STATE OF INDIANA	)	IN THE VANDERBURGH SUPERIOR COURT
	)SS:	DIVISION 3
COUNTY OF VANDERBURGH	)	CAUSE NO.: 82D03-1404-MF-001437

Whiteacre Funding, LLC, a Delaware limited liability company, Plaintiff, v. ERC I, LLC, Fred Martin Floors, Inc., and Vanderburgh County Treasurer, Defendants.	)	Assigned to: Judge Mary Margaret Lloyd

VANDERBURGH SUPERIOR COURT
FILED
MAY 11 2016
Debra G. Lucke
VANDERBURGH COUNTY CLERK

ERC I, LLC, Counterclaimant/ Third-Party Plaintiff, v. Whiteacre Funding, LLC, Counterclaim Defendant and Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 2, LLC, Third-Party Defendants.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF FINAL JUDGMENT

The above cause of action came before the Court for trial by court on February 8 – 11, 2016. Plaintiff and Counterclaim Defendant Whiteacre Funding, LLC ("Whiteacre"), and Third Party Defendants Riverdale Funding, LLC ("Riverdale") and Woodbridge Mortgage Investment Fund 2, LLC ("Woodbridge") (Whiteacre, Riverdale and Woodbridge are collectively referred to

herein as the "Woodbridge Parties") were represented by counsel, John D. Waller and Matthew B. Millis, from Wooden McLaughlin LLP. Defendant, Counterclaimant and Third-Party Plaintiff ERC I, LLC ("ERC") was represented by counsel, Steven Hoar, from Kahn Dees Donovan & Kahn, LLP.

By prior order dated January 26, 2016, default judgment was entered in Whiteacre's favor and against Defendant Fred Martin Floors, Inc. ("Fred Martin") thereby terminating any interest that Fred Martin may have had in the subject property. By prior order dated February 2, 2016, the Defendant Vanderburgh County Treasurer was dismissed from this action without prejudice.

Over the course of the four day trial, the Court heard testimony from five witnesses and admitted more than two hundred exhibits. Having considered all of the evidence and being duly advised in the premises, the Court NOW FINDS:

1. That this Court has jurisdiction over the parties;

2. That this Court has jurisdiction over the subject matter in controversy;

3. That the Woodbridge Parties prevailed on all claims;

4. That Whiteacre is entitled to a judgment and a decree of foreclosure as described herein; and

5. That the Woodbridge Parties are entitled to judgment on all Counterclaims and Third-Party Claims asserted by ERC.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that final judgment be entered in favor of the Woodbridge Parties and against ERC upon the following terms.

FINDINGS OF FACTS

Upon the motion of ERC, and pursuant to Indiana Trial Rule 52, the Court makes the following findings of fact. To the extent that any finding of fact should be construed as a conclusion of law, or vice versa, it shall be so construed.

I. ERC, the Property, and the Loan Documents.

1. ERC is a Virginia limited liability company that owns the Woolen Mill Building located on real estate with a common address of 420 N.W. Fifth Street in downtown Evansville, IN (the "Property"). The Property's legal description is set forth in the attached Plaintiff's Exhibit #17.

2. ERC is controlled by Alan Brill ("Brill"). (Brill Testimony.)

3. Brill is a sophisticated businessman with years of commercial real estate experience. He has a Harvard MBA and a CPA license, and has held top executive positions at a number of companies. (Brill Testimony.)

4. ERC has owned the Property since 1999. (Brill Test.)

5. On July 17, 2007, ERC executed a Promissory Note (the "Note") in the principal amount of $1,600,000.00 payable to GreenPoint Mortgage Funding, Inc. ("GreenPoint"). (Plaintiff's Exhibit #1.)

6. To secure and collateralize the Note, ERC executed and delivered to GreenPoint a Mortgage, Assignment of Rents and Security Agreement (the "Mortgage"). (Plaintiff's Exhibit #17.)

7. From 2007 to 2011, the Note and Mortgage were assigned a number of times, each time documented with properly executed Allonges and properly recorded mortgage assignments. (Plaintiff's Exhibits #2-#8 and #18-#23.)

8. As of March 21, 2011, Waterfall Victoria Mortgage Trust 2011-SBC1 ("Waterfall") was the holder of the Note and Mortgage. (Plaintiff's Exhibits #5 and #21.)

II. ERC's Default and Early Efforts to Work Out its Loan With Waterfall.

9. ERC has not made a regular payment under the Note and Mortgage since 2010 and has been in default for more than seven years. (Brill Testimony; Plaintiff's Exhibit #6.)

10. As of June 24, 2011, ERC owed an accelerated balance under the Note of $2,193,893.72. To stave off foreclosure, Waterfall and ERC entered into a forbearance agreement (the "Forbearance Agreement"). (Plaintiff's Exhibit #6.)

11. Under the Forbearance Agreement, Waterfall agreed to forbear from foreclosure provided that ERC, among other things, made monthly payments of $5,500.00 and bought out Waterfall on or before July 15, 2012, at the discounted payoff amount of $950,000. (Plaintiff's Exhibit #6.)

12. ERC defaulted under the Forbearance Agreement when it made only eleven of the required $5,500 monthly payments and failed to obtain financing to buy out Waterfall by July 15, 2012. (Brill Testimony; Plaintiff's Exhibit #98 at Paragraph #10)

13. ERC's primary contact with Waterfall was Joe Temm ("Temm"), who worked for Cohen Financial ("Cohen"), an agent for Waterfall that serviced the Mortgage. (Brill Test.)

14. After ERC's default under the Forbearance Agreement, Temm pursued Brill for updates on ERC's efforts to obtain financing. Brill's responses primarily consisted of representations that funding would be, or was about to be, secured. (Plaintiff's Exhibits #24, #26, #29, #31, #33, #35, #40, #45, #46, #47, #48.)

15. As time went by, Temm grew frustrated with Brill's inability to come through on his promises to pay off Waterfall. On July 11, 2013, Temm advised Brill that Waterfall would

sell the Note to another investor in the next 30-60 days if Brill did not propose a deal that would get Waterfall paid off. (Plaintiff's Exhibit #29.)

16. Dating back to at least 2013, ERC's income from the Property was less than the Property's expenses. Brill personally subsidized the expenses to keep the building open. (Brill Testimony; Plaintiff's Exhibit #31.)

17. On July 26 and 27, 2013, Brill told Temm that ERC had "less than no cash flow," and that Brill had been subsidizing the Property "to the tune of at least $5,000 to $10,000 per month." Brill claimed, given his financial situation, that he could offer no more than $700,000 to pay off Waterfall. Brill told Temm the money would be coming from a hard money loan that ERC would close no later than the second week of August. (Plaintiff's Exhibit #31.)

18. Temm countered Brill's offer on August 13, 2013, noting that his "investor approved the note sale for $750,000 which must close before September 25, 2013." (Plaintiff's Exhibit #33.)

19. Contrary to Brill's representations, he did not have a hard money loan ready to close, and he did not close on any financing by September 25, 2013. (see e.g. Plaintiff's Exhibit #35.)

20. When Brill failed to come through with financing by the September 25, 2013 deadline, Temm demanded a non-refundable payment to keep the discounted payoff deal alive. (Plaintiff's Exhibit #35.)

21. The following quotes from Temm's emails are illustrative of the pressure Temm was applying to Brill:

- October 7, 2013: "Alan, I have not heard back from you as to what is going on. I need an update an [sic] as well as when you will send the non-refundable deposit." (Plaintiff's Exhibit #35.)

- October 9, 2013: "Alan, just got off the phone with my boss and investor. You have until Friday afternoon to finalize this matter. I also will require the $25,000 non refundable pmt early next week. If you do not receive it from the settlement then you need to raise it from another source. I will need some sort of proof that this is going to happen—commitment etc. I know we spoke earlier today, but I cannot hold off much longer." (Plaintiff's Exhibit #40.)

- October 16, 2013: "Alan, the investor is ready to nix the deal and go with another party as to the note sale. I need the $25,000 non refundable payment by 12:00 noon Monday October 21, 2013." (Plaintiff's Exhibit #45.)

- October 17, 2013: "Importance: High." "Alan, I need more than $5,000. You are getting this note for 50%. Let me know tomorrow what you can do as well as the time table to close." (Plaintiff's Exhibit #45.)

- October 18, 2013: "Importance: High." "Alan. If you want this to happen and more time to get a closing I need from you a payment of some sort by 12:00 noon on Monday 10/21. Let me know how much you can pay-- $5,000 will not get it done. This is a must by noon Monday October 21, 2013." (Plaintiff's Exhibit #45.)

- October 21, 2013: "Importance: High." "Alan, so there is no confusion. Our commitment has expired; the $10,000 payment is non-refundable. I will try to get the investor to extend the time frame but you must make the $10,000 payment before I will go to them. ... It would also help to have your lender email me some sort of commitment with a short time frame. You have to send the money before I will proceed." (Plaintiff's Exhibit #45.)

22. To prevent Temm from retracting the $750,000 discounted buyout, Brill paid Waterfall a $10,000 non-refundable payment on October 21, 2013. (Plaintiff's Exhibit #46.)

23. During this time, Brill explored financing from several private lenders, including from Revere Capital. (Plaintiff's Exhibit #35.) Given the circumstances, Brill believed financing from a traditional bank was not an option. (Plaintiff's Exhibit #31.) Although Revere Capital issued a non-binding letter of intent on October 15, 2013, it backed out just two days later concluding that "the assets are not nearly strong enough to support this deal and the fact that

we don't have a personal guarantee [sic] from you and a lien position on the MN property doesn't give us enough comfort."[1] (Plaintiff's Exhibit #42, #43, and #44.)

24. After Revere Capital backed out, Brill sought a loan from Green Lake Fund ("Green Lake"), a Los Angeles based group headed by Peter Chang ("Chang"). (Plaintiff's Exhibit #45.)

25. On October 18, 2013, Brill told Temm he was close to having a term sheet from Green Lake, but by October 31, 2013, Brill still had nothing to show Temm that progress was being made on the financing front. (Plaintiff's Exhibit #45 and #47.)

26. Temm's frustration and impatience continued to grow, as shown in the following emails from Temm to Brill:

- October 31, 2013: "Importance: High." "Alan, have you received a term sheet yet? We are getting nervous about this deal. I know you are frustrated but we are about out of time. Please send me an update on Friday. You might need another alternative and quickly." (Plaintiff's Exhibit #47.)

- November 3, 2013: "What is the status? Please forward a copy of the term sheet etc. This deal is on life support and the plug getting close to being pulled." (Plaintiff's Exhibit #48.)

27. By mid to late January 2014, Brill's efforts to work out a deal with Green Lake were "getting really awkward," so he looked "on the internet for other asset based lenders" and came across the name of Riverdale. (Brill Testimony; Plaintiff's Exhibit #66.)

III. Riverdale's Business Model

28. Riverdale is a hard-money, asset-based, commercial real estate lender. Riverdale makes commercial loans secured by first priority mortgage liens on real property. As a hard-

[1] It is notable that Brill was offering Revere Capital more collateral and on less favorable terms than what later was required under Riverdale's Loan Commitment. (Compare Plaintiff's Exhibits #42 with Exhibit #73.)

money lender, Riverdale bases its lending decisions primarily upon the value of the real estate collateral. (Hughis Testimony.)

29. Riverdale does not fund the loans that it makes. Riverdale acts as the loan originator or broker, and Woodbridge is the entity that actually funds the loans and takes the mortgage interest in the subject collateral. (Hughis Testimony.)

30. Pursuant to its investor documents, the maximum loan-to-value ratio of any loan that Riverdale or Woodbridge makes is 65%. However, Riverdale and Woodbridge do not always loan 65% of the value of the collateral. Each loan request is separately considered and approved by Robert Shapiro, the president of both Riverdale and Woodbridge. In many cases, Shapiro approves a loan at less than 65% loan-to-value. (Hughis Testimony; Reed Testimony.)

31. The Woodbridge Parties are not in the business of owning real estate. The only time any of them would own real estate is if a borrower defaults and they are forced to foreclose on the subject collateral. In such cases, the Woodbridge Parties want to liquidate the collateral as quickly as possible to avoid carrying costs, repairs, and other expenses associated with owning commercial real estate. (Hughis Testimony; Reed Testimony.)

IV. ERC Requested a Loan from Riverdale.

32. Brill first made contact with Riverdale on January 20, 2014, when he called Riverdale and spoke with Tony Coffman. (Brill Testimony.)

33. Coffman's role at Riverdale was to speak to prospective borrowers, obtain information regarding the loan that the prospective borrower was looking for, and collect the information that Riverdale needed to make a decision regarding whether to move forward with a prospective loan. (Coffman Testimony; Hughis Testimony.)

34. Coffman did not have any authority to approve or deny any particular loan. Only Robert Shapiro had that authority. Coffman had no authority to vary the terms of a loan commitment. (Coffman Testimony; Hughis Testimony.)

35. After initial conversations with Brill, Coffman forwarded Brill a blank "Summary Form" that Brill was to fill out and submit to Riverdale. (Plaintiff's Exhibit #60.)

36. The Summary Form is the document that Riverdale uses to obtain from a prospective borrower a variety of information Riverdale needs to make a determination regarding whether to move forward with a prospective loan, much like a loan application. (Hughis Testimony.)

37. On January 20, 2014, to apply for a loan with Riverdale, Brill filled out the Summary Form and emailed it to Riverdale. (Plaintiff's Exhibit #60.)

38. In the "Summary Form," Brill represented to Riverdale that the Property had appraised for $3.4 and $3.8 million in 2006 and 2007, and that the Property had a current estimated value of $2 million. In the Summary Form, Brill requested a loan in the amount of $750,000 plus costs, plus an additional $150,000 for repairs, and another $100,000 for a separate note payoff. (Plaintiff's Exhibit #60.)

39. Riverdale understood that ERC needed a loan for $900,000 to cover the cost of the discounted payoff to Waterfall as well as ERC's other needs. At no time did Brill ever request from Riverdale or Woodbridge a loan in a lesser amount. (Hughis Testimony.)

40. With the Summary Form, Brill also provided a balance sheet for ERC that showed a gross asset value for the Property at $3,519,343, and a net value of $1,957,704. (Plaintiff's Exhibit #60.)

41. In the Summary Form, Brill directed Riverdale to ERC's website, "http://www.woolenmilloffices.com", for interior and exterior photographs of the Property. (Plaintiff's Exhibit #60.) The evidence at trial showed that the photographs on the website were not current, as they showed tenants occupying the space who had not been in the building for several years. (Plaintiff's Exhibit # 61; Hughis Testimony; Brill Testimony.) The photographs also did not show significant water damage to the Property that had recently occurred. (Compare Plaintiff's Exhibit #61 with Exhibit #136.)

42. As of January 20, 2014, the Property needed approximately $150,000 in deferred repairs according to Brill. (Plaintiff's Exhibit #60.) The court-appointed Receiver, however, opined that the cost of needed repairs exceeded $240,000. (Plaintiff's Exhibit #133.)

43. In his Summary Form submitted to Riverdale on January 20, 2014, Brill oversold the value and condition of ERC's Property. (Plaintiff's Exhibit #60; Hughis Testimony; Plaintiff's Exhibits #133 and #136.)

44. Brill advised Riverdale from the very beginning that his financing needs were urgent. He told Riverdale that he had the opportunity to buy out his Note and Mortgage from the current holder, Waterfall, for $750,000, a significant discount off the $2.5+ million unpaid balance. Brill represented to Riverdale that the window of opportunity for this discounted payoff amount, however, was closing. Brill told Riverdale that Waterfall was ready to foreclose on the Property if Brill did not come up with the money very quickly. (Hughis Testimony.)

45. In Brill's very first written communication to Riverdale, on January 20, 2014, he stated:

> I need immediate attention to this, as I have fiddled away expectations and time with someone who has not produced. I have a good relationship with the present holder of the note; they have been very straight, but are getting tired.

(Plaintiff's Exhibit #60.)

46. Tony Coffman's superior at Riverdale was Joe Hughis ("Hughis"). Hughis is a Vice President of Riverdale and ran its Tennessee office. Hughis had no day-to-day involvement in the management of Woodbridge. Hughis testified at length at the trial.[2] (Hughis Testimony.)

47. Soon after Brill submitted the Summary Form, Hughis reviewed it, as well as the photographs on Brill's website. (Hughis Testimony.)

48. Hughis then had a telephone conversation with Brill during which Brill emphasized that Waterfall was going to foreclose, so the Woodbridge Parties needed to move quickly to salvage the $750,000 discounted payoff that Temm had offered Brill. (Hughis Testimony.)

V. Riverdale Conditionally Approved a Loan to ERC.

49. On January 23, 2014, Hughis submitted information about Brill's requested loan to Shapiro. (Plaintiff's Exhibit #63.) That same day, Shapiro approved a $900,000 loan conditioned upon the Property having an appraised value of $1.5 million, which constituted a loan-to-value ratio of 60%. (Hughis Testimony.)

50. On January 23, 2014, Riverdale emailed Brill a letter advising that ERC had been conditionally approved for a $900,000 loan, with 12% interest, 1 year term, 6 points to lender, 1% upon signing of commitment, and the remaining 5 points due at closing (the "Conditional Approval Letter"). (Plaintiff's Exhibit #64.)

51. The Conditional Approval Letter made clear that Riverdale would need an "Appraisal certified to Riverdale Funding . . . showing a value of at least $1,500,000.00" as well

[2] Hughis and Coffman were both salaried employees and made no bonus or commissions based upon loan approvals or closings. (Coffman Testimony; Hughis Testimony.)

as a "local real-estate broker's opinion (BPO) of value" as conditions to making the requested loan to ERC. (Plaintiff's Exhibit #64.)

52. The Conditional Approval Letter also noted that Brill needed to pay a commitment fee before Riverdale would begin work on a commitment letter, which would "spell out the terms and conditions of the loan." (Plaintiff's Exhibit #64.)

53. The Conditional Approval Letter was based on information that Brill provided in the Summary Form. Riverdale had done no due diligence upon the issuance of the Conditional Approval Letter. (Plaintiff's Exhibit #64; Hughis Testimony.)

54. In response to the Conditional Approval Letter, Brill continued to stress to Riverdale how time sensitive his funding needs were. He represented that he "would like to proceed and efficiently get this deal done, instead of with the 'form-over-substance' lender I am currently doing it with who is driving me crazy." (Plaintiff's Exhibit #65.)[3] He advised that the current holder of his Note and Mortgage "has been very good to work with me, but I have stretched the holder's patience and he is looking for very soon settlement with the other takeout lender I have been working with who is driving us both nuts." (*Id.*)

55. Generally, when Woodbridge (through Riverdale) makes a loan to a borrower, it issues a new note and takes a new first mortgage lien position in the subject real estate. At Brill's insistence, however, the loan to ERC had to be different. Instead of Woodbridge satisfying the existing Note and Mortgage at the discounted price of $750,000 and then ERC issuing a new note and mortgage, Brill wanted Woodbridge to pay $750,000 to Waterfall in exchange for an assignment of the existing Note and Mortgage. ERC would then be given a year to pay off the loan from Woodbridge, and if ERC was able to do so, Woodbridge would then

[3] The "form-over-substance" lender that Brill was referring to was Green Lake.

assign the Note and Mortgage to ERC or its designee. (Reed Testimony; Plaintiff's Exhibits #67 and #73.)

56. Brill wanted the deal structured in this fashion to avoid significant debt forgiveness tax liability that would accrue to ERC if the Note was satisfied at a discount. (Defendant's Exhibit D; Brill Testimony.)

57. Although this was not the typical way that Riverdale and Woodbridge structured their loans, they agreed to Brill's proposed structure. (Plaintiff's Exhibit #67.)

58. Woodbridge is not in the business of buying distressed loans. In fact, the Waterfall note purchase was Woodbridge's first, and Woodbridge did this as an accommodation to Brill and at Brill's urging. (Reed Testimony.)

VI. Riverdale and ERC Entered Into a Loan Commitment, a Written Contract Setting Forth the Terms on Which Riverdale Would Make a Loan to ERC.

59. On January 30, 2014, Riverdale sent Brill a loan commitment letter (the "Loan Commitment") outlining the terms of the loan that Riverdale was willing to offer ERC. (Plaintiff's Exhibit #73.)

60. The Loan Commitment contained all of the essential terms of the parties' agreement, including the loan amount ($900,000), the loan term (1 year), the interest rate (12%), the monthly payments (interest only), application of the loan proceeds ($750,000 to Waterfall and $150,000 to cover attorneys' fees, commitment fee, title, closing costs, insurance, and repairs), the required loan-to-value ratio (60%), and the collateral securing ERC's payment obligations (assignment of the Note and Mortgage held by Waterfall). (Plaintiff's Exhibit #73.)

61. The Loan Commitment expressly conditioned Riverdale's "obligations to close and make any advance under the Loan discussed in this commitment" on Riverdale's "receipt

and approval of an appraisal . . . indicating that the mortgage property . . . has a value of not less than $1,500,000." (Plaintiff's Exhibit #73.)

62. The Loan Commitment also expressly conditioned Riverdale's "obligations to close and make any advance under the Loan" on Riverdale receiving "a broker's price opinion satisfactory to it in its sole discretion." (Plaintiff's Exhibit #73.)

63. Under the Loan Commitment, if the appraisal did not support the loan amount, Riverdale had the option, but was not obligated, to make a counterproposal to lend a different amount. (Plaintiff's Exhibit #73.)

64. Riverdale had done no due diligence upon the issuance of the Loan Commitment. Riverdale's due diligence did not begin until Brill paid the loan commitment fee. (Hughis Testimony.)

65. Brill read and reviewed the Loan Commitment. (Brill Testimony.)

66. He made hand-written changes to the provisions of the Loan Commitment that he sought to clarify. Yet, Brill made no changes to the $1.5 million appraisal requirement or the BPO condition. (Plaintiff's Exhibit #73.)

67. Brill then executed the Loan Commitment and returned it to Riverdale on January 30, 2014. (Plaintiff's Exhibit #73.)

68. Riverdale accepted Brill's handwritten changes. (Hughis Testimony.)

69. Brill claims that, before Riverdale provided the Conditional Approval Letter and the Loan Commitment, Coffman told Brill that the $1.5 million appraisal condition was a "mere formality" and that Riverdale would do a loan even if the appraisal came in at less than $1.5 million. The loan conditions needing to be met were 1) a high enough appraisal; and 2) the BPO: the value of the property if it had to sell less than for the loan appraisal. (Coffman

Testimony.) Coffman and Hughis denied the $1.5 Million appraisal condition was a "mere formality." (Coffman Testimony; Hughis Testimony.) Further, trial exhibits contradicted Brill's testimony as to the appraisal condition. Exhibits included the Conditional Approval Letter (Plaintiff's Exhibit #60.) and Loan Commitment (Plaintiff's Exhibit #73.), which Brill signed after making changes to clarify other terms. Brill's own actions also were inconsistent with his testimony, in that he spent significant effort over the weeks following execution of the Loan Commitment trying to fulfill the appraisal and BPO conditions. (Plaintiff's Exhibits #95, #97, #102, #106, #109-#11, #113-#16.)

VII. ERC Requested that Woodbridge Move Forward With the Waterfall Note Sale Separate and Apart from Riverdale's Loan so as to Preserve the Discounted Payoff Amount with Waterfall.

70. Brill did not initially tell Temm that he was working with yet another new lender. Upon learning that Brill was starting over with another lender (Riverdale), Temm and Waterfall were not happy. (Plaintiff's Exhibit #68.)

71. Temm stated in a January 30, 2014, email as follows:

> *Alan, the time is now.* We have to get this matter resolved now or everyone will lose. I have taken a beating from my investor for not foreclosing on you months ago. *If the deal with Green Lake doesn't happen we will initiate foreclosure proceedings and not look back. Sorry I have to be like this but I have no choice.* Do you have docs from Green Lake and are in process of reviewing? Please update me on the status of the Green Lake matter so I can let my investor know. *Sorry we are out of time.* Joe

(Plaintiff's Exhibit #72. (emphasis added).)

72. Brill pleaded with Temm for more time to get something done with Riverdale. Brill represented to Temm that, with help from Brill's lawyer, Chris Malone, he could get the Riverdale deal "done for sure next week … and with a lot less stress … and better [than working with Green Lake]." (Plaintiff's Exhibit #72.) He also told Temm that he did not think things

would work out with Green Lake, and therefore, he was "putting all of [his] emphasis on Riverdale." (*Id.*)

73. In response to Brill's January 30, 2014 email, Temm emailed Brill as follows:

> Alan, before I can send the information to Woodbridge I need some info for our investor. This matter has drug on and I am now being forced to request info before I can do anything with Woodbridge. We need a copy of the appraisal that was done by Green Point, copies of current rent roll and latest operating statement on the property. In addition, we may be requesting another payment before proceeding. Please provide this info asap so I can get with my investor to get the approval of sending Woodbridge info. Thanks, Joe Temm

(Plaintiff's Exhibit #75.)

74. On February 1, 2014, Temm continued to express his frustration about Brill's lack of performance:

> Alan, I am having a hard time getting anything approved by my investor due to lack of performance the past few years. I am speaking with my investor on Monday but it would help if you would forward a copy of the commitment from Woodbridge. I cannot promise anything at this time. Thanks, Joe Temm

(Plaintiff's Exhibit #79A.)

75. Brill made sure that Riverdale and Woodbridge knew that Temm was threatening to foreclose if Waterfall did not get paid soon. Brill forwarded Temm's emails to Riverdale and Woodbridge and emphasized the urgency of the situation in phone calls with Riverdale and Woodbridge. (Hughis Testimony; Reed Testimony; Plaintiff's Exhibits #79B, #81, #84, #85, #86.)

76. Meanwhile, Brill pleaded with Temm for more time. In an email dated February 2, 2014, Brill forwarded Riverdale's Loan Commitment to Temm. In this email, Brill advised Temm that Riverdale "understand[s] the urgency." (Plaintiff's Exhibit #79A.)

77. In an email copied to Riverdale and Woodbridge, Brill told Temm:

> I understand your investor's desire to move on from me. In his place I would probably be voicing the same concerns. . . . I hope you can hold this together. It has been a long road, and I know that you have not been frivolous about the importance even when I have caused issues beyond my control.

(Plaintiff's Exhibit #79A.)

78. Brill also admitted in his email to Temm that he understood that Riverdale was not obligated to make him a loan and that the parties still needed to agree on final paperwork:

> ...Then of course, we [Riverdale and Brill] have to agree on the contract, but at this stage I am pretty much subject to their desire. I am willing to do that (unless to unreasonable extreme) as the commitment is detailed professionally to indicate reasonably what the paperwork should look like[.]

(Plaintiff's Exhibit #79A.)

79. Following the issuance of the Loan Commitment but before Riverdale's due diligence had been completed, Brill persuaded Riverdale and Woodbridge to move forward with the acquisition of the Note and Mortgage from Waterfall (the "Waterfall Note Sale"). (Hughis Testimony; Reed Testimony.)

80. On February 3, 2014, Brill stated in an email to Riverdale that "Joe [Temm] is under tremendous pressure (immediate) from his boss to quit dealing with me and go to alternative. He has been going to bat for me and holding off for 6 months; I have paid some good faith deposits." (Plaintiff's Exhibit #79B (emphasis in original).)

81. In another February 3, 2014 email Brill advised Woodbridge and Riverdale that he received a "pained" call from Temm after Temm received a request from Woodbridge for information on the Waterfall Note Sale. Brill warned that Temm was "still willing to sell the note but is fed up with being required to negotiate a big agreement like he was doing with the other people." Brill advised that "the ability to buy the note is alive at the price, but Joe [Temm] is bummed out about 'agreement' and the 'packaging up all the stuff' may be for nothing [*sic*.]."

Brill said that he wanted Woodbridge and Riverdale "to know where Joe is coming from with a pain in his side." (Plaintiff's Exhibit #81.)

82. Although Brill wanted Waterfall paid off as soon as possible so as to preserve the $750,000 discounted price and avoid any further cash deposits, Riverdale was not ready to finalize the loan to ERC. In particular, Riverdale still did not have an appraisal showing a value of $1.5 million or a BPO supporting the valuation that Riverdale needed to make the loan. (Hughis Testimony.)

83. To keep Brill's deal with Waterfall alive, Brill asked both Woodbridge and Waterfall to move forward with the Waterfall Note Sale, separate and apart from the prospective loan from Riverdale to ERC. (Reed Testimony; Plaintiff's Exhibit #86.)

84. Woodbridge's associate counsel, Robert Reed ("Reed"), was responsible for negotiating the Waterfall Note Sale and documenting that transaction. (Reed Testimony.)

85. Brill gave Reed the impression that the Waterfall Note Sale had to be done immediately or they would risk losing the $750,000 purchase price or the deal altogether. Brill gave Reed the impression that foreclosure by Waterfall was imminent. (Reed Testimony.)

86. Reed emailed Temm to explain that the Waterfall Note Sale would be separate and distinct from Riverdale's loan to Brill:

> I think this has been made overly complicated. But it's simple. Woodbridge seeks to purchase via assignment, the Note, Mortgage, and associated loan docs from you. That's it. That's all.
>
> But before we close & fund, Woodbridge must review the loan file so that we can complete our due diligence. While we're waiting on that info, I would like to start prepping the sale docs in the anticipation of closing.
>
> Separate and aside from that, we are working with Mr. Brill on a separate agreement so that, once Woodbridge owns the loan, to work out the arrearage. But by that point, you'd be out of the picture.

(Plaintiff's Exhibit #82.)

87. Reed copied Brill on his email to Temm, and Brill did not dispute Reed's statements.

88. Reed's email, however, did not have the intended effect on Temm. After receiving Reed's email, Temm emailed Brill on February 4, 2014, expressing his frustration at being drug into yet another round of negotiations with yet another funder:

> Alan this is not the deal that we had originally had approved by our investor. I am willing to go back and discuss a note sale but before going to my investor I will expect something from you. Either a $75,000 payment or putting a deed in escrow in case this matter does not close. As this settlement has drug on I have to show my investor some form of performance. What is it going to be? I will wait for your response before proceeding. Joe

(Plaintiff's Exhibit #85.)

89. To appease Temm, Brill sent two emails on February 4, 2014. In the first email, which was copied to both Riverdale and Woodbridge, he advised Temm that he had "scratched the California people [Green Lake]" and that he was "not going to do it [the deal] with Peter [Chang of Green Lake.]" Brill told Temm to talk with Woodbridge. (Plaintiff's Exhibit #85.)

90. In the second email, which was also copied to both Riverdale and Woodbridge, Brill confirmed Reed's account of the transaction structure and Brill's understanding that the Waterfall Note Sale was separate and distinct from Riverdale's proposed loan to ERC. Brill stressed that Waterfall did not need to concern itself with the Riverdale loan:

> I just tried to call you and had to leave a voice mail.
>
> I just want to reaffirm what I said on the voice mail message I left you.
>
> The plan is simply for Woodbridge to buy the note from your holder without dealing with me in that process. You do not need to deal with me in this or how I am involved. Separately Riverdale deals with me but you are out of that.

> If I am involved in the discussion, it just gets confused whether I am right or wrong. These people understand your present note holding mechanism.
>
> Please deal with Robert [Reed] to get the sale done to Woodbridge, and it is all behind you. Clearer and Best I not be involved. I just confuse for all.

(Plaintiff's Exhibit #86.)

91. Brill introduced Waterfall and Temm to Riverdale, Hughis, Woodbridge and Reed. Brill brought the parties together and indeed wanted Woodbridge to buy the Note and Mortgage from Waterfall. (*See e.g.* Plaintiff's Exhibit #86.)

VIII. ERC Formally Ended Negotiations With Green Lake With Knowledge that the Riverdale Deal Was Still Contingent on ERC's Satisfaction of the Appraisal and BPO Conditions.

92. Although Brill technically was still negotiating with Green Lake during this time, it was clear that the Green Lake deal was not going to happen because the parties had not agreed to certain terms of the loan or to certain language in the loan documents. (Plaintiff's Exhibits #74, #80, #88.)

93. Brill formally ended negotiations with Green Lake on February 4, 2014. He called Peter Chang to advise that he no longer wanted to move forward with Green Lake. Chang confirmed this call in an email dated February 4, 2014. (Plaintiff's Exhibit #88.)

94. Brill claimed at trial that Riverdale induced him into foregoing further negotiations with Green Lake, but Brill knew when he cut off negotiations with Green Lake that the Riverdale loan was still contingent on ERC's satisfaction of the conditions in the Loan Commitment. On February 5, 2014, Brill admitted that the Riverdale deal was "not yet done" in an email to Peter Chang and acknowledged that he was "sticking his neck out into the uncertainty of other option, not yet done" by ending negotiations with Green Lake to focus entirely on Riverdale. (Plaintiff's Exhibit #88.)

95. Brill understood that the Riverdale deal was not "done," because he knew that Riverdale was still waiting on an appraisal and a BPO per the terms of the Loan Commitment. (Plaintiff's Exhibit #92.)

IX. ERC Executed the Consent to Assignment and Estoppel Certificate, and Woodbridge Closed on the Waterfall Note Sale.

96. Meanwhile, just as Brill requested, Temm worked with Woodbridge to finalize documents for the Waterfall Note Sale.[4] (Reed Testimony.)

97. By February 7, 2014, Woodbridge and Waterfall were close to finalizing the Waterfall Note Sale. (Defendant's Exhibit T.)

98. On February 7, 2014, Temm emailed Brill advising that Waterfall was "getting close on this note sale." Temm told Brill that he would be sending a document that weekend that Waterfall needed Brill to execute in connection with the Waterfall Note Sale. Temm did not copy Woodbridge or Riverdale on this email to Brill. (Defendant's Exhibit T.)

99. On February 10, 2014, Temm emailed Brill a document entitled "Consent to Assignment" and asked Brill to execute and return it for delivery the following morning. Again, Temm did not copy Woodbridge or Riverdale on this email. (Plaintiff's Exhibit #93.)

100. Brill executed the Consent to Assignment on February 10, 2014, and returned it that same day to Temm. (Plaintiff's Exhibit #94.)

101. On February 11, 2014, Brill executed an Estoppel Certificate to facilitate the closing of the Waterfall Note Sale. (Plaintiff's Exhibit #98.)

102. In the Estoppel Certificate, Brill expressly consented to Woodbridge's acquisition of the Note and Mortgage from Waterfall. (Plaintiff's Exhibit #98.)

[4] The purchase price for the Note was $740,000 instead of $750,000, due to the $10,000 non-refundable payment Brill had previously made to Waterfall. (Brill Testimony.)

103. In the Estoppel Certificate, Brill represented and warranted that the Note and Mortgage were still binding obligations on ERC. (Plaintiff's Exhibit #98.)

104. In the Estoppel Certificate, Brill acknowledged that ERC was in default under the Note and Mortgage and that the total outstanding balance, as of February 10, 2014, was $2,576,733.27. (Plaintiff's Exhibit #98.)

105. In the Estoppel Certificate, Brill represented and warranted that "there are no claims of offset, whether known or unknown, claimed, waived, or otherwise." (Plaintiff's Exhibit #98.)

106. In the Estoppel Certificate, Brill expressly waived and released any and all defenses or counterclaims to ERC's obligations under the Note and Mortgage, stating specifically:

> 24. Borrower [ERC] represents and warrants that there are no defenses to its obligations under the Note and Mortgage, whether known or unknown, and if any do exist, Borrower hereby waives such defenses as to the Seller [Waterfall] and the Buyer [Woodbridge].
>
> 25. Borrower [ERC] represents and warrants that there are no counterclaims to its obligations under the Note and Mortgage, whether known or unknown, and if any do exist, Borrower hereby waives such counterclaims as to the Seller [Waterfall] and Buyer [Woodbridge].

(Plaintiff's Exhibit #98.)

107. In the Estoppel Certificate, Brill also acknowledged that Woodbridge was "relying on the representations made by [Brill] herein and [Brill] agrees that [Woodbridge] may so rely on such representations and agreements." (Plaintiff's Exhibit #98.)

108. Brill knew at the time he executed the Consent to Assignment and Estoppel Certificate that the Riverdale loan was still contingent upon Riverdale's receipt of a $1.5 million appraisal and a satisfactory BPO. (Plaintiff's Exhibits #92, #95, #97.)

109. Brill testified that Waterfall would not have closed the Waterfall Note Sale without his consent. Thus, Brill had ultimate control over the transaction and hence the power to either delay the sale or stop it altogether. Brill decided to permit the Waterfall Note Sale to occur. Brill chose to move forward despite the fact that the conditions in the Loan Commitment had not been met. Brill consented to the Waterfall Note Sale in an effort to, among other things, avoid the risk of Waterfall: (a) selling the loan to another party, (b) foreclosing itself, (c) increasing the payoff amount or (d) demanding a further non-refundable cash forbearance payment.

110. Brill, a sophisticated businessman with years of commercial real estate experience, understood the implications of signing the Consent to Assignment and Estoppel Certificate. He was represented by counsel, Chris Malone, at the time, and even copied Malone on the email transmitting the executed Estoppel Certificate back to Riverdale. (Plaintiff's Exhibit #98.)

111. No representative of Riverdale or Woodbridge ever represented to ERC between the date of the Loan Commitment and the date of the Consent to Assignment that Riverdale either could do a $900,000 loan based upon less than a $1.5 million appraised value or do a loan at 65% of whatever the appraised value turned out to be. The Woodbridge Parties did not orally vary the terms of the Loan Commitment before the closing of the Waterfall Note Sale. (Reed Testimony; Hughis Testimony; Coffman Testimony.)

112. Brill was not induced into signing the Consent to Assignment or Estoppel Certificate. He did so upon his own free will. By doing so with full knowledge that the conditions in the Loan Commitment were not yet satisfied, and therefore, Riverdale was not yet obligated to make ERC a loan, Brill assumed the risk that the Riverdale loan might not happen.

113. The Waterfall Note Sale closed on February 11, 2014 when Woodbridge wired $740,000 to Cohen at approximately 3:30 p.m. (Plaintiff's Exhibit #99.)

X. Kiefer Provided Two BPOs to Riverdale. Neither Were Satisfactory.

114. Once Riverdale received ERC's commitment fee on February 3, 2014, Hughis worked on behalf of Riverdale to conduct its due diligence into the prospective $900,000 loan to ERC. Riverdale does not begin its due diligence process until it receivers the fee. (Reed Testimony; Hughis Testimony.)

115. Riverdale and Woodbridge are not in the business of owning or developing real estate. Woodbridge essentially is a private bank. The money Woodbridge uses to make loans comes from many different private investors. Woodbridge holds mortgages on real estate as collateral for the loans it makes. Woodbridge ends up owning real estate only if its borrower defaults, and Woodbridge is forced to foreclose. In that event, Woodbridge must liquidate the real estate quickly to recover its investment. Generally, Woodbridge wants to hold collateral for no more than 90 days. While a quick liquidation may result in a lower sales price, it prevents a situation where Woodbridge is stuck holding a property for months, incurring significant holding costs such as insurance, taxes, management, maintenance, and repairs. (Reed Testimony; Hughis Testimony.)

116. As part of its due diligence, Riverdale looks to local realtors to provide a BPO based upon a quick sale so that Riverdale knows what it could actually get for collateral in the event it is forced to foreclose and liquidate to recover its investment. (Hughis Testimony.)

117. At Brill's recommendation, Hughis contacted Joe Kiefer ("Kiefer"), a local commercial real estate broker. Hughis discussed with Kiefer the fact that Riverdale needed a BPO for the Property. Hughis told Kiefer that Riverdale would not want to sit on the Property

and that it needed to know what the Property would sell for if it needed to be sold quickly. (Hughis Testimony.)

118. Hughis thought Kiefer understood the type of valuation that Riverdale needed in its BPO, so Hughis requested that Kiefer provide a BPO for the Property. (Hughis Testimony.)

119. On February 12, 2014, the day after the Waterfall Note Sale, Kiefer provided his initial BPO for the Property to Brill (the "Initial Kiefer BPO"), and Brill immediately forwarded it to Riverdale. (Plaintiff's Exhibit #102.)

120. According to the Initial Kiefer BPO, a realistic final sales price for the Property would be approximately $1,475,000. However, to achieve this sales price, it could take up to 18 months to sell the Property. (Plaintiff's Exhibit #102.)

121. The Initial Kiefer BPO was not satisfactory to Riverdale. (Hughis Testimony.)

122. The Initial Kiefer BPO was not satisfactory because Kiefer had not provided the type of valuation that Riverdale needed and asked for. Riverdale was not interested in what the Property would sell for if it was held and marketed for 18 months. Riverdale wanted to know what the Property would be worth if it had to be sold quickly. (Hughis Testimony.)

123. Hughis discussed his concerns about the Initial Kiefer BPO with Kiefer. (Hughis Testimony.)

124. Kiefer volunteered to prepare an updated BPO to address the type of valuation that Hughis wanted. (Hughis Testimony.)

125. Kiefer provided an updated BPO on February 18, 2014 (the "Updated Kiefer BPO"). (Plaintiff's Exhibit #112.)

126. In the Updated Kiefer BPO, Kiefer concluded that "to get the $1,475,000 [sales price] . . . will likely take the full 18 months of marketing time." He also concluded that:

> If the Owners need to sell the property and close within a 60 to 90 day period, then using an auction method might be a good approach. Working with an auctioneer and real estate brokerage company together, the property should be able to sell "AS IS" (assuming no major concerns with the building structure or environmental concerns) for $750,000 to $900,000.

(Plaintiff's Exhibit #112.)

127. The Updated Kiefer BPO was not satisfactory to Riverdale. (Hughis Testimony.)

128. The Updated Kiefer BPO was not satisfactory because it demonstrated that the value of the Property was only $750,000 to $900,000. Riverdale needed a value of $1.5 million in order to make the $900,000 loan to ERC. With a Property value of only $750-900,000, Riverdale could not make a loan to ERC. (Hughis Testimony.)

XI. Riverdale Continued to Work With ERC to Determine if There Was Still a Way to Make ERC a Loan.

129. On February 18, 2014, Hughis emailed Brill to advise that Riverdale and Brill needed to rethink the loan in light of the $750,000 - $900,000 valuation in the Updated Kiefer BPO:

> Alan its not a fire sale its a today sale...if we wound up with this building the realtor is saying if you hold it for 18 months or more maybe we can get you the 1.4M....but then that means I have to carry the building and put more money into it...so in today's environment he is saying 750K to 900K...

(Plaintiff's Exhibit #113.)

130. Hughis expressly told Brill that, "at this point we have to figure out what to do, [because] looking at these numbers[,] we don't have a loan." (Plaintiff's Exhibit #113.)

131. In response, Brill did not tell Hughis that Riverdale was obligated to make a loan at 65% of appraised value. He did not tell Hughis that Riverdale was obligated to reduce the loan amount. He did not tell Hughis that, since Woodbridge had already acquired the Note and Mortgage from Waterfall, Riverdale was obligated to make ERC a loan. Instead, Brill only

disputed Kiefer's valuation and offered to pledge additional collateral. (Hughis Testimony; Brill Testimony; Plaintiff's Exhibit #113.)

132. Hughis responded on February 19, 2014, telling Brill that Riverdale was "willing to make the loan...but based on the numbers Joe [Kiefer] shows us we need to figure out how to make that happen...bring money to the table or have another asset that we can be first position on." (Plaintiff's Exhibit #114.)

133. Neither ERC nor Brill had cash to help close the loan. (Brill Testimony.)

134. Later that day, Brill again disputed Hughis's reasoning on the valuation and stated, "I have told you what I am able to propose. Tell me how you want to do it." (Plaintiff's Exhibit #115.)

135. What Brill proposed was the pledging of a security interest in the membership interest of a limited liability company that owned property in Duluth, MN. Riverdale was not interested in that type of collateral, as it only accepted first position mortgage liens in real estate as collateral for its loans. The membership interest offered by Brill was not a mortgage or a lien on real estate. (Hughis Testimony.)

136. In their post-BPO discussions, Hughis suggested to Brill that Riverdale still could work out a deal:

> Alan I'm not challenging any of this, that's not what this is about...I just need to lend off what the realtor can sell this for because that's real value...Joe [Kiefer] the realtor says this could be worth 1.4M if we were willing to hold and wait...but to sell in today's environment he is saying between 750K and 900K....
>
> all I'm trying to figure out now is how do we make this work because the reality is we own this note and have to make a decision on what to do with this....I was hoping you could either bring some cash or we have other asset we can put in to get the value up so we can lend you the money..
>
> you just tell me the plan and I will make it happen

> I'm trying to work with you...we can loan up to 65% [5]....but according to the BPO that value is between 750K and 900K....help me to help you...I'm est[imating] the total needed is about 890K this would be amount to pay off the loan..
>
> Bottom line is this building has a value of 750K to 900K today...won't do you any good to get angry at me about this...I didn't make the numbers...and to date I still don't have the appr[aisal]...not sure why this is taking so long...I'm here trying to help

(Plaintiff's Exhibit #115.)

137. Brill never requested a reduced loan amount or offered to bring any other cash to close the deal. His only proposal was the membership interest in the Minnesota limited liability company, which was insufficient collateral for Riverdale's purposes. (Hughis Testimony.)

XII. The Property Did Not Appraise for $1.5 Million, and Riverdale Declined to Make ERC a Loan.

138. On February 21, 2014, Riverdale received the appraisal for the Property from Integra, the appraisal company that Brill had recommended. (Hughis Testimony.) The appraisal valued the Property at $1.34 million, which was less than the $1.5 million that the Loan Commitment required. (Plaintiff's Exhibit #128.)

139. On February 21, 2014, Hughis emailed Brill and advised that Riverdale would not make a loan to ERC and would be returning Brill's 1% commitment fee. (Plaintiff's Exhibit #117.)

140. Riverdale did not make the loan because it was not satisfied with the value of the Property as set forth in the Updated Kiefer BPO and because ERC failed to obtain an appraisal that valued the Property at $1.5 million. (Hughis Testimony.)

[5] A loan at 65% of value would have been only $487,500 - $586,000 based on a BPO of $750,000 to $900,000—far short of the $900,000 that Brill wanted.

141. Both the Initial Kiefer BPO and the Updated Kiefer BPO were unsatisfactory to Riverdale, and the $1.5 million appraisal condition was not met. Therefore, the conditions in the Loan Commitment were not satisfied, and Riverdale had no obligation to make a loan. (Hughis Testimony.)

142. On February 21, 2014, Riverdale returned Brill's 1% commitment fee and explained that Riverdale had not made the loan due to the failure of Contingency 19(l) in the Loan Commitment, the requirement of a BPO satisfactory to Riverdale in its sole discretion. (Plaintiff's Exhibit #118.)

143. ERC claims that Riverdale's return of the commitment fee is evidence that Riverdale breached the Loan Commitment. This is not true. Paragraph 19(l) in the Loan Commitment expressly gave Riverdale the option to make a counterproposal to lend a different amount if the valuation conditions were not met. If Riverdale elected not to make such a counterproposal, it was required to return the commitment fee to Brill. Accordingly, because Riverdale elected not to make a counterproposal to Brill, Riverdale returned Brill's commitment fee per the terms of the Loan Commitment. (Plaintiff's Exhibit #73; Hughis Testimony.)

XIII. Whiteacre is the Current Holder of the Note and Mortgage.

144. On or about March 27, 2014, Woodbridge executed an Assignment of Mortgage and Security Documents, which assigned the Mortgage and related loan documents to Whiteacre, an affiliate of Woodbridge that holds distressed loans. (Plaintiff's Exhibit #23.)

145. Whiteacre is the current holder of the Note and Mortgage and entitled to enforce their terms.

146. ERC is in default under the Note and Mortgage for failing to make payments when due.

147. On or about September 12, 2014, Whiteacre paid ERC's delinquent real estate taxes on the Property in the amount of $93,402.81 to avoid the Property being sold at tax sale on September 16, 2014. (Plaintiff's Exhibit #11.)

148. As of February 8, 2016, the total amount due and owing under the Note and Mortgage was $3,270,676.08, calculated as follows:

Principal Balance	$1,584,717.18
Accrued Interest Through 6/24/11	$348,520.02
Default Interest Through 6/24/11	$198,098.65
Accrued Late Charges Through 6/24/11	$7,838.77
Escrow Advances Through 6/24/11	$54,728.10
Total Balance as of 6/24/11	*$2,193,902.72*
Accrued Interest From 6/24/11 – 2/10/14	$233,852.97
Accrued Default Interest From 6/24/11 – 2/10/14	$209,486.58
Less Payments Received	($60,500.00)
Total Balance as of 2/10/14	*$2,576,742.27*
Accrued Interest 2/10/14 – 2/8/16	$335,498.80
Real Estate Taxes Paid on ERC's Behalf	$93,402.81
Insurance Premiums Paid on ERC's Behalf	$7,828.00
Delinquent Taxes Due Prior to Sheriff's Sale	$68,341.97
Receiver Fees	$10,500.00
Attorneys' Fees and Litigation Expenses Incurred through 1/31/16	$153,362.23
Estimated Attorneys' Fees and Litigation Expenses 2/01/16 through Trial	$25,000.00
TOTAL	**$3,270,676.08**

(Plaintiff's Exhibit #16.)

149. Interest will continue to accrue at the rate of $460.85 per diem from February 8, 2016, until entry of judgment, and thereafter at the rate of 8% per annum.

CONCLUSIONS OF LAW

Upon the motion of ERC and pursuant to Indiana Trial Rule 52, the Court makes the following Conclusions of Law. To the extent that a conclusion of law should be construed as a finding of fact, or vice versa, it shall be so construed.

I. ERC's Claims Against the Woodbridge Parties All Fail For Numerous Reasons.

1. In its Counterclaim and Third-Party Complaint, ERC asserted the following claims: (1) Count I – Breach of Contract against Riverdale; (2) Count II – Promissory Estoppel against the Woodbridge Parties; (3) Count III – Constructive Fraud against the Woodbridge Parties; (4) Count IV – Unjust Enrichment against the Woodbridge Parties; (5) Count V – Tortious Interference with Business Relationship against the Woodbridge Parties; and (6) Count VI – Conspiracy against the Woodbridge Parties. ERC bears the burden of proving, by a preponderance of the evidence, each of the elements of its claims.

A. ERC's Breach of Contract Claim Fails Because ERC Did Not Fulfill Conditions Precedent to Riverdale's Obligation to Make ERC a Loan.

2. ERC alleges that Riverdale breached the Loan Commitment by failing to make ERC a loan. The Court rejects this argument and concludes that Riverdale had no obligation to make a loan to ERC because ERC failed to satisfy the conditions precedent set forth in the Loan Commitment.

1. ERC Did Not Satisfy the Appraisal or BPO Conditions in the Loan Commitment.

3. A condition precedent is a "condition which must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises." Capitol Land Co. v. Zorn, 134 Ind. App. 431, 443 (Ind. Ct. App. 1962).

4. "As a general rule an express condition must be fulfilled or no liability can arise on the promise that the condition qualifies." McGraw v. Marchioli, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004) (citing 13 *Williston on Contracts* § 38.7; *Restatement (Second) of Contracts*, § 225).

5. "It is axiomatic that a party seeking to enforce a contract must establish that all conditions precedent have been fulfilled, and that the burden of proof is on this party." First Nat'l Bank v. Logan Mfg. Co., 577 N.E.2d 949, 953 (Ind. 1991).

6. The Loan Commitment contained two express conditions precedent that ERC failed to fulfill. As a result, under the plain and unambiguous terms of the Loan Commitment, Riverdale had no obligation to make a loan to ERC.

7. First, the Loan Commitment expressly conditioned Riverdale's obligation to make a loan to ERC on Riverdale's "receipt and approval of an appraisal . . . indicating that the mortgaged property . . . has a value of not less than $1,500,000."

8. Second, the Loan Commitment expressly conditioned Riverdale's obligation to make a loan to ERC on Riverdale receipt of "a broker's price opinion satisfactory to it in its sole discretion."

9. The failure of either of these conditions precedent alone would be sufficient to relieve Riverdale from any obligation to make ERC a loan. In fact, neither condition precedent was met. The Property did not appraise for $1,500,000, and Riverdale did not receive a satisfactory BPO.

2. The Woodbridge Parties Did Not Act in Bad Faith.

10. ERC claims that Riverdale manipulated Kiefer's BPOs to prevent ERC from being able to fulfill the conditions precedent in the Loan Commitment. ERC argues that Riverdale acted in bad faith and that the Hamlin Doctrine prevents Riverdale from relying upon the failed conditions precedent as the basis for not making ERC a loan. The Court rejects these arguments.

11. Under the plain and unambiguous terms of the Loan Commitment, as a condition to Riverdale making a loan to ERC, Riverdale needed a satisfactory BPO. Hughis testified that

neither of Kiefer's BPOs were satisfactory. The Court concludes that Riverdale did not act in bad faith in making the determination that Kiefer's BPOs were unsatisfactory.

12. First, Kiefer's Initial BPO did not provide the type of valuation that Riverdale needed. Riverdale asked Kiefer to provide a BPO that valued the Property based on Riverdale not sitting on the Property. Riverdale was a hard money lender, and Kiefer knew or should have known that a valuation based on 18 months of marketing time was not what Riverdale was looking for.

13. Second, there is no evidence that Riverdale manipulated Kiefer's BPO. In fact, Riverdale did not even ask Kiefer to revise his initial BPO. Kiefer volunteered to revise it in order to give Riverdale the information it needed. Riverdale kept ERC in loop about the valuation it needed and the fact that Kiefer was planning to update his BPO.

14. Finally, neither of Kiefer's BPOs provided a valuation of $1.5 million, which was the value Riverdale needed to make the $900,000 loan to ERC.

15. ERC did not meet its burden to demonstrate that Riverdale wrongfully manipulated Kiefer's BPOs or acted in bad faith.

3. The *Hamlin* Doctrine is Irrelevant; No Good Faith Standard Applies as a Matter of Law.

16. Additionally, Riverdale had no duty to act in good faith as a matter of law. ERC relies upon the Hamlin doctrine to suggest that Riverdale owed a duty of good faith. The Hamlin doctrine is irrelevant.

17. According to Hamlin v. Steward, "[a] party may not rely on the failure of a condition precedent to excuse performance where that party's action or inaction caused the condition to be unfulfilled." 622 N.E.2d 535, 540 (Ind. Ct. App. 1993). Furthermore, where a

party is obligated to fulfill a condition precedent, he must use "reasonable and good faith efforts to satisfy the condition." Id.

18. The Hamlin doctrine is irrelevant for two reasons. First, Riverdale was not the party responsible for fulfilling the appraisal and BPO conditions. ERC was. Second, Riverdale did not cause the appraisal and BPO conditions to go unfulfilled. Third parties prepared the appraisal and BPOs. Because Riverdale was not responsible for fulfilling the conditions in the Loan Commitment, or for preparing the appraisal or BPO, it owed no good faith obligation to ERC in connection with those conditions. The Hamlin doctrine does not apply.

19. Indiana law is clear that there is no "good faith" duty here. The Loan Commitment was an arm's length transaction between sophisticated business entities. As the Indiana Supreme Court has stated, it is the Court's obligation to interpret the Loan Commitment as it is written, not to impose its own notions of fairness or good faith:

> It is not the province of courts to require a party acting pursuant to [an unambiguous] contract to be "reasonable," "fair," or show "good faith" cooperation. Such an assessment would go beyond the bounds of judicial duty and responsibility. It would be impossible for parties to rely on the written expressions of their duties and responsibilities. Further, it would place the court at the negotiation table with the parties. . . . The proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them.

First Federal Sav. Bank v. Key Markets, Inc., 558 N.E.2d 600, 604 (Ind. 1990). Indeed, "no Indiana case has ever recognized a duty of good faith outside the realm of UCC or insurance law." Id. at 605.

20. In First Federal, the Indiana Supreme Court found that it was error for the trial court to apply a good faith standard to a commercial lease dispute and held:

> The parties in the instant case entered into a lease contract clear in its terms and well understood in the business community. Neither of the parties requires "paternalistic protection" referred to by

> Judge Posner because they are experienced in business enterprises and fully understand the business. The trial court erred in applying improper standards in its interpretation of the contract.

Id. at 606.

21. ERC's arguments regarding good faith or bad faith are immaterial, and they improperly try to place the Court at the negotiation table with the parties in contravention of the Indiana Supreme Court's direction in First Federal.

B. ERC's Promissory Estoppel Claim Fails for a Variety of Other Reasons.

22. In Count II, ERC asserted a promissory estoppel claim against the Woodbridge Parties. The Court finds that ERC's promissory estoppel claim fails on the merits for a number of other reasons.

1. The Existence of the Loan Commitment Bars ERC's Promissory Estoppel Claim.

23. Promissory estoppel is a quasi-contractual remedy that will permit recovery where no contract in fact exists. Bailey v. Manors Group, 642 N.E.2d 249, 253 (Ind. Ct. App. 1994). "Quasi contracts do not arise from the parties' express agreement, but are implied by law in order to remedy wrongful enrichment of one party at the expense of another." Ind. BMV v. Ash, Inc., 895 N.E.2d 359, 367 (Ind. Ct. App. 2008) (citing Bailey, 642 N.E.2d at 253).

24. When a contract does, in fact, exist, there can be no claim for promissory estoppel. Id.; *see also* Comentis, Inc. v. Purdue Research Found., 765 F.Supp.2d 1092, 1098 (N.D. Ind. 2011) (holding that "a claim of promissory estoppel will permit recovery only where no contract in fact exists.").

25. Here, the written Loan Commitment was a contract that governed the terms and conditions upon which ERC was entitled to a loan. The existence of the Loan Commitment precludes recovery under a theory of promissory estoppel.

2. ERC's Promissory Estoppel Claim Fails For Other Reasons.

26. Even if the existence of the Loan Commitment did not bar ERC's promissory estoppel claim, the claim fails on other grounds.

27. To prevail on its promissory estoppel claim, ERC had to prove by a preponderance of the evidence: (1) that one of the Woodbridge Parties made a promise to ERC; (2) with the expectation that ERC would rely thereon; (3) which induced reasonable reliance on the part of ERC; (4) of a definite and substantial nature; and (5) that injustice can be avoided only by enforcing the promise. Huber v. Hamilton, 33 N.E.3d 1116, 1114 (Ind. Ct. App. 2015).

a. ERC Failed to Demonstrate the Existence of an Actionable Promise.

28. ERC failed to establish, by a preponderance of the evidence, that an actionable promise was ever made.

29. "'A promise is a voluntary commitment or undertaking by the party making it (the promisor) addressed to another party (the promisee) that the promisor will perform some action or refrain from some action in the future.'" Medtech Corp. v. Indiana Ins. Co., 555 N.E.2d 844, 847 (Ind. Ct. App. 1990) (quoting Woodall v. Citizens Banking Co., 507 N.E.2d 999, 1000 (Ind. Ct. App. 1987)).

30. As a threshold matter, the only evidence of any actionable promise was Brill's own testimony that Riverdale promised to make ERC a loan even if the appraisal and BPO conditions were not met. Both Hughis and Coffman contradicted this testimony. The written evidence in this case, including the Conditional Loan Approval, the Loan Commitment, and the parties' emails, also contradicted Brill's testimony.

31. The Court concludes that ERC failed to meet its burden to show by a preponderance of the evidence that the Woodbridge Parties promised ERC that Riverdale would

make a loan on any terms other than those set forth in the Loan Commitment. Without an actionable promise, there can be no promissory estoppel. ERC's promissory estoppel claim fails.

b. The Parol Evidence Rule Bars Brill's Testimony of an Alleged Promise that Contradicts the Written Loan Commitment.

32. Brill testified that Coffman represented to Brill, before he sent Brill the Conditional Loan Approval, that the appraisal requirement was a "mere formality," and that Riverdale would make a loan to ERC regardless of whether the appraisal and BPO conditions were met.

33. Even if the Court found that such a promise was made, it came before the Loan Commitment, and therefore, the parol evidence rule would bar the Court from considering Brill's testimony for the purpose of contradicting the parties' subsequent written Loan Commitment.

34. "It is an elementary rule of law that all negotiations and agreements *prior to or contemporaneous with* the execution of a written contract are merged in the final memorandum and that parol evidence will not be admitted to expand, contract or contradict a written instrument." Moll v. South Central Solar Sys., 419 N.E.2d 154, 160 (Ind. Ct. App. 1981) (emphasis supplied). As one court explained, "the law is so well settled that it needs no citation of authority that oral representations made by the parties *prior to* the execution of the property contract are merged into the written contract." Lacy v. White, 288 N.E.2d 178, 180 (Ind. Ct. App. 1972) (emphasis supplied).

35. "A written contract must be treated as embodying all of the agreements of the parties, and one who signs a written contract is bound to know the extent of his liability thereunder and is bound by the terms of the contract." W. T. Rewleigh Co. v. Snider, 194 N.E. 356, 358 (Ind. 1935). "The parol evidence rule bars the admission of evidence of oral

representations that contradicts a written contract." America's Directories v. Stellhorn One Hour Photo, Inc., 833 N.E.2d 1059, 1066 (Ind. Ct. App. 2005).

36. The Indiana Court of Appeals has explained the rationale behind the parol evidence rule as follows:

> It is based upon the principle that when parties to a contract have put their legal obligations in writing, it is conclusively presumed that the entire agreement of the parties has been reduced to that writing. The rule rests upon a rational foundation of experience and policy and is essential to the certainty and stability of written obligations."

Creech v. La Porte Production Credit Ass'n, 419 N.E.2d 1008, 1010 (Ind. Ct. App. 1981).

37. The presence or absence of an integration clause is not required for the parol evidence rule to apply. Rather, the existence of an integration clause is "only some evidence of the parties' intentions" that is to be considered "along with all other relevant evidence on the question of integration." Franklin v. White, 493 N.E.2d 161, 166 (Ind. 1986); America's Directories, 833 N.E.2d at 1067 ("[a]n integration clause does *not* control the question of whether a writing is or was intended to be a completely integrated agreement"); *see also* Hinkel v. Sataria Distrib. & Packaging, Inc., 920 N.E.2d 766, 769 (Ind. Ct. App. 2010) ("The absence of an integration clause is not conclusive as to whether parties intended a writing to be completely integrated.").

38. Even if a contract is not completely integrated as to every term, the parol evidence rule bars evidence of oral representations that contradict the written terms on which the contract is partially integrated. *See e.g.*, Restatement (2d) of Contracts, § 213, cmt a ("Whether a binding agreement is completely integrated or partially integrated, it supersedes inconsistent terms of prior agreements.")

39. In determining whether to apply the parol evidence rule, the Court must:

> compare both the alleged oral and written agreements and determine whether the parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If the alleged oral and written agreements relate to the same subject matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. In such case, parol evidence to vary, modify or supersede the written contract is inadmissible in evidence.

Id. at 769-70; *see also* Franklin, 493 N.E.2d at 166 ("If a court determines that a writing is integrated as to a specific term, then prior statements or negotiations of the parties which would tend to contradict that term as it appears in their final written expression are simply irrelevant.").

40. The Court concludes that, although there is no integration clause, the Loan Commitment was integrated on the essential terms of the parties' agreement including, among other things, loan amount, term, interest rate, commitment fee, allocation of loan proceeds, the appraisal valuation condition and the BPO condition. ERC seeks to enforce an alleged, prior, oral promise that Riverdale would make a loan on terms directly contradicted by these integrated terms in the Loan Commitment. The parol evidence rule precludes ERC's efforts.

41. ERC is bound by the terms of the unambiguous Loan Commitment. The Court will enforce the Loan Commitment. The Loan Commitment was unambiguous in its requirement of an appraisal in the amount of $1.5 million and a BPO satisfactory to Riverdale. These were conditions precedent to Riverdale's obligation to make a loan to ERC. The conditions were not met. Therefore, Riverdale was excused from any obligation to make a loan to ERC.

c. ERC Failed to Demonstrate Reliance.

42. An essential element of ERC's promissory estoppel claim is that ERC reasonably relied to its detriment on the alleged promise. The Court concludes that ERC failed to establish by a preponderance of the evidence the element of reasonable reliance.

43. ERC argued that it did two things in reliance on the alleged promise that Riverdale would make a loan: (1) ended negotiations with Green Lake; and (2) executed the Consent to Assignment.

44. ERC did not prove by a preponderance of the evidence that ERC ended negotiations with Green Lake in reliance on any promise made by the Woodbridge Parties. To the contrary, the evidence showed that Brill knew, at the time ERC ended negotiations with Green Lake, that the loan with Riverdale was "not yet done" because ERC had not yet fulfilled the appraisal and BPO conditions in the Loan Commitment. Additionally, the evidence showed that ERC was far from having a done deal with Green Lake, and ERC went with Riverdale because Brill did not think ERC could come to terms with Green Lake.

45. ERC did not prove by a preponderance of the evidence that ERC consented to the Waterfall Note Sale in reliance on any promise made by the Woodbridge Parties. To the contrary, the evidence showed that when Brill executed the Consent to Assignment on February 10, 2014, and the Estoppel Certificate on February 11, 2014, Brill knew that Riverdale was not yet obligated to make him a loan. Brill's emails sent on February 10 and February 11 show that Brill understood that Riverdale still needed an appraisal and BPO to finalize the deal. Brill subsequently went to great efforts to satisfy those conditions.

d. ERC's Alleged Reliance Was Unreasonable.

46. Even if Brill had relied on Riverdale's alleged oral promises, the Court concludes that such reliance would have been unreasonable.

47. It is unreasonable as a matter of law to rely upon oral promises when the very substance of those promises is set forth in a valid written contract. *See* Biberstine, 625 N.E.2d at 1316 (finding reliance on alleged oral promises unreasonable as a matter of law when such promises were contradicted by the express terms of the parties' written contract); *see also* Gary Hobart Savings & Loan Ass'n v. Strong, 190 N.E. 373 (Ind. 1934) (holding that plaintiff had no right to rely on oral representations made that were contradicted by the terms of a written deposit agreement); Plymale v. Upright, 419 N.E.2d 756 (Ind. 1981) (reversing jury verdict in favor of plaintiffs, where the plaintiffs had relied on the defendant's oral representations rather than the terms of a written proposal to purchase real estate).

48. Here, the Loan Commitment made clear that conditions precedent needed to be met before Riverdale was obligated to make a loan. Even if there was credible evidence of an oral promise that contradicted the Loan Commitment, relying on such a promise would have been unreasonable as a matter of law.

49. It is also unreasonable for Brill to now claim that ERC relied on Riverdale's promise to make a loan without conditions, when Brill worked for weeks to satisfy the very conditions he now seeks to avoid. If Brill truly believed that the conditions were "mere formalities," he would not have expended so much energy trying to satisfy those conditions.

50. Furthermore, Brill's sophistication and consultation with counsel also make any claimed reliance unreasonable. Brill was not a "naïve entrepreneur unfamiliar with the process of negotiating and finalizing detailed business agreements." Garwood Packaging, Inc. v. Allen & Co., 2002 U.S. Dist. LEXIS 24997 at *80-81 (S.D. Ind. December 26, 2002) (finding the sophistication of the parties relevant for determining whether reliance on alleged promise made during negotiation of financing was reasonable).

51. In sum, the Court finds that ERC did not meet its burden to prove an actionable promise. Even if there had been a promise, the Court finds that the parol evidence rule precludes the Court from considering evidence of such a promise to contradict the terms of the Loan Commitment. Even if the parol evidence rule did not bar consideration of the promise, ERC's claim still fails for lack of reliance. Even if the Court found that there was reliance, such reliance was unreasonable. Any one of these reasons alone defeats ERC's promissory estoppel claim.

C. ERC's Constructive Fraud Claim Fails for a Variety of Reasons.

52. In Count III, ERC asserted a constructive fraud claim against the Woodbridge Parties. The Court concludes that ERC's constructive fraud claim fails on the merits for a number of reasons.

53. "Constructive fraud arises by operation of law from a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud." Kreighbaum v. First Nat. Bank & Trust, 776 N.E.2d 413, 420 (Ind. Ct. App. 2002).

54. The five elements of a constructive fraud claim are: (1) a relationship giving rise to a duty; (2) representations or omissions made in violation of that duty; (3) reliance thereon by the complaining party; (4) injury as a proximate result; and (5) the gaining of an advantage by the party to be charged, at the expense of the other party. Strong v. Jackson, 777 N.E.2d 1141, 1146-47 (Ind. Ct. App. 2002).

1. There Was No Fiduciary Relationship.

55. "A plaintiff alleging the existence of constructive fraud has the burden of proving the first and last of these elements." Demming v. Underwood, 942 N.E.2d 878, 892 (Ind. Ct. App. 2011) (citing Strong, 777 N.E.2d at 1147). "Once the plaintiff meets the burden of proof with respect to these two elements and establishes the existence of a fiduciary relationship, the

burden shifts to the defendant to disprove at least one of the remaining three elements by clear and unequivocal proof." Id. The existence of a fiduciary or other "special" relationship is an essential element of a constructive fraud claim. *See* Epperly v. Johnson, 734 N.E. 2d 1066, 1074 (Ind. Ct. App. 2000).

56. ERC has failed to meet its burden of establishing the existence of a fiduciary relationship.

57. As a matter of Indiana law, "[a] lender does not owe a fiduciary duty to a borrower absent some special circumstances." Huntington Mortg. Co. v. DeBrota, 703 N.E.2d 160, 167 (Ind. Ct. App. 1998) (citing Block v. Lake Mortgage Co., 601 N.E.2d 449, 452 (Ind. Ct. App. 1992); *see also* Mantooth v. Federal. Land Bank of Louisville, 528 N.E.2d 1132, 1138-39 (Ind. Ct. App. 1988). "The general rule in Indiana is that 'the mere existence of a relationship between parties of bank and customer or depositor does not create a special relationship of trust and confidence.'" *Id.* (quoting Peoples Trust Bank v. Braun, 443, N.E.2d 875, 879 (Ind. Ct. App. 1983)); *see also* Nicoll v. Community State Bank, 529 N.E.2d 386, 389 (Ind. Ct. App. 1988).

58. Indiana courts have refused to find a fiduciary of "special" relationship between a lender and borrower. *See* Paul v. Home Bank SB, 953 N.E.2d 497, 504 (Ind. Ct. App. 2011) (affirming summary judgment in favor of bank and holding that there is no fiduciary or special relationship in a debtor/creditor relationship); Wilson v. Lincoln Fed. Sav. Bank, 790 N.E.2d 1042, 1046-47 (Ind. Ct. App. 2003) (affirming summary judgment in favor of mortgagee lender and holding that a lender does not owe a fiduciary duty to a borrower).

59. This is because "pure contractual relations between parties entering into an arm's length transaction may not form the basis for constructive fraud." Comfax Corp. v. N. Am. Van

Lines, Inc., 587 N.E.2d 118, 125-26 (Ind. Ct. App. 1992). "When the parties involved are in an arm's length, contractual relationship, the requisite fiduciary relationship may not be predicated on such an arrangement." Best Distrib. Co. v. Seyfert Foods, 714 N.E.2d 1196, 1204 (Ind. Ct. App. 1999). "A fiduciary relationship may not be premised on an arm's length transaction resulting in the formation of a contract." Am United Life Ins. Co. v. Douglas, 808 N.E.2d 690, 701 (Ind. Ct. App. 2004) (quoting Mullen v. Codgell, 643 N.E.2d 390, 401 (Ind. Ct. App. 1994)).

60. In this case, the relationship between ERC and the Woodbridge Parties was a lender/borrower or contractual relationship. ERC was a sophisticated commercial real estate owner who was represented by counsel. The parties entered into a written, arm's length, contractual relationship by way of the Loan Commitment. There were no "special" circumstances that could have given rise to any kind of fiduciary duty. Because there was no fiduciary relationship, ERC's constructive fraud claim fails.

2. ERC Failed to Demonstrate the Existence of a Misrepresentation or Reasonable Reliance.

61. But even if there was a fiduciary or special relationship giving rise to some kind of heightened duty on the part of the Woodbridge Parties, ERC's constructive fraud claim would still fail.

62. First, ERC did not meet its burden to prove the Woodbridge Parties made any actionable material misrepresentations of past or present fact, or ever remained silent when they had a duty to speak.

63. Second, as discussed above with regard to ERC's promissory estoppel claim, the evidence does not support a finding that ERC reasonably relied to its detriment on any alleged misrepresentation or omission on the part of the Woodbridge Parties. The same reasoning defeats the reliance element of ERC's constructive fraud claim.

64. In sum, ERC's constructive fraud claim fails because there was no fiduciary or special relationship between ERC and the Woodbridge Parties. Even if the claim was not barred and did not fail due to the lack of a fiduciary relationship, ERC's constructive fraud claim still fails for lack of a material misrepresentation or omission, and lack of reasonable reliance.

D. ERC's Count IV – Unjust Enrichment Claim Fails for a Number of Reasons.

65. In Count IV, ERC asserted a claim for unjust enrichment against the Woodbridge Parties. The Court concludes that ERC's unjust enrichment claim fails on the merits for a number of reasons.

1. The Existence of the Loan Commitment Precludes ERC's Unjust Enrichment Claim.

66. Unjust enrichment is the remedy for breach of a constructive contract, implied in law. However, "[w]hen the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law." Zoeller v. E. Chi. Second Century, Inc., 904 N.E.2d 213, 221 (Ind. 2011) (quoting Keystone Carbon Co. v. Black, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992)). Indeed, "[a]s a general rule, there can be no constructive contract where there is an express contract between the parties in reference to the same subject matter." City of Indianapolis v. Twin Lakes Enters., Inc., 568 N.E.2d 1073, 1078 (Ind. Ct. App. 1991); *see also* King v. Terry, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004) (Existence of a contract prohibits the application of quantum meruit to a case because "a plaintiff may not pursue an equitable remedy when there is a remedy at law."); Engelbrecht v. Property Developers, Inc., 296 N.E.2d 798, 802 (Ind. Ct. App. 1973) (recovery for unjust enrichment is not possible when rights of parties are controlled by a contract). When there is an express contract governing the relationship, there is no gap in the remedial system for unjust enrichment to fill, and it is therefore "superfluous to

consider unjust enrichment." Key Hotel Corp. v. Crowe, Chizek & Co., 359 N.E.2d 262, 264-65 (Ind. Ct. App. 1977).

67. Here, an express written contract, the Loan Commitment, controlled the parties' rights with regard to the proposed loan to ERC. The existence of the written Loan Commitment defeats ERC's unjust enrichment claim.

2. ERC Conferred no Measurable Benefit and the Woodbridge Parties Were Not Unjustly Enriched.

68. ERC's unjust enrichment claim also fails because ERC did not confer a "measurable benefit" to the Woodbridge Parties.

69. "To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." Zoeller v. E. Chi. Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009). Under Indiana law, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Id.*

70. The Court concludes that ERC did not meet its burden to prove that it conferred a measurable benefit on anyone. Put differently, the Woodbridge Parties were not unjustly enriched at ERC's expense.

71. The existence of the written Loan Commitment precludes ERC's unjust enrichment claim. Even if the Loan Commitment did not preclude ERC's claim, the Court concludes that ERC failed to establish by a preponderance of the evidence that ERC conferred a measurable benefit or that the Woodbridge Parties were unjustly enriched.

E. ERC's Count V – Tortious Interference With Business Relations Claim Fails for a Number of Reasons.

72. In Count V, ERC asserted a claim for tortious interference with business relations against the Woodbridge Parties. The Court concludes that ERC's tortious interference claim fails on the merits for a number of reasons

73. The elements of tortious interference with business relations are: (1) existence of a valid relationship; (2) defendant's knowledge of the existence of the relationship; (3) defendant's intentional interference; (4) absence of justification for the defendant's interference; (5) damages; and (6) illegal conduct by the defendant. Levee v. Beeching, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000).

74. ERC failed to establish elements (3), (4) and (6) by a preponderance of the evidence.

1. ERC Failed to Demonstrate Intentional Interference.

75. ERC failed to meet its burden to establish that any of the Woodbridge Parties intentionally interfered with ERC's relationship with Waterfall. To the contrary, the evidence showed that Brill himself introduced Woodbridge to Waterfall and requested that Waterfall work with Woodbridge for the purchase of the Note and Mortgage. ERC did not meet its burden to show that there was anything tortious about Woodbridge's acquisition of the Note and Mortgage.

2. ERC Failed to Prove the Absence of Justification.

76. ERC also failed to establish an absence of justification for the Woodbridge Parties' actions.

77. To fulfill this element, a "plaintiff must state more than a mere assertion that the defendant's conduct was unjustified." Morgan Asset Holding Corp. v. CoBank, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000) (affirming the dismissal of a tortious interference with business relations claim where plaintiff failed to allege conduct by defendant that was intended for the "sole purpose of causing injury and damage" to plaintiff). "To satisfy [the element of lack of

justification], the breach must be malicious and exclusively directed to the injury and damage of another." Winkler v. V.G. Reed & Sons, Inc., 619 N.E.2d 597, 600-01 (Ind. Ct. App. 1993) *aff'd* 638 N.E.2d 1228 (Ind. 1994). "Moreover, the existence of a legitimate reason for the defendant's actions provides the necessary justification to avoid liability." Morgan Asset Holding Corp, 736 N.E.2d at 1272 (citing Winkler, 19 N.E.2d at 600-01).

78. The evidence at trial supported a number of legitimate reasons for why Woodbridge acquired the Note and Mortgage from Waterfall even though Riverdale was not ready to close its loan with ERC.

79. First, as noted above, the Waterfall Note Sale happened at Brill's express direction and with his consent. Woodbridge went forward with the Waterfall Note Sale as an accommodation to ERC.

80. Second, Woodbridge closed the Waterfall Note Sale to prevent Waterfall from rescinding the discounted pay off and foreclosing on the Property. If ERC ultimately failed to fulfill the conditions of the Riverdale loan, ERC was in no different position than it had been with Waterfall—in default on a $2 million plus promissory note with no ability to refinance and on the brink of foreclosure.

81. Third, Woodbridge had a business objective in acquiring the Note and Mortgage, even without confirmation that ERC could fulfill the conditions in the Loan Commitment. Waterfall was offering to sell the Note and Mortgage, which documented a debt of over $2 million, for $740,000. If ERC ultimately failed to fulfill the conditions in the Loan Commitment, Woodbridge's $740,000 investment was protected by the first position mortgage lien it acquired from Waterfall.

82. Woodbridge's business motivations preclude any liability for tortious interference. *See* Winkler, 619 N.E.2d at 1236) (holding that a defendant who is motivated in part by his own legitimate business interest is not acting in the absence of justification); Harvest Life Ins. Co., 701 N.E.2d at 877 (pursuing legitimate business interest is justified).

3. ERC Failed to Prove "Illegal" Conduct.

83. ERC's tortious interference claim also fails because ERC failed to establish any "illegal" conduct on the part of the Woodbridge Parties.

84. The Indiana Supreme Court has held that a tortious interference with business relations claim "requires some independent *illegal* action" on the part of the defendant. Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 291 (Ind. 2003) (emphasis added) *cert. denied*, 541 U.S. 902 (2004); *see also* Watson Rural Water Co., Inc. v. Ind. Cities Water Corp., 540 N.E.2d 131, 139 (Ind. Ct. App. 1989) ("In the State of Indiana, an element necessary to prove this cause of action is that the defendant acted illegally in achieving his end.")

85. Indiana case law provides little guidance on what constitutes illegal conduct for purposes of establishing tortious interference with a business relationship claim. *See e.g.*, Levee v. Beeching, 729 N.E.2d 215, 222-23 (Ind. Ct. App. 2000) (noting a "lack of definition or test for showing of the 'illegal conduct' element of tortious interference with business relationship" but noting that defamation does not suffice); Bradley v. Hall, 720 N.E.2d 747, 751 n. 3 (Ind. Ct. App. 1999) (noting that '"Illegality' is not a term of art, and no court has defined the meaning of 'illegal' as used in this context. The Restatement suggests that interference with prospective business relations requires more blameworthy means be used than does interference with contractual relations").

86. However, Indiana law is clear that a breach of contract is not sufficient to establish illegal conduct. Nikish Software Corp. v. Manatron, Inc., 801 F.Supp.2d 791, 797

(S.D. Ind. 2011) (rejecting argument that breach of contract satisfies illegal conduct element and granting summary judgment on tortious interference claim); Smith v. Biomet, Inc., 384 F.Supp.2d 1241, 1252 (N.D. Ind. 2005) (breach of contract does not satisfy illegality requirement; to hold otherwise would be to "transmute the breach into the tort of tortious interference with business relations").

87. The Court finds that ERC failed to meet its burden to show illegal conduct on the part of the Woodbridge Parties.

88. ERC's tortious interference claim fails because ERC failed to establish the elements of intentional interference, absence of justification, or illegal conduct.

F. Because ERC's Other Tort Claims Fail, ERC's Conspiracy Claim (Count VI) Fails as Well.

89. In Count VI, ERC asserted a claim for conspiracy against the Woodbridge Parties. The Court concludes that, because ERC's other tort claims all fail, ERC's conspiracy claim fails as well.

90. A civil conspiracy is "a combination of two or more persons who engage in a concerted action to accomplish an unlawful purpose or to accomplish some lawful purpose by unlawful means." Miller v. Cent. Ind. Cmty Found., Inc., 11 N.E.3d 944, (Ind. Ct. App. 2014) (quoting K.M.K. v. A.K., 908 N.E.2d 658, 663-64 (Ind. Ct. App. 2009). "In Indiana, there is no separate civil cause of action for conspiracy. However, there is a civil cause of action for damages resulting from a conspiracy." Id. (citing Sims v. Beamer, 757 N.E.2d 1021, 1026 (Ind. Ct. App. 2001). "Allegations of civil conspiracy sound in tort. . . . In other words, allegations of a civil conspiracy are just another way of asserting a concerted action in the commission of a tort." Id. (citing Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157, 1168 (Ind. 2002). "As

such a claim of civil conspiracy must be considered together with an underlying tort." Id. (citing Winkler, 638 N.E.2d at 1234).

91. The Court has concluded that ERC's underlying tort claims fail for a variety of separate and independent reasons. Because ERC does not have an underlying tort, it cannot state a claim for conspiracy. The Court concludes that ERC's conspiracy claim fails.

G. ERC's Claims All Fail Because ERC Failed to Prove Causation or Damages.

92. In addition to all of the other reasons set forth above, ERC's claims all fail because ERC failed to meet its burden to prove any viable theory of damages.

93. Evidence at trial showed that ERC could not have performed under the terms of the Loan Commitment or any other loan that ERC claims the Woodbridge Parties were required to make.

94. ERC's own expert witness, Kiefer, made clear that, before ERC could ever get the Property occupied to generate net income to make loan interest payments or the final balloon payment, there were a number of hurdles that ERC would need to overcome.

95. First, the building needed to be in good operating condition, which, according to Kiefer, meant that ERC would have to address all major capital expenditures as well as minor repairs. The evidence showed that the cost of the major capital expenditures alone could exceed $229,000.

96. ERC failed to meet its burden to show an ability to fund those improvements.

97. Second, according to Kiefer, to get tenants into the Property ERC needed to have money available to perform tenant-specific improvements to the Property. According to Kiefer, there is not a space in the Property that did not need some degree of work. Kiefer opined in one version of his expert report that the cost of such tenant improvements would be $840,000 ($15.00/sq. ft.).

98. ERC failed to meet its burden to show an ability to fund those improvements.

99. Third, to actually obtain new tenants, ERC would need money available to pay 6-7% leasing commissions at the time it signed leases with new tenants.

100. ERC failed to meet its burden to show an ability to fund leasing commissions.

101. Fourth, ERC would have to continue to fund operating expenses, which according to Brill and Kiefer, were $200,000 per year.

102. Under the terms of the Loan Commitment, ERC needed to make $9,000 monthly interest payments as well as a $900,000 balloon payment at the end of one year. ERC failed to meet its burden to show an ability to come up with the money needed for monthly interest payments, or money to cover the $900,000 balloon.

103. Had Riverdale made a $900,000 loan to ERC on the terms set forth in the Loan Commitment, $740,000 would have gone toward the Waterfall Note Purchase, $45,000 would have gone to cover the balance of ERC's commitment fee, $12,000 would have gone to cover Riverdale's attorneys' fees, $5,000 would have gone to cover title policy and closing costs, and $51,000 would have gone to the taxes that were then in arrears. Only $47,000 in cash would have gone to ERC.

104. Had Riverdale made a loan at 60% or 65% loan-to-value based upon the $1.34 million appraisal, the loan would have been upside down from the very start, or ERC would have walked away with less than $20,000 in cash.

105. ERC failed to prove by a preponderance of the evidence an ability to perform under the terms of the Loan Commitment or any other loan that ERC may have claimed Riverdale was obligated to make. Furthermore, ERC failed to prove by a preponderance of the

evidence an ability to cover the $2.5+ million that would be needed to lease up the Property to attain the net income values upon which Kiefer opined.

106. ERC failed to prove by a preponderance of the evidence that it lost profits from the Property due to any actions or inactions of the Woodbridge Parties.

107. ERC failed to prove by a preponderance of the evidence that it lost equity in the Property due to any actions or inactions of the Woodbridge Parties.

108. The evidence at trial showed that ERC's financial woes pre-existed any action or inaction on the part of the Woodbridge Parties.

109. When ERC first came to Riverdale on January 20, 2014, ERC was already in default under the Note and Mortgage to the tune of nearly $2.5 million. In fact, ERC had not made a regular mortgage payment for years. The Woodbridge Parties did not cause ERC's default.

110. When ERC came to Riverdale, the Property was only 27% occupied, with more than half of that occupancy being Brill's own companies who did not actually pay rent. The Woodbridge Parties did not cause the Property's occupancy issues.

111. When ERC came to Riverdale, the Property was in need of significant repairs. It needed brick tuck pointing to prevent water intrusion and erosion of the historic brick exterior. It needed gutter replacement to stop the water intrusion that had already leaked into the building and destroyed the carpet, wallcoverings and ceilings. It needed a new cooling tower and a new boiler, which the receiver estimated just months later would cost a combined $138,000. The Woodbridge Parties did not cause the Property to fall into disrepair.

112. When ERC came to Riverdale, it was massively delinquent on its real estate taxes. In fact, Woodbridge paid more than $90,000 in taxes on ERC's behalf just to prevent the

Property from being sold at a tax sale. The Woodbridge Parties did not cause the delinquent taxes.

113. When ERC came to Riverdale, the Property could not cover basic operating costs without Brill subsidizing the building with his own personal funds. The Woodbridge Parties did not cause ERC's financial troubles.

114. ERC's failure to meet its burden to establish damages or causation is yet another reason why its claims against the Woodbridge Parties fail.

II. Whiteacre Is Entitled to Judgment and a Decree of Foreclosure

115. In its Complaint Whiteacre has asserted claims against ERC for breach of the Note and to foreclose the Mortgage. Because the Note is a non-recourse note, Whiteacre seeks only an *in rem* judgment and decree of foreclosure. The Court concludes that Whiteacre is entitled to judgment and a decree of foreclosure as set forth herein.

116. The loan documents governing this case are contracts, and the rules of contract construction control. The interpretation or legal effect of a contract is a question of law to be determined by the Court. Eckart v. Davis, 631 N.E.2d 494, 497 (Ind. Ct. App. 1994); George Uzelac & Assoc. v. Guzik, 663 N.E.2d 238, 240 (Ind. Ct. App. 1996); Beiger Heritage Corp. v. Montandon, 691 N.E.2d 1334, 1337 (Ind. Ct. App. 1998). Where the terms of a contract are clear and unambiguous, they are conclusive, and the court will not construe the contract or consider extrinsic evidence but merely apply the contract provisions. Eckart, 631 N.E.2d at 497; *citing*, Jackson v. DeFavis, 553 N.E.2d 1212, 1215 (Ind. Ct. App. 1990).

117. The law is well-established that a promissory note secured by a mortgage is a negotiable instrument governed by Article 3 of the Uniform Commercial Code. First Valley Bank v. First Sav. & Loan Ass'n of Cent. Ind., 412 N.E.2d 1237, 1240-41 (Ind. Ct. App. 1980).

Accordingly, Indiana's Uniform Commercial Code governs whether Whiteacre is entitled to enforce the Note and Mortgage.

118. Indiana Code § 26-1-3.1-301 provides that a negotiable instrument may be enforced by "the holder of the instrument." The "holder" of the instrument is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person if the identified person is in possession of the instrument." I.C. § 26-1-1-201(20)(A).

119. Thus, under Indiana law, to demonstrate that it is entitled to enforce the subject Note, Whiteacre need only establish (1) possession of the Note and (2) that the Note is payable to bearer or payable to Whiteacre. The stipulated evidence shows that Whiteacre has possession of both the original Note and Mortgage, and the Note is payable to Whiteacre. Accordingly, Whiteacre meets all of the requirements to be the "holder" of and "person entitled to enforce" the Note as a matter of law.

120. As holder of the Note, Whiteacre is also entitled to enforce the Mortgage as a matter of law. *See* Egbert v. Egbert, 80 N.E.2d 104, 106 (Ind. 1948) ("The assignment of a note, secured by mortgage operates *pro tanto* as an assignment of the mortgage.")

121. The stipulated evidence in this case is that the amount due and owing under the Note and Mortgage, as of February 8, 2016, was $3,270,676.08, plus interest accruing from February 8, 2016, to the date of entry of judgment, at the rate of $460.85 per day, and thereafter at the rate of 8% per annum.

III. ERC's Affirmative Defenses All Fail

A. The Estoppel Certificate bars all of ERC's defenses to Whiteacre's foreclosure.

122. ERC asserted the following affirmative defenses to Whiteacre's claims: (1) Estoppel; (2) Fraud; (3) Constructive Fraud; (4) Unclean Hands; (5) Waiver; (6) Illegality; and

(7) Plaintiff did not take assignment of Note and Mortgage in Good Faith.

123. The Estoppel Certificate defeats all of these defenses.

124. On February 11, 2014, ERC executed the Estoppel Certificate, which stated:

> 24. Borrower represents and warrants that *there are no defenses to its obligations under the Note and Mortgage*, whether known or unknown, and if any do exist, *Borrower hereby waives such defenses* as to the Seller [Waterfall] and the Buyer [Woodbridge].

(emphasis added.)

125. This is an express waiver of any defenses to Whiteacre's enforcement of the Note and Mortgage and foreclosure of the Property.

126. ERC's affirmative defenses are all based upon the theory that it was induced into signing the Consent to Assignment by oral promises that Riverdale would make a loan on terms other than those set forth in the Loan Commitment. Therefore, ERC contends that Whiteacre should be precluded from foreclosing.

127. As discussed above, the alleged oral promises that ERC claims induced its conduct all occurred prior to February 10, 2014. Therefore, the bases of ERC's defenses to Whiteacre's foreclosure were known and in existence at the time that ERC waived all such defenses in the Estoppel Certificate.

128. The Estoppel Certificate is fatal to all of ERC's affirmative defenses to Whiteacre's claims.

B. ERC's Affirmative Defenses Also Fail on the Merits.

129. Even if ERC had not waived and released its defenses to Whiteacre's claims by executing the Estoppel Certificate, ERC's affirmative defenses fail on the merits.

1. ERC's Estoppel Defense Fails.

130. ERC's first affirmative defense is estoppel.

131. "Estoppel is a judicial doctrine sounding in equity." Town of New Chi. V. City of Lake Station, 939 N.E.2d 638, 653 (Ind. Ct. App. 2010) (citing Brown v. Branch, 758 N.E.2d 48, 51 (Ind. 2001)).

132. "Although variously defined, it is a concept by which one's own acts or conduct prevents the claiming of a right to the detriment of another party who was entitled to and did rely on the conduct." Id.

133. "There are a variety of estoppel doctrines including: estoppel by record, estoppel by deed, collateral estoppel, equitable estoppel (also referred to as estoppel *in pais*), promissory estoppel, and judicial estoppel. All, however, are based on the same underlying principle: one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other." Id. (citing 31 C.J.S. *Estoppel & Waiver* § 2 (1996)).

134. Only equitable estoppel and promissory estoppel are applicable in this case.

135. For the same reasons that ERC's promissory estoppel claim fails, ERC's affirmative defense based on promissory estoppel fails as well. Therefore, the Court will only address equitable estoppel here.

136. Equitable estoppel is available only as a defense. Id. (citing 28 Am.Jur.2d *Estoppel & Waiver* § 35).

137. "The party claiming equitable estoppel must show its (1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially." Money Store Inv. Corp. v. Summers, 948 N.E.2d 544, 547 (Ind. 2006).

138. "Equitable estoppel may arise from silence or acquiescence as well as from positive conduct. However, silence will not form the basis of an estoppel unless the silent party has a duty to speak." Town of New Chicago, 939 N.E.2d at 654.

139. ERC claims that Whiteacre should be equitably estopped from foreclosing because Riverdale induced ERC into consenting to the Waterfall Note Sale with oral promises that Riverdale would make a loan to ERC, irrespective of ERC's fulfillment of the conditions set forth in the Loan Commitment.

140. ERC failed to carry its burden on its equitable estoppel affirmative defense.

141. First, ERC failed to establish, by a preponderance of the evidence, that any of the Woodbridge Parties ever orally promised to make a loan to ERC on terms other than those set forth in the Loan Commitment. ERC also failed to establish that the Woodbridge Parties stayed silent when they had a duty to speak.

142. Second, any alleged oral promises were made prior to ERC's execution of the Loan Commitment. As a result, the parol evidence rule bars the Court from considering evidence of oral promises that contradict the terms of the Loan Commitment.

143. Third, even if the Court found that oral promises were made and that the parol evidence rule does not bar the Court's consideration of such oral promises, the Court concludes that ERC failed to establish, by a preponderance of the evidence, that it relied on such oral promises, or that such reliance was reasonable, for the reasons discussed above in connection with ERC's promissory estoppel claim.

144. For all of these reasons, the Court finds that ERC's equitable estoppel defense fails.

2. ERC's Fraud Defense Fails.

145. ERC's second affirmative defense is fraud.

146. Fraud must be pleaded with particularity, which ERC failed to do. This is fatal to ERC's fraud defense.

147. ERC also failed to articulate whether its defense was based upon actual fraud or fraudulent inducement.

148. Either way, the Court concludes that ERC failed to establish the elements of such defense by a preponderance of the evidence.

149. Actual fraud consists of the following elements: (1) a representation of past or existing fact; (2) that is false; (3) that is made with knowledge of or in reckless ignorance of its falsity; (4) that the complaining party relied on; and (5) that that proximately caused injury. Wells v. Stone City Bank, 691 N.E.2d 1246,1250 (Ind. Ct. App. 1998); Nestor v. Kapetanovic, 573 N.E.2d 457, 458 (Ind. Ct. App. 1991).

150. "[A]ctual fraud may not be based on representations regarding future conduct, or on broken promises, unfulfilled predictions, or statements of existing intent which are not executed." Comfax Corp. v. North Am. Van Lines, 587 N.E.2d 118 (Ind. Ct. App. 1992).

151. "Promises and representations as to the future are regarded merely as statements of opinion, hope, or expectation upon which a party has no right to rely." Nestor v. Kapetanovic, 573 N.E.2d 457, 458 (Ind. Ct. App. 1991).

152. Further, the plaintiff must have had a right to rely on the representation or, stated differently, the reliance must have been reasonable. Plymale v. Upright, 419 N.E.2d 756, 761 (Ind. Ct. App. 1991).

153. The elements for fraud in the inducement are the same for actual fraud, except that the reliance results in entering a contract. Lightning Litho, Inc. v. Danka Indus., 776 N.E.2d

1238, 1241 (Ind. Ct. App. 2002); Circle Ctr. Dev. Co. v. Y/G Ind., L.P., 762 N.E.2d 176, 179 (Ind. Ct. App. 2002).

154. ERC failed to establish by a preponderance of the evidence that any of the Woodbridge Parties made any misrepresentation of past or existing fact.

155. ERC also failed to establish by a preponderance of the evidence its reasonable reliance on any alleged misrepresentation made by the Woodbridge Parties.

156. The Court concludes that no fraud was committed in this case.

3. ERC's Constructive Fraud Defense Fails.

157. ERC's third affirmative defense was constructive fraud.

158. The Court concludes that no fraud was committed in this case.

159. For the same reasons that ERC's claim for constructive fraud fails, so too does ERC's affirmative defense based upon constructive fraud.

4. ERC's Unclean Hands Affirmative Defense Fails.

160. ERC's fourth affirmative defense was unclean hands.

161. "The principle of unclean hands is that 'he who comes into equity must come in with clean hands.'" Villegas v. Silverman, 832 N.E.2d 598, 607 (Ind. Ct. App. 2005).

162. "The doctrine of unclean hands is not favored and must be applied with reluctance and scrutiny." Id.

163. "For this doctrine to apply, the misconduct must be intentional, and the wrong that is ordinarily invoked to defeat a claimant by using the unclean hands doctrine must have an immediate and necessary relation to the matter before the court." Id.

164. The Court concludes that ERC failed to meet its burden to establish that the Woodbridge Parties had unclean hands or that any action or inaction on the part of the

Woodbridge Parties prevents Whiteacre from enforcing its rights under the Note and Mortgage and foreclosing on the Property.

5. ERC's Waiver Affirmative Defense Fails.

165. ERC's fifth affirmative defense was waiver.

166. "Waiver is an intentional relinquishment of a known right, requiring both knowledge of the existence of the right and intention to relinquish it." Pohle v. Cheatham, 724 N.E.2d 655, 659 (Ind. Ct. App. 2000).

167. It is unclear what it is that ERC claims Whiteacre "waived" in this case.

168. To the extent ERC is suggesting that Whiteacre "waived" the right to foreclose due to the alleged oral promises upon which ERC's other defenses and claims are based, the Court rejects ERC's defense for the same reasons it has rejected all of ERC's other defenses and claims.

169. Moreover, ERC failed to demonstrate, by a preponderance of the evidence, that Whiteacre waived anything.

6. ERC's Illegality Defense Fails.

170. ERC's sixth affirmative defense was illegality.

171. A contract made in contravention of the law is typically void. Switzerland County School Corp. v. Sartori, 442 N.E.2d 702, 703 (Ind. Ct. App. 1982); Tolliver v. Mathas, 512 N.E.2d 187, 189 (Ind. Ct. App. 1987). The determination of whether a contract is illegal, and thereby void, is one for the court. Tolliver, 512 N.E.2d at 189.

172. ERC failed to meet its burden to establish that the Note and Mortgage were illegal.

173. Moreover, as the Court discussed in connection with ERC's tortious interference claim, ERC failed to prove by a preponderance of the evidence that there was illegal conduct on the part of the Woodbridge Parties.

174. ERC's illegality defense fails.

7. ERC's Defense Based Upon the Allegation that Whiteacre Did Not Take Assignment of the Note and Mortgage in Good Faith Fails.

175. ERC's seventh affirmative defenses was: "Plaintiff did not take assignment of the Note and Mortgage in Good Faith."

176. This defense fails for a number of reasons.

177. First, ERC failed to prove by a preponderance of the evidence that the Woodbridge Parties did not act in good faith. See the Court's discussion in connection with ERC's breach of contract claim.

178. Second, the Woodbridge Parties did not owe a duty of good faith as a matter of law. See the Court's discussion in connection with ERC's breach of contract claim.

179. The Loan Commitment was an arm's length transaction between sophisticated business entities. There is no duty of good faith in such situations. See First Federal Sav. Bank, 558 N.E.2d at 604. Indeed, "no Indiana case has ever recognized a duty of good faith outside the realm of UCC or insurance law." Id. at 606.

180. Third, this defense amounts to a challenge to the validity of the assignment from Waterfall to Woodbridge.

181. ERC, as the borrower, lacks standing to challenge this assignment.

182. An assignment is a contract. Pistalo v. Progressive Cas. Ins. Co., 983 N.E.2d 152, 159 (Ind. Ct. App. 2012). Under Indiana law, "the parties to a contract are the ones to complain of a breach, and if they are satisfied with disposition which has been made of it and of all claims

under it, a third party has no right to insist that it has been broken." Harold McComb & Sons, Inc. v. JPMorgan Chase Bank, N.A., 892 N.E.2d 1255, 1258 (Ind. Ct. App. 2008).

183. ERC was not a party to the assignment from Waterfall to Woodbridge. Therefore, ERC has no standing to challenge the validity of that assignment.

184. ERC's affirmative defense fails.

ORDER FOR ENTRY OF FINAL JUDGMENT

185. Final *in rem* judgment is hereby entered in favor of Whiteacre and against ERC and the Property on Whiteacre's Complaint to Enforce Note and Foreclose Mortgage, in the amount, as of February 8, 2016, of $3,270,676.08, plus interest accruing at the rate of $460.85 per diem from February 8, 2016, to the date of this Judgment, and thereafter at the statutory rate of 8% per annum until paid in full.

186. Final judgment is hereby entered in favor of Whiteacre and against ERC on all claims asserted in ERC's Counterclaim.

187. Final judgment is hereby entered in favor of Woodbridge and Riverdale and against ERC on all claims asserted ERC's Third-Party Complaint.

188. Whiteacre's Mortgage is hereby foreclosed as a first and prior lien, in and to the Property, senior to the interests of ERC, or to any persons claiming from, under or through any of them, in and to the Property, and the equity of redemption of ERC, and others claiming by and through them, in and to the Property is forever foreclosed, barred and terminated.

189. Upon praecipe for sale by Whiteacre, the Vanderburgh County Sheriff shall: (1) sell, without relief from valuation and appraisement laws, the Property, or so much thereof as may be necessary to satisfy the judgment and owed to Whiteacre; (2) permit Whiteacre to bid for the Property, or any part thereof, offered for sale, with the amount of judgment owed to it,

including all interest accrued to the date of sale; and (3) execute and deliver to the purchaser of the Property a sheriff's deed immediately after sale.

190. The proceeds from the sheriff's sale of the Mortgaged Property shall be applied in the following order:

> **First**, to the payment of the costs of this action, accrued and to accrue, together with the costs and expenses of the sheriff's sale;
>
> **Second,** to the payment of Whiteacre of the sum of $3,270,676.08, plus interest accruing at the rate of $460.85 per diem from February 8, 2016, to the date of this Judgment, and thereafter at the statutory rate of 8% per annum until paid in full; and
>
> **Third**, any sums remaining after payment of the above items to be paid into Court to be held pending further order of the Court.

191. ERC, and all other interested parties, shall surrender full and peaceful possession of the Property to the holder of such deed, bill of sale, or copy thereof, as a result of the sheriff's sale and if such parties do not surrender full and peaceful possession of the Property, then the Sheriff of Vanderburgh County shall enter the Property and eject and remove Defendants or any other persons who may be in possession of the Property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED this 11th day of May 2016.

Mary Margaret Lloyd
JUDGE, Vanderburgh County Superior Court

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Plaintiffs Exhibit # 17

The land described as follows:
Part of Block Ten (10); also part of Block Fourteen (14); also part of Block Thirteen (13); also part of vacated Bond Street and vacated N.W. Fifth Street; also part of the vacated alleys in said Block Ten (10) in Stockwell's Enlargement to the City of Evansville, as per plat thereof, recorded in Deed Record T, pages 1 to 5, inclusive, and transcribed of record to Plat Book B, pages 2 to 5, inclusive, and re-transcribed of record to Plat Book E, pages 12 to 15, inclusive, and as per amended plat thereof, recorded in Plat Book A, pages 1-A, 2 and 3, and transcribed of record to Plat Book E, pages 30, 31, and 32, in the office of the Recorder of Vanderburgh County, Indiana, said enlargement being located in Fractional Section Thirty (30), Township Six (6) South, Range Ten (10) West in said county and state and also being more particularly described as follows:
Beginning at the West most corner of Lot Five (5) is said Block Ten (10). Being the Southeast corner of the intersection of Bond Street and N.W. Fourth Street;

1. thence along the Northwesterly extended Southwest line of said Lot Five (5) North 32 degrees 40 minutes 50 seconds West [basis of bearing along the center line of Bond Street per right-of-way acquisition parcels prepared by Indiana Department of Transportation for Lloyd Expressway Project F-00604(3), said Bond Street bearing North 57 degrees 20 minutes 18 seconds East] Sixty (60) feet to the Northwesterly line of vacated Bond Street;
2. thence along said Northwesterly line North 57 degrees 20 minutes 18 seconds East One Hundred Seventy-two (172) feet to the point of intersection with the Southwesterly line of vacated N.W. Fifth Street;
3. thence along the Southwesterly line thereof North 32 degrees 40 minutes 50 seconds West One Hundred Twenty (120) feet to the South limited access right-of-way line of Lloyd Expressway [SR66] Project F-006-4(3);
4. thence along the South line thereof South 77 degrees 40 minutes 16 seconds East Eighty-four and Eighty-seven Hundredths (84.87) feet to the Northeasterly line of said N.W. Fifth Street;
5. thence continue along said limited access right-of-way line South 88 degrees 09 minutes 08 seconds East One Hundred Five and Ninety-one Hundredths (105.91) feet [One Hundred Five and Eighty-nine Hundredths (105.89) record] to the point of intersection with the Northwest line of vacated Bond Street;
6. thence continue along said limited access right-of-way line South 88 degrees 06 minutes 01 second East One Hundred Five and Seventy-seven Hundredths (105.77) feet to the point of intersection with the Southeast line of vacated Bond Street;
7. thence continue along said limited access right-of-way line North 89 degrees 30 minutes 34 seconds East One Hundred Fifty-eight and Seventy-nine Hundredths (158.79) feet to the point of intersection with the Southwest line of N.W. Sixth Street, also being the Northeast lien of Lot One (1) in said Block Fourteen (14);
8. thence along said lot line South 32 degrees 40 minutes 50 seconds East Thirty-seven and Seventy-one Hundredths (37.71) feet to the East most corner of said Lot One (1);
9. thence along the Southeast line of Lots One (1) through Fifteen (15) in Block Fourteen (14), inclusively, South 57 degrees 20 minutes 18 seconds West Three Hundred Eight and Seventy Hundredths (308.70) feet [Three Hundred Nine (309) feet record] to the South most corner of said Lot Fifteen (15), also being on the Northeast line of vacated N.W. Fifth Street;
10. thence South 64 degrees 13 minutes 40 seconds West Sixty and Forty-four Hundredths (60.44) feet to the East most corner of Lot Thirty-three (33) in Block Ten (10);
11. thence along the Northeast line of Lots Thirty-two (32), Thirty-one (31) and Thirty (30) in said Block Ten (10) South 32 degrees 40 minutes 50 seconds East Sixty (60) feet to the East most corner of said Lot Thirty (30);
12. thence along the Southeast line and Southwesterly extension thereof South 57 degrees 20 minutes 18 seconds West Eighty-six (86) feet to the center of a vacated Twelve (12) foot alley;
13. thence along the center of said vacated alley North 32 degrees 40 minutes 50 seconds West Seventy-five Hundredths (.75) feet to the point of intersection with the Northeasterly extended Southeast line of the Northwesterly Ten (10) feet of Lot Thirteen (13) in said Block Ten (10);

14. thence along said line South 57 degrees 20 minutes 18 seconds West Eighty-six (86) feet to the Southwest line of said Lot Thirteen (13), also being the Northeasterly line of N.W. Fourth Street;
15. thence along the Southwesterly line of Lot Thirteen (13) through Lot Five (5), inclusively, North 32 degrees 40 minutes 50 seconds West One Hundred Seventy-Four and Twenty-five Hundredths (174.25) feet [One Hundred Seventy Four and Fifty Hundredths (174.50) record] to the point of beginning.

Parcel Nos: P11-05-14685
R11-590-29-031-001

I, Affiant, under the penalties for perjury, that I have taken resonable care to redact each Social Security number in this document, unless required by law.

Marilyn Mannarino

This document prepared by:
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