

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WELLS FARGO BANK, N.A.,
SUCCESSOR BY MERGER TO
WACHOVIA BANK, NATIONAL
ASSOCIATION,

Plaintiff,

v.

CTD MOOREFIELD RETAIL, LLC,

Defendant.

Case No. 12-cv-03131(LTS)(ECF)

CTD MOOREFIELD RETAIL, LLC'S ANSWER AND COUNTERCLAIMS

COMES NOW Defendant CTD Moorefield Retail, LLC ("CTD"), through counsel, in response to the Complaint of Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association ("Wells Fargo"), and responds as follows:

SUMMARY

CTD Moorefield Retail, LLC was formed to develop a mixed-use commercial and residential project called Moorefield Station in Loudoun County, Virginia. In 2005, CTD began discussing with Wachovia Bank the possibility of financing the development costs of the project. CTD and Wachovia ultimately entered into a series of transactions, including predevelopment loans, construction loans, and an interest rate swap agreement—all of which were intended to finance the construction and development of the project and ultimately provide CTD the opportunity to obtain affordable permanent financing upon completion of the construction.

This case arises out of the interest rate swap agreement entered into by Wachovia and CTD in 2006. While interest rate swaps come in a variety of forms, banks commonly market them to borrowers as a hedge against the risk that commercial borrowing rates will increase.

In this case, Wachovia, while negotiating the terms of the construction loans with CTD, simultaneously promoted and marketed the use of a forward-starting interest rate swap—which Wachovia claimed CTD could enter to hedge against the risk of rising interest rates and effectively lock in a

reasonable, affordable fixed rate for its permanent financing. According to Wachovia, not only would the use of a forward-starting interest rate swap enable CTD to hedge against the risk of rising interest rates, but the swap would help ensure that CTD could actually obtain permanent financing because it would substantially reduce the credit risk to the bank caused by the large size of the anticipated construction loans.

Based on Wachovia's insistence on this "hedging" strategy and its fundamental assumption that LIBOR rates under the swap agreement would continue to move in tandem with permanent financing rates, CTD entered into a swap transaction with Wachovia when it obtained the predevelopment loans for the project. Over the next two years, however, the global financial crisis and the artificial depression in LIBOR rates—engineered by government intervention to keep banks from failing—eviscerated the commercial purpose of the swap as an effective hedge for CTD. Worse, after Wells Fargo bought Wachovia in 2009 to save it from bankruptcy, Wells Fargo deceptively inserted a "Mandatory Termination" provision in an amendment to the Swap Agreement that fundamentally changed the character and nature of the swap. Unbeknownst to CTD, the amendment converted CTD's forward-starting interest rate swap into a *cash-settled* forward-starting swap, causing the Swap Agreement to terminate on the same day it became effective and netting Wells Fargo a claimed windfall of more than \$28 million.

As a result, the interest rate swap no longer acted as a hedge on CTD's permanent financing but became a one-time, losing gamble. Rather than hedging against the risk of rising commercial borrowing rates, CTD's swap increased its effective interest rate by more than 50 percent and prevented CTD from obtaining permanent financing and performing under the loan agreements. As a consequence of the unforeseeable and artificial depression of the LIBOR rates and Wells Fargo's deceptive conversion of the interest rate swap into a *cash-settled* forward-starting swap, the entire commercial purpose of the swap was frustrated, and the Swap Agreement no longer operated as the parties intended.

CTD has been denied the entirety of the benefit for which it bargained when it agreed to Wachovia's "hedging" strategy and entered the swap in 2006. CTD therefore denies that it owes Wells Fargo any amounts under the Swap Agreement, seeks to rescind or reform the Swap Agreement, and seeks actual and punitive damages against Wells Fargo.

ANSWER

1. It is admitted that CTD entered into an interest rate swap transaction, specifically a forward-starting interest rate swap transaction, with Plaintiff. The remaining allegations contained in paragraph 1 of the Complaint state legal conclusions to which no response is required. It is denied that CTD owes Plaintiff any amount. Except as expressly admitted herein, the allegations contained in paragraph 1 of the Complaint are denied.

2. The allegations contained in paragraph 2 of the Complaint are admitted.

3. The allegations contained in paragraph 3 of the Complaint are admitted.

4. The allegations contained in paragraph 4 of the Complaint are admitted. It is further admitted that this matter should be transferred to the United States District Court for the Northern District of Texas based on the factors under 28 U.S.C. § 1404(a) and as more particularly set forth in CTD's Motion to Transfer Venue to be filed in this action.

5. It is admitted that CTD and Plaintiff signed documents related to a forward-starting interest rate swap transaction, which documents speaks for themselves. It is further admitted that this matter should be transferred to the United States District Court for the Northern District of Texas based on the factors under 28 U.S.C. § 1404(a) and as more particularly set forth in CTD's Motion to Transfer Venue to be filed in this action.

6. The allegations contained in paragraph 6 of the Complaint contain legal conclusions to which no response is required. It is further admitted that this matter should be transferred to the United States District Court for the Northern District of Texas based on the factors under 28 U.S.C. § 1404(a) and as more particularly set forth in CTD's Motion to Transfer Venue to be filed in this action.

7. It is admitted that Plaintiff and CTD executed the documents referred to Paragraph 7 of the Complaint which documents speak for themselves. It is further admitted that copies of the documents are attached to the Complaint as Exhibit 1. It is denied that the documents referred to constitute a singular "Swap Agreement" as implied by Paragraph 7 of the Complaint. Except as expressly admitted herein, the allegations contained in paragraph 7 of the Complaint are denied.

8. The allegations contained in Paragraph 8 of the Complaint refer to the terms of the 2009 Confirmation and the Master Agreement which documents speak for themselves. It is denied that CTD agreed to the terms of the 2009 Confirmation referred to in Paragraph 8 of the Complaint. It is denied that CTD owes Plaintiff any amount in connection with the 2009 Confirmation or the Master Agreement. Except as expressly admitted herein, the allegations contained in paragraph 8 of the Complaint are denied.

9. It is admitted that Plaintiff notified CTD of the amount allegedly due in a letter dated June 16, 2011, a copy of which is attached to the Complaint as Exhibit 2 which document speaks for itself. It is further admitted that Plaintiff improperly seized certain funds and applied them against the debt it claims is due under the Swap which conduct CTD contends was improper. It is denied that CTD owes Wells Fargo any amount related to the Swap. Except as expressly admitted herein, the allegations contained in paragraph 9 of the Complaint are denied.

10. The allegations contained in paragraph 10 of the Complaint are denied.

11. It is admitted that CTD has refused to pay Plaintiff the amount that Wells Fargo alleges is owed because CTD does not owe those or any other amounts in connection with the Swap. Except as expressly admitted herein, the allegations contained in paragraph 11 of the Complaint are denied.

12. CTD realleges and incorporates herein by reference its answers to the allegations contained in paragraphs 1-11 of the Complaint.

13. The allegations contained in paragraph 13 of the Complaint are denied.

14. The allegations contained in paragraph 14 of the Complaint are denied.

15. The allegations contained in paragraph 15 of the Complaint are denied.

ANSWER TO SUPPLEMENT TO COMPLAINT

16. CTD admits the allegations in Paragraph 1 of the Supplement to Complaint in Response to the Court's May 7, 2012 Order (the "Supplement").

17. In response to Paragraph 2 of the Supplement, (i) CTD admits the allegations in Paragraph 2.a.; (ii) CTD admits the allegations in Paragraph 2.b.; (iii) CTD admits the allegations in Paragraph 2.c.; and (iv) in response to the allegations in Paragraph 2.d., CTD admits that Garahan is a member of Loudon CL-1, LLC. Jones is no longer a member of the referenced limited liability company, therefore this portion of the allegation is denied. There are no other members of Loudon CL-1, LLC.

18. In response to Paragraph 3 of the Supplement, CTD believes that the public information concerning the identity of the limited partners in CTD's ownership structure is limited.

19. CTD admits the allegations in Paragraph 4 of the Supplement.

20. CTD is without knowledge or information sufficient to form a belief as to the allegations in Paragraph 5 of the Supplement.

DEFENSES

21. Wells Fargo's claims are barred because CTD's performance obligations under the Swap Agreement, if any, are excused pursuant to the doctrine of frustration of commercial purpose.

22. Wells Fargo's claims are barred by its prior material breach of the Swap Agreement.

23. Wells Fargo's claims are barred because it has prevented or substantially hindered CTD's performance of the Swap Agreement.

24. Wells Fargo's claims are barred by fraud and fraudulent inducement as described below in Defendant's Counterclaims, which CTD incorporates herein by reference.

25. Wells Fargo's claims are barred due to lack and/or failure of consideration.

26. Wells Fargo's claims are barred due to the existence of a mutual mistake of fact or a unilateral mistake by CTD of which Wells Fargo was aware.

27. Wells Fargo's claims are barred because the Swap Agreement is unconscionable.

28. Wells Fargo's claims are barred by the doctrine of estoppel.

29. Wells Fargo's claims are barred because the Swap Agreement is illegal pursuant to N.Y. Gen. Oblig. Law §§ 5-401, 4-411.

30. Wells Fargo's claims are barred by the doctrine of unclean hands.

COUNTERCLAIMS

Defendant/Counterclaim Plaintiff CTD Moorefield Retail, LLC ("CTD") files the following counterclaims against Plaintiff/Counterclaim Defendant Wells Fargo Bank, N.A. ("Wells Fargo"):

PRELIMINARY STATEMENT

1. This action arises out of a complex derivative instrument called an interest rate swap that Wachovia fraudulently induced CTD to execute in connection with CTD's construction of a mixed-use community development in Loudoun County in Northern Virginia.

2. Interest rate swaps are commonly cross-marketed by the derivatives or capital markets divisions of commercial banks or other institutional lenders, such as Wachovia and Wells Fargo, to borrowers of variable rate debt to hedge against the risk that commercial borrowing rates will increase and as a mechanism for converting the borrowers' variable interest costs on floating rate loans to effective fixed rates.

3. A forward-starting interest rate swap, like the original swap at issue in this case, is a swap where the parties agree on one date to the swap but it is not effective until a future date, typically several years later. Forward-starting interest rate swaps are frequently marketed to real estate developers to hedge against the risk of interest-rates rising during the construction phase of a development prior to converting construction loans to long-term permanent financing loans. CTD's swap was designed to hedge the interest-rate risk on CTD's permanent financing for a term of ten years, which term would commence after the construction of the development approximately four years later.

4. CTD entered into the forward-starting interest rate swap on May 3, 2006 with payments to start on May 3, 2010—the estimated date for completion for the construction—and continuing until May 3, 2020. On March 14, 2007, CTD entered into an amendment and restatement of the forward-starting interest rate swap to amend the notional amount and the rate, but retained the same payment starting date of May 3, 2010 and continuing until May 3, 2020.

5. As more fully explained below, on March 4, 2009, CTD executed a second amendment and restatement of the forward-starting interest rate swap primarily to push out the starting date from May 3, 2010 to June 16, 2011 to correspond with the new anticipated completion of construction of the development. Under the second amendment, the payments under the swap would start on June 16, 2011 and would continue until June 16, 2021. Contrary to the representations of Wells Fargo and the intention and understanding of CTD, Wells Fargo deceptively inserted into the second amendment and restatement a term that fundamentally changed the character and nature of the swap. Unbeknownst to CTD, the second amendment converted CTD's forward-starting interest rate swap into a *cash-settled* forward-starting interest rate swap through the insertion of a mandatory termination date of June 16, 2011. Instead of the ten-year term of payments beginning on June 16, 2011, Wells Fargo claims that the swap terminated at inception and that CTD owes a lump-sum, termination fee of approximately \$28 million.

6. This excess termination fee sought by Wells Fargo is the direct result of artificially low LIBOR rates. The United States and foreign governments intervened in the world's financial markets to keep LIBOR and other benchmark interest rates at artificially low levels to prop up Wachovia, Wells Fargo, and other financial institutions because of the unanticipated and catastrophic credit crisis that began in the fall of 2008—fueled in part by Wachovia's own illiquidity and imminent threat of government takeover. LIBOR, the benchmark index used as a proxy for commercial borrowing rates in the CTD swap, plummeted to near zero and has remained at that level while commercial borrowing rates have increased.

7. Presently, upon information and belief, the United States government is conducting a criminal investigation into the suspected manipulation of LIBOR by banking

institutions designed to keep LIBOR at artificially low levels even as commercial borrowing rates skyrocketed in the face of the credit crunch. This manipulation resulted in (and was intended to result in) windfall profits to Banks to the detriment of swap counterparties/borrowers such as CTD. If CTD's swap had functioned in accordance with the fundamental assumptions underlying it as well as with Wells Fargo's specific representations, on the fraudulently inserted mandatory termination date of June 16, 2011, Wells Fargo would have *owed CTD* more than \$5 million rather than CTD purportedly owing \$28 million. Rather than hedging the risk of rising commercial borrowing rates, CTD's swap has increased the effective interest rate for CTD by over 50%. As a consequence, the very purpose of the swap, as the parties understood, has been frustrated, and the Swap Agreement is unenforceable and should be rescinded or reformed.

8. The fraudulently inserted mandatory termination date, when coupled with the \$28 million charge to CTD, has made it impossible for CTD to obtain the expected permanent financing on the project and to repay the construction loans. Instead of requiring permanent financing for the anticipated amount of \$84 million, CTD was faced with the prospect of financing \$112 million, a hurdle no commercial lender was prepared to overcome. Wachovia and Wells Fargo conduct has therefore prevented CTD from performing its obligations under the construction loans.

9. In addition to the complete failure of CTD's swap to achieve its purposes, CTD has discovered in connection with this litigation that Wachovia and Wells Fargo fraudulently and deceptively overcharged CTD at inception of the swap and at each amendment and restatement of the swap in the aggregate amount of over \$2.6 million.

PARTIES

10. CTD Moorefield Retail, LLC is a limited liability company organized under the laws of the Commonwealth of Virginia, with its principal place of business in Richardson, Texas.

11. Wells Fargo Bank, N.A., upon information and belief, is a national banking association with its main office in Sioux Falls, South Dakota. It is, upon information and belief, a subsidiary of Wells Fargo and Company, whose principal place of business is in San Francisco, California. Wells Fargo Bank, N.A., upon information and belief, is the successor by merger to Wachovia Bank, National Association.

JURISDICTION AND VENUE

12. This Court has personal jurisdiction over Wells Fargo pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure and diversity jurisdiction of all claims pursuant to 28 U.S.C. § 1332, as the parties are citizens of different states and the amount in controversy exceeds \$75,000. This Court has personal jurisdiction over the Well Fargo because it has consented to jurisdiction through the filing of its Complaint.

13. While venue may lie in this District pursuant to a permissive venue clause contained in the Swap Agreement, venue is more appropriate and convenient in the United States District Court for the Northern District of Texas. CTD intends to promptly file a motion to transfer this action to the Northern District of Texas pursuant to 28 U.S.C. § 1404 and alleges proper venue in this District subject to that motion to transfer venue.

FACTS

Varieties of interest rate swaps

14. An interest rate swap is a derivative that banks market to borrowers, in certain instances, as a hedge against the risk that commercial borrowing rates will fluctuate over the life of a commercial loan. When a floating-rate commercial loan is properly hedged, an interest rate swap operates as a mechanism for converting the borrower's variable interest costs on floating rate loans to effectively fixed rates.

15. To provide an effectively fixed rate, an interest rate swap functions as follows: One party pays a variable rate of interest, usually the London Interbank Offered Rate (LIBOR), plus a credit spread, on a fictional principal amount called the "notional" amount. The other party pays a fixed interest rate on the same notional amount. The payments are made over a "term." When a client borrows funds at a variable rate, a swap can be used to fix the rate. The client pays the bank the fixed rate, and the bank pays the client the same variable rate as in its loan. Because the two variable rate payments cancel out, the client is effectively paying the fixed rate. The fixed rate, therefore, is effectively the price for the swap.

16. An interest rate swap also contains voluntary termination provisions. When a swap is terminated, a termination fee equal the present value of the expected remaining payments under the swap is paid either to the borrower or the bank. Under normal market conditions, if commercial borrowing rates rise, and the borrower chooses to terminate the swap, the bank will owe the borrower a termination fee. On the other hand, if commercial borrowing rates fall, the borrower would owe a termination fee but could take advantage of the lower rates available in the market.

17. A forward-starting interest rate swap works the same way as the swap described in Paragraphs 15-17, but the parties agree that the swap payments will not start until a predetermined effective date in the future, typically several years after the initial trade date. The borrower typically pays a forward-starting premium fee in order to lock in a fixed swap rate that starts in the future.

18. A cash-settled forward-starting interest rate swap is a different financial instrument altogether. Although it looks like a regular forward-starting swap as far as rates and terms, the parties do not make payments to each other depending on the difference between the floating and fixed rates at the end of each settlement period (*e.g.* on a monthly basis) over the life of the swap. Instead, the parties simply terminate the swap on the effective date and a termination fee is paid either to the borrower or the bank based on the then-present value of the payments that would have been made on the swap if it had not been cash-settled. Thus, while a forward-starting swap provides a hedge for interest rates over the life of a loan, a cash-settled forward-starting swap is merely a one-time payment event based upon the then-existing rates as applied to the term of the agreement.

Wachovia promotes an interest rate swap as a “hedge” strategy to protect CTD against rising interest rates in connection with a prospective \$76 million construction loan to finance CTD’s development of Moorefield Station.

19. CTD was formed to own and develop a mixed-use development called Moorefield Station in Asburn, Loudoun County, Virginia (“Moorefield Station”). The principals of CTD have had a long-standing banking relationship with Wells Fargo in Texas, where they have acquired, developed, and sold a variety of commercial properties over the years. Over the years, these principals, through other entities, have borrowed money from Wells Fargo to acquire, develop, and operate these properties.

20. John Hood (“Hood”) is the chief financial officer of the Carbon Companies. He interacted with Wells Fargo, on behalf of CTD, in connection with the Swap Agreement, the Construction Loans, and a related loan for infrastructure. Edmund Garahan and W.T. Field, the managing members of CTD, also dealt with Wells Fargo.

21. In 2005, CTD discussed with Wachovia the possible financing of the development of Moorefield Station. Wachovia was interested in providing conventional, variable-rate financing for the development. However, Wachovia, through its authorized representatives, including Richard Gross, claimed that as a result of the size of the anticipated construction loan or loans, its largest credit risk in connection with any loan was rising interest rates. Wachovia’s concern, as communicated to CTD by Gross and others at Wachovia, was that interest rates would rise to the point where CTD would be unable to obtain permanent financing. Without permanent financing available for Moorefield Station, there would be no proceeds to CTD from which to pay off Wachovia’s initial pre-development loan and its subsequent construction loans.

22. Therefore, according to Wachovia—as explained by Richard Gross and employees within Wachovia’s derivatives department—a “forward-starting interest rate swap” was necessary to hedge the credit risk because the swap would lock in interest rates for the anticipated term of the permanent financing before the construction loans were even completed. This strategy allegedly operated as a hedge against Wachovia’s credit risk under the construction loans and would ensure that permanent financing would be affordable.

23. In September 2005, members of Wachovia’s derivatives department, including Kim Lloyd, made a pitch to CTD that included the presentation of written marketing materials. In those marketing materials, Wachovia specifically claimed that “[b]y using a forward-starting swap to hedge the pricing on the company’s future fixed rate financing, the client is protected

against any increase in the ten-year Treasury yield as well as general widening of corporate borrowing spread.” Wachovia further claimed that, upon obtaining permanent financing at a fixed rate, CTD could unwind the swap: If the swap rate were to be higher than CTD’s fixed rate on the date of the termination of the agreement, then Wachovia would owe CTD a termination fee; if, on the other hand, the swap rate were to be lower than CTD’s fixed rate on its permanent financing, CTD would owe Wachovia a termination fee. Alternatively, if CTD obtained permanent financing at a variable rate, CTD could continue with the swap agreement and “use the floating to fixed rate swap to hedge the floating rate debt issuance.”

24. If CTD opted to terminate the Swap Agreement upon obtaining permanent financing, Wachovia claimed that CTD would be able to “amortize the resultant cash gain or loss on the hedge over the life of the [permanent] financing” of Moorefield Station. Thus, Wachovia made clear that CTD’s risk, if any, in having to pay Wachovia if the swap rates were to be lower than CTD’s fixed rate upon termination was mitigated by the fact that CTD would “be able to issue its debt at lower rates, thereby recouping the cost of settling the hedge over time.” That is, in the event lower interest rates required CTD to make a cash payment to Wachovia to settle the swap, CTD would obtain permanent financing for Moorefield Station at the lower interest rates, use the permanent financing to pay the debt owed on the construction loans and the termination fee, and still secure a reasonable and affordable effective interest rate on the permanent financing.

25. On November 1, 2005, Kim Lloyd explained to CTD that when CTD “actually locks its fixed rate on the permanent deals - they would simultaneously unwind the swaps. If rates are higher, [CTD] will finance at the higher rate and receive the positive value of the interest rate swap to offset the higher cost.... Conversely, if rates fall (or do not increase by as

much as the original forward premium), [CTD] *will finance at the lower rate* and will owe Wachovia the termination value of the swap.”

26. Wachovia later provided CTD with updated written marketing materials in January 2006. The updated marketing materials reaffirmed Wachovia’s recommended “hedge” strategy and, once again, described the mechanics for the proposed forward-starting swap to hedge “a future fixed rate debt issuance.” Wachovia explained:

For example, assuming the company enters into a forward starting swap at a fixed rate of 5.20% and that in February 2008 the ten-year swap rate is 5.70%, Wachovia will owe the client the present value of 50 ten-year basis point. This payment to the client will offset the company’s higher cost of [permanent financing] resulting from the increase in rates. On the other hand, if the ten-year swap rate is 4.70% in February 2008, the client will pay Wachovia the present value of 50 ten-year basis points, *offsetting their lower cost of [permanent financing]*.

And again, Wachovia explained that if CTD obtained permanent financing at a variable rate, CTD could continue to operate under the swap agreement, opt not to terminate the agreement, and use the swap transaction to effectively hedge the risk associated with variable interest rates on the permanent financing.

27. Wachovia’s own assumption, throughout its promotion of the interest rate swap “hedging” strategy, was that the pricing for CTD’s permanent commercial real-estate loans would be determined by the 10-year Treasury note rate plus a relatively constant credit spread that was estimated to be 1.50% per year. For example, in September 2005, Wachovia’s materials promoting the swap calculated that long-term borrowing costs as of September 7, 2008, would be 7.79% (including a 10-year Treasury rate of 6.29% plus a credit spread of 1.50%).

28. A key assumption inherent in Wachovia’s “hedging” strategy and marketing materials was that the 10-year swap rate would continue to move in tandem with the 10-year Treasury rate. According to Wachovia, in its 2006 promotional materials, “[t]he swap rate is

always higher than the Treasury rate because the swap rate represents not only the ten-year Treasury yield but also a spread that is essentially equivalent to AA-rated corporate borrowing spreads.” The materials also assumed that any changes in the difference between fixed-rate commercial real estate loans compared to Treasury notes would be matched by changes in the interest rate swap spreads.

29. As Wachovia further explained in its marketing materials in January 2006:

Treasury locks and forward starting swaps can be used to hedge against increases in long term rates between now and the time of the permanent take out. Both of these hedges are designed to increase in value as rates rise in order to offset the increase in interest expense associated with pricing in a higher interest rate environment. Likewise, as rates fall *and the interest expense associated with the future issue declines*, the cost of unwinding the hedge increases.

30. Thus, Wachovia’s “hedging” strategy, as presented to CTD, was based on the following core assumptions:

- that the fixed rate pricing on commercial real estate loans for a term of 10 years would be determined by the 10-year Treasury rate plus a relatively constant credit spread which was estimated to be 1.50%;
- that the 10-year LIBOR-based swap rate would continue to move in tandem with the 10-year Treasury rate;
- that any changes in the difference between fixed rate commercial real estate loans compared to Treasuries would be matched by changes in the interest rate swap spreads; and
- that if swap rates were lower and CTD desired to terminate the swap to take advantage of the lower rates, then the termination fee owed by CTD would be recouped by CTD issuing its debt at a lower rate.

31. Throughout the first quarter of 2006, Wachovia’s derivatives department monitored interest rates and advised CTD as to the timing of entering a forward interest rate swap, given the movement in interest rates and other economic factors. Wachovia continually pressed CTD to embrace Wachovia’s “hedging” strategy to protect against Wachovia’s

prediction of rising interest rates. For example, on February 22, 2006, John Townsend, Senior Vice President in Real Estate Financial Services at Wachovia, told CTD: “*We need to hedge ASAP, given January GDP, FED & spread.*”

CTD and Wachovia enter into a forward-starting interest rate swap.

32. On or about March 8, 2006, the Bank made a predevelopment loan to CTD in the principal amount of \$8 million (the “Predevelopment Loan”) to finance early stage project costs for Moorefield Station.

33. In reliance on the Wachovia’s representations and insistence, and embracing the core assumptions in Wachovia’s “hedging” strategy, CTD agreed to enter into a forward-starting interest rate swap. CTD signed an ISDA Master Agreement dated as of March 10, 2006 (the “Master Agreement”), a Schedule to the Master Agreement dated as of March 10, 2006 (the “Schedule”), and a Swap Transaction Confirmation dated May 3, 2006 (the “Original Swap Confirmation”) (the Master Agreement, Schedule, Original Confirmation and later amended and restated swap confirmations are collectively referred to as the “Swap Agreement”).

34. The Original Swap Confirmation provided a “Fixed Rate” of 6.035% matched against a floating rate of One-Month LIBOR for Wachovia and a notional amount of \$76 million—the anticipated amount of the construction loans. It also included an amortization schedule for expected payments at monthly intervals from May 3, 2010—the anticipated completion of construction—to May 3, 2020. The Original Swap Confirmation did not include a mandatory termination provision.

CTD and Wachovia modify the forward-starting interest rate swap.

35. On or about March 14, 2007, CTD and Wachovia amended and restated their forward-starting interest rate swap due to CTD’s projection of an increased amount for the

construction loans for Moorefield Station. First, the Fixed Rate was reduced from 6.035% to 5.895%. Second, the notional amount was raised from \$76 million to \$95 million, to account for the increased, anticipated amount of the construction loans. These changes were reflected in an Amended and Restated Swap Transaction Confirmation (“First Amended Swap Confirmation”). As with the Original Swap Confirmation, the First Amended Swap Confirmation included an amortization schedule for expected payments between May 3, 2010 and May 3, 2020. The First Amended Swap Confirmation did not include a mandatory termination provision.

Wachovia finances the development of Moorefield Station.

36. In May 2008, CTD entered into two construction loan agreements (the “Construction Loans”) for the two tracts of real estate at issue. Gross handled the Construction Loans on behalf of Wachovia before and after its acquisition by Wells Fargo.

37. For Tract 2A, Wachovia, as the agent bank, agreed to loan CTD up to \$50,826,898. Of that figure, Wachovia committed to lend \$23,454,928, and Compass Bank and US Bank committed to lend \$13,685,985 each. For Tract 2B, Wachovia, as the agent bank, agreed to loan CTD up to \$42,017,894. Of that figure, Wachovia committed to lend \$19,389,864, and Compass Bank and US Bank committed to lend \$11,314,015 each. For each loan, CTD was to pay a variable interest rate equal to the monthly LIBOR Index Rate plus a credit spread of 1.95%. With respect to the Construction Loans, CTD executed separate promissory notes in favor of Wachovia, Compass Bank, and US Bank.

38. Consistent with Wachovia’s “hedging” strategy, both loan agreements for the Construction Loans expressly contemplated the use of interest rate swap agreements and made clear that the Swap Agreement was actually a requirement of the Construction Loans. Under the loan documents: (i) Wachovia was not obligated to make an initial advance until receipt of a

swap agreement between CTD and Wachovia; (ii) any amounts owed under a swap agreement received preference in the application of payments received under the Construction Loans; and (iii) the deed of trust securing the notes under the loan agreements also purportedly secured any amounts owed under any swaps.

Wells Fargo fraudulently induces CTD to convert its forward-starting interest rate swap into a cash-settled forward-starting interest rate swap.

39. In the Fall of 2008, as worldwide financial markets experienced what is now referred to as the Great Recession, Wachovia's collapse was imminent. Ultimately, however, Wells Fargo purchased Wachovia's shares through a transaction consummated on January 1, 2009.

40. Shortly after Wells Fargo acquired Wachovia, Wells Fargo approached CTD concerning the swap transaction—ostensibly to extend the effective date of the swap to coincide with the June 16, 2011 maturity date under the Construction Loans. For example, Jason Smith of Wachovia's derivatives department contacted CTD on February 6, 2009, proposing a “new” start date for the Swap of June 16, 2011, and a “new” maturity date of June 16, 2021.

41. In the discussions relating to amending the Swap Agreement a second time, Wells Fargo, through Gross and representatives in the derivatives department, never disclosed that Wells Fargo desired to amend the Swap Agreement so that it would *mandatorily terminate* on June 16, 2011—the maturity date of the Construction Loans. The purpose of the amendment, as represented by Gross, Smith, and others at Wells Fargo, was simply to extend the effective date of the Swap Agreement to be consistent with completion of construction under the Construction Loans and the maturity dates for the Construction Loans. As Wells Fargo represented in Gross's February 29, 2010 e-mail to CTD: “[W]e have been approved to extend the SWAP to mature

with the current maturity date of the loan in order to avoid having the SWAP become due and payable before the project is complete.”

42. On or about March 9, 2009, Wells Fargo forwarded to CTD the Amended and Restated Swap Transaction Confirmation (the “Second Amended Swap Confirmation”) purportedly memorializing what the parties had agreed to on the previous day. Consistent with the parties’ discussions, (i) the effective date was extended from May 3, 2010 to June 16, 2011, and (ii) the termination date was extended from May 3, 2010 to June 16, 2021. The confirmation further stated that the payment dates were to begin “[m]onthly on the 16th of each month commencing July 18, 2011, through and including the Termination Date,” defined on page 2 of the confirmation as June 16, 2021.

43. New to the confirmation, however, was a “Mandatory Termination” provision that Wells Fargo inserted without informing CTD of its existence or effect. In fact, Wells Fargo concealed the fact that it had slipped the “Mandatory Termination” provision into the Second Amended Swap Confirmation. Other than the Mandatory Termination provision, the Second Amended Swap Confirmation mimicked the Original and First Amended Swap Confirmations in all respects.

44. A mandatory termination provision with a cash payment was not what CTD had bargained for in its negotiations of the Swap Agreement with Wachovia or Wells Fargo. Such a provision had not been included in the Original Swap Confirmation or in the First Amended Swap Confirmation and had not been discussed in connection with the negotiation of the Second Amended Swap Confirmation. The mandatory termination provision instead was slipped into the Second Amended Swap Confirmation and completely undermined CTD’s expectations and the entire purpose of the swap.

45. Upon information and belief, prior to entering into the Second Amended Swap Confirmation, Wells Fargo knew that sources of permanent financing were not, and would not be available to CTD. Yet, Wells Fargo failed to disclose this new information to CTD. Further, upon information and belief, contrary to the representations made in 2006 when the Swap Agreement was first entered, Wells Fargo had decided it also would not to provide permanent financing to CTD at the maturity of the Construction Loans. Wells Fargo also did not disclose this change-in-position to CTD prior to the Second Amended Swap Confirmation.

46. Wells Fargo's obvious purpose in inserting the mandatory termination provision was to lock in a windfall profit of \$18 million to Wells Fargo only months after it had acquired Wachovia from the precipice of bankruptcy. The Second Amended Swap Confirmation occurred during the economic crisis when One-Month LIBOR was artificially low and near zero due to government intervention and/or illegal bank manipulation. As it turned out, One-Month LIBOR decreased an additional 30 basis points by June 2011, putting CTD in an even worse position.

47. Upon information and belief, the Second Amended Swap Confirmation violated Wells Fargo's suitability standards as well as those of Comptroller of the Currency, because Wells Fargo knew at that time that the continuation of this interest-rate "hedging" strategy would serve to materially increase CTD's borrowing costs, such that CTD would not be able to obtain affordable permanent financing, instead of hedging against an increase in long-term borrowing costs—the entire purpose for which Wachovia and CTD entered into the Swap Agreement to begin with.

48. On March 4, 2009, the date the Second Amended Swap Confirmation was executed, Wells Fargo was "in the money" on the Swap Agreement in an amount over \$18 million, meaning that if the Swap Agreement was terminated on that day CTD would have owed

a termination fee in that amount. Thus, instead of watching interest rates fluctuate in the normal course and having swap payments fluctuate on the same schedule each month during the expected 10-year term of its permanent financing—the way a forward-starting interest rate swap is supposed to operate—all of the rights and obligations under the Swap Agreement (as fraudulently amended) were then keyed to interest rates as they would exist on June 16, 2011.

49. One-Month LIBOR was so low on March 4, 2009 that it would have had to increase by approximately 600 basis points in order to put CTD “in the money” on the Swap Agreement. Thus, when the Swap Agreement was amended the second time, CTD no longer had a hedge against the risk of rising interest rates for its permanent financing; instead, it unknowingly placed a bet that LIBOR would miraculously rise an exponential amount before June 16, 2011 to wipe out the embedded loss of over \$18 million—an outcome that no one, including Wells Fargo, ever expected to occur.

Wells Fargo fraudulently overcharged CTD in the Swap Agreement.

50. When Gross and the derivatives department personnel, on behalf of Wells Fargo, included an option for an interest rate swap as part of the Construction Loans, they represented that the interest rate swap would be extended to CTD at market rates and, specifically, that the swap rate “represents not only the ten-year Treasury yield but also a spread that is essentially equivalent to AA-rated corporate borrowing spreads.” Wachovia at all times presented the interest rate swap as a product to be offered at market rates with no mark-up for Wachovia.

51. The market rate for plain-vanilla interest rate swaps is quoted in the interdealer broker market based on established pricing conventions. The quoted rates change in 60 to 90 second intervals, meaning that the rates move constantly during a trading day. The interdealer broker market is a closed market, open only to the largest commercial and investment banks.

Only swap dealers or other participants in the swap markets have access to current market rate data for the confirmation of swap transactions.

52. Calculating rates for forward-starting swaps, such as the Swap Agreement, is a different analysis entirely and requires detailed modifications of the prevailing market data. A swap trader must modify the standard conventions to account for the forward start date and the other changes from the standard pricing conventions. Consequently, the rates for forward starting swaps are not available on any exchange.

53. Wachovia had its own proprietary system for determining the prevailing market rates for its derivative products. Wachovia's employees overseeing the Swap Agreement, including Gross and Lloyd, had access to this market-rate data and knew that CTD did not. Upon information and belief, Wachovia's employees overseeing the Swap Agreement, including Gross and Lloyd, further knew that CTD was therefore relying on Gross's explicit representations to Hood that the Swap Agreement was being extended to CTD at prevailing market rates.

54. CTD lacked the independent means or knowledge to verify if Wachovia was offering the Swap Agreement at the prevailing market rate.

55. Upon information and belief, the fixed interest rates set out in the confirmations of the Swap Agreement were not true or accurate market rates, contrary to the representations that Gross and others, on behalf of the Wachovia, made to CTD.

56. Wachovia prescribed a Fixed Rate in the Original Swap Confirmation of 6.035%, which, upon information and belief, was above the market rate on May 6, 2007. As a result, upon information and belief, Wachovia overcharged CTD by approximately \$1.2 million,

contrary to the explicit representations that Gross, Lloyd, and others on behalf of Wachovia made to CTD that the Swap Agreement was being confirmed at market rates.

57. Wachovia prescribed a Fixed Rate in the First Amended Swap Confirmation of 5.895%, which, upon information and belief, was above the market rate on March 14, 2007. As a result, upon information and belief, Wachovia overcharged CTD by approximately \$227,000 contrary to the explicit representations that Gross, Lloyd and others on behalf of Wachovia made to CTD that the Swap Agreement was being confirmed at market rates.

58. Wells Fargo prescribed a Fixed Rate in the Second Amended Swap Confirmation of 6.41%, which, upon information and belief, was above the market swap rate on March 4, 2009. As a result, upon information and belief, Wells Fargo overcharged CTD by approximately \$1.1 million contrary to the explicit representations that Gross and others on behalf of Wells Fargo made to CTD that the Swap Agreement was being confirmed at market rates.

59. Upon information and belief, Wachovia and Wells Fargo would have been required by the mark-to-market accounting rules that are applicable to banks to report as income the present value of the amounts that they overcharged CTD for the Swap Agreement. Upon information and belief, the banks' employees overseeing the Swap Agreement, including Gross and Lloyd, therefore knew or should have known of the overcharges.

60. Upon information and belief, Wachovia and Wells Fargo immediately realized profit by charging an above-market rate on the Swap Agreement, which directly impacted the compensation of the individual employees involved in the Swap Agreement. Wachovia and Wells Fargo, upon information and belief, locked in this profit through offsetting trades with unrelated third parties.

61. Neither Wachovia nor Wells Fargo disclosed to CTD the income it recognized on the overcharges on the Swap Agreement—income that was the direct result of a mark-up over the represented “market rates.”

62. As a result of the fraudulent overcharges from the Bank, CTD has been damaged in an amount to be proven at trial, but believed to be over \$2.5 million.

The worldwide credit crisis destroyed the fundamental bases assumed in Wachovia’s “hedge” strategy and frustrated the entire commercial purpose of the Swap Agreement.

63. At the time Wachovia first promoted the “hedge” strategy and required that CTD enter into the Swap Agreement, One-Month LIBOR was a rational and fundamentally sound choice for a floating rate index to employ in the Swap Agreement. It represented the free market rate at which solid and stable financial institutions lend money to one another in normal economic circumstances.

64. Beginning around October 2008, however, a severe, unprecedented, and unforeseeable credit crisis embroiled the world’s financial markets. These circumstances have been judicially recognized as an “unprecedented financial tsunami.”

65. As a result, One-Month LIBOR has suffered a sharp and precipitous decline that is no longer reflective of the fundamental assumptions that made it a rational choice for the floating rate in an interest rate swap.

66. The stunning decline in LIBOR rates since October 2008 (which continues today) is not the result of market forces. It is the result of artificially depressed interest rates designed to prop up the world’s failed financial markets and/or illegal bank manipulation—which is currently under investigation by numerous governmental entities.

67. In the current, unprecedented market conditions, banks are not subject to the same difficulties in borrowing money as ordinary commercial borrowers. Interest rate swap rates and

LIBOR are driven by the rates at which banks can borrow money. While the available pool of commercial financing was shrinking, the reverse was true for borrowing by banks. The financial and banking crisis led to a sweeping international regulatory intervention to bolster financial institutions by lowering both the rates at which governments make money available to banks and the rates at which banks lend to each other (*i.e.* interbank rates, such as LIBOR). Together with the global flight to quality, this government intervention has contributed, for example, to the yield of 10-year Treasury instruments and One-Month LIBOR rates being artificially low. This intervention has persisted in keeping One-Month LIBOR continuously artificially low.

68. LIBOR plus the credit spreads specified in the Swap Agreement is no longer a reliable, market-driven indicator of commercial borrowing rates from banks, which is the fundamental basis on which the parties chose it for the floating rate in the Swap Agreement. To the contrary, commercial borrowing rates during the relevant period *escalated* due to the credit crunch while LIBOR has remained artificially depressed. For instance, upon information and belief, prevailing permanent mortgage interest rates for mixed-used community developments like Moorefield Station, as of March 2009, were greater than 6.00%, and upon information and belief, as of June 2011, the prevailing permanent mortgage interest rates were greater than 7.00% for similar projects.

69. As a result, a fundamental assumption underlying the Swap Agreement—that it would protect CTD against the risk of higher interest rates on permanent financing for the development—is no longer valid. In fact, the opposite is true: the Swap Agreement (and the “cash settlement” demanded by Wells Fargo upon its termination) exposed CTD to significantly higher effective interest rates because LIBOR and permanent financing rates no longer moved in tandem.

70. The artificial depression of LIBOR and Wells Fargo's insertion of the "Mandatory Termination" provision into the Second Amended Swap Confirmation thus caused CTD's effective interest rate to *increase by over 50%* above the fixed rate promised and bargained for in the Swap Agreement and each of the amendments. When the undisclosed mark ups are taken into account, CTD's effective rate of interest virtually doubles from that which Wachovia promised and for which CTD bargained.

71. Further, the excessive termination fee sought by Wells Fargo as a result of the mandatory termination was a direct result of artificially low LIBOR rates. If LIBOR was not at artificially low levels and it was allowed to float as it had historically, the termination fee as of June 16, 2011 would have been in CTD's favor in the amount of approximately \$5 million.

Wells Fargo's fraudulently induced "mandatory termination" provision prevented CTD from paying the Construction Loans and related loan.

72. CTD first discovered that Wells Fargo had added the "Mandatory Termination" provision to the Second Amended Swap Confirmation in 2011 when Wells Fargo advised that the Swap Agreement would terminate automatically absent further agreement extending the dates. CTD then realized that Wells Fargo had inserted the "Mandatory Termination" provision without informing CTD of its inclusion or effect.

73. On June 17, 2011, and again on July 1, 2011, Wells Fargo claimed that CTD owed \$28 million to Wells Fargo on the Swap Agreement. Wells Fargo further claimed that (i) payments under the Swap Agreement took priority over payments under the Construction Loans; and (ii) amounts owed under the Swap Agreement had priority under the terms of the mortgage CTD had granted to Wachovia in connection with the financing of Moorefield Station.

74. As a result of this position, CTD effectively was prevented from being able to repay the Construction Loans and the related road loan, because no financial institution would

provide permanent financing to pay off the Swap and then the Construction Loans. CTD no longer needed an \$84 million loan to pair up with its forward-starting swap. Instead, it needed over *\$112 million* to liquidate its entire cash position.

75. On June 17, 2011, Wells Fargo seized over \$4,722,217.81 in pledged assets and applied that payment to the Swap Agreement “termination fee” rather than to the Construction Loans.

76. Notwithstanding the dispute over the Swap Agreement, CTD continued to pay amounts due on under the Construction Loans. However, CTD objected to Wells Fargo’s applying any payments to amounts Wells Fargo contended were owed under the Swap Agreement in light of the dispute over the swap. Accordingly, on July 19, 2011, when CTD sought to pay interest on the Construction Loans, CTD requested that the draft be used for interest payments on the Construction Loans. Instead of complying with this request, Wells Fargo refused to accept any payments of interest on the Construction Loans without first applying the payments towards amounts allegedly owed under the Swap Agreement.

COUNT ONE: FRAUD

77. The allegations in paragraphs 1-76 are realleged and incorporated herein by reference.

78. Wells Fargo made numerous oral and written misrepresentations and false and misleading statements of fact to CTD regarding the purpose and effect of the Second Amended Swap Confirmation, including, but not limited to, those set forth in paragraphs 39-49.

79. Had CTD known that the Second Amended Swap Confirmation included a “Mandatory Termination” provision, CTD would not have agreed to the Second Amended Swap Confirmation.

80. Moreover, given (i) CTD's relationship with both Wachovia and Wells Fargo, (ii) Wells Fargo's special knowledge regarding interest rate swap agreements, and (iii) the impact of a mandatory termination provision in light of the existing economic climate and unprecedented divergence of rates, Wells Fargo had a duty to fully and accurately disclose to CTD that the Second Amended Swap Confirmation included a "Mandatory Termination" provision. Further, Wells Fargo had a duty to disclose the truth about the inclusion of the "Mandatory Termination" provision and its effect because Wells Fargo made a partial disclosure that created the false impression that the amendment would only alter the effective date and termination date.

81. Wells Fargo misrepresented the legal effect of the Second Amended Swap Confirmation, including by intentionally suppressing the truth with respect to the mandatory termination date and through its words, conduct, and exhibition of documents.

82. Wells Fargo also had a duty to disclose to CTD, prior to the entry of the Second Amended Swap Confirmation, that it would not longer offer CTD permanent financing and that the Swap Agreement was no longer an effective hedge against rising interest rates because Wells Fargo had new information that made its prior representations regarding the availability of permanent financing and the overall "hedging" strategy misleading or untrue.

83. Wells Fargo knew its statements and misrepresentations were in fact false at the time they were made, and/or made such statements and misrepresentations with reckless disregard as to their truth or falsity.

84. Wells Fargo made the material misrepresentations with the intent to induce CTD into the Second Amended Swap Confirmation.

85. CTD reasonably and justifiably relied on Wells Fargo's misrepresentations, false and misleading statements of fact, and failure to disclose the true facts.

86. CTD has suffered damages due to Wells Fargo's fraud.

87. Wells Fargo's fraud entitles CTD to rescission of the Swap Agreement.

88. As a direct and proximate result of Wells Fargo's fraud, CTD has suffered damages in an amount to be proven at trial in excess of \$75,000.

89. Wells Fargo's conduct was undertaken maliciously, without justification, and fraudulently, entitling CTD to an award of punitive damages.

COUNT TWO: RESCISSION OR REFORMATION DUE TO MUTUAL MISTAKE

90. The allegations in paragraphs 1-89 are realleged and incorporated herein by reference.

91. At the time the parties entered into the Swap Agreement, Wachovia and CTD were operating under a shared understanding that One-Month LIBOR set forth in the confirmation of the Swap was a rational and fundamentally sound choice for a floating rate, which represented a free market rate at which solid and stable financial institutions lend money.

92. As stated above, the worldwide credit crisis has caused both Wachovia and CTD to be mutually mistaken about material facts on which they relied in forming the Swap Agreement.

93. As a result, the Swap Agreement should be rescinded.

94. In the alternative, the Swap Agreement should be reformed to conform to the expectations of the parties and One-Month LIBOR set forth in the Swap Agreement should be replaced with a suitable and acceptable benchmark rate of interest plus credit spreads currently prevailing for commercial borrowings for the floating rates specified in the Swap Agreement.

95. Accordingly, CTD is entitled to a judgment rescinding the Swap Agreement and returning to them all amounts paid or applied pursuant to the Swap Agreement or, in the

alternative, a reformation of the terms of the Swap Agreement to conform to the legitimate expectations and understanding of the parties. CTD is further entitled to an order declaring that no amounts are owed to Wells Fargo on account of Wells Fargo's termination of the Swap Agreement.

**COUNT THREE: RESCISSION OR REFORMATION DUE TO
UNILATERAL MISTAKE**

96. The allegations in paragraphs 1-95 are realleged and incorporated herein by reference.

97. In proposing the second amendment to the Swap Agreement, Wells Fargo encouraged CTD to amend the Swap Agreement so that it would not become effective until the construction of Moorefield Station was complete, the Construction Loans matured, and permanent financing was secured. During the discussions about the second amendment, Wells Fargo indicated that the sole reason for the amendment was to make sure that the Swap Agreement became effective when the Construction Loans matured. This rationale was consistent with the parties' overall strategy for the swap to be a hedge on the rate associated with permanent financing.

98. Wells Fargo included in the Second Amended Swap Confirmation a "mandatory termination" provision that converted the forward-starting swap into a one-time cash-settled swap, regardless of whether CTD had completed construction or the Construction Loans had matured. Because of Wells Fargo's representation about the purpose and content of the amendment, CTD did not have knowledge or an understanding of the inclusion of a mandatory termination provision—especially in light of the amortization schedule appended the confirmation and conflicting termination dates.

99. That the swap was a forward-starting swap rather than a *cash-settled* forward-starting swap went to the very essence of the Swap Agreement as a “hedging” strategy for CTD to begin with. CTD’s mistake in this regard related to a material feature of the Second Amended Swap Confirmation and was of so great a consequence that to enforce the Second Amended Swap Confirmation against CTD would be unconscionable and would result in a windfall to Wells Fargo.

100. CTD’s mistake occurred despite its taking ordinary care to understand the Second Amended Swap Confirmation.

101. Wells Fargo caused, and knew about, CTD’s mistake regarding the very essence of the facts on which the Swap Agreement was predicated.

102. Rescinding the Second Amended Swap Confirmation the Swap Agreement would place CTD and Wells Fargo in *status quo*.

103. Accordingly, CTD is entitled to a judgment rescinding the Second Amended Swap Confirmation so that the Swap Agreement so that the no longer includes a mandatory termination provision.

COUNT FOUR: FRAUDULENT OVERCHARGES

104. The allegations in paragraphs 1-103 are realleged and incorporated herein by reference.

105. Wachovia made false and material misrepresentations of fact to CTD and omitted material facts with the actual intent to mislead CTD as described in paragraphs 50-62.

106. Wachovia and Wells Fargo stated that the Swap Agreement would be executed at current market rates.

107. Wachovia and Wells Fargo set the Fixed Rate in the Swap Agreement significantly higher than the market rate on the effective dates of the Original Swap Confirmation, First Amended Swap Confirmation, and Second Amended Swap Confirmation, which resulted in millions of dollar in undisclosed income to the banks.

108. Wachovia and Wells Fargo knew, when the misrepresentations and omissions about the rates were made, that those statements were false or Wachovia and Wells Fargo recklessly made the misrepresentations and omissions without any knowledge of the truth and as positive assertions.

109. Wachovia and Wells Fargo made the misrepresentations and omissions about those rates with scienter and with the intent to deceive CTD in order to extract an improper benefit at CTD's expense in the form of the substantial hidden overcharges thereon.

110. CTD reasonably relied on the statements by Wachovia and Wells Fargo concerning the Swap Agreement to be accurate and complete, as Wachovia and Wells Fargo's experience with, and knowledge of, interest rate swaps or other similar derivative instruments was far superior to that of CTD. Wachovia and Wells Fargo knew that CTD was ignorant of the facts regarding the rates and did not have an equal opportunity to discover the truth about them.

111. Wachovia and Wells Fargo were deliberately silent about the rates and failed to disclose the facts with the intent to induce CTD to enter into the Swap Agreement.

112. If Wachovia and Wells Fargo had not deceived CTD about the hidden overcharge, CTD would not have entered into the Swap Agreement. Further, the Wachovia and Wells Fargo's fraud entitles CTD to rescission of the Swap Agreement.

113. As a direct and proximate result of the fraudulent misrepresentations and omissions, CTD has been damaged in an amount to be proven at trial, including but not limited

to the hidden overcharges assessed by Wachovia and Wells Fargo on the Swap Agreement, which amounts exceed \$75,000.

114. The conduct of Wachovia and Wells Fargo was undertaken maliciously, without justification, and fraudulently, entitling CTD to an award of punitive damages.

COUNT FIVE: BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

115. The allegations in paragraphs 1-114 are realleged and incorporated herein by reference.

116. The Swap Agreement places duties on each party to act in good faith, to be fair, to be reasonable, and to not engage in opportunistic conduct that deprives the other party of the benefits under the contract.

117. Wells Fargo's actions in securing the Second Amended Swap Confirmation to the Swap Agreement significantly increased the cost associated with the Swap Agreement, doomed the very "hedging" strategy that Wachovia had itself proposed, and deprived CTD entirely of the benefit of its bargain. Wells Fargo's inclusion of the mandatory termination provision, without disclosure to CTD as to its existence and effect, as well as Wells Fargo's insistence on exercising that provision, converted the parties' agreement from a hedge on the risk of "rising" interest rates to a one-time bet with overwhelming odds in favor of the house ensuring that Wells Fargo would receive substantial windfall profits. Wells Fargo's conduct, designed to deprive CTD of any benefit of the Swap Agreement, and its ultimate exercise of the mandatory early termination in the face of CTD's objections and concerns, were not in good faith and destroyed any benefit to CTD under the Swap Agreement.

**COUNT SIX: RESCISSION OR REFORMATION OF THE SWAP DUE TO
FRUSTRATION OF COMMERCIAL PURPOSE**

118. The allegations in paragraphs 1-117 are realleged and incorporated herein by reference.

119. At the time the parties entered into the Swap Agreement, One-Month LIBOR in the Swap agreement was a rational and fundamentally sound choice for a floating rate, which represented a free market rate at which solid and stable financial institutions lend money.

120. Both CTD and Wachovia assumed that a floating rate equal to One-Month LIBOR was a proper proxy for commercial borrowing rates and therefore would continue to move in tandem with commercial borrowing rates.

121. In fact, beginning with the onset of the worldwide credit crisis in October 2008 and continuing at present and into the indeterminate future, this economic truism no longer exists. The current financial markets are functioning in times that leading public and private economic experts could not have foreseen.

122. As a result, the Swap Agreement dramatically increased CTD's interest rate risk, as opposed to hedging or limiting it, which was the purpose of the Swap Agreement.

123. This change in circumstances has made Wells Fargo's performance under the Swap Agreement virtually worthless to CTD, frustrating CTD's purpose in entering into the Swap Agreement.

124. CTD, therefore, has been utterly deprived of any benefit from the Swap Agreement, and the expected value of the parties' performance has been destroyed. Because CTD has been deprived of the benefit of its bargain, there is a complete failure of consideration and the Swap Agreement is null and void.

125. In the alternative, the Swap Agreement should be reformed to conform to the expectations of the parties. Specifically, One-Month LIBOR set forth in the Swap Agreement should be replaced with a suitable and acceptable benchmark rate of interest currently prevailing for commercial borrowings for the floating rate specified in the Swap Agreement.

126. Accordingly, CTD is entitled to a judgment rescinding the Swap Agreement and returning to it all amounts paid or applied pursuant to the Swap Agreement, or in the alternative, a reformation of the terms of the Swap Agreement to conform to the legitimate expectations of the parties.

COUNT SEVEN: RESCISSION OR RESTITUTION IN EQUITY

127. The allegations in paragraphs 1-126 are realleged and incorporated herein by reference.

128. The parties to the ISDA Master Agreement represent that any obligations thereunder or in any Credit Support Documents, as defined in the ISDA Master Agreement, are enforceable subject to “equitable principles of general application (regardless of whether the enforcement is sought in a proceeding of equity or law).”

129. Contrary to express representations, Wachovia and Wells Fargo prescribed rates in the Swap Agreement over the market rate resulting in hidden overcharges to CTD and immediately realized profit for themselves.

130. Wells Fargo improperly required the second amendment to the Swap Agreement, as set forth above, and improperly inserted the mandatory termination provision in the Swap Agreement.

131. Further, Wells Fargo also applied amounts received under the Construction Loans to the termination fee under the Swap Agreement.

132. Under the facts and circumstances in this case, the Court, through its equitable powers and in accordance with the equitable principles of general application, should order restitution to CTD in an amount equal to the portions of the termination fee improperly applied under the Construction Loans and the hidden overcharges and other appropriate equitable relief.

COUNT EIGHT: CONVERSION

133. The allegations in paragraphs 1-132 are realleged and incorporated herein by reference.

134. As part of the Construction Loans and Swap Agreement and an underlying letter of credit, Wells Fargo had access, but not title, to \$4,722,217.81 that belonged to CTD but was being held as security on the Construction Loans by Wells Fargo.

135. In prosecuting its wrongful claims to the termination fee, after June 17, 2011, Wells Fargo seized the \$4,722,217.81 (the "Security Funds") and applied it to the amount it claimed due from CTD for the termination fee.

136. CTD owned and was entitled to possession of the Security Funds, as it was not in default on the Construction Loans.

137. Wells Fargo, unlawfully and without authorization, assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, CTD's rights.

138. CTD has made a demand for the Security Funds, and Wells Fargo refused to return the Security Funds.

139. CTD has been injured by the Wells Fargo's conversion of the Security Funds.

140. Accordingly, CTD is entitled to recovery of the Security Funds, and punitive damages for the Wells Fargo's willful conversion of them.

**COUNT NINE: REQUEST FOR DECLARATORY JUDGMENT RELATING TO
CREDIT LINE DEED OF TRUST**

141. The allegations in paragraphs 1-140 are realleged and incorporated herein by reference.

142. Pursuant to Virginia Code § 55-58.2, a Credit Line Deed of Trust shall set forth on the front page, either in capital letters or underscored language, the words “THIS IS A CREDIT LINE DEED OF TRUST.”

143. Pursuant to Virginia Code § 55-58.2, this phrase shall convey notice to all parties that the Noteholder and the Grantor and other borrowers identified in the Deed of Trust, have an agreement whereby the Noteholder contemplates making advances from time to time against the security described in the Deed of Trust.

144. Pursuant to Virginia Code § 55-58.2, a Credit Line Deed of Trust shall specify the maximum aggregate amount of principal to be secured at any one time.

145. Pursuant to Virginia Code § 55-58.2, from the date of the recording of the Credit Line Deed of Trust, the lien thereof shall have priority as to all other deeds which are unrecorded as of that date of which the Noteholder has no knowledge or notice. Such priority shall extend to any advances made following the recordation of the Credit Line Deed of Trust.

146. The lien, however, is limited to the maximum aggregate amount of principal stated in the Credit Line Deed of Trust.

147. The Amended and Partially Restated Credit Line Deed of Trust executed by CTD in favor of the Bank, as well as the Supplemental Credit Line Deed of Trust executed by CTD in favor of the Bank, both expressly state that the maximum aggregate amount of principal to be secured thereby is \$92,844,791.

148. Therefore, regardless of the validity and/or enforceability of the Swap Agreement, Wells Fargo's lien against the Moorefield Station property that is the subject of the Deed of Trust is capped at \$92,844,791.

149. However, Wells Fargo contends that the lien secured by the Amended and Partially Restated Credit Line Deed of Trust and/or the Supplemental Credit Line Deed of Trust is not capped at \$92,844,791, and therefore a justiciable controversy exists between Wells Fargo and CTD.

150. CTD requests that the Court, pursuant to 28 U.S.C. § 2201 *et seq.*, declare that Wells Fargo's lien against the Moorefield Station property that is the subject of the Deed of Trust is capped at \$92,844,791.

WHEREFORE, CTD respectfully prays that the Court:

1. Deny the relief requested in the Complaint;
2. Award CTD compensatory damages plus interest in an amount to be proven at trial;
3. Award CTD punitive damages;
4. Enter declaratory relief with respect to the Credit Line Deed of Trust as requested herein.
5. Award CTD prejudgment and post-judgment interest at the maximum legal rate;
6. Enter judgment of rescission with respect to the Swap Agreement;
7. Alternatively, enter judgment reforming the Swap Agreement; and
8. Award CTD such other and further relief, in law or in equity, as the Court deems just and proper.

This the 31st day of May 2012.

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MOOREFIELD RETAIL, LLC**

CERTIFICATE OF SERVICE

The undersigned certifies that on May 31, 2012, the foregoing document was submitted to the clerk of the U.S. District Court, Southern District of New York, using the electronic case filing system (CM/ECF) of the court. I certify that the document was served on all known counsel of record electronically as authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Eric B. Lamons
One of Counsel