

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**JAY F. SWINDEL, SR., AND  
COMMUNITY BANK, ELLISVILLE, MISSISSIPPI**

**APPELLANTS**

**VS.**

**NO. 2008-CA-00560**

**WILLIAM T. HARVEY, AND  
ELLEN TANNER HARVEY**

**APPELLEES**

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**BRIEF OF THE APPELLEES  
WILLIAM T. HARVEY AND ELLEN TANNER HARVEY**

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**ORAL ARGUMENT IS NOT REQUESTED**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. William T. Harvey, Appellee;
2. Ellen Tanner Harvey, Appellee;
3. David Shoemake, Attorney for the Appellees;
4. Regnal Blackledge, Attorney for the Appellees;
5. Community Bank of Ellisville, Mississippi, Appellant;
6. Jay F. Swindle, Sr., Appellant;
7. Terry L. Caves, Attorney for the Appellants;
8. Jerry Sharp, Attorney for the Appellants; and
9. Honorable Robert Evans, Circuit Court Judge.

Respectfully submitted,

  
DAVID SHOEMAKE

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### STATUTES

None.

### OTHER AUTHORITIES

None.

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**BRIEF OF THE APPELLEES**

**STATEMENT OF ISSUES**

ISSUE 1: Did the Circuit Court of Covington County err in finding that the acts alleged in the Complaint fell outside the arbitration agreement?

ISSUE 2: Did the Circuit Court of Covington County err in finding that arbitration was not the appropriate forum to determine if the issues in this case were arbitratable?

ISSUE 3: Did the Circuit Court of Covington County err in finding that the arbitration clause was unconscionable?

**STATEMENT OF THE CASE**

**A. Nature of the Case, Course of Proceedings and Disposition Below.**

This is an interlocutory appeal from the Circuit Court of Covington County from the trial court's proper denial of the Appellants' Motion to Compel Arbitration and Stay of Proceedings. (CP 99)<sup>1</sup>. The Appellees, William T. Harvey and Ellen Tanner Harvey (the Harveys) filed their Complaint against Jay F. Swindel, Sr. (Swindel) and Community Bank, Ellisville, Mississippi (the Bank) on or about April 5, 2007, seeking damages under various causes of action which relate directly to the wrongful foreclosure on the Harveys' home. (CP 4-8) On or about June 4, 2007, Swindel, and the Bank filed their Motion to Compel Arbitration (CP 37) The Circuit Court of Covington County, Honorable Robert G. Evans, presiding, heard and considered said motion and

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For continuity of the briefs, Appellees will use the same designations as the Appellants. (T. ) references the Transcript. (R.E. ) Appellant's Record Excerpts, (Ex. ) Exhibits, and (CP) Clerk's papers.

on March 24, 2008, denied the Bank's motion. (CP 97-98) The Bank and Swindel filed this appeal from that denial.

### **B. Statement of Facts**

The Harveys were the owners of a house and three (3) acres which adjoined approximately 36.52 acres upon which two (2) poultry houses were situated. In 2001, the Harveys borrowed \$355,000.00 from Community Bank to finance the poultry operations. The Appellants allege that at that time, the home and 3 acres were placed on the deed of trust as security for a total of 39.52 acres in which the Bank had a security interest. (Appellant's Brief p 1-2). However, this is simply not the case. In 2003, Tyson, for whom the Harveys grew chickens, required the Harveys to retrofit and/or upgrade the poultry houses or lose their contract. The cost of the renovations to the poultry houses was approximately \$120,000.00. In June of 2003, the Harveys borrowed \$120,000.00 to retrofit the poultry houses. (T. 4-5) When the 2001 and 2003 loans were made, the Bank prepared all documents associated with said loans including the deeds of trust. (T. 35-36) Admittedly, the Harveys did not read the documents prepared by the Bank regarding this loan as they were in a "do-or-die" situation. (T.12, 29-40) Either the Harveys borrowed the money to retrofit the poultry houses or they would be cut off and their contract would be canceled by Tyson. Certain loan documents also contained an arbitration agreement which the Bank seeks to have enforced. Interestingly, the Bank did not have an arbitration agreement as part of the wording in either the 2001 or the 2003 Deeds of Trust.<sup>2</sup> (Exhibits 1 and 2) The Bank at the hearing refers to the "loan documents" and proceeds to enter as evidence all but the 2001 and 2003 Deeds of Trust, which are certainly part of, if not the most important "loan document" when conducting a real estate loan.

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<sup>2</sup> The Deed of Trust for 2003 is Exhibit "A" to the Response to the Motion to Compel Arbitration before the trial court. The 2001 Deed of Trust however was not entered as evidence at the hearing before the trial court, but is pertinent to a full and complete understanding of the issues and for a full and complete *de novo* consideration by this Court. As such, certified copies of the 2001 and 2003 deeds of trust are attached hereto as Exhibits 1 and 2.

At the heart of this litigation is the fact that the Bank did not include the three (3) acres upon which the Harveys' home was situated in either of these Deeds of Trust. The Deeds of Trust clearly state that property secured therein is only 36.52 acres, not the 39.52 acres alleged by the Bank. Perhaps this is why the Bank has continually refused to reference the Deeds of Trust.

After the 2003 Deed of Trust was executed, subsequent events lead to the Harveys being unable to remain in the poultry business and they were forced to file bankruptcy.(T. 19) Thereafter, the Bank instituted foreclosure proceedings on or about April 7, 2006. At the foreclosure sale, the Substituted Trustee conveyed unto Community Bank the 36.52 acres contained in the Deeds of Trust but not the 3 acres upon which the Appellees' home was situated. Thereafter the Bank, under color of the foreclosure sale, wrongfully took possession of the home, and evicted the Harveys by removing their personal property from the home and leaving it exposed to the elements without regard for their preservation. (T. 34)

#### **SUMMARY OF THE ARGUMENT**

The Circuit Court of Covington County properly applied the principles of Rogers-Dabbs Chevrolet-Hummer v. Blakeney, 957 So.2d 170 (Miss. 2007) in denying the Motion to Compel Arbitration. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id. at ¶ 15. The Bank goes into great detail in addressing the fact that the Harveys failed to read the documents in which they signed. However, it is apparent that the Bank has failed to carefully read the documents as well. Of the two Deeds of Trust in which the Harveys executed, neither contains any language regarding the description of the three (3) acres upon which the house is situated. Deeds of Trust also do not contain any reference to arbitration clauses related to said documents or the three(3) acres. (Exhibits 1 and 2)

The Harveys' home and three(3) acres were not made a part of the Deeds of Trust, by the

Bank, and the foreclosure, ultimate wrongful possession and wrongful eviction of the Harveys are all claims relating to the home and three (3) acres which fall outside any arbitration clause in any other loan documents. This Court has correctly recognized and upheld the principal that, “[a]mbiguities in a contract are to be construed against the party who drafted the contract.” Union Planters Bank, National Association v. Rogers, 912 So.2d 116, 119 (Miss. 2005). Because the Bank failed to include the property in which it wanted to take a security interest, it cannot expect the borrower to acquiesce to the wrongful seizure of property which is not included the Deeds of Trust. Furthermore, in construing ambiguities within the documents against the Bank (its maker), it is not only apparent that there is no arbitration clause in the Deeds of Trust, but the Addendum thereto in fact it states, “any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument.” (Exhibit 2, page10)

The Bank argues that the Circuit Court erred in finding that arbitration was not the appropriate forum to determine if the issues in this case are arbitrable. The Bank at the hearing before the Circuit Court and now relies exclusively on Grater Canton Ford v. Ables, 948 So.2d 417 (Miss. 2007) asserting that arbitration is the proper forum to determine the validity of and/or if the issues in the case are arbitratable. In East Ford, Inc., v. Taylor, 826 So.2d 709, 713 (Miss. 2002), this Court held,

In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: **(1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement.** Under the second prong, the United States Supreme Court has stated the question as “whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (citations omitted). Under the second prong, applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

The principal set forth in East Ford, Inc., is, “[i]n determining the validity of a motion to compel

arbitration under the Federal Arbitration Act, *courts* generally conduct a two-pronged inquiry.” Further, in AT&T Technologies, v. Communications Workers of America, 475 U.S. 643, 649 (1986), the Supreme Court stated that whether a party is bound by an arbitration agreement is generally considered an issue for the courts not the arbitrator, unless the parties *clearly and unmistakably* provide otherwise. In the present case, there was no arbitration agreement contained within either Deed of Trust, and the matter pending before the court is outside the scope of any arbitration agreement, as the Bank failed to properly secure the three (3) acres of which it later took possession under the pretext of a foreclosure.

It is and/or will be an extremely dangerous prospect if arbitrators are left with the sole discretion of deciding if an issue should be arbitrated without some form of judicial review. Without some form of judicial review, it is possible, if not probable that an arbitrator would not want to render a decision which would effectively reduce his ultimate fee in the matter pending before him. The “safety net” of judicial review of arbitration clauses in no way prejudices any party. However, lack of and/or refusal to allow *independent judicial review* at the trial level and if necessary appellate review exposes parties to potentially irrevocable harm.

In Thompson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2<sup>nd</sup> Cir. 1995), the Second Circuit Court of Appeals held that,

Arbitration is contractual by nature and a party cannot be required to submit to arbitration any dispute to which he or she has not agreed so to submit. Thus while there is a strong and liberal federal policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.

The Bank in its brief asks several rectorial questions in support of its argument that there is a binding arbitration agreement. “Why did the Harveys list the Bank as loss-payee on homeowners insurance policy?”; “Why did they abandon their homestead at bankruptcy?”; “Why didn’t they object when the Bank force-placed insurance on their home...?”; “Why didn’t they enjoin the

foreclosure sale if the bank did not have a lien on their home?”. (Appellants’ Brief P. 19) These arguments do not support the contention of a valid arbitration agreement as it relates to the claims regarding the three(3) acres and home of the Harveys. These arguments are attempts by the Bank to draw attention away from the fact that it did not have a valid security interest on the Deeds of Trust entitling it to foreclosure and possession of the home and three(3) acres. These arguments also do not support a finding that the dispute is covered by a valid arbitration agreement or that the two pronged test is met to find an arbitration agreement exists. By the same token, the Harveys could ask similar questions such as, “Why did the Bank force place insurance on the property which was not part of the Deed of Trust?”, or “Why did the Bank go to such lengths to convince the Harveys that they had conveyed the three (3) acres via the Deed of Trust?” These questions by the Bank may at some point be defenses which the Appellees may wish to assert, however, those arguments, like so many put forth by the Appellants do not address the validity of the arbitration clause and/or whether the dispute falls within said clause.

The Circuit Court properly applied the principals in Rogers-Dabbs to the issues in the Motion to Compel Arbitration in denying said motion. Finally, the Circuit Court properly found that the arbitration clause was unconscionable. This Court has defined an unconscionable contract as, “...one such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other....” East Ford Inc., at 715 (¶17), (citations omitted). While it may not be said that no one in his right mind would ever agree to arbitrate, all be it a subjective argument, certainly the waiving of one’s right of access to the courts must be obtained by fairness and equal opportunity. While the trial court properly found that the dispute was outside the scope of the arbitration clause, it went on to properly find unconscionable elements in the circumstances of the loan which would void any arbitration clause.

“Unconscionability has been defined as absence of meaningful choice on the part of one of

the parties, together with contract terms which are unreasonably favorable to the other party.” East Ford, Inc., at 715 (¶17), *citing* Entergy Miss., Inc. v. Burdette Gin Co., 726 So.2d 1202 (Miss. 1998). As such the order of the trial court should be affirmed.

### STANDARD OF REVIEW

“The grant or denial of a motion to compel arbitration is reviewed de novo.” East Ford, Inc., at 713 ¶9, *citing* Webb v. Investacorp, Inc., 89 F.3d 252, 256 (5th Cir.1996).

In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement. Under the second prong, the United States Supreme Court has stated the question as “whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (citations omitted). Under the second prong, applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

Id.

### ARGUMENT

**ISSUE 1: Did the Circuit Court of Covington County err in finding that the acts alleged in the Complaint fell outside the arbitration agreement?**

The Circuit Court properly found that the issues in this action fell outside the arbitration agreement which the Bank seeks to have enforced. At the heart of this litigation is the fact that the Bank foreclosed on a Deed of Trust, and took possession of a house and three (3) acres of land which were not included in any Deed of Trust. The Bank knew, or should have known that the property referred to as the three (3) acres were not transferred by the Harveys to the Trustee in the Deed of Trust, to hold in trust for the benefit of Community Bank. Without this conveyance of the Deed of Trust of the three (3) acres, the Bank had no interest in the house and three (3) acres of land.

The Bank negligently, and/or intentionally and/or wrongfully assumed that said property was included in the foreclosure sale with the 36.52 acres to which it did have a valid security interest via the Deeds of Trust. The Bank has throughout this litigation intentionally denied the truth regarding the three (3) acres or it has been under the mistaken belief that it perfected its security interest in the three(3) acres upon which the house is located. It was so convinced of this fact that it through, acts, omissions, fraudulent misrepresentation, duress, and/or coercion ultimately convinced the Harveys that they had in fact conveyed "in trust" the three (3) acres as security in the Deeds of Trust. The Bank was in a better position to understand and/or read the legal "meets and bounds" description in the Deeds of Trust and understand the legal terms of the Deeds of Trust than were the Harveys.

Any arbitration agreements upon which the Bank relies only covers the property which was described in the Deeds of Trust prepared by the Bank. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Rogers-Dabbs, at ¶ 15. The Bank did not "foreclose" on the promissory notes, commercial security agreements or other documents which the Bank references as important documents which may have contained arbitration clauses. Rather, the Bank, via a substituted trustee, foreclosed on a Deed of Trust (which had no arbitration clause) and wrongfully took possession of the home without any authority granted in the Deeds of Trust. (Substituted Trustee's Deed is Exhibit B to the Complaint)

The other documents relied upon by the Bank, including the arbitration clause, did not give the Bank the right to have a Substituted Trustee publish its notice of sale in the newspaper, conduct an auction of the property, and to ultimately sale the three (3) acres and home situated thereon to the Bank. The only documents which provided the Bank with the authority of possession were in fact the Deeds of Trust, which do not describe the house and three (3) acres, nor make any reference to requiring disputes relating to the Deeds of Trust to be bound by arbitration.

Interestingly, the Deed of Trust Addendum on the 2003 Deed of Trust states, "**any clause**

in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument.” (Exhibit 2 p.10) It was the Bank who sought SBA involvement in this loan. (T.34) This one provision which the Bank adopted by first seeking SBA approval and/or security on the loan, and then placing this statement as a part of the Deed of Trust in of itself is sufficient to void any alleged arbitration agreement as to this dispute.

Although the Bank continually asserts that the Harveys “intended” to pledge the home, the actual Deed of Trust on page 6 of 6 clearly indicates that the property “will be used principally for *agricultural or farming* purposes and that Grantor is ...allowed to own agricultural land as provided by law.” (Exhibit 2 p.9) As such, a reasonable person would conclude that the purpose was for agricultural not residential purposes. Under “Personal Property” on that same page it indicates that it includes all farm products, inventory, equipment, etc., but then specifically excludes the property described as “household goods”. The house and three (3) acres in question were therefore obviously not part of this Deed of Trust, and therefore outside the scope of the arbitration agreement that the Bank seeks to enforce.

The Bank did not “foreclose” on the promissory notes, insurance company notes, etc. as to the Harveys from the Bank concerning said insurance, financial statements, or commercial security agreements which the Bank references as important documents in its brief filed before the hearing before the Circuit Court. Rather, the Bank, via a substituted trustee, foreclosed on the 36.52 acres and while they were at it, simply went ahead and took possession of the house and three (3) without any authority whatsoever as said property was not a part of the Deeds of Trust, Notice of Sale, or the Substituted Trustee’s Deed. (Exhibits 1&2; The Notice of Sale is Exhibit A to the Complaint) Throughout the transcript of the hearing and in the Brief of the Appellants, the Bank refers to the house and three(3) acres that the Harveys “intended to convey” in the Deeds of Trust. With this regard, the court must look to the four corners of the Deed of Trust to determine what

property was actually secured by the Deeds of Trust. The Bank, was in a better position to determine what property would be secured by the Deeds of Trust, but failed to properly secure all property to which it wanted a security interest. The Bank also argues throughout its brief, as it did before the Circuit Court, matters outside the Deeds of Trust and/or any applicable arbitration agreement as evidence why the Court should order arbitration. The Bank argues that the bankruptcy proceedings and/or other alleged actions by the Harveys support its Motion to Compel Arbitration. These arguments *may* be relevant as defenses and/or the Bank's attempt at decreasing its liability but they have no significance nor should those arguments have any bearing on the arbitration clause which the Bank now seeks to enforce.

The Circuit Court properly applied the principals restated in Rogers-Dabbs, which upheld the long standing two prong test with regards to arbitration agreements. This Court has stated time and time again that,

In order to determine the "validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry." East Ford, 826 So.2d at 713. Under the first prong, the court should determine whether the parties have agreed to arbitrate the dispute. *Id.* In order to determine if the parties have agreed to arbitrate the dispute, two considerations are taken into account: "(1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement." *Id.* If the court determines that the parties did in fact agree to arbitrate their dispute, the second prong is applied. The United States Supreme Court has instructed that the second prong is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.

Id. at ¶12.

As to the three(3) acres which were wrongfully seized under the guise of a valid foreclosure, there is no valid arbitration agreement. The Deeds of Trust contain no arbitration clauses, and even if they did, or the Court somehow finds that the arbitration clause in any of the loan documents applies to the Deeds of Trust, the three (3) acres and house are not part of the legal description which would be covered by the arbitration clause. The second consideration of the first prong clearly applies. Because the three (3) acres were never part of the Deeds of Trust, no matter how hard the

Bank may try to argue otherwise, this property was not covered by the arbitration agreement as it was not part of the actual loan evidenced by the description on the Deeds of Trust. The “dispute” in this action is that the Bank wrongfully without authority took possession of the Plaintiff’s home and three acres under the guise of a foreclosure sale. The Bank argues that it referenced the house in other “loan documents” and therefore it is covered by the arbitration agreement, and/or the Harveys’ intended to put the house up as collateral. However, it is the Bank’s responsibility to ensure that it secures its interests. Further, this argument does not take into account other possibilities which may have existed from the time the “loan documents” were prepared to the time when the Deed of Trust was executed. Nevertheless, the issue here is that the three(3) acres were not on the Deed of Trust, and was not actually part of the foreclosure, but the Bank through its superior position, influenced and/or misled the Harveys into believing that it had a perfected interest in the home and three(3) acres of land. This Court has correctly recognized and upheld the principal that, “[a]mbiguities in a contract are to be construed against the party who drafted the contract.” Union Planters Bank, National Association v. Rogers, 912 So.2d 116, 119 (Miss. 2005). Furthermore, it is important to remember that the Addendum on the 2003 Deed of Trust states, “**any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument.**” (Exhibit 2, p. 10)

When a Bank takes a Deed of Trust on property and it was later discovered that the property was not accurately described in the Deed of Trust, or that it was in fact another person’s property the Bank has failed to properly secure the real property as collateral. Clearly an error such as this prevents the lending institution from taking possession of the “wrong” property. Now, if the property in question was not part of the Deed of Trust there is no legitimate way the omitted property should be subject to an arbitration agreement. Mr. Harvey testified that he did not give the bank the description of the land or any surveys or paperwork, but rather the bank obtained those

documents.(T. 32) At the hearing Mr. Harvey also testified as follows:

Q: On the Commercial Security Agreement, that's been marked as Exhibit 5, who prepared this document?

A: The Bank.

Q: Why did you sign it?

A: I had to have a loan.

Q. If you had not gotten the loan, what would have happened to your poultry business?

A. I would have lost it sooner.

Q. How do you know that?

A. Well, because Tyson won't give you a contract if you don't do what they want you to do.

Q. So it's-- Mr. Caves asked you questions about what happened after the foreclosure. I want to ask you why you contacted or had a lawyer contact the bank after the foreclosure?

A. Because the land description, the house and three acres was not in the foreclosure.

Q. What happened to cause you to contact a lawyer to contact the bank?

A. They come in there and threw a lot of my stuff out.

Q. What happened to the stuff that was thrown out of the house?

A. It got rained on and ruined. (T. 35-36)

On or about April 7, 2006, the Substituted Trustee conveyed the 36.52 acres to the Bank. This description does not contain the three (3) acres upon which the house is located. It has long been held in Mississippi common law that the land via foreclosure sale must be accurately described in the Deed of Trust, Notice of Sale, and ultimately in the Trustee's Deed. In Seal v. Anderson, 108 So. 2d 864, 867 (Miss. 1959), the Mississippi Supreme Court stated, "[t]he trustee was without authority to convey by his deed to the purchaser any land that was not described in the deed of trust and in the notice of sale." Applying relevant case law, the Substituted Trustee in this action was

So.2d 417, ¶ 12, ¶ 21. In *Greater Canton*, we also determined that comity required us to defer to the Fifth Circuit's decision in related litigation concerning the separate motion to compel arbitration filed by Ford Motor Company. Greater Canton, 948 So.2d 417, ¶¶ 22-26. See *Ford Motor Co. v. Ables*, 207 F.Appx. 443, 2006 U.S.App. LEXIS 29347 (5th Cir.2006). Thus, *Greater Canton* is clearly distinguishable from today's case. We have consistently followed the principle that "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss.2002) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)). We wholeheartedly stand behind that proposition today. However, today's case does not involve fraud in the inducement of the arbitration agreement; therefore, the arbitration agreement is valid and enforceable. Blakeney's claim of fraud in the underlying suit is civil fraud outside the scope of the arbitration agreement. Our holding in today's case, in effect, upholds the arbitration agreement as a valid agreement, but determines that Blakeney's claims are outside the scope of the arbitration agreement. Thus, we are finding that Blakeney is not obligated to arbitrate Counts II, III, IV or V. To illustrate this point, the trial judge granted Defendant's Motion to Compel Arbitration as to Count I (breach of warranty), thereby revealing that the arbitration agreement was still in force. By no means are we invalidating the arbitration agreement on the account of Blakeney asserting fraud; we are excluding from arbitration the claims which Blakeney asserts are outside the scope of this particular arbitration agreement; thus, failing to meet the first prong of *East Ford*.

Clearly the test set forth in East Ford regarding the scope of the arbitration clause must be performed by a court of competent jurisdiction. Whether a party is bound by an arbitration agreement is generally considered an issue for the *courts*, not the arbitrator, unless the parties clearly and unmistakably provide otherwise. AT&T Technologies, v. Communications Workers of America, 475 U.S. 643, 649 (1986). The Bank asserts that its arbitration clause provides that "any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator...." However, the *courts* must still apply the two prong test, and to require a party to submit to the arbitrator claims which are not covered by the arbitration clause. The result of having an arbitrator make this determination, as the Appellants herein argue, in effect voids East Ford and its progeny relating to the two pronged test. Just as the party seeking to enforce an arbitration clause has the right to file a motion to compel arbitration before a court of competent jurisdiction, and appeal that decision if

it so chooses, the other party should also have a right of judicial review, prior to submitting to an arbitrator the ultimate conclusion of whether or not the arbitrator will find that he has authority over the controversy. Nevertheless, the acts alleged fall outside the scope of any arbitration clause the Bank now seeks to enforce.

**ISSUE 3: Did the Circuit Court of Covington County err in finding that the arbitration clause was unconscionable?**

The Circuit Court, in rendering its decision first found that the controversy fell outside the arbitration agreement, thereby determining that the second consideration under the first prong of test was not met. The trial court could have stopped its analysis there, but went on to find that the Harveys were under economic duress at the time the loan documents were executed and/or that the lack of voluntariness rendered the arbitration clause unconscionable. “The usual defenses to a contract such as fraud, **unconscionability**, duress, and **lack of consideration** may be applied to invalidate an arbitration agreement, so long as the law under which the provision is invalidated is not applicable only to arbitration provisions.” East Ford, Inc., at 714 (¶12)

“Unconscionability has been defined as absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.” East Ford, Inc., at 715 (¶17), *citing* Entergy Miss., Inc., v. Burdette Gin Co., 726 So.2d 1202 (Miss. 1998). “The courts have recognized two types of unconscionability, procedural and substantive.” Id. at 714 (¶12).

**a. Procedural Unconscionability**

Procedural unconscionability is unfairness in the way the contract was made or the manner into which it was entered. Procedural Unconscionability may be proved by showing lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power or the parties, and/or a lack of opportunity to study

the contract and inquire about the contract terms. East Ford, at 714, York v. Georgia Pacific Corp., 585 F. Supp. 1265, 1278 (N.D. Miss. 1984). This type of unconscionability is most strongly shown in contract of adhesion presented to a party on a take it or leave it basis. Regarding contracts of adhesion this Court has stated,

A contract of adhesion has been described as one that is drafted unilaterally by the dominant party and then presented on a take-it-or-leave-it basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small print.

Id., at 716 (¶20).

Although not addressed by the trial court, it is interesting to note that there was no separate consideration for this arbitration agreement. One may argue that the Bank's making of the loan was consideration for the entire agreement, however, this is not the case. When a bank lends money, it charges an interest rate and the parties each benefit from the arrangement. The Bank profits from the interest charges, and the customer is able to use the funds to make purchases that they may not otherwise be able to make at that time. The elements of a valid contract are, "(1) two or more contracting parties, (2) **consideration**, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation." Rotenberry v. Hooker, 864 So.2d 266 (Miss. 2004) (citations omitted).

There is no consideration for the Harveys waiving their constitutional right to present any disputes to a court of competent jurisdiction. The Bank certainly did not give up anything, but rather it benefitted from this unilateral arbitration clause. The Bank was not required to arbitrate the force-placed insurance, the foreclosure, or ultimate possession of the three(3) acres and house as it did not waive its right to do so. There was no reduction of the payments, or reduction in the interest rate to induce the Harveys into entering into the arbitration agreement, but rather it was a take it or leave it deal.

### **b. Substantive Unconscionability**

Substantive unconscionability deals with the actual terms of the contract. Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive. East Ford at 714(¶13), citing York, at 1278. “Substantively unconscionable clauses have been held to include *waiver* of choice of forum and *waiver* of certain remedies.” Id., at (¶14) In this case, the Harveys’ *waiver* was of their right to seek adjudication of their claims by a court. This Court correctly addressed waiver in Union Planters Bank, National Association, at 119 ¶ 8 when it held,

Submitting to arbitration means giving up the right to file a lawsuit in a court of competent jurisdiction. *Waiving* that right requires more than implied consent: *Waiver* presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish a *waiver*, there must be shown an act or omission on the part of the one charged with the *waiver* fairly evidencing an intention permanently to surrender the right alleged to have been *waived*. (Citing Ewing v. Adams, 573 So.2d 1364, 1369 (Miss. 1990)).

This Court has defined an unconscionable contract as, “...one such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other....” East Ford Inc., at 715 (¶17), (citations omitted). While it may not be said that no one in his right mind would ever agree to arbitrate, all be it a subjective argument, certainly the waiving of one’s right of access to the courts must be obtained by fairness and equal opportunity. The Bank required the arbitration clause to protect its interests at the expense of the Harveys. Certainly the trial court is correct in its assertion that the requirement of an arbitrator to decide if the subject issue is arbitratable is calculated to circumvent judicial review and has a color of unconscionability. The Court also considered the fact that the Harveys were left with no choice and as such the decision by the Bank to force the arbitration clause upon them resulted in a lack of voluntariness as they were under economic duress. The trial court properly found that the dispute was not covered by the arbitration agreement, but chose to further address the unconscionable nature

of the arbitration language and to take notice of the circumstances surrounding the events of this case. Therefore, the Circuit Court's ruling was proper under the circumstances of this case.

Furthermore, as this court is well aware, it may, "on appeal affirm the decision of the trial court where the right result is reached, even though we may disagree with the trial court's reasons for reaching that result." Pass Termite and Pest Control, Inc., v. Walker, 904 So.2d 1030, 1032 (Miss. 2004). Nevertheless, the decision of the trial court was proper and the ruling should be affirmed.

### CONCLUSION

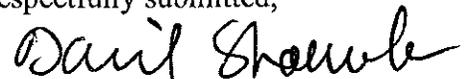
The Circuit Court of Covington County properly applied the principles of Robers-Dabbs Chevrolet-Hummer v. Blakeney, 957 So.2d 170 (Miss. 2007) in denying the Motion to Compel Arbitration. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id. at ¶ 15. Further, the Court properly applied the two prong test set forth in East Ford Inc., in denying the motion to compel arbitration. Regardless of whether there is a valid arbitration agreement under the first consideration of the first prong, the second consideration that the dispute falls outside the scope of the arbitration clause is met in this case. The Bank did not have authority under the Deed of Trust on which it foreclosed, to force-place insurance on the home and three acres, nor did it have the right to enter the home and forcibly remove the Harveys' personal property and allow it to be damaged. These actions are not within the arbitration agreement scope as the trial court properly found applying the principles of Rogers-Dabbs. Construing ambiguities within the documents against the Bank (its maker), it is clear that there is no arbitration clause in the Deed of Trust and in fact it states, "any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument."

The Circuit Court's decision was also well-founded with regard to finding that arbitration

was not the proper forum to determine if the issues in this action were arbitrable. According to the East Ford, Inc., it is the courts which should apply the two prong test not an arbitrator. Denying parties access to judicial review of an arbitration clause is a dangerous business that this Court should find is against public policy. In most cases, the trial courts will find that the arbitration clause applies to the dispute and grant the order compelling arbitration. In those instances in which it does not, there is an avenue of appellate review for the party seeking to compel arbitration. However, tying the court's hands so as to prevent judicial review, but giving an arbitrator who, may arbitrate numerous cases for the party seeking to enforce the arbitration agreement that ultimate authority, opens itself up to possible improprieties at worst, and at best denial of basic rights upon which America was founded. Clearly, the principals discussed in footnote 9 of the Rogers-Dabbs decision apply squarely to this action, and therefore the Circuit Court's ruling should be affirmed.

Finally, in the event this Court determines that there was a valid arbitration agreement, and the dispute falls within the scope of said agreement, the ruling of the Circuit Court should still be affirmed as the Harveys were under economic duress, which resulted in their lack of voluntariness. Further, the Bank offered no consideration nor was any consideration given for the Harveys' waiver of rights to enter into an arbitration agreement. Without consideration, there can be no agreement under the basic principals of contract formation. As such, the Appellees herein respectfully request that this Court affirm the Order of the Circuit Court denying the Appellants' motion to compel arbitration.

Respectfully submitted,



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DAVID SHOEMAKE  
ATTORNEY FOR THE APPELLEES

**CERTIFICATE OF SERVICE**

I, David Shoemake, attorney of record for the Appellant, do hereby certify that I have this day, mailed, via U.S. Postal Service, postage prepaid, a true and correct copy of the Appellee's Brief, to the following persons:

Honorable Robert G. Evans  
Circuit Judge for the 13<sup>th</sup> Judicial District  
P.O. Box 545  
Raleigh, MS 398153

and

Terry L. Caves, Esq.  
Jerry D. Sharp, Esq.  
Caves & Caves, PLLC  
P.O. Box 167  
Laurel, MS 39441-0167

This the 17<sup>th</sup> day of November, 2008.



---

David Shoemake  
ATTORNEY FOR APPELLEES

DAVID SHOEMAKE, MSB# 6773  
SHOEMAKE & BLACKLEDGE, PLLC  
Post Office Box 1678  
Collins, Mississippi 39428  
Telephone No. 601-765-8284  
Facsimile No. 601-765-8282

# 8550632 453

This document was prepared by .....COMMUNITY BANK, ELLISVILLE, MISSISSIPPI.....  
.....P. O. BOX 265, LAUREL, MS 39441.....(6.01) 642-5770..... (name, address, phone number)

----- State of Mississippi ----- Space Above This Line For Recording Data -----

**REAL ESTATE DEED OF TRUST**

This Security Instrument secures a line of credit.

9/26/2001

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is .....  
and the parties, their addresses and tax identification numbers, if required, are as follows:

GRANTOR: WILLIAM TONY HARVEY  
ELLEN T HARVEY  
194 HORSHOE RD  
MT OLIVE MS 39119

If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

TRUSTEE: WAYNE DAVIS

LENDER: COMMUNITY BANK,  
ELLISVILLE, MISSISSIPPI  
P. O. BOX 250  
ELLISVILLE, MS 39437

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains and sells to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

INDEXING: SE1/4 OF NW1/4, SECTION 9 TOWNSHIP 9 NORTH,  
RANGE 16 WEST COVINGTON COUNTY, MISSISSIPPI.  
SEE ATTACHED FOR COMPLETE LEGAL DESCRIPTION

The property is located in ....COVINGTON..... at .....

194 HORSHOE RD..... MT OLIVE..... Mississippi 39119  
(Address) (City) (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, all water and riparian rights, wells, ditches, reservoirs, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed \$ .....335,000.00..... This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:  
A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (When referencing the debts below it is suggested that you include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)

on promissory note made to WILLIAM TONY HARVEY  
and ELLEN T HARVEY  
maturing on 9/26/11 in the amount of \$335,000.00

CERTIFIED A TRUE COPY of original instrument now on record in my office.  
This the 26 day of Sept 2001  
Jimmie B Baggett  
JIMMIE BAGGETT, CHANCERY CLERK  
Covington County, Mississippi



EXHIBIT  
1  
PENGAD 800-631-8989

- B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Security Instrument whether or not this Security Instrument is specifically referenced and whether or not such future advances or future obligations are incurred for any purpose that was related or unrelated to the purpose of the debt. If more than one person signs this Security Instrument, each Grantor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.
- C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.
- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

This Security Instrument will not secure any other debt if Lender fails to give any required notice of the right of rescission.

- 5. **PAYMENTS.** Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.
- 6. **WARRANTY OF TITLE.** Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, bargain and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.
- 7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees:
  - A. To make all payments when due and to perform or comply with all covenants.
  - B. To promptly deliver to Lender any notices that Grantor receives from the holder.
  - C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.
- 8. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.
- 9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.
- 10. **TRANSFER OF AN INTEREST IN THE GRANTOR.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:
  - A. A beneficial interest in Grantor is sold or transferred.
  - B. There is a change in either the identity or number of members of a partnership or similar entity.
  - C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.
 However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.
- 11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Grantor makes to Lender the following warranties and representations which shall continue as long as the Secured Debt remains outstanding:
  - A. Grantor is duly organized and validly existing in the Grantor's state of incorporation or organization. Grantor is in good standing in all states in which Grantor transacts business. Grantor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Grantor operates.
  - B. The execution, delivery and performance of this Security Instrument by Grantor and the obligation evidenced by the Secured Debt are within the power of Grantor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
  - C. Other than previously disclosed in writing to Lender, Grantor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Grantor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

- 12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor shall not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such

replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Grantor shall not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

- 13. AUTHORITY TO PERFORM.** If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.
- 14. ASSIGNMENT OF LEASES AND RENTS.** Grantor irrevocably grants, bargains, and assigns to Trustee, in trust for the benefit of Lender as additional security all the right, title, and interest in the following (all referred to as Property).
- A. Existing or future leases, subleases, licenses, guaranties, and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications, or replacements (all referred to as Leases).
  - B. Rents, issues, and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims, which Assignor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property.

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Grantor may collect, receive, enjoy, and use the Rents so long as Grantor is not in default. Grantor will not collect in advance any Rents due in future lease periods, unless Grantor first obtains Lender's written consent. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting, and preserving the Property, and other necessary expenses.

Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Grantor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses, and landlords and tenants. Grantor, at its sole cost and expense, will keep, observe, and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Grantor or any party to the Lease defaults or fails to observe any applicable law, Grantor will promptly notify Lender. If Grantor neglects or refuses to enforce compliance with the terms of the Leases, then Lender or Trustee may, at Lender's option, enforce compliance. Grantor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so required) without Lender's consent. Grantor will not assign, compromise, subordinate, or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect, or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Grantor will indemnify Lender and hold Lender harmless for all liability, loss, or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

- 15. LEASEHOLDS; CONDOMINIUMS; TIME-SHARES; PLANNED UNIT DEVELOPMENTS.** Grantor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium, time-share or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

- 16. DEFAULT.** Grantor will be in default if any of the following occur:
- A. Any party obligated on the Secured Debt fails to make payment when due;
  - B. A breach of any term or covenant in this Security Instrument or any other document executed for the purpose of creating, securing or guarantying the Secured Debt;
  - C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Grantor or any person or entity obligated on the Secured Debt;
  - D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Grantor or any other person or entity obligated on the Secured Debt;
  - E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
  - F. A material adverse change in Grantor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
  - G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

17. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure, or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents, including without limitation, the power to sell the Property.

If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of the Lender, advertise and sell the Property as a whole or in separate parcels as Trustee deems best, at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the Property to be sold as required by Mississippi Code §89-1-55, in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.

All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

18. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Security Instrument. Grantor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the highest interest rate in effect as provided in the terms of the Secured Debt. Grantor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This Security Instrument shall remain in effect until released. Grantor agrees to pay for any recordation costs of such release.

19. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.

Grantor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
- B. Except as previously disclosed and acknowledged in writing to Lender, Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
- C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.
- D. Except as previously disclosed and acknowledged in writing to Lender, Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
- E. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
- F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
- G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
- H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.
- I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
- J. Lender has the right, but not the obligation, to perform any of Grantor's obligations under this section at Grantor's expense.

**NAME AFFIDAVIT**

STATE OF MISSISSIPPI

COUNTY OF JONES

PERSONALLY CAME AND APPEARED BEFORE ME, THE UNDERSIGNED  
AUTHORITY AND FOR THE JURISDICTION AFORESAID, THE UNDERSIGNED,  
WILLIAM T. HARVEY, WHO AFTER FIRST BEING DULY SWORN ON OATH  
STATES THAT HE IS ONE AND THE SAME PERSON AS  
WILLIAM TONY HARVEY, AS SET FORTH ON ALL LOAN DOCUMENTS.

WITNESS MY SIGNATURE THIS 26 DAY OF September, 2001.

*William Tony Harvey*  
WILLIAM TONY HARVEY

*Carolyn W Bryant*  
NOTARY PUBLIC  
MISSISSIPPI STATEWIDE NOTARY PUBLIC  
MY COMMISSION EXPIRES NOV. 20, 2004

MY COMMISSION EXPIRES

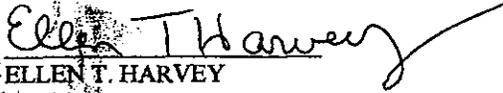
**NAME AFFIDAVIT**

STATE OF MISSISSIPPI

COUNTY OF JONES

PERSONALLY CAME AND APPEARED BEFORE ME, THE UNDERSIGNED  
AUTHORITY AND FOR THE JURISDICTION AFORESAID, THE UNDERSIGNED,  
ELLEN TANNER HARVEY, WHO AFTER FIRST BEING DULY SWORN ON OATH  
STATES THAT HE IS ONE AND THE SAME PERSON AS  
ELLEN T. HARVEY, AS SET FORTH ON ALL LOAN DOCUMENTS.

WITNESS MY SIGNATURE THIS 26 DAY OF Sept, 2001.

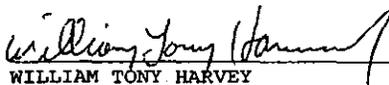
  
ELLEN T. HARVEY

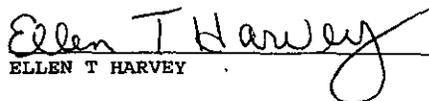
  
NOTARY PUBLIC

MISSISSIPPI STATEWIDE NOTARY PUBLIC  
MY COMMISSION EXPIRES NOV 20, 2004  
MY COMMISSION EXPIRES

ATTACHED TO AND FORMING PART DEED OF TRUST  
DATED 9/26/01 IN THE AMOUNT OF 335000.00  
AND IN THE NAME OF WILLIAM TONY HARVEY  
ELLEN T HARVEY

BORROWER FURTHER AGREES THAT THE LOAN(S) SECURED BY THIS INSTRUMENT  
WILL BE IN DEFAULT SHOULD ANY LOAN PROCEEDS BE USED FOR A PURPOSE THAT  
WILL CONTRIBUTE TO EXCESSIVE EROSION OF HIGHLY ERODIABLE LAND OR TO  
THE CONVERSION OF WETLAND TO PRODUCE OR TO MAKE POSSIBLE THE  
PRODUCTION OF AN AGRICULTURAL COMMODITY, AS FURTHER EXPLAINED IN 7  
CFR PART 1940, SUBPART G, EXHIBIT M.

  
WILLIAM TONY HARVEY

  
ELLEN T HARVEY

29. U.C.C. PROVISIONS. If checked, the following are applicable to, but do not limit, this Security Instrument:

- Construction Loan. This Security Instrument secures an obligation incurred for the construction of an improvement on the Property.
- Fixture Filing. Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property.
- Crops; Timber; Minerals; Rents, Issues, and Profits. Grantor grants to Lender a security interest in all crops, timber, and minerals located on the Property as well as all rents, issues, and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").
- Personal Property. Grantor grants to Lender a security interest in all personal property located on or connected with the Property, including all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Grantor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property (all of which shall also be included in the term "Property"). The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.
- Filing As Financing Statement. Grantor agrees and acknowledges that this Security Instrument also suffices as a financing statement and any carbon, photographic or other reproduction may be filed of record for purposes of Article 9 of the Uniform Commercial Code.

30. OTHER TERMS. If checked, the following are applicable to this Security Instrument:

- Line of Credit. The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released pursuant to Miss. Code Ann. § 89-5-21.
- Agricultural Property. Grantor covenants and warrants that the Property will be used principally for agricultural or farming purposes and that Grantor is an individual or entity allowed to own agricultural land as specified by law.
- Renewal and Extension. This Deed of Trust is given and taken in renewal and extension of a deed of trust dated the ..... day of ..... and recorded in Book ..... page ..... deed records ..... County, Mississippi, and is in no way intended to void the said deed of trust or impair the security thereof.
- Additional Terms.

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

Entity Name: ..... Entity Name: .....

*William Tony Harvey*                      *Ellen T Harvey*  
 (Signature) WILLIAM TONY HARVEY                      (Signature) ELLEN T HARVEY  
 (Date) .....                      (Date) .....

ACKNOWLEDGMENT:

STATE OF MISSISSIPPI ..... COUNTY OF JONES ..... ) ss.  
 Personally appeared before me, the undersigned authority in and for the said county and state, on this  
 26TH ..... day of SEPTEMBER, 2001, within my jurisdiction, the within named by  
 WILLIAM TONY HARVEY, ELLEN T HARVEY ..... who  
 acknowledged that he/she/they executed the above and foregoing instrument.  
 My commission expires: 0/00/0000



*Carolyn W Bryant*  
(Notary Public)

STATE OF ..... COUNTY OF ..... ) ss.  
 Personally appeared before me, the undersigned authority in and for the said county and state, on this  
 ..... day of ..... within my jurisdiction, the within named  
 ..... who  
 acknowledged to me that he/she is .....  
 My commission expires:

(Seal) ..... (Notary Public)

- K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Grantor will provide Lender with collateral of at least equal value to the Property secured by this Security Instrument without prejudice to any of Lender's rights under this Security Instrument.
- L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.
20. **CONDEMNATION.** Grantor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
21. **INSURANCE.** Grantor agrees to maintain insurance as follows:
- A. Grantor shall keep the Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.
- All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.
- Unless otherwise agreed in writing, all insurance proceeds shall be applied to restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of scheduled payment nor change the amount of any payments. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.
- B. Grantor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.
- C. Grantor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.
22. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and Lender's lien status on the Property.
24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Grantor signs this Security Instrument but does not sign an evidence of debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Grantor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Grantor's consent. Such a change will not release Grantor from the terms of this Security Instrument. The duties and benefits of this Security Instrument shall bind and benefit the heirs, successors and assigns of Grantor and Lender.
25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.
26. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee without any other formality than the designation in writing. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law.
27. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.
28. **WAIVER.** Except to the extent prohibited by law, Grantor waives all appraisal rights relating to the Property.

EXHIBIT A

Commence at the Southwest corner of Section 9, Township 9 North, Range 16 West, Covington County, Mississippi, and run North 2636.88 feet; Thence East 1313.15 feet to the Southwest corner of SE 1/4 of NW 1/4 and the Point of Beginning; Thence run North 919.69 feet to a point on the South R.O.W. line of a public road; Thence following along South R.O.W. line of said public road run N 44° 01' 23" E 164.71 feet to a point of curve having a radius of 433.40 feet; Degree of curve 13.1312 Degrees; Delta of 27.5336 Degrees; Thence along said curve an arc distance of 210.99 feet to point of tangent of said curve; Thence run N 71° 54' 59" E 163.44 feet to point of curve having a radius of 1511.85 feet; Degree of curve 3.4723 Degrees; Delta of 13.4247 Degrees; Thence along said curve an arc distance of 361.84 feet to point of tangent of said curve; Thence run N 85° 37' 46" E 514.56 feet to the East line of said SE 1/4 of NW 1/4; Thence run S 00° 02' 25" W 1309.15 feet to the Southeast corner of said SE 1/4 of NW 1/4; Thence run West 1313.15 feet back to the Point of Beginning - Containing 36.52 acres, more or less, and being in the SE 1/4 of NW 1/4 of Section 9, Township 9 North, Range 16 West, Covington County, Mississippi.

ATTACHED TO AND FORMING PART OF THE DEED OF TRUST DATED SEPTEMBER 26, 2001, IN THE NAMES OF WILLIAM TONY HARVEY AND ELLEN T. HARVEY, IN THE AMOUNT OF \$335,000.00.

SIGNED FOR THE PURPOSE OF IDENTIFICATION

*William Tony Harvey*  
WILLIAM TONY HARVEY

*Ellen T. Harvey*  
ELLEN T. HARVEY



STATE OF MISSISSIPPI  
COUNTY OF COVINGTON  
I certify that this instrument was filed for record at 11:45 AM  
on the 1 day of October, 2001  
at my office in Collins, Mississippi, and was recorded in  
Book 508 Page 453  
this the 1 day of October, A. D. 2001.  
ANN F. BULLOCK, CHANCERY CLERK  
BY [Signature] D.C.

This document was prepared by ...COMMUNITY BANK, ELLISVILLE, MISSISSIPPI...  
P.O. BOX 250... ELLISVILLE, MS, 39437... (name, address, phone number)  
(601) 477-9361

State of Mississippi Space Above This Line For Recording Data

**REAL ESTATE DEED OF TRUST**

This Security Instrument secures a line of credit.

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is ...JULY 18, 2003...  
and the parties, their addresses and tax identification numbers, if required, are as follows:

**GRANTOR:** WILLIAM TONY HARVEY  
ELLEN T HARVEY  
194 HORSESHOE RD  
MT OLIVE MS 39119

If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

**TRUSTEE:** Billy M Bounds

**FOR SUBSTITUTION OF TRUSTEE**  
SAB Book 980 Page 508  
THIS the 7 day of March 2006  
JIMMIE BAGGETT, CHANCERY CLERK  
BY *[Signature]* D.C.

**LENDER:** COMMUNITY BANK, ELLISVILLE, MISSISSIPPI  
P.O. BOX 250  
ELLISVILLE, MS 39437

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains and sells to Trustee, in trust for the benefit of Lender, with power of sale, the following described property: \*SEE EXHIBIT(S) ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE

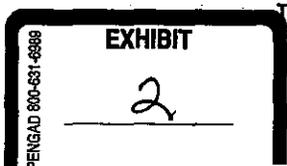
INDEXING INSTRUCTIONS  
SE1/4 OF NE1/4 SECTION 9, TOWNSHIP 9 NORTH, RANGE 16 WEST, COVINGTON  
COUNTY, MISSISSIPPI.

The property is located in ...COVINGTON... at ...  
(County)  
...194 HORSESHOE RD... MT OLIVE... Mississippi 391190000...  
(Address) (City) (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers, all water and riparian rights, wells, ditches, reservoirs, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed \$120,000.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:  
A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (When referencing the debts below it is suggested that you include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)  
Note Dated JULY 18, 2003 In The Amount Of \$120,000.00  
With a Maturity Date Of JULY 18, 2013  
Said Loan In The Name(s) Of WILLIAM TONY HARVEY  
And ELLEN T HARVEY D/B/A HARVEY POULTRY FARM  
*ETL & HT #*



**CERTIFIED A TRUE COPY** of original instrument now on record in my office.

This the 10 day of Nov 2006

*[Signature]*  
JIMMIE BAGGETT, CHANCERY CLERK  
Covington County, Mississippi

- B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt existing now or executed after this Security Instrument whether or not this Security Instrument is specifically referenced and whether or not such future advances or future obligations are incurred for any purpose that was related or unrelated to the purpose of the debt. If more than one person signs this Security Instrument, each Grantor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.
- C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.
- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

This Security Instrument will not secure any other debt if Lender fails to give any required notice of the right of rescission.

- 5. **PAYMENTS.** Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.
- 6. **WARRANTY OF TITLE.** Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, bargain and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.
- 7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees:
  - A. To make all payments when due and to perform or comply with all covenants.
  - B. To promptly deliver to Lender any notices that Grantor receives from the holder.
  - C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.
- 8. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.
- 9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.
- 10. **TRANSFER OF AN INTEREST IN THE GRANTOR.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:
  - A. A beneficial interest in Grantor is sold or transferred.
  - B. There is a change in either the identity or number of members of a partnership or similar entity.
  - C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.
 However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.
- 11. **ENTITY WARRANTIES AND REPRESENTATIONS.** If Grantor is an entity other than a natural person (such as a corporation or other organization), Grantor makes to Lender the following warranties and representations which shall continue as long as the Secured Debt remains outstanding:
  - A. Grantor is duly organized and validly existing in the Grantor's state of incorporation or organization. Grantor is in good standing in all states in which Grantor transacts business. Grantor has the power and authority to own the Property and to carry on its business as now being conducted and, as applicable, is qualified to do so in each state in which Grantor operates.
  - B. The execution, delivery and performance of this Security Instrument by Grantor and the obligation evidenced by the Secured Debt are within the power of Grantor, have been duly authorized, have received all necessary governmental approval, and will not violate any provision of law, or order of court or governmental agency.
  - C. Other than previously disclosed in writing to Lender, Grantor has not changed its name within the last ten years and has not used any other trade or fictitious name. Without Lender's prior written consent, Grantor does not and will not use any other name and will preserve its existing name, trade names and franchises until the Secured Debt is satisfied.

- 12. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor shall not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such

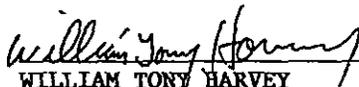
## EXHIBIT A

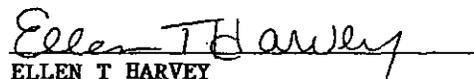
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ATTACHED TO AND FORMING PART OF THE DEED OF TRUST DATED JULY 18, 2003  
IN THE NAME OF WILLIAM TONY HARVEY AND ELLEN T HARVEY IN THE AMOUNT OF  
\$120,000.00

SIGNED FOR THE PURPOSE OF IDENTIFICATION

  
WILLIAM TONY HARVEY

  
ELLEN T HARVEY

NAME AFFIDAVIT

STATE OF MISSISSIPPI

COUNTY OF JONES

PERSONALLY CAME AND APPEARED BEFORE ME, THE UNDERSIGNED  
AUTHORITY AND FOR THE JURISDICTION AFORESAID, THE UNDERSIGNED,

ELLEN TANNER HARVEY & ELLEN L HARVEY WHO AFTER FIRST BEING DULY  
SWORN ON OATH STATES THAT HE IS ONE AND THE SAME PERSON AS  
ELLEN T HARVEY AS SET FORTH ON ALL LOAN DOCUMENTS.

WITNESS MY SIGNATURE THIS 18th DAY OF July, 2003.

*Ellen T. Harvey*  
ELLEN T HARVEY

*Carolyn W Bryant*  
NOTARY PUBLIC  
MISSISSIPPI STATEWIDE NOTARY PUBLIC  
MY COMMISSION EXPIRES NOV. 20, 2004

MY COMMISSION EXPIRES

NAME AFFIDAVIT

STATE OF MISSISSIPPI

COUNTY OF JONES

PERSONALLY CAME AND APPEARED BEFORE ME, THE UNDERSIGNED  
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WILLIAM T HARVEY WHO AFTER FIRST BEING DULY  
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WILLIAM TONY HARVEY AS SET FORTH ON ALL LOAN DOCUMENTS.

WITNESS MY SIGNATURE THIS 18 DAY OF July, 2003.

*William Tony Harvey*  
WILLIAM TONY HARVEY

*Cavelyn W Byrd*  
NOTARY PUBLIC

MISSISSIPPI STATEWIDE NOTARY PUBLIC  
MY COMMISSION EXPIRES NOV. 20, 2004

MY COMMISSION EXPIRES

replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Grantor shall not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

**13. AUTHORITY TO PERFORM.** If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

**14. ASSIGNMENT OF LEASES AND RENTS.** Grantor irrevocably grants, bargains, and assigns to Trustee, in trust for the benefit of Lender as additional security all the right, title, and interest in the following (all referred to as Property).

- A. Existing or future leases, subleases, licenses, guaranties, and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications, or replacements (all referred to as Leases).
- B. Rents, issues, and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims, which Assignor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property.

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Grantor may collect, receive, enjoy, and use the Rents so long as Grantor is not in default. Grantor will not collect in advance any Rents due in future lease periods, unless Grantor first obtains Lender's written consent. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting, and preserving the Property, and other necessary expenses.

Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment.

As long as this Assignment is in effect, Grantor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses, and landlords and tenants. Grantor, at its sole cost and expense, will keep, observe, and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Grantor or any party to the Lease defaults or fails to observe any applicable law, Grantor will promptly notify Lender. If Grantor neglects or refuses to enforce compliance with the terms of the Leases, then Lender or Trustee may, at Lender's option, enforce compliance. Grantor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so required) without Lender's consent. Grantor will not assign, compromise, subordinate, or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect, or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Grantor will indemnify Lender and hold Lender harmless for all liability, loss, or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

**15. LEASEHOLDS; CONDOMINIUMS; TIME-SHARES; PLANNED UNIT DEVELOPMENTS.** Grantor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium, time-share or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

**16. DEFAULT.** Grantor will be in default if any of the following occur:

- A. Any party obligated on the Secured Debt fails to make payment when due;
- B. A breach of any term or covenant in this Security Instrument or any other document executed for the purpose of creating, securing or guarantying the Secured Debt; -
- C. The making or furnishing of any verbal or written representation, statement or warranty to Lender that is false or incorrect in any material respect by Grantor or any person or entity obligated on the Secured Debt;
- D. The death, dissolution, or insolvency of, appointment of a receiver for, or application of any debtor relief law to, Grantor or any other person or entity obligated on the Secured Debt;
- E. A good faith belief by Lender at any time that Lender is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment is impaired or the value of the Property is impaired;
- F. A material adverse change in Grantor's business including ownership, management, and financial conditions, which Lender in its opinion believes impairs the value of the Property or repayment of the Secured Debt; or
- G. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart

**17. REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure, or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents, including without limitation, the power to sell the Property.

If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of the Lender, advertise and sell the Property as a whole or in separate parcels as Trustee deems best, at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the Property to be sold as required by Mississippi Code §89-1-55, in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.

All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

**18. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Security Instrument. Grantor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the highest interest rate in effect as provided in the terms of the Secured Debt. Grantor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This Security Instrument shall remain in effect until released. Grantor agrees to pay for any recordation costs of such release.

**19. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.

Grantor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
- B. Except as previously disclosed and acknowledged in writing to Lender, Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
- C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.
- D. Except as previously disclosed and acknowledged in writing to Lender, Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
- E. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
- F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
- G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
- H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.
- I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
- J. Lender has the right but not the obligation to perform any of Grantor's obligations under this section at Grantor's

- K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Grantor will provide Lender with collateral of at least equal value to the Property secured by this Security Instrument without prejudice to any of Lender's rights under this Security Instrument.
- L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section shall survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.
20. **CONDEMNATION.** Grantor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
21. **INSURANCE.** Grantor agrees to maintain insurance as follows:
- A. Grantor shall keep the Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.
- All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.
- Unless otherwise agreed in writing, all insurance proceeds shall be applied to restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of scheduled payment nor change the amount of any payments. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.
- B. Grantor agrees to maintain comprehensive general liability insurance naming Lender as an additional insured in an amount acceptable to Lender, insuring against claims arising from any accident or occurrence in or on the Property.
- C. Grantor agrees to maintain rental loss or business interruption insurance, as required by Lender, in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing), under a form of policy acceptable to Lender.
22. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
23. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and Lender's lien status on the Property.
24. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Grantor signs this Security Instrument but does not sign an evidence of debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Grantor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Grantor's consent. Such a change will not release Grantor from the terms of this Security Instrument. The duties and benefits of this Security Instrument shall bind and benefit the heirs, successors and assigns of Grantor and Lender.
25. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.
26. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee without any other formality than the designation in writing. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law.
27. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.

29. U.C.C. PROVISIONS. If checked, the following are applicable to, but do not limit, this Security Instrument:

- Construction Loan. This Security Instrument secures an obligation incurred for the construction of an improvement on the Property.
- Fixture Filing. Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property.
- Crops; Timber; Minerals; Rents, Issues, and Profits. Grantor grants to Lender a security interest in all crops, timber, and minerals located on the Property as well as all rents, issues, and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term "Property").
- Personal Property. Grantor grants to Lender a security interest in all personal property located on or connected with the Property, including all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Grantor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property (all of which shall also be included in the term "Property"). The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.
- Filing As Financing Statement. Grantor agrees and acknowledges that this Security Instrument also suffices as a financing statement and any carbon, photographic or other reproduction may be filed of record for purposes of Article 9 of the Uniform Commercial Code.

30. OTHER TERMS. If checked, the following are applicable to this Security Instrument:

- Line of Credit. The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released pursuant to Miss. Code Ann. § 89-5-21.
- Agricultural Property. Grantor covenants and warrants that the Property will be used principally for agricultural or farming purposes and that Grantor is an individual or entity allowed to own agricultural land as specified by law.
- Renewal and Extension. This Deed of Trust is given and taken in renewal and extension of a deed of trust dated the ..... day of ..... and recorded in Book ..... page ..... deed records ..... County, Mississippi, and is in no way intended to void the said deed of trust or impair the security thereof.
- Additional Terms.

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

Entity Name: .....

Entity Name: .....

*William Tony Harvey* 07/18/03  
(Signature) WILLIAM TONY HARVEY (Date)

*Ellen T. Harvey* 07/18/03  
(Signature) ELLEN T HARVEY (Date)

(Signature) (Date)

(Signature) (Date)

ACKNOWLEDGMENT:

STATE OF MISSISSIPPI, COUNTY OF JONES } ss.  
(Individual) Personally appeared before me, the undersigned authority in and for the said county and state, on this 18th day of JULY, 2003, within my jurisdiction, the within named by WILLIAM TONY HARVEY ELLEN T. HARVEY, who acknowledged that he/she/they executed the above and foregoing instrument.

My Commission expires: NOVEMBER 20, 2004

(Seal)

*Carolyn W. Bryant*  
(Notary Public)

STATE OF ....., COUNTY OF ..... } ss.  
(Business or Entity Acknowledgment) Personally appeared before me, the undersigned authority in and for the said county and state, on this ..... day of ....., within my jurisdiction, the within named ....., who acknowledged to me that he/she is .....

DEED OF TRUST ADDENDUM

This Exhibit is attached to and made a part of that Deed of Trust dated JULY 18, 2003, and further describes the SBA terms for a Deed of Trust further identified as:

WILLIAM TONY HARVEY  
ELLEN T HARVEY

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

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

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

<u>Initial</u>	<u>Initial</u>
WH	ETH



STATE OF MISSISSIPPI  
 COUNTY OF COVINGTON  
 I certify that this instrument was filed for record at 12:42 P.M.  
 on the 25 day of July, 2003.  
 at my office in Collins, Mississippi, and was recorded in  
 Book 542 Page 089  
 this the 25 day of July, A. D. 2003.  
 BY John F. Bullock CHANCERY CLERK  
John F. Bullock D.C.