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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SEP 03 2009

JAMES M. HATTEN, Clerk
By *SW* Deputy Clerk

FIRST STATE BANK)
OF NORTHWEST ARKANSAS,)
Plaintiff,)
v.)
JOAN HAMMER,)
GLEN HAMMER,)
MARC BERCOON,)
WILLIAM GOLDSTEIN,)
Defendants.)

Civil Action
File No.

109-CV-2421

BRM

COMPLAINT

COMES NOW Plaintiff First State Bank of Northwest Arkansas (Plaintiff or “First State Bank”) and files this Complaint against Defendants Joan Hammer, Glen Hammer, Marc Bercoo (‘Bercoo”), and William Goldstein (“Goldstein”) (collectively “Defendants”), showing the Court as follows:

PARTIES

1. Plaintiff First State Bank is an Arkansas based banking entity.
2. Defendant Joan Hammer is an individual and, upon information and belief, a resident of Fulton County, Georgia. Ms. Hammer may be served with process at 140 Habersham Waters Court, Atlanta, GA 30350, or wherever she may be found.

3. Defendant Glen Hammer is an individual and, upon information and belief, a resident of Fulton County, Georgia. Mr. Hammer may be served with process at 140 Habersham Waters Court, Atlanta, GA 30350, or wherever he may be found.

4. Defendant Marc Bercoo is an individual and, upon information and belief, a resident of DeKalb County, Georgia. Mr. Bercoo may be served with process at 5170 Brooke Farm Drive, Atlanta, GA 30338, or wherever he may be found.

5. Defendant William Goldstein is an individual and, upon information and belief, a resident of Fulton County, Georgia. Mr. Goldstein may be served with process at 5480 Claire Rose Lane, Atlanta, GA 30327, or wherever he may be found.

JURISDICTION AND VENUE

6. Per 28 U.S.C. § 1332(a), this Court has diversity jurisdiction over this action because there is complete diversity of citizenship between the Plaintiff and Defendants and the amount in controversy exceeds \$75,000.00. Furthermore, each of the Defendants has expressly consented to jurisdiction in this Court through paragraph 10.11 of the Loan and Security Agreement at issue in this action.

Paragraph 10.11 of the Loan and Security Agreement at issue in this action states:

10.11 Jurisdiction; Venue. Borrower and Guarantor(s) consent to the jurisdiction of any state or federal court sitting in the State of Georgia and agree that venue shall be proper in any such court.

7. Per 28 U.S.C. § 1391 venue is proper in this Court as to all Defendants based on the fact that each Defendant resides in the Atlanta Division of the Northern District of Georgia. Furthermore, venue is proper in this Court based on Defendants' express consent through paragraph 10.11 of the Loan and Security Agreement at issue in this action.

FACTUAL BACKGROUND

8. On or about October 20, 2006, Homeland Security Corporation n/k/a BGH Enterprises, Inc. ("BGH/HSC") and Defendants entered into a Loan and Security Agreement (the "Loan") with Alpha Bank & Trust of Alpharetta, Georgia ("Alpha Bank").¹ A true and complete copy of the Loan is attached hereto as Exhibit "A."²

9. On or about October 20, 2006, Defendant BGH/HSC executed a Revolving Credit Note to Alpha Bank in connection with the Loan (the "Note"). A true and complete copy of the Note is attached hereto as Exhibit "B."

¹ BGH/HSC is a Tennessee corporation which was registered to do business and maintained a registered office in Georgia during the time period at issue in this suit. Upon information and belief, Homeland Security Corporation changed its name to BGH Enterprises, Inc. on or about May 2, 2008 through filings with the Tennessee Secretary of State's office. At all times relevant to this action, BGH Enterprises, Inc. and Homeland Security Corporation remained one and the same entity. Further upon information and belief, BGH/HSC was administratively dissolved by the Tennessee Secretary of State's office on or about August 17, 2009. Due to its dissolution, BGH/HSC has not been made a party to this action.

² Paragraph 10.12 of the Loan contains a complete waiver of Defendants' right to a jury trial in this action.

10. Through the Note, BGH/HSC undertook the obligation to repay principal and interest on amounts actually disbursed by Alpha Bank under the Note.

11. Prior to the expiration of the Note's original maturity on October 20, 2007, BGH/HSC and Defendants entered into a Modification of Loan Documents agreement with Alpha Bank on or about October 20, 2007 (the "First Modification"). A true and complete copy of the First Modification is attached hereto as Exhibit "C."

12. Pursuant to the terms of the First Modification, the maturity date of the Note was extended to April 20, 2008.

13. Prior to the expiration of the extended maturity period under the First Modification, BGH/HSC and Defendants entered into a Second Modification of Loan Documents agreement with Alpha Bank on or about April 20, 2008 (the "Second Modification"). A true and complete copy of the Second Modification is attached hereto as Exhibit "D."

14. Pursuant to the terms of the Second Modification, the maturity date of the Note was extended to August 20, 2008.

15. The Note was further secured through separate and distinct Guaranty agreements executed by Defendants Joan Hammer, Glen Hammer, Marc Bercoom, and William Goldstein respectively on or about October 20, 2006. A true and

complete copy of the Joan Hammer Guaranty is attached hereto as Exhibit "E." A true and complete copy of the Glen Hammer Guaranty is attached hereto as Exhibit "F." A true and complete copy of the Marc Bercoom Guaranty is attached hereto as Exhibit "G." A true and complete copy of the William Goldstein Guaranty is attached hereto as Exhibit "H."

16. Alpha Bank disbursed a total of \$4,900,000.00 to Defendant BGH/HSC under the terms of the Loan and Note as modified. The amounts due were not paid in full as of maturity of the Note on August 20, 2008.

17. On or about October 24, 2008, the Commissioner of the Georgia Department of Banking and Finance closed Alpha Bank and caused the Federal Deposit Insurance Corporation to be appointed as receiver thereof ("FDIC-R").

18. The FDIC-R, as receiver for Alpha Bank, succeeded to all rights, titles, powers, and privileges of Alpha Bank, pursuant to 12 U.S.C. § 1821(c)(3)(A). As such the FDIC-R stands in the shoes of Alpha Bank with respect to all matters.

19. On or about February 3, 2009, BGH/HSC entered into a Change in Terms Agreement with the FDIC-R (the "Third Modification"). A true and complete copy of the Third Modification is attached hereto as Exhibit "I." The Note was brought current by BGH/HSC and/or the Defendants at that time through the payment of the then outstanding interest.

20. Pursuant to the terms of the Third Modification, the maturity date of the Note was extended to August 20, 2010.

21. On or about February 24, 2009, the FDIC-R executed an Assignment and Assumption of Interests and Obligations for a group of loan pool numbers (APH-1-09-025, APH-1-09-040) with First State Bank (the “Assignment”). A true and correct copy of the Assignment and exhibits are attached hereto as Exhibit “J.”³

22. Pursuant to that February 24, 2009 Assignment, the FDIC-R and First State Bank agreed that the FDIC-R would “sell, assign, transfer and convey to Assignee [First State Bank] all of the assets identified on Exhibit A of the Assignment.

23. Exhibit A of the Assignment identified the Loan to Defendant BGH/HSC referenced above.

24. In addition to the Assignment, on or about February 24, 2009, the FDIC-R and First State Bank executed a Bill of Sale evidencing First State Bank’s right, title, and interest in the Loan, Note, and Guarantees at issue in this lawsuit (the

³ Exhibit A attached to the Assignment has been redacted to prevent disclosure of irrelevant and confidential bank information regarding other loans not at issue in this lawsuit.

“Bill of Sale”). A true and correct copy of the Bill of Sale and exhibit are attached hereto as Exhibit “J.”⁴

25. In selling its interests, the FDIC-R completely transferred any and all interest it had in the Loan, Note, and Guarantees to First State Bank. As evidenced by both the Assignment and the Bill of Sale, First State Bank has succeeded to all rights to enforce the Loan, Note, and Guarantees at issue in this lawsuit against the Defendants. First State Bank is the holder of the Loan, Note, and Guarantees at issue in this lawsuit.

26. To date, Defendants have failed to meet their respective repayment obligations under the Note and Guarantees for the \$4,900,000.00 principal balance received, plus interest, and late charges. In fact, once the Note was brought current by BGH/HSC and/or Defendants in early February 2009, neither BGH/HSC nor Defendants made any further payments of principal or interest on the Note or Guarantees.

27. On April 1, 2009, and on April 9, 2009, First State Bank provided Defendants with notice of default and acceleration under the Loan, Note, and Guarantees. A true and correct copy of First State Bank’s April 1, 2009 and April

⁴ Exhibit A attached to the Bill of Sale has been redacted to prevent disclosure of irrelevant and confidential bank information regarding other loans not at issue in this lawsuit.

9, 2009 letters is attached hereto as Exhibit "L." Defendants have failed to cure the default.

28. Defendant Joan Hammer's, Glen Hammer's, Bercoons, and Goldstein's failure to meet their respective repayment obligations for principal and interest constitute defaults under the terms of the respective Guarantees.

29. Defendants' failure to repay the principal amount due at maturity entitles First State Bank to collect interest at the Default Rate of eighteen percent (18%) per annum as set forth in the Note, as well as late fees consisting of "Five percent (5.0%) of any payment not received by the Holder within five (5) days after the payment is due."

30. The Note and Guarantees also entitle First State Bank to collect its attorneys' fees from Defendants as a result of their respective defaults, including the sum of 15% of the aggregate principal and interest due under the Note as modified.

31. Defendant Joan Hammer has breached the terms of her Guaranty and is liable to First State Bank in the principal amount of \$4,900,000.00, plus accrued and unpaid interest of \$466,554.86 to and including August 31, 2009, plus continuing default interest accruing in the amount of \$2,450.00 per diem from September 1, 2009 until all balances are paid in full, plus late fees of \$245,000.00,

plus attorneys' fees of 15% of the principal and interest balance due on the date of judgment.

32. Defendant Glen Hammer has breached the terms of his Guaranty and is liable to First State Bank in the principal amount of \$4,900,000.00, plus accrued and unpaid interest of \$466,554.86 to and including August 31, 2009, plus continuing default interest accruing in the amount of \$2,450.00 per diem from September 1, 2009 until all balances are paid in full, plus late fees of \$245,000.00, plus attorneys' fees of 15% of the principal and interest balance due on the date of judgment.

33. Defendant Marc Bercoom has breached the terms of his Guaranty and is liable to First State Bank in the principal amount of \$4,900,000.00, plus accrued and unpaid interest of \$466,554.86 to and including August 31, 2009, plus continuing default interest accruing in the amount of \$2,450.00 per diem from September 1, 2009 until all balances are paid in full, plus late fees of \$245,000.00, plus attorneys' fees of 15% of the principal and interest balance due on the date of judgment.

34. Defendant William Goldstein has breached the terms of his Guaranty and is liable to First State Bank in the principal amount of \$4,900,000.00, plus accrued and unpaid interest of \$466,554.86 to and including August 31, 2009, plus

continuing default interest accruing in the amount of \$2,450.00 per diem from September 1, 2009 until all balances are paid in full, plus late fees of \$245,000.00, plus attorneys' fees of 15% of the principal and interest balance due on the date of judgment.

35. Defendants are jointly and severally liable to First State Bank for the amounts set for above as a result of their conduct.

COUNT I

BREACH OF GUARANTY CONTRACTS

**(Against Defendants Joan Hammer, Glen Hammer,
Marc Bercoom, and William Goldstein)**

36. Plaintiff incorporates by reference, as if fully restated herein, the averments contained in paragraphs 1 through 35 of this Complaint.

37. Through their respective defaults and by failing to pay the amounts due under the terms of the Guaranty agreements as described above, Defendants Joan Hammer, Glen Hammer, Marc Bercoom, and William Goldstein have breached their obligations under the Guaranty agreements.

38. Plaintiff First State Bank has been damaged by Defendant Joan Hammer's, Glen Hammer's, Marc Bercoom's, and William Goldstein's respective breaches in the principal amount of \$4,900,000.00, plus accrued and unpaid interest of \$466,554.86 to and including August 31, 2009, plus continuing default interest

accruing in the amount of \$2,450.00 per diem from September 1, 2009 until all balances are paid in full, plus late fees of \$245,000.00, plus attorneys' fees of 15% of the principal and interest balance due on the date of judgment.

39. Defendants Joan Hammer, Glen Hammer, Marc Bercoo, and William Goldstein are jointly and severally liable to First State Bank for these amounts as a result of their conduct.

COUNT II

UNJUST ENRICHMENT

(Against Defendants Joan Hammer, Glen Hammer, Marc Bercoo, and William Goldstein)

40. Plaintiff incorporates by reference, as if fully restated herein, the averments contained in paragraphs 1 through 35 of this Complaint.

41. Defendants have directly benefited and have been unjustly enriched through receipt of loan funds from First State Bank wrongfully retained and for which they are jointly and severally liable in the amounts set forth above.

COUNT III

ATTORNEYS' FEES AND EXPENSES PURSUANT TO O.C.G.A. § 13-1-11

**(Against Defendants Joan Hammer, Glen Hammer,
Marc Bercoom, and William Goldstein)**

42. Plaintiff incorporates by reference, as if fully restated herein, the averments contained in paragraphs 1 through 35 of this Complaint.

43. Plaintiff is claiming its attorneys' fees under the Note, Guaranty agreements, and Georgia law. Pursuant to O.C.G.A. § 13-1-11, First State Bank gives Defendants notice that it is enforcing the provisions of the Note and Guaranty agreements relative to the payment of attorneys' fees in addition to principal and interest. Defendants have ten (10) days from service of this Complaint to pay the amounts listed in paragraph 38 above without incurring additional liability for attorneys' fees. If Defendants pay the amount listed in paragraph 38 above in full before expiration of such time, then the obligation to pay attorneys' fees shall be void.

WHEREFORE, Plaintiff prays:

- a. That the Court enter judgment against the Defendants on each count of this Complaint;
- b. That the Court award compensatory and actual damages as a result of the respective Defendants' conduct;

- c. That the Court award Plaintiff its attorneys' fees and costs pursuant to O.C.G.A. § 13-1-11; and
- d. That the Court award Plaintiff such other and further relief as is just and proper.

Respectfully submitted this 3rd day of September, 2009.



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