

1. This case should be conducted pursuant to a level two (2) discovery control plan as provided by the Texas Rules of Civil Procedure.

STATEMENT OF RELIEF SOUGHT (TRCP 47)

2. Pursuant to Tex. R. Civ. P. 47, Plaintiffs seek monetary relief within the jurisdictional limits of this Court in the amount exceeding \$1,000,000.00. Plaintiffs' causes of actions are more particularly set forth below.

PARTIES

3. Sharestates Investments, LLC, is incorporated in the State of Delaware and has a principal place of business of 11 Middle Neck Road, Suite 400A, Great Neck, NY 110021 ("Plaintiff 1," "Mortgagee 1," or "Lender 1"); ShareStates Investments, LLC is wholly owned by Sharestates, Inc. Sharestates, Inc. is incorporated in the State of Delaware and has a principal place of business of 11 Middle Neck Road, Suite 400A, Great Neck, New York, 11021; 11 Middle Neck Road, Suite 400A, Great Neck, New York, 11021 is Sharestates Inc.'s nerve center; accordingly, the Plaintiff is a citizen of New York and Delaware for its allegation of diversity of jurisdiction under 28 U.S.C. § 1332.
4. Pallasite REO 2018-1, LLC ("Plaintiff 2" "Mortgagee 2") is registered to do business in Delaware; Sharestates Investments, LLC is the servicing agent for Plaintiff 2.
5. Capital Title of Texas, LLC is a Texas Limited Liability Company doing business in Texas, which may be served with process to its registered agent Preston Turner at 2400 Dallas Pkwy., Suite 560, Plano, Texas 75093 or wherever he may be found ("Capital Title").
6. Kelli M. Owens is an individual residing in Texas who may be served with process at 11638 Sagecanyon Dr., Houston, TX 77089, or wherever she may be found ("Owens").

7. Cushman & Wakefield, Inc., is a New York corporation doing business in Texas who may be served by process to its agent CT Corporation System, 1999 Bryan St., Ste 900, Dallas, TX 75201 ("C&W").
8. Mineral County Development Authority Corp. ("Authority"), is a terminated public corporation; the Authority is not organized for profit, but is organized exclusively for the purposes set forth in House Bill No. 367 enacted by the 1963 Session of the West Virginia Legislature, and now a part of the General Law as Article 12 of Chapter 7 of the Code of West Virginia which includes certain sections related to the purposes of Economic Development Authorities, with a principal office of 1116 Smith Street, Charleston, West Virginia, 25301 ("MCDA") and a service address of 87 North Main Street, Suite 1, Keyser, WV, 26726.
9. BDFI, LLC is a New York limited liability company doing business in Texas who may be served by process to its agent REGISTERED AGENT, INC., 5900 Balcones Dr., Ste 100, Austin, TX 78731 ("BDFI").
10. Appraisal Nation, LLC is a North Carolina limited liability company who may be served by process to its registered agent Corporation Service Company, 2626 Glenwood Ave., Ste 550, Raleigh, NC 27608.
11. Ehlert Law, PC is a Texas Professional Corporation doing business in Texas which may be served by process to its registered agent Jerel W. Ehlert II, at 14520 Old Katy Road, Suite 126 Houston, TX 77079, or wherever he may be found ("Ehlert PC").
12. Jerel W. Ehlert II, is an individual residing in Texas, who may be served with process at 305 E. Spring St., Georgetown, TX 78626, or wherever he may be found (Jerel W. Ehlert II and Ehlert PC are collectively, "Ehlert").

13. Michael Wells d/b/a Wells & Associates Appraisal Service is an individual residing in Texas, who may be served with process at 4422 Aspen Brook Ln., Spring, TX 77388, or wherever he may be found. ("Wells").

Background – Mortgage Lending

14. Lender 1 is in the business of funding mortgage loans.
15. Lender 1 uses an underwriting process to qualify potential loans applicants for specific loan requests.
16. To do this, Lender 1 underwriter examines, inter alia, the credit-worthiness of an applicant, the capacity of the applicant to repay the loan, and the value of the collateral.
17. Lender 1, inter alia, materially relies on the value of the collateral as determined by an appraisal.
18. Lender 1's underwriter then structures the transaction to meet the underwriting requirements, such as requiring that the borrower *have some skin in the game* by requiring it to apply a certain amount of its own funds into the transaction and the personal guaranty of all business entity owners.
19. Lender 1's underwriter confirms the borrower's ability to have some skin in the game by requiring, inter alia, bank statements reflecting sufficient funds to meet the borrower's obligations to close the loan.
20. Lender 1's proper underwriting protocols can be defeated with fraudulent documents, errors by title agents, and/or inflated appraisals.

Polk

21. Harold Gibson Polk, Jr. aka Harold Gibson Polk [Sr.] aka Grove Enterprises ("Harold"), is a straw-man mortgage fraudster who owns and incorporated Grove Enterprises, LLC

("Grove LLC") and 83 Griffith LLC ("Griffith LLC") ("Harold," "Grove LLC" and "83 Griffith, LLC" will be referred to collectively as "Polk") to purchase two parcels of real estate, the acquisition of which was intended to be funded by Lender 1; Polk, with the assistance of other Defendants, tricked Lender 1 into making two mortgage loans based on material false financial information then funneled significant loan proceeds to various improperly disclosed (or undisclosed) third-parties.

The Transactions – Kirby Loan

22. On September 17, 2017, Polk submitted a loan application to Lender 1 requesting Lender 1 fund a loan ("Kirby Loan") to assist Grove LLC to purchase 929 Kirby Drive, Houston Texas 20719 ("Kirby Property") from Isaiah M. Lewis ("Kirby Sale") for \$3,000,000.00; Polk agreed to supply the differential between Kirby Loan and the amount necessary to fund the \$3,000,000.00 Kirby Sale; these additional funds ("Kirby Cash at Closing") including, without limitation, settlement costs estimated at \$600,000.00.
23. Polk informed Lender 1 that the purpose of the Kirby Sale was *[t]o provide acquisition and rehab financing on the subject premises - Kirby Property ("Kirby Loan Purpose")*; this is also documented on the Term Sheet 1.
24. Lender 1's underwriter, inter alia, researched the credit-worthiness of Polk (recognizing that the legal entity entering into the transaction would be Kirby LLC), the capacity of the applicant to repay the loan, the ability to pay the Kirby Cash at Closing and the value of the collateral as a secondary source of recovery should Polk fail to pay as agreed.
25. Lender 1's underwriting requirements required a loan-to-value ratio ("LTV") of 77% of the Kirby Property ("Kirby LTV"), and restricted Kirby Loan to 80% of the acquisition price ("Kirby AP%"), (as noted in the Closing Conditions attached to the Settlement

Instructions); these requirements were partially documented by that term sheet letter dated March 7, 2018, from Lender 1 to Grove LLC and counter-signed by Polk ("Term Sheet 1");.

26. Lender 1 received that Appraisal of Real Property, by Michael Wells d/b/a Wells & Associates Appraisal Service, dated April 13, 2018 ("Kirby Appraisal") appraising the Kirby property at \$3,100,000.00.
27. Applying the Kirby LTV, Lender 1 would only lend \$2,400,000.00 towards the Kirby Property Sale.
28. Applying the Kirby AP%, Lender 1 would only lend \$2,400,000.00.
29. Additional construction/rehab funds were available increasing the total loan amount to \$2,660,000.00.
30. At Lender 1's request, Polk provided financial information supporting his ability to pay the Kirby Cash at Closing ("Kirby CAC Requirement"); Polk provided a series of Bank of America bank account statements in the name of Grove Enterprises, LLC and Harold G Polk, Jr., with an alleged balance of \$1,679,027.61, as of January 14, 2018; these bank statements were fake ("Fake BOA Statements 1").
31. Lender 1's underwriting requirements required Grove LLC to use its own funds to pay for the Cash at Closing and required the buyer to *have some skin in the game* by requiring the Kirby CAC Requirement and the personal guaranty of the buyer's owner - Polk; this was directly conveyed to Grove LLC, inter alia, in Term Sheet 1.
32. The Fake BOA Statements 1 were used by Polk to trick Lender 1 into believing that he had sufficient funds to pay the Kirby Cash at Closing.
33. Lender 1 approved Polk's request to fund the purchase of the Kirby Property.

34. Capital Title closed the purchase of the Kirby Property by Grove LLC on April 24, 2018.
35. Grove LLC executed that Commercial Promissory Note ("Kirby Note") dated April 24, 2018 in the amount of \$2,660,000.00 memorializing Kirby Loan.
36. Polk executed that Commercial Guaranty, dated April 24, 2018, guaranteeing Kirby Loan's repayment.
37. When Kirby Loan closed, unbeknownst to Lender 1, the approximately \$600,000.00 Kirby Cash at Closing was never brought to the closing.
38. In reality, the Kirby Property purchase price was \$2,341,239.86 ("Real Kirby Purchase Price") the exact amount of the net funds delivered by Lender 1 to Capital Title, despite the \$3,000,000.00 purchase price identified on the sale contract and Settlement Statement dated 4/24/2018 ("Kirby HUD-1") causing Lender 1 to finance 100% of the Kirby Sale in direct violation of the Kirby Loan AP and CAC Requirement.
39. Repayment of Kirby Loan was assured by Grove LLC's granting Lender 1 a security interest in the Kirby Property; this was documented by that Commercial Deed of Trust, Security Agreement, and Fixture Filing ("Kirby DOT"); the Kirby DOT contained the following language which created a contractual duty for Grove LLC to be sure, inter alia, *all reports, statements and other data furnished by the Trustor [Grove LLC] to the Beneficiary [Lender] in connection with the Loan are true, correct and complete in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading* (collectively, "Contractual Disclosure Duty 1") this created a duty for the buyer, Grove LLC, to disclose to Lender 1: accurate financial information, including without limitation, the Fake BOA Statement 2, true sales price, actual Kirby Cash at Closing, and disclose the true structure of the Kirby Sale as a

flip transaction (that the seller did not have title to and/or had not yet purchased, the Kirby Property).

- 40. Polk never intended to repay Kirby Loan or renovate the Kirby Property.
- 41. Polk never made a single payment towards the Kirby Loan.

Kirby Settlement Agent

- 42. Kelli Owens ("Owens") was at all times relevant to the subject matter of this Complaint an agent of the Capital Title, acting as the Kirby Sale settlement agent.
- 43. As an agent, Owens acted in part for the benefit of her principal, the Capital Title.
- 44. On or about April 24, 2018, Capital Title conducted the Kirby Sale.
- 45. On or about April 25, 2018, Lender 1 wired \$2,341,239.86 of Kirby Loan proceeds to the escrow company, Capital Title, and Grove LLC purchased the Kirby Property as is more fully documented pursuant to the Receipts and Disbursements Ledger relating to the Kirby Property ("Kirby Receipts and Disbursements Ledger").
- 46. On October 10, 2017, Grove Enterprise, LLC, tendered a \$10,000 earnest money check for the purchase of the Kirby property; this was dishonored when October 13, 2017 and never replaced or disclosed to Lender 1.
- 47. Nonetheless, on April 25, 2018, Kelli Owens, at all times acting within the scope and course of Capital Title's business as an employee/agent of Capital Title, closed the A to B sale of the Kirby Property from the Estate of Richard Haynes to Isaiah Menelik Lewis ("A to B Sale"); the sole funding for the A to B sale was the \$2,235,048.18 Kirby Loan proceeds wired from the B to C Kirby Sale from Isaiah Menelik Lewis to Grove LLC (the \$10,000.00 earnest money deposit (which was Polk's only contribution to the transaction)

did not exist); the B to C Kirby Loan funds funding the simultaneous/second A to B sale is a flip transaction ("Kirby Flip").

48. The following is a chart identifies key Kirby Sale funds according to the disbursement sheets ("Kirby DS Disbursements"):

\$2,341,239.86	from Lender 1
\$0.00	to seller/flip purchaser - Isaiah M. Lewis
\$2,077,306.28	to seller/flip seller - Estate of Richard Haynes
\$59,850.00	to broker - H-Capital Real Estate
\$5,387.82	to buyer - Grove
<u>\$59,850.00</u>	to insurance company - Abraham & Associates PLLC
\$2,202,394.10	

49. The following is a chart identifies distributions to the same recipients of the key Kirby Sale funds according to the Kirby HUD-1 ("Kirby HUD-1 Disbursements"):

\$2,660,000.00	from Lender 1
\$0.00	to seller/flip purchaser - Isaiah M. Lewis
\$2,235,048.14	to seller - Estate of Richard Haynes
\$5,000.00	to broker - H-Capital Real Estate
\$59,850.00	to broker - H-Capital Real Estate
\$5,637.82	to buyer - Grove
\$53,200.00	to Lender 1
<u>\$14,552.00</u>	to Insurance Company - Abraham & Associates PLLC
\$2,373,287.96	

50. The Kirby DS Disbursements and Kirby HUD-1 Disbursements do not match ("Kirby Disbursement Discrepancy").

51. On or about April 24, 2018, Capital Title conducted the Kirby Sale, inter alia, performing the following acts:

- a. Making the Kirby Loan DS Disbursements;
- b. Creating the Kirby HUD-1;
- c. Overseeing the execution of the Kirby Hud-1 by all parties, including itself;
- d. Overseeing execution of the Kirby Loan documents;

- e. Allowing the Kirby Sale to take place without the Kirby Cash at Closing;
- f. Allowing the Kirby Loan Disbursement Discrepancy;
- g. Otherwise facilitating the consummation of the flip Kirby Sale;
- h. Failing to follow lender instructions or inform lender of any of the above; and
- i. The Kirby Cash at Closing did not exist.

Kirby Appraisal

- 52. Lender 1 hired Appraisal Nation, LLC to perform an appraisal of the Kirby Property. Appraisal Nation, LLC hired its agent, Michael Wells d/b/a Wells & Associates Appraisal Service to perform these appraisal services (Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC are collectively, "Appraiser Defendants"). Appraiser Defendants drafted an Appraisal of the Kirby Property Lender 1, dated 04/13/2018, and identified as File No. ANS-278756 ("Appraisal") valuing the Property at \$3,100,000.00.
- 53. The Lender relied on the Appraisal when it decided to approve and fund the Loan.
- 54. The Lender is the mortgagee and as such is an intended user of the Appraisal.
- 55. The Intended Use was identified as: *The intended use of this appraisal report is for the lender/client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction.*
- 56. Lender 1 has since retained an expert to value the Property as of the Appraisal date; the Property should have appraised for \$2,100,000.00 as of 1/25/2018.
- 57. The Appraisal inflated the Property by \$1,000,000.00!
- 58. Lender 1 would not have funded Kirby Loan if it had known about the:
 - a. Actual LTV;

- b. Actual Kirby Loan AP%;
 - c. Fake BOA Statement 1 was not true;
 - d. Real Kirby Purchase Price;
 - e. Actual nature of the sale as a Flip;
 - f. Kirby Disbursement Discrepancy;
 - g. Actual Kirby Loan Purpose;
 - h. Actual Kirby Cash at Closing (or entire lack thereof); or
 - i. The actual value of the Kirby Property
59. Grove LLC failed to make any payments as required under the Note.
60. Lender 1 was forced to accelerate the balance under the Kirby Note and demanded that Grove LLC and Polk pay all outstanding funds, but they refused to do so.
61. Lender 1, in an effort to recoup its investment, was compelled to complete a short sale of the Kirby Property, with Polk's cooperation, to Robert C. Tortorice and Bonnie L. Tortorice on April 30, 2019, for \$2,334,171.26, leaving an unpaid principal balance of \$679,098.18; interest continues to accrue at 13% or \$241.87 per diem from April 30, 2019 to January 24, 2020 (269 days) totaling \$65,063.03.

The Transactions – Loan 2

62. On December 28, 2017, Lender 1 funded a loan ("Griffith Loan") for \$3,830,000.00 to the Griffith LLC to purchase 83 Griffith Street, Salem, New Jersey 08079 ("Griffith Property") for \$5,900,000 from the MCDA ("Griffith Sale"); Polk agreed to supply the differential between Griffith Loan and the amount necessary to fund the \$5,900,000.00 Griffith Sale; this acquisition down payment ("Griffith Cash at Closing") included, without limitation, settlement costs estimated at \$2,070,000.

63. Polk informed Lender 1 that the purpose of the Griffith Sale was *[t]o provide acquisition and rehab financing on the subject premises - Griffith Property ("Griffith Loan Purpose")*; this is also documented on the Term Sheet 1.
64. Lender 1's underwriter, inter alia, researched the credit-worthiness of Polk (recognizing that the legal entity entering into the transaction would be Griffith LLC), the capacity of the applicant to repay the loan, the ability to pay the Griffith Cash at Closing and the value of the collateral as a secondary source of recovery should Polk fail to pay as agreed.
65. Lender 1's underwriting requirements restricted Griffith Loan to 65% of the acquisition price ("Griffith AP%"); this requirement was partially documented by that term sheet letter dated September 12, 2017, from Lender 1 to Grove Enterprises, LLC and counter-signed by Polk ("Griffith Term Sheet").
66. Applying the Griffith AP%, Lender 1 would only lend \$3,830,000.
67. At Lender 1's request, Polk provided financial information supporting his ability to pay ability to pay the Griffith Cash at Closing ("Griffith CAC Requirement"); Polk provided a series of Bank of America bank account statements in the name of Grove Enterprises, LLC and Harold G Polk, Jr., with an alleged balance of \$3,204,000.83, as of November 14, 2017, these bank account statements were fake ("Fake BOA Statements 2").
68. Lender 1's underwriting requirements required Grove LLC to use its own funds to pay for the Griffith Cash at Closing and required the buyer to *have some skin in the game* by requiring the Griffith CAC Requirement and the personal guaranty of the buyer's owner - Polk, this was directly conveyed to Grove LLC, inter alia, in Term Sheet 1.

69. The Fake BOA Statements 2 were used by Polk to trick Lender 1 into believing that he had sufficient funds to pay the Griffith Cash at Closing.
70. Lender 1 approved Polk's request to fund the purchase of the Griffith Property.
71. Atlantis National Services, Inc. closed the purchase of the Griffith Property by Grove LLC on December 28, 2017.
72. Griffith LLC executed that Commercial Promissory Note ("Griffith Note") dated December 28, 2017 in the amount of \$3,830,000.00 memorializing Griffith Loan.
73. Polk executed that Guaranty, dated December 28, 2017, guaranteeing Griffith Loan's repayment.
74. When Griffith Loan closed, unbeknownst to Lender 1, the \$2,317,500.00 Griffith Cash at Closing was not Polk's funds, rather BDFI forwarded its own funds, in an apparent 1 day loan for which BDFI received \$705,360.00 in addition to the \$2,317,500.00 wired to the settlement agent ("BDFI Wire").
75. In reality, BDFI via its inexplicable one-day loan tricked Lender 1 into financing 100% of the Griffith Sale in direct violation of the Griffith Loan AP and Griffith CAC Requirement.
76. Repayment of Griffith Loan was assured by Grove LLC's granting Lender 1 a security interest in the Griffith Property; this was documented by that Mortgage, Assignment of Leases and Rents and Security Agreement ("Griffith Mortgage"); the Griffith Mortgage contained the following language which created a contractual duty for the Griffith to accurately disclose financial information and information relating to the Griffith Sale - *Mortgagor warrants that all information provided to Mortgagee is true, accurate and complete, in all material respects, and to the best of its knowledge does not omit any*

material facts (collectively, "Griffith Contractual Disclosure Duty"); this created a duty for the buyer, Griffith, to disclose to Lender 1: accurate financial information, including without limitation, the Fake BOA Statement 2, and Griffith Cash at Closing).

77. Polk never intended to repay Griffith Loan or renovate the Griffith Property.

78. Polk never made a single payment towards the Griffith Loan.

Griffith Settlement Agent

79. Atlantis National Services, Inc. acted as the Griffith Sale settlement agent.

80. On or about December 28, 2017, Atlantis National Services, Inc. conducted the Griffith Sale.

81. On December 28, 2017, Lender 1 wired \$3,740,070.00 of Griffith Loan proceeds to the settlement agent, BDFI wired \$2,317,500.00 to the settlement agent ("Cash at Closing 2"); Griffith purchased the Kirby Property on December 28, 2017, as is more fully documented pursuant to that File Balance Query for File# ANS23113NJ dated 12/28/2017 ("Griffith Ledger").

82. The following is a chart identifies key Griffith Sale funds on December 28, 2017, according to the settlement agent's File Balance Query:

\$3,740,070.00	from Lender 1
<u>\$2,317,500.00</u>	BDFI funds presented as Grove funds
\$6,057,570.00	Total
\$3,022,860.00	to mortgage fraud enabler/participant - BDFI
\$738,786.75	to seller – MDCA
\$754,013.00	for the benefit of seller - MDCA & was used to fund the purchase of the Griffith Property
\$430,000.00	to mortgage fraud enabler/participant - Ehlert purportedly
to be	held in Trust for environmental remediation aka Improvements
	Escrow
\$76,600.00	to broker - H-Capital Real Estate

\$879,485.25

to Cushman & Wakefield as a Consulting Fee

83. When the Griffith Loan closed, Polk and BDFI tricked the settlement agent and Lender 1 into believing that the funds used to pay the Griffith Cash at Closing existed; in reality there was no Griffith Cash at Closing as the funds used to pay for the Griffith Cash at Closing 2 were immediately (the next day) wired back to BDFI along with a healthy profit of \$705,360.00 ("BDFI Profit 1").
84. The Griffith Sale was documented, inter alia, by that Settlement Statement with a Settlement date of 12/28/17 ("Griffith HUD-1").
85. Griffith HUD-1 key line items were as follows:
- a. Line 303. Cash From Borrower - \$1,814,640.00;
 - b. Line 1302. Consulting Fee to Cushman & Wakefield - \$879,485.25;
 - c. Line 1303. Improvements Escrow to BDFI, LLC - \$2,520,000.00; and
 - d. Line 1304. Improvements Escrow to Ehlert Law PC - \$430,000.00.
86. Lender 1 believed that Griffith HUD-1 Lines 1303 and 1304 represented funds held in escrow under escrow agreements for the sole and express purpose of environmental remediation for the Griffith Property, if necessary. Paul Simon, then in-house counsel for Jetall, allegedly drafted the escrow agreement for either BDFI, and/or Jetall.
87. No environmental remediation took place on the Griffith Property, Plaintiff 2, via servicing agent Lender 1, demanded, return of the escrowed funds, but BDFI refused to refund these funds.
88. Upon information and belief, the Griffith HUD-1 Line 1303 funds were conveyed to Jetall.

89. Plaintiff 2, via servicing agent Lender 1, also demanded return of the funds escrowed by Ehlert, but Ehlert refused to return the funds, identify the recipient of the funds or produce the escrow agreement (or trust agreement) allegedly governing the terms of the escrow citing alleged attorney-based ethical restrictions.
90. Cushman & Wakefield is a global commercial real estate services company according to its website; Griffith HUD-1 Line 1302 describes the purpose of the \$879,485.25 payment to the broker as a "Consulting Fee" (Griffith HUD-1 Line 808 discloses a broker fee to H-Capital Real Estate of \$76,600.000; the Griffith HUD-1 Line 1302 \$879,485.25 payment is really a blind money grab to orchestrate the Griffith Sale and coordinating the Griffith Sale.
91. MCDA purchased the Griffith Property on December 28, 2017 ("MCDA Purchase").
92. Per the HUD-1 dated 12/28/17 ("MCDA Purchase HUD-1"), Line 1302, Cushman & Wakefield received another \$466,080.00 for an additional "Consulting Fee" from the MCDA Purchase proceeds, bringing Cushman & Wakefield's total profits for consultation / orchestration to \$1,345,565.25 ("Mortgage Fraud Profits"), the seller to MCDA only received \$271,445.00 profits per Line 603, MDCA received \$1,492,799.75 in profits per Griffith HUD-1 Lines 603 and 506; the total "Consulting Fee" of \$1,345,565.25 was a whopping 39.91% of the actual funds that were used to purchase the Griffith Property \$3,740,070.00.
93. H-Capital Real Estate per KIRBY HUD-1 Line 808 received \$76,600.00 from Griffith Loan proceeds for mortgage broker fees for helping Polk obtain financing from Lender 1.
94. H-Capital Real Estate per HUD-1-2 Line 808 received \$59,850.00 from Kirby Loan proceeds for mortgage broker fees for helping Polk obtain financing from Lender 1.

95. Grove LLC failed to make any payments as required under the Griffith Note.
96. Lender 1 accelerated the balance under the Note and demanded that Griffith LLC and Polk pay all outstanding funds, but they refused to do so.
97. Lender 1 assigned its interests in the Griffith Loan to Plaintiff 2.
98. The funds due on the Griffith Loan, as of January 31, 2020, are calculated as follows:
- | | |
|----------------|------------------|
| \$3,830,000.00 | Principal due |
| \$838,000.00 | Interest Due |
| \$48,258.00 | Late Fee |
| \$841,897.83 | Default Interest |
| \$188,340.94 | Legal fee |
| \$928,235.16 | Tax |
| \$6,674,731.93 | Total |
99. Interest continues to accrue at 23.99% or \$2,517.30 per diem.

COUNT 1 – NEGLIGENCE

*Appraisers Kirby Loan
Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC*

100. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-99 of this Complaint.
101. Appraiser Defendants performed the Appraisal with a signature line dated April 13, 2018.
102. The Appraisal must meet the standard of care set forth in the Uniform Standards of Professional Appraisal Practice ("USPAP") as this is the degree of care, which a reasonably prudent person (appraiser) would have exercised under the same or similar circumstances; the Appraisal expressly identifies this on p. 8 of 40:

I performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.

103. The Appraiser Defendants, knew the express purpose of the Appraisal as the Appraisal expressly identifies this on p. 8 of 40:

INTENDED USE: The intended use of this appraisal report is for the lender/client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction.

104. The Lender 1 used said Appraisal in determining whether or not to make a loan by calculating the Kirby LTV based on the value identified on the Appraisal as \$3,100,000.00.
105. Appraiser Defendants with special training and experience must adhere to a standard of conduct commensurate with such attributes and owed Lender 1 a duty to prepare the Appraisal using that degree of care and skill which is reasonable under the circumstances - a reasonably competent appraiser acting in similar circumstances - would use in preparing an appraisal of the Property.
106. This duty included, but was not limited to, complying with USPAP.
107. The Appraiser Defendants in violation of their uniform standard of conduct: that of reasonable care under the circumstances – USPAP in the case of an appraiser – in reaching a value conclusion that was inappropriate, unreliable, and grossly overstates the Property's value by \$1,000,000.00 primarily because of inaccuracies related to the subject condition, generally, inaccuracies related to the subject condition, selection of comparables and analysis of differences of the value characteristics are excessive in total creating a misleading report regarding the value of the Kirby Property for the following reasons (collectively, "Appraiser Errors"):
- a. The Kirby Property site value and that of the comparables was not properly analyzed. Site value (on a unit and overall basis) of the Kirby Property and

comparables must be individually analyzed. The Appraisal adjusts differences as if the underlying unit value is a constant when the reality is that the unit value varies significantly. Adjustments applied for differences in value related to lot size & location are not market based and are seriously deficient;

- b. The condition of Kirby Property is overstated as the subject has inferior condition than C4 (relative to the subject market); adjustments applied for condition related differences are not market based and seriously deficient; and
- c. Due to the poor (CS) condition of Kirby Property, the site value to total value ratio approaches 100%. The object of the appraisal process should be to determine site value and estimate the contribution for the existing improvements.
- b. The As-Is Value of Kirby Property by the Cost Approach as of the Effective date is approximately \$2,100,000. Value is broken down as follows: -\$88/sf for the site (\$1,900,000) and -10% (\$190,000) contribution for the improvements.
- c. By the Sales Comparison Approach, the As-Is Value of Kirby Property as of the Effective Date is \$2,100,000.
- d. Sales comparables in the Appraisal 1-3 and Listings 5-6 have a site value that ranges between \$1.65 million to \$2.23 million (and Kirby Property has a stated site value of \$1.75 million). Only one of the sales has a site value lower than the Kirby Property yet adjustments applied are all positive. Sales 1-3 and Listings 5-6 have an improvements value that ranges from \$0.72 million to \$1.65 million. Since that latter value (Listing #6) is not realistic, the improvements value ranges from \$0.72 million to \$1.15 million. These figures make sense since all have been remodeled (between 2003 and 2014). Sale #4 improvements had a value of \$0

(torn down). Given the poor condition of the Kirby Property (despite high quality), it is clear these sales and listings in the Appraisal (excepting Sale #4) have superior houses and (except for Listing #6) have superior lots.

108. The Appraiser Errors caused the following USPAP violations:

- a. As to the condition misrepresentation - 2018/2019 USPAP SR 1-1(b), 1-2(e)(i), 2-1(a), 2-2(a)(iii); as to the unsupported description & adjustments of the comparable sales - 2018/2019 USPAP SR 1-1(b), 1-4(a), 2-1(a), 2-1(b), 2-2(a)(viii); the provided sales were not directly comparable to the Kirby Property nor adjusted accordingly in the Appraisal, in addition, the appraised value of \$3,100,00 is 27% higher than the value indication in the cost approach, which undermines the credibility of the final value estimate considering there was no reconciliation/analysis addressing this disparity included in the Appraisal, these observations reflect non-compliance with 2018/2019 USPAP SR 1-1(b), 1-6(a), 2-1(a), 2-1(b), 2-2(a)(viii); non-compliance including an unsupported site value estimate, and an unsupported accrued depreciation estimate, reflect non-compliance with 2018/2019 USPAP SR 1-1(c), 1-4(b)(i), 1-4(b)(iii), 2-1(a), 2-1(b), 2-2(a)(viii); and the lack of adequate support and analysis for the final value estimate reflects examples of non-compliance with 2018/2019 USPAP SR 1-1(b), 2-1(a), 2-1(b), 2-2(a)(viii) (collectively, "USPAP Violations").

109. The Appraiser Defendants breached this duty and violated USPAP by making the Appraiser Errors & causing the USPAP Violations.

110. The Lender reasonably relied on the Appraisal to determine the Loan Requirements, including specifically the Kirby LTV.

111. The Lender reasonably relied on the Appraisal to determine the value of the Kirby Property so that it could limit its risks in making the Kirby Loan by having a secondary source of repayment if the primary source of repayment, the buyer, defaulted and failed to pay the Kirby Loan.
112. But for the Appraiser Defendants' violation of their professional obligations, Lender 1 would not have approved and funded the Kirby Loan, and would not have been damaged as set forth above.
113. The Lender's damages were proximately caused by the Appraiser Defendants' failure to use that degree of care and skill that a reasonably competent appraiser would have used in preparing an appraisal of the Property.
114. WHEREFORE, the Plaintiff seeks judgments against Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC, jointly and severally, in the amount of:
- a. \$679,098.18, the principal balance due under the Kirby Note;
 - b. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
 - c. Court costs, service of process fees; and
 - d. Such other and further relief as justice in this case may require.

COUNT 2 – BREACH OF CONTRACT

Appraisers – Kirby Loan

Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC

115. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-114 of this Complaint.

116. A valid contract existed as Lender 1 requested that the Appraiser Defendants enter into a contract for the Appraisers to appraise the Kirby Property ("Appraisal Contract").
117. The Lender performed the contract by paying for the Appraisal.
118. The Appraiser Defendants breached the Appraisal Contract committing the Appraiser Errors and USPAP Violations.
119. The Appraisal Contract was made expressly for the benefit of Lender 1.
120. The contract had an obligation or duty for the Appraiser Defendants to prepare the Appraisal that was performed in compliance with USPAP, which would have accurately valued the Kirby Property.
121. The Plaintiff sustained damages due to the breach of the Appraisal contract by Appraiser Errors and USPAP Violations which caused an overvaluation of the Kirby Property by \$1,000,000; The over-valuation caused Lender 1 to sustain damages due to the breach because Lender 1 relied on an very inaccurate Kirby LTV I its decision to fund the Kirby Loan; had the Appraisal accurately valued the Kirby Property, Lender 1 would not made the Kirby Loan, and would not have suffered any damages as noted above.
122. In the alternative, the Appraiser Errors and USPAP Violations by inflating the value of the Property caused harm to Lender 1 in the amount of \$1,000,000.00 – the amount of the improperly inflated Property.
123. WHEREFORE, Lender 1 seeks judgments against Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC, jointly and severally, in the amount of:
- a. \$679,098.18, the principal balance due under the Kirby Note;

- b. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
- c. Court costs, service of process fees; and
- d. Such other and further relief as justice in this case may require.

COUNT 3 – NEGLIGENT MISREPRESENTATION

Appraisers – Kirby Loan

Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC e

- 124. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-123 of this Complaint.
- 125. The Appraiser Defendants, in the course of their business or in a transaction in which it had a pecuniary interest, made many representations, to the Lender 1, including, without limitation, that the Kirby Property had a value of \$3,100,000.00, the condition of the Kirby Property, information identified in the Appraiser Errors, and that the Appraisal complied with USPAP (collectively, "Appraiser Misrepresentations").
- 126. The Appraiser Defendants supplied "false information" for the guidance of another in the other's business – for the Lender 1 to determine the Kirby LTV as guidance during the Kirby Loan underwriting process of the Kirby Loan, the business of Lender 1.
- 127. The Appraiser Defendants did not exercise reasonable care or competence in obtaining or communicating the information based on the Appraiser Errors and USPSP Violations.
- 128. Plaintiff, Lender 1 suffered pecuniary loss by justifiably relying on the Appraiser Misrepresentations.
- 129. But for Appraiser Defendants' negligent Appraiser Misrepresentations, Lender 1 would not have approved or funded the Kirby Loan, and would not have been damaged as set forth above.

130. WHEREFORE, Lender 1 seeks judgments against Michael Wells d/b/a Wells & Associates Appraisal Service, and Appraisal Nation, LLC, jointly and severally, in the amount of:

- a. \$679,098.18, the principal balance due under the Kirby Note;
- b. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
- c. Court costs, service of process fees; and
- d. Such other and further relief as justice in this case may require.

COUNT 4 – BREACH OF CONTRACT

*Title Company – Kirby Loan
Capital Title of Texas*

131. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-130 of this Complaint.

132. Capital Title and Kelli Owens are collectively called, "Title Company Defendants."

133. In Kirby Loan, a valid contract exists between Lender 1 and Capital Title ("TC Contract") to perform various settlement services, documented inter alia, by that letter dated April 24, 2018, to Capital Title from Jonathan L. Hornick, Esq.

134. The HUD-1 form is a US Department of Housing and Urban Development Regulation X prescribed standardized form used by settlement companies across the country to detail all funds involved in a real estate transaction.

135. The TC Contract, Capital Title included contractual obligations to comply with settlement company standards, including without limitation (collectively, "TC Contractual Obligations").

- a. Documenting the Kirby Sale via a settlement statement;

- b. Properly documenting Kirby Loan, including without limitation, properly perfecting a security interest in the Kirby Property on behalf of Lender 1;
 - c. If the settlement agent chose to use the US Department of Housing and Urban Development form HUD-1 Settlement Statement ("HUD-1"), then the HUD-1 must be properly filled out;
 - d. All funds had to be disbursed and disclosed in accordance with, and otherwise comply with, federal law, including without limitation, the Real Estate Settlement Procedures Act ("RESPA"), 18 U.S.C. ¶ 1010 and 18 U.S.C. ¶ 1001; and
 - e. The settlement, documentation execution, HUD-1, receipt and funds disbursement, funds disclosure, collecting funds from the Buyer and disbursing funds to the seller, performing escrow services, and all other aspects of the settlement of the Kirby Sale and Kirby Loan must comply with the policies and procedures set forth by Fidelity National Title Insurance Company, the title insurance company providing title insurance on behalf of Lender 1;
 - f. Distribute all Kirby Loan funds as identified in Kirby HUD-1 and TC Contract by issuing all disbursement checks from the escrow account controlled by it in a manner that matches the Kirby HUD-1;
 - g. Handling all aspects of the funds involved with the Kirby Loan and Kirby Sale closing; and
 - h. To only allow the closing and funding to occur if the seller had title to the property.
136. The Kirby Loan Closing Conditions and Settlement Instructions prescribe some of the contractual obligations of Capital Title under the TC Contract and identify requirements

that Lender 1 required Capital Title to fulfill before it would fund the Kirby Loan enabling the Kirby Sale to close.

137. Capital Title was, at all times relevant hereto, a title agency licensed in the State of Texas to perform real estate settlements and closings.
138. Capital Title could only be paid if the Kirby Sale closed and the Lender funded Kirby Loan.
139. Lender 1 performed or tendered performance of the TC Contract as Capital Title, inter alia, because Capital Title was paid approximately \$16,474.10 at the Kirby Sale from Lender 1's Kirby Loan proceeds for closing and title services in the Transaction and Capital Title was paid approximately \$1,300.00 for escrow fee.
140. The defendant, Capital Title, breached the contract by failing to perform or tender performance as contractually required, inter alia allowing the Kirby Sale to take place without the Kirby Cash at Closing defeating the Kirby CAC Requirement, failing to disclose the Real Kirby Purchase Price, orchestrating an inaccurate Kirby HUD-1, failing to disclose the Kirby Flip, allowing the Kirby Flip, allowing the Kirby Disbursement Discrepancy, making the Kirby Loan DS Disbursements, creating the Kirby HUD-1.
141. As a direct and proximate cause of the TC Contract breaches, Lender 1 sustained damages due because Lender 1 would not have made the Kirby Loan, and would not have suffered any damages as noted above.
142. WHEREFORE, Lender 1 seeks judgments against Capital Title of Texas, in the amount of:
 - a. \$679,098.18, the principal balance due under the Kirby Note;

- b. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
- c. Court costs, service of process fees; and
- d. Such other and further relief as justice in this case may require.

COUNT 5 – SIMPLE NEGLIGENCE

*Title Company – Kirby Loan
Capital Title of Texas & Kelli Owens*

- 143. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-142 of this Complaint.
- 144. Capital Title and Kelli Owens are collectively called, "Title Company Defendants."
- 145. The HUD-1 form is a US Department of Housing and Urban Development Regulation X prescribed standardized form used by settlement companies across the country to detail all funds involved in a real estate transaction.
- 146. By definition, an escrow officer's duty is to protect Lender 1's interests. The Texas Supreme Court has held that an escrow officer owes the duties of loyalty, full disclosure, and the requirement to exercise a high degree of care in conserving the funds placed in escrow, as well as to carry out the terms of the escrow agreement.¹ During the Sale of the Kirby Property, Title Company Defendants owed Lender 1 a duty to comply with settlement company standards, including without limitation (collectively, "TC Duties"):

¹ See *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 664-65 (Tex. 1969); see also *Holder-McDonald v. Chicago Title Ins. Co.*, 188 S.W.3d 244, 248 (Tex. App.—Dallas 2006, pet. denied); see also *Trevino v. Brookhill Capital Res., Inc.*, 782 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *Home Loan Corp. v. Tex. Am. Title Co.*, 191 S.W.3d 728, 731-34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Jones v. Blume*, 196 S.W.3d 440, 448 (Tex. App.—Dallas 2006, pet. denied); *Chapman Children's Trust v. Porter & Hedges, LLP*, 32 S.W.3d 429, 438 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)

- a. If the settlement agent chose to use the US Department of Housing and Urban Development form HUD-1 Settlement Statement ("HUD-1"), then the HUD-1 must be properly filled out and utilized;
- b. All funds had to be disbursed and disclosed in accordance with, and otherwise comply with, federal law, including without limitation, the Real Estate Settlement Procedures Act ("RESPA"), 18 U.S.C. ¶ 1010 and 18 U.S.C. ¶ 1001;
- c. Distribute all Kirby Loan funds as identified in Kirby HUD-1;
- d. The settlement, documentation execution, Kirby HUD-1, receipt and funds disbursement, funds disclosure, collecting funds from the buyer, Grove LLC, and disbursing funds to the seller, Isaiah M. Lewis, performing escrow services, and all other aspects of the settlement of the Kirby Sale and Kirby Loan must comply with the policies and procedures set forth by Fidelity National Title Insurance Company, the title insurance company providing title insurance on behalf of Lender 1;
- e. Conduct the closing in accordance with the industry standards;
- f. The duty to disclose to the principal all matters coming to the agent's notice or knowledge concerning the subject of the agency, which it is material for the principal to know for his protection or guidance;
- g. Disclose the Kirby Flip;
- h. Duty to ensure Seller had title prior to closing;
- i. Not allow the Kirby Flip;
- j. Duty to ensure Seller had record title before releasing escrow funds;
- k. To handle the Lender's funds in a proper manner; and

1. To close the Kirby Sale with strict adherence to the closing instructions and TC Contract by issuing all disbursement checks from the escrow account controlled by it in a manner that matches the Kirby HUD-1.
147. Closing instructions are the requirements that lenders require settlement agent's, such as Title Company Defendants, to fulfill before they will fund a loan enabling a transaction to close.
148. Owens was, at all times relevant herein, a licensed escrow officer in the State of Texas, in the employ of Capital Title.
149. Capital Title was, at all times relevant hereto, a title agency licensed in the State of Texas to perform real estate settlements and closings.
150. Capital Title could only be paid if the Kirby Sale closed and the Lender funded Kirby Loan.
151. Capital Title was paid approximately \$16,474.10 for closing and title services, and approximately \$1,300.00 for escrow fee in the Transaction.
152. Title Company Defendants breached their duties owed to Lender 1 by, inter alia, allowing the Kirby Sale to take place without the Kirby Cash at Closing defeating the Kirby CAC Requirement, failing to disclose the Real Kirby Purchase Price, orchestrating an inaccurate Kirby HUD-1, failing to disclose the Kirby Flip, allowing the Kirby Flip, allowing the Kirby Disbursement Discrepancy, making the Kirby Loan DS Disbursements, creating the Kirby HUD-1 (collectively, "Title Company Duties").
153. The Title Company Defendants' failure to follow the Closing Instructions materially altered the Lender's Loan risk analysis.

154. The damages as noted above were proximately caused by the breach of the Title Company Duties.
155. WHEREFORE, Lender 1 seeks judgments against Capital Title of Texas and Kelli Owens, jointly and severally, in the amount of:
- a. \$679,098.18, the principal balance due under the Kirby Note;
 - b. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
 - c. Court costs, service of process fees; and
 - d. Such other and further relief as justice in this case may require.

COUNT 6 – NEGLIGENT MISREPRESENTATION

*Title Company – Kirby Loan
Capital Title of Texas Kelli Owens*

156. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-156 of this Complaint.
157. The Title Company Defendants, in the course of its business or in a transaction in which it had a pecuniary interest, made many representations, some of which are identified as follows (collectively, "Title Company Misrepresentations"):
- a. Kirby Cash at Closing exists;
 - b. Grove LLC brought \$600,000.00 to the Kirby Sale;
 - c. The Real Kirby purchase price was \$3,000,000.00;
 - d. The Kirby HUD-1 was accurate (*The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.*);
 - e. The Kirby Sale funds were distributed exactly as identified on the Kirby HUD-1;

- f. The seller owned the property, and was in title at the time of closing transaction
158. The Title Company Defendants supplied "false information" for the guidance of another in the other's business – for the Lender 1 to determine whether or not to make the Kirby Loan, the business of Lender 1.
159. The Title Company Defendants did not exercise reasonable care or competence in obtaining or communicating the information including, without limitation, the Title Company Misrepresentations.
160. Plaintiff, Lender 1 suffered pecuniary loss by justifiably relying on the Title Company Misrepresentations.
161. But for Title Company Defendants' negligent Title Company Misrepresentations, Lender 1 would not have approved or funded the Kirby Loan, and would not have been damaged as set forth above.
162. WHEREFORE, Lender 1 seeks judgments against Capital Title of Texas and Kelli Owens, jointly and severally, in the amount of:
- a. \$679,098.18, the principal balance due under the Kirby Note;
 - b. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
 - c. Court costs, service of process fees; and
 - d. Such other and further relief as justice in this case may require.

COUNT 7 – BREACH OF FIDUCIARY DUTY

*Title Company – Kirby Loan
Capital Title of Texas Kelli Owens*

163. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-162 of this Complaint.

164. As Lender 1's escrow agent, The Title Company Defendants owed Lender 1 the duties of loyalty, full disclosure, and the requirement to exercise a high degree of care in conserving the funds placed in escrow, as well as to carry out the terms of the escrow agreement.²
165. However, the Title Company Defendants breached their duties owed to Lender 1 by, inter alia, allowing the Kirby Sale to take place without the Kirby Cash at Closing defeating the Kirby CAC Requirement, failing to disclose the Real Kirby Purchase Price, orchestrating an inaccurate Kirby HUD-1, failing to disclose the Kirby Flip, allowing the Kirby Flip, allowing the Kirby Disbursement Discrepancy, making the Kirby Loan DS Disbursements, and creating the Kirby HUD-1.
166. WHEREFORE, Lender 1 seeks judgments against Capital Title of Texas and Kelli Owens, jointly and severally, in the amount of:
- e. \$679,098.18, the principal balance due under the Kirby Note;
 - f. \$65,063.03 in interest, from April 30, 2019 to January 24, 2020, court costs, service of process fees; and
 - g. Court costs, service of process fees; and
 - h. Such other and further relief as justice in this case may require.

COUNT 8 QUASI-CONTRACT – UNJUST ENRICHMENT

*Griffith Loan
Cushman & Wakefield, Inc., BDFI, LLC, & Mineral County Development Authority*

167. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-166 of this Complaint.

² See *fn. 1*.

168. Lender 1 would not have funded Griffith Loan if it had known about the true Griffith Loan AP%, Fake BOA Statements 2, Real Griffith Purchase Price, true source of Griffith Cash at Closing, MDCA flip profit, BDFI fake Improvement Escrow, Ehlert fake Improvement Escrow, and/or BDFI cash at closing scam and resulting profit.
169. BDFI, C&W, and MCDA obtained significant cash benefits (collectively, "Benefits") from Lender 1 as follows:
- a. BDFI - \$3,225,360.00
 - 1. \$2,520,000.00 – (Griffith Sale) Griffith HUD-1, Line 1303. Improvements Escrow; and
 - 2. \$705,360.00 - BDFI Profit 1;
 - b. C&W - \$1,345,565.25;
 - 1. \$879,485.25- Griffith HUD-1, Line - 1302. Consulting Fee; and
 - 2. \$466,080.00 - MCDA Purchase HUD-1, Line 1302. Consulting Fee;
 - c. MCDA - \$1,492,799.75;
 - 1. \$738,786.75 - MCDA Purchase HUD-1, Line 603 (pure flip profit); and
 - 2. \$754,013.00 - MCDA Purchase HUD-1, Line 506.
170. Lender 1 did not have a direct contractual relationship with BDFI, C&W or MCDA regarding these funds.
171. The Benefits were obtained by fraud per the Fake BOA Statement 2, Griffith Cash at Closing sham (the transfer in of \$2,317,500.00 on December 28, 2017 and transfer out of the \$2,317,500.00, plus an additional \$705,360.00 defrauded the Lender and settlement agent into believing that the funds used to pay the Griffith Cash at Closing existed), 2 fake Improvements Escrows, and/or hidden flip.

172. The Benefits were obtained by the taking of an undue advantage of Lender 1 by the entire Griffith Sale structure coordinated by C&W, engineered by BDFI to, upon information and belief, pay off old Polk and/or Polk related entity loans (these old loans may be in excess of \$7,000,000.00); the Benefits enabled BDFI, MCDA and C&W to make exorbitant flip profits which were unjustified and undisclosed to Lender 1.
173. But for the fraud and undue advantage, Lender 1 would not have approved or funded the Griffith Loan, and would not have been damaged as set forth above.
174. WHEREFORE, Plaintiff 2 seeks judgments against Cushman & Wakefield, Inc., BDFI, LLC, & Mineral County Development Authority, jointly and severally, in the amount of:
- a. \$6,674,731.93, the principal balance due under the Note,
 - b. Prejudgment interest from January 31, 2020 at the contract rate of 23.99% \$2,517.30 per diem;
 - c. Court costs, service of process fees; and
 - d. Such other and further relief as justice in this case may require.

COUNT 9 – QUASI-CONTRACT – BREACH OF FIDUCIARY DUTY

Griffith Loan
BDFI LLC & Ehlerl Law PC, Jerel W. Ehlerl II

175. Plaintiffs adopt and incorporate by reference the allegations contained in paragraphs 1-174 of this Complaint.
176. BDFI was the trustee under a Construction Trust expressly for the purpose of remediation of environmental contamination to the Griffith Property ("BDFI Trust").
177. The BDFI Trust was funded by the Lender 1's Griffith Loan proceeds of \$2,520,000.00.

178. The BDFI Trust beneficiary was Lender 1, and its assignee, Mortgagee 2 as the value of the Griffith Property as mortgaged to Lender 1, and its assignee, Mortgagee 2, depended, in material part on any environmental contamination to be remediated.
179. Lender 1 demanded BDFI refund the funds in the BDFI Trust, but BDFI declined to do so.
180. Ehlert was the trustee under a second Construction Trust expressly for the purpose of remediation of environmental contamination to the Griffith Property ("Ehlert Trust").
181. The Ehlert Trust was funded by the Lender 1's Griffith Loan proceeds of \$430,000.00.
182. The Ehlert Trust beneficiary was Lender 1, and its assignee, Mortgagee 2 as the value of the Griffith Property as mortgaged to Lender 1, and its assignee, Mortgagee 2, depended, in material part on any environmental contamination to be remediated.
183. Lender 1 demanded Ehlert refund the funds in the Ehlert Trust, but Ehlert declined to do so and refused to disclose the recipient of the Ehlert Trust funds further breaching his fiduciary duties to Lender 1.
184. The BDFI Trust and Ehlert Trust were set up to benefit Lender 1 at the request of the settlement agent and were made a Griffith Loan closing requirement.
185. The BDFI Trust and Ehlert Trust funds are necessary to remediate environmental issues on the Griffith Property, upon information and belief two large pools of oil covered with plywood.
186. To the extent that the BDFI Trust and Ehlert Trust funds were not necessary to remediate the Property, these funds should be returned to Lender 1, failure to do so breached the trustee's duties to Lender 1 and/or Mortgagee 2.

187. To the extent that the BDFI Trust and/or Ehlert Trust funds were conveyed to a third party for any reason other than environmental remediation of the Griffith Property, such conveyance was improper, in direct violation of the trust terms, breached the trustee's duties to Lender 1 and/or Mortgagee 2 and proximately caused the Lender 1 and/or Mortgagee 2 harm in the amount of the improperly conveyed funds.

Constructive Trust / Unjust Enrichment

188. Alternatively, if the BDFI Trust or Ehlert Trust were shams, and no such trust actually existed, then said funds should be deemed to be held in a constructive trust for the benefit of the Lender 1 and/or Mortgagee 1, as noted above, and any improperly disbursed funds from said constructive trust was improper, breached the trustee's duties to Lender 1 and/or Mortgagee 2, and was in direct violation of the trust terms and proximately caused the Lender 1 and/or Mortgagee 2 harm in the amount of the improperly conveyed funds.
189. To the extent that the BDFI Trust and/or Ehlert Trust funds were disbursed for purposes other than environmental remediation, such disbursements proximately caused Lender 1 and/or Mortgagee 2 harm, inter alia, as to the diminution of value in the Griffith Property and/or costs to perform such remediation.
190. To the extent that the BDFI Trust and/or Ehlert Trusts were shams, never intending to pay for environmental remediation, disbursements from these sham trusts proximately caused Lender 1 and/or Mortgagee 2 harm, inter alia, by prohibiting Polk from using them to renovate the Griffith Property and/or repay Loan 1.
191. WHEREFORE, Plaintiff 2 seeks judgments against BDFI, LLC, Ehlert Law, PC and Jerel W. Ehlert II jointly and severally, in the amount of:
- a. \$6,674,731.93, the principal balance due under the Note,

- b. Prejudgment interest from January 31, 2020 at the contract rate of 23.99%
\$2,517.30 per diem;
- c. Court costs, service of process fees; and
- d. Such other and further relief as justice in this case may require.

Respectfully Submitted;

HUNTER C. PIEL, LLC

/s/ William M. Rudow

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