

IN THE CIRCUIT COURT OF THE 15<sup>th</sup>  
JUDICIAL CIRCUIT IN AND FOR PALM  
BEACH COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. \_\_\_\_\_

**2009 CA 008 924 XXXX MR**

BANK OF AMERICA, NATIONAL  
ASSOCIATION, as trustee for the FMC  
Real Estate CDO 2005-1 Grantor Trust,  
Series O,

Plaintiff,

v.

COMEAU NCP LLC, a Florida limited  
liability company; JOHN F. QUINN III, an  
individual; and NCP HOLDINGS LLC, an  
Illinois limited liability company,

Defendants.

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**COMPLAINT OF FORECLOSURE**

Plaintiff Bank of America, National Association ("Plaintiff") sues defendants Comeau NCP LLC ("Comeau"), John F. Quinn III ("Quinn"), and NCP Holdings LLC ("Holdings"), and alleges:

**Jurisdiction and Venue**

1. This Court has jurisdiction over the subject matter of this action in that the relief sought is the foreclosure of real property located in Palm Beach County, Florida, and the matter in controversy exceeds the sum or value of \$15,000.00, exclusive of interest, attorneys' fees, and costs.

2. Venue in this action is proper in Palm Beach County, Florida, since the real property in foreclosure is located in Palm Beach County, Florida.

3. As described in more detail below, Plaintiff, as trustee for the FMC Real Estate CDO 2005-1 Grantor Trust, Series O, is the owner and holder of a promissory note and mortgage encumbering certain real property located in Palm Beach County, Florida and owned by Comeau. Comeau is currently in default under the Loan Documents (as hereinafter defined), having failed to make interest and other payments on the Loan (as hereinafter defined) when due as well as failing to adhere to additional obligations. In this action, Plaintiff seeks the following remedies:

- a. foreclosure of the mortgage on improved real property located in Palm Beach County, Florida, and rents therefrom;
- b. a judgment for damages against Quinn and Holdings, jointly and severally, as guarantors of Comeau's obligations under a promissory note and mortgage;
- c. to the extent applicable, a judgment for damages against Comeau for any deficiency resulting thereof; and
- d. appointment of a receiver to manage, operate, and preserve the subject real property while this action is pending.

#### **The Parties**

4. Plaintiff is a national bank, with its principal place of business located in Charlotte, North Carolina and is acting in its capacity as trustee for the FMC Real Estate CDO 2005-1 Grantor Trust, Series O.

5. Defendant Comeau is a Florida limited liability company with its principal place of business located in Chicago, Illinois.

6. Upon information and belief, defendant Quinn is an individual who resides in or around Chicago, Illinois and is *sui juris*. Quinn is a guarantor of Comeau's obligations under the Loan Documents. Quinn directly or indirectly owns a financial and/or ownership interest in Comeau. This Court has personal jurisdiction over Quinn by virtue of his breaching a contract in Florida by failing to perform acts required by the contract to be performed in Florida as described herein.

7. Defendant Holdings is an Illinois limited liability company with its principal place of business located in Chicago, Illinois. Holdings is a guarantor of Comeau's obligations under the Loan Documents. Holdings directly or indirectly owns a financial and/or ownership interest in Comeau. This Court has personal jurisdiction over Holdings by virtue of its breaching a contract in Florida by failing to perform acts required by the contract to be performed in Florida as described herein.

#### **Common Allegations**

8. Comeau is the owner of certain real property located at 319 Clematis Street, West Palm Beach, Palm Beach County, Florida, with a legal description found in Exhibit "A" attached hereto and incorporated herein (the "Real Property").

9. On or about September 20, 2006, Five Mile Capital Pooling REIT, LLC ("Five Mile") made a loan to Comeau in the principal sum of \$13,400,000.00 (the "Loan").

10. In order to evidence the obligation to repay the Loan, Comeau executed and delivered to Five Mile on or about September 20, 2006, a Renewal Promissory Note (the "Note")

in the original principal amount of \$13,400,000.00, which Note renewed and consolidated the indebtedness under certain other promissory notes, described in more detail in the Note. A true and correct copy of the Note is attached hereto and incorporated herein as Exhibit "B".

11. Concurrently with the Note, Comeau executed and delivered to Five Mile an Amended and Restated Mortgage, Assignment of Rents, Security Agreement and Fixture Filing (the "Mortgage"), which secured the total principal amount of \$13,400,000.00 plus interest and all other sums due pursuant to the provisions of the Note, the Mortgage, or the other Loan Documents (as hereinafter defined). The Mortgage encumbers the Real Property, together with, among other things, all present and future buildings, leases, rents, income, revenue, improvements, equipment, easements, personal property, and fixtures thereon as more particularly described in the Mortgage. The Mortgage amends and restates in their entirety certain other mortgages, as described in more detail in the Mortgage. The Mortgage is recorded in Official Records Book 20875, Page 1894 of the Public Records of Palm Beach County, Florida. A true and correct copy of the Mortgage is attached hereto and incorporated herein as Exhibit "C".

12. Concurrently with the Note and the Mortgage and to further secure repayment of the Loan, Comeau executed and delivered to Five Mile an Assignment of Leases (the "Assignment of Leases"). Pursuant to the Assignment of Leases, Comeau absolutely and irrevocably granted to Five Mile, among other things, all the leases, rents, income, and receivables from the Real Property as more particularly described in the Assignment of Leases. The Assignment of Leases is recorded in Official Records Book 20875, Page 1958 of the Public Records of Palm Beach County, Florida. A true and correct copy of the Assignment of Leases is attached hereto and incorporated herein as Exhibit "D".

13. Concurrently with the Note and the Mortgage and to further secure repayment of the Loan, Comeau executed and delivered to Five Mile a Cash Management Agreement (the "Cash Management Agreement"). A true and correct copy of the Cash Management Agreement is attached hereto and incorporated herein as Exhibit "E".

14. Concurrently with the Note and the Mortgage and to further secure repayment of the Loan, Comeau executed and delivered to Five Mile a Collateral Assignment of Contracts, Licenses, Permits, Agreements, Warranties and Approvals (the "Assignment of Contracts"). Pursuant to the Assignment of Contracts, Comeau, among other things, absolutely and irrevocably assigned to Five Mile all contracts agreements, licenses, permits, variances, entitlements, and certificates relating to the Real Property as more particularly described in the Assignment of Contracts. A true and correct copy of the Assignment of Contracts is attached hereto and incorporated herein as Exhibit "F".

15. Concurrently with the Note and the Mortgage and to further secure repayment of the Loan, Comeau and NCP Investments LLC (the "Manager") executed and delivered to Five Mile a Manager's Consent and Subordination of Management Agreement (the "Manager's Consent"). Pursuant to the Manager's Consent, Comeau and Manager, among other things, consented to the assignment to Five Mile of that certain Property Management Agreement between Comeau and Manager, agreed that the Management Agreement did not create an interest in the Real Property, and agreed that the Management Agreement and any liens or interest of Manager were subordinate and inferior to Five Mile's priority lien in the Real Property, all as more particularly described in the Manager's Consent. A true and correct copy of the Manager's Consent is attached hereto and incorporated herein as Exhibit "G".

16. To perfect Five Mile's security interest in certain personal property pledged to Five Mile to secure the Loan pursuant to various Loan Documents (as hereinafter defined), Comeau delivered two UCC-1 Financing Statements, which were, respectively, filed with the Florida Secured Transaction Registry under file no. 20060371724X (the "State Financing Statement") and recorded in Official Records Book 20875, Page 1972 of the Public Records of Palm Beach County, Florida (the "Local Financing Statement", and together with the State Financing Statement, collectively, the "Financing Statements"). True and correct copies of the Financing Statements are attached hereto and incorporated herein as Exhibit "H".

17. Concurrently with the Note and the Mortgage, Quinn and Holdings executed a Guaranty of Certain Recourse Obligations (the "Guaranty") in favor of Five Mile, whereby Quinn and Holdings, jointly and severally, guaranteed, among other things, the full performance, observance, and compliance of Comeau with all "Guaranteed Recourse Obligations," as defined in the Guaranty and Mortgage. A true and correct copy of the Guaranty is attached hereto and incorporated herein as Exhibit "I".

18. Concurrently with the Note and the Mortgage, Quinn and Holdings executed a Guaranty of Payment (the "Payment Guaranty") in favor of Five Mile, whereby Quinn and Holdings, jointly and severally, guaranteed, among other things, the full and prompt payment of certain of Comeau's obligations owing to Five Mile under the Note and the other Loan Documents, including, without limitation, an aggregate amount of principal up to \$5,000,000.00 plus all interest and other sums due and payable under the Loan Documents (as hereinafter defined), and, in certain events, the payment of all sums due under the Loan Documents (as hereinafter defined). A true and correct copy of the Payment Guaranty is attached hereto and incorporated herein as Exhibit "J".

19. The Note, the Mortgage, the Assignment of Leases, the Cash Management Agreement, the Assignment of Contracts, the Manager's Consent, the Financing Statements, the Guaranty, and the Payment Guaranty are collectively referred to herein as the "Loan Documents".

20. On or about December 21, 2006, Five Mile executed and delivered to Five Mile Capital Real Estate CDO Depositor LLC ("Depositor") an Assignment and Assumption (the "First Assignment"), in which Five Mile assigned to Depositor, among other things, the Loan, the Loan Documents, and all of Five Mile's right, title, and interest under the Loan Documents. A true and correct copy of the First Assignment is attached hereto and incorporated herein as Exhibit "K".

21. Concurrently with the First Assignment, Five Mile executed and delivered to Depositor an Assignment of Mortgage (the "First Mortgage Assignment"), in which Five Mile assigned to Depositor the Note, the Mortgage, all money due thereon and all rights thereunder, as more particularly described in the First Mortgage Assignment. The First Mortgage Assignment is recorded in Official Records Book 21307, Page 804 of the Public Records of Palm Beach County, Florida. A true and correct copy of the First Mortgage Assignment is attached hereto and incorporated herein as Exhibit "L".

22. Concurrently with the First Assignment, Five Mile executed and delivered to Depositor an Assignment of Assignment of Rents (the "First ALR Assignment"), in which Five Mile assigned to Depositor the Assignment of Leases, as more particularly described in the First ALR Assignment. The First ALR Assignment is recorded in Official Records Book 21307, Page 818 of the Public Records of Palm Beach County, Florida. A true and correct copy of the First ALR Assignment is attached hereto and incorporated herein as Exhibit "M".

23. In connection with the First Assignment, Five Mile delivered two UCC-3 Financing Statement Amendments (collectively, the "First UCC Amendments"), which are, respectively, filed with the Florida Secured Transactions Registry under file no. 200705055394 and in Official Records Book 21307, Page 822 of the Public Records of Palm Beach County, Florida, assigning the Financing Statements to Depositor. True and correct copies of the First UCC Amendments are attached hereto and incorporated herein as Exhibit "N".

24. On or about March 9, 2009 and effective as of December 21, 2006, Depositor executed and delivered to LaSalle Bank National Association ("LaSalle"), as trustee for the FMC Real Estate CDO 2005-1 Master Trust, Series O, a Correction Assignment and Assumption (the "Second Assignment"), in which Depositor assigned to LaSalle the Loan, the Loan Documents, and all of Depositor's right, title, and interest under the Loan Documents, among other things. A true and correct copy of the Second Assignment is attached hereto and incorporated herein as Exhibit "O".

25. Concurrently with the Second Assignment and effective as of December 21, 2006, Depositor executed and delivered to LaSalle, as trustee for the FMC Real Estate CDO 2005-1 Master Trust, Series O, a Correction Assignment of Mortgage (the "Second Mortgage Assignment"), in which Depositor assigned to LaSalle the Note, the Mortgage, all money due thereon, and all rights thereunder, as more particularly described in the Second Mortgage Assignment. A true and correct copy of the Second Mortgage Assignment is attached hereto and incorporated herein as Exhibit "P".

26. Concurrently with the Second Assignment and effective as of December 21, 2006, Depositor executed and delivered to LaSalle, as trustee for the FMC Real Estate CDO 2005-1 Master Trust, Series O, a Correction Assignment of Assignment of Rents (the "Second ALR

Assignment”), in which Depositor assigned to LaSalle the Assignment of Leases, as more particularly described in the Second ALR Assignment. A true and correct copy of the Second ALR Assignment is attached hereto and incorporated herein as Exhibit “Q”.

27. In connection with the Second Assignment, Depositor delivered two UCC-3 Financing Statement Amendments (the “Second UCC Amendments”), which are, respectively, filed with the Florida Secured Transactions Registry under file no. 200705220115 and in Official Records Book 21307, Page 823 of the Public Records of Palm Beach County, Florida, assigning the Financing Statements to FMC Real Estate CDO 2005-1, Ltd. (“CDO”). True and correct copies of the Second UCC Amendments are attached hereto and incorporated herein as Exhibit “R”.

28. Further in connection with the Second Assignment, CDO delivered two UCC-3 Financing Statement Amendments (the “Third UCC Amendments”), to be filed, respectively, with the Florida Secured Transactions Registry and in the Public Records of Palm Beach County, Florida, assigning the Financing Statements to Plaintiff. True and correct copies of the Third UCC Amendments are attached hereto and incorporated herein as Exhibit “S”.

29. As the result of a merger, LaSalle merged with and into Plaintiff, with Plaintiff as the surviving entity of the merger.

30. On or about February 1, 2009, an interest payment on the Loan in the amount of \$80,079.89 (the “February Payment”) was due from Comeau pursuant to the Loan Documents. Comeau failed to pay a \$26,266.48 portion of the total February Payment. The failure of Comeau to pay the total February Payment within five days after February 1, 2009 constitutes an “Event of Default” (as defined in the Loan Documents) under the Loan Documents.

31. On or about February 1, 2009, a Tax Deposit (as defined in the Loan Documents) payment in the amount of \$23,432.26 (the "February Tax Deposit") was due from Comeau pursuant to the Loan Documents. Comeau failed to pay the February Tax Deposit. The failure of Comeau to pay the February Tax Deposit within five days after February 1, 2009 constitutes an Event of Default under the Loan Documents.

32. On or about February 1, 2009, an Insurance Premium Deposit (as defined in the Loan Documents) payment in the amount of \$1,943.88 (the "February Insurance Deposit") was due from Comeau pursuant to the Loan Documents. Comeau failed to pay the February Insurance Deposit. The failure of Comeau to pay the February Insurance Deposit within five days after February 1, 2009 constitutes an Event of Default under the Loan Documents.

33. On or about February 1, 2009, a deposit into the Property Reserve (as defined in the Loan Documents) in the amount of \$9,637.00 (the "February Property Reserve") was due from Comeau pursuant to the Loan Documents. Comeau failed to pay the February Property Reserve. The failure of Comeau to pay the February Property Reserve within five days after receipt of the Default and Demand Letter (as hereinafter defined) constitutes an Event of Default under the Loan Documents.

34. On or about February 6, 2009, Midland Loan Services, Inc. ("Midland"), as servicer of the Loan, sent Comeau a default and demand letter (the "Default and Demand Letter"). Comeau was notified in the Default and Demand Letter it had defaulted by failing to pay the total amount of the February Payment, February Tax Deposit, and the February Insurance Deposit due under the Note and the other Loan Documents on February 1, 2009. Comeau was also informed in the Default and Demand Letter that its failures to pay the total February Payment, February Tax Deposit, and February Insurance Deposit constituted an

immediate Event of Default and its failure to pay the February Property Reserve within five days would constitute an Event of Default. Comeau was further notified that if Comeau failed to pay the total February Payment, February Tax Deposit, and February Insurance Deposit on or before February 12, 2009 and the total February Property Reserve on or before February 17, 2009, the lender would exercise its remedies under the Loan Documents, including, without limitation, the right to accelerate the maturity of the principal of the Loan and all other amounts due under the Loan Documents, and the right to commence a foreclosure action. A true and correct copy of the Default and Demand Letter is attached hereto and incorporated herein as Exhibit "T".

35. Comeau has not cured all defaults under the Loan Documents. By filing this action, Plaintiff elects to accelerate the maturity of the principal of the Loan and all other amounts due under the Loan Documents.

36. Plaintiff, as trustee for the FMC Real Estate CDO 2005-1 Master Trust, Series O, is the owner and holder of the Loan and the Loan Documents.

37. Pursuant to the Loan Documents, Comeau owes Plaintiff as of March 12, 2009:

- a. \$13,400,000.00 in principal;
- b. \$95,597.73 in past due and accrued interest;
- c. \$49,133.33 in default interest;
- d. \$6,096.40 in late fees;
- e. \$1,317.67 in servicing fees;
- f. \$268,000.00 in exit fees;
- g. \$1,262.68 in Tax Deposits;
- h. \$1,943.88 in Insurance Premium Deposits;
- i. \$19,274.00 in Property Reserve deposits;

- j. \$17,413.20 in protective advances to pay utility bills;
  - k. reasonable attorneys' fees, other fees, costs, and other expenses (less any credit for unapplied funds) as set forth in the Loan Documents; and
  - l. title search expenses for ascertaining the necessary parties to this action.
38. Plaintiff has performed all necessary conditions precedent to file this action.
39. Plaintiff has retained the law firm of Holland & Knight LLP to represent it in this action and has agreed to pay it a reasonable fee for its services.

**COUNT I**  
**FORECLOSURE OF MORTGAGE AND RENTS**

Plaintiff sues defendant Comeau and repeats and incorporates the allegations in paragraphs 1 through 39.

40. Pursuant to the Mortgage, Plaintiff has a lien on and security interest in and to the Real Property, including, but not limited to, all present and future buildings, improvements, equipment, and fixtures thereon and all rents, income, and revenue from all leases and subleases of the Real Property (the "Rents"), as security for the sums due Plaintiff under the Loan Documents.

41. The Real Property is owned by Comeau.

WHEREFORE, Plaintiff demands:

a. judgment of foreclosure in the amounts due Plaintiff, including principal, interest, late charges, fees, costs, expenses, and attorneys' fees, and if such sums are not paid within the time set by this Court that the Real Property be sold to satisfy Plaintiff's claims;

b. that defendant Comeau and all persons claiming under, by, through, or against it since the filing of Plaintiff's Notice of Lis Pendens, be forever barred and foreclosed of all right, title, and interest in and to the Real Property;

c. that the Court require Comeau to turn over the Rents to Plaintiff pursuant to section 697.07, Florida Statutes;

d. as ancillary relief, the appointment of a receiver to operate, manage, and preserve the Real Property until the Real Property is sold to satisfy Plaintiff's claims; and

e. such other and further relief as the Court deems appropriate.

**COUNT II**  
**PROMISSORY NOTE**

Plaintiff sues defendant Comeau and repeats and incorporates the allegations contained in paragraphs 1 through 39.

42. This is an action for damages against Comeau for breach of the Note.

43. Comeau is in default under the Note for, among other reasons, its failure to pay the entire February Payment, February Tax Deposit, and the February Insurance Deposit despite demand.

44. By virtue of Comeau's default under the Note, Plaintiff has sustained damages.

WHEREFORE, Plaintiff demands judgment against defendant Comeau for damages in the principal sum of \$13,400,000.00, together with accrued interest thereon, default interest thereon, late charges, deposits, fees, costs, expenses, including reasonable attorneys' fees pursuant to the terms of the Note, and all other amounts due and payable under the Note, and for such other and further relief the Court deems just and proper.

**COUNT III**  
**GUARANTY**

Plaintiff sues defendants Quinn and Holdings and repeats and incorporates the allegations contained in paragraphs 1 through 39.

45. This is an action for damages against Quinn and Holdings, jointly and severally, for breach of the Guaranty.

46. Quinn and Holdings are in default under the Guaranty for, among other reasons, failing to make full and prompt payment of the February Tax Deposit and February Insurance Deposit.

47. By virtue of the defaults of Quinn and Holdings under the Guaranty, Plaintiff has sustained damages.

WHEREFORE, Plaintiff demands judgment against defendants Quinn and Holdings, jointly and severally, for compensatory damages, including reasonable attorneys' fees pursuant to the terms of the Guaranty, and all other amounts due and payable under the Guaranty, and for such other and further relief the Court deems just and proper.

**COUNT IV**  
**PAYMENT GUARANTY**

Plaintiff sues defendants Quinn and Holdings and repeats and incorporates the allegations contained in paragraphs 1 through 39.

48. This is an action for damages against Quinn and Holdings, jointly and severally, for breach of the Payment Guaranty.

49. Quinn and Holdings are in default under the Payment Guaranty for, among other reasons, failing to make full and prompt payment of all of Comeau's obligations owing to

Plaintiff under the Loan Agreement and the Note, limited to an aggregate amount equal to \$5,000,000.00, plus all interest and other sums due and payable under the Loan Documents.

50. By virtue of the defaults of Quinn and Holdings under the Payment Guaranty, Plaintiff has sustained damages.

WHEREFORE, Plaintiff demands judgment against defendants Quinn and Holdings, jointly and severally, for compensatory damages, including reasonable attorneys' fees pursuant to the terms of the Payment Guaranty, and all other amounts due and payable under the Payment Guaranty, and for such other and further relief the Court deems just and proper.

**COUNT V**  
**FORECLOSURE OF SECURITY AGREEMENT**

Plaintiff sues defendant Comeau and repeats and incorporates the allegations in paragraphs 1 through 39.

51. Pursuant to the Mortgage, other Loan Documents, and Financing Statements, Plaintiff has a first lien on and security interest in and to personal property owned now or in the future by Comeau (the "Collateral", as such term is further defined in the Financing Statements) including, without limitation, certain personal property related to the Real Property, as security for the sums due Plaintiff under the Note.

52. The Collateral is owned by Comeau.

WHEREFORE, Plaintiff demands:

a. judgment of foreclosure in the amounts due Plaintiff, including principal, interest, late charges, costs, expenses, and attorneys' fees, and if such sums are not paid within the time set by this Court, that the Collateral be sold to satisfy Plaintiff's claims;

b. that Comeau and all persons claiming under, by, through, or against it since the filing of Plaintiff's Notice of Lis Pendens, be forever barred and foreclosed of all right, title, and interest in and to the Collateral; and

c. as ancillary relief, the appointment of a receiver to operate, manage and preserve the Real Property and the Collateral until the Real Property and the Collateral are sold to satisfy Plaintiff's claims; and

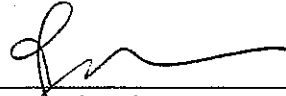
d. such other and further relief as the Court deems appropriate, including the entry of a deficiency judgment.

Dated this 12<sup>th</sup> day of March, 2009.

Respectfully submitted,

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