

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY COURT OF COMMON PLEAS

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-07-02407  
Appellate Case No. 2011-196888

Bank of America, N.A.,..... Respondent,

versus

Jerry C. Wardlaw Construction of South Carolina, Inc.;  
Jerry C. Wardlaw Construction, Inc.;  
Wardlaw Construction of Effingham, LLC;  
JCW Construction, LLC; Jerry C. Wardlaw; Jack Wardlaw;  
New Riverside Association, Inc.; and Midpoint at New Riverside  
Homeowners Association, Inc.,..... Defendants,

Of whom

Jerry C. Wardlaw Construction of South Carolina, Inc.;  
Jerry C. Wardlaw Construction, Inc.;  
Wardlaw Construction of Effingham, LLC;  
JCW Construction, LLC; Jerry C. Wardlaw; Jack Wardlaw  
are the..... Appellants.

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RECORD ON APPEAL

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Bank Of America Na vs. Jerry C Wardlaw Construction Of South Carolina Inc

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRPC;
  - Rule 43(k), SCRPC (Settled);
  - Other:
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other:

RECEIVED  
CLERK OF COURT  
JULY 5 2011

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

<input type="checkbox"/> Affirmed;	<input type="checkbox"/> Reversed;	<input type="checkbox"/> Remanded;	<input type="checkbox"/> Other;
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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- See attached order; (Formal order to follow)
- Statement of Judgment by the Court:

Defendants' Motion to Compel Arbitration is denied.

Dated at Beaufort, South Carolina, this 29 June, 2011

Court Reporter:

PRESIDING JUDGE - Carmen T. Mullen

This judgment was entered on the 5 July 2011, and a copy mailed first class this 5 July 2011, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Jamie Thompson

Jerri Ann Roseneau - Clerk of Court

1 STATE OF SOUTH CAROLINA )

2 COUNTY OF BEAUFORT )

COURT OF COMMON PLEAS  
No. 2010 CP 07 02407

3

4 BANK OF AMERICA )

5 Plaintiff )

6 versus )

TRANSCRIPT OF RECORD

7

8 JERRY WARDLAW )

9 CONSTRUCTION OF )

10 SOUTH CAROLINA, )

11 et al )

12 Defendants )

Beaufort, South Carolina  
June 6, 2011

13

14 B E F O R E :

15 HONORABLE CARMEN MULLEN, Judge

16

17 A P P E A R A N C E S :

18 For the Plaintiff: JOSEPH BELTON, Esq.

19 For the Defendant: JOSHUA WALKER, Esq.

20 Reporter Present: DEBORAH EVERETT

21

22

23 HARRIET P. BENNETT  
24 Reporter, S. C. Court Administration  
46 Regency Oaks Drive  
25 Summerville, SC 29485

1 (The within matter came before the Court on June  
2 6, 2011)

3 THE COURT: All right. What is the first motion  
4 you want to bring up?

5 MR. WALKER: Josh Walker for the Defendant.

6 I filed a motion to compell arbitration which we  
7 believe would be the primary motion before you.

8 THE COURT: When did you file that?

9 MR. WALKER: We filed it -- I think I sent it for  
10 filing last week. I did have to send a check. I think  
11 I neglected to send a check so the actual filing may  
12 have been Thursday or Friday of last week.

13 CLERK: It was entered on Friday when we received  
14 the check.

15 MR. WALKER: We demanded arbitration on May 25th  
16 in this case, and the way we read the statute, 15 48  
17 20D, upon the application for a motion to compell ar-  
18 bitration and upon showing the refusal of the other  
19 party to agree, we are entitled to file that applica-  
20 tion and it stays all the litigation pending at the  
21 moment.

22 As I said, we demanded arbitration on May 25th,  
23 and there was some delay in filing. We were just bas-  
24 ically trying to see if the Bank was going to agree,  
25 Judge.

1 THE COURT: When was the law suit filed?

2 MR. WALKER: I think the law suit was filed -- it  
3 may have been over a year ago when it was filed.

4 THE COURT: Well, why didn't you compell arbitra-  
5 tion in the year that you've had since you filed suit?

6 MR. WALKER: Well, the suit was actually filed by  
7 the Plaintiff, by Bank of America. There has been  
8 some discovery. There was a motions hearing scheduled  
9 I think a couple of months ago. They filed a motion  
10 to amend the pleadings and in reading the actual agreement  
11 to arbitrate it does not provide for any prejudice.

12 It actually says that a party shall not be con-  
13 strued as having waived their right to arbitrate simply  
14 by filing a suit or maintaining a suit, or by seeking  
15 any other remedies in litigation.

16 So the agreement itself provides that there is  
17 no waiver in the situation.

18 THE COURT: That doesn't make any sense because  
19 the whole idea of arbitration is to do things more  
20 quickly and to move things along; not do all the dis-  
21 covery.

22 What you've done is you have availed yourself of  
23 the Court for a year and now you want to compell arbi-  
24 tration.

25 MR. WALKER: Judge, I would agree with the Court

1 in the sense that the case has been sitting for some  
2 time, and the case law would distinguish those cases  
3 of waiver where there has been extensive use of the  
4 Court but that really hasn't occurred here.

5 There has been some litigation going back and  
6 forth. The Defendants have not been, nor have the  
7 Plaintiffs, pursuing this litigation very strongly.

8 Again, I would just point out that in the agreement  
9 itself it says there is no waiver. If you are maintain-  
10 ing, if you are instituting a law suit and if you're  
11 litigating it, there is no waiver to be had by applying  
12 for arbitration at that point.

13 Furthermore, Your Honor, really the issues in the  
14 case are still being sort of squared away. The Plain-  
15 tiff has filed a motion to amend their pleadings, so  
16 really the pleadings aren't set as of now.

17 So while there has been some time since the ini-  
18 tial action was filed, I know that the agreement to arbi-  
19 trate does give us the right to compell and submit the  
20 matters to arbitration. It is in the plain language  
21 of the agreement.

22 THE COURT: Are you ready today to address their  
23 motion?

24 MR. BELTON: Your Honor, the way the Bank feels  
25 about this, I think, first off, we feel we have had a

1 year of litigation. It definitely has been stagnant.

2 This has been a foreclosure case, a straight-up  
3 foreclosure, where the Defendant ended up filing a  
4 single counterclaim basically saying that there were  
5 promises made for additional funding which clearly  
6 wasn't supported -- isn't supported by any writings.

7 That goes to our summary judgment argument, which  
8 there is a statute both in South Carolina and Georgia  
9 on point, saying you need to produce a writing.

10 So we are here today. We filed a motion for sum-  
11 mary judgment on that point back in February.

12 To round up that one year period, the Defendant  
13 did request written discovery, and we did go through  
14 the process, and it was obviously not easy. We had  
15 to produce over a thousand pieces of paper to the  
16 other side.

17 So we have taken time on the case, and since Feb-  
18 ruary we have been -- we deferred to the Defendant to  
19 give him time, and he did what he did.

20 So as of February, we filed our summary judgment  
21 -- we said that's enough and we filed our summary judg-  
22 ment motion on his counterclaim to get rid of it.

23 It is clearly on point with the statute, and we  
24 then went to move this case over to the Master to start  
25 the foreclosure proceedings.

1           Again, here we are, pretty much on the eve of hav-  
2   ing the Court address the counterclaim so we can move  
3   forward with the foreclosure, and the Defendant wants  
4   to compel arbitration, which, Your Honor may know,  
5   would mean we have to start from scratch. We've got to  
6   put the Complaint together, call up the arbitration panel  
7   and start that process.

8           Not only is that going to be extremely time-consuming  
9   if we did but it's going to be costly on both sides, if  
10  they want to do it anyway, which I'm not certain of.

11          We would ask that it be referred to the Master as  
12  a compromise, which we haven't been allowed to do as they  
13  have not been willing to do.

14          THE COURT: Let me just ask you, is that your argu-  
15  ment? I can go ahead and hear it, as this file is on  
16  my docket.

17          MR. WALKER: Your Honor, if we say no . . .

18          THE COURT: Let me tell you, if you say no, it  
19  hasn't been ten days, I'm going to give you ten days.

20          Ten days from today's date -- then we're going to  
21  come back and hear it. If I deny it, then we're going  
22  to hear another motion, but we will be here, however  
23  many days it's been.

24          So that's why I say, if you're going to go ahead  
25  -- I think you will agree but it doesn't make any

1 difference to us.

2 MR. WALKER: The cases supporting our argument as  
3 far as the delay in length of time is Rhodes versus  
4 (inaudible) at, I believe, 74 South Carolina 122.

5 THE COURT: Would someone show me the arbitration  
6 clause in the agreement?

7 MR. WALKER: If I may, there are quite a few agree-  
8 ments involved in this case. All of those are their  
9 documents.

10 I have sort of tagged one particular agreement  
11 which is on the very last page. It should be on Exhibit  
12 A-One that is attached to the Summons and Complaint.

13 THE COURT: Yes.

14 (Brief pause in the proceeding)

15 THE COURT: Why didn't you all brief this as an  
16 arbitration action?

17 MR. BELTON: As it's a foreclosure. The way the  
18 things are today . . .

19 THE COURT: The way the law is.

20 MR. BELTON: Again, a foreclosure is today an eas-  
21 ier process to do.

22 THE COURT: Is there anything in this Section 20  
23 to require it be brought as an arbitration?

24 MR. BELTON: No, Your Honor. As you know, a fore-  
25 closure can be conducted by a magistrate so we need to

1 go to him eventually anyway.

2 MR. WALKER: Your Honor, if I may, I believe the  
3 agreement provides that the actual foreclosure compon-  
4 ents are not subject to arbitration if any other dis-  
5 putes arise thereunder.

6 THE COURT: So what is your dispute?

7 You said you had one counterclaim.

8 MR. WALKER: We counterclaimed -- there's actually  
9 a lot of issues in this case, Your Honor. I mean, this  
10 isn't just your standard note and mortgage foreclosure.

11 This is actually something -- if you look at the  
12 exhibits that you have, they are very extensive and com-  
13 plex documents where the lender was going to provide  
14 financing for an entire thing. Five Million and Ten  
15 Million Dollar loan agreements are involved, and they  
16 provide for everything that is supposed to happen during  
17 the development.

18 So what has happened, of course, like with many  
19 other builders in these economic times, bad times were  
20 thrust upon them and they really didn't have anything  
21 to do.

22 All of a sudden, they have the Bank saying, no more;  
23 we're not doing this any more; and then the builder is  
24 stuck with all this land they've bought with everything  
25 they've got depending on the entire development.

1           The construction loan and all the rest, it was basic-  
2 ally snatched from them, and so there were issues of  
3 we're going to be there with you, providing the financ-  
4 ing for the entire development which are basically then  
5 taken away.

6           So there are issues raised of duress, There are  
7 issues of bank officers who are telling them, hey, we  
8 are going to be there with you; we're going to walk hand  
9 in hand with you, and all of a sudden that is snatched  
10 away.

11           So there are a whole lot of issues involved here  
12 that we think should be submitted to arbitration.

13           MR. BELTON: If I may, Your Honor, there has been  
14 as he said some litigation in this case. There was some  
15 discovery, but the basis of the complaint is on a loan,  
16 a failure of payment.

17           (Portion inaudible)

18           MR. BELTON: Why don't we do these together? Why  
19 don't we arbitrate all these claims together, and I do  
20 not know that we're opposed to that, except at that  
21 point there would be different rules.

22           MR. WALKER: It may be that if the Court agrees  
23 we are entitled to arbitration, we may be able to do  
24 that then.

25           We do believe we're entitled to arbitration in the

1 case, Your Honor.

2 THE COURT: All right. Well, respectfully, I'm  
3 going to deny your motion to compel arbitration. I  
4 think there has been plenty of time.

5 So at this point, you have a motion to refer, is  
6 that correct?

7 MR. BELTON: We have two motions. One is a motion  
8 to amend our reply, which is simply to add the defense  
9 under Rule 15, to make sure he is on notice of every-  
10 thing, under the Dennis case.

11 Our motion for summary judgment has been fully  
12 briefed, and it obviously has been sitting on the doc-  
13 ket for quite a while, our first motion to amend.

14 Under 37 10 107, which is the statute we have re-  
15 lied upon in the motion for summary judgment, as well as  
16 the Georgia statute, which, again, if the Court deter-  
17 mines we should look at Georgia law -- these are essenti-  
18 ally the statutes that require any loan amendments or  
19 promises, commitments, to be in writing. Again Rule 15,  
20 but it has not been fully briefed by both sides.

21 That's our first motion, to make sure that is in  
22 fact added.

23 THE COURT: What's your position on this matter?

24 MR. WALKER: Well, Your Honor, as I recall, under  
25 the law the Court will grant it unless there is prejudice

1 I don't think we are biased by seeking to compell  
2 arbitration.

3 THE COURT: I understand, and I'm going to grant  
4 the motion for summary judgment.

5 MR. BELTON: Yes, Your Honor. this was a pretty  
6 straight-forward loan, construction loan situation, al-  
7 though counsel argued it was a little egregious.

8 We can see where there may be a number of documents  
9 we've retained which is consistent with the practice of  
10 lending. There is a loan agreement, there is a note,  
11 and there were a number of extensions from time to time.  
12 The last extension was beginning of 2009. The maturity  
13 date was July of 2009.

14 It was never amended, and the Defendant clearly  
15 knew that that was the date of maturity. Payment was  
16 not made and there were no further agreements, written  
17 agreements, between the parties to extend the loan.

18 Obviously, it is unfortunate that the economoy did  
19 not cooperate but it is not in the terms of the agree-  
20 ment that the bank would be required to lend until the  
21 end of time or until these things were concluded.

22 Again, counsel might bring up other potential de-  
23 fenses to the foreclosure, the counterclaim clearly we-  
24 are here on today indicates that promises and assurances  
25 were made to continue or to have a commitment to lend,

1 which the Defendant hasn't produced any evidence what-  
2 ever to establish that.

3 I think that would satisfy the requirement as to  
4 South Carolina. The statute, 37 10 106, I'd like to  
5 get in -- 13 5 30, and Seacove is right on point with  
6 this, this commercial lending situation, the same sort  
7 of lending situation.

8 The Court found in favor the bank in the case and  
9 granted summary judgment, by the fact that there was  
10 no writing.

11 MR. WALKER: Your Honor, this is a foreclosure ac-  
12 tion and there are issues we have raised by counterclaim.

13 The first thing I need to point out is that I did  
14 brief this back when they first filed their motion, and  
15 the fact that the documents would be covered by Georgia  
16 law versus that of South Carolina.

17 As far as the South Carolina law, we don't feel it  
18 applies. Make that, that Georgia law would apply.

19 Our position is that Georgia doesn't have that same  
20 statute. It does have a statute that is a little differ-  
21 ent under Georgia law, and, again, I think you will see  
22 that even though -- We had a situation where the bank was  
23 going to walk in and hand our client millions and millions  
24 of dollars, and I think you'll see the indebtedness is now  
25 over a Million Dollars.

1           It was probably a Fifteen Million Dollar loan agree-  
2           ment when it started, and there is plenty of language  
3           in that loan agreement about the bank is going to loan  
4           money. When the economy went down the tubes, of course,  
5           the bank, like all banks or a lot of banks at the time,  
6           were stuck with it, so they said, we are done with you;  
7           then the builders and developers are stuck saying, not  
8           only can we not sell houses, but we're done -- they can't  
9           get other financing to continue.

10          - We might be able to complete this; we might be able  
11          to pull this off, sell these houses. The bank pulls the  
12          funding, so it's not so much an agreement to further lend  
13          money but it's to agree to continue to finance this pro-  
14          ject.

15          What the bank said was, we're not going to do this  
16          any more, but they were officers with the bank who were  
17          telling my folks, hey -- but they didn't know what was  
18          going on. Nobody knew what was going on with the econ-  
19          omy -- hey, we're going to get you out of this; we're  
20          going to continue, and my client has signed and submitted  
21          an affidavit to tht effect.

22          THE COURT: Do we have any signed documents where  
23          they say they're going to continue?

24          MR. WALKER: No, we don't. One of our defenses is  
25          that we did this under duress, and I think I learned in

1 law school that economic duress is not the best thing to  
2 hang your hat on.

3 But circumstances are different here. Not only do  
4 you have the duress of them saying, we'll hang with you  
5 until it's done, but they also have an officer saying,  
6 we're going to help you out; a bank officer saying, we  
7 are going hand in hand with you, sir.

8 Again, the document that my client may have signed un-  
9 der these circumstances, it was either go under now or we'll  
10 see what happened later. Basically what they say.

11 And, again, the affidavit we submitted -- you know  
12 certain things the parties may do as a part of their con-  
13 duct and that might change the agreement. That's what we  
14 contend happened here.

15 Here we have varied agreements and a bank officer who  
16 is at the other end. That's our position. We would  
17 think, as a matter of law, there are a number of questions  
18 or issues involved in this litigation, and we'd like to  
19 basically have our day in Court.

20 MR. BELTON: I would say that the issue of duress,  
21 first off, is nothing that's in evidence. Duress is very  
22 clearly a defense that has nothing to do with the counter-  
23 claim.

24 If he wishes to raise that, he can go ahead and do it,  
25 but basically we are here on the counterclaim trying to  
have our motion granted.

1           They are saying that promises and assurances were made  
2 to lend money which is barred by the statute. Not only in Sout.  
3 Carolina but in Georgia as well -- that when assurances are  
4 made to lend money, that is barred by the statute.

5           South Carolina and Georgia law is ~~exac~~ exactly the same under  
6 the case law.

7           MR. WALKER: We have three arguments, and that was the  
8 basis of the third one. Again, the best evidence would be  
9 the contract itself.

10          THE COURT: Yes. Okay, I'll tell you what I'm going  
11 to do. As to the counterclaim, let me go ahead and read  
12 the document. No one forwarded it to me to read. I mean, I  
13 don't know if I ever got them sent directly to me, but usu-  
14 ally when I hear motions, because of the vast number that I  
15 do hear, I have the lawyers provide an Order beforehand --  
16 just Email me the copy, and within five, six, seven days  
17 beforehand so I can read it beforehand -- let me look at  
18 the docket.

19          (Brief pause in proceeding)

20          THE COURT: I hate to say it, but a Four, Five Mil-  
21 lion Dollar development is not that unusual here. It is  
22 just not. A Four or Five Million loan for development.

23          That part -- I want to take a look at these documents.  
24 Obviously there are different documents, and let me take a  
25 look at it.

1           Again, why can't it just be deferred, other than that  
2 somebody has requested or made demand for jury trial?

3           I believe that was by the Bank, a request for jury  
4 trial?

5           MR. WALKER:     Correct.

6           THE COURT:    I don't know if they have a right to a jury  
7 trial, but you might have a right to have it heard  
8 by a Judge.

9           MR. WALKER:     I'm not sure.

10          THE COURT:    I'm going to go ahead and refer the case  
11 to the Master in Equity on the foreclosure.

12          This is Mr. Wardlaw's affidavit, correct?

13          MR. WALKER:    Yes, Your Honor.

14          THE COURT:    Again, there might have been something  
15 else that was filed that I don't see. All I have is what  
16 I'm looking at in the file.

17          MR. WALKER:    I think I filed a brief and a supplemental  
18 brief.

19          THE COURT:    But you didn't attach any additional af-  
20 fidavits?

21          MR. WALKER:    No, sir.

22          THE COURT:    I hate to say this, but I'm going to re-  
23 fer it over to the Master and he will be able to solve it  
24 for you.

25          MR. BELTON:    The bank would like to have it for the

1 Bank to deal with those issues. We have to deal with those  
2 issues and there are property appraisals and things that will  
3 need to be done, environmental things.

4 THE COURT: Let me go back. You said you have sent an  
5 amended Reply, is that correct?

6 MR. BELTON: I have not read that as yet.

7 THE COURT: Go ahead and read it. I will Email one  
8 of you a request for a proposed Order, and you can submit  
9 it.

10 I will tell you after that I'm going to refer it to  
11 the Master, and you will have to call and request a hear-  
12 ing on it.

13 MR. WALKER: Just for the record I would make an objec-  
14 tion to your ruling as to arbitration.

15 ----- END OF REQUESTED TRANSCRIPT OF RECORD-----  
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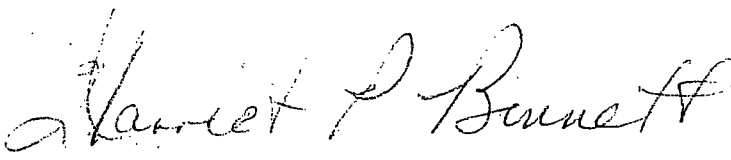
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CERTIFICATE

I, HARRIET P. BENNETT, Official Court Reporter for South Carolina Court Administration, do hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Deborah Everett, having been heard in the Court of Common Pleas for Beaufort County, South Carolina, on June 6, 2011.

Further, that I am neither of kin nor counsel to any party to this action, nor do I have any interest in the same.

February 19, 2013



STATE OF SOUTH CAROLINA )

COUNTY OF BEAUFORT )

BANK OF AMERICA, N.A. )

Plaintiff, )

vs. )

JERRY C. WARDLAW )

CONSTRUCTION OF SOUTH )

CAROLINA, INC., JERRY C. )

WARDLAW CONSTRUCTION, INC., )

WARDLAW CONSTRUCTION OF )

EFFINGHAM, LLC, JCW )

CONSTRUCTION, LLC, JERRY C. )

WARDLAW, JACK WARDLAW, NEW )

RIVERSIDE ASSOCIATION, INC., and )

MIDPOINT at NEW RIVERSIDE )

HOMEOWNERS ASSOCIATION, INC. )

Defendants. )

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO. 2010-CP-07-2407

**ANSWER, AFFIRMATIVE  
DEFENSES AND COUNTERCLAIM**

NOW COMES Defendants, JERRY C. WARDLAW CONSTRUCTION OF SOUTH CAROLINA, INC., WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, JCW CONSTRUCTION, LLC, JERRY C. WARDLAW, and JACK WARDLAW (hereinafter collectively referred to as "Defendants"), by and through their attorney, and state in response to the Plaintiff's Complaint as follows:

**AFFIRMATIVE DEFENSES**

1. Plaintiff's Complaint fails to state a cause of action against Defendants upon which relief can be granted.
2. The Loan Agreement, Note and Mortgage, described and defined in Plaintiff's Complaint, are ambiguous, insufficient, inadequate, and invalid as a matter of law.
3. Defendants have paid and/or discharged some or all of their principal obligation under the Loan Agreement, Note and Mortgage.

4. Plaintiff's claims should be dismissed as they fail for lack of consideration.
5. Plaintiff's claims are barred by the applicable statutes of limitation.
6. Plaintiff's claims are barred by the doctrine of laches.
7. Defendants plead the defense of waiver. Plaintiff has waived and relinquished the rights alleged in its Complaint, with full knowledge of and the intention to waive and relinquish such rights.
8. Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.
9. Plaintiff's claims are barred, in whole or in part, by the doctrine of setoff.
10. Plaintiff's claims are barred, in whole or in part, of the doctrine of accord and satisfaction.
11. Plaintiff's Complaint should be dismissed for lack of personal jurisdiction over Defendants Jerry C. Wardlaw, Jack Wardlaw, Jerry C. Wardlaw Construction, Inc., Wardlaw Construction of Effingham, LLC, and JCW Construction, LLC.
12. The Plaintiff's Complaint, including each and every allegation thereof, fails to state a claim against Jerry C. Wardlaw for liability or indebtedness.
13. The Plaintiff's Complaint, including each and every allegation thereof, fails to state a claim against Jack Wardlaw for liability or indebtedness.
14. Plaintiff's Complaint should be dismissed as Plaintiff condoned and participated in the acts of Defendants of which Plaintiff complains.
15. Defendants plead the defense of duress.
16. Defendants plead the defense of mistake.
17. Defendants plead the defense of unclean hands.
18. Defendants plead the defense that the acts of Plaintiff were intervening in connection with the allegations set forth in Plaintiff's Complaint.

19. Plaintiff's Complaint should be dismissed as Plaintiff was unjustly enriched.
20. Defendants plead the defense of fraud, inasmuch as they were fraudulently induced by an officer of Plaintiff to execute and deliver documents and instruments for the continuation of financing given them by Plaintiff in order to continue to proceed with the project for which said financing was provided. Defendants relied on such inducements to their detriment and have been damaged thereby.
21. Defendants plead the defense of misrepresentation inasmuch as they were induced by misrepresentation of an officer of Plaintiff to execute and deliver documents and instruments for the continuation of financing given them by Plaintiff in order to continue to proceed with the project for which said financing was provided. Defendants relied on such inducements to their detriment and have been damaged thereby.
22. Plaintiff's Complaint should be dismissed as it is based on a contract of adhesion for which Defendants have no choice but to execute.
23. All Defendants except Jerry C. Wardlaw Construction of South Carolina, Inc. plead the defense of insufficiency of process.
24. All Defendants except Jerry C. Wardlaw Construction of South Carolina, Inc. please the defenses of insufficiency of service of process.

#### ANSWER

Defendants respond to each of the enumerated allegations in Plaintiff's Complaint, seriatim, as follows:

1. Defendants do not possess knowledge or information sufficient to admit or deny the allegations set forth in paragraph 1 of Plaintiff's Complaint and, therefore, deny same.

2. Defendants admit that Jerry C. Wardlaw Construction of South Carolina, Inc. is a domestic corporation doing business in Beaufort County, South Carolina. Defendants deny the remaining allegations that appear in paragraph 2 of the Plaintiff's Complaint.
3. Defendants admit that Jerry C. Wardlaw Construction, Inc. is a Georgia corporation and Defendants deny the remaining allegations that appear in paragraph 3 of Plaintiff's Complaint.
4. Defendants admit that Jerry C. Wardlaw and Jack Wardlaw are residents of the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 4 of Plaintiff's Complaint.
5. Defendants admit the allegations that appear in paragraph 5 of Plaintiff's Complaint.
6. Defendants admit that the Court has jurisdiction over the subject matter of this action. Defendants deny the remaining allegations that appear in paragraph 6 of Plaintiff's Complaint.
7. Defendants state that the Loan Agreement referenced in paragraph 7 of Plaintiff's Complaint was executed in the State of Georgia and speaks for itself. Defendants deny the remaining allegations that appear in paragraph 7 of Plaintiff's Complaint.
8. Defendants admit that the Note referenced in paragraph 8 of Plaintiff's Complaint was executed and delivered and state that the Note speaks for itself. Defendants deny the remaining allegations that appear in paragraph 8 of Plaintiff's Complaint.
9. Defendants admit the instrument referenced in paragraph 9 of Plaintiff's Complaint was executed and delivered and state that said instruments speaks for itself. Defendants deny the remaining allegations that appear in paragraph 9 of Plaintiff's Complaint.
10. Defendants admit that the Guaranty referenced in paragraph 10 of Plaintiff's Complaint was executed and delivered and state that the Guaranty speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 10 of Plaintiff's Complaint.

11. Defendants admit that the instrument referenced in paragraph 11 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 11 of Plaintiff's Complaint.

12. Defendants admit that the instrument referenced in paragraph 12 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 12 of Plaintiff's Complaint.

13. Defendants admit that the instrument referenced in paragraph 13 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 13 of Plaintiff's Complaint.

14. Defendants admit that the instrument referenced in paragraph 14 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 14 of Plaintiff's Complaint.

15. Defendants admit that the instrument referenced in paragraph 15 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 15 of Plaintiff's Complaint.

16. Defendants admit that the instrument referenced in paragraph 16 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 16 of Plaintiff's Complaint.

17. Defendants admit that the instrument referenced in paragraph 17 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 17 of Plaintiff's Complaint.

18. Defendants admit that the instrument referenced in paragraph 18 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 18 of Plaintiff's Complaint.

19. Defendants admit that the instrument referenced in paragraph 19 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 19 of Plaintiff's Complaint.

20. Defendants admit that the instrument referenced in paragraph 20 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 20 of Plaintiff's Complaint.

21. Defendants admit that the instrument referenced in paragraph 21 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 21 of Plaintiff's Complaint.

22. Defendants admit that the instrument referenced in paragraph 22 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 22 of Plaintiff's Complaint.

23. Defendants do not possess knowledge or information sufficient to admit or deny the allegations set forth in paragraph 23 of Plaintiff's Complaint and, therefore, deny same.

24. Defendants admit that the instrument referenced in paragraph 24 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 24 of Plaintiff's Complaint.

25. Defendants admit that the instrument referenced in paragraph 25 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 25 of Plaintiff's Complaint.

26. Defendants admit that the instrument referenced in paragraph 26 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 26 of Plaintiff's Complaint.

27. Defendants admit that the instrument referenced in paragraph 27 of Plaintiff's Complaint was executed and delivered and state that said instrument speaks for itself and was executed in the State of Georgia. Defendants deny the remaining allegations that appear in paragraph 27 of Plaintiff's Complaint.

28. Defendants admit that the Mortgage speaks for itself. Defendants deny the remaining allegations that appear in paragraph 28 of Plaintiff's Complaint.

29. Defendants admit that the Mortgage speaks for itself. Defendants deny the remaining allegations that appear in paragraph 29 of Plaintiff's Complaint.

30. Defendants state that the Loan Agreement, Note and Mortgage speak for themselves. Defendants deny any remaining allegations that appear in paragraph 30 of Plaintiff's Complaint.

31. Defendants do not possess knowledge or information sufficient to admit or deny the allegations set forth in paragraph 31 of Plaintiff's Complaint and, therefore, deny same.
32. Defendants do not possess knowledge or information sufficient to admit or deny the allegations set forth in paragraph 32 of Plaintiff's Complaint and, therefore, deny same.
33. Defendants do not possess knowledge or information sufficient to admit or deny the allegations set forth in paragraph 33 of Plaintiff's Complaint and, therefore, deny same.
34. Defendants deny the allegations that appear in paragraph 34 of Plaintiff's Complaint.
35. Defendants deny the allegations that appear in paragraph 35 of Plaintiff's Complaint.
36. Defendants deny the allegations that appear in paragraph 36 of Plaintiff's Complaint.
37. Defendants restate their responses to paragraphs 1 through 36 above as if fully set forth verbatim herein.
38. Defendants admit that the guaranty referenced in paragraph 38 of Plaintiff's Complaint speaks for itself and was executed in the State of Georgia. Defendants deny any remaining allegations that appear in paragraph 38 of Plaintiff's Complaint.
39. Defendants deny the allegations that appear in paragraph 39 of Plaintiff's Complaint.
40. Defendants deny the allegations that appear in paragraph 40 of Plaintiff's Complaint.

WHEREFORE, Defendants pray:

- a) That the prayers of the Plaintiff's Complaint be dismissed and/or denied, and all court costs be cast upon the Plaintiff;
- b) That Defendants be awarded reasonable attorney's fees and expenses of litigation and that all costs of this litigation be cast upon Plaintiff; and
- c) That the Court grant such and further relief as the Court may deem just and appropriate under all the facts and circumstances of this case.

COUNTERCLAIM

Comes now all Defendants who have been properly served in this matter and file this their Counterclaim against Plaintiff, showing as follows:

1. Subject matter jurisdiction and venue are proper as to Plaintiff in this Court by virtue of Plaintiff having filed the instant action herein.
2. Defendants or their principals have had a lending relationship with Plaintiff for more than 15 years.
3. Throughout the Defendants' lending relationship with Plaintiff, Defendants' main contact with Plaintiff was a loan officer by the name of Tom Feeney.
4. Defendants lending relationship with Plaintiff was based on contact and communications with Tom Feeney.
5. Tom Feeney, at all times relevant hereto and during the entire course of the lending relationship between Plaintiff and Defendants, assured Defendants they would be able to borrow adequate funds for the completion of the project in which the property is located, including, but not limited to, construction and sale of homes to homeowners.
6. Despite Tom Feeney's and Plaintiff's agreement, repeated assurances Plaintiff failed and refused to continue funding Defendants project at a time when Defendants were undergoing unprecedented economic turmoil, which constituted fraud and a breach of the representation of Tom Feeney and breach the contractual obligations of Plaintiff. Because of Plaintiff's actions as described herein, Defendants were unable to proceed with the project.
7. Plaintiff breached its agreement with Defendants and is liable for all damages arising therefrom.
8. Plaintiff fraudulently induced Defendants to continuing lending relationship with Plaintiff and misrepresented its willingness to provide financing for Defendants to complete the project,

which fraud and which misrepresentations Defendants relied upon to their detriment, resulting in damages.

WHEREFORE, Defendants pray in connection with their Counterclaims as follow:

- a) That this Court enter judgment in favor of Defendants and against Plaintiff regarding all of Defendants Counterclaims herein and award damages;
- b) That Defendants be awarded reasonable attorney's fees and expenses of litigation and that all costs of this litigation be cast upon Plaintiff; and
- c) That the Court grant such and further relief as the Court may deem just and appropriate under all the facts and circumstances of this case.

This 26 day of July, 2010.

WEINER, SHEAROUSE, WEITZ,  
GREENBERG & SHAW, LLP



---

Joshua D. Walker  
S.C. Bar No. 73953  
William G. Glass  
GA. Bar No. 297340  
Attorneys for Defendants

14 East State Street  
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Savannah, Georgia 31412  
(912) 233-2251

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT )

COURT FILE NO. 2010-CP-07-2407

BANK OF AMERICA, N.A., )

Plaintiff, )

vs. )

JERRY C. WARDLAW )  
CONSTRUCTION OF SOUTH )  
CAROLINA, INC., JERRY C. )  
WARDLAW CONSTRUCTION, )  
INC., WARDLAW )  
CONSTRUCTION OF EFFINGHAM, )  
LLC, JCW CONSTRUCTION, LLC, )  
JERRY C. WARDLAW, JACK )  
WARDLAW, NEW RIVERSIDE )  
ASSOCIATION, INC. and )  
MIDPOINT at NEW RIVERSIDE )  
HOMEOWNERS ASSOCIATION, )  
INC., )

Defendants. )

**PLAINTIFF'S REPLY TO**  
**COUNTERCLAIM**

FILED  
11/19/20 PM 3:20

The Plaintiff, Bank of America, N.A. (the "Plaintiff"), replying to the Counterclaim of the Defendants, Jerry C. Wardlaw Construction of South Carolina, Inc., Wardlaw Construction of Effingham, LLC, JCW Construction, LLC, Jerry C. Wardlaw, and Jack Wardlaw (the "Defendants") herein, states as follows that:

1. Plaintiff denies each and every allegation of the Counterclaim not hereinafter specifically admitted.

**FOR A FIRST DEFENSE**

2. The allegations of Paragraph 1 constitute conclusions of law which Plaintiff is required neither to admit nor deny. To the extent a response is required, Plaintiff admits the allegations of Paragraph 1.

3. Plaintiff admits, upon information and belief, the allegations of Paragraphs 2 and 3.

4. Plaintiff denies the allegations of Paragraphs 4, 5, 6, 7 and 8, being the final paragraphs of the Counterclaim.

**FOR A SECOND DEFENSE**

5. Furthering replying to the Counterclaim, and as and for a further defense thereto, Plaintiff alleges that the Counterclaim fails to state facts sufficient to constitute a cause of action.

**FOR A THIRD DEFENSE**

6. Further replying to the Counterclaim, and as and for a further defense thereto, Plaintiff alleges that the Counterclaim is barred by the doctrines of waiver and/or estoppel.

**FOR A FOURTH DEFENSE**

7. Further replying to the Counterclaim, and as and for a further defense thereto, Plaintiff alleges that the Counterclaim is barred by the applicable statute of limitations and/or doctrine of laches.

**FOR A FIFTH DEFENSE**

8. Further replying to the Counterclaim, and as and for a further defense thereto, Plaintiff alleges that the Counterclaim is barred by the doctrine of unclean hands.

**FOR A SIXTH DEFENSE**

9. Further replying to the Counterclaim, and as and for a further defense thereto, Plaintiff alleges that the Counterclaim is barred because the Defendants released all claims in the loan documents, including those release provisions in the Loan Extension and Modifications Agreements, referenced in and attached to Plaintiff's Complaint as Exhibits A7, A8, A9 and A10.

**FOR A SEVENTH DEFENSE**

10. Further replying to the Counterclaim, and as and for a further defense thereto, Plaintiff alleges that the Counterclaim is barred by the applicable, clear and unambiguous loan documents, referenced in and attached to Plaintiff's Complaint.

WHEREFORE, having fully answered the Counterclaim, the Plaintiff prays that the same be dismissed as to it with attorneys' fees and costs, and for such other and further relief as the Court may deem appropriate.



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ATTORNEYS FOR PLAINTIFF

August 27, 2010

Charleston, South Carolina

CHARLESTONM21748v1

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

IN THE COURT OF COMMON PLEAS  
  
CIVIL CASE NO.: 2010-CP-07-2407

Bank of America, N.A., )  
 )  
Plaintiff, )

v. )

Jerry C. Wardlaw Construction of )  
South Carolina, Inc., Jerry C. )  
Wardlaw Construction, Inc., Wardlaw )  
Construction of Effingham, LLC, )  
JCW Construction, LLC, Jerry C. )  
Wardlaw, Jack Wardlaw, New )  
Riverside Association, Inc., and )  
Midpoint at New Riverside )  
Homeowners Association, Inc., )

Defendants. )  
 )  
 )

**NOTICE OF MOTION AND MOTION  
FOR SUMMARY JUDGMENT**


TO: JOSHUA D. WALKER, ESQUIRE, ATTORNEY FOR DEFENDANTS, OTHER THAN NEW RIVER ASSOCIATION, INC.

The Plaintiff, Bank of America, N.A., by and through its undersigned attorneys, will move before the Presiding Judge of the Court of Common Pleas for Beaufort County in Beaufort, South Carolina, on the tenth (10th) day after service hereof, or as soon thereafter as the parties may be heard, for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in favor of the Plaintiff as to the Counterclaim of Defendants Jerry C. Wardlaw Construction of South Carolina, Inc., Jerry C. Wardlaw Construction, Inc., Wardlaw Construction of Effingham, LLC, JCW Construction, LLC, Jerry C. Wardlaw, and Jack Wardlaw.

The basis for this motion is that the Counterclaim is barred because the Defendants released all claims in the subject Loan Documents, including those release provisions in the Loan Extension and Modifications Agreements, referenced in and attached to Plaintiff's Complaint. In addition, the Counterclaim is barred pursuant to South Carolina Code § 37-10-107. There is no genuine issue as to any material fact in regards to the Counterclaim and the Plaintiff is entitled to judgment as a matter of law on its Complaint.

34

This motion is further supported by the pleadings, discovery, depositions, if any, the applicable law, a memorandum in support of the motion which may be submitted by counsel, and the arguments of counsel.



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ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC  
February 3rd, 2011

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON  
PLEAS

COUNTY OF BEAUFORT )

BANK OF AMERICA, N.A. )

CASE NO. 2010-CP-07-2407

Plaintiff, )

vs. )

JERRY C. WARDLAW )  
CONSTRUCTION OF SOUTH )  
CAROLINA, INC., JERRY C. )  
WARDLAW CONSTRUCTION, INC., )  
WARDLAW CONSTRUCTION OF )  
EFFINGHAM, LLC, JCW )  
CONSTRUCTION, LLC, JERRY C. )  
WARDLAW, JACK WARDLAW, NEW )  
RIVERSIDE ASSOCIATION, INC., and )  
MIDPOINT at NEW RIVERSIDE )  
HOMEOWNERS ASSOCIATION, INC. )

Defendants. )

**DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendants, JERRY C. WARDLAW CONSTRUCTION OF SOUTH CAROLINA, INC., JERRY C. WARDLAW CONSTRUCTION, INC., WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, JCW CONSTRUCTION, LLC, JERRY C. WARDLAW, and JACK WARDLAW (hereinafter collectively referred to as "Defendants"), by and through their attorneys, and submit this brief in opposition to Plaintiff's Motion for Summary Judgment, as follows:

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. “For summary judgment to be granted, it must be perfectly clear that no issue of fact is involved.” Davenport v. Island Ford, Lincoln, Mercury, Inc., 320 S.C. 424, 465 S.E.2d 737 (1995). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 378, 534 S.E.2d 688, 692 (2000). *See also* Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (1997) (“When ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record*, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.”)

“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” Brandt v. Gooding, 368 S.C. 618, 630 S.E.2d 259 (2006). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). “Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues.” Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

Based on the foregoing standard, Defendants assert that summary judgment is not appropriate in this case for the following reasons:

Defendants are developers and builders in both Georgia and South Carolina. (See Affidavit of Jack Wardlaw, attached hereto as Exhibit "A", ¶6) For more than fifteen (15) years, Plaintiff participated as a lender in many of Defendants projects ("Projects") (as well as those of an affiliate company, First Coast Homes of South Carolina, LLC). (Wardlaw Affidavit, ¶7) During most of this time period, Plaintiff was perfectly willing to walk hand-in-hand, figuratively speaking, with Defendants during the good times, as the Projects progressed. (Wardlaw Affidavit, ¶8)

In late 2003, Plaintiff entered into a Lot Acquisition and Construction Loan Agreement ("Loan Agreement") with Defendants, the purpose of which was for Plaintiff to provide funding for Defendants' Projects, including, but not limited to, funding for development, acquisition, and construction of homes. (See Plaintiff's Complaint, Exhibit A-1 and Wardlaw Affidavit, ¶9). In other words, Plaintiff was to provide all of the financing necessary for the Projects. (Wardlaw Affidavit, ¶10) The original total loan amount for the loan the subject of this action was Four Million Dollars (\$4,000,000.00), and the Loan Agreement provided for various terms and provisions pursuant to which Defendants would be able to finance all aspects of their Projects. (Wardlaw Affidavit, ¶11) The Loan Agreement was closely intertwined and incorporated with a Promissory Note (Plaintiff's Complaint, Exhibit B-1), a Guaranty Agreement (Plaintiff's Complaint, Exhibit C-1) and several security instruments, amendments and modifications (see the remaining Exhibits to Plaintiff's Complaint and Wardlaw Affidavit, ¶12). All of the foregoing shall hereinafter be referred to as the "Loan Documents". The aforementioned loan was increased during this time to Five Million Dollars (\$5,000,000.00). (Wardlaw Affidavit, ¶13)

During the latter part of the last decade, the real estate market plummeted and this region and the rest of the country experienced extraordinary economic turmoil, mainly in the real estate industry. (Wardlaw Affidavit, ¶14) Like many other builders and developers, Defendants bore the brunt of the dire economic straits in which the country found itself, with no bailouts, handouts, etc. to save them. (Wardlaw Affidavit, ¶15) Plaintiff, like many other lenders across the country, officially indicated that they were less willing to work with Defendants and participate in their Projects, knowing full well that Defendants' Projects could not survive without Plaintiff complying with its original agreement for funding the development, acquisition and construction of the Projects. (Wardlaw Affidavit, ¶16) Despite all of this, representatives of Plaintiff continued to assure and agree with Defendants that they would not completely terminate construction funding for the Projects and would allow Defendants to work their way out of the economic morass. (Wardlaw Affidavit, ¶17) Even following May 14, 2009, representatives of Plaintiff continued to provide such assurances and agreements. (Wardlaw Affidavit, ¶18) However, Plaintiff thereafter refused to provide any funding for the Projects. (Wardlaw Affidavit, ¶19) Defendants were unable to otherwise complete construction and finish selling houses despite the fact that they were on course to sell 7-10 houses per year and that they would by now be completely built out and sold out of the Projects, with the bank fully satisfied. (Wardlaw Affidavit, ¶20)

The parties' relationship, as evidenced by the Loan Documents, was always intended to be governed by Georgia law. Accordingly, Plaintiff's reliance upon S. C. Code § 37-10-107 is misplaced, as Georgia law is to govern the various agreements between the parties. Even assuming *arguendo*, that S. C. Code § 37-10-107 applied to

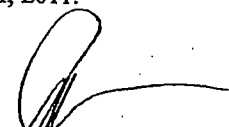
this matter, that section contains an exception for promissory notes, real estate mortgages, guaranties, security agreements, etc. Those types of documents make up most of the Loan Documents, and are so closely intertwined with any remaining Loan Documents such that the exception would apply to those transactions as a matter of law.

Plaintiff also argues that Defendants released Plaintiff from any and all claims arising in the matter. Defendants contend that several such release provisions contained in the Loan Documents are ambiguous, inasmuch as they do not set forth with certainty the date upon which the release provisions are effective. Regardless, assurances and agreements were made to and with Defendant following the execution of the last of the Loan Documents, and therefore such assurances and agreements are not affected by any of the release provisions contained therein.

Finally, it is clear that Plaintiff breached the agreements with the Defendants regarding funding the project, and should be liable for damages arising therefrom.

Wherefore, for all of the foregoing reasons, it is evident that Plaintiff is not entitled to summary judgment in this case. Therefore, it is respectfully requested that Plaintiff's Motion for Summary Judgment be denied.

Respectfully submitted this 8 day of April, 2011.

  
\_\_\_\_\_  
Joshua D. Walker  
S~~E~~ Bar No. 73953  
Attorney for Defendants

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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON  
PLEAS

COUNTY OF BEAUFORT )

BANK OF AMERICA, N.A. )

CASE NO. 2010-CP-07-2407

Plaintiff, )

vs. )

JERRY C. WARDLAW )  
CONSTRUCTION OF SOUTH )  
CAROLINA, INC., JERRY C. )  
WARDLAW CONSTRUCTION, INC., )  
WARDLAW CONSTRUCTION OF )  
EFFINGHAM, LLC, JCW )  
CONSTRUCTION, LLC, JERRY C. )  
WARDLAW, JACK WARDLAW, NEW )  
RIVERSIDE ASSOCIATION, INC., and )  
MIDPOINT at NEW RIVERSIDE )  
HOMEOWNERS ASSOCIATION, INC. )

Defendants. )

AFFIDAVIT OF JACK WARDLAW

PERSONALLY APPEARED before the undersigned officer authorized by law to administer oaths, came JACK WARDLAW, who, after being duly sworn, states as follows:

1. My name is Jack Wardlaw, and I am competent in all respects to testify regarding the matters set forth herein.
2. I have personal knowledge of the recitals set forth herein and know them to be true.
3. I am giving this affidavit freely and voluntarily.
4. I understand that this affidavit will be used in regards to Defendants'

Response to Plaintiff's Motion for Summary Judgment in the above-captioned case.

5. I am a resident of Chatham County, Georgia.
6. Defendants are developers and builders in both Georgia and South Carolina.
7. For more than fifteen (15) years, Plaintiff participated as a lender in many of Defendants projects ("Projects") (as well as those of an affiliate company, First Coast Homes of South Carolina, LLC).
8. During most of this time period, Plaintiff was perfectly willing to walk hand-in-hand, figuratively speaking, with Defendants during the good times, as the Projects progressed.
9. In late 2003, Plaintiff entered into a Lot Acquisition and Construction Loan Agreement ("Loan Agreement") with Defendants, the purpose of which was for Plaintiff to provide funding for Defendants' Projects, including, but not limited to, funding for development, acquisition, and construction of homes.
10. Plaintiff was to provide all of the financing necessary for the Projects.
11. The original total loan amount for the loan the subject of this action was Four Million Dollars (\$4,000,000.00), and the Loan Agreement provided for various terms and provisions pursuant to which Defendants would be able to finance all aspects of their Projects.
12. The Loan Agreement was closely intertwined and incorporated with a promissory, a Guaranty Agreement and several security instruments, amendments and modifications.
13. The aforementioned loan was increased during this time to Five Million

Dollars (\$5,000,000.00).

14. During the latter part of the last decade, the real estate market plummeted and this region and the rest of the country experienced extraordinary economic turmoil, mainly in the real estate industry.

15. Like many other builders and developers, Defendants bore the brunt of the dire economic straits in which the country found itself, with no bailouts, handouts, etc. to save them.

16. Plaintiff, like many other lenders across the country, officially indicated that they were less willing to work with Defendants and participate in their Projects, knowing full well that Defendants' Projects could not survive without Plaintiff complying with its original agreement for funding the development, acquisition and construction of the Projects.

17. However, representatives of Plaintiff continued to assure and agree with Defendants that they would not completely terminate construction funding for the Projects and would allow Defendants to work their way out of the economic morass.

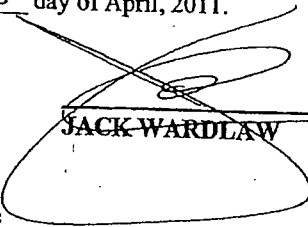
18. Even following May 14, 2009, representatives of Plaintiff continued to provide such assurances and agreements.

19. Plaintiff thereafter refused to provide any funding for the Projects.

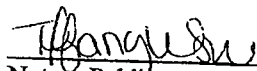
20. Defendants were unable to otherwise complete construction and finish selling houses despite the fact that they were on course to sell 7-10 houses per year and that they would by now be completely built out and sold out of the Projects, with the bank fully satisfied.

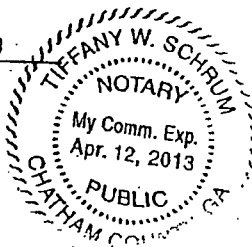
Further Affiant sayeth naught.

Made and sworn this 5 day of April, 2011.

  
~~JACK WARDLAW~~

Sworn to and subscribed before  
me this 5 day of April, 2011.

  
Notary Public



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 Bank of America, N.A., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Jerry C. Wardlaw Construction of )  
 South Carolina, Inc., Jerry C. )  
 Wardlaw Construction, Inc., Wardlaw )  
 Construction of Effingham, LLC, )  
 JCW Construction, LLC, Jerry C. )  
 Wardlaw, Jack Wardlaw, New )  
 Riverside Association, Inc., and )  
 Midpoint at New Riverside )  
 Homeowners Association, Inc., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 CIVIL CASE NO.: 2010-CP-07-2407

**NOTICE OF AMENDED MOTION  
 AND AMENDED MOTION FOR  
 SUMMARY JUDGMENT**

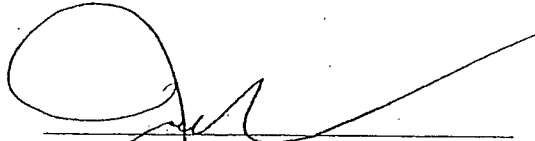
JERRI ANN ROSENEAU  
 BEAUFORT COUNTY, S.C.  
 CLERK OF COURT  
 11 MAY - 2 PM 3:20

TO: JOSHUA D. WALKER, ESQUIRE, ATTORNEY FOR DEFENDANTS, OTHER THAN NEW RIVER ASSOCIATION, INC.

The Plaintiff, Bank of America, N.A., by and through its undersigned attorneys, will move before the Honorable Carmen Mullen of the Court of Common Pleas for Beaufort County in Beaufort, South Carolina, on June 6, 2011 at 10:00 a.m., for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in favor of the Plaintiff as to the Counterclaim of Defendants Jerry C. Wardlaw Construction of South Carolina, Inc., Jerry C. Wardlaw Construction, Inc., Wardlaw Construction of Effingham, LLC, JCW Construction, LLC, Jerry C. Wardlaw, and Jack Wardlaw.

The basis for this amended motion is that the Counterclaim is barred because the Defendants released all claims in the subject Loan Documents, including those release provisions in the Loan Extension and Modifications Agreements, referenced in and attached to Plaintiff's Complaint. In addition, the Counterclaim is barred pursuant to South Carolina Code § 37-10-107 and/or Georgia Code § 13-5-30 and/or any other applicable statute of frauds. There is no genuine issue as to any material fact in regards to the Counterclaim and the Plaintiff is entitled to judgment as a matter of law on its Complaint.

This amended motion is further supported by the pleadings, discovery, depositions, if any, the applicable law, a memorandum in support of the motion which may be submitted by counsel, and the arguments of counsel.



David B. Wheeler (SC Bar #6055)  
Trudy H. Robertson (SC Bar #64856)  
Joseph T. Belton (SC Bar #71993)  
Moore & Van Allen PLLC  
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Post Office Box 22828  
Charleston, SC 29413-2828  
T (843)579-7000

ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC  
April 29, 2011

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 Bank of America, N.A., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Jerry C. Wardlaw Construction of )  
 South Carolina, Inc., Jerry C. )  
 Wardlaw Construction, Inc., Wardlaw )  
 Construction of Effingham, LLC, )  
 JCW Construction, LLC, Jerry C. )  
 Wardlaw, Jack Wardlaw, New )  
 Riverside Association, Inc., and )  
 Midpoint at New Riverside )  
 Homeowners Association, Inc., )  
 )  
 Defendants. )  
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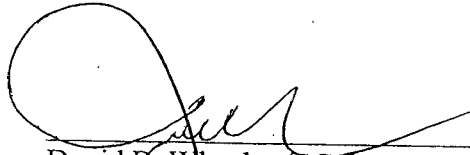
IN THE COURT OF COMMON PLEAS  
 CIVIL CASE NO.: 2010-CP-07-2407

**NOTICE OF MOTION AND MOTION  
 TO AMEND REPLY**

TO: JOSHUA D. WALKER, ESQUIRE, ATTORNEY FOR DEFENDANTS, OTHER THAN NEW RIVER ASSOCIATION, INC.

The Plaintiff, Bank of America, N.A., by and through its undersigned attorneys, will move before the Honorable Carmen Mullen, Presiding Judge for Beaufort County, at the Beaufort County Courthouse, Beaufort, South Carolina, on **June 6, 2011**, at **10:00 a.m.**, for an Order pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, authorizing the Amendment of the Reply filed by Plaintiff in the present action. The purpose of the Amendment is to assert a defense pursuant to South Carolina Code § 37-10-107 and/or Georgia Code § 13-5-30 and/or any other applicable statute of frauds defense.

This motion is further supported by the pleadings, discovery, depositions, if any, the applicable law, a memorandum in support of the motion which may be submitted by counsel, and the arguments of counsel.



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Trudy H. Robertson (SC Bar #64856)  
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T (843)579-7000  
ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

May 4, 2011

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 BANK OF AMERICA, N.A. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JERRY C. WARDLAW )  
 CONSTRUCTION OF SOUTH )  
 CAROLINA, INC., JERRY C. )  
 WARDLAW CONSTRUCTION, INC., )  
 WARDLAW CONSTRUCTION OF )  
 EFFINGHAM, LLC, JCW )  
 CONSTRUCTION, LLC, JERRY C. )  
 WARDLAW, JACK WARDLAW, NEW )  
 RIVERSIDE ASSOCIATION, INC., and )  
 MIDPOINT at NEW RIVERSIDE )  
 HOMEOWNERS ASSOCIATION, INC. )  
 )  
 Defendants. )

IN THE COURT OF COMMON  
 PLEAS

CASE NO. 2010-CP-07-2407

**DEFENDANTS' AMENDED RESPONSE TO PLAINTIFF'S  
 MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendants, JERRY C. WARDLAW CONSTRUCTION OF SOUTH CAROLINA, INC., JERRY C. WARDLAW CONSTRUCTION, INC., WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, JCW CONSTRUCTION, LLC, JERRY C. WARDLAW, and JACK WARDLAW (hereinafter collectively referred to as "Defendants"), by and through their attorneys, and submit this brief in opposition to Plaintiff's Motion for Summary Judgment, as follows:

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. “For summary judgment to be granted, it must be perfectly clear that no issue of fact is involved.” Davenport v. Island Ford, Lincoln, Mercury, Inc., 320 S.C. 424, 465 S.E.2d 737 (1995). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 378, 534 S.E.2d 688, 692 (2000). *See also* Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (1997) (“When ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record*, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.”)

“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” Brandt v. Gooding, 368 S.C. 618, 630 S.E.2d 259 (2006). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). “Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues.” Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

Based on the foregoing standard, Defendants assert that summary judgment is not appropriate in this case for the following reasons:

Defendants are developers and builders in both Georgia and South Carolina. (See Affidavit of Jack Wardlaw, attached to Defendant's Response to Plaintiff's Motion for Summary Judgement as Exhibit "A", ¶6) For more than fifteen (15) years, Plaintiff participated as a lender in many of Defendants projects ("Projects") (as well as those of an affiliate company, First Coast Homes of South Carolina, LLC). (Wardlaw Affidavit, ¶7) During most of this time period, Plaintiff was perfectly willing to walk hand-in-hand, figuratively speaking, with Defendants during the good times, as the Projects progressed. (Wardlaw Affidavit, ¶8)

In late 2003, Plaintiff entered into a Lot Acquisition and Construction Loan Agreement ("Loan Agreement") with Defendants, the purpose of which was for Plaintiff to provide funding for Defendants' Projects, including, but not limited to, funding for development, acquisition, and construction of homes. (See Plaintiff's Complaint, Exhibit A-1 and Wardlaw Affidavit, ¶9). In other words, Plaintiff was to provide all of the financing necessary for the Projects. (Wardlaw Affidavit, ¶10) The original total loan amount for the loan the subject of this action was Four Million Dollars (\$4,000,000.00), and the Loan Agreement provided for various terms and provisions pursuant to which Defendants would be able to finance all aspects of their Projects. (Wardlaw Affidavit, ¶11) The Loan Agreement was closely intertwined and incorporated with a Promissory Note (Plaintiff's Complaint, Exhibit B-1), a Guaranty Agreement (Plaintiff's Complaint, Exhibit C-1) and several security instruments, amendments and modifications (see the remaining Exhibits to Plaintiff's Complaint and Wardlaw Affidavit, ¶12). All of the foregoing shall hereinafter be referred to as the "Loan Documents". The aforementioned

loan was increased during this time to Five Million Dollars (\$5,000,000.00). (Wardlaw Affidavit, ¶13)

During the latter part of the last decade, the real estate market plummeted and this region and the rest of the country experienced extraordinary economic turmoil, mainly in the real estate industry. (Wardlaw Affidavit, ¶14) Like many other builders and developers, Defendants bore the brunt of the dire economic straits in which the country found itself, with no bailouts, handouts, etc. to save them. (Wardlaw Affidavit, ¶15) Plaintiff, like many other lenders across the country, officially indicated that they were less willing to work with Defendants and participate in their Projects, knowing full well that Defendants' Projects could not survive without Plaintiff complying with its original agreement for funding the development, acquisition and construction of the Projects. (Wardlaw Affidavit, ¶16) Despite all of this, representatives of Plaintiff continued to assure and agree with Defendants that they would not completely terminate construction funding for the Projects and would allow Defendants to work their way out of the economic morass. (Wardlaw Affidavit, ¶17) Even following May 14, 2009, representatives of Plaintiff continued to provide such assurances and agreements. (Wardlaw Affidavit, ¶18) However, Plaintiff thereafter refused to provide any funding for the Projects. (Wardlaw Affidavit, ¶19) Defendants were unable to otherwise complete construction and finish selling houses despite the fact that they were on course to sell 7-10 houses per year and that they would by now be completely built out and sold out of the Projects, with the bank fully satisfied. (Wardlaw Affidavit, ¶20)

The parties' relationship, as evidenced by the Loan Documents, was always intended to be governed by Georgia law. Accordingly, Plaintiff's reliance upon S. C.


Code § 37-10-107 is misplaced, as Georgia law is to govern the various agreements between the parties, and those agreements were changed through the course of conduct and mutual departure of the parties from their terms. Even assuming *arguendo*, that S. C. Code § 37-10-107 applied to this matter, that section contains an exception for promissory notes, real estate mortgages, guaranties, security agreements, etc. Those types of documents make up most of the Loan Documents, and are so closely intertwined with any remaining Loan Documents such that the exception would apply to those transactions as a matter of law.

Plaintiff also argues that Defendants released Plaintiff from any and all claims arising in the matter. Defendants contend that several such release provisions contained in the Loan Documents are ambiguous, inasmuch as they do not set forth with certainty the date upon which the release provisions are effective. Additionally, any such provisions were entered into under duress. Regardless, assurances and agreements were made to and with Defendant following the execution of the last of the Loan Documents, and therefore such assurances and agreements are not affected by any of the release provisions contained therein.

Finally, it is clear that Plaintiff breached the agreements with the Defendants regarding funding the project, and should be liable for damages arising therefrom.

Wherefore, for all of the foregoing reasons, it is evident that Plaintiff is not entitled to summary judgment in this case. Therefore, it is respectfully requested that Plaintiff's Motion for Summary Judgment be denied.

Respectfully submitted this 1 day of <sup>June</sup>~~April~~, 2011.

  
\_\_\_\_\_  
Joshua D. Walker  
SC Bar No. 73953  
Attorney for Defendants

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 BANK OF AMERICA, N.A. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JERRY C. WARDLAW )  
 CONSTRUCTION OF SOUTH )  
 CAROLINA, INC., JERRY C. )  
 WARDLAW CONSTRUCTION, INC., )  
 WARDLAW CONSTRUCTION OF )  
 EFFINGHAM, LLC, JCW )  
 CONSTRUCTION, LLC, JERRY C. )  
 WARDLAW, JACK WARDLAW, NEW )  
 RIVERSIDE ASSOCIATION, INC., and )  
 MIDPOINT at NEW RIVERSIDE )  
 HOMEOWNERS ASSOCIATION, INC. )  
 )  
 Defendants. )

IN THE COURT OF COMMON  
 PLEAS

CASE NO. 2010-CP-07-2407

AFFIDAVIT OF JACK WARDLAW

PERSONALLY APPEARED before the undersigned officer authorized by law to administer oaths, came JACK WARDLAW, who, after being duly sworn, states as follows:

1. My name is Jack Wardlaw, and I am competent in all respects to testify regarding the matters set forth herein.
2. I have personal knowledge of the recitals set forth herein and know them to be true.
3. I am giving this affidavit freely and voluntarily.
4. I understand that this affidavit will be used in regards to Defendants'

Response to Plaintiff's Motion for Summary Judgment in the above-captioned case.

5. I am a resident of Chatham County, Georgia.
6. Defendants are developers and builders in both Georgia and South Carolina.
7. For more than fifteen (15) years, Plaintiff participated as a lender in many of Defendants projects ("Projects") (as well as those of an affiliate company, First Coast Homes of South Carolina, LLC).
8. During most of this time period, Plaintiff was perfectly willing to walk hand-in-hand, figuratively speaking, with Defendants during the good times, as the Projects progressed.
9. In late 2003, Plaintiff entered into a Lot Acquisition and Construction Loan Agreement ("Loan Agreement") with Defendants, the purpose of which was for Plaintiff to provide funding for Defendants' Projects, including, but not limited to, funding for development, acquisition, and construction of homes.
10. Plaintiff was to provide all of the financing necessary for the Projects.
11. The original total loan amount for the loan the subject of this action was Four Million Dollars (\$4,000,000.00), and the Loan Agreement provided for various terms and provisions pursuant to which Defendants would be able to finance all aspects of their Projects.
12. The Loan Agreement was closely intertwined and incorporated with a promissory, a Guaranty Agreement and several security instruments, amendments and modifications.
13. The aforementioned loan was increased during this time to Five Million

Dollars (\$5,000,000.00).

14. During the latter part of the last decade, the real estate market plummeted and this region and the rest of the country experienced extraordinary economic turmoil, mainly in the real estate industry.

15. Like many other builders and developers, Defendants bore the brunt of the dire economic straits in which the country found itself, with no bailouts, handouts, etc. to save them.

16. Plaintiff, like many other lenders across the country, officially indicated that they were less willing to work with Defendants and participate in their Projects, knowing full well that Defendants' Projects could not survive without Plaintiff complying with its original agreement for funding the development, acquisition and construction of the Projects.

17. However, representatives of Plaintiff continued to assure and agree with Defendants that they would not completely terminate construction funding for the Projects and would allow Defendants to work their way out of the economic morass.

18. Even following May 14, 2009, representatives of Plaintiff continued to provide such assurances and agreements.

19. Plaintiff thereafter refused to provide any funding for the Projects.

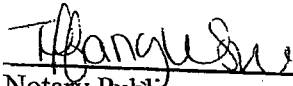
20. Defendants were unable to otherwise complete construction and finish selling houses despite the fact that they were on course to sell 7-10 houses per year and that they would by now be completely built out and sold out of the Projects, with the bank fully satisfied.

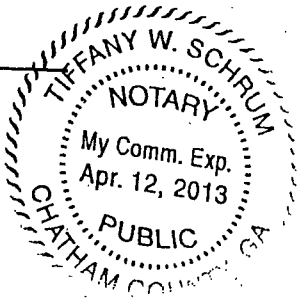
Further Affiant sayeth naught.

Made and sworn this 5 day of April, 2011.

  
JACK WARDLAW

Sworn to and subscribed before  
me this 5 day of April, 2011.

  
Notary Public



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF BEAUFORT ) CIVIL CASE NO.: 2010-CP-07-2407

Bank of America, N.A., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Jerry C. Wardlaw Construction of South )  
 Carolina, Inc., Jerry C. Wardlaw )  
 Construction, Inc., Wardlaw Construction of )  
 Effingham, LLC, JCW Construction, LLC, )  
 Jerry C. Wardlaw, Jack Wardlaw, New )  
 Riverside Association, Inc., and Midpoint at )  
 New Riverside Homeowners Association, )  
 Inc., )  
 )  
 Defendants. )

**MEMORANDUM IN SUPPORT OF  
 MOTION FOR SUMMARY  
 JUDGMENT**

To: The Honorable Carmen Mullen and Joshua D. Walker, Esquire.

The Plaintiff, Bank of America, N.A. ("Plaintiff"), by and through its counsel, files this Memorandum in Support of its Motion for Summary Judgment as to the Counterclaim of Defendants, Jerry C. Wardlaw Construction of South Carolina, Inc., Jerry C. Wardlaw Construction, Inc., Wardlaw Construction of Effingham, LLC, JCW Construction, LLC, Jerry C. Wardlaw, and Jack Wardlaw ("Defendants").

**STATEMENT OF THE CASE**

The Plaintiff filed its Foreclosure Complaint on May 19, 2010. The Plaintiff is seeking a judgment of foreclosure on certain Mortgages and an immediate money judgment for amounts due under a Loan Agreement and Note against Defendants-Borrowers, Jerry C. Wardlaw Construction of South Carolina, Inc., Jerry C. Wardlaw Construction, Inc., Wardlaw Construction of Effingham, LLC, and JCW Construction, LLC. The Plaintiff is

also seeking immediate money judgments against Defendants Jerry C. Wardlaw and Jack Wardlaw for amounts due under certain unconditional Guaranties. The Defendants filed their Answer, Affirmative Defenses, and Counterclaim in response to the Plaintiff's Foreclosure Complaint on July 29, 2010. The Defendants' Counterclaim asserts that the Plaintiff made certain assurances or agreements that the Defendants would be able to continue to borrow money in order to complete their real estate projects which concerned the real property subject to the Mortgages. The Defendants claim that the Plaintiff failed and refused to continue funding their real estate projects and therefore breached its agreements with the Defendants. The Plaintiff filed its Motion for Summary Judgment on February 4, 2011, seeking an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment in favor of the Plaintiff as to the Counterclaim of Defendants. The basis for this motion is that (1) the Counterclaim is barred pursuant to South Carolina Code § 37-10-107 and/or Georgia Code § 13-5-30 and/or any other applicable statute of frauds; (2) the Counterclaim is barred because the Note matured on July 1, 2009, according to the terms and conditions of the Loan Agreement and it was not extended or modified by a written instrument signed by the Plaintiff and the Defendants; and (3) the Counterclaim is barred because the Defendants released all claims in the subject Loan Documents, including those release provisions in the Loan Extension and Modifications Agreements.

### **STATEMENT OF FACTS**

On or about October 29, 2003, Borrowers, executed and delivered in favor of Plaintiff that certain Lot Acquisition and Construction Loan Agreement ("Loan Agreement"), which Loan Agreement provided, among other things, for the terms pursuant to which the Plaintiff would extend credit to the Co-Borrowers, Jerry C. Wardlaw Construction, Inc., Wardlaw

Construction of Effingham, LLC, and JCW Construction, LLC, under a Four Million and no/100 (\$4,000,000.00) Dollar Promissory Note, for the extension of loans for individual lot development and individual corresponding maturity dates, along with such other provisions, all as may be seen by reference to the Loan Agreement, attached hereto as Exhibit "A-1". On that same date, for value, Co-Borrowers executed and delivered in favor of Plaintiff, that certain revolving line of credit Promissory Note in the original principal sum of up to Four Million and no/100 (\$4,000,000.00) Dollars ("Note"), which Note provides, among other things, for repayment of the balance due under the Note on December 31, 2004, all as may be seen by reference to the Note, a copy of which is attached hereto as Exhibit "B-1". On that same date and in order to more fully assure repayment of the Note, Defendants, Jerry C. Wardlaw and Jack Wardlaw, executed and delivered to Plaintiff for value that certain Guaranty Agreement ("Guaranty"), which Guaranty provides it is a guaranty of payment and not collection and obligates Guarantors for all amounts due under the Note, as may be more fully seen by reference to the Guaranty attached hereto as Plaintiff's Exhibit "C-1".

On or about August 20, 2004, Co-Borrowers, executed and delivered in favor of Plaintiff that certain First Amendment to Loan Agreement, which provided among other things, for an adjusted construction period for the lots being developed by Co-Borrowers and an extension of the maturity date under the Note to December 31, 2005, a copy of which is attached hereto as Exhibit "A-2". On that same date, in order to better evidence the agreement between the parties, the Co-Borrowers, for value, executed and delivered in favor of Plaintiff, that certain First Amendment to Promissory Note reflecting an extension of the maturity date under the Note to December 31, 2005, a copy of which is attached hereto as Exhibit "B-2".

On or about November 17, 2004, Co-Borrowers, executed and delivered in favor of Plaintiff that certain Second Amendment to Loan Agreement, which provided, among other things, for an increase in the maximum principal amount available under the Note of up to Five Million and no/100 (\$5,000,000.00) Dollars, a copy of which is attached hereto as Exhibit "A-3". On that same date, in order to better evidence the agreement between the parties, the Co-Borrowers, for value, executed and delivered in favor of Plaintiff, that certain Second Amendment to Promissory Note reflecting an increase in the maximum principal sum of up to Five Million and no/100 (\$5,000,000.00) Dollars, a copy of which is attached hereto as Exhibit "B-3". On that same date, for good and valuable consideration, Guarantors executed and delivered in favor of Plaintiff that certain Modification of Guaranty and Consent of Guarantors, formally consenting to the increased amount of the Note and acknowledging their liability therefore, a copy of which is attached hereto as Exhibit "C-2".

On or about June 30, 2005, in order to better evidence the agreement between the parties, the Co-Borrowers, for value, executed and delivered in favor of Plaintiff, that certain Third Amendment to Promissory Note reflecting an extension of the maturity date to December 31, 2006, a copy of which is attached hereto as Exhibit "B-4".

On or about August 7, 2006, Co-Borrowers, executed and delivered in favor of Plaintiff that certain Fourth Amendment to Loan Agreement, which provided, among other things, for an for an adjusted construction period for the lots being developed by Co-Borrowers and an extension of the maturity date under the Note to December 1, 2007, a copy of which is attached hereto as Exhibit "A-5". On that same date, in order to better evidence the agreement between the parties, the Co-Borrowers, for value, executed and delivered in favor of Plaintiff, that certain Fourth Amendment to Promissory Note reflecting an extension

of the maturity date under the Note to December 1, 2007, a copy of which is attached hereto as Exhibit "B-5".

On or about October 12, 2007, Borrower executed and delivered for value in favor of Plaintiff that certain Borrower Joinder Agreement in which the Plaintiff and Defendant Jerry C. Wardlaw Construction of South Carolina, Inc. ("Borrower"), agreed and acknowledged that Defendant Jerry C. Wardlaw Construction of South Carolina, Inc, would constitute a "Borrower" for purposes of the Loan Agreement, Note and related loan documents, a copy of which is attached hereto as Exhibit "D". On that same date, Borrower and Co-Borrowers, executed and delivered in favor of Plaintiff that certain Fifth Amendment to Loan Agreement, which provided, among other things, for the addition of Borrower as a co-borrower for purposes of the Loan Agreement, Note and related loan documents, a copy of which is attached hereto as Exhibit "A-6". On that same date, in order to better evidence the agreement between the parties, the Borrower and Co-Borrowers, for value, executed and delivered in favor of Plaintiff, that certain Fifth Amendment to Promissory Note reflecting the addition of Borrower as a co-borrower for purposes of the Loan Agreement, Note and related loan documents, a copy of which is attached hereto as Exhibit "B-6" (Exhibits "B-1" through "B-6" being collectively referred to as the "Note"). In order to secure repayment of the Note, Borrower executed and delivered in favor of Plaintiff various mortgages on real property. Included among those Mortgages is the following: First Mortgage, Assignment of Leases, Assignment of Sales Contracts and Security Agreement, a copy of which is attached hereto as Plaintiff's Exhibit "E" and was recorded on November 14, 2007, in the Office of the Register of Deeds ("ROD") for Beaufort County, South Carolina, in Volume 2650, Page 1293 (the "Mortgage").

On or about January 1, 2008, Borrower, Co-Borrowers and Guarantors, executed and delivered in favor of Plaintiff that certain Loan Extension and Modification Agreement, which provided, among other things, for an for an adjusted construction period for the lots being developed by Borrower and Co-Borrowers, an extension of the maturity date under the Note to December 31, 2008 and the addition of various appraisal and principal curtailment requirements, a release of claims against Plaintiff and a reaffirmation of the Guaranty, a copy of which is attached hereto as Exhibit "A-7".

On or about May 1, 2008, Borrower, Co-Borrowers and Guarantors, executed and delivered in favor of Plaintiff that certain Loan Modification Agreement, which provided, among other things, for an adjusted construction period for the lots being developed by Borrower and Co-Borrowers, a release of claims against Plaintiff and a reaffirmation of the Guaranty, a copy of which is attached hereto as Exhibit "A-8".

Effective December 31, 2008, Borrower, Co-Borrowers and Guarantors, executed and delivered in favor of Plaintiff that certain Loan Extension and Modification Agreement, which provided, among other things, for an extension of the maturity date under the Note to April 1, 2009, for an acknowledgment that the Note is secured by, among other collateral, real property located in Georgia, the Mortgage and the Guaranty, for an adjusted loan availability for the lots being developed by Borrower and Co-Borrowers, a release of claims against Plaintiff and a reaffirmation of the Guaranty, a copy of which is attached hereto as Exhibit "A-9".

Effective April 1, 2009, Borrower, Co-Borrowers and Guarantors, executed and delivered in favor of Plaintiff that certain Loan Extension and Modification Agreement, which provided, among other things, for an extension of the maturity date under the Note to

July 1, 2009 and for an adjusted loan availability for the lots being developed by Borrower and Co-Borrowers, a release of claims against Plaintiff and a reaffirmation of the Guaranty, a copy of which is attached hereto as Exhibit "A-10". In addition, and as may be seen by reference to the said Loan Extension and Modification Agreement, the Borrower, Co-Borrowers and Guarantors acknowledged that the outstanding principal balance due under the Note as of May 14, 2009 totaled Five Hundred Thirty-Three Thousand One Hundred Twenty-Three and 34/100 (\$533,123.34) Dollars (Exhibits "A-1" through "A-10" being collectively referred to as the "Loan Agreement").

On or about August 25, 2009, the Plaintiff provided Borrower, Co-Borrowers, and Guarantors with a demand notice that the maturity date under the Note, Loan Agreement, and Mortgages occurred on July 1, 2009. The Defendants' failure to repay the Note upon maturity constituted an event of default under the Loan Documents. The Plaintiff demanded immediate payment of the full balance of principal and accrued interest owed under the Note and Loan Agreement by the close of business, September 4, 2009. The Borrower, Co-Borrowers, and the Guarantors failed to make this required payment. The Plaintiff has not made any further promises, commitments, or agreements to lend money to the Defendants concerning the subject real estate projects.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. South Carolina Rules of Civil Procedure ("SCRCP") Rule 56; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment should be granted when plain, palpable,

and undisputable facts exist upon which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993). To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994).

The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). The non-moving party must then "do more than simply show that there is some metaphysical doubt as to the materials facts" but "must come forward with specific facts showing that there is a genuine issue for trial." *Id.* The purpose of a motion for summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). Accordingly, summary judgment should be granted when it is clear that "further inquiry into the facts is not desirable to clarify application of the law." Cullum Mech. Constr. Co. v. South Carolina Baptist Hosp., 336 S.C. 423, 520 S.E.2d 809 (Ct. App. 1999).

A party opposing a properly supported motion for summary judgment, however, may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the existence of a

mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. See Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). In addition, a conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985).

**I. THE DEFENDANTS' COUNTERCLAIM IS BARRED BY SOUTH CAROLINA CODE § 37-10-107 AND/OR BY GEORGIA CODE § 13-5-30.**

S.C. Code § 37-10-107 states that:

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement: (a) to lend or borrow money; (b) to defer or forbear in the repayment of money; or (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing. (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories: (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship; (b) promissory or equitable estoppel; (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or (d) negligent misrepresentation. (3) Subsections (1) and (2) do not apply to: (a) a loan of money used primarily for personal, family, or household purposes; (b) an agreement or change in the terms of an agreement relating to a line of consumer credit, lender credit card, or similar arrangement; (c) an overdraft on a demand deposit or other bank account; or (d) promissory notes, real estate mortgages, security agreements, guaranty and surety agreements, and letters of credit. (4) In the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed writing, the provisions of the other provision of law shall control.

In Sea Cove Development, LLC v. Harbourside Community Bank, Sea Cove Development, LLC, brought an action for breach of contract and promissory estoppel against Harbourside Community Bank and Harbourside Mortgage Company (Harbourside) after its loan application was denied. 387 S.C. 95, 691 S.E.2d 158 (S.C. 2010). Sea Cove asserted that it had a loan agreement with Harbourside and that it had forfeited its deposits and incurred expenses based on assurances from Harbourside personnel that the loan had been approved. Id. at 100. Harbourside denied the allegations and moved for summary judgment on three grounds: (1) Sea Cove's claims are barred by S.C. Code § 37-10-107 because there is no required writing evidencing a promise, undertaking, accepted offer, commitment, or agreement between the parties; (2) there is no genuine issue of material fact supporting Sea Cove's claim of a loan commitment by Harbourside; and (3) there is no genuine issue of material fact by which Sea Cove can establish that Harbourside's authority to approve the loan could come from anyone or anything other than the organization's loan committee. Id. The circuit court granted summary judgment to Harbourside based solely on the first ground, finding as a matter of law that Sea Cove's claims were barred by the provisions of S.C. Code § 37-10-107. Id.

The circuit court found Sea Cove's claims were subject to the writing requirement of S.C. Code § 37-10-107 because its members sought a loan from Harbourside for an amount in excess of \$50,000. Id. at 106. The circuit court observed that none of the documents, writings, and exhibits submitted to the court contain any indication of a promise, undertaking, accepted offer, commitment or agreement between the parties as contemplated by the legislature within S.C. § 37-10-107. Id. The circuit court also found that any alleged oral assurances could not be used to alter the requirement for a writing. Id. The circuit court

concluded that there were no genuine issues of material fact regarding Sea Cove's causes of action for breach of contract and promissory estoppel, even when the evidence and its inferences were viewed in the light most favorable to Sea Cove. *Id.* at 106-107.

Georgia Code § 13-5-30 states that

To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him: (7) Any commitment to lend money.

To be binding, any commitment to lend money must be in writing and signed by the party to be charged or some person lawfully authorized by him. Oceanmark Bank, F.s.b. v. Stubblefield, 230 Ga.App. 399, 400, 496 S.E.2d 465, 467 (Ga.App. 1998) citing O.C.G.A. § 13-5-30 (7); see also Stedry v. Summit Nat. Bank, 227 Ga.App. 511, 514, 489 S.E.2d 862, 866 (Ga.App. 1997). To hold that the mere act of lending any sum to a borrower will serve to render enforceable an alleged oral agreement to lend some additional sum would negate OCGA § 13-5-30 (7) and have the anomalous effect of subjecting the lenders of this state to potentially fraudulent claims despite the protection ostensibly afforded them under the Statute of Frauds. Studdard v. George D. Warthen Bank, 207 Ga.App. 80, 81, 427 S.E.2d 58, 59 (Ga.App. 1993). Although fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place, fraud cannot be predicated on a promise which is unenforceable at the time it is made. *Id.* The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by OCGA § 13-5-30 (7). *Id.* Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds. *Id.* Georgia Code § 13-5-30 (7) not only applies to any oral promises

to lend new money, but also to any oral promises to refinance existing debts. See Stedry, 227 Ga.App. at 514-515, 489 S.E.2d at 866.

In our matter, the Loan Agreement, which includes the final Loan Extension and Modification Agreement effective April 1, 2009 (Exhibit "A-10"), between the Plaintiff and the Defendants, clearly sets forth the terms and conditions of the lending obligations between the Plaintiff and Defendants. It is clear from the Loan Documents that the Loan is commercial in nature and is in excess of \$50,000.00. Moreover, the final Loan Extension and Modification Agreement effective April 1, 2009, expressly requires that "all outstanding principal, accrued and unpaid interest, outstanding late charges, unpaid fees, and all other amounts outstanding under the Note and the other Loan Documents, shall be due and payable in full on July 1, 2009." The Defendants failed to make this required payment on or before July 1, 2009. The Plaintiff has not made any further written promises, commitments, or agreements to lend money to the Defendants concerning the subject real estate projects, or refinance the above-referenced Loan Agreement and Note, or to forbear in seeking the repayment of amounts due under the Note, Loan Agreement, and Mortgages.

In addition, the Defendants have not submitted to this Court any documents, writings, or exhibits which contain any indication of a promise, undertaking, accepted offer, commitment or agreement between the Plaintiff and the Defendants to continue funding the subject real estate project which would satisfy the requirements of S.C. Code § 37-10-107 or Georgia Code § 13-5-30. As in Sea Cove Development, LLC v. Harbourside Community Bank and the referenced Georgia case law, there are no genuine issues of material fact regarding the Defendants' Counterclaim even when the evidence and its inferences are

viewed in the light most favorable to them, and the Counterclaim should be barred pursuant to South Carolina Code § 37-10-107 and/or Georgia Code § 13-5-30.

**II. THE DEFENDANTS' COUNTERCLAIM IS BARRED BECAUSE THE NOTE MATURED ON JULY 1, 2009, ACCORDING TO THE TERMS AND CONDITIONS OF THE LOAN AGREEMENT AND IT WAS NOT EXTENDED OR MODIFIED BY A WRITTEN INSTRUMENT SIGNED BY THE PLAINTIFF AND DEFENDANTS.**

Under South Carolina law, where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705 (1993). Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense. Warner v. Weader, 280 S.C. 81, 83, 311 S.E.2d 78 (1983). Where an action presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous, the question is not one of fact but one of law. Shipyards Property Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 849 (1996).

Under Georgia law, the construction of a written contract is a question of law for the trial court based on the intent of the parties as set forth in the contract. Donchi, Inc. v. Robdol, LLC, 283 Ga.App. 161, 163-164, 640 S.E.2d 719, 722 (Ga.App. 2007). If the language of a contract is clear and unambiguous, we enforce those terms and need not look elsewhere to assist in the contract's interpretation. Id at 164; see also Johnson v. Oconee State Bank, 226 Ga.App. 617, 618-619, 487 S.E.2d 369, 371 (Ga.App. 1997) (Where the terms of the agreement are clear and unambiguous, the court will look only to the agreement to find the parties' intention).

The clear and unambiguous language in the Loan Agreement requires that "this Loan Agreement shall not be amended except by a written instrument signed by all parties hereto." See Exhibit "A-1" Section 6.4 Amendments. The final amendment to the Loan Agreement, which was executed by the Borrowers and the Guarantors, was the Loan Extension and Modification Agreement effective April 1, 2009. See Exhibit "A-10". The Loan Extension and Modification Agreement effective April 1, 2009, provides that "unless specifically modified hereby all terms of the Loan Documents shall remain in full force and effect." See Exhibit "A-10" Section 13 Miscellaneous. The language of the Loan Agreement clearly states that the "the Lender and Borrower[s] hereby acknowledge and agree that at no time shall any prior or subsequent course of conduct by Borrower[s] or Lender directly or indirectly limit, impair or otherwise adversely affect any of Lender's rights, interests or remedies in connection with the Loan and the Loan Documents or obligate Lender to agree to, or to negotiate or consider an agreement to, any waiver of any obligation or default by Borrower[s] under any Loan Document or any amendment to any term or condition of any Loan Document." See Exhibit "A-10" Section 14 Course of Dealings.

The Loan Agreement clearly mandates that "all outstanding Loan Proceeds shall be due and payable on the Loan Maturity Date." See Exhibit "A-1" Section 2.5 Maturity Dates. The Loan Agreement requires that "the Borrowers[s] will pay when due all sums owing to the Bank under the Note, this Loan Agreement, and the other Loan Documents." See Exhibit "A-1" Section 4.1(a) Payment. The Loan Extension and Modification Agreement effective April 1, 2009, expressly required that "all obligations, including (without limitation) all outstanding principal, accrued and unpaid interest, outstanding late charges, unpaid fees, and all other amounts outstanding under the Note and the other Loan Documents, shall be due

and payable in full on July 1, 2009 (the "Maturity Date"); Any reference to "Maturity Date" in the Note and other Loan Documents shall be deemed to mean July 1, 2009. See Exhibit "A-10" Section 2 Maturity; see also Exhibit "A-10" Section 11 Renewal, Lien Continuation, No Novation ("The Borrower[s] hereby renews the Obligations and promises to pay all Obligations as modified by this Agreement").

The clear and unambiguous language of the Loan Agreement between the Plaintiff and the Defendants required that any amendment to the terms and conditions must be in writing and signed by the parties. The Defendants have not submitted to this Court any documents, writings, or exhibits which contain any indication of a promise, undertaking, accepted offer, commitment or agreement between the Plaintiff and the Defendants to continue funding the subject real estate project beyond the Maturity Date of July 1, 2009, which would satisfy the clear and unambiguous requirements of the Loan Agreement.

**III. THE DEFENDANTS' COUNTERCLAIM IS BARRED BECAUSE THE DEFENDANTS RELEASED ALL CLAIMS IN THE LOAN DOCUMENTS, INCLUDING THOSE RELEASE PROVISIONS IN THE LOAN EXTENSION AND MODIFICATION AGREEMENTS.**

Under South Carolina law, a release is a contract, and the scope of a release is gathered by its terms. Southern Glass & Plastics Co. v. Angela Duke, 367 S.C. 421, 626 S.E.2d 19, 22 (S.C.App. 2005). In construing a release, the court must seek to ascertain and give effect to the intention of the parties. Id. Pursuant to the general rule, particular words and expressions in releases are given their ordinary meanings, unless the context indicates their use in a different sense. Gardner v. City of Columbia Police Department et al., 216 S.C. 219, 223, 57 S.E.2d 308 (1950).

Under Georgia law, a release is a contract itself, and principles of law applicable to contracts generally are also applicable to releases. Mcdowell v. Lackey, 200 Ga.App. 506,

507, 408 S.E.2d 481, 482 (Ga.App. 1991). In interpreting the scope of releases, the cardinal rule of construction is to ascertain the intention of the parties, and if that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction. Id at 507.

The Loan Documents, including the Loan Extension and Modification Agreement effective April 1, 2009, contain a release provision which bars the Defendants' Counterclaim against the Plaintiff. The release provision provides that

The Borrower[s] and the Guarantor[s], for themselves and for each of their respective heirs, personal representatives, successors and assigns, hereby release and waive all claims and/or defenses they now or hereafter may have against the Lender and its successors and assigns on account of any occurrence relating to the Loan, the Loan Documents, and/or the Property which accrued prior to the date hereof. This release and waiver shall be effective as of the date of this Agreement and shall be binding upon the Borrower[s] and the Guarantor[s] and each of their respective heirs, personal representatives, successors and assigns, and shall inure to the benefit of the Lender and its successors and assigns. See Exhibit "A-10" (16) Release of Claims.

By executing the Loan Extension and Modification Agreement effective April 1, 2009, it clearly was the intention of the Borrowers and the Guarantors to release and waive all claims against the Plaintiff concerning the Loan. The subject matter of Defendants' Counterclaim arises out of the Loan and should be barred and dismissed according to the terms of the above release.

#### CONCLUSION

For the reasons stated herein and those presented at an oral argument, if any, the Plaintiff respectfully request that this Court grant its motion for summary judgment because (1) the Counterclaim is barred pursuant to South Carolina Code § 37-10-107 and/or Georgia Code § 13-5-30; (2) the Counterclaim is barred because the Note matured on July 1,

2009, according to the terms and conditions of the Loan Agreement and it was not extended or modified by a written instrument signed by the Plaintiff and the Defendants; and (3) the Counterclaim is barred because the Defendants released all claims against the Plaintiff in the subject Loan Documents, including those release provisions in the Loan Extension and Modifications Agreements.

Trudy H. Robertson

David B. Wheeler (SC Bar #6055)

Trudy H. Robertson (SC Bar #64856)

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ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

June 3, 2011

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON  
PLEAS

COUNTY OF BEAUFORT )

BANK OF AMERICA, N.A. )

CASE NO. 2010-CP-07-2407

Plaintiff, )

vs. )

JERRY C. WARDLAW )

CONSTRUCTION OF SOUTH )

CAROLINA, INC., JERRY C. )

WARDLAW CONSTRUCTION, INC., )

WARDLAW CONSTRUCTION OF )

EFFINGHAM, LLC, JCW )

CONSTRUCTION, LLC, JERRY C. )

WARDLAW, JACK WARDLAW, NEW )

RIVERSIDE ASSOCIATION, INC., and )

MIDPOINT at NEW RIVERSIDE )

HOMEOWNERS ASSOCIATION, INC. )

Defendants. )

**DEFENDANTS'  
MOTION TO COMPEL ARBITRATION**

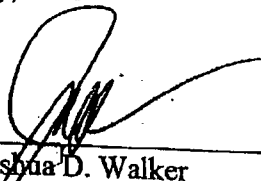
NOW COMES Defendants, JERRY C. WARDLAW CONSTRUCTION OF SOUTH CAROLINA, INC., JERRY C. WARDLAW CONSTRUCTION, INC., WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, JCW CONSTRUCTION, LLC, JERRY C. WARDLAW AND JACK WARDLAW (hereinafter collectively referred to as "Defendants"), by and through their attorneys, and submit this Motion to Compel Arbitration, as follows:

The issues being litigated in this matter are clearly subject to an agreement among the parties to submit disputes to Arbitration (see loan agreement, promissory note and

mortgage, and amendments thereto, all attached as exhibits to Plaintiff's Complaint, and being hereinafter referred to as "Loan Documents"). Defendants have demanded that this matter be submitted to arbitration, as shown in the correspondence attached hereto as Exhibit A, and Plaintiffs have refused to comply with the arbitration provisions. Accordingly, Defendants move this Court for an order compelling arbitration in accordance with the Loan Documents pursuant to S.C. Code Section 15-48-20, and to stay the pending litigation to the extent any issues therein are subject to arbitration.

Wherefore, for all of the foregoing reasons, it is respectfully requested that Defendants Motion to Compel Arbitration be granted.

Respectfully submitted this 31 day of May, 2011



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May 25, 2011

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VIA FAX & E-MAIL

Re: Bank of America v. Jerry C. Wardlaw Construction of South Carolina,  
Inc.  
Case No.: 2010-CP-07-2407

Dear Gentlemen:

We hereby demand that the matters at issue in the above-referenced action be submitted to arbitration and determined according to the arbitration provisions contained within the applicable loan documents governing our clients' relationship. If your client agrees that our clients are entitled to have these matters arbitrated, please let me know and we can jointly inform the Court that any further litigation shall be stayed pending the completion of arbitration. If your client is unwilling to comply with the agreement to arbitrate, please let me know as soon as possible so that I can make the appropriate application to the Court pursuant to S.C. Code Section 15-48-20. If you have any questions or comments regarding this matter, please feel free to contact me.

Yours truly,  
JOSHUA D. WALKER, P. C.

  
Joshua D. Walker  
For the Firm

JDW/cas

LOT ACQUISITION AND CONSTRUCTION  
LOAN AGREEMENT

THIS LOT ACQUISITION AND CONSTRUCTION LOAN AGREEMENT, dated as of the 29th day of October, 2003 (the "Loan Agreement" or "Agreement"), is by and between the following, jointly and severally: (a) JERRY C. WARDLAW CONSTRUCTION, INC., a Georgia corporation, (b) WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, a Georgia limited liability company, and (c) JCW CONSTRUCTION, LLC, a Georgia limited liability company (collectively, the "Borrower"); and

BANK OF AMERICA, N.A., national banking organization, its successors and assigns (the "Bank").

RECITALS

A. The Borrower has applied to the Bank for a revolving loan in the principal amount of up to \$4,000,000.00 (the "Loan"), to be advanced by the Bank pursuant to the terms hereof, to finance certain lot acquisitions and construction of certain single family residences in the Savannah, Georgia area.

B. The Bank is willing to establish a revolving credit financing arrangement under the terms of this Loan Agreement whereby the Borrower may acquire and improve certain lots and repay the Loan Proceeds (as hereinafter defined) with proceeds of the sale of lots on which improvements have been constructed and otherwise and, subject to the terms and limits of this Loan Agreement, Borrower may reborrow certain funds which have previously been repaid to Bank; and

C. Subject to the terms of this Loan Agreement, the Bank is willing to provide for the ability of Borrower to finance acquisition of additional real property not currently encumbered by the Deed to Secure Debt (as hereinafter defined) and the construction of single family residences thereon which will be incorporated into the this Loan Agreement and other Loan Documents; and

D. The Bank is willing to make the Loan described hereinabove based on the terms and conditions set forth in this Loan Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Borrower and the Bank hereby agree as follows

ARTICLE I  
Definitions

1.1 For the purposes hereof:

(a) "Appraisal" means a written appraisal of the applicable Loan Collateral prepared at Borrower's expense by a qualified appraiser designated by and satisfactory to Bank or internally prepared by Bank; such appraisal must be satisfactory in form and substance to Bank;



(b) "Appraised Value" means the value for each (a) Dwelling Lot determined by Bank, in Bank's sole discretion, based upon the square footage of the Dwelling, the location of the Dwelling Lot, the value of the Dwelling Lots similar to the subject Dwelling Lot and other factors that the Bank in its sole discretion deems appropriate and (b) Developed Lot determined by Bank, in Bank's sole discretion, based upon the location of the Developed Lot, the value of other Developed Lots similar to the subject Developed Lot and other factors that the Bank in its sole discretion deems appropriate.

(c) "Closing Date" means the date as of which the Loan Documents, as applicable, are executed by the Borrower and the Bank;

(d) "Commitment" means the Bank's commitment letter to the Borrower dated September 29, 2003, the terms and conditions of which are incorporated herein by reference, but in the event of any conflict or discrepancy between the terms of this Agreement and the Commitment, the terms of this Agreement shall control

(e) "Construction Inspector" means an engineering firm of the Bank's choice, to be engaged by the Bank at the Bank's expense to perform various services on behalf of the Bank including examination of cost breakdowns and estimates, periodic inspections on the Bank's behalf, advising and rendering periodic reports to the Bank concerning the same, and approving request for disbursement of Loan Proceeds;

(f) "Construction Loan(s)" means an advance of Loan Proceeds for the financing of costs of Borrower attributable to the acquisition of any one Developed Lot and incurred for the construction of Dwellings; these are allocations of Loan amounts made by Bank and maintained and calculated by Bank for purposes of tracking construction costs for particular Dwellings; these are part of the Loan and are included within the Loan, and are not separate loans;

(g) "Contract Home" means a Dwelling for which a Sales Contract is in effect;

(h) "Default Condition" means the occurrence or existence of an event or condition which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default;

(i) "Developed Lot Acquisition Loan(s)" means an advance of Loan Proceeds on the Closing Date or thereafter for the purpose of financing the costs of Borrower incurred for acquisition of Developed Lots; these are allocations of Loan amounts made by Bank and maintained and calculated by Bank for purposes of determining funding amounts and otherwise; these are part of the Loan and are included within the Loan and are not separate loans;

(j) "Developed Lots" mean subdivision lots included within the term Loan Collateral (a) in which the Bank holds a first lien under its Deed to Secure Debt, which first lien is insured by the applicable Title Policy and (b) which the Bank has designated to be

included and are included in the calculation of Total Developed Lot Funding Availability.

(k) "Draw Request" means a written or oral request for any disbursement of Loan Proceeds which shall be submitted for each requested disbursement in a form satisfactory to Bank;

(l) "Dwellings" means houses which the Borrower has constructed or is constructing on Dwelling Lots. An individual Dwelling is sometimes referred to herein as a "Dwelling." A Dwelling may be a Contract Home, a Model Home or a Speculative Home.

(m) "Dwelling Lots" mean subdivision lots included within the term Loan Collateral with Dwellings in which the Bank holds a first lien under its Deed to Secure Debt which first lien is insured by the applicable Title Policy.

(n) "Engineer" means Borrower's engineer(s), who will serve as engineer, subject to Bank approval;

(o) "Event of Default" means an Event of Default as defined in Article III of the Deed to Secure Debt;

(p) "Financing Statements" mean the UCC-1 financing statements filed in order to perfect the Bank's lien on certain personal property and fixtures as more particularly described therein;

(q) "Force Majeure" means strikes, lock-outs, riots or other labor troubles, unavailability of materials, a national emergency, any rule, order or regulation of Governmental Authorities, tornados, floods, hurricanes or other natural disasters, or other similar causes not within the Borrower's control;

(r) "Governmental Authorities" mean any governmental (including health and environmental) office, officer or official whose consent or approval is required as a prerequisite to the commencement of the construction of the Improvements or to the installation, operation and occupancy of the Improvements or the Loan Collateral or to the performance of any act or obligation or the observance of any agreement, provision or condition of whatsoever nature herein contained;

(s) "Guarantor" or "Guarantors" means, collectively, Jack Wardlaw and Jerry C. Wardlaw;

(t) "Guaranty" or "Guarantys" means that certain Guaranty Agreement between the Guarantors and the Bank dated as of the Closing Date;

(u) "Improvements" mean all infrastructure and Dwellings which are Loan Collateral;

(v) "Individual Loan" means each individual, separate Construction Loan and

Developed Lot Acquisition Loan;

(w) "Individual Loan Maturity Date" means, for each Individual Loan, the date which is twelve (12) months from the date the Developed Lot or Dwelling Lot (as applicable) is included as Loan Collateral, but in no event shall the Individual Loan Maturity Date exceed the Loan Maturity Date, December 31, 2004.

(x) "Inspection Sheet" means information compiled by Bank as a requirement for funding each Draw Request;

(y) "Loan" means the revolving line of credit loan to be advanced to the Borrower pursuant to the terms of this Agreement and evidenced by the Note;

(z) "Loan Collateral" means all real and personal property encumbered by the Deed to Secure Debt, at any applicable time, including real and personal property that is added by amendments prior to such applicable time and excluding all real and personal property that is released pursuant to the terms of this Agreement prior to such applicable time, the aforesaid real property to include Developed Lots and Dwelling Lots.

(aa) "Loan Documents" mean this Loan Agreement, the Note, the Deed to Secure Debt, the Guaranties and the Financing Statements, and all modifications, amendments, spreaders and additions thereto;

(bb) "Loan Maturity Date" means December 31, 2004;

(cc) "Loan Proceeds" means any and all amounts now and hereafter advanced under the Loan to or on behalf of the Borrower;

(dd) "Model Home" means a Dwelling on a Dwelling Lot designated by Borrower as a model unit for use in marketing and promoting the sale of Dwelling Lots; provided however that Bank reserves the right to approve or disapprove Borrower's designation of a Model Home pursuant to this provision;

(ee) "Deed to Secure Debt" means, collectively, each Deed to Secure Debt, Assignment of Leases, Assignment of Sales Contracts and Security Agreements executed by Borrower granting a first priority lien on the Loan Collateral dated as of the Closing Date and such later date as Loan Collateral is added, to be recorded in the offices of the Register of Deeds for the applicable Counties, together with all modifications, amendments, spreaders and additions thereto;

(ff) "New Construction Loan Period Termination Date" means July 1, 2004;

(gg) "Note" means the promissory note of the Borrower dated as of the Closing Date in favor of the Bank in the amount of \$4,000,000.00 as well as any promissory note or notes issued by the Borrower in substitution, replacement, extension, amendment or renewal of any such promissory note or notes;

(hh) "Permitted Encumbrances" mean those liens, encumbrances, easements and other matters described in the Deed to Secure Debt;

(ii) "Sales Contract" means a bonafide contract for the sale of any Dwelling Lot to a third party;

(ij) "Speculative Home" means a Dwelling on a Dwelling Lot which is not subject to a Sales Contract, excluding Model Homes;

(kk) "Title Policy" means the mortgagee title policy meeting the requirements of this Loan Agreement, together with all endorsements thereto.

(ll) "Total Developed Lot Funding Availability" means up to One Million no/100 Dollars (\$1,000,000.00) outstanding at any time of Loan Proceeds, advanced pursuant to this Agreement under Developed Lot Acquisition Loans;

## ARTICLE II The Loan

2.1 Loan Terms. Subject to the terms and conditions of this Loan Agreement, the Bank will lend and the Borrower will borrow up to a maximum principal amount outstanding at any time of \$4,000,000.00, such borrowing to be evidenced by the Note. This Loan is a revolving line of credit loan, subject to the provisions of this Loan Agreement. Borrower shall have the right at any time prior to the maturity date of the Note and provided no Default Condition or Event of Default exists, to repay amounts due under the Loan and thereafter to re-borrow such funds so that the outstanding Loan balance may increase or decrease from time to time as a result of such payment and re-borrowing.

2.2 Advances. The Bank agrees that it will from time to time, so long as there shall exist no Event of Default or Default Condition, advance Loan proceeds to the Borrower pursuant to the terms of this Agreement.

2.3 Draw Requests. At least three (3) business days prior to each Loan disbursement by the Bank, the Borrower must submit to the Bank a Draw Request, which shall include a listing of each Lot for which funding is requested. Bank shall then inspect the proposed Lots and shall notify Borrower of the maximum amount of Loan Proceeds available to be funded in connection therewith, and Borrower shall indicate its required draw amount. Borrower shall provide Bank with names of persons authorized to make such Draw Requests by execution of the Advance Authorization attached hereto as Exhibit B.

2.4 Disbursements. Bank agrees, under the terms and conditions of this Loan Agreement and the Loan Documents, to make the advances to Borrower from time to time for the purposes herein authorized.

(a) Purposes Of Advances. Advances shall be available to Borrower for (i) Developed Lot Acquisition Loans, and (ii) for Construction Loan(s).

(b) Loan Commitments. The maximum principal amount of Loan Proceeds shall be limited as follows:

(i) Developed Lot Acquisition Loans. The maximum principal amount of Loan Proceeds outstanding at any time for Developed Lot Acquisition Loans shall not exceed the Total Developed Lot Funding Availability. The maximum principal amount of each individual Developed Lot Acquisition Loan shall not exceed ninety (90%) percent of the lesser of: (a) the Appraised Value of such Developed Lot, or (b) the contract sales price; provided, however, beginning on the date twelve (12) months from the date of Loan closing, the maximum principal amount of each individual Developed Lot Acquisition Loan shall be limited to ninety (75%) percent of the lesser of: (x) the Appraised Value of such Developed Lot, or (y) the contract sales price.

(ii) Construction Loans. The maximum principal amount of Loan proceeds allocated under any individual Construction Loan shall not exceed eighty (80%) percent of the lesser of: (a) the Appraised Value of the Dwelling Lot plus proposed improvements to which such Construction Loan relates (including 100% of the allocated Developed Lot acquisition cost), or (b) the Sales Contract price of such Developed Lot. Available funding amounts will be based on a percentage of completion basis in accordance with the Bank's inspection. The Bank shall not advance funds for any Construction Loan unless it has received a satisfactory appraisal. The cost of the appraisals shall be the responsibility of the Borrower. Bank shall not be obligated to make Construction Loans for more than, at any one time, thirty-five (35) houses, of which no more than fifteen (15) houses may be built as Speculative Homes and no more than one (1) house may be built as a Model Home. Furthermore, Lender shall not be obligated to make Construction Loans for more than seven (7) Speculative Homes per subdivision. Bank shall not be obligated to fund any new Construction Loans after the New Construction Loan Period Termination Date.

(c) Other Indebtedness of Borrower. For purposes of this Section 2.4, all other indebtedness of Borrower to Bank, including but not limited to Borrower's existing \$485,500 Lot Revolver and \$1,897,780 Construction Revolver with Bank, shall be subject to this section's limitation on Construction Loans, as well as the restrictions on the number of outstanding loans for Model Homes and Speculative Homes.

## 2.5 Maturity Dates.

(a) Loan. The Loan shall mature and become due and payable in full on the Loan Maturity Date.

(b) Individual Loan Maturity Dates. Each individual, separate Construction

Loan shall mature and shall be due and payable in full on the applicable Construction Loan Maturity Date and each individual, separate Developed Lot Acquisition Loan shall mature and shall be due and payable in full on the applicable Developed Lot Acquisition Loan Maturity Date. Notwithstanding the foregoing, all outstanding Loan Proceeds shall be due and payable on the Loan Maturity Date.

2.6 Deposit of Disbursements. All deposits of Loan Proceeds are to be made at the Charleston office of the Bank or at such other place as the Bank may designate and shall be made by depositing same in the Borrower's account with the Bank.

2.7 Option to Pay Contractors. If an Event of Default shall exist, at its option the Bank may make Loan Proceeds payable directly to the general contractor or engineer or any unpaid subcontractor, laborer or material supplier providing labor, services or materials in connection with the construction of the Improvements on any Dwelling Lot, and the execution of this Loan Agreement by the Borrower shall, and hereby does, constitute an irrevocable direction and authorization to so disburse the funds. No further direction or authorization from the Borrower shall be necessary to warrant such direct disbursements and all such disbursements shall be secured by the Deed to Secure Debt as fully as if made to the Borrower, regardless of the disposition thereof by the general contractor or Engineer, any subcontractor, laborer or material supplier so paid.

2.8 Release of Collateral. Provided no Event of Default or Default Condition then exists, Bank shall execute recordable releases from the Deed to Secure Debt in the form attached hereto as Exhibit D with respect to a specified Dwelling Lot or Developed Lot at the request of Borrower and upon payment of upon payment of the outstanding principal balance of the Individual Loan allocated to that particular Lot, all of which will be applied to reduce the outstanding principal of the Loan. In the event that Bank elects to release a specified Dwelling Lot or Developed Lot while there shall be an Event of Default or Default Condition existing, such release shall not waive the then existing Events of Default or Default Condition. Notwithstanding any other provision of this Agreement, any amounts tendered by Borrower for the release of a Developed Lot or Dwelling Lot may be applied by Bank in its sole discretion.

2.9 Controlling Document. In the event of any inconsistency between this Loan Agreement and any of the Loan Documents, the provisions of this Loan Agreement shall control.

2.10 Loan Collateral. Initially, the Borrower's obligations under the Loan shall be secured, without limitation, by a first priority lien on certain real property which is zoned for residential use or intended by the Borrower for residential development and improvements thereon, owned by the Borrower, located in Chatham, Bryan and Effingham Counties, Georgia and approved by Bank. If, at any time after the initial property is made to secure the Loan, the Borrower acquires or desires to acquire additional real property in Savannah, Georgia area, which Borrower desires to include as Loan Collateral, the Borrower shall notify the Bank and provide information to Bank with respect to such real property as Bank may require. The Bank may, in its sole discretion, accept or reject as additional Loan Collateral such of the aforesaid real property as Borrower has notified Bank that Borrower desires to be additional Loan Collateral. If the Bank desires to make such real property part of the Loan Collateral, the Bank shall notify the Borrower of its acceptance of the said real property as additional Loan Collateral. If the Bank desires to reject the real property

as additional Loan Collateral, the Bank shall so notify the Borrower. If the Bank accepts the proposed additional property as Loan Collateral, the Borrower shall immediately deliver to Bank the items set forth in Section 3.2 hereof.

ARTICLE III  
Conditions Precedent to Loan Disbursements

3.1 Conditions Precedent to First Loan Disbursement. The Bank shall not be obligated to make the first disbursement of Loan Proceeds of each Construction Loan until all of the following conditions have been satisfied by proper evidence, execution and/or delivery to the Bank of the following items, all in form and substance reasonably satisfactory to the Bank and the Bank's counsel:

- (a) Loan Documents: Execution and delivery to Bank of the Loan Documents.
- (b) Title Policy: Title insurance issued to Borrower by a title insurance company acceptable to Bank, including any necessary reinsurance or coinsurance, as to the Loan Collateral from a company or from companies approved by the Bank. This policy shall (i) provide coverage for the full principal amount of the Loan; (ii) include a variable rate endorsement; (iii) delete all "standard" exceptions except taxes for the current year; (iv) list only those title exceptions acceptable to Bank; (v) include insurance of all appurtenant easements; (vi) include a revolving line of credit endorsement and (vii) contain such "affirmative" coverage as may be required by Bank.
- (c) Subdivision Plat: Preliminary or final recorded subdivision plat showing the applicable Dwelling Lot or Developed Lot, and all approvals of Governmental Authorities for such subdivision plat.
- (d) Flood Hazard Insurance: If any part of a Dwelling Lot is determined by Bank to be in a flood hazard area, the Borrower, at its expense, shall provide to Bank all information which the Bank deems necessary, in Bank's sole discretion, to determine whether flood insurance is required. If Bank determines flood insurance is required, a flood insurance policy covering such property and insuring Bank as mortgagee must be submitted to Bank.
- (e) Liability Insurance: Liability insurance satisfactory to Bank.
- (f) Authority Documents of Borrower: For each entity comprising the Borrower:
  - (i) Articles of Organization/Incorporation and all amendments thereto, certified by the Georgia Secretary of State.
  - (ii) Operating Agreement/Bylaws and all amendments thereto, certified by the applicable entity;

- (iii) Current certificate of existence issued by the Georgia Secretary of State.
- (iv) Current tax compliance letter issued by Georgia Department of Revenue; and
- (v) Resolution and secretary's certificate.
- (g) Attorney's Opinion: The written opinion of counsel to the Borrower and the Guarantors, addressed to the Bank, as to the matters acceptable to Bank and to Bank's counsel.
- (h) Taxpayer Identification Number: The federal taxpayer identification number of each Borrower.
- (i) Environmental Assessment: Bank reserves the right to require an environmental audit of the Loan Collateral or portions thereof by an engineer or other environmental consultant designated by Bank at Borrower's expense.
- (j) Appraisal: An Appraisal of the applicable Loan Collateral.
- (k) Inspection Sheet: The Inspection Sheet.
- (l) Building Permit. As to Construction Loans only, all building permits and other approvals required for construction of any Speculative Homes, Model Homes or Contract Homes, if requested by Bank.
- (m) Compliance With Warranties: All representations and warranties of the Borrower contained in this Loan Agreement shall be true and correct as of the date of disbursement.
- (n) No Default: No Default Condition or Event of Default shall exist.
- (o) Draw Request: The Bank shall have received the Borrower's Draw Request, along with authorization of person or persons to request a draw and designation of account to receive the draw.
- (p) Origination Fee: an origination fee in the amount of \$5,000.00 (.25%) for the first \$2,000,000.00 of availability under the Loan, which was earned upon the issuance of the Commitment, shall be due and payable at Loan closing. In addition, the Borrower covenants and agrees to pay to Bank an additional one-quarter percent (0.25%) origination fee on each \$500,000.00 of Loan availability utilized over and above \$2,000,000.00, up to the maximum principal amount of \$4,000,000.
- (q) Miscellaneous: All other Loan Documents or items that are customarily

provided in loan transactions of this type and all other loan documents or items set forth in the Commitment.

3.2 Subsequent Disbursements. Prior to requesting subsequent disbursements under the Loan, the Borrower shall execute and deliver to Bank all of the following items, in form and substance satisfactory to Bank, with respect to additional Loan Collateral accepted by Bank after the Closing Date. The Bank shall have no obligation to make further disbursements of Loan Proceeds until each of the following items, to the extent necessary, as determined by the Bank, have been properly executed and delivered to the Bank:

(a) Amendment to Deed to Secure Debt; New Deed to Secure Debt. An executed amendment to Deed to Secure Debt in the form attached hereto as Exhibit C, providing that all additional Loan Collateral shall secure the Loan or, for the initial disbursement for additional Loan Collateral in Counties in which a Deed to Secure Debt has not been recorded, an executed Deed to Secure Debt encumbering such additional Loan Collateral in substantially the same form as the Deed to Secure Debt dated as of the date hereof;

(b) Title Policy Endorsement. An endorsement to the Title Policy (i) providing insurance for any additional Loan Collateral which is being added as security for the Loan, (ii) insuring a first priority lien on such Loan Collateral, and (iii) reflecting no change in the exceptions except as approved by Bank;

(c) Subdivision Plat. A copy of the subdivision plat which has been recorded in the applicable real estate records for all Developed Lots and Dwelling Lots added as Loan Collateral.

(d) Flood Hazard Insurance. If any part of a Dwelling Lot is determined by Bank to be in a flood hazard area, the Borrower, at its expense, shall provide to Bank all information which Bank deems necessary, in Bank's sole discretion, to determine whether flood insurance is required. If Bank determines flood insurance is required, a flood insurance policy covering such property naming the Bank as mortgagee.

(e) Insurance. Certificate of insurance as required by Bank.

(f) Appraisal. An Appraisal of the applicable Loan Collateral.

(g) Environmental Assessment. Bank reserves the right to require an environmental assessment of the additional Loan Collateral by an engineer or other environmental consultant designated by Bank, at Borrower's expense.

(h) Miscellaneous. Any and all other items or documents reasonably required by Bank.

3.3 Novation. Borrower and Bank agree that the addition of Loan Collateral to the lien of the Deed to Secure Debt and the other Loan Documents does not act as a "novation", impairment

of collateral, or otherwise act to create a defense for Borrower in any future litigation or foreclosure action.

3.4 Waiver. Acceptance of any additional Loan Collateral under the terms of this Agreement does not constitute a waiver of any provisions or terms of the Loan Documents, Deed to Secure Debt or Notes between Bank and Borrower or rights thereunder.

#### ARTICLE IV

##### The Borrower's Warranties, Covenants and Agreements

4.1 Borrower warrants, covenants and agrees with the Bank as follows:

(a) Payment. The Borrower will pay when due all sums owing to the Bank under the Note, this Loan Agreement, and the other Loan Documents.

(b) Further Assurances. On demand of the Bank, the Borrower will do any act, or execute any additional documents reasonably required by the Bank to secure the Loan, confirm the lien of the Deed to Secure Debt or to comply with the Loan Documents.

(c) Payment of Contractors. The Borrower will advise the Bank in writing immediately if the Borrower receives written notice from any laborer, contractor, subcontractor or material furnisher to the effect that said laborer, contractor or material furnisher has not been paid for any labor or materials furnished to or in the Loan Collateral exceeding \$20,000 per occurrence, and the Borrower will deliver to the Bank on demand, any contracts, bills of sale, statements, receipted vouchers or agreements, under which the Borrower claims title to any materials, fixtures or articles used in the construction of the Improvements.

(d) Construction. The Borrower will begin construction on each Dwelling as soon as practicable after the initial advance of Construction Loan proceeds, and in any event, within thirty (30) days after the date of the initial advance of Construction Loan proceeds; will continue conscientiously the construction of the Improvements; will not discontinue or permit the discontinuance of work on the Improvements for as much as ten (10) business days, except for Force Majeure causes, in which event construction of the Improvements may be discontinued for the length of such Force Majeure, but in no event for more than ninety (90) days; and, in any event, will complete the Improvements, including installation of any required items of personalty, free and clear of liens or claims of liens for material supplied or for labor services performed in connection with the construction of the Improvements. Notwithstanding the foregoing, completion of each Dwelling must occur on or before the applicable Individual Loan Maturity Date.

(e) Inspection. The Borrower will permit the Bank or its authorized agents to enter upon the Loan Collateral during normal working hours and as often as the Bank desires, for the purpose of inspecting the construction of the Improvements. When requested, the Borrower will furnish to the Bank detailed plans, shop drawings and specifications which relate to the Improvements. Failure of the Bank or its authorized agents

to discover or to reject materials or workmanship shall not make it liable to the Borrower or to any other person on account of such deficiency, nor shall any prior failure constitute a waiver of the Bank's right to subsequently reject any such workmanship or materials. The Borrower shall make available for audit and inspection, at any time by the Bank or its duly authorized agents, all property, equipment, books, contracts, records and other papers relating to the Loan Collateral. It shall keep the books and accounts of all operations relating to the Loan Collateral in accordance with generally accepted accounting principles acceptable to Bank.

(f) Fees and Expenses. Whether or not the Loan is made, or all Loan proceeds disbursed hereunder, the Borrower agrees to pay and shall hold the Bank harmless from all expenses reasonable in amount incurred by the Bank, or by the Borrower in order to meet the Bank's requirements, in connection with the Loan, including (without limitation) fees for Appraisals, reappraisals, surveys, recording, title insurance, builder's risk and other insurance premiums, brokerage commissions and claims of brokerage, property taxes, document taxes, intangible taxes, architect's fees, the Construction Inspector's fees, and such legal fees as are reasonable in amount incurred by the Bank in connection with the making of the Loan and the enforcement of the Bank's rights hereunder. Any such amounts paid by the Bank shall be due and payable become part of the secured indebtedness.

(g) Use of Loan Funds. The Borrower shall use all Loan proceeds disbursed to the Borrower for general corporate purposes, including without limitation, acquisition of Lots and construction of Improvements on Lots.

(h) Financial Statements. Financial statements from the Borrower and the Guarantor in form and substance satisfactory to Bank shall be submitted to in accordance with the Deed to Secure Debt.

(i) Hazardous Substances. The Borrower warrants and represents to the Bank that, to the best of the Borrower's knowledge, the Loan Collateral and all real property now or previously owned by the Borrower have not been and are not now being used in violation of any federal, state or local environmental law, ordinance or regulation, that no proceedings have been commenced, or notice(s) received, concerning any alleged violation of any such environmental law, ordinance or regulation, and that the Loan Collateral and all real property now or previously owned by the Borrower are free of hazardous or toxic wastes, substances, contaminants, oil, radioactive or other materials the removal of which is required or the maintenance of which is restricted, prohibited or penalized by any federal, state or local agency, authority or governmental unit. The Borrower covenants that it shall not permit any such materials to be brought on to the Loan Collateral or any other real property owned by the Borrower, or if so brought or found located thereon, shall be immediately removed, with proper disposal, and all required environmental cleanup procedures shall be diligently undertaken pursuant to all such laws, ordinances and regulations.

The Borrower agrees that it will reimburse the Bank for and hold the Bank harmless from all fines or penalties made or levied against the Bank by any governmental agency or

authority as a result of or in connection with (i) the use of the Loan Collateral, (ii) the use of facilities thereon, or (iii) the use, generation, storage, transportation, discharge, release or handling of any hazardous or toxic materials, wastes or substances (as such terms are defined by any applicable federal state or local law), or any other material the use, generation, storage, transportation, discharge, release or handling of which is regulated by any federal, state or local statute, law, rule, regulation, ordinance or order at any time, or as a result of any release of any nature onto the ground or into the water or air from or upon the Loan Collateral at any time. The Borrower also agrees that it will reimburse the Bank for and indemnify and hold the Bank harmless from any and all costs, expenses, (including reasonable attorneys' fees) and for all civil judgments or penalties incurred, entered, assessed, or levied against the Bank as a result of the Borrower's use of the Loan Collateral.

Such reimbursement or indemnification shall include but not be limited to any and all judgments or penalties to recover the cost of cleanup of any such release by the Borrower from or upon the Loan Collateral and all expenses incurred by the Bank as a result of such a civil action, including but not limited to reasonable attorneys' fees.

To the best of Borrower's knowledge, there are no surface impoundments, lagoons, waste piles, landfills, injection wells, underground storage areas or other man-made facilities which may have accommodated Hazardous Substances.

The Borrower's obligations under this Section shall survive the repayment of the Loan and any foreclosure of the Deed to Secure Debt or other collateral securing the Loan or any deed in lieu of foreclosure.

(j) Subordinate Financing and Alienation. There shall be no subordinate financing of the personal or real property included in the Loan Collateral, and no sale or transfer of ownership of the Loan Collateral subject to the Bank's lien, without the prior written consent of Bank in each instance.

(k) Ownership. There shall be no change in the ownership or control of the Borrower, without the prior written consent of Bank. Jerry C. Wardlaw Construction, Inc. is a Georgia corporation, duly formed and validly existing, and is fully qualified to do business in the State of Georgia, and has full power and authority to consummate the transactions contemplated herein. Wardlaw Construction of Effingham, LLC is a Georgia limited liability company, duly formed and validly existing, and is fully qualified to do business in the State of Georgia, and has full power and authority to consummate the transactions contemplated herein. JCW Construction, LLC is a Georgia limited liability company, duly formed and validly existing, and is fully qualified to do business in the State of Georgia, and has full power and authority to consummate the transactions contemplated herein.

(l) Indemnification. Borrower shall indemnify the Bank from claims or process arising by reason of the execution hereof or the consummation of the transactions contemplated hereby and caused by the acts or omissions of Borrower.

(m) Liens. Borrower shall bond off under the provisions of applicable law any lien or claim of lien filed for record, within thirty (30) days of the date of notice to Borrower of filing of said claim.

(n) Absence of Suits or Actions. Borrower warrants and represents to the Bank that there are no actions, suits or proceedings pending, or to the knowledge of the Borrower, threatened: (i) involving the validity or enforceability of this Loan Agreement or any of the Loan Documents; or (ii) involving the priority of any lien created by, or granted pursuant to, any of the Loan Documents; or (iii) against or affecting the Borrower or the Loan Collateral.

(o) Appraisals and/or Reappraisals. Every twelve (12) months, or more often if requested by Bank, Borrower may be required to furnish an Appraisal and/or reappraisal of the Loan Collateral satisfactory to Bank at Borrower's expense. The Appraisals and/or reappraisals shall be prepared in accordance with written instructions from Bank by a professional appraiser satisfactory to Bank who is a member of either the Society of Real Estate Appraisers or the American Institute of Real Estate Appraisers.

(p) Environmental Assessments. Updated environmental assessments shall be prepared at Borrower's expense and submitted to Bank at Bank's request. The Borrower will permit the Bank and/or its authorized agents to enter upon the Loan Collateral during normal working hours and as often as the Bank desires, for the purpose of inspecting the Loan Collateral for the presence hazardous substances or violations of any federal, state or local environmental law, ordinance or regulation.

(q) Roads. All roads necessary for ingress and egress to the Loan Collateral have either been completed or the necessary rights-of-ways therefor have been acquired by the appropriate governmental authority or have been dedicated to public use and accepted by said Governmental Authority and all necessary steps have been taken by Borrower and said Governmental Authority to assure the complete construction and installation thereof.

(r) Land Sales. Borrower covenants, represents, agrees and warrants to Bank that the marketing, offering and sale of every lot comprising the Loan Collateral has been and will be made in compliance with and subject to, or in accordance with applicable exemption from the provisions of the Interstate Land Sales Full Disclosure Act and any regulations promulgated thereunder, including without limitation, the regulations set forth in Chapter IX of Title 24 of the Code of Federal Regulations, as amended, and State and local land sales laws and regulations.

(s) Covenants. Borrower shall, prior to executing or recording any restrictive or affirmative covenants affecting the Loan Collateral (the "Covenants"), obtain the prior written consent of Bank with respect to such Covenants. Failure of Borrower to so obtain the prior written consent of Bank shall be an Event of Default hereunder.

(t) Insurance. Borrower shall provide Bank with public liability insurance, as follows: bodily injury \$1,000,000; Property damage \$100,000. Borrower shall provide Bank

with builders risk insurance. All insurance shall be acceptable to Bank.

4.2 Until payment in full of the Loan, Borrower shall not do any of the following without the prior written approval of Bank:

(a) No Conveyance (Real Property): Except as to contracts currently in place and future contracts which shall be subject to the approval of the Bank, convey, transfer, lease, deteriorate or further encumber any of the properties described in the Deed to Secure Debt and/or the other Loan Documents, or any right to manage or receive any of the rents and profits and insurance thereof. Each contract as to the Loan Collateral entered into subsequent to the date hereof shall be reasonably satisfactory to Bank.

(b) No Conveyance (Personal Property): Convey, assign, transfer, deteriorate, dispose of or encumber any personal property of Borrower used or useful in the operation of the Loan Collateral.

(c) No Change in Use: Permit the use of the Loan Collateral for any purpose except the use which was originally intended.

(d) No Other Work: Undertake or suffer any work to be done upon the Loan Collateral, other than the construction of the Improvements provided for herein.

(e) No Other Debt: Except as to the debt secured hereby, current debt shown on the financial statements submitted herewith and other debt previously disclosed to Bank in writing and approved by Bank, create, incur, assume, or permit to exist any indebtedness or advances or any indebtedness or liability for borrowed money or any other indebtedness or liability evidenced by notes, bonds, debenture or similar obligations except trade indebtedness which occurs in the ordinary course of operations, including but not limited to any additional debts with respect to the Loan Collateral or secured by the Loan Collateral not provided for in this Loan Agreement or the Loan Documents; or sell, lease (except in the normal course of business) convey or otherwise dispose of any of its property or assets.

(f) No Transfer of Accounts Receivable, Etc.: Sell, assign or discount any of its accounts receivable, chattel paper (to include leases) or any promissory note held by it with or without recourse other than to discount such notes in the ordinary course of business.

(g) No Other Business: Engage in any business except the business of developing the lots as provided herein and there will be no material changes in the manner in which Borrower's business will be conducted.

#### ARTICLE V

##### The Bank's Rights and Remedies

The following rights and remedies are available to the Bank:

5.1 Acceleration. Upon the occurrence of an Event of Default, the entire unpaid

principal balance of the indebtedness of the Borrower to the Bank evidenced by the Note, and all accrued interest thereon shall, at the option of the Bank, upon written notice and thirty (30) days to cure as provided in Article V above, become immediately due and payable. In addition, upon acceleration, any and all other obligations of the Borrower to the Bank shall be immediately due and payable.

5.2 Disputes. Where disputes have arisen which, in the opinion of the Bank, may endanger timely completion of the Improvements or fulfillment of any condition precedent or covenant herein, the Bank may agree to disburse Loan funds for the account of the Borrower without prejudice to the Borrower's rights, if any, to recover said proceeds from the party to whom paid. Such agreement or agreements may take the form which the Bank in its discretion, deems proper, including, but without limiting the generality of the foregoing, agreements to indemnify (on behalf of the Borrower and/or for the Bank's own account) any title insurer against possible assertion of lien claims, agreements to pay disputed amounts and the like. All sums paid or agreed to be paid pursuant to such undertaking shall be advances of Loan Proceeds.

5.3 Remedies Cumulative; Nonwaiver. All remedies of the Bank provided for herein or in the other Loan Documents are cumulative and shall be in addition to any and all other rights and remedies provided for or available under the other Loan Documents, at law or in equity. The exercise of any right or remedy by the Bank hereunder shall not in any way constitute a cure or waiver of a Default Condition or an Event of Default hereunder or under the Note, the Deed to Secure Debt or any Loan Document, or invalidate any act done pursuant to any notice of the occurrence of a Default Condition or Event of Default, or prejudice the Bank in the exercise of any of its rights hereunder or under the Note, the Deed to Secure Debt or any Loan Document, unless, in the exercise of said rights, the Bank realizes all amounts owed to it under the Note, the Deed to Secure Debt, and other Loan Documents.

5.4 No Liability of the Bank. Whether or not the Bank elects to employ any or all remedies available to it in the event of an occurrence of a Default Condition or an Event of Default, the Bank shall not be liable for the construction of or failure to construct or complete or protect the Improvements or for payment of any expense incurred in connection with the exercise or any remedy available to the Bank or for the construction or completion of the Improvements or for the performance or nonperformance of any other obligation of the Borrower.

5.5 Security Interest. It is understood and agreed that the Bank shall have and enjoy and is hereby granted a lien on and a security interest in, any and all materials (stored on-site or offsite), reserves, deferred payments, deposits or advance payments for materials (stored on-site or off-site), undisbursed loan proceeds, insurance refunds, impound accounts, refunds for overpayment of any kind, and any surplus of withheld funds resulting from the invalidity of "stop notice" claims or the failure of claimants to prosecute their claims to judgment, to the extent the same arise out of or occur in connection with the construction of the Improvements, and such lien and security interest shall constitute additional security for the indebtedness of the Borrower evidenced by the Note, and the Bank shall have and possess any and all rights and remedies of a secured party provided by law with respect to enforcement of and recovery on its security interest on such items and amounts.

ARTICLE VI  
General Conditions

6.1 Waivers. No waiver of any Event of Default or breach by the Borrower hereunder shall be implied from any delay or omission by the Bank to take action on account of such Default Condition or Event of Default, and no express waiver shall affect any Default Condition or Event of Default other than the Event of Default specified in the waiver and it shall be operative only for the time and to the extent therein stated. Waivers of any covenants, terms or conditions contained herein must be in writing and shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by the Bank to or of any act by the Borrower requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent or similar act. No single or partial exercise of any right or remedy of the Bank hereunder shall preclude any further exercise thereof or the exercise of any other or different right or remedy.

6.2 Benefit. This Loan Agreement is made and entered into for the sole protection and benefit of the Bank and the Borrower, their successors and assigns, and no other person or persons shall have any right to action hereon or rights to the Loan proceeds at any time, nor shall the Bank owe any duty whatsoever to any claimant for labor performed or material furnished in connection with the construction of the Improvements, or to apply any undisbursed portion of the Loan to the payment of any such claim, or to exercise any right or power of the Bank hereunder or arising from any Default Condition or Event of Default by the Borrower.

6.3 Assignment. The terms hereof shall be binding upon and inure to the benefit of the heirs, successors, assigns, and personal representatives of the parties hereto; provided, however, that the Borrower shall not assign this Loan Agreement or any of its rights, interests, duties or obligations hereunder or any Loan proceeds or other moneys to be advanced hereunder in whole or in part without the prior written consent of the Bank and that any such assignment (whether voluntary or by operation of law) without said consent shall be void. It is expressly recognized and agreed that the Bank may assign this Loan Agreement, the Note, the Deed to Secure Debt and any other Loan Documents, in whole or in part, to any other person, firm, or legal entity provided that all of the provisions hereof shall continue in full force and effect and, in the event of such assignment, the Bank shall thereafter be relieved of all liability hereunder and any disbursement of Loan Proceeds made by any assignee shall be deemed made in pursuance and not in modification hereof and shall be evidenced by the Note and secured by the Deed to Secure Debt and any other Loan Documents.

6.4 Amendments. This Loan Agreement shall not be amended except by a written instrument signed by all parties hereto.

6.5 Terms. Whenever the context and construction so require, all words used in the singular number herein shall be deemed to have been used in the plural, and vice versa, and the masculine gender shall include the feminine and neuter and the neuter shall include the masculine and feminine.

6.6 Governing Law and Jurisdiction. This Loan Agreement and the other Loan

Documents and all matters relating thereto shall be governed by and construed and interpreted in accordance with the laws of the State of Georgia. The Borrower and all of its general partners hereby submit to the jurisdiction of the state and Federal courts located in Georgia and agree that the Bank may, at its option, enforce its rights under the Loan Documents in such courts.

6.7 Publicity. Subject to applicable laws, regulations and restrictions, the Borrower, with approval by Bank, will place upon the Loan Collateral a mutually agreeable sign or signs, advertising the fact that financing is being provided by the Bank at a mutually agreeable location or locations. The cost of said sign shall be paid for by the Borrower. The Bank shall have the right to secure printed publicity through newspaper and other media concerning the Loan Collateral and source of financing.

6.8 Savings Clause. Invalidation of any one or more of the provisions of this Loan Agreement shall in no way affect any of the other provisions hereof, which shall remain in full force and effect.

6.9 Execution in Counterparts. This Loan Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument, and in making proof of this Loan Agreement, it shall not be necessary to produce or account for more than one such counterpart.

6.10 Captions. The captions herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Loan Agreement nor the intent of any provision hereof.

6.11 Notices. All notices required to be given hereunder shall be in writing and shall be deemed served at the earlier of (i) receipt or (ii) seventy-two (72) hours after deposit in registered, certified or first-class United States mail, postage prepaid, and addressed to the parties at the following addresses, or such other addresses as may from time to time be designated by written notice given as herein required:

to the Borrower:

Jerry C. Wardlaw Construction, Inc.  
2702 Whatley Avenue, Suite B-1  
Thunderbolt, Georgia 31404

Wardlaw Construction of Effingham, LLC  
2702 Whatley Avenue, Suite B-1  
Thunderbolt, Georgia 31404

JCW Construction, LLC  
2702 Whatley Avenue, Suite B-1  
Thunderbolt, Georgia 31404

to the Guarantors:

Jack Wardlaw  
2702 Whatley Avenue, Suite B-1  
Thunderbolt, Georgia 31404

Jerry C. Wardlaw  
2702 Whatley Avenue, Suite B-1  
Thunderbolt, Georgia 31404

to the Bank:

BANK OF AMERICA, N.A.  
5900 Core Avenue, Suite 201  
North Charleston, South Carolina 29406

Personal delivery to Borrower or to any officer, partner, agent or employee of Borrower at its address herein shall constitute receipt. Rejection or other refusal to accept or inability to deliver because of changed address of which no notice has been received shall also constitute receipt. Notwithstanding the foregoing, no notice of change of address shall be effective until the date of receipt thereof.

6.12 Mandatory Arbitration. Any controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this Agreement or any related agreements or instruments, including any claim based on or arising from an alleged tort, shall be determined by binding arbitration in accordance with the Federal Arbitration Act (or if not applicable, the applicable state law), the Rules of Practice and Procedure for the Arbitration of Commercial Disputes of Judicial Arbitration and Mediation Services, Inc. (J.A.M.S.), and the "Special Rules" set forth below. In the event of any inconsistency, the Special Rules shall control. Judgment upon any arbitration award may be entered in any court having jurisdiction. Any party to this Agreement may bring an action, including a summary or expedited proceeding, to compel arbitration of any controversy or claim to which this agreement applies in any court having jurisdiction over such action.

a. Special Rules. The arbitration shall be conducted in the city of the Borrower's domicile at time of this Agreement's execution and administered by J.A.M.S. who will appoint an arbitrator; if J.A.M.S. is unable or legally precluded from administering the arbitration, then the American Arbitration Association will serve. All arbitration hearings will be commenced within 90 days of the demand for arbitration; further, the arbitrator shall only, upon a showing of cause, be permitted to extend the commencement of such hearing for up to an additional 60 days.

b. Reservations of Rights. Nothing in this Agreement shall be deemed to (i) limit the applicability of any otherwise applicable statutes of limitation or repose and any waivers contained in this Agreement; or (ii) be a waiver by Bank of the protection afforded to it by 12 U.S.C. Sec. 91 or any substantially equivalent state law; or (iii) limit the right of Bank (A) to exercise self help remedies such as (but not limited to) setoff, or (B) to foreclose against any real or personal property

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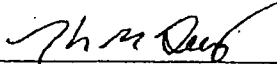
collateral, or (C) to obtain from a court provisional or ancillary remedies such as (but not limited to) injunctive relief or the appointment of a receiver. Bank may exercise such self help rights, foreclose upon such property, or obtain such provisional or ancillary remedies before, during or after the pendency of any arbitration proceeding brought pursuant to this Agreement. At Bank's option, foreclosure under a Deed to Secure Debt may be accomplished by any of the following: the exercise of a power of sale under the Deed to Secure Debt, or by judicial sale under the Deed to Secure Debt, or by judicial foreclosure. Neither the exercise of self help remedies nor the institution or maintenance of an action for foreclosure or provisional or ancillary remedies shall constitute a waiver of the right of any party, including the claimant in any such action, to arbitrate the merits of the controversy or claim occasioning resort to such remedies.

No provision in the Loan Documents regarding submission to jurisdiction and/or venue in any court is intended or shall be construed to be in derogation of the provisions in any Loan Document for arbitration of any controversy or claim.

IN WITNESS WHEREOF, the Borrower and the Bank have executed this Loan Agreement as of the above-written date by their general partner(s) or officers, as applicable.

BANK:

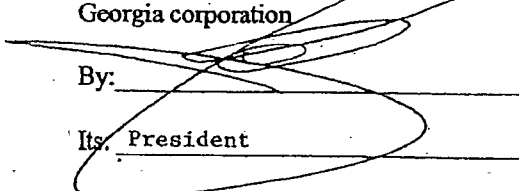
BANK OF AMERICA, N.A.

By 

Title SVP

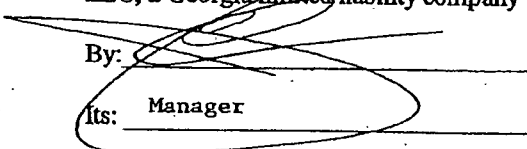
BORROWER:

JERRY C. WARDLAW CONSTRUCTION, INC., a Georgia corporation

By: 

Its: President

WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, a Georgia limited liability company

By: 

Its: Manager

JCW CONSTRUCTION, LLC, a Georgia limited liability company

By: 

Its: Manager

EXHIBITS

<u>EXHIBIT A</u>	LAND DESCRIPTION
<u>EXHIBIT B</u>	ADVANCE AUTHORIZATION
<u>EXHIBIT C</u>	FORM DEED TO SECURE DEBT AMENDMENT
<u>EXHIBIT D</u>	FORM OF RELEASE

**EXHIBIT "A" - LEGAL DESCRIPTION**

**PARCEL ONE:**

All those certain lots, tracts or parcels of land situate, lying and being in Effingham County, Georgia, being known as LOT NUMBERS 446, 447, 449, 450, 451, 452, 453, 454, 455, 456, 457, 461, 462, 463, 464, 465, 467, 468, 469, 470, 471, 472, 473 and 474, LOST PLANTATION, PHASE H, being a 11.444 acre portion of The Lands of South Rincon Development Associates, 9th G.M. District, Effingham County, Georgia, as shown on that certain map or plan of said Subdivision recorded in the Office of the Clerk of Superior Court of Effingham County, Georgia in Plat Cabinet C5-D, to which express reference is hereby made for a more particular description of the property herein described.

SUBJECT, HOWEVER, to all valid restrictions, easements and rights-of-way of record.

**PARCEL TWO:**

ALL those certain lots, tracts or parcels of land situate, lying and being in the 7th G.M. District of Chatham County, Georgia and being known as LOTS 61 and 67, WESTBROOK SUBDIVISION, PHASE 1, a subdivision of a portion of the lands of Southwest Quadrant Development Company, LLC, a Georgia Limited Liability Company, Seventh G.M. District, Pooler, Georgia, as shown on that certain subdivision map prepared by Hussey, Gay, Bell & DeYoung, dated April 24, 2001, revised May 9, 2001 and August 10, 2001, and being recorded in Subdivision Map Book 22-S, Page 42A, in the Office of the Clerk of the Superior Court of Chatham County, Georgia. For a more particular description of the above described lot, reference is made to the Subdivision Map which is incorporated herein and made a part hereof by specific reference.

SUBJECT, HOWEVER, to all valid restrictions, easements and rights-of-way of record.

**PARCEL THREE:**

All those certain lots, tracts or parcels of land situate, lying and being known as LOT NUMBERS 292, 299, 301 AND 304, VILLAGE GREEN SUBDIVISION, PHASE 5, being a portion of the A.D. Kent Estate, formerly a portion of the Demere Tract, Sixth G.M. District, Chatham County, Georgia as more particularly described on that certain survey prepared for James Corde Company by Hussey, Gay, Bell & DeYoung, Consulting Engineers, dated March 5, 2001, and recorded in Subdivision Map Book 23-S, Page 12, in the Office of the Clerk of the Superior Court of Chatham County, Georgia, to which map reference is hereby made for a more particular description of the property herein described.

Subject, however, to all valid restrictions, easements and rights-of-way of record.



JCW CONSTRUCTION, LLC, a Georgia limited  
liability company

By:  \_\_\_\_\_

Its: Manager \_\_\_\_\_

**EXHIBIT C**

**FORM DEED TO SECURE DEBT AMENDMENT (ADDING PROPERTY)**

STATE OF GEORGIA            )    AMENDMENT TO DEED TO SECURE  
                                  )    DEBT, ASSIGNMENT OF LEASES,  
COUNTY OF CHATHAM        )    ASSIGNMENT OF CONTRACTS AND  
                                  )    SECURITY AGREEMENT RECORDED IN  
                                  )    BOOK \_\_\_\_\_ at PAGE \_\_\_\_\_

THIS AMENDMENT TO DEED TO SECURE DEBT, ASSIGNMENT OF LEASES, ASSIGNMENT OF CONTRACTS AND SECURITY AGREEMENT ("Amendment") is made and entered into as of the 29th day of October, 2003 by and among Jerry C. Wardlaw Construction, Inc., JCW\* (the "Grantor") and BANK OF AMERICA, N.A. a national banking association (the "Grantee").  
\*Construction, LLC and Wardlaw Construction of Effingham, LLC,

**WITNESSETH:**

WHEREAS, Grantor and Grantee made and entered into that certain loan, evidenced by that certain Promissory Note dated October 29, 2003 in the original principal amount of \$4,000,000.00, (together with all amendments thereto, the "Note") and secured in part by that certain Deed to Secure Debt, Assignment Of Leases, Assignment Of Contracts and Security Agreement dated October 29, 2003, and recorded in the Register of Deeds Office for Chatham County in Book \_\_\_\_\_ at Page \_\_\_\_\_, (together with all amendments thereto, the "Deed to Secure Debt"); and Deed Book \_\_\_\_\_, Page \_\_\_\_\_, Effingham County, Georgia Records.

[WHEREAS, Grantor and Grantee have modified the Deed to Secure Debt from time to time in order to, without limitation, add property thereto, release property therefrom and acknowledge changes in the provisions of the Note, such as changes to the maturity date and the original principal amount; and]

NOW, THEREFORE, in consideration of the premises herein and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, Grantor and Grantee do hereby agree to modify the Deed to Secure Debt and the Deed to Secure Debt is hereby modified as follows:

1. Grantor, in further consideration of the indebtedness of the Note and for better securing the payment thereof, and also in consideration of Ten (\$10.00) Dollars to the Grantor in hand paid by the Grantee concurrent with the sealing and delivery of these presents, Grantor has GRANTED, BARGAINED, SOLD, CONVEYED, TRANSFERRED, ASSIGNED and SET OVER, and by these presents, does hereby GRANT, BARGAIN, SELL, CONVEY, TRANSFER, ASSIGN and SET OVER to Grantee the premises described on Exhibit A-1 attached hereto and made a part hereof.

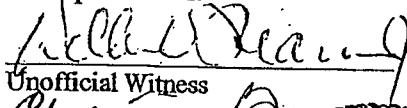
TO HAVE AND TO HOLD the foregoing premises and all rights, estates, powers and privileges appurtenant thereto, to the use, benefit and behoof of Grantee, forever, in fee simple.

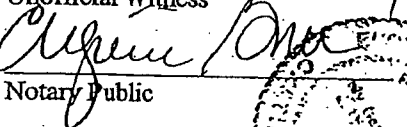
The Grantor does hereby bind its successors and assigns to procure or execute any further necessary assurances of title to the said premises and also to warrant and forever defend all and singular said premises unto the said Grantee, its successors and assigns and all persons lawfully claiming or to claim the same or any part thereof.

Except as amended and modified hereby, the Deed to Secure Debt shall otherwise remain in full force and effect in accordance with its terms and the Grantor and Grantee hereby ratify and affirm the same, as amended hereby. Grantor hereby reaffirms unto Grantee all of its indemnities in favor of Grantee under the documents evidencing, securing and otherwise executed in connection with the loan secured by the Deed to Secure Debt. All of the terms, warranties, indemnities and covenants of the aforesaid loan documents shall apply to the property described on Exhibit A-1 hereto as though such real property was included in the original description of the "Premises" as used in the Deed to Secure Debt.

IN WITNESS WHEREOF, the Grantor and the Grantee have executed this Amendment as of the date first above written.

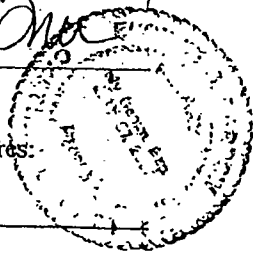
Signed, sealed and delivered  
in the presence of:

  
Unofficial Witness

  
Notary Public


My Commission Expires: \_\_\_\_\_

[AFFIX NOTARIAL SEAL]



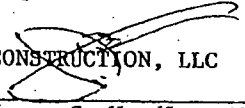
GRANTOR:

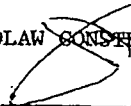
JERRY C. WARDLAW CONSTRUCTION, INC.

By:   
Name: Jerry C. Wardlaw  
Title: President

Attest: \_\_\_\_\_  
Name: Carol Vincent  
Title: Assistant Secretary

[CORPORATE SEAL]

  
JCW CONSTRUCTION, LLC  
By: Jerry C. Wardlaw, Manager

  
WARDLAW CONSTRUCTION OF EFFINGHAM, LLC  
By: Jerry C. Wardlaw, Manager

Signed, sealed and delivered  
in the presence of:

\_\_\_\_\_  
Unofficial Witness

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

[AFFIX NOTARIAL SEAL]

GRANTEE:

BANK OF AMERICA, N.A.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

[CORPORATE SEAL]

**EXHIBIT D**

**FORM OF RELEASE**

STATE OF GEORGIA	)	PARTIAL RELEASE OF DEED TO SECURE
	)	DEBT, ASSIGNMENT OF LEASES,
COUNTY OF <u>CHATHAM</u>	)	ASSIGNMENT OF CONTRACTS AND
	)	SECURITY AGREEMENT RECORDED IN
	)	BOOK ____ at PAGE ____
_____	)	
Grantor,	)	
	)	
to	)	
	)	
Bank of America, N.A.	)	
Grantee.	)	
_____	)	

FOR VALUABLE CONSIDERATION, the receipt whereof is hereby acknowledged, the undersigned, being the owner and holder of the above-mentioned Deed to Secure Debt, Assignment Of Leases, Assignment Of Contracts and Security Agreement (the "Deed to Secure Debt, dated \_\_\_\_\_, 2003, and recorded in Book \_\_\_\_\_ at Page \_\_\_\_\_ and the obligation secured thereby, does hereby release and forever discharge from the lien, operation and effect of said Deed to Secure Debt the following described property, to-wit:

See Exhibit A Attached Hereto and Incorporated Herein

Provided, however, the lien, operation and effect of said Deed to Secure Debt shall otherwise remain of full force and unaltered hereby.

IN WITNESS WHEREOF, the above named Grantee, by its undersigned officer, has hereunto set its hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

Signed, sealed and delivered  
in the presence of:

BANK OF AMERICA, N.A.

\_\_\_\_\_  
Unofficial Witness

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

[CORPORATE SEAL]

My Commission Expires: \_\_\_\_\_

[AFFIX NOTARIAL SEAL]

EXHIBIT A

Legal Description of Released Property

FIFTH AMENDMENT TO LOAN AGREEMENT

THIS FIFTH AMENDMENT TO LOAN AGREEMENT ("Amendment") is made and entered into this 12<sup>th</sup> day of October, 2007, by and between the following, jointly and severally: (a) JERRY C. WARDLAW CONSTRUCTION, INC., a Georgia corporation, (b) WARDLAW CONSTRUCTION OF EFFINGHAM, LLC, a Georgia limited liability company, and (c) JCW CONSTRUCTION, LLC, a Georgia limited liability company (collectively, the "Borrower"), and BANK OF AMERICA, N.A. a national banking association ("Bank").

WHEREAS, Bank and Borrower made and entered into that certain loan (the "Loan"), as evidenced by that certain Promissory Note dated October 29, 2003 in the original principal amount of \$4,000,000.00; as amended by that certain First Amendment to Promissory Note dated August 20, 2004; as amended by that certain Second Amendment to Promissory Note dated November 17, 2004 which, among other things, increased the maximum principal amount of the Note by \$1,000,000 to \$5,000,000; as amended by that certain Third Amendment to Promissory Note dated June 30, 2005; as amended by that certain Fourth Amendment to Promissory Note dated August 7, 2006; and as amended by that certain Fifth Amendment to Promissory Note dated on or about the date hereof (together with all amendments thereto, the "Note"); and

WHEREAS, the Loan is further evidenced by that certain Loan Agreement dated October 29, 2003; as amended by that certain First Amendment to Loan Agreement dated August 20, 2004; as amended by that certain Second Amendment to Loan Agreement dated November 17, 2004; as amended by that certain Third Amendment to Loan Agreement dated June 30, 2005, and as amended by that certain Fourth Amendment to Loan Agreement dated August 7, 2006 (as amended, the "Loan Agreement"); and

WHEREAS, Borrower and Bank desire to execute this Amendment to modify and amend the Loan Agreement in the manner hereinafter set forth, it being specifically understood that, except as herein modified and amended, the terms and provisions of the Loan Agreement shall remain unchanged and continue in full force and effect as therein written.

NOW, THEREFORE, in consideration of the premises herein and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, Borrower and Bank do hereby agree to amend the Loan Agreement and the Loan Agreement is hereby amended as follows:

1. The foregoing "WHEREAS" paragraphs are incorporated herein by reference as if restated in full herein.
2. The Loan Agreement is hereby amended as necessary to add Jerry C. Wardlaw Construction of South Carolina, Inc. as a co-borrower; all references to "Borrower" shall include Jerry C. Wardlaw Construction of South Carolina, Inc.
3. The Loan Agreement is hereby amended as necessary to delete Section 1.1(ff) in its entirety and to insert the following in lieu thereof:

(ff) "New Construction Loan Period Termination Date" means October 1, 2007;

4. The Loan Agreement is hereby amended as necessary add the following after Section 2.10:

2.11 Joint and Several Liability

(a) Notwithstanding any other provision of this Agreement, each Borrower shall be jointly and severally liable as a primary obligor and not merely as a surety for the payment of the Loan and for the performance and satisfaction of all duties, responsibilities, agreements, covenants and obligations of the Borrower under this Agreement and the other Loan Documents, and that such liability is independent of the obligations of any other Borrower. Consequently, Bank may bring an action against any Borrower under the Note, this Agreement or any other Loan Document, whether an action is brought against the other Borrowers or any of them. Such joint and several liability shall apply to each Borrower regardless of whether (i) any Loan was requested by or made to another Borrower or the proceeds of any Loan were used only by another Borrower or (ii) any indemnification obligation or any other obligation arose only as a result of the actions of another Borrower; provided, that, the liability of each Borrower under this Agreement, the Note and the other Loan Documents shall be limited to the maximum amount of obligations for which such Borrower



may be liable without violating any applicable fraudulent conveyance, fraudulent transfer or comparable laws. Each Borrower shall retain any right of contribution arising under applicable law against the other Borrowers as the result of the satisfaction of any obligations, provided, that no Borrower shall assert any such right of contribution against any other Borrower until all obligations shall have been paid in full and all Loan Documents shall have terminated.

Without limiting the foregoing provisions of this Section 2.11(a), but subject to the limitation set forth in the proviso to the penultimate sentence of the immediately preceding paragraph, each Borrower hereby irrevocably, absolutely and unconditionally guarantees the full and punctual payment or performance when due, whether at stated maturity, by required prepayment, declaration, acceleration, demand or otherwise, of all obligations of each other Borrower, whether now or hereafter owing to the Bank, under the Loan Documents. This guarantee constitutes a guaranty of payment and not of collection.

(b) Each Borrower hereby expressly waives: (i) notice of Banks' acceptance of this Agreement; (ii) notice of the existence or creation or non-payment of all or any of the obligations under the Loan Documents; (iii) presentment, demand, notice of dishonor, protest, notice of intent to accelerate any of the obligations, notice of acceleration, and all other notices and actions whatsoever other than notices expressly provided for in this Agreement and (iv) all diligence in collection or protection of or realization upon the obligations under the Loan Documents or any security for or guaranty thereof.

(c) Without limitation of the foregoing, each Borrower agrees that any of the following will not release such Borrower from its obligations under the Loan Documents:

- (1) any partial or full release, whether express or by operation of law, which may be given by Bank to any other Borrower;
- (2) the insolvency, bankruptcy, dissolution, liquidation, termination, receivership, reorganization, merger, consolidation, change of form, structure or ownership, sale of all assets, or lack of corporate or limited liability company, partnership or other power of any Borrower;
- (3) the taking or accepting of any other security or guaranty for, or right of recourse with respect to, any or all of the Loan;
- (4) any release, surrender, abandonment, exchange, alteration, sale or other disposition, subordination, deterioration, waste, failure to protect or preserve, impairment, or loss of, or any failure to create or perfect any lien or security interest with respect to, or any other dealings with, any collateral or security at any time existing or purported, believed or expected to exist in connection with any or all of the Loan, including any impairment of any Borrower's recourse against any person or collateral;
- (5) either with or without notice to or consent of a Borrower; with respect to the other Borrowers, any adjustment, indulgence, forbearance or compromise that may be granted from time to time by Bank to the other Borrowers;
- (6) any neglect, lack of diligence, delay, omission, failure, or refusal of Bank to take or prosecute (or in taking or prosecuting) any action for the collection or enforcement of the Loan, or to foreclose or take or prosecute any action to foreclose (or in foreclosing or taking or prosecuting any action to foreclose) upon any security therefor, or to exercise (or in exercising) any other right or power with respect to any security therefor, or to take or prosecute (or in taking or prosecuting) any action in connection with any Loan Document, or any failure to sell or otherwise dispose of in a commercially reasonable manner any collateral securing the Loan;
- (7) any failure of Bank on one or more occasions to notify a Borrower, with respect to any other Borrower, of any release of or change in any security, or of any other action taken or refrained from being taken by Bank against such other Borrower or any security or other recourse;
- (8) the existence of any claim, counterclaim, setoff, defense or other right that any Borrower may at any time have against any other Borrower, or any other person,

whether or not arising in connection with this Agreement or any other Loan Document;

(9) the unenforceability of all or any of the Loan Documents against any other Borrower, whether because of a lack of validity or enforceability of or defect or deficiency in any of the Loan Documents, or because the other Borrower has any valid defense, claim or offset with respect thereto, or because the other Borrower's obligation ceases to exist by operation of law, or because of any other reason or circumstance; or

(10) any order, ruling or plan of reorganization emanating from proceedings under Title 11 of the United States Code with respect to any other Borrower; including any extension, reduction, composition, or other alteration of the Loan or any of the Loan Documents with respect thereto, whether or not consented to by Bank.

(d) No Borrower shall have any right to assert against Bank any claim, counterclaim, defense or setoff which such Borrower may have against any other Borrower.

(e) Each Borrower agrees that it is solely responsible for keeping itself informed as to the financial condition of the other Borrowers and of all circumstances which bear upon the risk of nonpayment. Each Borrower waives any right it may have to require Bank to disclose to such Borrower any information which Bank may now or hereafter acquire concerning the financial condition of any other Borrower.

(f) Each Borrower represents and warrants to Bank that such Borrower will derive benefit, directly and indirectly, from the collective administration and availability of the Loan under this Agreement. Each Borrower agrees that Bank will not be required to inquire as to the disposition by any other Borrower of funds disbursed in accordance with the terms of this Agreement.

(g) Until all obligations of Borrower to Bank under this Agreement and the other Loan Documents have been paid in full, no Borrower shall have any right of subrogation in or under any of the Loan Documents or to participate in any way therein, or in any right, title or interest in and to any security or right of recourse for the indebtedness incurred under this Agreement or any of the Loan Documents, or any right to reimbursement, exoneration, contribution (contractual, statutory or otherwise), indemnification or any similar rights, including without limitation, any claim or right of subrogation under the Bankruptcy Code (Title 11, United States Code) or any successor statute, which such Borrower may now or hereafter have against any other Borrower with respect to the indebtedness incurred under this Agreement and the other Loan Documents. No Borrower shall have any right to enforce any remedy which Bank now has or may hereafter have against any other Borrower, or shall have any benefit of, or any right to participate in, any security now or hereafter held by Bank.

(h) Each Borrower waives all rights and defenses that such Borrower may have because the Loan is secured by real property.

5. The Loan Agreement is hereby amended as necessary to delete Section 6.12 in its entirety and to insert the following in lieu thereof:

6.12 Dispute Resolution: Arbitration. Except to the extent expressly provided below, any Dispute shall, upon the request of either party, be determined by binding arbitration in accordance with the Federal Arbitration Act, Title 9, United States Code (or if not applicable, the applicable state law), the then-current rules for arbitration of financial services disputes of the American Arbitration Association, or any successor thereof ("AAA"), and the "Special Rules" set forth below. "Dispute" means any controversy, claim or dispute between or among the parties to this Agreement, including any controversy, claim or dispute arising out of or relating to (a) this Agreement, (b) any other Loan Documents, (c) any related agreements or instruments, or (d) the transaction contemplated herein or therein (including any claim based on or arising from an alleged personal injury or business tort). In the event of any inconsistency, the Special Rules shall control. The filing of a court action is not intended to constitute a waiver of the right of Borrower or Bank, including the suing party, thereafter to require submittal of the Dispute to arbitration. Any party to this Agreement may bring an action, including a summary or expedited proceeding, to compel arbitration of any Dispute in any court having jurisdiction over such action. For the purposes of this Dispute Resolution Section only, the terms "party" and "parties" shall include any parent corporation, subsidiary or affiliate of Bank involved in the servicing, management or administration of any

obligation described in or evidenced by this Agreement, together with the officers, employees, successors and assigns of each of the foregoing.

(a) Special Rules.

(i) The arbitration shall be conducted in any U.S. state where real or tangible personal property collateral is located, or if there is no such collateral, in the City and County where Bank is located pursuant to its address for notice purposes in this Agreement.

(ii) The arbitration shall be administered by AAA, who will appoint an arbitrator. If AAA is unwilling or unable to administer or legally precluded from administering the arbitration, or if AAA is unwilling or unable to enforce or legally precluded from enforcing any and all provisions of this Dispute Resolution Section, then any party to this Agreement may substitute another arbitration organization that has similar procedures to AAA and that will observe and enforce any and all provisions of this Dispute Resolution Section. All Disputes shall be determined by one arbitrator; however, if the amount in controversy in a Dispute exceeds Five Million Dollars (\$5,000,000), upon the request of any party, the Dispute shall be decided by three arbitrators (for purposes of this Agreement referred to collectively as the "arbitrator").

(iii) All arbitration hearings will be commenced within ninety (90) days of the demand for arbitration and completed within ninety (90) days from the date of commencement; provided, however, that upon a showing of good cause, the arbitrator shall be permitted to extend the commencement of such hearing for up to an additional sixty (60) days.

(iv) The judgment and the award, if any, of the arbitrator shall be issued within thirty (30) days of the close of the hearing. The arbitrator shall provide a concise written statement setting forth the reasons for the judgment and for the award, if any. The arbitration award, if any, may be submitted to any court having jurisdiction to be confirmed and enforced, and such confirmation and enforcement shall not be subject to arbitration.

(v) The arbitrator will have the authority to decide whether any Dispute is barred by the statute of limitations and, if so, to dismiss the arbitration on that basis. For purposes of the application of the statute of limitations, the service on AAA under applicable AAA rules of a notice of Disputes is the equivalent of the filing of a lawsuit.

(vi) Any dispute concerning this arbitration provision, including any such dispute as to the validity or enforceability of this provision, or whether a Dispute is arbitrable, shall be determined by the arbitrator.

(vii) The arbitrator shall have the power to award legal fees and costs pursuant to the terms of this Agreement.

(b) Reservations of Rights. Nothing in this Agreement shall be deemed to (i) limit the applicability of any otherwise applicable statutes of limitation and any waivers contained in this Agreement, or (ii) apply to or limit the right of Bank (A) to exercise self help remedies such as (but not limited to) setoff, or (B) to foreclose judicially or nonjudicially against any real or personal property collateral, or to exercise judicial or nonjudicial power of sale rights, (C) to obtain from a court provisional or ancillary remedies such as (but not limited to) injunctive relief, writ of possession, prejudgment attachment, or the appointment of a receiver, or (D) to pursue rights against a party to this Agreement in a third-party proceeding in any action brought against Bank in a state, federal or international court, tribunal or hearing body (including actions in specialty courts, such as bankruptcy and patent courts). Bank may exercise the rights set forth in clauses (A) through (D), inclusive, before, during or after the pendency of any arbitration proceeding brought pursuant to this Agreement. Neither the exercise of self help remedies nor the institution or maintenance of an action for foreclosure or provisional or ancillary remedies shall constitute a waiver of the right of any party, including the claimant in any such action, to arbitrate the merits of the Dispute occasioning resort to such remedies. No provision in the Loan Documents regarding submission to jurisdiction and/or venue in any court is intended or shall be construed to be in derogation of the provisions in any Loan Document for arbitration of any Dispute.

(c) Conflicting Provisions for Dispute Resolution. If there is any conflict between the terms, conditions and provisions of this Section and those of any other provision or agreement for arbitration or dispute resolution, the terms, conditions and provisions of this Section shall prevail as

to any Dispute arising out of or relating to (i) this Agreement, (ii) any other Loan Document, (iii) any related agreements or instruments, or (iv) the transaction contemplated herein or therein (including any claim based on or arising from an alleged personal injury or business tort). In any other situation, if the resolution of a given Dispute is specifically governed by another provision or agreement for arbitration or dispute resolution, the other provision or agreement shall prevail with respect to said Dispute.

(d) Jury Trial Waiver in Arbitration. By agreeing to this Section, the parties irrevocably and voluntarily waive any right they may have to a trial by jury in respect of any Dispute.

6.13 WAIVER OF JURY TRIAL. WITHOUT INTENDING IN ANY WAY TO LIMIT THE PARTIES' AGREEMENT TO ARBITRATE ANY "DISPUTE" (FOR PURPOSES OF THIS SECTION, AS DEFINED IN SECTION 6.12) AS SET FORTH IN THIS AGREEMENT; TO THE EXTENT ANY "DISPUTE" IS NOT SUBMITTED TO ARBITRATION OR IS DEEMED BY THE ARBITRATOR OR BY ANY COURT WITH JURISDICTION TO BE NOT ARBITRABLE OR NOT REQUIRED TO BE ARBITRATED, BORROWER AND BANK WAIVE TRIAL BY JURY IN RESPECT OF ANY SUCH "DISPUTE" AND ANY ACTION ON SUCH "DISPUTE." THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY MADE BY BORROWER AND BANK, AND BORROWER AND BANK HEREBY REPRESENT THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY PERSON OR ENTITY TO INDUCE THIS WAIVER OF TRIAL BY JURY OR TO IN ANY WAY MODIFY OR NULLIFY ITS EFFECT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE PARTIES ENTERING INTO THE LOAN DOCUMENTS. BORROWER AND BANK ARE EACH HEREBY AUTHORIZED TO FILE A COPY OF THIS SECTION IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER OF JURY TRIAL. BORROWER FURTHER REPRESENTS AND WARRANTS THAT IT HAS BEEN REPRESENTED IN THE SIGNING OF THIS AGREEMENT AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL, OR HAS HAD THE OPPORTUNITY TO BE REPRESENTED BY INDEPENDENT LEGAL COUNSEL SELECTED OF ITS OWN FREE WILL, AND THAT IT HAS HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH COUNSEL.

6.14 Electronic Transmission of Data. Bank and Borrower agree that certain data related to the Loan (including confidential information, documents, applications and reports) may be transmitted electronically, including transmission over the Internet. This data may be transmitted to, received from or circulated among agents and representatives of Borrower and/or Bank and their affiliates and other Persons involved with the subject matter of this Agreement. Borrower acknowledges and agrees that (a) there are risks associated with the use of electronic transmission and that Bank does not control the method of transmittal or service providers, (b) Bank has no obligation or responsibility whatsoever and assumes no duty or obligation for the security, receipt or third party interception of any such transmission, and (c) Borrower will release, hold harmless and indemnify Bank from any claim, damage or loss, including that arising in whole or part from Bank's strict liability or sole, comparative or contributory negligence, which is related to the electronic transmission of data.

6.15 USA Patriot Act Notice. Bank hereby notifies Borrower that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Act"), Bank is required to obtain, verify and record information that identifies Borrower, which information includes the name and address of Borrower and other information that will allow Bank to identify Borrower in accordance with the Act.

6. The following shall be conditions precedent to the effectiveness of this Amendment:

(a) No Default: No Event of Default or condition which with the passage of time or the giving of notice would ripen into an Event of Default shall exist.

(b) Modification Documents: Borrower and Bank shall have duly executed, acknowledged and/or sworn to as required, recorded or filed and delivered to Bank the following documents dated of this date and all in a form and content satisfactory to Bank:

- (1) Fifth Amendment to Loan Agreement;
- (2) Fifth Amendment to Note;
- (3) Modification of Guaranty and Consent of Guarantors;
- (4) Mortgage of Jerry C. Wardlaw Construction of South Carolina, Inc.;

- (5) Joinder Agreement (Jerry C. Wardlaw Construction of South Carolina, Inc.); and
- (6) Legal Opinion regarding Jerry C. Wardlaw Construction of South Carolina, Inc.

(c) Authority: Authority documents of Borrower and Jerry C. Wardlaw Construction of South Carolina, Inc., including but not limited to a Certificate of Existence and resolution.

(d) Endorsement. An endorsement to the Title Policy adding the additional property in Beaufort County, satisfactory to Bank.

(e) Bank's Fee. Borrower shall pay Bank's fee for this modification.

7. Borrower and Bank hereby warrant and represent that all warranties, representations, covenants and agreements set forth in the Loan Agreement, as amended, are true, complete and correct as of the date hereof.

Except as herein expressly modified, the Loan Agreement shall remain unchanged and in full force and effect. Each and every term, covenant and condition of the Loan Agreement is hereby incorporated herein such that the Loan Agreement and this Amendment shall be read and construed as one instrument.

IN WITNESS WHEREOF, Borrower and Bank have executed this Amendment as of the date first above written.

BANK:

BANK OF AMERICA, N.A.

By: *Belus Aust*

Title: *Vice President*

BORROWER:

JERRY C. WARDLAW CONSTRUCTION, INC.,  
a Georgia corporation

By: *[Signature]*

Jack Wardlaw, III, Vice-President

BORROWER:

WARDLAW CONSTRUCTION OF EFFINGHAM, LLC,  
a Georgia limited liability company

By: *[Signature]*

Jack Wardlaw, III, Managing Member

BORROWER:

JCW CONSTRUCTION, LLC,  
a Georgia limited liability company

By: *[Signature]*

Jack Wardlaw, III, Managing Member

BORROWER:

JERRY C. WARDLAW CONSTRUCTION OF SOUTH  
CAROLINA, INC., a South Carolina corporation

By: *[Signature]*

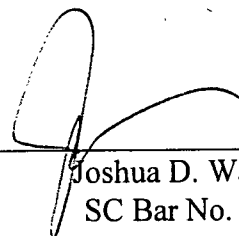
Jack Wardlaw, III, Vice-President

CERTIFICATION

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

June 28, 2013



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Attorney for Appellants

Other Counsel of Record:  
Robert C. Byrd  
Frank B. Ulmer

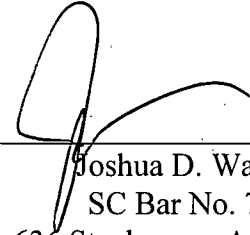
Parker Poe Adams & Bernstein, LLP  
200 Meeting Street, Suite 301  
Charleston, South Carolina 29401  
843.727.2650  
Attorney for Respondent

CERTIFICATION

---

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

June 28, 2013



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Joshua D. Walker  
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912.355.0328  
Attorney for Appellants

Other Counsel of Record:  
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-07-02407  
Appellate Case No. 2011-196888

BANK OF AMERICA, N.A.,

Respondent,

v.

Appellants.

JERRY C. WARDLAW  
CONSTRUCTION OF  
SOUTH CAROLINA, INC.,  
JERRY C. WARDLAW  
CONSTRUCTION, INC.,  
WARDLAW  
CONSTRUCTION OF  
EFFINGHAM, LLC, JCW  
CONSTRUCTION, LLC,  
JERRY C. WARDLAW,  
JACK WARDLAW.

I hereby certify I am an employee of Joshua D. Walker, P.C., and that I have this day served a copy of the Record on Appeal upon the following parties to this appeal by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Robert C. Byrd  
Frank B. Ulmer  
Parker Poe Adams & Bernstein, LLP  
200 Meeting Street, Suite 301  
Charleston, South Carolina 29401

This 28th day of June, 2013

  
Cherese Waters

RECEIVED

JUL 05 2013

SC Court of Appeals

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