

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NORTH AMERICAN SAVINGS
BANK, F.S.B.,

Plaintiff,

v.

MELVIN L. HENDERSON, LAVETTA
B. HENDERSON, HENDERSON
HOLDINGS COMPANY, LLC,
LEROY ROBERTS, JR., JACQUELINE
M. ROBERTS, PAUL A. VIETA,
INGRAM WALTERS, and ERIN
WALTERS,

Defendants.

Civil Action No. 5:08-CV-00601

COMPLAINT

Plaintiff North American Savings Bank, F.S.B. (“NASB”), by and through its undersigned counsel, for its Complaint against the above-named Defendants, alleges and states as follows:

PARTIES

1. North American Savings Bank, F.S.B. is a federally chartered bank with its principal place of business located in Grandview, Missouri. NASB is duly authorized to conduct business in the State of North Carolina.

2. Upon information and belief, Defendants Melvin L. Henderson and Lavetta B. Henderson (collectively the “Hendersons”) are citizens and residents of Fayetteville, North Carolina.

3. Defendant Henderson Holdings Company, LLC (“HHC”) is a limited liability company organized and existing under the laws of the State of North Carolina.

4. Upon information and belief, Defendants Leroy Roberts, Jr. and Jacqueline M. Roberts (collectively the “Roberts”) are citizens and residents of Durham, North Carolina.

5. Upon information and belief, Defendant Paul A. Vieta (“Vieta”) is a citizen and resident of Fayetteville, North Carolina.

6. Upon information and belief, Defendants Ingram Walters and Erin Walters (collectively the “Walters”) are citizens and residents of Monroe, North Carolina.

JURISDICTION

7. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1).

8. This Court has personal jurisdiction over all defendants.

9. Venue in this District is proper pursuant to 28 U.S.C. § 1391(a)(1).

FACTUAL ALLEGATIONS

NASB’s Loan to The Capitol Building, LLC

10. NASB is a federally chartered savings bank in the business of providing a variety of financial services to its customers, including commercial and construction loans.

11. On or about February 23, 2007, NASB and The Capitol Building, LLC (“Capitol Building”) entered into a Construction Loan Agreement (the “Agreement”) whereby NASB agreed to lend the principal amount of Four Million One Hundred Sixty Thousand Dollars (\$4,160,000.00) to Capitol Building for the construction and renovation of a multi-use building and for other improvements to property located in Fayetteville, North Carolina (the “Loan”). A copy of the Agreement is attached hereto as Exhibit A.

12. On or about February 23, 2007, Capitol Building executed and delivered a Promissory Note (the "Note") in the original principal amount of Four Million One Hundred Sixty Thousand Dollars (\$4,160,000.00) to NASB, a true and accurate copy of which is attached hereto as Exhibit B.

13. On or about February 23, 2007, Capitol Building also executed and delivered a Deed of Trust and Security Agreement (the "Deed of Trust") securing the Note, a true and accurate copy of which is attached hereto as Exhibit C.

14. Paragraph 1 of the Note obligates Capitol Building to make monthly payments to NASB. From April 1, 2007 through August 1, 2008, the monthly payments consisted of accrued interest only. Beginning on September 1, 2008, Capitol Building was obligated to make monthly payments of both principal and accrued interest.

15. Paragraph 9 of the Note provides for an automatic increase in the interest rate of the Note to the "Default Rate" upon the occurrence of an "Event of Default" (as that term is defined in the Note) by Capitol Building.

16. Paragraph 16 of the Note provides as follows:

Borrower shall obtain and deliver to Lender satisfactory evidence of, all necessary approvals, authorizations, consents, certificates, and other agreements or documents necessary to complete the development, construction and renovation of the Property and to obtain the local, state, and/or federal tax credit ("Tax Credits") in connection therewith, and shall complete the project. Borrower shall further provide Lender with such authorizations, approval, consents, pledges, assignments, certifications, and agreements necessary to ensure, to Lender's satisfaction in Lender's sole discretion, that at least \$1,300,000.00 of the capital contributions required to be made by the investors for Tax Credits upon completion of the project and issuance of the Tax Credits shall be applied to reduce the principal balance of this Note.

The Guarantors

17. HHC, the Hendersons, the Roberts, Vieta, and the Walters (collectively the “Guarantors”) agreed to execute Guaranty Agreements in order to induce NASB to make the Loan to Capitol Building.

18. In exchange for NASB making the Loan to Capitol Building, the Hendersons executed a Guaranty in favor of NASB on or about on February 22, 2007, for all obligations due under the Note, including the costs of enforcement and collection of the obligations due under the Note. A copy of the Henderson Guaranty is attached hereto as Exhibit D.

19. In exchange for NASB making the Loan to Capitol Building, HHC executed a Guaranty in favor of NASB on or about on February 22, 2007, for all obligations due under the Note, including the costs of enforcement and collection of the obligations due under the Note. A copy of the HHC Guaranty is attached hereto as Exhibit E.

20. In exchange for NASB making the Loan to Capitol Building, the Roberts executed a Guaranty in favor of NASB on or about February 28, 2007, limited to \$433,333.00 of the principal balance due under the Note, plus all unpaid and accrued interest and the costs of enforcement of the Guaranty and the Note. A copy of the Roberts Guaranty is attached hereto as Exhibit F.

21. In exchange for NASB making the Loan to Capitol Building, Vieta executed a Guaranty in favor of NASB on or about February 22, 2007, limited to \$433,333.00 of the principal balance due under the Note, plus all unpaid and accrued interest and the costs of enforcement of the Guaranty and the Note. A copy of the Vieta Guaranty is attached hereto as Exhibit G.

22. In exchange for NASB making the Loan to Capitol Building, the Walters executed a Guaranty in favor of NASB on or about February 26, 2007, for all obligations due under the Note, including the costs of enforcement and collection of the obligations due under the Note. A copy of the Walters Guaranty is attached hereto as Exhibit H.

The Capitol Building, LLC's Default

23. Upon information and belief, to date Capitol Building has received a total of at least \$1,300,000.00 in capital Tax Credits. Pursuant to the terms of the Note, Capitol Building was obligated to remit \$1,300,000.00 to NASB upon completion of the project and issuance of the Tax Credits.

24. In March 2008, Capitol Building remitted \$500,000.00 to NASB from Tax Credit receipts to reduce the principal balance due on the Note, but in direct violation of the terms of the Note failed to pay the remaining \$800,000.00 principal reduction due to NASB. As of March 28, 2008, Capitol Building was in default of the terms of the Note.

25. On April 22, 2008, counsel for NASB sent a notice of default to Capitol Building regarding the remaining \$800,000.00 due to reduce the principal balance due on the Note.

26. Upon Capitol Building's default on March 28, 2008, the interest rate under the Note increased automatically to the Default Rate. On May 27, 2008, Defendant Melvin Henderson assured NASB that Capitol Building would deliver the remaining \$800,000.00 principal reduction owed no later than September 1, 2008. In consideration for this assurance, NASB agreed to temporarily defer the accrual of Default Interest, but reserved the right to

reinstate the Default Rate as of March 28, 2008 if the remaining \$800,000.00 principal reduction was not delivered by September 1, 2008.

27. Capitol Building failed to deliver the past due \$800,000.00 principal reduction by September 1, 2008. Accordingly, on September 29, 2008, NASB, through its counsel, informed Capitol Building that it had reinstated the Default Rate, effective as of March 28, 2008.

28. As of October 1, 2008, Capitol Building owed the sum of \$123,094.74 to cure its default and bring the Loan current. This amount was composed of Capitol Building's regular principal and interest payment of \$28,040.44, and default interest from March 28, 2008 through September 30, 2008 in the amount of \$95,054.30.

29. Capitol Building made a payment to NASB on or about October 16, 2008 in the amount of \$33,040.44. This payment was insufficient to meet Capitol Building's payment obligations on the Note, and Capitol Building committed another Event of Default.

30. As of November 1, 2008, Capitol Building owed the sum of \$132,528.08 to cure its default and bring the Loan current. This amount was composed of Capitol Building's regular principal and interest payment of \$28,040.44, default interest through October 31, 2008 in the amount of \$100,885.87, and a late charge for the October payment in the amount of \$3,601.77.

31. Capitol Building failed to make a payment of any amount by November 1, 2008, and thus committed another Event of Default.

32. Capitol Building has also failed to furnish NASB with certain information regarding the Guarantors and Capitol Building, which is required under the terms of Section 8.7 of the Agreement. Thus, Capitol Building has committed yet another Event of Default.

33. Capitol Building remains in default pursuant to the terms of the Agreement, Note, and Deed of Trust.

FIRST CAUSE OF ACTION
(Action on Guaranty Agreements)

34. NASB restates and re-alleges the allegations contained in paragraphs 1-33 of this Complaint as if fully set forth herein.

35. Capitol Building committed Events of Default under the Agreement, Note and Deed of Trust by, among other things, (1) failing and refusing to pay the additional \$800,000.00 due from Tax Credit receipts to reduce the principal balance due on the Loan; (2) failing and refusing to pay on a timely basis all principal and interest, including Default Interest, due under the terms of the Note; and (3) failing and refusing to furnish information required by the Agreement.

36. Capitol Building failed to cure its Events of Default and remains in default under the terms of the Agreement, Note and Deed of Trust.

37. The Guarantors, for good and valuable consideration, executed Guaranty Agreements which unconditionally guaranteed to NASB the payment of all sums due under the Note, as well as all attorneys' fees incurred by NASB in the enforcement of the Note.

38. Pursuant to each of the Guaranty Agreements, the Guarantors each agreed that upon Capitol Building's default in the payment of any installments of the Note, all of the remaining installments on the Note shall immediately become due and payable without notice.

39. Accordingly, subject to the limitations in the Roberts and Vieta Guaranty Agreements, the Guarantors are jointly and severally liable to NASB for the amounts currently due under the Note, including \$3,658,545.29 in principal, all interest (including Default

Interest) that has accrued and will continue to accrue, and for NASB's reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff North American Savings Bank, F.S.B. respectfully prays that the Court grant the following relief:

1. That NASB recover damages in an amount to be determined at trial, but in excess of \$3,658,545.29, plus interest as allowed under the terms of the Note and by law;
2. That NASB recover its reasonable attorneys' fees and costs of suit incurred herein; and
3. That the Court grant NASB such additional relief as the Court may deem just and proper.

Respectfully submitted, this 10th day of December, 2008.

/s/ Matthew P. McGuire

Matthew P. McGuire
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

NORTH AMERICAN SAVINGS BANK, F.S.B.

(b) County of Residence of First Listed Plaintiff Jackson County, MO
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Matthew P. McGuire, Nelson Mullins Riley & Scarborough LLP
4140 Parklake Ave., Suite 200, Raleigh, NC 27612 919-329-3800

DEFENDANTS

See Attachment

County of Residence of First Listed Defendant Cumberland
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input checked="" type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332

Brief description of cause:
Breach of Contract

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE _____ SIGNATURE OF ATTORNEY OF RECORD _____

12/10/2008 /s/ Matthew P. McGuire

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Attachment to Civil Cover Sheet

Defendants

Melvin L. Henderson
Lavetta B. Henderson
Henderson Holdings Co., LLC
Leroy Roberts, Jr.
Jacqueline M. Roberts
Paul Vieta
Ingram Walters
Erin Walters