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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM MARION COUNTY  
Court Of Common Pleas

The Honorable W. Haigh Porter, Special Referee

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Case No: 2015-CP-33-280  
Appellate Case No.: 2016-000956

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PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC ..... Appellants.

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RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENTS

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STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR THE TWELFTH JUDICIAL CIRCUIT

C/A No. 2015-CP-33-280

Partners 95, LLC and HSGCHG )  
Investments, LLC, )  
Plaintiffs, )

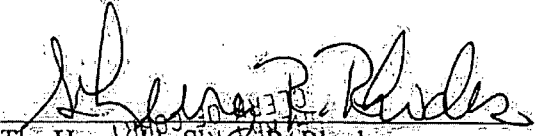
**ORDER OF REFERENCE**

v. )  
Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC )  
Defendants. )

It appearing that pursuant to South Carolina Rule of Civil Procedure 53, the issues in this dispute are properly referred to the Honorable W. Haigh Porter, as Special Referee for Marion County, South Carolina with the authority to enter a final judgment in the cause with direct appeal to the Supreme Court of South Carolina;

NOW THEREFORE, upon motion of W. Taylor Stanley, attorney for the Plaintiffs,

IT IS ORDERED that this action be, and the same hereby is, referred to the Honorable W. Haigh Porter, as Special Referee for Marion County, South Carolina, for the purpose of taking testimony and making findings of fact and conclusions of law, and with authority to render a final judgment in the cause, with direct appeal from said final judgment to the Supreme Court of the State of South Carolina.

  
The Honorable Sherry R. Rhodes  
Marion County Clerk of Court

8/10, 2015  
maury, South Carolina

63 71 0 90 510

PAGE

FILED

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR THE TWELFTH JUDICIAL CIRCUIT

C/A No. 2015-CP-33-280

PARTNERS 95, LLC and HSGCHG )  
Investments, LLC, )

Plaintiffs, )

v. )

Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC )

Defendants. )

ORDER

FILED  
2015 DEC 29 PM 1:30  
MARION COUNTY SC  
SHERIFF'S OFFICE  
CLERK OF COURT

This matter came before me upon the motion of Defendants, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively hereinafter "Defendants"), to set aside their default. For the reasons set forth below, I deny Defendants' motion.

**I. Defendants have failed to demonstrate good cause for setting aside the entry of default.**

12/1  
10P  
"For good cause shown the court may set aside an entry of default." Rule 55, SCRPC. The "good cause" standard requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacation of the default would serve the interests of justice. Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Where a defendant fails to demonstrate good cause for failing to answer the complaint, a court need not go any farther. See Regions Bank v. Owens, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (2013) ("Because we find the master did not err in finding [the defendant] failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors."). "A party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is

applied to an attorney.” Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (cited with approval in Regions Bank). It is always a matter of regret that a party should not have his day in court. Williams v. Ray, 232 S.C. 373, 384, 102 S.E.2d 368, 373 (1958). Where, however, the defendant was duly served with the summons and complaint, he has a duty to answer the complaint thereafter. Id. Therefore, “[h]e must suffer the consequence of his failure to answer. Id.

#2  
RP

This matter was commenced by the filing of the Summons and Complaint on March 17, 2015. Thereafter, Defendants were served via certified mail, return receipt requested, restricted delivery addressed to their registered agent, A Registered Agent, Inc. (“Defendants’ Registered Agent”), as is evidenced by the Affidavits of Service filed with the Court on April 2, 2015. After more than thirty (30) days, exclusive of the date of service, had elapsed since the service of the Summons and Complaint, no Answers or other pleadings were filed or served. An Affidavit of Default was filed with the Court on May 8, 2015. The Affidavit of Default was served on Defendants’ Registered Agent, as evidenced by the Certificate of Service also filed on May 8, 2015. On August 10, 2015, Plaintiffs filed their Notice of Motion and Motion for Order of Reference and served Defendants’ Registered Agent with this motion, as is evidenced by the Certificate of Service filed August 10, 2015. On October 16, 2015, Plaintiffs filed the Notice of Hearing. It was likewise served on Defendants’ Registered Agent as evidenced by the Certificate of Service filed October 16, 2015. It was not until Defendants’ were served with the Notice of Hearing that any action was taken.

The Defendants were served multiple times with documents in connection with this case. According to the Mr. Rubenstein’s affidavit, during the period of time in which the Defendants’ Registered Agent would have been served, Diana Balayan, the person in typically in charge of

receiving service was out on maternity leave. (Affidavit of Eugene Rubenstein ¶ 4). However, in this case, those tasked with “filling in” for Ms. Balayan failed to review the Summons and Complaint. Id. ¶ 6. Mr. Rubenstein further states that this failure to “fill in” for Ms. Balayan presumably caused Defendants’ failure to respond to the Notice of Default. Id. at ¶ 7. Mr. Rubenstein continued to state that the Notice of Motion and Motion for Order of Reference was *received* by Mr. Balayan on or about August 17, 2015, and that it was forwarded to in-house attorneys who again failed to take any action. Id. at ¶ 8. Mr. Rubenstein stated that he, himself, “briefly looked at the document (the Notice of Motion and Motion for Order of Reference), did not read it carefully, and took no further action.” Id. at ¶ 13. Each time Defendants were served with documents was another opportunity for the Defendants to realize their default and take action, yet each time, until the service of the Notice of Hearing, Defendants failed to take action. Defendants have admitted in Mr. Rubenstein’s affidavit that they received the notices, and failed to act. The Defendants have failed to demonstrate good cause for setting aside default.

#3  
16  
Defendants contend that good cause for their failure to act is demonstrated by their misunderstanding the nature of the case and the requirement to answer a Complaint. I find this unpersuasive under the reasoning set forth in Regions Bank, *supra* and Hill, *supra*. Because Defendants have failed to demonstrate good cause, their motion to set aside default is DENIED.

**II. The Wham factors also weigh against setting aside defendant’s default.**

Even if the Court believed that good cause existed to set aside default, the Wham factors weigh against setting aside Defendants’ default. “Once a party has put forth satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the

plaintiff if relief is granted.” Sundown, 383 S.C. at 607, 681 S.E.2d at 888 (citing Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)).

Defendants contend that “as soon as Defendants learned of the nature of the lawsuit and the entry of default, they immediately set into action to retain counsel to defend this matter.” Affidavit of Eugene Rubenstien. However, Defendants failed to act even given multiple opportunities on which to act, i.e. the service of the Summons and Complaint, the service of the Affidavit of Default, and the service of the order of reference. From the time of the filing and service of the Summons and Complaint to when Defendants took action, over seven months had elapsed. South Carolina appellate courts have upheld denial of motions to set aside default for less amounts of time than the seven months present in this case. See e.g. Sundown, *supra*; Dixon, *supra*; Regions Bank, *supra*. This factor weighs against setting aside Defendant’s default.

#4  
167  
Furthermore, Defendants have failed to present any evidence of a meritorious defense. Not only must a movant make a proper showing he is entitled to relief on a specified ground, but he must also make a prima facie showing of a meritorious defense. McClurg v. Deaton<sup>1</sup>, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2009) *affirmed by* McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011). In McClurg, the court noted that the defendant failed to present any evidence, by affidavit or otherwise, to suggest it had a meritorious defense, and therefore upheld the denial of the motion to set aside the default judgment. 380 S.C. at 576, 671 S.E.2d at 94. The only affidavit Defendants’ submitted was that of Mr. Rubenstein, which addressed only the circumstances surrounding the Defendants’ going into default.

<sup>1</sup> While McClurg involved a denial of a motion to set aside default judgment, the factors are largely similar as under Rule 60 the factors to consider are “(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense and (4) the prejudice to the other parties.” McClurg, 380 S.C. at 573, 671 S.E.2d at 93.

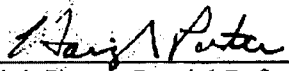
Plaintiffs have justifiably relied on Defendants' default. Despite Defendants' allegations that this is in the early stages of litigation, over seven months passed since the filing of the Summons and Complaint to Defendants' action. Setting aside Defendants' default would only further delay Plaintiffs recovery of the sums due to them by virtue of Defendants' failure to consummate the loan.

Because of the extended period of time for Defendants to take action, the lack of evidence of a meritorious defense, and the prejudice to Plaintiffs, the Wham factors weigh against setting aside Defendants' default. Therefore, even addressing the Wham factors, the Court finds setting aside Defendants' default would not be merited.

For the foregoing reasons, Defendants Motion to Set Aside default is DENIED.

**AND IT IS SO ORDERED.**

#5

  
Haigh Porter, Special Referee for  
Marion County

December 16, 2015  
Florence, South Carolina

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

FILED  
FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-33-280

PARTNERS 95, LLC, and HSGCHG Investments, LLC,

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: W. Taylor Stanley, Esquire.

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below)                              | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|-----------------------------------------------------------------------|----------------------------------------------------------|
| PARTNERS 95, LLC and HSGCHG Investments, LLC | Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC | \$73,184.20                                              |
|                                              |                                                                       | \$                                                       |
|                                              |                                                                       | \$                                                       |

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

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

*David Porter*  
Circuit Court Judge

Judge Code

*April 6, 2016*  
Date

*Special Referee* For Clerk of Court Office Use Only

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

Taylor Stanley  
Callison, Tighe & Robinson, LLC  
P.O. Box 1390 Columbia, SC 29202  
ATTORNEY(S) FOR THE PLAINTIFF(S)

Amy L. B. Hill  
Gallivan, White & Boyd, P.A.  
P.O. Box 7368 Columbia, SC 29202  
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter:**

FILED

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )  
PARTNERS 95, LLC and HSGCHG )  
Investments, LLC, )  
Plaintiffs, )  
v. )  
Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE TWELFTH JUDICIAL CIRCUIT  
MARION COUNTY SC  
C/A No. 2015-CP-33-280  
SHERRY R. RHODES  
CLERK OF COURT

**ORDER**  
(ending action)

#1  
JP

The above-captioned matter was referred to the undersigned as Special Referee for Marion County by Order of Reference executed by the Honorable Sherry R. Rhodes, Clerk of Court for Marion County on August 10, 2015, and filed in the Office of the Clerk of Court for Marion County on August 10, 2015. By Order dated December 16, 2015, filed in the Office of the Clerk of Court for Marion County on December 29, 2015, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively, "Defendants") were held in default. A default damages hearing was held on February 8, 2016. Present at the hearing were W. Taylor Stanley, Esquire, for the Plaintiffs and Amy L.B. Hill, Esquire for the Defendants. Also present and testifying were Michael W. Tighe, Esquire and Robert D. Hartmann, Sr.

**PROCEDURAL HISTORY**

This matter was commenced by the filing of the Summons and Complaint on March 17, 2015. Thereafter, Defendants were served via certified mail, return receipt requested, restricted delivery addressed to their registered agent as is evidenced by the Affidavits of Service filed with the Court on April 2, 2015. An Affidavit of Default was filed with the Court on May 8, 2015.

On August 10, 2015, Plaintiffs filed their Notice of Motion and Motion for Order of Reference which was granted by Order of Reference signed by the Honorable Sherry R. Rhodes, Clerk of Court for Marion County on August 10, 2015. After service of a Notice of Hearing, Defendants filed their Objection to Entry of Default or, in the Alternative, Notice of Motion and Motion to Set Aside Entry of Default on November 2, 2015, which was denied by Order dated December 16, 2015. Thereafter, a damages hearing was held on February 8, 2016 before the Honorable Haigh Porter, as Special Referee for Marion County.

To the extent necessary, Findings of Fact shall be construed as Conclusions of Law and Conclusions of Law shall be construed as Findings of Fact. Based on the pleadings, motions, arguments of counsel, testimony and evidence, I find the following:

#### **FINDINGS OF FACT**

#2  
HP  
1. The Summons and Complaint were filed in the Office of the Clerk of Court for Marion County on March 17, 2015.

2. The Defendants were properly served with the Summons and Complaint pursuant to the Affidavits of Service on file herein.

3. Defendants are in default pursuant to Affidavit of Default filed on May 8, 2015 and Order dated December 16, 2015, filed of record on December 29, 2015.

4. Defendants were notified of the time, date and place of hearing in this matter, as evidenced by the Amended Notice of Hearing and Certificate of Service on file herein.

5. Plaintiff Partners 95, LLC ("Partners") is a limited liability company organized and existing under the laws of the state of Connecticut and doing business, among other locations, in the County of Marion, State of South Carolina.

6. Plaintiff HSGCHG Investments, LLC ("HSGCHG") is a limited liability company organized and existing under the laws of the State of Connecticut and doing business in, among other locations, the County of Marion, State of South Carolina.

7. Defendant Riverdale Funding, LLC ("Riverdale") is a limited liability company organized and existing under the laws of State of Delaware and doing business in the State of South Carolina among other states.

8. Defendant Woodbridge Mortgage Investment Fund 3, LLC ("Woodbridge") is a limited liability company organized and existing under the laws of State of Delaware and doing business in the State of South Carolina among other states.

9. At all times relative hereto, the parties were engaged in a contractual relationship that was to culminate in a loan transaction to be performed in and secured by real property located in the County of Marion, State of South Carolina.

10. On December 9, 2014, Riverdale issued a Loan Commitment letter ("Commitment") to Partners and HSGCHG (collectively, "Plaintiffs").

11. Under the terms of said Commitment, Riverdale agreed to lend Plaintiffs the total sum of One Million Nine Hundred Thousand and 00/100s (\$1,900,000.00) dollars at rate of twelve (12%) per annum ("Loan") for the acquisition and development of the below described real property ("Marion Property"):

All that certain piece, parcel or tract of land lying and being situate South of the City of Marion, Marion Township, Marion County, South Carolina, containing 248.52 acres, more or less, as shown on plat prepared for New World Entertainment, Inc. By Beasley Land Surveying, Inc., dated February 14, 2001 and revised March 26, 2002. The said map as revised is recorded in the Office of the Clerk of Court for Marion County on June 13, 2002 in Plat Book 303 at Page 3 and is incorporated herein by reference. The said tract being bounded as follows, now or formerly, to wit: on the North by lands now or formerly of William H. Lide; on the Northeast and East by lands now or formerly of Paul J. Graves and William L. Cheezem, and others; on the South by lands now or formerly of

Cheezem and others; on the Southwest by US Highway 501 and lands of Atkinson and other; and on the Northeast by lands of William E. Thompson.

LESS AND EXCEPT: All that certain piece, parcel or lot of land containing .066 acres as shown on survey prepared for the City of Marion recorded in the Office of the Clerk of Court for Marion County in Plat Book 304, at Page 6 and a fifty (50) foot temporary easement for construction, the said lot and easement being more fully and completely described in a certain deed of Donald D. Godwin and Jack H. Jones to the City of Marion recorded in the Office of the Clerk of Court for Marion County on April 20, 2002 in Deed Book A-472 at Page 296.

TMS No. 085-00-00-001-000

12. The Commitment further provided that Plaintiffs would pay a commitment fee of \$114,000.00 of which \$19,000.00 was paid in advance (the "Initial Commitment Fee").

13. The Commitment provided the Initial Commitment Fee was deemed to have been fully earned "upon the execution of this commitment letter and shall be due and payable in full from Borrower (HSGCHG) and/or any Guarantor regardless of whether the Loan closes or not, *so long as the failure to close the Loan is not the result of a default or failure by Riverdale Funding, its successors and assigns. Should this loan not close as a result of the default or failure by Riverdale Funding, its successors and assigns, said advance commitment fee shall be returned to the Borrower in full without offset.*" (emphasis added).

14. The Initial Commitment Fee was returned by Defendants to Plaintiffs which acknowledges their default.

15. The Commitment further provided that the Loan would be secured by a first priority mortgage, security agreement and assignment of leases and rents on the Marion Property and additional collateral secured by certain property in East Haven Connecticut (the "Connecticut Property").

16. Pursuant to the terms of the Commitment, the Loan was set to close on or before January 12, 2015; however, the parties knew, at the time of the execution of the Commitment,

that Plaintiffs had to close the Loan and purchase the Marion Property no later than December 31, 2014 to avoid a significant price increase.

17. The Commitment further provided various contingencies prior to funding loan, each of which was satisfied by the Plaintiffs.

18. Throughout the month of December 2014, the parties worked together towards closing the Loan including negotiating loan documents, exchanging numerous e-mails about the Loan, and coordination of the Closing which was to take place at the offices of Fidelity National Title Insurance Company in Florida.

19. Prior to Closing, Riverdale transferred and assigned the Commitment to Woodbridge who was to be the owner and holder of the promissory note, mortgage and other loan documents.

20. Woodbridge is a related entity of Riverdale and share common ownership. (Affidavit of Eugene Rubinstein ¶ 2).

21. The Closing was scheduled for December 30, 2014 with recordation to occur on December 31, 2014.

22. Throughout the morning of December 30, 2014, counsel for the Plaintiffs and Defendants exchanged e-mails regarding last minute closing details.

23. Approximately an hour prior to the hour appointed for Closing, Robert Hartmann, guarantor and member of the Plaintiffs, arrived at the Fidelity office to execute the Loan Documents to which all the parties had agreed.

24. Without warning, Defendants, by and through their counsel, instructed the Fidelity office in Florida not to allow the Plaintiffs to sign the documents via an e-mail dated December 30, 2014 12:07 p.m.

25. Immediately following the above-referenced email, counsel for the Plaintiffs, Michael W. Tighe, Esquire contacted Defendants' counsel to inquire as to why the Closing was cancelled.

26. As of the date of the hearing, no response had been received despite numerous emails, telephone calls and correspondence.

27. As a result of the Defendants' failure and refusal to close the transaction as contemplated in the Commitment, Plaintiffs were unable to purchase the Marion Property by December 31, 2014 as agreed in their contract with the Seller.

28. While the Plaintiffs ultimately found another source of funding from Avatar Financial Group (the "Avatar Loan"), the Plaintiffs have suffered damages as a result of Defendants' unexplained and bad faith refusal to fund the Loan and honor the Commitment, including but not limited to fees related to brokers' price opinions, appraisal costs, attorney's fees, liability insurance premiums, and further expense related to signage that was time dependent on the closing of the transaction.

29. As is set forth more fully above, Defendants breached the terms of the Commitment by failing to close the transaction contemplated therein on December 30, 2014.

30. Defendants' intent in breaching the Commitment was fraudulent as evidenced by their behavior leading up to breach including but not limited to their negotiations of the terms of the loan documents, correspondence between counsel, and its failure to communicate with Plaintiffs' counsel after 12:07 p.m. on the day of Closing.

31. There were no contingencies by the Plaintiffs outstanding and the Plaintiffs were ready to close.

32. Defendants were aware that Plaintiffs would incur additional expenses if the Closing failed to occur on December 30, 2014. In light of Defendants education, training and information, Defendants had reason to foresee the probable existence of such circumstances.

33. Prior to the Closing, Plaintiffs entered into the Advantage Sign Contract<sup>1</sup> to obtain signage for the Marion Property.

34. As a result of the Closing failing to occur on December 30, 2014, Advantage Sign Company was unable to perform under the Advantage Sign Contract.

35. As a result of Advantage Sign being unable to perform under the Advantage Sign Contract, Plaintiffs were forced to enter into the Tyson Contract at an additional expense. In addition, the Tyson Sign Contract provides for a sign smaller in size.

#7  
108  
36. Leading up to Closing, Plaintiffs incurred various expenses including (a) Broker's Price Opinion on the Connecticut Property; (b) Appraisal on Connecticut Property; (c) Broker's Price Opinion on the Marion Property; (d) Appraisal on the Marion Property; (e) payment of Defendants' counsel fees incurred in the transaction; (f) attorneys' fees with Plaintiffs' counsel, Callison Tighe & Robinson, LLC, associated with the transaction; (g) an increase in the loan broker's commission; (h) additional title examination and abstract work; (i) loan packaging associated with the transaction; (j) wire fee for the loan packaging; and (k) extra liability insurance required by Defendants, not required in the Avatar Loan.

37. As a direct and proximate result of Defendants failure to close the transaction Plaintiffs have suffered the following damages which were substantiated by testimony and evidence presented at the hearing:

---

<sup>1</sup> Prior to the scheduled closing, Plaintiffs entered into a contract with Advantage LED Signs for a sign dated December 18, 2015 (the "Advantage Sign Contract"). The purchase price of the sign in the Advantage Sign Contract was \$350,000.00. As more fully explained above, Plaintiffs thereafter entered into a contract with Tyson Sign Company, Inc. dated February 25, 2015 (the "Tyson Sign Contract"). The purchase price of the sign in the Tyson Sign Contract was \$365,803.00.

|                                                                                 |                    |
|---------------------------------------------------------------------------------|--------------------|
| a. Broker's Price Opinion on Connecticut Property-                              | \$ 500.00          |
| b. Appraisal on Connecticut Property -                                          | \$2,000.00         |
| c. Broker's Price Opinion on Marion Property -                                  | \$ 750.00          |
| d. Appraisal on Marion Property-                                                | \$2,500.00         |
| e. Defendants' Counsel fees (Holloren & Sage, LLP)                              | \$500.00           |
| f. Callison Tighe & Robinson, LLC fees related to<br>Woodbridge/Riverdale Loan- | \$10,000.00        |
| g. Loan Broker Commission increase-                                             | \$2,000.00         |
| h. Additional Title examination and abstract work-                              | \$1,645.50         |
| i. Loan Packaging fee to Grow Financial -                                       | \$495.00           |
| j. Wire fee for Loan Packaging fee to Grow Financial-                           | \$35.00            |
| k. Extra liability insurance required by Defendants-                            | \$1,955.70         |
| l. Difference in Advantage Sign Contract<br>and Tyson Sign Contract-            | <u>\$15,803.00</u> |

**TOTAL: \$38,184.20**

38. Mr. Hartmann requested proof of funds to close the transaction from Defendants.

Defendants have failed or refused to provide such proof of funds.

39. Defendants' unexplained and bad faith refusal to fulfill the terms of the commitment, provide proof of funds or otherwise communicate with Plaintiffs lead to the unescapable conclusion that Defendants did not have the funds to close the transaction.

40. If the loan failed to close on December 30, 2014, Defendants knew Plaintiffs could lose in excess of \$300,000.00 due to the increased purchase price and that Plaintiffs could incur additional expenses such as those outlined above.

41. Defendants are part of a larger organization with many affiliated companies involved in the mortgage lending business. *See generally*, (Affidavit of Eugene Rubinstein). Therefore, because of Defendants' education, training and experience, Defendants had reason to foresee the probable existence of the expenses incurred by Plaintiffs as a result of Defendants' breach, including but not limited to the sign and those outlined in Paragraphs 36 and 37, above.

#### CONCLUSIONS OF LAW

A. All parties were properly served with the pleadings herein and that all parties were given proper notice in this matter.

B. This Court has jurisdiction over the parties and the subject matter hereof.

**I. Defendants' Default.**

C. "[A]n entry of an order of default is an admission of the defaulting party of the well-pleaded allegations of the Complaint." *State ex. rel. Medlock v. Love Shop Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 530 (Ct. App. 1985) *see also e.g. Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012) ("A defendant in default admits liability but not damages as set forth in the prayer for relief."). "The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations set out in the plaintiff's declaration or complaint... Hence the default authorizes the entry of any judgment warranted by the facts alleged." *Id.*, 286 S.C. at 489, 334 S.E.2d at 530 quoting *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 487-88, 72 S.E. 15, 17 (1911).

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D. By failing to answer the Complaint and having an order of default entered against them, the Defendants have admitted liability. Therefore, the default authorizes me to enter judgment warranted by the facts alleged in the Complaint.

**II. Plaintiff's Damages on Breach of Contract Accompanied by a Fraudulent Act:**

E. The elements of a breach of contract accompanied by a fraudulent act are (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985).

F. "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach."

*Branche Builders, Inc., v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Damages are designed to give the nonbreaching party the benefit of his bargain with the breaching party. *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Company, Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990). Breach of contract damages normally consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed. *Collins Entertainment Inv. v. White*, 363 S.C. 546, 559, 611 S.E.2d 262, 268-9 (Ct. App. 2005).

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G. "When a plaintiff seeks special damages for breach of contract, he must plead and prove both the fact of damage and the amount of damage with a reasonable degree of certainty." *Thornton-Crosby Dev.*, 303 S.C. at 77, 399 S.E.2d at 11. "The fact of damage is proved by showing (1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract and (2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made." *Id.* at 77-8. The party claiming special damages must show that the defendant was warned of the probable existence of unusual circumstances or that because of the defendant's own education, training, or information, the defendant had reason to foresee the probable existence of such circumstances. *Stern & Stern v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992). The defendant need not foresee the exact dollar amount of the injury, but must only know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance. *Id.* "If the fact of damages is established, the law does not require the amount of damage to be proved with

absolute mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made.” *Thornton-Crosby Dev.*, 303 S.C. at 77, 399 S.E.2d at 11; *see also, Collins*, 363 S.C. at 559, 611 S.E.2d at 268-9.

H. South Carolina law has long recognized a plaintiff's right to recover punitive damages for breach of contract accompanied by a fraudulent act. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985). Fraudulent intent is normally proved by the circumstances surrounding the breach. *Id.* 287 S.C. at 53, 336 S.E.2d at 503-4. The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. *Id.* A fraudulent act is any act characterized by dishonesty in fact or unfair dealing. *Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002). “‘Fraud’ in this sense assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.” *Id.*

I. Defendants contend that damages related to the sign were not pled and therefore not recoverable. Upon review of the Complaint, I find that Plaintiff sufficiently pled damages related to the Advantage Sign Contract and Tyson Sign Contract. *See* (Compl. ¶ 23). Defendants were well aware that if the transaction failed to close by December 31, 2014, Plaintiffs would incur large sums of additional expenses. Moreover, because of Defendants' own education, training and information, Defendants had reason to foresee the probable existence of Plaintiffs' damages outlined above in Paragraphs 36 & 37, including the sign. Had the transaction between Plaintiffs and Defendants closed on December 31, 2014 as planned,

Plaintiffs would not have suffered the additional damages due to the sign. This loss was the natural consequence of Defendants' breach of contract and was foreseeable by Defendants because of their education, training and information. Furthermore, testimony and evidence were submitted at trial to substantiate an award of \$15,803.00 on the sign contract alone.

J. I find and conclude that as a natural consequence and proximate result of Defendants' breach of contract, Plaintiffs have suffered the following actual damages and are entitled to an award therefore:

|                                                                              |                    |
|------------------------------------------------------------------------------|--------------------|
| a. Broker's Price Opinion on Connecticut Property-                           | \$ 500.00          |
| b. Appraisal on Connecticut Property -                                       | \$2,000.00         |
| c. Broker's Price Opinion on Marion Property -                               | \$ 750.00          |
| d. Appraisal on Marion Property-                                             | \$2,500.00         |
| e. Defendants' Counsel fees (Holloren & Sage, LLP)                           | \$500.00           |
| f. Callison Tighe & Robinson, LLC fees related to Woodbridge/Riverdale Loan- | \$10,000.00        |
| g. Loan Broker Commission increase-                                          | \$2,000.00         |
| h. Additional Title examination and abstract work-                           | \$1,645.50         |
| i. Loan Packaging fee to Grow Financial -                                    | \$495.00           |
| j. Wire fee for Loan Packaging fee to Grow Financial-                        | \$35.00            |
| k. Extra liability insurance required by Defendants-                         | \$1,955.70         |
| l. Difference in Advantage Sign Contract and Tyson Sign Contract-            | <u>\$15,803.00</u> |

**TOTAL:** **\$38,184.20**

K. Furthermore, based on the circumstances surrounding Defendants' breach, including but not limited to their negotiations of the terms of the loan documents, correspondence between counsel, their failure to communicate with Plaintiffs' counsel after 12:07 p.m. on the day of Closing, and their failure to provide proof of funds lead to the unescapable conclusion that Defendants misrepresented the availability of funds to close the transaction - a fraudulent act. Moreover, by continuing to negotiate the terms of the loan documents and correspondence between counsel, Defendants' fraudulent intent is demonstrated. Therefore, I find and conclude that Plaintiffs have met their burden of proving breach of contract

accompanied by a fraudulent act and are entitled to an award of punitive damages, as more fully set forth below.

### **III. Punitive Damages.**

L. The practice of awarding punitive damages originated in principles of common law to deter the wrongdoer and others from committing like offenses in the future. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009). "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. The state's interest in awarding punitive damages must remain consistent with the principle of penal theory that the punishment should fit the crime." *Id.* (internal citations and quotations omitted).

M. To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). The amount of damages, remains largely within the discretion of the finder of fact and the trial judge is vested with considerable discretion of the amount of a punitive damages award. *Id.*

N. There are three "guideposts" a trial court must follow when conducting a post-judgment review of punitive damages awards: (1) reprehensibility, (2) ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award and (3) comparative penalty awards. *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183.

O. In regard to the reprehensibility "guidepost," the South Carolina Supreme Court has stated:

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. This principle reflects the view that some wrongs are more blameworthy than others. In considering the reprehensibility, a court should consider whether (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

*Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (internal citations and quotations omitted).

P. The *Mitchell* Court continued with regard to the ratio "guidepost:"

#14  
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[T]he Court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." [*BMW of North America v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589 (1996)]. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." [*State Farm v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1589 (2003)]. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Id.* at 425-26, 123 S. Ct. 1513. With this in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

*Id.* at 587-88, 686 S.E.2d at 185. A court need not always compare the punitive damages award to the actual damages award, but may compare it to the potential harm suffered by the plaintiff. *Id.* at 590, 686 S.E.2d at 187.

Q. When addressing comparative penalty awards, a court may consider “the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant’s conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.” *Id.* at 588-89, 686 S.E.2d at 186.

In reviewing more recent punitive damages awards, South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct. *See James*, 371 S.C. at 196-97, 638 S.E.2d at 671-72 (upholding a 6.82 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct.App.2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct.App.2004) (upholding a 2.54 to 1 ratio); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003) (upholding a 9.96 to 1 ratio); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio). *Cf. Atkinson*, 361 S.C. at 170, 604 S.E.2d at 392-93 (overruling a 127 to 1 ratio).

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*Id.* at 593, 686 S.E.2d at 188 (reviewing comparative penalty awards and holding that a ratio of 9.2 to 1 satisfied due process and comported with South Carolina law).

R. Plaintiffs have met their burden of proving Defendant’s misconduct was willful, wanton or in reckless disregard of Plaintiffs’ rights. Defendants’ actions in continuing to negotiate the loan documents and communicate with counsel leading up to the closing demonstrate Defendants’ knew their responsibilities under the Commitment. Furthermore, Defendants breached the terms of the Commitment by failing to close the transaction, all while knowing the repercussions for Plaintiff if the loan failed to close on December 30, 2014. In my discretion, I find that a punitive damages award in the amount of \$35,000.00 is appropriate under the circumstances.

S. Turning now to the post-judgment review of punitive damages, Defendants' actions were reprehensible. Without question, Defendants targeted Plaintiffs who Defendants knew were financially vulnerable because of the potential of a substantial price increase. The harm caused by Defendants was the result of intentional malice, trickery or deceit rather than mere accident; they knew their lack of funds to close the transaction and continued to negotiate the loan documents in the face of this fact.

T. Here, actual damages are \$38,184.20, and I have awarded \$35,000.00 in punitive damages for a ratio of 0.92:1 punitive damages to actual damages. Moreover, Plaintiffs had a potential harm of over \$300,000.00 as a result of Defendants' actions leading to a ratio of punitive damages to potential damages of 0.12:1.

U. In comparison of other punitive damages awards, I find that both a ratio of 0.92:1 punitive damages to actual damages and 0.12:1 punitive damages to potential damages are at the low end of the single-digit spectrum. Based upon the type of harm suffered by Plaintiffs, the reprehensibility of Defendants' conduct, the ratios of harm to punitive damages and the size of the award, I find that the punitive damages awarded is in line with the comparative punitive damages awards.

V. Therefore, I find that the punitive damages award of \$35,000.00 is appropriate in this case and that the punitive damages award meet the Court's post-judgment review of punitive damages.

**THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED** as follows:

A. Plaintiffs are entitled to judgment against the Defendants, jointly and severally, for actual damages in the amount of \$38,184.20 and punitive damages in the amount of \$35,000.00 for a total judgment of \$73,184.20.

AND IT SO ORDERED.

Haigh Porter  
Haigh Porter, Special Referee for  
Marion County

#17

April 6, 2016  
Florence, South Carolina

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

## JUDGMENT IN CIVIL CASE

CASE NO. 2015 CP-33-280

PARTNERS 95, LLC, and HSGCHG Investments,  
LLC,

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: W. Taylor Stanley, Esquire

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

## DISPOSITION TYPE (CHECK ONE)

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

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

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court. The Defendants' Emergency Motion and Emergency Motion for Stay Pursuant to SCRPC 62 and for Alternate Forms of Relief Pursuant to SCRPC 52, 59, and 60 is hereby DENIED.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : .

## INFORMATION FOR THE JUDGMENT INDEX

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

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

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

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

FILED  
2016 MAY -2 AM 9:24  
MARION COUNTY  
SHERIFF R. RICHES  
CLERK OF COURT

*Special Referee*  
Circuit Court Judge

Judge Code

*April 26, 2016*  
Date

or Clerk of Court Office Use Only

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

W. Taylor Stanley, Esquire

Callison Tighe & Robinson, LLC

P.O. Box 1390, Columbia SC 29202

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

Amy L.B. Hill, Esquire

Gallivan, White & Boyd, PA

P.O. Box 7368, Columbia SC 29202

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**CLERK OF COURT**

**Court Reporter:**

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR THE TWELFTH JUDICIAL CIRCUIT

C/A No. 2015-CP-33-280

PARTNERS 95, LLC and HSGCHG )  
Investments, LLC, )

Plaintiffs, )

v. )

Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC )

Defendants. )

**ORDER**

This matter came before me upon the motion of Defendants, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively hereinafter "Defendants"), to request an emergency motion for stay pursuant to SCRCP 62 and for alternate forms of relief pursuant to SCRCP 52, 59, and 60 as related to this Court's Order and Judgment of April 7, 2016.

After careful consideration of the motion made, the memoranda submitted, arguments of counsel, and the record in this case, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, Defendants Emergency Motion and Emergency Motion for Stay Pursuant to SCRCP 62 and for Alternate Forms of Relief Pursuant to SCRCP 52, 59, and 60 is DENIED.

**AND IT IS SO ORDERED.**

*Haigh Porter*

Haigh Porter, Special Referee for  
Marion County

FILED  
MARION COUNTY  
SHERIFF R. RHODES  
CLERK OF COURT  
2016 MAY -2 AM 10:24

*April 26*  
\_\_\_\_\_  
Florence, South Carolina, 2016

STATE OF SOUTH CAROLINA

COUNTY OF MARION

Partners 95, LLC and HSGCHG Investments, LLC  
Plaintiff(s)

vs.

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC  
Defendant(s)

Submitted By: Ian D. McVey, Esquire  
Address: Callison Tighe & Robinson, LLC  
P.O. Box 1390  
Columbia, SC 29202-1390

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP 33-280

SC Bar #: 71196  
Telephone #: 803-404-6900  
Fax #: 803-404-6902  
Other:  
E-mail: ianmcvey@callisontighe.com

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

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

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

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

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

- Real Property**  
☐ Claim & Delivery (400)  
☐ Condemnation (410)  
☐ Foreclosure (420)  
☐ Mechanic's Lien (430)  
☐ Partition (440)  
☐ Possession (450)  
☐ Building Code Violation (460)  
☐ Other (499)
- Appeals**  
☐ Arbitration (900)  
☐ Magistrate-Civil (910)  
☐ Magistrate-Criminal (920)  
☐ Municipal (930)  
☐ Probate Court (940)  
☐ SCDOT (950)  
☐ Worker's Comp (960)  
☐ Zoning Board (970)  
☐ Public Service Comm. (990)  
☐ Employment Security Comm (991)  
☐ Other (999)

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

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

- Judgments/Settlements**  
☐ Death Settlement (700)  
☐ Foreign Judgment (710)  
☐ Magistrate's Judgment (720)  
☐ Minor Settlement (730)  
☐ Transcript Judgment (740)  
☐ Lis Pendens (750)  
☐ Transfer of Structured Settlement Payment Rights Application (760)  
☐ Confession of Judgment (770)  
☐ Petition for Workers Compensation Settlement Approval (780)  
☐ Other (799)

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

Submitting Party Signature: \_\_\_\_\_

Date: March 13, 2015

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

**FOR MANDATED ADR COUNTIES ONLY**

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

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2015 MAR 17 A 10 43

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-33-280

Partners 95, LLC and HSGCHG  
Investments, LLC, )

Plaintiffs, )

v. )

Riverdale Funding, LLC and  
Woodbridge Mortgage Investment  
Fund 3, LLC, )

Defendants. )

**SUMMONS**  
(Jury Trial Demanded)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, P.O. Box 1390, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

**CALLISON TIGHE & ROBINSON, LLC**

  
\_\_\_\_\_  
Ian D. McVey, SC Bar No. 71196  
Post Office Box 1390  
Columbia, SC 29202-1390  
Telephone: 803-404-6900  
Facsimile: 803-404-6902  
[ianmcvey@callisontighe.com](mailto:ianmcvey@callisontighe.com)  
*Attorneys for the Plaintiff*

March 13, 2015  
Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP- 33-280

Partners 95, LLC and HSGCHG  
Investments, LLC, )

Plaintiffs, )

v. )

Riverdale Funding, LLC and  
Woodbridge Mortgage Investment  
Fund 3, LLC, )

Defendants. )

**COMPLAINT**  
(Jury Trial Demanded)

NOW COME THE PLAINTIFFS, by and through their undersigned counsel, who allege and  
state as follows:

**PARTIES AND JURISDICTION**

1. Plaintiff Partners 95, LLC ("Partners") is a limited liability company organized and  
existing under the laws of the state of Connecticut and doing business, among other locations, in the  
County of Marion, State of South Carolina.

2. Plaintiff HSGCHG Investments, LLC ("HSGCHG") is a limited liability company  
organized and existing under the laws of the State of Connecticut and doing business in, among other  
locations, the County of Marion, State of South Carolina.

3. Defendant Riverdale Funding, LLC ("Riverdale") is, upon information and belief, a  
limited liability company organized and existing under the laws of State of Delaware and doing  
business in the State of South Carolina among other states.

4. Defendant Woodbridge Mortgage Investment Fund 3, LLC ("Woodbridge") is, upon  
information and belief, a limited liability company organized and existing under the laws of State

of Delaware and doing business in the State of South Carolina among other states.

5. At all times relative hereto, the parties were engaged in a contractual relationship that was to culminate in a loan transaction to be performed in and secured by real property located in the County of Marion, State of South Carolina.

6. Jurisdiction and venue are proper in the Circuit Court for the County of Marion, State of South Carolina.

### **FACTUAL BACKGROUND**

7. On December 9, 2014, Riverdale issued a Loan Commitment letter ("Commitment") to Partners and HSGCHG (collectively, "Plaintiffs").

8. Under the terms of said Commitment, Riverdale agreed to lend Plaintiffs the total sum of One Million Nine Hundred Thousand and 00/100s (\$1,900,000.00) dollars at rate of twelve (12%) per annum ("Loan") for the acquisition and development of the below described real property ("Property"):

All that certain piece, parcel or tract of land lying and being situate South of the City of Marion, Marion Township, Marion County, South Carolina, containing 248.52 acres, more or less, as shown on plat prepared for New World Entertainment, Inc. By Beasley Land Surveying, Inc., dated February 14, 2001 and revised March 26, 2002. The said map as revised is recorded in the Office of the Clerk of Court for Marion County on June 13, 2002 in Plat Book 303 at Page 3 and is incorporated herein by reference. The said tract being bounded as follows, now or formerly, to wit: on the North by lands now or formerly of William H. Lide; on the Northeast and East by lands now or formerly of Paul J. Graves and William L. Cheezem, and others; on the South by lands now or formerly of Cheezem and others; on the Southwest by US Highway 501 and lands of Atkinson and other; and on the Northeast by lands of William E. Thompson.

LESS AND EXCEPT: All that certain piece, parcel or lot of land containing .066 acres as shown on survey prepared for the City of Marion recorded in the Office of the Clerk of Court for Marion County in Plat Book 304, at Page 6 and a fifty (50) foot temporary easement for construction, the said lot and easement being more fully

and completely described in a certain deed of Donald D. Godwin and Jack H. Jones to the City of Marion recorded in the Office of the Clerk of Court for Marion County on April 20, 2002 in Deed Book A-472 at Page 296.

TMS No. 085-00-00-001-000

9. The Commitment further provided that Plaintiffs would pay a commitment fee of \$114,000.00 of which \$19,000.00 was paid in advance.

10. The Commitment further provided that the Loan would be secured by a first priority mortgage, security agreement and assignment of leases and rents on the Property.

11. Pursuant to the terms of the Commitment, the Loan was set to close on or before January 12, 2015; however, the parties knew, at the time of the execution of the Commitment, that Plaintiffs had to close the Loan and purchase the Property no later than December 31, 2014 to avoid a significant price increase.

12. The Commitment further provided various contingencies prior to funding loan, each of which was satisfied by the Plaintiffs with the exception of the execution of the Commitment which the parties agreed would be done at Closing.

13. Throughout the month of December 2014, the parties worked together towards closing the Loan including negotiating loan documents, exchanging numerous e-mails about the Loan, and coordination of the Closing which was to take place at the offices of Fidelity National Title Insurance Company in Florida.

14. Prior to Closing, Riverdale transferred and assigned the Commitment to Woodbridge who was to be the owner and holder of the promissory note, mortgage and other loan documents.

15. Upon information and belief, Woodbridge is a related entity of Riverdale and share common ownership (collectively, "Defendants").

16. The Closing was scheduled for December 30, 2014 with recordation to occur on December 31, 2014.

17. Throughout the morning of December 30, 2014, counsel for the Plaintiffs and Defendants exchanged e-mails regarding last minute closing details.

18. Approximately an hour prior to the hour appointed for Closing, Robert Hartmann, guarantor and member of the Plaintiffs, arrived at the Fidelity office to execute the Loan Documents to which all the parties had agreed.

19. Without warning, Defendants, by and through their counsel, instructed the Fidelity office in Florida not to allow the Plaintiffs to sign the documents via an e-mail dated December 30, 2014 12:07 p.m.

20. Immediately following the above-referenced email, counsel for the Plaintiffs contacted Defendants' counsel to inquire as to why the Closing was cancelled.

21. To date, no response has been received despite numerous emails, telephone calls and correspondence.

22. As a result of the Defendants' failure and refusal to close the transaction as contemplated in the Commitment, Plaintiffs were unable to purchase the Property by December 31, 2014 as agreed in their contract with the Seller.

23. While the Plaintiffs ultimately found another source of funding to purchase the Property, the Plaintiffs have suffered damages as a result of Defendants' unexplained and bad faith refusal to fund the Loan and honor the Commitment including but not limited to fees related to brokers price opinions, appraisal costs, attorneys fees, liability insurance premiums, and further expense related to signage that was time dependent on the closing of the transaction.

**FOR A FIRST CAUSE OF ACTION**

24. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

25. The Commitment constituted a binding contract between the Plaintiffs and Defendants.

26. Defendants breached the Commitment by failing to close the transaction contemplated therein on December 30, 2014.

27. As a direct and proximate result of the Defendants' breach of the Commitment, the Plaintiffs have suffered injury.

28. Therefore, the Plaintiffs would respectfully submit they are entitled to a judgment against the Defendants for actual and consequential damages in an amount to be proven at trial.

**FOR A SECOND CAUSE OF ACTION**

29. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

30. As is set forth more fully above, Defendants breached the terms of the Commitment by failing to close the transaction contemplated therein on December 30, 2014.

31. Plaintiffs are informed and believed that Defendants' intent in breaching the Commitment was fraudulent as evidenced by their behavior leading up to breach including but not limited to its negotiation of terms in loan documents, correspondence between counsel, and its failure to communicate with Plaintiffs' counsel after 12:07 p.m. on the day of Closing.

32. Plaintiffs are further informed and believe that Defendants fraudulently breached the Commitment because there were no contingencies were outstanding and the Plaintiffs were ready,

willing and able to close.

33. Therefore, the Plaintiffs would respectfully submit that it is entitled a judgment against the Defendants for actual and consequential damages in an amount to be proven at trial along with punitive damages in an amount to be determined by a jury.

#### **FOR A THIRD CAUSE OF ACTION**

34. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

35. As has been set forth above, Defendants made an unambiguous promise to lend Plaintiffs funds to purchase the Property upon certain terms.

36. Plaintiffs reasonably relied on Defendants' promise and complied with the terms required by Defendants.

37. Defendants foresaw and expected, when making the promise, that Plaintiffs would rely upon Defendants' promise.

38. As a direct and proximate result Plaintiffs' reliance on Defendants' promise and failure to fulfil their promise, Plaintiffs have suffered injury.

39. Therefore, Plaintiffs would respectfully submit that they are entitled to actual and consequential damages in an amount to be proved at trial as result of their reliance on Defendants' promise and failure to honor that promise.

#### **FOR A FOURTH CAUSE OF ACTION**

40. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

41. As is set forth above, Defendants represented to Plaintiffs that they would extend

funds to the Plaintiffs for the acquisition and development of the Property pursuant to the terms of the Commitment.

42. Defendants continued to make such representations in the weeks, days and hours prior to the scheduled Closing on December 30, 2014.

43. Upon information and belief, Defendants' representations were false and material.

44. Plaintiffs are informed and believe that Defendants either knew that the representations were false or were completely reckless in their disregard of representations' truth or falsity.

45. Defendants intended that Plaintiffs would act on their representations.

46. Plaintiffs were completely unaware of the falsity of the Defendants' representations and rightfully relied upon the truth of the representations in its actions leading up to Closing.

47. As a direct and proximate result of Defendants' false and fraudulent representations, Plaintiffs have been injured.

48. Therefore, Plaintiffs would respectfully submit that they are entitled to an award of actual, special and consequential damages in an amount to be proven at trial along with punitive damages in an amount to be determined by a jury.

#### **FOR A FIFTH CAUSE OF ACTION**

49. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

50. As has been set forth above, Defendants wilfully and fraudulently induced Plaintiffs to move forward towards Closing by issuing the Commitment.

51. Further, Defendants engaged in wilful deceptive and fraudulent behavior by exchange

numerous email correspondence, providing draft loan documents, and continuing to represent to Plaintiffs that the Loan would Close on December 30, 2014 including email correspondence in the hours leading up to Closing.

52. The above-referenced fraudulent and deceptive acts and practices are a knowing violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

53. Defendants fraudulent and deceptive acts are capable of repetition and effect the public interest because Defendants, upon information and belief, are active commercial lenders engaged in numerous transactions inside and outside of the State of South Carolina.

54. As a direct and proximate cause of Defendants' deceptive and fraudulent acts, Plaintiffs have suffered damages including but not limited to those set forth above.

55. Therefore, Plaintiffs would respectfully submit that they are entitled to an award of actual, special and consequential damages in an amount to be proven at trial, treble damages and attorney's fees and costs as provided for in S.C. Code Ann. § 39-5-140.

WHEREFORE, having fully complained of the Defendants herein, Plaintiffs would respectfully pray this Court for the following relief:

- a. Award Plaintiffs actual damages in an amount to be proven at trial;
- b. Award Plaintiffs consequential damages in an amount to be proven at trial;
- c. Award Plaintiffs special damages in an amount to be proven at trial;
- d. Award Plaintiffs treble damages pursuant to S.C. Code Ann. § 39-5-140;
- e. Award Plaintiffs punitive damages;
- f. Award Plaintiffs attorneys fees and costs; and
- g. Award such relief as is just and proper.

**CALLISON TIGHE & ROBINSON, LLC**

  
\_\_\_\_\_  
Ian D. McVey, SC Bar No. 71196  
PO Box 1390  
Columbia, South Carolina 29202  
Tel. (803)404-6900  
Fax (803)404-6902  
E-mail: [ianmcvey@callisontighe.com](mailto:ianmcvey@callisontighe.com)

*Attorneys for the Plaintiffs*

March 13, 2015  
Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-33-280

Partners 95, LLC and HSGCHG )  
Investments, LLC, )  
Plaintiffs, )

v. )

**AFFIDAVIT OF SERVICE**

Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC, )  
Defendants. )

I, Katie A. Minton, an employee of Callison Tighe & Robinson, LLC, attorneys for Plaintiffs, do hereby certify that I have served a copy of the **clocked-in Civil Action Coversheet, Summons and Complaint**, in the above-captioned matter on the below listed, by depositing a copy of same in the United States Mail, postage prepaid, via certified mail, restricted delivery, return receipt requested, on March 19, 2015, addressed as follows:

A Registered Agent, Inc., Registered Agent  
for Riverdale Funding, LLC  
1521 Concord Pike, #303  
Wilmington, DE 19803

Said original Certified Mail Article No. 7011 1150 0001 1473 6860 is attached hereto showing that these documents were accepted and signed for by the registered agent for Defendant Riverdale Funding, LLC on March 23, 2015.

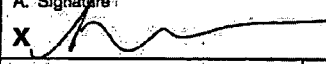
Katie A. Minton  
KATIE A. MINTON

SWORN to before me this  
3/26 day of March, 2015.

Kathleen Honore  
Notary Public for South Carolina  
My Commission Expires: 3/13/22

FILED  
2015 APR - 2 A 10:30

Partners 95, LLC and HSGCHG Investments, LLC vs.  
Riverdale Funding, LLC and  
Woodbridge Mortgage Investment Fund 3, LLC  
Case No. 2015-CP-33-280

| SENDER: COMPLETE THIS SECTION                                                                                                                                                                                                                                                                                                |  | COMPLETE THIS SECTION ON DELIVERY                                                                                                                                                                                                                                                                                                                                                                                                                     |  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <ul style="list-style-type: none"><li>■ Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.</li><li>■ Print your name and address on the reverse so that we can return the card to you.</li><li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul> |  | <p>A. Signature: <u>X</u>  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <u>Michael Williams</u> C. Date of Delivery <u>5/23/15</u></p> <p>D. Is delivery address different from Item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No<br/>If YES, enter delivery address below:</p> |  |
| 1. Article Addressed to:<br><u>A Registered Agent, Inc.,</u><br><u>Registered Agent for</u><br><u>Riverdale Funding, LLC</u><br><u>1521 Concord Pike, #303</u><br><u>Wilmington, DE 19803</u>                                                                                                                                |  | 3. Service Type<br><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail<br><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise<br><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.                                                                                                                                                                   |  |
| 2. Article Number<br>(Transfer from service label)<br><u>7011 1150 0001 1473 6860</u>                                                                                                                                                                                                                                        |  | 4. Restricted Delivery? (Extra Fee) <input checked="" type="checkbox"/> Yes                                                                                                                                                                                                                                                                                                                                                                           |  |

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )  
Partners 95, LLC and HSGCHG )  
Investments, LLC, )  
Plaintiffs, )  
v. )  
Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC, )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-33-280

**AFFIDAVIT OF SERVICE**

I, Katie A. Minton, an employee of Callison Tighe & Robinson, LLC, attorneys for Plaintiffs, do hereby certify that I have served a copy of the **clocked-in Civil Action Coversheet, Summons and Complaint**, in the above-captioned matter on the below listed, by depositing a copy of same in the United States Mail, postage prepaid, via certified mail, restricted delivery, return receipt requested, on March 19, 2015, addressed as follows:

A Registered Agent, Inc., Registered Agent  
for Woodbridge Mortgage Investment Fund 3, LLC  
1521 Concord Pike, #303  
Wilmington, DE 19803

Said original Certified Mail Article No. 7011 1150 0001 1473 6877 is attached hereto showing that these documents were accepted and signed for by the registered agent for Defendant Woodbridge Mortgage Investment Fund 3, LLC on March 23, 2015.

Katie A. Minton  
KATIE A. MINTON

FILED  
2015 APR - 2 A 10:30

SWORN to before me this  
31st day of March, 2015.  
Kathleen R. Rouse  
Notary Public for South Carolina  
My Commission Expires: 3/13/22

Partners 95, LLC and HSGCHG Investments, LLC vs.  
Riverdale Funding, LLC and  
Woodbridge Mortgage Investment Fund 3, LLC  
Case No. 2015-CP-33-280

| SENDER: COMPLETE THIS SECTION                                                                                                                                                                                                                                                                                                |  | COMPLETE THIS SECTION ON DELIVERY                                                                                                                                                                                                                                                                                               |  |
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| <ul style="list-style-type: none"><li>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>■ Print your name and address on the reverse so that we can return the card to you.</li><li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul> |  | <p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p> |  |
| 1. Article Addressed to:                                                                                                                                                                                                                                                                                                     |  | 3. Service Type:                                                                                                                                                                                                                                                                                                                |  |
| A Registered Agent, Inc.<br>Registered Agent for Woodbridge<br>Mortgage Investment Fund 3, LLC<br>1521 Concord Pike, #303<br>Wilmington, DE 19803                                                                                                                                                                            |  | <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail<br><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise<br><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.                                                                |  |
| 2. Article Number<br>(Transfer from service label)                                                                                                                                                                                                                                                                           |  | 4. Restricted Delivery? (Extra Fee) <input checked="" type="checkbox"/> Yes                                                                                                                                                                                                                                                     |  |
| 7011 1150 0001 1473 6877                                                                                                                                                                                                                                                                                                     |  |                                                                                                                                                                                                                                                                                                                                 |  |

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-33-280

Partners 95, LLC and HSGCHG  
Investments, LLC, )

Plaintiffs, )

v. )

**AFFIDAVIT OF DEFAULT**

Riverdale Funding, LLC and  
Woodbridge Mortgage Investment  
Fund 3, LLC, )

Defendants. )

PERSONALLY APPEARED before me, W. Taylor Stanley, who, first being duly sworn, deposes and says that he is the attorney for the Plaintiffs in the above entitled action; that the Summons and Complaint were served upon Defendant Riverdale Funding, LLC on March 23, 2015, as evidenced by the Affidavit of Service filed with the Court and attached hereto as **Exhibit A**; that the Summons and Complaint were served upon Defendant Woodbridge Mortgage Investment Fund 3, LLC on March 23, 2015, as evidenced by the Affidavit of Service filed with the Court and attached hereto as **Exhibit B**; that more than thirty (30) days, exclusive of the date of service has elapsed since the service of the Summons and Complaint as aforesaid; that the Defendants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC have filed no Answers or any other pleadings as required by said Summons; and, Defendants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC are now in default.

[SIGNATURE PAGE TO FOLLOW]

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2015 MAY -8 A 10:24

CALLISON TIGHE & ROBINSON, LLC



W. Taylor Stanley  
Post Office Box 1390  
Columbia, SC 29202-1390  
Telephone: (803) 404-6900  
Facsimile: (803) 404-6902  
Email: [taylorstanley@callisontighe.com](mailto:taylorstanley@callisontighe.com)

ATTORNEYS FOR PLAINTIFFS

May 6, 2015  
Columbia, South Carolina

SWORN TO BEFORE ME this  
6<sup>th</sup> day of May, 2015.

  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission expires: 2/25/2018

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-33-280

Partners 95, LLC and HSGCHG  
Investments, LLC, )

Plaintiffs, )

v. )

AFFIDAVIT OF SERVICE

Riverdale Funding, LLC and  
Woodbridge Mortgage Investment  
Fund 3, LLC, )

Defendants. )

I, Katie A. Minton, an employee of Callison Tighe & Robinson, LLC, attorneys for Plaintiffs, do hereby certify that I have served a copy of the **clocked-in Civil Action Coversheet, Summons and Complaint**, in the above-captioned matter on the below listed, by depositing a copy of same in the United States Mail, postage prepaid, via certified mail, restricted delivery, return receipt requested, on March 19, 2015, addressed as follows:

A Registered Agent, Inc., Registered Agent  
for Riverdale Funding, LLC  
1521 Concord Pike, #303  
Wilmington, DE 19803

Said original Certified Mail Article No. 7011 1150 0001 1473 6860 is attached hereto showing that these documents were accepted and signed for by the registered agent for Defendant Riverdale Funding, LLC on March 23, 2015.

Katie A. Minton  
KATIE A. MINTON

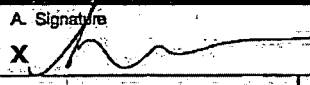
SWORN to before me this  
3<sup>rd</sup> day of March, 2015.

Kathleen Thomas  
Notary Public for South Carolina  
My Commission Expires: 3/3/22

FILED  
2015 APR -2 A 10:30



Partners 95, LLC and HSGCHG Investments, LLC vs.  
Riverdale Funding, LLC and  
Woodbridge Mortgage Investment Fund 3, LLC  
Case No. 2015-CP-33-280

| SENDER: COMPLETE THIS SECTION                                                                                                                                                                                                                                                                                                    |  | COMPLETE THIS SECTION ON DELIVERY                                                                                                                                                                                                                                                                |  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul> |  | <p>A. Signature<br/> X  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>                                                                                                                  |  |
| <p>1. Article Addressed to:</p> <p>A Registered Agent, Inc.,<br/> Registered Agent for<br/> Riverdale Funding, LLC<br/> 1521 Concord Pike, #303<br/> Wilmington, DE 19803</p>                                                                                                                                                    |  | <p>B. Received by (Printed Name) C. Date of Delivery<br/> Michael Williams 5/23/15</p>                                                                                                                                                                                                           |  |
| <p>2. Article Number<br/> (Transfer from service label)</p>                                                                                                                                                                                                                                                                      |  | <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No<br/> If YES, enter delivery address below:</p>                                                                                                                              |  |
| <p>PS Form 3811, February 2004</p>                                                                                                                                                                                                                                                                                               |  | <p>3. Service Type<br/> <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail<br/> <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise<br/> <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> |  |
|                                                                                                                                                                                                                                                                                                                                  |  | <p>4. Restricted Delivery (Extra Fee) <input checked="" type="checkbox"/> Yes</p>                                                                                                                                                                                                                |  |
|                                                                                                                                                                                                                                                                                                                                  |  | <p>7011 1150 0001 1473 6860</p>                                                                                                                                                                                                                                                                  |  |
|                                                                                                                                                                                                                                                                                                                                  |  | <p>Domestic Return Receipt 102595-02-M-1540</p>                                                                                                                                                                                                                                                  |  |

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2015 APR -2 A 10:30  
DELAWARE COUNTY  
POST OFFICE

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR TWELFTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-33-280

Partners 95, LLC and HSGCHG )  
Investments, LLC, )  
Plaintiffs, )

v. )

**AFFIDAVIT OF SERVICE**

Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC, )  
Defendants. )

I, Katie A. Minton, an employee of Callison Tighe & Robinson, LLC, attorneys for Plaintiffs, do hereby certify that I have served a copy of the clocked-in Civil Action Coversheet, Summons and Complaint, in the above-captioned matter on the below listed, by depositing a copy of same in the United States Mail, postage prepaid, via certified mail, restricted delivery, return receipt requested, on March 19, 2015, addressed as follows:

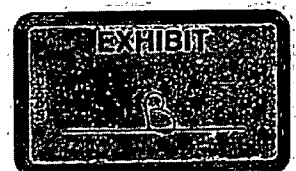
A Registered Agent, Inc., Registered Agent  
for Woodbridge Mortgage Investment Fund 3, LLC  
1521 Concord Pike, #303  
Wilmington, DE 19803

Said original Certified Mail Article No. 7011 1150 0001 1473 6877 is attached hereto showing that these documents were accepted and signed for by the registered agent for Defendant Woodbridge Mortgage Investment Fund 3, LLC on March 23, 2015.

Katie A. Minton  
KATIE A. MINTON

SWORN to before me this  
31st day of March, 2015.

Kathleen K. Ramey  
Notary Public for South Carolina  
My Commission Expires: 3/13/12



Partners 95, LLC and HSGCHG Investments, LLC vs.  
Riverdale Funding, LLC and  
Woodbridge Mortgage Investment Fund 3, LLC  
Case No. 2015-CP-33-280

| SENDER: COMPLETE THIS SECTION                                                                                                                                                                                                                                                                                                |  | COMPLETE THIS SECTION ON DELIVERY                                                                                                                                                                                                                                                                                               |  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <ul style="list-style-type: none"><li>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>■ Print your name and address on the reverse so that we can return the card to you.</li><li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul> |  | <p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p> |  |
| 1. Article Addressed to:                                                                                                                                                                                                                                                                                                     |  | 3. Service Type                                                                                                                                                                                                                                                                                                                 |  |
| A Registered Agent, Inc.<br>Registered Agent for Woodbridge<br>Mortgage Investment Fund 3, LLC<br>1521 Concord Pike, #303<br>Wilmington, DE 19803                                                                                                                                                                            |  | <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail<br><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise<br><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.                                                                |  |
| 2. Article Number<br>(Transfer from service label)                                                                                                                                                                                                                                                                           |  | 4. Restricted Delivery? (Extra Fee) <input checked="" type="checkbox"/> Yes                                                                                                                                                                                                                                                     |  |
| 7011 1150 0001 1473 6877                                                                                                                                                                                                                                                                                                     |  |                                                                                                                                                                                                                                                                                                                                 |  |

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF MARION ) THE TWELFTH JUDICIAL CIRCUIT  
PARTNERS 95, LLC and HSGCHG ) C/A No. 2015-CP-33-280  
Investments, LLC, )  
Plaintiffs, )  
v. )  
Riverdale Funding, LLC and Woodbridge )  
Mortgage Investment Fund 3, LLC, )  
Defendants. )

**AFFIDAVIT OF  
EUGENE RUBINSTEIN**

Personally appeared before me, Eugene Rubinstein, who being first duly sworn, deposes and says as follows:

1. I am over the age of eighteen years and I submit this affidavit based upon my personal knowledge and as to those matters which are not within my personal knowledge, I am making these statements on information and belief.

2. I am employed as Associate Counsel at Woodbridge Structured Funding, LLC, ("Woodbridge") which is an affiliated company of both Defendants and is charged with receiving, reviewing and acting upon notices served on Defendants' registered agent for service of process in Delaware (the "Registered Agent").

3. I am writing this Affidavit to disclose the events leading up to any default in this matter and to explain that Defendants, above named, were unaware of this law suit in its entirety until October 22, 2015.

4. According to court documents, the Complaint was served on Defendants' Registered Agent in Delaware on March 23, 2015. The usual procedure when Defendants' Registered Agent received documents on behalf of Defendants is that it scans the documents into

its system and then sends an email to Diana Balayan in our Woodbridge California office that it had received documents on behalf of the Defendants. The email from the Registered Agent does not indicate the nature of the documents it has received. Ms. Balayan can then log into Woodbridge's online account to review the documents received by the Registered Agent and determine the nature of the documents. I have been informed that once Ms. Balayan receives notices from the Registered Agent, she typically forwards them to our legal department in Connecticut.

5. During the time that the Registered Agent presumably would have informed the Woodbridge California office that it had been served with registered mail, Ms. Balayan was out of the office on maternity leave.

6. While Ms. Balayan was on maternity leave, several different people were charged with the task of "filling in" for Ms. Balayan; as a result, the notice received by Woodbridge from its registered agent in Delaware was apparently not reviewed by anyone and no determination was made that the documents received were a summons and complaint which required immediate action.

7. The same thing that happened with the initial service documents presumably happened with the Notice of Default. On information and belief, the Notice of Default was served on our Registered Agent on or about May 6, 2015. Ms. Balayan was still on maternity leave at that time and would not return until mid-June.

8. On information and belief, the Notice of Motion and Motion for Order of Reference was received by Ms. Balayan on or about August 17, 2015. She immediately forwarded it to our Connecticut office, which is staffed by transactional attorneys, who apparently did not understand what the documents meant.

9. The motion was forwarded to me via email with a comment by an attorney in our Connecticut office who stated that this litigation was "in its beginning stages" and commented that the Connecticut office "have not yet retained local counsel."

10. At the time he sent me this email, the company was contemplating transferring oversight of our routine mortgage foreclosure litigation to our California office from Connecticut.

11. The attorney who sent me the document in question on August 17, 2015 had been sending me information and documents regarding a number of routine foreclosure cases which the Connecticut office was handling in order to familiarize me with the foreclosure litigation process.

12. Given his statement that the case was in its early stages and Connecticut had not yet retained local counsel, I assumed this was one of the routine foreclosure cases which was being sent to me for purposes of familiarizing me with the process and did not require any action on my part.

13. I therefore briefly looked at the document attached, did not read it carefully, and took no further action.

14. Woodbridge has many affiliate companies so the fact that I was unfamiliar with the names of the Plaintiff LLC's in the case did not immediately alert me to the fact that the plaintiffs were not Woodbridge affiliates.

15. Thereafter, the company decided oversight of routine foreclosure matters would stay in Connecticut, so I did not receive any additional updates on foreclosure matters. As I believed this case was a routine foreclosure matter, I did not follow up.

16. On Thursday, October 22, 2015, Diana Balayan received a Notice of Hearing on the default judgment, which she forwarded to our Connecticut office.

17. Our General Counsel, David Golden, contacted me immediately upon receipt to let me know that he had never heard of the case prior to that date.

18. It was only when Mr. Golden contacted me that I realized that this was not a routine foreclosure case, that a default had been taken and immediate action was necessary.

19. After I spoke with Mr. Golden, I contacted a real estate attorney in South Carolina on October 23, 2015 to request a referral to local litigation counsel.

20. On Sunday, October 25, 2015, the real estate attorney recommended Sowell Gray Stepp and Laffitte, and on Monday, October 26, 2015, I contacted Cal Watson at Sowell Gray Stepp and Laffitte to assist us in this matter.

21. I was hired on June 1, 2015 to oversee all of the company's litigation which did not involve routine matters (such as routine judicial foreclosures). The position did not exist before I was hired. As such, we were and to an extent still are, setting up the process of transferring routine cases being handled by our attorneys in the Connecticut and Florida offices to California when routine matters become more "serious" litigation cases.

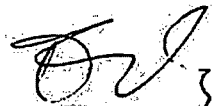
22. This new process has resulted in several "glitches," which included this case.

23. We have now advised our Registered Agent in Delaware that all future service notices will go to me, as well as to Ms. Balayan, so that we can prevent similar incidents in the future.

FURTHER AFFIANT SAYETH NOT.

Sworn to before me this \_\_\_\_ day  
of \_\_\_\_\_, 2015

\_\_\_\_\_  
Notary Public for California

  
\_\_\_\_\_  
Eugene Rubinstein

FILED

PAGE

2015 NOV -2 A 11:17

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )

County of LOS ANGELES )

On OCTOBER 29, 2015 before me, KRISTINE W. LAUENGCO, a notary public,  
Date Here Insert Name and Title of the Officer

personally appeared EUGENE RUBINSTEIN  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Signature]  
Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: AFFIDAVIT OF EUGENE RUBINSTEIN Document Date: \_\_\_\_\_

Number of Pages: 5 Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

☐ Corporate Officer -- Title(s): \_\_\_\_\_

☐ Partner -- ☐ Limited ☐ General

☐ Individual ☐ Attorney in Fact

☐ Trustee ☐ Guardian or Conservator

☐ Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

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☐ Partner -- ☐ Limited ☐ General

☐ Individual ☐ Attorney in Fact

☐ Trustee ☐ Guardian or Conservator

☐ Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

STATE OF SOUTH CAROLINA

COUNTY OF MARION

PARTNERS 95, LLC and HSGCHG  
Investments, LLC,

Plaintiffs,

v.

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC

Defendants.

IN THE COURT OF COMMON PLEAS  
THE TWELFTH JUDICIAL CIRCUIT

C/A No. 2015-CP-33-280

**DEFENDANTS' OBJECTION TO  
ENTRY OF DEFAULT OR, IN THE  
ALTERNATIVE, NOTICE OF  
MOTION AND  
MOTION TO SET ASIDE ENTRY OF  
DEFAULT**

FILED  
PAGE 33

Defendants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC, ("Defendants") hereby object to Plaintiffs PARTNERS 95, LLC and HSGCHG Investments, LLC's ("Plaintiffs") Motion for Default Judgment or, in the alternative, move the Court for an order, pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure, setting aside the entry of default. This Motion will be supported by any affidavits, memoranda, and supporting authorities that may be filed on or before the hearing of this matter to establish "good cause" as to why the Entry of Default should be set aside. Defendants base their objection to the entry of default or, in the alternative, motion to set aside entry of default on the following grounds:

1. Good cause exists to set aside the entry of default because the person responsible for receiving and distributing service of process was on maternity leave, and her duties were spread amongst several people. Consequently, the Summons and Complaint were not properly delivered to the correct people.

2. Further, good cause exists to set aside the entry of default because the legal department of Woodbridge Structure Funding, LLC was being restructured across offices in both

Connecticut and California.<sup>1</sup> As a result, confusion arose over job duties and the significance of legal documents. Moreover, the planned restructuring involved hiring a new associate counsel in California, which further complicated determining job responsibilities in this bicoastal effort. Miscommunications were inevitable. For example, Woodbridge routinely is involved in commercial foreclosures, and it was under the impression that the present lawsuit was a routine foreclosure case. On October 22, 2015, Woodbridge first realized that this matter was not a routine foreclosure and that Defendants were in default. This prompted Woodbridge to retain quickly counsel for Defendants. In sum, a “perfect storm” existed for Woodbridge and the Defendants. Good cause exists to set aside the entry of default.

3. The timing of the motion provides that the entry should be set aside. As soon as Defendants learned of the nature of the lawsuit and the entry of default, they immediately set into action to retain counsel to defend this matter.

4. Defendants have a meritorious defense. First and foremost, Defendants generally deny Plaintiffs’ allegations. Second, Plaintiffs’ complaint centers on a commitment letter, but they do not allege that it was ever executed. Plaintiffs curiously do not attach it as an exhibit to the Complaint. Defendants maintain that they had every right not to consummate the transaction pursuant to the pertinent documents. Moreover, Plaintiffs, themselves, allege that they found another source of funding, questioning their alleged damages. Defendants have not breached any contract, nor committed any tortious act.

5. There is no prejudice to the Plaintiffs if the entry of default is set aside. This case is still in the early stages of litigation. The complaint was filed on March 17, 2015 with service

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<sup>1</sup> Woodbridge Structured Funding, LLC is an affiliated company of both Defendants and is charged with receiving, reviewing, and acting upon notices served on Defendants’ registered agent for service of process in Delaware.

on the Registered Agent for Defendants on March 23, 2015. Plaintiffs' Affidavit of Default was signed on May 6, 2015 – soon after Defendants' responsive pleadings were due. Rule 55(c), SCRCP, is liberally construed by our courts "so as to promote justice and dispose of the case on the merits." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997) (citing *Dixon v. Besco Eng'g*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995)). Justice is served by setting aside the entry of default, and this Court should dispose of the case on its merits.

Provided that an entry of default has already been entered, Defendants, by and through the undersigned counsel, will move before Special Referee W. Haigh Porter for an order setting aside any entry of default pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure, with leave to file an Answer.

In support of this motion, Defendants will rely upon the Affidavit of Eugene Rubinstein submitted contemporaneously herewith and a copy of which is attached hereto as **Exhibit A**, together with other materials and authorities that may be submitted hereafter.

Undersigned counsel certifies that counsel for the Plaintiffs was consulted prior to filing this motion, but no agreement could be reached with regard to the Motion.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

J. Calhoun Watson  
Amy L.B. Hill  
Bess J. DuRant  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

*Attorneys for Defendants*

Columbia, South Carolina  
October 29, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF MARION

) IN THE COURT OF COMMON PLEAS  
) THE TWELFTH JUDICIAL CIRCUIT  
)

PARTNERS 95, LLC and HSGCHG  
Investments, LLC,

) C/A No. 2015-CP-33-280  
)  
)

Plaintiffs,

v.

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC,

Defendants.

**AFFIDAVIT OF  
EUGENE RUBINSTEIN**

MARION COUNTY SC  
CLERK OF COURT  
2015 NOV - 2 A 11:33

FILED  
BOOK PAGE

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and says as follows:

1. I am over the age of eighteen years and I submit this affidavit based upon my personal knowledge and as to those matters which are not within my personal knowledge, I am making these statements on information and belief.

2. I am employed as Associate Counsel at Woodbridge Structured Funding, LLC, ("Woodbridge") which is an affiliated company of both Defendants and is charged with receiving, reviewing and acting upon notices served on Defendants' registered agent for service of process in Delaware (the "Registered Agent").

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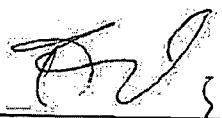
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23. We have now advised our Registered Agent in Delaware that all future service notices will go to me, as well as to Ms. Balayan, so that we can prevent similar incidents in the future.

FURTHER AFFIANT SAYETH NOT.

Sworn to before me this \_\_\_\_ day  
of \_\_\_\_\_, 2015

\_\_\_\_\_  
Notary Public for California

  
\_\_\_\_\_  
Eugene Rubinstein

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
 County of LOS ANGELES  
 On OCTOBER 29, 2015 before me, KRISTINE W. LAUENGCO, a notary public,  
 Date Here Insert Name and Title of the Officer  
 personally appeared EUGENE RUBINSTEIN  
 Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Signature]  
 Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: WARRANT OF ARREST OF EUGENE RUBINSTEIN Document Date: \_\_\_\_\_  
 Number of Pages: 5 Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_  
☐ Corporate Officer — Title(s): \_\_\_\_\_  
☐ Partner — ☐ Limited ☐ General  
☐ Individual ☐ Attorney in Fact  
☐ Trustee ☐ Guardian or Conservator  
☐ Other: \_\_\_\_\_  
 Signer Is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_  
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☐ Individual ☐ Attorney in Fact  
☐ Trustee ☐ Guardian or Conservator  
☐ Other: \_\_\_\_\_  
 Signer Is Representing: \_\_\_\_\_

W. TAYLOR STANLEY  
803-404-6900  
TaylorStanley@callisontighe.com  
Admitted in SC and NC

CALLISON  TIGHE

February 10, 2016

Via Email

W. Haigh Porter, Special Referee  
PO Box 4337  
Florence, SC 29502-4337  
*hporter5@bellsouth.net*

**RE: Partners 95, LLC and HSGCHG Investments, LLC vs.  
Riverdale Funding, LLC and Woodbridge Mortgage Inv. Fund 3, LLC  
Case No. 2015-CP-33-280  
Our File No. 6151.003**

Dear Mr. Porter:

As you requested, below is a breakdown of the damages which were proven at the hearing held on February 8, 2016:

|                                                                                  |                    |
|----------------------------------------------------------------------------------|--------------------|
| 1. Broker's Price Opinion on Connecticut Property -                              | \$500.00           |
| 2. Appraisal on Connecticut Property -                                           | \$2,000.00         |
| 3. Broker's Price Opinion on Marion County Property -                            | \$750.00           |
| 4. Appraisal on Marion County Property -                                         | \$2,500.00         |
| 5. Defendants' Counsel fees (Holloren & Sage, LLP)-                              | \$500.00           |
| 6. Callison Tighe & Robinson, LLC fees related to<br>Woodbridge/Riverdale Loan - | \$10,000.00        |
| 7. Loan Broker Commission increase -                                             | \$2,000.00         |
| 8. Additional Title examination and abstract work-                               | \$1,645.50         |
| 9. Loan Packaging fee to Grow Financial -                                        | \$495.00           |
| 10. Wire fee for Loan Packaging fee to Grow Financial -                          | \$35.00            |
| 11. Extra liability insurance required by Defendants -                           | \$1,955.70         |
| 12. Difference in Advantage Sign Contract and Tyson Sign Contract -              | <u>\$15,803.00</u> |

**TOTAL: \$38,184.20**

The itemization listed above does not account for the fact that to get a replacement sign of equal size would have required \$250,000.00 in addition to the amounts actually paid to Tyson Sign Company. Even if Advantage sign company could have delivered in the required time frame, it would have cost an additional \$35,244.69 because Defendants failed to close by

W. Haigh Porter  
February 9, 2016  
Page 2

December 30, 2014. Plaintiffs were forced to accept a smaller sign from Tyson due to Defendants' failure to close the transaction on December 30-31, 2014.

This itemization also does not account for the punitive damages which Plaintiffs seek as a result of the Defendants' breach of contract accompanied by a fraudulent act. Defendants failed to respond to Mr. Hartmann's request for proof of funds. Likewise, Defendants, nor their counsel, have responded to Mr. Tighe's inquiries regarding the reasons for instructing the Florida title company to not allow Mr. Hartmann to sign the closing documents on December 30, 2014, as originally instructed. The only reasonable conclusion from these acts is that Defendants did not have the funds to close the transaction and this fraudulent act accompanied their breach.

I hope the foregoing is helpful to your calculation of damages. If I may be of any assistance, please do not hesitate to contact me.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

A handwritten signature in black ink, appearing to read 'W. Taylor Stanley', with a stylized flourish at the end.

W. Taylor Stanley

WTS/jlb  
Enclosure  
cc: Amy Hill, Esquire (via email)  
Robert D. Hartmann (via email)

STATE OF SOUTH CAROLINA )  
COUNTY OF MARION )

IN THE COURT OF COMMON PLEAS  
FOR THE TWELFTH JUDICIAL CIRCUIT

C/A No. 2015-CP-33-280

PARTNERS 95, LLC and HSGCHG )  
Investments, LLC, )

Plaintiffs, )

v. )

Riverdale Funding, LLC and )  
Woodbridge Mortgage Investment )  
Fund 3, LLC )

Defendants. )

**MEMORANDUM OF LAW IN**  
**SUPPORT OF PLAINTIFFS'**  
**DAMAGES**

FILED  
2016 FEB 29 AM 11:19  
MARION COUNTY, SC  
SHERRY R. RHODES  
CLERK OF COURT

Plaintiffs Partners 95, LLC and HSGCHG Investments, LLC ("Plaintiffs") by and through their undersigned attorney, submit this Memorandum of Law in Support of Plaintiffs' Damages. Plaintiffs have met their burden of proving damages and therefore judgment should be entered against Defendants as set forth in more detail herein. Furthermore, Plaintiffs have met their burden and are therefore entitled to an award of punitive damages in an amount to be determined by the Court.

**PROCEDURAL HISTORY**

This matter was commenced by the filing of the Summons and Complaint on March 17, 2015. Thereafter, Defendants were served via certified mail, return receipt requested, restricted delivery addressed to their registered agent as is evidenced by the Affidavits of Service filed with the Court on April 2, 2015. An Affidavit of Default was filed with the Court on May 8, 2015. On August 10, 2015, Plaintiffs filed their Notice of Motion and Motion for Order which was granted by Order of Reference signed by the Honorable Sherry R. Rhodes, Clerk of Court for Marion County on August 10, 2015. After service of a Notice of Hearing, Defendants Riverdale

Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively, "Defendants") filed their Objection to Entry of Default or, in the Alternative, Notice of Motion and Motion to Set Aside Entry of Default on November 2, 2015, which, after a hearing held on November 4, 2015 was denied by Order dated December 16, 2015, filed of record on December 29, 2015. Thereafter, a damages hearing was held on February 8, 2016 before the Honorable Haigh Porter, as Special Referee for Marion County. Following the hearing, Mr. Porter requested memoranda from each party as to Plaintiff's right to recover damages.

### ARGUMENT

"It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998). In a default action, the entry of default settles the issue of liability. *Ammons v. Hood*, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986). A hearing is held solely to determine what damages should be awarded. *Id.*

#### **I. Plaintiffs are entitled to judgment on their breach of contract cause of action.**

"The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Branche Builders, Inc., v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Damages are designed to give the nonbreaching party the benefit of his bargain with the breaching party. *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Company, Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990). Breach of contract damages normally consist of two distinct elements: (1) out-of-pocket costs actually

incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed. *Collins Entertainment Inv. v. White*, 363 S.C. 546, 559, 611 S.E.2d 262, 268-9 (Ct. App. 2005).

“When a plaintiff seeks special damages for breach of contract, he must plead and prove both the fact of damage and the amount of damage with a reasonable degree of certainty.” *Thornton-Crosby Dev.*, 303 S.C. at 77, 399 S.E.2d at 11. “The fact of damage is proved by showing (1) that the plaintiff realized an actual loss he would not have incurred but for the defendant’s breach of contract and (2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made.” *Id.* at 77-8. The party claiming special damages must show that the defendant was warned of the probable existence of unusual circumstances or that because of the defendant’s own education, training, or information, the defendant had reason to foresee the probable existence of such circumstances. *Stern & Stern v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992). The defendant need not foresee the exact dollar amount of the injury, but must only know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance. *Id.* “If the fact of damages is established, the law does not require the amount of damage to be proved with absolute mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made.” *Thornton-Crosby Dev.*, 303 S.C. at 77, 399 S.E.2d at 11; *see also*, *Collins*, 363 S.C. at 559, 611 S.E.2d at 268-9.

Plaintiff have entered evidence to establish the following actual damages<sup>1</sup>:

- |                                                                |            |
|----------------------------------------------------------------|------------|
| 1. Broker’s Price Opinion on Connecticut Property (Exhibit 5)- | \$500.00   |
| 2. Appraisal on Connecticut Property (Exhibit 6)-              | \$2,000.00 |

<sup>1</sup> References to Exhibits included herein for the Court’s convenience. Testimony related to those damages documented with Exhibits is also throughout the transcript.

|                                                                                                          |                                |
|----------------------------------------------------------------------------------------------------------|--------------------------------|
| 3. Broker's Price Opinion on Marion County Property (Exhibit 7)-                                         | \$750.00                       |
| 4. Appraisal on Marion County Property (Exhibit 8)-                                                      | \$2,500.00                     |
| 5. Defendants' Counsel fees (Holloren & Sage, LLP) <sup>2</sup> -                                        | \$500.00                       |
| 6. Callison Tighe & Robinson, LLC fees related to<br>Woodbridge/Riverdale Loan <sup>3</sup> (Exhibit 4)- | \$10,000.00                    |
| 7. Loan Broker Commission increase <sup>4</sup> -                                                        | \$2,000.00                     |
| 8. Additional Title examination and abstract work <sup>5</sup> -                                         | \$1,645.50                     |
| 9. Loan Packaging fee to Grow Financial (Exhibit 12)-                                                    | \$495.00                       |
| 10. Wire fee for Loan Packaging fee to Grow Financial <sup>6</sup> -                                     | \$35.00                        |
| 11. Extra liability insurance required by Defendants (Exhibit 9)-                                        | \$1,955.70                     |
| 12. Difference in Advantage Sign Contract<br>and Tyson Sign Contract (Exhibits 10 & 11)-                 | <u>\$15,803.00</u>             |
| <b>TOTAL:</b>                                                                                            | <b>\$38,184.20<sup>7</sup></b> |

Each of the damages listed above are the natural consequence and proximate result of the Defendants' breach of contract. Had the loan closed, as had been planned on December 30-31, 2014, the above listed items of damages would have been used, or have been avoided. In particular, had the loan with the Defendants closed, the Broker's Price Opinions and Appraisals would have been used in the Defendant's loans; the Defendants' counsel fees would have been used and applied toward closing; Plaintiffs' counsel fees, loan packaging fees and wire fees would have been used as was originally planned; the loan broker commission would have remained the same as no replacement loan would have been necessary; the liability insurance which Defendants required would have been utilized and required by the Defendants' loan; and the Advantage Sign could have been installed as originally planned. However, because the Defendants' failed to close the loan, each of the above listed items of damages were increased, or

<sup>2</sup> See Exhibit 12, (Transcript P

<sup>3</sup> Alternatively, Defendants should be required to pay the additional counsel fees incurred by Plaintiffs in closing the Avatar loan in the amount of \$8,500.00.

<sup>4</sup> (Transcript P. 54, L. 1-8).

<sup>5</sup> (Transcript P. 17, L. 15-25; P. 18 1-14)

<sup>6</sup> (Transcript P. 55, L. 13-15).

<sup>7</sup> Plaintiffs further note that in closing the Avatar loan an origination fee of \$60,000.00, an inspection charge TR Travel of \$1,862.98, a valuation report charge of \$500.00, a Reis Report charge in the amount of \$1,500.00, and a service fee in the amount of \$4,000.00 were incurred. See Exhibit 4.

rendered useless. Only by the Defendants compensating Plaintiffs in the sum of \$38,184.20, can the Plaintiffs be placed in the position they would have enjoyed had the Defendants performed under the contract.

Defendants may argue that they should not be responsible for the additional increase in the price of the sign; however, the Defendants were on notice of the requirement to close by December 31, 2014, or the Plaintiffs would incur additional fees<sup>8</sup>. Without question, Defendants were advised of the deadline by which the loan must close in order to avoid additional fees for the Plaintiffs. Defendants cannot now complain that because they failed to live up to their end of the bargain, Plaintiffs have incurred additional expenses. Furthermore, it should be noted that because Plaintiffs accepted a smaller sign, the additional expense was reduced. Had Plaintiffs required the same size sign and Advantage had been able to perform (as it would have been had the loan closed on December 31, 2014), an additional \$35,244.69 would have been due and payable to Advantage sign company. Furthermore, had Plaintiffs sought the same size sign in the marketplace from Tyson Sign Company, it would have cost an additional \$250,000.00.

Because Plaintiffs incurred all of their damages as a direct and proximate result of Defendants' breach, which potential damages were well aware to Defendants, Plaintiffs are entitled to an entry of judgment on their breach of contract cause of action.

**II. Plaintiffs are entitled to an award of punitive damages based on Defendants' breach of contract accompanied by a fraudulent act.**

South Carolina law has long recognized a plaintiff's right to recover punitive damages for breach of contract accompanied by a fraudulent act. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985). To recover punitive damages for breach of contract accompanied by a fraudulent act, the plaintiff must prove three elements: (1) a

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<sup>8</sup> For example, the additional purchase price which would have been incurred.

breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Id.* 287 S.C. at 53, 336 S.E.2d at 503-4. Fraudulent intent is normally proved by the circumstances surrounding the breach. *Id.* The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. *Id.* A fraudulent act is any act characterized by dishonesty in fact or unfair dealing. *Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002). “‘Fraud’ in this sense assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.” *Id.*

In *Conner*, our Supreme Court addressed the question of whether the City of Forest Acres’ alleged pretextual reasons for the plaintiff’s termination while knowing the reasons were false and did not justify termination for cause, could give rise to the fraudulent act element of breach of contract accompanied by a fraudulent act. *Id.* The Court held that the City of Forest Acres’ alleged pretextual reasons for termination, while knowing the reasons given were false, could give rise to a breach of contract accompanied by a fraudulent act. *Id.*

The practice of awarding punitive damages originated in principles of common law to deter the wrongdoer and others from committing like offenses in the future. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009). “Punitive damages may properly be imposed to further a state’s legitimate interests in punishing unlawful conduct and deterring its repetition. The state’s interest in awarding punitive damages must remain consistent

with the principle of penal theory that the punishment should fit the crime.” *Id.* (internal citations and quotations omitted).

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant’s misconduct was willful, wanton, or in reckless disregard of the plaintiff’s rights. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997). “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.” *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). The amount of damages, remains largely within the discretion of the finder of fact and the trial judge is vested with considerable discretion of the amount of a punitive damages award. *Id.*

There are three “guideposts” a trial court must follow when conducting a post-judgment review of punitive damages awards: (1) reprehensibility, (2) ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award and (3) comparative penalty awards. *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183.

In regard to the reprehensibility “guidepost,” the South Carolina Supreme Court has stated:

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant’s conduct. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. This principle reflects the view that some wrongs are more blameworthy than others. In considering the reprehensibility, a court should consider whether (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

*Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (internal citations and quotations omitted).

The *Mitchell* Court continued with regard to the ratio “guidepost:”

[T]he Court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is “perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award.” [*BMW of North America v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589 (1996)]. Although the Supreme Court has “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,” and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” [*State Farm v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1589 (2003)]. Nevertheless, the Supreme Court has made clear that “there are no rigid benchmarks that a punitive damages award may not surpass,” so long as “the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered.” *Id.* at 425-26, 123 S. Ct. 1513. With this in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant’s ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

*Id.* at 587-88, 686 S.E.2d at 185. A court need not always compare the punitive damages award to the actual damages award, but may compare it to the potential harm suffered by the plaintiff.

*Id.* at 590, 686 S.E.2d at 187.

When addressing comparative penalty awards, a court may consider “the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant’s conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.” *Id.* at 588-89, 686 S.E.2d at 186.

In reviewing more recent punitive damages awards, South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct. See *James*, 371 S.C. at 196-97, 638 S.E.2d at 671-72 (upholding a 6.82 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct.App.2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C.

298, 594 S.E.2d 867 (Ct.App.2004) (upholding a 2.54 to 1 ratio); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003) (upholding a 9.96 to 1 ratio); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio). *Cf. Atkinson*, 361 S.C. at 170, 604 S.E.2d at 392-93 (overruling a 127 to 1 ratio).

*Id.* at 593, 686 S.E.2d at 188 (reviewing comparative penalty awards and holding that a ratio of 9.2 to 1 satisfied due process and comported with South Carolina law).

As has been set forth in more detail above, Plaintiffs have met their burden of showing Defendants breached the terms of the commitment, therefore breaching a contract with Plaintiffs. In regards to Defendants' fraudulent intent and fraudulent act in breaching the contract, the only reasonable inference from the evidence presented is that Defendants did not have the funds available to close. The evidence shows that on the morning of December 30, 2014, Mr. Tighe received over 20 emails from the Defendants' counsel in Connecticut prior to 12:07 p.m. Moreover, Mr. Tighe received at least 10 emails from representatives of the Defendants themselves. All of these emails were related to the closing and in preparation of closing. At 12:07 p.m. on December 30, 2014, Mr. Tighe received a copy of an email directed to a representative of Fidelity National Title from Mr. Roberts, the Defendants' counsel, instructing the title company not to allow Plaintiffs to execute the closing documents. Mr. Tighe immediately responded to Mr. Roberts inquiring, "Is there a problem?" He received no response. Mr. Tighe later emailed Mr. Roberts again stating, "Rich: I need you to call me. I called for Larry but could not get him. Does your client know my client is going to lose \$300,000 if we don't close today?" As of the date of the hearing<sup>9</sup>, Mr. Tighe had not received any response to his calls and emails to Mr. Roberts inquiring as to the reasons for Defendants' failure to close. Likewise, Mr. Hartmann on behalf of the Plaintiffs has inquired into the reasons

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<sup>9</sup> Undersigned counsel is not aware of any communications from Defendants to Plaintiffs or their representatives since the hearing other than related to this action.

behind the Defendants' failure to close the transaction. Mr. Hartmann went so far as to tell representatives of the Defendants that he did not believe Defendants had the money to close the deal and that he thought the Defendants ran out of cash. Mr. Hartmann asked to see proof of funds, but has not been provided such proof.

As is stated in *Floyd*, fraudulent intent is normally proved by the circumstances surrounding the breach. Based on the circumstances surrounding the hours and minutes leading up to the Defendants' failure to close the transaction, the only reasonable inference is that Defendants did not have the funds to close the transaction, yet up to December 30, 2014 at 12:07 p.m continued to negotiate the transaction as if they were prepared to close. Defendants' continued failure to communicate and failure to provide proof of funds leads to the unavoidable conclusion that Defendants did not have the funds to close the transaction. Allowing the Plaintiffs to continue preparation for closing, including Mr. Hartmann's presence at the title agency in Florida, while the Defendants knew they had no way of funding the transaction per their commitment constitutes dishonesty and unfair dealing. Defendants should be subject to the imposition of punitive damages to punish their unlawful conduct and deter its repetition of such action.

Defendants' actions were reprehensible. While the harm caused was economic, Defendants knew that Plaintiffs were financially vulnerable and would incur large additional expenses if the loan did not close on December 31, 2014. Fortunately, the Plaintiffs and their counsel were able to negotiate such that Plaintiffs did not incur \$300,000.00 in additional purchase price. Moreover, the evidence leads to the conclusion that the harm was the result of intentional malice, trickery or deceit as Defendants apparently did not have the funds to close the loan.

In regard to the ratio "guidepost," Defendants knew that if the loan failed to close, Plaintiffs would incur additional expenses, including but not limited to the additional \$300,000.00 for the purchase price of the Swamp Fox Amphitheater, but also expenses in regard to the signage. Because Defendants knew of these potential additional expenses, the Court should compare the punitive damages imposed not to the actual damages, but to the potential damages which were avoided because of Plaintiffs successful efforts to mitigate their damages.

Finally, with regard to comparative penalty awards, Plaintiffs believe that because of the reprehensible nature of Defendants' actions, along with the potential damages which Defendants had knowledge of, the Court should fix the punitive damage award in the mid- single digit of the ratio spectrum.

### **III. Plaintiffs are entitled to judgment and treble damages pursuant to the South Carolina Unfair Trade Practices Act.**

Any person who suffers any ascertainable loss of money or property as a result of the use or employment by another person of an unfair or deceptive method, act or practice may bring an action to recover actual damages. S.C. Code Ann. § 39-5-140(a). "If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court *shall* award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court *shall* award to the person bringing such action under this section reasonable attorney's fees and costs." *Id.* A willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of S.C. Code Ann. § 39-5-20. S.C. Code Ann. § 39-5-140(d). Under S.C. Code Ann. § 39-5-20, "unfair

methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are" declared unlawful.

A deceptive act is any act which has a tendency to deceive. *Wright v. Craft*, 372 S.C. 1, 26, 640 S.E.2d 486, 500 (Ct. App. 2006). "Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends on the surrounding facts and the impact on the transaction in the marketplace." *Id.* An act is unfair when it is offensive to public policy or when it is immoral, unethical, or oppressive. *Id.* An impact on the public interest is required for recovery under the UTPA, which may be shown if the acts or practices have the potential for repetition. *Id.* at 29, 640 S.E.2d at 501. Each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the public impact prong of UTPA. *Id.* at 30, 640 S.E.2d at 502.

The Unfair Trade Practices Act ("UTPA") allows for the recovery of actual damages. *Wright*, at 24, 640 S.E.2d at 499. "Actual damages under the UTPA include special or consequential damages that are a natural and proximate result of deceptive conduct." *Id.*

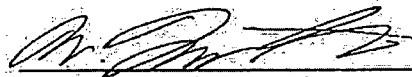
Actual damages on the UTPA cause of action are the same as those in the breach of contract cause of action. However, because as is outlined in the breach of contract accompanied by a fraudulent act section of this Memorandum, the Defendants actions portray a willful or wanton disregard of Plaintiffs' rights, the actual damages should be trebled and the Plaintiffs awarded attorney's fees and costs in this action. Plaintiffs request the opportunity to submit an affidavit of attorney's fees upon the completion of this action such that all attorney's fees and costs may be included.

### CONCLUSION

Plaintiffs are entitled to an award of their actual damages on their breach of contract cause of action. Moreover, because of the fraudulent acts and intent in the Defendants' breach of contract, the Plaintiffs are entitled to an award of punitive damages under their breach of contract accompanied by a fraudulent act cause of action. Finally, Defendants have willfully and knowingly violated the provisions of the South Carolina Unfair Trade Practices Act, entitling Plaintiffs to treble damages and an award of attorneys' fees and costs.

Respectfully submitted,

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**Attorneys for the Plaintiffs**

February 25, 2016  
Columbia, South Carolina

|                                                                       |   |                                |
|-----------------------------------------------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA                                               | ) | IN THE COURT OF COMMON PLEAS   |
|                                                                       | ) | THE TWELFTH JUDICIAL CIRCUIT   |
| COUNTY OF MARION                                                      | ) |                                |
| PARTNERS 95, LLC and HSGCHG Investments, LLC,                         | ) | C/A No. 2015-CP-33-280         |
|                                                                       | ) |                                |
| Plaintiffs,                                                           | ) | RESPONSE TO PLAINTIFFS         |
|                                                                       | ) | PARTNERS 95, LLC AND HSGCHG    |
| v.                                                                    | ) | INVESTMENTS, LLC'S PRESENTMENT |
|                                                                       | ) | OF DAMAGES                     |
| Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC | ) |                                |
|                                                                       | ) |                                |
| Defendants.                                                           | ) |                                |

FILED  
 2016 FEB 29 AM 11:19  
 MARION COUNTY, SC  
 CLERK OF COURT

Defendants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively "Defendants") hereby responds to the presentment of damages by Plaintiffs PARTNERS 95, LLC and HSGCHG Investments, LLC ("Plaintiffs") at the hearing before this Court on February 8, 2016. For the reasons set forth below, Plaintiffs have not proven their damages and thus are not entitled to an award of damages in any amount.

#### **Facts and Procedural History**

This matter arises out of a claim by Plaintiffs that they were damaged when Defendants, as lenders, did not fund a proposed loan set forth in a loan commitment letter between Plaintiffs and Defendants. Plaintiffs claim that they were forced to seek other funding and thus incurred damages in the course of preparing for the closing on the property they ultimately purchased with the help of a subsequent lender. Plaintiffs brought a complaint with the following causes of action<sup>1</sup>: 1) Breach of Contract, 2) Breach of Contract Accompanied by a Fraudulent Act, 3) Failure to Honor a Promise to Lend, 4) Fraud, and 5) Violation of South Carolina Unfair Trade

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<sup>1</sup> Plaintiffs did not specifically name their causes of action in the complaint, but based on the allegations, Defendants have surmised that these are the intended causes of action.

Practices Act. The Complaint was filed on March 17, 2015 in Marion County and subsequently referred to Honorable W. Haigh Porter as special referee for Marion County, South Carolina on August 6, 2016. On May 6, 2015, Plaintiffs filed an Affidavit of Default against Defendants. On October 29, 2016, Defendants filed a Motion to Set Aside the Default. The Court held a hearing on Defendants' Motion but ultimately upheld the Default. Thereafter, the Court held a hearing to determine the amount of damages to be awarded, if any, on February 8, 2016. Shortly thereafter, at the Court's request, Plaintiffs submitted a letter summarizing the amount and category of damages sought. The Court allowed Defendants to respond to the summary of damages and as such, Defendants submit this response.

**Plaintiffs have not been damaged because the loan Plaintiffs ultimately received contained better terms than those of the Proposed Loan by Defendants.**

As an overarching matter, Plaintiffs cannot show that they have been damaged in any way because they ultimately received a loan with a much lower interest rate than the loan that was proposed between Plaintiffs and Defendants. The loan commitment letter from Defendant Riverdale Funding, LLC to Plaintiff Partners 95, LLC dated December 12, 2014 was entered as an exhibit at the damages hearing ("Commitment Letter"). The Commitment Letter describes a loan in the amount of \$1,900,000 with a fixed rate per annum equal to 12% with a term of one year with the option to extend the maturity date by an additional period of one year if the loan remained sufficient in the commercially reasonable discretion of the Lender. By comparison, the loan that Plaintiffs ultimately entered into to purchase the subject property with Avatar ("the Avatar Loan") was in the amount of \$2,000,000 with an interest rate of 8.99% for the first six months and 9.99% thereafter (Transcript pp. 31-32, 73). Certainly, 8.99 % or 9.99% is a better interest rate than 12%. Assuming the interest is only compounded on an annual basis, the

interest for the 12% loan on \$1,900,000 from Defendants is \$228,000 compared to \$189,800 in interest for the Avatar loan of \$2,000,000 with 8.99% for the first six months and 9.99% for the remaining six months.<sup>2</sup> Notable, Plaintiffs failed to enter the terms of the Avatar loan even though Mr. Tighe, the closing attorney noted in his testimony that you would have to look at the fee structure and interest rate and all of those things to determine if Plaintiffs were damaged by entering into the Avatar loan as compared with the Defendants' proposed loan. (Transcript p. 31).

In addition, there are other aspects of the Avatar loan that benefit Plaintiffs more than the terms of Defendants proposed loan. Even though the Avatar loan documents were not presented by Plaintiffs, Defendants are basing their limited comparison on the closing document submitted as evidence at the damages hearing. These components are set forth in bullet points below:

- **Attorney's Fees:** Under Defendants' proposed loan, Plaintiffs would have been required to pay all of Defendants' attorney's fees, which totaled \$17,500 compared with \$12,500 for lender's counsel that was reported on the Borrower's statement for the Avatar Loan.
- **Guarantee:** Mr. Robert Hartman was required to guarantee Defendants' proposed loan whereas there is no evidence that a guarantee was required for the Avatar loan.
- **Commitment/Origination Fee:** Defendants charged a commitment fee of \$114,000 as compared with the \$60,000 origination fee listed on the Borrower's statement for the Avatar loan.
- **Amount:** Defendants were only lending \$1,900,000 whereas Avatar ultimately lent \$2,000,000 to Plaintiffs.

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<sup>2</sup> This assumes that the ultimate loan Plaintiffs received had a one year maturity date similar to the proposed terms of Defendants' proposed loan. Certainly, the ultimate loan would have had at least a one year period since the interest rate testified to by the closing attorney Mr. Mike Tighe was 8.99% for the first six months and 9.99% thereafter. See Transcript pp. 31-32.

For these reasons, the Avatar loan was ultimately a better loan with more favorable terms for Plaintiffs. Thus, Plaintiffs have not been damaged by the fact that Defendants did not ultimately close their loan with Plaintiffs. Rather, Plaintiffs ultimately benefitted from the circumstances. The difference between the interest rates alone equals a savings to Plaintiffs of \$38,200. Coincidentally, Plaintiffs are seeking \$38,184.20 in actual damages. See Letter from Taylor Stanley dated February 10, 2016.

**Plaintiffs Have Failed to Properly Plead the Following Causes of Action: Fraud, Breach of Contract with a Fraudulent Intent, Failure to Honor a Promise, and Violation of the South Carolina Unfair Trade Practices Act.**

“A party seeking a default judgment is entitled only to such relief as is framed by his pleading and then only to the extent requested therein.” *Mutual Sav. & Loan Asso. V. McKenzie*, 274 S.C. 630 (1980). Thus if a complaint fails to state a cause of action, a default judgment on that cause of action is reversible error because it is done so without the authority of law. *Id.* See also, *Gadsden v. Home Fertilizer and Chemical Co.*, 89 S.C. 483, 72 S.E. 15 (1911); *Williams v. American Ry. Express Co.*, 118 S.C. 121, 110 S.E.125 (1921). In this instance, Plaintiffs have failed to set forth in their complaint the proper elements of Fraud, Breach of Contract with a Fraudulent Intent and a violation of the South Carolina Unfair Trade Practices Act (SCUTPA). For this reason, Plaintiffs cannot receive any damages allowed pursuant to those causes of action including but not limited to punitive damages, treble damages in the instance of SCUTPA, and attorney’s fees in the instance of SCUTPA.

**Fraud**

It is well-settled in South Carolina that in order to prove fraud, the following elements must be shown: 1) a representation, 2) its falsity, 3) its materiality, 4) the speaker’s knowledge

of its falsity; 5) his intent that it should be acted upon by the person, 6) the hearer's ignorance of its falsity, 7) his reliance on its truth, 8) his right to rely thereon, and 9) his consequent and proximate injury. *Id.*; *Kahn Construction Co. v. South Carolina National Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). Plaintiffs have failed to properly plead the elements of fraud.

First, Plaintiffs plead that the misrepresentation is that Defendants would extend funds to the Plaintiffs for the acquisition and development of the Property pursuant to the terms of the Commitment. See Complaint, ¶ 41. However, in Paragraph 12 of the Complaint, Defendants admit that they had not executed the Commitment letter, which was a contingency prior to funding the loan. In addition, a review of the Commitment letter submitted in the damages hearing shows it is clear that many of the contingencies listed are only satisfied if Defendants deemed them satisfied in their sole discretion. For instance, Defendant's review of Plaintiffs' credit report was required to be satisfactory to Defendants in Defendants' sole discretion. Another such example is that Defendants were entitled to deem the broker's opinion letter satisfactory only in Defendants' sole discretion. The allegations of the Complaint make it clear that not all contingencies had been met and a review of the Commitment letter is even clearer that Defendants had not promised to unconditionally fund the loan. Thus, there is no misrepresentation which meets this element of Fraud.

In addition, Plaintiffs do not conclusively plead that Defendants' representations were false and material. Rather, Plaintiffs plead that "upon information and belief" Defendants' representations were false and material. This non-conclusive assertion does not satisfy the elements of a Complaint that can conclusively assert a claim against Defendants. See Complaint, ¶43. Similarly, Plaintiffs plead that they are "informed and believe" that Defendants either knew

that the representations were false or were completely reckless in their disregard of the representations' truth or falsity. See Complaint, ¶44. Thus, the elements of Defendants representations as false and martial as well as Defendants' knowledge of such falsity are destroyed by the allegations themselves, to which Plaintiffs are bound.

Plaintiffs have simply failed to plead that they had a right to rely on the alleged misrepresentation. This necessary element is missing from the pleadings. If the Court reviews the Commitment Letter, it is clear that Plaintiffs had no right to rely on it when so many contingencies were based on Defendant's approval within Defendants' sole discretion. It is impossible for Plaintiffs to show that they had a right to rely on Defendants' supposed representation that they would unconditionally lend the money when it is apparent from the face of the Commitment Letter that is not the case.

The failure to properly plead the elements of fraud is fatal to Plaintiffs' default judgment on this cause of action.

#### **Breach of Contract Accompanied by Fraudulent Act**

In order to prove a breach of contract accompanied by a fraudulent act, Plaintiffs must show: 1) breach of contract, 2) fraudulent intent relating to the breach, and 3) fraudulent act accompanying the breach. *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374, 378 (1986). Plaintiffs first non-conclusively allege there was a fraudulent intent by stating that they are "informed and believed" that Defendants intent in breaching the Commitment Letter was fraudulent. Complaint, ¶31. This type of pleading is fatal when seeking a default judgment. However, most importantly, Plaintiffs have failed to allege with any specificity the fraudulent act that accompanied the alleged breach of failing to fund the loan. Neither nonfeasance nor a mere statement without more constitutes a fraudulent act that sufficiently meets this element of the

cause of action. *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 918 (Ct.App. 1991). The fraudulent act must be separate and distinct from the act constituting the breach of contract. *Floyd v. Country Squires Mobile Homes, Inc.* 287 S.C. 51, 336 S.E.2d 502 (Ct.App. 1985). Plaintiffs have failed to plead a specific fraudulent act separate and apart from the alleged breach of contract. The standard of proof for the fraudulent act is clear and convincing evidence, which clearly cannot be met failing to allege any such specific act. *Osborn v. Univ. Med. Assocs. Of the Med. Univ. of S.C.*, 278 F.Supp. 2d 720 (D.S.C. 2003). For this reason, Plaintiffs' attempt to assert a cause of action for breach of contract accompanied by a fraudulent act fails.

#### **Failure to Honor a Promise**

Although, failure to honor a promise is not a common cause of action in South Carolina, the Supreme Court recently declined to hold a lender liable for failure to honor a promise to lend money where the promise was not properly set forth in writing and signed by all parties. *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 107, 691 S.E.2d 158 (2010). S.C. Code § 37-10-107, known as the Lender's Statute of Frauds, provides in relevant part that no person can maintain a cause of action for failure to perform on an alleged promise or agreement to loan money in excess of \$50,000 unless the plaintiff has received a writing from the defendant lender containing the material terms and conditions of the promise and the Plaintiff has signed the writing. *Id.* Again, by the terms of the Complaint, the Commitment Letter upon which Plaintiffs rely was not executed.

However, even if the Commitment Letter had been executed, the letter did not provide an unconditional promise to lend the money. In the *Sea Cove* matter, the Supreme Court noted that the writing relied upon provided only a conditional qualification and that the qualification

required a verification and validation of the previously supplied information along with an appraisal and site work as well as expressing that "additional information" may be needed for final approval. *Id.* Based on the terms of the writing, the Supreme Court noted that the circuit court was correct in determining that the right to receive the loan's proceeds clearly had not vested and thus the writing did not satisfy the requisite foundation as contemplated by the legislature.

Similarly in this matter, the Commitment Letter, even if properly executed, has many instances whereby Defendants as lender can determine the adequacy of a form or review in their sole discretion. For instance, Defendants in their sole discretion could determine whether or not Plaintiffs' credit report was satisfactory. There was no indication that Defendants had determined that Plaintiff's credit report was satisfactory and such determination was in Defendants' sole discretion.

For these reasons, Plaintiffs have not satisfied the Lender's Statute of Frauds such that they can provide a written document whereby Defendants unconditionally promise to lend money and such writing was executed by all parties. Thus this cause of action fails as a matter of law as plead in the Complaint.

#### **Violation of the South Carolina Unfair Trade Practices Act**

In order to prove a violation of the SCUTPA, Plaintiffs must show that the act or practice complaint of has an impact on the public interest by showing that the conduct is capable of repetition. *Bessinger v. Food Lion, Inc.*, 305 F.Supp. 2d 574, 581 (D.S.C. 2003), see also *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461, 466 (2004). However, in order make such a showing, the Plaintiffs must do more than allege a conclusory statement with no specific facts demonstrating that Defendants have conducted the same kind of action in the past

or that their procedures or business practices create the potential for repetition in the future.

*Compare Ameristone Tile, LLP v. Ceramic Consulting Corp.*, 966 F.Supp. 2d 604 (D.S.C. 2013).

In this instance, Plaintiffs have not even provided a conclusory statement because again, Plaintiffs plead that “upon information and belief” Defendants are active commercial lenders engaged in numerous transactions inside and outside of the State of South Carolina. This non-conclusory allegation does not come close to rising to the standard required to properly plead a violation of the SCUTPA and for this reason, Plaintiffs’ allegations for this cause of action cannot be the basis of a default award of damages against Defendants.

Plaintiffs SCUTPA claims fail on additional grounds because the acts complained are regulated under the statutory authority of S.C. Code § 37-10-107, known as the Lender’s Statute of Frauds. S.C. Code § 39-5-40(a) excludes from the SCUTPA any activity regulated by state or federal agencies or other state statutes. In this case, as described above, the Lender’s Statute of Frauds describes the terms under which a potential borrower can rely upon a promise to lend. Defendants cannot be held to a higher standard than that afforded in the state statute. For this reason, Plaintiffs’ pleadings as to the SCUTPA fail on their face and cannot provide an avenue for a default damages award to Plaintiffs.

**Plaintiffs Specific Items of Damages Fail.**

As set forth above, Plaintiffs have not been damaged because the loan that they ultimately achieved with Avatar provided better terms than Defendants’ proposed loan. In a default case, such as the instant case, Plaintiffs must prove the amount of their damages by a preponderance of the evidence. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct.App. 2002). Plaintiffs cannot do so simply because they received a better loan than the one sought from Defendants. However, even if this Court does not accept that

position, the specific elements of Defendants' damages fail because they cannot prove such damages by a preponderance of the evidence for the following reasons:

- Broker's Price Opinion on Connecticut Property -- \$500. This amount was incurred for possible collateral required by the Defendants' loan. However, by the terms of the Commitment letter, Defendants at their sole discretion could determine whether or not the broker's price opinion was adequate. Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.
- Appraisal on Connecticut Property -- \$2,000. This amount was incurred on an appraisal of possible collateral required by the Defendants' loan. However, by the terms of the Commitment letter, Defendants at their sole discretion could determine whether or not the appraisal was adequate. Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.
- Broker's Price Opinion on Marion County Property -- \$750. This amount was incurred for possible collateral required by the Defendants' loan. However, by the terms of the Commitment letter, Defendants at their sole discretion could determine whether or not the broker's price opinion was adequate. Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.
- Appraisal on Marion County Property - \$2,500. This amount was incurred on an appraisal of possible collateral required by the Defendants' loan. However, by the terms of the Commitment letter, Defendants at their sole discretion could

determine whether or not the appraisal was adequate. Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Callison Tighe & Robinson, LLC Fees Related to Woodbridge/Riverdale Loan -- \$10,000. Mr. Tighe testified that some of his work for the Woodbridge Loan was used in the Avatar loan, yet he did not distinguish exactly which portion of the \$10,000 worth of work related solely to Defendants' proposed loan. Mr. Tighe provided no itemized list of his legal services or engagement letter and thus it is impossible to show that the services claimed are solely related to the Woodbridge loan especially when he testified that his fee is simply an estimate based on the "amount of responsibility, the time generally required, and the kind of documentation required to produce the transaction." (Transcript, p. 18). Mr. Tighe further testified that there were some items that he prepared for Defendants' proposed loan that he ultimately used in the Avatar loan, yet there was no distinguishing exactly what these items were or what different legal requirements existed between the two loans. (Transcript pp. 28-29).
- Additional Title Examination on Connecticut Property -- \$1,645.50. This is title work that was required on a third piece of property that Avatar required for collateral. This cost pertains to a separate loan and thus is not a damage related to Plaintiffs' allegations against Defendants.
- Loan Broker Commission Increase -- \$2,000. This amount is simply based on the fact that Plaintiffs borrowed an additional \$100,000 with the Avatar loan as opposed to the \$1,900,000 they sought to borrow from Defendants. The fact of

the matter is they received the advantage of the additional \$100,000 and based on the Borrower's Statement; it appears that Plaintiffs used the \$100,000 in some form or fashion including buying out two of the members of Partners 95.

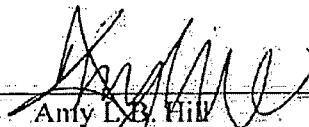
- Difference in Advantage Sign Contract and Tyson Sign Contract -- \$15,803.

Plaintiffs' desire to go with a more expensive sign company was wholly related to their desire to have the sign up by early May. This is a desire separate and apart from any actions of Defendants and was not a necessity for Plaintiffs. In fact, Mr. Hartman testified that a portion of the sign is currently down. (Transcript pp. 77-78). This amount is not a valid damage where it appears that the proposed contract was an estimate based on the use of the current poles. See Advantage LED Signs Contract entered as Exhibit 10 to the damages hearing. In fact, Plaintiffs testified that they now have to replace a portion of the sign because the company they ultimately used did not use new poles but rather attempted to use the poles that were already located on the site. (Transcript p. 78, Exhibit 10 to the Damages Hearing). When Plaintiffs had an independent engineer prepare a report, they were required to use additional poles. There was no evidence submitted as to how much more the Advantage sign cost would have been if new poles were required, which should have been a necessary element of that contract based on the engineer's report.

### **Conclusion**

In conclusion, Plaintiffs have not met their burden of proving damages related to the allegations against Defendants as set forth in their Complaint. For this reason, no damages can be awarded against Defendants despite the entry of default.

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February 25, 2016

FILED

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF MARION 2016 MAR -4 AM 10:11 THE TWELFTH JUDICIAL CIRCUIT

PARTNERS 95, LLC and HSGCHG R. RHODES /A No. 2015-CP-33-280  
Investments, LLC, ) CLERK OF COURT

Plaintiffs, )  
v. ) RESPONSE TO PLAINTIFFS  
Riverdale Funding, LLC and Woodbridge ) PARTNERS 95, LLC AND HSGCHG  
Mortgage Investment Fund 3, LLC ) INVESTMENTS, LLC'S  
Defendants. ) MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFFS' DAMAGES

Defendants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (collectively "Defendants") hereby submit this Response to Plaintiffs' PARTNERS 95, LLC and HSGCHG Investments, LLC ("Plaintiffs") Memorandum of Law in Support of Plaintiffs' Damages filed on February 25, 2016. For the reasons set forth below, Plaintiffs have not proven their damages and thus are not entitled to an award of damages in any amount.

**Plaintiffs are not Entitled to Damages Where They Have Failed to Properly Plead the Necessary Elements of a Cause of Action.**

While it may be well settled that a defaulting party is deemed to have admitted the truth of plaintiff's allegations and thus conceded liability, the plaintiff in a default matter is still bound by its pleadings. "A party seeking a default judgment is entitled only to such relief as is framed by his pleading and then only to the extent requested therein." *Mutual Sav. & Loan Asso. v. McKenzie*, 274 S.C. 630 (1980). A default does not admit that the facts plead are sufficient to constitute a cause of action because the default confession is limited to the material facts well pleaded in the complaint.<sup>1</sup> *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 72 S.W. 15

<sup>1</sup> Similarly, a default does not admit an allegation that is a mere conclusion of law. *Id.*

(1911). Where the allegations are insufficient, necessarily the proof is also and thus a judgment for damages may not be sustained. *Id.* Thus if a complaint fails to state a cause of action, a default judgment on that cause of action is reversible error because it is done so without the authority of law. *Mutual Sav. & Loan Asso*, 274 S.C. 630, *See also, Gadsden*, 89 S.C. 483, 72 S.E. 15 (1911); *Williams v. American Ry. Express Co.*, 118 S.C. 121, 110 S.E.125 (1921). In this instance, Plaintiffs have failed to set forth in their complaint the proper elements of Fraud, Breach of Contract with a Fraudulent Intent and a violation of the South Carolina Unfair Trade Practices Act (SCUTPA). These specific causes of action are addressed in Defendants' prior response filed on February 25, 2016. For this reason, Plaintiffs cannot recover any damages allowed pursuant to those causes of action including but not limited to punitive damages, treble damages in the instance of SCUTPA, and attorney's fees in the instance of SCUTPA.

**Plaintiffs Failed to Properly Plead the Existence of Special Damages Related to the Sign.**

As set forth in the above paragraph, in a default case, the defaulting party is bound by the factual allegations of the complaint, however if allegations are insufficient, the proof is also insufficient and thus a judgment for damages cannot be sustained. *Gadsden*, 89 S.C. 483. "The fact of damages is proved by showing 1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract and 2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made." *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Company, Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct.App. 1990). The party seeking special damages must show that the defendant was warned of the probable existence of unusual circumstances or that because of the defendant's own education, training or information, the defendant had reason to foresee the probable existence of such circumstances.

*Stern & Stern v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992).

In this instance, Plaintiffs presented evidence at the hearing that a portion of their claimed damages resulted from having to spend more on the sign outside of the subject property because the property sale did not close quickly enough for them to be able to take advantage of a time-sensitive offer for a less expensive sign installation. However, there are no pleadings in the Complaint regarding the sign expense and such expense is not a natural consequence of a breach of contract claim. As Plaintiffs set forth in their brief, Defendants need not foresee the exact dollar amount of the injury, but must only know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance. *Id.* There are no allegations in the Complaint and no evidence was presented at the hearing that Plaintiffs made Defendants aware of the sign circumstances. Certainly, it is not foreseeable that the Plaintiffs would suffer a loss due to a time-sensitive sign installation quote. The circumstances of the sign as testified to by Mr. Hartman at the hearing were very specific to this location and Defendants cannot be charged with assuming that such circumstances would have existed related to this property sale. Costs and expenses such as title search fees related to the closing of the property is one thing, but it is quite another to assume that Defendants would have been aware of the circumstances surrounding the installation of the sign. Again, Plaintiffs are bound by the facts alleged in their Complaint and there were no allegations relating to the sign, that Plaintiffs ever informed Defendants of the time-sensitive proposed sign contract, or that Defendants would have any reason to foresee the existence of damages related to the price of the sign.

There is absolutely no evidence either in the pleading or in the hearing that Defendants could have foreseen the damages related to the sign alleged breach of contract. For this reason,

Plaintiffs cannot prove any damages related to the installation of the sign and any such calculations should be stricken from Plaintiffs' award to the extent this Court determines an award of a damage amount is proper.<sup>2</sup>

**Conclusory Statements of Fact do not Satisfy the Requirements of a Judgment on the Pleadings.**

As discussed above, Plaintiffs have failed to present a Complaint upon which damages can be based because they have either failed to properly plead their causes of action or have done so "upon information and belief" without any factual knowledge. In *Dawkins v. Fields*, the Court determined that a non-conclusory statement could not form the basis of a summary judgment. 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003). Similarly, a non-conclusory statement "upon information and belief" cannot be the basis of a default judgment. For instance, in order to prove a violation of the SCUTPA, Plaintiffs must show that the act or practice complained of has an impact on the public interest by showing that the conduct is capable of repetition. *Bessinger v. Food Lion, Inc.*, 305 F.Supp. 2d 574, 581 (D.S.C. 2003), see also *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461, 466 (2004). However, in order to make such a showing, the Plaintiffs must do more than allege a conclusory statement with no specific facts demonstrating that Defendants have conducted the same kind of action in the past or that their procedures or business practices create the potential for repetition in the future. *Ameristone Tile, LLP v. Ceramic Consulting Corp.*, 966 F.Supp. 2d 604 (D.S.C. 2013). In this instance, Plaintiffs have provided something less than a conclusory statement because again, Plaintiffs plead that "upon information and belief" Defendants are active commercial lenders

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<sup>2</sup> Defendants also stand by the positions set forth in their prior response that the Plaintiffs have failed to show that they suffered any damages related to the sign when the proposal was an estimate assuming the existing poles could be used for the proposed sign. Plaintiffs' witness testified that the sign is currently being replaced because new poles are being installed due to a report of an independent engineer. Thus the damages numbers related to the sign and the use of existing poles are not reliable and cannot support an award of damages.

engaged in numerous transactions inside and outside of the State of South Carolina. This non-conclusory allegation does not satisfy the standard required to properly plead a violation of the SCUTPA and for this reason, Plaintiffs' allegations for this cause of action cannot be the basis of a default award of damages against Defendants.

Similarly, Plaintiffs have made allegations in their fraud cause of action "upon information and belief" that cannot support such a claim.

**Plaintiffs have not Shown they are Entitled to Punitive Damages.**

There are only two causes of action alleged in Plaintiffs' Complaint that could possibly allow for an award of punitive damages. To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of plaintiff's rights. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App. 1997). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct.App. 2009). Statements made "upon information and belief" cannot rise to the level of "clear and convincing." Again, Plaintiffs are bound by the allegations set forth in their Complaint in a default judgment situation and to the extent they have plead non-conclusory allegations to support punitive damages, they have not met the necessary burden of clear and convincing evidence.

The practice of awarding punitive damages originated in principles of common law 'to deter the wrongdoer and others from committing like offenses in the future.'" *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009); citing *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964). Punitive damages may be imposed in order

to protect a state's legitimate interest in punishing unlawful conduct and deterring its repetition. *Id. Citing BMW of N.Am. v. Gore*, 517 U.S. 559, 568 (S.C. 1996). Of course, such punishment must fit the crime. *Id.* In addition, it is an elementary notion of fairness based upon due process that a party must receive fair notice not only of the alleged conduct that will subject him to punishment but also of the severity of the penalty that a state may impose. *Id. citing Gore*, 517 U.S. at 575. Plaintiffs cannot satisfy the three "guideposts" a trial court must follow when conducting a post-judgment review of punitive damages awards. These three guideposts include: 1) reprehensibility, 2) the ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award and 3) comparative penalty awards. *Id.*

Reprehensibility has been defined by the South Carolina Supreme Court as the consideration of the following factors: 1) the harm caused was physical as opposed to economic; 2) the tortious conduct evidenced an indifference to or a reckless disregard for the health or safety of others, 3) the target of the conduct had financial vulnerability, 4) the conduct involved repeated actions or was an isolated incident, and 5) the harm was the result of intentional malice, trickery, or deceit, rather than a mere accident." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (2009). Plaintiffs have failed to plead or otherwise prove any of these factors and thus cannot prove reprehensibility.

Further, it should be noted that Plaintiffs repeatedly attempt to draw the conclusion that Defendants did not have the funds to close the loan. However, this alleged fact was not plead in the Complaint to which Plaintiffs are bound for a default award. Further, there is no evidence of this theory other than the idea that this is the "only reasonable inference." See Plaintiffs Memorandum of Law at p. 10. Yet, Plaintiffs do not address the possibility that other contingencies in the Commitment Letter were not met. Plaintiffs in their complaint admit that

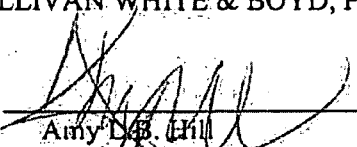
the Commitment letter was not executed. In addition, a review of the Commitment letter presented by Plaintiffs at the hearing shows there were numerous contingencies that had to be met and could be deemed by Defendants to have not been satisfied in their sole discretion. While Defendants would disagree that an inability to fund the loan does not support an award of punitive damages, even if that were the case, Plaintiffs have not properly plead such an allegation in their Complaint such that default punitive damages should be awarded.

The causes of action in the Complaint that have the possibility of an award of punitive damages have not been plead in such a way as to meet Plaintiffs' burden of showing clear and convincing evidence of the factors necessary to consider for an award of punitive damages. For this reason, any request for a punitive damage award, must be denied.

#### Conclusion

In conclusion, Plaintiffs have not met their burden of proving damages related to the allegations against Defendants as set forth in their Complaint. For this reason, no damages can be awarded against Defendants despite the entry of default.

GALLIVAN WHITE & BOYD, P.A.

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March 1, 2016

STATE OF SOUTH CAROLINA  
COUNTY OF MARION

) IN THE COURT OF COMMON PLEAS  
) THE TWELFTH JUDICIAL CIRCUIT  
)

PARTNERS 95, LLC and HSGCHG  
Investments, LLC,

) C/A No. 2015-CP-33-280  
)

)  
)  
) Plaintiffs,  
)

v,  
)

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC  
)

)  
)  
) Defendants.  
)

**DEFENDANTS' NOTICE OF  
EMERGENCY MOTION AND  
EMERGENCY MOTION FOR STAY  
PURSUANT TO SCRCP 62  
AND FOR ALTERNATE FORMS OF  
RELIEF PURSUANT TO SCRCP 52,  
59, AND 60**

TO: W. TAYLOR STANLEY, ESQUIRE, ATTORNEY FOR PLAINTIFFS  
PARTNERS 95, LLC AND HSGCHG INVESTMENTS, LLC:

YOU WILL PLEASE TAKE NOTICE that the defendants, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (hereinafter "Defendants"), hereby move the Court, pursuant to Rules 52(b), 59(e) and 60(b) of the South Carolina Rules of Civil Procedure to alter, amend, reconsider, vacate, or set aside the Order of Default Judgment dated April 7, 2016 (the "April 7 Judgment") and to relieve Defendants from the actual and punitive damages adjudged and decreed therein.<sup>1</sup> Defendants received written notice of entry of the April 7 Judgment on April 11, 2016.

Defendants also move, pursuant to Rule 62(b), SCRCP, for an emergency stay of the execution of, or proceedings to enforce, the April 7 Judgment, pending disposition of the aforementioned motions made pursuant to Rules 52, 59, and 60, SCRCP.

<sup>1</sup> Defendants previously filed a Motion to Set Aside the Entry of Default pursuant to Rule 55(c), SCRCP, and those arguments are adopted and incorporated as if fully set forth herein.

This motion is based upon the pleadings filed in this case; the transcripts of proceedings; affidavits previously filed or to be filed; the Orders previously entered and filed with the Clerk of Court; the accompanying memorandum of law; the applicable provisions of the South Carolina Rules of Civil Procedure; and the common and statutory laws of the State of South Carolina.

GALLIVAN, WHITE & BOYD, P.A.

By:

  
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*Attorneys for Defendants*

Columbia, South Carolina  
April 20, 2016

FILED  
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CLERK OF COURT

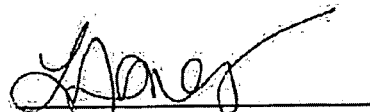
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|---------------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS  |
|                                       | ) | THE TWELFTH JUDICIAL CIRCUIT  |
| COUNTY OF MARION                      | ) |                               |
| PARTNERS 95, LLC and HSGCHG           | ) | C/A No. 2015-CP-33-280        |
| Investments, LLC,                     | ) |                               |
|                                       | ) |                               |
| Plaintiffs,                           | ) |                               |
|                                       | ) | <b>CERTIFICATE OF SERVICE</b> |
| v,                                    | ) |                               |
|                                       | ) |                               |
| Riverdale Funding, LLC and Woodbridge | ) |                               |
| Mortgage Investment Fund 3, LLC       | ) |                               |
|                                       | ) |                               |
| Defendants.                           | ) |                               |

I, the undersigned legal assistant of the law offices of Gallivan, White & Boyd, P.A., attorneys for Defendants, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

**Document:** **DEFENDANTS' NOTICE OF EMERGENCY MOTION AND EMERGENCY MOTION FOR STAY PURSUANT TO SCRCP 62 AND FOR ALTERNATE FORMS OF RELIEF PURSUANT TO SCRCP 52, 59, AND 60**

**Counsel Served:** W. Taylor Stanley, Esquire  
Callison Tighe & Robinson, LLC  
PO Box 1390  
Columbia, SC 29202

*Attorneys for Plaintiffs*

  
Lindsey J. Jones

2016 APR 22 AM 10:10

FILED

Columbia, South Carolina  
April 20, 2016

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF MARION ) THE TWELFTH JUDICIAL CIRCUIT

PARTNERS 95, LLC and HSGCHG ) C/A No. 2015-CP-33-280  
Investments, LLC, )

Plaintiffs, ) DEFENDANTS'  
) MEMORANDUM IN SUPPORT OF  
) EMERGENCY MOTION FOR STAY  
) PURSUANT TO SCRPC 62  
) AND FOR ALTERNATE FORMS OF  
) RELIEF PURSUANT TO SCRPC 52,  
) 59, AND 60

v. )  
Riverdale Funding, LLC and Woodbridge )  
Mortgage Investment Fund 3, LLC )

Defendants. )

TO: W. TAYLOR STANLEY, ESQUIRE, ATTORNEY FOR PLAINTIFFS  
PARTNERS 95, LLC AND HSGCHG INVESTMENTS, LLC:

By and through their undersigned counsel, Defendants Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC (hereinafter "Defendants") submit this memorandum in support of their "Emergency Motion For Stay Pursuant to SCRPC 62 and for Alternate Forms of Relief Pursuant to SCRPC 52, 59, and 60" (the "Motion"). Defendants have moved pursuant Rules 52(b), 59(e) and 60(b) of the South Carolina Rules of Civil Procedure to alter, amend, reconsider, vacate, or set aside the Order of Default Judgment dated April 7, 2016 (the "April 7 Judgment") and to relieve Defendants from the actual and punitive damages adjudged and decreed therein.<sup>1</sup> Defendants have also moved, pursuant to Rule 62(b), SCRPC, for an emergency stay of the execution of, or any proceedings to enforce, the April 7 Judgment, pending disposition of the aforementioned requests pursuant to Rules 52, 59, and 60, SCRPC. For all of the reasons set forth herein, Defendants' Motion should be granted.

<sup>1</sup> Defendants previously filed a Motion to Set Aside the Entry of Default pursuant to Rule 55(c), SCRPC, and those arguments are adopted and incorporated as if fully set forth herein.

### **PROCEDURAL POSTURE AND FACTUAL BACKGROUND**

This matter arises out of a claim by Plaintiffs that they were damaged when Defendants, as lenders, did not fund a proposed loan set forth in a loan commitment letter between Plaintiffs and Defendants (the "Commitment"). Plaintiffs claim that they were forced to seek other funding and thus incurred damages in the course of preparing for the closing on the property they ultimately purchased with the help of a subsequent lender. Plaintiffs brought a complaint with the following causes of action<sup>2</sup>: 1) Breach of Contract, 2) Breach of Contract Accompanied by a Fraudulent Act, 3) Failure to Honor a Promise to Lend, 4) Fraud, and 5) Violation of South Carolina Unfair Trade Practices Act (the "Complaint").

The Complaint was filed on March 17, 2015 in Marion County and subsequently referred on August 6, 2015 to The Honorable W. Haigh Porter as special referee for Marion County, South Carolina. On May 6, 2015, Plaintiffs filed an Affidavit of Default against Defendants. On October 29, 2015, Defendants filed a Motion to Set Aside the Default Pursuant to Rule 55(c), SCRPC. The Court held a hearing on Defendants' Motion but ultimately upheld the Default in an Order signed on December 22, 2015.

Thereafter, the Court held a hearing to determine the amount of damages to be awarded, if any, on February 8, 2016. Two witnesses provided testimony: Michael W. Tighe, Plaintiffs' closing attorney, and Robert D. Hartmann, the majority owner of Partners 95 LLC. Shortly thereafter, at the Court's request, Plaintiffs submitted a summary of the amount and category of damages sought, and the parties exchanged memoranda addressing the damages and arguments presented by Plaintiffs. On April 7, 2016, the Court entered a Form 4 Order, accompanied by a written Order (ending action), which was received by Defendants on April 11, 2016.

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<sup>2</sup> Plaintiffs did not specifically name their causes of action in the Complaint, but based on the allegations, Defendants have surmised that these are the intended causes of action.

### LEGAL STANDARDS

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Roberson v. S. Fin. of S. Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (vacating a default judgment on the ground of improper service). Nevertheless, “[a]n abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.* (quoting *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

Defendants request that the Court alter, amend, reconsider, vacate, or set aside the April 7 Judgment pursuant to the authority of several South Carolina Rules of Civil Procedure. First, Rule 52(b), SCRPC, provides that a party may move within ten (10) days of written notice of entry of judgment for the Court to amend its findings or make additional findings and to amend the judgment accordingly. Specifically, Rule 52(b) permits Defendants to question the sufficiency of the evidence to support the Court’s factual findings when, as here, the findings were made without a jury. Second, Rule 59(e), SCRPC provides an alternative vehicle to seek alteration or amendment of a judgment, and it also requires a timely motion within ten (10) days of receipt of written notice of entry of the order.

Finally, pursuant to Rule 60(b), SCRPC, a court may relieve a party of default judgment, among other things, for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;<sup>3</sup>

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<sup>3</sup> “Excusable Neglect” is defined as a failure “to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance or accident . . . .” Black’s Law Dictionary (9th ed. 2009), neglect.

- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void; [or]
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCP. The motion to set aside the judgment must be “made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.” *Id.*

When determining whether a default judgment should be set aside under Rule 60(b)(1), SCRCP, “[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant” must all be taken into account. *Hill v. Dotts*, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001) (quoting *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct.App.1993)); see also *McClurg v. Deaton*, 380 S.C. 563, 573-74, 671 S.E.2d 87, 93 (Ct. App. 2008). Importantly, a showing of meritorious defense does not require Defendants to establish that they would prevail on the merits—it only need be a defense which is “worthy of a hearing or judicial inquiry.” *McClurg*, 380 S.C. at 575, 671 S.E.2d at 93-94.

Given the pendency of the post-judgment motion addressing the aforementioned grounds, Rule 62(b), SCRCP, provides for a stay of execution of the judgment, as follows:

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made

pursuant to Rule 60, . . . or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

Rule 62(b), SCRCP.

### **ARGUMENT AND AUTHORITIES**

Pursuant to Rules 52(b), 59(e), and 60(b), SCRCP, and the accompanying case law, Defendants respectfully request that this Court alter, amend, reconsider, vacate, and/or set aside its April 7 Judgment. Defendants also request, pursuant to Rule 62(b), SCRCP, that the Court stay of the execution of, or any proceedings to enforce, the April 7 Judgment, pending disposition of these matters. Although numerous reasons are articulated below that require modification of the actual and punitive damages assessed by this Court, any *one* of the grounds enumerated below is sufficient – standing alone – to warrant relief from the April 7 Judgment.

#### **I. THE RECORD LACKS SUFFICIENT EVIDENCE TO SUPPORT THE FACTUAL FINDINGS UPON WHICH THE APRIL 7 JUDGMENT RELIES.**

First, the April 7 Judgment must be modified because the Findings of Fact upon which it is premised are not supported by competent evidence admitted at the damages hearing. For ease of reference, the Findings of Fact with which Defendants take issue are identified below by the corresponding number in the Court's April 7 Judgment, and Defendants have addressed only those Findings of Fact that impact the Court's assessment of damages (not liability).

##### **A. Findings of Fact No. 16 and 32, respectively, are erroneous: "[T]he parties knew . . . that Plaintiffs had to close . . . no later than December 31, 2014 to avoid a significant price increase" and "Defendants were aware that Plaintiffs would incur additional expenses if the Closing failed to occur on December 30, 2014."**

Although the Complaint alleges that Defendants were aware of additional expenses that Plaintiffs would incur should the closing occur later than December 30, 2014, no evidence was presented at the damages hearing demonstrating an ongoing awareness of what was essentially

Plaintiffs' internal closing deadline. The only record evidence showing the closing date contemplated by the parties at the time of the agreement – the Commitment – indicated that closing should occur two weeks later, on or before January 12, 2015. And, the only evidence that Plaintiffs ever communicated the potential loss of \$300,000 if the loan did not close on December 30 occurred *on the date of closing* in the form of an email sent from Plaintiffs' closing attorneys to Defendants' attorney at 2:08 p.m., two hours after Defendants' attorney halted execution of the documents. (Tr. at Ex. 3). This email insinuates Defendants had no prior knowledge of the potential cost of not closing on this date (indeed, the email asks *whether* Defendants knew about the \$300,000 potential loss), and it was sent *after* Defendants indicated they would not go through with the closing. Moreover, there is no evidence that it was received or viewed by Defendants' counsel prior to close of business on that day. These Findings of Fact lack evidentiary support and require modification of the April 7 Judgment.

**B. Finding of Fact No. 39 is erroneous: “Defendants’ unexplained and bad faith refusal to fulfill the terms of the commitment, provide proof of funds or otherwise communicate with Plaintiffs led to the unescapable conclusion that Defendants did not have the funds to close the transaction.”**

There is no testimony or evidence that Defendants did not have the funds to close the transaction, nor does the evidence demonstrate that Defendants refused “[to] communicate with Plaintiffs.” In fact, Hartmann testified that he spoke with Brian Duvant of Riverdale about the failure to close the loan (Tr. at 57:3-25), which evidences that at least one communication occurred between Plaintiffs and Defendants regarding the decision not to close. Hartmann also made clear that the “inability to fund” theory arose solely from his suspicions about Defendants’ motivation for not closing on the loan; it was not based upon any information that originated with Defendants. (Tr. at 57:7 – 58:21). This Finding of Fact also lacks evidentiary support and requires modification of the April 7 Judgment.

**II. THE RECORD LACKS SUFFICIENT EVIDENCE TO SUPPORT THE CONCLUSIONS OF FACT AND LAW AWARDING PLAINTIFFS \$35,000.00 IN PUNITIVE DAMAGES AND, ALTERNATIVELY, \$35,000.00 IS PATENTLY AND GREATLY OUT OF PROPORTION TO THE WRONGS ALLEGED IN THE COMPLAINT.**

Second, the April 7 Judgment must be modified because the Conclusions of Fact and Law regarding Plaintiffs' entitlement to punitive damages (including but not limited to Conclusions of Law "R", "S", "T", "U", and "V") are erroneous and/or not supported by competent evidence admitted at the damages hearing. South Carolina law is clear: Punitive damages must be proven by clear and convincing evidence. S.C. Code Ann. § 15-33-135. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). The clear and convincing standard is the highest burden of proof known to civil law, *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867, 875 (S.C. Ct. App. 2004), and it is axiomatic that statements made "upon information and belief" cannot rise to the level of "clear and convincing." In this case, Plaintiffs presented no evidence warranting the imposition of punitive damages.

The imposition of punitive damages is not compulsory or required. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991); *Miller v. City of West Columbia*, 322 S.C. 224, 230-231, 471 S.E.2d 683, 687 (1996); *James v. Horace Mann Ins. Co.*, 638 S.E.2d 667, 671 (S.C. 2006); *Hundley v. Rite Aid of S.C., Inc.*, 529 S.E.2d 45, 59 (S.C. Ct. App. 2000). And the entry of default judgment does not obviate the need for determinations of the amount and character of damages. By nature, punitive damages are penal in nature and are, "by definition 'punishing damages' or 'private fines' levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future." *Patterson v. I.H. Servs.*, 368 S.E.2d 215, 221 (S.C. Ct.

App. 1988). In the absence of knowledge by a tortfeasor of his conduct, it cannot be said that such conduct is willful or wanton reckless or that the imposition of punitive damages would serve to deter the unknown conduct in the future. Rather, punitive damages should only be awarded if a defendant's culpability is so outrageous and reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Of course, such punishment must fit the crime. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009).

In addition, it is an elementary notion of fairness based upon due process that a party must receive fair notice not only of the alleged conduct that will subject him to punishment but also of the severity of the penalty that a state may impose. *Id.* (citing *Gore*, 517 U.S. at 575). And, under South Carolina law, the Court "is required, as a threshold matter, to assess the culpability of a defendant's conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the [factfinder in the first instance]).'" *Longshore v. Saber Sec. Servs.*, 619 S.E.2d 5, 11 (S.C. Ct. App. 2005) (quoting *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 478 S.E.2d 57, 58 (S.C. 1996)). Punitive damages that are not imposed on the basis of constitutionally adequate and objective standards violate Defendants' due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the equivalent provision(s) of the South Carolina Constitution. Because those standards were not met in this case, and the imposition of punitive damages against Defendants violates both federal and state law.

**A. Plaintiffs have failed to provide clear and convincing evidence of willful, wanton, or reckless conduct.**

The most glaring defect in the Plaintiffs' claims for punitive damages is the failure to provide clear and convincing evidence of willful, wanton, or reckless conduct against Defendants. See S.C. Code Ann. § 15-32-520(D) ("Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct."). Conduct is willful, wanton, or reckless when clear and convincing evidence demonstrates the conduct was committed with deliberate intention under such circumstances that a person of ordinary prudence would be conscious of it as an invasion of another's rights. *McCourt v. Abernathy*, 457 S.E.2d 603, 607 (S.C. 1995); *Cohen v. Allendale Coca-Cola Bottling Co.*, 351 S.E.2d 897, 900 (S.C. Ct. App. 1986)(citations omitted); S.C. Code Ann. § 15-33-135 (2005). Willfulness requires "[a] conscious failure to exercise due care," *McCourt*, 457 S.E.2d at 607 (emphasis added), and a showing of mere negligence will not suffice, see, e.g., *Fairchild v. S.C. Dept. of Transp.*, 727 S.E.2d 407, 412 (S.C. 2012). It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor. *Carter v. R.L. Jordan Oil Co.*, 301 S.C. 84, 390 S.E.2d 367 (Ct. App. 1990). Under South Carolina law, the conduct allegedly justifying an award of punitive damages must be the same conduct that harmed the plaintiff. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258, 263 (1958) (punitive damages appropriate only when at the time of the alleged tort the defendant "would then have been conscious of it as an invasion of the plaintiff's rights"). As outlined below, the Court's award of punitive damages in this matter violates the standards required by state and federal law.

The Court's Conclusions of Fact and Law leading to its award of \$35,000.00 in punitive damages contain erroneous findings that are not supported by the evidence adduced at the

damages hearing. In particular, there was no clear and convincing evidence that Defendants failed to close “all while knowing the repercussions for Plaintiff if the loan failed to close on December 30, 2014” (Conclusion of Law “R”) or that “Defendants targeted Plaintiffs who Defendants knew were financially vulnerable” (Conclusion of Law “S”). As outlined earlier, the record is devoid of evidence that Defendants were aware of Plaintiffs’ internal closing deadline of December 30 when the Commitment was drafted, much less the consequences of not closing two weeks earlier than the Commitment envisioned. The only evidence that Plaintiffs ever communicated a potential loss of \$300,000 is a closing-day email sent from Plaintiffs’ closing attorneys to Defendants’ attorney at 2:08 p.m., two hours after Defendants’ attorney halted execution of the documents. (Tr. at Ex. 3). This email, which asks *whether* Defendants knew about the \$300,000 potential loss, was sent after Defendants indicated they would not go through with the closing, and there is no indication that it was received or viewed by Defendants’ counsel prior to close of business on that day. This is not clear and convincing evidence that “Defendants targeted Plaintiffs who Defendants knew were financially vulnerable.” (Conclusion of Law “S”).

Moreover, the Court incorrectly assumed that Defendants “knew their lack of funds to close the transaction and continued to negotiate the loan documents in the face of this fact.” (Conclusion of Law “S”). Inability to fund the loan was never pled in the Complaint, and Plaintiffs are bound by those allegations for a default award. A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. *Mut. Sav. & Loan Assn. v. McKenzie*, 274 S.C. 630, 632-33, 266 S.E.2d 423, 424-25 (1980). Further, there is no evidence of this “inability to fund” theory - other than the idea that this is the “only reasonable inference,” (*see* Plaintiffs Memorandum of Law at p. 10), or the

"unescapable conclusion," (April 7 Judgment, Conclusion of Fact No. 39). Hartmann's testimony at the damages hearing makes clear that the "inability to fund" theory arose solely from his suspicions about Defendants' motivation for not closing on the loan; it was not based upon any information that originated with Defendants, (Tr. at 57:7 – 58:21), and was certainly not based upon clear and convincing evidence.

Plaintiffs never address the possibility that Defendants may not have consummated the loan because other contingencies in the Commitment were not met; Plaintiffs' Complaint alleges that at least one contingency was not met because the Commitment was not executed. (Complaint, ¶ 12). Moreover, a review of the Commitment presented by Plaintiffs at the hearing shows there were numerous contingencies that had to be met and could be deemed by Defendants to have not been satisfied *in their sole discretion*. (Tr. at Ex. 13; *see also* Tr. at 65:19-23, 67:3-7). While Defendants maintain that an inability to fund the loan does not support an award of punitive damages, even if that fact were supported by the evidence and sufficient to support an award of punitive damages, it *still* would not entitle Plaintiffs to punitive damages in this case because they failed to plead that allegation in their Complaint. Accordingly, the award of punitive damages against Defendants in this case without clear and convincing evidence of willful, wanton, or reckless conduct (in an uncontested setting, no less) violated Defendants' constitutional rights under both federal and state law.

**B. Plaintiffs have failed to prove that *each Defendant's* conduct warrants a punitive damages award.**

Moreover, in this two-defendant case, Plaintiffs failed to prove specific conduct on the part of *each Defendant* warranting the imposition of punitive damages *against that Defendant*. *See* S.C. Code Ann. § 15-32-520(G) ("In an action with multiple defendants, a punitive damages award must be *specific to each defendant*, and each defendant is liable only for the amount of the

award made against *that defendant*.” (emphasis added)); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (“ . . . the Constitution’s Due Process Clause *forbids* a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties.” (emphasis added)). Plaintiffs’ allegations – mirrored by the Court’s April 7 Judgment – lump Defendants together with respect to both allegations and the assessment of punitive damages. This error of law requires that the April 7 Judgment be vacated, because the Court’s failure to separately and/or severally apportion the punitive damages award between Defendants in accordance with the conduct warranting the imposition of punitive damages violates Defendants’ constitutional rights, including but not limited to the procedural due process right of notice and an opportunity to be heard, under both federal and state law.

**C. Plaintiffs have failed to prove *in-state conduct* that warrants the imposition of punitive damages.**

The Supreme Court of the United States has repeatedly found that a punitive damages award should not – and cannot - be based on out-of-state conduct. *See Gore*, 517 U.S. at 572-73 (“Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.”); *Campbell*, 538 U.S. at 422 (“A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”). South Carolina has adopted this rule as well. *Mitchell*, 385 S.C. at 586, 686 S.E.2d at 184 (“Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”).

Without presentation of even a shred of evidence that Defendants conducted business within the state of South Carolina, there is no *conduct* that this Court can properly consider to support a punitive damages award, and without the requisite level of conduct, Plaintiffs’ claim

for punitive damages fails because the Court lacks jurisdiction to impose punitive damages over out-of-state conduct. S.C. Code Ann. § 15-32-520(D) (“Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's willful, wanton, or reckless *conduct*.”); *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989) (finding that the purpose of punitive damages is “to punish the wrongdoer and to deter him and others from engaging in similar *misconduct*” and holding that punitive damages are not available for a strict liability claim). The Court’s failure to require (or even consider) evidence of in-state conduct raises serious due process concerns, and the imposition of punitive damages for conduct that occurred outside of South Carolina violates principles of comity and public policy.

**D. Plaintiffs cannot satisfy the three “guideposts” a trial court must follow when conducting a post-judgment review of punitive damages awards.**

Three guideposts must be satisfied as part of the Court’s requisite post-judgment review of punitive damages award: 1) reprehensibility, 2) the ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award and 3) comparative penalty awards. *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183. Reprehensibility has been defined by the South Carolina Supreme Court as the consideration of the following factors: 1) the harm caused was physical as opposed to economic; 2) the tortious conduct evidenced an indifference to or a reckless disregard for the health or safety of others, 3) the target of the conduct had financial vulnerability, 4) the conduct involved repeated actions or was an isolated incident, and 5) the harm was the result of intentional malice, trickery, or deceit, rather than a mere accident.” *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. For all of the reasons outlined above, Plaintiffs have failed to plead or otherwise prove any of these factors and thus cannot prove the three required guideposts. Without satisfaction of these

requirements, and against the backdrop of Plaintiffs' inadequate pleading and non-existent proof, the imposition of punitive damages against Defendants violates Defendants' due process rights under both federal and state law.

**E. Alternatively, the award of punitive damages is grossly out of proportion to the wrongs alleged in the Complaint.**

"Our Supreme Court has held that a judgment should be vacated on general equity principles where the award is patently and greatly out of proportion to the wrongs alleged in the complaint." *Williams v. Vereen*, 284 S.C. 219, 223, 325 S.E.2d 337, 340 (Ct. App. 1985). Such is the case here. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused by defendant. *Gore*, 517 U.S. at 580-81 (1996); *Campbell*, 538 U.S. at 417. Punitive damages must bear a reasonable relationship to compensatory damages, lest they violate Defendants' constitutional rights. *Gore*, 517 U.S. at 580 (finding that the second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff); *Campbell*, 538 U.S. at 426. Even assuming arguendo that Plaintiffs were entitled to all of the actual damages awarded by this Court (which they were not, as outlined below in Section III), the Court's imposition of a punitive damages award that almost equals 1:1 the amount of actual damages awarded is grossly disproportionate to the wrongs alleged in the Complaint and requires reversal on due process grounds. In fact, as explained below, Plaintiffs were entitled (at best) to only a fraction of the total actual damages awarded. Thus, the Court's predicate for establishing the 1:1 ratio is corrupt, which renders the true ratio far more egregious. For all of these reasons, the Court's punitive damages award impinges on Defendants' constitutional rights and must be vacated.

### **III. THE RECORD LACKS SUFFICIENT EVIDENCE TO SUPPORT THE CONCLUSIONS OF FACT AND LAW AWARDING PLAINTIFFS \$38,184.20 IN ACTUAL DAMAGES.**

Third, the April 7 Judgment must be modified because the Conclusions of Fact and Law regarding Plaintiffs' entitlement to actual damages are erroneous and/or not supported by competent evidence admitted at the damages hearing.

It is clear that Plaintiffs cannot rely on a prayer for relief as proof of damages. Rather, they must prove by competent evidence the amount of damages, and such proof must be by a preponderance of the evidence. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 240, 246 S.E.2d 880, 881 (1978). "The fact of damages is proved by showing 1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract and 2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made." *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Company, Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990). Plaintiffs, who seek special damages, must show that Defendants were warned of the probable existence of unusual circumstances or that because of the Defendants' own education, training or information, they had reason to foresee the probable existence of such circumstances. *Stern & Stern v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992).

#### **A. The record demonstrates that the replacement loan Plaintiffs obtained was actually more beneficial to Plaintiffs.**

As a threshold matter, Plaintiffs cannot show that they have been damaged in any way because they ultimately received a loan with more favorable terms than the loan proposed between Plaintiffs and Defendants. The Commitment describes a loan in the amount of \$1,900,000 with a fixed rate per annum equal to 12% with a term of one year with the option to extend the maturity date by an additional period of one year if the loan remained sufficient in the

commercially reasonable discretion of the Lender. (Tr. at Ex. 13). By comparison, the loan that Plaintiffs ultimately entered into to purchase the subject property with Avatar ("the Avatar Loan") was in the amount of \$2,000,000 with an interest rate of 8.99% for the first six months and 9.99% thereafter. (Tr. at 31:3-32:4, 73). Certainly, 8.99 % or 9.99% is a better interest rate than 12% - resulting in a significant reduction in interest paid.<sup>4</sup> Notably, Plaintiffs failed to enter the terms of the Avatar Loan into evidence – despite testimony by their closing attorney that an assessment of the specific fee structure and interest rate of the Avatar Loan was required to assess Plaintiffs' claim. (Tr. at 31:3-25).

In addition, there are other aspects of the Avatar Loan that benefit Plaintiffs more than the terms of Defendants' proposed loan:<sup>5</sup>

- Attorney's Fees: Under Defendants' proposed loan, Plaintiffs would have been required to pay all of Defendants' attorney's fees, which totaled \$17,500 compared with \$12,500 for lender's counsel that was reported on the Borrower's statement for the Avatar Loan.
- Guarantee: Mr. Robert Hartman was required to guarantee Defendants' proposed loan whereas there is no evidence that a guarantee was required for the Avatar loan.
- Commitment/Origination Fee: Defendants charged a commitment fee of

<sup>4</sup> Assuming the interest is only compounded on an annual basis, the interest for the 12% loan on \$1,900,000 from Defendants is \$228,000 versus \$189,800 in interest for the Avatar Loan of \$2,000,000 with 8.99% for the first six months and 9.99% for the remaining six months. This assumes that the ultimate loan Plaintiffs received had a one year maturity date similar to the proposed terms of Defendants' proposed loan. Certainly, the ultimate loan would have had at least a one year period since the interest rate testified to by Plaintiffs' closing attorney was 8.99% for the first six months and 9.99% thereafter. (Tr. at 31:3-32:4).

<sup>5</sup> Even though the Avatar Loan documents were not presented by Plaintiffs at the damages hearing, Defendants are basing their limited comparison on the closing document which was submitted as evidence. (Tr. at Ex. 4).

\$114,000 as compared with the \$60,000 origination fee listed on the Borrower's statement for the Avatar loan.

- Loan Amount: Defendants were only lending \$1,900,000 whereas Avatar ultimately lent \$2,000,000 to Plaintiffs.

(Tr. at Ex. 4). For these reasons, the Avatar loan was ultimately a better loan with more favorable terms for Plaintiffs. Plaintiffs have not been damaged by the fact that Defendants did not ultimately close their loan with Plaintiffs. Rather, Plaintiffs ultimately benefitted from the circumstances. The difference between the interest rates alone equals a savings to Plaintiffs of \$38,200.00. Coincidentally, this benefit almost exactly cancels out the \$38,184.20 in actual damages that Plaintiffs sought and were awarded.

**B. Plaintiffs did not prove the specific amounts they sought as damages by a preponderance of the evidence.**

This Court awarded twelve (12) different line items of damages, totaling \$38,184.20. (Conclusion of Fact 37, (a) - (l); Conclusion of Law J). Plaintiffs, however, failed to prove all but three (3) of those line items by a preponderance of the evidence, as outlined below:

- Broker's Price Opinion on Connecticut Property -- \$500: This amount was incurred for possible collateral required by the Defendants' loan. However, by the terms of the Commitment, Defendants at their sole discretion could determine whether or not the broker's price opinion was adequate. (Tr. at Ex. 13). Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.
- Appraisal on Connecticut Property -- \$2,000: This amount was incurred on an appraisal of possible collateral required by the Defendants' loan.

However, by the terms of the Commitment, Defendants at their sole discretion could determine whether or not the appraisal was adequate. (Tr. at Ex. 13). Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Broker's Price Opinion on Marion County Property -- \$750: This amount was incurred for possible collateral required by the Defendants' loan. However, by the terms of the Commitment, Defendants at their sole discretion could determine whether or not the broker's price opinion was adequate. (Tr. at Ex. 13). Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Appraisal on Marion County Property - \$2,500: This amount was incurred on an appraisal of possible collateral required by the Defendants' loan. However, by the terms of the Commitment, Defendants at their sole discretion could determine whether or not the appraisal was adequate. (Tr. at Ex. 13). Thus, Plaintiffs were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Callison Tighe & Robinson, LLC Fees Related to Woodbridge/Riverdale Loan -- \$10,000: Mr. Tighe testified that some of his work for the Woodbridge Loan was used in the Avatar loan, yet he did not distinguish exactly which portion of the \$10,000 worth of work related solely to Defendants' proposed loan. (Tr. at 27:4 – 29:3). Mr. Tighe provided no itemized list of his legal services or engagement letter and thus it is

impossible to show that the services claimed are solely related to the Woodbridge loan especially when he testified that his fee is simply an estimate based on the "amount of responsibility, the time generally required, and the kind of documentation required to produce the transaction." (Tr. at 18:19-22). Mr. Tighe further testified that there were some items that he prepared for Defendants' proposed loan that he ultimately used in the Avatar loan, yet there was no distinguishing exactly what these items were or what different legal requirements existed between the two loans. (Tr. at 27:4 – 29:3).

- Loan Broker Commission Increase -- \$2,000: This amount is simply based on the fact that Plaintiffs borrowed an additional \$100,000 with the Avatar loan as opposed to the \$1,900,000 they sought to borrow from Defendants. Plaintiffs received the advantage of the additional \$100,000. Based on the Borrower's Statement, (Tr. at Ex. 4), it appears that Plaintiffs used the \$100,000 in some manner, including buying out two of the members of Partners 95.
- Additional Title Examination on Connecticut Property -- \$1,645.50: This is title work that was required on a third piece of property that Avatar required for collateral. This cost pertains to a separate loan and thus is not a damage related to Plaintiffs' allegations against Defendants.
- Difference in Advantage Sign Contract and Tyson Sign Contract -- \$15,803: Plaintiffs' desire to engage a more expensive sign company was wholly related to their self-imposed desire to have the sign installed by

early May. This is a desire separate and apart from any actions of Defendants and was not a necessity for Plaintiffs. In fact, Hartman testified that a portion of the sign is currently down. (Tr. at 77:23-78:21). This amount is not a valid damage where it appears that the proposed contract was an estimate based on the use of the current poles. (Tr. at Ex. 10). In fact, Plaintiffs testified that they now have to replace a portion of the sign because the company they ultimately used did not use new poles but rather attempted to use the poles that were already located on the site. (Tr. at 77:23-78:21; Ex. 10). When Plaintiffs had an independent engineer prepare a report, they were required to use additional poles. There was no evidence submitted as to how much more the Advantage sign would have cost if new poles were required, which should have been a necessary element of that contract based on the engineer's report.

Because Plaintiffs' evidence failed to rise to a preponderance as to the vast majority of their damages claimed, the April 7 Order must be vacated or, at the very least, modified to reflect the appropriate award of damages in the amount of \$2485.70, comprised of the only damages proved by Plaintiffs: (1) \$495.00 Loan Packaging Fee; (2) \$35.00 Wire Fee; and (3) \$1955.70 Extra Liability Insurance.

**C. The record lacks sufficient evidence to demonstrate that the \$15,803.00 sign contract difference was foreseeable.**

An additional reason warrants modification of the April 7 Judgment to remove the line item of \$15,803.00 for the Sign Contract Difference: This expense was not foreseeable to Defendants. Although Plaintiffs presented evidence at the hearing that a portion of their claimed damages resulted from having to spend more on the sign outside of the subject

property because the property sale did not close quickly enough for them to be able to take advantage of a time-sensitive offer for a less expensive sign installation, the record is devoid of any evidence that Defendants should have foreseen this expense as a natural consequence of the breach. Plaintiffs admitted that the short timeframe imposed upon the sign installation was the result of their demand – not a requirement of the closing or a requirement of the sign contract. (Tr. at 71:23-72:25). While it is true that Defendants need not foresee the exact dollar amount of the damage (but must only know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance), there are no allegations in the Complaint and no evidence was presented at the damages hearing that Plaintiffs made Defendants aware of this sign contract *at all, much less the time-sensitive demand Plaintiffs placed upon it*. Nor is it logical that Defendants should have foreseen that failing to close a loan would cause Plaintiffs to suffer a loss due to a self-imposed, time-sensitive sign installation quote completely unrelated to the terms of closing. The Court's award of actual damages must be modified or amended to reflect a reduction of \$15,803.00 for unforeseeable damages that were not a natural consequence of the breach.

#### **IV. THE APRIL 7 JUDGMENT EXCEEDS THE RELIEF SUPPORTED BY PLAINTIFFS' COMPLAINT ALLEGATIONS.**

Fourth, the April 7 Judgment must be vacated because it exceeds the relief supported by the Complaint and therefore is without authority of law. A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. *McKenzie*, 274 S.C. at 632-33, 266 S.E.2d at 424-25 (1980)(referencing cases collected in 12 West's South Carolina Digest, Judgment, at Key Number 117 and Section 15-35-70, Code of Laws of South Carolina (1976)). "It follows that if a complaint fails to state a cause of action,

the rendering of a default judgment thereon is without authority of law and therefore reversible error." *Id.* (citing *Gadsden v. Home Fertilizer and Chemical Co.*, 89 S.C. 483, 72 S.E. 15 (1911); *Williams v. American Ry. Express Co.*, 118 S.C. 121, 110 S.E. 125 (1921)).

It is important to note that default does not preclude Defendants from challenging the sufficiency of the complaint allegations as a basis for the judgment entered in this case, *id.*, because "[a]n objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984). A default does not admit that the facts pled are sufficient to constitute a cause of action simply because the default confession is limited to the material facts well pleaded in the complaint.<sup>6</sup> *Gadsden*, 89 S.C. 483, 72 S.W. 15 (1911). Indeed, even "[a] defendant who is in default for failure to answer has the right to assume that the judgment will be limited to the cause of action stated in the complaint[, and if] the complaint states facts which entitled the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained." *Blakely v. Wright*, 269 S.C. 6, 11-12, 235 S.E.2d 803, 806 (1977). Such is the case here.

The April 7 Judgment must be set aside because it exceeds the relief supported by Plaintiffs' Complaint, which was filed on March 17, 2015 and never amended. The Order awards two types of damages: (1) actual damages arising out of breach of contract accompanied by a fraudulent act (Section II); and (2) punitive damages (Section III). As outlined below, Plaintiffs' Complaint failed to plead a cognizable claim for relief in either category. Importantly, however, the failure to adequately plead *even one* of the two grounds for relief requires that the April 7 Judgment be altered, amended, reconsidered, vacated, and/or set aside.

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<sup>6</sup> Similarly, a default does not admit an allegation that is a mere conclusion of law. *Id.*

**A. Plaintiffs failed to state a claim for breach of contract accompanied by a fraudulent act because the Complaint alleges the Commitment was not signed.**

A cognizable claim for breach of contract accompanied by a fraudulent act requires, at a minimum, the following allegations: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). It is axiomatic that the very foundation of this cause of action is a contract that could be breached in the first instance.

The law is clear that under both the South Carolina common law statute of frauds and the Lender Liability Statute of Frauds, a promise to buy a loan must be signed in writing. *See* S.C. Code Ann. § 37-10-107(1)(c)(providing in relevant part that no person may maintain an action for failure to perform an alleged promise or agreement to loan money in excess of \$ 50,000 unless the party bringing the action “has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing”); *see also Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 105, 691 S.E.2d 158, 163 (2010)(discussing the writing requirement of 37-10-107, which “is essentially a statute of frauds”). Yet, the Complaint clearly admits that the only alleged binding contract between the parties, the Commitment, was not executed. (*Compare* Complaint, ¶ 12 (“with the exception of the execution of the Commitment which the parties agreed would be done at Closing”) *with* Complaint, ¶ 30 (“As set forth more fully above, Defendants breached the terms of the Commitment by failing to close the transaction contemplated”) *and* ¶ 25 (“The Commitment constituted a binding contract”). This fundamental deficiency in the allegations pled by Plaintiffs is fatal to their breach of contract accompanied by a fraudulent act claim.

Plaintiffs do not appear to dispute the need for the Commitment to be signed, despite pleading to the contrary. Indeed, Plaintiffs introduced evidence at the damages hearing – for the first time – of a signed Commitment. (Tr. at 74:5-24; Ex. 13). Although Plaintiffs initially requested amendment of their Complaint to conform to that evidence, (Tr. at 80:1-4), they quickly withdrew their request to amend once it became apparent that would permit Defendants the opportunity to file an answer, (Tr. at 80:5-11). But Plaintiffs cannot have their cake and eat it too. Either the default judgment must be set aside because the Commitment was unexecuted as pled in Paragraph 12 of the Complaint (and therefore no binding contract between the parties existed), *or* the default judgment must be set aside because Plaintiffs must amend their Complaint to conform to the evidence and permit Defendants the opportunity to answer. The record is clear: The allegations as pled in the Complaint did not state a claim for breach of contract accompanied by a fraudulent act upon which relief could be granted because it admitted the Commitment was not signed and, by operation of law, no binding contract existed. The April 7 Judgment must be vacated for this reason alone.

**B. Plaintiffs' fraudulent breach of contract allegations also fail to state a claim upon which relief can be granted because no fraudulent act or intent was alleged, much less alleged with particularity as required by Rule 9(b), SCRPC.**

Moreover, "[t]he complaint must allege facts which would afford a basis upon which a jury could properly find support for each of the elements [of the cause of action], and if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective." *McKenzie*, 274 S.C. at 632-33, 266 S.E.2d at 424-25. "Although the cases involving breach of contract accompanied by a fraudulent act do not present an easy formula for defining a 'fraudulent act,' it is clear that the fraudulent act alleged must be an act done with the intent to deceive." *Save Charleston Found. v. Murray*, 286 S.C. 170, 181,

333 S.E.2d 60, 67 (Ct. App. 1985). The fraudulent act must be separate and distinct from the act constituting the breach of contract. *Floyd*, 287 S.C. at 53-54, 336 S.E.2d at 503-04. Moreover, these allegations must all be pled with particularity under the requirements of Rule 9(b), SCRPC. Plaintiffs' allegations are deficient in several respects.

First, while the Complaint allegations describe Defendants' conduct in a conclusory fashion as "fraudulent", there are no substantive allegations of *actual* fraudulent activity. Indeed, when the language of Plaintiffs' Second Cause of Action is stripped of that adjective, the conduct alleged is nothing more than a failure to consummate a loan transaction: first "negotiation" and "correspondence", then a "failure to communicate", a contract with "no contingencies", and "Plaintiffs [] ready, willing, and able to close." (Complaint, ¶ 31). Adding the word "fraudulent" to modify these actions does not transform an alleged breach of contract into a fraudulent act pled with particularity. *Ray v. Pilgrim Health & Life Ins. Co.*, 206 S.C. 344, 349, 34 S.E.2d 218, 219-20 (1945) ("It is well established in this State that in order to recover punitive damages for breach of contract, it must be shown that the breach 'was accomplished with a fraudulent intention, and was accompanied by a fraudulent act' . . . . There is no evidence in this case of fraud or fraudulent acts on the part of the appellant."). No fraudulent motivation<sup>7</sup> or conduct evidencing deceit was alleged – just a mere lack of communication and a failure to close the loan. This is simply not enough to rise to the level of particularity required to state a claim for breach with a fraudulent act.

Second, no actual fraudulent act is alleged separate and apart from the breach itself. Indeed, the term "fraudulent act" is not found anywhere in Plaintiffs' Second Cause of Action.

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<sup>7</sup> Although Plaintiffs later argued that Defendants acted fraudulently because they were unable to fund the loan, the Complaint is devoid of any allegation to that effect and, in any event, that argument (unsupported by any competent evidence, as discussed above) does not cure a deficient pleading.

Rather, the Complaint insufficiently alleges “that Defendants fraudulently breached the Commitment.” Neither nonfeasance nor a mere statement without more constitutes a fraudulent act that sufficiently meets this element of the cause of action. *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 918 (Ct. App. 1991). The standard of proof for the fraudulent act is clear and convincing evidence, which clearly cannot be met when no specific act is alleged in the first place. *Osborn v. Univ. Med. Assocs. Of the Med. Univ. of S.C.*, 278 F.Supp. 2d 720 (D.S.C. 2003).

Third, Plaintiffs’ allegations of fraud are pled “upon information and belief” without any factual knowledge. In *Dawkins v. Fields*, the South Carolina Supreme Court determined that a non-conclusory statement could not form the basis of a summary judgment, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003) – a threshold equally applicable to the allegations in support of a default judgment. The Complaint reveals that two of the essential elements of Plaintiffs’ claim – alleged fraudulent intent and the alleged fraudulent breach – were pled with the qualifier “Plaintiffs are informed and believed.” (Complaint, ¶¶ 31, 32). As a matter of law, these non-conclusory allegations fail to state a claim for relief and warrant an order vacating the April 7 Judgment.

**C. Plaintiffs’ claim for punitive damages fails to state a claim upon which relief can be granted.**

As previously discussed, Plaintiffs’ Complaint – at best – alleges the fraudulent breach of a contract, which as a matter of law is simply not enough to warrant a punitive damages award. Although “our law has long recognized a plaintiff’s right to recover punitive damages for breach of contract accompanied by a fraudulent act . . . mere breach of a contract, *even if willful or with fraudulent purpose*, is not sufficient to entitle a plaintiff to go to the jury on the issue of punitive damages.” *Floyd*, 287 S.C. at 53-54, 336 S.E.2d at 503-04 (emphasis

added)(citing *Vann v. Nationwide Ins. Co.*, 257 S.C. 217, 185 S.E. (2d) 363 (1971); *Holland v. Spartanburg Herald-Journal Co.*, 166 S.C. 454, 165 S.E. 203 (1932)). Even assuming that all allegations in the Complaint are true and conclusory, the facts as pled "would not constitute a fraudulent act but a mere violation of the contract . . . , [and p]unitive damages are not recoverable for the mere failure or refusal to pay a debt." *Patterson v. Capital Life & Health Ins. Co.*, 228 S.C. 297, 299, 89 S.E.2d 723, 724 (1955). See also *Roberts v. Fore*, 231 S.C. 311, 314-15, 98 S.E.2d 766, 767-68 (1957)("There is a total failure to make any allegation that would be appropriate to show a fraudulent intention or that the breach of the contract was accompanied by a fraudulent act."); *Blakely*, 269 S.C. at 11-12, 235 S.E.2d at 806 ("Our opinion is that the trial judge acted without authority and thereby committed reversible error when he awarded Plaintiff punitive damages [in a default judgment] . . . . In the case at bar, Plaintiff alleged only that Defendant 'wrongfully and unlawfully detains' the hogs. There was no pleading of facts to the effect that Defendant took the hogs wilfully, maliciously, or by collusion. Moreover, the record does not indicate what evidence there was tending to prove any such misconduct. See 77 C.J.S. Replevin § 262 and § 285. Therefore, we find it necessary to reverse the lower court's award of punitive damages."). These allegations simply are not sufficient to warrant relief in the form of punitive damages.

**V. THE APRIL 7 JUDGMENT MUST BE SET ASIDE FOR MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE.**

Fifth and finally, the Court should set aside the default judgment in this matter for one or all of the reasons established by Rule 60(b), SCRCp – mistake, inadvertence, surprise, or excusable neglect. "The promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties" all

weigh in favor of permitting Defendants to answer out of time in this case. *Hill*, 345 S.C. at 309, 547 S.E.2d at 897.

First, as outlined previously in Defendants' Rule 55(c) Motion to Set Aside the Entry of Default (and incorporated by reference herein), good cause existed for Defendants' delay in responding to the Complaint (maternity leave of the recipient of service and corporate restructuring), and as soon as Defendants learned of the nature of the lawsuit and the entry of default, they immediately set into action to retain counsel to defend this matter. Because Defendants were not acting willfully in failing to respond in this matter and given their quick response, the Court should grant Defendants' Motion and set aside the April 7 Judgment under Rule 60(b)(1), SCRCP, due to inadvertence and excusable neglect.

Second, Defendants have a meritorious defense in this matter. A meritorious defense is not an absolute defense nor one "which can be guaranteed to prevail at a trial;" rather to be meritorious, the defense only has to be "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." See *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (finding that a meritorious defense does not have to be perfect or absolute to set aside default judgment under the heightened standard of Rule 60(b), SCRCP). As outlined above, Plaintiffs' Complaint fails to state a claim upon which relief can be granted in numerous respects. See discussion, *supra*, Section IV. These defenses are deserving of investigation and discussion. Accordingly, Defendants satisfy the second factor taken into account in determining whether a default judgment should be set aside pursuant to Rule 60(b)(1). *Hill*, 345 S.C. at 309, 547 S.E.2d at 897.

Third, Plaintiffs have suffered no prejudice thus far in the litigation. No discovery, depositions, or mediation have been served, scheduled, or attended. The only proceedings to date in this matter have related to the entry of default and the default judgment itself. Even Plaintiffs appear to acknowledge that they need to amend the Complaint to correct the allegation that the Commitment was not executed, (Tr. at 80:1-4), yet they are reluctant to do so simply because it would permit Defendants time in which to answer their allegations and address their claims on the merits. (Tr. at 80:5-11). Therefore, setting aside default and allowing Defendants to answer would not prejudice Plaintiffs as any delay created by a lack of response up to this point in the litigation is minimal and has not resulted in the loss of relevant evidence or witnesses. Indeed, it appears that an amended complaint is in order. Accordingly, to the extent an analysis under Rule 60(b)(1) looks to prejudice caused, no prejudice to Plaintiff would occur if relief is granted due to the current stage of litigation and posture of this case. *Hill*, 345 S.C. at 309, 547 S.E.2d at 897.

### **CONCLUSION**

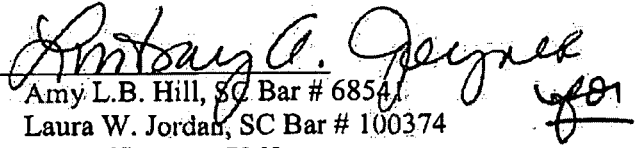
For all of the myriad of reasons outlined above – any one of which is sufficient – the April 7 Judgment must be altered, amended, reconsidered, vacated, or set aside pursuant to Rules 52(b), 59(e), and/or 60(b), SCRCP.

### **REQUEST FOR STAY OF EXECUTION OF JUDGMENT**

As a final matter, Defendants also request, pursuant to Rule 62(b), SCRCP, for an emergency stay of the execution of, or any proceedings to enforce, the April 7 Judgment, pending disposition of the aforementioned motions made pursuant to Rules 52, 59, and 60, SCRCP.

*Signature on following page*

GALLIVAN, WHITE & BOYD, P.A.

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*Attorneys for Defendants*

Columbia, South Carolina  
April 20, 2016

|                                       |   |                               |
|---------------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS  |
|                                       | ) | THE TWELFTH JUDICIAL CIRCUIT  |
| COUNTY OF MARION                      | ) |                               |
| PARTNERS 95, LLC and HSGCHG           | ) | C/A No. 2015-CP-33-280        |
| Investments, LLC,                     | ) |                               |
|                                       | ) |                               |
| Plaintiffs,                           | ) |                               |
|                                       | ) | <b>CERTIFICATE OF SERVICE</b> |
| v.                                    | ) |                               |
|                                       | ) |                               |
| Riverdale Funding, LLC and Woodbridge | ) |                               |
| Mortgage Investment Fund 3, LLC       | ) |                               |
|                                       | ) |                               |
| Defendants.                           | ) |                               |

I, the undersigned legal assistant of the law offices of Gallivan, White & Boyd, P.A., attorneys for Defendants, Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

**Document:** **DEFENDANTS' MEMORANDUM IN SUPPORT OF  
EMERGENCY MOTION FOR STAY PURSUANT TO SCRCP 62  
AND FOR ALTERNATE FORMS OF RELIEF PURSUANT TO  
SCRCP 52, 59, AND 60**

**Counsel Served:** W. Taylor Stanley, Esquire  
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Lindsey J. Jones

**FILED**  
16 APR 22 AM 10:11  
MARION COUNTY  
SHERIFF'S OFFICE  
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Columbia, South Carolina  
April 20, 2016

1 STATE OF SOUTH CAROLINA  
2 COUNTY OF MARION  
3  
4 PARTNERS 95, LLC AND HSGCHG  
5 INVESTMENTS, LLC  
6  
7 Plaintiffs,  
8 vs. CASE NO. 2015-CP-33-280  
9 RIVERDALE FUNDING, LLC AND  
10 WOODBRIDGE MORTGAGE  
11 INVESTMENT FUND 3, LLC  
12 Defendants.  
13  
14  
15 HEARING  
16 BEFORE HONORABLE W. HAIGH PORTER, SPECIAL REFEREE  
17  
18  
19 DATE: Wednesday, November 4, 2015  
20 TIME: 1:58 p.m. - 2:27 p.m.  
21 LOCATION: Office of Haigh Porter  
22 152 South McQueen Street  
23 Florence, South Carolina  
24 REPORTED BY: Laura Chamblee  
25 Registered Professional Reporter  
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1 at the second element which is a meritorious  
2 defense. And this is our strongest factor here.  
3 My client feels very strongly and they do have a  
4 meritorious defense. The commitment letter  
5 which is the basis of the Plaintiff's complaint,  
6 the Plaintiffs in their own complaint admit the  
7 commitment letter was not executed. They're  
8 saying that that is the agreement between the  
9 parties, that is the agreement to fund the loan.  
10 And they admit in their own complaint that it  
11 was not executed. So looking at their own  
12 facts, they have issues right there that  
13 provides us with a meritorious defense.

14 However, if we dig even further into  
15 looking at the document, the commitment letter,  
16 the Court would see that there are numerous  
17 other meritorious defenses based on the language  
18 of that letter. There are lots of contingencies  
19 in that letter. The other side cannot prove  
20 that they were all met.

21 This is essentially a closing that  
22 didn't happen at the last minute. And basically  
23 that happens all the time. You know, closings  
24 don't happen for a variety of reasons, which is  
25 why they're not good until the signatures are on

1           It was not until the fourth attempt or  
2           the fourth time they were served that they woke  
3           up and filed a motion. That said, I did receive  
4           an email from Mr. Rubinstein on October 22,  
5           2015. And within about a week they did file a  
6           motion. However, that still leaves 22 days --  
7           220 days from the date of service--not  
8           institution of this action, but service--till  
9           when the motion was actually filed.

10           If the Court were to find that good  
11           cause has been shown, I think the Wham factors  
12           even weigh against them. Again, 220 days pass  
13           from the service to when the motion was actually  
14           filed. They knew or should have known that the  
15           complaint was not a foreclosure but was breach  
16           of contract and a few other causes of action.

17           As to their meritorious defenses, they  
18           have to present some evidence of the meritorious  
19           defense. They failed to present any evidence  
20           whatsoever. You know, they have said that we  
21           didn't attach to the complaint the commitment  
22           letter. But how we plead is at our discretion.

23           Finally to the prejudice. My client  
24           has incurred expenses relying upon the damages  
25           hearing would go forward today. My client is

1 particular weight to those factors. It just says  
2 that all three must be considered in order to  
3 determine whether good cause is shown.

4 Again, I want to touch on the  
5 meritorious defense. If I refer the Court to  
6 their own complaint which is based on the  
7 commitment letter, they admit in their own  
8 complaint that the commitment letter was not  
9 executed. There by itself we have a meritorious  
10 defense simply based on the language of the  
11 complaint itself. I'm not sure how we can have  
12 an agreement whereby we are required to fund a  
13 loan if the document that they're holding us to  
14 was not signed.

15 Again, there are numerous other  
16 defenses based on that commitment letter. If  
17 we're able to argue our case at some point, our  
18 position will be that the appraisal did not come  
19 back as we had asked for it to -- as we had  
20 required.

21 I mean there are reasons why our  
22 client did not fund this at the last minute.  
23 They're in the business of making commercial  
24 loans. They would like to make commercial  
25 loans. They don't gain anything by running up

1 consider the Wham factors.

2 THE COURT: I need to read these cases. I  
3 read your brief very rapidly yesterday before I  
4 started court, but I need -- I think I should read  
5 these cases.

6 I do find it disturbing that it took  
7 the fourth set of papers you sent them before  
8 anybody said, well, maybe these folks down in  
9 South Carolina are serious. One could almost  
10 say they took a very cavalier attitude said to  
11 hell with the courts in South Carolina.

12 MS. HILL: I can assure you, Your Honor, that  
13 my client's interaction in the past ten days has  
14 been anything but to hell with the courts in South  
15 Carolina.

16 THE COURT: I take it that must be the case  
17 or you wouldn't be here.

18 MS. HILL: Right.

19 THE COURT: But it is a little disturbing.

20 MS. HILL: Furthermore, if I may add this,  
21 this is a very unusual case. As you know,  
22 typically lenders don't get sued for deciding not  
23 to fund a loan. I mean they have all kinds of  
24 rights not to fund a loan. They don't make  
25 promises. There's a lender's statute of

1 liabilities -- I mean statute of frauds where it  
2 must be in writing, signed. So this is an unusual  
3 case.

4 THE COURT: A lot of unusual cases today.

5 MS. HILL: That's right.

6 THE COURT: Do you have a copy of the Regents  
7 case?

8 MR. STANLEY: I did not bring one with me. I  
9 apologize.

10 THE COURT: Okay.

11 MR. STANLEY: Just to point you in the right  
12 direction, on the quote that I read to you, it's  
13 on page 649 in the South Carolina Reporter and on  
14 page 55 in the Southeastern 2d.

15 THE COURT: What is the volume on  
16 Southeastern?

17 MR. STANLEY: On the Southeastern, 741 SE 2d  
18 51. And the quote that I read to you was at page  
19 55. And it's cited on page three of my  
20 memorandum.

21 THE COURT: I think another case I had about  
22 a year ago -- not a year ago, a few months ago,  
23 the Regents case was cited, but I can't remember  
24 now the case name or I'd have a copy of it. Let  
25 me step around the corner and see if I've got that



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15 (INDEX AT REAR OF TRANSCRIPT)

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1 PROCEEDINGS:

2 THE COURT: This is Marion County case  
3 2015-CP-33-280. It's a matter of Partners 95, LLC  
4 and HSGCHG Investments, LLC, Plaintiffs versus  
5 Riverdale Funding, LLC and Woodbridge Mortgage  
6 Investment Fund 3, LLC, Defendants. The matter is  
7 before me pursuant to an order of reference dated  
8 August 10, 2015 and filed I believe on the -- yes,  
9 on the same date.

10 Let the record reveal that Mr. Taylor  
11 Stanley is present representing the Plaintiffs.  
12 Ms. Amy Hill is present representing the  
13 Defendants. The matter was previously before me  
14 pursuant to a motion concerning default, and an  
15 order was issued. I'm looking for the date of the  
16 order.

17 MR. STANLEY: I've got December 16, 2015.

18 THE COURT: Yeah, here it is. The order was  
19 issued December 15, 2015 concerning the matter of  
20 default by the Defendants. They were deemed to be  
21 in default.

22 Let the record further reveal that prior  
23 to this hearing this morning the parties through  
24 their attorneys were given an opportunity to have  
25 some discussion concerning possible settlement.

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MIKE TIGHE - DIRECT EXAMINATION BY MR. STANLEY

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1 And the Court has been advised by the attorneys  
2 that they are at an impasse; therefore, it would  
3 be necessary for a hearing to proceed on the  
4 damages as sought in the complaint. Mr. Stanley,  
5 are you ready to proceed?

6 MR. STANLEY: I am. Plaintiff would call  
7 Mike Tighe as our first witness.

8 MIKE TIGHE, being first duly sworn,  
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. STANLEY:

12 Q Mr. Tighe, would you please state your name.

13 A Michael W. Tighe, T-I-G-H-E.

14 Q And what do you do for a living?

15 A I'm a lawyer in real life.

16 Q What kind of law do you practice?

17 A I practice real estate litigation and real  
18 estate transactional. I have a real estate  
19 transactional practice.

20 Q For how long have you done that?

21 A Fifty-two years.

22 Q During your practice have you had an occasion  
23 to represent the Plaintiff, Partners 95, LLC and HSGCHG  
24 Investments, LLC?

25 A I have.

1 Q In what capacity?

2 A I was contacted by them when they were  
3 negotiating for the purchase of an amphitheater  
4 property in Marion County, South Carolina. And I  
5 assisted in negotiating the purchase contract and in  
6 representing them in connection with that acquisition  
7 and the necessary loan to close the transaction.

8 Q When you say the necessary loan to close the  
9 transaction, were there more than one lenders ever  
10 present?

11 A There was -- To begin with, Riverdale Funding  
12 and Woodbridge Mortgage Investment Fund were going to  
13 make the loan to HSGCHG Investments, LLC which was  
14 buying the property. And the purchaser of the property  
15 had a contract with a bank, I want to say it was Wells  
16 Fargo, to purchase the property for \$1 million if the  
17 loan -- if the transaction would close on or before  
18 December 31, 2014.

19 Q What happened if it didn't close by that  
20 date?

21 A The purchase price would go up \$300,000.

22 Q During your representation, do you recall the  
23 date on which you were first contacted by Riverdale  
24 Funding or a loan commitment was issued?

25 A Loan commitment was issued on December 9,

1 19- -- I'm sorry, 2014. And as I say, the real estate  
2 contract had to close by the 31st or the price would go  
3 up. So everybody was targeting for that. The  
4 transaction with Riverdale was expected to close on  
5 December 30 and disburse on December 31 so that we  
6 could close the transaction.

7 Q Did that happen?

8 A No, it did not.

9 Q Can you tell me the circumstances surrounding  
10 why that didn't happen?

11 A Well, we were -- I was dealing with the law  
12 firm in -- I forgot where it was, maybe Connecticut or  
13 somewhere, that represented the lender. And the  
14 lawyer's name was Richard Roberts, very nice guy. I  
15 dealt with him with regard to the usual transactional  
16 documents and things that you do when you're closing a  
17 commercial lending matter. And he was very nice and  
18 behaved very appropriately and he and I had absolutely  
19 no trouble getting the documents together that we  
20 agreed were necessary for the transaction. And we  
21 exchanged various correspondences during the time  
22 between December 9 and December 30.

23 The transaction, as I say, needed to close on  
24 December 30 so that we could fund on the 31st after  
25 recording and close the purchase of the amphitheater

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MIKE TIGHE - DIRECT EXAMINATION BY MR. STANLEY

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1 that Mr. Hartmann's company was buying. So on the  
2 30th --

3 Well, let me say this. Mr. Roberts or his  
4 office arranged for Mr. Hartmann to sign the closing --  
5 loan closing documents in Florida where Mr. Hartmann  
6 has a home, I believe. And he was to go on the 30th to  
7 a title insurance office in Florida where his signature  
8 would be witnessed and notarized by title insurance  
9 people down there arranged by the lender.

10 So on the 30th -- I guess maybe the 29th,  
11 thereabout, I emailed 106 pages of documents to the  
12 title insurance person in Florida for Mr. Hartmann to  
13 sign. And I contacted him, told him where to be to  
14 sign it. And I also told them that when they got ready  
15 to sign each individual document, they should get me on  
16 the speaker phone so I could walk him through the  
17 execution because at the time we didn't have any time  
18 for anything to get screwed up. And things signed out  
19 of state, as everybody knows at this table, often get  
20 messed up in the execution, witnessing, and  
21 notarization.

22 So he was to go to this title insurance  
23 office a little bit earlier than the scheduled time.  
24 And the title insurance lady understood that she was to  
25 call me when he was ready to start signing and I would

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8

1 go through each document with them so that we wouldn't  
2 have any trouble getting the documents signed.

3 Q Do you know if Mr. Hartmann was present at  
4 that location at the prescribed time?

5 A He was there I would say maybe an hour  
6 earlier. He could tell that but he was there earlier  
7 than the appointed time. And -- Go ahead. I'm sorry.

8 Q Did there come -- Did you have any  
9 communications with Mr. Roberts?

10 A Actually I had received --

11 Q Go ahead.

12 A You mean that day?

13 Q On the 30th.

14 A Yeah, on the 30th I received 20 emails from  
15 Mr. Roberts prior to noon about various nits, you know.  
16 No difficulties of any kind but just routine kind of  
17 closing transactional things. And so the final email I  
18 received from him was a copy of an email he sent to the  
19 title insurance lady in Florida at 12:07 in which he  
20 instructed her that she was not to witness any  
21 documents until she heard further back from him or his  
22 client.

23 (THEREUPON, Exhibit Number 1 was marked for  
24 identification.)

25

1 BY MR. STANLEY:

2 Q I'm showing you what's been marked as Exhibit

3 1. Is that the email -- is that a copy of the email  
4 that you were just mentioning?

5 A This is a copy of the email that Rich  
6 Roberts, lawyer for the lender, sent to the title  
7 insurance lady whose name was Mirna, M-I-R-N-A, it  
8 looks like Moya, M-O-Y-A. And she worked for Fidelity  
9 National Title.

10 Q And did you receive a copy of that email?

11 A I did.

12 MR. STANLEY: We would move Exhibit 1 into  
13 evidence.

14 MS. HILL: No objection.

15 BY MR. STANLEY:

16 Q Did you respond to the email?

17 A I did. The email came to me at about 12:07,  
18 and I assumed there was some temporary problem. And so  
19 I immediately sent an email to Mr. Roberts to inquire  
20 about that.

21 (THEREUPON, Exhibit Number 2 was marked for  
22 identification.)

23 THE COURT: Any objection?

24 MS. HILL: No objection.

25

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MIKE TIGHE - DIRECT EXAMINATION BY MR. STANLEY

10

1 BY MR. STANLEY:

2 Q Is that a copy of your email?

3 A It is.

4 Q What does that email say?

5 A It says, is there a problem, from me to  
6 Mr. Roberts.

7 MR. STANLEY: Move Exhibit 2 into evidence.

8 MS. HILL: No objection.

9 BY MR. STANLEY:

10 Q As you sit here today have you received a  
11 response to that email?

12 A I did not receive a response to that email or  
13 from the telephone calls I made to Mr. Roberts. So the  
14 transaction did not close.

15 Q Were there any other emails to Mr. Roberts?

16 A I think I sent one additional email to him  
17 reminding him that the purchase price would go up by  
18 \$300,000 if we didn't close by the 31st.

19 (THEREUPON, Exhibit Number 3 was marked for  
20 identification.)

21 BY MR. STANLEY:

22 Q I'm showing you what's been marked as Exhibit  
23 3. Is that a copy of that email?

24 A It is.

25 Q Did you send that email?

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1           A     I did.

2           Q     And is the email there, in the To: line, is  
3     that the known email address for Mr. Roberts?

4           A     It is.

5                     MR. STANLEY: We move Exhibit 3 into  
6     evidence.

7                     MS. HILL: No objection.

8     BY MR. STANLEY:

9           Q     It says there that if the loan didn't close  
10    on the 30th and 31st -- Well, let me rephrase that.  
11    What does this email reflect? What's going to happen  
12    if the loan doesn't close?

13          A     The email indicates -- I was reminding  
14    Mr. Roberts that the purchase price for the  
15    amphitheater would go up by \$300,000 if we did not  
16    close the purchase transaction by the 31st. I also  
17    referred in there to one of his clients -- I also  
18    recall that I had like ten emails from his -- people in  
19    the lending company on the 30th, as well as 21 I think  
20    from Mr. Roberts. And one of the people I got them  
21    from was Larry somebody. Let's see here. I don't  
22    remember what his name was but he worked inside the  
23    company, the lender. And I was just pointing out to  
24    Rich that this would be an expensive problem if the  
25    loan didn't close and the transaction didn't close by

1 the 31st.

2 Q Did the transaction eventually close?

3 A It did with another lender. And the -- I was  
4 able to negotiate a 30-day extension on the contract  
5 without having to pay the \$300,000. So we had to close  
6 it by 30 days after the original schedule and still  
7 bought it for a million bucks, so that's what we did.

8 Q During the representation of the Plaintiffs  
9 involving the loan with the Defendants, did you charge  
10 a fee for this, although it did not close?

11 A I did.

12 Q Do you recall what that fee was?

13 A \$10,000.

14 Q And did you charge an additional fee for the  
15 loan that eventually did close?

16 A I'm sure I did.

17 (THEREUPON, Exhibit Number 4 was marked for  
18 identification.)

19 BY MR. STANLEY:

20 Q I'm showing you --

21 THE COURT: Any objection?

22 MS. HILL: I'm not sure what it is yet. I  
23 probably don't have an objection.

24 THE COURT: You want me to give you a minute  
25 or two more to look it over?

1 MR. STANLEY: I bet you want me to ask a  
2 couple of questions first.

3 MS. HILL: Why don't you lay a foundation,  
4 then I can figure out what it is.

5 BY MR. STANLEY:

6 Q Do you recognize that document?

7 A I do.

8 Q What is that document?

9 A That is the disbursement statement for the  
10 transaction involving the loan and the purchase of the  
11 amphitheater.

12 Q Did this loan -- Does this document reflect  
13 the actual fees that were incurred in the transaction  
14 that actually closed?

15 A They do. It does.

16 MR. STANLEY: Move Exhibit 4 into evidence.

17 MS. HILL: No objection.

18 BY MR. STANLEY:

19 Q Looking at Exhibit 4, is there a line item  
20 for the attorney's fees that were incurred in regard to  
21 the loan that did not close with the Defendants?

22 A There is.

23 Q How much was that?

24 A \$10,000.

25 Q During the course of the negotiation for the

1 loan that did not close, the Woodbridge loan, did you  
2 review any appraisals or other valuation documents?

3 A I did.

4 Q Were those sent to the Avatar Capital  
5 Finance, the lender of the loan that eventually did  
6 close?

7 A No.

8 Q Do you know why that was?

9 A Avatar did not require appraisals or any  
10 valuations of the collateral. They had one of their  
11 officers visit each area -- each piece of collateral to  
12 determine their satisfaction with it in terms of value.

13 Q Were there any differences in the collateral  
14 between the Woodbridge loan and the Avatar loan?

15 A The Avatar loan required an additional piece  
16 of collateral from Connecticut in addition to the ones  
17 that were required for the Woodbridge loan.

18 THE COURT: Let me make sure I'm following  
19 you now. The original loan was supposed to be  
20 with Woodbridge?

21 THE WITNESS: Woodbridge.

22 THE COURT: The actually closing was with  
23 somebody Avatar?

24 THE WITNESS: Right, exactly.

25 THE COURT: And they required not only the

1 Marion County collateral but additional  
2 collateral?

3 THE WITNESS: They did. Maybe I wasn't too  
4 clear. The original loan with Riverdale required  
5 two pieces of collateral owned by companies that  
6 Mr. Hartmann is interested in Connecticut as well  
7 as the property in Marion County. The Riverdale  
8 people ordered appraisal information on the  
9 properties in Connecticut and Marion county.

10 The loan from Avatar did not require any  
11 appraisals at all. They visited both -- all the  
12 collateral and decided on their own what its value  
13 was in terms of whether it was suitable for their  
14 transaction. And there were no appraisals  
15 provided to Avatar or ordered by Avatar in  
16 connection, as far as we know, in connection with  
17 the ultimate loan that was closed. So that we  
18 have appraisals that we paid for in connection  
19 with the Woodbridge loan.

20 THE COURT: That's what I wanted to get to.  
21 Did the Plaintiffs have to pay for those  
22 appraisals? Or did the original or actual lender  
23 either one, did they pay for it?

24 THE WITNESS: The Plaintiffs had to pay for  
25 them.

1 THE COURT: Okay.

2 THE WITNESS: They paid for appraisals and  
3 BPOs, which means broker's opinion of value, in  
4 Connecticut and in Marion County. And on one  
5 piece of property in Connecticut they paid \$500  
6 for one of the BPO and \$2,000 for the appraisal.  
7 And on Marion County, they paid 750 for the BPO  
8 and \$2587.50 for the appraisal in Marion County.  
9 I guess the appraisals in Connecticut covered both  
10 pieces of collateral up there.

11 BY MR. STANLEY:

12 Q Were those amounts reflected on this  
13 disbursement summary, Exhibit 4?

14 A No. They were paid by the -- before this  
15 transaction, by the Plaintiffs.

16 Q In connection with Woodbridge having  
17 attorneys, are you aware of Plaintiffs paying any fee  
18 to their attorneys?

19 MS. HILL: I'm going to object. Do you have  
20 any personal knowledge of that?

21 THE WITNESS: Yeah, I mean -- He did it as a  
22 part of the transaction that I was representing  
23 him in. And he's going to be here. He can  
24 testify to it as well. He had to pay a \$500  
25 deposit on legal fees in connection with the first

1        loan transaction, which did not close. And he can  
2        testify whether he ever got it back, but as far as  
3        I know he never got it back.

4        BY MR. STANLEY:

5            Q        Were you aware of any additional requirements  
6        required by Woodbridge that affected the amount of  
7        money that the Plaintiffs expended?

8            A        Mr. Hartmann had intended to get a liability  
9        insurance policy of some amount, the amount of which I  
10       don't recall. And Woodbridge required that he get more  
11       insurance than that. And he had to pay an additional  
12       \$1,955 for the additional liability coverage.

13            THE COURT:    How much?

14            THE WITNESS:   \$1955.70 according to my notes.  
15        And he also had to pay additional attorney's fees  
16        to his lawyer for title abstract work in  
17        Connecticut for another piece of collateral that  
18        Avatar required, and that was \$1645.50.

19            THE COURT:    I'm sorry?

20            THE WITNESS:   \$1645.50.

21            THE COURT:    And that's not shown on the  
22        disbursement statement either?

23            THE WITNESS:   No, sir. Well, it really is  
24        but it's included in another fee paid to the  
25        Bevilacqua law firm which was the lawyers in

1 Connecticut. They did some earlier work for the  
2 collateral that was going to be in each loan. So  
3 we paid for that with the second loan and we had  
4 to pay them additional money for the third piece  
5 of collateral in Connecticut. You see the  
6 Bevilacqua firm mentioned on the borrower  
7 statement. Yeah, right there.

8 BY MR. STANLEY:

9 Q So on Exhibit 4, on Bevilacqua it shows  
10 \$8,855 being paid to them. That includes the  
11 additional amount?

12 A It includes the \$1,645 that they charged  
13 extra to do the title work on the piece of collateral  
14 that was not included in the Woodbridge loan.

15 Q In your practice as a real estate attorney,  
16 do you keep specific hourly time sheets?

17 A I do not, no.

18 Q How do you come up with your fee?

19 A I do it based on the amount of  
20 responsibility, the time generally required, and the  
21 kind of documentation required to produce the  
22 transaction. I don't think I've ever had a complaint.

23 THE COURT: Mr. Tighe and I came along before  
24 it was fashionable to keep exact time records and  
25 we shot from the hip on fees.

1           THE WITNESS: But I will say if we had kept  
2           time on transactions like this it probably would  
3           have been more money than I have gotten from time  
4           to time. I make all the younger lawyers in the  
5           office keep time records, Bob, so they get bigger  
6           fees than I do.

7   BY MR. STANLEY:

8           Q     How much of your time between December 9,  
9           2014 and December 30 -- December 31, 2014, do you think  
10          you spent on this?

11          A     I have no idea. Probably a third to a half.  
12          It was a lot of pieces: Lining up Connecticut,  
13          collateral, title insurance in Connecticut, title  
14          insurance in South Carolina, lawyers in Connecticut,  
15          corporate documents that had to be put together and  
16          sent to the lender's counsel. I don't know whether  
17          your question was open-ended enough for me to talk  
18          about the sign or not. You're going to ask me if we  
19          had any expenses that resulted from the failure to  
20          close?

21          Q     What do you know about a sign located on the  
22          Swamp Fox Amphitheater?

23          A     Mr. Hartmann had a contract with a sign  
24          provider called Advantage LED for a very expensive  
25          sign. But the trick was he had to have it by a certain

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20

1 date because he had scheduled events. And the sign  
2 company had to have a commitment to buy the sign by the  
3 31st of December of the year in question in order to be  
4 able to deliver it on time. And since we couldn't get  
5 the sign -- couldn't close on December 31st, we closed  
6 30 days later, they charged -- or indicated they were  
7 going to charge him another \$42,180 to be able to  
8 deliver the sign.

9 THE COURT: How much?

10 THE WITNESS: \$42,180.03.

11 BY MR. STANLEY:

12 Q Do you know if that amount actually was  
13 charged?

14 A It was not actually charged because he didn't  
15 use that sign. He, I think, got another sign. He can  
16 testify to that. I really can't. But I think he got a  
17 different sign that -- But that was -- At the time I  
18 made my initial demand on the Defendants, he had signed  
19 a contract or was already obligated to pay another  
20 \$42,000 for a sign that ultimately he did not get. So  
21 that \$42,000 is not part of the damages.

22 I mentioned it in my letter to your clients,  
23 so I wanted to be sure you didn't think we had  
24 forgotten it.

25 MR. STANLEY: I think that's all the

1 questions I have at this time for you.

2 MS. HILL: I think I have a few for you, Mr.  
3 Tighe.

4 CROSS EXAMINATION

5 BY MS. HILL:

6 Q I want to be clear from the outset that any  
7 questions I have regarding your fee are by no means an  
8 indication that you did not earn your fee, just a  
9 question as to whether my client actually must pay it.  
10 So let me start with this. So my understanding is  
11 there was a commitment letter issued. Do we have a  
12 copy of that commitment letter?

13 A I do.

14 Q Has that been entered?

15 A I do. I don't think it's been entered but  
16 we've got a copy.

17 MS. HILL: Is there a reason why that hasn't  
18 been entered into evidence?

19 THE WITNESS: I don't need answer that  
20 question. You need to answer it.

21 MS. HILL: Is there a reason why that hasn't  
22 been entered into evidence?

23 MR. STANLEY: Because liability has already  
24 been conceded.

25

1 BY MS. HILL:

2 Q I believe without that letter in evidence --  
3 Let me ask you, Mr. Tighe, my understanding based on  
4 your pleadings, what was the date in that letter that  
5 the loan had to close on?

6 A I don't recall what the pleadings say because  
7 I'm not the lawyer.

8 Q Would January 12, 2015 ring a bell?

9 A No.

10 Q Did the commitment letter say it had to close  
11 by December 30, 2014?

12 A I don't recall what the commitment letter  
13 said, but all the parties at hand knew that we either  
14 had to close it by then or we had to have another  
15 \$300,000.

16 Q And I know you are a long-time real estate  
17 practitioner in this state and I'm sure you've  
18 represented both borrowers and lenders.

19 A I have.

20 Q Are you familiar with the South Carolina  
21 Statute of Frauds or the Lender Liability Statute of  
22 Frauds?

23 A Not that I can recall.

24 Q Are you familiar with the fact that a promise  
25 to buy a loan must be signed in writing?

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MIKE TIGHE - CROSS EXAMINATION BY MS. HILL

23

1 MR. STANLEY: Object. That has no relevance.  
2 Liability has already been conceded.

3 MS. HILL: And this doesn't go to liability  
4 but rather to the amount of damages. The question  
5 is, my client said they were close it at a later  
6 date. And they're saying the damages they  
7 incurred were incurred because it didn't close on  
8 December 30. And the question becomes how much of  
9 those damages are applicable to this time period,  
10 or would they still be in effect if it had closed  
11 at a later date, January 12.

12 THE COURT: Go back and ask your question  
13 again.

14 MS. HILL: Sure, sure.

15 BY THE COURT:

16 Q Well, I guess what I'm getting at is, did the  
17 commitment letter say it had to close by December 30,  
18 2014?

19 A I don't know, but it didn't close in January  
20 either.

21 Q But was there a promise in writing that it  
22 close by December 30, 2014?

23 MR. STANLEY: Objection as to relevance.

24 THE COURT: Let him answer it anyhow. It's  
25 an equity amount and I'll sort that out.

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24

1 THE WITNESS: I'll say this, everybody  
2 operated on the assumption from your client and my  
3 client that it was closing on the 30th. And all  
4 the documents were prepared for the 30th.  
5 Everybody's head was pointed towards the 30th so  
6 that we could close it in time to avoid the other  
7 \$300,000. So there wasn't any question but that  
8 everybody knew it was going to close on the 30th.

9 And, of course, they never offered to  
10 close it on the 12th of January or any other date.  
11 And I didn't write them about this until February  
12 when I suggested they owed Mr. Hartmann some  
13 money. But they never -- I have yet to hear from  
14 Mr. Roberts from my email to him on the 30th,  
15 which that was a great shock to me because, as I  
16 say, I had 21 emails from him between 9:00 and  
17 12:00 o'clock on the 30th and 10 from your client.  
18 Your client was very active in dealing with me  
19 directly. I mean they would call me from time to  
20 time. They were all very nice people too I might  
21 say.

22 BY MS. HILL:

23 Q Did you hear from Mr. Graybill?

24 A Not until much later.

25 THE COURT: What was that name?

1 MS. HILL: Wesley Graybill.

2 THE WITNESS: Wesley Graybill was their  
3 lawyer going into the deal, and he had -- South  
4 Carolina counsel for the lender. He handed it off  
5 to somebody else in his firm. I can't remember  
6 who it was, but I did send things to them off and  
7 on. And I sent them probably a copy of my letter  
8 to -- I don't see that I did, but I should have  
9 sent them a copy of my letter that I wrote to your  
10 clients. I may; I may not have.

11 BY MS. HILL:

12 Q How much did the property appraise for?

13 A I don't remember. In the millions.

14 THE COURT: Excuse me. I didn't hear you.

15 THE WITNESS: In the millions. Well, over  
16 the amount of this loan.

17 BY MS. HILL:

18 Q Was there a requirement that it close for --  
19 that it appraise for a higher amount?

20 MR. STANLEY: Same ob -- Relevance. Object  
21 to its relevance.

22 THE WITNESS: The requirements in the  
23 commitment -- Let me let you talk, not me. There  
24 were requirements for satisfactory collateral in  
25 terms of values, just like everybody has. And if

1       they had any unhappiness with the values, they  
2       never communicated it to me. And they instead,  
3       through their lawyer, told me we were closing on  
4       the 30th until 12:07 on the 30th when he sent the  
5       email down to the title insurance lady saying not  
6       to let Mr. Hartmann sign anything. And Mr.  
7       Hartmann sat there until 5:30 and they were trying  
8       to close the office because he, like I, really  
9       expected that there was some wrinkle that was  
10      going to be ironed out and that we would  
11      eventually close the deal. But nobody ever  
12      suggested there were any issues about the values.

13               I take that back. One time one of the  
14      principles in your client's office suggested to me  
15      that he had a concern about the value because the  
16      property had a mortgage on it. And when I asked  
17      him what difference that made to the value, he was  
18      unable to answer that question. And obviously it  
19      doesn't make any difference to the value if a  
20      property has a mortgage on it because in this  
21      particular case the mortgage on that property was  
22      already scheduled to be paid off as part of the  
23      loan proceeds from your client. So it wasn't a  
24      question of priorities. He seemed to think the  
25      value somehow was the affected by the existence of

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MIKE TIGHE - CROSS EXAMINATION BY MS. HILL

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1 a mortgage, which I've been unable to understand  
2 after applying my full 52 years of thinking.

3 BY MS. HILL:

4 Q Let me ask you about that \$10,000 fee. And I  
5 certainly appreciate the way in which you determine the  
6 \$10,000, but what went into that work for that \$10,000  
7 fee?

8 A Well, I had to -- I didn't -- I had to do the  
9 corporate work in connection with the resolutions and  
10 documents that the lender needed from the borrower. I,  
11 of course, had to prepare the 106 pages of documents  
12 that I sent down to the title insurance office for the  
13 use in the closing, as well as other documents  
14 pertaining to the sales transaction.

15 Q Let me stop you there. What are these  
16 corporate resolutions that you had to do?

17 A What are they?

18 Q Uh-huh. What type of corporate resolutions  
19 did you --

20 A There were like three entities on the  
21 borrower's side of the transaction. We had to get  
22 certificates of good standing and similar documents  
23 from Connecticut or wherever these entities were sited,  
24 as well as resolutions from everybody who was involved  
25 in the corporations to approve the loan transactions.

1           Q     I notice in here that there is a buy-out of  
2     Mr. Hartmann. There's two Hartmanns, there's a Jason  
3     Hartmann and a Robert Hartmann.

4           A     It's from him. Mr. Hartmann had to buy out  
5     two of his sons in one of the transactions in order to  
6     get their concurrence. And that's what that was.

7           Q     And did you prepare those documents?

8           A     I did.

9           Q     And you prepared those for the Woodbridge  
10    loan?

11          A     I must have because they had to -- they had  
12    to approve that loan too.

13          Q     But ultimately they were used in the Avatar  
14    loan?

15          A     Yeah, they were used in the Avatar loan.

16          Q     And wouldn't it be true that a lot of the  
17    documents you prepared were also used in the Avatar  
18    loan?

19          A     Very few. The transaction was entirely  
20    different. Title insurance was pretty close to the  
21    same thing in South Carolina, but I had to get title  
22    insurance in Connecticut through a New York insurance  
23    broker for the new piece of collateral. So there  
24    was -- I'm sure there's bound to be some things that  
25    were the same.

1 Q So certainly there were portions and pieces  
2 that were the same?

3 A No question about it.

4 Q And the new piece of collateral in  
5 Connecticut, that was purely a requirement by Avatar,  
6 correct?

7 A It was. And it was something he wouldn't  
8 have had to provide if your clients had closed with  
9 him. That's the reason why I mentioned it.

10 Q Was it because Avatar was concerned about the  
11 value of the collateral for the loan?

12 A I think they just knew he had it and they  
13 decided they wanted to get it. They seemed to be well  
14 pleased with him. They're lending him some more money  
15 right now.

16 Q But they sought additional security?

17 A Uh-huh.

18 Q And that had nothing to do -- I mean  
19 Woodbridge didn't tell Avatar to seek additional  
20 security, did they?

21 A No.

22 Q That was a decision all on their own?

23 A That was all on their on.

24 Q Unrelated to Woodbridge?

25 A As far as I know unrelated to Woodbridge.

1           Q     Is there any reason why your fees were less  
2     for the complicated Avatar loan that involved a third  
3     piece of collateral than they were for the Woodbridge  
4     loan?

5           A     I had less time to do it for one thing. So I  
6     spent less time on it by my own calculations. So it  
7     was less. Of course, we also charged title insurance  
8     premiums as you're aware.

9           Q     Yeah. In fact, what were your title  
10    insurance premiums?

11          A     I'll have to look now that I told you that.  
12    It looks like it was about \$4,000, thereabout.

13          Q     And this loan by the date on this  
14    disbursement summary, did it close on January 22, 2015?

15          A     If that's what it says, it must have.

16          Q     You had roughly about 22, 23 days between the  
17    fallout of this loan to close with Avatar?

18          A     I don't remember when we got the commitment  
19    from Avatar to tell you the truth. I probably know but  
20    it wasn't right away.

21          Q     Is that the commitment letter?

22          A     This is the commitment from Avatar. It's  
23    January 4th we got the commitment.

24          Q     May I see that?

25          A     Sure.

1 Q How much was the Woodbridge loan going to be?

2 A I want to say like a million nine.

3 Q Do you remember what the interest rate was  
4 for the Woodbridge loan?

5 A I don't remember.

6 Q Would it surprise you that your complaint  
7 said it was 12 percent?

8 A No.

9 Q Does that sound about right?

10 A These are both hard money lenders so it  
11 easily could have been.

12 Q What's the interest rate that Avatar charged?

13 A I don't remember that either.

14 Q Let me show you the commitment letter.

15 A Okay. They charged 8.99 for the first six  
16 months, 9.99 thereafter, and five points for closing.

17 Q Would you agree with me that that's better  
18 than 12 percent or 12.99 percent?

19 A I don't remember what the fee structure was  
20 on the Woodbridge commitment. But you would have to  
21 look at all those things together.

22 Q Right. To determine truly if they're damaged  
23 you'd have to look at all those items, right?

24 A If you were basing it on the interest rate,  
25 you would.

1 Q Would you agree with me that if someone comes  
2 out with a rate of 9.9 percent versus 12.9 percent,  
3 typically that's a plus, that's a better rate?

4 A That's a better rate.

5 Q Uh-huh. Do you have any type of itemization  
6 for your fees for the Avatar loan versus the  
7 Woodbridge?

8 A Huh-uh, neither one.

9 Q You don't know what your reasoning was that  
10 Avatar was 8,500 and Woodbridge was 10,000?

11 A Probably because I was getting part of the  
12 title insurance commitment -- I mean fee.

13 Q So if you get part of the title commitment  
14 fee, you reduce your fee?

15 A Normally I take that into account when I'm  
16 setting a fee on a real estate transaction.

17 Q Do you remember if Mr. Hartmann or anyone  
18 else from his company ever executed a commitment letter  
19 from my client?

20 A They did.

21 Q They did?

22 A Uh-huh.

23 Q Would it surprise you that your complaint  
24 said they did not?

25 A It wouldn't surprise me but I don't know why

1 it said that.

2 Q Again, we don't have a copy of that  
3 commitment letter, do we?

4 A We do.

5 Q Did 95 -- Did the Plaintiff in this case, did  
6 they pay the \$10,000 to your firm?

7 A Yeah. It's in the closing statement.

8 Q They paid it as part of the closing with  
9 Avatar?

10 A The second closing, yeah. It shows  
11 separately as the Woodbridge fee on that statement.

12 Q So your firm has received that money?

13 A Yeah, we've received it. You couldn't put it  
14 on the closing statement if you didn't get it. That's  
15 how lawyers get in trouble, Amy.

16 Q That's the truth. Let me ask you, in your  
17 initial testimony with Mr. Stanley you testified that  
18 there was roughly \$1,645 in legal fees related to title  
19 work in Connecticut. Now your client is not asking for  
20 that today?

21 A Yes, he is. He is asking for that.

22 Q What his reasoning on that? Because that's  
23 the third piece, right?

24 A It's a third piece of collateral he wouldn't  
25 have had to do if your client had closed.

1           Q     But it was an additional requirement by  
2     Avatar?

3           A     But he wouldn't have had that requirement if  
4     your client had closed. So that's a damage. That's a  
5     damage that he sustained when your client didn't close.  
6     He had to do something extra.

7           Q     To get a better interest rate?

8           A     Well, to get the loan closed. We saved your  
9     client 300 grand by negotiating an additional 30 days  
10    on the purchase contract.

11          Q     Do you know the date of those appraisals that  
12    you testified to that were part of the damages?

13          A     Huh-uh. I don't have them. They were sent  
14    to your client though. Your client has them.

15          Q     Do you have any type of documentation of  
16    those appraisals?

17          A     I don't have it -- no, I don't know of any  
18    right now. My client paid for them out of his own --  
19    you know, outside of closing so I didn't pay them, but  
20    he will testify in a minute and he can tell you about  
21    that. When the deal fell through, the appraisers had  
22    to be paid anyway. And of course lenders don't ever  
23    pay appraisers.

24          Q     But you saw the invoices?

25          A     I saw the invoices.

1 MS. HILL: I have no further questions.

2 THE COURT: Okay. Any redirect?

3 MR. STANLEY: Just a couple.

4 REDIRECT EXAMINATION

5 BY MR. STANLEY:

6 Q In order to authorize a loan from a corporate  
7 entity, do you have to do resolutions?

8 A You do.

9 Q And are the resolutions the same no matter  
10 what the loan is?

11 A No.

12 Q So you had to do different resolutions for  
13 the Avatar and for the Woodbridge?

14 A I did.

15 MR. STANLEY: That's all I've got.

16 MS. HILL: Can I ask one more follow-up on  
17 that?

18 THE COURT: Yes.

19 RECROSS EXAMINATION

20 BY MS. HILL:

21 Q What did you have to do different other than  
22 change the name?

23 A Well, I had to get them signed and change the  
24 amounts to protect the innocent, but that's about all.  
25 Some corporate resolutions are difficult to get because

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ROBERT HARTMANN - DIRECT EXAMINATION BY MR. STANLEY

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1 people are spread out. At least one of these had  
2 shareholders that were some distance, and they had to  
3 get signed. They had to get signed twice.

4 MR. STANLEY: No questions.

5 THE COURT: Any other witness?

6 MR. STANLEY: Yes, sir.

7 THE COURT: I do have one question.

8 MR. STANLEY: Okay.

9 THE COURT: Was a commitment fee paid for the  
10 failed loan? I notice on page 3, paragraph 9, it  
11 refers to a commitment fee and a commitment  
12 payment. Was that paid in advance?

13 MR. STANLEY: That will be addressed -- If I  
14 may, that will be addressed in the next witness.

15 ROBERT HARTMANN, being first duly sworn,  
16 testified as follows:

17 THE COURT: If you will state your full name  
18 and your residence.

19 THE WITNESS: Robert D. Hartmann, 50  
20 Eveningside Drive in Milford, Connecticut 06460.

21 MR. STANLEY: May I proceed?

22 THE COURT: Go ahead.

23 DIRECT EXAMINATION

24 BY MR. STANLEY:

25 Q Mr. Hartmann, what do you do for a living?

1           A     I'm a real estate developer, financier,  
2 investor.

3           Q     How long have you been doing that?

4           A     Fifty years.

5           Q     And do you have any relationship with  
6 Partners 95, LLC?

7           A     Yes, sir.

8           Q     What is that relationship?

9           A     I'm 95 percent owner of Partners 95.

10          Q     Who is the other five percent owner?

11          A     My CPA, Paul Greenberg.

12          Q     Do you have any relationship with HSGCHG  
13 Investments, LLC?

14          A     Yes, sir.

15          Q     What is that involvement?

16          A     I own 90 percent of that.

17          Q     Can you tell me who the other owners are?

18          A     There are minority shareholders that  
19 basically work in the company that I gave percentages  
20 to just to keep them involved and thought if you had an  
21 interest, you know, in the company, whether it be two  
22 percent or one percent, I thought they would just do a  
23 better job, be more loyal.

24          Q     Does either of those companies own Swamp Fox  
25 Amphitheater?

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ROBERT HARTMANN - DIRECT EXAMINATION BY MR. STANLEY

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1 A Yes, sir.

2 Q Which one?

3 A HSGCHG Investments.

4 Q When it did acquire the Swamp Fox  
5 amphitheater?

6 A It acquired Swamp Fox January 15, 16, or 21,  
7 I forget the exact date, of 2015.

8 Q You were here for Mr. Tighe's testimony  
9 regarding the two loans. Was there a loan that failed?

10 A Yes, sir.

11 Q And who was that loan with?

12 A Riverdale Funding and Woodbridge Investments,  
13 I think it is.

14 Q During the course of those negotiations did  
15 the Defendants require appraisals?

16 A Yes, sir, they did.

17 Q Did you -- Did the Plaintiffs pay those  
18 appraisals -- pay for those appraisals?

19 A Yes, I did. The appraisers were, although we  
20 paid for them, were requested by Riverdale and they  
21 were selected by Riverdale, not by me.

22 (THEREUPON, Exhibit Number 5 was marked for  
23 identification.)

24 BY MR. STANLEY:

25 Q I'm showing you what's been marked as Exhibit

1 5. Do you recognize that?

2 A Yes. This was for the BPO of Partners 95, 96  
3 Frontage Road.

4 Q Where is that located, what city or state?

5 A It's located in East Haven Connecticut.

6 Q Who requested that BPO?

7 A Riverdale Funding.

8 Q Did you pay the amount listed there as the  
9 total?

10 A Yes, I did.

11 Q What is that amount?

12 A \$500.

13 Q Did you use this BPO in connection with the  
14 Avatar loan that ultimately closed?

15 A No, sir.

16 MR. STANLEY: Move Exhibit 5 into evidence.

17 MS. HILL: No objection.

18 (THEREUPON, Exhibit Number 6 was marked for  
19 identification.)

20 BY MR. STANLEY:

21 Q I'm showing you what's been marked as Exhibit

22 6. Do you recognize that document?

23 A Yes, sir.

24 Q Can you tell me what that is?

25 A That's an invoice for an appraisal that, an

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ROBERT HARTMANN - DIRECT EXAMINATION BY MR. STANLEY

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1 MAI appraisal, that was done by Domus Appraisals out of  
2 Bronxville, New York.

3 Q What property was that appraisal on?

4 A That was on 96 Frontage Road in East Haven,  
5 Connecticut.

6 THE COURT: Where?

7 THE WITNESS: In East Haven, Connecticut,  
8 sir.

9 BY MR. STANLEY:

10 Q That property, was that part of the  
11 collateral for the Woodbridge loan?

12 A Yes, sir, both the BPO and the appraisal were  
13 both on the same property and they were both used for  
14 collateral for the Riverdale Funding.

15 Q What was the amount on that invoice?

16 A \$2,000.

17 Q Did you pay \$2,000 to Domus Appraisals?

18 A Yes, I did.

19 MR. STANLEY: Move Exhibit 6 into evidence.

20 THE COURT: Any objection?

21 MS. HILL: No.

22 BY MR. STANLEY:

23 Q We've talked about the Connecticut property.

24 Was there any other property that Riverdale required be  
25 part of their collateral?

1           A     They requested a BPO and an appraisal done on  
2     the Marion property.

3           Q     And is the Marion property Swamp Fox  
4     Amphitheater?

5           A     Yes, sir.

6           Q     Now known as Swamp Fox Amphitheater.

7           A     Right. Prior to that it was called Carolina  
8     Amphitheater or Carolina Entertainment Complex.

9                     (THEREUPON, Exhibit Number 7 was marked for  
10           identification.)

11   BY MR. STANLEY:

12           Q     Showing you what's been marked Exhibit 7. Do  
13     you recognize that document?

14           A     Yes, sir.

15           Q     Can you tell me what it is?

16           A     That's an invoice for a BPO for the Marion  
17     amphitheater or Carolina Entertainment Complex.

18           Q     And was that part of the collateral, that  
19     piece of property?

20           A     Yes, sir.

21           Q     Did you pay the amount listed there?

22           A     Yes, sir.

23           Q     And what is the amount?

24           A     \$750.

25                     MR. STANLEY: Move Exhibit 7 into evidence.

1 MS. HILL: No objection.

2 (THEREUPON, Exhibit Number 8 was marked for  
3 identification.)

4 BY MR. STANLEY:

5 Q I'm showing you what's been marked Exhibit 8.

6 Do you recognize that?

7 A Yes, sir.

8 Q Can you tell me what that is?

9 A It's an invoice from Alliance Appraisal Group  
10 that did an appraisal on the Carolina Entertainment  
11 Complex at the request of Riverdale Funding.

12 Q Did you pay that amount listed there?

13 A Yes, sir.

14 Q And what is that amount?

15 A \$2,500.

16 MR. STANLEY: Move Exhibit 8 -- oh, I didn't  
17 give you one. I'm sorry. Give you a second to  
18 look at it.

19 MS. HILL: It's fine.

20 MR. STANLEY: Sorry about that.

21 BY MR. STANLEY:

22 Q The Woodbridge loan, did you pay any lender's  
23 fees in connection with that?

24 A Yes, I did.

25 Q How much did you pay, do you recall?

1           A     I believe it was \$19,000.

2           Q     Now is that \$19,000 a commitment fee or was  
3 that the legal fees?

4           A     No, that was a commitment fee, I believe.

5           Q     Did you get that commitment fee back?

6           A     Yes, I did.

7           Q     Did you pay any lender's fees?

8           A     \$500 was the initial that we had to rush to  
9 the law firm up in Hartford, Sage & Halloran -- or  
10 Halloran & Sage, I'm sorry, prior to them starting the  
11 documents.

12          Q     Did you get that money back?

13          A     I don't believe we did.

14          Q     Was Halloran & Sage involved in any way in  
15 the Avatar loan?

16          A     No, they were not.

17          Q     Mr. Tighe testified earlier that he charged  
18 \$10,000 in connection with the Woodbridge loan. Did  
19 you pay that amount to Callison, Tighe & Robinson?

20          A     Yes, I did.

21          Q     To your knowledge is that solely for the  
22 Woodbridge loan?

23          A     Yes. I would like to just touch on that if I  
24 may. You know, I've been in this business for quite a  
25 long time. We've dealt with law firms pretty much

1 across the country. And I can tell you that this loan  
2 would have never closed, this property would have never  
3 closed if it wasn't for Mr. Tighe. And I can tell you  
4 that although he didn't keep records and although as  
5 far as the time sheets, I can tell you that I thought  
6 that his fee of \$10,000 was extremely reasonable when I  
7 paid that fee because I talked to Mr. Tighe if it  
8 wasn't three or four, five times a day, if not somebody  
9 else in my office. I can tell you that Callison &  
10 Tighe is probably the first time that I've ever had a  
11 law firm that I didn't have a problem paying them. So  
12 I just wanted to clear the record because I know that  
13 there might have been a problem with his timekeeping,  
14 but like I said, I was extremely pleased with the rate  
15 that we paid.

16 Q Did you pay an additional fee to Callison  
17 Tighe?

18 A Yes, I did.

19 Q Do you recall how much that was?

20 A I believe that was \$8,500, \$9,000.

21 Q What was your understanding -- I'm sorry. Go  
22 ahead.

23 A What was my understanding?

24 Q What was your understanding of what that  
25 \$8,500 was paying for?

1           A     That was to pay the Avatar loan. It had  
2     nothing to do with the Riverdale. I mean you played  
3     one ballgame and now you're starting off on another  
4     ballgame. That's basically it. There was a different  
5     set of documents that had to be read, a different set  
6     of circumstances that had to be done. And, you know,  
7     I've been traveling and Mr. Tighe was on this. In  
8     fact, he signed the commitment letter on my behalf on  
9     that loan.

10          Q     On the Avatar loan?

11          A     On the Avatar loan.

12          Q     Prior to the Woodbridge loan, were you going  
13     to get insurance on the Swamp Fox Amphitheater?

14          A     Prior to?

15          Q     Yes.

16          A     Yes, sir.

17          Q     Was it going to be in the same amount as what  
18     Woodbridge required, the same policy limits?

19          A     On the Avatar loan?

20          Q     No, on the Woodbridge loan.

21          A     I'm sorry. I don't understand the question.

22          Q     Did Woodbridge require you to get additional  
23     insurance in order to close that loan?

24          A     Yes, they did.

25          Q     Would you have gotten that additional

1 insurance had it not been for the Woodbridge loan?

2 A No.

3 Q Did Avatar require that amount of insurance  
4 on the property?

5 A No. And if I may speak a little probably out  
6 of turn here.

7 THE COURT: Go ahead.

8 THE WITNESS: I know there was some  
9 discussion about the interest rate, and why the  
10 interest rate was lower with the Avatar loan than  
11 it was with the Riverdale loan. And that was  
12 because Avatar also, the gentleman that we dealt  
13 with, and mind you, they closed that loan in 15  
14 days. I don't know too many lenders that are  
15 going to close a loan in 15 days. But the reason  
16 why they did that is because I have a relationship  
17 with Zion National Bank in Utah, and they happen  
18 to be a substantial lender for Zion National Bank.  
19 And Zion was the ones that recommended us to go to  
20 Avatar. I guarantee they closed that loan out of  
21 respect for them and me.

22 (THEREUPON, Exhibit Number 9 was marked for  
23 identification.)

24 BY MR. STANLEY:

25 Q Showing you what's been marked Exhibit 9. Do

1 you recognize that document?

2 A Yes, sir.

3 Q Can you tell me what that is?

4 A It's an invoice for the insurance for  
5 Carolina Entertainment at the time in Marion.

6 Q Can you read for me the stars there beneath  
7 balance due? Can you read, within the description  
8 column, what that says?

9 A Well, there was a \$2,000 increase in the  
10 policy limits.

11 Q Limits, does that say to \$2 million?

12 A Two million dollars. And that was based on  
13 the last minute at Riverdale.

14 THE COURT: Was that liability insurance or  
15 what?

16 THE WITNESS: Yes, sir.

17 MR. STANLEY: Yes, it was.

18 BY MR. STANLEY:

19 Q And how much was that for?

20 A \$1,955.70.

21 Q Did Avatar require that amount, or the  
22 additional insurance?

23 A No.

24 MR. STANLEY: Move Exhibit 9 into evidence.

25 MS. HILL: No objection.

1 THE COURT: This was to satisfy Riverdale?

2 MR. STANLEY: Yes, sir.

3 THE WITNESS: And that was, Your Honor, at  
4 the last moment. The loan officer for -- Bryan  
5 Duvant [sic], I think his name was, we had a  
6 discussion about that. And I said, listen, you  
7 know when we first -- you asked me what the  
8 policy -- I told you what we had and you said that  
9 was sufficient. Now all of sudden, you're raising  
10 up on the eleventh hour. And he said, well, if  
11 you want to close the loan, that's what you're  
12 going to have to pay.

13 THE COURT: Was that refunded?

14 THE WITNESS: No, sir.

15 BY MR. STANLEY:

16 Q I talked with Mr. Tighe earlier about a sign  
17 out on the Swamp Fox Amphitheater property. Did you  
18 have a contract that -- did you have a contract to have  
19 a sign put in right around the time of the loan  
20 closing, the Woodbridge loan closing?

21 A Yes, sir.

22 Q Who was that with?

23 A Advantage Sign Company.

24 (THEREUPON, Exhibit Number 10 was marked for  
25 identification.)

1 BY MR. STANLEY:

2 Q Did --

3 MS. HILL: I'm going to object to this to the  
4 extent -- I thought -- My understanding is there  
5 was no additional amount paid for the sign.

6 MR. STANLEY: I'll show you. We'll go ahead  
7 and do both at the same time. That may be easier.

8 (THEREUPON, Exhibit Number 11 was marked for  
9 identification.)

10 BY MR. STANLEY:

11 Q Showing you Exhibits 10 and 11. Exhibit 10,  
12 can you tell me what that is?

13 A This is a contract that we approved for the  
14 Advantage Sign Company.

15 Q Did you end up getting a sign from Advantage  
16 Sign Company?

17 A No, we did not.

18 Q Can you tell me why?

19 A Well, because the closing never happened. We  
20 couldn't go forward with it. There was a difference at  
21 the time of when we finally did close the property. We  
22 would have had to pay additional amounts of money. But  
23 Advantage decided to say, listen, we can't meet the  
24 time frame. And if you're not prepared to move the  
25 time frame, then we can't go forward with it even

1    though you are going to have to pay the extra money.

2           Q     What did you do in response to that?

3           A     Well, we sent the same specifications out to  
4   several sign companies here in South Carolina because  
5   what we found out was Advantage was going to use  
6   somebody in South Carolina anyway. So we sent the bids  
7   out to -- of the same signs out to several sign  
8   companies here.

9                   Tyson who was right up the street was very  
10   familiar with the property which I was unaware of.  
11   They said that they could do the sign but they couldn't  
12   meet that price. And what they did was, it was the --  
13   The difference was 365 versus 350. It's 365 plus tax.  
14   350 on this was including the tax. The problem that  
15   comes in is that we had to settle for a smaller sign  
16   for the 365,803 plus tax than the sign we had with the  
17   Advantage. So we got a smaller sign.

18                   If we were going to get the same sized sign  
19   that we had originally contracted with Advantage, this  
20   sign with Tyson would have ran us another \$250,000. So  
21   obviously at that stage it was out of the budget. We  
22   decided, okay, can you meet us somewhere in the middle.  
23   And that's where they came up with that number and we  
24   agreed to that.

25                   THE COURT: Signs have gotten very expensive

1       since I worked for a sign company for a few months  
2       when I first got out of the Army, before I ever  
3       went to law school. We didn't charge that much in  
4       those days.

5               THE WITNESS: Your Honor, I agree with you,  
6       but the sign that we have here is not just a  
7       regular sign. It's an LED, you know, high impact.  
8       We can change the graphics on it from anywhere.

9               THE COURT: The technology has increased  
10       tremendously.

11              THE WITNESS: Oh, yeah. And again, what  
12       we're looking at doing, we wanted an impact on  
13       that street to stop -- to let people know there's  
14       been a change.

15   BY MR. STANLEY:

16              Q     Are these -- is Exhibit 10 an accurate copy  
17       of the contract you had with Advantage Sign?

18              A     Yes, sir.

19              Q     And to your understanding had the loan closed  
20       on December 31, could Advantage Sign have performed?

21              A     Yes, sir.

22              MR. STANLEY: Move Exhibit 10 into evidence,  
23       the Advantage Sign contract.

24              THE COURT: So the Tyson sign was just over  
25       \$15,000 more?

1 THE WITNESS: It was \$15,000 more, plus we  
2 got less of a sign. And mind you, we could have  
3 lost the deposit with Advantage Sign but they were  
4 nice enough to give us back our money.

5 MR. STANLEY: Move Exhibit 10 and 11 into  
6 evidence.

7 MS. HILL: No objection.

8 BY MR. STANLEY:

9 Q Did you have a loan broker involved with the  
10 acquisition of the Swamp Fox Amphitheater?

11 A Yes, I did.

12 Q Who was that?

13 A CMP, which was Earl Chasworth.

14 THE COURT: I'm sorry. You have to speak up.

15 THE WITNESS: Earl Chasworth from CMP  
16 Financial.

17 BY MR. STANLEY:

18 Q Do you recall how much he was going to charge  
19 for the Woodbridge loan, what his commission was going  
20 to be?

21 A I want to think it was two points or three  
22 points. I'm not exactly sure but I think it was about  
23 that.

24 Q Was it the same amount as for the Avatar  
25 loan?

1           A     Yes, I believe the -- I believe it was. I'm  
2 not sure.

3           Q     The dollar amount of the commission, was that  
4 the same amount; do you recall that?

5           A     No. The dollar amount was -- It was more  
6 money with the Avatar.

7           Q     Do you recall the difference in the amounts?

8           A     I don't recall. I don't have the documents  
9 in front of me. I think it was \$4- or \$5,000 or  
10 something. I'm not sure though.

11          Q     Do you recognize Exhibit 4?

12          A     Yes, sir.

13          Q     Can you tell me what that is?

14          A     This is a disbursement sheet. It was paid  
15 out of the closing documents and I think the broker is  
16 on there. Isn't it?

17          Q     CMP Group is indicated there.

18          A     Correct.

19          Q     How much was that broker fee?

20          A     \$40,000.

21          Q     And the Woodbridge loan was for less money  
22 than the Avatar loan, correct?

23          A     Yes, sir.

24          Q     Roughly \$100,000?

25          A     Yes, sir.

1           Q     And two points on \$100,000 would equate to  
2     \$2,000?

3           A     Yes, sir.

4           Q     The difference in the loan broker  
5     commission -- The additional loan broker commission,  
6     had the Woodbridge loan, closed would you have had to  
7     pay that, the additional \$2,000?

8           A     No, sir.

9           MS. HILL: Additional what? I'm sorry.

10          MR. STANLEY: Loan broker commission.

11          MS. HILL: Additional what thousand?

12          MR. STANLEY: I'm sorry. 2000.

13          (THEREUPON, Exhibit Number 12 was marked for  
14     identification.)

15          (The witness began whispering to his  
16     attorney.)

17          MS. HILL: Uh-uh.

18          THE WITNESS: I'm sorry.

19          MS. HILL: You can talk on the record.

20          MR. STANLEY: You're on the stand. I know  
21     you're sitting next to me right now, but --

22          THE WITNESS: I'm sorry.

23          MR. STANLEY: -- think of it as if you're on  
24     the stand.

25          THE COURT: And I'm a little hard of hearing.

1 Sometimes I'm having trouble hearing you. I can't  
2 hear out of my left side and you're sitting on my  
3 left side.

4 THE WITNESS: I'm sorry.

5 THE COURT: Old age problem.

6 THE WITNESS: You're getting better.

7 BY MR. STANLEY:

8 Q Exhibit 12, do you recognize that?

9 A Yes, sir.

10 Q What is that?

11 A This was a wire transfer to Wells Fargo.

12 Q What was that for?

13 A This was an underwriting fee that we had to  
14 send CMP to start the process, \$495 plus a \$35 wire  
15 fee.

16 Q Did you use that \$495 in connection with the  
17 Avatar loan?

18 A No, sir.

19 Q Did you use it in connection with the  
20 Woodbridge loan?

21 A Yes, sir.

22 MR. STANLEY: Move Exhibit 12 into evidence.

23 MS. HILL: No objection.

24 THE WITNESS: Can I just say one thing?

25

1 BY MR. STANLEY:

2 Q Sure.

3 A One of the other things though is that Mike  
4 negotiated an extension with Wells Fargo, which was  
5 Wachovia Loan at the time. And I have a pretty strong  
6 record with Wells Fargo back in Connecticut and been a  
7 long-time customer of Wachovia. The reason why they  
8 extended this loan was because of that relationship,  
9 number one, because I called some of the senior level  
10 people about that, that we were going to start pulling  
11 some accounts out if they decided they were going to  
12 take our money. But we had to send additional monies  
13 that were at risk if we didn't close this loan with  
14 Avatar. So we were mitigating as much of our loss as  
15 possible. Just wanted to add that to the record.

16 Q Have you had any further communications since  
17 December 30, 2014 with Riverdale Funding?

18 A No, sir.

19 Q Have you attempted to, other than through  
20 Mike?

21 A After December 31st, I spoke to Earl  
22 Chasworth about it, whether or not they were going to  
23 close this loan or not because we have a problem with  
24 this capital being at risk. Earl said --

25 MS. HILL: Objection. Hearsay.

1 THE COURT: Hearsay.

2 BY MR. STANLEY:

3 Q Have you spoken with anyone with Riverdale  
4 itself or with Woodbridge?

5 A After December 31?

6 Q Correct.

7 A Yes, Bryan Duvant, who was the original loan  
8 vice-president of Riverdale.

9 Q What were those conversations about?

10 A The conversation was, why didn't you guys  
11 close? You left me cooling my heels at the title  
12 company on a holiday weekend when my family was coming  
13 in, and I'm sitting down all day long at a title  
14 company in Miami. My wife is upset. My family is  
15 upset because I'm not back at the house. And, you  
16 know, traffic is building up. And nobody can give us  
17 any answers. And the poor woman at the title company,  
18 says, I'm sorry, Mr. Hartmann, I don't know what to  
19 tell you, nobody is responding. The attorneys weren't  
20 responding to Mike. I kept calling Mike and saying  
21 what's going on here. He says I don't know.

22 And when I finally talked to Bryan, I said  
23 you guys got a lot of nerve. I said I don't believe  
24 that you guys had the money to close this deal. I  
25 think you ran out of cash. And I said I would like to

1 see some proof of funds if you got it, and they refused  
2 to come up with it.

3 MS. HILL: Objection.

4 THE COURT: I think he can testify what he  
5 told but not what the other man told him.

6 MS. HILL: Right.

7 THE WITNESS: So I said to Bryan, this is a  
8 terrible way to do business with somebody. I  
9 said, you know, I've never in all my life done  
10 with a lender who you send me directions on how to  
11 get to a facility to where to close this loan and  
12 I sit down there all day long and nobody has the  
13 decency to communicate. No one had the decency to  
14 pick up a phone to call my attorney or me. It's  
15 ridiculous. It's just a waste of time. So, you  
16 know, we're worried about I've got people that  
17 I've hired in the company to expand this. We're  
18 trying to create jobs in a county that desperately  
19 needs jobs. And we have a bank that turns around  
20 and promises and doesn't fulfill on their  
21 promises.

22 BY MR. STANLEY:

23 Q To your knowledge and recollection, do you  
24 have any other monies that you expended in regard to  
25 the Woodbridge loan that were not used or necessary in

1 the Avatar loan?

2 A Well, my time, my faxing, I had secretaries  
3 create documents, you know, my fuel, monies going back  
4 and forth trying to address all their concerns. That's  
5 about it.

6 MR. STANLEY: No further questions.

7 MS. HILL: I have a few questions if you  
8 don't mind.

9 THE COURT: Y'all want to take about a five-  
10 or ten-minute break.

11 MS. HILL: Sure.

12 (Whereupon, a brief break was taken.)

13 CROSS EXAMINATION

14 BY MS. HILL:

15 Q Mr. Hartmann, if you don't mind telling me,  
16 what was the purpose of this loan?

17 A The purpose of the loan with...

18 Q Either one. Why were you seeking this money?

19 A The purpose of the loan was to do the  
20 acquisition on 1548 South Highway 501, Marion, which  
21 was known as the Carolina Entertainment Complex.

22 Q So you nor any entity you had an ownership  
23 interest in owned it prior to the transaction?

24 A No, ma'am.

25 Q What did the appraisal come back for on the

1 piece of property?

2 A On the property itself?

3 Q Uh-huh.

4 A I believe it was 3.5 million, 3.6 million.

5 Q Had you done any sort of market analysis  
6 prior to the appraisal?

7 A Yes, ma'am. We spent about three and a half  
8 years on that property.

9 Q Did you have a written engagement letter with  
10 Mr. Tighe or his firm?

11 A Mr. Tighe?

12 Q Yes, or his firm.

13 A What do you mean a written engagement?

14 Q I mean did you have a letter whereby you  
15 hired Callison Tighe, or Mr. Tighe, as your attorney?

16 A Well, I'm a little bit old school, honey.  
17 The man was recommended to me. I spoke to him on the  
18 phone. He seemed like he was cut of the same cloth  
19 that I was. I'm an old-fashioned kind of guy. So if I  
20 shake somebody's hand, it's a deal.

21 Q Were you going to pay him whether or not it  
22 closed?

23 A I was going to pay him no matter what it is.  
24 He's a great man. It's a good law firm.

25 Q Did you have -- What were the terms of the

1 engagement?

2 A Engagement?

3 Q Uh-huh.

4 A The engagement was that he would do the right  
5 thing by me, make sure my company is protected, and  
6 make sure we close this loan and buy the property. And  
7 then from that point on, it was for him to represent  
8 our firm in anything that we do here in South Carolina.

9 Q Did you negotiate the fee? I mean did you  
10 ask him about an hourly fee or --

11 A With Mr. Tighe?

12 Q Yes.

13 A I don't usually negotiate with attorneys. I  
14 look at it this way: I'm going to hire you one time.  
15 I'm a pretty busy guy. I do a lot of real estate all  
16 over the place. All you're going to steal from me the  
17 first time is a little bit of money, but you're never  
18 going to get it the second time.

19 Q Did you ask him up-front what his fee would  
20 be?

21 A Never.

22 Q You just wait to the end to see what the fee  
23 will be?

24 A If I think it's too high, we sit down and  
25 have a little talk. But he seemed like a fair guy.

1           Q     Tell me about the additional liability  
2 insurance. Let me refer you to that exhibit.

3                   MS. HILL: Taylor, I don't know if you know  
4 what number that was.

5                   MR. STANLEY: Exhibit 9 it looks like.

6 BY MS. HILL:

7           Q     Exhibit 9. What were some of the terms of  
8 the commitment letter?

9                   MR. STANLEY: Objection. Again, it goes to  
10 relevance. The terms of the commitment letter  
11 don't have a bearing on the damages.

12                   THE COURT: The terms of the commitment  
13 letter could.

14 BY MS. HILL:

15           Q     What were some of the terms of the commitment  
16 letter?

17           A     I don't recall the commitment letter. You  
18 know, at my age things that don't happen you try to  
19 forget them, so you don't only have so many plates in  
20 there you can organize. But if you have a copy of the  
21 commitment letter, I'll be more than glad to read it  
22 for you.

23           Q     I don't.

24                   MR. STANLEY: I've got a copy if you want it.  
25 Do you want it?

1 MS. HILL: Yes.

2 MR. TIGHE: We should put it in evidence.

3 MS. HILL: Hold on a second. Let me look at  
4 it.

5 BY MS. HILL:

6 Q Let me ask you, Mr. Hartmann, do you remember  
7 the commitment letter saying that any attorney's fees  
8 you incurred would be your responsibility whether or  
9 not the loan closed?

10 A Do I remember that? I think in all  
11 commitment letters basically most lenders put that sort  
12 of language in.

13 Q Sort of an industry standard?

14 A It's a boilerplate.

15 Q So it wouldn't surprise you if that language  
16 were included in this commitment letter, right?

17 A No, it wouldn't surprise me. Usually the  
18 borrower pays for the bank's attorney and his own  
19 attorney.

20 Q So it's your understanding that any  
21 attorney's fees incurred whether or not it closed would  
22 be your responsibility?

23 A It would be my understanding that if the loan  
24 closed out of fault of my own, then certainly I would  
25 be -- I wouldn't be responsible to pay legal fees. So

1 in other words, if it was the lender's fault that the  
2 loan didn't close, then the lender should reimburse me.

3 Q Was that language in the document?

4 A I believe that there was some sort of  
5 language to that in the documents.

6 Q Do you remember specifically?

7 A Well, I do remember that specifically in that  
8 commitment letter the \$19,000 certainly wouldn't be  
9 refunded if it was my fault. However, if it's the  
10 bank's fault, they would certainly refund that \$19,000,  
11 which the bank did.

12 THE COURT: I believe you earlier testified  
13 that the bank did refund that \$19,000.

14 THE WITNESS: That's correct, sir. But they  
15 wouldn't have to refund that if it was my fault.

16 THE COURT: And was that at some point after  
17 December 31?

18 THE WITNESS: Yes, it was, sir. It was  
19 approximately around January 8.

20 THE COURT: January 8?

21 THE WITNESS: Yes, sir. So if Riverdale had  
22 any intentions of closing this loan, they  
23 certainly wouldn't have refunded the money.

24 BY MS. HILL:

25 Q Did you execute the commitment letter?

1           A     Yes, I did.

2           Q     I thought you testified earlier Mr. Tighe  
3     executed it?

4           A     No. What I testified earlier is that Mr.  
5     Tighe executed the commitment letter with Avatar, not  
6     with Riverdale.

7           Q     But you executed the commitment letter with  
8     Riverdale?

9           A     With Riverdale, yes, I did.

10          Q     Let me show you your complaint that you filed  
11     in this case. On page 3 of that document, let me refer  
12     you to that. Let me refer you to paragraph 12. Would  
13     you agree with me that it says the commitment letter  
14     was not executed? I'm just trying to figure out why  
15     that's in the complaint.

16          A     I don't know. You're talking about item 12  
17     on page 3.

18          Q     Right.

19          A     The commitment further provided various  
20     contingencies prior to funding, each of which was  
21     satisfied by the Plaintiffs, with the exception of the  
22     execution of the commitment, which the parties agreed  
23     would be done at the closing.

24                     I'm not sure if there was a revised  
25     commitment, but I know that when we negotiated the deal

1 with Bryan Duvant, I think that's his name, or Benjamin  
2 Duvant, I did sign some documents and they were faxed  
3 back to him. And I remember he said that I had to send  
4 him \$500 to the attorney of Halloran & Sage. And I did  
5 raise the question with Benjamin at the time, would  
6 there be a conflict of interest. And he said, what do  
7 you mean? Because I said I've done business with  
8 Halloran & Sage. He said, I don't believe that there  
9 would be. So I said, okay, fine. So I did sign  
10 something. Whether that was a full-blown commitment,  
11 I'm not sure what we're talking about.

12 Q Let me ask you this. Were there any leases  
13 on the property?

14 A On what property are we talking about?

15 Q On the amphitheater.

16 A On the amphitheater, no.

17 Q There were not? Did they require valid  
18 leases?

19 A They required valid leases on the Partners 95  
20 property, which was a shopping center, which they were  
21 provided well in time, and then documented by their  
22 appraisers, and their BPO experts who verified the  
23 leases. And certainly the value of that property was  
24 more than two times their loan value just on that  
25 shopping center.

1 Q On the Connecticut property?

2 A That's correct.

3 Q What was the contingency requirement in the  
4 commitment letter as to the appraised value of the  
5 amphitheater?

6 A It wasn't just the amphitheater. It was a  
7 total combined I think 65 percent loan-to-value.

8 Q I guess that's not really my question, but  
9 what was the actual number they wanted for the  
10 appraised value, the two pieces of property?

11 A I think it was 2.8, something like that. And  
12 they certainly well exceeded that.

13 Q What was the appraised value?

14 A Just on the amphitheater was 3.5 and on  
15 Partners 95 it was 2.9.

16 Q Let me get back to the liability insurance  
17 with Exhibit 9. So you initially paid -- if I'm  
18 looking at Exhibit 9, you initially paid \$12,000  
19 general liability insurance premium?

20 A We paid \$12,302.36. Actually 10,000 -- I'm  
21 sorry. We paid \$10,346.66. That was based on the  
22 insurance that Benjamin Duvant wanted from Riverdale.

23 Q How much insurance was that?

24 A I don't really know because Benjamin talked  
25 to Earl Chasworth who then spoke to the guys from Shoff

1 Darby who does insurance for us. Then I got a call on  
2 the eleventh hour from Rocko who was the agent for  
3 Shoff Darby who said, you need to come up with another  
4 \$2,000. I said, why is that. Because the bank decided  
5 they wanted additional liability coverage. I said, for  
6 what. He said, that's what they want. He said -- I  
7 said, I can't give it to you now, I'm not in  
8 Connecticut. I said, we'll pay it out of closing. So  
9 I think that's what's on their statement, on the  
10 closing statement. I called Ben up from Miami and  
11 said, you know, you find it pretty easy to go spend  
12 somebody else's money.

13 Q Let me ask you this. You paid this on the  
14 closing, which appears on the disbursement occurred  
15 January 22, 2015. So we're now more than a year after  
16 closing. How much insurance do you have on the  
17 property now?

18 A Well, we have -- Right now it's occupied. So  
19 we have workers' comp. We have liquor control, liquor  
20 insurance, you know, plus building because we've done a  
21 tremendous amount of building out there.

22 Q You have much more insurance?

23 A Absolutely.

24 Q Did y'all move on to the property shortly  
25 after this closing, January 22, 2015?

1           A     2015 January, the tail end of January we  
2 started cleaning the property up.

3           Q     When did y'all move on to the property?

4           A     When you say move on to the property, what do  
5 you mean by that?

6           Q     When did you start doing things whereby you  
7 needed additional insurance?

8           THE COURT: When did you exert control over  
9 it I think is what she's saying.

10          THE WITNESS: Oh, I would say probably in May  
11 of 2015..

12 BY MS. HILL:

13          Q     Did you ask for a refund on this insurance  
14 amount?

15          A     No, you can't get a refund.

16          Q     What was the term for this insurance?

17          A     One year.

18          Q     Let me ask you about the broker's commission.  
19 That amount was tied directly to how much you borrowed,  
20 correct?

21          A     Yes, ma'am.

22          Q     So if you borrowed less, your commission  
23 would have been less?

24          A     Yes, ma'am.

25          Q     But you actually borrowed more from Avatar

1 than you were going to borrow from Woodbridge, right?

2 A Yes, ma'am.

3 Q So that's simply a matter of you choosing to  
4 borrow more, correct?

5 A Well, Avatar was requiring to a certain  
6 degree that we were going to borrow more money if they  
7 wanted to close this loan in the time frame that  
8 they -- they happened to have a fund that was available  
9 to fund this. We lucked out. Your clients lucked out.

10 Q How quickly did you first contact my clients?  
11 My clients moved pretty quickly too, didn't they?

12 A They did? They didn't move too quick because  
13 they didn't close the loan. I don't know how quick  
14 you're talking about they moved. They moved taking my  
15 money.

16 Q When did you first contact them?

17 A We contacted them about a year prior to the  
18 conversation.

19 Q When did you get the commitment letter?

20 A Commitment letter was given -- I don't know  
21 the date. I want to think it was November, December.  
22 I think maybe October when we started passing paperwork  
23 to them.

24 Q Now let's talk about the sign, the infamous  
25 sign, Advantage LED sign. So if I understand your

1 testimony correctly, and don't let me put words in your  
2 mouth, so correct me.

3 A Okay.

4 Q The Advantage sign you were going to get was  
5 going to be larger and it was going to cost you  
6 \$350,000?

7 A That's correct.

8 Q Why did you not go with Advantage?

9 A Advantage couldn't deliver the sign. There  
10 was a penalty if they couldn't deliver the sign.

11 Q Help me understand that. Were they going to  
12 be able to deliver the sign if you closed on the 30th?

13 A They were going to be able to close -- They  
14 were going to be able to deliver the sign if, in fact,  
15 we were going to close it and allow them to start their  
16 permitting process. We didn't close it on  
17 December 30th, so we could not issue a check to them.

18 We could not -- I mean we couldn't have them go off and  
19 do a permit on property that we didn't own. When we  
20 did close, we contacted them immediately and they said  
21 we're not going to be able to make the time frame and  
22 we can't line up local contractors to get it done.

23 Q What was the time frame you were demanding?

24 A We were demanding that we needed to have the  
25 sign up, done, built, and lit by May 1.

1 Q Was that your requirement?

2 A That was my requirement because he had an  
3 event that was going to happen and we had everybody  
4 from the Governor on down coming to do an unveiling on  
5 it.

6 Q What time did they say they could get the  
7 sign to you?

8 A It wouldn't be until late June, July. That's  
9 when we went to Tyson.

10 Q Originally when were they going to get the  
11 sign to you?

12 A Which one, Advantage?

13 Q Uh-huh.

14 A Advantage was going to get the sign -- They  
15 would have it done before May 1.

16 Q And with Tyson Sign, who else did you contact  
17 or try to determine --

18 A We contacted another substantially large firm  
19 here in South Carolina. I think it started with a C,  
20 I'm not sure. Collier or something. But it was  
21 another large firm, and they just said that they  
22 couldn't deliver the goods.

23 Q So again, that was your requirement to get  
24 the sign up by then, right?

25 A Yes, ma'am.

1 Q Let me ask you about the wire transfer  
2 services. I know this is a small fee but what was the  
3 fee again, the 495?

4 A It was for an underwriting that Riverdale  
5 requested to start the loan package or something.

6 Q Who did you wire the money to?

7 A I think it went to CMP.

8 Q Did you ultimately use CMP?

9 A No.

10 Q Who was it --

11 A For?

12 Q For the Avatar loan.

13 A No. We used CMP as a broker. We had no  
14 choice. We had an agreement with them.

15 Q I'm almost done. Would you agree with me  
16 that 12 percent is a higher interest rate than 9.9?

17 THE COURT: What was that question?

18 BY MS. HILL:

19 Q Would you agree with me that 12 percent is a  
20 higher interest rate than 9.9?

21 A Yes, I would agree with you depending on the  
22 context of it.

23 MS. HILL: I have no further questions right  
24 now.

25 THE COURT: Anything further from the

1 Plaintiff?

2 MR. STANLEY: Yes, sir.

3 REDIRECT EXAMINATION

4 BY MR. STANLEY:

5 Q I believe you testified that you signed the  
6 loan commitment; is that correct?

7 A Yes, sir.

8 (THEREUPON, Exhibit Number 13 was marked for  
9 identification.)

10 BY MR. STANLEY:

11 Q I believe you testified that you faxed that  
12 in to the Riverdale people? Don't let me put words in  
13 your mouth.

14 A I believe I did.

15 Q Okay. Would they accept a faxed copy of the  
16 loan commitment?

17 A Yes. I mean there was no objection to it,  
18 but I think that they said they wanted an original  
19 signed or something like that. But in light of  
20 speeding the process, you know, we -- Again, because at  
21 that time I was traveling so I don't know where I was  
22 at this particular time when I signed it. They sent it  
23 to me, I printed it and sent it back to them. I think  
24 this was actually emailed.

25 MR. STANLEY: I would like to admit Exhibit

1           13 into evidence.

2           MS. HILL: That's fine. I have no objection.

3 BY MR. STANLEY:

4           Q     And turn to the last page of Exhibit 13. Is  
5 that your signature?

6           A     Yes, sir..

7           Q     What's the date on those signatures?

8           A     12/9.

9           Q     Did you sign that on 12/9?

10          A     Yes.

11          Q     Was Avatar willing to issue a loan in the  
12 same amount as what Woodbridge was willing to issue the  
13 loan? Woodbridge issued a loan commitment for 1.9  
14 million. Was Avatar willing to issue a loan for  
15 1.9 million?

16          A     Yes, they were.

17          Q     Do you recall how much the loan was finally  
18 for?

19          A     The loan for Avatar was -- Let me take that  
20 back. 1.9 was the Riverdale Funding loan. Avatar came  
21 up and said they have a fund that they could get this  
22 going but it would be 2 million and change. I think  
23 that's what happened. And we agreed to accept the  
24 2 million.

25          Q     Did they ever offer to issue a loan for

1 1.9 million? 1.9 million exactly as opposed to 2  
2 million?

3 MS. HILL: Object to the form. I object to  
4 the question.

5 MR. STANLEY: I'll rephrase.

6 BY MR. STANLEY:

7 Q What amount did Avatar contact your -- what  
8 amount would -- what specific amount would Avatar issue  
9 a loan for?

10 A Well, the loan actually was -- I think was  
11 1,958,365.

12 Q I think you talked with Ms. Hill about the  
13 interest rate some. You testified earlier that there  
14 was additional collateral for the Avatar loan.

15 A Correct.

16 Q In your experience does the collateral affect  
17 the interest rate?

18 A Absolutely. And if I may clear that up, the  
19 reason why Riverdale did not accept the collateral that  
20 we gave Avatar was the piece that Avatar took to lower  
21 the rate was -- it was a service station, it was a  
22 gasoline station. Riverdale did not want to take the  
23 gas station and they didn't want to take a second.  
24 Avatar did a second on the gas station which lowered  
25 the rate.

1 THE COURT: They were worried about  
2 environmental matters in all likelihood.

3 THE WITNESS: Exactly. But it didn't bother  
4 Avatar. We did have a clean bill of health on it.

5 BY MR. STANLEY:

6 Q Turning now back to the sign, did you -- what  
7 amount would Tyson have charged for the same sign?

8 A The same exact sign that Advantage was going  
9 to -- the same size and everything else would be  
10 \$250,000 more than the 365 that they charged us.

11 THE COURT: That much more?

12 THE WITNESS: Yes, sir. That's exactly what  
13 I said.

14 THE COURT: 250,000 more?

15 THE WITNESS: \$250,000 more than --

16 THE COURT: I haven't been down that highway  
17 in a couple of years. Is the sign in place?

18 THE WITNESS: The sign actually -- The top  
19 part of the sign will be put in place within the  
20 next 15 days -- I guess 30 days.

21 THE COURT: I'm just getting off track. Just  
22 curious. Next time I'm --

23 THE WITNESS: The LED is up but we had to --  
24 we have to -- The LED portion of the sign is up,  
25 but we had to take the top part of it down because

1           there was deflection in it.

2           THE COURT: I'm in Marion usually once or  
3           twice a month. Out of curiosity I want to drive  
4           out and see a sign that cost that much.

5           THE WITNESS: I can tell you, Your Honor,  
6           that it's quite a sign. When the top and  
7           everything is put together, I think you'll -- It  
8           looks like Las Vegas.

9   BY MR. STANLEY:

10       Q     When did the sign -- the sign that you  
11       bought, when did that actually get up?

12       A     That was up actually the time that they said  
13       they were going to get it, Tyson did. May.

14       Q     In May of 2015?

15       A     Right. But the reason why it's down is  
16       because we had a problem with the poles. What they  
17       did was they took our old poles, which we found out,  
18       and put them on. And when we had the engineer -- We  
19       hired an independent engineer to go out and inspect the  
20       sign. We found that there was deflection in it. So  
21       Tyson has to remove the sign and redo the poles.

22       Q     Do you remember which one is the Advantage --  
23       There it is. Exhibit 10 is the Advantage Sign  
24       contract. Can you tell me the date on there?

25       A     12/17/2014.

1 Q If you turn to the fifth page, down in the  
2 comments section, can you read that sentence, "Assuming  
3 that we can get," the last one in the comments section.

4 A It's \$35,000 --

5 Q I'll read it and you tell me if I'm reading  
6 it accurately. "Assuming that we can get the permit  
7 within two weeks as Scott was told by the people in  
8 Marion, SC, the sign will be completely installed by  
9 April 8, 2015." Did I read that right?

10 A Yes, sir.

11 Q Were they have able to get -- did you own the  
12 property within two weeks of that, of December 17,  
13 2014?

14 A No.

15 Q Could they have gotten a permit, if you  
16 didn't own it, for you? Could they have gotten a  
17 permit?

18 A No.

19 MS. HILL: Objection, leading.

20 BY MR. STANLEY:

21 Q What would it take for them to get a permit  
22 for you?

23 A Well, we would have to have title of the  
24 land.

25 MR. STANLEY: That's all I've got right now.

1 We would make a motion to amend the complaint to  
2 conform to the evidence, that the commitment was  
3 signed on December 9, 2014.

4 THE COURT: I think that speaks for itself.

5 MS. HILL: Well, it does, but if they amend  
6 the complaint, we get to answer.

7 THE COURT: Pardon?

8 MS. HILL: If they amend the complaint, we  
9 get to answer.

10 MR. STANLEY: Well, we'll withdraw our  
11 motion.

12 THE COURT: Anything else?

13 MR. STANLEY: That's it. That's all.

14 THE COURT: Ms. Hill?

15 MS. HILL: Indulge me just one moment.

16 THE COURT: Sure.

17 RECROSS EXAMINATION

18 BY MS. HILL:

19 Q Mr. Hartmann, how long has this property not  
20 had a sign currently? I believe you testified in your  
21 testimony that there is no sign out there. The sign  
22 had been taken down.

23 A No, no, no, no. There's been a sign out there  
24 since the time that we had in May. The top portion of  
25 the sign has been removed and they're going to

1     reinstall it. The reason for it is because Tyson cut  
2     two of the old signs and put bigger poles that were  
3     rusted on top. They're now going to remove those two,  
4     but the LED sign is intact.

5           Q     There is a -- the sign that we're all talking  
6     about is out there right now?

7           A     It's out there.

8           Q     It's been there since May?

9           A     Since May.

10          Q     But again, had you been willing to wait until  
11     June you could have used Advantage?

12          A     Could have used Advantage? Advantage didn't  
13     want to do the sign.

14                   MS. HILL: No further questions.

15                   MR. STANLEY: Can I have just one quick --  
16     well, a few quick questions.

17                   REDIRECT EXAMINATION

18     BY MR. STANLEY:

19           Q     Comment one to the Advantage Contract,  
20     Exhibit 10, if you'll look on it with me, it's on the  
21     5th page. There in the comment section, that first  
22     one, 35,244 --

23                   MS. HILL: What page?

24                   MR. STANLEY: Fifth page, that one with the  
25     numbers on it.

1 MS. HILL: This one?

2 MR. STANLEY: One more. Down there in the  
3 comments.

4 BY MR. STANLEY:

5 Q \$35,244.69 discount is valid through  
6 December 31, 2014 as part of our end-of-year promotion.  
7 What had to be done by December 31, 2014 for you to get  
8 that end-of-year promotion?

9 A We had to have a signed contract and they had  
10 to be paid. And we were not prepared to do that. And  
11 the other reason why, because it took so long to get  
12 this done, Advantage didn't want to even do it for that  
13 price because they would have lost money. So they were  
14 going to be basically in the same line as Tyson.

15 MR. STANLEY: That's all I have.

16 MS. HILL: I have one more.

17 THE COURT: Go ahead.

18 RECROSS EXAMINATION

19 BY MS. HILL:

20 Q Under that portion that Taylor just had you  
21 read, can you read the next sentence?

22 A Why did you wait until I get it closed up?  
23 This quote includes the existing poles, pending  
24 engineering approval.

25 Q Uh-huh. So this quote may have gone up had

1 they had to replace the poles, correct?

2 A Correct, but they didn't have to replace the  
3 poles.

4 MS. HILL: No further questions.

5 THE COURT: I've been trying to run sort of a  
6 little running total in my head. I think the  
7 testimony from Mr. Hartmann, counting the extra  
8 attorney's fees and all and everything, you're in  
9 the neighborhood of something under \$40,000 is  
10 what you've testified to, or had testimony on  
11 today. Does that sound about -- You may have a  
12 little breakdown, a little sheet where you've  
13 totaled up these costs. Am I in the ballpark? As  
14 you've gone through, I've been sticking it in the  
15 back corner of my head.

16 MR. STANLEY: Given the sign is a different  
17 size, not accounting for that, the total is  
18 \$36,503.70. However, we would also ask that the  
19 Court consider punitives in this case. As  
20 Mr. Hartmann testified, he asked for proof of  
21 funds. They couldn't provide it. They couldn't  
22 or were unwilling to provide those proof of funds.  
23 The only reasonable inference from that is that  
24 they didn't have those funds. And we would argue  
25 that that's fraud -- or, I'm sorry, that that is

1 breach of contract accompanied by fraudulent act  
2 entitling the Plaintiffs to punitive damages as  
3 well.

4 Mr. Hartmann has expended additional  
5 sums of money in his work towards getting these  
6 things closed. He's gone out of his way to  
7 mitigate his damages. As he's testified, the  
8 \$300,000 was avoided through the work of  
9 Mr. Hartmann and Mr. Tighe. He has taken a  
10 smaller sign in order to accommodate his budget.  
11 The sign not being -- the sign contract not being  
12 signed by December 31 was due solely to the acts  
13 of the Defendants. Therefore, he's taken a  
14 smaller sign. I'm sure he would have preferred to  
15 have the larger sign but because of his budget, he  
16 was not able to have that sign.

17 You know, we would ask for punitive  
18 damages as well as the actual damages on the  
19 breach of the contract itself.

20 THE COURT: Ms. Hill, what you got to say  
21 about that?

22 MS. HILL: I think the law is well settled  
23 that they have to prove their damages even if we  
24 were in default, and they have to prove them with  
25 specificity, and they have to prove them to a

1 preponderance of the evidence. And in this  
2 situation I don't believe they have proven, met  
3 their threshold for punitive damages. I have  
4 arguments as to other damages as well, but  
5 certainly punitive damages.

6 They haven't proven that there was any  
7 fraud. They haven't proven that that was -- that  
8 actually occurred. So, you know, they didn't  
9 prove that they've hit all the contingencies in  
10 the letter. You know, had they hit all the  
11 contingencies, perhaps there would have been but  
12 they haven't proved that, in order to prove their  
13 damages. So that's our position at least with  
14 regard to the punitive damages.

15 THE COURT: Any response?

16 MR. STANLEY: The contingencies, the ones  
17 that we've talked about here as well as all the  
18 rest of them were fulfilled. There's testimony  
19 that the appraisals came back higher than  
20 required. The BPOs were exceeding what was  
21 required. Frankly, all the contingencies were  
22 fulfilled, even up to the day of closing. Mr.  
23 Tighe had correspondence with the Defendant's  
24 lawyer regarding why is this not closing. And  
25 there's been silence.

1           Perhaps if they had responded, we could  
2           have -- we wouldn't be here today. So the  
3           contingencies -- Our position is that the  
4           contingencies have been fulfilled. And to be  
5           clear, we're not -- I'm not asking for punitives  
6           on the fraud cause of action but the breach of  
7           contract accompanied by fraudulent act. There's a  
8           small difference there, but that would be, I  
9           think -- You know, it's still a difference,  
10          although it's a small one.

11                 I don't have a copy of the complaint  
12          with me.

13                 MS. HILL: There's one as an Exhibit.

14                 MR. STANLEY: When I talk about breach of  
15          contract accompanied by a fraudulent act, I'm  
16          talking about the second cause of action.

17                 THE COURT: I'm going to take it under  
18          advisement. You can prepare a list of -- I made  
19          notes on most of it, the actual -- what you  
20          consider the actual damages. And y'all both can  
21          address any questions you want to on that and on  
22          anything about punitive damages.

23                 It is a mystery to me why the lawyers --  
24          Mr. Tighe was communicating with Robert  
25          whatever-his-name-was, how he apparently has died

1 and gone across the sand dunes somewhere or either  
2 has played like an ostrich and stuck his head in a  
3 sand dune, which is very puzzling to me. But I  
4 feel sure he had some good and legitimate reason  
5 why he didn't want to talk to Mr. Tighe again.  
6 Mr. Tighe being the roughneck that he is maybe  
7 that was why.

8 MR. TIGHE: I was very fearsome.

9 THE COURT: I've known Mr. Tighe for over 50  
10 years and he's always a gentleman.

11 MS. HILL: I can assure you that we would  
12 have loved to have put up evidence to --

13 MR. TIGHE: You mean about my fearsomeness?

14 MS. HILL: No, no.

15 THE COURT: That will conclude the hearing.

16 (Proceedings concluded at 12:36 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, Laura Chamblee, Registered  
3 Professional Reporter and Notary Public for the State  
of South Carolina at Large, do hereby certify:

4 That the foregoing proceedings was taken  
before me on the date and at the time and location  
5 stated on page 1 of this transcript; that the foregoing  
proceedings as typed is a true, accurate and complete  
6 record made at the time of the hearing to the best of  
my ability.

7 I further certify that I am neither  
8 related to nor counsel for any party to the cause  
pending or interested in the events thereof.

9 Witness my hand, I have hereunto affixed  
10 my official seal this 15th day of February 2016, at  
Hartsville, Darlington County, South Carolina.

11

12

13

14

15 \_\_\_\_\_  
Laura Chamblee,  
16 Registered Professional Reporter  
Notary Public  
17 State of South Carolina at Large  
My Commission expires:  
December 22, 2018

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25

|    |                                      |          |
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## Mike Tighe

---

**From:** Roberts, Richard P. <ROBERTS@halloransage.com>  
**Sent:** Tuesday, December 30, 2014 12:07 PM  
**To:** Mike Tighe; mirna.moya@fnf.com  
**Cc:** Jeff Vinzani <JVinzani@glvlawfirm.com> (JVinzani@glvlawfirm.com); bdunavent@riverdalefunding.com; Stephanie Brown; jhughis@aol.com; Llacey365@aol.com; David Golden (dgolden@woodbridgeinvestments.com)  
**Subject:** RE: Loan of Woodbridge Mortgage Investment Fund 3, LL to 95 Partners, L.L.C. and HSGCHG Investments, LLC  
**Importance:** High

Mirna –

Please do not have the borrower/guarantor execute any of the loan documents until either the lender (through Joe Hughis or Larry Lacey) or its counsel (David Golden, me or Jeff Vinzani) lets you know that it is OK to do so. Thank you.

Rich Roberts

---

**From:** Mike Tighe [mailto:MikeTighe@callisontighe.com]  
**Sent:** Tuesday, December 30, 2014 11:31 AM  
**To:** mirna.moya@fnf.com  
**Cc:** Roberts, Richard P.; Jeff Vinzani <JVinzani@glvlawfirm.com> (JVinzani@glvlawfirm.com); bdunavent@riverdalefunding.com; Mike Tighe; Stephanie Brown  
**Subject:** Loan of Woodbridge Mortgage Investment Fund 3, LL to 95 Partners, L.L.C. and HSGCHG Investments, LLC

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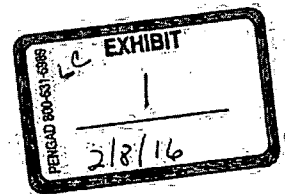
Thank you.

CALLISON |||| TIGHE

**Stephanie T. Brown**  
**Legal Assistant to Michael W. Tighe**  
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## Mike Tighe

**From:** Mike Tighe  
**Sent:** Tuesday, December 30, 2014 12:08 PM  
**To:** 'Roberts, Richard P.'  
**Subject:** RE: Loan of Woodbridge Mortgage Investment Fund 3, LL to 95 Partners, L.L.C. and HSGCHG Investments, LLC

Is there a problem?

**From:** Roberts, Richard P. [<mailto:ROBERTS@halloransage.com>]  
**Sent:** Tuesday, December 30, 2014 12:07 PM  
**To:** Mike Tighe; [mirna.moya@fnf.com](mailto:mirna.moya@fnf.com)  
**Cc:** Jeff Vinzani <[JVinzani@glvlawfirm.com](mailto:JVinzani@glvlawfirm.com)> ([JVinzani@glvlawfirm.com](mailto:JVinzani@glvlawfirm.com)); [bdunavent@riverdalefunding.com](mailto:bdunavent@riverdalefunding.com); Stephanie Brown; [jhughis@aol.com](mailto:jhughis@aol.com); [lacey365@aol.com](mailto:lacey365@aol.com); David Golden ([dgolden@woodbridgeinvestments.com](mailto:dgolden@woodbridgeinvestments.com))  
**Subject:** RE: Loan of Woodbridge Mortgage Investment Fund 3, LL to 95 Partners, L.L.C. and HSGCHG Investments, LLC  
**Importance:** High

Mirna –

Please do not have the borrower/guarantor execute any of the loan documents until either the lender (through Joe Hughis or Larry Lacey) or its counsel (David Golden, me or Jeff Vinzani) lets you know that it is OK to do so. Thank you.

Rich Roberts

**From:** Mike Tighe [<mailto:MikeTighe@callisontighe.com>]  
**Sent:** Tuesday, December 30, 2014 11:31 AM  
**To:** [mirna.moya@fnf.com](mailto:mirna.moya@fnf.com)  
**Cc:** Roberts, Richard P.; Jeff Vinzani <[JVinzani@glvlawfirm.com](mailto:JVinzani@glvlawfirm.com)> ([JVinzani@glvlawfirm.com](mailto:JVinzani@glvlawfirm.com)); [bdunavent@riverdalefunding.com](mailto:bdunavent@riverdalefunding.com); Mike Tighe; Stephanie Brown  
**Subject:** Loan of Woodbridge Mortgage Investment Fund 3, LL to 95 Partners, L.L.C. and HSGCHG Investments, LLC

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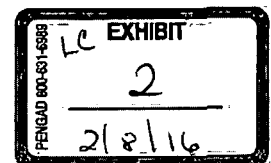
Thank you.

CALLISON TIGHE

**Stephanie T. Brown**  
**Legal Assistant to Michael W. Tighe**  
Callison Tighe & Robinson, LLC  
1812 Lincoln Street  
P.O. Box 1390  
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## Mike Tighe

**From:** Mike Tighe  
**Sent:** Tuesday, December 30, 2014 2:08 PM  
**To:** Roberts, Richard P. (ROBERTS@halloransage.com)  
**Subject:** Hartmann

Rich: I need you to call me. I called for Larry but could not get him. Does your client know my client is going to lose \$300,000 if we don't close today?

 **TIGHE**

### Michael W. Tighe

Callison Tighe & Robinson, LLC  
1812 Lincoln Street  
P.O. Box 1390  
Columbia, SC 29202

P 803.404.6900

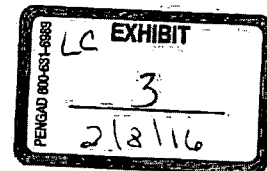
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E [miketighe@callisontighe.com](mailto:miketighe@callisontighe.com)

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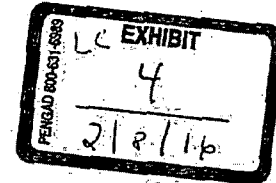
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# DISBURSEMENTS SUMMARY / BALANCE SHEET

**Borrower:** HSGCHG Investments, LLC, a Delaware limited liability company  
Oil Barons, Inc.  
Partners 95, L.L.C.  
**Seller:** Wells Fargo Bank N.A.  
**Lender:** Avatar Capital Finance, LLC  
**Settlement Agent:** Callison Tighe & Robinson, LLC  
(803)256-2371  
**Place of Settlement:** 1812 Lincoln Street, Suite 200  
Columbia, SC 29201  
**Settlement Date:** January 22, 2015  
**Property Location:** 1548 State Hwy 501  
Marion, SC  
Marion County, South Carolina



## INCOMING FUNDS

|                             |                     |                     |
|-----------------------------|---------------------|---------------------|
| Avatar Capital Finance, LLC | Loan Funding Amount | 1,883,365.00        |
| Deposit/Earnest money       |                     | 75,000.00           |
| <b>Total Incoming Funds</b> |                     | <b>1,958,365.00</b> |

## DISBURSEMENTS

|                                              |                                |           |            |
|----------------------------------------------|--------------------------------|-----------|------------|
| Associated Real Estate Company, LLC          |                                | 50,000.00 | 50,000.00  |
| Commission                                   |                                |           |            |
| W Coleman Talley, LLP                        | Lender's Counsel Fee           |           | 12,500.00  |
| Renee Burch Baxley                           | Update and Record              |           | 60.00      |
| Chicago Title Insurance Company              | Closing Protection Letter      |           | 35.00      |
| W National Corporate Research, Ltd.          | UCC Searches                   |           | 1,679.70   |
| W Bevilacqua & Bevilacqua, LLC               | Atty. Rec & Title Fees for CT  |           | 8,855.00   |
| Marion County Register of Deeds              | Recording Fees                 |           | 11.00      |
| Marion County Register of Deeds              | State Tax/Stamp                |           | 3,700.00   |
| Marion County Register of Deeds              | Recording Fees - Est.          |           | 60.00      |
| South Carolina Secretary of State            | UCC                            |           | 12.00      |
| Marco Rural Water Co.                        | Water Bill                     |           | 378.09     |
| Jason R. Hartmann                            | Membership Buyout Partners 95* |           | 50,000.00  |
| Robert D. Hartmann, Jr.                      | Membership Buyout Partners 95* |           | 100,000.00 |
| W Paul Greenberg, Trustee                    | Payoff of Loan in Connecticut  |           | 399,104.77 |
| Marion County Treasurer                      | County Taxes                   |           | 4,764.32   |
| W Wells Fargo Bank N.A.                      | Closing Proceeds               |           | 941,157.59 |
| HSGCHG Investments, LLC, a Delaware limited  | Excess Cash to Close           |           | 323,237.53 |
| Avatar Capital Finance, LLC                  | Loan Closing                   |           | 0.00       |
| Loan Origination Fee                         | 60,000.00 Deducted             |           |            |
| Inspection Charge TR Traval                  | 1,862.98 Deducted              |           |            |
| Valuation Report                             | 500.00 Deducted                |           |            |
| Reis Report                                  | 1,500.00 Deducted              |           |            |
| Verachek                                     | 435.00 Deducted                |           |            |
| Credit and Background Check                  | 45.00 Deducted                 |           |            |
| Service Fee                                  | 4,000.00 Deducted              |           |            |
| Interim Interest                             | 3,995.52 Deducted              |           |            |
| Borrower's Deposit                           | -6,500.00 Deducted             |           |            |
| Escrow: Hazard Insurance (Frontage)          | 6,320.00 Deducted              |           |            |
| Escrow: County Taxes                         | 5,305.00 Deducted              |           |            |
| Escrow: Hazard Insurance (Marion)            | 2,050.50 Deducted              |           |            |
| County Taxes CT                              | 37,121.00 Deducted             |           |            |
| CMP Group                                    | Loan Closing                   |           | 40,000.00  |
| Broker Fee                                   | 40,000.00                      |           |            |
| Callison Tighe & Robinson, LLC               | Settlement Agents Fees         |           | 18,750.00  |
| Attorneys Fees for Avatar Loan               | 8,500.00                       |           |            |
| Atty Fees for Woodbridge Loan                | 10,000.00                      |           |            |
| Fed Ex Copies, Courier, etc.                 | 250.00                         |           |            |
| Eastern Title Agency, Inc. as Agent for CTIC | Title Charges                  |           | 4,060.00   |
| Title Insurance Binder                       | 125.00                         |           |            |
| Title Insurance Endorsements                 | 1,800.00                       |           |            |
| Title Insurance                              | 2,135.00                       |           |            |

Number of checks -

(6151.001.PFD/6151.001/66)

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**DISBURSEMENTS SUMMARY / BALANCE SHEET - Continued**

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**15**

**Total Disbursements**      1,958,365.00

# BORROWER'S STATEMENT

**Borrower:** HSGCHG Investments, LLC, a Delaware limited liability company  
Oil Barons, Inc.  
Partners 95, L.L.C.  
**Seller:** Wells Fargo Bank N.A.  
**Lender:** Avatar Capital Finance, LLC  
**Settlement Agent:** Callison Tighe & Robinson, LLC  
(803)256-2371  
**Place of Settlement:** 1812 Lincoln Street, Suite 200  
Columbia, SC 29201  
**Settlement Date:** January 22, 2015  
**Property Location:** 1548 State Hwy 501  
Marion, SC  
Marion County, South Carolina

## DEBITS

|                                       |                                              |  |                     |
|---------------------------------------|----------------------------------------------|--|---------------------|
| Purchase Price                        |                                              |  | 1,000,000.00        |
| Payoff of Loan in Connecticut         | Paul Greenberg, Trustee                      |  | 399,104.77          |
| Loan Orig. Fee 3.0000 percent         | Avatar Capital Finance, LLC                  |  | 60,000.00           |
| Inspection Charge TR Traval           | Avatar Capital Finance, LLC                  |  | 1,862.98            |
| Valuation Report                      | Avatar Capital Finance, LLC                  |  | 500.00              |
| Reis Report                           | Avatar Capital Finance, LLC                  |  | 1,500.00            |
| Verachek                              | Avatar Capital Finance, LLC                  |  | 435.00              |
| Credit and Background Check           | Avatar Capital Finance, LLC                  |  | 45.00               |
| Lender's Counsel Fee                  | Coleman Talley, LLP                          |  | 12,500.00           |
| Broker Fee                            | CMP Group                                    |  | 40,000.00           |
| Service Fee                           | Avatar Capital Finance, LLC                  |  | 4,000.00            |
| Interim Interest For 8 Days           | Avatar Capital Finance, LLC                  |  | 3,985.52            |
| Borrower's Deposit                    | Avatar Capital Finance, LLC                  |  | -6,500.00           |
| Hazard Insurance                      | 8,000 at 790.00 per month                    |  | 6,320.00            |
| Escrow County Taxes                   | 2,000 at 2,652.50 per month                  |  | 5,305.00            |
| Escrow                                | 2,000 at 1,025.25 per month                  |  | 2,050.50            |
| Escrow County Taxes CT                | 7,000 at 5,303.00 per month                  |  | 37,121.00           |
| Attorneys Fees for Avatar Loan        | Callison Tighe & Robinson, LLC               |  | 8,500.00            |
| Update and Record                     | Renee Burch Baxley                           |  | 60.00               |
| Closing Protection Letter             | Chicago Title Insurance Company              |  | 35.00               |
| Title Insurance Binder                | Eastern Title Agency, Inc. as Agent for CTIC |  | 125.00              |
| Title Insurance Endorsements          | Eastern Title Agency, Inc.                   |  | 1,800.00            |
| Title Insurance                       | Eastern Title Agency, Inc. as Agent for CTIC |  | 2,135.00            |
| Atty Fees for Woodbridge Loan         | Callison Tighe & Robinson, LLC               |  | 10,000.00           |
| UCC Searches                          | National Corporate Research, Ltd.            |  | 1,679.70            |
| Atty, Rec & Title Fees for CT         | Bevilacqua & Bevilacqua, LLC                 |  | 8,855.00            |
| Recording Fees                        | Marion County Register of Deeds              |  | 11.00               |
| Recording Fees - Est.                 | Marion County Register of Deeds              |  | 60.00               |
| UCC                                   | South Carolina Secretary of State            |  | 12.00               |
| Fed Ex, Copies, Courier, etc.         | Callison Tighe & Robinson, LLC               |  | 250.00              |
| See addit'l disb. exhibit             |                                              |  | 150,000.00          |
| <b>Gross Amount Due From Borrower</b> | <b>TOTAL DEBITS</b>                          |  | <b>1,751,762.47</b> |

## CREDITS

|                                       |                      |
|---------------------------------------|----------------------|
| Deposit or Earnest money              | 75,000.00            |
| Principal Amount of New Loan(s)       | 2,000,000.00         |
| <b>Less Total Credits to Borrower</b> | <b>TOTAL CREDITS</b> |
|                                       | <b>2,075,000.00</b>  |

## BALANCE

**To Borrower** **323,237.53**

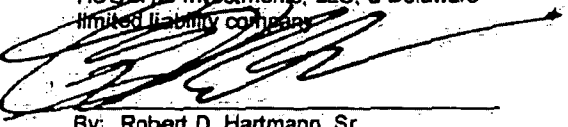
APPROVED:

(6151.001.PFD/6151.001/66)

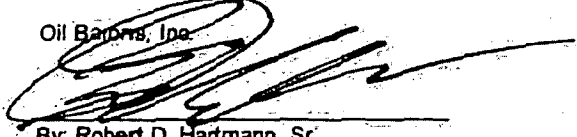
**BORROWER'S STATEMENT - Continued**

Signatures on Page 2:

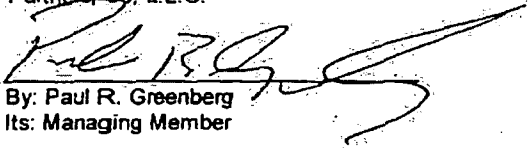
HSGCHS Investments, LLC, a Delaware  
limited liability company

  
By: Robert D. Hartmann, Sr.  
Its: President/Executive Chairman

Oil Barons, Inc.

  
By: Robert D. Hartmann, Sr.  
Its: President

Partners, 95, L.L.C.

  
By: Paul R. Greenberg  
Its: Managing Member

**WIRING INSTRUCTIONS:**

First Citizens Bank & Trust Company  
1230 Main Street  
Columbia, SC 29201

ABA#: 053906041

ACCOUNT: Callison Tighe & Robinson, LLC  
Real Estate Trust Account

ACCOUNT#: 891001356701

\*To be held in escrow pending final purchase arrangements.

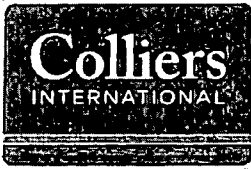
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Callison Tighe & Robinson, LLC

**BORROWER ADDITIONAL DISBURSEMENTS EXHIBIT**

**Borrower:** HSGCHG Investments, LLC, a Delaware limited liability company  
Oil Barons, Inc.  
Partners 95, L.L.C.  
**Seller:** Wells Fargo Bank N.A.  
**Lender:** Avatar Capital Finance, LLC  
**Settlement Agent:** Callison Tighe & Robinson, LLC  
(803)256-2371  
**Place of Settlement:** 1812 Lincoln Street, Suite 200  
Columbia, SC 29201  
**Settlement Date:** January 22, 2015  
**Property Location:** 1548 State Hwy 501  
Marion, SC  
Marion County, South Carolina

| <u>PAYEE/DESCRIPTION</u>                                 | <u>NOTE/REF NO</u> | <u>BORROWER</u>      |
|----------------------------------------------------------|--------------------|----------------------|
| Jason R. Hartmann                                        |                    | 50,000.00            |
| Membership Buyout Partners 95*                           |                    |                      |
| Robert D. Hartmann, Jr.                                  |                    | 100,000.00           |
| Membership Buyout Partners 95*                           |                    |                      |
| <b>Total Additional Disbursements shown on Line 1305</b> |                    | <b>\$ 150,000.00</b> |



864 Wethersfield Ave.  
Hartford, CT 06114  
(860)249-6521

# Invoice

Invoice Number:  
14217

Invoice Date:  
12/16/14

Page:  
1

TO: Riverdale Funding LLC  
Attn: Joel Holland  
207 Mockingbird Lane, Ste 402  
Johnson City, TN 37604

| PROPERTY | INVOICE TYPE | AGENT | Due Date |
|----------|--------------|-------|----------|
|          | CONSULTATION | KEOGH | 12/16/14 |

| Description                                                                   | Amount |
|-------------------------------------------------------------------------------|--------|
| Consultation fee for 96 Frontage Road, East Haven                             | 500.00 |
| <div data-bbox="1140 1327 1416 1516"><p>LC EXHIBIT<br/>5<br/>2/8/16</p></div> |        |

|                      |               |
|----------------------|---------------|
| Subtotal             | 500.00        |
| Total Invoice Amount | 500.00        |
| Payment Received     |               |
| <b>TOTAL</b>         | <b>500.00</b> |

Please make checks payable to Colliers International  
A 1.5% interest charge will be applied to overdue balances.

12/17/2014

Colliers International

\*\*USD 500.00

Five Hundred and 00/100\*\*\*\*\*

Colliers International  
864 Wethersfield Ave  
Hartford, CT 06114

INV 14217

Colliers International

| Date       | Type | Reference |
|------------|------|-----------|
| 12/17/2014 | Bill | 14217     |

| Original Amt. |
|---------------|
| USD 500.00    |

| Balance Due |
|-------------|
| USD 500.00  |

12/17/2014

| Discount     |
|--------------|
| Check Amount |

| Payment    |
|------------|
| USD 500.00 |
| USD 500.00 |

Wells Fargo Bank      INV 14217

USD 500.00

Colliers International

| Date       | Type | Reference |
|------------|------|-----------|
| 12/17/2014 | Bill | 14217     |

| Original Amt. |
|---------------|
| USD 500.00    |

| Balance Due |
|-------------|
| USD 500.00  |

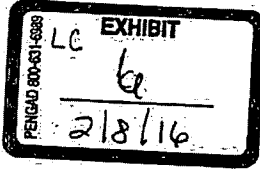
12/17/2014

| Discount     |
|--------------|
| Check Amount |

| Payment    |
|------------|
| USD 500.00 |
| USD 500.00 |

Wells Fargo Bank      INV 14217

USD 500.00

|                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|---------|------|------------|-----------|---------------------------|----------------|------------------------------|-----------------------|----------------------------|--------------|
| <b>FROM:</b><br><br>DOMUS APPRAISALS<br>P.O. BOX 594<br>BRONXVILLE, NY 10708<br><br>Telephone Number: (914) 969-2890      Fax Number:                                   | <h2 style="margin: 0;">INVOICE</h2> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">INVOICE NUMBER</td> </tr> <tr> <td style="text-align: center;">1412018</td> </tr> <tr> <td style="text-align: center;">DATE</td> </tr> <tr> <td style="text-align: center;">12/14/2014</td> </tr> <tr> <td style="text-align: center;">REFERENCE</td> </tr> <tr> <td>Internal Order #: 1412018</td> </tr> <tr> <td>Client File #:</td> </tr> <tr> <td>Main File # on form: 1412018</td> </tr> <tr> <td>Other File # on form:</td> </tr> <tr> <td>Federal Tax ID: 20-3121350</td> </tr> <tr> <td>Employer ID:</td> </tr> </table> | INVOICE NUMBER | 1412018 | DATE | 12/14/2014 | REFERENCE | Internal Order #: 1412018 | Client File #: | Main File # on form: 1412018 | Other File # on form: | Federal Tax ID: 20-3121350 | Employer ID: |
| INVOICE NUMBER                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| 1412018                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| DATE                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| 12/14/2014                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| REFERENCE                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Internal Order #: 1412018                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Client File #:                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Main File # on form: 1412018                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Other File # on form:                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Federal Tax ID: 20-3121350                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Employer ID:                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>TO:</b><br><br>RIVERDALE FUNDING<br>270 MOCKINGBIRD LANE, #402<br>JOHNSON CITY, TN 37604<br><br>Telephone Number:      Fax Number:<br>Alternate Number:      E-Mail: | Internal Order #: 1412018<br>Client File #:<br><br>Main File # on form: 1412018<br>Other File # on form:<br><br>Federal Tax ID: 20-3121350<br>Employer ID:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                |         |      |            |           |                           |                |                              |                       |                            |              |
| PAYMENTS RECEIVED<br><br>THANK YOU!!                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
|                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>DESCRIPTION</b>                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Client: RIVERDALE FUNDING<br>Property Address: 96 Frontage Rd<br>City: East Haven      State: CT      Zip: 06512<br>County: NEW HAVEN<br>Legal Description:             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>FEES</b>                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| NARRATIVE COMMERCIAL APPRAISAL                                                                                                                                          | 2,000.00                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>SUBTOTAL</b>                                                                                                                                                         | 2,000.00                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>PAYMENTS</b>                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Check #:      Date:      Description: Payment Received                                                                                                                  | 2,000.00                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Check #:      Date:      Description:                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| Check #:      Date:      Description:                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>SUBTOTAL</b>                                                                                                                                                         | 2,000.00                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                |         |      |            |           |                           |                |                              |                       |                            |              |
| <b>TOTAL DUE</b>                                                                                                                                                        | \$ 0                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                |         |      |            |           |                           |                |                              |                       |                            |              |



## TED O. MCGEE, III

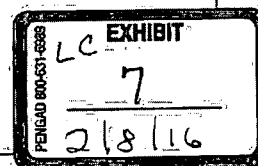
560 Meeting Street, West Columbia, SC 29169 • 803-739-0550 • FAX 803-796-9420

### INVOICE

TO: Carolina Entertainment Complex, LLC  
HDMG Entertainment, LLC  
Attention: Robert D. Hartmann, Sr.  
c/o Hartmann Development, LLC  
114 Cascade Blvd.  
Milford, CT 06460

DATE: December 23, 2014

| DESCRIPTION                                                                                                                                                                                                        | TOTAL    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Fee for Broker's Price Opinion:<br>Property reviewed December 22, 2014<br><br>248.46 Acres plus Improvements<br>1548 South Highway 501<br>Marion, SC 29571<br><br>(also known as the Marion Amphitheater Property) | \$750.00 |
| TOTAL DUE                                                                                                                                                                                                          | \$750.00 |



# INVOICE

**FROM:**  
 Contact: Ken O. Flowers Jr.  
 Company: Alliance Appraisal Group, LLC  
 Address: 106 North Edisto Drive  
 City, State, Zip: Florence, SC 29501  
 Telephone Number: 800-630-1790 Fax Number: 800-630-1790  
 Alternate Number: E-Mail: ken@aagsc.com

**INVOICE NUMBER:**  
 L & K1214-8  
**DATE:**  
 12/24/2014  
**REFERENCE:**  
 Internal Order #:  
 Lender Case #:  
 Client File #: L & K1214-8  
 Main File # on form:  
 Other File # on form:  
 Federal Tax ID: 20-8582904  
 Employer ID:

**TO:**  
 Contact:  
 Company: Riverdale Funding, LLC  
 Address: 207 Mockingbird Lane Suite 402  
 City, State, Zip: Johnson City, TN 37604  
 Telephone Number: Fax Number:  
 Alternate Number: E-Mail:

## DESCRIPTION

Lender: Riverdale Funding, LLC  
 Purchaser/Borrower: Robert Hartman, Sr.  
 Property Address: 1548 South Highway 501  
 City: Marion  
 County: Marion

Client:  
 State: SC Zip: 29571

## FEES

## AMOUNT

Commercial Appraisal for the Carolina Entertainment Complex

\$ 2,500

\$

\$

\$

\$

\$

\$

\$

\$

**SUBTOTAL** \$ 2,500

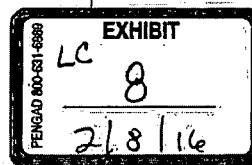
## PAYMENTS

## AMOUNT

Check #: Date: Description: \$  
 Check #: Date: Description: \$  
 Check #: Date: Description: \$

**SUBTOTAL** \$

**TOTAL DUE** \$ Paid



Shoff Darby Companies, Inc.  
 PO Box 850  
 Norwalk, CT 06852  
 203.354.6200

**DUE DATE: 12/30/14**

# INVOICE

Carolina Entertainment Complex  
 114 Cascade Blvd  
 Milford, CT 06460

|                |              |
|----------------|--------------|
| Client         | SD #00062865 |
| Date           | 12/30/14     |
| Client Service |              |
| Page           | 1            |

| Payment Information                                          |  |
|--------------------------------------------------------------|--|
| Invoice Summary                                              |  |
| Payment Amount                                               |  |
| Payment For:<br>Balance due for New General Liability policy |  |

Thank you

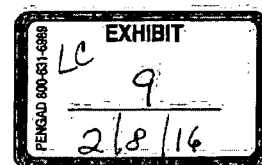
PLEASE DETACH AND RETURN WITH PAYMENT

Client: Carolina Entertainment Complex – SD #00062865

| INVOICE                                                         | EFFECTIVE | TRANSACTION | DESCRIPTION                                                                                                                                                                                                                                                                                                | AMOUNT                                   |
|-----------------------------------------------------------------|-----------|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|
|                                                                 | 12/30/14  | 12/30/15    | General Liability # AGL0020728-00<br>Paid Check #1506 dated 12/24/14<br>Balance Due<br><br><i>**invoice reflects amended<br/>           policy premium due to increase in<br/>           policy limits to \$2,000,000<br/>           occurrence/ \$2,000,000 aggregate*</i><br><br>PAID IN FULL 01/22/2015 | \$12,302.36<br>-10,346.66<br>\$ 1,955.70 |
| Please remit check payable to Shoff Darby Companies. Thank you. |           |             |                                                                                                                                                                                                                                                                                                            | Total<br>\$ 1,955.70                     |

Shoff Darby Companies, Inc.  
 203.354.6200

Date  
 12/30/14



12/24/2014

Shoff Darby Companies, Inc

\*\*10,346.66

Ten Thousand Three Hundred Forty-Six and 66/100\*\*\*\*\*

Shoff Darby Companies, Inc  
100 Technology Dr Ste 200  
Trumbull, CT 06611

| Shoff Darby Companies, Inc |      |           |               | 12/24/2014   |           |
|----------------------------|------|-----------|---------------|--------------|-----------|
| Date                       | Type | Reference | Original Amt. | Balance Due  | Discount  |
| 12/24/2014                 | Bill | 07012014  | 10,346.66     | 10,346.66    |           |
|                            |      |           |               | Check Amount | Payment   |
|                            |      |           |               |              | 10,346.66 |

Wells Fargo Bussines

10,346.66

| Shoff Darby Companies, Inc |      |           |               | 12/24/2014   |           |
|----------------------------|------|-----------|---------------|--------------|-----------|
| Date                       | Type | Reference | Original Amt. | Balance Due  | Discount  |
| 12/24/2014                 | Bill | 07012014  | 10,346.66     | 10,346.66    |           |
|                            |      |           |               | Check Amount | Payment   |
|                            |      |           |               |              | 10,346.66 |

Wells Fargo Bussines

10,346.66

1/22/2015

Shoff Darby Companies, Inc

\*\*1,955.70

One Thousand Nine Hundred Fifty-Five and 70/100\*\*\*\*\*

Shoff Darby Companies, Inc  
100 Technology Dr Ste 200  
Trumbull, CT 06611

| Shoff Darby Companies, Inc |      |           |               |             | 1/22/2015    |          |
|----------------------------|------|-----------|---------------|-------------|--------------|----------|
| Date                       | Type | Reference | Original Amt. | Balance Due | Discount     | Payment  |
| 1/22/2015                  | Bill | 00062865  | 1,955.70      | 1,955.70    |              | 1,955.70 |
|                            |      |           |               |             | Check Amount | 1,955.70 |

Wells Fargo Bussines 1,955.70

| Shoff Darby Companies, Inc |      |           |               |             | 1/22/2015    |          |
|----------------------------|------|-----------|---------------|-------------|--------------|----------|
| Date                       | Type | Reference | Original Amt. | Balance Due | Discount     | Payment  |
| 1/22/2015                  | Bill | 00062865  | 1,955.70      | 1,955.70    |              | 1,955.70 |
|                            |      |           |               |             | Check Amount | 1,955.70 |

Wells Fargo Bussines 1,955.70

# ADVANTAGE LED SIGNS

## Sign Proposal & Agreement

Sales Consultant: Scott Alden

### Client

HDMG Entertainment/Carolina  
Entertainment Complex  
Robert Hartmann

### Installation Location

1549 South US Hwy 501 Bypass Marion SC 29571

### Proposal ID

QUO-11074-QHGG14rev0

### Date

12/17/2014

**REVISED**  
Proposal Valid for 30 Days

### Description

**15' -4 1/8" x 30' -5 3/16" 12.5mm iPixel Full Color 368x736 iMatrix Single Face Display**

Qty

2

U.S. Built LED Display with iPixel Technology, providing (4) times the resolution of comparable displays. Screen Features include super-bright, long lasting LED diodes with a 100,000 life expectancy (11 years) and a super-wide 160 degree viewing angle. Additional features include corrosion resistant, IP65/54 rated aluminum sign cabinet for maximum weather durability and outdoor protection, highly reliable power supplies and advanced control system diagnostics.

2 Independent LED signs capable of playing 2 different messages on each screen at the same time

### Display Specifications

**Active Viewing Area:** 15' -1 1/8" x 30' -2 3/16"  
**Viewing Angle:** Extra wide 160 degree horizontal viewing angle  
**Color Capability:** Full Color with 281 Trillion Colors  
**Video Capability:** 60 frames per second refresh rate  
**Brightness:** >=10,000 nits (100 levels of brightness control)  
**Physical Pitch:** 25mm Pitch with a 184x368 Matrix/Resolution  
**Max Lines:** 23 Lines of Text at 6" Minimum Character Height  
**Max Characters:** 61 Characters per line at 6" Minimum Character Height  
**Max Amps:** @120VAC (210) Amps or @240VAC (105) Amps Per Face  
**Estimated Electrical Usage:** \$369.17 \*Est. Per Month Per Face(National Average \$.10 KWh)

### iPixel Technology - Included

Provides (4) four times the resolution of comparable 25mm base pixel displays. This means clearer smoother text, graphics and animation.

### SM Infinity™ Lite Free with each display & (1) Year Content Creation - Included

SM Infinity™ Silver Features Professionally Created Custom Content & Smart Content Scheduling ability in a powerful and easy to use Cloud Based platform. Includes online content library with automatic backups and remote access ability from mobile devices. \*\*Internet Connectivity Required\*\*

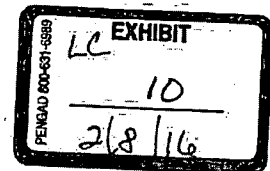
### 5 Year Parts Warranty & 5 Year On-Site Service - Included

100% Continental US and most of Canada coverage of On-Site labor & lift equipment expense after \$100 co-pay per incident for a full 5 years. Comprehensive coverage and peace of mind.

### Smart Ops Diagnostics™ & (1) Year Remote Monitoring - Included

Experience a new level of service through Proactive Tech Support. SM Command Center will continuously monitor system critical hardware for temperature, voltage and dataflow. Automatic switching to Data Redundancy minimizes or restores the effected display area during a malfunction.

### Lifetime Software Training - Included



*Handwritten note:*  
3 can handle different content on each side of sign

1424 N. Sam Houston Pwy E., 160  
Houston, TX 77032  
www.advantageledsigns.com  
TECL #29878

Client: HDMG Entertainment/Carolina Entertainment Complex Sales Rep: Scott Alden  
Proposal ID: QUO-11074-QHGG14rev0 Printed: 12/17/2014 2:22:13 PM  
Document: SL-0029-01 Release Date: 9-30-2013



LIVE webinar, online training for users of SM Infinity™ software. Quickly request and receive professionally created content at anytime. Learn how to upload files and schedule your LED display for maximum effectiveness.

**Identification Cabinet - Flexface Custom Shaped (25+ Sq Ft) 299**

Double faced Flexface, internally illuminated with high output fluorescent lamps, all aluminum and/or steel construction identification sign. Layout may include vinyl overlays, text and/or graphics. Cabinet finishes, text, graphics and colors will be as shown on the associated art rendering proof sheet.

13'x23'

**Installation (Billboard) 1**

Professional Standard Installation and Configuration of LED Display(s) listed above. \*Electrical run to base of the sign is the responsibility of the sign owner, please see Advantage LED Electrical Requirements and Responsibilities document. In certain and rare circumstances, installation quotes may vary based on site specific conditions determined at time of physical site inspection. Please see Terms & Conditions Document listed in this proposal.

**Cedar Wood at base of sign 1**

Durable 2" thick cedar boards custom finished to client's specifications (age, color).

**Shipping (Billboard) 1**

This includes Crating, Shipping & Delivery (Continental US Only)

**Cedar on Top Section of sign 1**

10'x 32'

**Identification - Channel Letters Internally Illuminated with LEDs (Per Inch) 1**

Aluminum Channel Letters 5" Deep with Acrylic Faces illuminated by internal LEDs. Built with 3/16" Acrylic Faces, 1" Trim Cap, Primed & Painted .063 Aluminum Backs & .040 Aluminum Returns, Drain Holes, and Fully Caulked Seams..

SWAMP FOX (3 ft. tall letters)

ENTERTAINMENT COMPLEX (1 ft. tall letters)

**Install - Removal of Existing Sign over 40 Sq Ft (Per Sq Ft) 696**

Removal and disposal of existing sign(s).

**Identification - Pole Skirting (per Sq Ft) 128**

Pole skirting up to 24" in depth.

- Aluminum Construction
- Primed & Painted
- Polyurethane Enamel Automotive Paint
- Vents installed if needed for LED Display ventilation

**Identification - Pole Skirting (per Sq Ft) 84**

Pole skirting up to 24" in depth.

- Aluminum Construction
- Primed & Painted
- Polyurethane Enamel Automotive Paint
- Vents installed if needed for LED Display ventilation

**Install - Identification Sign (151 - 199 Sq Ft) 320**

This is for installation of the identification sign up to 199 sq. ft.

- Professional Installation
- Proper mounting to support structure
- Leveling
- Touch up

320 Sq. Ft.

**Identification - Pole Skirting (per Sq Ft)**

90

Pole skirting up to 24" in depth.

- Aluminum Construction
- Primed & Painted
- Polyurethane Enamel Automotive Paint
- Vents installed if needed for LED Display ventilation

**Install - Identification Sign (151 - 199 Sq Ft)**

299

This is for installation of the identification sign up to 199 sq. ft.

- Professional Installation
- Proper mounting to support structure
- Leveling
- Touch up

299 SF

**Identification Cabinet - Add-On - Reveal up to 6 inches in Height and Depth (per linear ft)**

162

Accent sheet metal molding made out of aluminum then primed and painted. Up to 6" in depth and height. Priced per linear foot.

painted to match the fox logo sign

**Identification Cabinet - Add-On - Reveal up to 6 inches in Height and Depth (per linear ft)**

144

Accent sheet metal molding made out of aluminum then primed and painted. Up to 6" in depth and height. Priced per linear foot.

**Top ID Mounting Pole up to 12" Diameter up to 15ft tall for Top Sign with Fox logo**

1

Pole up to a 12" Diameter Schedule 40. All work performed to engineering specifications.

Includes:

- Location Inspection
- Steel Pole
- Welding to existing poles

**Permit - Will Pull Billboard Off-Premise(Over 50 Sq Ft)**

1

Permit - Advantage LED Signs will Pull Local Sign Permits for a sign structure over 100 Sq Ft. for off premise advertising use.

Services Include:

- Physical Site Survey
- Document Gathering
- Engineering Drawings
- Completed Permit Forms
- Actual Cost of Permit from governing agency with jurisdiction to be billed once fees in addition are accessed

Agreement is contingent upon Advantage LED acquiring a sign permit from governing agency with jurisdiction over sign location. In the event the permit is denied, the client is under no obligation to fulfill this agreement. The permit & engineering acquisition fee is non-refundable.

**On-Site Technician**

2

(8) Hours of On-Site + travel expenses. Advantage LED will send out a qualified installation technician to ensure that your first "Light Up" goes well.

The technician will direct and assist installer in the proper installation of the LED displays.

- Proper Connection
- Control System Testing
- Communication Testing
- Programming
- Software Training

#### Identification - Skinning on sides of LED Displays (per linear ft)

32

Aluminum sheeting to cover the sides of LED displays mounted back to back.

- .080 Thick Aluminum Primed and Painted
- Vents installed to allow proper air circulation
- Up to 3" of retainer covers
- Up to 32" LED side depth coverage

#### Comm - Billboard Communication Package

1

Protect your investment with Advantage LED Billboard Communication package.

- Package Includes: Internet ready VPN Firewall router configured for VPN connectivity 4-Port Ethernet Switch
- NEMA 4 rated outdoor enclosure with thermostat activated heating element and cooling fans
- Internet service not included\*

#### Identification - Full Color 8mm Alumalite Double Sided (per Sq Ft)

44

Alumalite is a corrugated polymer core sandwiched between two 5mil thick painted Aluminum panels that resists warping to provide a flat sign surface. It can be attached with silicone, adhesive, screws or rivets.

- 600 dpi Digitally Printed
- UV Laminated to resist fading

#### Communication - Safe-Link™ 5 GHz Wireless (Full Bridge)

Safe-Link™ is an Advanced 5 GHz Wireless Communication System designed and built for severe weather conditions. Enables fast, wireless transmission of data files and content seamlessly to your LED display at distances up to 1000 feet apart with line of sight. Protects your important files and LED display messages from outside interference or tampering. Communication is done via tried and tested TCP/IP communication with WPA/PSK Security Encryption.

- Outdoor access point antenna included
- Outdoor sign antenna included
- Mounting hardware included

#### Electrical Disclaimer

Primary and Final Electrical Disclaimer Customer is responsible for providing primary and final electrical power to the LED Sign. Circuit breakers should never be loaded with more than 75% of it's stated load capacity. (i.e. 20AMP breaker should not have more than a 15AMP sign placed on it)

#### Lifetime Diagnostics Warranty

Remote diagnostics for the life of your sign by Advantage Technical Department

#### Series 51 - 5 Year Parts & Labor Warranty & 5 Year On-Site Service + 1 Year of SM Infinity

1

1  
COMMUNICATION  
TO EACH SIDE  
OF SIGN IS  
INDEPENDENT

*[Signature]*

**5 Years Parts & Labor Warranty / 5 Years On-Site Service / Lifetime Remote Diagnostics:**

ADvantage LED warrants the LED display to be free from defects in workmanship and materials and will provide Five (5) Years of Parts & Factory Labor. For signs installed below 37 ft OAH, ADvantage LED will provide Five (5) Years of On-Site Service after a \$100 Co-Pay is satisfied. Lifetime Remote Diagnostics will be provided through our Toll Free Technical Support Line.

+ PLUS +

**1 Year SM Infinity™ Silver Service FREE**

Ad-Sponsored, means Buyer allows Spectacular Media, LLC and its partners to utilize 1 minute of display time per hour to create awareness of their services including SM Infinity™.

- FREE Professional Graphic Artist Created Slides (10 per month) or 8 second Animations (5 per month)
- Cloud Based Software (Mac, PC, iPad and Android friendly)
- SM Voice Control through iPad and Android Devices
- SM Remote Monitoring & Proactive Technical Support
- SM Conditional Smart Scheduling (based on weather, stocks, sports and others)

SM Infinity™ service requires an internet connection and can be converted to an SM Infinity Lite (Free) service level at any time after the initial first year.

**FREE iPad Mini**

For a limited time a FREE iPad Mini will be awarded to any customer who purchases a Series 51 display and "likes" ADvantage LED's Facebook page and comments "[Client's Business Name] wants Series 51!" on ADvantage LED's Facebook page. Once this criteria is met a FREE iPad Mini will be shipped with your display.

**Cloth Tarp with draw string**

Sign will be covered for the grand opening when the governor will unveil the sign

**Scott Alden will be present at the grand opening**

|                          |                     |
|--------------------------|---------------------|
| <b>Subtotal:</b>         | <b>\$385,244.69</b> |
| <b>Manager Discount:</b> | <b>\$35,244.69</b>  |
| <b>Grand Total:</b>      | <b>\$350,000.00</b> |

**Payment Terms**

Terms are 50% Initial Investment from leasing company with remaining 50% due before delivery.

Please make checks payable to: "ADvantage LED Signs"

Estimated lease based on (60) sixty month lease with \$1 buy-out at the end of the lease.

\*With OAC, Total reflects a 20% Initial Investment.

Please be advised that applicable sales tax will be added to all 'Texas' and 'California' sales orders unless a tax exempt certificate is provided. Unless shipping charges are already included in this order, shipping charges will apply to any items shipping to the final destination.

ADvantage LED Standard Cash Payment Terms are 50% down with 50% due before shipment

**Initial Investment : \$70,000.00 \***

**Est. Lease Payment: \$6,266.18**

**Comments**

\$35,244.69 discount is valid through December 31th, 2014 as part of our "End of the Year Promotion"

This quote includes the use of the existing poles (pending engineering approval).

Assuming that we can get the permit within 2 weeks as Scott was told by the people in Marion, SC, the sign will be completely installed by April 8th, 2015.

1424 N. Sam Houston Pwy E., 160  
Houston, TX 77032  
www.advantageledsigns.com  
TECL #29878

Client: HDMG Entertainment/Carolina Entertainment Complex Sales Rep: Scott Alden  
Proposal ID: QUO-11074-QH6J4rev0 Printed: 12/17/2014 2:22:13 PM  
Document: SL-0029-01 Release Date: 9-30-2013



### Exclusions

Unless expressly stated in this Proposal #QUO-11074-QHG6J4 or any official attachments, If Advantage LED performs installation of the equipment, the price quoted does not include the following services pertaining to actual installations: Impact fees, digging or footing, bonds, unforeseen conditions, unsuitable soils, rock excavation, hazardous waste removal, electrical work, civil/structural/mechanical/electrical engineering, special inspections, domestic water fees, utility fees, and landscaping.

- |                               |                                |
|-------------------------------|--------------------------------|
| -Electrical Installation      | -Footing/Support Structure     |
| -Power Service                | -Holst/Front End Equipment     |
| -Electrical Switches/Breakers | -Signal Conduit                |
| -Engineering Certification    | -Data/Audio/Video Signal Cable |
| -Applicable Permits           | -Labor to Pull Signal Cable    |

### Terms & Conditions Documents

Proposal # QUO-11074-QHG6J4 Executed 12/17/2014 2:22:13 PM Consultant Scott Alden  
Completed installation photos will be required to validate the warranty upon installation completion.

### Acceptance

This Agreement is expressly limited to the acceptance by the Buyer of the exact listed terms and Buyer acknowledges that discussions and negotiations have occurred leading up to this Agreement but that neither party now or hereafter will rely on any oral representations made outside of this stated terms of this Agreement, which includes the "Standard Terms and Conditions" and "Standard Warranty" contained in the downloadable links above. All of which are a part of this Agreement. Any purchase order or related documents purchaser issues to seller for this transaction shall constitute purchaser's unconditional agreement to be bound exclusively by the seller's Terms and Conditions of this agreement, and purchaser hereby agrees that such additional or inconsistent terms shall not apply nor become a part of this agreement.

To complete the order sign here, initial above pages, and return this page along with all pages above. Fax to: 281-605-1919

Printed Name: GABRIEL GARNELL Signature: Gabriel Garnell Date: 12-18-14  
VICE PRESIDENT

### Optional Accessories

Optional LED display accessories may or may not have been included with this quotation. If you wish to add it to the order, initial next to the item and we will adjust the final price of your invoice.

- |                                                       |                                                                                                                                                 |
|-------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> 5 GHz Wireless Communication | \$750                                                                                                                                           |
| <input type="checkbox"/> CDMA Cellular Modem          | \$750 (*Requires Cellular Service Plan w/Verizon \$49.99 per month)                                                                             |
| <input type="checkbox"/> Parts Cache                  | <input type="checkbox"/> (1-50 sq ft) \$799   <input type="checkbox"/> (51-150 sq ft) \$1199   <input type="checkbox"/> (over 151 sq ft) \$2199 |
| <input type="checkbox"/> Spare Control System Cache   | \$2000                                                                                                                                          |
| <input type="checkbox"/> Auto Dimming Photocell       | \$250                                                                                                                                           |

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## Lifetime Diagnostics & 5 Year Parts & Labor Warranty PLUS 5 Year ON-SITE Service



ADvantage LED offers an industry leading Limited Lifetime Warranty on its LED and Signage

**Traditional Static Signage, Sign Structure and Pole:** Should the identification sign structure, its support structure, or pole on which it is mounted fail or malfunction due to workmanship or materials, under normal use and service, for the life of the sign, ADvantage LED will at its discretion replace defective materials.

**Vandal Blade and Integrated Louver System:** ADvantage LED warrants both the Vandal Blade System and Louver System against defects in workmanship and breakage from vandalism for the life of the sign. Exclusions include damage or breakage due to a fired projectile such as bullets or arrows and cosmetic damage due to spray paint or graffiti.

**Electronic LED Display:** ADvantage LED warrants the LED display to be free from defects in workmanship and materials for a period of five (5) years from date of shipment from Corona California facility. In the event a defect occurs, ADvantage LED will replace defective component. If on-site labor is required and sign is installed at or below 37 ft OAH, ADvantage LED will cover the on-site labor after a \$100 Co-Pay is satisfied. Warranty period begins at date of installation when installation services are purchased from ADvantage LED.

**Communication Devices:** ADvantage LED warrants modems, wireless radio systems, Ethernet devices, fiber devices and Cat 5 cabling from defects in workmanship and materials for a period of 24 months. Excluded items include fiber cable, when applicable.

**General Warranty Terms:** This warranty covers products under normal use and service. Damage caused by Acts of God, Lighting, intentional breakage or negligence are excluded from this warranty. Warranty Claims must be submitted in writing within thirty (30) days of malfunction or damage. ADvantage LED, at its discretion, may elect to visit the installation location to document the claim prior to assuming any responsibility under the provisions of this warranty. This document is intended to provide a general understanding of the ADvantage LED Limited Lifetime Warranty, a complete warranty statement is available upon request.

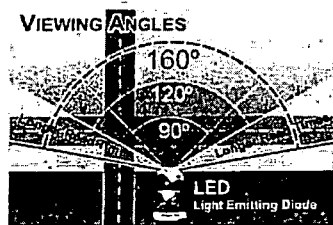
**Loss of Revenue:** ADvantage LED is not responsible for any loss of revenue due to delays or repairs associated with the LED display or any other identification signs installed or proposed.



# ADVANTAGE LED SIGNS

## What You Need to Know About LED Displays Part 1

### LED Diodes



All of our displays have 100,000 hr rated LEDs. Advantage LED utilizes Slim Line™ 3 mm diodes. The superior brightness and increased space between diodes dramatically improves contrast ratio and image sharpness. Our LEDs also feature a wide 160 degree viewing angles to produce longer read times for passing traffic.

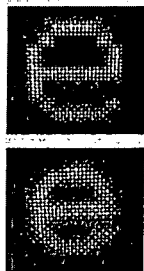
### "Did You Know"

Increasing contrast creates visually brighter displays and impact!

### Things to look out for:

5 mm diodes are outdated and provide poor contrast. Brightness ratings below 9500 NITS will have diminished view ability during the daylight hours. Narrow viewing angles will color shift and become dark and are veiwed for shorter periods of time.

### iPixel™ Technology



A key factor in how good an image or graphic looks on your display is the resolution/matrix. Advantage LED's proprietary iPixel™ Technology provides the highest resolution available today. Every iPixel™ display we build has up to 4X the number of Driver IC Chips when compared to other manufacturers. Our proprietary HARDWARE allows each LED diode to be controlled individually, resulting in smoother, more detailed images and text.

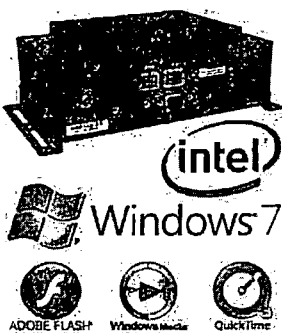
### "Did You Know"

Higher Resolution / Matrix = Better Image Quality

### Things to look out for:

Displays that provide only a physical pitch specification will limit your resolution and image quality. Many competitors will feature "optimized", "enhanced", "virtual" or "shared" pixel options, which only use software to try and improve image quality. Don't be fooled, these companies are still just working with a larger, multi-LED pixel, which thereby can not match iPixel image quality and performance.

### Sign Controller - Darwin NS2™



Advantage LED utilizes the Darwin NS2™ Industrial Controller. This Windows 7-based control system with Intel™ CPU processes 281 Trillion Colors at 60 frames per second with 900 Hz refresh rate. The Darwin NS2™ is compatible with Adobe Flash Files (.SWF), Windows Media Files (.WMV), Apple QuickTime (.MOV), (.AVI) plus more! All of your content files are stored on a built-in Solid State 40 Gigabyte hard drive.

### "Did You Know"

Intel-Based Control Systems are more expensive to integrate into LED displays. You can't afford to skimp on performance and reliability, especially when it is the brain that drives your display.

### Things to look out for:

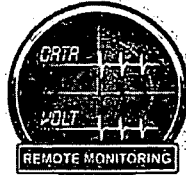
Low End Controllers usually have 1 to 8 Gigabytes(GB) of storage. Low End Controllers do not utilize Intel-Based Technology nor Microsoft Windows 7 operating systems. In most cases they are not compatible with third party media and software formats including compressed video.



## ADVANTAGE LED SIGNS

### What You Need to Know About LED Displays Part 2

#### Smart Chip Diagnostics™ & Remote Monitoring



Advantage LED utilizes state of the art Smart Chip™ Technology in all of our LED display systems. This proprietary technology sends continuous system health status reports to SM Command Center. This technology allows our support staff to offer Proactive Tech Support to optimize display performance.

#### "Did You Know"

Our Smart Chip™ Diagnostics can allow our technical support staff to remotely access sign control systems to troubleshoot potential malfunctions. This allows them to quickly and properly diagnose problems and solve them or make sure correct replacement parts are dispatched to get your sign restored to full function expediently.

#### Things to look out for:

LED signs without diagnostic capability can be very difficult to troubleshoot and will cost more to operate in service labor because they require multiple trips to the site to diagnose and replace parts.

#### Conformal Coating



All of our electronics inside our signs are protected by a water, sea salt, dust and corrosion resistance conformal coating. Even our power supplies have factory-applied conformal coating to extend the life span and reliability of our LED displays. Our conformal coating is specially formulated to allow our electronics to stay cool and not overheat by trapping heat in.

#### "Did You Know"

The two main enemies to LED displays and the cause of most malfunctions are heat and moisture.

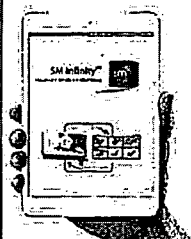
#### Things to look out for:

LED signs that do not protect their internal electronics with conformal coating will be prone to corrosion and repetitive premature failures. Signs that use thick protective silicone coating on both sides of the LED modules that trap heat in the LED circuit boards.

#### SM Infinity Cloudware

**SM Infinity™**

cloudware for digital advertising



Our software engineers developed the SM Infinity™ as cloudware, which integrates both the scheduling and provides access to professional content creators through one powerful solution. SM Infinity™ is designed as a cross platform software solution compatible with PC, LINUX, Mac, iPad, iPhone, & Android devices.

#### "Did You Know"

Cloudware does not need a computer to be installed on. It exists on the internet and is automatically updated to guarantee that it is always compatible with new operating systems.

#### Things to look out for:

Software that is not cross platform compatible. Software without "Help Menus" and tutorials. Software without a Toll Free Software Support line. Non-US-based Software Phone Support. Software that is not compatible with third party file formats such as (.MOV) and (.SWF). Companies that won't let you test drive their software or demo how it works.



**ADVANTAGE LED  
SIGNS**

## 23 Hard Questions You Should Ask Before Buying LED Signs



Brand X

|                                                                                       |              |   |
|---------------------------------------------------------------------------------------|--------------|---|
| Does your sign company manufacture their own product?                                 | ✓            | ? |
| Can they refer you to previous clients with at least 2 years working signs?           | ✓            | ? |
| How old is the Company?                                                               | 10yrs        | ? |
| Are their products Certified by a Third-Party Agency for Quality?                     | UL & ETL     | ? |
| How long is the Parts Warranty?                                                       | 5 Years      | ? |
| Do they provide On-Site Labor Service and for how long?                               | ✓ 5 Years    | ? |
| How long do they offer Toll-Free Technical Support that is US based?                  | Lifetime     | ? |
| How long do they offer Free Software Training?                                        | Lifetime     | ? |
| Do they Keep Parts In Stock for immediate shipment for sign repairs?                  | ✓            | ? |
| How long do they keep spare parts in stock for legacy product lines?                  | 10+ Years    | ? |
| Is their software Cloud based with Automatic Backup of your content?                  | ✓            | ? |
| Is their software PC, Mac, iPad, iPhone and Android compatible?                       | ✓            | ? |
| Have you taken the Software for a Test Drive?                                         | ✓            | ? |
| How long do they provide Professionally Created Custom Content for free?              | 1 Year       | ? |
| Is the Resolution/Matrix big enough to create High-Impact Quality images and text?    | ✓            | ? |
| What is the Brightness of their display?                                              | 10,000+ nits | ? |
| Are the LED modules and internal components Conformal Coated to Resist Corrosion?     | ✓            | ? |
| Does the sign have a Thermostatically Controlled Cooling System?                      | ✓            | ? |
| Does the sign have built in Surge Suppression System?                                 | ✓            | ? |
| Is the entire sign coated, sealed and finished with durable Spray-On Truck Bed Liner? | ✓            | ? |
| Does your sign company offer Turnkey Installations?                                   | ✓            | ? |
| Do they provide job-specific State-Certified Engineering Drawings?                    | ✓            | ? |
| Can they and do they Pull all necessary State, County and City Permits for you?       | ✓            | ? |

1424 N. Sam Houston Pwy E., 160  
Houston, TX 77032  
www.advantageledsigns.com  
TECL #29878

Client: HDMG Entertainment/Carolina Entertainment Complex Sales Rep: Scott  
Alden  
Proposal ID: QUO-11074-QHG6J4rev0 Printed: 12/17/2014 2:22:13 PM  
Document: SL-0029-01 Release Date: 9-30-2013





## Sales Contract

February 25, 2015

CONTRACT #54088

**SUBMITTED TO:**  
**HDMG Entertainment, LLC**  
**114 Cascade Blvd.**  
**Milford, CT 06460**

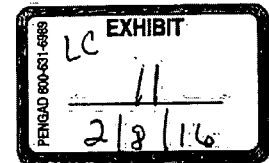
**JOB LOCATION:**  
**Swamp Fox**  
**1548 S. Hwy 501**  
**Marion, SC 29571-8483**

**TYSON SIGN COMPANY, INC. (Seller)** agrees to manufacture and install the products and services outlined below. **HDMG ENTERTAINMENT, LLC (Buyer)** to pay all charges included on the final invoice pursuant to the terms of this contract and adhere to the terms and conditions herein.

### A. PRODUCT:

#### CHANNEL LETTER CABINET

1. One (1) double face 47'-6"H x 28'-6"W illuminated main ID sign with 19mm color LED unit as further described on TSC drawing #54088-a1-r1.
  - a. FOX Cabinet:
    - Construction: Steel and aluminum construction as required. Cabinet to be painted with simulated wood grain finish for the fillers.
    - Faces: Digitally printed flexible face material.
    - Illumination: Internal illumination by use of metal halide fixtures.
  - b. SWAMP FOX Cabinet:
    - Construction: Steel and aluminum construction as required.
    - Faces and Filler: Flat painted aluminum with simulated wood grain finish.
    - Letters: Fabricated aluminum channel letters with acrylic faces.
    - Illumination: Illumination from fabricated aluminum channel letters with internal LED's.
  - c. Pole cover and décor will be fabricated painted aluminum. Pole covers will receive simulated wood grain finish.
  - d. LED: WATCHFIRE: Two (2) single face 19mm color LED message center. EACH UNIT WILL BE INDIVIDUAL WITH SEPARATE CONTROLLERS AND COMMUNICATIONS:
    - Pixel Pitch: XVS 19mm COLOR
    - Matrix: 144 x 368
    - Character Size: 18 lines/74 characters per line with 5" text
    - Cabinet Size: 10'-0"H x 24'-0"W x 8" deep
    - Viewing Area: 9'-0" x 23'-0"
    - Control: Broadband with 1 year plan included for both units.
    - Power: 240 Volt-One 78AMP Single Phase Service.
    - Software and web training included.
    - Host computer by others.
    - \*\*Customer is responsible for coordinating broadband wireless service for sign. First year of broadband service is included in cost, and all following years are the customer's responsibility to coordinate with Watchfire sign.
  - e. Sign will be constructed in accordance with U.L. Listing specifications.
  - f. One (1) double face 18'-0"H x 28'-6"W quick release cover for top section of sign above electronic message center on TSC drawing #54088-a1
  - g. Sign to be installed on two (2) structural steel columns set in concrete foundations designed to with stand 57 PSF wind loads as per ASCE-7.05 Building Code.
  - h. Remove and Dispose of existing sign at grade and cover existing steel pipe hole with steel plate.



**Selling Price: \$ 365,803.00**

Page 1 of 3 Initial

**TYSON SIGN COMPANY**

P.O. Box 50580 • Myrtle Beach, SC 29579 • Telephone: 843-448-5168 • Fax: 843-448-0535 • www.tysonsign.com



## Sales Contract

February 25, 2015

Upon execution of this agreement, Tyson Sign Company will furnish a complete set of line drawings for customer approval prior to production.

Quote valid for 60 days.

### B. TAXES

Taxes are not included in the Selling price and will be included on final invoice. If Purchaser is tax-exempt, a copy of purchaser's tax-exempt certificate shall be required at time of order.

### C. PERMITS

Permit fees are not included in this Selling price and will be included on final invoice.

### D. PAYMENT TERMS (Select One)

☒ PURCHASE - 50% down payment due upon execution of this contract, and an additional 25% due on or before 5/1/15. Balance due upon completion.

☐ LEASE - The terms and conditions of the lease can be found on the Attached Lease Documents.

### ACCEPTANCE:

The undersigned warrants to have full authority to execute this contract. By executing this contract the Buyer agrees to purchase the products and adhere to the terms and conditions as described in Sections A-D above, along with Tyson Sign Company's Standard Terms and Conditions (Exhibit A) which is attached hereto and incorporated by reference herein. These documents constitute the full and final understanding of the parties regarding the sale of the products and services.

BUYER: HDMG Entertainment, LLC

By: [Signature] Name/Title: TEJA SHARIF CEO  
Date: 2/25/2015 HDMG ENTERTAINMENT, LLC

SELLER: Tyson Sign Company, Inc.

By: [Signature] Name/Title: VP OF SALES  
Date: 2/25/15  
By: [Signature] Name/Title: President  
Date: 2-25-15

Page 2 of 3 Initial TKS

TYSON SIGN COMPANY

P.O. Box 50580 • Myrtle Beach, SC 29579 • Telephone: 843-448-5168 • Fax: 843-448-0535 • www.tysonsign.com



## Sales Contract

February 25, 2015

Exhibit A

### STANDARD CONTRACT TERMS & CONDITIONS

1. **TERMS OF PAYMENT:** The Buyer agrees to pay to Seller in consideration for the above described product as follows, unless superseded in section D: A sum equal to 1/2 the total above price upon execution of the Contract, and the balance (plus any approved additional charges) payable upon shipment or installation, if installation is made by Seller, net ten (10) days. Buyer agrees to pay a service charge on past due amounts at the rate of one and one-half percent (1 1/2 %) per month. (18%) per Annum until paid.
2. **ACCEPTANCE OF CONTRACT:** This contract shall not take effect until signed on behalf of Buyer and by an officer of Seller. This Contract constitutes the entire understanding between parties. No modification of this contract shall be binding on Seller unless approved in writing by an officer of Seller.
3. **TITLE:** Ownership of Product shall at all times remain in Seller, and Buyer hereby grants Seller a security interest in Product until all of the payments are made and all of the conditions herein contained are fully satisfied, at which time Buyer shall be vested with full title to Product. Buyer shall bear all risk of loss of Product after delivery or installation has been completed.
4. **DELIVERY AND PERFORMANCE:** Seller shall commence the construction of Product and complete the work thereon with due diligence. All obligations to be performed by Seller shall be subject to delay or failure resulting from war, fire, labor disputes, terrorism, unforeseen commercial delays, acts of God, or other accidents, forces or conditions beyond its control. Should Seller have Product ready for shipment or installation and Seller is unreasonably delayed or prevented from making shipment or installation, for reasons beyond its control or at the request of the Buyer, the manufacturing portion of the contract shall become due and payable. The installation labor will be invoiced separately once the installation is complete.
5. **PERMITS AND LICENSES:** Seller will act as agent for Buyer to obtain any permits and/or licenses and/or other fees required from public authorities for the installation of the Product, and Buyer will promptly reimburse Seller for the cost thereof and any reasonable expense incurred in obtaining the same. Seller shall not have any responsibility for the validity or continuing validity of such permits and/or license and/or fees which is obtained on behalf of the Buyer.
6. **GROUND CONDITIONS:** If unusual subsoil condition such as rock, hardpan, subsurface water, non supportive ground condition and the like, are encountered in erecting the Product, Buyer will reimburse Seller for any additional expense so incurred on demand.
7. **WAIVER OF BREACH:** Time and punctual performance of each provision are of the essence of this agreement. No waiver by either party of any default shall constitute a waiver of any subsequent default.
8. **ELECTRICAL SERVICE AND REINFORCEMENT OF BUILDING:** Buyer shall provide and make final connection of feed wires and/or data cables of suitable capacity and approved type to the Product, and shall pay for all electricity energy and/or telephone fees used by Product. Buyer shall provide all necessary reinforcements to the building on which Product is installed along with adequate access behind the wall to mount necessary remote components if needed.
9. **CHANGE ORDERS:** The Buyer and Seller may modify the scope of work, without invalidating the agreement, by executing a "Change Order". The Buyer and Seller shall mutually agree in writing or otherwise mutually agree as to the scope of work to be changed and cost or credit of the change order.
10. **SELLERS DESIGN:** All drawings, descriptions and specification of the Product and rights therein are reserved to and remain the property of Seller, and Buyer shall not use or divulge same to others except as required in connection with this contract.
11. **DEFAULT:** Buyer shall be in default if it fails to perform any of its obligations under this contract or if bankruptcy or insolvency proceedings are instituted by or against Buyer. Upon Buyer's default all amounts owing Seller hereunder shall become due and payable and Seller shall have all the rights and remedies of a secured party under the Uniform Commercial Code and any other applicable laws, and may enter upon Buyer's premises and take possession of Product or render it unusable. Buyer expressly waives any and all rights to notice or hearing prior to Seller taking possession of product. Buyer shall pay for expenses of Seller in retaking, holding and selling product and in enforcement of other remedies of Seller including reasonable attorney's fees and other legal expenses.

### LIMITED EXPRESS WARRANTY

**WARRANTY:** Seller warrants to the Buyer that each product it manufactures is free from defect in material and factory workmanship to the extent as hereinafter set out. Seller's obligation under this warranty covers all components and workmanship for a period of 90 days from date of installation. At the end of the 90 day period, this product is covered for an additional 9 months except for lamps, neon, bulbs or any other light source. Any other defective part will be replaced at no charge for the part. A charge will be made for installation of the part. Seller shall not have any obligation under this warranty for any of the following reasons: 1) If product is installed by anyone other than Seller or one of our authorized agents; 2) If product is serviced or maintained by anyone other than Seller or one of our authorized agents; 3) If Buyer fails to notify Seller promptly of any components Buyer believes to be defective; 4) If product is moved from original location at any time during the 12 month period; 5) If display is damaged by acts of God, vandalism or casualty of any kind. The obligations of Seller are limited to replacement of defective parts or components for the period as described above and Seller has no other obligations or liability for any other injury or damages including but not limited to consequential damages resulting therefrom.

Page 3 of 3 Initial 

TYSON SIGN COMPANY

P.O. Box 50580 • Myrtle Beach, SC 29579 • Telephone: 843-448-5168 • Fax: 843-448-0535 • www.tysonsign.com

# Wire Transfer Services

## Outgoing Wire Transfer Request

WELLS  
FARGO

|                  |                         |                               |
|------------------|-------------------------|-------------------------------|
| Today's Date:    | Created After Deadline: | Wells Fargo Reference Number: |
| 12/05/2014       | No                      | FW0044495339557691            |
| Banker Name:     |                         | Officer/Portfolio Number:     |
| LAURA CONIGLIARO |                         | CT000                         |
| Banker Phone:    | Store Number:           | Banker AU:                    |
| 203/225-5863     | 20034                   | 0044495                       |
|                  |                         | Banker MAC:                   |
|                  |                         | J4221-043                     |

Outgoing wires can only be sent for Wells Fargo customers. Provide the Customer Copy to the customer ensuring you give them the Wire Transfer Agreement on pages 3 and 4. Note: Wells Fargo Wire Transfer Services will route wires based on correspondent banking relationships. See the Wire Transfer Information for explanations of the Mexican CLABE number, the SWIFT BIC, the International Routing Code ("IRC") and the International Bank Account Number ("IBAN").

### Originator's Information

|                                  |                           |                               |                  |          |
|----------------------------------|---------------------------|-------------------------------|------------------|----------|
| Customer Name:                   | Street Address:           |                               |                  |          |
| ROBERT HARTMANN SR               | 114 CASCADE BLVD          |                               |                  |          |
| Primary ID Type:                 | Primary ID Description:   |                               |                  |          |
| TOKN                             | Token ID                  |                               |                  |          |
| Primary ID St/Ctry/Prov:         | Primary ID Issue Date:    | Primary ID Expiration Date:   | Address Line 2:  |          |
|                                  |                           |                               |                  |          |
| Secondary ID Type:               | Secondary ID Description: | City:                         | State:           |          |
|                                  |                           | MILFORD                       | CT               |          |
| Secondary ID State/Country:      | Secondary ID Issue Date:  | Secondary ID Expiration Date: | ZIP/Postal Code: | Country: |
|                                  |                           |                               | 06460-2848       | US       |
| Business, Trust, or Estate Name: | Home Phone:               | Business Phone:               |                  |          |
| HARTMANN DEVELOPMENT LLC         |                           | 203/876-1152                  |                  |          |

### Wire Amount and Source of Funds

|            |                      |                            |           |
|------------|----------------------|----------------------------|-----------|
| Create AU: | Amount (US Dollars): | Debit Wells Fargo Account: | Bank/COD: |
| 0044495    | \$495.00             | 2000046768184              | 00221     |

### Beneficiary/Recipient Information (This is the ultimate recipient of the wire transfer funds)

|                                                           |                           |
|-----------------------------------------------------------|---------------------------|
| Beneficiary/Recipient Name:                               | Name/Address Line 1:      |
| Attentive Mortgage Processing LLC                         |                           |
| Beneficiary Account Number/IBAN (Foreign)/CLABE (Mexico): | Name/Address Line 2:      |
| 000264659000                                              |                           |
| Information/Comments:                                     | Name/Address Line 3:      |
| CMP Group                                                 |                           |
|                                                           | Beneficiary Phone Number: |
|                                                           |                           |

### Beneficiary Bank (This is the financial institution where the beneficiary maintains their account.)

|                           |            |                        |
|---------------------------|------------|------------------------|
| ABA/RTN                   | SWIFT/BIC: | Beneficiary Bank Name: |
| 263182914                 |            | GROW FINANCIAL FCU     |
| Beneficiary Bank Address: | City:      | State:                 |
|                           | TAMPA      | FL                     |



Customer Copy

**Wire Fees**

Wire transfer fees will be charged to the Originator's Debit Account. Additional fees from intermediary and beneficiary banks may be charged to international transactions. My signature here indicates agreement to all of the information on this Outgoing Wire Transfer Request and to the terms and conditions of this request. Wells Fargo is authorized to rely on the information on this Request in making the requested funds transfer.

AU of Originator's Account: 0044495  
Wells Fargo Wire Fee Amount: \$35

**Customer Signature**

Originator Name

ROBERT HARTMANN SR

Originator Signature



☐ Submit manually  
☒ Signature not required

Date:

12/05/2014

**Customer Copy**

**Agreement For Outgoing Wire Transfer Requests ("Wire Transfer Agreement")**

**Responsibility of Wells Fargo.** The wire transfer described in the Outgoing Wire Transfer Request (Page 1) ("Order") may be sent by wire telegraph, telephone, cable or whatever other transmission method Wells Fargo considers to be reasonable. The wire transfer may be transmitted directly to the Beneficiary Bank (the financial institution designated in the Request as the Beneficiary Bank), or indirectly to the Beneficiary Bank through another bank, government agency, or other third party that Wells Fargo considers to be reasonable. Wells Fargo may utilize any funds transfer system or intermediary bank reasonably selected by Wells Fargo, even if its selection differs from instructions in the request.

**Agent.** Wells Fargo may use agents of its choice to perform any of its obligations.

**Limitation of Liability.** Wells Fargo will not be liable for any loss or damage due to the failure, delay, or error of: (1) the method of transmission selected by Wells Fargo, (2) a third party selected by Wells Fargo to receive the Order, or (3) the Beneficiary Bank. IN NO EVENT WILL WELLS FARGO BE LIABLE FOR DAMAGES ARISING DIRECTLY OR INDIRECTLY IF THE ORDER IS EXECUTED BY WELLS FARGO IN GOOD FAITH AND IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT. REGARDLESS OF THE FORM OR NATURE OF ANY CLAIM OR ACTION, IN NO EVENT WILL WELLS FARGO BE LIABLE FOR PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER OR NOT WELLS FARGO SHALL HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**Reliance on Information Provided.** If a wire transfer request describes the person to receive the wire transfer ("Beneficiary") inconsistently by name and account number, the wire transfer may be made on the basis of the account number even if the account number identifies a person different from the Beneficiary. If a wire transfer request describes a financial institution inconsistently by name and identification number, the identification number may be relied upon as the proper identification of the financial institution.

**International Wire Transfers.** A Payment Order expressed in U.S. Dollars will be sent in U.S. Dollars. Company may request that prior to executing a Payment Order, Wells Fargo convert the amount to be transferred from U.S. Dollars to the currency of a designated foreign government or intergovernmental organization ("Foreign Currency") at Wells Fargo's sell rate for exchange in effect on the date Wells Fargo executes the Payment Order. If the financial institution designated to receive the funds does not pay the beneficiary specified in a Payment Order payable in Foreign Currency and the funds are returned to Wells Fargo, Wells Fargo will not be liable for a sum in excess of the value of the funds after they have been converted from Foreign Currency to U.S. Dollars at Wells Fargo's buy rate for exchange at the time the cancellation of the Payment Order is confirmed by Wells Fargo. Wells Fargo will not be liable for any failure or delay by any financial institution or other third party in the designated foreign country in executing or failing to execute any Payment Order Wells Fargo transmits to a foreign country.

**Refund.** If the Beneficiary Bank does not pay the Beneficiary specified on the Order, a refund will be made only after Wells Fargo has received confirmation of the effective cancellation of the Order and Wells Fargo is in free possession of the funds debited or earmarked in connection with the Order. If the order is payable in Foreign Currency, Wells Fargo will not be liable for a sum in excess of the value of the Order after it has been converted from Foreign Currency to U.S. Dollars at Wells Fargo's buying rate for exchange at such time as the cancellation of the Order is confirmed by Wells Fargo.

**Failure to Transfer Proper Amount.** If Wells Fargo is notified that it did not transfer the full amount stated in the Request, Wells Fargo's sole liability will be to promptly execute a second Payment Order in the amount of the stated deficiency. If Wells Fargo executes an instruction in excess of the amount stated in the Request, to the extent that the originator does not receive the benefit of the Order, Wells Fargo will only be liable for any loss of the principal amount transferred in excess of the amount stated in the Request Instructions. Additionally, Wells Fargo will be liable for the amount of interest the originator has lost due to the transfer of the excess amount, computed at the then current Federal Funds rate. However, Wells Fargo's liability for loss of interest shall be limited to twenty (20) calendar day's interest. This section sets forth Wells Fargo's complete liability for the order issued under this agreement.

**Finality of orders.** The order will be final and will not be subject to stop payment or recall, except that Wells Fargo may, at the originator's request, make an effort to effect such stop payment or recall. In such case, Wells Fargo will incur no liability for its failure or inability to do so.

**Fees.** In addition to the outgoing wire transfer fee, additional fees may apply. Additional fees can include, but are not limited to: an additional fee for bank initiated transactions, amendment fees, statement fees, fees assessed by beneficiary and intermediary banks, etc. On international outgoing wires, if a SWIFT BIC, IRC, IBAN, or CLABE number is not provided the foreign banks may return the wire or assess a surcharge. Wells Fargo Wire Transfer Fees are disclosed in your most recent Fee and Information Schedule and related amendments.

**Acts of God.** Wells Fargo is excused for delays or failure to execute the Order to the extent that the delay or failure results from a cause beyond the reasonable control of Wells Fargo.

**Wire Transfer Information**

**General Information:** You can NOT have a bank as the final beneficiary, unless the wire is a payment to Wells Fargo (i.e.: mortgage, auto loan, etc.). We are required to know who the money is going to, to ensure the funds are not being used to support terrorist or drug activity. We need an account number for the beneficiary OR a complete physical address. No PO Boxes may be used when no account number is provided for the beneficiary.

**International Wires:** Wires going to foreign countries require different numbers depending on the receiving foreign country. All wire transfer payments destined for Europe should include the SWIFT Bank Identifier Code (SWIFT BIC), International Routing Code (IRC) as applicable, and for participating countries the beneficiary's International Bank Account Number (IBAN). Mexican banks require a CLABE number in addition to the SWIFT BIC.

1. **SWIFT Bank Identifier Code (SWIFT BIC).** The 8 or 11 character SWIFT BIC is a unique series of alpha numeric characters that help to identify a specific financial institution. The SWIFT BIC should be obtained from the beneficiary. To ensure timely delivery please be sure that international outgoing wires include the SWIFT BIC where applicable.
2. **International Routing Code (IRC):** Some countries throughout the international banking community have created international routing codes, which are used in combination with the SWIFT BIC to aid in routing the payment through a main office to a branch. Each country has a specific name for their routing code (i.e., Sort Code in the United Kingdom, Canadian Payments Association Routing Numbers in Canada). Your beneficiary must provide the international routing code to facilitate receipt of an international payment. Sending a wire without the IRC number can delay the wire, or the receiving bank may return the wire when this number is not included in the payment instructions, and additional fees may be assessed.
3. **International Bank Account Number (IBAN):** The IBAN varies by country/institution. Warning! Only the bank servicing an account can provide the correct IBAN of that account and must be obtained from the beneficiary of the wire. Sending a wire to a participating country without the IBAN can delay the wire, or the receiving bank may return the wire when the IBAN is not included in the payment instructions, and additional fees may be assessed.

Customer Copy

## Participating Countries that require an IBAN:

|                        |                    |                       |               |                |                      |
|------------------------|--------------------|-----------------------|---------------|----------------|----------------------|
| Albania                | Denmark            | Greece                | Liechtenstein | Netherlands    | Slovak Republic      |
| Andorra                | Dominican Republic | Guadeloupe            | Lithuania     | New Caledonia  | Slovenia             |
| Austria                | Estonia            | Hungary               | Luxembourg    | Norway         | Spain                |
| Bahrain                | Finland            | Iceland               | Macedonia     | Poland         | Sweden               |
| Belgium                | France             | Ireland (Republic of) | Malta         | Portugal       | Switzerland          |
| Bosnia and Herzegovina | French Guiana      | Isle of Man           | Martinique    | Reunion Island | Tunisia              |
| Bulgaria               | French Polynesia   | Italy                 | Mauritania    | Romania        | Turkey               |
| Croatia                | Georgia            | Kazakhstan            | Mauritius     | San Marino     | United Arab Emirates |
| Cyprus                 | Germany            | Kuwait                | Monaco        | Saudi Arabia   | United Kingdom       |
| Czech Republic         | Gibraltar          | Latvia                | Montenegro    | Serbia         |                      |

4. **Mexico CLABE Account Number:** Mexican banks now require an 18 digit CLABE account number be added to the Beneficiary instructions to ensure payment. The CLABE number is required on all Mexican Peso (MXN) and USD payments sent to Mexico. The CLABE account number must be obtained from the beneficiary. If the beneficiary does not have the CLABE account number, please have the beneficiary contact their bank. Wells Fargo does not provide or calculate the CLABE. Sending a wire without a CLABE account number can delay the wire, or the receiving bank may return the wire if the CLABE is not included in the payment instructions, and additional fees may be assessed.

5. **Wells Fargo recommends** that if you do not have a SWIFT BIC, IBAN, IRC, or Mexican CLABE number, that you contact the beneficiary of the wire. If the beneficiary does not have the needed information, please have the beneficiary contact their bank to obtain the appropriate information. Sending International wires without the required information can cause the wire to be delayed, returned, or assessed additional fees. For International outgoing wires only: When sending in foreign currency, please ensure the beneficiary's account accepts the designated foreign currency. International foreign currency wires are generally less expensive to send as compared with International USD wires (the Wells Fargo wire fee is always less when the wire is sent in foreign currency and Wells Fargo does not charge a converting fee; we also offer competitive exchange rates.) For International wires in foreign currency that are equal to or over \$100,000 U.S. equivalent, please call your local Foreign Exchange Specialist at 800-785-5593, to obtain a contract number.

Customer Copy

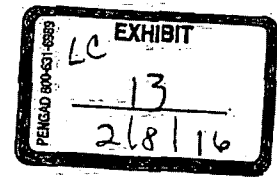


RIVERDALE  
FUNDING, LLC

Ben Dunavent  
207 Mockingbird Lane Suite 402  
Johnson City TN, 37604  
Phone: 423-328-1606  
Email: [bdunavent@riverdalefunding.com](mailto:bdunavent@riverdalefunding.com)

December 9, 2014

Mr. Robert Hartmann  
Partners 95, LLC  
P. O. Box 466  
Shelton, CT 06484



Re: Commercial Loan to Partners 95, LLC and HSGCHG Investments, LLC

Dear Mr. Hartmann:

This letter confirms the terms and conditions upon which Riverdale Funding, LLC (hereinafter referred to as the "Lender"), or its assignee(s) or affiliates, agrees to lend to Partners 95, LLC and HSGCHG Investments, LLC (hereinafter referred to as the "Borrower") the principal sum of \$1,900,000.00 (said principal amount together with interest thereon is hereinafter referred to as the "Loan") subject to the following terms, provisions, limitations and conditions:

1. Interest, Repayment and Term.

During the term of the Loan, the outstanding principal of the Loan shall bear interest at a fixed rate per annum equal to twelve percent (12%).

During the term of the Loan, payments of interest only shall be paid monthly in arrears, such monthly payments shall commence on the first day of the second calendar month following the closing.

The entire principal balance of the Loan, together with all unpaid interest and fees, shall be due and payable in a balloon payment on the date which is one year from the date of the closing (the "Maturity Date"). Notwithstanding anything herein to the contrary, in the event the Borrower shall have complied with all of its obligations during the term of the Loan and further that the collateral securing the Loan remains sufficient in the commercially reasonable discretion of the Lender, the Borrower may exercise an option to extend the Maturity Date by a period of one additional year by making a payment of an additional commitment fee in the amount of \$18,720.00 at the time of such exercise. The terms and provisions of the documents evidencing the Loan, including the interest rate, shall remain in full force and effect during the extended period.

2. Commitment Fee.

Borrower shall pay to Lender a commitment fee in the amount of \$114,000.00, of which an advance commitment fee of \$19,000.00 shall be returned to Lender with this commitment letter and the

balance, of \$95,000.00, is to be paid at closing. Notwithstanding anything herein to the contrary, this commitment fee shall be deemed to have been fully earned upon the execution of this commitment letter and shall be due and payable in full from the Borrower and/or any Guarantor regardless of whether the Loan closes or not, so long as the failure to close the Loan is not the result of a default or failure by Riverdale Funding, its successors and/or assigns. Should this loan not close as a result of the default or failure by Riverdale Funding, its successors and/or assigns, said advance commitment fee shall be returned to the Borrower in full without offset.

3. **Prepayment.**

The Borrower may prepay the Loan indebtedness in whole or in part any time upon fifteen (15) days prior written notice to the Lender (the "Prepayment Notice"). All full or partial prepayments of principal shall be applied first to the payment of unpaid late charges, then to accrued and unpaid interest, and the balance on the account of the unpaid principal in inverse order of maturity. Such partial prepayments shall not affect the Borrower's obligation to make regular installments required thereunder until the entire Note balance is fully paid.

4. **Guarantor**

The note evidencing the Loan shall be unconditionally guaranteed by Mr. Robert Hartmann.

5. **Security/Documentation.**

This commitment letter is intended to set forth the general terms under which the Loan will be made and does not set forth each and every provision which will be included in the Loan Documents. All closing documents for the Loan shall be substantially consistent with this letter and shall contain such other terms and conditions as are customarily required by the Lender in transactions of this nature, and as may be required by counsel to the Lender.

In addition to other items of collateral or security as provided elsewhere herein, the Loan shall be secured by:

**Mortgage/Deed of Trust.** A valid first lien upon the Borrower's fee simple interest in certain real estate owned by Borrower at 96 Frontage Road, East Haven, CT and 1548 S Highway 501, Marion, SC, together with all appurtenances to said property and all other buildings and improvements now or hereafter erected thereon. The final legal description of the mortgaged premises shall be satisfactory to the Lender. There shall be included under the lien of the Lender's mortgage all open space land, all proposed public or private roadways or portions thereof, all drainage, utility, or other easements, and all other similar lands, easements, appurtenances, or rights which may be reasonably necessary in order to develop and/or use the mortgaged property in the intended manner.

Security Agreement. A valid blanket first lien on and security interest in and to all personal property and fixtures of Borrower or Guarantor used or usable or incidental to the use and operation of the mortgaged property, whether now owned or later acquired. Borrower and/or Guarantor shall execute at closing a UCC-1 for filing with the Secretary of State.

6. Rents and Leases.

Lender shall be provided with a general assignment of rents and leases, in form and substance satisfactory to Lender, of all leases and rents now existing or arising in the future, to be operative in the event of default. The form and content of all leases shall be acceptable to Lender and its counsel. At Lender's option, Borrower shall not enter into any lease or other rental agreement without Lender's prior written approval of said lease or rental agreement and will maintain all security deposits held for benefit of tenants with the Lender. Further, at the option of Lender, each tenant and/or occupant shall duly execute and deliver to Lender a subordination and attornment agreement, which agreement shall be satisfactory and in form and substance to the Lender and shall provide, among other terms, that (i) that tenant acknowledges the assignment of its lease or rental agreement to the Lender; (ii) upon notification from the Lender the tenant and/or occupant shall pay, without set-off or deduction, all rent and other sums due under its lease and/or rental agreement directly to the Lender or its designee regardless of whether or not said tenant or occupant receives a notice to the contrary from the Borrower; and (iii) the Lender shall not be responsible for refunding any security deposits unless the Lender has actually received said deposits. Lender shall agree not to disturb any tenant which so subordinates and attorns provided such tenant is not in default of its lease.

Lender shall also be provided with copies of existing leases as to the mortgaged property, a listing of existing leases in effect with minimum gross rentals and security deposits for each lease set forth and, at Lender's option, lease ratification agreements executed by Borrower and the tenant for all leases affecting space in the property. Such lease ratification agreements shall be to the effect that the lease is in full force and effect, without modification or default by either party, that the tenant is in possession of its premises, paying the full rental called for by the lease, that no rental payments have been or will be made in advance except as may be approved by the Lender, that the parties will not modify, amend, cancel, surrender, or pledge or assign the lease without the Lender's consent, that the tenant has no claim or offset it could assert against the payment of rent and will make no deduction from rent payments without the Lender's consent except as provided in existing leases and then only after the expiration of notice and cure periods, that the tenant will not terminate the lease by reason of landlord's default without at least ten days' written notice to the Lender and an opportunity to cure the default, and stating the date and term of the lease, the rent payable thereunder, a description of the leased premises and containing such other provisions as the Lender may reasonably require.

Lender shall be authorized to notify lessees of the existence of such assignments. Lender agrees, however, not to exercise any such assignments until such time as a default or event of default exists under the Loan documents.

All leases shall be subordinate to the mortgage securing the Loan, pursuant to written subordination agreements in form satisfactory to Lender, and Lender's title insurance shall insure such

subordination. Lender shall agree however that so long as tenants are not in default that their rights under respective leases will be recognized.

7. **Title and Documents.**

Title and all documents, agreements, or other instruments used, provided or required in conjunction with the Loan transaction shall be subject to Lender's approval.

Lender is to be furnished with a mortgagee title insurance policy, in form satisfactory to Lender, in the amount of the Loan insuring the mortgage as a first lien on the Borrower's fee simple interest in the mortgaged property and containing no liens, encumbrances or exceptions, other than those approved by Lender, and issued by a title insurance company or companies acceptable to it. Such policy shall be delivered at the closing and shall be complete in all respects, except as to the date of recording of the insured mortgage and the effective date of the policy, with authorization to the Lender to fill in such blanks on the basis of information provided to or obtained by the Lender. Such title insurance policy shall (i) contain no exception for matters which would be shown on a survey or by inspection of the mortgaged property and have read into it the survey which is required pursuant to Section 8; (ii) insure against any and all unrecorded mechanic's and materialmen's liens; (iii) show no liens, encumbrances, exceptions or encroachments, whether prior or subsequent to the said mortgage loan, other than those specifically approved by the Lender; (iv) insure against the rights of tenants and parties in possession (except as approved by Lender in its sole discretion); and (v) include such endorsements, including without limitation, coverage for all construction advances, interest rate changes, usury, and a comprehensive endorsement, as Lender may require. Lender reserves the right to require re-insurance and/or co-insurance and to review and approve companies providing such coverage.

The condition of the title and the type, form and substance of all documents, agreements, or other instruments shall be such as Lender shall deem necessary or require and shall be satisfactory to Lender and its counsel. Without limiting the foregoing, the Loan documents shall include such covenants, representations and warranties and default provisions as Lender may deem necessary or desirable.

Borrower shall duly execute and/or deliver such instruments, documents, certificates, opinions, assurances and shall do such other acts and things as Lender may reasonably request to provide Lender with such information and assurances Lender may require with respect to the Loan and the construction, development and operation of the project and to effect the intent and purpose of the Loan and this commitment letter.

Borrower shall also provide an opinion letter addressed to Lender from a licensed attorney covering such issues as the Lender may reasonably require.

8. **Survey.**

Lender shall be furnished prior to the closing with a currently dated survey of the property to be mortgaged, prepared and certified to Lender by a licensed surveyor, showing no state of facts objectionable to Lender. Such survey shall show dimensions and total square foot area of the property and that all buildings are within lot and building lines and shall locate all easements also identified with recording data, buildings, improvements, utilities, rights of way, striped parking areas indicating the total number of spaces, street access and driveways, whether above or under ground, on or affecting the property, which exist at the date of certification. All such surveys shall be Class A-2 of the Code of Recommended Practice for Accuracy of Surveys and Maps and shall contain a "long form certification" satisfactory to Lender in the form attached hereto as Exhibit A.

Lender may, in its sole discretion, waive the requirements for a survey so long as there are no exceptions in the title policy issued to Lender for any survey.

9. **Insurance.**

The Loan documents shall provide for insurance coverage listed below, each of which shall be prepaid for a period of at least one (1) year at the time of closing:

(a) Fire and extended coverage insurance including vandalism and malicious mischief, broadened to the so-called "All Risk of Physical Loss" coverage basis, in an amount, after application of any deductibles acceptable to the Lender, of not less than one hundred (100%) per cent of the full replacement value of the insured property (both real and personal, including fixtures and equipment) at the time of issuance of such policy or policies and at each renewal date thereof, exclusive of land, excavations, foundations and other items normally excluded from the such policies;

(b) loss of rent insurance in an amount not less than the aggregate rental value of the property for a period of one year if available, or business interruption insurance in an amount acceptable to the Lender, as the case may be;

(c) public liability insurance in an amount not less than \$1,000,000 insurance;

(d) during any period during which construction of improvements is proceeding on the insured property, extended coverage casualty insurance in the form of a "Builder's Risk 100% Completed Value Non-Reporting Form" policy in an amount to be determined by the Lender as the full replacement value of the improvements; and

(e) flood insurance, if the improvements are located in an area designated as a special flood hazard area by the Director of the Federal Emergency Management Agency, naming the Lender as an additional insured party. If no flood insurance is to be provided, Borrower shall provide Lender with evidence satisfactory to Lender from a licensed surveyor or engineer that the property is not in an area of special flood hazard.

All insurance policies shall be in form and substance, for amounts and in companies "A" rated and acceptable to the Lender, with annual premiums prepaid by the Borrower, shall contain non-

contributory standard mortgagee and lender's loss payable clauses (as Lender may require) effective as of the closing date, providing for any loss payable thereunder to be paid to the Lender, shall provide that the policy may not be canceled without 10 days prior written notice to the mortgagee and shall be deposited with the Lender throughout the life of the Loan. The Lender's obligations under this commitment shall be conditioned upon receipt at closing of such insurance policies complying with this paragraph together with evidence of premium payment. All notices are required to be sent to Lender shall be sent by first class mail, postage prepaid, to the address above set forth.

10. **Due on Sale/Transfer of Property/ Further Secondary Financing.**

There shall be a default under the Loan documents and the entire indebtedness shall be due and payable at the option of the Lender together with any prepayment fee which would be required for voluntary prepayment at such time, upon or at any time after a sale, conveyance, or transfer, whether voluntary, by operation of law or otherwise, of all or any portion of, or interest in, the property or the placing of any mortgage, lien or other encumbrance on the property, without prior written consent of the Lender in each case, or upon the termination of existence or bankruptcy or insolvency of the Borrower. Borrower shall provide such financial information as Lender may, in its sole discretion, deem necessary to confirm that there is no secondary financing or investor financing contemplated as part of any transaction and, if applicable, that Borrower has sufficient funds to consummate the proposed transaction.

11. **Late Charge/Default Interest Rate.**

The note evidencing the Loan will provide that the Borrower will be assessed by the Lender a late charge equal to five percent (5%) of the aggregate monthly payment of interest, principal and, if any, reserve funds required under the terms of the note for each payment not paid within five (5) days of the due date to cover the expenses to the Lender resulting from such delinquent payment. During the continuance of any default under the note evidencing the Loan, the mortgage securing the note or any related documents beyond any applicable grace period contained therein, the interest rate under the note shall increase to the lesser of (i) twenty-four percent (24%) per annum or (ii) the highest rate of interest legally chargeable by Lender on this transaction.

The late charge only applies to the monthly payments of interest and not to the payments due at maturity, whether stated or accelerated. In the event a check for any monthly payment is returned due to insufficient funds, that payment must be made by wire transfer, bank check or cashier's check.

12. **Licenses, Permits and Approvals.**

Prior to the closing Lender shall be supplied with evidence satisfactory to it and its counsel that all licenses, permits and approvals from appropriate governmental authorities that are necessary for the construction, development, use and operation of the mortgaged property have been issued and are in full force and effect and that all appeal periods with respect to the issuance of each license, permit or

approval have expired with no appeal from the issuance having been taken, accompanied by copies of all such permits, licenses, and approvals. Lender shall also be satisfied as to the expiration date of each such license, permits and approvals as Lender may from time to time require. Copies of all licenses, permits and approvals shall be submitted to Lender prior to closing.

13. **Lender's Counsel Fees.**

All fees and disbursements of Lender's counsel in connection with the Loan, including, without limitation, documentation, negotiation and closing of the Loan, are the responsibility of the Borrower and Guarantor, whether or not the Loan closes. Absent further agreement between Borrower and Lender, the fees are agreed to be \$17,500.00 in total, of which Borrower has prepaid \$500.00.

14. **Costs and Expenses; Impound for Taxes and Insurance.**

The Loan transaction shall be made without cost to the Lender. Whether or not this commitment is terminated for any reason (other than Lender's default), and whether or not the Loan transaction closes or portion thereof is disbursed, Borrower and Guarantor agree to pay all expenses, fees and out of pocket charges paid or payable to third parties with respect to the Loan transaction or in any way connected therewith, including, without limiting the foregoing, legal fees of counsel for the Borrower, if any, legal fees of counsel for the Lender, architect's and engineer's fees, survey costs, brokerage commission, title costs, title insurance premiums, costs of recording, documentary stamps, taxes, mortgage taxes, surveys, appraisal fees, and such other customary and reasonable expenses (whether incurred prior to or after the date of closing) as are normally and reasonably incurred in connection with the processing and/or consummation of the Loan transaction, or such similar expenses as may be incurred in connection with the submission of any instruments and documents after the date of closing or the modification of the mortgage and other instruments and documents as may occur or be required after the date of closing.

Lender shall maintain an escrow/impound account to cover the payment of insurance premiums and real estate taxes on the mortgaged property. Borrower shall be required to make such deposits as Lender shall determine are reasonably necessary to allow for the timely payment of such insurance premiums and taxes during the term of the Loan.

15. **Consideration for Commitment.**

In consideration of the expenses incurred by Lender in processing this Loan, for the issuance of this commitment, and for the holding of funds for disbursement at the future date, the parties agree that upon acceptance of this commitment and payment of the commitment fee specified in Section 2, this commitment shall become binding and that the provisions hereof shall govern the closing of the Loan.

16. **Property Inspection**

The mortgage shall contain a provision that the Lender, its agents, or employees shall be permitted to inspect the property at any reasonable time and from time to time and upon reasonable

notice to tenant such that inspection(s) shall not interfere with tenants' business operations. Any such inspection is subject to the rights of Tenant under the Lease.

17. **Borrower's Representations.**

This commitment is issued in reliance on the representations made by the Borrower in connection with its application for the Loan. By acceptance of this commitment, the Borrower represents that all such representations remain true and correct and that it has not accepted any other commitment for a mortgage loan on the property.

18. **Assignment.**

The identity of the Borrower is of material importance to the Lender, and this commitment may not be assigned by the Borrower, and the Lender shall have no obligation hereunder to any third party, without the Lender's prior written consent, which may be given or withheld in Lender's sole discretion.

19. **Contingencies.**

Lender's obligations to close and make any advance under the Loan discussed in this commitment are subject to the following:

(a) Closing and funding of the Loan before January 12, 2015 unless said date is extended by Lender in its sole discretion. Borrower shall provide Lender and its counsel with no less than three (3) business days' prior notice of any scheduled closing date;

(b) There being no material adverse change in the financial condition of Borrower at the closing date from that shown on financial statements and other materials heretofore submitted to Lender, and there being no litigation at the closing date involving those parties, except litigation previously disclosed in writing to, and accepted by, the Lender. Any failure of the Borrower to notify Lender of any such material adverse change or of any such litigation shall constitute a representation by the Borrower to the Lender that none has occurred;

(c) Neither the Borrower, nor any tenant under any lease to be assigned as security for the Loan, being subject to a bankruptcy, insolvency or reorganization proceeding; provided, however, that any bankruptcy proceeding commenced after the closing shall not constitute a default under the Loan, but rather shall suspend further advances thereunder for a period of 120 days in order for such bankruptcy to be discharged or, if a tenant bankruptcy, in order for such tenant to affirm its lease at the mortgaged property. If after said 120-day period, the bankruptcy has not been discharged or the relevant lease affirmed, then Lender shall have no obligation to make any further advances under the Loan and the Loan may, at Lender's option, be declared to be in default;

(d) There exists no default under the Loan documents and no event or condition which could become a default with the passage of time or giving of notice;

Mr. Robert Hartmann  
Partners 95, LLC and HSGCHG Investments, LLC  
December 12, 2014  
Page 9

(e) Borrower accepting this commitment on or before December 12, 2014 by signing and returning the enclosed copy of this letter to Lender with the applicable fees;

(f) Satisfaction of all other conditions and requirements set forth in this Commitment Letter;

(g) Lender's review of the credit report of Borrower and determination that the same is satisfactory to Lender in its sole discretion; and

(h) Evidence satisfactory to Lender of valid leases of the mortgaged property for a rental of \$18,699.49 per month;

(i) Lender's receipt within ten (10) days of the date hereof but in any event not less than three (3) business days prior to the closing of estoppel certificates or letters satisfactory to Lender in its sole discretion with respect to any tenants of the mortgaged property;

(j) Lender's receipt and review of a fully-executed purchase contract for the mortgaged premises with a purchase price of \$1,000,000.00;

(k) Lender's receipt and review of a payoff letter in the amount of \$450,000.00 from the existing lender;

(l) Lender's receipt and approval of an appraisal, addressed to Lender, indicating that the mortgaged property located at 96 Frontage Road, East Haven, CT and 1548 S Highway 501, Marion, SC have an aggregate value of not less than \$3,500,000.00. Lender shall also receive a broker's price opinion satisfactory to it in its sole discretion. In the event the Lender determines in its sole discretion that the appraisal and/or the broker's price opinion do not support the proposed loan amount, Lender may offer a counterproposal to lend a different amount. In the event the Borrower does not accept the Lender's counterproposal, the prepaid portion of the commitment fee shall be returned to the Borrower.

20. **Reliance.**

Neither this commitment nor any obligation or undertaking of Lender set forth in this Commitment Letter, may be relied on by third parties without the express consent of Lender to such reliance.

Very truly yours,

**RIVERDALE FUNDING, LLC**

By

  
Joseph Hughis

Mr. Robert Hartmann  
Partners 95, LLC and HSGCHG Investments, LLC  
December 12, 2014  
Page 10

The undersigned hereby accepts this commitment and agrees to be bound by its terms and provisions.

Date: 12/9/2014

PARTNERS 95, LLC  
By: 

Date: 12/9/2014

HSGCHG INVESTMENTS, LLC  
By: 

Date: 12/9/2014

  
Robert Hartmann, individually as Guarantor

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM MARION COUNTY  
Court Of Common Pleas

The Honorable W. Haigh Porter, Special Referee

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**RECEIVED**

Case No: 2015-CP-33-280  
Appellate Case No.: 2016-000956

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NOV 21 2016  
SC Court of Appeals

PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC ..... Appellants.

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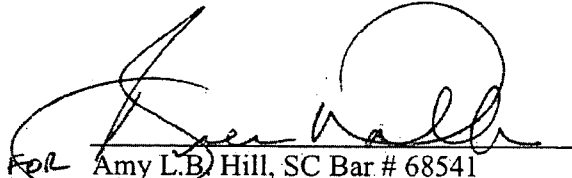
PROOF OF SERVICE

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I, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for the Appellant, do hereby certify that I have served a copy of the foregoing **Record on Appeal** in connection with the above-referenced case by mailing a copy of the same on November 21, 2016, by United States Mail, postage prepaid, to the following address:

W. Taylor Stanley, Esquire  
CALLISON TIGHE & ROBINSON, LLC  
1812 Lincoln Street  
Columbia, SC 29201

*[Signature follows on next page]*

A handwritten signature in black ink, appearing to read "Amy L.B. Hill", is written over a horizontal line.

For Amy L.B. Hill, SC Bar # 68541

Laura W. Jordan, SC Bar # 100374

GALLIVAN, WHITE & BOYD, P.A.

PO Box 7368

Columbia, SC 29202

ahill@gwblawfirm.com

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(803) 779-1833 Office

(803) 779-1767 Fax

ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM MARION COUNTY  
Court Of Common Pleas

The Honorable W. Haigh Porter, Special Referee

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Case No: 2015-CP-33-280  
Appellate Case No.: 2016-000956

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PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge  
Mortgage Investment Fund 3, LLC ..... Appellants.

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CERTIFICATE OF COMPLIANCE

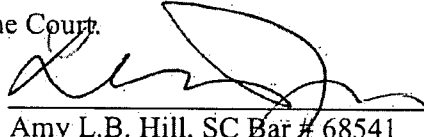
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The undersigned counsel hereby certifies, pursuant to South Carolina Court of Appeals Rule 210(g), that Record on Appeal contains all material proposed to be included by any of the parties and no other material and it also complies with the August 13, 2007 Order of the South Carolina Supreme Court.

**RECEIVED**

DEC 12 2016

**SC Court of Appeals**

  
\_\_\_\_\_  
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Laura W. Jordan, SC Bar # 100374  
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ATTORNEYS FOR APPELLANTS

November 21, 2016