans within your responsibility?

14 A. Yes.

15 Q. Okay. All right. And do you know when that  
16 began? This e-mail is January 23rd, 2012, but do you  
17 know when that would have begun?

18 A. I don't recall when it began, but . . .

19 Q. Okay. As of January 23rd, 2012, as far as  
20 you were aware, were the borrowers in compliance with  
21 the forbearance agreement?

22 A. Yes.

23 Q. Now let me show you another one, which I  
24 should have marked at the same time. I'm sorry.

25 (Exhibit No. 4 was marked.)

1 BY MR. STEPP:

2 Q. Exhibit 4 is two e-mails, one from Debbie  
3 Rice-Marko to you, same date, January 23rd, 2012, and  
4 she says, "You will have it later today, do you know  
5 what they are considering?" And then you respond that  
6 same day, "No, this is just routine due diligence prior  
7 to closing."

8 Do you see that?

9 A. Yes.

10 Q. And by closing, you're talking about the  
11 closing between PNC and RBC?

12 A. Yes, that's correct.

13 Q. All right. Now, had anybody raised --  
14 anybody from PNC raised any issues with you about the  
15 status of the Debbie Rice-Marko loans?

16 A. Not that I recall.

17 Q. Do you remember having any conversations with  
18 anybody at PNC about these specific loans as a part  
19 of -- in this due diligence period?

20 A. At some point, I did have a conversation  
21 regarding all of my credits that I managed --

22 Q. Okay.

23 A. -- which certainly included this.

24 Q. All right. Tell me about that. When did  
25 that happen, as best you can recall?

1           A.     I don't remember the timeline. I think we  
2 provided information such as this that PNC had  
3 requested. Then at some point I -- at some point prior  
4 to closing -- no. I think after the closing, probably  
5 the week of March the 5th, I sat in a room with PNC  
6 people and discussed all of my credits. I also had a --  
7 phone conversations with Liz Paulson, and at some point  
8 she visited my office. The dates, the timeline there,  
9 I'm just not clear on.

10          Q.     Okay. Well, let's try to deconstruct that a  
11 little bit. When was the closing between RBC and PNC?

12          A.     It would have been March 2nd, 2012, as I  
13 recall.

14          Q.     Okay. And you recall that shortly thereafter,  
15 the week of March 5th, you had an in-person meeting with  
16 some people from PNC to review all of your portfolio?

17          A.     Yes. It was -- it was either the week of  
18 March the 5th or the following week --

19          Q.     Okay.

20          A.     -- because I spent those two weeks in Raleigh.

21          Q.     Okay. So you were in Raleigh for two weeks,  
22 and you were there because of transition issues; is that  
23 correct?

24          A.     Yes, that's correct.

25          Q.     And so did you have just the one meeting

1 Rice-Marko on the phone? Did y'all speak?

2 A. Yes.

3 Q. Was that a fairly routine occurrence?

4 A. I think so.

5 Q. Do you recall a conversation you had with her  
6 on March 19, 2012 relative to the PNC purchase of RBC?

7 A. Do I recall the conversation?

8 Q. Yes, sir.

9 A. No, sir, I do not.

10 Q. Do you recall calling Debbie Rice-Marko and  
11 telling her that PNC Bank had a different way of looking  
12 at things and spoke a different language?

13 A. I don't specifically recall that.

14 Q. All right. Might you have had such a  
15 conversation with her along those lines?

16 MR. KNOWLTON: Object to the form.

17 A. It's possible.

18 BY MR. STEPP:

19 Q. Yeah. Do you recall ever telling to Debbie  
20 Rice-Marko in March of 2012 or otherwise that based upon  
21 what you knew, you didn't think PNC would have entered  
22 into the forbearance agreement?

23 A. No, I don't -- I don't -- I don't recall  
24 saying that. I know that one of the early messages we  
25 were hearing from PNC was that they liked very

1 short-term forbearance or extensions in the -- in the 90  
2 to 180-day range as opposed to a two-year type thing.

3 Q. Uh-huh. Weren't you -- after you met with  
4 PNC, weren't you concerned that they were going to take  
5 a tougher stance with Debbie Rice-Marko than RBC had  
6 taken up until that time?

7 MR. KNOWLTON: Object to the form.

8 A. Could you repeat that, please?

9 BY MR. STEPP:

10 Q. Yeah. Were you concerned that when PNC took  
11 over that they were going to be tougher for Debbie to  
12 deal with than RBC had been?

13 MR. KNOWLTON: Same objection.

14 A. I -- I didn't really know what -- what it  
15 would be. I -- my concern would have been that anyone,  
16 you know, Debbie and anybody I dealt with, if they had  
17 an agreement in place, that they needed to perform under  
18 that agreement. If -- you know, if they didn't, then I  
19 think the outcome would have been the same regardless of  
20 who was -- whether it was PNC or RBC.

21 BY MR. STEPP:

22 Q. Okay. So along those lines, didn't you tell  
23 Debbie in March of 2012 that if PNC could find a reason  
24 to default her under the forbearance agreement they  
25 would do so?

1 design an exit strategy, but I don't believe you were  
2 ever asked the question in the DRM loans was that the  
3 case. When you got them, was that still -- did you have  
4 both options, or had y'all already decided you were at  
5 an exit strategy at that time?

6 A. No. Both options would have been available.

7 Q. And that would have been up to you and your  
8 manager to decide which way to go?

9 A. That's correct.

10 Q. Was it ever determined that you had given  
11 up -- while you had those loans under your supervision,  
12 was it ever determined that you were in an exit strategy  
13 and not a rehabilitative mode anymore?

14 A. Yes.

15 Q. When did that happen?

16 A. I -- I couldn't tell you when it happened,  
17 but as it evolved, it -- it was pretty apparent to my  
18 way of looking at the credits that I couldn't see  
19 anything that was going to change to improve the  
20 situation other than the sale of the properties.

21 Q. Would that have been before or after the  
22 forbearance agreement was executed?

23 A. Probably before.

24 Q. All right. And that would, of course, have  
25 been before PNC bought out RBC; is that right?

# EXHIBIT Q

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF DORCHESTER

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

Plaintiff(s),

5 vs.

C/A No: 2013-CP-18-825

6 Liberty Cottages, LLC; GW  
7 Dorchester, LLC; USS Clarksville,  
8 LLC; Liberty Cottages Land, LLC;  
9 ROA, LLC; Royal Beach Properties,  
10 LLC; The Brothers of SC, LLC;  
Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
E. Marko, Jr.,

11 Defendant(s).

12 (Caption continued on page 2)

13 D E P O S I T I O N

14 WITNESS: Stephen Wursta, Jr.

15 DATE: Wednesday, May 7, 2014

16 TIME: 1:34 p.m.

17 LOCATION: Nelson Mullins Riley & Scarborough  
18 5 Exchange Street  
Charleston, South Carolina

19 TAKEN BY: Attorneys for the Defendants

20 REPORTED BY: HEATHER M. CURLIN  
Professional Court Reporter

21 -----

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1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON  
3 PNC Bank, N.A., successor to RBC  
Bank (USA),  
4  
Plaintiff(s),  
5  
vs. C/A No: 2013-CP-10-2624  
6  
Liberty Cottages, LLC; GW  
7 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
8 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
9 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
10 E. Marko, Jr.,  
11 Defendant(s).

12 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
13 COUNTY OF FLORENCE  
14 PNC Bank, N.A., successor to RBC  
Bank (USA),  
15  
Plaintiff(s),  
16  
vs. C/A No: 2013-CP-21-1193  
17  
Liberty Cottages, LLC; GW  
18 Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
19 ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
20 Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
21 E. Marko, Jr.,  
22 Defendant(s).

23  
24  
25

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12 USS CLARKSVILLE, LLC; LIBERTY LAND COTTAGES, LLC;  
13 ROA, LLC; ROYAL BEACH PROPERTIES, LLC; and DEBORAH  
14 RICE-MARKO a/k/a DEBORAH G. RICE-MARKO:

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22 MARKO, JR.; THE BROTHERS OF SC, LLC; and GW  
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26 ALSO PRESENT: Evan Marko  
27 John E. Marko  
28 Deborah Rice-Marko

29 (INDEX AT REAR OF TRANSCRIPT)

30

1 Q. Well, are there any others?

2 A. Yes.

3 Q. How many do you know of?

4 A. Approximately 20.

5 Q. Okay. And are they located throughout the  
6 service area for PNC, or are they all in one place?

7 A. Throughout the service area.

8 Q. Okay. What is the service area for PNC?

9 A. I would say the Midwest, Northeast, Mid  
10 Atlantic, and Southeast United States.

11 (Reporter interjection.)

12 BY MR. STEPP:

13 Q. Okay. Midwest, Northeast, Mid Atlantic, and  
14 Southeast?

15 A. Yes, sir.

16 Q. Okay. Were you involved in any consideration  
17 or discussions within PNC about the acquisition of RBC?

18 A. Yes.

19 Q. Tell me what role or responsibility you had  
20 in that regard.

21 A. I was asked to do due diligence on the  
22 commercial real estate portfolio.

23 Q. Okay. Who participated with you in doing  
24 that due diligence?

25 A. Probably 30 other people.

1 Q. Okay. How did that work? Were you just  
2 asked to look at certain loans or did you look at  
3 certain offices or how was it split up?

4 A. Boxes of files and everyone was asked to work  
5 as much and as hard and as fast as they could to get  
6 through the boxes.

7 Q. So boxes of files were just delivered to you  
8 and they went --

9 A. They were -- they were delivered to a site,  
10 remote site, and we flew in to do our due diligence.

11 Q. Okay. So when you flew into the site, did  
12 you just start at one end of the table and somebody else  
13 started at the other end of the table, or did you  
14 already know what was there and make some decision about  
15 who was going to do what?

16 A. There was no decision as to who was going to  
17 do what.

18 Q. Okay. When did that process take place?

19 A. I believe November two thousand -- December  
20 2011.

21 Q. Okay. Do you know when the agreement between  
22 PNC and RBC was signed?

23 A. I do not.

24 Q. Okay. Do you know when the transaction  
25 closed?

1 A. March 3rd, 2012.

2 Q. Okay.

3 A. I believe.

4 Q. All right. Now, when you set out to do due  
5 diligence on a commercial real estate loan portfolio,  
6 what are you trying to do? What are you trying to find  
7 out or what are you looking for?

8 A. We open the files and try to quickly assess  
9 the financial condition of the -- you know, the borrower  
10 and the guarantors and understand the market and  
11 determine if the risk rating is appropriate.

12 Q. Okay. Were you familiar with the RBC risk  
13 rating system?

14 A. I wasn't familiar with it.

15 Q. Okay. So what did you do? Just try to  
16 assign a risk rating to the loans you reviewed based  
17 upon the RBIC criteria -- I'm sorry, the --

18 A. Yes, sir.

19 Q. -- PNC criteria?

20 A. Yes, sir.

21 Q. That's a yes?

22 A. Yeah.

23 Q. And did you have a way to compare your rating  
24 to the rating that RBC had?

25 A. Yes.

1 A. Yes.

2 Q. Is that right?

3 A. (Witness nods head.)

4 Q. And so if you got these loans in May of 2012,  
5 in August of 2012, more or less, sometime in there, you  
6 would have -- you would have filled out this form and  
7 made a selection whether to exit or retain, correct?

8 A. That's correct.

9 Q. And in August of 2012, the first time that  
10 you filled out that form and got the drop-down box, you  
11 selected exit --

12 A. Correct.

13 Q. -- correct?

14 A. That's correct.

15 Q. Okay. In June of 2012 -- you took over the  
16 relationship in May. In June of 2012, do you remember  
17 calling Ms. Rice-Marko to try to get some information  
18 about the loans and the properties?

19 A. In June 2012, yes.

20 Q. Okay. And do you remember what you asked --  
21 I mean, I assume you introduced yourself and that sort  
22 of stuff, correct?

23 A. Yes.

24 Q. And how did you describe yourself to  
25 Ms. Rice-Marko at that time?

1           A.     As experienced and knowledgeable in  
2 commercial real estate.

3           Q.     Okay.  And what information were you looking  
4 for at that point?

5           A.     Federal tax returns and personal financial  
6 statements on the borrowers and guarantors along with  
7 the operating statements for the different entities.

8           Q.     Okay.  And had you -- you had examined the  
9 files and found that not to be included in the files?

10          A.     Correct.

11          Q.     Or there was some information, but it was out  
12 of date?

13          A.     I had no federal tax returns for any of the  
14 party -- borrowers or guarantors, and I had 2011 personal  
15 financial statements.

16          Q.     Okay.  All right.  And did Ms. Rice-Marko  
17 provide you with the information you requested?

18          A.     Not until November of 2013.

19          Q.     So your testimony is that you asked Debbie  
20 Rice-Marko in June of 2012 for information that she did  
21 not provide to you?

22          A.     Correct.

23          Q.     All right.  Did you write her a letter and  
24 tell her you didn't have it or anything else?

25          A.     I think I spoke to her on the 6th of June and

1 her about the letter after you got a copy? I'm not  
2 asking you what the communication was --

3 MR. KNOWLTON: It's yes or no.

4 BY MR. STEPP:

5 Q. -- I'm asking you whether there were any.

6 A. No.

7 Q. Okay. Now, in July of 2012, did you and  
8 Ms. Paulson come to Charleston to meet with Debbie  
9 Rice-Marko?

10 A. We did.

11 Q. And tell me a little more about Ms. Paulson,  
12 who she is and what her responsibilities are.

13 A. Liz Paulson was an account manager, recently  
14 promoted to be a manager, and she was assigned some of  
15 the portfolio along the coast of Virginia and North and  
16 South Carolina. And, in fact, she was my manager for --  
17 under this relationship. So I had two managers, one for  
18 some of the portfolio and another manager for the loans  
19 along the East Coast of the United States. She is no  
20 longer with the bank. I can't tell you when she left.

21 Q. Okay. You said that for a while you had two  
22 managers, Ms. Paulson being one. And, I mean, was --  
23 did you report -- I guess I don't understand how the two  
24 managers for one portfolio worked. How did you know who  
25 to tell what to?

1           A.     That -- I -- I've been doing this for 30  
2     years; I'm experienced and knowledgeable; I have the  
3     confidence of senior management; I've never, to my  
4     knowledge, done anything immoral or unethical or  
5     illegal. I mean, that's what we do as a bank. I mean,  
6     you provide information, and it's my duty to keep it  
7     confidential.

8           Q.     Do you remember discussing with Ms. Rice-Marko  
9     that the information that Kenneth Nix appeared to have  
10    could only have come from PNC?

11          A.     My -- I don't recall having any conversation  
12    about Kenneth Nix at my meeting with Deborah Rice-Marko  
13    in July.

14          Q.     Okay. Do you remember in the meeting in  
15    Charleston at the conclusion after you discussed the  
16    financial information and Ms. Rice-Marko said she was  
17    not going to provide it -- you remember that part, she  
18    said she wasn't going to do it?

19          A.     Yes.

20          Q.     And do you remember Ms. Paulson said to her  
21    that, well, we can do this the easy way or we can do it  
22    the hard way? Do you remember that?

23          A.     I recall that.

24          Q.     Ms. Paulson was upset at the end of that  
25    meeting, wasn't she?

# EXHIBIT R

Subj: RE: Info  
Date: 1/23/2012 11:26:51 A.M. Eastern Standard Time  
From: [bill.harrington@rbc.com](mailto:bill.harrington@rbc.com)  
To: [Christmas4@aol.com](mailto:Christmas4@aol.com)

No this is just routine due diligence prior to closing  
Thanks

Bill Harrington | Asset Resolution Group | RBC Bank (USA) | T. (910) 457-7808 | F. (910) 457-7805 |  
4961 Long Beach Road | Southport NC 28461 | [bill.harrington@rbc.com](mailto:bill.harrington@rbc.com)

---

**From:** Christmas4@aol.com [mailto:Christmas4@aol.com]  
**Sent:** 2012, January, 23 10:50 AM  
**To:** Harrington, Bill (RBC Bank)  
**Subject:** Re: Info

you will have it later today...do you know what they are considering?

In a message dated 1/23/2012 10:29:01 A.M. Eastern Standard Time, [bill.harrington@rbc.com](mailto:bill.harrington@rbc.com) writes:

Debbie  
I need your help regarding info requested by PNC.  
I need rent rolls for The Brothers and ROA (King Street).  
Thanks for your help.  
Bill

Bill Harrington | Asset Resolution Group | RBC Bank (USA) | T. (910) 457-7808 | F. (910) 457-  
7805 | 4961 Long Beach Road | Southport NC 28461 | [bill.harrington@rbc.com](mailto:bill.harrington@rbc.com)

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Wednesday, November 06, 2013 AOL: Christmas4

DRM 000325

# EXHIBIT U

1 STATE OF SOUTH CAROLINA  
 2 COUNTY OF CHARLESTON  
 3 PNC Bank, N.A., successor to RBC  
 4 Bank (USA),  
 5 Plaintiff(s),  
 6 vs. C/A No: 2013-CP-10-2624  
 7 Liberty Cottages, LLC; GW  
 8 Dorchester, LLC; USS Clarksville,  
 9 LLC; Liberty Cottages Land, LLC;  
 10 ROA, LLC; Royal Beach Properties,  
 11 LLC; The Brothers of SC, LLC;  
 12 Deborah Rice-Marko a/k/a Deborah G.  
 13 Rice-Marko; Evan R. Marko and John  
 14 E. Marko, Jr.,  
 15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
 18 WITNESS: Robert G. Radermacher (PNC Bank)  
 19 DATE: Tuesday, January 27, 2015  
 20 TIME: 10:07 a.m.  
 21 LOCATION: Nelson Mullins Riley & Scarborough, LLP  
 22 151 Meeting Street, Suite 600  
 23 Charleston, South Carolina  
 24 TAKEN BY: Attorneys for the Defendants  
 25 REPORTED BY: HEATHER M. CURLIN  
 Registered Professional Reporter

-----  
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9 USS CLARKSVILLE, LLC; LIBERTY LAND COTTAGES, LLC;  
ROA, LLC; ROYAL BEACH PROPERTIES, LLC; and DEBORAH  
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15 ATTORNEYS FOR THE DEFENDANTS EVAN R. MARKO; JOHN E.  
16 MARKO, JR.; THE BROTHERS OF SC, LLC; and GW  
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22 ALSO PRESENT: Ms. Deborah Rice-Marko  
Mr. John Marko, Jr.  
23 Mr. Evan Marko  
Mr. Stephen Wursta, Jr.  
24

25 (INDEX AT REAR OF TRANSCRIPT)

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1 request?

2 A. That is correct.

3 Q. All right. Look over on the next page, if  
4 you would. Under 3 -- well, in this document, we looked  
5 at -- on the first page, there's a Number 1 that says  
6 "Applies to"; and there's a Number 2, "Purpose"; and now  
7 Number 3 on page 2 says "Policy." So this is the actual  
8 policy relating to nonaccrual loans; is that correct?

9 A. Yes.

10 Q. Okay. And 3.1.1 says, "A commercial loan or  
11 lease must be placed on nonaccrual status when any one  
12 of the following conditions exist, regardless of the  
13 risk rating or regulatory classification." And then  
14 there follows a series of bullets, the first one of  
15 which is, "Payment in full of the interest or principal  
16 under the contractual terms of the loan is not  
17 expected." Correct?

18 A. Correct.

19 Q. So if the bank no longer believes that it  
20 will receive payment in full of the interest or  
21 principal pursuant to the terms of the loan itself,  
22 it -- that loan must be placed on nonaccrual status at  
23 that point; is that correct?

24 A. That's correct.

25 Q. And is this one of those policies for which

1 lenient repayment terms." Who decides if it's  
2 excessively lenient?

3 A. I guess it's up to the credit officer or --  
4 now, there are guidelines within the TDR policies and  
5 procedures that, you know, indicate what characteristics  
6 of a modification would be outside of being market and  
7 being excessively lenient.

8 Q. Okay. But I gather from this that a loan  
9 could be considered a troubled debt restructuring and  
10 yet not be designated as nonaccrual?

11 A. That is correct, provided that we can justify  
12 that the contractual obligation of the modified loan is  
13 fully collectible and it's performing under the terms of  
14 the modification agreement.

15 Q. Is the decision about whether the loan is  
16 fully collectible, is that based in part on the value of  
17 the collateral?

18 A. Yes.

19 Q. So if a bank -- if PNC concludes --  
20 designates a loan as nonaccrual, then that would -- then  
21 that designation is a determination both that the loan  
22 is not going to be repaid according to its terms and  
23 that the collateral would be insufficient to fully repay  
24 the bank with accrued principal and interest?

25 A. Yes. It would also include any guaranties

1 A. Correct.

2 Q. And of course, doubtful and loss would always  
3 be nonaccrual status?

4 A. Correct.

5 Q. So if something is classified as nonaccrual,  
6 is designated nonaccrual, then the exit classification  
7 is automatic?

8 A. Yes.

9 Q. Is that correct?

10 A. (Witness nods head.)

11 Q. Okay. All right, sir.

12 All right. Are there any exceptions to this  
13 policy? Is it -- if the conditions under -- any of the  
14 conditions under 4.1 are met that would require transfer  
15 to ART, would there be any circumstances under which a  
16 loan would not be transferred to ART?

17 A. Well, in Bullet Point 2 it indicates one of  
18 the exceptions that we would have with respect to the  
19 chief credit officer.

20 Q. Okay. Any other exception that you're aware  
21 of?

22 A. Not that I'm aware of outside of that.

23 Q. All right.

24 A. The second -- the other bullet -- the third  
25 bullet point also has that same written approval of the

# EXHIBIT V

# Nelson Mullins

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November 26, 2012

## VIA FEDERAL EXPRESS AND US MAIL

Deborah Rice-Marko  
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Charleston, SC 29401

GW Dorchester, LLC  
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Charleston, SC 29401

Liberty Cottages, LLC  
32 South Battery  
Charleston, SC 29401

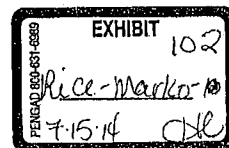
ROA, LLC  
32 South Battery  
Charleston, SC 29401

Royal Beach Properties, LLC  
32 South Battery  
Charleston, SC 29401

The Brothers of SC, LLC  
32 South Battery  
Charleston, SC 29401

USS Clarksville, LLC  
32 South Battery  
Charleston, SC 29401

(all of the above hereafter the "Borrowers")



Deborah Rice-Marko  
November 26, 2012  
Page 2

Deborah Rice-Marko  
32 South Battery  
Charleston, SC 29401

Liberty Cottages Land, LLC  
32 South Battery  
Charleston, SC 29401

John E. Marko, Jr.  
32 South Battery  
Charleston, SC 29401

Evan R. Marko  
32 South Battery  
Charleston, SC 29401

(all of the above hereafter the "Guarantors")

**RE: Forbearance Agreement dated July 15, 2011 and Amended and Restated Promissory Notes dated July 15, 2011 from Borrowers to PNC Bank, N.A. successor to RBC Bank (USA) (the "Bank").**

Dear Borrowers and Guarantors:

This Firm has been retained by the Bank regarding the following loans:

- (1) That loan in the original principal amount of \$1,595,963.91 (the "DRM Loan") to Deborah Rice-Marko, evidenced by the Amended and Restated Promissory Note, dated July 15, 2011 ("Note 1"). The DRM Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and
- (2) That loan in the original principal amount of \$2,327,500 (the "Dorchester Loan") to GW Dorchester, LLC, evidenced by an Amended and Restated Promissory Note, dated July 15, 2011 ("Note 2"). The GW Dorchester Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and
- (3) That loan in the original principal amount of \$430,324.41 (the "Clarksville Loan") to USS Clarksville, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 3"). The Clarksville Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

Deborah Rice-Marko  
November 26, 2012  
Page 3

(4) That loan in the original principal amount of \$\$1,271,220.00 (the "Liberty Loan") to Liberty Cottages, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 4"). The Liberty Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

(5) That loan in the original principal amount of \$\$1,294,197.25 (the "ROA Loan") to ROA, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 5"). The ROA Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

(6) That loan in the original principal amount of \$3,396,459.83 (the "ROA Loan #2") to ROA, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 6"). The ROA Loan #2 was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

(7) That loan in the original principal amount of \$4,900,000 (the "Brothers Loan") to Brothers of SC, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 7"). The Brothers Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

(8) That loan in the original principal amount of \$1,087,495.66 (the "Brothers Loan #2") to Brothers of SC, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 8"). The Brothers Loan #2 was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

(9) That loan in the original principal amount of \$3,262,500 (the "Royal Loan") to Royal Beach Properties, LLC evidenced by an Amended and Restated Promissory Note dated July 15, 2011 ("Note 9"). The Royal Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith.

All of the abovementioned Loans and Notes accompanied a Forbearance Agreement dated July 15, 2011. The Forbearance Agreement contained the following provisions:

Section 4.4 Payment of Liabilities. All expenses and other liabilities of the Borrowers shall remain current, and the Borrowers shall deliver such accounts payable aging reports and other financial information as the Bank may request related thereto.

Section 4.5 Payment of Taxes. Each Obligor shall pay, discharge and perform as the same shall become due and payable or required to be performed all tax liabilities, assessments and governmental charges or levies upon it or its properties or assets and all lawful claims which, if unpaid, would by law become a lien upon its property.

Deborah Rice-Marko  
November 26, 2012  
Page 4

Section 4.8 Financial Reporting. Within six (6) months from the previous statement date on file with Bank, a detailed financial statement of each of DRM, JEM and ERM containing a balance sheet at the end of that period (including all contingent liabilities) and a statement of income for that period, all in such form as approved by Bank, and within fifteen (15) days after the filing thereof, personal federal tax returns of each of DRM, JEM and ERM.

By letter to Scott Hale, Esq, dated June 28, 2012, the Bank requested information that fell under the above-mentioned terms of the Forbearance Agreement, and the information has not been provided to the Bank. Furthermore the Borrowers have not provided reports to the Bank on their efforts to sell non-income producing collateral as required by Section 4.3.

Furthermore, the Forbearance Agreement provided as follows:

Section 4.10 Post-Closing Obligations. The Obligors (defined as the Borrowers and Guarantors) shall complete or cause the completion of the following items on or prior to the respective dates set forth below:

4.10.1. On or prior to July 8, 2011, deliver to the Bank such documents and instruments as the Bank may reasonably require in order to evidence its claim against the Estate for the obligations arising pursuant to the Estate's Guaranty Agreement;

4.10.2. On or prior to July 29, 2011, deliver to the Bank fully executed, valid and binding subordination, non-disturbance and attornment agreements executed by Goodwill and BB&T, respectively, as tenants, and the other parties thereto, in form and substance reasonably acceptable to Bank;

4.10.3. On or prior to July 29, 2011, deliver to the Bank such evidence of property and liability insurance as the Bank shall require, in form and substance reasonably acceptable to the Bank, together with such endorsements as the Bank may reasonably require with respect to its status as a mortgagee, loss payee, and additional insured; and

4.10.4. On or prior to July 29, 2011, deliver to the Bank fully executed estoppel certificates from Goodwill and BB&T, respectively, as tenants, in form and substance reasonably acceptable to Bank, including without limitation with respect to the Bank's ability to verify that revenue-producing Collateral generates in excess of \$51,000 per month in net rental income (prior to any reduction for debt service and property taxes).

The documents mentioned above were not delivered to the Lender as required by the Forbearance Agreement.

Deborah Rice-Marko  
November 26, 2012  
Page 5

Section 2.2 of the Forbearance Agreement provides that upon the occurrence of any Default or upon the breach or violation of any term of the Forbearance Agreement, the Bank may terminate the Forbearance Period, and all "Obligations" shall at the option of the Bank be immediately due and payable in full, and the Bank may exercise any one or more, or all, of its rights and remedies against any or all Obligor under the Loan Documents and at law.

The Bank hereby terminates the Forbearance Period, and the following amounts were due as of November 13, 2012:

	Principal	Interest	Late Charges
DRM Loan	\$1,548,703.91	\$183,936.49	\$ 917.68
Dorchester Loan	\$2,185,420.00	\$230,273.15	\$ 1,038.76
Liberty Loan	\$1,241,540.00	\$146,294.42	
Clarksville Loan	\$ 368,804.41	\$ 46,762.52	\$ 247.42
ROA Loan #2	\$3,304,619.83	\$275,648.70	\$ 2,959.37
ROA Loan #1	\$1,259,637.25	\$148,635.53	\$ 744.16
Royal Loan	\$3,175,460.00	\$385,798.93	\$ 1,875.91
Brothers Loan #1	\$ 261,720.43	\$ 13,598.38	\$10,000.00
Brothers Loan #2	<u>\$4,793,790.00</u>	<u>\$475,755.31</u>	<u>\$ 1,634.00</u>
	\$18,139,695.83	\$1,906,703.30	\$19,417.30

From the date of this letter, interest will accrue on the unpaid principal of the Notes at the Default Rate as provided under the Notes. The "Default Rate" is seven percent (7.0%) plus the LIBOR Base Rate.

If the balances due on the Notes are not paid within ten (10) days of the date of this letter, the Bank has requested that we proceed with collection efforts, to include pursuit of any collateral securing the Notes. Furthermore, the Notes provides that if payment is not made when due, the Borrowers agree to pay all of the Bank's costs and expenses of collection, including reasonable attorneys' fees which are stipulated to be 15% of the balance due. Therefore, we encourage the Borrowers and Guarantors to take care of this matter immediately. Please feel free to contact this office for updated payoff balances and to arrange full payment of the Notes.

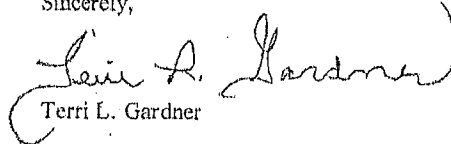
*Nothing contained in this letter shall be deemed to waive or modify any rights or remedy of the Bank available at law or in equity, or as provided in the Loan Documents.*

Deborah Rice-Marko  
November 26, 2012  
Page 6

*Be advised that any partial payments on the Notes after the date of this letter may be retained by the Bank and applied to the balance of the Notes as determined by the Bank in its sole discretion, but will not reinstate the Notes.*

Thank you for your prompt attention to this matter.

Sincerely,



Terri L. Gardner

cc: Stephen Wursta, Jr., Senior Vice-President  
Cyd B. Wolf, Senior Counsel

# **EXHIBIT W**

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON

3 PNC Bank, N.A., successor to RBC  
4 Bank (USA),

5 Plaintiff(s),

6 vs.

C/A No: 2013-CP-10-2624

7 Liberty Cottages, LLC; GW  
8 Dorchester, LLC; USS Clarksville,  
9 LLC; Liberty Cottages Land, LLC;  
10 ROA, LLC; Royal Beach Properties,  
11 LLC; The Brothers of SC, LLC;  
12 Deborah Rice-Marko a/k/a Deborah G.  
13 Rice-Marko; Evan R. Marko and John  
14 E. Marko, Jr.,

15 Defendant(s).

16 D E P O S I T I O N

17 30(b)(6)  
18 WITNESS:

Stephen Wursta, Jr. (PNC Bank)

19 DATE:

Wednesday, January 28, 2015

20 TIME:

1:33 p.m.

21 LOCATION:

Nelson Mullins Riley & Scarborough, LLP  
151 Meeting Street, Suite 600  
Charleston, South Carolina

22 TAKEN BY:

Attorneys for the Defendants

23 REPORTED BY:

HEATHER M. CURLIN  
Registered Professional Reporter

24 -----  
25 COMPUSCRIPTS, INC.  
A Full-Service Court Reporting Agency  
Post Office Box 7172  
Columbia, South Carolina 29202  
803-988-0086  
1-888-988-0086  
www.compuscriptsinc.com



1           A.     My understanding is that it was sent to  
2 provide notice of payment default, which was not  
3 addressed in the November 2012 letter.

4           Q.     Well, in the November letter there had not --  
5 no payment default existed at the time the November  
6 letter was written; is that correct?

7           A.     That's correct.

8           Q.     But there were other defaults referenced as  
9 we just went through, correct?

10          A.     That's correct.

11          Q.     And in your view, you didn't distinguish  
12 between those defaults and any other kind of default,  
13 correct?

14          A.     A default -- we identified a default at a  
15 given point in time..

16          Q.     Okay. But for some reason, not withstanding  
17 that fact, did PNC feel it necessary to send a second  
18 letter of default in February referencing nonpayment?

19          A.     The decision to send this letter was, again,  
20 a collective conversation between me, my manager, our  
21 in-house counsel, and outside counsel. And it was  
22 determined that -- to send the letter, and we did.

23          Q.     Okay. Who made -- would the decision to send  
24 the November letter, Exhibit 6, who made that decision?

25          A.     Again, it was a collective

# EXHIBIT X

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.256.7500  
www.nelsonmullins.com

Frank B. B. Knowlton  
Tel: 803.255.9588  
frank.knowlton@nelsonmullins.com

February 15, 2013

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED and U. S. MAIL - FIRST CLASS

Deborah Rice-Marko  
32 South Battery  
Charleston, SC 29401

John E. Marko, Jr.  
32 South Battery  
Charleston, SC 29401

Evan R. Marko  
32 South Battery  
Charleston, SC 29401

GW Dorchester, LLC  
32 South Battery  
Charleston, SC 29401

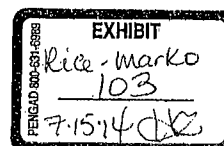
Liberty Cottages, LLC  
32 South Battery  
Charleston, SC 29401

Liberty Cottages Land, LLC  
32 South Battery  
Charleston, SC 29401

ROA, LLC  
32 South Battery  
Charleston, SC 29401

Royal Beach Properties, LLC  
32 South Battery  
Charleston, SC 29401

*With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia*



February 15, 2013  
Page 2

The Brothers of SC, LLC  
32 South Battery  
Charleston, SC 29401

USS Clarksville, LLC  
32 South Battery  
Charleston, SC 29401

RE: Forbearance Agreement dated July 15, 2011, and Amended and Restated Promissory Notes dated July 15, 2011, from Borrowers to PNC Bank, N.A. successor to RBC Bank (USA) (the "Bank")  
Our File No.: 17104/01517

Borrower:

This firm represents PNC Bank, N.A., successor to RBC Bank (USA) (the "Bank") (hereinafter referred to as "Lender") in connection with the above-referenced matter.

Reference is made to that prior Notice of Default to you dated November 26, 2012, a copy of which is attached hereto ("First Default Notice").

In addition to the defaults outlined in the First Default Notice, you are hereby notified that the Borrower is in default of its obligations under the Loan Documents for failure to make payments required thereunder when due. As a result of the foregoing defaults, effective November 26, 2012, Lender had increased the Interest Rate charged on the outstanding balance under the Note to the Default Rate.

In addition, as a result of the foregoing defaults, Lender has now accelerated the outstanding balances under the Note, and Lender hereby makes demand upon Borrower and the Guarantor for immediate payment of the entire balances owed under the Notes. If Lender does not receive full payment of the entire balances owed under the Notes within ten (10) days of the date of this letter, Lender shall have no alternative but to pursue its rights upon default, including, but not limited to, pursuing litigation to collect on the Notes, foreclosure of the Mortgages and enforcement of the Guarantys.

The entire balance owed under the Note as of February 12, 2013, is as follows:

<u>Dorchester Loan # 605443827</u>	
Principal:	\$2,185,540.00
Interest:	267,671.64
Late Charges	<u>1,620.76</u>
TOTAL:	\$2,450,832.40

February 15, 2013  
Page 3

Liberty Loan # 605445205  
Principal: \$1,239,420.00  
Interest: 167,542.00  
Late Charges 212.00  
TOTAL: \$1,407,174.00

ROA Loan # 605420275  
Principal: \$1,257,477.25  
Interest: 170,192.67  
Late Charges 960.16  
TOTAL: \$1,428,630.08

ROA Loan # 605420281  
Principal: \$3,298,879.83  
Interest: 332,201.94  
Late Charges 3,820.37  
TOTAL: \$3,634,902.14

Royal Loan # 605457764  
Principal: \$3,170,020.00  
Interest: 440,143.10  
Late Charges 2,419.91  
TOTAL: \$3,612,583.01

Brothers Loan #1 605840156  
Principal: \$259,905.43  
Interest: 18,053.98  
Late Charges 1,974.93  
TOTAL: \$279,934.34

Brothers Loan #2 605395242  
Principal: \$4,785,620.00  
Interest: 557,795.97  
Late Charges 2,859.50  
TOTAL: \$5,346,275.47

USS Clarksville Loan # 605840074  
Principal: \$368,084.41  
Interest: 53,072.65  
Late Charges 2,818.29  
TOTAL: \$423,975.35

February 15, 2013  
Page 4

<u>Deborah Rice-Marko #605840174</u>	
Principal:	\$1,545,748.91
Interest:	210,435.51
Late Charges	<u>11,085.05</u>
TOTAL:	\$1,767,269.47

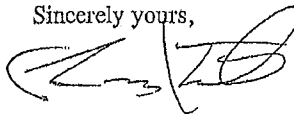
The above does not include interest that will continue to accrue after February 12, 2013, at the Default Rate. The above also does not include any other fees or charges for which the Borrowers and the Guarantors are responsible under the terms of the Loan Documents, or which may later accrue under the terms of the Loan Documents.

If you make any partial payments toward the outstanding obligations under the Note in the future, those partial payments will be applied to the total, accelerated balance pursuant to the terms of the Loan Documents, and Lender's acceptance and application of any partial payments toward the total accelerated balance will not constitute a waiver of the foregoing defaults under the terms of the Loan Documents or of Lender's rights and remedies arising from the foregoing defaults.

Nothing contained in this letter or in previous or subsequent discussions or communications between Borrowers, the Guarantors and Lender, or their respective representatives or counsel shall serve or be deemed to waive or modify any provision of the Loan Documents or of any other document executed by Borrowers or the Guarantors in connection with or otherwise related to the Note, nor waive, modify or postpone any right or remedy of Lender thereunder, and each and every one of said rights and remedies are expressly reserved by Lender. No delay by Lender of exercising any such rights or remedies shall be deemed to operate as a waiver of the same.

This notice is sent to you as a courtesy and is not an admission that any written notice is otherwise due you, nor is it an election of remedies or a waiver of Lender's right to exercise any rights or remedies that may be available at law or in equity.

Sincerely yours,



Frank B. B. Knowlton

FBBK:jak

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1140 Parklane Avenue / Glen Lake One / Second Floor / Raleigh, NC 27612  
Tel: 919.877.3800 Fax: 919.877.3799  
www.nelsonmullins.com

Terri L. Gardner  
Tel: 919.329.3882  
terri.gardner@nelsonmullins.com

November 26, 2012.

VIA FEDERAL EXPRESS AND US MAIL

Deborah Rice-Marko  
32 South Battery  
Charleston, SC 29401

GW Dorchester, LLC  
32 South Battery  
Charleston, SC 29401.

Liberty Cottages, LLC  
32 South Battery  
Charleston, SC 29401

ROA, LLC  
32 South Battery  
Charleston, SC 29401

Royal Beach Properties, LLC  
32 South Battery  
Charleston, SC 29401

The Brothers of SC, LLC  
32 South Battery  
Charleston, SC 29401

USS Clarksville, LLC  
32 South Battery  
Charleston, SC 29401

(all of the above hereafter the "Borrowers")

Deborah Rice-Marco  
November 26, 2012  
Page 2

Deborah Rice-Marco  
32 South Battery  
Charleston, SC 29401

Liberty Cottages Land, LLC  
32 South Battery  
Charleston, SC 29401

John E. Marko, Jr.  
32 South Battery  
Charleston, SC 29401

Evan R. Marko  
32 South Battery  
Charleston, SC 29401

(all of the above hereafter the "Guarantors")

**RE: Forbearance Agreement dated July 15, 2011 and Amended and Restated Promissory Notes dated July 15, 2011 from Borrowers to PNC Bank, N.A. successor to RBC Bank (USA) (the "Bank").**

Dear Borrowers and Guarantors:

This Firm has been retained by the Bank regarding the following loans:

(1) That loan in the original principal amount of \$1,595,963.91 (the "DRM Loan") to Deborah Rice-Marco, evidenced by the Amended and Restated Promissory Note, dated July 15, 2011 ("Note 1"). The DRM Loan was evidenced and/or secured by certain other documents and instruments executed in connection therewith; and

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Deborah Rice-Marco  
November 26, 2012  
Page 4

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Deborah Rice-Marko  
November 26, 2012  
Page 5

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	\$18,139,695.83	\$1,906,703.30	\$19,417.30

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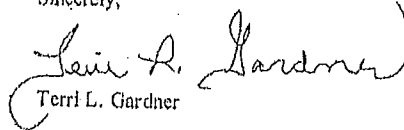
*Nothing contained in this letter shall be deemed to waive or modify any rights or remedy of the Bank available at law or in equity, or as provided in the Loan Documents.*

Deborah Rice-Marko  
November 26, 2012  
Page 6

*Be advised that any partial payments on the Notes after the date of this letter may be retained by the Bank and applied to the balance of the Notes as determined by the Bank in its sole discretion, but will not reinstate the Notes.*

Thank you for your prompt attention to this matter.

Sincerely,

  
Terri L. Gardner

cc: Stephen Wursta, Jr., Senior Vice-President  
Cyd B. Wolf, Senior Counsel

# EXHIBIT Y

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT

PNC Bank, N.A., successor to RBC Bank (USA), ) Civil Action No. 2013-CP-10-2624  
 )

Plaintiff, )

vs. )

Liberty Cottages, LLC; GW Dorchester, )  
 LLC; USS Clarksville, LLC; Liberty )  
 Cottages Land, LLC; ROA, LLC; Royal )  
 Beach Properties, LLC; The Brothers of )  
 SC, LLC; Deborah Rice-Marko a/k/a )  
 Deborah G. Rice-Marko; Evan R. Marko )  
 and John E. Marko, Jr., )

Defendants. )

ORDER TO TRANSFER AND  
 CONSOLIDATE

FILED  
 2014 JUN 11 AM 8:47  
 JULIE J. ARSTREOM  
 CLERK OF COURT

This matter came before the Court on the Motion to Transfer and Consolidate by Plaintiff PNC Bank, N.A., successor to RBC Bank (USA). Plaintiff seeks to transfer two companion cases from the Court of Common Pleas for Dorchester and Florence Counties to Charleston County and consolidate them into the above-captioned matter. The two cases to be transferred and consolidated are as follows:

(i) Dorchester County action:

*PNC Bank, N.A., successor to RBC Bank (USA) v. GW Dorchester, LLC, et al.*, Civil Action No. 2013-CP-18-0825; and

(ii) Florence County action:

*PNC Bank, National Association, successor to RBC Bank (USA) v. The Brothers of SC, LLC, et al.*, Civil Action No. 2013-CP-21-1193.

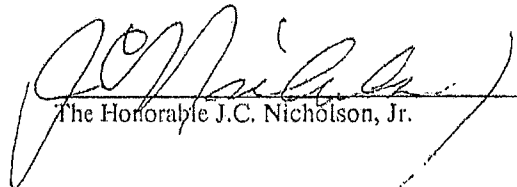
The reason for the consolidation is to allow the Charleston County Court of Common Pleas to acquire jurisdiction over all three related legal actions involving the same parties, loan agreements, and collateral, and to determine all claims at law between the parties, including the counterclaims of Defendants. Consolidation will also maximize judicial economy and allow greater efficiencies for the parties, witnesses and attorneys.

Once the Florence and Dorchester actions are transferred, the Charleston Court of Common Pleas shall consolidate the claims at law in all three matters into the above-captioned case and preside over same. Plaintiff's foreclosure claims shall be stayed pending resolution of Defendants' counterclaims. This Court shall determine how the foreclosures of property located in the various counties will be handled at the appropriate time.

Based on the parties' consent, which was put on the record at the May 22, 2014 hearing, and this Court's findings, it is hereby ORDERED

That the Clerk of Court for Charleston County will accept the transfer of the above-referenced actions to Charleston County and consolidate these actions for purposes of case administration and trial.

AND IT IS SO ORDERED.

  
The Honorable J.C. Nicholson, Jr.

Charleston, South Carolina

6/10, 2014.

# **EXHIBIT Z**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS  
TWELFTH JUDICIAL CIRCUIT

PNC Bank, National Association,  
successor to RBC Bank (USA),

Civil Action No. 2013-CP-21-1193

Plaintiff,

vs.

The Brothers of SC, LLC; GW  
Dorchester, LLC; USS Clarksville, LLC;  
Liberty Cottages, LLC; Liberty Cottages  
Land, LLC; ROA, LLC; Royal Beach  
Properties, LLC; The Brothers of SC,  
LLC; Deborah Rice-Marko a/k/a  
Deborah G. Rice-Marko; Evan R. Marko  
and John E. Marko, Jr.,

Defendants.

CONSENT ORDER  
TRANSFERRING VENUE

CERTIFIED: A TRUE COPY

*Conita Red. Spartin*

CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

2014 JUN 11 PM 1:39  
CONNIE REEL-SHEARER  
CLERK OF COURT & G.S.  
FLORENCE COUNTY, SC

FILED

This matter came before the Court on the Motion to Transfer and Consolidate by Plaintiff PNC Bank, N.A., successor to RBC Bank (USA). All parties to this case now agree and consent to transfer the above-captioned matter to Charleston County, where it will be consolidated with two related cases for administration and trial of the claims at law. The claims for foreclosure or other equitable relief will be stayed pending final determination of the legal claims. The claims for equitable relief may be transferred back to Dorchester County after determination of the claims at law.<sup>1</sup> The reason for the consolidation is to allow the Charleston County Court of Common Pleas to acquire jurisdiction over all related matters to maximize judicial economy, avoid inconsistent rulings and provide greater efficiencies to the parties, witnesses and attorneys.

<sup>1</sup> This action and the related Dorchester County case will be consolidated into the pending Charleston County case, which bears Civil Action No. 2013-CP-10-2624.

*# WBS*

After careful consideration of the arguments asserted by the parties and the material submitted to the Court, and given the consent of all counsel of record,

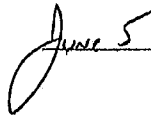
It is hereby ORDERED

That the Clerk of Court for Florence County transfer the above-captioned matter to the Clerk of Court of Charleston County to administer this action.

AND IT IS SO ORDERED.

  
PRESIDING JUDGE, TWELFTH JUDICIAL CIRCUIT

Florence, South Carolina

, 2014.

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CONNIE REEL-SHEARIN  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY

  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

We consent to the above Order:

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

Frank B. B. Knowlton, SC Bar No. 003588  
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Attorneys for PNC Bank, National Association, successor to  
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Columbia, South Carolina

June 4, 2014.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By:  *w/express permission from*

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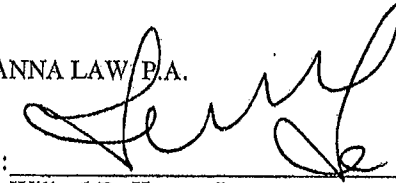
Attorneys for Defendants Liberty Cottages, LLC, USS  
Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC,  
Royal Beach Properties, LLC, and Deborah Rice-Marko a/k/a  
Deborah G. Rice-Marko

Columbia, South Carolina

June 4, 2014.

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By:



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*w/ express permission from*

Attorneys for Evan R. Marko, John E. Marko, Jr., The  
Brothers of SC, LLC, and GW Dorchester, LLC

Surfside Beach, South Carolina

June 4, 2014.

# **EXHIBIT AA**

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
PNC Bank, National Association, successor to RBC Bank (USA),	)	Civil Action No. 2013-CP-18-0825
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GW Dorchester, LLC; USS Clarksville, LLC; Liberty Cottages, LLC; Liberty Cottages Land, LLC; ROA, LLC; Royal Beach Properties, LLC; The Brothers of SC, LLC; Deborah Rice- Marko a/k/a Deborah G. Rice-Marko; Evan R. Marko and John E. Marko, Jr.,	)	
	)	
	)	
Defendants.	)	

CONSENT ORDER  
TRANSFERRING VENUE

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CERTIFIED COPY  
COURT OF COMMON PLEAS  
DORCHESTER COUNTY

This matter came before the Court on the Motion to Transfer and Consolidate by Plaintiff PNC Bank, N.A., successor to RBC Bank (USA). All parties to this case now agree and consent to transfer the above-captioned matter to Charleston County, where it will be consolidated with two related cases for administration and trial of the claims at law.<sup>1</sup> The claims for foreclosure or other equitable relief will be stayed pending final determination of the legal claims. The claims for equitable relief may be transferred back to Dorchester County after determination of the claims at law. The reason for the consolidation is to allow the Charleston County Court of Common Pleas to acquire jurisdiction over all related matters to maximize judicial economy, avoid inconsistent rulings and provide greater efficiencies to the parties, witnesses and attorneys.

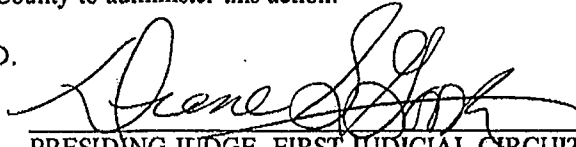
<sup>1</sup> This action and the related Florence County case will be consolidated into the pending Charleston County case, which bears Civil Action No. 2013-CP-10-2624.


After careful consideration of the arguments asserted by the parties and the material submitted to the Court, and given the consent of all counsel of record,

It is hereby ORDERED

That the Clerk of Court for Dorchester County transfer the above-captioned matter to the Clerk of Court of Charleston County to administer this action.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
PRESIDING JUDGE, FIRST JUDICIAL CIRCUIT

  
St. George, South Carolina  
6-18, 2014.

We consent to the above Order:

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Attorneys for PNC Bank, National Association, successor to  
RBC Bank (USA)

Columbia, South Carolina

June 4, 2014.

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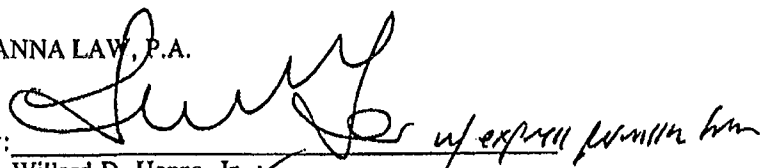
Attorneys for Defendants Liberty Cottages, LLC, USS  
Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC,  
Royal Beach Properties, LLC, and Deborah Rice-Marko a/k/a  
Deborah G. Rice-Marko

Columbia, South Carolina

June 4, 2014.

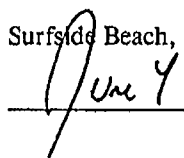
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Surfside Beach, SC 29575

Attorneys for Evan R. Marko, John E. Marko, Jr., The  
Brothers of SC, LLC, and GW Dorchester, LLC

Surfside Beach, South Carolina

  
\_\_\_\_\_, 2014.

# **EXHIBIT BB**

Code of Business  
**CONDUCT AND ETHICS**

---

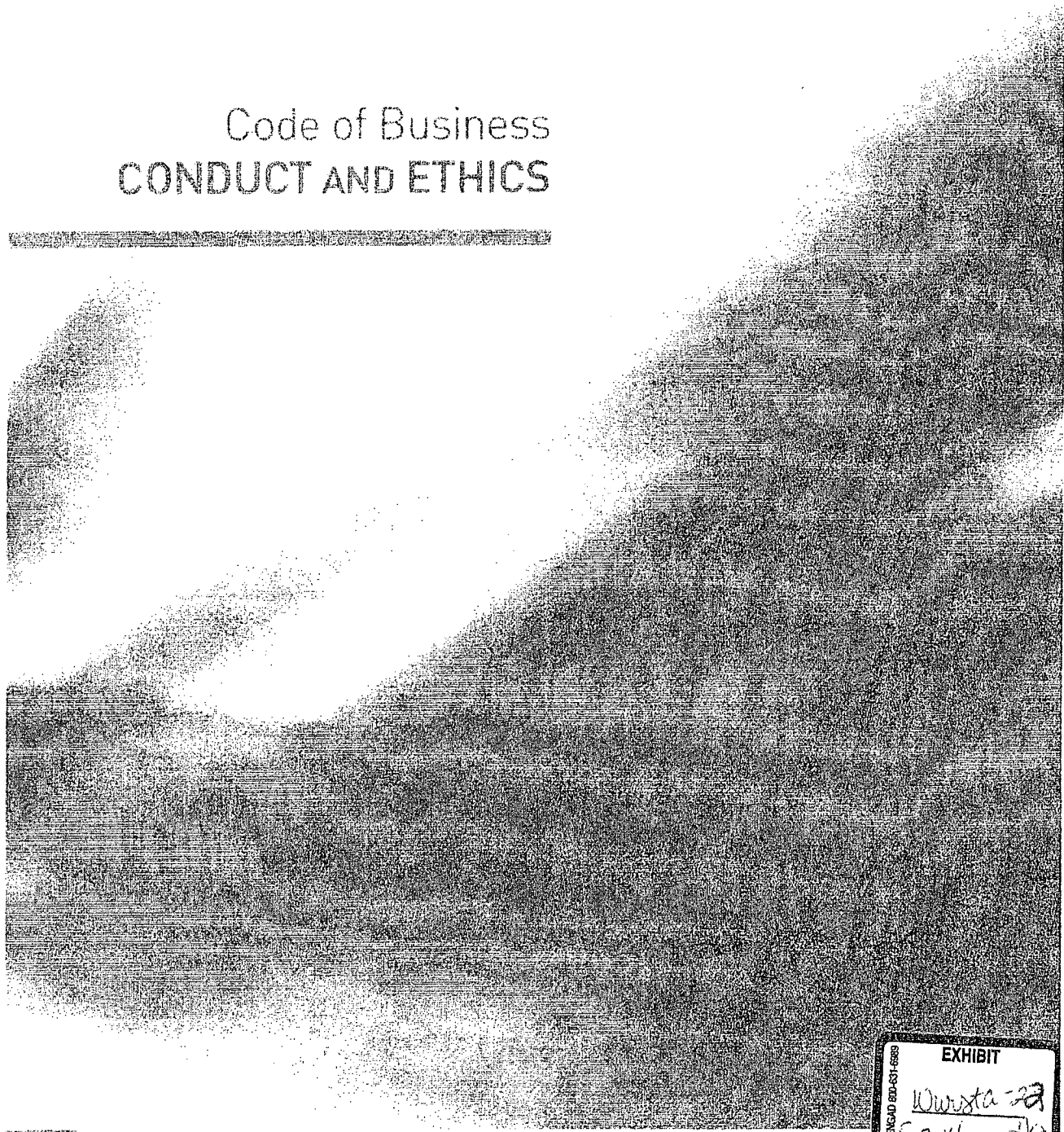


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## Our Values

In today's competitive environment, it is vital to have a clear vision and strong principles to guide our actions. Our Values convey our strengths and create a solid foundation for ethical business behavior, continued growth, and a best-in-class work environment.

### > Performance

We are high-energy, innovative, and confident about providing the highest levels of customer service and solutions in an industry where we are recognized for our leadership.

### > Customer Focus

We understand the needs and aspirations of our customers. PNC's brand promise of ease, confidence, and achievement helps us to consistently do what is right for our customer.

### > Respect

We trust the capabilities, character, and judgment of our colleagues and empower them to make decisions.

### Integrity

We are honest and conduct business with the highest ethical standards.

### > Diversity

We understand the value of our differences and appreciate how diversity creates a stronger organization.

### Teamwork

We work together to achieve our goals, and we celebrate the success of our co-workers.

### > Quality of Life

We recognize and encourage the importance of balancing professional and personal life.

## A Message to All Employees

For more than 150 years, we have demonstrated a commitment to performance and integrity. This commitment has not diminished as we have grown to become one of the leading financial services companies in America. Our Values and our Code of Business Conduct and Ethics serve as our guides to conducting business with the highest integrity and the highest ethical standards.

PNC has seven enduring core values that continue to serve us well:

Performance, Customer Focus, Respect, Integrity, Diversity, Teamwork, and Quality of Life.

Our Values, created by employees, reflect PNC's culture and help to ground us by guiding our day-to-day actions with customers and colleagues. Similarly, PNC's Code of Business Conduct and Ethics and related policies provide important guidance to conduct our daily affairs. They apply to all employees and directors of PNC. As a team, we have worked very hard to build a successful and well-respected company. We simply cannot - and will not - tolerate unethical or inappropriate behavior.

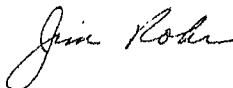
Remember, if you have a question or concern about what is proper conduct for you or anyone else, you may always talk to your supervisor, the Employee Relations Information Center ("ERIC") at 1-866-661-3742, or the Corporate Ethics Office at 412-768-8507. You may also report possible violations by calling the PNC Business Conduct and Ethics Hotline at 1-866-785-9753, where you may choose to remain anonymous.

Now more than ever, building a great company requires an unwavering commitment to the highest ethical standards:

- > Living Our Values
- > Executing on our brand promise of ease, confidence, and achievement
- > Embracing our Code of Business Conduct and Ethics

Each of us is accountable to do the right thing.

Sincerely,



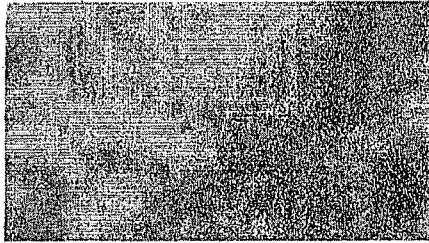
James E. Rohr  
*Chairman and Chief Executive Officer*



PNC Code of Business

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## Our Code and Your Responsibilities

### Our Commitment to Ethics and Values

PNC's Code of Business Conduct and Ethics represents our commitment to live by the ethical standards expressed in Our Values and to comply with all applicable laws and regulations. To help us understand and meet these commitments, the Code defines PNC's expectations, provides guidance, and identifies resources to help address concerns.

The Code is an important reference tool, but it cannot address every situation, nor can it describe every law, regulation, or policy that may apply in our work. PNC has additional standards and policies for which references and links are provided throughout the Code. Although these policies are not part of the Code, it is very important that you become familiar and comply with them.

The Code also includes Questions and Answers that illustrate topics discussed in the Code and may help to address concerns that commonly arise. A Glossary of Terms is included to provide definitions of certain terms used within the Code.

As you review this Code, remember that our commitment to ethics and compliance rests on the strong foundation of Our Values. Our Values are more than words. They are a reflection of who we are and how we do business. They are the standards we live by and the characteristics by which we want to be known. Living Our Values sets us apart from the competition and demonstrates that we share a unified commitment to our customers, our communities, our shareholders, and one another.

### To Whom the Code Applies

The PNC Code of Business Conduct and Ethics provides the ethical guidelines and expectations for conducting business on behalf of PNC. The Code is a resource for all PNC employees and PNC's Board of Directors. It cannot address every issue that we may encounter but it does provide guidance and resources for those times when the right choice may not be clear.

Certain PNC business partners, such as vendors, agents, consultants, and other representatives, serve as an extension of PNC, and they are expected to adhere to the spirit of the Code, and to any applicable provisions, when working on behalf of PNC.

### Compliance with the Law and Regulations

Given the highly regulated environment in which PNC operates, it is important that you are aware of, and never intentionally violate, relevant laws and regulations.

Violating relevant laws, regulations, or this Code, or encouraging others to do so, exposes PNC to risk, including risk to its reputation, and therefore may result in disciplinary action up to and including termination of employment.

You should understand that violations of laws or regulations may also result in legal proceedings and penalties including, in some circumstances, civil and



PNC Code of Business

criminal penalties that could affect you personally in addition to a risk of adverse consequences to PNC.

You should also be alert to changes in the law or new requirements that may affect your business unit, as well as new products or services that may be subject to special legal requirements.

### Employee Responsibilities

As a PNC employee, you are responsible for understanding and adhering to this Code.

- Always act in a professional, honest, and ethical manner when conducting your activities with and on behalf of PNC.
- Be familiar with the information contained in this Code and related ethics, human resources, and compliance policies. In addition, you should be well versed in any specific policies that pertain to your job responsibilities.
- Do not engage in or tolerate inappropriate harassment of, discrimination against, or bias toward another employee.
- Provide all required notifications and obtain necessary approvals. If you are in doubt as to whether or not notification or approval is required in a particular situation, seek guidance from your supervisor, manager, or the Corporate Ethics Office.
- Never ask another employee to do something that would be prohibited by this Code.
- Cooperate and provide honest and accurate information in investigations, regulatory examinations, audits, and similar types of inquiries.
- Promptly report concerns about possible violations of laws, regulations, or this Code, whether it be by a colleague, customer, or vendor, to the appropriate individuals. The section of the Code titled "Asking Questions and Raising Concerns," found on page 7, details several methods by which you can report your concerns.
- Complete required Code of Business Conduct and Ethics training in a timely manner and keep up-to-date on current standards and expectations.

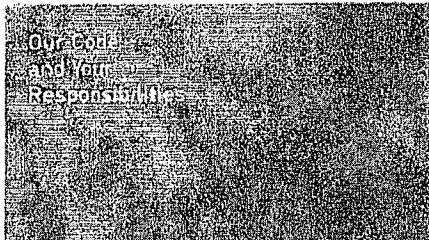
### Additional Responsibilities of PNC Leadership

If you are in a leadership position at PNC, you have additional responsibilities.

- Create a work environment where ethical business conduct is recognized and valued.
- Never permit or ask an employee or anyone acting on behalf of PNC to do something that would be prohibited by this Code.

➤ **Q:** In my country, our local laws differ from the standards in PNC's Code of Business Conduct and Ethics. What should I do?

➤ **A:** If you believe local laws conflict with the Code or related policies, please discuss the issue with the Corporate Ethics Office.



➤ **Q:** My business unit sets various goals that we are asked to achieve. Sometimes I feel pressured to violate the Code to achieve these goals. Is this acceptable?

➤ **A:** No. While successful businesses set high goals and employees strive to achieve them, you should never violate the Code of Business Conduct and Ethics or PNC policies to achieve your goals.

- Be a resource for employees. Communicate to employees about how the Code and related policies apply to their daily work.
- Serve as a role model for the highest ethical standards and work to create and sustain a culture of Integrity.
- Be proactive. Take reasonable actions to prevent and identify misconduct within your work group and report any situation that might impact the ability of employees to act ethically.
- Create an environment where employees feel comfortable asking questions about, and reporting potential violations of, this Code and PNC policies.
- Be aware of the limits on your authority and do not take any action that exceeds those limits. Delegate authority only where permissible under corporate policies and otherwise appropriate.
- Take prompt corrective action to remedy business conduct that is inconsistent with this Code or related policies.

#### Protection from Retaliation

Retaliation is a serious violation of Our Values and this Code. Regardless of the conduct you report and method of reporting you choose, PNC will not tolerate any employment discrimination or retaliation because you made a good faith report of an alleged violation of this Code or PNC policies.

Allegations of retaliation will be investigated and appropriate action will be taken. This may include disciplinary action up to and including termination of employment for those responsible for retaliation.

If you believe that you or someone you know has been retaliated against for raising an ethics concern, contact the Corporate Ethics Office or call the PNC Business Conduct and Ethics Hotline.

#### Waivers and Exceptions

From time to time, PNC may amend or waive certain provisions of this Code. If you believe that a waiver may be appropriate, discuss the matter with the Corporate Ethics Office.

The Corporate Ethics Office also has responsibility for interpretation of the provisions of this Code and their applicability.

In the case of directors and executive officers, any proposed waiver or exception must be approved not only by the Corporate Ethics Office but also by the Audit Committee of PNC's Board of Directors. PNC will disclose publicly waivers or exceptions granted to directors and executive officers to the extent required by law or the rules of the New York Stock Exchange.



## THE NEWSPAPER TEST

### Making the Right Choice

If you're faced with a dilemma and you're not sure what to do, ask yourself:

- > Is it legal?
- > Is it appropriate and honest?
- > Am I acting consistent with PNC's Values?
- > Could I defend my actions if they appeared in the newspaper?

#### Asking Questions and Raising Concerns

Most of your concerns can be resolved by working with your supervisor or manager, but you also have the option to ask questions or report issues and concerns by contacting:

- > The Corporate Ethics Office at **412-768-8507**
- > The PNC Business Conduct and Ethics Hotline at **1-866-785-9753**
- > The Corporate Ethics Office Mailbox at **Corporate.Ethics.Office@pnc.com**

PNC's Business Conduct and Ethics Hotline is an attended line, managed for PNC by The Network, an independent company that provides reporting services for hundreds of companies worldwide. It is available 24 hours a day, seven days a week.

You may remain anonymous, and whether or not you give your name, your call will not be recorded. Information received by The Network is relayed to PNC's Corporate Ethics Office for further investigation and review as appropriate.

Please note that if you are a PNC employee working outside the United States, a separate PNC Business Conduct and Ethics Hotline has been established for your use. This phone number is available in the country-specific information that has been provided to you.

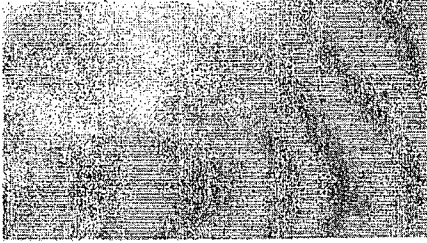
In addition, there are other resources at PNC through which you may also report issues, concerns, or violations of the law or this Code:

- > The Employee Relations Information Center (ERIC) at **1-866-661-3742**
- > Any representative of the Legal Department

Remember: You have an obligation to report any unethical business conduct and any known or suspected violation of the Code of Business Conduct and Ethics or any other PNC policy. An issue cannot be addressed unless it is brought to someone's attention.

> **Q:** Our manager typically does nothing when concerns about potential misconduct are brought to her attention, and I believe she has made things difficult for co-workers who have raised issues. Now I have a problem: a co-worker is doing something that I believe to be ethically wrong. What should I do?

> **A:** Speak up. Our Code says that you should report misconduct of which you are aware and that you can do so without fear of retaliation for good-faith reporting. While starting with your direct manager is often the best way to address concerns, if you do not believe that it is appropriate or do not feel comfortable doing so, you should talk to another member of management, Employee Relations, or the Corporate Ethics Office. Also, if you wish to remain anonymous, you may call the Business Conduct and Ethics Hotline at 1-866-785-9753.



> **Q:** As a teller in one of PNC's branch offices, sometimes customers will ask me to give them my opinion on investment or tax matters. Is it alright for me to do so?

> **A:** No, it is not. You should never give advice in fields where you lack professional qualifications or where that advice is not part of your job responsibilities. However, you can refer the customer to an appropriate business partner at PNC.

## Acting in the Best Interest of Our Customers and the Public

### Fair Dealing

We endeavor to deal fairly with our customers, suppliers, competitors, and employees. All employees are expected to meet these obligations and maintain the highest standards of honesty and integrity.

In our dealings with customers and the public, we must never take unfair advantage through manipulation, abuses of Confidential Information, or misrepresentation of material facts.

### Employee Responsibilities | Fair Dealing

- > Never request or accept any kickbacks, or other inappropriate personal benefits from a current or prospective customer or supplier.
- > Never use a customer's money or property in any way that is not authorized by the customer and by PNC.
- > Do not engage in personal financial transactions with customers, suppliers, or any other PNC business partner unless the transaction is with a family member or other person with whom you have a relationship established outside of your PNC employment.
- > Always award contracts and purchase goods and services solely in accordance with legal requirements and in the best interest of PNC.

### Conflicts of Interest

We are expected to make sound business decisions in the best interests of PNC, undistorted by personal interests. A conflict exists when personal interests influence decisions that should be made solely on behalf of PNC or its clients.

We must never use our position at PNC for inappropriate personal gain or advantage to us or a member of our family. Any situation that creates a conflict of interest between personal interests and the interests of PNC should be avoided. Conflict of interest situations that cannot be avoided must be disclosed and approved by the Corporate Ethics Office.

Conflicts of interest expose our personal judgment and that of PNC to increased scrutiny and criticism and can undermine our credibility and the trust that others place in us. This may be so, even if there is an appearance of a conflict. Because it is impossible to describe every potential conflict, PNC relies on each of us to exercise sound judgment, to seek advice when appropriate, and to adhere to the highest standards of Integrity.

### Employee Responsibilities | Conflicts of Interest

- > Never allow your judgment or actions to be compromised by personal interests. Be mindful of the appearance of conflicts of interest.
- > Always seek to make business decisions in the best interest of PNC.



PNC Code of Business

- Always identify and manage conflicts according to policies and regulatory requirements, and bring conflicts or situations reasonably likely to lead to conflicts to the attention of your supervisor, manager, or the Corporate Ethics Office.
- Be mindful of how personal activities, such as taking a second job, potentially can lead to conflicts.
- Proactively address situations that may put your interests or those of a family member in conflict with PNC.
- When in doubt, disclose to the Corporate Ethics Office.

Various business units have specific policies regarding conflict of interest situations, and additional rules are applicable to certain senior executives and directors. You are responsible for knowing and complying with the relevant policies applicable to you. If you have any questions or concerns, contact the Corporate Ethics Office.

#### Self Dealing

We have a responsibility not to take corporate opportunities for ourselves and not to compete with PNC. Business opportunities that arise because of our position at PNC, or by using corporate property or information, belong to PNC.

#### Employee Responsibilities

- Do not use your PNC position or authority if others may reasonably believe that your business decision is affected by your personal interests, including the interests of relatives and friends. Examples of these situations include:
  - Do not engage in transactions on behalf of PNC with a supplier or a customer in which you or an Extended Family Member has a significant personal or financial interest.
  - Do not transact business on behalf of PNC with respect to your own accounts, Extended Family Member accounts, or accounts for anyone whose close relationship with you may reasonably be viewed as creating a conflict of interest (this includes both financial and non-financial transactions).

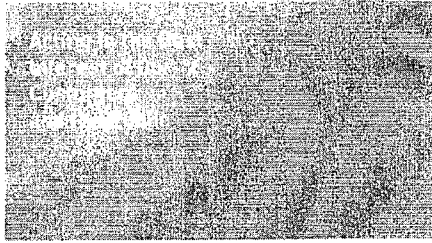
#### Insider Trading

Anyone who possesses material non-public information ("Inside Information") concerning any company is prohibited from trading in that company's Securities. Inside Information is information that:

- Relates to an issuer of Securities, such as information about its business operations or Securities, if a reasonable investor would consider the

➤ **Q:** A long-time supplier of PNC who is also a friend offered to lend money to me for a down payment on some land. We have discussed and agreed on the terms of the repayment. Is this a problem?

➤ **A:** It could be a problem. You may not accept a loan of money from a supplier with whom you interact on behalf of PNC. It may appear to others to be an effort to influence your judgment. Also, regardless of your intentions, the loan may create the potential for a conflict among your interests, the supplier's interests, and those of PNC. You should discuss this situation and other situations where you believe that there is at least an appearance of a conflict of interest with the Corporate Ethics Office.



> **Q:** An officer of one of PNC's clients told me confidentially that his company was about to be awarded a new and very lucrative contract. He suggested I buy some of the company's stock. A number of people at the company know about the deal. Would it be wrong if I bought some shares?

> **A:** Yes, it would be wrong. The information you received appears to be material and non-public. You must not trade now that you know, nor can you "tip" someone else in order for them to trade.

information important in determining whether to buy, sell, or hold such Securities; and

> Has not been disclosed to the public.

Remember: The test for insider trading is whether you were aware of Inside Information at the time of the trade, not whether you actually used the information in deciding to trade. You should also keep in mind that rumors circulating in the market do not necessarily mean that the underlying information is public.

The Corporate Ethics Office, along with Compliance and executive management for each business function, designates certain employees as Restricted Employees. Restricted Employees are subject to special reporting requirements related to their Securities trading activities. In addition, some Restricted Employees will be subject to Pre-Clearance requirements. Employees will be notified by the Corporate Ethics Office and/or Compliance if they are designated as a Restricted Employee, and they will be provided with additional information on the particular restrictions to which they will be subject.

Remember: If you pass Inside Information on to someone who trades in Securities related to the information (sometimes referred to as "tipping"), or even if you simply recommend the Securities (without sharing the actual information), you may be legally liable.

#### Employee Responsibilities | Pre-Clearance

You must obtain Pre-Clearance from the Corporate Ethics Office for the following types of Personal Investment Transactions on your behalf or on behalf of a member of your Immediate Family:

- > A transaction that is made available to you or your Immediate Family Member because of your position with PNC.
- > An investment in a non-publicly traded entity in which PNC also holds an equity interest.

In addition, you or your Immediate Family Members must comply with all applicable securities rules and regulations and the following:

- > Do not trade while in possession of Inside Information.
- > Do not disclose Inside Information to any other person unless permitted to do so to advance legitimate PNC business interests (and pursuant to appropriate confidentiality restrictions).
- > Do not advise others to buy, sell, or hold Securities when you have Inside Information.



- Do not engage in Day Trading or Short Selling of PNC or BlackRock Securities.
- Never engage in transactions in any derivative of PNC Securities, including buying and writing options.
- Be aware that you may be restricted from using PNC Securities to meet a margin call or satisfy a loan secured by PNC Securities, if the Securities were to be liquidated while you are aware of Inside Information.

Consult the policy entitled **Personal Investment Transaction Rules for All Employees** available on the Ethics site of the PNC intraweb for additional information.

For Restricted Employees, consult the policy entitled **Restricted Employees Investment Transaction Rules** available on the Ethics site of the PNC intraweb for additional information.

#### Outside Employment

Other Employment, including self-employment, generally is permitted and does not require prior approval from the Corporate Ethics Office provided that the Other Employment does not:

- Interfere with your PNC job responsibilities or schedule.
- Create a conflict of interest or the appearance of a conflict of interest.
- Result in competition with any of PNC's business activities, including offering similar products or services.
- Involve using PNC property or using the time of other PNC employees during working hours.
- Involve actively soliciting PNC customers or PNC employees while working at PNC.
- Involve preparation, audit, or certification of documents pertaining to PNC business.

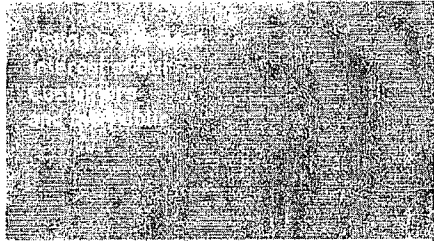
#### Employee Responsibilities | [Click here for more information](#)

- In all cases, you must obtain written approval from your supervisor or manager prior to engaging in Other Employment.

Consult the policy entitled **Other Employment** available on the Ethics site of the PNC intraweb for additional information, including specific examples of Other Employment that may create a conflict of interest and require approval from the Corporate Ethics Office.

➤ **Q:** I have an opportunity to serve as an expert witness. May I accept the offer?

➤ **A:** Serving as an expert witness or advisor or providing technical assistance in litigation generally takes a significant amount of time and may create a conflict of interest with PNC's policies and practices. It may also put you in a position where your opinion might conflict with that of PNC. For these reasons, you must obtain advance written approval from the Corporate Ethics Office. In addition, if you are permitted to accept the offer, you must not use or distribute any materials or products developed as part of your responsibilities with PNC without approval from PNC's Legal Department.



> **Q:** I serve as the treasurer for a civic organization that is applying for a loan from PNC. I have been asked to help prepare some financial statements that may be needed as part of the application. Is this a conflict?

> **A:** Yes, it is a conflict. You cannot prepare documents that may be used by PNC in underwriting the loan. In addition, you must recuse yourself from any discussions or decisions involving PNC business, whether it is this loan or any other services PNC may provide, such as investment advisory or treasury management services.

#### Outside Director, Officer, and Trustee Positions

PNC encourages employee involvement in our communities.

Serving as an officer or board member of a local cultural, social service, or other not-for-profit organization generally does not require approval from the Corporate Ethics Office. However, if an employee believes that a conflict may exist between serving on such board and their role at PNC, they should contact the Corporate Ethics Office.

Service as an officer or board member of a for-profit company generally requires the approval of the Corporate Ethics Office.

#### Employee Responsibilities

- > When a transaction involving PNC is discussed by an outside organization where you serve as an officer or director, you should disclose your relationship with PNC and not participate in any discussion of or decision about the transaction.
- > Special care should be taken when the organization has a banking relationship with PNC. The Corporate Ethics Office can provide guidance in these situations.

Consult the policy entitled **Outside Director, Officer, and Trustee Positions**, available on the Ethics site of PNC's intraweb for additional information.



### Transactions with PNC

Employees and their families are encouraged to use PNC for their personal financial services. Such services are to be provided on the same terms that they are available to the general public or to all employees in your market, all employees in your business, or all similarly situated employees.

Any business arrangements, such as the sale or lease of property or services between PNC and PNC employees or their Immediate Family Members, must be pre-approved by a supervisor or manager and the Corporate Ethics Office.

### Inheritances and Fiduciary Appointments

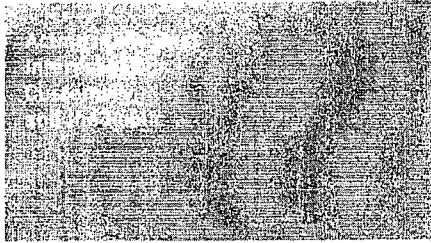
There are very few circumstances when it is permissible to accept inheritances from or fiduciary appointments by or on behalf of PNC customers. All inheritances and fiduciary appointments involving PNC customers must be approved in advance by the Corporate Ethics Office.

#### Employee Responsibilities

- > Unless the customer is a family member or personal friend whose relationship with you was established outside your PNC employment, you must try to discourage a PNC customer from leaving you an inheritance or appointing you as a fiduciary, if you have knowledge of the inheritance or appointment; and you must promptly report this potential inheritance or appointment to the Corporate Ethics Office upon learning of it.
- > Neither you, nor any of your Immediate Family Members, may receive an inheritance from a customer unless:
  - > The customer is a family member, or
  - > Your relationship with the customer was established outside your PNC employment, and the Corporate Ethics Office determines that you may accept the inheritance.
- > Neither you, nor any of your Immediate Family Members, may accept an appointment as a customer's executor, trustee, attorney-in-fact, or other fiduciary unless:
  - > The customer is a family member, or
  - > Your relationship with the customer was established outside your PNC employment, and the Corporate Ethics Office determines that you may accept the appointment.
- > You may not act as a co-fiduciary with PNC Bank, or any bank affiliated with PNC, and be compensated without prior approval from the Corporate Ethics Office.

> **Q:** My manager's friend is a freelance graphic designer. Whenever we need some design work, my manager calls her friend and, thereafter, she always receives the business. The friend creates a good work product, but I have always wondered if this is appropriate.

> **A:** Your manager's approach is creating an appearance of impropriety. However, you may not have all the facts. It may be that your manager's friend is an approved vendor and has gone through all the necessary selection and approval processes. If you are comfortable doing so, you should discuss this matter with your manager, but if you do not feel comfortable doing so, contact the Corporate Ethics Office.



**Q:** One of my customers presented to me a small gift of cash on my birthday to thank me for all of the extra time that I spent with her account this past year. Is it appropriate to accept this one-time gift?

**A:** No. It is never appropriate to accept cash in any form or amount as a gift from a customer.

## Gifts and Entertainment

### GENERAL PRINCIPLES

Appropriate gifts and entertainment can help strengthen business relationships, but these business courtesies must never improperly influence business decisions, and they must always be given and received in accordance with our policies and the law. This section of the Code provides guidance on giving or receiving gifts or entertainment, or anything else of value, to or from anyone doing or seeking to do business with PNC. Consult the policies entitled **Gifts** and **Business Entertainment** available on the Ethics site of the PNC intraweb for additional guidance on giving or accepting a gift or business entertainment. The term "gift" is defined broadly to include gifts and other things of value.

Neither you nor your Immediate Family Members may ask for or accept a gift from anyone doing or seeking to do business with PNC, if the gift is for the purpose of influencing or rewarding you in connection with any business decision or transaction involving PNC, or, to a reasonable person, the gift would present the appearance of an attempt to influence or reward you in connection with any business decision or transaction involving PNC. Importantly, it is unnecessary for the gift to be in exchange for some action by you to be improper. You may not accept a gift that is or, to a reasonable person, appears to be an attempt to reward you for any action you took as a PNC employee, even if you would have taken the same action without regard to the gift.

You may accept a gift from or give a gift to a person doing or seeking to do business with PNC when the gift is based on a family or personal relationship that exists independently of any PNC business.

If you are giving a gift to a customer and expect reimbursement, you should consult the guidelines in the **PNC Expense Reimbursement Policy**. However, regardless of whether you are seeking reimbursement, your gifts to customers and their Immediate Family Members should be of a reasonable and customary value, and must comply with applicable law.

### BUSINESS ENTERTAINMENT

In addition to the principles set out above, employees may accept or provide business entertainment, including meals and refreshments, only if such entertainment is common in their particular business and the cost of the entertainment is of reasonable and customary value. The purpose should be to discuss business or foster business relationships.

Entertainment provided by others must be commensurate with the recipient's job responsibilities and should not be lavish or extravagant under the circumstances. As a general rule, the value should not exceed what PNC would normally reimburse as an appropriate business expense.



When travel arrangements and/or accommodations are to be paid for by a customer or vendor, you must obtain prior approval from the Corporate Ethics Office, unless the customer or vendor is a family member or personal friend whose relationship with you was established outside your PNC employment.

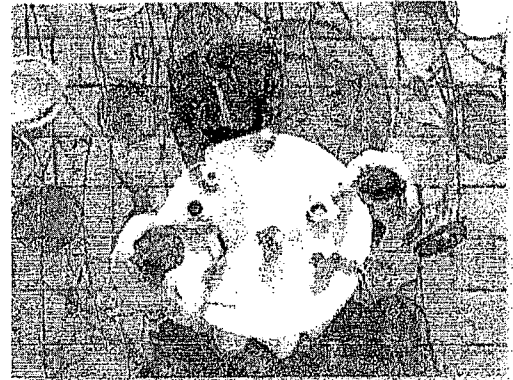
**GIFTS AND ENTERTAINMENT - GOVERNMENT OFFICIALS**

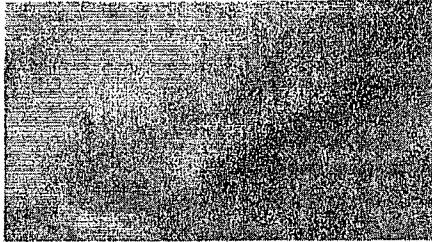
Special care must be taken when providing gifts, meals, or entertainment to foreign or U.S. federal, state, or local government employees, as well as officials or employees of government-owned or controlled enterprises. There may be additional restrictions or prohibitions. Consult the policy entitled **Gifts to and Entertainment of Government Employees** available on the Ethics site of the PNC intraweb for additional information.

**GIFTS AND ENTERTAINMENT - ADDITIONAL RESTRICTIONS**

Employees of a PNC broker dealer affiliate are subject to the policy imposing more restrictive gift rules as a result of securities industry regulation.

Guidance for providing gifts, meals, and business entertainment to union recipients is included in the policy entitled **Gifts to and Entertainment of Union Recipients** available on the Ethics site of the PNC intraweb.





## Protecting Our Information and Assets

### Creating Business Records

Business records should always be prepared honestly and accurately. We must never be dishonest or deceptive in creating or maintaining PNC records, or otherwise attempt to mislead PNC customers, management, auditors, or regulators.

We are responsible for helping ensure that the information we record, process, and analyze is accurate, and recorded in accordance with applicable legal or accounting principles. We also need to ensure that it is made secure and readily available to those with a need to know the information on a timely basis.

PNC is a publicly traded company. We make filings with the SEC and other public disclosures about our business performance and financial results. These disclosures must be full, fair, accurate, timely, and understandable. We must not mislead investors. Employees with a role in the preparation of our public disclosures have a special responsibility to help us meet these standards and other legal requirements relating to public disclosure. PNC has adopted disclosure controls and internal controls over financial reporting to assist in satisfying this responsibility. Employees with a role in the operation or evaluation of these controls are responsible for helping assure their operation and effectiveness.

Remember: We are all responsible for bringing any evidence of fraud in accounting, financial reporting, or internal controls to the attention of a manager, supervisor, or the Corporate Ethics Office.

Q: At the very end of the last quarterly reporting period, my supervisor asked me to record additional expenses even though I had not received the invoices from the vendor and the work had not started. I agreed to do it, mostly because I know that she has been under a lot of pressure in explaining delays. I also did not think it really made a difference since we were all quite certain that the work would be completed in the next quarter. Now I wonder if I did the right thing.

A: No, you did not. Costs must be recorded in the period in which they are incurred. The work was not started, and the costs were not incurred at the date you recorded the transaction; it was, therefore, a misrepresentation and, depending on the circumstances, could amount to fraud.

### Employee Responsibilities | Creating Accurate Records

Most of us participate to some extent in recording, processing, or analyzing financial or other information, or in the review and audit of these activities. These processes exist to assist in business decision-making and the evaluation of PNC's performance by PNC's Board and senior management. They are also necessary to ensure compliance with legal and other requirements pertaining to the retention of information and its disclosure to others, including to investors and regulators.

- Never make, or ask others to make, a false or misleading entry or report. This applies whether the report is financial or non-financial or for internal or external use.
- Always record business transactions and payments accurately and in accordance with PNC policies.
- Never use or transfer PNC funds for any purpose that would be in violation of any law, regulation, or PNC policy.
- If you have any questions or concerns about PNC's financial records, internal accounting controls, or audit practices, discuss the matter with your supervisor, manager, or the Corporate Ethics Office.



### Document Retention

We are required to maintain accurate books and records of our business activities consistent with legal requirements and business needs. Each of us is responsible for the integrity of the information and records under our control. We also should be familiar with any recordkeeping procedures that apply to our business function.

Legal restrictions may also require you to retain documents beyond the normal period.

PNC's **Corporate Records Management Intranet Site** provides guidelines on record retention.

### Confidential Information

Safeguarding confidentiality is a fundamental obligation for everyone at PNC. While employed by PNC, we may have access to Confidential Information about PNC, our customers, shareholders, colleagues, or suppliers. Use Confidential Information only for legitimate business purposes and never disclose it to anyone who is not entitled to it.

Remember: Each of us has an obligation to safeguard information and prevent its unauthorized disclosure. As a general rule, you should assume all information learned on the job is confidential.

### EMPLOYEE PRIVACY

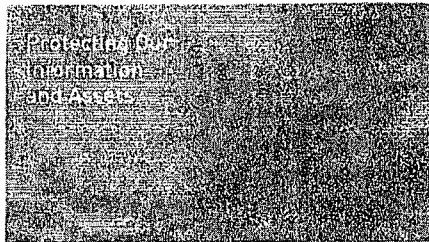
PNC respects the confidentiality of the personal information of employees. This includes employee medical and personnel records. Access to personal information is only authorized when there is a legitimate and lawful reason, and access is only granted to appropriate personnel.

Requests for confidential employee information from anyone outside PNC under any circumstances must be approved in accordance with our policies.

It is important to remember, however, that employees should have no expectation of privacy with regard to normal course workplace communication or any personal property brought onto PNC premises or used for PNC business.

> **Q:** I have just joined PNC as a new employee. May I bring with me to PNC the confidential information that I developed while working for my prior employer?

> **A:** No. Doing so would be a violation of this Code, probably your obligations to your former employer, and possibly even be against the law. You must protect your past employer's confidential information just as PNC employees are obliged to protect our Confidential Information. Similarly, if you leave your employment at PNC, you are prohibited from taking Confidential Information with you.



➤ **Q:** I recently met a former PNC employee who is now a consultant. During our conversation, it became clear to me that she has kept copies of manuals and computer files from projects on which she worked while she was with PNC. I think the information is the company's property. Is it? What should I do?

➤ **A:** You may be correct. The information may be the property of PNC and if so, she should not have kept it after her employment ended. At the very least, it appears that she may have violated her obligation under our Code. You should contact your supervisor, manager, or the Corporate Ethics Office. They will follow up to see if additional steps should be taken.

## CUSTOMER AND CLIENT CONFIDENTIALITY

PNC is committed to protecting Confidential Information about our clients and customers. We follow all applicable laws and regulations directed toward privacy and information security.

We must safeguard all Confidential Information our clients and customers share with us by ensuring that their information is used only for the reasons for which the information was gathered or other reasons allowed by law and that their information is only shared with authorized individuals. When we use other companies to provide services for us, we require them to protect the confidentiality of information they receive.

Remember: You should be familiar with PNC's **Customer Privacy Policy**, as well as with any privacy policy of your business unit.

### Employee Responsibilities | [Employee Responsibilities](#)

As an employee of PNC, you are expected to protect Confidential Information from unauthorized access and disclosure and use it only as directed.

- Do not attempt to access Confidential Information unless you have a legitimate PNC business reason for doing so. Do not attempt to gain access to information you do not need to perform your job.
- Do not disclose Confidential Information to a PNC colleague, unless they have a need to know such information in connection with their PNC responsibilities.
- Never disclose customer information outside PNC to anyone other than the customer unless such disclosure has been approved by the Legal Department, is in response to proper legal process or regulation or as required by law, or has been permitted by the customer.
- Never use Confidential Information for personal financial gain or to compete with PNC.
- Take appropriate steps to ensure the security of Confidential Information.

Consult the policy entitled **Protect Confidential Information from Unauthorized Use** available on the Technology & Processing site of the PNC intraweb for additional information.

Remember: Avoid discussing Confidential Information in places where you may be overheard – this includes public and non-public areas, such as PNC's elevators or hallways.

### Intellectual Property

PNC intellectual property consists of any inventions, business ideas, or information that PNC owns, such as unique products, methodologies, and our business strategies. PNC owns all inventions that are made using PNC's systems and property or that are developed during your time working at PNC.



We protect our intellectual property through patents, trademarks, and copyrights. Each of us is required to safeguard the Confidential Information and trade secrets belonging to PNC and its business partners. Doing so helps ensure that we reap the full benefit of our efforts and that we keep our commitments to our business partners.

#### Employee Responsibilities

- Never improperly use PNC intellectual property. Never disclose non-public intellectual property without approval from the Legal Department.
- Do not use PNC resources or time to create or invent something unrelated to PNC's business, such as writing a book using your PNC computer.
- Never use a previous employer's intellectual property without that company's permission.
- Never use or copy software or licensed information, except as specified in the licensing agreement.

Consult the **Intellectual Property** policies on the Legal Department site of the PNC intraweb for additional information.

#### Protecting Company Assets

To best serve our customers and shareholders, it is our responsibility to care for and use our resources. All employees are responsible for using good judgment to ensure that PNC's assets are not lost, stolen, or wasted and are used to further PNC's legitimate business purposes.

PNC property is meant solely for company business, though incidental personal use, such as domestic telephone calls, appropriate personal use of e-mail, minor photocopying, printing, or computer use is permitted unless your business unit has different rules.

Be aware that PNC reserves the right to search all corporate property, as well as anything brought onto or taken from corporate premises (including employee personal possessions).

Remember: Corporate property includes PNC's physical facilities, office supplies and furnishings, products and services, technologies and processes, Confidential Information, files and documents, U.S. Mail delivered to a PNC address, e-mail, and inventions by employees related to PNC's business or created using PNC facilities or time.

#### Employee Responsibilities

- Use corporate property only to further PNC's business.
- Never use corporate property for improper personal gain or benefit.

**Q:** I am not sure when I am permitted to disclose Confidential Information outside PNC. Is there a procedure that I need to follow?

**A:** You may never disclose Confidential Information unless (1) the individual or organization to which the information relates gives written consent, (2) the disclosure is authorized by a member of the Legal Department, or (3) the disclosure is in response to proper legal process or regulation or as required by law. If you are unsure about whether to disclose information inside or outside of PNC, contact your supervisor, your business unit's privacy coordinator, PNC's Privacy Director, or the Corporate Ethics Office.



Q: I sometimes receive e-mails from friends outside PNC that I find amusing but others may think are offensive. What should I do with these?

A: Even if you are not offended, you should delete these e-mails and not show or send them to anyone — including sending it to yourself at another e-mail address. You should advise your friends that it would be prudent not to send these types of e-mails to your work e-mail address.

#### Proper Use of Electronic Media

Electronic Media, such as telephones, fax machines, personal computers, data storage units or thumb drives, voice mail, and pagers are provided to employees to enable us to do our job at PNC. Each of us has a responsibility to protect these systems and the data that is contained on them from misuse, improper access, damage, and theft.

Even when use of PNC's Electronic Media for limited personal purposes is permitted, such use is not private. Anything sent or received using PNC's Electronic Media may be reviewed by PNC and others at its discretion and direction.

Remember: Be just as careful and professional with e-mails, instant and text messaging, and other similar forms of communication as you would when writing a formal letter.

#### Employee Responsibilities | Protecting our information and assets

- > Never use Electronic Media to initiate, save, or send items that are hostile, harassing, offensive, threatening, or otherwise inappropriate.
- > Do not use Electronic Media to initiate, save, or send chain letters or other widespread non-business distributions.
- > Do not use Electronic Media to initiate or participate in any malicious, unauthorized, or fraudulent use of company resources.
- > Think before you use PNC Electronic Media for non-business purposes and comply with the policies of your business unit.

Consult the policy entitled **Electronic Media** available on the Ethics site of the PNC intraweb for additional information.

Remember: The unauthorized transmission of company data, access to inappropriate internet sites, and the transmission of inappropriate e-mails are examples of misuse of technology.



### Communicating with the Public

Only authorized persons approved by our Corporate Communications Department can provide information to investors, analysts, and the media.

Unless authorized, do not give the impression that you are speaking on behalf of PNC in any communication that may become public. This includes on-line forums, blogs, chat rooms, and bulletin boards. This policy also applies to comments to journalists about specific matters that relate to our businesses, as well as letters to the editor and endorsements of products or services.

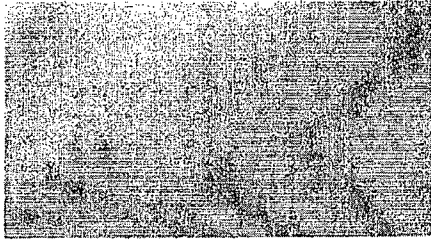
### Employee Responsibilities

- > Never respond to media inquiries or initiate contact with the media about PNC and its business, unless specifically authorized to do so by our Corporate Communications Department.
- > Be alert to situations in which you may be perceived to be representing or speaking on behalf of PNC. You should make it clear in presentations and speeches that you are not representing PNC, unless you are specifically authorized to do so.

Consult the policy entitled **Communicating with the Public** available on the Ethics site of the PNC intraweb for additional information.

- > **Q:** I have heard that my e-mail and internet access are being monitored. Is that true?
- > **A:** While at work or using PNC systems, e-mail and internet access are property of PNC and may be monitored.





## Following Laws and Regulations

### Operating as a Regulated Company

Given the highly regulated environment in which PNC operates, we must be vigilant in meeting our responsibilities to comply with relevant laws and regulations. It is our policy to cooperate with our regulators and to respond to their requests for information in an appropriate fashion.

We should be alert to any changes in the law or new requirements that may affect our business unit and be aware that new products or services may be subject to special legal and/or regulatory requirements.

If we become aware of any significant regulatory or legal concerns, we must bring them to the attention of our supervisor, manager, the Legal Department, or the Corporate Ethics Office.

#### Employee Responsibilities | Operating as a Regulated Company

- > During an inspection or examination, do not mislead regulators, including by concealing, altering, or destroying documents responsive to their requests. Your reply to regulators must be responsive, factual, and accurate.
- > Notify your supervisor, manager, or the Regulatory Affairs Department if regulators express concern about a transaction or product.
- > If your job responsibilities do not include regular interaction with regulators, you should report all regulatory inquiries to your manager.

### Antitrust and Fair Competition

Antitrust and fair competition laws are intended to prohibit practices that restrain trade or limit free and fair competition. They include provisions against conspiracies to fix prices, attempts to achieve or maintain monopoly power, or other agreements between competitors that divide markets or limit competition.

PNC competes vigorously in all its business lines, but in compliance with antitrust and fair competition laws that apply in the markets in which we operate.

Antitrust laws prevent the use of inappropriately obtained competitor information. At PNC, we use available literature and other publicly available sources to understand business and industry trends. We do not allow the use of competitor confidential information, nor do we share our own competitively sensitive business information with rival firms.

Remember: Antitrust laws are complex. If you have questions or if you believe an activity undertaken by PNC may be viewed as restraining fair competition, consult with the Legal Department.

#### Employee Responsibilities | Antitrust and Fair Competition

- > Never share information with a competitor about our or their customers, pricing, bids, or market strategies.
- > Never discriminate unfairly in terms of price or services between similarly situated customers.



PNC Code of Business

- Never enter into any of the following types of agreement with our competitors that restrict free trade:
  - Agreements to fix, set, raise, or lower prices, fees, interest rates, or any other business terms.
  - Agreements to allocate markets, clients, territories, or locations.
  - Agreements to boycott or refuse to deal with third parties.
- Always consult the PNC Legal Department if you have any questions about compliance with antitrust or fair competition laws.

### Political Involvement

Each of us has the right to voluntarily participate in the political process. However, due to complex requirements that vary from state to state and that may differ depending on local jurisdiction, there are specific guidelines for pre-approval before contributions may be made and before a decision is made to campaign for or accept public office.

### HOLDING OR CAMPAIGNING FOR POLITICAL/PUBLIC OFFICE

Campaigning, holding a public office, or running for re-election requires prior approval from the Corporate Ethics Office. This is necessary because of the complexity of relevant laws and regulations. For example, occupying a governmental position (whether elected or not), may trigger conflict of interest laws, which in some jurisdictions may prohibit PNC from engaging in business with that jurisdiction.

In all cases, when a PNC employee campaigns for or seeks appointment to a public office or serves as a member of a candidate's political campaign committee, an employee does so as an individual and not at the request of or as a representative of PNC.

### POLITICAL CONTRIBUTIONS AND POLITICAL SPENDING

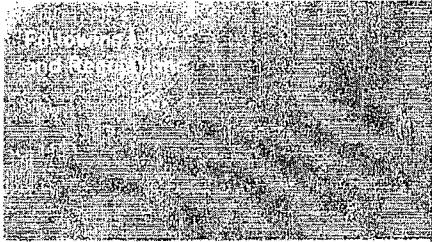
U.S. law and certain states and other jurisdictions prohibit corporations from making political contributions. PNC will not make corporate contributions that are prohibited under applicable law, and under no circumstance will PNC reimburse or compensate anyone for his or her political contributions.

Because laws and regulations governing personal contributions and corporate political activities and spending are complex, please refer to the **Political Activities** policy available on the Ethics site of the PNC intraweb for additional information on each of the following circumstances:

- Use of corporate funds or PNC assets and property, including office space, computers, or personnel, in connection with any political activity, including your voluntary support.
- Permitting political posters, signs, or campaigning on PNC property.

➤ **Q:** What is covered by PNC's policy on political spending?

➤ **A:** Political spending includes monetary contributions, as well as indirect contributions such as the purchase of tickets to a political fundraiser. The policy also applies to "in-kind" contributions such as the use of corporate personnel or facilities, or payment for services.



> **Q:** Does PNC have a PAC or Political Action Committee?

> **A:** Yes it does. PNC maintains federal and state Political Action Committees, which enable officers to make contributions to candidates for elected office. Nothing in this Code is intended to prohibit the activities of the PACs or the ability of eligible employees to participate in them.

- > Personal political contributions, due to the limitations in some jurisdictions placed on contributions made individually or in aggregate by employees.
- > The solicitation or direction of a political contribution by an employee registered or otherwise associated with a PNC affiliated broker dealer.

**Employee Responsibilities | Political Activities**

- > Before beginning a campaign for public office or accepting such a position, you must obtain prior approval from PNC's Corporate Ethics Office. The Corporate Ethics Office will provide you with additional information on your responsibilities.

Consult the policy entitled **Campaigning for or Holding Political/Public Office** available on the Ethics site of the PNC intraweb for additional information.

Consult the policy entitled **Political Activities** available on the Ethics site of the PNC intraweb for a schedule of jurisdictions where Pre-Clearance is required for personal political contributions by you and your Immediate Family Members.

Before committing PNC to any corporate political spending, refer to the **Political Activities** policy and seek approval from the Government Affairs Office.

**Global Trade and Anti-Corruption**

Regulations concerning global trade are complex and often change. For these reasons, it is important that employees who travel internationally, or who provide services or information across national borders, remain up-to-date on relevant laws, regulations, and our policies.

**TRADE SANCTIONS, EMBARGO PROGRAMS, AND ANTI-BOYCOTT LAWS**

In compliance with U.S. trade sanctions and embargo programs, PNC employees are prohibited from conducting business with designated governments and individuals (such as suspected terrorists and narcotics traffickers), as well as with individuals and entities that are located in, or are nationals or agents of, particular countries.

PNC employees must also comply with U.S. anti-boycott laws that prohibit participation in boycotts unless sanctioned by the U.S. government.

Consult with the Legal Department if you have any international activities that may be subject to these laws.

**ANTI-CORRUPTION AND BRIBERY**

The United States and many other countries have laws that prohibit bribery and other improper payments. No PNC employee, agent, or independent contractor acting on our behalf may offer or provide bribes or other improper benefits in order to obtain business or an unfair advantage.

Payments that are intended to improperly influence must never be made to a government official or employee. Government officials may include



senior management of enterprises that are owned in whole or in part by a foreign government.

Consult the **Foreign Corrupt Practices Act Policy Guidelines** available on the Ethics site of PNC's intraweb for additional information on payments to foreign government officials.

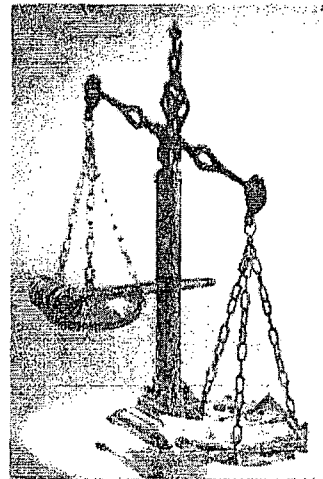
Remember: Perform due diligence and always know your customer, business partner, intermediary, and any entity through whom we conduct our business.

#### Anti-Money Laundering

Money laundering is a global problem with far-reaching and serious consequences. Money laundering is defined as the process of converting illegal proceeds so that funds are made to appear legitimate, and it is not limited to cash transactions. Involvement in such activities undermines our integrity, damages our reputation, and can expose PNC and individuals to severe sanctions.

PNC takes seriously its obligation as a financial services provider to help prevent money laundering and to ensure that all relevant laws and regulations are strictly enforced. PNC has policies and standards to protect us from doing business with customers involved in money laundering and related criminal activity.

Remember: Money laundering is conduct designed to disguise proceeds of criminal activity. PNC may be a target for persons or entities who want to make the proceeds of criminal activity look legitimate.



#### Employee Responsibilities

- Always know the parties with whom you are conducting business and be sure to perform all required due diligence with respect to customers, clients, and business partners.
- Be alert for transactions which are inconsistent with usual business practices, or which do not match the customer's or client's normal pattern of activity.
- Never cooperate with efforts to evade reporting requirements. These efforts commonly include a series of fund transactions that individually are below the amount requiring disclosure.
- Know the procedures in your department for reporting suspicious activity pertaining to a customer or client, the source of their funds, or their transactions. These reporting mechanisms include Currency Transaction Report, Security Incident Report, and Suspicious Activity Report. You may also contact the Corporate Ethics Office to report suspicious activity.

Consult PNC's **Anti-Money Laundering (AML)** policies and program guidelines available on the PNC intraweb for additional information on the PNC AML compliance programs.

## Glossary of Terms

**BlackRock Securities** – Any Security issued by BlackRock, Inc., including without limitation, Anthracite, Inc. and any closed-end mutual fund or real estate investment trust managed or advised by BlackRock, Inc. These do not include open-end mutual funds managed or advised by BlackRock, Inc.

**Confidential Information** – “Confidential Information” is information relating to PNC, its customers, clients, shareholders, directors, employees, and suppliers that is not publicly available. It includes but is not limited to: customer/client lists, prospect lists, and any listing of shareholders, employees, and suppliers; customer account or personal financial information; strategic business, marketing, project and financial information, and plans; price lists, sales methods, training and staffing models; information relating to mergers and acquisitions; contracts under negotiation; computer programs, system documentation, special hardware, software, and technology developments; manuals, formulas, processes, methods, machines, compositions, ideas, improvements, inventions, and other proprietary information and trade secrets; reports written to or by regulatory agencies; information designated as confidential, private, or privileged; security information, such as passwords, personal identification numbers (PINs), and electronic keys; employee payroll, benefit, health, performance, and other non-public information that is personal to the employee; Inside Information; and all other non-public information that might be of use to competitors, or harmful to PNC or its customers, if disclosed.

**Day Trading** – Buying and selling the same Securities during one calendar day.

**Electronic Media** – Electronic Media includes but is not limited to voicemail messaging (“Voicemail”), electronic mail systems (“E-mail”), the internet, the PNC intranet, and electronic devices such as telephone systems, cellular phones, pagers, and facsimile machines.

**Extended Family Member** – Includes any Immediate Family Member plus any other parent, parent-in-law, brother, sister, brother and sister-in-law, children, and spouse of any children.

**Immediate Family Member** – Includes your spouse or domestic partner, any minor children, any older children living in your household or who rely primarily on you for financial support, and any other relatives (by blood, marriage or otherwise) living in your household.

**Inside Information** – Information that (a) relates to an issuer of Securities, such as information about its business operations or Securities, if a reasonable investor would consider the information important in determining whether to buy, sell, or hold such Securities; and (b) has not been disclosed to the public. To show that information is public, there must be evidence that it is widely disseminated. Information generally would be considered widely disseminated if it has been disclosed, for example, on the Dow Jones broad tape, news wire services such as AP or Reuters, or in newspapers or magazines of general circulation, or public disclosure documents filed with the Securities and Exchange Commission, such as prospectuses, proxy statements, and periodic reports. It is impossible to provide a complete list of Inside Information, but Inside Information may include:

- Unpublished financial reports or projections
- Information about current, proposed, or contemplated transactions, business plans, financial restructuring, or acquisition targets
- Dividend increases or decreases
- Extraordinary borrowing or liquidity problems
- Material defaults under agreements or actions by creditors, clients, or vendors relating to a company's credit standing
- Proposed or contemplated issuance, redemption, or repurchase of Securities or stock splits
- Significant expansions or contractions of operations, including acquisitions, mergers, divestitures, and joint ventures, and purchases or sales of substantial assets
- Major new project developments
- Significant increases or decreases in business or information about major contracts
- Institution of, or developments in, major litigation, investigations, or regulatory actions or proceedings
- Developments regarding a company's senior management

**Other Employment** – With the exception of outside director or officer positions and outside political positions, "other employment" is defined as any position outside of PNC, including self-employment, whether voluntary or paid.

**PNC Securities** – Any Security issued by The PNC Financial Services Group, Inc. or any subsidiary or a derivative of any such Security, including, without limitation, any closed-end mutual fund or real estate investment trust managed or advised by The PNC Financial Services Group, Inc. or any subsidiary. These do not include open-end mutual funds managed or advised by The PNC Financial Services Group, Inc. or any subsidiary.

**Personal Investment Transaction** – Any purchase, sale, pledge, or gift of Securities, which includes without limitation: common and preferred stock, partnership interests, limited partnership interests, and other debt and equity interests such as notes, bonds, or other evidence of indebtedness, warrants, options, futures, and other derivative instruments, whether or not such Securities are publicly traded.

**Pre-Clearance** – The prior approval of the Corporate Ethics Office and/or the appropriate compliance unit.

**Restricted Employees** – Employees that must comply with additional restrictions and procedures that govern Personal Investment Transactions.

**Security** – Any equity or debt interest. Examples include common and preferred stock, partnership interests, limited partnership interests, notes, bonds, and other evidence of indebtedness, options, warrants, futures, swaps, and other derivatives.

**Short Selling** – Selling Securities which you do not currently own, or selling Securities you currently own, but not closing out your position in those Securities ("selling short against the box").



## Notification and Pre-Clearance Process

The process for seeking approval from the Corporate Ethics Office is detailed in the Ethics related policies. In most cases, you will be asked to submit a Notification/Approval Form available on the Ethics site of the PNC Intranet for notification and approval, and Pre-Clearance.



## Key Contacts

Employees are reminded of their obligation to report any unethical business conduct and any known or suspected violation of the Code of Business Conduct and Ethics and related policies. Such reports may be made to any of the following:

- > Your supervisor or manager
- > The Employee Relations Information Center (ERIC) at **1-866-661-3742**
- > The Corporate Ethics Office at **412-768-8507**
- > The PNC Business Conduct and Ethics Hotline at **1-866-785-9753**
- > The Corporate Ethics Office Mailbox at **Corporate.Ethics.Office@pnc.com**

Calls to the Hotline may be made anonymously.

Additional contacts for those departments referenced in the Code can be found on the Ethics site of the PNC intraweb.



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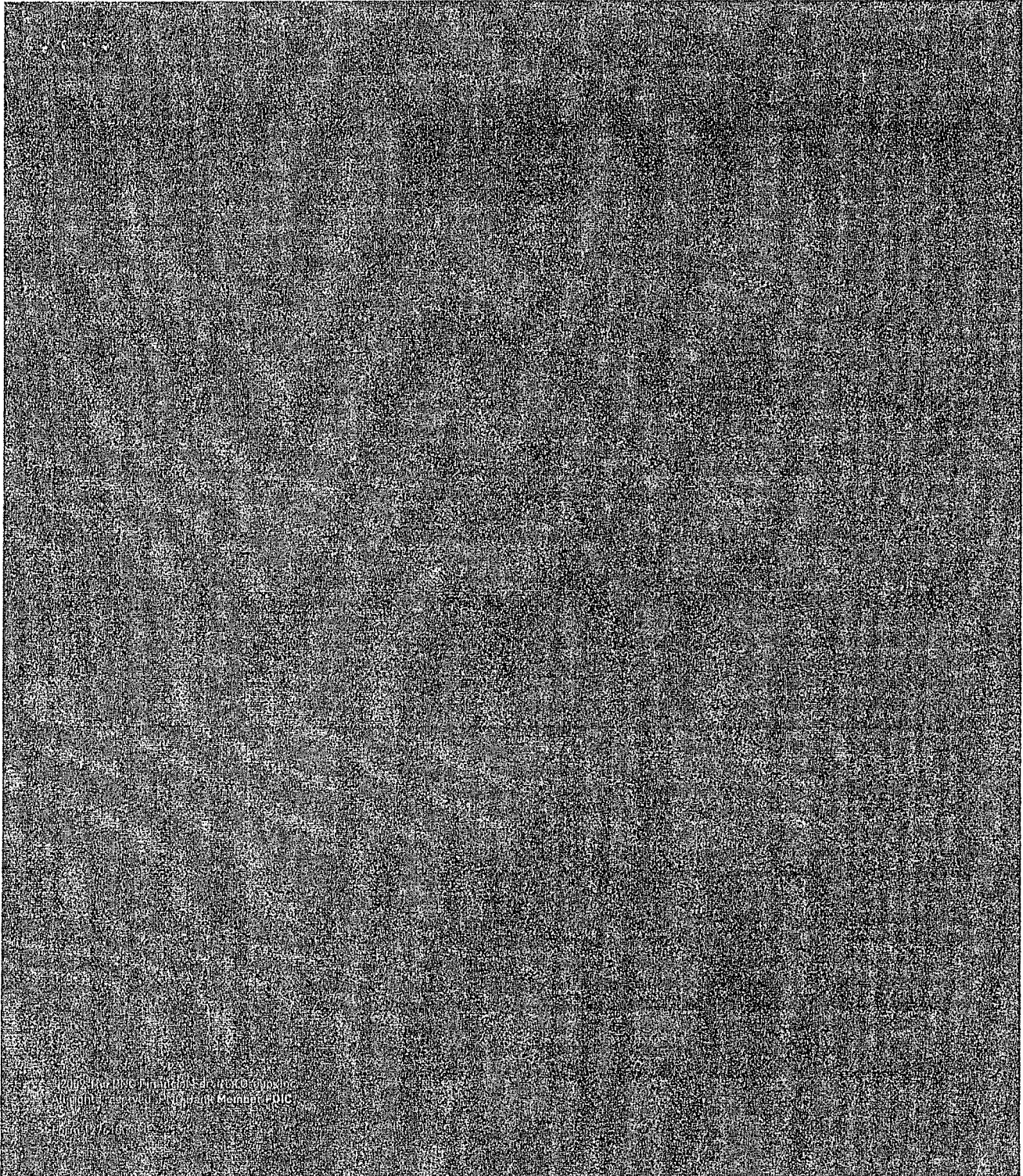
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and (3) the counterclaims attack the enforceability of the very contracts pursuant to which Plaintiff asserts Defendants waived their right to a jury trial. Defendants raise the following additional points for the Court's consideration.

a. Defendants' Counterclaims are Compulsory.

While the Court in Carolina First Bank v. BADD, LLC held that a guarantor's counterclaims in response to a bank's foreclosure action and suit on guaranty were permissive, 2015 WL 340791 at \*3-4 (S.C. 2015), the Court previously held in NC Fed. Sav. & Loan Ass'n v. DAV Corp. that five out of six of a foreclosure defendant's counterclaims were compulsory: 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). BADD and DAV Corp. both recognize that the determinative factor for whether a counterclaim in a foreclosure action is compulsory (i.e., whether it bears a "logical relationship" to the foreclosure) is whether the counterclaim affects the enforceability of the subject agreements. See BADD, 2015 WL 340791 at \*4 ("This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements."); DAV Corp., 298 S.C. at 519, 381 S.E.2d at 905 (addressing whether the counterclaims "affect the enforceability of the note").

In this case, as argued at the hearing and as set forth in more detail below, Defendants' counterclaims attack Plaintiff's right to enforce the subject loan documents. Under the standard established in DAV Corp. and later applied in BADD, Defendants' counterclaims are compulsory.

Moreover, in its memorandum in support of its motion, Plaintiff itself took to the position that Defendants' counterclaims are compulsory. In its brief, Plaintiff stated as follows: "Because Defendants' counterclaims are *related to the subject loan documents*, Defendants expressly and

irrevocably waived their right to a jury trial on those claims in said documents.” (Pl. Brief 4 (emphasis added).) Defendants’ counterclaims are compulsory.

b. If Defendants are Successful on Their Counterclaims, Plaintiff Would Not Be Entitled to Enforce the Subject Contracts.

Defendants have asserted counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, breach of confidentiality, conspiracy, negligence, negligent misrepresentation, and violation of South Carolina’s Unfair Trade Practices Act. (Am. Ans. & Counterclaims ¶¶ 44-97.) As one of their remedies, Defendants seek a determination that all “duties or responsibilities of Defendants to Plaintiff are discharged and that all agreements between Plaintiff and Defendants, including but not limited to all notes, guaranties, and mortgages are null and void.” (Am. Ans. & Counterclaims p. 19.)

The remedy of rescinding the contracts or otherwise precluding Plaintiff from enforcing the subject agreements in the event Defendants are successful on their counterclaims is supported by the law.

First, with respect to Defendants’ negligent misrepresentation cause of action, “[a] rescission of a contract is allowed when there is evidence of misrepresentation or concealment.” State Farm Mut. Auto. Ins. Co. v. Turner, 303 S.C. 99, 102, 399 S.E.2d 22, 23 (Ct. App. 1990) (citing Jumper v. Queen Mab Lumber Co., 115 S.C. 452, \_\_\_, 106 S.E. 473, 476 (1921)). The Restatement (Second) of Contracts<sup>1</sup> confirms such a remedy, noting that “[i]f a party’s manifestation of assent is induced by either fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”

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<sup>1</sup> South Carolina courts routinely rely upon the Restatement (Second) of Contracts to establish relevant legal standards. See, e.g., Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 51, 747 S.E.2d 178, 186-87 (2013); Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 745 (Ct. App. 2007).

Restatement (Second) of Contracts § 164. Plainly, if Defendants are able to prove their claim for negligent misrepresentation, a determination that Plaintiff cannot enforce the subject contracts would be an available remedy.

Additionally, with respect to Defendants' allegations that Plaintiff breached both express terms of the agreements and the implied covenant of good faith and fair dealing, the law recognizes that "[a] party who first commits a material breach cannot enforce the contract." Williston on Contracts § 63:3 (citing Horton v. Horton, 254 Va. 111, 487 S.E.2d 200 (1997); see also Restatement (Second) of Contracts § 237 ("[I]t is a condition of each party's remaining duties to render performance to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.")). Thus, if Defendants are able to prove that Plaintiff, by its bad faith and misconduct, materially breached the subject agreements, the result would be that Plaintiff would not be entitled to enforce the terms of the contracts against Defendants.

Accordingly, Defendants' attack of the enforceability of the subject contracts is not theoretical. Defendants have asserted causes of action that, if proven, would entitle Defendants to a determination that Plaintiff cannot enforce the contracts, including the jury trial waivers, against Defendants.

c. At a Minimum, the Court Should Utilize an Advisory Jury Pursuant to Rule 39(c), SCRPC.

Defendants contend that because they have asserted legal, compulsory counterclaims that attack the enforceability of the contracts at issue in this litigation, they are entitled to a jury trial on their counterclaims. However, even if the Court disagrees with Defendants' position, the Court should nevertheless exercise its discretion to utilize an advisory jury under Rule 39(c), SCRPC. Given the substantial counterclaims asserted by Defendants in this action, even if the

Court determines that Defendants are not entitled to a jury trial, it would be appropriate for the Court to allow an advisory jury to find facts relevant to Defendants' counterclaims.

d. The Court Should Not Refer this Matter to the Master-In-Equity.

Regardless of the Court's decision on Plaintiff's Motion to Strike the Jury Demand, the Court should not refer this matter to the Master-In-Equity. In their counterclaim, Defendants have asserted claims at law and it would be inappropriate for this Court to refer the claims at law to the equitable court, even if the Court determines that Defendants are not entitled to a jury trial. This is particularly true given the fact that this Court has designated this case as a complex case, bifurcated the legal and equitable claims at issue, and consolidated the legal claims in three separate actions for the purpose of trial.

For these reasons, and for the reasons set forth in Defendants' initial memorandum, Plaintiff's Motion to Strike Jury Demand and Refer to Master-In-Equity should be denied.

**2. Plaintiff's Motion for Summary Judgment as to Defendants' Breach of Confidentiality Cause of Action Should Be Denied.**

a. Plaintiff is Collaterally Estopped from Arguing It Has No Duty to Protect Confidential Information.

In their initial brief and at the hearing, Defendants discussed the fact that PNC Bank argued in prior litigation that it had a *fiduciary duty* to protect its customer's confidential information. As discussed, the New Jersey Superior Court agreed with PNC and used that finding in support of its finding in favor of PNC in that case. See Berrios v. PNC Bank, 2006 WL 2933899 at \*2 (N.J. Oct. 16, 2006). As a result, Plaintiff is collaterally estopped from arguing in this case that it has no duty to protect Defendants' confidential information.

Collateral estoppel "prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action." Crosby v.

Prysmian Communications Cables & Sys., USA, LLC, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012) (quoting Aaron v. Mahl, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009)). Collateral estoppel prevents the relitigation of issues “regardless of whether the claims in the first and subsequent lawsuits are the same.” Carolina Renewal, Inc. v. South Carolina Dep’t of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). “A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Crosby, 397 S.C. at 109, 723 S.E.2d at 817 (quoting Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782). “While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.” Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782.

The Bank’s obligation to protect the confidentiality of its customer information was actually litigated in the Berrios case, was directly determined by the New Jersey court, and was necessary to support the court’s determination that PNC was not liable to the security guard who was terminated. As a result, in this case, Plaintiff cannot argue that it has no duty to Defendants. Instead, Plaintiff is limited to arguing that, under the facts of this case, it did not *breach* that duty. Whether Plaintiff *breached* a duty is not the subject of Plaintiff’s Motion for Summary Judgment and is an issue of fact that is not appropriate for resolution on summary judgment. The Bank’s motion for summary judgment therefore must be denied.

b. Plaintiff Assumed a Duty to Protect Defendants' Confidential Information.


In their initial memorandum, Defendants submitted ample facts and law to establish that Plaintiff's Motion for Summary Judgment as to Defendants' Breach of Confidentiality cause of action must be denied. The law, as cited in Defendants' initial brief, is clear that Plaintiff owed Defendants a duty to maintain the confidentiality of Defendants' personal and financial information. Plaintiff has cited no law in support of its position that a bank has an unfettered ability to disclose its customers' confidential information, a position that would be contrary to established principles of banking and would result in substantial harm to bank customers. Defendants simply add that, under South Carolina law, a legal duty may be created not only by statute or contract, but also by "relationship, status, property interest, or some other special circumstance." Rayfield v. SC Dept. of Corrections, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). The law recognizes that a party may assume a duty that is not otherwise imposed upon it by the law. See, e.g., Miller v. City of Camden, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct. App. 1994) ("One who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care.").

In this case, even if the Court determines that no duty at law exists, Plaintiff plainly assumed a duty to protect the confidentiality of Defendants' personal and financial information. Plaintiff did so, in part, by making its policies publicly available on the internet; policies that required its employees to protect the confidentiality of its customers' financial information.

For this reason, and for the reasons set forth in Defendants' initial memorandum, Plaintiff's Motion for Summary Judgment must be denied.

[Signature Page Follows]

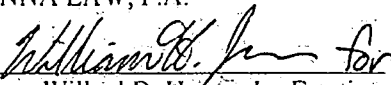
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LLC*

April 20, 2015

CERTIFICATE OF SERVICE

13-CP-10-21024

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendants Liberty Cottages, LLC, USS Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC, Royal Beach Properties, LLC, and Deborah Rice-Marko a/k/a/ Deborah G. Rice-Marko, do hereby certify that I have served all counsel in these actions with a copy of the documents specified below by E-mail and mailing a copy of the same by United States Mail, postage prepaid, to the following address:

**Documents:** Supplemental Memorandum of Law on Motion to Strike Jury Demand and Motion for Summary Judgment.

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CLERK OF COURT  
BY \_\_\_\_\_

*Valerie N. Hampton*  
Valerie N. Hampton

April 20, 2015  
Columbia, South Carolina

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT

PNC Bank, N.A., successor to RBC Bank (USA), ) Civil Action No. 2013-CP-10-2624

Plaintiff, )

vs. )

Liberty Cottages, LLC; GW  
Dorchester, LLC; USS Clarksville,  
LLC; Liberty Cottages Land, LLC;  
ROA, LLC; Royal Beach Properties,  
LLC; The Brothers of SC, LLC;  
Deborah Rice-Marko a/k/a Deborah G.  
Rice-Marko; Evan R. Marko and John  
E. Marko, Jr., )

Defendants. )

PLAINTIFF'S RESPONSE TO  
DEFENDANTS' SUPPLEMENTAL  
MEMORANDUM ON PLAINTIFF'S  
MOTION TO STRIKE JURY  
DEMAND AND MOTION FOR  
SUMMARY JUDGMENT

FILED  
2015 APR 21 PM 3:23  
JULIE J. ARNSTRONG  
CLERK OF COURT

Plaintiff PNC Bank, National Association, successor to RBC Bank (USA) ("PNC" or "PNC"), by and through its undersigned counsel, hereby submits this Response to Defendants' Supplemental Memorandum ("Supplemental Memorandum") regarding Plaintiff's Motion to Strike Jury Demand & Refer Case to Master-in-Equity ("Motion to Strike Jury Demand") and its Motion for Summary Judgment as to Defendants' breach of confidentiality claim ("Motion for Summary Judgment") (collectively, the "Motions").

INTRODUCTION

For the reasons advanced at the April 9, 2015 hearing on the Motions ("April 9 Hearing"), and for the reasons set forth herein and in PNC's initial supporting Memoranda, (1) Defendants are not entitled to a jury trial on their counterclaims, and (2) PNC is entitled to summary judgment on the Defendants' breach of confidentiality claim. As explained below, the

arguments advanced in the Defendants' Supplemental Memorandum fail to overcome either of these conclusions.

## ARGUMENT

### I. Defendants' Jury Trial Demand Should be Stricken.

In their Supplemental Memorandum, Defendants essentially argue that because their counterclaims attack the enforceability of the subject loan documents, the jury waivers contained in said documents are unenforceable. However, the counterclaims do not attack the enforceability of *every single loan document* that contains a jury trial waiver.<sup>1</sup> Instead, as shown through the voluminous discovery in this case and the documents filed of record, Defendants' counterclaims only attack the enforceability of the January 2009 loan modification documents and the July 2011 Forbearance Agreement. While the evidence shows these documents are valid and enforceable, even if they were not, the previous, uncontested loan documents that contain jury waivers would still be enforceable. Simply put, the Defendants cannot avoid the jury trial waivers that they repeatedly signed for years prior to the January 2009 and July 2011 modifications of which they now complain.

Further, Defendants' arguments show that they are seeking rescission of the subject loan documents (see Supplemental Memorandum at pp. 3-4), which is an equitable remedy. See Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (stating that "[r]escission is an *equitable remedy* that attempts to undo a contract from the beginning as if the contract had never existed") (emphasis added). In an equitable foreclosure action, the counterclaims must be both *legal* and compulsory in order for a defendant to be entitled to a jury trial. See Wells Fargo Bank N.A. v. Smith, 398 S.C. 487,

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<sup>1</sup> As previously explained and shown to the Court, at least 84 loan documents contain jury trial waivers, and Defendants began waiving their jury trial rights as early as 2001 for some loans.

730 S.E.2d 328 (2012) (emphasis added). As South Carolina courts have consistently explained, whether a particular claim is legal or equitable depends on the relief sought. *See, e.g., Ins. Fin. Servs. Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). Thus, because the Defendants are seeking the equitable remedy of rescission, they are not entitled to a jury trial on their counterclaims, regardless of whether the jury trial waivers in the subject loan documents are enforceable.

As an alternative, Defendants request the Court to utilize an advisory jury in the event the Court correctly strikes their jury demand. However, there is no need for an advisory jury here. First, there is simply no need in the case at bar. Having presided over this case for nearly two years, the Court is extremely familiar with the applicable facts, circumstances, and legal arguments, and is therefore capable of issuing a final ruling on its own. Second, an advisory jury would increase the time needed to try this case, thereby taking up more judicial resources and causing all parties to incur additional attorneys' fees and costs. Given the Court's experience and knowledge of the issues involved, there has been no showing that these adverse effects are necessary or warranted in this case.

**II. Plaintiff is Entitled to Summary Judgment as to Defendants' Breach of Confidentiality Claim.**

Perhaps recognizing that South Carolina law does not provide for a duty of confidentiality in the borrower-lender relationship, Defendants attempt to confuse the Court by discussing a prior case involving PNC that dealt with an entirely different set of facts and circumstances. Specifically, Defendants attempt to show that PNC argued in previous litigation that it has a fiduciary duty to protect certain information. *See Berrios v. PNC Bank*, 2006 WL 2933899 (N.J. Oct. 16, 2006). As a result, Defendants argue that PNC is now

collaterally estopped from claiming it has no such duty in this case. However, Berrios did not involve PNC's commercial lending division, a borrower-lender relationship, or the type of information at issue in this case. Therefore, the issue of whether PNC has a duty to protect *commercial borrower information* was not litigated in Berrios. Furthermore, because this issue was not actually litigated, it was not ruled upon either. As recognized by the Defendants, a party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was *actually litigated in the prior action* and was *directly determined in the prior action*. See Carolina Renewal, Inc. v. South Carolina Dept. of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Thus, the required elements of collateral estoppel are not met here.

Furthermore, Berrios simply does not apply to this case. As shown in Berrios' filed *Statement of Material Facts*, Berrios involved PNC's "Bank Advisors" division, an entirely different arm of PNC that governs its wealth and investment management services. See *Statement of Material Facts* at pp. 1-2, attached hereto as Exhibit A and incorporated herein by reference. Therefore, PNC did not argue in Berrios that it had a fiduciary duty to protect *commercial borrower information*. Rather, it argued that it had a fiduciary duty to protect highly sensitive *investment information*, which is entirely different than the information at issue here. This difference is highlighted by the fact that the facility housing the investment information in Berrios was physically guarded by security personnel and was kept in a restricted area that could only be accessed by key-card. See *Statement of Material Facts* at pp. 1, 3. There has been no authority presented to the Court that commercial borrower information is or should be subject to such secure treatment.

Also, in the bank-investment management relationship, the client relies upon and trusts the bank's advice, which makes the relationship fiduciary in nature. In contrast, no such fiduciary relationship exists in the lender-borrower context because the parties are dealing in an arm's length transaction in an ordinary business relationship. See Nat'l Loan & Exchange Bank v. N.Y. Life Ins. Co., et al., 149 S.C. 378, 147 S.E. 322, 323 (S.C. 1929). Defendants have never argued that anything other than a lender-borrower, debtor-creditor relationship exists in this case. For all of these reasons, the Defendants' reliance on Berrios is nothing more than an attempt to camouflage the fact that there is no duty of confidentiality in the borrower-lender relationship under South Carolina law.

Additionally, Defendants appear to argue that PNC has the burden of establishing the lack of a duty of confidentiality. However, this assertion inappropriately shifts the burden of proof to PNC. As the parties asserting the claim, Defendants have the burden to establish the existence of such a duty, which they have not done. As explained at the April 9 hearing and in PNC's initial Memorandum, South Carolina has recognized the breach of confidentiality cause of action in the physician-patient context only. See McCorimck v. England, 328 S.C. 627, 494 S.E.2d 431 (S.C. Ct. App. 1997). **Defendants have not cited to a single South Carolina case or other authority that establishes a duty of confidentiality in any other context.**


Finally, Defendants allege that Plaintiff assumed a duty of confidentiality by making its internal policies publicly available on the internet. Such a conclusion is inconsistent with South Carolina law, as the state Supreme Court has specifically rejected the contention that a bank's policy manual creates any duty by the bank to the borrower. See Citizens & S. Nat'l Bank v. Langford, 313 S.C. 540, 443 S.E. 2d 549 (1994) (explaining that policy manuals are

for the bank's protection only) (emphasis added). Further, Defendants fail to cite to any authority that shows this rule would not apply in the context of publically available policies.

CONCLUSION

For the reasons set forth herein, and for the reasons previously set forth by PNC at the April 9 Hearing and in its initial Memoranda, PNC hereby requests that this Honorable Court enter orders (1) striking Defendants' jury trial demand and (2) granting Plaintiff's Motion for Summary Judgment.

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April 24, 2015.

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT

PNC Bank, N.A., successor to RBC ) Civil Action No. 2013-CP-10-2624  
 Bank (USA), )  
 )  
 Plaintiff, )

vs. )

Liberty Cottages, LLC; GW )  
 Dorchester, LLC; USS Clarksville, )  
 LLC; Liberty Cottages Land, LLC; )  
 ROA, LLC; Royal Beach Properties, )  
 LLC; The Brothers of SC, LLC; )  
 Deborah Rice-Marko a/k/a Deborah G. )  
 Rice-Marko; Evan R. Marko and John )  
 E. Marko, Jr., )  
 Defendants. )

**PLAINTIFF'S MOTION TO ALTER,  
 AMEND, OR VACATE THE  
 PORTION OF THE COURT'S  
 APRIL 29, 2015 ORDER DENYING  
 PLAINTIFF'S MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

FILED  
 2015 MAY -5 PM 12:18  
 JULIE J. ARMSTRONG  
 CLERK OF COURT

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff PNC Bank, N.A., successor to RBC Bank (USA) ("Plaintiff" or "PNC"), by and through its undersigned counsel, respectfully requests that the Court alter, amend and/or vacate the portion of its April 29, 2015, Order denying PNC's Motion for Summary Judgment as to the Defendants' breach of confidentiality claim ("Summary Judgment Order"). PNC received written notice of the entry of the Summary Judgment Order on April 29, 2015, and, therefore, this Motion is timely filed. In support hereof, PNC states as follows:

First, the Court's decision is based on the conclusion that a breach of confidentiality claim in the borrower-lender context "appears to be a novel issue in the State of South Carolina." *See* Summary Judgment Order at pg. 2. However, the South Carolina Federal District Court has specifically addressed a "breach of confidence" claim in this context. *See*

Peters-Mone, et al., v. Clayton Homes, Inc., et al., No. 4:06-CV-1326-TLW, at \* 20-21 (D.S.C. Jan. 9, 2007), attached hereto as Exhibit A and incorporated herein by reference. In Peters-Mone, the borrowers alleged that the lender disclosed "confidential mortgage account and mortgage payment information" to third parties without their consent. *See id.* at, \* 20. Thus, the "breach of confidence" cause of action asserted in Peters-Mone is essentially the same as the "breach of confidentiality" claim asserted in this case.

In ruling that the borrowers' "breach of confidence" claim failed as a matter of law, the Court in Peters-Mone examined South Carolina state law and concluded that breach of confidentiality/breach of confidence has **not** been recognized in South Carolina outside of the physician-patient context. *Id.* at, \* 21. More specifically, the Peters-Mone court held as follows:

South Carolina has recognized a cause of action for a breach of confidentiality in the physician-patient context. *See McCormick v. England*, 494 S.E.2d 431, 437 (S.C. App. 1997) (joining the majority and holding that an actionable tort lies for a physician's breach of the duty to maintain the confidences of his or her patient in the absence of a compelling public interest or other justification for the disclosure). **However, this Court is unaware of and no authority has been cited to support that the cause of action has been recognized in the context of any other relationship.** The recognition of a cause of action in the physician-patient context rests in part on the nature of that relationship as a fiduciary relationship. *Id.* at 635. The South Carolina Supreme Court has suggested that a creditor-debtor relationship is not a fiduciary one. *Burwell v. South Carolina Nat. Bank*, 340 S.E.2d 786, 790 (S.C. 1986) (noting that normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one). The rationale is that a borrower does not have a confidential relationship with a lender because the parties are dealing in an arm's length transaction in the ordinary business relationship. *National Loan & Exchange Bank v. New York Life Ins. Co.*, 147 S.E.322, 323 (S.C. 1929) (noting that there was no peculiar or confidential relationship between plaintiff and [defendant] as they were dealing at arm's length in the ordinary business relationship of creditor and debtor). **Based upon the above outlined case law**, this Court concludes that plaintiff's claim for breach of confidence has not been recognized in South Carolina outside of a physician-patient context and therefore fails as a matter of law.

Id. at, \*20-21 (emphasis added).

Therefore, a breach of confidentiality claim in the borrower-lender context is not a novel issue. In fact, the issue before this Court has been addressed and decided by a South Carolina District Court, which expressly held that **there is no legal duty of confidentiality in the borrower-lender relationship** under South Carolina law. As such, the Court should vacate and/or amend its Summary Judgment Order and grant PNC summary judgment as to Defendants' breach of confidentiality claim.<sup>1</sup>

Second, the Summary Judgment Order was also based on the Court's finding "that the **facts** should be further developed" (emphasis added). *See* Summary Judgment Order at pg. 2. However, the facts of this particular case have no bearing on the **legal** issue of whether a duty of confidentiality exists in the borrower-lender relationship. Simply put, factual issues are irrelevant in determining this question of law. As set forth above and in PNC's briefing, South Carolina law unequivocally holds that there is **no** duty of confidentiality owed by PNC to the Defendants in the case at bar. Defendants have not and cannot provide this Court with any statute, regulation or other authority to the contrary. Further, Defendants have conceded that there is no fiduciary relationship in this case, which is necessary to create a duty of confidentiality, and that the applicable loan documents do not impose such a duty. Accordingly, there is no genuine issue of material fact precluding summary judgment as to Defendants' confidentiality claims and defenses as a matter of law.

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<sup>1</sup> Even if there was not precedent and this claim was a novel issue, this Court should still grant PNC's Motion for Summary Judgment. Defendants have informed the Court they intend to file a notice of appeal of the April 29, 2015 Order. *See Exhibit B*, Letter from Stepp to Judge Nicholson of 5/1/15. Since the appealed ruling (striking the jury demand) would be contained in the same order as the one granting summary judgment, the Court of Appeals could address this issue for the parties and other litigants and courts dealing with the same claims.

WHEREFORE, PNC respectfully requests that the Court alter, amend and/or vacate its Summary Judgment Order, grant PNC summary judgment as to the Defendants' breach of confidentiality claim, and grant such other and further relief as the Court deems just and proper.

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MAY 4, 2015.

**CERTIFICATE OF SERVICE**

I the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for PNC Bank, N.A., successor to RBC Bank (USA), do hereby certify that I have served all counsel in this action with a copy of the document(s) herein below specified via Hand Delivery, Federal Express, and/or United States Mail, postage prepaid to the following address(es):

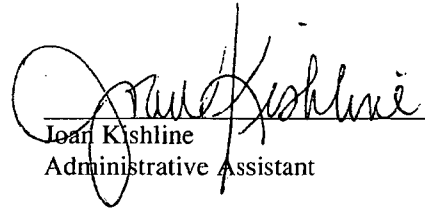
Document(s): Plaintiff's Motion to Alter, Amend, or Vacate the Portion of the Court's April 29, 2015 Order Denying Plaintiff's Motion for Partial Summary Judgment

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BY \_\_\_\_\_

2015 MAY -5 PM 12: 18  
JULIE J ARMSTRONG  
CLERK OF COURT

FILED

  
\_\_\_\_\_  
Jean Kishline  
Administrative Assistant

Columbia, South Carolina  
May 4, 2015

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
FLORENCE DIVISION

Rebecca N. Peters-Mone, Patricia Greene, )  
Stacy J. Dalbec, individually and as class )  
representatives, )

C.A. No. 4:06-CV-1326-TLW

Plaintiffs, )

vs. )

**ORDER**

Clayton Homes, Inc., and )  
Vanderbilt Mortgage and Finance, Inc., )

Defendants. )

**INTRODUCTION**

This matter is before the Court upon defendant Clayton Homes, Inc.'s (hereinafter "Clayton" or "defendant") motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, and defendant Vanderbilt Mortgage and Finance, Inc.'s (hereinafter "Vanderbilt" or "defendant") motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Docs. # 41 & 42 respectively). Plaintiffs filed the instant action on or about March 23, 2006, in the Court of Common Pleas for Horry County. The defendants removed the action to this Court on May 1, 2006. (Doc. # 1). Thereafter, defendants filed their respective motions to dismiss with supporting memorandum on August 7, 2006. (Docs. # 41 & 42). Plaintiffs filed a response in opposition to defendant Vanderbilt's motion on August 24, 2006, (Doc. # 44), and a response in opposition to defendant Clayton's motion on August 25, 2006. (Doc. # 45). Defendant Vanderbilt filed a reply on September 5, 2006. (Doc. # 46). Defendant Clayton filed a reply on September 6, 2006. (Doc. # 47). A supplemental response was filed by defendant



Vanderbilt on November 16, 2006.<sup>1</sup> A hearing was held and the Court heard oral argument from counsel on defendants' outstanding motions on November 17, 2006. For the reasons set forth in this Order, the defendant Clayton's motion to dismiss for lack of personal jurisdiction is granted; and defendant Vanderbilt's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is granted.

### **BACKGROUND**

In their third amended complaint, plaintiffs allege the following causes of action (1) injunctive and declaratory judgment relief; (2) negligence; (3) negligence *per se*; (4) invasion of privacy; (5) intentional infliction of emotional distress; (6) breach of the covenant of good faith and fair dealing; and (7) breach of confidence. The conduct at issue in this case is defendant Vanderbilt's numerous telephone calls attempting to collect mortgage loan payments, after the due date for payment, but before the end of a "grace period" after which a late charge is assessed. This Court will address each of defendants' motions in turn, in the order which they were argued at the hearing.

### **LEGAL STANDARD FOR MOTION TO DISMISS**

In general, a motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872; *Wilson v. Benedict College*, 2006 WL 2433794, \*2 (D.S.C. 2006). In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable

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<sup>1</sup>This supplemental response was a result of an amended complaint, filed with the consent of all parties. The agreement of the parties is set forth in the Consent Order regarding plaintiff's third amended complaint and hearing on motion to dismiss. (Doc. # 61).

to the plaintiff. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130 (1993), cert. denied, American Home Products Corp. v. Mylan Labs., Inc., 510 U.S. 1197 (1994); see also Randall v. United States, 30 F.3d 518, 522 (4th Cir.1994), cert. denied, 514 U.S. 1107 (1995). In deciding whether to dismiss a claim under Rule 12(b)(6), the court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference into the complaint, and matters about which the court may take judicial notice. E.E.O.C. v. St. Francis Xavier Parochial School, 117 F.3d 621, 624-25 (D.C. Cir.1997). However, the court need not accept inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. Word v. U.S. Probation Dept., 439 F.Supp.2d 497, 500 (D. S.C.2006). When, however, it appears to the court that the plaintiff has totally failed to state a claim which would entitle him or her to relief, a defendant is entitled to have its motion to dismiss granted. Fed.R.Civ.P. 12(b)(6).

#### **DISCUSSION AND ANALYSIS OF DEFENDANT VANDERBILT'S MOTION<sup>2</sup>**

With regards to defendant Vanderbilt's motion to dismiss made pursuant to Rule 12(b)(6), the Court will analyze the motion in relation to each of the causes of action alleged. Plaintiffs' first cause of action is for injunctive and declaratory relief. In their complaint, plaintiffs assert that the defendant Vanderbilt through its collection activities, telephone calls and communications with its mortgage customers has: (1) violated public policy; (2) violated privacy rights; (3) violated Section 16-17-430 of the South Carolina Code of Laws; (4) violated Title 16 of Federal Regulations, Sections 1.5, 1.6, 1.8, 313.10, 313.11, 314.3; (5) violated Section 5(a)(1) of the Federal Trade Commission Act as stated in 16 Code of Federal Regulations, Section 1.8(a); and (6) violated 15 U.S.C. Section 45(a) and Section 6801(b). The defendant has moved to dismiss on the basis that (1)

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<sup>2</sup>References to "defendant" in this section are to defendant Vanderbilt.

there is no private right of action for violation of the statutes and regulations plaintiffs cite, and (2) plaintiffs have not alleged facts that establish the irreparable harm necessary to warrant injunctive relief. This Court finds defendant's argument persuasive.

With regards to South Carolina Code Section 17-17-430, which is a criminal statute prohibiting obscene and threatening communications, this Court is unable to conclude that a private cause of action exists. The statute reads as follows:

- (A) It is unlawful for a person to:
  - (1) use in a telephonic communication or any other electronic means, any words or language of a profane, vulgar, lewd, lascivious, or an indecent nature, or to communicate or convey by telephonic or other electronic means an obscene, vulgar, indecent, profane, suggestive, or immoral message to another person;
  - (2) threaten in a telephonic communication or any other electronic means an unlawful act with the intent to coerce, intimidate, or harass another person;
  - (3) telephone or electronically contact another repeatedly, whether or not conversation ensues, for the purpose of annoying or harassing another person or his family;
  - (4) make a telephone call and intentionally fail to hang up or disengage the connection for the purpose of interfering with the telephone service of another;
  - (5) telephone or contact by electronic means another and make false statements concerning either the death or injury of a member of the family of the person who is telephoned or electronically contacted, with the intent to annoy, frighten, or terrify that person; or
  - (6) knowingly permit a telephone under his control to be used for any purpose prohibited by this section.
- (B) A person who violates any provision of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than thirty days.

S.C. Code Ann. § 16-17-430.

The statute in question is found in a section of the South Carolina Code denominated

“Offenses Against Public Policy” which specifically provides for criminal enforcement. A primary consideration in deciding whether a private cause of action should be implied under this type of statute, i.e., a criminal statute, is the legislature's intent. Adkins v. South Carolina Dept. of Corrections, 602 S.E.2d 51, 54 (S.C. 2004) (citing Dorman v. Aiken Communications, Inc., 398 S.E.2d 687 (1990)). “The legislative intent to grant or withhold a private right of action for the violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute. In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.” Whitworth v. Fast Fare Markets of South Carolina, Inc., 338 S.E.2d 155, 156 (S.C. 1985). Where a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. Adkins v. South Carolina Dept. of Corrections, 602 S.E.2d 51, 54 (S.C. 2004) (citing Citizens for Lee County v. Lee County, 416 S.E.2d 641 (1992)). The plaintiffs submitted at the hearing on this matter the cases of Yalanzon v. Citibank (South Dakota) N.A., 315 S.E.2d 677 (Ga.App. 1984); Chassereau v. Global-Sun Pools, Inc., 611 S.E.2d 305 (S.C. App. 2005); Aiken v. World Finance Corp. of South Carolina, 623 S.E.2d 873 (S.C. App. 2005); Simpson v. World Finance Corp. of South Carolina, 623 S.E.2d 877 (S.C. App. 2005). Plaintiffs also cite in their brief the case of Marcum v. Bowden, 2005 WL 2129176, \*1 (S.C. 2005), which is part of a line of alcohol related liability cases in South Carolina state jurisprudence. This Court has carefully reviewed all of the cases presented by plaintiffs, but find that none of them indicate that a private cause of action exists, or is even implied, under S.C. Ann. Section 16-17-430. Accordingly, based on the above cited case law, and after careful review and consideration, this Court does not

find that a private cause of action exists for an alleged violation of state criminal statute S.C. Code Ann. 16-17-430.

Next, with regards to the alleged violations of Title 16 of the Code of Federal Regulations, this Court likewise concludes that the regulatory sections cited provide no private right of action. In Alexander v. Sandoval, 532 U.S. 275 (2001), the Supreme Court held that only Congress by statute can create a private right of action. "In reaching this decision, the Supreme Court stressed that legislative intent is the only basis upon which a private right of action may be inferred: The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Chaffin v. Kansas State Fair Bd., 348 F.3d 850, 856 (10<sup>th</sup> Cir. 2003). The Court noted that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." Id. (citing Sandoval). "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." Id. Properly construed, Sandoval holds only that regulations may not create a private cause of action where no such right was intended by Congress in the statute authorizing promulgation of such regulations. Id.

16 C.F.R. 1.5 reads as follows:

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices

by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

16 C.F.R. 1.6 reads as follows:

Industry guides are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor, by any interested person or group, when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission. In connection with the promulgation of industry guides, the Commission at any time may conduct such investigations, make such studies, and hold such conferences or hearings as it may deem appropriate. All or any part of any such investigation, study, conference, or hearing may be conducted under the provisions of Subpart A of Part 2 of this chapter.

These sections of the Federal Regulations concern the purpose and promulgation of industry guides.

16 C.F.R. 1.8 reads as follows:

- (a) For the purpose of carrying out the provisions of the Federal Trade Commission Act, the Commission is empowered to promulgate trade regulation rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Such rules may include requirements prescribed for the purpose of preventing such acts or practices. A violation of a rule shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of that Act, unless the Commission otherwise expressly provides in its rule. However, the respondent in an adjudicative proceeding may show that his conduct does not violate the rule or assert any other defense to which he is legally entitled.
- (b) The Commission at any time may conduct such investigations, make such studies and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of Subpart A of Part 2 of this chapter.

This regulation addresses the nature, authority, and use of trade regulation rules. Defendant argues that these sections do not create any substantive rights, nor do they create any private rights of action for private citizens. Plaintiffs offer no authority to the contrary. The Court is sufficiently