

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Case No. 2010-CP-42-4430

**RECEIVED**  
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SC Court of Appeals

Wells Fargo Bank, N.A., successor-by-merger to  
Wachovia Bank, N.A.,

Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R.  
Fallon, Susan C. Fallon, Fallon Luminous Products  
Corporation, G. E. Business Capital Corporation,  
formerly Transamerica Business Capital  
Corporation, FSD Repurchase Solutions, LLC and  
South Carolina Department of Revenue,

Defendants,

Of Whom Fallon Properties South Carolina, LLC,  
Timothy R. Fallon, Susan C. Fallon are the,

Appellants.

RECORD ON APPEAL

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Counsel for Appellants

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Attorneys for Respondent

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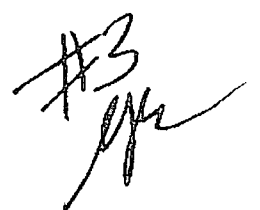
1. The Summons and Notices and Complaint were filed on August 23, 2010 in the Office of the Clerk of Court for Spartanburg County, South Carolina.
2. The Lis Pendens was filed on August 23, 2010 in the Office of the Clerk of Court for Spartanburg County, South Carolina as 2010-LP-42-1477.
3. The Complaint contained an allegation that this action involves a commercial loan to a business such that the Home Affordable Modification Program is not applicable. No Defendant filed an Answer denying the allegation; the court finds that the Home Affordable Modification Program does not apply to this action.
4. The Plaintiff provided an Affidavit establishing that no portion of the subject property which is owned by Fallon Properties South Carolina, LLC, is an "Owner-Occupied dwelling" as defined in the Administrative Order of the South Carolina Supreme Court dated May 2, 2011.
5. Fallon Luminous Products Corporation was served with the Lis Pendens, Summons and Complaint on October 15, 2010, as evidenced by the Affidavit of Service filed on October 20, 2010.
6. Subsequent to the commencement of the action, Plaintiff's counsel learned that Fallon Luminous Products Corporation was a debtor in a Chapter 11 bankruptcy proceeding in the Eastern District of Tennessee. The Plaintiff obtained an Agreed Order from the bankruptcy court on October 7, 2010 that modified and annulled the automatic stay to allow this action to proceed against the interest, if any, of Fallon Luminous Products Corporation. A copy of the Agreed Order is of record herein.

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7. The Defendant GE Business Capital Corporation formerly Transamerica Business Capital Corporation was served with the Lis Pendens, Summons and Complaint on August 27, 2010, as evidenced by the Affidavit of Service filed on October 8, 2010.
8. The Defendant FSD Repurchase Solutions, LLC was served with the Lis Pendens, Summons and Complaint on October 16, 2010, as evidenced by the Certificate of Service filed on October 25, 2010.
9. The Defendant the South Carolina Department of Revenue accepted service of the Lis Pendens, Summons and Complaint on September 10, 2010, as evidenced by the Acceptance of Service and Consent to Order of Reference filed on September 30, 2010.
10. The Defendants Fallon Properties South Carolina, LLC ("Fallon Properties" or Borrower"), Timothy R. Fallon, and Susan C. Fallon accepted service of the Lis Pendens, Summons and Complaint through their counsel, who filed a timely Answer to the Complaint on behalf of Fallon Properties, Timothy R. Fallon, Susan C. Fallon, and Fallon Luminous Products Corporation filed a timely Answer on or about October 12, 2010.
11. The Defendants Fallon Properties, Timothy R. Fallon and Susan C. Fallon filed Amended Answer to the Complaint on or about November 10, 2010, which omitted Defendant Fallon Luminous Products Corporation.
12. The Defendant the South Carolina Department of Revenue filed a timely Answer to the Complaint on or about September 10, 2010.
13. The Defendants Fallon Luminous Products Corporation, GE Business Capital Corporation, formerly Transamerica Business Capital Corporation, have not filed an Answer to the Complaint filed in this action and are therefore in default, as evidenced by the Affidavit of Default and of Non-Military Service filed on December 8, 2010.

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 IN RE: FALLON LUMINOUS PRODUCTS CORPORATION

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14. The Defendants were provided with notice of the time, place and date of the hearing as shown by the Notice of Hearing and Certificate of Service filed on November 21, 2013.

15. The Borrower executed a Promissory Note dated February 15, 2007, payable to the order of Wachovia Bank, N.A. ("Wachovia") in the principal amount of Two Million, Nine Hundred Sixty Thousand and no/100 Dollars (\$2,960,000.00), together with interest at a variable rate equal to the sum of 1-month LIBOR plus 2.75% (the "Interest Rate") and a maturity date of November 20, 2009 (the "Note"). A copy of the Note is of record herein.

16. The loan evidenced by the Note is further governed by a Loan Agreement dated February 15, 2007 executed by Wachovia and the Borrower (the "Loan Agreement"). A copy of the Loan Agreement is of record herein.

17. On February 15, 2007, in order to secure the indebtedness represented by the Note, the Borrower executed and delivered to Wachovia a Mortgage and Assignment of Rents (the "Mortgage") encumbering the real property located in Spartanburg County, South Carolina (the "Premises") which is more fully described below.

18. The Mortgage was recorded on February 20, 2007 at 1:54 p.m., in the Office of the Register of Deeds for Spartanburg County, South Carolina in Mortgage Book 3837 at Page 872. A copy of the Mortgage is of record herein.

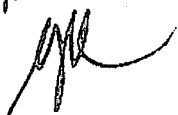
19. The Mortgage constitutes a first lien on the Premises.

20. The Mortgage also includes a grant of a security interest in any fixtures attached to the Premises or to any improvements thereon, and constitutes a fixture filing under the Uniform Commercial Code to perfect the security interest in fixtures.

21. The Mortgage requires the mortgagor to maintain and perform the terms and conditions of any lease of the Premises and prevents the mortgagor, without the consent of the mortgagee,

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from entering into a new lease of the Premises or from cancelling, surrendering, accepting prepayments of rent under, or modifying, any existing lease of the Premises. Any such new lease or material alteration of a prior lease, made without the consent of the mortgagee, is void as against the mortgagee.

22. As additional consideration for the making of the loan evidenced by the Note, Timothy R. Fallon and Susan C. Fallon (collectively the "Guarantors") executed an Unconditional Guaranty dated February 15, 2007 (the "Guaranty"), by which the Guarantors unconditionally guaranteed payment of all obligations of the Borrower to Wachovia. A copy of the Guaranty is of record herein.

23. Wells Fargo is the successor by merger to Wachovia and the owner and holder of the Note, the Mortgage and the Guaranties.

24. The Borrower failed to make the installment payments as required by the Note prior to maturity, which constituted an event of default under the Note. The Borrower also failed to pay the Note in full at its stated maturity date of November 20, 2009 which constitutes additional event of default thereunder.

25. As a result of the default, Wells Fargo accelerated the Note and demanded immediate payment of the balance due from the Borrower and Guarantor. Despite the demand, the Note has not been paid and remains due and payable in full.

26. Additional events of default exist, including the Borrower's failure to pay the 2009 ad valorem taxes on the Premises before the taxes became delinquent. Wells Fargo advanced funds to pay the 2009 taxes.

27. As a result of the default(s) set forth above, Wells Fargo placed the Note, Mortgage and the Guaranty in the hands of its attorneys for collection by foreclosure.

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28. The Mortgage includes an Assignment of Rents provision which reads as follows:

Mortgagor hereby absolutely assigns and transfers to Bank all the leases, rents, issues and profits of the Property (collectively "Rents"). Although this assignment is effective immediately, so long as no Default exists, Bank gives to and confers upon Mortgagor the privilege under a revocable license to collect as they become due, but not prior to accrual, the Rents and to demand, receive and enforce payment, give receipts, releases and satisfactions, and sue in the name of Mortgagor for all such Rents. Mortgagor represents there has been no prior assignment of leases or Rents, and agrees not to further assign such leases or Rents. Upon any occurrence of Default, the license granted to Mortgagor herein shall be automatically revoked without further notice to or demand upon Mortgagor, and Bank shall have the right, in its discretion, without notice, by agent or by a receiver appointed by a court, and without regard to the adequacy of any security for the Obligations, (i) to enter upon and take possession of the Property, (ii) notify tenants, subtenants and any property manager to pay Rents to Bank or its designee, and upon receipt of such notice such persons are authorized and directed to make payment as specified in the notice and disregard any contrary direction or instruction by Mortgagor, and (iii) in its own name, sue for or otherwise collect Rents, including those past due, and apply Rents, less costs and expenses of operation and collection, including attorneys' fees, to the Obligations in such order and manner as Bank may determine or as otherwise provided for herein. Bank's exercise of any one or more of the foregoing rights shall not cure or waive any Default or notice of Default hereunder.

29. Pursuant to the Assignment of Rents provision in the Mortgage, and pursuant to

Code Ann. §29-3-100, the Plaintiff is entitled to collect all rents derived from the Premises

30. A Consent Order Regarding Application of Rent (the "Consent Order") was entered on April 28, 2011 whereby Fallon Properties assigned its claim in the Fallon Luminous Products Corporation Chapter 11 case to Wells Fargo. The Consent Order directed Wells Fargo's counsel of record to deposit the funds into a trust account, and authorized counsel to disburse the proceeds, first, to reimburse Wells Fargo for property taxes advanced, second, to pay property taxes on the Premises that are due or past due, and to hold any undisbursed proceeds pending further order of the court.

31. Wells Fargo's counsel presented a report from his Firm's trust account showing a balance of \$95,239.86 after reimbursement of 2009 property taxes advanced by Wells Fargo

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and payment of property taxes for 2010, 2011 and 2012. A copy of the Trust Account Report is of record herein.

32. The 2013 property taxes on the Premises total \$20,783.10, which taxes are payable without penalty through January 15, 2014. At the hearing, the court authorized Wells Fargo's counsel to disburse funds from the trust account to pay the 2013 property taxes, which funds were disbursed and the taxes paid, prior to the issuance of this order. Wells Fargo's counsel is further authorized to disburse the remaining \$74,456.76 to Wells Fargo. Upon Wells Fargo's receipt of this disbursement, the Borrower shall be entitled to a reduction in the Total Debt.

33. The Note as well as the Guaranty provide that the lender shall be entitled to recover all reasonable expenses actually incurred to enforce or collect any of the obligations including, without limitation, attorneys' fees. The sum of \$40,000.00 is a reasonable fee to allow as attorney fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Note and Mortgage. Services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

34. The Note and Mortgage provide for recovery of additional expenses, including but not limited to the costs of appraisals or environmental inspections if requested by the mortgagee; Wells Fargo has incurred appraisal costs totaling \$6,100.00 and environmental assessment costs of \$2,900.00 and is entitled to recover those costs.

35. The Note further provides that upon the occurrence of an event of default that any outstanding obligation shall bear interest at a Default Rate equal to the sum of the Interest

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Rate plus three percent (3.0%). Wells Fargo has invoked its right to accrue and collect interest at the Default Rate.

36. The Note also provides for recovery of a late charge of five percent (5%) of any payment that is delinquent for fifteen (15) days or more.

37. The amount due and owing on the Note with interest at the rate provided therein, and other costs and expenses of collection, including an attorney's fee is as follows:

(a) Principal	\$2,699,329.49
(b) Interest as of 12/18/2013 (calculated at 5.92% / per diem of \$443.73978)	\$ 676,560.47
(c) Late Charge	\$ 15,379.51
(d) Appraisals <i>April 2013 - \$3,100.00</i> <i>September 2011 - \$3,000.00</i>	\$ 6,100.00
(e) Environmental Fees <i>May 2013</i>	\$ 2,900.00
(f) Attorneys Fees	\$ 40,000.00
Total Debt secured by the Note and Mortgage, including interest to date shown	\$3,440,269.47

Interest from the date shown in (b) through the date of this judgment at above stated rate to be added to the "Total Debt" to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the statutory post judgment rate should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage through the date to which such interest is computed.

38. Wells Fargo is entitled to a judgment of foreclosure and sale of the Premises together with any fixtures encumbered by the Mortgage.

39. The Plaintiff in its Complaint demanded a deficiency judgment against Fallon

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JUDICIAL DEPARTMENT

Properties South Carolina, LLC, Timothy R. Fallon and Susan C. Fallon, jointly and severally, for any portion of the indebtedness remaining unsatisfied after application of the proceeds of the foreclosure sale. The Plaintiff has reserved the right to waive its deficiency demand at any time prior to the sale.

40. On August 7, 2013, Fallon Properties South Carolina entered into a new Lease Agreement with Martex Properties, LLC for a portion of the Premises, specifically Building B, consisting of 51,000 square feet on Southport Road, for a term beginning September 1, 2013 and ending August 31, 2014 for a monthly rent of \$2,500.00. A copy of the Lease Agreement is of record herein. In the event that Wells Fargo enters into a Subordination Nondisturbance and Attornment Agreement with Martex Properties, the foreclosure sale shall be subject to the tenant's right of occupancy under the lease, otherwise, the sale will be deemed to extinguish the tenant's leasehold interest and right of occupancy.

41. The following Defendants may claim a lien or interest in all or part of the real property that is the subject of this action; unless otherwise stated below, the lien or interest of the Defendants is junior to the Mortgage held by Wells Fargo; in the event there is a surplus from the sale of the subject properties, the validity, priority, and amount of any such lien or interest (except as may be specifically provided below) will be determined at a hearing subsequent to the sale, in accordance with Rule 71(c) SCRPC. The said Defendant(s) and such claims or liens are as follows:

- a. Fallon Luminous Products Corporation, by virtue of its interest in or right of occupancy of the Premises pursuant to the following leases, which leases are now expired, terminated or abandoned; Fallon Properties South Carolina holds an interest in the leases as lessor or as assignee:

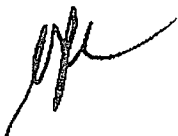
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- i. A Lease Agreement recorded on May 6, 1998 in Deed Book 67-V at Page 86 and re-recorded on December 31, 1998 in Deed Book 69-D at Page 412;
  - ii. A Lease Agreement recorded on May 6, 1998 in Deed Book 67-V at Page 95, as amended by First Amendment recorded November 11, 1998 in Deed Book 68-W at Page 518;
  - iii. Memorandum of Lease Agreement recorded November 11, 1998 in Deed Book 68-W at Page 512, as amended by First Amendment recorded November 11, 1998 in Deed Book 68-W at Page 516 and as to which the lessor's interest was assigned to Fallon Luminous Products corporation by Assignment of Lease instruments recorded November 11, 1998 in Deed Book 68-W at Page 536 and in Deed Book 68-W at Page 546; and
  - iv. Memorandum of Lease Agreement recorded January 29, 2001 in Deed Book 73-H at Page 191.
- b. GE Business Capital Corporation, formerly Transamerica Business Capital Corporation, by virtue of its interest in the following Leasehold Mortgage and Security Interest. The leasehold interest that is the subject of the Leasehold Mortgage and Security Interest is expired, terminated or abandoned and as a result, the following Leasehold Mortgage and Security Interest is no longer in effect and should be satisfied of record:
- i. Leasehold Mortgage and Security Interest given by Fallon Luminous Products Corporation to Transamerica Business Credit Corporation dated October 10, 2000 and recorded on October 18, 2000 in Mortgage Book 2394 at Page 709; and

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- ii. Modification to Leasehold Mortgage and Security Interest executed between Fallon Luminous Products Corporation and Transamerica Business Capital Corporation, successor in interest to Transamerica Business Credit Corporation, as Agent for itself and for Transamerica Commercial Finance Corporation, Canada, dated as of May 18, 2001 and recorded on August 15, 2001 in Mortgage Book 2540 at Page 33; according to information on file with the South Carolina Secretary of State, Transamerica Business Capital Corporation changed its name to GE Business Capital Corporation.
- b. FSD Repurchase Solutions, LLC and GE Business Capital Corporation, formerly Transamerica Business Capital Corporation, by virtue of its interest in the Premises pursuant to the following UCC-1 Financing Statement, as amended. The Financing Statement relates to the Leasehold Mortgage and Security Interest and is no longer in effect and should be satisfied of record:
- i. UCC-1 Financing Statement filed on October 18, 2000 in the Office of Register of Deeds for Spartanburg County as Document Number UCC-2000-20723 (Book/Page 00-2127) showing Fallon Luminous Products Corporation and others as Debtor and Transamerica Business Credit Corporation as Secured Party;
- ii. UCC-3 Amendment filed on June 6, 2001 as Document Number UCC-2001-18045 (Book/Page 01-973) evidencing an assignment to Transamerica Business Capital Corporation, as Agent; and

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- iii. UCC-3 Amendment filed on June 23, 2005 as Document Number UCC-2005-32052 (Book/Page 05-257) amending the name of the secured party of record to FSD Repurchase Solutions, LLC and further evidencing that the amendment was authorized by secured party GE Business Capital Corporation, formerly known as Transamerica Business Capital Corporation, successor to Transamerica Business Credit Corporation; and
  - iv. UCC-3 Continuation filed on July 7, 2005 as Document Number UCC-2005-34237 (Book/Page 05-299) amending the name of the secured party of record.
- c. South Carolina Department of Revenue, by virtue of tax liens filed in the Office of the Register of Deeds for Spartanburg County against former tenant Luminous Products Corporation; since the lease is no longer in effect, the tax liens do encumber the Premises:
- i. Tax Lien Number 3-50634681-4 in the amount of \$561.75 filed September 23, 2005 in State Tax Lien Book S-22 at Page 389;
  - ii. Tax Lien Number 3-50756533-5 in the amount of \$575.53 filed December 18, 2006 in State Tax Lien Book S-32 at Page 269;
  - iii. Tax Lien Number 3-50850281-8 in the amount of \$532.05 filed on October 2, 2007 in State Tax Lien Book S-39 at Page 23; and
  - iv. Tax Lien Number 3-50956067-1 in the amount of \$528.78 filed on September 26, 2008 in State Tax Lien Book S-47 at Page 645.

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CONCLUSIONS OF LAW

I, therefore, conclude as follows:

The Plaintiff in this action should have judgment of foreclosure of the Note and Mortgages, and the Premises, be sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. There is due to the Plaintiff on the Note and Mortgage described herein the sum of \$3,440,269.47, representing the Total Debt due to Plaintiff on the Note set out in paragraph 37 supra, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date of this Order.

2. The amount due in the preceding paragraph (the "Total Debt", and later accrued interest on the principal) shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the legal postjudgment rate of 7.25% per annum.

3. That the Defendant liable for the aforesaid mortgage debt shall on or before the date of the sale pay to the Plaintiff or to its attorney, the amount of Plaintiff's Total Debt as aforesaid together with the costs and disbursements of this action.

4. At the hearing, the court authorized Plaintiff's counsel to disburse funds held pursuant to the Consent Order Regarding Application of Rent to pay the 2013 property taxes on the Premises. The court authorizes Plaintiff's counsel to disburse the remaining \$74,456.76 to Wells Fargo. Upon Wells Fargo's receipt of this disbursement, the Borrower shall be entitled to a like reduction in the Total Debt.

5. That on default of payments at or before the time herein indicated, the Premises, together with any improvements thereon, shall be sold together to a single bidder by the Master in Equity, at public auction, at the Spartanburg County Courthouse, in the City of Spartanburg,

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County and State aforesaid, on Monday, February 3, 2014 or on some convenient Sale Day hereafter on the following terms, that is to say:

(a) FOR CASH: The Master in Equity will require a deposit of 5% on the amount of the bids (in cash or equivalent) same to be applied on the purchase price only upon compliance with the bids, but in case of non-compliance within twenty (20) days same to be forfeited and applied to the costs and Plaintiff's debt.

(b) Interest on the bids shall be paid to the day of compliance at the rate of 5.92 %.

(c) The sale shall be subject to taxes (including specifically any delinquent taxes) and assessments, existing easements and restrictions and easements and restrictions of record, and any other senior encumbrances.

(d) The sale shall extinguish the Lease Agreement of Martex Properties, LLC unless the tenant shall have entered into a Subordination Nondisturbance and Attornment Agreement acceptable to Wells Fargo prior to the foreclosure sale, in which case the sale shall then be subject to the tenant's right of occupancy under the Lease Agreement.

(e) Purchaser to pay for deed stamps (if applicable) and cost of recording the deeds.

(f) If the Plaintiff's representative is not in attendance at the scheduled time of the sales, the sales shall be canceled and sold on some subsequent Sale Day after due advertisement.

(g) If Plaintiff is the successful bidder at said sales, for a sum not exceeding the amount of costs, expenses, and the indebtedness of Plaintiff in full, Plaintiff may pay to the

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Master in Equity, only the amount of the costs and expenses, crediting the balance of the bids on Plaintiff's indebtedness. No deposit shall be due if Plaintiff is the successful bidder.

(h) A deficiency judgment having been demanded, the sale shall reopen for additional bids at 11:00 a.m. on the 30th day following the initial Sale Day, except that if the Plaintiff shall waive its right to a deficiency judgment the sale will become final on the Sale Day and immediate compliance may be had.

6. That the Master in Equity will by advertisement according to law, give notice of the time, and place of sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, deed(s) to the Premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sales, and that is, upon such sales being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within twenty (20) days after date of sale, then the Master in Equity, may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured. At the hearing on this matter, the undersigned directed that the properties be advertised for sale. In the event an advertisement is published prior to the entry of this written Order, such advertisement is hereby ratified and approved nunc pro tunc as if such advertisements were published after the entry of this Order.

7. That the Master in Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any Guardian ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff or Plaintiff's Attorney, of the amount of Plaintiff's Total Debt secured by the Mortgage; and

NEXT: Any surplus will be held pending further Order of this Court.

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8. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the Defendant(s) in possession herein, the Sheriff of Spartanburg County ordered and directed to eject and remove from the Premises the occupant(s) of the properties sold, together with all personal property located thereon, and put the successful bidders or his assigns in such peaceable possession.

9. And it is further ORDERED, ADJUDGED AND DECREED that each Defendant(s) named herein and all persons whosoever claiming under him, her, them or it be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged Premises so sold, or any part thereof.

10. It is further ORDERED, ADJUDGED AND DECREED that the Spartanburg County Register of Deeds is hereby directed to make appropriate entries in the public records to reflect the termination or satisfaction of the leases, leasehold mortgages, and financing statements as determined in Paragraph 41 of the Findings of Fact.

11. IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. Section 30-9-30 (Supp. 1987), the deed of conveyance made pursuant to the sales shall be indexed in the grantor index by the Register of Deeds Office in the name of the owners of record of subject properties immediately prior to execution of the deed(s), as well as in the name of the Master in Equity who executes such deed(s) as grantor.

12. The undersigned Master in Equity will retain jurisdiction to do all the necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance and disposing of any surplus funds pursuant to Rule 71(c), SCRCP.

13. The following is a description of the Premises ordered to be sold, as separate parcels:

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**PARCEL 1**

ALL that certain piece, parcel or tract of land located in the County of Spartanburg, State of South Carolina, designated as Tract A, containing 3.478 acres, shown on plat prepared for Pulliam Investment Co., Inc., by Neil R. Phillips, Professional Land Surveyor, dated November 21, 1989 and recorded in the Office of the RMC for Spartanburg County in Plat Book 108 at Page 845.

Also, a nonexclusive right of way and easement for ingress and egress along that strip of property running along the southern and western property lines of the property herein conveyed and shown as "Asphalt" adjacent to and south of the property herein conveyed and "19.5 feet paved" to the west of the property shown on that certain plat prepared for Pulliam Investment Co., Inc., by Neil R. Phillips, Professional Land Surveyor, dated November 21, 1989 and recorded in the Office of the RMC for Spartanburg County in Plat Book 108 at Page 845.

TMS No: 6-25-00-160.04  
Address: One Fallon Place, Spartanburg, SC

**PARCEL 2**

All that certain piece, parcel or tract of land located in [ ] Spartanburg County, State of South Carolina, designated as Tract B, containing 3.458 acres, shown on plat prepared for South Port Associates, by Neil R. Phillips, S.C. Professional Land Surveyor, dated May 24, 1990, last revised June 19, 1990 and recorded in the Office of the RMC for Spartanburg County in Plat Book 110, at page 415.

Also, the northern one-half of a 40 foot non-exclusive ingress-egress easement running adjacent to the northern most property line of the above-described tract, as shown on plat prepared for South Port Associates, by Neil R. Phillips, S.C. Professional Land Surveyor, dated May 24, 1990, last revised June 19, 1990, and recorded in the Office of the RMC for Spartanburg County in Plat Book 110, at page 415.

Also a nonexclusive 19.5 foot ingress-egress easement on the northern side of the above-described tract, as shown on plat prepared for South Port Associates, by Neil R. Phillips, S.C. Professional Land Surveyor, dated May 24, 1990, last revised June 19, 1990, and recorded in the Office of the RMC for Spartanburg County in Plat Book 110, at page 415.

Also a nonexclusive 40 foot ingress-egress easement on the northern side of the above described tract, as shown on plat prepared for South Port Associates, by Neil R. Phillips, S.C. Professional Land Surveyor, dated May 24, 1990, last

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SPARTANBURG COUNTY  
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revised June 19, 1990, and recorded in the Office of the RMC for Spartanburg County in Plat Book 110, at page 415.

All owner' rights, easements and appurtenances contained in instruments recorded in Deed Book 56-P, at page 733; Deed Book 53-C, page 787; and Deed Book 53-Q, page 40, in the RMC Office for Spartanburg County.

TMS No.: 6-25-00-161:08  
Address: 150 Southport Road, Spartanburg, SC

DERIVATION [Parcels 1 and 2]: Deed to Fallon Properties South Carolina, LLC from Timothy R. Fallon dated November 10, 1998 and recorded November 11, 1998 in the Office of the RMC for Spartanburg County in Book 68-W, at page 533.

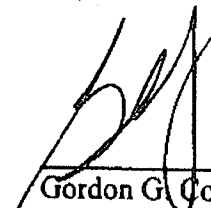
**PARCEL 3**

ALL that certain piece, parcel or lot of land located in the County of Spartanburg, State of South Carolina, shown and designated as Lot J-1, containing 1.0 acre as shown on that certain plat prepared for Tim Jackson by Neil R. Phillips & Company, Inc., dated February 4, 1994, and recorded in the Office of the RMC for Spartanburg County in Plat Book 125, page 632; and more recently shown on a plat prepared for Fallon Properties, S.C., LLC, by Neil R. Phillips & Company, Inc., dated June 17, 1998.

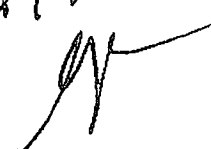
DERIVATION: Deed to Fallon Properties South Carolina, LLC from Timothy B. Jackson and Andrea E. Jackson recorded June 30, 1998 in the Office of the RMC for Spartanburg County in Book 68-C, at page 444.

TMS No.: 6-25-00-017.06  
Address: Southport Road, Spartanburg, SC

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T. E. SEAVUNLEY

  
Gordon G. Cooper  
Master-In-Equity

Spartanburg, South Carolina  
January 12, 2014

#18  




Interest from January 14, 2014 through March 26, 2014 / (calculated at 7.25% / \$687.28 per diem)	\$ 48,796.88
Total Debt, as adjusted	\$3,508,871.81
Less: Disbursement of Funds Held Pursuant to Court Order	\$ 74,456.76
Less: Rental Income of January 2014	\$ 2,350.00
Rental Income of February 2014	\$ 2,100.00
Less: Net Proceeds of Sale (Bid less costs and disbursements as shown on Taxation of Costs)	\$1,104,375.00
<b>Deficiency Amount</b>	<b>\$2,325,590.05</b>

It is therefore, ORDERED that the deficiency due to the Plaintiff, in this action is determined to be in the amount of \$2,325,590.05. The Clerk of Court shall enter judgment in favor of Wells Fargo Bank, N.A. against Fallon Properties South Carolina, LLC, Timothy R. Fallon, and Susan C. Fallon, jointly and severally.

AND IT IS SO ORDERED.

  
 \_\_\_\_\_  
 Gordon Q. Cooper.  
 Master in Equity

April 9, 2014

2014 APR 10 AM 10:21  
 M. HOPE BLACKLEY



STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

WELLS FARGO BANK, N.A.,  
successor-by-merger to  
Wachovia Bank, N.A.,

Plaintiff,

v.

Fallon Properties South Carolina, LLC,  
Timothy R. Fallon, Susan C. Fallon,  
Fallon Luminous Products Corporation,  
GE Business Capital Corporation, formerly  
Transamerica Business Capital Corporation,  
and FSD Repurchase Solutions, LLC,  
and South Carolina Department of Revenue,

Defendants.

) IN THE COURT OF COMMON PLEAS  
) C/A No. 2010-CP-42-4430

**ORDER DENYING PETITION  
FOR APPRAISAL**

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The matter before the court is the Petition for Order of Appraisal filed by the Defendants Timothy R. Fallon and Susan C. Fallon on or about April 4, 2014. The Petition was timely filed. The Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") served a Return to the Petition on April 16, 2014 asserting that the petitioners had signed a Waiver of Appraisal Rights, both in their individual capacities as guarantors and on behalf of the Borrower Fallon Properties South Carolina, LLC. A hearing was scheduled, canceled and ultimately rescheduled for December 11, 2014.

An application for an order of appraisal, and a waiver of appraisal rights, are governed by S.C. Code Section 29-3-680, which provides as follows:

(A) In any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked, whether he has theretofore appeared in the action or not, may within thirty days after the sale of the mortgaged property apply by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal.

(B) Except in any real estate foreclosure proceeding relating to a dwelling place, as defined in Section 12-37-250, or to a consumer credit transaction, as defined in Section 37-1-301(11), a defendant against whom a personal judgment may be taken on a real estate secured transaction may waive the appraisal rights as provided by this section if the debtors, makers, borrowers, and/or guarantors are notified in writing before the transaction that a waiver of appraisal rights will be required and upon signing a statement during the transaction similar to the following:

"The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY."

2014 DEC 15 PM 2:21

This waiver may be in any document relating to the transaction; however, the required language must be on a page containing the signature of the person making the waiver and the capitalized sentence must be underlined, in capital letters, or disclosed in another prominent manner.

S.C. Code Ann. § 29-3-680.


Wells Fargo relies upon a Waiver of Appraisal Rights dated February 15, 2007 bearing the signatures of Timothy R. Fallon as sole member and sole manager of the borrower/mortgagor Fallon Properties South Carolina, LLC and of the guarantors Timothy R. Fallon and Susan C. Fallon. The Waiver of Appraisal Rights meets the requirements of Section 29-3-680(B) in that the language contained therein is the same as the sample statement contained in the statute, including the capitalization of the waiver language, and the signatures of the borrower and guarantor appear on the same page as the required language.

The petition does not assert that the foreclosure action relates to a dwelling place or to a consumer credit transaction such that a waiver would not be allowed under the statute. The only

remaining issue is the requirement that the petitioners be "notified in writing before the transaction that a waiver of appraisal rights will be required...." Wells Fargo has provided ample evidence of such notice.

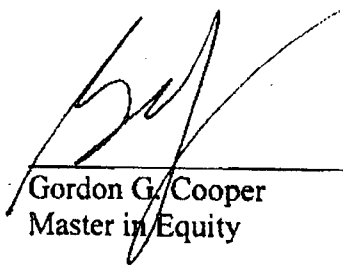
First, the Waiver of Appraisal Rights itself contains a statement whereby the borrower and guarantors "acknowledge[d] receipt of written notification before this transaction that signing of a waiver of appraisal rights would be required during this transaction". Second, Wells Fargo tendered the testimony of Ethan Burroughs, the Spartanburg Market President of Wells Fargo Bank, that Wachovia Bank's standard practice at the time was for the loan administration staff to generate a written notice that a waiver will be required, and to forward that notice to the loan officer who in turn sends the notice to the obligor. This notice is typically mailed to the borrower a week or so prior to closing. Mr. Burroughs testified that he did not have a specific recollection of sending the notice in connection with this loan, nor was there any document in the loan file confirming this. Mr. Burroughs testified that because the obligor is not required to sign this notice, Plaintiff does not retain a copy of it as part of the loan file. Tim Fallon testified that he did not receive any documents prior to receiving the loan closing package.

While there is a dispute in the testimony about whether pre-closing notice was given to the Petitioners in this case, the Court finds that documents provided in the loan closing package sent to Petitioners' attorney prior to closing fulfill the statutory requirement. In this transaction, the loan documents were prepared by Wachovia Bank and transmitted to the borrower's attorney by letter dated February 12, 2007 which was three days prior to the execution date of the documents. The Waiver of Appraisal Rights was one of the documents transmitted to the borrower's attorney. The delivery of the Waiver to the obligors' attorney was notice to the obligors that the waiver would be required as part of the mortgage loan transaction.

#3  



Since Wells Fargo has demonstrated to the satisfaction of the court that it obtained a waiver of appraisal rights from the petitioners that comports with the requirements of the applicable statute, the court finds that the waiver should be given its effect and that the court must deny the Petition for Order of Appraisal.

It is therefore ORDERED, that the Petition for Order of Appraisal filed by the Defendants Timothy R. Fallon and Susan C. Fallon is denied.

  
\_\_\_\_\_  
Gordon G. Cooper  
Master in Equity

December 15, 2014

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#4  


M

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS

Wells Fargo Bank, N.A.,  
successor-by-merger to Wachovia Bank,  
N.A., )

C.A. NO.: 10-CP-42-4430

Plaintiff,

PETITION FOR ORDER OF  
APPRAISAL

vs.

Fallon Properties South Carolina, LLC, )  
Timothy R. Fallon, Susan C. Fallon, )  
Fallon Luminous Products Corporation, )  
GE Business Capital Corporation, formerly )  
Transamerica Business Capital Corporation, )  
and FSD Repurchase Solution, LLC, and )  
South Carolina Department of Revenue, )

Defendants.

The petitioners would respectfully allege:

1. The above-entitled action was a real estate foreclosure proceeding in which the Petitioners were found to be liable for Plaintiff's debt.
2. That less than thirty (30) days have elapsed since the sale of the mortgaged property.
3. That the final sale of the property resulted in a deficiency judgment being entered against the Petitioners, and the Petitioners are informed and believe that by virtue of Section 29-3-680 of the Code of Laws of South Carolina, 1976, as amended, *et. seq.*, they are entitled to petition for an Order of Appraisal with the Clerk of the court in which the Decree of Foreclosure was entered.

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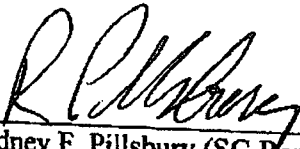
4. The Petitioners do hereby petition the Court for an Order of Appraisal and hereby designate James B. Mayo of the J.B. Mayo Company, as a disinterested state certified real estate appraiser who is not related by blood or marriage to, or connected in business with, any party pursuant to the aforesaid Code sections.

5. The Petitioners pray that the property is show to have a value greater than that for which it was sold at auction that the deficiency judgment entered against the Petitioners be reduced or eliminated.

Wherefore, Petitioners pray that an Order of Appraisal be issued; that the Board of Appraisers be constituted pursuant to Section 29-3-710 of the Code of Laws of South Carolina, 1976, as amended, and that an appraisal be made of the subject property according to statute; that after such appraisal, the deficiency judgment entered against the Petitioners be reduced or eliminated if the final appraisal determines that the property had greater value than that for which it was sold at auction; and for such other and further relief as the court may deem just and proper.

Respectfully Submitted,

Pillsbury & Read, P.A.

  
Rodney F. Pillsbury (SC Bar No.: 13067)  
1204-A E. Washington Street  
Greenville, SC 29601  
Phone: (864) 241-9828  
Fax: (864) 241-9818  
Email: [rpillsbury@prlawpa.com](mailto:rpillsbury@prlawpa.com)


April 1, 2014

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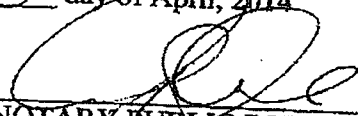
STATE OF SOUTH CAROLINA )  
  ) VERIFICATION  
COUNTY OF SPARTANBURG )  
  ) C.A. No.: 10-CP-42-4430

Personally appeared before me, Timothy R. Fallon and Susan C. Fallon, who, after being duly sworn, depose and state that they are the Petitioners in the foregoing action; that the Petition has been read by them and that the allegations therein are true and correct the best of their knowledge, information and belief.

  
Timothy R. Fallon

  
Susan C. Fallon

SWORN to before me this  
3 day of April, 2014

  
NOTARY PUBLIC FOR TEXAS  
MY COMMISSION EXPIRES: 08/22/2016



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Respectfully submitted

MCNAIR LAW FIRM, P.A.

*Weyman C. Carter*

Weyman C. Carter / S. C. Bar No: 15255

Post Office Box 447

Greenville, South Carolina 29602

(864) 271-4940

Attorney for Wells Fargo Bank, N.A.

Greenville, South Carolina  
April 16, 2014

2014 APR 17 PM 2:46  
M. HOPE DUNNLEY

**WAIVER OF APPRAISAL RIGHTS**

Borrower/Mortgagor: Fallon Properties South Carolina, LLC  
Guarantor: Timothy R. Fallon and Susan C. Fallon  
Date of Mortgage: February 15, 2007  
Mortgagee: Wachovia Bank, National Association

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The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

Further, the undersigned acknowledges receipt of written notification before this transaction that signing of a waiver of appraisal rights would be required during this transaction.

**BORROWER/MORTGAGOR**

Fallon Properties South Carolina, LLC

By:  (SEAL)  
Timothy R. Fallon, Sole Member and Sole Manager

**GUARANTOR**

 (SEAL)  
Timothy R. Fallon

 (SEAL)  
Susan C. Fallon

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M. HOPE STANLEY

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1 STATE OF SOUTH CAROLINA )  
2 COUNTY OF SPARTANBURG )  
3 WELLS FARGO BANK, N.A., successor-by- )  
4 merger to Wachovia Bank, N.A., )  
5 Plaintiff, )

COURT OF COMMON PLEAS  
2010-CP-42-4430

6 vs. )

TRANSCRIPT OF RECORD

7 Fallon Properties South Carolina, LLC, )  
8 Timothy R. Fallon, Susan C. Fallon, Fallon )  
9 Luminous Products Corporation, GE Business )  
10 Capital Corporation, formerly Transamerica )  
11 Business Capital Corporation, and FSD )  
12 Repurchase Solutions, LLC, and South )  
13 Carolina Department of Revenue, )  
14 Defendants. )

December 11, 2014  
Spartanburg, South Carolina

15 BEFORE: HONORABLE GORDON G. COOPER, Master-in-Equity

16 APPEARANCES:

17 WEYMAN C. CARTER, Esquire  
18 MCNAIR LAW FIRM, P.A.  
19 Post Office Box 447  
20 Greenville, South Carolina 29602  
21 Attorney for Plaintiff

COPY

22 ALEXANDER HRAY, JR., Esquire  
23 ATTORNEY AT LAW  
24 389 East Main Street, Suite 107  
25 Spartanburg, South Carolina 29302

AND

RODNEY F. PILLSBURY, Esquire  
PILLSBURY & READ, P.A.  
1204-A East Washington Street  
Greenville, South Carolina 29601

Attorneys for Defendants, Fallon Properties, Timothy Fallon and Susan Fallon

DOROTHY HUNTSINGER  
Court Reporter

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INDEX TO WITNESSES

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
ETHAN BURROUGHS	7	10	11	13
TIMOTHY FALLON	14			

INDEX TO EXHIBITS

<u>EXHIBIT NO:</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
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RESP EX 2	LETTER	11
RESP EX 3	WAIVER OF APPRAISAL RIGHTS	11
RESP EX 4	WAIVER OF APPRAISAL RIGHTS	11
RESP EX 5	LETTER	11

1 THE COURT: This is Wells Fargo Bank versus Fallon Properties South Carolina,  
2 LLC, Timothy R. Fallon, Susan C. Fallon, et. al., 2010-4430. Mr. Carter, would you bring  
3 us up to date as to where we are?

4 MR. CARTER: I'll be happy to, Your Honor. I am Weyman Carter and I  
5 represent the Plaintiff in this case. We had a foreclosure sale which became final, I  
6 believe, back in March of 2014. The Fallons---

7 THE COURT: Hold on just a second. Counsel, I don't know if we are...

8 MR. PILLSBURY: Your Honor, I was trying to get Wi-Fi, if that is okay. This  
9 is purely to get outside information.

10 THE COURT: Alright. Go ahead, Mr. Carter.

11 MR. CARTER: Mr. and Ms. Fallon, who are the individual guarantor defendants,  
12 filed a Petition for Appraisal Rights. I believe that that was filed on April 4, if memory  
13 serves, which was timely. This has to be filed within thirty days of the sale and that was  
14 thirty days from the deficiency sale, which was the final sale in this case. I had filed a  
15 brief response to that Petition stating that there had been a valid Waiver of Appraisal  
16 Rights executed in connection with the transaction, attached a copy of that document and  
17 it was my position that because there was a Waiver of Appraisal Rights, they comported  
18 with the statute that there was not -- that the Petition should be denied. We had that set  
19 for a hearing at one point. I thought we might of had it resolved, but we did not. I  
20 requested that the hearing be rescheduled. It was continued again and then rescheduled  
21 for today and I am here on behalf of the Plaintiff who answered the Petition for Appraisal  
22 Rights and I have with me Ethan Burroughs, who is the President for Wells Fargo who  
23 held the same, I believe, position for Wachovia at the time the loan was made, and also  
24 Marion Gray of Wachovia in Columbia who is the account officer responsible for this  
25 matter as it stands. So, again, my position is that there was a valid waiver and that being

1 the case, that the Petition should simply be denied and the deficiency judgment stand as  
2 originally rendered.

3 THE COURT: Alright.

4 MR. PILLSBURY: Your Honor, Rodney Pillsbury and Lex Hray for the Fallons.  
5 Briefly, Your Honor, on the Petition itself, the -- I believe the deficiency is somewhere  
6 around the neighborhood of two point five (2.5) million, and as the foreclosure had gone  
7 through and Mr. and Ms. Fallon were looking to minimize whatever they could as far as  
8 the deficiency, we've looked into the issue on the Waiver of Appraisal Rights, didn't see  
9 anything in the original mortgage. Originally, didn't see anything as far as a waiver that  
10 they had done in this case and it's important to note that, you know, the -- my clients were  
11 in Texas at the time they basically were sent all the documents FedEx and they had signed  
12 everything out there and returned it and you know, when, obviously, anytime that there  
13 is a waiver on the appraisal that is done, strict compliance with the statute is required.  
14 When Mr. Carter had filed his Return and called the appraisal to our attention, you know,  
15 the statute obviously requires that (a) there is a written waiver, and (b) that there is a  
16 disclosure in advance of closing, that the closing is subject to or contingent upon the  
17 waiver being executed, and I had inquired about whether or not there was that pre-closing  
18 written notice that was sent. You know, essentially, what we are talking about now, Your  
19 Honor, is that Mr. Fallon, when it did not look like the bank had complied, and it's not the  
20 current bank with--- It wasn't Wells Fargo at the time. And whether they had complied  
21 with the statute and so, he went ahead and got Mr. Mayo to do a commercial appraisal.  
22 That appraisal came in at about two million (\$2,000,000.00) Dollars which lessened the  
23 deficiency about nine hundred (900,000) thousand, give or take, and so that's basically  
24 where we are. That we don't think that at the closing that the bank complied with the  
25 statute. You know, Mr. and Ms. Fallon are here to testify, if they need to, on the issue.

1 You know, they frankly didn't recall signing anything about the waiver and even when it  
2 was brought up after their -- you know, when all this stuff came up afterwards, they still  
3 couldn't locate the waiver as part of the original documents, but it was part of the bank's  
4 -- it was one of the twenty-five hundred (2,500) plus documents that the bank produced  
5 during the litigation itself. So, we would--- I'm not quite sure whether we are--- If we  
6 are here on the Petition, we would like it to be granted so that Mr. Mayo's appraisal would  
7 be accepted. Obviously, the bank would have the ability to have their's and the Court  
8 would appoint one of their own and see what the real value of this property may be.

9 THE COURT: Mr. Carter?

10 MR. CARTER: I do have a witness that I'm going to call on the issues that have  
11 been framed for the Court and I think it comes down to--- The way I understand it is --  
12 and I have gone back and taken his deposition on this point, but, I think the position of the  
13 parties is that there was a timely application for -- timely Petition for Appraisal Rights.  
14 That this is not a--- And we've already had the foreclosure hearing. The Court has  
15 reviewed the documents. It doesn't involve a dwelling house and it's not a consumer  
16 credit transaction, so it's possible to have a waiver. We have a waiver document, so I  
17 think the issue before the Court is whether the bank meets the second requirement of the  
18 statute, that there is a notice given, a written notice given prior to closing that a waiver  
19 will be required and I've got some testimony I'd like to offer on that point, and some  
20 documents as well. And certainly, if the Petitioners want to put up evidence, I don't  
21 want to preclude them from doing so, but I want to let the Court know that I was going to  
22 make a presentation on that point.

23 THE COURT: And that is my understanding of the basis for today's hearing is  
24 whether there was a waiver and if the documents and the testimony is found to support the  
25 bank's position that there was a waiver, then we would not go forward. The waiver

1 would be accepted. But that is the reason we are here. Alright. Mr. Carter?

2 MR. CARTER: I'm happy to go ahead and call my witness and if -- the order  
3 really doesn't matter.

4 MR. PILLSBURY: Yeah. Your Honor, I think that is the primary issue, is  
5 compliance with the statute.

6 THE COURT: Right. That's my understanding.

7 MR. PILLSBURY: Yes. Thank you, Your Honor.

8 THE COURT: Alright.

9 MR. CARTER: And I'll just--- And I'm sure everybody is working off of the  
10 same statutory provision, but the Code section that deals with both the application for  
11 order of appraisal and waivers is all in South Carolina Code Section 29-3-680. I'll pass  
12 a copy up.

13 THE COURT: Alright.

14 MR. CARTER: And I think we're all pretty familiar with that. Subsection (B)  
15 deals with waivers. It talks about what the language of the waiver has to say, and then the  
16 Code Section also says at the end of the first paragraph of (B) is that the -- there has to be  
17 a notification in writing before the transaction that a waiver of appraisal rights will be  
18 required. So, on that point, I would like to call Ethan Burroughs as a witness.

19 THE COURT: Alright.

20 MR. CARTER: Step up to the stand, please, sir.

21 THE COURT: Please raise your right hand.

22 (WHEREUPON, ETHAN BURROUGHS IS DULY SWORN.)

23 THE COURT: Alright. Have a seat.

24 MR. CARTER: Your Honor, I have a number of documents that I am going to  
25 sponsor in through Mr. Burroughs and I will -- I've given those to Mr. Pillsbury. I've got

1 a set that I have pre-marked.

2 THE COURT: Alright.

3 ETHAN BURROUGHS,

4 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION BY MR. CARTER:

6 Q. Mr. Burroughs, good morning. Would you tell the Court what your current  
7 position is and where you are employed?

8 A. I'm currently the business banking manager and market president with Wells Fargo  
9 Bank here in Spartanburg.

10 Q. And prior to the merger of Wells Fargo and Wachovia, were you employed by  
11 Wachovia Bank?

12 A. Yes.

13 Q. And in 2007, what was your position, if you recall?

14 A. In 2007, I was a relationship manager in business banking with Wachovia Bank.

15 Q. And are you familiar with the loan that is the subject of this action? The loan to  
16 Fallon Properties.

17 A. Yes.

18 Q. Alright. Are you familiar with a prior loan that the bank might have had with  
19 Fallon Properties?

20 A. Yes.

21 Q. Alright. Just briefly tell the Court what your involvement was with this particular  
22 loan.

23 A. I was involved in helping originate and close the loan in regards to the property  
24 that was financed to the borrower Fallon Properties.

25 Q. Okay. Alright. I'm going to hand you a document that has been pre-marked as

1 Respondent's Exhibit 1 and ask if you can identify what that is.

2 A. Yes. This is an e-mail correspondence where we were -- we had gotten verbal  
3 approval to move forward with the loan, and it had to do with Mr. Fallon wanting  
4 to use Brian Price as his attorney to help close the loan, where we had a  
5 relationship with that firm and we were making sure there was no conflict of him  
6 representing Mr. Fallon since we also worked with him as well.

7 Q. Alright. And did that document come from the bank's records?

8 A. Yes.

9 Q. Alright. I'm going to hand you another document, Mr. Burroughs, that has been  
10 marked as Respondent's Exhibit 2 and ask if you can identify that document.

11 A. This is our closing checklist that was sent to Mr. Price that included all of the  
12 documents that were a part of the closing package as far as the real estate loan in  
13 question and his instructions of how to get those executed and recorded and  
14 returned to the bank.

15 Q. Alright. And to your knowledge, did Mr. Price follow the instructions that were  
16 given in that letter?

17 A. Yes.

18 Q. Okay. I hand you another document that has been marked as Respondent's Exhibit  
19 3 and ask if you can identify that.

20 A. This is the Waiver of Appraisal Rights document that was a part of the closing  
21 package and it is a separate document that is required to be signed by both the  
22 borrower and any guarantors in connection with the loan.

23 Q. Alright. I am going to hand you one out of order. This is marked as Respondent's  
24 Exhibit 5 and ask if you can identify that.

25 A. This is the letter that came to me via UPS from Brian Price that included the loan

1 documents, stating that they were all executed appropriately and that he was going  
2 to handle the recording of the mortgage and get the recorded mortgage to us at a  
3 later date.

4 Q. Okay. And what did you do with the documents after you received them?

5 A. They are then put into what we call our loan bag and it is sent to our operations  
6 area where, you know, we keep all of our credit files and keep all the loan  
7 documents in connection with the real estate loan.

8 Q. Do you recollect any problems or irregularities with the receipt of the documents?

9 A. No. I do not.

10 Q. I am going to hand you the one that was out of order. This is marked as  
11 Respondent's Exhibit 4, and ask you to see if you can identify that document,  
12 please.

13 A. This is the Waiver of Appraisal Rights that was in conjunction with the first loan  
14 that we did in 2005. That was also to Fallon Properties, that was executed at that  
15 time.

16 Q. Were you the account officer in connection with that 2005 loan?

17 A. Yes.

18 Q. Alright. Tell the Court just real briefly what -- do you recall what the collateral  
19 was securing that 2005 loan?

20 A. It was a second mortgage on the Fallon property on Highway 295.

21 Q. The same property that was---

22 A. The same property that we did in 2007 that was---

23 Q. Alright.

24 MR. CARTER: I'd like to move that Respondent's Exhibits 1 through 5 be  
25 received into evidence, Your Honor.

1 THE COURT: Any objections?

2 MR. PILLSBURY: On Exhibit 2, Your Honor, there are checkmarks that are  
3 obviously--- I don't know. It's not part of the original document, and to the--- Does  
4 he know who made the checkmarks? Are they his?

5 MR. CARTER: You can ask him.

6 MR. PILLSBURY: Well, I mean, I'm just trying to get the foundation.

7 CROSS EXAMINATION BY MR. PILLSBURY:

8 Q. Are the checkmarks yours?

9 A. I do not recall placing the checkmarks there, but, you know, I can't say for certain  
10 that they're not mine. But I would say they are either--- They would either belong  
11 to Brian Price or the person who assembled the documents to send to me, or you  
12 know, it could have been me or someone in my office, but, I really can't say for  
13 certain whose checkmarks they are.

14 MR. PILLSBURY: So, Your Honor, my objection would be that the checkmarks  
15 themselves would be hearsay. So, subject to redacting them, I would have no objection.

16 MR. CARTER: I'll just say in response to the objection that if it's a business  
17 record, that it comes in as it is, and if there is a question about the meaning of the  
18 checkmarks, the testimony is what it is and the Court can give whatever weight to the  
19 checkmarks as is appropriate.

20 THE COURT: And these are, I think he testified, copies that came out of the  
21 records.

22 MR. CARTER: Out of the bank's records.

23 THE COURT: Out of the bank's records.

24 MR. CARTER: Produced in the course of discovery.

25 THE COURT: I will allow them as-is.

1 (E-MAIL CORRESPONDENCE DATED AUGUST 23, 2007 IS RECEIVED  
2 INTO EVIDENCE AND MARKED AS RESPONDENT'S EXHIBIT 1.)

3 (LETTER DATED FEBRUARY 12, 2007 IS RECEIVED INTO EVIDENCE  
4 AND MARKED AS RESPONDENT'S EXHIBIT 2.)

5 (WAIVER OF APPRAISAL RIGHTS DATED FEBRUARY 15, 2007 IS  
6 RECEIVED INTO EVIDENCE AND MARKED AS RESPONDENT'S EXHIBIT 3.)

7 (WAIVER OF APPRAISAL RIGHTS DATED JUNE 29, 2005 IS RECEIVED  
8 INTO EVIDENCE AND MARKED AS RESPONDENT'S EXHIBIT 4.)

9 (LETTER DATED FEBRUARY 19, 2007 IS RECEIVED INTO EVIDENCE  
10 AND MARKED AS RESPONDENT'S EXHIBIT 5.)

11 **REDIRECT EXAMINATION RESUMED BY MR. CARTER:**

12 Q. Mr. Burroughs, you've heard some discussion before you were called as a witness,  
13 about the requirement that the lender provide, prior to the transaction, a notice to  
14 the obligors that a Waiver of Appraisal Rights would be required. Are you familiar  
15 with that requirement?

16 A. Yes, sir.

17 Q. Explain to the Court, if you can, how it is that that notice is given in -- or was given  
18 in connection with mortgage-secured transactions and, you know, the question  
19 really goes to the time frame of February 2007, and if there is a difference in the  
20 procedure now, you can explain that as well.

21 A. Okay. Our process is once the loan has been approved, it's then transferred to our  
22 document preparation group, which is tasked to prepare all the documents in  
23 conjunction with the closing. And once it is assigned to that group and it is a real  
24 estate loan, then they send me a pre-closing Notice of Waiver of Appraisal Rights  
25 which it lists the borrower and the guarantor and their name and address, and it

1 gives the same clause that's in the form that was referenced earlier that is signed  
2 at closing, and then it's signed by the banker. It's basically stating this is your  
3 notice of your waiver of appraisal rights that will be required to be signed at  
4 closing. And so, once that is sent to me, I sign it and then we mail it to the address  
5 that we have on file to the borrower. Then, once the loan closes, the borrower and  
6 guarantor sign it as well and then that is the copy that we keep, is the copy that is  
7 signed at closing. But that is our process and it's the same process that we use  
8 today as well. It has not changed.

9 Q. Do you require that the borrower or other obligor, the person that receives that  
10 notice, do you require that they sign something and send it back?

11 A. No. There is only--- It only requires the banker to sign it stating, you know, that  
12 we are giving them that notice and the way we handle that at the bank is we mail  
13 that to the client prior to closing and so normally that is done a week or two prior  
14 to the closing date.

15 Q. Is that document normally retained? A copy of that notice that goes out, is that  
16 normally retained?

17 A. It is not.

18 Q. Did you look for -- to see if the notice had been retained in connection with this  
19 transaction?

20 A. We did.

21 Q. Did you find one?

22 A. We did not.

23 Q. Alright. Do you have a specific recollection about sending the -- sending such a  
24 notice in connection with this loan?

25 A. What I will say is every real estate loan that we do, I get the notice, I sign it and

1 send it out. It is a common part of closing a real estate loan and so, you know, my  
2 recollection is yes, it was provided.

3 Q. I think that is all the question that I have for you, Mr. Burroughs. Answer any  
4 questions that Mr. Fallon's counsel may have.

5 **RECROSS EXAMINATION BY MR. PILLSBURY:**

6 Q. Mr. Burroughs, the notice that you -- pre-closing notice that you've referenced.

7 A. Yes, sir.

8 Q. There is no documentation of that, if I understand your testimony.

9 A. Correct.

10 Q. And you don't have a recollection specifically one way or the other whether that  
11 took place in this case. I understand that may be your normal course, but as you  
12 sit here today, you don't have a specific recollection one way or the other; do you?

13 A. Yeah. Yeah, I can't go back and say in 2007, you know, and tell you how many  
14 loans that I did that year and how many notices we sent out, you know.

15 Q. So, the answer would be no.

16 A. Correct.

17 Q. Okay. And in--- Regarding this loan, notice would have been mailed to the  
18 Fallons or to Mr. Price?

19 A. It would have been mailed to the Fallons.

20 Q. Okay. And do you recall where they were living at the time?

21 A. My recollection is they were living in Texas.

22 Q. Okay. And the--- And also, if I understand your testimony, that document that  
23 we don't have would be the notice that the bank would rely upon in establishing  
24 that it had complied with the statute; correct?

25 A. Yes.

1 Q. Okay.

2 MR. PILLSBURY: That's all I have, Your Honor.

3 MR. CARTER: I have no redirect. You can come down, sir.

4 WITNESS: Okay.

5 THE COURT: Alright.

6 MR. CARTER: I'm just going to have an argument to make based on the evidence,  
7 Your Honor, but if Mr. Pillsbury wants to put up testimony or other evidence, I will wait  
8 until after he does that.

9 THE COURT: Alright. Mr. Pillsbury?

10 MR. PILLSBURY: Yes, Your Honor. May it please the Court, I'd call Tim Fallon  
11 to the stand.

12 THE COURT: Alright. Please raise your right hand.

13 (WHEREUPON, TIMOTHY R. FALLON IS DULY SWORN.)

14 THE COURT: Alright. Have a seat, please.

15 TIMOTHY R. FALLON,

16 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

17 DIRECT EXAMINATION BY MR. PILLSBURY:

18 Q. Mr. Fallon, I will just sort of cut to the chase on the issues. Where were you living  
19 at the time that this loan was closed?

20 A. In Texas.

21 Q. And when this loan was closed, what documents do you recall receiving?

22 A. A ton of them in a large package, noted where to sign, and we did so.

23 Q. So you got one large stack of documents---

24 A. Yes, sir.

25 Q. ---regarding the loan. Was there anything that you received prior to that?

1 A. No, sir.

2 Q. Okay. Thank you.

3 MR. CARTER: I don't have any questions for Mr. Fallon.

4 THE COURT: Alright. Mr. Fallon, you may step down.

5 MR. PILLSBURY: That is all I have, Your Honor.

6 THE COURT: Alright. Alright, Mr. Carter?

7 MR. CARTER: I think I passed up a--- Did I pass up a proposed Order, Your  
8 Honor?

9 THE COURT: You did.

10 MR. CARTER: Alright. It is certainly the bank's burden to show that it complies  
11 with the provisions of the statute, including the requirement to provide a notice prior to  
12 the closing, and I would point to the following evidence. It is in the record that a notice  
13 was given. Mr. Burroughs testified that there is a unilateral notice that goes out and he  
14 is honest in saying I've done a lot of these loans; this is what we do every time; I don't  
15 recall this one specifically. And a notice like that, something that he does everyday, he  
16 doesn't recognize. Mr. Fallon testified that he didn't recall receiving it, and so, perhaps  
17 that evidence is somewhat in conflict, but that is not the only evidence of notice that we  
18 have. Taking it in chronological order, there was a prior loan that Wachovia had made  
19 with the same borrowers, same collateral, in 2005, and in connection with that transaction,  
20 Mr. and Ms. Fallon signed a Waiver of Appraisal Rights. It is exactly the same form as  
21 the one that was done in 2007. So, from their prior course of dealings with Wells Fargo,  
22 they had some notice there that a similar waiver would be one of the large stack of  
23 documents that they would be required to sign. Also, at this loan closing in 2007, the  
24 Waiver of Appraisal Rights that Fallon signed includes -- and this is not statutory language  
25 -- but, the second paragraph of that document says the undersigned acknowledges receipt

1 of written notification before this transaction that signing of a waiver of appraisal rights  
2 would be required during this transaction. If that was not a correct acknowledgment, I  
3 would suggest that the time to say so was then, if that was not the case. And this notice  
4 and this acknowledgment, signed by the Fallons, is a lot closer in time to the receipt of a  
5 notice than we are talking about now. Also, we have -- and I think this is dispositive,  
6 Your Honor, on February 12, 2007, the bank's doc prep department sent all the  
7 documents to Brian Price, who was serving as the closing attorney, the attorney chosen  
8 by the Fallons to close this transaction. Mr. Price received a number of documents to --  
9 that he was responsible for having executed and returned to the bank, including a Wavier  
10 of Appraisal Rights as one of the documents listed in that letter. So, there we have, I think  
11 three days prior to the transaction, a notice to borrowers, obligor's attorney that it would  
12 be required because it was in that package at that time. There is nothing in the statute that  
13 talks about how far in excess -- how far before the transaction that the notice has to be  
14 given. I mean, frankly, I've seen them given on the day of the closing, earlier in the day.  
15 This one three days before. I think, certainly, if we had no other evidence of notice, that  
16 that would be sufficient to show that the Fallons were given notice through the notice to  
17 their Counsel that a Waiver of Appraisal Rights would be required, as it was in the 2005  
18 transaction, and as it is in virtually every commercial mortgage transaction that I have  
19 seen since the statute was passed, setting forth the procedure that we are operating under  
20 today. So, I believe that the weight of the evidence is that any one of these notices is  
21 sufficient to satisfy the statute, and so, as a result, that makes the waiver--- There is no  
22 other question that I know of about the sufficiency of the waiver itself, and as a result, I  
23 think the bank has shown ample evidence that it complied with the statute. It gave a pre-  
24 closing notice, and the notice, and waiver itself signed at closing comported with the  
25 statute, and as a result, there is not -- the opportunity to exercise statutory appraisal rights

1 has been waived in this case and the Court should deny the Petition. Thank you.

2 THE COURT: Mr. Pillsbury?

3 MR. PILLSBURY: May it please the Court, Your Honor. The 2005 issue is  
4 irrelevant to this transaction because there is no -- there is no evidence on complying with  
5 the notice requirement that we are talking about right here, because that goes as to this  
6 particular loan. And obviously, the statute is written for a particular reason and it is there  
7 to make sure that there is -- the bank has to have strict compliance as its burden of proof  
8 in order to waive this very important right. Exhibit 2, the loan packet information, doesn't  
9 say anything about -- that the loan is -- will be contingent upon the waiver. The waiver  
10 is part of the packet, apparently. You know, we don't have Mr. Price here to confirm, but  
11 we assume based on what document that they have, that it was. But there was--- The  
12 reason why the statute is -- requires pre-loan notification is because it is so important, and  
13 frankly, the bank hasn't met this very strict burden, which they've been honest about.  
14 They say in the normal course it would be, but the only evidence is that the Fallons, in  
15 Texas, received one large loan packet. They executed all the documents in that packet and  
16 there was never anything came to them beforehand that had this issue. The other point is  
17 that the notice has to be directly to the party, but--- And, you know, if it matters at all,  
18 Your Honor, in the big picture, we're talking about reducing something from two and a  
19 half to one and a half, roughly, if that, and--- But, that's the next step down the road.  
20 But, given the requirement that is required, the bank has failed to meet that proof. What  
21 they relied on is a normal course of dealing, with no documents, and my client is adamant  
22 that he got nothing before the loan closing papers came in, which would have been,  
23 apparently, the notice that complies with the statute. Thank you.

24 THE COURT: Alright. Counsel?

25 MR. CARTER: I don't really have anything in reply other than just, again, to rely

1 on notice to the attorney is notice to the client, and the fact that when it came time to sign  
2 the actual documents, they signed it both -- and both signed the acknowledgment that they  
3 had in fact received a notice.

4 THE COURT: Mr. Pillsbury, anything further?

5 MR. PILLSBURY: You know, just as to that issue, the loan closing packet was  
6 yea thick. There were tons of documents that they signed. I know what the law is, but the  
7 reality is, you know, it was a huge packet of documents and this is one page of many,  
8 many, which is why the pre-loan notification is so important.

9 THE COURT: Well, there is no question that Mr. Price was the attorney for the  
10 debtors in this situation and from the documents--- I'm looking at Exhibit 2 and I am  
11 disregarding the checks. But the instructions in the package--- And, I can appreciate  
12 there was a large packet of documents in this size of a transaction, but Mr. Price was  
13 provided the documentation and included in that letter of transmittal was the -- and this  
14 is February 12th -- Waiver of Appraisal Rights. And, then on Page 2, the post-closing  
15 package should be provided to -- and this is the closing agent or person who finalized the  
16 transaction. Instructions are in addition to the fully executed documents listed above,  
17 which are the documentation required to close the transaction, one of those documents  
18 being the Waiver of Rights, and the statute is not definitive as far as the amount of time  
19 prior to a transaction being closed that the notification will be given. Based on the  
20 documentation provided, I am going to find that the debtors in this situation were provided  
21 the Waiver of Appraisal Rights prior to the closing, and that the bank complied with the  
22 statutory requirements relating to the execution of the appraisal rights waiver. Based on  
23 that, I will deny the Petition for the appraisal. Is that the essence of the Order that you  
24 have handed up, Mr. Carter?

25 MR. CARTER: It is, Your Honor.

1 THE COURT: Has Mr. Pillsbury seen the proposed Order?

2 MR. CARTER: He didn't see it before he came in today.

3 THE COURT: Alright. If you would---

4 MR. CARTER: Well, he has seen it now, but---

5 THE COURT: Oh, he has seen it. Okay.

6 MR. CARTER: ---not before today.

7 THE COURT: Alright.

8 MR. PILLSBURY: Which one is that?

9 THE COURT: The Order Denying Petition for Appraisal.

10 MR. HRAY: Your Honor, if I could ask one question.

11 THE COURT: Yes.

12 MR. HRAY: I have not read this Order yet. Does the Order have a finding of fact  
13 that notice to the attorney is notice to the debtors on this transaction? Is that your ruling,  
14 your finding of fact?

15 THE COURT: That is my ruling. I am reading the Order right now to see if  
16 that--- And there is no question about the fact that Mr. Price was the attorney for the  
17 Fallons in this transaction.

18 MR. HRAY: I don't think that is contested. I just wanted to know if that was your  
19 finding of fact, that notice to the attorney is notice to the debtor.

20 MR. CARTER: I don't think I put that in that--- That's the--- It's implied, but  
21 maybe not stated quite as positively as--- I think I handed you my other copy of that  
22 Order.

23 THE COURT: Here, if you want to check it as I am.

24 MR. CARTER: The sentence in there, it says the delivery of the waiver to the  
25 obligors' attorney was notice to the obligors that the waiver would be required as part of

1 the mortgage loan transaction. That is on Page 3.

2 THE COURT: And that is consistent with my ruling that providing the  
3 documentation, including the waiver to the obligors' attorney, constituted providing the  
4 same to the obligors.

5 MR. PILLSBURY: Your Honor, if I may on--- Again, this is--- We are seeing  
6 the same Order at the same time. I think it's important that the Order include the  
7 testimony that actually took place, which is that Mr. Burroughs acknowledged he didn't  
8 recall specifically whether notice was sent in this case, but it was custom and practice for  
9 them to do so. And, it was also the testimony of Mr. Fallon that there was no document  
10 independently received prior to the loan closing packet itself. And, where I am headed,  
11 Your Honor, is if there is a finding that the note -- the compliance was based solely on  
12 what the loan closing packet that was given to the attorney, and that's how the bank  
13 complied with the statute, then I think that just clarifies where their compliance comes  
14 from because, as you know, in the event there was something done later, the findings of  
15 fact by the Court would hold true.

16 THE COURT: Well, my finding is based solely on the documentation, not on the  
17 testimony. In other words, my finding is based on this Exhibit 2, February 12, 2007,  
18 which provided all the documentation.

19 MR. PILLSBURY: Okay. So I think we can strike the first full paragraph of  
20 Page 3.

21 MR. CARTER: I think the language in the paragraph is consistent with the  
22 evidence and the only thing is, there is not a reference to Mr. Fallon's testimony, but it's  
23 not that the--- It's not that the Order is inaccurate. If the Court wanted to add some  
24 additional language to clarify it, I think that is fine, but I don't know that it's proper to  
25 strike it completely because it is some additional evidence supporting the ultimate finding.

1 MR. PILLSBURY: Respectfully, Your Honor, therein lies the problem. If Your  
2 Honor isn't relying upon it, then it's not necessary.

3 THE COURT: Well, I think that what I've just gone over, at least for the record,  
4 shows what I was relying on, but I don't see a reason to delete that totally from the Order  
5 because it was testimony that was presented during the time. Now, if you want to add a  
6 statement made by Mr. Fallon that he does not recall, I will allow that to be added into it.

7 MR. PILLSBURY: And also, that Mr. Burroughs acknowledged he has no specific  
8 recollection of that document in this case. I think that is very material because the issue,  
9 I think, ultimately, will come down to whether or not there is a factual dispute about  
10 notice. One--- And that occurs in two arenas. One is directly to the borrower prior to  
11 the loan, and the other one is via the attorney. And I think the Court needs to make a  
12 specific finding of fact as to whether or not that notice was given in arena number one,  
13 because, you know, if--- Which is why I say, I understand the Court's ruling that they  
14 complied with the statute via Exhibit 2 forward, and if that's the basis of the ruling, then  
15 this paragraph is irrelevant to the Court's findings of fact, and all it does is open the door  
16 for some dispute later about, well, did he make a determination that pre-notice was given  
17 or not, outside of what was given to the attorney.

18 THE COURT: The reason I was not, or I did not, and still do not, rely on that  
19 testimony is because there was no--- And you've got it in here that the obligor was not  
20 required to sign that particular notice, so it was not retained as part of that closing file.  
21 Was that the testimony, the total testimony, at the time?

22 MR. CARTER: That was the testimony. It is unilateral notice. It is not required  
23 to be acknowledged.

24 THE COURT: Acknowledged. So that was the reason for my not relying on that,  
25 because it was not one that the obligor signed. But, now if you want to add an additional

1 sentence that says Mr. Burroughs further testified that he was not or did not recall that the  
2 standard practice was done in this transaction. Is that what you are suggesting?

3 MR. PILLSBURY: Yes. That there was no testimony that that in fact occurred in  
4 this transaction, and there was definitive testimony from Mr. Fallon that there was nothing  
5 received prior to the loan closing papers.

6 THE COURT: Well, I don't know whether that was definitive, but he testified to  
7 it.

8 MR. PILLSBURY: Well, that's--- I mean---

9 THE COURT: That he didn't get it.

10 MR. PILLSBURY: The only testimony that there was, was that there was only the  
11 loan closing papers and nothing before that.

12 MR. CARTER: I don't have an objection to adding a recital of what was -- of  
13 what the testimony was. But, again, I don't think it's appropriate to delete that section.  
14 I think it carries--- I think there is--- And again, we get back to the, you know, other  
15 ways to -- other evidence that is in the record that supports the ultimate ruling, and we are  
16 not just -- we are not just looking at the notice that the banker says we send it every time,  
17 it's unilateral notice, Mr. Fallon says I don't recall receiving it. Then we have--- And,  
18 I think the--- Well, I mean, the statute doesn't say that it has to be sent. It doesn't say  
19 it has to be received. It says they have to be notified. So, you know, frankly, I don't know  
20 how a--- If you had testimony. If the facts were, in a case, that a banker said I absolutely  
21 sent this notice, I remember sending it, and the defendant said well, I don't recall  
22 receiving it. You know, if the fact finder believes that the notice was sent, but not  
23 received, does that comport with the statute? I don't know. But, if we are looking at  
24 evidence that it actually was received, again, we have that as well in the waiver itself. The  
25 statute doesn't require the Waiver of Appraisal Rights to contain an acknowledgment of

1 receipt of the pre-closing notice. This one does. I mean, Wachovia chose to put that in  
2 their agreement and that was signed. So, I don't think we are hanging completely on the  
3 nail of notice to the attorney. I think there is some other evidence there in the record. But,  
4 again, I think it's Your Honor's Order and if you want something inserted in it---

5 THE COURT: Well, I don't have any objection to restating what was actually said  
6 and that is, he doesn't know whether this standard practice was followed in this particular  
7 transaction.

8 MR. CARTER: He could have said that it was. He could have just said I think it  
9 was, I'll say that it was.

10 THE COURT: Yes. But the point that--- I'm not relying on their standard  
11 practice. I'm relying on the fact that the documents were provided to the attorney prior  
12 to the transaction being finalized, and that the notice sent to the attorney says when you  
13 have got all of these signed, send them back and we will finalize the transaction.

14 MR. CARTER: Right. And I argued that was dispositive. I think if that was the  
15 only document we had, it would carry today.

16 THE COURT: Right. And that is what--- But, if you would finalize a--- I do  
17 not want to interlineate this in this Order. If you would go ahead and add what Mr.  
18 Pillsbury is saying, and that is, that Mr. Burroughs, in his testimony, or however you want  
19 to set it out. But, basically, he does not recall, in this transaction, whether this standard  
20 practice was followed.

21 MR. PILLSBURY: Yes, and---

22 THE COURT: And Mr. Fallon testified that he did not recall getting the  
23 document.

24 MR. PILLSBURY: Right.

25 THE COURT: His signature is on it, and he said there was a stack of papers and

1 he doesn't recall getting it. So, if you want to recite exactly what the testimony was, that  
2 is fine.

3 MR. PILLSBURY: The only thing, and I do not want to beat a dead horse, is that  
4 I just think it's important to make clear what Your Honor is relying upon, specifically, as  
5 part of Your Honor's findings because---

6 THE COURT: I thought I was pretty clear on that, that I am relying on the---

7 MR. PILLSBURY: You are. The Order isn't. Right.

8 THE COURT: Well, I thought it was.

9 MR. CARTER: I'll suggest--- I will offer that I will prepare a revision to this  
10 Order with the language that I think -- that I understand the Court wants to appear in there  
11 and I will send it to Mr. Pillsbury, and if he disagrees, he can submit a competing Order.

12 THE COURT: Well, the only thing that I want added to this one--- This Order,  
13 I think, recites my ruling, but to add additional language that has been requested by Mr.  
14 Pillsbury, I have no objection to, and that is, whatever the wording is, that Mr. Burroughs  
15 could not testify or did not testify, whatever, that this standard practice was followed in  
16 this situation, and Mr. Fallon did not recall getting this waiver in his package to sign. But,  
17 I'm not relying on that for my decision. I'm relying on the documentation that was  
18 presented, and that is, providing all the documents to the attorney prior to the closing, and  
19 the instructions in the closing instruction package were to get all these documents signed  
20 and then we will finalize the transaction, which is typical in a large transaction like this.  
21 You have got a closing package. If something is not signed, it's not funded, and that is  
22 basically what--- But, to say I'm relying on the standard practice, I'm not. I'm relying  
23 on the documents.

24 MR. PILLSBURY: And that is--- Your Honor, we are saying the same thing. I  
25 think, just something along those lines, and I can work with Mr. Carter on this. There is

1 a dispute between the parties about whether pre-loan was specifically given. It was their  
2 custom and practice. There was no specific recollection as to whether that happened. Mr.  
3 Fallon testified. Nevertheless, the Court finds that unnecessary because the Court is  
4 relying upon boom, boom, boom, boom, boom.

5 THE COURT: I'm not relying on what or may not have been their standard  
6 practice. I'm relying on what the documents say.

7 MR. PILLSBURY: Yes.

8 THE COURT: And I'm finding that the documents provided, and the process and  
9 procedure complied with the statutory requirements as far as a waiver of the appraisal  
10 rights.

11 MR. PILLSBURY: That is all I wanted to clarify.

12 THE COURT: Alright.

13 MR. PILLSBURY: Thank you, Your Honor.

14 THE COURT: Alright.

15 MR. CARTER: I will submit that Order, Your Honor.

16 THE COURT: Alright, if you would. I would rather have a clean Order than one  
17 that is interlineated. Alright. Have a good day.

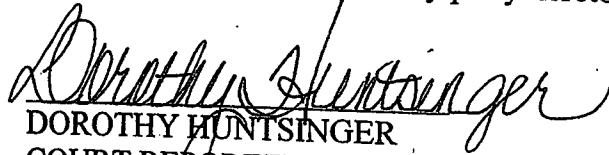
18 --- END OF RECORD ---  
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25

1 STATE OF SOUTH CAROLINA )  
2 COUNTY OF SPARTANBURG )

CERTIFICATE

3  
4 I, the undersigned Dorothy Huntsinger, Court Reporter for the Office of the Master-in-  
5 Equity for the County of Spartanburg, State of South Carolina, do hereby certify that the  
6 foregoing is a true, accurate and complete transcript of testimony of the proceedings had and  
7 evidence introduced at the hearing of the captioned case, before Honorable Gordon G. Cooper,  
8 Master-in-Equity for Spartanburg County, South Carolina, on the 11 day of December, 2014.

9 I do further certify that I am neither of kin, counsel nor interest to any party hereto.

10  
11   
12 DOROTHY HUNTSINGER  
COURT REPORTER

13 Typing Completion date:

14 January 22, 2015  
15  
16  
17  
18  
19  
20  
21  
22  
23  
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25

**From:** <rusty.copsey@wachovia.com>  
**To:** CommCredit@Wachovia.com<CommCredit@Wachovia.com>  
**Sent:** Thursday, August 23, 2007 5:46 PM  
**Attachments:** ecblank.gif;doclink.gif;graycol.gif;pic12536.gif  
**Subject:** Mail - Attorney Conflict Waiver - Fallon Properties of South Carolina~3062256

CATools Mail Migration  
Original Create Date: 02/07/2007 12:03:15 PM  
Original Send To: CATools@WACHOVIA  
Original CC:

----- Forwarded by Rusty Copsey/RMG/WACH on 02/07/2007 12:03 PM -----

**TAMMY**  
**NICHOLSON/Legal/WACH**  
02/06/2007 02:54 PM

To: Rusty Copsey/RMG/WACH@WACHOVIA  
cc: ethan.burroughs@wachovia.com  
Re: FW: Fallon Properties of South  
Subject: Carolina X Rusty Copsey

Rusty,  
Are we represented in this deal? If they plan to negotiate documents, we will need outside counsel. If there are other loans to this entity, please confirm that Nexsen did not represent Bank on those other deals. If not, I am ok with waiving conflict.

Tammy Nicholson  
Wachovia Corporation Legal Division  
301 S. College Street, TW31  
Charlotte, NC 28288-0630  
Phone: (704) 374-6720  
Fax: (704) 374-6204

"Price, Brian T." <BPrice@nexsenpruet.com>

"Price, Brian T."  
<BPrice@nexsenpruet.com>  
02/06/2007 12:35 PM

To: tammy.nicholson@wachovia.com  
cc: ethan.burroughs@wachovia.com  
Subject: FW: Fallon Properties of South Carolina

Tammy,

Our firm represents Tim Fallon and his related entities. Tim has requested that I represent him in connection the loan described in the e-mail below from Ethan Burroughs in Wachovia's Spartanburg office. I hereby request a waiver of the potential conflict in my representation of Tim Fallon and Fallon Properties South Carolina, LLC.

Regards,

Brian Price

WELLSFARGO-001584

Nexsen Pruet, LLC  
Mailing Address:  
P.O. Drawer 10648  
Greenville, South Carolina 29603-0648  
Physical Address:  
201 West McBee Avenue, Suite 400  
Greenville, SC 29601  
Phone: 864-370-2211  
Fax: 864-282-1177  
E-mail: bprice@nexsenpruet.com

[www.nexsenpruet.com](http://www.nexsenpruet.com)

\*\*\*\*\*  
\*\*\*\*\*

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**IRS CIRCULAR 230 NOTICE:** Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication.

---

**From:** ethan.burroughs@wachovia.com [<mailto:ethan.burroughs@wachovia.com>]  
**Sent:** Tuesday, February 06, 2007 10:59 AM  
**To:** rusty.copsey@wachovia.com; ginger.desprez1@wachovia.com  
**Cc:** brian.rogers@wachovia.com; todd.lumsden@wachovia.com; Price, Brian T.  
**Subject:** Fallon Properties of South Carolina

Dear Rusty and Ginger,

I have spoken with Tim Fallon of Fallon Properties of SC. He is ready to move forward with the loan of \$2,960,000 and going with the cap of 8.35%(indicative as of Friday) for 18 months. Our loan would be 3 years with 20 year amortization at Libor + 275bp. Our loan fee will be \$12,300 and fee for cap is \$2,500(indicative as of Friday). Loan will be fully funded at closing. Client would like to close loan on 02/14/2007. First payment would be on March 20th and same day going forward. Please invoice for the payment.

Rusty- current balance on existing loan that will be paid off is \$86,150.81.

Thanks,

Ethan R. Burroughs

WELLSFARGO-001585

Vice President  
Senior Community Banking Relationship Manager  
Wachovia Bank, N.A.  
101 North Pine Street SC 5910  
PO Box 5707  
Spartanburg, SC 29304-5707  
864-596-4184  
864-596-4540 Fax  
ethan.burroughs@wachovia.com  
ForwardSourceID:NT00026B0A

ForwardSourceID:NT000688E2

WACHOVIA BANK, NATIONAL ASSOCIATION  
COMMERCIAL LOAN DOCUMENTATION PREPARATION  
P.O. BOX 13327  
ROANOKE, VIRGINIA 24011-7376  
(540) 857-4603

February 12, 2007

Brian Price, Esquire  
Nexsen Pruet Adams Kleemeler, LLC  
201 West McBee Avenue  
Greenville, South Carolina 29601

Email: bprice@nexsenpruet.com

RE: Fallon Properties South Carolina, LLC  
\$2,960,000.00 Term Loan  
Document Tracking No.211674.Rke

Dear Mr. Price:

Enclosed herewith please find the following documentation with respect to the above-referenced transaction:

- Certificate of Resolution to Borrow ✓
- Loan Agreement ✓
- Promissory Note ✓
- Mortgage (please attach "Exhibit A", legal description, prior to execution)
- Waiver of Appraisal Rights ✓
- Unconditional Guaranty (Timothy R. Fallon and Susan C. Fallon) ✓
- Closing Statement, for Bank fees only ✓
- Closing Statement (you may add these fees to your Settlement Statement) ✓

**SPECIAL INSTRUCTIONS:**

Closing is subject to receipt, review and approval of the title binder. All exceptions must be approved prior to closing. You may proceed to close the loan when you are in a position to meet all requirements prior to closing.

Evidence of insurance, will need to be obtained and forwarded with closing package, listing Bank as Loss Payee/Mortgagee. Loss Payee/Mortgagee clause will need to be listed as follows:

Wachovia Bank, National Association, its successors and/or assigns, ATIMA  
Attn: Insurance Dept.  
Bk41/DT#211674  
Post Office Box 700308  
Dallas, Texas 75370

Instruct agent/borrower not to mail the original binder to Texas, but forward to you for delivery with your final package.

Please coordinate receipt of loan proceeds and closing directly with Ethan Burroughs, Vice President, closing representative for the Bank at (864) 696-4184.

Page Two  
Brian Price, Esquire  
February 12, 2007

The post-closing package should be provided to Ethan Burroughs, Vice President, Wachovia Bank, National Association, 101 North Pine Street, Spartanburg, South Carolina 29302, who will forward the package to the proper booking city. In addition to the fully executed documents listed above, please include the following items in the package:

- Original title insurance binder;
- Certified copy of the Mortgage, with recordation receipt;
- Certificate/Evidence of insurance; and
- Check made payable to Wachovia Bank, National Association, for bank fees as listed on the Closing Statement.

The following documents should be returned within 30 days of closing to Wachovia Bank, National Association, Collateral Maintenance, Mail Code-NC6038, P.O. Box 2705, Winston Salem, NC 27101:

- Original recorded Mortgage; and
- Original title insurance policy.

Should you need any further information or have questions, please contact me at (540) 857-4603 or you may contact Ethan Burroughs at (864) 596-4184.

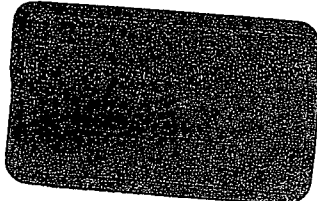
Sincerely,

*Pam Kessler*

Pam Kessler  
Documentation Review Senior Analyst

Enclosures  
cc: Ethan Burroughs, Vice President

**WAIVER OF APPRAISAL RIGHTS**



Borrower/Mortgagor: Fallon Properties South Carolina, LLC  
Guarantor: Timothy R. Fallon and Susan C. Fallon  
Date of Mortgage: February 15, 2007  
Mortgagee: Wachovia Bank, National Association

07054P301701

The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

Further, the undersigned acknowledges receipt of written notification before this transaction that signing of a waiver of appraisal rights would be required during this transaction.

**BORROWER/MORTGAGOR**

Fallon Properties South Carolina, LLC

By:  (SEAL)  
Timothy R. Fallon, Sole Member and Sole Manager

**GUARANTOR**

 (SEAL)  
Timothy R. Fallon

 (SEAL)  
Susan C. Fallon

Tracking #: 211674  
CAT - Deal # 790566 Facility ID 579444



S40400 (Rev 4 0)  
DOTM

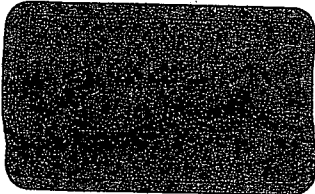
RPCI579444XXXX001

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Warfm doc



051940 315202



**WAIVER OF APPRAISAL RIGHTS**

Mortgagor/Borrower: Fallon Properties South Carolina, LLC

Guarantor: Timothy R. Fallon  
Susan C. Fallon

Date of Mortgage: June 29, 2005

Mortgagee: Wachovia Bank, National Association

The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

Further, the undersigned acknowledges receipt of written notification before this transaction that signing of a waiver of appraisal rights would be required during this transaction.

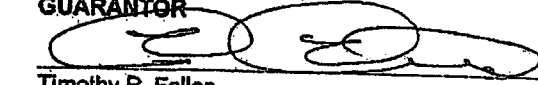
**MORTGAGOR/BORROWER**

Fallon Properties South Carolina, LLC

By:  (SEAL)  
Timothy R. Fallon, Sole Managing Member

**GUARANTOR**

Timothy R. Fallon

 (SEAL)  
Susan C. Fallon

Tracking #: 105069rke  
CAT - Deal # 571672 Facility ID 378031

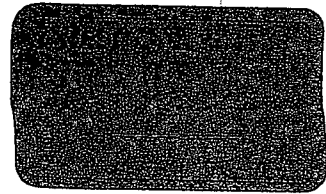
940460 (Rev 4.0)  
DOTM

PCI378031XXXX001

CDDOTMXXXX

Warfm.doc

**NEXSEN/PRUET**



**Brian Price**  
Associate  
Admitted in SC

February 19, 2007

**VIA UPS**

Ethan Burroughs  
Wachovia Bank, N.A.  
101 N. Pine St.  
Spartanburg, SC 29304

Re: Fallon Properties South Carolina, LLC Loan Documents

Dear Ethan:

Enclosed please find the original documents for the Fallon Properties South Carolina, LLC loan closing. I will forward the original mortgage upon its recordation and return. We plan to record and fund this loan on Tuesday, February 20.

Please let me know if you need anything further.

Sincerely,

  
Brian Price

BTP/bch

- Charleston
- Charlotte
- Columbia
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach

201 W. McBee Avenue  
 Suite 400 (29601)  
 PO Drawer 10848  
 Greenville, SC 29603-0848  
 www.nexsenpruet.com

T 864.282.1102  
 F 864.282.1177  
 E BPrice@nexsenpruet.com  
 Nexsen Pruet Adams Kleemeier, LLC  
 Attorneys and Counselors at Law

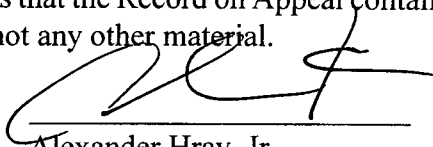
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Certificate of Counsel

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 21, 2018



Alexander Hray, Jr.  
389 E. Henry St., Suite 107  
Spartanburg, South Carolina 29302  
(864) 342-1111  
Fax: (864) 342-1113  
Attorney for Appellants

**RECEIVED**  
JUL 11 2018  
SC Court of Appeals