

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

ORIGINAL

Case No. 2011-CP-04-2728
Appellate Case No. 2013-002341

LNv Corporation Respondent
v.

Affordable Hospitality Group-Anderson, LLC;
Diversified Capital Investment Group, LLC; Jay Berlye;
Anderson County, South Carolina, and the State of South
Carolina Defendants,

Of Whom Affordable Hospitality Group-Anderson, LLC;
Diversified Capital Investment Group, LLC; and Jay
Berlye are Appellants.

RECORD ON APPEAL – Volume Two

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
LNV Corporation,	)	C.A. No. 2011-CP-04-2728
	)	
Plaintiff,	)	
	)	
vs.	)	<u>DEFENDANTS' SUPPLEMENTAL</u>
	)	<u>MEMORANDUM IN OPPOSITION</u>
Affordable Hospitality Group, Anderson,	)	<u>TO PLAINTIFF LNV CORPORATION'S</u>
LLC; Diversified Capital Investment	)	<u>MOTION TO DISMISS</u>
Group, LLC; Jay Berlye; Anderson	)	
County, South Carolina; and the State of	)	
South Carolina,	)	
	)	
Defendants.	)	

Defendants Affordable Hospitality Group—Anderson, LLC, Diversified Capital Investment Group, LLC, and Jay Berlye (referred to hereinafter collectively as “Defendants”), by and through their undersigned counsel, respectfully submit this Supplemental Memorandum in Opposition to LNV’s Motion to Dismiss. A hearing on the Motion was held on February 29, 2012, at which time LNV argued primarily that it cannot be held liable for adverse funding determinations of the United States Small Business Administration (“SBA”), and that even if it could, Defendants have previously waived or released all claims.

However, as explained below, Defendants’ claims are not based on SBA’s actions, but rather on LNV’s wrongful conduct which caused substantial economic damage to Defendants. This has given rise to claims that have not been waived or released. The facts and circumstances of such claims have been set out in defendants’ pleading and are sufficient as a matter of law to defeat dismissal.¹ At this stage of the proceedings, the truth of Defendants’ allegations must be

¹ Defendants’ counterclaims are: (1) breach of contract; (2) breach of duty of good faith and fair dealing; (3) breach of contract accompanied by a fraudulent act; (4) violation of the South

presumed. See, e.g., Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). To the extent that inferences may be necessary, such inferences must be drawn in the light more favorable to Defendants. See, e.g., Grimsley v. South Carolina Law Enforcement Div., 396 S.C. 276, ___, 721 S.E.2d 423, 436 (2012). Because the allegations and inferences reasonably deducible therefrom would entitle Defendants to relief against LNV, see, e.g., Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009), LNV's Motion to Dismiss must be denied.

I. STATEMENT OF MATERIAL FACTS

SBA provides small businesses with long-term, fixed-rate financing through a loan program known as § 504. See generally 15 U.S.C. § 697 et seq. Typically, 504 loans are structured so that 3 parties contribute financing to a project's total cost: one is the borrower; one is a third-party lender; and one is known as a "certified development company" ("CDC").² The first step in the process of applying for SBA-backed financing is to obtain a financing commitment from a third-party lender. See id. § 120.920 ("A Project financing must include one or more Third Party Loans totaling at least as much as the 504 loan."). Then, through the CDC, the applicant must submit its proposal to the SBA. If the project is approved, SBA will issue an "Authorization" to the CDC to guarantee a portion of the financing. Id. § 120.801(a). However, before funds are released, SBA requires that the financing application be up-to-date. Id. § 120.960. In the event that the identity of the third-party lender changes, SBA requires that the new lender identify itself and commit to the financing relationship previously represented to the

Carolina Unfair Trade Practices Act; and (5) tortious interference with prospective contractual relationships.

² CDCs are non-profit corporations that are authorized by SBA to administer 504 loans within a certain geographic area.

government. Id. The failure to do so will result in the denial of SBA funding. Id.

In this case, Defendants intended to build a hotel in Anderson County and to finance its construction and operation with an SBA 504 loan. (§ 214) Defendants had been negotiating long-term financing options with Haven Trust Bank who would act as the required third-party lender. (Id.) These negotiations culminated with a Loan Commitment Letter dated November 6, 2007.³ (Id.) The Letter had been prepared by Haven Trust and was intended “[t]o provide construction and permanent mortgage financing” for Defendants’ hotel project.⁴ (§§ 214–15)⁵ The Letter expressly contemplated three transactions: (1) an initial construction loan of \$3,384,000, which would have a 9-month term; (2) a conventional permanent loan of \$2,115,000, which would have a 20-year term; and (3) an interim 3-month loan of \$1,269,000, which would be replaced with an SBA-backed loan and 20-year term. (§§ 216–17) Together, the conventional permanent loan and the interim financing / SBA-backed loan were intended to replace the construction loan. (Id.) Defendants immediately accepted the Loan Commitment Letter, which came to establish the Basic Contract among the parties. (§ 218) Defendants also paid Haven Trust the \$10,000 “expense deferment fee” referenced in Paragraph 25 of the Letter. (§ 219)

³ A copy of the Letter was attached to the Amended Answer & Counterclaim and incorporated expressly into Paragraph 218. A copy of the Loan Commitment Letter is also attached hereto as Exhibit A. See S.C. R. Civ. P. 10(c) (“A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading.”).

⁴ Notably, LNV does not even reference the existence of the Loan Commitment Letter or the Basic Contract in its foreclosure Complaint.

⁵ Unless otherwise specifically stated, all paragraph references pertain to the allegations of Defendants’ Answer to the Amended Complaint & Counterclaim.

Soon thereafter, and in furtherance of the Basic Contract, Defendants and Haven Trust began working with the Appalachian Development Corporation, (§ 219), which is a CDC for upstate South Carolina. By letter dated December 6, 2007, Defendants were advised that SBA had authorized financing for the hotel project on terms that were identical to the terms set out in the Loan Commitment Letter.⁶ Then, on May 15, 2008, Defendants executed documents with Haven Trust specific to the construction-loan phase.⁷ (*Id.*) Haven Trust subsequently disbursed funds to Defendants under the Basic Contract and hotel construction began. (§ 221) Defendants subsequently posted a \$100,000 certificate of deposit as security for performance of the Basic Contract.⁸

On December 12, 2008, Haven Trust was closed by the Georgia Department of Banking and Finance and the Federal Deposit Insurance Corporation (“FDIC”) became Haven Trust’s receiver. (§ 222) However, Defendants continued to build during Haven Trust’s receivership, and in May 2009, the hotel opened for business. (§§ 223–25) At about the same time, LNV purchased Haven Trust’s portfolio of assets from the FDIC, including Defendants’ account. (§ 226)⁹ Accordingly, LNV became Haven Trust’s successor-in-interest to any obligations that the Bank may have had with Defendants. (§§ 226–27)

⁶ SBA Authorization for Debenture Guarantee, Dec. 6, 2007, attached hereto as Exhibit B. Here, as in other points throughout this memorandum, Defendants refer to documents created by government agencies which are therefore in the public record. Such documents may be considered on a motion to dismiss pursuant to Rule 12(b)(6) without converting the matter to a motion under Rule 56. See, e.g., Marzouca v. GFG Realty Fund, LLC, 2012 WL 910010 n.2 (D.S.C. Mar. 16, 2012) (citing Hall v. Virginia, 385 F.3d 421 n.3 (4th Cir. 2004)).

⁷ These documents were attached to LNV’s foreclosure complaint. However, LNV did not attach—or even reference the existence of—the Loan Commitment Letter or the SBA Authorization.

⁸ FDIC Case Update Notification, Mar. 3, 2009, attached hereto as Exhibit C.

⁹ The Complaint alleges that the loan balance due is \$4,126,000. However, LNV paid less than 32 cents on the dollar, see FDIC Closed Loan Sales Record, attached hereto as Exhibit D, or

During the summer of 2009, LNV appeared to be performing in good faith under the Basic Contract. In August 2009, LNV and Defendants were in the midst of finalizing a draft commitment letter for the permanent loan promised by Haven Trust under the Basic Contract.¹⁰ (¶ 231) Between May and November 2009, LNV entered into two modifications of the construction loan agreement with Defendants. (¶¶ 230, 232–33) Under the first modification, LNV advanced \$250,000 to Defendants. (¶ 230) Under the second modification, LNV extended the maturity date for the construction loan by almost 4 months. (¶ 233) At no time during the negotiation of the first or second loan modification agreements did LNV propose any changes to the Basic Contract, much less any changes to the terms calling for permanent loan financing or assistance in obtaining the SBA-backed loan.¹¹ (¶ 234)

However, in late 2009, LNV started showing signs of its intention to suspend performance. LNV was becoming non-responsive to communications from Defendants and Defendants' consultants. (¶ 242) For long periods of time, LNV would cease all communications with Defendants altogether. (*Id.*) Importantly, LNV never made the permanent loan contemplated by the Basic Contract. (¶ 244) Furthermore, after it had acquired Defendants' account from the FDIC, LNV never provided SBA with a new commitment letter as it was required to do. (*Id.*) This was necessary to perfect Defendants' SBA-financing application. Therefore, as a consequence of LNV's failure to provide SBA with a new commitment letter, SBA was never put in a position to close on Defendants' 504 loan, even though SBA had

approximately \$1,320,000.

¹⁰ Regarding this allegation, LNV states: "to the extent a response is required, LNV admits the allegations to the extent consistent with the terms of the referenced document [sic]." (LNV's Ans. Countercl. ¶ 28)

¹¹ Regarding this allegation, LNV states: "to the extent a response is required, LNV admits the allegations to the extent consistent with the terms of the referenced document [sic]." (LNV's

previously authorized the transaction under the terms presented. Instead, LNV commenced this foreclosure action.

II. DEFENDANTS HAVE ALLEGED THE EXISTENCE OF CONTRACTUAL OBLIGATIONS WHICH REQUIRED LNV TO MAKE A CONVENTIONAL PERMANENT LOAN AND TO PROVIDE INFORMATION NECESSARY TO COMPLETE DEFENDANTS' SBA-FINANCING APPLICATION.

A. The Basic Contract is established by the Loan Commitment Letter.

Fundamentally, LNV agrees that this case is predicated on the existence of a contract with Haven Trust Bank. Defendants' position is that the controlling contract documents are established by the Loan Commitment Letter. (¶¶ 214–18) The Letter states that Haven Trust commits “[t]o provide construction and permanent first mortgage financing” to Defendants “in conjunction with a 504 loan from the U.S. Small Business Administration.”¹² The first stage of Haven Trust's financing commitment was the provision of a construction loan.¹³ It was expressly intended that upon completion of construction, the initial loan would be replaced by a conventional permanent loan and an SBA-backed loan.¹⁴ The Letter specifically established the term of each loan, the amount of each loan, the fees associated with each loan, the penalties associated with prepayment, and conditions associated therewith.¹⁵ The circumstances surrounding the Loan Commitment Letter are sufficient as a matter of law to establish the existence of a contract:

Ans. Countercl. ¶ 31)

¹² Loan Commitment Letter, Ex. A, 1.

¹³ Id., Ex. A, 2.

¹⁴ Id., Ex. A, 2.

¹⁴ Id., Ex. A, 2–8.

1. Offer. Haven Trust Bank prepared and sent the Loan Commitment Letter to Defendants on November 6, 2007. See Ans. & Countercl. ¶ 214; see also Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); Rakusin v. Radiology Assocs. Of Atlanta, P.C., 699 S.E.2d 384 (Ga. 2010).

2. Acceptance. Defendants accepted the Loan Commitment Letter on November 6, 2007. See Ans. & Countercl. ¶ 218; see also Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); Ga. Code § 13-3-1.

3. Mutual Assent. Defendants and Haven Trust commenced performance of their obligations established by the Loan Commitment Letter. See Ans. & Countercl. ¶¶ 219–21; see also Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978); Ga. Code § 13-3-1.

4. Consideration. In reliance on the validity and enforcement of the terms and conditions of the Loan Commitment Letter, Defendants expended significant amounts of money, including the payment of a 1.311% “Interim Loan Fee” on the construction loan (totaling over \$44,000) and a \$10,000 “Expense Deferment Fee,” as well as the posting of a \$100,000 certificate of deposit as security for their performance. See Loan Commitment Letter, Nov. 6, 2007, Ex. A, ¶¶ 9 & 25; see also Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); Ga. Code § 13-3-1; Thompson v. Floyd, 713 S.E.2d 883 (Ga. Ct. App. 2011); Hunt v. Thomas, 675 S.E.2d 256 (Ga. Ct. App. 2009); King v. Comfort Living, Inc., 651 S.E.2d 484 (Ga. Ct. App. 2007).

B. The Basic Contract obligated Haven Trust to provide financing for the construction and operation of Defendants' hotel.

LNV asserts that the Loan Commitment Letter “did not require Haven Trust to issue a permanent loan or guarantee an SBA 504 loan.”¹⁶ This is a puzzling argument. The Letter could not be clearer about its purpose, which is “[t]o provide construction and permanent first mortgage financing” for Defendants’ hotel “in conjunction with a 504 loan from the U.S. Small Business Administration.”¹⁷ LNV may argue that the Loan Commitment Letter did not require Haven Trust to provide permanent financing or assist in obtaining an SBA-backed loan, but that is exactly what the Letter called for, and it says so in clear, unambiguous terms.

In addition to the fact that LNV’s argument is inconsistent with the plain language of the Loan Commitment Letter, its interpretation of the financing structure established by the Letter is non-sensical. According to LNV, Defendants undertook a 9-month construction loan of \$3,384,000 at 9% interest to build a hotel for which there was obviously no pre-existing stream of revenue. If LNV’s position is correct that Haven Trust had no obligation to provide permanent financing, Defendants would have been leaving themselves without any way to pay off the loan or manage the debt.¹⁸

The only reasonable understanding of Defendants’ financing relationship with Haven Trust is described exactly in the Loan Commitment Letter and Defendants’ allegations. Haven Trust committed to providing financing for the construction of Defendants’ hotel, and upon its completion, to replace Defendants’ construction loan with permanent financing and assist in obtaining an SBA-backed loan.

¹⁶ LNV’s Memo. Supp. Mot. Dismiss 7.

¹⁷ Loan Commitment Letter, Ex. A, 1.

¹⁸ Id., Ex. A, 2.

C. In reliance on the Basic Contract, Haven Trust Bank and Defendants began performing their contractual obligations.

For the purposes of a motion to dismiss, it should be sufficient that Defendants have alleged the existence of a contract and attached the putative contract to the pleading.¹⁹ Nonetheless, LNV claims that as a matter of law, the Loan Commitment Letter did not become the Basic Contract with Haven Trust. This position is based exclusively on two provisions in the Letter:

This commitment is subject to satisfactory completion of credit investigations and analysis, satisfactory documentation and such other terms and conditions as are determined by Bank and SBA.²⁰

And:

THIS COMMITMENT IN NO WAY IS TO BE CONSTRUED AS FINAL APPROVAL BY HAVEN TRUST BANK OR ITS ASSIGNS.²¹

LNV's emphasis on these provisions is misguided. To begin with, both provisions relate to an ordinary, garden-variety financial underwriting requirement, that prior to funds being disbursed the lender must be satisfied with borrower's performance. Certainly, by the time that Defendants' hotel was completed and had become operational, Defendants could have satisfied any typical underwriting requirements. After all, there was no question that Defendants had rendered full performance of their obligations under the Loan Commitment Letter in the precise way contemplated by the Letter.

However, the enforceability of the Loan Commitment Letter was established long before the hotel was completed. LNV's position ignores the allegations that Haven Trust Bank and

¹⁹ Furthermore, the provisions of the Loan Commitment Letter are consistent with the allegations of the Counterclaim.

²⁰ Loan Commitment Letter, Ex. A, 1.

²¹ Id., Ex. A, 9.

Defendants each began rendering performance in furtherance of the Basic Contract. (§§ 218–21)

Specifically:

- (1) On or about November 6, 2007, soon after accepting the Loan Commitment Letter, Defendants paid Haven Trust Bank \$10,000 in furtherance of the “expense deferment fee” required by Paragraph 25;²²
- (2) On December 6, 2007, Defendants received SBA authorization to proceed with their hotel development project;²³
- (3) On May 15, 2008, Defendants executed loan construction documents with Haven Trust Bank in furtherance of the Basic Contract, (§ 219);²⁴
- (4) Haven Trust Bank disbursed millions of dollars to Defendants for the development of the hotel, (§ 221); and,
- (5) Defendants posted a \$100,000 certificate of deposit as performance security in furtherance of the Basic Contract.²⁵

These circumstances establish that Haven Trust Bank and Defendants began rendering performance to each other in reliance upon the obligations set out in the Loan Commitment Letter. Certainly, for the purposes of Rule 12(b)(6), the allegations of performance in reliance on the Basic Contract are sufficient to overcome dismissal. Georgia v. U.S. Oil Co., 389 S.E.2d 498 (Ga. 1989); Franklin v. UAP/GA AG. Chem, Inc., 514 S.E.2d 241 (Ga. Ct. App. 1999).

²² See id., Ex. A, 8.

²³ SBA Authorization, Ex. B.

²⁴ These are the documents attached to complaint and which form the exclusive basis of LNV's foreclosure

D. Two federal agencies determined that the Basic Contract was valid and enforceable.

By letter dated December 6, 2007, Defendants were advised that SBA had given its authorization for financing.²⁶ Notably, the terms of SBA's Authorization—which was issued 5 months before the construction loan documents were executed—are identical to the financing structure established by the Loan Commitment Letter.²⁷ The Authorization identifies Haven Trust as the provider of the “permanent third party lender loan.”²⁸ The amounts of Haven Trust's and SBA's commitments are the same as the amounts specified in the Loan Commitment Letter. SBA financing is to be repaid over the course of 20 years.

As a consequence of LNV's specious position that the Loan Commitment Letter is not a valid, enforceable contract, these facts have become critical. First and foremost, they show that the federal government was relying on the validity of the representations made in the Loan Commitment Letter. Additionally, they establish that SBA gave a financing commitment in reliance on those same representations. Indeed, SBA was prohibited as a matter of law from authorizing financing unless it had already determined that a third-party lender had given an enforceable commitment for permanent financing.²⁹ In this case, that third-party lender was Haven Trust Bank. These facts also confirm that Haven Trust and Defendants were working together in the precise way called for in the Loan Commitment Letter.

SBA was not the only federal agency that determined the Loan Commitment Letter was valid and enforceable. On December 12, 2008, FDIC became the receiver for Haven Trust's

²⁵ FDIC Case Update Notification, Ex. C.

²⁶ SBA Authorization, Ex. B.

²⁷ Compare SBA Authorization, Ex. B, with the Loan Commitment Letter, Ex. A.

²⁸ SBA Authorization, Ex. B.

portfolio of assets, including Defendants' account. (§ 222) Critically, in February 2009—which is 3 months before LNV became involved—FDIC decided that the maturity date for Defendants' construction loan should be extended, specifically to allow for the hotel's completion, the replacement of the construction loan with a permanent loan, and the funding of the SBA loan.³⁰ The only reasonable inference that can be drawn from this fact is that FDIC, like SBA, believed the Loan Commitment Letter to be a binding agreement.³¹

E. As Haven Trust's successor-in-interest, LNV had a critical role in perfecting Defendants' SBA-financing application, which it failed to do.³²

Defendants agree that LNV “does not control the issuance of SBA 504 Loans.”³³ Only SBA makes those determinations. However, upon acquisition of Defendants' account, LNV had an obligation to provide SBA with a new commitment letter showing that it was stepping into Haven Trust's shoes. LNV failed to issue such a letter, and as a consequence, SBA was never presented with a final application to approve or deny.

This is a legally cognizable injury. In Champion v. Whaley, which has already been discussed at length in Defendants' memorandum in opposition to LNV's motion to dismiss, the Court of Appeals held that a party cannot avoid liability on a contingent contract if that party's wrongful conduct caused the contingency to not occur. 280 S.C. 116, 120, 311 S.E.2d 404, 406 (Ct. App. 1984) (citing Shear v. Nat'l Rifle Ass'n of Am., 606 F.2d 1251 (D.C. Cir. 1979)). In this case, LNV did not submit a new commitment letter to SBA, and therefore, SBA was

²⁹ 13 C.F.R. § 120.920

³⁰ FDIC Case Update Notification, Ex. C.

³¹ See also Part III, below, where it is shown that LNV's own loan modification documents acknowledge its responsibility with regard to permanent financing.

³² It is alleged that LNV was the successor-in-interest to Haven Trust Bank's rights and obligations with regard to Defendants' account. (§§ 222, 226)

³³ LNV's Memo. Supp. Mot. Dismiss 5.

precluded as a matter of law from rendering a final decision on the merits of Defendants' loan application. However, notably, SBA had already authorized the project for financing. Presumably, funds would have been released upon presentment of an updated application. Consistent with Champion, LNV cannot benefit from its wrongful conduct toward Defendants and avoid its contractual obligations.

Furthermore, the authority cited by LNV is inapposite to the circumstances of this lawsuit. It is true that each case involves SBA 504 loans. But that is where the similarities end. In Fifth Third Bank v. McClure Properties, Inc., borrower sought financing for the construction and operation of a gas station and convenience store. 724 F. Supp. 2d 598 (S.D. W. Va. 2010). The relationship between bank and borrower was established by a loan commitment letter, which contemplated SBA financing.³⁴ However, neither bank nor borrower ever submitted a financing application to the SBA. Borrower's claims were based exclusively on the position that bank had an obligation to pursue and obtain SBA financing on behalf of the borrower. The district court held that no such obligation existed, and therefore, granted summary judgment against borrower.

The instant case arises under much different circumstances. Defendants pursued SBA financing on their own behalf at the outset of the project. This was done in cooperation with Haven Trust. It was only after SBA had given its authorization to provide project financing that Haven Trust entered into the construction loan documents with Defendants and disbursed funds. The borrower in Fifth Third Bank never took these steps to obtain SBA financing, and as the

³⁴ The terms of this letter are strikingly similar to the terms of the Loan Commitment Letter issued by Haven Trust. Notably, the federal district court in Fifth Third Bank held that as a matter of law, the commitment letter was a legally enforceable contract. It is therefore surprising that LNV would cite Fifth Third Bank in support of its position that the Loan Commitment Letter is not binding, since that argument was expressly raised and rejected in the authority cited.

court ruled, could not pin the blame for those omissions on the bank.

Regions Bank v. Lost Cove Cabins & Campground, Inc. is similarly unhelpful. 2010 WL 4514957 (Tenn. Ct. App. Nov. 9, 2010). In Regions Bank, borrower received a commitment letter from bank for the construction and operation of a public campground. Borrower also received SBA authorization for the project, which would fund upon completion of the campground's construction. Construction commenced but suffered from significant delays and cost-overruns. Ultimately, when construction was completed, the campground was substantially smaller in scope than was anticipated. This caused SBA to withhold funding for its prior commitment. For the next 4 years, the campground operated at a tremendous financial loss. Additionally, it was stipulated by the parties that borrower failed to provide documents and information to the SBA which was necessary to perfect its application. Consequently, because of borrower's own actions in failing to satisfy the SBA's requirements, summary judgment was granted to bank against borrower's claims.

In the instant case, upon completion of Defendants' project, the only material change in circumstances that had occurred was to the identity of the third-party lender. Haven Trust was succeeded by FDIC, who was succeeded by LNV. Consequently, LNV had an obligation to advise SBA promptly of that material change through a new commitment letter, which only LNV could send. LNV's failure to do so prevented Defendants from receiving SBA financing and the performance to which they were entitled.

Finally, Minnwest Bank Central v. Flagship Properties, LLC is only superficially analogous. 689 N.W.2d 295 (Minn. Ct. App. 2004). The facts involve SBA financing intended for the construction and operation of borrower's hotel. Like the instant case, SBA had given its

authorization for project financing. However, there is one critical difference between Minnwest and the instant case. In Minnwest, upon completion of construction, SBA was presented with borrower's complete financing application. SBA reviewed the application, and upon its merits, the application was denied.

In the instant case, upon completion of Defendants' hotel, SBA was never presented with a complete financing application. LNV's failure to issue a new commitment letter precluded that opportunity as a matter of law. As a consequence of LNV's wrongful conduct, Defendants' SBA financing application was never approved or denied on its merits; it simply withered on the vine.

III. DEFENDANTS HAVE NEITHER WAIVED NOR RELEASED THEIR CLAIMS AGAINST LNV.

At the hearing on February 29, LNV called the Court's attention to the loan modifications of June and November 2009, which were attached by Defendants to the Counterclaim. LNV specifically cited to the waiver and release provisions, arguing that such provisions waive any and all claims that Defendants may have against LNV. However, LNV has misconstrued the text. First and foremost, by its own terms, the waiver and release provisions are limited in time. They apply only to claims "arising out of, connected with or relating to any and all acts, omissions or events occurring prior to the execution of this agreement." Defendants have alleged quite clearly that LNV's modifications were interpreted as indications of good faith performance. (¶¶ 230, 232–33, 235) In fact, in August 2009, LNV circulated a draft commitment letter which ostensibly would have satisfied SBA's loan-making requirements. (¶ 231) Consequently, as of November 10, 2009—the date of the second and last modification—Defendants had no reason to suspect that LNV intended to withhold performance under the Basic Contract. Indeed, there are no allegations in the Counterclaim to suggest that Defendants knew or should have known prior

to November 10, 2009 that LNV intended to withhold performance.

There are also no allegations to suggest that Defendants' counterclaims must have accrued at the latest by November 10, 2009. Indeed, Defendants expect that discovery will establish their claims did not accrue until after that date. For example, it is already known that SBA's Authorization period was in effect until December 2011 and that LNV could have issued a commitment letter at any time during that period without prejudice to Defendants' application. LNV did not issue the commitment letter, and instead chose to be non-responsive toward Defendants before ultimately filing this foreclosure action. (¶ 240) Regardless, to the extent that LNV engaged in wrongful conduct after November 10, 2009, LNV's waiver and release is ineffective.

Furthermore, LNV's waiver and release is not conclusive on the issues of liability for acts and omissions occurring before November 10, 2009. As discussed above, at all relevant times before November 10, 2009, Defendants believed that LNV was performing its contractual obligations in good faith. However, if LNV was not performing its contractual obligations in good faith during that time, Defendants had no knowledge of those circumstances, and instead, were being actively led to rely on LNV's representations of good faith performance to their detriment. See, e.g., M.B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 271 S.E.2d 414 (1980) (addressing fraudulent inducement); Davis v. Upton, 250 S.C. 288, 157 S.E.2d 567 (1967); Adair v. Park, 104 S.E.2d 473 (Ga. 1958) (holding that for a release to be operative, it must be mutually intended by the parties).

LNV has also argued that the release should be construed in the broadest, most encompassing way possible since all parties are sophisticated business entities, as if the

sophistication of parties were somehow dispositive of the issues. However, a release is merely a form of contract, Bowers v. Dep't of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004), and therefore, the intention of the parties is controlling, S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 20 (Ct. App. 2005). In fact, the Supreme Court has held that a release is effective only as to claims “within the contemplation of the parties.” Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950).

As stated above, prior to November 10, 2009, Defendants did not have any reason to believe that LNV would withhold performance of its contractual obligations. Furthermore, there are no facts in the Counterclaim which establish that Defendants knew or should have known—as of November 10, 2009—that LNV intended to withhold performance. Nor is there any language in LNV’s release to suggest that Defendants intended to waive and/or release unknown claims.

However, LNV’s waiver argument is about more than just counterclaims; it is also about performance obligations. In fact, at its core, LNV’s argument is that the waiver and release provisions discharged its performance obligations under the Basic Contract. There is no authority for the proposition that a contractual waiver of claims inherently acts to waive all outstanding performance obligations. Therefore, even if the waiver provisions released Defendants’ breach of contract claims as they may have existed on November 10, 2009, the provisions would not excuse LNV’s failure to perform on November 11 and afterward.

LNV’s argument is also inconsistent with the other provisions of the modifications. LNV would have this Court believe that the Basic Contract never existed, that the only transaction contemplated by the parties was the initial construction loan, and that the concept of the Basic

Contract is a legal fiction. This is demonstrably false. Not only do the Loan Commitment Letter, SBA actions, FDIC reports, and conduct of the parties—all as described in the pleadings and above—establish that the Basic Contract existed as it has been alleged, so do the loan modifications with LNV. For example, the modification of June 1, 2009, contains the following language:

Notwithstanding anything to the contrary contained in the Loan Documents, including, without limitation, the [FDIC modification dated April 20, 2009], the \$100,000 certificate of deposit presently held as additional collateral **for the permanent loan** shall be transferred into a cash reserve account held by Lender or an affiliate of Lender. Such cash reserve account shall continue to be additional security for the Loan; however, Borrower hereby authorizes Lender to apply funds immediately from such cash reserve account to pay Loan interest due to July 1, 2009 and thereafter, to the extent that cash flow from operations at the Mortgaged Property cannot satisfy the monthly interest payment due, funds from such cash reserve account may be applied to the net remaining interest payment due on the Loan **until such time as the Small Business Administration funds its new subordinate loan** at which time such funds may be used to pay closing costs (e.g., title premiums, lender costs, attorneys' fees for Lender and Borrower, SBA loan points or fees if any, appraisal and inspection fees if any, survey costs, etc.) **in connection with the closing of the permanent loan, the SBA Loan, or as otherwise determined by Lender.**

(emphasis added).

Therefore, it is indisputable that as of June 1, 2009, even LNV believed that the structure of its financing relationship with Defendants contemplated a permanent loan and SBA financing. This is consistent with Defendants' allegation that "[a]t no time during the negotiation of the first or the second loan modification did LNV propose any modification of the Basic Contract whatsoever, much less any modification of the terms calling for permanent loan financing or assistance in obtaining the SBA 504 Interim Loan." (§ 234) It is also consistent with Defendants' allegation that in August 2009, LNV circulated a draft commitment letter which

represented an adoption of the Basic Contract and its obligations regarding permanent and SBA-backed financing. Indeed, by all accounts, LNV initially appeared as if it were going to perform in good faith. Unfortunately, this was not the case.

IV. DEFENDANTS HAVE SUFFICIENTLY ALLEGED CLAIMS BASED ON BREACH OF CONTRACT.

A. Breach of Contract

There are 4 elements of an action for breach of contract. Each element is set out below in association with its supporting allegations.

1. Existence of Contractual Obligations. See Loan Commitment Letter, Nov. 6, 2007, Ex. A. (¶¶ 214–18)
2. Breach of Contractual Obligations. (¶¶ 236–44)
3. Damages. (¶¶ 245–46)
4. Damages were the Direct and Proximate Consequence of Breach. (*Id.*)

B. Breach of Duty of Good Faith and Fair Dealing

It is axiomatic that in every contract there exists an implied covenant of good faith and fair dealing. See, e.g., Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970); TechBios, Inc. v. Champagne, 688 S.E.2d 378 (Ga. Ct. App. 2009). Defendants have supported their claim with the allegations set out in Paragraphs 235–44 and 248.

C. Breach of Contract Accompanied by a Fraudulent Act

There are 3 elements of an action for breach of contract accompanied by a fraudulent act. See, e.g., Ball v. Canadian Am. Express Co., 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994); Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986); Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). Each element is set out

below in association with its supporting allegations.

1. Breach of Contract. (§§ 222–46)
2. Accompanied by a Fraudulent Intent. (§§ 251, 253–54)
3. Accompanied by a Fraudulent Act. (§§ 254–56)

V. **DEFENDANTS HAVE SUFFICIENTLY ALLEGED A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.**

There are 3 elements of an action for violation of the South Carolina Unfair Trade Practices Act. S.C. Code § 39-5-10 *et seq.*; Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988); Wright v. Craft, 640 S.E.2d 486 (Ct. App. 2006); Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986). Each element is set out below in association with its supporting allegations.

1. The Defendant Engaged in an Unfair or Deceptive Act in the Conduct of Trade or Commerce. (§ 259)
2. The Unfair or Deceptive Act Is Capable of Affecting the Public Interest. (*Id.*)
3. Damages. (§ 260).

This case involves more than the mere breach of a contract between the litigants. As Defendants will develop through the course of discovery and at trial, LNV's business model is predatory. Specifically, LNV purchases distressed assets from the FDIC at bargain-basement prices, forces the owners of such assets into foreclosure, takes possession of the property, then sells the property for an amount which is more than what LNV paid for it, but still less than the original amount of the loan.³⁵ Defendants believe that LNV, consistent with this business model, never

³⁵ Georgia, for instance, is taking legislative action against this very business model. *See* Ga. S.B. 448, attached hereto as Exhibit E.

had any serious intention of performing under the Basic Contract. Defendants further believe that LNV is replicating this model throughout South Carolina, if not the United States. Accordingly, Defendants have stated facts sufficient to constitute a cause of action for violation of the Unfair Trade Practices Act.

VI. DEFENDANTS HAVE SUFFICIENTLY ALLEGED THAT LNV TORTIOUSLY INTERFERED WITH DEFENDANTS' PROSPECTIVE CONTRACTUAL RELATIONS.

There are 3 elements of an action for tortious interference with prospective contractual relations. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009); Rendan, Inc. v. Liberty Real Estate Ltd. P'ship III, 444 S.E.2d 814 (Ga. Ct. App. 1994). Each element is set out below in association with its supporting allegations.

1. The Intentional Interference with Prospective Contractual Relations. (§§ 262–70)
2. For an Improper Purpose or by Improper Methods. (§ 271)
3. Causing Damages. (§ 272)

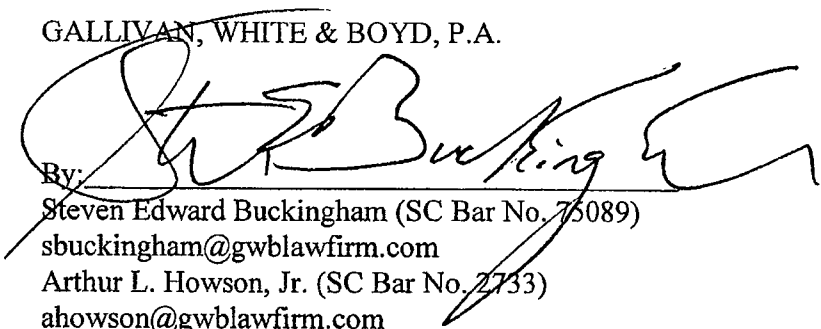
VII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that LNV's Motion to Dismiss be denied.

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

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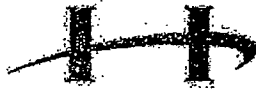
Columbia, SC 29209

(o) 803.776.8567

April 2, 2012
Greenville, South Carolina

*Attorney for Defendants,
Affordable Hospitality Group—Anderson, LLC,
Diversified Capital Investment Group, LLC, and
Jay Berlye*

EXHIBIT A



HAVEN TRUST BANK

November 6, 2007

Mr. Jay Berlye
Affordable Hospitality Group - Anderson, LLC d/b/a
Microtel Inn & Suites
3904 N. Druid Hills Rd. #221
Decatur, GA 30033

Re: Loan Commitment

Dear Mr. Berlye:

Subject to the facts presented by you and further subject to the terms and conditions hereafter set forth, Haven Trust Bank (Bank) commits to Affordable Hospitality Group - Anderson, LLC d/b/a Microtel Inn & Suites to place a loan in conjunction with a 504 loan from the U. S. Small Business Administration (SBA), with the provisions as described in this letter. This commitment is subject to satisfactory completion of credit investigation and analysis, satisfactory documentation and such other terms and conditions as are determined by Bank and SBA.

1. **Borrower:** Affordable Hospitality Group - Anderson, LLC d/b/a Microtel Inn & Suites

2. **Purpose:** To provide construction and permanent first mortgage financing associated with Microtel Inn & Suites to be located on Electric City Boulevard in Anderson, South Carolina.

USES:

Land	\$650,000	15%
Construction	\$2,619,628	62%
Construction Contingency (5%)	\$130,981	3%
Construction Management	\$25,000	1%
Landscaping	\$34,000	1%
F,F,E	\$542,394	13%
Interest Carry	\$153,159	4%
Soft Costs	\$74,838	2%
Total project costs	\$4,230,000	100%

SOURCES:

Haven Trust Bank	\$2,115,000	50%
SBA 504	\$1,269,000	30%
Borrower Equity	\$846,000	20%
	\$4,230,000	

(See the attached for the Project Cost Worksheet which outlines the costs and equity requirement.)

2175 LAWRENCEVILLE HIGHWAY • DECATUR, GEORGIA 30033 • TEL: 404.638.6940 • FAX: 404.638.6941

Member
FDIC

A Preferred SBA Lender

3. Loan Amount:

- a. Construction Loan of \$3,384,000
- b. Conventional Permanent Loan of \$2,115,000
- c. SBA 504 Interim Loan of \$1,269,000

4. Term:

- a. Construction loan shall be for a period of nine (9) months from the date of closing. Interest will be accrued during the construction period and interest payments will be paid from permanent loan proceeds.
- b. Proposed permanent loan will be for a period of twenty (20) years from the date of closing payable in two hundred and forty (240) installments of principal and interest.
- c. SBA 504 Interim Loan will be for a period of three (3) months.

5. Interest Rate:

- a. The interest rate shall be a variable rate based on the Wall Street Journal Prime plus 1.50% adjusting daily. Interest shall be calculated on the accrual basis of 365/360. The initial interest rate today would be 9.0%.
- b. The interest rate shall be a variable rate based on the Wall Street Journal Prime plus 1.50% adjusting daily. Interest shall be calculated on the accrual basis of 365/360. The initial interest rate today would be 9.0%. Or a 5-year fixed rate adjustable every 5-years based on the five-year swap rate plus 400 basis points (currently 8.86%). This rate will be fixed at the time the loan converts to the term loan. Interest shall be calculated on the accrual basis of 365/360.
- c. The interest rate shall be a variable rate based on the Wall Street Journal Prime plus 1.50% adjusting daily. Interest shall be calculated on the accrual basis of 365/360. The initial interest rate today would be 9.0%.

6. Collateral:

- a-b. The loan will be secured by a First Deed to Secure Debt conveying first security title to the real property and improvements, including a general collateral assignment of all rents and leases. The said property will be located at Electric City Boulevard, Anderson, South Carolina.

The loan will be further secured by a first lien position on all assets of the Borrower including, but not limited to, furniture, fixtures and equipment of the Borrower.

In addition, the loan will be secured by an assignment of \$100,000 certificate of deposit to be held at the Bank. The certificate of deposit will be released once the interim SBA 504 loan is paid off by the SBA 504 debenture.

- c. The loan will be secured by a Second Deed to Secure Debt conveying second security title to the real property and improvements located at Electric City Boulevard, Anderson, South Carolina.

7. Guarantors: Jay Berlye

8. Prepayment Penalty: There will be a five (5) year prepayment penalty at a 5% decreasing rate per year, i.e., 5,4,3,2,1 as it relates to the permanent loan first mortgage. The pre-payment penalty will be calculated on the entire principal balance at the time of payoff.

9. Loan Fees:

- a-b. There is an Interim Loan Fee of 1.311% on the construction loan which will be deemed earned by the Bank upon issuance of this Commitment. Lender will pay the SBA fee of 1/2% of the first mortgage loan from these funds.

There is an Expense Deferment Fee in the amount of \$10,000 due and payable on acceptance of this proposal.

- c. The SBA fees which will be added to the debenture total approximately \$30,000 as shown on the attached Project Cost Worksheet.

10. Borrower's Cost: Borrower shall otherwise be responsible for all costs associated with the proposed Loan including, but not limited to, recording costs, state of South Carolina intangible taxes, costs to obtain credit reports, Lender's and Borrower's attorney fees and expenses, property inspection, environmental assessment and appraisal. Borrower is required to pay such costs incurred whether or not closing occurs.

11. Title Insurance: The Bank shall be furnished with a mortgagee title insurance policy in an amount and form and substance written by a title insurance company that is satisfactory to the Bank, insuring the title conveyed by the security instrument as a valid first lien upon and security title in and to the collateral property.

12. Collateral Restrictions: So long as this Loan commitment or any part of the Loan is outstanding, the collateral property and any additional property, if any, shall remain free and clear of all encumbrances, liens, mortgages, security interests and secondary financing, except those approved in writing by the Bank. The Borrower shall not, without the prior written consent of the Bank, sell, transfer or convey all or part of its interest in the property or the business or any portion thereof. The occurrence of any of the foregoing shall, at the option of the Bank, constitute grounds for terminating this Commitment and for accelerating any and assumes unpaid under this anticipated Loan or under any Loan with the Bank.

13. Financial Reports: The Borrower and Guarantors shall furnish to the Bank the following information: () *Initials*.

- a. Quarterly financial statements on Borrower to include, but not limited to, Balance Sheet and Income Statement;
b. Annual Financial Statement on Borrower to include, but not limited to, Balance Sheet and Income Statement;

- c. Copy of Borrower and Guarantors' Tax Returns for previous year, within 30 days after said returns have been completed; and
 - d. Annual Personal Financial Statement for each Guarantor, in its original format, signed and dated by Guarantor.
14. **Power of Attorney:** Bank shall not accept a power of attorney. All persons needed to finalize the closing must be present.
15. **Additional Provisions:**
- a. This Commitment is subject to receipt and review of an Appraisal satisfactory to the Bank, reporting a minimum appraisal value of the real state and business value located at Electric City Boulevard, Anderson, South Carolina. This appraisal will be ordered by the Bank and must show a minimum current value of \$4,230,000 or maximum 80% loan to value.
 - b. A current A.L.T.A. survey of the land to be mortgaged (no older than 60 days) prepared and certified by a duly registered land surveyor or engineer showing the location of all improvements, encroachments, easements and rights-of-way must be received and approved by Bank. The survey must bear the name(s) of the intended Borrower(s) and must also show Bank as Mortgagee. In addition, a Surveyor's Inspection Report, as required by the title company, must accompany the survey. The survey must contain an acceptable surveyor's certification.
 - c. A mortgagee's title insurance policy in an amount, in form and substance, and written by a title insurance company, satisfactory to the Bank, insuring the title conveyed by the security instrument as a valid first lien upon and security interest in and to the Property. Said policy shall contain affirmative insurance against liens of mechanics and materialmen and shall contain no exceptions other than approved by Bank. Said policy shall be updated by endorsement, from time to time, as required by Bank. Bank's legal counsel will be the agent for this policy. **TO INSURE THE BEST PREMIUM, PLEASE PROVIDE A COMPLETE COPY OF ANY EXISTING TITLE INSURANCE POLICY.**
 - d. A true and correct copy of the Articles of Incorporation, By-Laws, Certificate of Good Standing and borrowing resolution or the appropriate partnership agreements, if applicable, must be received by Bank.
 - e. Proof of insurance for the Property in an amount not less than the loan amount, in the name of the Borrower with an insurer satisfactory to Bank and policy (ies) satisfactory to Bank in both form and content, showing Bank as both mortgagee and additional insured. In addition, Bank must receive proof of general public liability insurance of not less than \$1,000,000.
 - f. Evidence in a form satisfactory to Bank that final zoning approval consistent with the intended use has been rendered to the Property by the appropriate governmental authorities.

- g. Borrower shall certify to Bank in writing that the Property is in compliance with all applicable government laws and government regulation, including but not limited, to the National Environmental Policy Act, Clean Air Act, National Flood Insurance Program and the Americans with Disabilities Act.
- h. The Bank will require evidence that the real property submitted as collateral by Borrower complies with all applicable laws and regulations (both federal and state) pertaining to the protection and preservation of the environment. In the Bank's sole discretion, this evidence will include (but not limited to) a Phase I Environmental Site Assessment report prepared by a consultant acceptable to the Bank attesting to the satisfactory environmental condition of the real property and certifying that you and prior occupants of the real property have complied with and are complying with all federal, state, and local environmental statutes, laws and regulations. Following a review of such report, the Bank may require additional testing at your expense. The Bank will not be required to fund the loan if the property to be taken as collateral is subject to any existing or threatened contamination.
- i. A detailed estimate of all site development and/or direct construction costs, executed by the Borrower and the Borrower's engineer, certifying that such cost estimates are fair and reasonable and sufficient to complete the proposed development, must be submitted to Bank. A front-end analysis of the proposed improvements and cost budget by Bank's designated inspector will be required.
- j. All fully executed contracts and their counterparts for site planning, development, and construction of the improvements must be submitted to Bank.
- k. Letter from the appropriate utility companies and governmental agencies stating that all utilities, including but not limited to, electricity, gas, water, sanitary sewer, storm water retention and telephone services are available to the Property.
- l. Two (2) complete sets of final plans and specifications as certified by the Borrower's architects and appropriate engineers, and with the seals of such architects and engineers affixed, are to be submitted to and approved by Bank. Any deviation from the approved plans and specifications must be submitted to and approved by Bank, in writing. Borrower's architect shall certify to Bank, in writing, that the Project, as shown in said plan and specifications, is in compliance with all applicable government laws and government regulations including, but not limited to, the National Environmental Policy Act, Clean Air Act, Americans with Disabilities Act, and National Flood Insurance Program.
- m. Builder's risk insurance is required
- n. Haven Trust Bank reserves the right to request and review the resume and financial information from the contractor. Said review may determine Bank's willingness to approve the contractor for the project.

- o. Haven Trust Bank will require the Borrower to use a Hotel Management Company that is acceptable to the Bank at its sole discretion.
 - p. Haven Trust Bank will require an assignment of key man life insurance in the amount of \$1.25MM for Jay Berlye during construction.
16. **Construction Requirements:** Prior to the Bank's disbursement of each draw request, the following conditions must be met by Borrower.
- a. The first draw will cover the acquisition of the property. No other draws will be processed until all the requirements have been met in accordance to the loan agreement.
 - b. There will be 10% retainage on all construction draws.
 - c. Requests for disbursement must be made in writing on AIA Form with appropriate lien waivers. Bank shall allocate and disburse funds based upon a complete construction cost breakdown to be attached to the Construction Loan Agreement after Bank's inspector completes the front-end analysis ("Approved Budget"). Soft Costs paid by Borrower must be supported by paid invoices and/or invoices due. Bank shall disburse funds for direct construction based on line-item draw schedule not to exceed the total amount allocated in Approved Budget. Any changes in loan allocations are subject to Bank's approval.
 - d. Inspections will be performed by an independent inspector satisfactory to Bank. Borrower shall pay costs of all such inspections.
 - e. Requests for funding shall be received no later than the 20th of each month and disbursement made on the first.
 - f. The loan must be current in all respects and no event of default may exist.
 - g. If requested by Bank, Borrower shall deliver to Lender an endorsement of Bank's title insurance policy, indicating that there has been no change in the condition of title to the secured property from that previously reported and containing no exceptions not previously approved by Bank. The endorsement shall, expressly or by virtue of a proper "pending disbursement" clause in the policy, increase the coverage of the policy to aggregate amount of all loan proceed advances on or before the effective date thereof.
 - h. Borrower shall deliver waivers or subordinations of lien rights, in form satisfactory to Bank, executed by all contractors in connection with direct costs applicable to the preceding disbursements of the loan.

- i. In the event that Bank's total disbursement for any category in Approved Budget is less than the amount scheduled, said amount shall be re-allocated to increase the Contingency category.
- j. Borrower must provide a slab survey to ALTA specifications prior to any draw request, including the foundation/slab.
- k. Borrower must provide an "as built" survey to ALTA specifications before the loan converts to permanent term.
- l. Borrower must provide a copy of building's Certificate of Occupancy before the loan converts to permanent term.

17. Borrower's Representation: Issuance of this letter, converting the application into a commitment on the part of Bank is based upon the accuracy of Borrower's representations and statements, loan application and all additional information, representations, exhibits, and other matters submitted to Bank in connection with the loan request. Bank shall have the right to declare the Commitment to be breached if there shall have been any material misrepresentation nor misstatement or any material error in the factual data previously submitted to Bank, or if prior to the initial loan disbursement, there shall have been any material or adverse change in the state of facts regarding the Borrower, Guarantors, Property or any other matter associated with the closing of the loan.

18. Non-Assignability: This Commitment is made exclusively to the Borrower and is non-transferable and non-assignable by operation or law or otherwise without the prior written consent of Bank.

19. Voiding of Commitments: This Commitment shall become voided at the option of the Bank if any of the following events occur:

- a. The borrower fails to meet for any reason any of the requirements or conditions of this Commitment letter within the specified time frame.
- b. An act of bankruptcy or insolvency with voluntary or involuntary is filed by or asserted against the Borrower, any Guarantors, any entity related to the Borrower or any Guarantors or any tenant of the Property.
- c. The expiration date of this Commitment passes without a written extension from Bank.
- d. Any other material event, occurrence or change in circumstances which in the opinion of Bank adversely affects any of the collateral or the Property or the financial condition of the Borrower or any Guarantor.

20. Modifications and Amendments: No change, amendment or modification the provisions of this Commitment shall be binding unless it is changed in writing and executed in the name of and by an officer of the Bank and in the name of and by Borrower and each Guarantor.

21. **Laws Governing:** This commitment shall be construed according to and governed by the laws of the state of Georgia. However, this shall not limit the applicability of federal law to the transaction. This commitment may be executed in any number of counterparts and each counterpart will be considered an original and constitute one and the same instrument.

22. **Waivers:** Waivers of any of the terms or conditions of the commitment shall not constitute a continuing waiver or waivers of strict performance of any other provision in this Commitment by Bank.

23. **Pre-closing Property Inspection:** Bank's obligation to close and fund the loan is subject to Bank's completion of a satisfactory property inspection immediately prior to closing by Bank and/or Bank's designated inspector. If this inspection reveals any material adverse change in the occupancy or condition of the property, at Bank's option, the closing may be delayed until the property is restored to its original condition or the cost to cure any discrepancies found during such inspection shall be deducted from the loan proceeds and placed into escrow until such time as the discrepancies have been corrected to the satisfaction of Bank. Bank will have no obligation to extend the expiration date of this commitment in order to accommodate any delay created by the above.

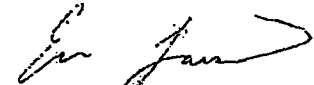
24. **Loan Closing:** The closing of this loan shall be arranged by the Bank. All documents and proceeds relating to the completion of the loan shall be satisfactory to Bank and the Bank's counsel.

25. **Acceptance:** If the provisions contained in this letter are in accordance with Borrower's and Guarantors' understanding, please indicate your acceptance by executing and returning this Commitment Letter, together with the required Expense Deferment Fee in the amount of \$10,000 to Bank on or before November 16, 2007. Should Bank not receive this Commitment Letter executed by Borrower and Guarantors and the required fee on or before such date, this Commitment Letter shall become null and void. Furthermore if this loan is not closed with ninety (90) days from the date of acceptance, this Commitment will expire.

The Expense Deferment Fee of \$10,000 will be due and payable upon acceptance of this Commitment. This Expense Deferment Fee will be refunded to the Borrower if/when all outstanding fees associated the loan have been paid in full. In the event the above-mentioned loan does not close for any reason other than a failure or default by the Borrower, Lender will return the Expense Deferment Fee less any expenses incurred to the borrower and this agreement shall be null and void. Lender will have no further responsibility or liability to the Borrower. Should the Borrower for any reason not close the loan as approved by SBA with Bank, the Bank shall keep the Expense Deferment Fee as compensation for services rendered.

Haven Trust Bank is pleased to have the opportunity to offer this Loan Commitment to you. We look forward to working with you on this transaction and any future proposals.

Sincerely yours,



Eric Larson
Assistant Vice President

Attachment: Project Cost Worksheet

**THIS COMMITMENT IN NO WAY IS TO BE CONSTRUED AS FINAL
APPROVAL BY HAVEN TRUST BANK OR ITS ASSIGNS.**

ACCEPTANCE OF COMMITMENT:

The undersigned hereby accepts this Commitment and agrees to the terms and conditions contained herein, the ___ day of _____ 2007.

**AFFORDABLE HOSPITALITY GROUP ANDERSON, LLC
D/B/A MICROTTEL INN & SUITES**

By: _____
Jay Berlye, Managing Member

GUARANTORS:

Jay Berlye, Individually

Haven Trust Bank is pleased to have the opportunity to offer this Loan Commitment to you. We look forward to working with you on this transaction and any future proposals.

Sincerely yours,



Eric Larson
Assistant Vice President

Attachment: Project Cost Worksheet

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ACCEPTANCE OF COMMITMENT:

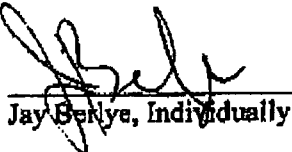
The undersigned hereby accepts this Commitment and agrees to the terms and conditions contained herein, the 6 day of Nov. 2007.

**AFFORDABLE HOSPITALITY GROUP - ANDERSON, LLC
D/B/A MICROTREL INN & SUITES**

By:


Jay Berlye, Managing Member

GUARANTORS:


Jay Berlye, Individually

AFFORDABLE HOSPITALITY GROUP - ANDERSON, LLC
D/B/A MICROTREL INN & SUITES
ANDERSON, ANDERSON COUNTY, GEORGIA
EXHIBIT A- ESTIMATED PROJECT COSTS
November 3, 2007

Project Description:
Construction of a 69-room Microtel Inn & Suites located at Electric City Boulevard in Anderson, South Carolina.

Total Project Costs/Uses:					
Acquisition/Purchase Price					0
Building/Improvements					0
Leasehold Improvements					0
Land					650,000
Construction					2,619,628
Survey, Soil Tests, Landscaping, Etc.					34,000
Architectural & Engineering					25,000
Construction Contingency	Percentage	5%			130,981
Construction Period Interest	Months	9	Interest Rate	9.00%	124,606
Machinery & Equipment					0
F, P & E					542,394
Inventory					0
Working Capital					50,000
Interim SBA 504 Interest	Months	3	Interest Rate	9.00%	28,553
Franchise/Transfer Fee					35,000
Lender's and Owner's Title Policy- 1st Mortgage and Interim 504					6,968
Lender's and Owner's Title Work/Title Policy- SBA 504 Loan					2,798
Survey					4,000
Environmental Report(s)					2,500
Intangible Recording Tax (Permanent Third Party Loan & Interim 504 Loan)					6,345
Intangible Recording Tax (SBA 504 Loan)					3,897
Appraisal					3,500
Miscellaneous Closing Costs					500
Legal- Third Party Lender Attorney					2,500
Legal- 504 Closing Attorney					2,500
Interim Loan Points	Percentage	1.31%			44,330
Permanent Loan Points	Percentage	0.00%			0
Total					4,320,000 100.00%

Ineligible 504 Project Costs:					
Inventory					0
Working Capital					50,000
Legal					2,500
Franchise/Transfer Fee					35,000
Permanent Loan Points					0
Total					87,500

Total SBA 504 Project Costs/Uses:					
Acquisition/Purchase Price					0
Building/Improvements					0
Leasehold Improvements					0
Land					650,000
Construction					2,619,628
Survey, Soil Tests, Landscaping, Etc.					34,000
Architectural & Engineering					25,000
Construction Contingency					130,981
Construction Period Interest					124,606
Machinery & Equipment					0
F, P & E					542,394
Interim SBA 504 Interest					28,553
Lender's and Owner's Title Policy- 1st Mortgage and Interim 504					6,968
Lender's and Owner's Title Work/Title Policy- SBA 504 Loan					2,798
Survey					4,000
Environmental Report(s)					2,500
Intangible Recording Tax (Permanent Third Party Loan & Interim 504 Loan)					6,345
Intangible Recording Tax (SBA 504 Loan)					3,897
Appraisal					3,500
Miscellaneous Closing Costs					500
Interim Loan Points					44,330
Total					4,310,000

SBA 504 Project Sources:					
First Mortgage					2,115,000 50.00%
SBA 504 Net Debt Service Proceeds*					1,269,000 30.00%
Other Financing- Seller Note					0 0.00%
Equity					846,000 20.00%
Total					4,230,000

Total Equity Requirements:					
Eligible SBA 504 Project Costs					846,000
Ineligible SBA 504 Project Costs					87,500
Total					933,500 21.61%

* Net SBA 504 debt service proceeds. The actual SBA 504 debt service amount will be higher, reflecting the inclusion of SBA 504 debt service fees, which are financed as part of the gross SBA 504 debt service. Please refer to Exhibit B for more information.



GCDC
Georgia Community Development Corporation



TCDC
Tennessee Community Development Corporation

950 EAST PACES FERRY ROAD
 SUITE 3150- ATLANTA PLAZA
 ATLANTA, GEORGIA 30326

P: 404.240.1733 F: 404.240.1725 E: loans@gcdc.com W: www.gcdc.com

AFFORDABLE HOSPITALITY GROUP - ANDERSON, LLC

2007 SBA 504 GROSS DEBENTURE

CALCULATION WORKSHEET**EXHIBIT B**

November 3, 2007

A. SBA 504 Net Debenture Amount (from Exhibit A)	\$1,269,000.00
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B. Administrative Costs	
1 Funding Fee (A x 0.0025)	\$ 3,172.50
2 CDC Processing Fee (A x 0.015)	\$ 19,035.00
3 Closing Costs	\$ 2,500.00
4 Subtotal (B.1 through B.3)	\$ 24,707.50
5 Underwriter Fee Calculation*	
a. Sum of A and B.5	\$ 1,293,707.50
b. a. divided by 0.99600	\$ 1,298,903.11
c. 6.b Rounded up to the next thousand	\$ 1,299,000.00
Underwriter Fee Result	\$ 5,196.00
6 Total (B.5 plus B.6)	\$ 29,903.50

C. Total Debenture Amount Calculation	
1. A plus B.7	\$ 1,298,903.50
2. C.1 Rounded up to the next thousand	\$ 1,299,000.00

Total Debenture Amount	\$ 1,299,000.00
------------------------	-----------------

D. Balance to Borrower (C minus (A plus B.7))	\$ 96.50
---	----------

The fees associated with the SBA 504 loan are added to the loan amount so that the Borrower can amortize their cost over the loan term. The Borrower will sign a note for the gross debenture amount shown above in section C.

- 1/4 of 1% of the net debenture is a Funding Fee
- 1.5% of the net debenture amount goes to GCDC as its processing fee
- Underwriter's fee calculated as follows: Sum of A and B.4 divided by 0.99600; round this number up to the highest thousand; multiply this number by 0.00400.
- \$2,500 towards the closing attorney fee is included. E.g. if the closing attorney charges \$5,000, the borrower pays \$2,500 out of pocket and the remaining \$2,500 is funded by the SBA loan.

In addition, when the loan closes, your monthly payment will include annual servicing fees based on the declining balance of the SBA 504 loan: 1% to CDC; 1/8% to SBA; 1/10% to the central servicing agent.



GCDC
Georgia Certified Development Corporation
Your SBA 504 Lending Source



TCDC
Tennessee Certified Development Corporation
Your SBA 504 Lending Source

950 EAST PACES FERRY ROAD
SUITE 3250- ATLANTA PLAZA
ATLANTA, GEORGIA 30326

P: 404.240.1733 F: 404.240.1725 E: loans@gaedc.com W: www.gaedc.com

EXHIBIT B



U.S. Small Business Administration
**AUTHORIZATION FOR DEBENTURE GUARANTEE
(SBA 504 LOAN)**

SBA Loan #	30896660-07
SBA Loan Name	Microtel Inn and Suites
Approval Date	December 6, 2007

CDC:

Appalachian Development Corporation
Post Office Drawer 6668 30 Century Circle
Greenville, SC 29606

U. S. Small Business Administration (SBA):

South Carolina District Office
1835 Assembly Street, Room 1425
Columbia, SC 29201

SBA will guarantee, under the following terms and conditions, a 20 year Debenture ("Debenture") in the amount of \$1,300,000.00 to be issued by CDC and used to fund a 504 Loan ("the Loan") to assist:

Borrower:

1. Affordable Hospitality Group-Anderson, LLC
dba
Microtel Inn and Suites
3904 North Druid Hills Road-#221
Decatur, GA 30033

A. PROJECT TO BE FINANCED

1. Project Property ("Project Property")

Debenture Proceeds will be used as part of the financing for:

- a. the purchase and improvement of real estate, described as Microtel Inn and Suites, located at Lot 4 Electric City Blvd., Anderson, SC.
- b. the purchase and installation of equipment; fixtures, located at Lot 4 Electric City Blvd., Anderson, SC.

SBA Loan Number: 30896660-07
SBA Loan Name: Microtel Inn and Suites

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2. **Project Costs ("Project Costs") include:**

a. Purchase Land	\$650,000.00
b. Purchase Land & Building	\$0.00
c. Construction/Remodeling	\$2,619,628.00
d. Purchase/Install Equipment	\$0.00
e. Purchase/Install Fixtures	\$542,394.00
f. Professional Fees	\$65,000.00
g. Other Expenses (construction contingencies, interim interest)	\$352,978.00
h. TOTAL Project Cost	\$4,230,000.00

B. PROJECT FINANCING

1. **Debenture Proceeds:** Debenture Proceeds will be used to pay Administrative Costs and the final 30.00% of the total Project Cost. Prior to the Debenture sale, the CDC conducts a 504 Loan Closing ("504 Loan Closing"), and forwards the closing documents to SBA. After review and approval, SBA forwards the closing documents for Debenture Sale. At or prior to the 504 Loan Closing, Borrower and CDC must sign a Servicing Agent Agreement certifying as to the actual use of the Debenture Proceeds and authorizing a Central Servicing Agent ("CSA") to handle all disbursements and payments under the Debenture.

a. SBA/CDC Share: 30.00% of total Project Cost ("Net Debenture Proceeds")	\$1,269,000.00
b. Administrative Costs ("Administrative Costs")	
(1) SBA Guarantee Fee (a. x 0.000)	\$ 0.00
(2) Funding Fee (a. x 0.0025)	\$3,172.50
(3) CDC Processing Fee (a. x 0.015)	\$19,035.00
(4) Closing Costs	
(i) CDC Closing Fee (not to exceed \$2,500)	\$2,500.00
(ii) Other Out of Pocket Closing Costs (excluding legal fees)	\$500.00 \$3,000.00
(5) Subtotal (b.1 through b.4)	\$25,207.50
(6) Underwriters Fee*	\$5,200.00
(7) Total (b.5 plus b.6)	\$30,407.50
c. Total Debenture Amount ("Gross Debenture Proceeds") (a. Plus b.7, rounded up to next thousand)	\$1,300,000.00
d. Balance to Borrower (c. minus (a. plus b.7))	\$ 592.50

* Underwriters fee calculated as follows: For 20 year Debentures, the sum of a. and b.5 divided by 0.99600; round this number up to the next highest thousand; multiply this number by 0.00400. For 10 year Debentures, the sum of a. and b.5 divided by 0.99625; round this number up to the next highest thousand; multiply this number by 0.00375.

e. **Disbursement:** CDC must issue a Debenture and the Debenture Proceeds must be disbursed no later than 12 months from the approval date of this Authorization, unless CDC or SBA extends the time in writing.

SBA Loan Number: 30896660-07
SBA Loan Name: Microtel Inn and Suites

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2. **Interim Financing (paid off by the Debenture):**

- a. **Interim Lender:** An interim loan in the total principal amount of \$1,269,000.00 will be provided by the following lender(s) ("Interim Lender"):
 - (1) Haven Trust Bank in the principal amount of \$1,269,000.00.
- b. **Application of Net Debenture Proceeds to Interim Loan:** Upon sale of the Debenture, the Net Debenture Proceeds (the portion of Debenture Proceeds that finance Project Cost) will be applied to pay off the balance of the interim loan. If the Interim Lender is also the Third Party Lender, this payment will reduce the total balance owed to Third Party Lender to the amount specified in Paragraph B.3.a. below.
- c. **Required Certifications Before 504 Loan Closing:** Following completion of the Project, CDC must cause Interim Lender to certify the amount of the interim loan disbursed, that the interim loan has been disbursed in reasonable compliance with this Authorization, and that it has no knowledge of any unremedied substantial adverse change in the condition of the Borrower since the date of the loan application to the Interim Lender.

3. **Permanent Third Party Lender Loan:**

- a. Haven Trust Bank ("Third Party Lender") will provide permanent project financing in the amount of \$2,115,000.00 ("Third Party Lender Loan"). This amount is 50.00% of the total project cost.
- b. The Third Party Lender's note and loan documents must not:
 - (1) allow future advances except advances made for the reasonable costs of collection, maintenance, and protection of the Third Party Lender's lien;
 - (2) be cross-collateralized with other financing provided by Third Party Lender;
 - (3) have an early call feature;
 - (4) be payable on demand unless the Third Party Lender's note is in default;
 - (5) have a term less than, or require a balloon payment prior to, ten years.
- c. At or prior to 504 Loan Closing, Third Party Lender must execute a Third Party Lender Agreement that:
 - (1) Confirms that the Third Party Lender Loan has been fully advanced;
 - (2) Confirms that the Third Party Lender note and loan documents do or will comply with paragraph b. above, or waives its right to enforce any provisions in the note and loan documents that do not comply with these SBA requirements;
 - (3) Subordinates any prepayment penalties, late fees, and increased default interest to the CDC/SBA lien. Any advances made for the reasonable costs of collection, maintenance, and protection of the Third Party Lender's lien need not be subordinated;
 - (4) Waives as to the CDC/SBA lien any provisions in its lien instruments prohibiting further encumbrances; and
 - (5) Third Party Lender will provide written notice to CDC and SBA of default within 30 days of any delinquency upon which Third Party Lender intends to take action, and 60 days notice prior to foreclosure.
- d. **Third Party Lender Fee.** SBA must collect a one-time Third Party Lender Participation fee equal to 50 basis points on the Third Party Lender's participation in a project when the Third Party Lender is in a senior credit position to SBA on the project. SBA may accept payment of this fee from the Third Party Lender, the 504 borrower, or the CDC. This payment may be made to SBA by (1) the Third Party Lender sending to the CDC a

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SBA Loan Name: Microtel Inn and Suites

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certified check or guaranteed funds check made payable to the CSA, and CDC forwarding it to the CSA with the 504 Loan Closing documentation, or (2) the CDC may collect the fee and the CSA will deduct the amount of the fee from the amount sent to the CDC after Debenture sale.

4. **Borrower's Contribution ("Borrower's Contribution"):**

- a. At or prior to 504 Loan Closing, Borrower must contribute \$846,000.00 to the Project. This amount is 20.00% of the total project cost.
 - (1) Contribution may be in cash, land or other property acceptable to SBA;
 - (2) Contribution may come from Borrower's own resources, CDC, or another source;
 - (3) If any of the contribution is borrowed and secured by any of the Project Property, the resulting obligation must be expressly subordinate to the liens securing the Promissory Note ("Note") in favor of CDC and may not be repaid at a faster rate than the Note unless prior written approval is obtained from SBA. A copy of any debt instrument evidencing the obligation must be supplied to CDC at or prior to 504 Loan Closing.
- b. **Costs in Excess of Project Cost:** Borrower must pay any costs in excess of the total Project Cost referred to in Paragraph A.2 which Borrower incurs in completing the Project.
- c. **Closing Costs:** At or prior to 504 Loan Closing, Borrower must pay all closing costs, including but not limited to title insurance premiums, recording costs, and premiums for insurance required by this Authorization.

5. **Borrower's Fees ("Borrower's Fees")—Borrower must pay:**

- a. An ongoing guarantee fee equal to 0.021 of one percent per annum of the principal balance of the Note calculated at five-year intervals beginning with the first payment. This guarantee fee will be made until the loan is terminated. It will be included with the payment on the Note made each month to the CSA.
 - b. A servicing fee, as stated on the Servicing Agent Agreement at the time of 504 Loan Closing, calculated on the outstanding principal balance at five-year intervals. The fee will be included in the monthly loan installment paid to the CSA.
 - c. A late fee of 5 percent of the late payment or \$100.00, whichever is greater, for payments received by the CSA after the 15th day of the month.
6. **CDC Fee—**CDC must pay an ongoing guarantee fee equal to one-eighth of one percent per annum of the principal balance of the Note calculated on the balance outstanding at five-year intervals. It will be deducted from the servicing fee collected monthly by the CSA for the CDC. The CDC will retain a minimum servicing fee as required by SBA regulations and policies.

C. **THE NOTE**

At or prior to 504 Loan Closing, the Borrower must execute a Note in favor of CDC. The CDC must assign the Note to SBA. Borrower must make payments by Automated Clearinghouse (ACH) or wire transfer.

The Note and Debenture will include the following terms:

1. **Amount:** \$1,300,000.00
2. **Term:** 20 years

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SBA Loan Name: Microtel Inn and Suites

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3. **Repayment Terms:** At the date the Debenture is sold, the interest rate will be set and the amount of the monthly principal and interest installment for the term of the Note and the semi-annual principal and interest installment for the term of the Debenture will be established.
4. **Prepayment:** If Borrower prepays during the first half of the stated term, there will be a prepayment premium, calculated by applying a declining percentage of the Debenture interest rate to the outstanding principal balance of the Note. A schedule of the dollar amount of the premium will be provided after the sale of the Debenture.

The Borrower may prepay the Note or Lease in full. Partial prepayment is not allowed. Borrower must pay the sum of:

- a. all principal and interest payments, servicing-agent fees, and SBA guarantee fees up to and including the date of the next semi-annual debenture payment date;
- b. all CDC servicing fees that accrue before Borrower prepays;
- c. all late fees incurred before Borrower prepays;
- d. all expenses incurred by CDC for which Borrower is responsible;
- e. the balance owing on the Note as of the next semi-annual debenture payment date; and
- f. any prepayment premium required under the Note and Debenture.

To prepay, Borrower must give the CDC at least 45 days prior written notice. At least 10 days before the prepayment date, Borrower must wire a deposit of \$1,000 to the Servicing Agent. If the Borrower prepays, the Servicing Agent will apply the deposit to the prepayment. If Borrower does not prepay, the deposit is forfeited. The prepayment must take place on the third Thursday of the month. If the third Thursday of the month is not a business day, the payment must be made on the next business day.

D. COLLATERAL CONDITIONS

The Note must be secured by the following collateral. All collateral must be assigned to SBA. CDC must obtain a lien on 100% of the interests in the following collateral and properly perfect all lien positions:

1. **Second Mortgage (including due on sale clause) on land and improvements located at Lot 4 Electric City Blvd., Anderson, SC. This property is commercial.**
 - a. Subject only to prior lien(s) as follows:
 - (1) First: Haven Trust Bank in the amount of \$2,115,000.00
 - b. Any prior lien(s) that is (are) open ended as to future advances must be closed, in writing, according to applicable state law. The revolving line(s) of credit set out above, if any, must be limited in writing to the amount stated.
 - c. CDC must obtain a written agreement from Prior Lienholders to provide CDC with 60 days written notice before commencing foreclosure of prior lien.
 - d. Evidence of title and priority of lien must be based upon:
 - (1) ALTA Loan Policy, insuring CDC and assigns, in the amount of \$1,300,000.00, policy to be without standard survey exception.
 - e. CDC must obtain in recordable form written subordination agreements from any tenants occupying any of the Project real property required as collateral. Appropriate subordination language may be included in the Lease as an alternative.

- f. At the time of Closing, either:
- (1) there must be no contractor's, mechanic's or materialman's lien on the Property, including a lien which might possibly be filed after Closing, which would impair the stated priority of the CDC/SBA lien, and there must be no other circumstances adversely affecting the value of the property; or,
 - (2) no exception for these in the title insurance commitment/policy, or
 - (3) The title insurance company must provide affirmative coverage to CDC and SBA over any such exceptions, affording reasonably adequate protection against material loss arising from such exceptions. In addition, the title insurance company must provide such endorsements as CDC or SBA deems necessary to protect CDC and SBA reasonably against material loss arising from any other exceptions. In states where a survey is customarily provided for title insurance coverage, Borrower must also provide a survey certified to SBA/CDC, or a prior survey acceptable to SBA/CDC and the title insurer and a satisfactory survey affidavit of no change.
2. Second Perfected Security Interest in the following personal property (including any proceeds and products), whether now owned or later acquired, or acquired with loan proceeds, including all replacements and substitutions, wherever located: Equipment; Fixtures;
- a. Subject only to the prior lien of Haven Trust Bank in the amount of \$2,115,000.00 on the following collateral: Equipment; Fixtures;
 - b. Any prior lien that is open ended as to future advances must be closed, in writing, according to applicable state law.
 - c. CDC must obtain a written agreement from all Lessors (including sublessors) agreeing to: (1) Subordinate to CDC Lessor's interest, if any, in this property; (2) Provide CDC written notice of default and reasonable opportunity to cure the default; and (3) Allow CDC the right to take possession and dispose of or remove the collateral.
 - d. CDC must obtain a list of all equipment and fixtures that are collateral for the Loan. For items with a unit value of \$5,000.00 or more, the list must include a description and serial number, if applicable.
 - e. CDC must obtain an appropriate Uniform Commercial Code lien search evidencing all required lien positions. If UCC search is not available, another type of lien search may be substituted.
 - f. At the time of Closing, there must be no circumstances adversely affecting the value of the property. There must be no lien on the Property, including a lien which might possibly be filed after Closing, which impairs the stated priority of the CDC/SBA lien.
3. Guarantee on SBA Form 148, by Jay L. Berlye, resident in Georgia.
4. Guarantee on SBA Form 148, by Diversified Capital Investment Group, LLC, resident in Georgia.

Assignment to SBA. CDC must execute a satisfactory written assignment to SBA of its interest in the Note, lease and all collateral documents executed by the Borrower and guarantors.

The following language must appear in all lien instruments including Mortgages, Deeds of Trust, and Security Agreements:

"The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations:

- a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law.*
- b) CDC or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan.*

Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument."

Georgia Mandatory Provision—The following language must appear in all guarantees (SBA Form 148 or 148L) signed by Georgia residents:

"The undersigned Guarantor hereby waives the right to require the Holder of the obligations here by guaranteed to take action against the debtor as provided for in O.C.G.A. 10-7-24."

E. ADDITIONAL CONDITIONS

1. Insurance Requirements

Prior to 504 Loan Closing, CDC must require Borrower to obtain the following insurance coverage and maintain this coverage for the life of Loan:

- a. Flood Insurance.** If FEMA Form 81-93 reveals that any portion of a building that is collateral for the Loan is located in a special flood hazard area, CDC must require Borrower to obtain flood insurance under the NFIP in amounts equal to the lesser of the insurable value of the property or the maximum limit of coverage available. If equipment, fixtures, or inventory that is collateral for the Loan is located in a building that is collateral for the Loan and located in a special flood hazard area, CDC must also require Borrower to obtain flood insurance under the NFIP on these assets in amounts equal to the lesser of the insurable value of the property or the maximum limit of coverage available. Insurance coverage must contain a MORTGAGEE CLAUSE/LENDER'S LOSS PAYABLE CLAUSE (or substantial equivalent) in favor of CDC and SBA. This clause must provide that any act or neglect of the debtor or owner of the insured property will not invalidate the interest of CDC and SBA. (Borrower will be ineligible for any future SBA disaster assistance or business loan assistance if Borrower does not maintain any required flood insurance for the entire term of the Loan.)
- b. Real Estate Hazard Insurance** coverage on all business real estate that is collateral for the Loan in the amount of the full replacement cost. If full replacement cost insurance is not available, coverage should be for maximum insurable value. Insurance coverage must contain a MORTGAGEE CLAUSE (or substantial equivalent) in favor of CDC and SBA. This clause must provide that any act or neglect of the mortgagor or owner of the insured

property will not invalidate the interest of CDC and SBA. The policy or endorsements must provide for at least 10 days prior written notice to CDC of policy cancellation.

- c. **Personal Property Hazard Insurance** coverage on all equipment, fixtures or inventory that is collateral for the Loan, in the amount of full replacement costs. If full replacement cost insurance is not available, coverage should be for maximum insurable value. Insurance coverage must contain a **LENDER'S LOSS PAYABLE CLAUSE** in favor of CDC and SBA. This clause must provide that any act or neglect of the debtor or owner of the insured property will not invalidate the interest of CDC and SBA. The policy or endorsements must provide for at least 10 days prior written notice to CDC of policy cancellation.
- d. **Life Insurance**, satisfactory to CDC:
 - (1) on the life of Jay L. Berlye in the amount of \$1,300,000.00.CDC must obtain a collateral assignment of each policy with CDC and SBA as assignees. CDC must also obtain acknowledgment of the assignment by the Home Office of the Insurer.
- e. **Liability Insurance** in an amount and with an insurance company satisfactory to CDC.
- f. **Workers' Compensation Insurance** in an amount meeting state law requirements and with an insurance company satisfactory to CDC.

2. **Environmental Requirements**

- a. CDC must not close the Loan until it has:
 - (1) completed the review for potential environmental contamination required in SOP 50 10(4) ("Environmental Investigation") on each business real property site that is:
 - (a) acquired or improved with proceeds from the Loan, or
 - (b) taken as collateral if the site represents over 50% of the value of all collateral securing the Loan; and
 - (2) sufficiently minimized the risk from any adverse environmental findings discovered in the Environmental Investigation, or otherwise, as required by SOP 50 10(4), Subpart A, Chapter 5, Paragraph 7 (Environmental Conditions).
- b. Immediately after CDC review, the CDC must submit the results of the Environmental Investigation to the SBA office listed above for SBA approval prior to 504 Loan Closing. If CDC or SBA determines from the Environmental Investigation that there is potential environmental contamination, CDC may not forward the Debenture until SBA is satisfied that the risk has been sufficiently minimized. Adverse environmental findings may lead to cancellation of this Authorization.
- c. CDC should consult with the local SBA office where the real property collateral is located to ascertain any state or local environmental requirements.

3. Borrower, Guarantor and Operating Company Documents

- a. Prior to 504 Loan Closing, CDC must obtain from Borrower, Guarantor and Operating Company a current copy of each of the following as appropriate:
- (1) **Corporate Documents**—Articles or Certificate of Incorporation (with amendments), any By-laws, Certificate of Good Standing (or equivalent), Corporate Borrowing Resolution, and, if a foreign corporation, current authority to do business within this state.
 - (2) **Limited Liability Company (LLC) Documents**—Articles of Organization (with amendments), Fact Statement or Certificate of Existence, Operating Agreement, Borrowing Resolution, and evidence of registration with the appropriate authority.
 - (3) **General Partnership Documents**—Partnership Agreement, Certificate as to Partners, and Certificate of Partnership or Good Standing (or equivalent), as applicable.
 - (4) **Limited Partnership Documents**—Partnership Agreement, Certificate as to Partners, and Certificate of Partnership or Good Standing (or equivalent), as applicable, Certificate of Limited Partnership, and evidence of registration with the appropriate authority.
 - (5) **Limited Liability Partnership (LLP) Documents**—Partnership Agreement, Certificate as to Partners, Certificate of Partnership or Good Standing (or equivalent) as applicable, and evidence of registration with the appropriate authority.
 - (6) **Trustee Certification**—A Certificate from the trustee warranting that:
 - (a) The trust will not be revoked or substantially amended for the term of the Loan without the consent of SBA;
 - (b) The trustee has authority to act;
 - (c) The trust has the authority to borrow funds, guarantee loans, and pledge trust assets;
 - (d) If the trust is an Eligible Passive Company, the trustee has authority to lease the property to the Operating Company;
 - (e) There is nothing in the trust agreement that would prevent CDC from realizing on any security interest in trust assets;
 - (f) The trust agreement has specific language confirming the above; and
 - (g) The trustee has provided and will continue to provide SBA with a true and complete list of all trustors and donors.
 - (7) **Trade Name**—Documentation that Borrower has complied with state requirements for registration of Borrower's trade name (or fictitious name), if one is used.
- b. Prior to 504 Loan Closing, CDC must obtain from Borrower and Operating Company:
- (1) **Ownership**—Evidence that ownership and management have not changed without CDC's approval since the application was submitted.

4. Operating Information

Prior to 504 Loan Closing, CDC must obtain:

- a. **Verification of Financial Information**—CDC must submit IRS Form 4506-T (SBA version) to the Internal Revenue Service to obtain federal income tax information on Borrower, or the Operating Company if Borrower is an EPC, for either the last 2 or 3 years (unless Borrower or Operating Company is a start-up business) depending upon the number of years and number of annual financial statements used to substantiate size eligibility. If the business has been operating for less than 3 years, CDC must obtain the information for all years in operation.

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SBA Loan Name: Microtel Inn and Suites

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This requirement does not include tax information for the most recent fiscal year if the fiscal year-end is within 6 months of the date SBA received the application. CDC must compare the tax data received from the IRS with the financial data or tax returns submitted with the Loan application, and relied upon in approving the Loan. Borrower must resolve any significant differences to the satisfaction of CDC and SBA. Failure to resolve differences may result in cancellation of the Loan.

If the Loan involves purchase of a business or change of ownership, CDC must verify financial information provided by the seller of the business in the same manner as above.

If CDC does not receive a response from the IRS within 10 business days of submitting the IRS Form 4506-T, then CDC may close the Loan prior to completing this verification, provided that CDC has submitted IRS Form 4506-T to the IRS no later than 10 business days from the date of this Authorization. At the time the information is received, CDC must still perform the verification and resolve any significant differences discovered, even if the loan is fully disbursed.

- b. **Authority to Conduct Business**—Evidence that the Borrower has an Employer Identification Number and any authorization necessary to legally operate the business.
- c. **Flood Hazard Determination**—A completed Standard Flood Hazard Determination (FEMA Form 81-93).
- d. **Agreement of Franchisor:**
 - (1) To give CDC 30 days notice of intent to terminate the Franchise Agreement.

5. **Appraisal**

Prior to 504 Loan Closing, and in accordance with SOP 50-10(4), CDC must obtain and submit to SBA:

- a. **Real Estate Appraisal** on the Project real property, including fixtures and equipment, located at Lot 4 Electric City Blvd., Anderson, SC. If the appraised fair market value is less than \$4,230,000.00, Borrower must provide additional investment, additional collateral, or reduce the size of the Project as appropriate.

6. Construction Provisions

- a. **Building Standards:** In the construction of a new building or an addition to an existing building, the construction must conform with the "National Earthquake Hazards Reduction Program Recommended Provisions for the Development of Seismic Regulations for New Buildings" (NEHRP), or a building code that SBA has identified as having substantially equivalent provisions. At or prior to 504 Loan Closing, CDC must obtain from Borrower evidence of compliance with these requirements. Examples of evidence include a certificate issued by a licensed building architect, construction engineer or similar professional, or a letter from a state or local government agency stating that an occupancy permit is required and that the local building codes upon which the permit is based include the Seismic standards.
- b. **Required Documentation—**At or prior to 504 Loan Closing, if any proceeds will be used to repay interim construction financing, CDC must obtain a copy of the Occupancy Certificate, final inspection report, or other evidence that the contractor has substantially completed construction and the property complies with all zoning and necessary governmental permit and licensing requirements. CDC must certify that construction has been completed in accordance with the final plans and specifications. CDC may rely upon a certification by the Interim Lender.

7. Certifications and Agreements

- a. At or prior to 504 Loan Closing, CDC must require Borrower to certify that:
 - (1) **No Adverse Change—**Since the date of application there has been no unremedied substantial adverse change in the financial condition of Borrower and Operating Company or their ability to repay the Project financing, including the Note. Borrower must also supply to CDC accurate financial statements, current within 120 days of 504 Loan Closing.
 - (2) **Child Support—**No principal who owns at least 50% of the ownership or voting interest of the company is delinquent more than 60 days under the terms of any (a) administrative order, (b) court order, or (c) repayment agreement requiring payment of child support.
 - (3) **Current Taxes—**Borrower is current on all federal, state, and local taxes, including but not limited to income taxes, payroll taxes, real estate taxes, and sales taxes.
 - (4) **Environmental—**For any real estate pledged as collateral for the Loan or where the Borrower is conducting business operations (collectively "the Property"):
 - (a) At the time Borrower submitted the Loan application, Borrower was in compliance with all local, state, and federal environmental laws and regulations pertaining to reporting or clean-up of any hazardous substance, hazardous waste, petroleum product, or any other pollutant regulated by state or federal law as hazardous to the environment ("Contaminant"), and regarding any permits needed for the creation, storage, transportation or disposal of any Contaminant;
 - (b) Borrower will continue to comply with these laws and regulations;
 - (c) Borrower, and all of its principals, has no knowledge of the actual or potential existence of any Contaminant that exists on, at, or under the Property, including groundwater, other than what was disclosed in connection with the Environmental Investigation of the Property;
 - (d) Until full repayment of the Loan, Borrower will promptly notify Lender and SBA if it knows or suspects that there has been, or may have been, a release of a Contaminant in, at, or under the Property, including groundwater, or if Borrower

- or such Property is subject to any investigation or enforcement action by any federal, state, or local environmental agency ("Agency") pertaining to any Contaminant on, at, or under such Property, including groundwater;
- (e) As to any Property owned by Borrower, Borrower indemnifies, and agrees to defend and hold harmless, Lender and SBA, and any assigns or successors in interest which take title to the Property, from and against all liabilities, damages, fees, penalties or losses arising out of any demand, claim or suit by any Agency or any other party relating to any Contaminant found on, at, or under the Property, including groundwater, regardless of whether such Contaminant resulted from Borrower's operations. (Lender or SBA may require Borrower to execute a separate indemnification agreement).
- b. At or prior to 504 Loan Closing, CDC must require Borrower to certify that it will:
- (1) **Reimbursable Expenses**—Reimburse CDC for expenses incurred in the making and administration of the Loan.
 - (2) **Books, Records, and Reports**—
 - (a) Keep proper books of account in a manner satisfactory to CDC;
 - (b) Furnish year-end statements to CDC within 120 days of fiscal year end;
 - (c) Furnish additional financial statements or reports whenever CDC requests them;
 - (d) Allow CDC or SBA, at Borrower's expense, to:
 - [1] Inspect and audit books, records and papers relating to Borrower's financial or business condition; and
 - [2] Inspect and appraise any of Borrower's assets; and
 - [3] Allow all government authorities to furnish reports of examinations, or any records pertaining to Borrower, upon request by CDC or SBA.
 - (3) **Equal Opportunity**—Post SBA Form 722, Equal Opportunity Poster, where it is clearly visible to employees, applicants for employment and the general public.
 - (4) **American-made Products**—To the extent practicable, purchase only American-made equipment and products with the proceeds of the Loan.
 - (5) **Taxes**—Pay all federal, state, and local taxes, including income, payroll, real estate and sales taxes of the business when they come due.
 - (6) **Occupancy**—(a) Immediately occupy at least 60% of the rentable property; (b) Continue to occupy at least 60% of the rentable property for the term of the Loan; (c) Lease long term no more than 20% of the rentable property to one or more tenants; (d) Plan to occupy within three years some of the remaining rentable property not immediately occupied or leased long term; (e) Plan to occupy within ten years all of the rentable property not leased long term.
- c. Prior to 504 Loan Closing, CDC must require Borrower to certify that it will not, without prior written consent of CDC and SBA:
- (1) **Distributions**—Make any distribution of company assets that will adversely affect the financial condition of Borrower.
 - (2) **Ownership Changes**—Change the ownership structure or interests in the business during the term of the Note, provided that, commencing six months after the Debenture sale, Borrower may have one or more changes in ownership without approval of SBA so long as the cumulative change over the term of the Note is less than five percent (5%).
 - (3) **Transfer of Assets**—Sell, lease, pledge, encumber (except by purchase money liens on property acquired after the date of the Note), or otherwise dispose of any of Borrower's property or assets, except in the ordinary course of business.

- (4) **Conflict**—Or any of its affiliates acquire, directly or indirectly, in excess of a 10% ownership or interest in CDC during the term of the Debenture. If this type of acquisition occurs the Debenture will immediately become due and payable in full.

F. DEBENTURE SALE CONDITIONS

1. SBA will not authorize the sale of the Debenture until SBA is satisfied that:
 - a. there has been no unremedied adverse change in the financial condition, organization, management, operations, or assets of Borrower ;
 - b. all the terms and conditions of this Authorization have been met, and;
 - c. Borrower and the CDC have complied with their responsibilities as listed below.
2. IT IS BORROWER'S RESPONSIBILITY TO:
 - a. Comply with other conditions, outside the Authorization, that are reasonably imposed by CDC.
 - b. Cooperate fully with CDC and SBA in closing the Loan and obtaining necessary certifications and documents.
 - c. Comply with the closing instructions provided by CDC and SBA.
 - d. Execute all documents required by CDC and SBA. All documents required to be produced by the Borrower must be satisfactory to SBA in form and substance.
 - e. Submit all required documents to CDC counsel sufficiently in advance of 504 Loan Closing (as directed by CDC counsel).
 - f. Certify that all elements of Project Costs have been paid in full and how they were paid.
 - g. Certify that any bankruptcy or insolvency proceeding involving, or pending lawsuit against, Borrower, Operating Company or any of their principals has been disclosed in writing to CDC.
3. IT IS CDC'S RESPONSIBILITY TO:
 - a. Close the Loan in accordance with the terms and conditions of this Authorization.
 - b. Obtain valid and enforceable Loan documents and all required lien positions. This includes obtaining the signatures or written consent of any obligor's spouse if such consent or signature is necessary to bind the marital community or create a valid lien on marital property.
 - c. Obtain all necessary certifications.
 - d. Obtain a legal opinion from CDC counsel or Borrower's counsel if there is one, acceptable to CDC and SBA, verifying:
 - (1) that all Borrower or guarantor entities (other than natural persons) are properly organized, in good standing, validly existing, and have the authority to borrow or guarantee;
 - (2) that the documents executed by the Borrower and guarantors have been authorized, executed, and delivered by an authorized person, and are valid and binding obligations, enforceable in accordance with their respective terms; and
 - (3) opinions as to such other matters as CDC and SBA may require.

SBA Loan Number: 30896660-07
SBA Loan Name: Microtel Inn and Suites

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(504 Wizard 2008)

CONFIDENTIAL

LNv 001950

- e. Certify to SBA that there has been no substantial unremedied adverse change in the Borrower's financial condition, organization, operation, or assets, as set forth on the CDC Certification (SBA Form 2101).
- f. Certify that all elements of Project Costs have been paid in full and that the Interim Lender, Third Party Lender, Borrower, and CDC have each contributed to the Project in the amount and manner authorized by SBA.
- g. Properly complete all closing documents using SBA Required Forms. CDC may use its own forms except as otherwise instructed in this Authorization. CDC must use the following forms for the Loan:

Opinion of CDC Counsel (Appendix D to the National 504 Authorization Boilerplate)
 SBA Form 2101, CDC Certification
 SBA Form 1505, SBA Note
 SBA Form 1504, Debenture
 SBA Form 159 (504), Compensation Agreement, for each representative
 SBA Form 1528, CDC Board Resolution
 SBA Form 1506, Servicing Agent Agreement
 SBA Form 722, Equal Opportunity Poster
 IRS Form W-9

CDC may use computer-generated versions of mandatory SBA Forms, as long as these versions are exact reproductions.

- h. Submit these documents as well as other required documents and copies, such as a Closing Checklist and Collateral Listing, to SBA for review and Debenture sale by the deadlines established by SBA.
- 4. **Compensation Agreement.** At Closing, CDC and Borrower must provide an SBA Form 159 (504) from each agent, as described in the form, that assisted the Borrower to obtain the Loan, indicating the amount of each fee.
- 5. **Completion of Debenture and Note Terms.** Borrower and CDC authorize CDC, SBA and/or CSA to date and otherwise complete any terms of the Debenture, Note, or Loan Documents which were incomplete at the time of their execution as soon as such terms become known to them.

ADMINISTRATOR
SMALL BUSINESS ADMINISTRATION



December 6, 2007

By: Authorized SBA Representative

Date

SBA Loan Number: 30896660-07
SBA Loan Name: Microtel Inn and Suites

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(504 Wizard 2008)

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LNK 001952

EXHIBIT C

Tim Collins

From: Hill, Samuel C. [Sahill@FDIC.gov]
 Sent: Tuesday, March 03, 2009 10:21 AM
 To: Tim Collins
 Subject: FW: CASE# 2500077130 - FACTS Case Update Notification

From: NADREWS@fdic.gov [mailto:NADREWS@fdic.gov]
 Sent: Tuesday, March 03, 2009 9:53 AM
 To: Hill, Samuel C.
 Subject: CASE# 2500077130 - FACTS Case Update Notification

This is a system generated 'Case Update Notification' from FACTS.

The subject case has been updated and the changes may impact the preparation of your action/response.

Case #: 2500077130 Affordable Hospitality Group-Anderson, LLC dba Miratrel Inn & Suites				
Subject: CASE# 2500077130 - FACTS Case Update Notification				
Proposals:	RECOMMENDATION: That authority be granted to:			
	1. Extend the maturity date three months from 03/01/09 to 06/01/09 to allow construction to finish and the SBA 504 Debenture to fund. B-1(b)			
	2. Approve increase in construction loan by \$229,897 to \$3,641,679. B-6			
	3. Approve construction draws of \$125,646 and \$391,033. B-3(b)			
	4. Approve payment of invoices for furniture, fixtures, equipment and soft costs totaling \$43,176. B-3(b)			
	5. Approve future construction draws of \$1,355,160 (after recommended increase listed in item 2 and recommended payment of construction draws and invoices listed in items 3 and 4 above). B-3(b)			
Assignments:	Assignee(s)	Unit	Assigned Date	Completed Action Date
	Hartwell, William	Asset Management	02/25/2009	
	Jackson, Diane	Asset Management	03/03/2009	
Comments:	02/25/2009 10:28:26 AM Newsom, Kandi Case was Concurred upon by the PCAM on February 19, 2009 (Log #1136) 03/03/2009 09:52:53 AM Andrews, Nedra C Case was presented in CRC-1 Committee today Tuesday, March 3, 2009. The chairperson was Dianne Jackson and the voting members were James Hammett and Lorraine Padgett. The case was unanimously approved subject to the amendment from Susan Battle concerning the \$100,000 CD.			

3/3/2009

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LNV 002212

Date: February 18, 2009

LOG#

1136

RAC CASE #

1002702091136

FDIC CASE #

2500077130

MEMORANDUM TO: Credit Review Committee 1 - CM-1

FROM: Susan F. Battle
HTB-FDIC Contractor
RSM McGladrey

SUBJECT: DRR, Dallas Field Operations Branch
10027, Haven Trust Bank
In Receivership - 12/12/2008
Asset Number: 700031487 - BV \$1,786,664
Asset Name: Affordable Hospitality Group-Anderson, LLC dba
Microtel Inn & Suites

RECOMMENDATION: That authority be granted to:

1. Extend the maturity date three months from 03/01/09 to 06/01/09 to allow construction to finish and the SEA 504 Debenture to fund. B-1(ii)
2. Approve increase in construction loan by \$229,897 to \$3,641,679. B-6
3. Approve construction draws of \$125,646 and \$331,033. B-3(b)
4. Approve payment of invoices for furniture, fixtures, equipment and soft costs totaling \$43,176. B-3(b)
5. Approve future construction draws of \$1,355,160 (after recommended increase listed in item 2 and recommended payment of construction draws and invoices listed in items 3 and 4 above). B-3(b)
6. Approve retention of the \$100,000 Certificate of Deposit securing the construction loan to remain as additional collateral for the permanent loan.

CONCUR:

Susan F. Battle 3/3/09
Susan F. Battle Date
HTB-FDIC Contractor
RSM McGladrey

Samuel C. Hill 3/3/09
Samuel C. Hill Date
Post Closing Asset Manager

APPROVED UNDER DELEGATED AUTHORITY: B-1(ii), B-6 and B-3(b)

Johannie Wells
CM-1
Credit Review Committee 1

CONFIDENTIAL

LVN 002213

EXHIBIT D



Advanced Search

Each depositor insured to at least \$250,000 per insured bank

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FDIC Closed Loan Sales - Search Results

Data Last Updated 12/31/2011

Number of matches: 1 Page 1 of 1

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FDIC: Closed Loan Sales - Search Results

	Sale ID	Site Name	Date Sold	Loan Type	Quality	No. of Loans	Book Value	Sales Price	Winning Bidder	Address
1	HTB-1-09-005	Dallas FOB	04/30/2009	RE\Commercial	Perform/Nonperf	61	\$10,197,848	\$3,263,311	LNV Corporation	6000 Legacy Drive Plano, TX 75024

Number of matches: 1 Page 1 of 1

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Last Updated 12/31/2011

1/13/2009-12/31/2011

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EXHIBIT E

Senate Bill 448

By: Senators Balfour of the 9th, Chance of the 16th, Hill of the 4th, Mullis of the 53rd,
Hooks of the 14th and others

AS PASSED SENATE

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 2 of Title 18 of the Official Code of Georgia Annotated, relating to debtor
2 and creditor relations; so as to enact the "Small Business Borrower Protection Act"; to
3 provide for definitions; to provide for recovery limits for debt obligations by successor
4 creditors; to provide for applicability; to require successor creditors to submit the amount
5 paid for a debt during recovery proceedings; to provide for an exemption; to provide for
6 related matters; to repeal conflicting laws; and for other purposes.

7 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

8 SECTION 1.

9 Chapter 2 of Title 18 of the Official Code of Georgia Annotated, relating to debtor and
10 creditor relations, is amended by adding a new article to read as follows:

11 "ARTICLE 5

12 18-2-90.

13 This article shall be known and may be cited as the 'Small Business Borrower Protection
14 Act.'

15 18-2-91.

16 As used in this article, the term:

17 (1) 'Affiliate' means a majority owned subsidiary or entity having common majority
18 ownership.

19 (2) 'Guarantor' means any person who agrees to pay, in whole or in part, the original debt
20 obligation of another person.

21 (3) 'Guaranty' means any guaranty, indemnification, agreement to make whole, or any
22 other arrangement under which a person shall agree to pay, in whole or in part, the
23 original debt obligation of another person.

24 (4) 'Original creditor' means any person who first extends credit to a debtor or person
25 obligated on a debt obligation.

26 (5) 'Person' means any natural person, corporation, limited liability company, or any
27 form of partnership, or any combination of any of the foregoing, and the heirs, executors,
28 administrators, successors, and assigns of such person.

29 (6) 'Successor creditor' means any person who did not enter into the original debt
30 obligation with the debtor and has by assignment, sale, transfer, or other means acquired
31 the original debt obligation.

32 18-2-92.

33 Any successor creditor shall be limited to recovery against any guarantor on any debt
34 obligation to the lesser of:

35 (1) The actual amount paid for the debt obligation, plus interest at the interest rate stated
36 on the face of the debt obligation from the date of purchase, transfer, or assignment of the
37 obligation. The interest rate allowed under this article shall be a nondefault rate; or

38 (2) The maximum amount permitted to be collected under the guaranty.

39 18-2-93.

40 This article shall apply to the sale, assignment, or transfer of debt obligations and the sale,
41 assignment, or transfer of judgments rendered on debt obligations regardless of when such
42 judgments were entered.

43 18-2-94.

44 In any action to collect a debt obligation by a successor creditor, the successor creditor
45 shall be required to prove the actual amount paid for the debt obligation.

46 18-2-95.

47 This article shall not apply to institutions with federally insured deposits or their affiliates."

48 **SECTION 2.**

49 All laws and parts of laws in conflict with this Act are repealed.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
LNV Corporation,	)	Civil Action No. 2011-CP-04-2728
	)	
Plaintiff,	)	
vs.	)	
	)	
Affordable Hospitality Group-Anderson,	)	<u>REPLY BRIEF IN SUPPORT OF</u>
LLC; Diversified Capital Investment	)	<u>MOTION TO DISMISS</u>
Group, LLC; Jay Berlye; Anderson County,	)	
South Carolina; and the State of South	)	
Carolina,	)	
	)	
Defendants.	)	
	)	

The Plaintiff, LNV Corporation (hereinafter, "LNV"), respectfully submits this Reply Brief in Support of Its Motion to Dismiss, responding to the Defendants' Supplemental Memorandum in Opposition to the Motion to Dismiss (hereinafter, "Defendants' Supp. Brief").

INTRODUCTION

Contrary to its prior agreements with the Federal Deposit Insurance Corporation ("FDIC") and LNV, Defendants¹ ask this court to ignore their previously executed release agreements that were attached to, and incorporated into, their Answer and Counterclaim.² To induce the FDIC and LNV to advance additional sums, extend the term of the construction loan, and refrain from foreclosing on the underlying property, Defendants reaffirmed their obligations and released all defenses and counterclaims to their obligations to pay the indebtedness evidenced by the Note and Mortgage. Yet when

¹ Among the Defendants, Affordable Hospitality Group-Anderson, LLC ("Defendants"), is the borrower; Diversified Capital Investment Group, LLC, and Jay Berlye are guarantors.

² See Answer and Counterclaim, Exhibits B (June 1, 2009 Agreement) and C (November 10, 2009 Agreement).

faced with this action to enforce these obligations, Defendants assert defenses and counterclaims to the debt based on an alleged contract and breach that existed prior to their execution of the releases. LNV's motion to dismiss should be granted because Defendants released these defenses and counterclaims.

However clever it may be, Defendants' fanciful theory of liability simply cannot support a cause of action under South Carolina law, at least pursuant to the Note, Mortgage, Guaranty, and other instruments executed by the parties to this action. It is fanciful to contend that the bank, and not the borrower, bears the contractual risk of default on a construction loan, and that the Note and Mortgage evidencing the debt are not obligations of the borrower but are instead "partial performance."³ Under the Note and Mortgage in this case, the borrower bears the contractual risk of default on the construction loan, and the Note and Mortgage do indeed represent the Defendants' obligations, as Defendants affirmed in various agreements that they now ask the Court to disregard.

In the final analysis, of course, LNV will incur a substantial loss; contrary to Defendant's nonsensical theory of the case, a fully performing SBA financing arrangement (whereby SBA would have guaranteed 40% of the debt) would have been far more beneficial to LNV than the default on the Note and Mortgage. For Defendants to suggest that this default is something that LNV wanted or worked to achieve defies common sense.

³ E.g., Answer and Counterclaim, ¶ 118.

UNDISPUTED FACTS CONTAINED IN DEFENDANTS' ANSWER AND BRIEF⁴

Defendants admit that the Note, Mortgage, Guaranty, and other instruments attached to the Complaint speak for themselves.⁵ As is typical, the Note states that the borrower's failure to make payments when due, or any default, will result in the balance being due and payable immediately, at the option of the holder of the Note.⁶ The Guaranty states that the guarantor "*unconditionally* guarantees the full and prompt payment, observance, and performance" of the obligations of Defendants, and that the guarantor remains obligated even if the bank opts to "extend (including extensions beyond the original term)," or "modify" the underlying obligations, or "stop lending money or extending other credit to Obligor."⁷ Defendants further admit that they failed to pay the Note and Mortgage and Guaranty.⁸

Defendants admit that they executed a "Loan Modification Agreement" on November 10, 2009. The Agreement, which was attached to and incorporated into Defendants' Answer and Counterclaim, provides as follows:

AS A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THIS AGREEMENT, **BORROWER AND GUARANTOR**. . . HEREBY FULLY, FINALLY AND **COMPLETELY RELEASE** AND FOREVER DISCHARGE ORIGINAL LENDER [Haven Trust Bank], THE FEDERAL DEPOSIT INSURANCE CORPORATION. . . LENDER AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS. . . OF AND FROM ANY AND **ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS, DEMANDS, DAMAGES,**

⁴ For the sake of brevity, LNV incorporates its statement of undisputed facts contained in its opening Memorandum of Law in Support of its Motion to Dismiss.

⁵ E.g., Answer and Counterclaim, ¶¶ 12, 14, 16, 18.

⁶ Complaint, Exhibit A, p. 2.

⁷ Complaint, Exhibit B, ¶¶ 1 and 10.

⁸ E.g., Answer and Counterclaim, ¶¶ 34 and 116 (admitting Defendants' failure to make payments under Note and Mortgage as demanded) and 91 (Berlye's refusal to pay guaranty).

EXPENSES. . . DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION OF ANY AND EVERY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR MORTGAGE OR ANY OTHER LOAN DOCUMENT WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER, ET AL. OR ANY THEREOF, ARISING OUT OF, CONNECTED WITH OR RELATING TO ANY AND ALL ACTS, OMISSIONS OR EVENTS OCCURRING PRIOR TO THE EXECUTION OF THIS AGREEMENT.⁹

The Loan Modification Agreement also contained the borrower's reaffirmation of its obligations and the Lender's right to enforce the Note and Mortgage:

Borrower hereby affirms, confirms, ratifies, renews and extends the debts, duties, obligations, liabilities, rights, titles, security interests, liens, powers and privileges created or arising by virtue of the Loan Documents, as amended hereby, until all of the indebtedness and obligations relating to the Loan have been paid or performed in full.¹⁰

The guarantor expressly disclaimed any offsets or claims against the bank in the Loan Modification Agreement:

Guarantor has executed this Agreement to evidence his consent. . . and to acknowledge, reaffirm and restate the continuing effect of the Guaranty and the obligations contained therein. Guarantor hereby represents that it has no offset or claims against Lender arising under, related to or connected with the Loans or any of the Loan Documents or otherwise.¹¹

Throughout the Answer and Counterclaim, Defendants assert the "Plaintiff's prior and contemporaneous breaches of the Basic Contract" as the basis for their defenses and

⁹ Exhibit C to Answer and Counterclaim, Nov. 10, 2009 Release, ¶ 3(emphasis added).

¹⁰ *Id.* ¶ 6.

¹¹ *Id.* ¶ 7.

counterclaims.¹² Defendants describe LNV's alleged obligations and breaches as follows:

- Haven Trust Bank issued a Loan Commitment on November 6, 2007.¹³
- The Loan Commitment allegedly obligated Haven Trust (and its successors) to make a construction loan, followed by a permanent loan and an SBA loan.¹⁴
- "At all times relevant, Plaintiff has been and remains bound by the written commitment of Haven Trust Bank. . . to fund a permanent mortgage and to assist Defendants in obtaining SBA financing."¹⁵
- As of May 2009, Haven Trust Bank would have been required to grant the permanent loan and assist Defendants in obtaining SBA financing pursuant to the Loan Commitment.¹⁶
- On May 1, 2009, the FDIC informed Defendants that LNV had acquired the rights to the loan.¹⁷
- When Plaintiff acquired the Note, it should have known that "it was required to grant the permanent loan and assist Defendants in obtaining the SBA 504 Interim Loan."¹⁸
- Defendants "began immediately to negotiate with Plaintiff for future performance of their respective duties under the Basic Contract."¹⁹
- After entering into a loan modification agreement in June 2009, Plaintiff sent Defendants a draft commitment letter in August 2009.²⁰
- "Prior to August 2009, Plaintiff had never originated a loan of the type contemplated by the Basic Contract nor participated in a loan transaction that involved SBA financing" and "[a]t all times relevant, Plaintiff knew or should have known that it lacked knowledge and experience to assist Defendants in obtaining the SBA 504 Interim Loan."²¹

¹² *E.g.*, Answer and Counterclaim, ¶ 40.

¹³ *Id.* ¶ 214.

¹⁴ *Id.* ¶ ¶ 214-216.

¹⁵ *Id.* ¶ 44.

¹⁶ *Id.* ¶ 214.

¹⁷ *Id.* ¶ 226.

¹⁸ *Id.* ¶ 227.

¹⁹ *Id.* ¶ 229.

²⁰ *Id.* ¶ 230-31.

²¹ *Id.* ¶¶ 232 and 236.

- Plaintiff allegedly never took steps to qualify as a lender under SBA rules, despite Defendants' repeated requests.²²
- "Commencing in June 2009, Defendants proposed various avenues to qualify Plaintiff for SBA purposes, but their efforts produced no action by Plaintiff, and for periods of time Plaintiff did not communicate at all with Defendants, even though Defendants tried repeatedly to learn Plaintiff's intentions and "repeatedly sought compliance by Plaintiff with the Basic Contract, and/or in the alternative repeatedly sought to negotiate a modification of the Basic Contract," but their communications "elicited no meaningful response."²³
- Plaintiff allegedly breached the "Basic Contract" by failing to provide permanent financing and by failing to assist Defendants in obtaining permanent financing.²⁴
- Plaintiff's allegedly fraudulent breach of contract is supposedly evidenced by the August 2009 proposed commitment and by the negotiations leading up to the loan modifications.²⁵
- Plaintiff's alleged violation of the UTPA arises from its purchase of the loan.²⁶

In summary, based on a commitment letter dated November 6, 2007, Defendants assert a breach of a contractual duty that existed *on May 1, 2009*, a breach that occurred despite Defendants' efforts to secure compliance, efforts that began "immediately" upon Plaintiff's acquisition of the loan in May 2009 and continued into June 2009 and beyond, to no avail.

The effect of the release on Defendants' claims, defenses, and counterclaims is apparent from its terms. Defendants released LNV "*from any and all claims, controversies, disputes, liabilities, obligations, demands, damages, expenses, . . . debts, liens, actions and causes of action of any and every nature whatsoever.*" The claims so

²² *Id.* ¶ 238.

²³ *Id.* ¶¶ 239-43.

²⁴ *Id.* ¶ 244.

²⁵ *Id.* ¶ 254-56.

²⁶ *Id.* ¶ 259.

released *included, but were not limited* to, any “claim,” “defense,” “counterclaim” or “set-off” that Defendants “have or may claim to have against” LNV “*arising out of, connected with or relating to any and all acts, omissions or events occurring prior to [November 10, 2009].*” (Emphasis added). The sole question is whether Defendants’ counterclaims—all of which arise from the Haven Trust Bank Loan Commitment Letter—fall within the scope of the broad release that Defendants granted to induce LNV to extend the term of the loan on November 10, 2009.

ARGUMENT AND ANALYSIS

I. Defendants’ Claims Arose Prior to November 10, 2009, and Fall Within the Scope of the Release.

Defendants’ claims for the alleged breach of the Haven Trust Loan Commitment Letter existed before the release executed on November 10, 2009. The alleged contract existed, the alleged breach existed, and Defendants sought in vain to secure Plaintiff’s compliance—all prior to November 10, 2009, according to the allegations of the Answer and Counterclaim. Defendants, contrary to the releases they executed, now argue that as of November 10, 2009, “Defendants had no reason to suspect that LNV intended to withhold performance under the Basic Contract [Haven Trust Loan Commitment Letter].”²⁷ This assertion is contrary to the release and the facts alleged.

As the recitation of allegations from the Answer and Counterclaim above demonstrates, the claims for breach of the Haven Trust Commitment Letter existed prior to November 10, 2009, when Defendants (*for the third time*) released, among other things, “claims,” “demands,” and “causes of action of any nature whatsoever.” Defendants alleged that they *immediately* sought to secure the permanent loan and SBA

²⁷ Defendants’ Supp. Br. p. 15.

financing from LNV upon LNV's acquisition of the loan, and that LNV assumed the obligation embodied in the commitment letter when it acquired the loan. In other words, Defendants immediately sought to "enforce" what they refer to as "the Basic Contract." One of the alleged obstacles, according to Defendants, was that LNV did not qualify as a lender under SBA rules. To surmount this obstacle, "[c]ommencing in June 2009, Defendants proposed various avenues to qualify Plaintiff."²⁸ Defendants "*repeatedly sought compliance by Plaintiff with the Basic Contract*" and—perhaps most interestingly—"in the alternative *repeatedly sought to negotiate a modification of the Basic Contract.*"²⁹ Defendants' allegations paint a clear picture: From the time that LNV acquired the loan in May 2009, Defendants have contended that LNV is obligated to make a permanent loan and assist with SBA financing pursuant to the Haven Trust Commitment Letter, and they have sought to secure LNV's compliance—always unsuccessfully. But when Defendants released all claims, causes of action, and defenses to the debt in the June 2009 and November 2009 Loan Modifications, Defendants never preserved these claims. Instead, Defendants released all claims, demands, and causes of action, and they reaffirmed their respective obligations under the Note and Guaranty.

The facts are so compelling that even Defendants' Supplemental Brief includes admissions (perhaps inadvertently) that establish that the counterclaims existed prior to the release Defendants executed in November 2009. For example:

- "the enforceability of the Loan Commitment Letter was established long before the hotel was completed"³⁰;

²⁸ See, *supra*, pp. 5-6 discussing these allegations in the Defendants' Answer and Counterclaims.

²⁹ *Id.*

³⁰ Defendants' Supp. Br., p. 9.

- “Two federal agencies determined that the Basic Contract was valid and enforceable.”³¹
- “[U]pon acquisition of Defendants’ account, LNV had an obligation to provide SBA with a new commitment letter showing that it was stepping into Haven Trust’s shoes. LNV failed to issue such a letter, and as a consequence, SBA was never presented with a final application to approve or deny. This is a legally cognizable injury.”³²
- “LNV’s failure to do so [send the new commitment letter to SBA] prevented Defendants from receiving SBA financing and the performance to which they were entitled.”³³

The release that Defendants executed (*for the third time*) in November 2009 bars them from litigating claims arising from LNV’s failure to send the commitment letter to SBA—a breach of an alleged duty that occurred upon LNV’s acquisition of the loan. The release bars them from redressing the “legally cognizable injury” allegedly resulting from this failure, because they released all claims and causes of action that existed as of November 10, 2009. What Defendants are arguing for is this: Allow *Party A* with a claim for breach of contract to sit on its rights, enter into a modification agreement with *Party B* that causes *Party B* to forbear its right to seek contractual remedies, execute a broad release of all claims and causes of action in favor of *Party B*, then later sue *Party B* for breach of contract on claims that predated the release. Such a result is untenable.

Further, Defendants’ argument that their claims are somehow saved by the August 2009 proposed commitment letter from LNV defies common sense.³⁴ If anything, this separate commitment letter from LNV demonstrates that by August 2009, if not earlier, Defendants knew that LNV did not intend to abide by the Haven Trust Loan

³¹ *Id.*, p. 11.

³² *Id.*, p. 12.

³³ *Id.*, p. 14.

³⁴ *Id.*, p. 15 (“[I]n August 2009, LNV circulated a draft commitment letter which ostensibly would have satisfied SBA’s loan-making requirements.”).

Commitment Letter (assuming, *arguendo*, that it constituted a contract).³⁵ By August 2009, LNV was drafting its own loan commitment letter. Had the parties been operating under the belief that LNV would abide by the Haven Trust Loan Commitment Letter, there would be no purpose for this new “Draft Loan Commitment Letter from LNV.”³⁶ Furthermore, if this commitment would have satisfied LNV’s obligations under the “Basic Contract,” why didn’t Defendants simply accept, rather than continue to negotiate, ultimately entering into the November 2009 modification and release? Why is it that Defendants, as alleged in paragraph 243, “in the alternative repeatedly sought to negotiate a modification of the Basic Contract”?

Likewise, Defendants’ contention that the Loan Modification Agreements themselves somehow save their claims from dismissal³⁷ defies reality. LNV could have sued to enforce the Note, Mortgage, and Guaranty, but instead, in June 2009 and November 2009, it opted to extend the term of the loan. At that time, for the express purpose of inducing LNV’s agreement to grant the extension, Defendants granted the release of all claims and causes of action, including, but not limited to, defenses and counterclaims arising prior to the time of execution of the agreement. One of the reasons that banks insist on such releases in loan modification agreements is to avoid litigation about the enforceability of the underlying loan obligation. A borrower cannot simultaneously release and retain such claims.

³⁵ See Draft Loan Commitment Letter dated August, 2009, attached hereto as **Exhibit A** and referenced by Defendants in its Supplemental Brief.

³⁶ This was, in fact, required by the United States SBA since LNV (a subsidiary of Beal Bank) was an approved SBA lender and a new permanent loan commitment was required.

³⁷ Defendants’ Supp. Br., p. 15 (arguing that the modifications were indications of good faith performance of the Haven Trust Commitment Letter).

Finally, Defendants' contention that it did not *really* intend to release the claims does not withstand scrutiny under South Carolina law. The terms of the release are judged by their plain language, not by one party's *ex post facto* attempt to explain away that meaning. Ecclesiastes Production Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007) ("[I]f the language [of a release] is perfectly plain and capable of legal construction, it alone determines the document's force and effect. [The parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." (Internal citations omitted)).

In the end, neither party can dispute that by August 2009, if not earlier, both LNV and Defendants understood that LNV did not intend to follow the Haven Trust Commitment Letter and LNV intended to issue its own commitment letter. Defendants sought from May 2009 forward to enforce the Haven Trust Commitment Letter (the so-called "Basic Contract"), to no avail, and any claims that LNV breached the "Basic Contract" arose on or before August 2009, and in any event well before Defendants executed the November 10, 2009.

II. The Entirety of Defendants' Supplemental Brief Contradicts its Prior Agreements.

Defendants ask this court to ignore their prior agreements and the loan modifications wherein the various lenders tried to help Defendants return to solvency and rescue Defendants' failing project.³⁸

³⁸ LNV does not suggest that Defendants' intentionally brought about this project's failure. However, AHG obligated itself to a \$3,641,679 debt during one of the worst economic cycles in modern times, and the guarantor defendants *unconditionally* guaranteed this obligation. LNV does suggest, as admitted by Defendants, that they failed to keep the loan current, pay their taxes, pay franchise fees, and keep the property free of liens and encumbrances.

Lender	Defendants' Representations
Federal Deposit Insurance Corporation (April 20, 2009)	"Borrower and Guarantors hereby ratify and affirm the Loan Documents, waive any defenses thereto and RELEASE AND DISCHARGE Receiver [FDIC]. . . from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action of any nature whatsoever. . ." (Compl., ¶ 22, admitted in Answer and Counterclaim, ¶ 30).
LNV Corporation (June 1, 2009)	"AS A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THIS AGREEMENT, BORROWER AND GUARANTOR. . . HEREBY FULLY, FINALLY AND COMPLETELY RELEASE AND FOREVER DISCHARGE ORIGINAL LENDER [Haven Trust Bank], THE FEDERAL DEPOSIT INSURANCE CORPORATION. . . LENDER AND THEIR RESPECTIVE . . . SUCCESSORS AND ASSIGNS. . . OF AND FROM ANY AND ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS, DEMANDS, DAMAGES, EXPENSES. . . DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION OF ANY AND EVERY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR MORTGAGE OR ANY OTHER LOAN DOCUMENT WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER, ET AL. OR ANY THEREOF, ARISING OUT OF, CONNECTED WITH OR RELATING TO ANY AND ALL ACTS, OMISSIONS OR EVENTS OCCURRING PRIOR TO THE EXECUTION OF THIS AGREEMENT. (Answer and Counterclaim, Ex. B, ¶ 3).
LNV Corporation (November 10, 2009)	"AS A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THIS AGREEMENT, BORROWER AND GUARANTOR. . . HEREBY FULLY, FINALLY AND COMPLETELY RELEASE AND FOREVER DISCHARGE ORIGINAL LENDER [Haven Trust Bank], THE FEDERAL DEPOSIT INSURANCE CORPORATION. . . LENDER AND THEIR RESPECTIVE . . . SUCCESSORS AND ASSIGNS. . . OF AND FROM ANY AND ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS, DEMANDS, DAMAGES, EXPENSES. . . DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION OF ANY AND EVERY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE

	AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR MORTGAGE OR ANY OTHER LOAN DOCUMENT WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER, ET AL. OR ANY THEREOF, ARISING OUT OF, CONNECTED WITH OR RELATING TO ANY AND ALL ACTS, OMISSIONS OR EVENTS OCCURRING PRIOR TO THE EXECUTION OF THIS AGREEMENT. (Answer and Counterclaim, Ex. C, ¶ 3).
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Now, having executed the releases, Defendants ask this court to ignore them and allow Defendants to proceed on a theory that LNV breached contracts arising prior to November 10, 2009.

III. The Haven Trust Loan Commitment Does Not Bind LNV Corporation to Make a Permanent Loan.

While the release of claims is dispositive of Defendants' claims, defenses, and counterclaims arising from the Haven Trust Loan Commitment, additional grounds exist for granting LNV's motion to dismiss. In particular, Defendants ask this Court to ignore the actual language of the Haven Trust Loan Commitment Letter when they refer to the Loan Commitment as the "Basic Contract." Under Defendants' theory of the case, LNV was obligated—pursuant to the Haven Trust Loan Commitment Letter—to provide U.S. Small Business Administration ("SBA") 504 Permanent Financing on this project.³⁹ However, a review of the Haven Trust Loan Commitment Letter reveals otherwise:

Section	Actual Language from Haven Trust Loan Commitment
Preamble	"This commitment is subject to satisfactory completion of credit investigation and analysis, satisfactory documentation and such other terms and conditions as are determined by Bank and SBA."
<i>Sole Reference to</i>	<i>"Proposed</i> permanent loan will be for a period of twenty (20)

³⁹ "[C]ommitted to providing financing for the construction. . . and upon completion, to replace [Defendants'] construction loan with permanent financing. . . ." (Defendants' Supp. Br. p 8).

"Permanent Loan" terms (¶ 4(b))	years from the date of closing payable in two hundred and forty (240) installments of principal and interest." (Emphasis added).
Haven Trust May Not Be Permanent Lender (¶ 25)	"Should the Borrower for any reason not close the loan as approved by SBA with Bank. . . ."
Conditions to Commitment (above signature blocks)	"THIS COMMITMENT IN NO WAY IS TO BE CONSTRUED AS FINAL APPROVAL BY HAVEN TRUST BANK OR ITS ASSIGNS."

Nowhere in this Loan Commitment Letter is there a contractual obligation for Haven Trust (or LNV, in turn) to provide a permanent loan, nor is there an obligation to obtain SBA financing on Defendants' behalf. The first time these obligations are mentioned is in Defendants' filings with this Court, but Defendants cannot point to any language in the supposed "Basic Contract" to sustain their breach of contract claims. Instead, Defendants use words like the following every time they reference the "Basic Contract": (a) "intended to" (p. 3); (b) "it was expressly intended" (p. 6); (c) "[t]he circumstances surrounding the Loan Commitment Letter are sufficient. . . to establish the existence of a contract" (p. 6); (d) "the only reasonable understanding" (p. 8); and (e) "only reasonable inference" (p. 12). Tellingly, *at no point* do Defendants cite any language obligating Haven Trust (or LNV) to provide a "permanent loan" or obtain SBA 504 financing on their behalf.⁴⁰

IV. Defendants Admittedly Cannot Satisfy the SBA Loan Requirements.

Defendants' claims are premised upon LNV's purported breach of the Haven Trust Loan Commitment Letter and LNV's failure to provide permanent, SBA 504

⁴⁰ Nor have Defendants provided to the Court a copy of the Haven Trust Commitment Letter bearing their signatures. For the Commitment Letter to have become effective, it was to be signed. (Answer and Counterclaim, Ex. A, ¶ 25.)

financing for Defendants. However, Defendants admit that AHG cannot meet the conditions of the SBA financing commitment that they presented to the Court.⁴¹

Condition Precedent to SBA Funding	Defendants' Admissions
¶ B(2)(c): “Required Certifications Before 504 Loan Closing: Following completion of the Project, [SBA Administrator] must cause Interim Lender to certify the amount of the interim loan disbursed, that the interim loan has been disbursed in reasonable compliance with this Authorization, and that it has no knowledge of any unremedied substantial adverse change in the condition of the Borrower since the date of the loan application. . . .”	As admitted by Defendants, they defaulted on the payments under the loan (Ans., ¶ 34); failed to pay taxes to the State of South Carolina and Anderson County (Compl., ¶ 52—public records); and allowed liens to attach to the property (<i>Id.</i>).
¶ E(7)(a)(1): “Certifications and Agreements: At or prior to 504 Loan Closing, CDC must require Borrower to certify that. . . No Adverse Change—Since the date of application there has been no unremedied substantial adverse change in the financial condition of Borrower and Operating Company or their ability to repay the Project financing, including the Note. Borrower must also supply to CDC accurate financial statements, current within 120 days of 504 Loan Closing.”	Defendants admit that they did not make the payments under the loan with LNV as required by the loan documents. (Ans., ¶ 34).
¶ E(7)(a)(2): “Certifications and Agreements: At or prior to 504 Loan Closing, CDC must require Borrower to certify that. . . Current Taxes—Borrower is current on all federal, state, and local taxes, including but not limited to income taxes, payroll taxes, real estate taxes, and sales taxes.”	As shown in public filings with Anderson County, South Carolina, Defendants failed to pay taxes to the State of South Carolina and Anderson County (Compl., ¶ 52—public records); and allowed tax liens to attach to the property (<i>Id.</i>).

In this case, Defendants ask the Court to ignore the fact that AHG could not meet the requirements of the SBA Loan Commitment. Instead, Defendants place the burden

⁴¹ See Defendants’ Supp. Br., Ex. B (requirements include appraised value of \$4,230,000; no adverse charge in financial condition of borrower or ability to repay Note; current on all federal, state, and local taxes).

upon LNV to falsely certify facts to the federal government. LNV cannot falsely represent to the United States SBA that AHG met the SBA 504 loan criteria. It was *impossible* for AHG to close its SBA permanent loan. However, in this case, Defendants ask the court to hold LNV responsible for AHG's failure to satisfy the criteria.

V. Defendants' Theory of this Case Cannot Be Maintained.

Defendants ask this Court to throw construction financing "on its head." Defendants' entire theory makes no sense. LNV, like any lender, would prefer to have this loan converted to an SBA 504 Loan. In that case, the SBA would absorb 40% of the losses that will be suffered by LNV in this case. The argument that LNV is secretly conspiring to obtain a defunct hotel, with a value far less than the value of the stream of payments that a performing loan would produce, is nonsensical. Had Defendants been able to qualify for SBA permanent financing, LNV would have done everything possible to close that loan. However, *LNV cannot falsify information to the United States SBA.*

As set forth in the loan documents, SBA financing involves three phases: (1) a construction loan, (2) an interim loan, and (3) a permanent, SBA loan. As set forth in the documents, a party pre-qualifies for an SBA loan and an SBA Loan Commitment is issued. Assuming that all the criteria of the SBA Loan Commitment are met, the party can ultimately convert the loan from its loan with the lender—the construction loan—into a permanent loan backed by the United States SBA (*assuming the borrower can still meet the requirements*).

Because of the requirements set forth in the SBA Commitment Letter, Borrowers appreciate the upfront risk that the project will not qualify for an SBA permanent loan after construction is complete. To qualify for permanent financing, Defendants were

required to: (a) have the property appraise for *at least* \$4,230,000.00,⁴² (b) pay the sum of \$846,000.00 as equity into the project,⁴³ (c) keep the property free of any liens or encumbrances,⁴⁴ (d) maintain insurance,⁴⁵ (e) represent that since the date of application to the SBA, “there has been no . . . substantial adverse change in the financial condition of Borrower,”⁴⁶ and (f) certify that all taxes are paid.⁴⁷

Under Defendants’ convoluted theory, all of the risk that a borrower would be unable to meet these qualifications would be placed on a lender. If, at any time, a borrower wanted a “free pass” out of the loan, he need only default on payments, fail to pay taxes, or fail to maintain insurance. Defendants argue that, in such a case, the lender is faced with full liability and should (*apparently*) convey the property, unencumbered, to the borrowers. This is not the case under the documents in this case, and cannot be the case in the realm of construction and SBA 504 financing.

VI. Defendants’ Unfair Trade Practices Act Claim Must Be Dismissed

Defendants’ Unfair Trade Practices Act claim is premised upon LNV’s purchase of assets from failed banks through the FDIC. Defendants claim that LNV’s attempts to enforce a promissory note according to its terms are “predatory” or “unfair or deceptive.”⁴⁸ Defendants’ arguments are directly contrary to the provisions of the South Carolina Uniform Commercial Code, particularly the concept that a holder of a note is

⁴² SBA Loan Commit. ¶ E(5)(a) (attached to Defendants’ Supp. Br.).

⁴³ *Id.* at ¶ B(4)(a).

⁴⁴ *Id.* at ¶ D(1)(a).

⁴⁵ *Id.* at ¶ E(1)(d).

⁴⁶ *Id.* at ¶ E(7)(a)(1).

⁴⁷ *Id.* at ¶ E(7)(a)(3).

⁴⁸ Defendants’ Supp. Br. p. 20-21.

entitled to enforce the note on its terms. *See* S.C. Code §§ 36-3-203(b) *et seq.* (“Transfer of an instrument. . . vests in the transferee any right of the transferor to enforce the instrument”); S.C. Code 36-3-302(c) (Official Cmt. 5) (“[I]f the Federal Deposit Insurance Corporation takes over an insolvent bank. . . the FDIC and similar financial institution insurers are given holder in due course status and that status is also acquired by their assignees under the shelter doctrine.”); Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

Defendants’ citation to proposed Georgia legislation that bans “this very business model” is without merit. This legislation has not been adopted in Georgia and is merely proposed legislation. Moreover, even should this legislation pass, it does not apply to “institutions with federally insured deposits or their affiliates.” (SB 448, p. 2, lines 46-7.)⁴⁹ LNV Corporation, a subsidiary of Beal Bank—regulated by the Federal Deposit Insurance Corporation—would not fall under this statute.

CONCLUSION

As set forth above, and in Plaintiff’s initial brief, this Court should dismiss the counterclaims asserted by Defendants as they are barred by prior releases and are insufficient as a matter of law.

****Signature Page Follows****

⁴⁹ *See* Proposed Senate Bill, attached hereto as **Exhibit B**.

Respectfully submitted,

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Attorneys for LNV Corporation

Greenville, South Carolina
April 12, 2012

EXHIBIT A

Mark Pulliam

From: Mark Pulliam LNV
Sent: Thursday, August 06, 2009 4:55 PM
To: 'Jay Berlye'
Subject: Affordable Hospitality - Draft Commitment Letter
Attachments: Commitment Letter - Affordable Hospitality Group-Anderson LLC - First Draft - 080609.pdf

Jay,
Attached is the first draft of the commitment letter for Affordable Hospitality.
LNV reserves the right to amend this draft for additional bank or SBA requirements.

Please call with comments.

Mark Pulliam
LNV Corporation
6000 Legacy Drive
Plano, TX 75024
(469)467-5406
(469)467-5550 fax
mpulliam@lnvcorp.com

August __, 2009

COMMITMENT LETTER

Affordable Hospitality Group-Anderson, LLC
3904 N. Druid Hills Road, #221
Decatur, Georgia 30033
Attn: Jay Berlye

Gentlemen:

Provided all conditions specified herein are satisfied, LNV Corporation (the "Lender") hereby agrees to make a loan (the "Loan") to Affordable Hospitality Group-Anderson, LLC, a Georgia limited liability company (the "Borrower"), upon the terms and conditions as outlined below. The obligation of the Lender to make the Loan contemplated by this Commitment Letter will be subject to the Borrower (i) owning the improved real property located in Pennington Township, Anderson County, South Carolina, and being more particularly described on Exhibit "A" attached hereto (the "Land"), the Improvements, as hereinafter defined, and the other Property, as hereinafter defined, and (ii) satisfying all other conditions herein specified. The Property will secure the Loan contemplated by this Commitment Letter along with additional collateral and guarantors as specified herein.

1. Loan Amount and Use of Proceeds. The Loan will be in the maximum amount of the 50% of the Total Project Cost (as herein defined). The proceeds of the Loan will be advanced to and used by Borrower to refinance a portion of the existing construction loan held by Lender and secured by the Property (with the balance of such construction loan to be repaid concurrently with the closing of the Loan from funds advanced to Borrower by the Small Business Administration (the "SBA") as well as from equity invested by the Borrower). For purposes hereof, Total Project Cost shall mean the final approved cost of construction of the Project (as herein defined), as certified by the SBA.

2. Security for the Loan. The Loan is to be evidenced by a promissory note or notes (collectively the "Note") in the face amount of the maximum principal amount of the Loan, which will be secured by the following (all of the following being referred to herein collectively as the "Property"):

(a) A mortgage, security agreement and assignment of leases and rents (the "Mortgage") constituting a valid first priority, and the only, lien upon the Land, all improvements, now or hereafter constructed on the Land (the "Improvements") and all other property and interests making up or otherwise relating to the Project. The Improvements currently consist of a 69 room motel which is operating under the Microtel (Wyndam) flag (the "Project");

(b) A first priority, and the only, security interest in and to all the tangible and intangible personal property (none of which may be leased by the Borrower without the prior written consent of the Lender, which may be granted or withheld at the sole discretion of the Lender) in which the Borrower has an interest used in the construction, development, operation, ownership, use or enjoyment of the Project, including, without limitation, all Improvements now or hereafter constructed and located on the Land or relating to any part of the Project, all furnishings, fixtures and equipment located in or on such Improvements or otherwise related to

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the Project and all certificates of occupancy, construction contracts, plans and specifications, other permits, approvals, documents, instruments and materials related to the Property;

(c) A first priority, and the only, security interest in and to all the accounts, proceeds, and revenues from the operation of the Improvements;

(d) A first priority, and the only, security interest in and to the hotel management agreement (the "Hotel Agreement") with Microtel Hotels, Inc. ("Microtel");

(e) A first priority, and the only, collateral assignment and security interest in any and all contracts of sale now or hereafter existing relating to all or any portion of the Property and all proceeds therefrom;

(f) A first priority, and the only, collateral assignment of and security interest in all leases of space in the Project, and all management, leasing, service and other contracts relating to the Project; and

(g) A first priority, and the only, collateral assignment of and security interest in any and all easements, agreements (including, without limitation, parking agreements and use agreements), development agreements, development and/or existing credits, municipal utility district, road district and other similar entities rights and payments, all rights of the declarant under deed restrictions and covenants, and condominium declarations and/or in regard to owners/condominium associations relating to all or any part of the Property, and bond obligations now existing or hereafter created in regard to any of the Property and granted for the benefit of the Property, as well as the right to use the utilities, etc. for the benefit of the owners, assignees, tenants and invitees. A condition to the Lender's obligation to close and fund the Loan is that any and all such easements, leases, agreements, development agreements, credits, municipal utility district, road district and other similar entities rights and payments, other rights as described above and bond obligations and other agreements relating to the ownership, development and/or operation of the Property, must be satisfactory to the Lender in its sole discretion.

3. **Interest Rate.** Interest on the Principal Balance, as hereinafter defined, from time to time remaining unpaid prior to maturity shall be payable at a per annum rate (the "Applicable Rate") equal to, at Borrower's option at the time of Loan closing (with such election to be designated in writing by Borrower at least 15 business days prior to Loan closing and any failure to do so shall result in Lender making such election on Borrower's behalf), either (a) the lesser of: (i) the highest rate of interest permitted by applicable law or (ii) a fluctuating rate equal to the then current Prime Rate, as hereinafter defined, as it fluctuates from time to time and adjusted quarterly commencing the first business day of January 2010, and every April, July and October thereafter during the term of this loan, plus one and one-half percent (1.50%), or (b) the lesser of: (i) the highest rate of interest permitted by applicable law, or (ii) a 5-year fixed rate adjustable loan, adjustable every 5-years based on the five-year swap rate for U.S. Treasuries plus 400 basis points. For the purposes hereof and of the Note, (i) "Principal Balance" shall mean so much of the principal balance of the Loan as may be actually advanced or accrued by the

Lender and/or its successors and assigns out of its/their own funds and outstanding on the Loan from time to time and (ii) Prime Rate means the prime rate of interest for commercial borrowings published from time to time by *The Wall Street Journal*, provided that if at any time *The Wall Street Journal* ceases to publish such prime rate, Lender shall select a nationally recognized substitute publication comparable to *The Wall Street Journal* for use in determining such prime rate, and Lender shall provide written notice to Borrower of any such substitution. In the event of a change in the Applicable Rate caused by a change in the Prime Rate, the Applicable Rate shall be adjusted effective as of the opening of business on the day of such change in the Prime Rate. Interest for each month, or part thereof, during the term of the Note shall be calculated as of the end of each month, and at maturity and shall be payable on or before the first day of the following month and at maturity, the first such payment being due on the first day of the first month following the Closing. The principal balance of the Loan and past due interest thereon (to the extent permitted by applicable law) shall bear interest at a per annum rate (the "Default Rate") equal to the lesser of (i) the maximum rate permitted by applicable law or (ii) five percent (5%) in excess of the Applicable Rate; (x) a payment due on the Loan is not paid on its due date, until such payment is received, or (y) during the continuance of any other default in regard to the Loan or (z) after the maturity date of the Loan.

4. Payment of the Loan. Commencing on the first day of the first month following the Closing and continuing on the first day of each month thereafter until the maturity date of the Loan, monthly payments of all accrued and unpaid interest on the Loan shall be paid to the Lender at the Applicable Rate and/or the Default Rate, whichever is applicable. Should Borrower elect the floating rate option, the monthly payments will vary on a quarterly basis. In addition, Borrower shall make monthly payments of principal based upon a 20-year amortization schedule. The unpaid Principal Balance of and all accrued and unpaid interest on the Loan shall be due and payable on the maturity date of the Loan.

5. Term of Loan. The Loan term shall be twenty (20) years from the date of the closing and funding of the Loan; provided, however, the Loan shall be callable by Lender ten (10) years from the date of the closing and funding of the Loan. The date of Closing and funding of the Loan (the "Closing") shall occur no later than December 31, 2009 (the "Expiration Date").

6. Funding of Loan Proceeds. At the Closing, the Lender will advance to the Borrower the proceeds of the Loan.

7. Loan Fees. The Borrower agrees to pay from time to time and as and when requested by the Lender all of the costs of issuing this Commitment Letter and closing the Loan, specifically including, but not limited to, the reasonable attorneys fees of the Lender.

8. Prepayment. The Loan may be prepaid, in whole or in part, provided (i) the Borrower gives to the Lender at least thirty (30) days prior written notice of such prepayment and (ii) if any prepayment of all or part of the Loan is made prior to the fifth (5th) anniversary of the Closing, the Borrower must pay to the Lender, concurrently with the prepayment in question, a declining prepayment fee equal to five percent (5%) of the amount of principal so prepaid in the first loan year, four percent (4%) of the amount of principal so prepaid in the second loan year, three percent (3%) of

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the amount of principal so prepaid in the third loan year, two percent (2%) of the amount of principal so prepaid in the fourth loan year, and one percent (1%) of the amount of principal so prepaid in the fifth loan year. Thereafter no prepayment fee shall be due and owing.

9. Loan Documentation. The documents evidencing and securing the Loan (collectively, the "Loan Documents") will be in the forms required by the Lender, and will contain, without limitation of other provisions the Lender may require, the following specific provisions:

(a) A provision, whereby the Lender may require that the Borrower deposit in cash each month an amount equal to one twelfth (1/12) of the annual taxes and insurance premiums relating to the Project as well as any hotel fees or payments to the extent not due monthly pursuant to the terms of the Hotel Agreement. Such escrowed funds will be held in a non-interest bearing account. If the Lender requires funds to be so escrowed, any deficiencies between the amounts due annually and the funds actually escrowed must be paid to the Lender by the Borrower, promptly upon request by the Lender;

(b) A provision requiring that the Borrower deliver to the Lender, at the Borrower's expense, (i) within ninety (90) days after the termination of each fiscal year of the Borrower and the Guarantor, as hereinafter defined, annual financial statements of the Borrower and the Guarantor, certified as true and correct by an independent certified public accountant(s) acceptable to the Lender, (ii) within forty-five (45) days following the end of each fiscal quarter of the Borrower and the Guarantor, quarterly financial statements of the Borrower and the Guarantor, certified as true and correct by the Borrower and the Guarantor, (iii) in regard to the Guarantor and upon request of the Lender, copies of all reports and statements the Guarantor files with any governmental or regulatory body, promptly following the filing thereof, (iv) within twenty (20) days following the end of each month during the term of the Loan, unaudited, certified (by the Borrower) operating statements of the Project for the preceding month, and (v) true and correct copies of any reports provided by Borrower to Microtel and the SBA, concurrently with their delivery to such parties. The Lender reserves the right to audit the Borrower's books, records and accounts at the Lender's expense (except as hereinafter provided) and to request (and if requested, the Borrower will promptly provide) such additional financial information concerning the Borrower, the Guarantor, the Project and/or any other portion(s) of the Property, as the Lender may deem necessary or appropriate. If any audit by the Lender reveals any errors, omissions or discrepancies in the financial statements, which result in an adjustment of 3% or more in any major category of income, expense, asset or liability or in the totals thereof, the Lender may require that the financial statements be prepared by an independent certified public accountant acceptable to the Lender, at the Borrower's expense, and the Borrower shall also pay the cost of the audit performed by the Lender which discovers such errors, omissions or discrepancies;

(c) A provision permitting the Lender to accelerate the Loan if, without the prior written consent of the Lender, which consent may be granted or withheld at the sole discretion of the Lender, (i) the Borrower should sell, lease, transfer, convey, assign, mortgage, pledge or encumber the Project (or any portion thereof or interest therein), the rents and income

therefrom, or any other items of collateral for the Loan, or amend or modify any material lease of space in the Improvements (provided, however, Lender consents to the placement of the subordinate financing which will be executed by Borrower in favor of the SBA provided such financing is on terms and conditions acceptable to Lender and in connection therewith Lender will also execute a third-party lender agreement in favor of the SBA in form and substance mutually satisfactory to Lender and the SBA), (ii) any portion of the Property is subjected to any condominium declaration, declaration of covenants, easement or other encumbrance, (iii) any portion of the Property is subjected to any preliminary or final plat, (iv) any ownership interest in Borrower is assigned or otherwise transferred if as a result thereof the Borrower is no longer wholly owned, directly or indirectly, by the Guarantor, (v) any portion of the Property is zoned or the terms of zoning applicable to any portion of the Property are changed. The Loan Documents will also include provisions requiring the Borrower to perform its obligations under and comply with the terms of all leases relating to space in the Project;

(d) A provision requiring that the Borrower maintain, throughout the term of the Loan, policies of liability, flood, vandalism, malicious mischief and other insurance in an amount, form and from a company acceptable to the Lender, and in accordance with the requirements and provisions of the Loan Documents. The Loan Documents will also contain provisions permitting the Lender to utilize insurance proceeds to repair damaged property (if the conditions set forth in the Loan Documents are satisfied) or apply to the Principal Balance of the Loan;

(e) Provisions that each management, leasing and service contract related to the Project must be (i) with parties consented to by the Lender, (ii) on market terms, as determined by the Lender, and (iii) subordinated to the Loan, but Lender shall have the right to require an attornment agreement to be executed by such service providers;

(f) A provision that if there occurs a default in the payment of the Note (or any installment thereon or any other monetary amount due in regard to the Loan) (if such default remains uncured upon the expiration of five (5) days following the date written notice thereof is provided to the Borrower, provided, however, the Lender will not be obligated to give such written notice more than twice during any twelve (12) month period and following the second such notice, any subsequent default during the then current twelve (12) month period will constitute a default without any notice being required and the Lender shall not be obligated to provide any such written notice or cure period in regard to the payment due on the Loan on the maturity date of the Loan, whether such maturity date is the stated maturity date thereof or any accelerated maturity date declared by the Lender pursuant to the Loan Documents) or in the performance of any other covenant in any Loan Document (if such default remains uncured for a period of fifteen (15) days following the date written notice thereof is provided to the Borrower), the entire Note and accrued interest owing thereon and all other amounts due in regard to the Loan shall at once become due and payable without notice (except as described above) at the option of the Lender. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In addition, Lender agrees that it will provide written notice to the SBA within thirty (30) days following any

delinquency upon which Lender intends to take action, as well as sixty (60) days prior written notice to the SBA prior to a contemplated foreclosure sale of the Property;

(g) A provision requiring the Borrower to maintain the Property in good condition and repair as a first class motel and to comply with the terms and conditions of the Hotel Agreement, with the express understanding that a default under the Hotel Agreement shall constitute an event of default under the Loan;

(h) A provision requiring the Borrower to comply with the terms and conditions of the subordinate financing in favor of the SBA with the express understanding that a default under such subordinate financing shall constitute an event of default under the Loan;

(i) A provision requiring the Borrower to comply, and cause the Property to comply, with all applicable laws, rules and regulations, including, without limitation, those relating to the environment; and

(j) Provisions confirming the Lender's right, at the Lender's sole option, to pursue remedies in such order and manner as the Lender may elect, including, without limitation, the right, if the Lender so elects, to pursue remedies against the Guarantor before pursuing remedies against the Borrower, the Project or any other Property; and

10. Liability. The Borrower, as well as Jay R. Ryke, a Georgia resident, and Diversified Capital Investment Group, LLC, a Georgia limited liability company (individually and collectively referred to as the "Guarantor"), directly or indirectly, shall have full, unconditional, joint and several, personal liability for: (i) the full and timely payment of the Principal Balance of and all accrued and unpaid interest on the Loan, (ii) the full and timely payment and performance of all other obligations of the Borrower and the Guarantor in regard to the Loan and under the Loan Documents, and (iii) without limitation of the foregoing, any and all loss, cost, expense, liability and damage suffered or incurred by the Lender as a result of the presence or existence of or in or from any of the Property of any hazardous substance or as a result of any violation of or non-compliance with any environmental law, rule or regulation applicable to the Property of the Borrower.

11. Essential Parties. If, prior to the Closing, any one or more of the essential parties, as hereinafter defined, files or has filed against him or it any proceeding in bankruptcy, or if a petition for the appointment of a receiver, trustee, or liquidator of any of the essential parties or of all or a substantial portion of their respective assets, or for bankruptcy or insolvency, or for liquidation or winding up of his or its affairs under the proceedings of any Federal or State insolvency laws; or if any of the essential parties shall make an assignment for the benefit of creditors, generally; or if at any time prior to the Closing there should occur or be reported a material adverse change in the assets, liabilities, financial condition, or business operation of any essential party as reflected in the latest financial statements of the essential parties delivered to the Lender, the Lender may, at its option, terminate this Commitment Letter by written notice thereof delivered to you at the address hereinabove set forth. The Loan Documents will also provide that if after the Closing any of the foregoing should occur, an Event of Default shall be deemed to have occurred under the Loan Documents.

The term "essential parties" shall include only the following:

the Borrower and the Guarantor

12. Plans and Specifications/Completion of Construction. Although no construction is contemplated in regard to the Project during the term of the Loan, if any such construction does occur during the term of the Loan other than tenant finish-out improvements, prior to the commencement of construction of any improvement on or development of any of the Property, the Borrower shall submit to the Lender for approval the plans and specifications for such improvements/development (the plans and specifications for such improvements/development, when and as approved by the Lender, are herein referred to as the "Plans and Specifications"), cost breakdowns and takeoffs, bids for construction, the name of the proposed general and other primary contractor(s) for the proposed construction contracts and all other Lender required documents related to such construction. Approval of such general contractor, construction contracts, cost breakdowns and takeoffs, bids for construction, other documents and Plans and Specifications, including change orders thereto (which shall also be subject to approval by the Lender, in its sole discretion), shall be at the reasonable discretion of the Lender. The improvements/development shall be made and completed of first-class materials and in a first-class and workmanlike manner in substantial accordance with the Plans and Specifications and the Loan Documents, and shall be completed with no unbonded (to the Lender's satisfaction) or unreleased mechanics' or materialman's liens or lien claims having been filed or existing with regard thereto. The approval of the Plans and Specifications, such cost breakdowns and takeoffs, bids for construction, contractor(s), construction contracts or such other documents or materials by the Lender shall not imply or result in any responsibility by the Lender for the adequacy or sufficiency of such Plans and Specifications, such cost breakdowns and takeoffs, bids for construction, construction contracts or such other documents and approval of the general and other primary contractor(s) shall not imply any representation or warranty of the Lender of the competency or ability thereof or any other matter relating thereto. The Lender may make or cause to be made inspections of the improvements/development during the course of and upon completion of construction/development thereof, however, the adequacy and sufficiency of such inspections, or the failure to perform inspections by the Lender or a designated party, shall not relieve the Borrower of its obligation to complete the improvements/development in substantial accordance with the Plans and Specifications. The Lender, at its option, may designate an independent inspector and/or consultant to perform inspections of construction and provide other review and/or oversight, in all cases for the sole benefit of the Lender, and the Borrower will pay all reasonable costs incurred in connection with such inspections and other activities. In order for the improvements/development to be deemed completed, in addition to all other requirements hereunder, the Borrower must have obtained and supplied to the Lender all final required governmental approvals and the Lender must have determined, from its own inspections, that completion of the improvements/development in substantial accordance with the Plans and Specifications and the Loan Documents, applicable laws, rules, ordinances and permits has occurred. In addition, the Borrower must supply to the Lender a completion certificate (in form and substance acceptable to the Lender) issued by an architect/engineer acceptable to the Lender pursuant to which such architect/engineer will confirm that completion of the improvements/development has occurred in substantial accordance with the Plans and Specifications and the Loan Documents, applicable laws, rules, ordinances and permits. In regard to tenant finish-out improvements in the Improvements, the

Borrower may cause such improvements to be constructed in accordance with the applicable lease and standards common to other first class motels, provided the construction of such improvements is diligently completed and no mechanic's or materials liens or lien claims arise from such construction (unless they are satisfied/bonded as required by the Loan Documents).

13. Required Documents. At least ten (10) business days prior to the anticipated Loan Closing date, Borrower shall deliver to the Lender, or, as provided below, the Lender shall have received, the following documents:

(a) Documentation substantiating the total project costs for the Project as certified by the SBA;

(b) Documentation evidencing the anticipated subordinate loan from the SBA to the Borrower (the "SBA Loan") in form and substance satisfactory to Lender in Lender's sole discretion;

(c) A Commitment for a standard form full coverage ALTA Loan Policy of Title Insurance, relating to the Property, together with legible copies of the documents creating all exceptions shown thereon, to be issued by a title insurance company acceptable to the Lender; and at the Closing of the Loan, the Borrower will cause such title insurance company to issue to the Lender a standard form full coverage ALTA Loan Policy of Title Insurance (with the survey exception deleted), with such endorsements as the Lender may require and (b) are available under applicable title insurance regulations (the "Title Policy"), in form acceptable to the Lender, in the amount of the Loan, showing the fee simple title to the Property to be vested in the Borrower and insuring the priority of the Lender's liens upon the Property as valid first priority, and the only, lien, subject only to such exceptions as the Lender may, in its sole discretion, approve;

(d) Four copies of a current as-built survey of the Land (in form including, without limitation, the certification thereon, acceptable to the Lender in its sole discretion) prepared by a licensed surveyor acceptable to the Lender in its sole discretion. The survey is to include the metes and bounds (or platted) description of the Land, the area of the Land in square feet, the location and dimensions of any easements on or servicing the Land, rights of way on or servicing the Land, roads on or servicing the Land, restricted areas or flood-prone areas and the location and dimensions of all existing Improvements on the Land. The survey must show that no encroachments or protrusions of any Improvements over boundary lines, set back lines, easements, rights of way or restricted areas exist. The surveyor must include in the survey a signed narrative statement certifying as to the existence or nonexistence of any encroachments, the date of the survey and whether any portion of the Land is located within an area identified by the Secretary of Housing and Urban Development or other governmental entity with jurisdiction as having special flood hazards. The survey must satisfy the requirements specified in Exhibit "B" attached hereto. The surveyor's registered number and seal must appear on the survey. The Borrower must also provide to the Lender, four copies of each of the recorded plats applicable to the Land, if any;

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(e) Original policies (or certified copies of blanket policies) of such insurance as are required by the Loan Documents, which policies are to be issued by a company or companies approved by the Lender, must name the Lender as additional insured, mortgagee and loss payee, as required by the Lender, and must be in form, coverage and amount satisfactory to the Lender in accordance with the provisions of the Loan Documents and contain a standard mortgagee's endorsement in favor of the Lender;

(f) Evidence satisfactory to the Lender that all of the Land is validly zoned in a manner and under a classification or classifications acceptable to the Lender which will permit the operation of the Project as a first class motel, subject only to such conditions as the Lender finds acceptable;

(g) A physical inspection report and certificate(s) (in form acceptable to the Lender) from an engineer and/or other independent consultants acceptable to the Lender stating that the Project is in good condition and repair;

(h) Evidence, including a Phase I Environmental Site Assessment (the "ESA") addressed to the Lender and in a form and containing certificates from qualified engineers and/or architects satisfactory to the Lender, that the Property is in compliance with all applicable environmental laws, rules and regulations, and specifically, but without limitation, that no underground storage tanks are located on the Land, that there is no asbestos on or in the Property (or, if there is in fact asbestos, a recommendation for the handling and/or disposal thereof that is acceptable to the Lender in its sole discretion, and prepared by an engineer acceptable to the Lender) and that there has been no storage, disposal or release of any oil, fuels, gases, pesticides, paints and solvents, lead, cyanide, DDT, acids, ammonium compounds and other chemicals, trash, garbage or other solid wastes or hazardous materials or wastes upon the Property or adjacent lands, that, if not to be removed (in a manner, for a cost and within a timeframe acceptable to the Lender), would reasonably be expected to cause a material increase in the cost of owning and operating the Project, and an indemnification from the Borrower and the Guarantor for any loss, cost, expense, liability and damages suffered by the Lender resulting from the presence of any such items or materials; which ESA will be ordered by the Lender, however, the Borrower will be obligated to pay the cost of obtaining such ESA;

(i) True, correct and complete copies of (i) all existing management, leasing and/or service contracts, including, without limitation, the Hotel Agreement, (ii) certificate of occupancy, building and other permits relating to the occupancy and use of the Project and (iii) such other information concerning the Property and/or the Project as the Lender may require from time to time. In addition, the Borrower will provide access to the Project for the Lender's employees, agents and other representatives for the purpose of conducting tests and inspections. A condition to the Lender's obligation to close and fund the Loan is that all of the items described above in this paragraph and the physical condition of the Project must be found acceptable to the Lender in its sole discretion;

(j) An estoppel certificate from Microtel (the "Microtel Estoppel") evidencing compliance by the Borrower and the Property to the terms of the Hotel Agreement as well as a comfort letter from Microtel (the "Microtel Comfort Letter") in favor of Lender with regard to Lender's ability to become a party to the Hotel Agreement following any foreclosure or other exercise of Lender's remedies at no cost or fee to Lender, with the forms of such estoppel and comfort letter to be satisfactory to Lender in Lender's sole discretion.

(k) True, correct and complete copies of any and all deed restrictions, bond documents, architectural control requirements, protective covenants, and other documents relating to the Project which may affect the Property. A condition to the Lender's obligation to close and fund the Loan is that all such documents must be acceptable to the Lender in its sole discretion;

(l) Evidence satisfactory to the Lender that water, sewer, electricity, natural gas, telephone, fiber optic, cable television and all other necessary utility services are available to and currently servicing the Project, without restrictions, obligations and/or costs which are not acceptable to the Lender, and meet the requirements (if any capacity and otherwise) of operation and occupancy of the Project as a first class motel. The Borrower shall also furnish evidence satisfactory to the Lender in its sole discretion that the streets servicing the Project have been properly completed, dedicated and accepted for maintenance by the proper governmental authorities with free and uninterrupted access to and from said streets;

(m) Proof satisfactory to the Lender in its sole discretion of compliance by the Borrower and the Project with any and all applicable laws, regulations, ordinances and requirements;

(n) True, correct and complete copies of the organizational and governing documents and any related documents by which the Borrower were formed and are governed, and as conditions to the Lender's obligation to close the Loan, all such documents and the owners of the interests in the Borrower must be acceptable to the Lender in its sole discretion, and the Borrower must satisfy the Lender, in the Lender's sole discretion, that the obtaining of the Loan pursuant hereto and the performance of the Borrower's obligations in regard to the Loan have been duly and properly authorized and approved by the owners of Borrower and the Guarantor and any other person or entity the Lender may require. Without limitation of other issues relating to or requirements of the Lender concerning the owners of interests in the Borrower and the Guarantors, neither the Borrower nor any partner or stockholder of the Borrower may hold no legal or beneficial interest in a partner or stockholder of the Borrower is held by, directly or indirectly, a person or entity who is listed in or is subject to Executive Order 13224 issued by the President of the United States on September 23, 2001, or any similar law, rule, regulation or Executive Order;

(o) A flood certification relating to the Land from a consultant selected by the Lender, and a condition to the Lender's obligation to close the Loan is that such flood certification must confirm that all Improvements, other than the parking garage and surface

parking lot, are located on portions of the Land which are not in any flood prone or flood hazard area, and that the parking garage and surface parking lot, which are located on portions of the Land which are included within the 100 year flood plain, have been constructed, and can be used, repaired and reconstructed in their current locations and at their current elevations, in accordance with applicable law. The Lender will order and obtain the flood certification, however, the Borrower will be responsible for the cost thereof; and

(p) Such other documents, items, certificates and evidences as the Lender, in its sole discretion, may request.

14. Closing. At the Closing, the following shall occur:

(a) the Borrower and the Guarantor, as required by the Lender, shall execute and/or deliver and, as required by the Lender, shall cause to be executed and delivered, to the Lender, the Note, the Mortgage, Security Agreements relating to the personal property Collateral, an Assignment of Rents and Leases, a Guaranty Agreement, and other Loan Documents required by the Lender;

(b) the Borrower shall arrange or shall have previously arranged for the payment of all fees and expenses incurred in connection with this transaction, including, but not limited to, reasonable attorneys' fees of the Lender, escrow fees, title insurance costs, recording fees, taxes and brokerage commissions; and

(c) the Borrower and the Guarantor shall furnish or cause to be furnished to the Lender legal opinions of Counsel representing the Borrower and the Guarantor, dated the date of the Closing, in form and substance satisfactory to the Lender in its sole discretion, stating (a) that, to the best knowledge of such counsel, no provision of any mortgage, indenture, agreement, contract, or other instrument to which the Borrower or the Guarantor is a party and known to such counsel requires the consent or authorization of any other person, firm or corporation as a condition precedent to the consummation of the transaction contemplated herein or, if any such consent or authorization is required, that it has been obtained; (b) that the Borrower and the Guarantor have full power and authority to carry out the duties imposed upon them by the loan transaction contemplated by this Commitment Letter and have taken all acts and other proceedings required to be taken on their part necessary to carry out their duties in connection with the Loan; (c) that such counsel knows of no litigation, proceeding, or investigation pending or threatened against the Borrower or the Guarantor which questions the validity of any documentation required by this Commitment Letter or of any action taken or to be taken pursuant to or in connection with the provisions of the Loan Documents; (d) that such counsel has no actual knowledge of any violation of governmental laws, regulations, ordinances, or requirements in relation to this transaction that exist, and that the subject transactions are not usurious; (e) that the Loan Documents have been duly authorized and approved by all persons and entities who must consent thereto on the part of the Borrower and the Guarantor, and that the Loan Documents (including, without limitation, all waivers therein contained) are valid and binding obligations of the Borrower, the Guarantor and each such other

person or entity, enforceable in accordance with their terms, subject only to the effect on the enforceability of such documents of the bankruptcy and similar debtor relief law affecting the rights of creditors generally; (f) that the choice of Texas law as governing the Loan Documents (except to the extent of creation, perfection and enforcement of the Mortgage which will be governed by South Carolina law) is valid, binding and enforceable; and (g) such other matters as the Lender may reasonably request.

15. Obligation to Close. The Lender shall not be obligated to close the Loan transaction contemplated hereby or fund all or any portion of the Loan unless and until the following conditions have been satisfied:

- (a) No event of default exists under Lender's existing construction loan to Borrower;
- (b) All matters pertaining to (i) title to the Property, (ii) the survey and the physical condition of the Property, (iii) the form, the substance and the execution of all documents required hereunder or which may be required for the completion of this transaction, (iv) the Borrower's and Guarantor's organizational and ownership structure and financial condition, (v) all sale, management, service and other contracts relating to any of the Property or the Project (including, without limitation, the Hotel Agreement, the Microtel Estoppel and the Microtel Comfort Letter), and (vi) all other matters relating to the Property, the Project and the Loan, have been approved by the Lender, in its sole discretion;
- (c) None of the Improvements may (i) be subject to any material condemnation, whether pending or threatened or (ii) have been damaged or destroyed if the estimated cost to repair and restore such damaged Improvements, as reasonably determined by the Lender, exceeds the amount of insurance proceeds available or reasonably expected to be available (based on the applicable insurance policies in effect at the time of the damage or destruction) to repair such damaged Improvements (which insurance proceeds will be paid to the Lender and handled as provided in the Mortgage) unless the Borrower provides evidence and documentation reasonably satisfactory to the Lender of the availability of the additional funds needed to pay for the repair in question, which additional funds will be delivered to the Lender at the Closing to be used pursuant to the Mortgage and used to pay for the cost of repairs of the damaged Improvement;
- (d) The terms and conditions of this Commitment Letter have been met by the Borrower and the Guarantor and such evidence of compliance has received the approval of the Lender; and
- (e) The Borrower must satisfy the Lender that there is no basis for the assertion of a valid mechanics and/or materialman's lien or claim affecting any of the Property which could have priority over the Lender's liens, security interests, rights or remedies relating to the Property and/or the Loan.

(f) The Borrower must close the SBA Loan and the SBA shall fund such SBA Loan at no cost to Lender.

16. Brokers. The Lender has no liability or obligation of any kind to pay any brokers fee, finders fee or other fee relating to the Loan, and the Borrower hereby agrees to pay any and all such fees. The Borrower and the Guarantor hereby jointly and severally agree to indemnify and hold the Lender harmless of and from any and all loss, cost, expense, liability, damage, action, cause of action or claim relating to any thereof.

17. Acceptance. In order for this Commitment Letter to be binding upon the Lender, it must be signed and unconditionally accepted by the Borrower and the Guarantor and returned to the Lender, on or before 3:00 p.m. on August 14, 2009. If, on or before 3:00 p.m. on August 14, 2009, this Commitment Letter is accepted by returning to the Lender executed copies of this Commitment Letter, this Commitment Letter will be binding upon the Lender, the Borrower and the Guarantor from the date of this Commitment Letter until the Expiration Date, subject to the terms and provisions hereof. If for any reason, except for a default by the Lender, the Closing contemplated by this Commitment Letter is not completed on or prior to the Expiration Date, all obligations of the Lender hereunder shall cease and the Lender may terminate this Commitment Letter by delivering written notice thereof to you at your above-specified address; however, such termination will not affect the Borrower's obligation to pay and/or reimburse the Lender for costs and expenses incurred by the Lender in regard to the transaction contemplated hereby. Time is of the essence in the performance of the terms of this Commitment Letter. The Lender, the Borrower and the Guarantor expressly agree that this Commitment Letter, when properly accepted, grants to the Borrower the option, but not the obligation, to actually close the Loan.

18. Representations. Discovery of a misrepresentation of any material fact, either herein or in your loan application, supporting documents, financial statements or any other document provided to the Lender by or on behalf of the Borrower or the Guarantor, shall entitle the Lender, at its option, to terminate this Commitment Letter by delivering written notice thereof to the Borrower at the address specified above, however, notwithstanding such termination, the Borrower will remain liable for and will pay the costs as provided herein, and such termination will not affect or limit any other rights of the Lender arising from or relating to any such misrepresentations.

19. Assignability. This Commitment Letter shall not be assignable without the Lender's prior written consent which may be granted or withheld at the sole discretion of the Lender. The Lender may assign and delegate this Commitment Letter to one or more affiliates of the Lender, however, the Lender will remain liable hereunder notwithstanding any such assignment or delegation, until the Loan is closed and funded or this Commitment Letter is terminated by the Lender, as permitted hereby, or expires, whichever first occurs.

20. Applicable Law. The Loan and the documents evidencing and securing same are to be governed by Texas law except to the extent of creation, perfection and enforcement of the Mortgage which will be governed by South Carolina law.

21. Scope of Agreement. This Commitment Letter sets forth the entire agreement of the Borrower, the Guarantor and the Lender with respect to the Loan, and supersedes all prior written and oral understandings with respect thereto. All representations and agreements made by or on behalf of the Borrower and/or the Guarantor to the Lender with respect to the subject matter hereof shall survive the execution of this Commitment Letter and the closing of the Loan. The Lender has no obligation to make or agree to make any loan other than the Loan pursuant hereto.

22. Indemnity and Release. The Borrower hereby agrees to indemnify and hold the Lender harmless of and from any and all claims, debts, liabilities, actions, causes of action, costs and expenses including, but not limited to, reasonable attorneys' fees and costs of suit incurred by the Lender, and obligations relating to the transactions contemplated hereby which may occur or have arisen prior to or as of the closing of the Loan transaction referenced herein, except for any thereof arising as a result of a default by the Lender hereunder or as a result of the gross negligence or willful misconduct of the Lender. In addition, the Borrower hereby agrees to release Lender and any predecessor lender, including, without limitation, the Federal Deposit Insurance Corporation, from any and all claims related to the construction loan being refinanced by the Lender.

23. Verification of Financial Status. The obligations of the Lender hereunder are subject to verification satisfactory to the Lender of the financial status of the Borrower and the Guarantor, and that such verified financial status is acceptable to the Lender, and the Borrower and the Guarantor hereby authorize the Lender to from time to time take such action and request such information as the Lender may deem necessary or appropriate in connection with the Lender's effort to so verify the financial status of the Borrower and the Guarantor. In this regard, promptly upon request by the Lender, you will supply to the Lender such financial and other information as the Lender may reasonably require, including, without limitation, status reports on projects in which the Borrower or the Guarantor or any affiliate of the Borrower or the Guarantor is involved and a listing of contingent liabilities of the Borrower, the Guarantor and of any affiliates of the Borrower or the Guarantor.

24. WAIVER OF JURY TRIAL. EACH PARTY TO THIS AGREEMENT HEREBY EXPRESSLY, VOLUNTARILY, KNOWINGLY AND IRREVOCABLY WAIVES ANY CONSTITUTIONAL OR OTHER RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN THE EVENT OF LITIGATION CONCERNING ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION ARISING UNDER THIS AGREEMENT, THE PARTIES' PERFORMANCE HEREUNDER OR ANY OTHER INSTRUMENT, DOCUMENT OR AGREEMENT EXECUTED OR DELIVERED IN CONNECTION HERewith, OR (b) IN ANY WAY CONNECTED WITH, OR RELATED OR INCIDENTAL TO, THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO ANY INSTRUMENT, DOCUMENT OR AGREEMENT RELATED IN ANYWAY WHATSOEVER TO THE SUBJECT MATTER OF THIS AGREEMENT; AND IN ANY CASE, WHETHER NOW OR HEREAFTER ARISING AND WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE. ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY. THE LOAN DOCUMENTS WILL CONTAIN A SIMILAR WAIVER OF THE RIGHT TO A JURY TRIAL.

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25. CHOICE OF FORUM; SERVICE OF PROCESS. THE LENDER MAY BRING ANY ACTION OR PROCEEDING TO ENFORCE ANY OF THE LOAN DOCUMENTS, OR ANY ACTION OR PROCEEDING ARISING OUT OF ANY OF THE LOAN DOCUMENTS, IN ANY COURT OR COURTS IN THE STATES OF TEXAS AND SOUTH CAROLINA OR THE UNITED STATES DISTRICT COURT FOR EITHER THE NORTHERN DISTRICT OF TEXAS OR THE DISTRICT COURT OF SOUTH CAROLINA. THE BORROWER AND THE GUARANTOR HEREBY AGREE THAT THE BORROWER AND THE GUARANTOR WILL SUBMIT AND DO HEREBY IRREVOCABLY SUBMIT TO THE PERSONAL JURISDICTION OF SUCH COURTS; IF SERVED IN ACCORDANCE WITH THE LAWS OF THE STATES OF TEXAS OR SOUTH CAROLINA, OR THE RULES OF SUCH COURTS, WILL ACKNOWLEDGE RECEIPT OF A COPY OF THE SUMMONS AND COMPLAINT WITHIN THE STATUTORY TIME LIMIT AND IN THE MANNER SET FORTH IN THE NOTICE AND SUMMONS; AND WILL NOT ATTEMPT TO HAVE SUCH ACTION DISMISSED, ABATED OR TRANSFERRED ON THE GROUND OF FORUM NONCONVENIENS OR SIMILAR GROUNDS; PROVIDED, HOWEVER, THAT NOTHING CONTAINED HEREIN SHALL PROHIBIT THE BORROWER OR THE GUARANTOR FROM SEEKING, BY APPROPRIATE MOTION, TO REMOVE AN ACTION BROUGHT IN A STATE COURT TO THE UNITED STATES DISTRICT COURT FOR THE APPROPRIATE DISTRICT OF SUCH STATE. IF SUCH ACTION IS SO REMOVED, HOWEVER, THE BORROWER AND THE GUARANTOR SHALL NOT SEEK TO TRANSFER SUCH ACTION TO ANY OTHER DISTRICT NOR SHALL THE BORROWER NOR THE GUARANTOR SEEK TO TRANSFER TO ANY OTHER DISTRICT ANY ACTION WHICH THE LENDER ORIGINALLY COMMENCED IN A UNITED STATES DISTRICT COURT. ANY ACTION OR PROCEEDING BROUGHT BY THE BORROWER OR THE GUARANTOR ARISING OUT OF ANY OF THE LOAN DOCUMENTS OR OTHERWISE IN REGARD TO THIS COMMITMENT LETTER OR THE LOAN SHALL BE BROUGHT SOLELY IN A COURT OF COMPETENT JURISDICTION LOCATED IN THE STATE OF TEXAS OR IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

26. LENDER'S DEFAULT. IN THE EVENT EACH OF THE CONDITIONS TO THE LENDER'S OBLIGATION TO FUND THE LOAN IS SATISFIED AND THE BORROWER AND THE GUARANTOR PERFORM EACH OF THEIR RESPECTIVE OBLIGATIONS DESCRIBED IN THIS COMMITMENT LETTER AND THE LENDER THEREAFTER FAILS OR REFUSES TO CLOSE THE LOAN, THE BORROWER AND THE GUARANTOR SHALL BE ENTITLED TO RECOVER UP TO, BUT NOT IN EXCESS OF \$10,000.00 IN THE AGGREGATE IN ACTUAL DAMAGES FROM THE LENDER TO COMPENSATE THE BORROWER AND THE GUARANTOR FOR ANY OUT-OF-POCKET LOSSES OR DAMAGES ACTUALLY SUFFERED BY THE BORROWER AND THE GUARANTOR AS A RESULT OF SUCH A FAILURE OR REFUSAL BY THE LENDER, AS THE BORROWER'S AND THE GUARANTOR'S SOLE AND EXCLUSIVE REMEDY FOR SUCH A FAILURE OR REFUSAL. THE BORROWER AND THE GUARANTOR HEREBY WAIVE ALL OTHER REMEDIES AND RELIEF. IN NO EVENT WILL THE LENDER (i) BE LIABLE FOR ANY PUNITIVE, CONSEQUENTIAL, SPECIAL OR OTHER DAMAGES OR (ii) SUBJECT TO ANY EQUITABLE REMEDY OR RELIEF, INCLUDING, WITHOUT LIMITATION, SPECIFIC PERFORMANCE, ARISING FROM OR RELATING TO ANY

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LNV 001514

Affordable Hospitality Group-Anderson, LLC
August __, 2009
Page 16

DEFAULT BY THE LENDER IN THE PERFORMANCE OF ANY OF ITS OBLIGATIONS
HEREUNDER, OTHER THAN ACTUAL DAMAGES LIMITED AS PROVIDED ABOVE.
THE LOAN DOCUMENTS WILL CONTAIN A SIMILAR LIMITATION OF THE LENDER'S
LIABILITY.

LNV CORPORATION

By: _____
Name: _____
Title: _____

AGREED TO AND ACCEPTED THIS day of _____, 2009.

BORROWER

AFFORDABLE HOSPITALITY GROUP-ANDERSON,
LLC, a Georgia limited liability company

By: _____
Name: _____
Title: _____

GUARANTOR

JAY BERLYE, individually

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EXHIBIT "A"

The Land

DRAFT

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LVN 001516

EXHIBIT "B"

The Survey Requirements

- (a) Field Note Description. The Survey should contain a certified metes and bounds description and should comply with the following requirements:
- (i) The beginning point should be established by a monument located at the beginning point, or by reference to a nearby monument;
 - (ii) The sides of the property should be described by giving the distances and bearings of each;
 - (iii) The distances, bearings and angles should be taken from a recent instrument survey, or recently recertified instrument survey, by a licensed Professional Engineer or Registered Surveyor;
 - (iv) Curved sides should be described by data including length of arc, central angle, radius of circle for the arc and chord distance and bearing;
 - (v) The legal description should be single perimeter description of the entire property;
 - (vi) The description should include reference to all streets, alleys, and other rights-of-way that abut the property surveyed, and the width of all rights-of-way mentioned should be given the first time these rights-of-way are referred to; and
 - (vii) If the property surveyed has been recorded on a map or plat as part of an abstract or subdivision, reference to such recording data should be made.
- (b) Lot and Block Description. If the Property is included within a properly established recorded subdivision or addition, then a lot and block description will be an acceptable substitute for a metes and bounds description, provided that the lot and block description must completely and properly identify the name or designation of the recorded subdivision or addition and give the recording information therefor.
- (c) Map or Plat. The Survey should contain a certified map or plat showing the following:
- (i) The plot to be covered by the Mortgage.
 - (ii) The relation of the point of beginning of said plot to the monument from which it is fixed;
 - (iii) All easements showing recording information therefor by volume and page.
 - (iv) The established building line, if any.
 - (v) All easements appurtenant to said plot.

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- (vi) The boundary lines of the street or streets abutting the plot, the width of said streets and the names of such streets.
- (vii) Encroachments and the extent thereof in terms of distance upon said plot or any easement appurtenant thereto.

The Survey should also locate and show all structures and other improvements on said plot with horizontal lengths of all sides and the relation thereof by distances to (a) all boundary lines of this plot, (b) easements, (c) established building lines, and (d) street lines.

- (d) Certification. The certification for the property description and the map or plat should be addressed to LNV CORPORATION (and to the interested title company if required by the title company), signed by the surveyor, bear current date, registration number, and seal and should be in the following form or its substantial equivalent:

The undersigned hereby certifies to LNV CORPORATION that this Survey (i) was made on the ground as per the field notes shown hereon and correctly shows the boundary lines and dimensions and area of the land indicated hereon and each individual parcel thereof indicated hereon; (ii) correctly shows the location of all buildings, structures and other improvements, and visible items on the subject property; (iii) correctly shows the location and dimensions of all alleys, streets, roads, rights-of-way, easements, and other matters of record of which the undersigned has been advised affecting the subject property according to the legal description in such easements and other matters (with instrument, book, and page number indicated); (iv) correctly shows the location of all streets and roads providing access to the subject property and that the following streets and roads which provide such access have been dedicated for public use and are completed and have been accepted by the appropriate governmental authorities [list below all public streets abutting the property];

correctly shows the locations of all portions of the subject property which are located in an area designated as a "flood prone area" as defined by U.S. Department of Housing and Urban Development pursuant to the Flood Disaster Protection Act of 1973 (i) as having special flood hazards [or if no part of the subject property is designated as being a "flood prone area" or as having special flood hazards, the surveyor shall so state and certify]; (vi) except as shown, there are no visible easements, rights-of-way, party walls, or conflicts, and there are no visible encroachments on adjoining premises, streets, or alleys by any of said buildings, structures, or other improvements, and there are no visible encroachments on the subject property by buildings, structures, or other improvements situated on adjoining premises; and (vii) the distance from the nearest intersecting street and road is as shown hereon; and (viii) this survey complies with the current ALTA standards.

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EXHIBIT B

The Senate Banking and Financial Institutions Committee offered the following substitute to SB 448:

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 2 of Title 18 of the Official Code of Georgia Annotated, relating to debtor
2 and creditor relations, so as to enact the "Small Business Borrower Protection Act"; to
3 provide for definitions; to provide for recovery limits for debt obligations by successor
4 creditors; to provide for applicability; to require successor creditors to submit the amount
5 paid for a debt during recovery proceedings; to provide for an exemption; to provide for
6 related matters; to repeal conflicting laws; and for other purposes.

7 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

8 **SECTION 1.**

9 Chapter 2 of Title 18 of the Official Code of Georgia Annotated, relating to debtor and
10 creditor relations, is amended by adding a new article to read as follows:

11 **'ARTICLE 5**

12 18-2-90.

13 This article shall be known and may be cited as the 'Small Business Borrower Protection
14 Act.'

15 18-2-91.

16 As used in this article, the term:

17 (1) 'Guarantor' means any person who agrees to pay, in whole or in part, the original debt
18 obligation of another person.

19 (2) 'Guaranty' means any guaranty, indemnification, agreement to make whole, or any
20 other arrangement under which a person shall agree to pay, in whole or in part, the
21 original debt obligation of another person.

22 (3) 'Original creditor' means any person who first extends credit to a debtor or person
23 obligated on a debt obligation.

24 (4) 'Person' means any natural person, corporation, limited liability company, or any
 25 form of partnership, or any combination of any of the foregoing, and the heirs, executors,
 26 administrators, successors, and assigns of such person.

27 (5) 'Successor creditor' means any person who did not enter into the original debt
 28 obligation with the debtor and has by assignment, sale, transfer, or other means acquired
 29 the original debt obligation.

30 18-2-92.

31 Any successor creditor shall be limited to recovery against any guarantor on any debt
 32 obligation to the lesser of:

33 (1) The actual amount paid for the debt obligation, plus interest at the interest rate stated
 34 on the face of the debt obligation from the date of purchase, transfer, or assignment of the
 35 obligation. The interest rate allowed under this article shall be a nondefault rate; or

36 (2) The maximum amount permitted to be collected under the guaranty.

37 18-2-93.

38 This article shall apply to the sale, assignment, or transfer of debt obligations and the sale,
 39 assignment, or transfer of judgments rendered on debt obligations regardless of when such
 40 judgments were entered.

41 18-2-94.

42 In any action to collect a debt obligation by a successor creditor, the successor creditor
 43 shall be required to prove the actual amount paid for the debt obligation.

44 18-2-95.

45 This article shall not apply to institutions with federally insured deposits."

46 **SECTION 2.**

47 All laws and parts of laws in conflict with this Act are repealed.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
LNV Corporation,	)	Civil Action No. 2011-CP-04-2728
	)	
Plaintiff,	)	
vs.	)	
	)	
Affordable Hospitality Group-Anderson,	)	<u>MEMORANDUM IN OPPOSITION TO</u>
LLC; Diversified Capital Investment	)	<u>MOTION TO ALTER OR AMEND</u>
Group, LLC; Jay Berlye; Anderson County,	)	<u>JUDGMENT</u>
South Carolina; and the State of South	)	
Carolina,	)	
	)	
Defendants.	)	
	)	

The Plaintiff, LNV Corporation (hereinafter, "LNV"), hereby respectfully submits this Memorandum in Opposition to Defendants' Affordable Hospitality Group-Anderson, LLC's; Diversified Capital Investment Group, LLC's; and Jay Berlye's (collectively, hereinafter, "AHG") Motion to Alter or Amend Judgment.

AHG's delay tactics continue with this, their latest filing. AHG's motion does nothing more than re-argue the previous issues raised—and rejected—by this Court. LNV asks the Court to stand behind its previous ruling that granted LNV's motion to dismiss AHG's baseless counterclaims.

BRIEF FACTUAL BACKGROUND¹

- LNV initiated foreclosure proceedings against AHG on September 13, 2011.
- The foreclosure action is based on a loan made to AHG for the construction of the Microtel hotel in Anderson, South Carolina. On May 15, 2008, AHG entered into a loan agreement with Haven Trust Bank ("Haven Trust") (a failed institution) in the original principal sum of \$3,411,782.00. The note was guaranteed by the other Defendants and was secured by a mortgage on the property that is the subject of this action (the "Subject Property").

¹ LNV incorporates its statement of facts previously provided in its memorandum in support of its Motion to Dismiss.

- Haven Trust was closed and placed into receivership with the Federal Deposit Insurance Corporation (“FDIC”). LNV subsequently acquired the note from the FDIC.
- AHG breached the terms of the loan documents when they failed to pay the loan as agreed (Compl., ¶ 26) and allowed various tax liens to attach to the property for failure to pay taxes to the State of South Carolina and the County of Anderson (Compl., ¶ 29). As of the date of filing the Complaint, LNV was owed \$4,125,598.66 (with interest accruing at \$834.55 *per diem*).
- AHG filed a series of counterclaims in its Amended Answer dated November 28, 2011. AHG alleged claims for:
 - breach of contract,
 - breach of the duty of good faith and fair dealing,
 - breach of contract with fraudulent intent,
 - violation of the South Carolina Unfair Trade Practices Act, and
 - tortious interference.
- All of AHG’s counterclaims are premised upon their claim that LNV did not abide by a “Loan Commitment Letter” that purportedly obligated AHG to “grant [a] permanent loan and assist Defendants in obtaining [a] SBA 504 Interim Loan.” (Ans., ¶ 227).

LEGAL ANALYSIS

AHG has raised three issues in its Motion (the “Motion”) to Alter or Amend the Court’s previous Judgment (the “Existing Order”). None of these arguments serve as a basis for the Court to overturn its previous Order.

I. These Matters Were Previously Raised to the Court and Ruled Upon

AHG’s Motion does nothing more than re-argue the points that it previously raised in its briefing on the Motion to Dismiss. AHG claims that the Court did not consider its arguments regarding a “3-part” “Basic Contract” between AHG and the Plaintiff. (Motion, p. 1). However, the Court addressed these very arguments in its Order when it discussed the Loan Commitment Letter and the alleged “3 parts” of the

commitment. (Order, pp. 2-3). The Motion does nothing more than raise these same issues previously addressed by the Court.

Similarly, AHG asks the Court to re-visit its argument regarding “continuing negotiations” regarding the “3-part” “Basic Contract.” (Motion, p. 2). The Court’s Existing Order addresses these issues regarding the “continuing negotiations.” (Order, p. 5). This same issue is further addressed later in the Order when it analyzes these “continuing negotiations” and the fact that they are alleged to have occurred prior to the date of the releases. (Order, p. 7).

AHG’s final argument—that the release was limited only to the construction financing aspect of the parties’ relationship—was previously addressed by the Court’s Order. The Court examined the language of the releases (Order, p. 3-4) and found that it was a broad release that encompassed “any claims, controversies, disputes, [etc.]...arising out of, connected with or relating to any and all acts, omissions, or events....” (Order, p. 7). As such, AHG’s claims are foreclosed.

AHG’s Motion is nothing but a second bite at the apple, seeking to raise issues that were previously heard by the Court and addressed in the Existing Order. The Court should reaffirm its prior Order and reject AHG’s Motion.

II. AHG’s Argument that LNV Breached One of Three, Successive Contracts

AHG never challenges that it is plainly in breach of its loan agreements with LNV. To this day, AHG does not deny that: (a) it did not make the payments, as agreed, under the promissory note with LNV, (b) it allowed tax liens to attach to the property in violation of its contract with LNV, and (c) it permitted the Microtel hotel to go into receivership. Nonetheless, AHG claims that its breach of contract claims are founded

upon a “Basic Contract” evidenced by a November 6, 2007 Loan Commitment letter. AHG, again, raises its argument that this Loan Commitment Letter obligated LNV to offer AHG a “20 year permanent loan” with “SBA 504 funding.”

What AHG failed (and still fails) to tell the Court, is that the parties never entered into these subsequent contracts because AHG could not qualify for an SBA 504 Loan. Though AHG characterizes the Loan Commitment as a “Basic Contract” that required the issuance of a permanent SBA-backed loan, the Loan Commitment Letter *contains no such language*.² Contrary to AHG’s arguments, the Loan Commitment Letter expressly states that *there is no guarantee* that LNV will be able to issue a permanent, 20 year loan, or guarantee SBA 504 backing. Instead, the Loan Commitment Letter explains that detailed loan documents will be executed once each portion of construction is complete and upon AHG’s ability to obtain SBA loan backing. The Letter clearly states that it is preliminary and subject to AHG meeting SBA qualifications:

- “This commitment is subject to satisfactory completion of credit investigation and analysis, satisfactory documentation and such other terms and conditions as are determined by Bank and SBA.” (Loan Commitment, p. 1).
- “*Proposed* permanent loan will be for a period of twenty (20) years....” (*Id.*, p. 2) (emphasis added).
- “This Commitment is subject to receipt and review of an Appraisal satisfactory to the Bank, reporting a minimum appraisal value of...\$4,230,000 or maximum 80% loan to value.” (*Id.*, p. 4).
- **THIS COMMITMENT IN NO WAY IS TO BE CONSTRUED AS FINAL APPROVAL BY HAVEN TRUST BANK OR ITS ASSIGNS.** (*Id.*, p. 9 (bolding and capitals in original)).

² Tellingly, AHG does not attach the full text of the Loan Commitment Letter to the Motion. LNV has done so and attached the Loan Commitment Letter as **Exhibit A**.

The only contracts executed between the parties were the construction loan agreements, which LNV seeks to enforce in this action. These were the loan documents breached by AHG well before AHG was able to apply for, or obtain, SBA consideration.

AHG asks this Court to enforce a commitment letter that expressly contemplates future terms and conditions of future contracts. Such “agreements to agree” are not enforceable as contracts in South Carolina. “It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent...to all of the terms of the contract.” Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). “To be final, the agreement must extend to all of the terms which the parties intend to introduce and material terms cannot be left for future settlement.” McLaurin v. Hamer, 165 S.C. 411, 164 S.E. 2, 5 (1932). Clearly, the terms of an SBA 504 Loan and a permanent loan promissory note, mortgage, and guarantees are not included in the Loan Commitment Letter. The Loan Commitment Letter expressly states that it is preliminary and these future, “proposed” contracts will be executed once AHG meets the qualification criteria and obtains governmental, SBA, approval. As such, the Loan Commitment Letter is simply an agreement to agree and the provisions that AHG cite as the “Basic Contract” are not enforceable under South Carolina law.

III. AHG Released the Claims It Now Seeks to Enforce

Regardless of whether the Loan Commitment Letter even creates an enforceable contract, AHG previously released the claims it now seeks to assert. LNV and AHG previously entered into a series of loan modifications to extend the term of the loan, provide additional liquidity, and assist AHG in completing construction of the hotel.

These two Loan Modification Agreements are dated June 1, 2009,³ and November 10, 2009⁴, respectively. In each of these documents, in consideration of the lender's modifying the loan agreement, AHG granted a broad release that includes the very claims that they now raise as counterclaims.

Both of these documents contain similar language:

AS A MATERIAL INDUCEMENT TO LENDER [LNV] TO ENTER INTO THIS AGREEMENT, BORROWER AND GUARANTORS ... HEREBY FULLY, FINALLY AND COMPLETELY RELEASE AND FOREVER DISCHARGE ORIGINAL LENDER [HAVEN TRUST BANK], THE FEDERAL DEPOSIT INSURANCE CORPORATION ... [AND] LENDER [LNV] OF AND FROM ANY AND ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS, DEMANDS, DAMAGES, EXPENSES ... DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION OF ANY AND EVERY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR THE MORTGAGE OR ANY OTHER LOAN DOCUMENT WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER, ET AL., OR ANY THEREOF, ARISING OUT OF, CONNECTED WITH OR RELATING TO ANY AND ALL ACTS, OMISSIONS OR EVENTS OCCURRING PRIOR TO THE EXECUTION OF THIS AGREEMENT.

(6/1/2009 and 11/10/2009 Loan Modification Agreements, ¶ 3).

Regardless of the position now taken by AHG in its Motion, AHG alleges that the obligation to grant the SBA loan arose in May 2009. (Am. Ans. & Counterclaim, ¶ 225 ("In May 2009, [AHG] completed performance under the Construction Loan Agreement...[and] [a]t that time, [LNV] would have been required to grant the permanent loan and assist [AHG] in obtaining the SBA 504 Interim Loan...")). After this supposed obligation arose, AHG entered into the Loan Modification Agreements

³ Attached to the Answer as Exhibit B and hereto as Exhibit B.

⁴ Attached to the Answer as Exhibit C and hereto as Exhibit C.

with Plaintiff on June 1, 2009, and November 10, 2009. (Id. ¶¶ 230, 233.) Now, despite this release of (a) all claims and causes of action relating to the note, mortgage “or any other loan document which obligors, et al., now have or may claim to have against lender. . . .; (b) all claims and causes of action “arising out of any and all acts... occurring prior to the execution” of the Loan Modification Agreement; and (c) all defenses to repayment of the indebtedness, AHG asserts counterclaims arising from the failure to enter into a permanent loan or obtain SBA 504 financing.

Having entered into the loan modification agreements and having released these claims without reservation, AHG is barred from asserting these claims and defenses now. Releases of this type are regularly recognized under South Carolina law and are enforced accordingly. See Lowery v. Callahan, 210 S.C. 300, 305, 42 S.E.2d 457, 459 (1947); Gardner v. City of Columbia Police Dept., 216 S.C. 219, 225, 57 S.E.2d 308, 310 (1950); Gecy v. Prudential Ins. Co. of America, 273 S.C. 437, 442, 257 S.E.2d 709, 712 (1979); Bowers, 360 S.C. at 156, 600 S.E.2d at 546. AHG’s previously executed releases, given in consideration of LNV’s continued extensions and modification of the loan agreements should be enforced according to their terms. AHG cannot now assert these claims to prolong and delay the foreclosure process.

Regardless of AHG’s position in this Motion that there were “continuing negotiations” after the Loan Modification Agreements, AHG cannot escape the fact that after determining that LNV would not grant a permanent loan (due to AHG’s breach of the construction loan agreements), it entered into a full release in the Loan Modification Agreements. AHG cannot now seek to enforce the claims they released.

IV. The Release Was Not Limited to Only the Construction Loan Agreements

AHG asks the Court to ignore the language of the Loan Modification Agreements and limit their release to only claims arising under the construction financing agreements.

However, this is contrary to the plain language of the Loan Modification Agreements:

BORROWER AND GUARANTORS ... HEREBY FULLY, FINALLY AND COMPLETELY RELEASE AND FOREVER DISCHARGE ORIGINAL LENDER [HAVEN TRUST BANK], THE FEDERAL DEPOSIT INSURANCE CORPORATION ... [AND] LENDER [LNV] OF AND FROM ANY AND ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS, DEMANDS, DAMAGES, EXPENSES ... DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION **OF ANY AND EVERY NATURE WHATSOEVER**, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR THE MORTGAGE **OR ANY OTHER LOAN DOCUMENT** WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER.

Loan Modification Agreements, ¶ 3 (emphasis added). The language of the releases forecloses AHG's argument that "the modifications touched only the construction loan agreement...." (Motion, p. 2). "A release is a contract and contract principles of law should be used to determine what the parties intended." Ecclesiastes Production Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). Where a "[r]elease unambiguously sets forth the contracting parties' intent, [the court is] bound by that clearly expressed intent." Bowers v. Dept. of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004). AHG chose to enter into the releases and use the language contained in those releases. They cannot now narrow the release when it suits their pleasure in this Motion.

CONCLUSION

The claims asserted by AHG are barred as a matter of law. AHG, to this day can assert no basis, at fact or at law that would allow it to prosecute these claims in light of the releases. AHG has raised no new issues in its Motion and the Court should stand behind the Existing Order and deny AHG's motion to alter or amend.

Respectfully submitted,

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Attorneys for LNV Corporation

Greenville, South Carolina
May 6, 2013

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

LVN Corporation,

Plaintiff,

vs.

Affordable Hospitality Group-Anderson,
LLC; Diversified Capital Investment
Group, LLC; Jay Berlye; Anderson County,
South Carolina; and the State of South
Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-04-2728

MEMORANDUM IN OPPOSITION TO
MOTION TO AMEND ITS FIRST
AMENDED ANSWER AND
COUNTERCLAIMS

The Plaintiff, LVN Corporation (hereinafter, "LVN"), hereby respectfully submits this Memorandum in Opposition to Defendants' Affordable Hospitality Group-Anderson, LLC; Diversified Capital Investment Group, LLC; and Jay Berlye (collectively, hereinafter, "AHG") Motion to Amend its First Amended Answer. Defendants have previously filed a First Amended Answer and Counterclaims. They now seek to, once again, amend their Answer following this Court's decision that granted the Motion to Dismiss the Counterclaims. Such tactics should not be tolerated by this Court.

BRIEF FACTUAL BACKGROUND¹

- LVN initiated foreclosure proceedings against AHG on September 13, 2011.
- AHG filed its initial Answer and Counterclaims. Thereafter, on November 28, 2011, AHG filed its First Amended Answer and Counterclaims.
- LVN filed a reply to the Amended Answer and Counterclaims on January 9, 2012.
- LVN also filed a Motion to Dismiss the Counterclaims on January 9, 2012.

¹ LVN incorporates its statement of facts previously stated in its memorandum in support of its Motion to Dismiss.

- A hearing on the Motion to Dismiss occurred on February 29, 2012. This Court granted the Motion to Dismiss and struck the counterclaims by an Order signed November 14, 2012 by the Honorable Alexander S. Macaulay.

At no time up until the receipt of the Order Granting the Motion to Dismiss did Defendants ever move to amend their pleading. Only upon receipt of the Order from the Court have Defendants now moved to amend their pleadings and substantively change their previous admissions to “side-step” the Court’s Order.

PROCEDURAL ISSUE

As of the date that AHG purports to have filed to amend its counterclaims, there were no counterclaims that could be amended. The counterclaims asserted by AHG have been previously dismissed, with prejudice, by Order of the Court dated November 14, 2012.

STANDARD ON MOTION TO AMEND PLEADINGS

At this late stage in litigation, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and **does not prejudice any other party.**" Rule 15(a), SCRCPP (emphasis added). "[A] motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice." Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (citing Tanner v. Florence County Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999)). "[L]eave to amend is not to be granted automatically." Deasy v. Hill, 833 F.2d 38, 40 (4th Cir. 1987) (interpreting the same Federal Rule of Civil Procedure).

Courts should not grant leave to amend when the amendment is motivated by “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing

party by virtue of allowance of the amendment, [or] futility of amendment....” Higgins v. Medical University of South Carolina, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) citing Foman v. Davis, 371 U.S. 178 (1962).

LAW / ANALYSIS

1. Defendants’ Motion to Amend only serves to cause undue delay. Defendants have already amended their Answer and Counterclaims once to try to “cure” the deficiencies in their counterclaims. After the filing of the Motion to Dismiss, after the Hearing at which the Court stated it would dismiss the Counterclaims, and only after *receiving* this Court’s Order dismissing its claims, do the Defendants now move to Amend. This is nothing more than a transparent attempt to try to “side-step” the Court’s holding in its prior Order. Defendants have waited nearly one and one-half (1 ½) years to seek this Court’s leave to file an amended Counterclaim even as these issues were raised and ruled upon by the Court.
2. The amendment to the Counterclaims would be futile. As set forth in the Motion to Dismiss, there are two critical flaws that cannot be overcome by the Defendants. First, Defendants executed multiple documents releasing claims against Plaintiff, which they now seek to enforce. Second, Defendants assert that Plaintiff violated the terms of a November 2007 Loan Commitment Letter, however, that Letter does not contain any statement of the obligations alleged by Defendants. Thus, the amendment to add additional “information” and retract its prior admissions would be futile. Higgins, 326 S.C. at 604, 486 S.E.2d at 275.
3. LNV will be prejudiced by the amendment. A Motion to Dismiss will be rendered a procedural nullity if, upon the granting of the motion, the other party may simply

revise its pleadings, retract its admissions, and attempt to “write-around” the Court’s Order. This leads to undue delay and undue costs for a party attempting to litigate a case and avoid needless expense defending spurious claims.

4. LNV is particularly prejudiced by the delay in this case. To date, Defendants do not contest that they are in breach of the promissory note and mortgage given to Plaintiff. The operation of the hotel (the subject of this action) was so poor that the parties agreed to have a receiver appointed to operate the hotel—at Plaintiff’s expense. Every month of delay harms Plaintiff by causing it to lose the revenue on its loan and pay the costs of the receiver to operate the facility. Defendants are using Rule 59 and Rule 15 Motions as nothing more than delay tactics to leverage the Plaintiff that seeks to obtain some recovery on a defaulted loan.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants’ Motion to Amend Pleadings.

Respectfully submitted,

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Certificate of Counsel

The undersigned Attorney for Appellants hereby certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and no other material, in compliance with Rule 210(g) of the South Carolina Appellate Court Rules.

A handwritten signature in black ink, appearing to read "Ronald M. Childress", written over a horizontal line.

Ronald M. Childress
(SC Bar No. 0001216)

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MAR 17 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2011-CP-04-2728
Appellate Case No. 2013-002341

LNV Corporation Respondent

v.

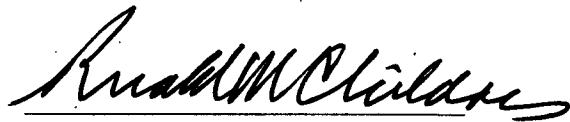
Affordable Hospitality Group-Anderson, LLC;
Diversified Capital Investment Group, LLC; Jay Berlye;
Anderson County, South Carolina, and the State of South
Carolina Defendants,

Of Whom Affordable Hospitality Group-Anderson, LLC;
Diversified Capital Investment Group, LLC; and Jay
Berlye are Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that the Record on Appeal counsel for the Respondent this 8th day of March 2014, by depositing the Record on Appeal in the United States mail, postage prepaid, and addressed as follows:

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Hospitality Group-Anderson, LLC,
Capital Investment Group, LLC and
Jay Berlye

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