

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354

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S.C. Supreme Court

Larius G. Woodson and Maurissa Woodson *Petitioners,*

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan L. Cauthen,

of whom:

Allen Tate Co., and
Melia C. Faile are the Respondents.

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Larius G. Woodson and
Maurissa Woodson, Appellants,

v.

DLI Properties, LLC, Allen
Tate Co, Inc., Melia C. Faile,
and Alan L. Cauthen,

of whom Allen Tate Co. and
Melia C. Faile are the Respondents.

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

Unpublished Opinion No. 2011-UP-291
Submitted June 1, 2011 – Filed June 14, 2011

AFFIRMED

John Martin Foster, of Rock Hill, for Appellants.

Thomas L. Ogburn, III, of Charlotte, North Carolina,
for Respondents.

PER CURIAM: Larius G. Woodson and Maurissa Woodson (the Woodsons) appeal a circuit court's grant of summary judgment to Allen Tate Co., Inc. (ATC) and Melia C. Faile on claims of fraud, negligent misrepresentation, and unfair trade practices. They raise a number of issues addressing whether summary judgment was appropriate. We affirm for failure to provide a sufficient record.¹

"Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Bowen v. Lee Process Sys. Co., 342 S.C. 232, 235, 536 S.E.2d 86, 87 (Ct. App. 2000). In Bowen v. Lee Process Systems Co., this court vacated a trial court's grant of summary judgment and remanded the case to the trial court for more specific findings and analysis because the trial court's "fail[ure] to articulate the reasons for its action on the record or enter a written order outlining its rationale . . ." prevented this court from sufficiently reviewing whether summary judgment was appropriate. Id. at 235-36, 241, 536 S.E.2d at 88, 91.

Here, we cannot determine whether summary judgment was appropriate because the trial court's order fails to articulate its reasons for granting summary judgment. However, we do not vacate and remand this case because the trial court might have articulated its decision during the summary judgment hearing and the Woodsons failed to provide a hearing transcript. Because the Woodsons failed to satisfy their burden of providing a sufficient record, therefore, we affirm the appeal. See Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); Price v. Pickens Cnty., 308 S.C. 64, 67, 416 S.E.2d 666, 668 (Ct. App. 1992) ("The burden is on the appellant to provide a sufficient record such that this court can make an intelligent review." (citation omitted)).

AFFIRMED.

HUFF, WILLIAMS, and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354
Opinion No. 2011-UP-291

RECEIVED

JUN 29 2011

SC Court of Appeals

Larius G. Woodson and Maurissa Woodson Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan Cauthen,

of whom:

Allen Tate Co., and
Melia C. Faile are the Respondents.

PETITION FOR REHEARING

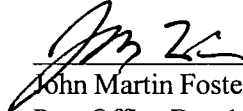
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Other Counsel of Record:
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The Petitioners petition for a rehearing of the matter above under Rules 221(a) and 240, S.C.A.C.R.

This Petition is based upon those certain points, factual and legal, which the Petitioners believe the Court to have overlooked or misapprehended, as set out in the accompanying Memorandum, a copy of which is attached hereto and incorporated herein.

June 28, 2011



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354
Opinion No. 2011-UP-291

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JUN 29 2011
SC Court of Appeals

Larius G. Woodson and Maurissa Woodson Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
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of whom:

Allen Tate Co., and
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CERTIFICATE OF SERVICE

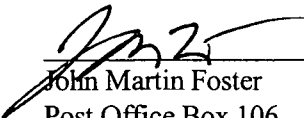
I certify that I have served the **Petition for Rehearing** and its accompanying **Memorandum** on the following counsel or persons:

Thomas Ogburn, III
Poyner & Spruill, LLP
301 S. College Street, Suite 2300
Charlotte, N.C. 28202
Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

June 28, 2011


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354
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SC Court of Appeals

Larius G. Woodson and Maurissa Woodson Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan Cauthen,
of whom:

Allen Tate Co., and
Melia C. Faile are the Respondents.

MEMORANDUM OF PETITIONERS
ON PETITION FOR REHEARING

This Court filed its Opinion herein on June 14, 2011. The Petitioners submit herewith their Memorandum on the petition for a rehearing of this matter under Rules 221(a) and 240, S.C.A.C.R.

Rule 221(a), S.C.A.C.R. states, in relevant part:

A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court.

By this Memorandum, the Petitioners set out those points of the said Opinion herein which they believe to fall within the ambit of Rule 221(a).

FIRST POINT:

The decision of the Court states, in relevant part:

Here, we cannot determine whether summary judgment was appropriate because the trial court's order fails to articulate its reasons for granting summary judgment. However, we do not vacate and remand this case because the trial court might have articulated its decision during the summary judgment hearing and the Woodsons failed to provide a hearing transcript. Because the Woodsons failed to satisfy their burden of providing a sufficient record, therefore, we affirm the appeal.

[OPINION No. 2011-UP-291, 3d Para., June 14, 2011; emphasis added.]

To state the holding briefly, because the Lower Court "might" have stated oral reasons for its ruling, and because its statements at the motion's argument (or lack thereof) are not reflected in the Record, the issues raised on appeal may not be addressed.

With respect, this understanding of the relation between a Judge's oral statements at haring and the final order is fundamentally incorrect. Rule 58, S.C.R.C.P. states, in relevant part:

(a) Entry Upon Verdict or Decision. Subject to the provisions of Rule 54(b)¹:

(1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;

(2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.

Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs.

It is counsel's understanding of Rule 58 that a written order is required and that only a written order can be effective. This is also the position taken by our Appellate Courts. In *Corbin v. Kohler Co.*, 351 S.C. 613, 571 S.E.2d 92 (Ct.App. 2002), this Court held:

[Appellant] Kohler asserts the trial judge's statements reflect his misunderstanding of the standard of review. Kohler maintains the Circuit Court reviewed the Commission's decision based on a "cracked door" standard of review in which a mere scintilla of

¹ Rule 54(b), S.C.R.C.P. deals with multiple claims or multiple parties.

evidence would be sufficient to sustain the decision of the Commission. This argument has no merit because the statements by the judge were merely contemporaneous colloquy. The judge and the lawyers were talking in the course of working through the attorneys' arguments. The judge's final written order represents the decision of the court.

"No order is final until it is written and entered." *First Union Nat'l Bank v. Hitman, Inc.*, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct.App. 1991), *AFF'D*, 308 S.C. 421, 418 S.E.2d 545 (1992) (*CITING* Rule 58(a), SCRCP). *SEE ALSO Case v. Case*, 243 S.C. 447, 134 S.E.2d 394 (1964) (judgments in general are not final until written and entered); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct.App. 1990) (divorce decree is not final until written and recorded). "Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); *First Union Nat'l Bank*, 306 S.C. at 329, 411 S.E.2d at 682. *SEE ALSO Case v. Case*, 243 S.C. at 451, 134 S.E.2d at 396 (holding even if the trial judge made oral ruling in favor of one party, such pronouncement is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the judge, and delivered for recordation).

"It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." *Badeaux v. Davis*, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct.App. 1999). *SEE ALSO Owens v. Magill*, 308 S.C. 556, 419 S.E.2d 786 (1992) (ruling judge was not bound by prior oral ruling and could issue written order which conflicted with prior oral ruling). "To the extent the written order may conflict with the prior oral ruling, the written order controls." *Parag v. Baby Boy Lovin*, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct.App. 1998). "The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties." *Ford*, 344 S.C. at 646, 545 S.E.2d at 823 (*CITING* Rule 58, SCRCP).

[*Id.*, 351 S.C. 613, ___, 571 S.E.2d 95-96 (Ct.App. 2002).]

The above is the same reasoning affirmed recently by our Supreme Court:

It is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls. *SEE Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); *Corbin v. Kohler Co.*, [*SUPRA*]; *Parag v. Baby Boy Lovin*, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct.App. 1998). [*Cole Vision Corp. v. Hobbs*, Supreme Court Opinion No. 26988, June 20, 2011]

SECOND POINT:

In addition, the Petitioners argue that the source or basis for the Lower Court's ruling herein is stated in its Order denying the Petitioner/Plaintiff's Motion to Alter or Amend Judgment.

[RECORD ON APPEAL, p.002.] The Lower Court there stated:

Upon receiving the notice for the Motion to Reconsider, the Court elected to make a decision on this motion by receiving each parties' memorandum of law.

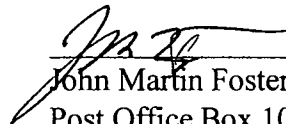
After careful consideration of said motion and memorandums submitted by the parties, the Court finds that there is no basis of granting the motion and, therefore, *Plaintiffs' Motion to Alter or Amend Judgment* is hereby denied.
[*Id.*, 2d and 3d Para.s; emphasis in original.]

Appellants submit that the language of the Lower Court in the Order cited above can only be read to mean that its reasoning was limited to the arguments of the Memoranda, all of which are included in the Record on Appeal. Because all bases for the Court's ruling are thus indicated, there is no requirement for any further documentation thereof.

Conclusion:

For the reasons stated above, the Petitioners request that this Court grant a rehearing upon the grounds stated.

Respectfully submitted,



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Attorney for Petitioners

June 28, 2011

Rock Hill, South Carolina

The South Carolina Court of Appeals

Larius G. Woodson and Maurissa
Woodson,

Appellants,

v.

DLI Properties, LLC, Allen Tate Co.,
Inc., Melia C. Faile, and Alan L.
Cauthen,

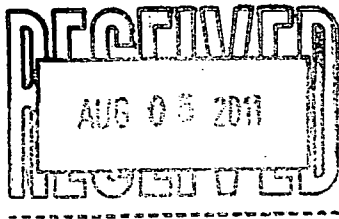
of whom Allen Tate Co., and Melia C.
Faile are the

Respondents.

The Honorable Brooks P. Goldsmith
Lancaster County
Trial Court Case No. 2006-CP-29-01354

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.



Columbia, South Carolina

Thomas C. Hoff J.
H. B. W. J.
Paul C. Thomas J.

FILED

August 4, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354

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SEP - 6 2011

S.C. Supreme Court

Larius G. Woodson and Maurissa Woodson Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan L. Cauthen,

of whom:

Allen Tate Co., and
Melia C. Faile are the Respondents.

RECORD ON APPEAL

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SOUTH CAROLINA
LANCASTER COUNTY

IN THE COURT OF COMMON PLEAS
06-CP-29-1354

LARIUS G. WOODSON AND
MAURISSA WOODSON,

Plaintiffs,

v.

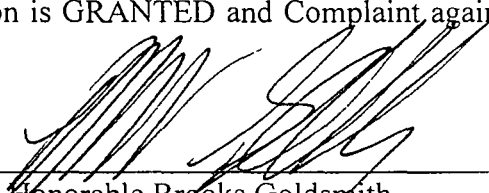
DLI PROPERTIES, LLC, ALLEN TATE
CO., INC., MELIA C. FAILE, AND ALAN
L. CAUTHEN,

Defendants

**ORDER GRANTING SUMMARY
JUDGMENT**

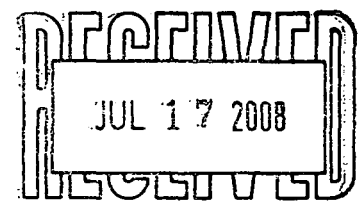
THIS CAUSE came on for hearing before the undersigned Circuit Judge at the July 7, 2008, session of Lancaster County Court of Common Pleas upon the Motion of Defendants Allen Tate Co., Inc. and Melia C. Faile for Summary Judgment on Plaintiffs' Complaint. Counsel for all parties were present for the hearing. Based upon the arguments of counsel, and upon consideration of the motion for summary judgment, the pleadings, affidavits, deposition transcripts, discovery responses and other documents on file and the briefs filed by the parties, the Court determines that there are no genuine issues of material fact, and Allen Tate Co., Inc. and Melia C. Faile are entitled to judgment as a matter of law on all claims against them contained in the Complaint, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant Allen Tate Co., Inc. and Melia C. Faile's Motion is GRANTED and Complaint against them is dismissed with prejudice.



The Honorable Brooks Goldsmith
Circuit Court Judge

July 13, 2008
Lancaster, South Carolina



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LANCASTER	)	
	)	
LARIUS G. WOODSON and	)	
MAURISSA WOODSON,	)	
	)	
PLAINTIFF(S),	)	ORDER DENYING
	)	PLAINTIFFS' MOTION TO
	)	ALTER OR AMEND JUDGMENT
VS.	)	
	)	
	)	CASE NO. 08-CP-29-1354
DLI PROPERTIES, LLC,	)	
ALLEN TATE CO., INC.,	)	
MELIA C. FAILE and	)	
ALAN L. CAUTHEN,	)	
	)	
<u>DEFENDANT (S).</u>	)	

This matter comes before the Court on *Plaintiffs' Motion to Alter or Amend Judgment* dated July 28, 2008.

Upon receiving the notice for the motion to reconsider, the Court elected to make a decision on this motion by receiving each party's memorandum of law.

After careful consideration of said motion and memorandums submitted by the parties, the Court finds there is no basis for granting the motion and, therefore, *Plaintiffs' Motion to Alter or Amend Judgment* is hereby denied.

AND IT IS ALL SO ORDERED.

June 11, 2009
Lancaster SC



BROOKS P. GOLDSMITH, JUDGE
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA]
]
COUNTY OF LANCASTER]

IN THE COURT OF COMMON PLEAS

SIXTH JUDICIAL CIRCUIT

COMPLAINT

C.A. No. 06-CP-29-_____

LARIUS G. WOODSON and
MAURISSA WOODSON,

Plaintiffs,

vs.

DLI PROPERTIES, LLC, a South Carolina limited liability company,
ALLEN TATE CO., INC., a North Carolina corporation licensed to do business in South
Carolina,

MELIA C. FAILE, and
ALAN L. CAUTHEN,

Defendants.

The Plaintiffs above named, complaining of the Defendants herein, would respectfully
show:

1. The Plaintiffs LARIUS G. WOODSON and MAURISSA WOODSON (hereafter also "the WOODSONS" and "the Plaintiffs WOODSON") are residents of Mecklenburg County, North Carolina.
2. The Defendant DLI PROPERTIES, LLC, (hereafter also "DLI PROPERTIES") is a limited liability company duly organized under the laws of, and doing business in, the State of South Carolina. Its Registered Agent is Morris J. Pitzulo, having an address of 4350 Cole Creek Drive, Fort Mill, South Carolina 29715.
3. The Defendant ALLEN TATE CO., INC. (hereafter also "ALLEN TATE") is a corporation duly organized under the laws of the State of North Carolina, licensed and doing

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LANCASTER COUNTY, SC

business in the State of South Carolina as a a real estate brokerage firm. Its Registered Agent is C T Corporation, having an address of 75 Beattie Place, Greenville, South Carolina 29601.

4. On knowledge and information, the Defendant MELIA C. FAILE (hereafter also "FAILE") is a real estate salesman licensed by the South Carolina Real Estate Commission, and a resident of York County, South Carolina.

5. On knowledge and information, the Defendant ALAN L. CAUTHEN (hereafter "CAUTHEN") is a resident of Lancaster County, South Carolina.

6. This civil action concerns real property located within Lancaster County, South Carolina (hereafter also "the Subject Real Property"), which is described as follows:

"All that certain piece, parcel or lot of land lying, being and situate in the County of Lancaster, State of South Carolina, and being known and designated as Lot 36, Phase 1, Lakeview Landing, as shown on a plat thereof recorded as Plat No. 15788, Office of the Clerk of Court for Lancaster County, South Carolina."

Derivation: Being the same property conveyed to, and the identical language used in, the deed of Lonnie Willaby to DLI PROPERTIES, LLC, dated April 21st, 2006 and recorded May 31st, 2006 in Record Book 337 at Page 1 in the Office of the Clerk of Court for Lancaster County, South Carolina.

Tax Map: 0013A-0A-026.00

FIRST CAUSE OF ACTION:

SPECIFIC PERFORMANCE OF CONTRACT

7. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein.

8. This cause of action concerns the specific performance of a contract concerning that real property above located within Lancaster County, South Carolina.

9. On knowledge and information, by a deed recorded in Record Book 337 at Page 1 in the Office of the Clerk of Court for Lancaster County, South Carolina, Lonnie Willaby conveyed the Subject Real Property to the Defendant DLI PROPERTIES, LLC. DLI PROPERTIES was the owner of the Subject Real Property at all relevant times and remains so to this day.

10. In or about August, 2006, the Defendant DLI PROPERTIES and the Plaintiffs WOODSON engaged in a series of negotiations and proposed contracts for the sale and purchase of the Subject Real Property.

11. In the course of the said negotiations, the Defendants DLI PROPERTIES were represented by the Defendant ALLEN TATE and by its salesman MELIA C. FAILE. On knowledge and information, all actions and inaction set out or referenced herein on the part of the Defendant FAILE was within the regular course of her employment by ALLEN TATE and by DLI PROPERTIES.

12. On August 3, 2006, the Plaintiffs WOODSON had received a contract-offer from DLI PROPERTIES acceptable to them in its then-present form. Having recalled one minor detail previously discussed by the parties relating to a cap on the tap fee for the Subject Real Property, they discussed this point with MELIA C. FAILE of ALLEN TATE.

13. In response to their inquiry on this point, they were orally assured on August 4, 2006 by FAILE that DLI PROPERTIES had agreed to this change and to the contract as so modified. The Plaintiffs were further instructed by the Defendant FAILE to bring the last contract form, changed to include this point and initialed by the Plaintiffs, with their deposit check to her office.

14. On Saturday, August 5th, 2006, the Plaintiffs WOODSON complied with the instructions of Defendant FAILE by bringing the changed contract form to FAILE's office and proffering their check for the earnest money deposit of \$1,000.00. Copies of the said contract form and of the Plaintiffs' check are attached hereto and incorporated herein.

15. The Plaintiffs understood from the statements and actions of FAILE that they had entered into a valid and binding contract with DLI PROPERTIES for the purchase and sale, respectively, of the Subject Real Property.

16. On knowledge and information, the tone, content and context of the said communication from Defendant FAILE indicated that she understood a valid and binding contract to exist between the Plaintiffs and DLI PROPERTIES and communicated the same to them.

17. In reliance upon the statements and actions of FAILE, in the period after the events referenced above, the Plaintiffs WOODSON took the actions referenced above, paid the sum of \$1,000.00 as earnest money, and expended time and funds applying for a construction loan and arranging a builder for the Subject Real Property.

18. On August 8, 2006, the Plaintiff LARIUS G. WOODSON was called by his broker with a message that DLI PROPERTIES had "received a better offer with a quicker closing".

19. On knowledge and information, after the events above, the Defendant DLI PROPERTIES entered into a contract for the sale and purchase of the Subject Real Property, respectively, to ALAN L. CAUTHEN. As of this date, CAUTHEN has filed a *Lis Pendens* to the Subject Real Property and asserts his contract with DLI PROPERTIES to be valid and enforceable as against all parties.

20. In response to the telephone call from his broker, LARIUS G. WOODSON called FAILE. At that time, she stated that one of the owners of DLI PROPERTIES had not agreed to the changed cap fee. Confronted with her earlier, inconsistent statement, FAILE responded to the effect: "I know; I told my clients this is wrong, but I have to do what my clients tell me."

21. On knowledge and information, the contract and the terms thereof as to the sale and ownership of the Subject Real Property is fair, just, and reasonable, and is supported by adequate consideration.

22. The Plaintiffs have at all times been ready, willing, and able to perform the requirements of the contract on Plaintiffs' part.

23. The Plaintiffs stand ready to perform all the conditions of the contract on Plaintiffs' part agreed to be performed, and to tender to the Defendant DLI PROPERTIES the price and necessary documents to convey the Subject Real Property, which instruments the said Defendant has refused, and continue to refuse, to sign.

24. The Plaintiffs have no plain, speedy, and adequate remedy at law.

25. On knowledge and information, they are entitled to an order of this Court to compel specific performance of the contract for sale and purchase of the Subject Real Property against the Defendants.

SECOND, ALTERNATIVE CAUSE OF ACTION:
DECLARATORY JUDGMENT AS TO CONTRACT

26. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein.

27. The Plaintiffs institute this civil action pursuant to S.C. Code Ann. § 15-53-30 (1976) to determine the construction and validity of the above-referenced contract for the purchase and

sale, respectively, of any contract between the Plaintiffs and the Defendant DLI PROPERTIES, and to obtain a declaration of rights, status and legal relations thereunder.

28. On knowledge and information, the parties herein are persons interested under a written contract or other writings constituting a contract within the meaning of S.C. Code Section § 15-53-30 (1976) and are entitled thereby to have determined questions of construction or validity arising under the instrument or contract and to obtain a declaration of rights, status or legal relations thereunder.

29. On knowledge and information, the parties hereto are all persons who have or claim any interest which would be affected by the said declaration of rights, and no declaration shall prejudice the rights of persons not parties to the said proceeding, within the meaning of S.C. Code Ann. § 15-53-80(1976).

30. A judicial determination and respective rights and duties of Plaintiffs and Defendants with regard to the said contract and its effect upon the title to the Subject Real Property is both necessary and proper at this time.

THIRD. ALTERNATIVE CAUSE OF ACTION:

FRAUD: DLI PROPERTIES

31. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein. The allegations of this cause of action are set out in the alternative to those above.

32. At the time of dealings between the Plaintiffs and FAILE, and during the communications from FAILE to the Plaintiffs, Defendant DLI PROPERTIES made certain representations to the Plaintiffs. Those representations included, but were not limited to, the following:

- a. That they had accepted the Plaintiff's proposed modification of the previous contract or contract-offer to include a cap on the tap fee chargeable to the Plaintiffs;
- b. That they had accepted and agreed to the contract for purchase and sale of the Subject Real Property, including such proposed modification;
- c. That a valid and enforceable contract of purchase and sale of the Subject Real Property existed between the Plaintiffs and the Defendant DLI PROPERTIES;

- d. That the Plaintiffs could, and were expected to, act in reliance upon the existence of a valid and enforceable contract between themselves and the Defendant DLI PROPERTIES.

33. The above representations were false. DLI PROPERTIES had not accepted the Plaintiff's proposed modification of the previous contract or contract-offer to include a cap on the tap fee chargeable to the Plaintiffs. DLI PROPERTIES had not accepted and agreed to the contract for purchase and sale of the Subject Real Property, including such proposed modification. There was no valid and enforceable contract between the Plaintiffs and the Defendant DLI PROPERTIES. The Plaintiffs could not act in reliance upon the existence of a valid and enforceable contract between themselves and the Defendant DLI PROPERTIES.

34. The facts described in the paragraphs above were material facts.

35. The Plaintiffs were ignorant of the falsity of the above-described misrepresentations, concealments and omissions.

36. On knowledge and information, the Defendant DLI PROPERTIES intended that the Plaintiffs rely upon the above-described misrepresentations, concealments and omissions.

37. The Plaintiffs did rely on the above-described representations, concealments and omissions of Defendant DLI PROPERTIES.

38. The Plaintiffs had a right to rely on the truth of the said misrepresentations, concealments and omissions in that the truth of the said representations, and the validity and effectiveness of the said contract were under the said Defendant's control and the said Defendant could reasonably be expected to know their truth and validity

39. The Plaintiffs have suffered damages as a proximate result of such misrepresentations, concealments and omissions, as referenced herein.

FOURTH. ALTERNATIVE CAUSE OF ACTION:

FRAUD: ALLEN TATE

40. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein. The allegations of this cause of action are set out in the alternative to those above.

41. In the alternative to the allegations set out above, the representations made were made by, and were the responsibility of, the Defendant ALLEN TATE, acting without the authority of its client, principal or employer, DLI PROPERTIES.

42. The facts described in the paragraphs above were material facts.

43. The Plaintiffs were ignorant of the falsity of the above-described misrepresentations, concealments and omissions.

44. On knowledge and information, the Defendant ALLEN TATE intended that the Plaintiffs rely upon the above-described misrepresentations, concealments and omissions.

45. The Plaintiffs did rely on the above-described representations, concealments and omissions of Defendant ALLEN TATE.

46. The Plaintiffs had a right to rely on the truth of the said misrepresentations, concealments and omissions in that the truth of the said representations, and the validity and effectiveness of the said contract were under the said Defendant's control and the said Defendant could reasonably be expected to know their truth and validity.

47. The Plaintiffs have suffered damages as a proximate result of such misrepresentations, concealments and omissions, as referenced herein.

FIFTH, ALTERNATIVE CAUSE OF ACTION:

FRAUD: FAILE

48. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein. The allegations of this cause of action are set out in the alternative to those above.

49. In the alternative to the allegations set out above, the representations made were made by, and were the responsibility of, the Defendant FAILE, acting without the authority of her client, principal or employer, DLI PROPERTIES, and without the authority of her principal or employer ALLEN TATE.

50. The facts described in the paragraphs above were material facts.

51. The Plaintiffs were ignorant of the falsity of the above-described misrepresentations, concealments and omissions.

52. On knowledge and information, the Defendant FAILE intended that the Plaintiffs rely upon the above-described misrepresentations, concealments and omissions.

53. The Plaintiffs did rely on the above-described representations, concealments and omissions of Defendant FAILE.

54. The Plaintiffs had a right to rely on the truth of the said misrepresentations, concealments and omissions in that the truth of the said representations, and the validity and effectiveness of the said contract were under the said Defendant's control and the said Defendant could reasonably be expected to know their truth and validity

55. The Plaintiffs have suffered damages as a proximate result of such misrepresentations, concealments and omissions, as referenced herein.

SIXTH. ALTERNATIVE CAUSE OF ACTION:

NEGLIGENT MISREPRESENTATION: DLI PROPERTIES

56. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein. The allegations of this cause of action are set out in the alternative to those above.

57. At the time of dealings between the Plaintiffs and FAILE, and during the communications from FAILE to the Plaintiffs, Defendant DLI PROPERTIES made certain representations to the Plaintiffs. Those representations included, but were not limited to, the following:

- a. That they had accepted the Plaintiff's proposed modification of the previous contract or contract-offer to include a cap on the tap fee chargeable to the Plaintiffs;
- b. That they had accepted and agreed to the contract for purchase and sale of the Subject Real Property, including such proposed modification;
- c. That a valid and enforceable contract of purchase and sale of the Subject Real Property existed between the Plaintiffs and the Defendant DLI PROPERTIES;
- d. That the Plaintiffs could, and were expected to, act in reliance upon the existence of a valid and enforceable contract between themselves and the Defendant DLI PROPERTIES.

58. The above representations were false. DLI PROPERTIES had not accepted the Plaintiff's proposed modification of the previous contract or contract-offer to include a cap on the tap fee chargeable to the Plaintiffs. DLI PROPERTIES had not accepted and agreed to the contract for

purchase and sale of the Subject Real Property, including such proposed modification. There was no valid and enforceable contract between the Plaintiffs and the Defendant DLI PROPERTIES. The Plaintiffs could not act in reliance upon the existence of a valid and enforceable contract between themselves and the Defendant DLI PROPERTIES.

59. The Plaintiffs were ignorant of the falsity of the representations referenced above.

60. The Defendant DLI PROPERTIES had a pecuniary interest in making the representations above.

61. The Defendant DLI PROPERTIES, and its agents, servants and employees, had a duty of care to see that they communicated truthful information to the Plaintiffs.

62. The Defendant DLI PROPERTIES breached its duty of care by failing to exercise due care in its actions and communications.

63. The Plaintiffs justifiably relied on the above representations of Defendant DLI PROPERTIES, in that the truth of the said representations, and the validity and effectiveness of the contract between those parties, was within the control of DLI PROPERTIES.

64. The Plaintiffs suffered the pecuniary losses set out or referenced above as the proximate result of their reliance upon the representations of Defendant DLI PROPERTIES above.

SEVENTH. ALTERNATIVE CAUSE OF ACTION:

NEGLIGENT MISREPRESENTATION: ALLEN TATE

65. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein. The allegations of this cause of action are set out in the alternative to those above.

66. In the alternative to the allegations set out above, the representations made were made by, and were the responsibility of, the Defendant ALLEN TATE, acting without the authority of its client, principal or employer, DLI PROPERTIES.

67. The Defendant ALLEN TATE had a pecuniary interest in making the representations above.

68. The Defendant ALLEN TATE, and its agents, servants and employees, had a duty of care to see that they communicated truthful information to the Plaintiffs.

69. The Defendant ALLEN TATE breached its duty of care by failing to exercise due care in its actions and communications.

70. The Plaintiffs justifiably relied on the above representations of Defendant ALLEN TATE, in that the truth of the said representations, and the validity and effectiveness of the contract between those parties, was within the control of ALLEN TATE.

71. The Plaintiffs suffered the pecuniary losses set out or referenced above as the proximate result of their reliance upon the representations of Defendant ALLEN TATE above.

EIGHTH. ALTERNATIVE CAUSE OF ACTION:

NEGLIGENT MISREPRESENTATION: FAILE

72. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein. The allegations of this cause of action are set out in the alternative to those above.

73. In the alternative to the allegations set out above, the representations made were made by, and were the responsibility of, the Defendant FAILE, acting without the authority of her client, principal or employer, DLI PROPERTIES, and without the authority of her principal or employer ALLEN TATE.

74. The Defendant FAILE had a pecuniary interest in making the representations above.

75. The Defendant FAILE had a duty of care to see that they communicated truthful information to the Plaintiffs.

76. The Defendant FAILE breached her duty of care by failing to exercise due care in her actions and communications.

77. The Plaintiffs justifiably relied on the above representations of Defendant FAILE, in that the truth of the said representations, and the validity and effectiveness of the contract between those parties, was within the control of FAILE.

78. The Plaintiffs suffered the pecuniary losses set out or referenced above as the proximate result of their reliance upon the representations of Defendant FAILE above.

NINTH CAUSE OF ACTION:

UNFAIR OR DECEPTIVE TRADE PRACTICES

79. All matters, set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein.

80. This cause of action is brought against the Defendants, jointly and severally, or any combination of them, for actual and statutory treble damages based on the violation of Title 39, Chapter 5 of the South Carolina Code of Laws (hereafter the Unfair Trade Practices Act or "UFTP"), in the negotiation and sale of real property.

81. In the course of the transaction Defendants have committed or engaged in, among others, the following unfair and/or deceptive acts or practices in violation of Title 39, Chapter 5:

- a. they have accepted, or communicated the acceptance, of the Plaintiff's proposed modification of the previous contract or contract-offer to include a cap on the tap fee chargeable to the Plaintiffs, and then acted as if such acceptance had not occurred;
- b. they have accepted and agreed, or communicated their acceptance and agreement, to the contract for purchase and sale of the Subject Real Property, including such proposed modification, and then acted as if such acceptance and agreement had not occurred;
- c. they have admitted and acted upon a valid and enforceable contract of purchase and sale of the Subject Real Property as existing between the Plaintiffs and the Defendant DLI PROPERTIES, and then denied and repudiated the existence of such contract;
- d. they have allowed the Plaintiffs to act in reliance upon the existence of a valid and enforceable contract between themselves and the Defendant DLI PROPERTIES, despite their intent to repudiate the same or deny the existence of a valid and enforceable contract, and have in fact repudiated the same and denied its existence.

82. On knowledge and information, the actions of the Defendants, by and through its, her or their agents, servants, and employees, have an impact, either direct or indirect, upon the public interest as defined by S. C. Code Ann. § 39-5-10(b) (1976) and by the holding of the South Carolina Court of Appeals in *Noack Enterprises, Inc. vs. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986).

83. On knowledge and information, the actions and words of the Defendants and its, her or their agents show a pattern of behavior by the said Defendants consistent with a deliberate pattern of such actions both in the past and planned in the future.

84. On knowledge and information, the actions of the Defendants have the potential for repetition within the meaning of the holdings in *Noack*, and of the Supreme Court of Washington cited in that case, *Anhold vs. Daniels*, 94 Wash.2d 40, 614 P.2d 184 (1980) cited therein.

85. On knowledge and information, the actions of the Defendants as referenced herein constitute unfair or deceptive methods, acts or practices in the conduct of a trade or commerce as defined by S. C. Code Ann. § 39-5-20 (1976).

86. On knowledge and information, the actions of the Defendants entitle the Plaintiffs WOODSON to damages in the amount of three times the actual damages sustained by reason of the Defendants' unfair or deceptive methods, acts or practices, as provided by S. C. Code Ann. § 39-5-140(a) (1976).

87. On knowledge and information, the actions of the Defendants entitle the Plaintiff WOODSON to an award of reasonable attorney's fees and costs under the provisions of S. C. Code Ann. § 39-5-140(a) (1976).

TENTH CAUSE OF ACTION:

BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

88. Any allegation set out elsewhere in this Complaint and consistent herewith, are realleged hereby as fully as if set out herein.

89. On knowledge and information, by reason of the actions and inaction of Defendants DLI PROPERTIES, ALLEN TATE and/or FAILE as referenced herein, DLI PROPERTIES is estopped from denying the existence of a mutually binding contract of sale and purchase for the Subject Real Property between the Plaintiffs WOODSON and itself.

90. On knowledge and information, the actions and inaction of Defendant DLI PROPERTIES as referenced herein demonstrate that its refusal to acknowledge the contract of purchase and sale of the Subject Real Property as binding on both parties results from its bad faith or that its said action is unreasonable, and in breach of the implied covenant of good faith and fair dealing in the said contract and business dealings.

91. Defendant DLI PROPERTIES' conduct has offended acceptable notions of business ethics, inasmuch as it has in bad faith:

- a. accepted the Plaintiff's proposed modification of the previous contract or contract-offer to include a cap on the tap fee chargeable to the Plaintiffs, and then acted as if such acceptance had not occurred;
- b. accepted and agreed to the contract for purchase and sale of the Subject Real Property, including such proposed modification, and then acted as if such acceptance and agreement had not occurred;
- c. admitted and acted upon a valid and enforceable contract of purchase and sale of the Subject Real Property as existing between the Plaintiffs and the Defendant DLI PROPERTIES, and then denied and repudiated the existence of such contract;
- d. allowed the Plaintiffs to act in reliance upon the existence of a valid and enforceable contract between themselves and the Defendant DLI PROPERTIES, despite their intent to repudiate the same or deny the existence of a valid and enforceable contract, and despite the fact that they had in fact repudiated the same and denied its existence.

92. For all those reasons referenced herein, Defendant DLI PROPERTIES acted without a reasonable belief in its position when it denied the validity and existence of the valid contract between the Plaintiffs and itself and in its other actions and inaction set out and referenced herein.

93. On knowledge and information, Defendant DLI PROPERTIES has breached its duty of good faith and fair dealing due to Plaintiffs WOODSON by other acts or omissions of which Plaintiffs are presently unaware and which will be shown according to proof at the time of trial.

94. As a proximate result of the above unreasonable and bad faith conduct of Defendant DLI PROPERTIES, Plaintiffs WOODSON have suffered and will continue to suffer in the future damages under the policies plus allowable interest, and other economic and consequential damages, for a total amount to be shown at the time of trial.

95. As a further proximate result of the unreasonable and bad faith conduct of Defendant DLI PROPERTIES, Plaintiffs WOODSON have been compelled to retain legal counsel to obtain the benefits due under the contract. On knowledge and information, DLI PROPERTIES is liable to

Plaintiffs WOODSON for those attorneys' fees unnecessarily incurred by the Plaintiffs in order to obtain the policy benefits or proceeds in a sum to be determined at trial.

WHEREFORE, the Plaintiffs pray that this Court:

AS TO SPECIFIC PERFORMANCE:

- A. Adjudge and decree that the Defendant DLI PROPERTIES, LLC specifically perform the above-mentioned contract and execute a deed to the Subject Real Property to the Plaintiffs under the terms of the contract between them and the Plaintiffs;
- B. Decree that in the event of the failure of the Defendant DLI PROPERTIES, LLC to execute the required deed, that such deed issue from this Court;

AS TO DECLARATORY JUDGMENT:

- C. Issue its order for any declaratory relief necessary to determine the validity and construction of any contract between the Plaintiffs and the Defendant DLI PROPERTIES, LLC relating to the sale and purchase, respectively, of the Subject Real Property;
- D. Pursuant to any such order for declaratory relief, determine the existence and status of all owners and claimants of the Subject Real Property herein;

AS TO FRAUD:

- E. Enter judgment for the Plaintiffs LARIUS G. WOODSON and MAURISSA WOODSON and against the Defendants DLI PROPERTIES, LLC, ALLEN TATE CO., INC. and/or MELIA C. FAILE, jointly and/or severally, in the amount of their actual damages set out or referenced herein;
- F. Award the Plaintiffs exemplary and punitive damages, by reason of the negligent misrepresentations of the Defendants DLI PROPERTIES, LLC, ALLEN TATE CO., INC. and/or MELIA C. FAILE, jointly and/or severally, as set out and referenced herein;

AS TO NEGLIGENT MISREPRESENTATION:

- G. Enter judgment for the Plaintiffs LARIUS G. WOODSON and MAURISSA WOODSON and against the Defendants DLI PROPERTIES, LLC, ALLEN TATE CO., INC. and/or MELIA C. FAILE, jointly and/or severally, in the amount of their actual damages set out or referenced herein;
- H. Award the Plaintiffs exemplary and punitive damages, by reason of the negligent misrepresentations of the Defendants DLI PROPERTIES, LLC, ALLEN TATE CO., INC. and/or MELIA C. FAILE, jointly and/or severally, as set out and referenced herein;

AS TO UNFAIR AND DECEPTIVE TRADE PRACTICES:

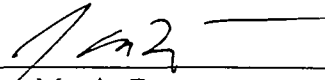
- I. Enter judgment for the Plaintiffs LARIUS G. WOODSON and MAURISSA WOODSON and against the Defendants DLI PROPERTIES, LLC, ALLEN TATE CO., INC. and/or MELIA C. FAILE, jointly and/or severally, in an amount of three times the actual damages sustained by them, pursuant to S.C. Code Ann. § 39-5-140(a) (1976);
- J. Award the Plaintiffs their reasonable attorney's fees and costs pursuant to S.C. Code Ann. § 39-5-140(a) (1976);

AS TO BREACH OF GOOD FAITH AND FAIR DEALING:

- K. Enter judgment for the Plaintiffs LARIUS G. WOODSON and MAURISSA WOODSON and against the Defendants DLI PROPERTIES, LLC in the amount of their actual damages set out or referenced herein;
- L. Award the Plaintiffs exemplary and punitive damages, by reason of the negligent misrepresentations of the Defendants DLI PROPERTIES as set out and referenced herein;
- M. Award the Plaintiffs their reasonable attorney fees for the prosecution of this action;

AS TO ALL CAUSES OF ACTION:

- N. Include a prayer for any other relief which may be authorized under other causes of action; and
- O. Award or allow Plaintiffs such other and further relief as this Court may deem just and proper.



John Martin Foster
Attorney for Plaintiffs

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October 6, 2006

Rock Hill, South Carolina

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ALLEN TATE

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AGREEMENT TO BUY AND SELL REAL ESTATE (FOR GENERAL USE AND LOTS/ACREAGE)

1. **PARTIES:** This legally binding Agreement entered into on August 3, 2008 between, Buyer(s), Marina Woodson and Harrison Woodson, (hereinafter called "BUYER"), and Seller(s), "D.I.T. Properties" (hereinafter called "SELLER"). The property shall be deeded in the name(s) of Marina Woodson and Harrison Woodson.

THE BUYER/SELLER IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

2. **PROPERTY TO BE SOLD:** Subject to terms and conditions herein, Seller agrees to sell and Buyer agrees to buy the following described property with improvements and fixtures thereon:

Lot #36 Block _____ Section _____ Subdivision Lakeview Landing
Address Lot #36 Point Prosperity Rd.
Tax Map # _____ City Fort Mill Zip 29715
County of Concord, State of South Carolina.

3. **PURCHASE PRICE** shall be \$ 88,900.00 Eighty eight thousand nine hundred + 10/100 dollars.

4. **METHOD OF PAYMENT:** Purchase price shall be paid as follows: ☐ Cash; or ☒ Subject to Financing. Financing to be obtained by ☐ Conventional ☐ Seller ☐ VA ☐ FHA ☐ Other terms: _____

5. **EARNEST MONEY:** This offer is accompanied by an earnest money deposit of \$ 1,000.00. Buyer and Seller authorize Allen Tate as Escrow Agent, to hold and disburse earnest money according to the terms of this agreement. Earnest money paid by ☐ Cash, ☒ Check, or Other. Broker does not guarantee payment of a check or checks accepted as earnest money. All escrow money received shall be deposited as required by South Carolina law and South Carolina Real Estate Commission Rules and Regulations. At the consummation of this sale, the earnest money deposit shall be credited to the Buyer.

THE PARTIES UNDERSTAND THAT, UNDER ALL CIRCUMSTANCES, INCLUDING DEFAULT, THE BROKER HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT.

6. **LOAN PROCESSING AND APPLICATION:** Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum 750 % loan (loan-to-value ratio) within 7 consecutive days from the execution of this Agreement and shall provide Seller with written satisfactory loan approval within 28 consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. Time is of the essence. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with the written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's creditworthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these above conditions, Buyer shall be in default of this agreement subject to the terms of paragraph 22.

FHA Mortgage Insurance ☐ will ☒ will not be added to the mortgage. VA funding fee ☐ will ☒ will not be added to the mortgage.

7. **CLOSING COSTS:** Unless otherwise agreed, closing costs, including all loan charges and prepaid recurring items, shall be paid as follows:

(a) SELLER shall provide or pay for preparation of deed, any recording charge based on value of property, and all costs necessary to deliver a marketable title, including recording of satisfactions and property taxes to the day of closing.

(b) BUYER shall pay, unless otherwise agreed herein, the cost of the Buyer's credit report, property insurance, appraisal, survey, cost of obtaining loan, discount points, title examination, escrow deposits, and prepaid expenses. The Buyer shall also pay, if applicable, interim interest and mortgage insurance premium on VA funding fee. Buyer's hazard insurance policy shall provide coverage as required by lender. Other terms: No Closing Costs to be paid by Seller

[Signature] BUYER [Signature] BUYER [Signature] SELLER [Signature] SELLER HAVE READ THIS PAGE



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ALLEN TATE

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8. **OPTION TO TERMINATE AFTER DUE DILIGENCE:** (A) Seller grants to Buyer a 30 day right ("Termination Right") from the date of this agreement during which Buyer may do any or all of the following:

1. Conduct at Buyer's sole expense whatever due diligence, inspections, examinations, surveys and testing, if any, Buyer deems appropriate to evaluate the suitability of Property for Buyer's intended use including but not limited to, zoning, governmental regulations, environmental concerns, availability of utilities and whether the soil on Property will support a septic system of a size and type of desired Buyer (hereinafter collectively referred to as "Buyer's Due Diligence");

(B) Seller acknowledges and agrees that Buyer and/or his agents and employees may have free access during normal business hours to visit Property for the purpose of conducting Buyer's Due Diligence. Buyer hereby agrees to indemnify and hold Seller, Broker and Broker's Affiliated Licensees harmless from and against any and all loss, injury, cost or expense associated with Buyer's inspection of and entry upon Property.

(C) If Buyer decides to exercise Buyer's right to terminate this Agreement, Buyer must give notice of the same to Seller prior to the expiration of the Termination Right. If Buyer fails to give such notice timely, the Termination Right shall automatically expire and shall no longer be part of this agreement, and Buyer shall be deemed to have accepted Property "as-is". The expiration of the Termination Right shall not, however, remove or terminate and other contingencies to which the Agreement may be subject or limit any other rights which Buyer may have under this Agreement.

9. **BUILDING PERMIT:** This Agreement ☒ is ☐ is not contingent upon Buyer's ability to acquire all required licenses and permits from the appropriate governmental authority to build on Property. If Buyer notifies Seller in writing within 30 days after the complete execution of this agreement that Buyer is unable to acquire all required licenses and permits for the appropriate governmental authority to build on Property, then in such event this Agreement shall terminate. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

10. **REZONING:** This Agreement ☒ is ☐ is not contingent upon Property being rezoned to A1A on or before the 30 day of 11/11 by the appropriate governmental authority. For purpose herein, the term rezoned shall mean that the above referenced zoning has been fully approved by the appropriate governmental authority and any period to appeal such rezoning has expired without an appeal being filed. The ☐ Buyer ☐ Seller shall be responsible for pursuing such rezoning, and paying all associated costs. All rezoning applications shall be submitted to Seller for Seller's approval prior to filing, which approval shall not be unreasonably withheld. All parties agree to cooperate, to sign the necessary documentation and to support the rezoning application. If Buyer notifies Seller or Broker in writing within forty-eight hours after the above date the Property cannot be so rezoned, then in such event this Agreement shall automatically terminate and Broker shall promptly refund the Earnest Money to Buyer. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

11. **WELL, SEPTIC TANK, SEWER AVAILABILITY:** It shall be the responsibility of the Buyer to obtain approval from the South Carolina Department of Health and Environmental Control or other proper South Carolina authority prior to closing in the event a well and/or septic tank is needed to be placed on the property.

In the event that the Buyer applies for well or septic tank approval and DHEC or other proper authority denies approval or issues a preliminary opinion showing that the property is not suitable for the installation of a well and/or a conventional septic system suitable for the Buyer's intended home or other structure, then in such event, the Buyer may elect to rescind this Agreement and receive a refund of the earnest money deposit. If the property is capable of being connected to a water and/or sewerage line maintained by a private or public utility for a normal tap fee and at a cost to complete tap not to exceed \$ 4,300.00, then in such event, the Buyer shall contract such authority to obtain confirmation that the subject property is properly tapped for water and power system or may be tapped into the water and sewerage system.

Seller represents that the property is connected to ☒ public sewer system or to ☐ septic tank or to ☐ public water or to ☐ well system or to ☐ other _____

12. **SURVEY:** Upon the acceptance of this offer, the property shall be surveyed by a licensed surveyor at the expense of the ☒ BUYER ☐ SELLER. The surveyor shall set and flag all property pins, showing encroachments and easements. Property must be x or having at least _____ acres. The survey to be approved in writing by Buyer prior to closing. The purchase price is based upon \$ _____ per _____ (acre, sq. ft., or front ft.) and shall be adjusted in accordance with the area set forth in such a survey, if applicable.

13. **CONVEYANCE SHALL BE MADE:** Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing, and transaction closed on or before Sept 29, 2006, no later than 2:00 p.m. Time is of the essence. Seller and Buyer authorize their respective attorneys and the settlement agent to furnish to Listing Broker and Selling Broker copies of the final HUD-1 settlement statement for the transaction for their review prior to closing.

14. **POSSESSION:** Possession of said property will be given to Buyer on the day of closing. Seller agrees to deliver property free of debts and in a clean condition. Possession by Buyer before closing or by Seller after closing shall be subject to the terms and conditions of a separate agreement to be executed prior to closing or occupancy.

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ALLEN TATE

004/008

16. **CONDITION OF PROPERTY:** The Seller shall not remove any timber, dirt, minerals or otherwise affect the condition of the property after the signing of this Agreement. All timber, dirt, minerals, etc., shall remain with the property and be a part of the property and be transferred to the Buyer. The Seller shall not bring any trash, refuse, debris, medical or hazardous waste, or other improper materials upon the property. In the event any condemnation proceeding is brought by any governmental authority, agency, utility, etc., prior to the closing, then the Buyer may elect to rescind the agreement.

18. **EXPIRATION OF OFFER:** The offer from Buyer shall be withdrawn at 7 o'clock P M on Aug 4, 2006 unless countered or accepted by Seller in written form prior to such time. Time is of the essence.

17. **SPECIAL STIPULATIONS:** The following stipulations concerning restrictions, and easements affecting desired use, drainage, hazardous waste, availability of water and sewer, soil test, wetlands study, subordination, lot releases, etc., should be included here. If conflicting with printed matter, the following stipulations shall control: (See addendum if applicable)

19. **ADJUSTMENTS:** Taxes, water, all sewer assessments, sewer charges, fuel oil, rents as when collected, insurance premiums, if applicable, and other assessments, including homeowner's association fees, shall be adjusted as of the date of closing. Tax proration pursuant to this Agreement are to be based on the tax information available on the date of closing, and are to be prorated on that basis. **BUYER IS TO BE RESPONSIBLE FOR APPLYING FOR ANY APPLICABLE TAX EXEMPTIONS.** Property taxes and rent, as well as other expenses and income of the property, if applicable, shall be apportioned to the date of closing. Annual expenses or income shall be apportioned using 365 days. Monthly property expenses or income shall be apportioned by the number of days in month of closing. Prorations at closing shall be final.

10. **NON-RESIDENT TAX:** Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-530 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

20. **ROLLBACK TAXES (IF ANY):** When rollback taxes are subsequently determined and billed to the Buyer, the Seller and Buyer agree that the rollback taxes shall be paid by Buyer or Seller.

21. **RISK OF LOSS OR DAMAGE:** In case the property herein referred to is destroyed wholly or partially by fire or other casualty prior to delivery of deed, Buyer or Seller shall have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Agreement.

22. **DEFAULT:** If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 23), or terminate this Agreement with a five day written notice. If terminated, both parties shall execute a written release of the other from this contract and both shall agree to hold the Escrow Agent harmless. If either Buyer or Seller refuses to execute release, Escrow Agent will hold the earnest money in trust until said releases are executed or until a court of competent jurisdiction dictates legal disposition.

23. **ACTUAL COST INCURRED** shall include all costs and expenses incurred or obligated for by Buyer, Seller or Broker in an effort to consummate this sale. Such costs shall include, but are not limited to, cost of credit report, appraisal, survey, inspections and reports, title examination, and Broker's fee or commission for this sale.

24. **SURVEY, TITLE EXAMINATION, AND INSURANCE:** The Listing and Cooperating Broker(s) and their Agent(s) recommend that Buyer have a survey of the subject property made, have examination as to the title to the property, obtain owner's title insurance, and that Buyer obtain appropriate hazard insurance coverage effective with the time of closing. All hazard insurance to be canceled and new policies furnished by Buyer at closing unless otherwise stipulated in this Agreement. Flood insurance, if required by Lender at Buyer's option, shall be assigned to Buyer with permission of carrier, and premium prorated to date of closing.

25. **APPRAISED VALUE:** (check one)

☐ This agreement is not contingent on the lot or parcel with building and improvements thereon. If any, appraising, according to the lenders appraisal or other appraisal as agreed, for the selling price.

☒ This agreement is contingent on the lot or parcel with building and improvements thereon, if any, appraising, according to the lenders appraisal or other appraisal as agreed, for the selling price or more; if the lot or parcel with building and improvements thereon appraises for less than the selling price, the seller may elect to sell for the appraised value. In such case, the Buyer agrees to proceed with the consummation of this sale at the reduced price. However, if Seller does not agree to sell at the appraised value, the Buyer shall have the option of proceeding with the consummation of the Agreement without regard to the amount of the appraised valuation, or terminate the agreement without penalty.

26. **SPECIAL STUDIES AREA, WETLANDS, AND ENVIRONMENTAL PROTECTION MATTERS:** All reports and certifications called for by the lending agencies and any governmental body, by the Buyer concerning any special study area, wetlands or for any environmental protection matter shall be at the expense of the Buyer. In the event such studies are wanted or required, the studies must be furnished by the proper parties within 30 days of complete execution of the agreement. The Buyer and Seller must have access to all studies within five (5) days of receipt of the studies. If Buyer fails to meet these deadlines, Buyer is deemed to have waived any and all rights under this paragraph. If the Buyer is not satisfied with the results, the Seller shall have the option of correcting the problem. If the Seller elects not to correct the problem, the Buyer's obligations under this Agreement terminate.

27. **COASTAL TIDELANDS & WETLANDS ACT:** In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures at the Buyer's or Seller's expense.

BUYER BUYER BUYER SELLER SELLER HAVE READ THIS PAGE

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ALLEN TATE

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28. DISCLAIMER BY BROKERS AND AGENTS: The parties acknowledge that the Listing and Cooperating Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the property or as to condition of or existence of improvement services or systems, thereto, included but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage, electric systems, and to the structure; (2) Give no warranty, express or implied, as to the merchantability or fitness for a particular purpose as to the property or such improvements thereto and any implied warranty hereby disclaimed; (3) Give no warranty as to title; (4) Give no guaranty or warranty concerning (a) any certification or inspection concerning the condition of the property, (b) any matters which would be reflected by current survey of the property, and (c) the accuracy of the published square footage of the property; (5) Buyer acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Buyer regarding (a) projected income or economic benefit for Buyer from rentals; (b) rental arrangements except that Buyer may rent the unit if Buyer so desires or (c) other economic benefits to the Buyer.

29. MEDIATION CLAUSE: Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this Agreement pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud.

Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; (e) the filing of an interpleader action to resolve earnest money disputes. The filing of a judicial action to enforce the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

30. ENTIRE BINDING AGREEMENT: This written instrument, including the additional terms and conditions set forth on any documents intended by the parties to be included, expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Seller. It can be changed only by a subsequently written instrument signed by both parties. Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein. The benefits and obligations shall inure to and bind the parties hereto and their heirs, assigns, successors, executors, or administrators. Whenever used, singular includes plural, and use of any gender shall include all.

31. SURVIVAL: If any provision herein contained which by its nature and effect is required to be observed, kept or performed after the closing, it shall survive the closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed.

32. FACSIMILE AND OTHER ELECTRONIC MEANS: The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

33. EXTENSION AGREEMENT: If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 30 consecutive days from the original closing date. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date. Time is of the essence.

34. CONTINGENCIES: These stipulations shall preempt printed matter herein: (attach and reference addendum if necessary)

Addendum: THIS PROPERTY IS VACANT LAND & IS NOT CONNECTED
TO PUBLIC WATER OR SEWATIC TAKE. HOWEVER
BOTH ARE AVAILABLE

BUYER BUYER SELLER SELLER HAVE READ THIS PAGE

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THIS IS A LEGALLY BINDING AGREEMENT. BOTH BUYER AND SELLER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: [Signature] - Larius Woodson Date 8/3/06 Time 11:30 am

WITNESS: _____ Date _____ Time _____

BUYER: [Signature] - Maurissa Woodson Date 8/3/06 Time 11:30 am

WITNESS: _____ Date _____ Time _____

SELLER: [Signature] DLI Date 8/3/06 Time 1:15 PM

WITNESS: [Signature] C. Tate Date 8/3/06 Time 1:16 pm

SELLER: [Signature] DLI Date 8/3/06 Time 1:16 PM

WITNESS: [Signature] C. Tate Date 8/3/06 Time 1:16 pm

LISTING AGENT AND COMPANY [Signature] C. Tate Allen Tate & Son

SELLING AGENT AND COMPANY SHARON DAVIS DAVIS INTEGRITY REALTY

SELLING AGENT IS PRESENTING THIS OFFER AS A ☒ BUYER'S AGENT OR C SUBAGENT OF THE SELLER.

ESCROW AGENT ACKNOWLEDGMENT _____

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Accounts | **Bill Pay & e-Bills** | **Transfer Funds** | **Investments** | **Customer Service**

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Check Image – Front and Back

Posting Date: 08/21/2006

Check #: 1050

Amount: \$1,000.00

Reference: 81492544415

Account: DDA-4283

Nickname:

MAURISSA J. WOODSON LARIUS G. WOODSON 9799 WESTVIEW DR. APT. 1012 CORAL SPRINGS, FL 33076-2542		1050 8/4/06 53-4/630 FI 1630
Pay to the Order of <u>Allen Tate</u>	<u>\$ 1,000.00</u> <u>One thousand and 00/100</u> Dollars	
Bank of America ACH R/T 065100277		
For <u>Point Carpenter Rd</u>	<u>Yes</u>	
⑆063000047⑆ 005504784283⑆ 1050 ⑆0000100000⑆		

For Deposit Only -
 Allen Tate Company
 FL Min Trust Account
 Wachovia Bank
 Acct #201000269218

⑆031200730⑆
 WACHOVIA NA SUCC 11 42-51
 PHILA, PA 08106
 5719046666

To print this page for reference purposes please use the print button on your browser or click "File" and "Print". [More information about images and image availability.](#)

[Return to Account Activity](#)

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building	PO Box 106	803 324 8100
223 East Main Street Suite 520	Rock Hill SC	803 324 8109 Fax
Rock Hill South Carolina 29730	29731-6106	jmfoster@infoave.net

October 27, 2006

Philip E. Wright, P.A.
408 North Main Street
Lancaster, S.C. 29720

Re: Alan L. Cauthen v.
DLI Properties, LLC: Larius
Woodson and Maurissa Woodson
C.A. 06-CP-29-1195

Dear Phil:

Please accept this letter as my acceptance of service of your civil action on behalf of my clients, Mr. and Mrs. Woodson. If you wish their signed Acceptances to confirm this, please inform me.

With this letter, I am having a copy of our independent action delivered to your office. Its filing and service have been delayed by my need to deal with cases inherited after Fred Reynolds died. I ask you to show the same courtesy by either accepting, or having Mr. Cauthen sign an acceptance. Let me know how you wish to handle this matter.

With best personal regards,

Sincerely Yours,



John Martin Foster

JMF/ens
enclosure(s)

JOHN MARTIN FOSTER

Attorney at law

The Guardian Building	PO Box 106	803 324 8100
223 East Main Street Suite 520	Rock Hill SC	803 324 8109 Fax
Rock Hill South Carolina 29730	29731-6106	jmfoster@infoave.net

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With best personal regards,

Sincerely Yours,



John Martin Foster

JMF/ens
enclosure(s)

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

LARIUS WOODSON and
MAURISSA WOODSON,

Plaintiffs,

vs.

DLI PROPERTIES, LLC, ALLEN
TATE CO., INC., MELIA C. FAILE,
and ALAN L. CAUTHEN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 04-CP-29-1354

ANSWER

Defendants Allen Tate Co., Inc. ("Allen Tate") and Melia C. Faile ("Faile") by and through undersigned counsel, respond as follows to Plaintiffs' Larius Woodson and Maurissa Woodson's ("Plaintiffs") Complaint:

FIRST DEFENSE

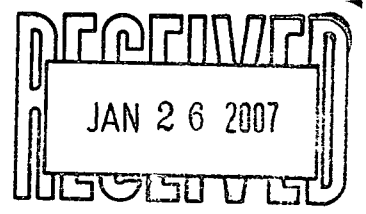
(Failure to State a Claim upon which Relief may be Granted)

The Complaint fails to state a claim upon which relief can be granted and should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

SECOND DEFENSE

Responding to the specific numbered paragraphs of Plaintiffs' Complaint, Allen Tate and Faile allege and say as follows:

1. Admitted, upon information and belief.
2. Admitted, upon information and belief.
3. Admitted.
4. It is admitted that Faile is a licensed real estate salesperson by the South Carolina Real Estate Commission and that she is a resident of York County, South Carolina.
5. Admitted, upon information and belief.



6. It is admitted that this action concerns property known as Lot 36, Point Carpenter Road, located in Lancaster County, South Carolina (The "Property"). To the extent not admitted, the remaining allegations of this paragraph are denied for lack of information and knowledge sufficient to form a belief as to the truth thereof.

FIRST CAUSE OF ACTION

7. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 6 of the Complaint hereinabove.

8. It is admitted that Plaintiffs seek to compel specific performance of an alleged contract concerning the Property, and it is specifically denied that a valid, binding, and enforceable contract existed. The remaining allegations of this paragraph are denied for lack of information and knowledge sufficient to form a belief as to the truth thereof.

9. It is admitted that DLI Properties, LLC ("DLI") was at one time the record owner of the Property, but specifically denied that DLI Properties owns the Property to this day. The remaining allegations of this paragraph are denied for lack of information and knowledge sufficient to form a belief as to the truth thereof.

10. It is admitted that Plaintiffs and DLI engaged in negotiations concerning the sale and purchase of the Property and exchanged a proposed contract and continued to modify the terms of such proposed contract. To the extent not admitted, the remaining allegations of this paragraph are denied.

11. It is admitted that DLI engaged Allen Tate to assist it in the marketing and listing of the Property, and that Allen Tate, through its duly licensed salesperson Faile, fulfilled its duties. It is further admitted that Faile acted within the regular course and scope of her affiliation with Allen Tate in assisting DLI. It is denied that any alleged fraudulent conduct is within the

regular course and scope of Allen Tate representatives. To the extent not admitted, the remaining allegations of this paragraph are denied.

12. It is admitted that on August 1, 2006, Faile faxed a proposed, unsigned Agreement to Buy and Sell Real Estate to Plaintiff Larius Woodson containing previously discussed terms. It is further admitted that after receiving the proposed agreement, Plaintiffs made certain changes to the terms of the agreement and failed to initial one or more of the changes and failed to fill in one or more blanks. It is further admitted that on August 3, 2006, Plaintiffs signed the proposed agreement and submitted it to DLI, through Faile. It is further admitted that DLI agreed to the proposed changes and signed the agreement on August 3, 2006, with the expectation that Plaintiffs would initial their proposed modifications in order to make the agreement valid and binding. It is further admitted that Faile faxed the agreement to Plaintiffs' real estate agent, Sharon Davis, with explicit instructions for Plaintiffs to initial their proposed modifications and to fill in the remaining blanks in the agreement. It is further admitted that on August 4, 2006, Plaintiff Larius Woodson contacted Faile and apologized for not making an additional change to the terms of the agreement. It is further admitted that during the August 4, 2006 conversation Plaintiff Larius Woodson informed Faile he wished to insert a maximum tap fee of \$4,300 into paragraph 11 of the agreement. It is further admitted that prior to this material change there was no limit to the tap fee in the proposed contract. To the extent not admitted, the remaining allegations of this paragraph are denied.

13. It is admitted that Faile informed Plaintiff Larius Woodson that she believed the parties had a deal and that Plaintiffs should deliver a fully initialed and completed agreement to her along with the earnest money deposit of \$1,000. It is denied that Faile represented that DLI

had agreed to Plaintiffs' material modification to the proposed contract. To the extent not admitted, the remaining allegations of this paragraph are denied.

14. It is admitted that on August 4, 2006, Plaintiffs delivered an agreement to Faile substantially similar to the document attached to the Complaint as well as the earnest money deposit in the amount of \$1,000, a copy of which is attached as an exhibit to the Complaint. It is further admitted that DLI never initialed the material modification to the maximum tap fee provision, which added a maximum tap fee to the proposed contract, and represented a material modification to the parties' previous discussions. To the extent not admitted, the remaining allegations of this paragraph are denied.

15. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

16. Denied.

17. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

18. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

19. It is admitted that DLI and Alan L. Cauthen ("Cauthen") entered into an Agreement to Buy and Sell Real Estate with respect to the Property, that Cauthen filed a Lis Pendens against the Property, and that Cauthen asserts his contract with DLI is valid and enforceable against all parties. To the extent not admitted, the remaining allegations of this paragraph are denied.

20. It is admitted that Plaintiff Larius Woodson and Faile discussed the issue of the cap fee. To the extent not admitted, the remaining allegations of this paragraph are denied.

21. Denied.

22. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

23. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

24. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

25. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

SECOND, ALTERNATIVE CAUSE OF ACTION

26. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 25 of the Complaint hereinabove.

27. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

28. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied. It is specifically denied that a valid and binding contract between DLI and Plaintiffs exists.

29. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied. It is specifically denied that a valid and binding contract between DLI and Plaintiffs exists.

30. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied. It is specifically denied that a valid and binding contract between DLI and Plaintiffs exists.

THIRD, ALTERNATIVE CAUSE OF ACTION

31. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 30 of the Complaint hereinabove.

32. Denied.

33. It is admitted that DLI did not accept Plaintiffs' proposed modification of the previous contract-offer to include a cap on the tap fee chargeable to Plaintiffs; that DLI had not accepted and agreed to the contract for purchase and sale of the Property, including the proposed tap fee modification, that there was no valid and enforceable contract between Plaintiffs and DLI, and that Plaintiffs could not act in reliance upon the existence of a valid and enforceable contract between themselves and DLI. To the extent not admitted, the remaining allegations of this paragraph are denied.

34. It is specifically denied that DLI and/or Faile made the representations alleged in paragraph 32. Accordingly, Allen Tate and Faile cannot admit or deny whether such non-existent representations concerned material facts.

35. Allegations concerning Plaintiffs' alleged ignorance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

36. Allegations concerning DLI's intent are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

37. Allegations concerning Plaintiffs' alleged reliance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

38. Denied. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

39. Allegations concerning Plaintiffs' alleged damages are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

FOURTH, ALTERNATIVE CAUSE OF ACTION

40. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 39 of the Complaint hereinabove.

41. It is denied that Allen Tate made the alleged misrepresentations or that Allen Tate acted without the authority of DLI. The remaining allegations of this paragraph are denied.

42. It is specifically denied that Allen Tate and/or Faile made the representations alleged. Accordingly, Allen Tate and Faile cannot admit or deny whether such non-existent representations concerned material facts.

43. Allegations concerning Plaintiffs' alleged ignorance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

44. Denied.

45. Allegations concerning Plaintiffs' alleged reliance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

46. Denied. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

47. Allegations concerning Plaintiffs' alleged damages are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

FIFTH, ALTERNATIVE CAUSE OF ACTION

48. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 47 of the Complaint hereinabove.

49. It is denied that Faile made the alleged misrepresentations or that Faile acted without the authority of DLI. The remaining allegations of this paragraph are denied.

50. It is specifically denied that Allen Tate and/or Faile made the representations alleged. Accordingly, Allen Tate and Faile cannot admit or deny whether such non-existent representations concerned material facts.

51. Allegations concerning Plaintiffs' alleged ignorance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

52. Denied.

53. Allegations concerning Plaintiffs' alleged reliance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

54. Denied. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

55. Allegations concerning Plaintiffs' alleged damages are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

SIXTH, ALTERNATIVE CAUSE OF ACTION

56. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 55 of the Complaint hereinabove.

57. Denied.

58. It is admitted that DLI did not accept Plaintiffs' proposed modification of the previous contract-offer to include a cap on the tap fee chargeable to Plaintiffs; that DLI had not accepted and agreed to the contract for purchase and sale of the Property, including the proposed tap fee modification, that there was no valid and enforceable contract between Plaintiffs and DLI, and that Plaintiffs could not act in reliance upon the existence of a valid and enforceable contract between themselves and DLI. To the extent not admitted, the remaining allegations of this paragraph are denied.

59. Allegations concerning Plaintiffs' alleged ignorance are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

60. It is admitted that DLI had a pecuniary interest in the potential sale of the Property. To the extent not admitted, the remaining allegations of this paragraph are denied.

61. The allegations of this paragraph are a misstatement of applicable law and are therefore denied.

62. Denied.

63. Denied. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

64. Allegations concerning Plaintiffs' alleged damages are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

SEVENTH, ALTERNATIVE CAUSE OF ACTION

65. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 64 of the Complaint hereinabove.

66. It is denied that Allen Tate made the alleged misrepresentations or that Allen Tate acted without the authority of DLI. The remaining allegations of this paragraph are denied.

67. It is admitted that Allen Tate had a pecuniary interest in the potential sale of the Property. To the extent not admitted, the remaining allegations of this paragraph are denied.

68. The allegations of this paragraph are a misstatement of applicable law and are therefore denied.

69. Denied.

70. Denied. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

71. Allegations concerning Plaintiffs' alleged damages are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

EIGHTH, ALTERNATIVE CAUSE OF ACTION

72. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 71 of the Complaint hereinabove.

73. It is denied that Faile made the alleged misrepresentations or that Allen Tate acted without the authority of DLI. The remaining allegations of this paragraph are denied.

74. It is admitted that Faile had a pecuniary interest in the potential sale of the Property. To the extent not admitted, the remaining allegations of this paragraph are denied.

75. The allegations of this paragraph are a misstatement of applicable law and are therefore denied.

76. Denied.

77. Denied. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

78. Allegations concerning Plaintiffs' alleged damages are denied for lack of information or knowledge sufficient to form a belief as to the truth thereof. It is specifically denied that Allen Tate and Faile made the alleged misrepresentations.

NINTH CAUSE OF ACTION

79. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 78 of the Complaint hereinabove.

80. Allen Tate and Faile are without information or knowledge sufficient to form a belief as to the truth of the allegations in this paragraph, and therefore the same are denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

86. Denied.

87. Denied.

TENTH CAUSE OF ACTION

88. Allen Tate and Faile incorporate by reference their responses to paragraphs 1 through 87 of the Complaint hereinabove.

89. Denied.

90. Denied.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

THIRD DEFENSE

Plaintiffs' claims are barred by the statute of frauds, specifically S.C. Code Ann. § 32-3-10.

FOURTH DEFENSE

Allen Tate and Faile plead the absence of a valid and binding contract between Plaintiffs and DLI in bar of Plaintiffs' claims.

FIFTH DEFENSE

Upon information and belief, Plaintiff Larius Woodson is a licensed real estate broker. Accordingly, Plaintiff Larius Woodson failed to exercise his own increased skill and judgment in this matter, and his reliance on alleged representations by Allen Tate and/or Faile were not reasonable. Plaintiff Larius Woodson's unreasonable reliance is pled in bar of Plaintiff Larius Woodson's claims.

SIXTH DEFENSE

Upon information and belief, Plaintiff Larius Woodson made representations to Plaintiff Maurissa Woodson regarding the existence of a contract to purchase the property and that Maurissa Woodson relied on such representations. Plaintiff Larius Woodson, a licensed real estate broker with real estate training and education, made representations which proximately caused Plaintiff Maurissa Woodson's alleged damages. Plaintiff Larius Woodson's representation and conduct is a superceding and intervening cause of Plaintiff Maurissa Woodson's alleged damages, and the same is pled in bar of Plaintiff Maurissa Woodson's claims.

SEVENTH DEFENSE

Plaintiffs' comparative negligence in failing to reasonably satisfy themselves that the contract, with all its modifications, was signed by DLI and in such other respects as may be proven at trial, exceeds any negligence on the part of Allen Tate and Faile, and the same is pled in bar of Plaintiffs' claims.

EIGHTH DEFENSE

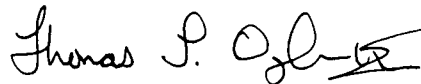
Plaintiffs' claims are barred by the doctrine of waiver and estoppel.

WHEREFORE, Allen Tate and Faile pray the Court as follows:

1. That Plaintiffs recover nothing of Allen Tate and Faile and that Plaintiffs' Complaint be dismissed with prejudice;
2. That Allen Tate and Faile recover their costs in this matter, to include their reasonable attorney's fees as provided by law; and
3. That the Court grant such other and further relief as is just and proper.

This the 22nd day of January, 2007.

POYNER & SPRUILL LLP



Thomas L. Ogburn, III
S.C. Bar No. 11761
301 South College Street, Suite 2300
One Wachovia Center
Charlotte, North Carolina 28202-6021
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ATTORNEYS FOR ALLEN TATE CO., INC. and
MELIA C. FAILE

CERTIFICATE OF SERVICE

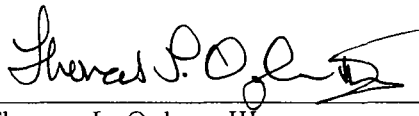
The undersigned attorney hereby certifies that the foregoing *Answer* was served this date by mailing copies thereof, U.S. mail, postage prepaid, to the following:

John Martin Foster
223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, South Carolina 29731-6106

Thomas A. Givens
McKinney, Givens, Tucker & Rhea
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Post Office Box 11784
Rock Hill, South Carolina 29731-1784

Phillip E. Wright
Phillip E. Wright, P.A.
408 N. Main Street
Lancaster, South Carolina 29720

This the 22nd day of January, 2007.



Thomas L. Ogburn III

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

LARIUS WOODSON and
MAURISSA WOODSON,

Plaintiffs,

vs.

DLI PROPERTIES, LLC, ALLEN
TATE CO., INC., MELIA C. FAILE,
and ALAN L. CAUTHEN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 06-CP-29-1354

MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants Allen Tate Co., Inc. ("Allen Tate") and Melia C. Faile ("Faile"), by and through undersigned counsel, and moves the Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for summary judgment on the claims contained in Plaintiff's Complaint, since as shown by the pleadings, affidavits and discovery on file, there is no genuine issue as to any material fact and Allen Tate and Faile are entitled to judgment as a matter of law.

Allen Tate and Faile are entitled to summary judgment because, among other things, Plaintiff has failed to establish that Allen Tate or Faile acted outside of the scope of their client, principal or employer. Additionally, Plaintiff cannot establish the required elements for fraud, negligent misrepresentation or unfair trade practices.

In support of this motion, Allen Tate and Faile rely on the pleadings on file, the transcripts and selected exhibits from the depositions of Larius Woodson and Melia Faile attached hereto as Exhibit 1 and 2, respectively, and on the Answers to Interrogatories Propounded by Defendants attached here to as Exhibit 3. Personal identification numbers have been redacted from these exhibits.

In the event the Court does not render judgment for all the relief requested, pursuant to Rule 56(d) of the South Carolina Rules of Civil Procedure, Allen Tate and Faile further move the Court to examine the pleadings and the evidence before it and ascertain what material facts are actually and in good faith controverted, and enter an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings as are just.

WHEREFORE, Allen Tate and Faile pray the Court to grant their motion for summary judgment, dismiss Plaintiff's claims against Allen Tate and Faile with prejudice, and for such other and further relief as may be just and proper.

This the 26th day of March, 2008.

POYNER & SPRUILL LLP



Thomas L. Ogburn, III
S.C. Bar No. 11761
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ATTORNEYS FOR ALLEN TATE CO.,
INC. and MELIA C. FAILE

CERTIFICATE OF SERVICE

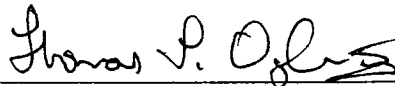
The undersigned attorney hereby certifies that the foregoing *Motion for Summary Judgment* was served this date by mailing copies thereof, U.S. mail, postage prepaid, to the following:

John Martin Foster
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Phillip E. Wright
Phillip E. Wright, P.A.
408 N. Main Street
Lancaster, South Carolina 29720

This the 26th day of March, 2008.



Thomas L. Ogburn III

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER)

LARIUS G. WOODSON AND)
MAURISSA WOODSON,)

PLAINTIFFS,)

VS.) CASE NO. 06-CP-29-1354

DLI PROPERTIES, LLC,)
ALLEN TATE CO., INC.,)
MELIA C. FAILE, AND)
ALAN L. CAUTHEN,)

DEFENDANTS.)

ALAN L. CAUTHEN,)

PLAINTIFF,)

VS.) CASE NO. 06-CP-29-1195

DLI PROPERTIES, LLC, LARIUS G.)
WOODSON AND MAURISSA)
WOODSON,)

DEFENDANTS.)

DEPOSITION OF LARIUS G. WOODSON
ROCK HILL, SOUTH CAROLINA
APRIL 17, 2007

REPORTER: JAN DUNKIN

DALLAS

REPORTING

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ROCK HILL, SOUTH CAROLINA
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Appearances: For the Plaintiff -

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Rock Hill, South Carolina 29731

For the Defendant, Tate and Faile -

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For the Defendant, DLI -

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Rock Hill, South Carolina 29731

For the Defendant, Cauthen -

Phillip E. Wright, Esquire
Attorney at Law
408 North Main Street
Lancaster, South Carolina 29720

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1 Deposition of Larius Woodson, taken before me, Jan
2 Dunkin, a Notary Public for the State of South Carolina,
3 in the law offices of John Martin Foster, Rock Hill,
4 South Carolina, commencing at 3:44 on April 17, 2007, in
5 accordance with the South Carolina Rules of Civil
6 Procedure.
7 It was stipulated by and between Counsel for the
8 Plaintiff(s) and Counsel for the Defendant(s) that this
9 deposition is taken for any purpose allowed under the
10 South Carolina Rules of Civil Procedure;
11 That the signing of the transcript of deposition by
12 the witness is not waived.
13 * * * * *
14 Larius Woodson, first being duly sworn, deposes and says
15 as follows:
16 EXAMINATION: (By Mr. Givens)
17 Q Mr. Woodson, my name is Thomas A. Givens. You've
18 been here and listened to the testimony of Melia
19 Faile. You kind of know the procedure, but I will
20 just briefly go through so that it will be on this
21 record. I recognize DLI Properties who the
22 principals are Mr. Willoughby and Mr. Pitzulo. Mo
23 is here today. He's sitting right behind me. Mr.
24 Wright represents Mr. Cauthen, and Tate represents
25 Allen Tate and Melia Faile I guess. Today I will

EXHIBIT

1 (Pages 1 to 4)

1 be asking you certain questions. It will be
 2 recorded. You will have to answer yes and no and
 3 responses like that. You can't shake your head up
 4 and down or no. You have to give a response that
 5 the court reporter can take it down. If you need
 6 to take a break at any time, as Mr. Foster said,
 7 just let me know. We're just here to try to
 8 understand this quite confusing case so that
 9 everybody at this table will have a better
 10 understanding when we leave here today. If you
 11 don't understand a question, let me know. I'll
 12 rephrase it. There may be some objections that
 13 your attorney may make. You will be instructed
 14 probably to answer the question, and if you again
 15 don't understand the question I can rephrase it.
 16 If you need water at any time just let us know.
 17 Okay?
 18 A Yes.
 19 Q State your full name.
 20 A Larius G. Woodson.
 21 Q And where do you reside at the present time?
 22 A In Charlotte, North Carolina.
 23 Q And what is your address?
 24 A It's 5117 Boulware Court, that's B-o-u-l-w-a-r-e.
 25 That's in Charlotte, North Carolina 28277.

1 Q And how long have you lived there?
 2 A Ten months.
 3 Q Are you renting or did you purchase a house?
 4 A Purchase.
 5 Q When did you purchase the house?
 6 A May 9th, 2006.
 7 Q And prior to that time where did you live?
 8 A In South Florida.
 9 Q And what address in South Florida?
 10 A 5887 Northwest 119th Drive, Coral Springs, Florida,
 11 33076.
 12 Q And how long did you live at that address?
 13 A About five years.
 14 Q What is your present occupation?
 15 A I'm a real estate broker.
 16 Q And who are you working for at the present time?
 17 A Alpha Omega Realty.
 18 Q How long have you been with Alpha Omega Realty?
 19 A Since the end of November.
 20 Q And prior to that who were you working for?
 21 A Sharon Davis at Davis Integrity Realty.
 22 Q How long did you work for her?
 23 A I would say the end of July of 2006 through
 24 November.
 25 Q Are you a real estate agent licensed in North

1 Carolina?
 2 A Yes.
 3 Q And when did you get your license in North
 4 Carolina?
 5 A End of July.
 6 Q End of 2006?
 7 A Around July, yeah.
 8 Q In South Carolina, are you a licensed agent in
 9 South Carolina?
 10 A I am now.
 11 Q When were you licensed in South Carolina?
 12 A Not really sure. I think it was October.
 13 Q Of 2006?
 14 A Yes.
 15 Q Were you required to take an exam in South
 16 Carolina?
 17 A No.
 18 Q When did you apply to become licensed in the state?
 19 A I believe it was October.
 20 Q What was your occupation when you lived in Florida?
 21 A I owned wine and liquor stores, and I was an
 22 investor.
 23 Q What type of investments did you make?
 24 A Real estate investments, commercial businesses. I
 25 bought businesses and land and we sold them.

1 Q Approximately how many properties did you buy or
 2 sell in Florida while you down in Florida as an
 3 investor?
 4 A I'll say about ten.
 5 Q Were you ever licensed as a real estate agent in
 6 Florida?
 7 A No.
 8 Q Can you give me your educational background?
 9 A I went to college as a software engineer.
 10 Q And what college did you go to?
 11 A Keyser College.
 12 Q Where is that?
 13 A Fort Lauderdale, Florida.
 14 Q And did you obtain a four year degree?
 15 A Two year.
 16 Q Two year degree. Okay. What other educational
 17 experiences do you have? Do you have other kind of
 18 courses that you may have taken at other various
 19 schools?
 20 A Just more training courses as a certified probate
 21 specialist. I've taken different courses, sales
 22 and marketing type courses.
 23 Q You said a certified probate specialist. What is
 24 that?
 25 A Just basically someone who understands the probate

- 1 process and is able to help a person to liquidate
2 their assets.
- 3 **Q Did you use that in various businesses you were in?**
4 A Just one.
- 5 **Q All right.**
6 A As an investor I did. I used it.
- 7 **Q In getting your North Carolina Real Estate License,**
8 **did you have to go through a certain a number of**
9 **hours courses and pass the test?**
10 A Yes. I had took a seventy-five hour pre-licensing
11 course, and then I took a ninety hour post
12 licensing course.
- 13 **Q Where did you take your seventy-five hour course?**
14 A Superior School of Real Estate.
- 15 **Q And where is that located?**
16 A Their office is in Charlotte, Fairview Lane, but
17 the class is in Pineville.
- 18 **Q And when did you take the course there?**
19 A I started the course in May, completed the course
20 the beginning of June, towards the beginning of
21 June, the second week of June.
- 22 **Q At the end of the course, did they give you a test?**
23 A Yes.
- 24 **Q And you are required to pass that test in order to**
25 **take the licensing test for the State of North**

- 1 **Carolina. Is that correct?**
2 A That is correct. Yes.
- 3 **Q And you passed that test after the course?**
4 A Yes.
- 5 **Q Correct?**
6 A Yes. I passed the test in July.
- 7 **Q And then when did you take the licensing test?**
8 A Sometime in July.
- 9 **Q Sometime very shortly thereafter?**
10 A It was pretty much right -- Yes. As soon they
11 sent me the qualification to take the state exam, I
12 drove to Winston Salem to take it.
- 13 **Q And then you started working for your broker**
14 **sometime in July?**
15 A Yes.
- 16 **Q When did you first find out about the particular**
17 **lot that is the subject of this lawsuit today?**
18 A I believe it was at the beginning of June that I
19 initially saw it.
- 20 **Q All right.**
21 A With Melia.
- 22 **Q Did you visit the site with Melia, or did you visit**
23 **the site with Sharon? Who was present?**
24 A I went by myself initially. Called -- that's how I
25 found the lot and contacted Melia. She then met me

- 1 out there at a later date. I think it was a couple
2 of days later.
- 3 **Q And did you identify yourself as a prospective**
4 **buyer at that time?**
5 A Both as a prospective buyer and as a licensed real
6 estate broker.
- 7 **Q Out of North Carolina?**
8 A Yes.
- 9 **Q Did you make any kind of preliminary offer?**
10 **According to her testimony, there was some offer**
11 **made that she didn't have a copy of it today. Did**
12 **you make an offer to purchase the property early**
13 **on?**
14 A Not at that precise moment, but we did follow up
15 and made an offer.
- 16 **Q All right.**
17 A It was probably maybe a couple of days later.
- 18 **Q And what happened to that offer? Was it rejected**
19 **or was it ---**
20 A It was basically rejected based on the terms of, I
21 believe, we offered ninety-four thousand plus there
22 was some closing cost that we were trying to get
23 the seller to contribute to, and she said that it
24 was not accepted.
- 25 **Q In the meantime, did you find another lot that you**

- 1 **thought you were going to purchase in Charlotte?**
2 A Actually, it wasn't in Charlotte. We were looking
3 at lots in different places, and I told her that at
4 this point I wasn't prepared to counter offer.
- 5 **Q So, that contract died?**
6 A Yes.
- 7 **Q Now, on or about August 1st you made another**
8 **contact with Melia. Is that correct?**
9 A It was actually July 31st. I called her.
- 10 **Q She called you back on August 1st?**
11 A Correct.
- 12 **Q And tell me what happened during that conversation.**
13 A She told me that the deal had fell through on the
14 lot with the other person, whoever it was, and that
15 the lot was available again, and if I would be
16 interested, it was available.
- 17 **Q And you said you had initially offered early on**
18 **into the '90s, but how did you -- Did you come up**
19 **with a lower figure without any closing cost?**
20 A Yeah. I just told her that my wife wasn't as
21 excited about the lot as I was, and that's why we
22 kind of decided to look at some other options. I
23 said I could probably convince my wife to do it at
24 eighty-eight nine.
- 25 **Q Based on that conversation on August 1st, did you**

1 ask her to prepare a contract on the South Carolina
2 form?

3 A I did, because that was at the point that I told
4 that I had finally passed the state exam, and that
5 we needed to you know put a contract together, but
6 I wasn't licensed in South Carolina and didn't have
7 any of the contracts or documents. She says well
8 that's not a problem. I can prepare the contract,
9 and I'll send it to you. That's what she said.

10 Q Now, based on your being licensed and based on your
11 experience, would you say that you had more
12 knowledge than a normal buyer looking for a house
13 or lot for purchase?

14 A I don't know if I had more knowledge than the
15 normal buyer, but I felt comfortable about what I
16 was doing.

17 Q During the real estate course, did you not learn
18 that in order to have a properly executed contract
19 it must be executed signed and initialed for any
20 changes that are made?

21 MR. FOSTER - I'm going to object to the form.

22 Go ahead and answer as far as you can.

23 A As far as the real estate course was concerned,
24 they stated that a contract must be signed, fully
25 executed, and sent back. Initials for blanks was

1 not a requirement, and I actually mentioned that to
2 Melia Faile on August the 4th.

3 Q So, you feel that it is not a requirement on any
4 kind of counter offer that you have to have
5 initials beside the changes to a proposed contract
6 or an offer?

7 A Well, we weren't talking about a counter offer at
8 that point. There was a blank line at that point.

9 Q All right.

10 A And, basically, the blank line had a slash through
11 it with initials, and we had already discussed the
12 forty-three hundred prior, but I missed it when I
13 signed it and sent it back. So ---

14 Q Well, let's get in particular. You got what's been
15 identified as Plaintiff's Exhibit Number One.

16 MR. FOSTER - For the record, I don't know that
17 we've said on the record that we are adopting
18 all the Faile exhibits as exhibits in this
19 deposition also.

20 MR. GIVENS - All right. Can we do that at
21 this time? Can we adopt all the exhibits
22 entered into during the Melia Faile deposition
23 into this deposition and maybe list them as
24 the same exhibit numbers?

25 MR. FOSTER - I believe no one has objections.

1 MR. WRIGHT - All right..

2 MR. OGBURN - That's fine with me.

3 WHEREUPON - Documents were marked as
4 Plaintiff's Exhibit Numbers One through Seven
5 and Defendant's Exhibit Numbers One through
6 Three.

7 Q I show you Plaintiff's Exhibit Number One. Is that
8 the Contract or the Agreement to Buy and Sell that
9 you received from Melia Faile?

10 A This was the initial one, yes.

11 Q And I show you Defendant's Exhibit Number One. Is
12 that the fax cover sheet that was sent to you with
13 that as far as you know?

14 A Yes.

15 Q Now, after you received that, did you make certain
16 changes to this particular offer? See Plaintiff's
17 Exhibit Number Two, and that's one that's been
18 entered into in evidence that has also been signed
19 off and initialed by my client, DLI Properties.

20 A Yes.

21 Q Can you summarize what changes you made from the
22 initial offer provided or prepared by Melia Faile
23 and faxed to you unsigned, and I will also point
24 out can you identify this as the Exhibit that was
25 used to send that signed off document back as

1 Defendant's Exhibit Number Two? Is that the cover
2 sheet that she sent back to you at that ---

3 A Yes.

4 MR. FOSTER - For the record, we're referring
5 to Defendant's Two?

6 MR. GIVENS - That's correct.

7 Q And you made certain changes on the offer back to
8 the DLI Properties. Is that correct?

9 A Yes, sir, it is.

10 Q Can you tell what changes that you actually made?

11 A The change was regarding the actual contract date,
12 because it went from the 1st to the 3rd.

13 Q All right. So, you changed that.

14 A We all initialed that. The next change was Section
15 Thirteen which was regarding the closing date from
16 the 15th to the 25th was what we originally talked
17 about, but we ended up changing it to the 29th,
18 because it was Friday, the end of the week.

19 Q All right.

20 A The expiration of offer we changed to August 4th.

21 Q All right.

22 A We wanted to get a definitive answer. The roll
23 back taxes, Section Twenty, we did not agree to pay
24 any roll back taxes. We wanted the seller to have
25 to cover that.

- 1 **Q And when you say we you're talking about you and**
 2 **your wife?**
 3 **A Correct.**
 4 **Q Okay.**
 5 **A Yes, and the Section Thirty-three we were asked to**
 6 **eliminate the time period that we put into the**
 7 **blank for Section Thirty-three.**
 8 **Q And what was that changed to?**
 9 **A It was just crossed out and initialed by all**
 10 **parties.**
 11 **Q So, you delivered that signed document to Melia,**
 12 **and she in turn had her clients sign off, sign it,**
 13 **initial, change the dates or whatever, and then she**
 14 **sent it back to you with this cover sheet. Is that**
 15 **correct?**
 16 **A No. This cover sheet came with this one, because I**
 17 **didn't initial ---**
 18 **Q Okay. I beg your pardon. I may be getting these**
 19 **confused. All right. I'll show you Plaintiff's**
 20 **Exhibit Number Three.**
 21 **A Okay. This was the final one that I sent back.**
 22 **Q All right. Now ---**
 23 **A This was afer the voice message.**
 24 **Q Okay.**
 25 **A And after ---**

- 1 **Q But on Defendant's Exhibit Number Two, this fax**
 2 **cover sheet accompanied this contract stating where**
 3 **you needed to initial some of the specific things**
 4 **that you had not initialed before. Was that**
 5 **correct? You just failed to initial some things?**
 6 **A Yes.**
 7 **Q That's when you started initialing that document**
 8 **that we refer to as Plaintiff's Number Three. Is**
 9 **that correct?**
 10 **A Yes. This was done on August 4th.**
 11 **Q Now, on August 1st, 2nd, 3rd, or 4th or on August**
 12 **1st, 2nd, or 3rd, when did you bring up the part**
 13 **about the forty-three hundred dollar cap on the**
 14 **septic system or on the tap fee?**
 15 **A It was one of the -- the first day when she put the**
 16 **contract together.**
 17 **Q Now, when you made your initial offer and sent it**
 18 **back to her you had left that part out.**
 19 **A Yes.**
 20 **Q Is that correct?**
 21 **A Yes, I did.**
 22 **Q And was it something you just forgot to do?**
 23 **A Yes.**
 24 **Q So, when she sent the document that was signed and**
 25 **initialed by my client, DLI Properties, in that she**

- 1 **indicated that you need to initial Item Eight and**
 2 **date it. Did you do that on Number Three?**
 3 **MR. FOSTER - For the record, counsel is again**
 4 **referring to D-2 and the language on that.**
 5 **MR. GIVENS - Correct.**
 6 **A In Section Eight, yes.**
 7 **Q And that's what you had not done before. Is that**
 8 **correct?**
 9 **A Correct.**
 10 **Q Item Eleven where no amount was put in, she wanted**
 11 **you to initial that also. Is that correct?**
 12 **A Yes. She wanted me to initial that.**
 13 **Q And you did initial that at some point in time for**
 14 **the blank?**
 15 **A Yes. I initialed it as the blank, because as I**
 16 **told her over the phone I recognized that was my**
 17 **mistake for not catching it.**
 18 **Q Okay.**
 19 **A And I said initial it and accept the contract as it**
 20 **is.**
 21 **Q Item Eleven where seller represented the property**
 22 **can be connected to sewer and public water you**
 23 **initialed that area, I guess?**
 24 **A Yes.**
 25 **Q And then initialed and date Item Thirty-four, you**

- 1 **initialed that area too. Is that correct?**
 2 **A Which section again?**
 3 **Q Thirty-four.**
 4 **A Yes.**
 5 **Q And there were, according to her, the fax were five**
 6 **areas that you needed to initial. Was that**
 7 **correct?**
 8 **A According to her fax, yes.**
 9 **Q So, after you read this is when you realized you**
 10 **had left out the amount of forty-three hundred. Is**
 11 **that correct?**
 12 **A After I had already sent it back to her, yes.**
 13 **Q So, you say that you had already sent a document**
 14 **back to her.**
 15 **A Correct.**
 16 **Q Do you have a fax sheet showing that?**
 17 **A Yes. I should.**
 18 **Q Okay. I believe I do.**
 19 **A It was actually from Sharon Davis' fax. So, it**
 20 **should have her header on it. I may have left that**
 21 **in her file at the office. I can produce that. I**
 22 **know it's there.**
 23 **MR. FOSTER - We would be happy stipulate that**
 24 **it will be produced. We have it.**
 25 **Q I want to be sure I'm understanding this, that**

1 prior to your delivery of Plaintiff's Exhibit
 2 Number Three, the one where you have filled in
 3 forty-three hundred dollars, is it your testimony
 4 that prior to delivering that you faxed to Allen
 5 Tate a contract that had initialed every place as
 6 they had -- that my clients had initialed, without
 7 the forty-three hundred dollars filled in?
 8 A Correct. They had a copy with my initials and the
 9 seller's initials on it at that point.
 10 Q When did you send that?
 11 A It was prior to the 4th. It was on the 4th, but it
 12 was prior to me changing this and taking it in on
 13 the 5th. I would say -- I can tell you based on
 14 the phone log. Hang on. It was sometime after
 15 4:00 p.m.
 16 Q On what day?
 17 A On August the 4th.
 18 Q And do you have a copy of that contract with just
 19 your initials beside the blank without any initials
 20 beside forty-three hundred filled in?
 21 A Well, the copy of the contract did not have my
 22 initials. I had accepted it at that point. So, we
 23 didn't have to put the initials on it until after.
 24 Q I see.
 25 MR. FOSTER - Without attempting to interrupt,

1 I believe the witness did refer to a record of
 2 his phone in order to answer the question.
 3 Q Well, I'm seeing a copy of something from your file
 4 that has no initials beside Paragraph Eleven. It's
 5 highlighted. There's no initials beside this
 6 document.
 7 A That's how it came back to us.
 8 Q That's how it came to you?
 9 A Exactly.
 10 Q Okay.
 11 A And we had already initialed and that was the
 12 return fax from Melia Faile. We didn't initial
 13 Section Eleven, because I didn't feel that Section
 14 Eleven required an initial. It was a blank line.
 15 Q But in her fax to you of presumably August 3rd at
 16 5:20, she said you need to initial Paragraph Eleven
 17 where there's a blank space where my clients had
 18 marked through it and initialed.
 19 A Right, and I was told it was not required, because
 20 it was a blank.
 21 Q Who told you that?
 22 A Both Sharon Davis as well as realtors that I have
 23 spoken to as well my attorney.
 24 Q What attorney told you that?
 25 A It was Michael Kotler.

1 Q Where does he practice law?
 2 A Florida and New York.
 3 Q Is he licensed to practice law in the State of
 4 South Carolina?
 5 A No.
 6 Q But when it was faxed back to you and the real
 7 estate agent said that had to be initialed, you
 8 just ignored that?
 9 A I ignored it after the fact. I didn't catch it the
 10 first time. That was the whole point. I had never
 11 -- I didn't catch Section Eleven.
 12 Q Okay.
 13 A I didn't even notice on the fax cover sheet,
 14 because I didn't have the fax cover sheet. The fax
 15 cover sheet went to my -- to Sharon Davis. All I
 16 got was a copy of the contract.
 17 Q So, Sharon Davis did not send you a copy of that?
 18 A At that point, no.
 19 Q All right.
 20 A And --
 21 MR. GIVENS - Can we mark this as an Exhibit?
 22 WHEREUPON - A document was marked as
 23 Defendant's Exhibit Number Four.
 24 A I didn't get -- That was the week that Sharon Davis
 25 was out of town. So, Melia faxed me directly the

1 contract. She called me and told me --
 2 WHEREUPON - An off the record discussion was
 3 held and the deposition was continued.
 4 Q I show you Defendant's Exhibit Number Four. Is
 5 that the same thing, if you know, as Plaintiff's
 6 Exhibit Number Two that was faxed to you with your
 7 initials, signatures and initials, on your first
 8 offer and then my client's initials on some of the
 9 changes on the second? Is that the same thing?
 10 A Yes.
 11 Q So, that was still your copy of the initialed --
 12 without any initials of you -- of your signatures
 13 or initials based on that fax. Now, do you have a
 14 copy of a Agreement to Buy and Sell that you
 15 initialed only the blank area to the right?
 16 A No. That one didn't exist.
 17 Q Let me just clarify. My understanding was you had
 18 faxed a copy of the August 3rd contract similar to
 19 the change that you made on the forty-three hundred
 20 back to Melia. Did I misunderstand you on that?
 21 A No. That's correct. We sent the second one here
 22 back to Melia Faile.
 23 Q You sent the second one back to Melia Faile?
 24 A Yes. On August 3rd we have -- this is one we sent
 25 off. I'm sorry rephrase the question. Just to

1 make sure.

2 **Q All right. I want to make sure that I've got**

3 **copies of all contracts that were ever faxed with**

4 **initials and changes.**

5 A (Indicating yes)

6 **Q Do you have in your possession any other copies of**

7 **your initials of any offers or counter offers other**

8 **than Plaintiff's One, Two, and Three?**

9 A No.

10 **Q Let me just get this straight, at what point in**

11 **time in the negotiations did you and Melia talk**

12 **about the forty-three hundred dollars?**

13 A It was on the 4th, August the 4th.

14 **Q Which was Friday?**

15 A Yes.

16 **Q And what was that discussion about? You had taken**

17 **the contract that had been faxed back to you, and**

18 **there was five places you needed to initial.**

19 A I think I see where the misunderstanding is.

20 August 3rd the contract was sent back. August 4th

21 is when we discussed the forty-three hundred,

22 because she just followed up.

23 **Q Can you show me the copy of the August 3rd contract**

24 **that you faxed to Melia Faile?**

25 A That's the one that you have here, Number Two, the

1 one that has no initials on Section Eleven, I

2 believe. It's the one that has just the crossed

3 through line from the seller with seller's

4 initials.

5 **Q I think you have Plaintiff's Number Two.**

6 A Oh, I'm sorry. That is the one that went back on

7 the 3rd.

8 **Q And who is Home Buyer Connection?**

9 A That's my corporation.

10 **Q And is your fax number 561-828-9244?**

11 A Correct.

12 **Q And do you get those faxes by way of computer?**

13 A Yes.

14 **Q On August 3rd at 5:20 she sent you this fax, and**

15 **she says please initial Item Eight where they have**

16 **changed ten to twenty, and did you do that?**

17 A This, again, went to Sharon Davis.

18 **Q Okay.**

19 A On that date, the 3rd she was out of town. This is

20 when I received -- When Melia called me to see if I

21 received the fax, I told her that I did not receive

22 the fax. She told me where she faxed it to, and I

23 said well Sharon is not there. I need you to fax

24 it to me.

25 **Q All right.**

1 A And she faxed it to 561-828-9244 which is my fax

2 number without this.

3 **Q Without that?**

4 A Just this.

5 **Q Just this?**

6 A Just this.

7 **Q And do you have a copy ---**

8 **MR. FOSTER - May we clarify what this and**

9 **this is?**

10 A I'm sorry. She sent me the contract without the

11 cover sheet.

12 **Q So, you didn't know what to initial then?**

13 A She told me that there were initials on there, and

14 I just needed to counter sign the initials.

15 **Q All right.**

16 A So, I looked at it, and it was obvious where the

17 sellers had initialed changes, but again Section

18 Eleven I didn't see, and I really wasn't concerned

19 about after the fact when it came up the week

20 after, the contract on the 9th.

21 **Q When did you fax the initialed contract back to**

22 **Melia?**

23 A The 3rd.

24 **Q The 3rd?**

25 A Yes.

1 **Q And do any of these Exhibits, D-4 or P-2 have any**

2 **kind of trail showing when you would have faxed**

3 **that to her?**

4 A I don't understand the question.

5 **Q Okay.**

6 A What do you mean?

7 **Q It's your testimony that you faxed on August the**

8 **3rd initials on a contract or a contract back that**

9 **you didn't put initials on.**

10 A Yes, and it has my header right there that I faxed

11 it.

12 **Q At 11:55.**

13 A Correct.

14 **Q On August the 3rd.**

15 A Yes.

16 **Q Well, then on August the 3rd, 2006 at 5:20 p.m. she**

17 **sent a fax to your broker stating where you needed**

18 **to make some initials, because that's what needed -**

19 **- that she needed to present to her client.**

20 A Maybe she sent it to Sharon. I have no idea.

21 **Q All right.**

22 A I mean 11:55. I didn't make sure that's a.m.

23 You're assuming it's a.m. as well. It could have

24 been 11:55 p.m.

25 **Q All right. You've got your computer here today.**

1 Can you pull up any of those faxes, and can you
2 pull up any faxes to you on your computer today?

3 A Should be able to.

4 Q Okay.

5 MR. FOSTER - As need be, we can supply any
6 floppy disks and give you copies. That's
7 possible.

8 Q I'd like you to pull up any faxes that you received
9 on your computer from Melia Faile.

10 MR. FOSTER - Counsel, may I make a suggestion?

11 I don't know if we've established how he sent the
12 faxes, but if any of them were sent
13 through the computer I assume you want
14 them as well.

15 MR. GIVENS - Right. I want to see any faxes
16 that he received from Melia Faile.

17 WHEREUPON - An off the record discussion was
18 held and the deposition was continued.

19 A I may have archived it which means it's on my other
20 hard drive.

21 MR. GIVENS - All right. Counsel, would it be
22 possible to get copies of any --

23 MR. FOSTER - Whatever we have.

24 MR. GIVENS - Faxes?

25 MR. FOSTER - Whatever we have we will supply.

1 were told that they had a new buyer.

2 Q All right.

3 A We didn't get a copy of that until after.

4 Q But you would admit that your broker at the real
5 estate office had a copy of this fax cover sheet
6 with everything on it that they requested about
7 initialing.

8 A Yes.

9 Q Is that correct?

10 A Yes.

11 Q Now, on Plaintiff's Exhibit Number Three, you
12 indicated that you caught the mistake of not
13 including the forty-three hundred dollars.

14 A Yes. I realized it after she called me.

15 Q And did that have to do with her wanting it
16 initialed beside Paragraph Eleven?

17 A No.

18 Q What did that have to say to do with it?

19 A She just called to say congratulations.

20 Q Okay.

21 A And I said by the way this, was my mistake. So, I
22 realize that I have a contract, and I can't back
23 out of it, but we spoke about the forty-three
24 hundred in Section Eleven. I forgot it. Missed
25 it. I faxed it back to you without it.

1 MR. GIVENS - All right.

2 MR. FOSTER - Do I understand the request is
3 not only for faxes to Melia Faile, but faxes
4 from Melia Faile. Well, your first concern is
5 faxes from Melia Faile.

6 MR. GIVENS - Correct.

7 MR. FOSTER - But you, I assume, wish to get
8 the faxes to her as well if they are on it.

9 MR. GIVENS - Correct.

10 MR. FOSTER - We will supply those.

11 MR. GIVENS - All right. We will continue
12 then.

13 Q Mr. Woodson what I'm trying to find out, is it your
14 testimony that you sent on August 3rd, which would
15 have been a Thursday, a contract that you thought
16 you accepted everything including leaving out the
17 forty-three hundred dollars?

18 A Yes.

19 Q And do you recall getting this back from ---

20 A Sharon.

21 Q Sharon, getting this from Sharon ---

22 A Yes.

23 Q Stating that you needed to initial certain things
24 that had not been initialed at some point in time?

25 A Actually, that didn't come up to me until after we

1 Q So, it's your position that you had a contract that
2 you could enforce or my clients could enforce
3 without having the forty-three hundred dollars in
4 there. Is that correct?

5 A That's my understanding. I don't know.

6 Q Can you produce a copy of that contract from your
7 file today that does not have any writing of the
8 forty-three hundred dollars with the initials
9 beside it?

10 A It's the one you already have, Number Two.

11 MR. FOSTER - Let's get them marked Number Two.

12 That's not it. Is that it?

13 MR. GIVENS - Yes, marked Number Two.

14 Q There were some other paragraphs that had not been
15 an issue in this paragraph, Number Eight concerning
16 the number of days.

17 A Let me see that. That's the section that affects
18 me, Section Eight.

19 Q Correct, but it affects them, too.

20 A Actually, they initialed on it.

21 Q They initialed, but you had not initialed Paragraph
22 Eight.

23 A Your question again regarding --

24 Q All right. Paragraph Eight in your -- In the one
25 that you presented today as Defendant's Exhibit

1 **Number -- is it seven?**
 2 A Two, Number Two.
 3 **Q Let me make sure we're looking at the same one.**
 4 **Plaintiff's Exhibit Number Two, you had not**
 5 **initialed Paragraph Eight that my clients had**
 6 **initialed, and that's where it had been starred.**
 7 **Correct?**
 8 A Correct.
 9 **Q You had not initialed Paragraph Eleven where this**
 10 **had been starred. Correct?**
 11 A Correct.
 12 **Q You had not initialed this star here that she**
 13 **refers to in the fax cover sheet.**
 14 **MR. WRIGHT - Are we still on Item Eleven?**
 15 **MR. GIVENS - Yes, Item Eleven.**
 16 **Q Where seller represented the property can be**
 17 **connected to water and sewer.**
 18 A Okay.
 19 **Q You had not initialed that either, had you?**
 20 A That's all that came back to me that way. That
 21 would be correct.
 22 **Q Paragraph Thirty-four addendum, this property is**
 23 **vacant land. It is not connected to public water**
 24 **and septic tank; however, both are available. My**
 25 **clients had initialed it, and you had not initialed**

1 **that you faxed another copy of Plaintiff's Number**
 2 **Two with initials in at least three places that**
 3 **were marked on this copy?**
 4 A I'm confident that we initialed what was required
 5 to be initialed and faxed back, yes.
 6 **Q So, after that was faxed back, your belief, when**
 7 **did you catch the part about the forty-three**
 8 **hundred dollars.**
 9 A On the 4th of August.
 10 **Q Which was Friday?**
 11 A Correct.
 12 **Q Now, at that point in time, you felt you had faxed**
 13 **a completed initialed copy of all the documents?**
 14 A Yes.
 15 **Q Have you had a chance to look through your file**
 16 **today and see if you have anything?**
 17 A I was rushing. I grabbed this file out of my box
 18 and left my house. So, I would have to go through
 19 it all at some point.
 20 **Q Now, did you fax or e-mail anybody on that day,**
 21 **that I made a mistake. I realize I can go with**
 22 **this contract, and explain to me about the forty-**
 23 **three hundred. Was that a tap fee? Was that what**
 24 **you were willing to pay for the tap fee?**
 25 A That was the maximum amount that the tap fee would

1 **it.**
 2 A This is the one from the 3rd?
 3 **Q Correct.**
 4 A Yes, on the 3rd.
 5 **Q Looking at this fax cover sheet that you said that**
 6 **you did not have on or about August 3rd that was**
 7 **delivered to Sharon Davis' office, this came to you**
 8 **requesting that you initial all of these changes,**
 9 **and on Plaintiff's Exhibit Number Two they had not**
 10 **been initialed. Will you agree with that?**
 11 A Yes.
 12 **Q Do you have anything in your file where you have**
 13 **initialed these things without -- all the five**
 14 **initials here, without having added the forty-three**
 15 **hundred dollars beside Paragraph Eleven? Do you**
 16 **have a copy in your file today with ---**
 17 A Not with me today, no.
 18 **Q Where would that be?**
 19 A Honestly, I'll have to check the file at the
 20 office.
 21 **Q Do you keep separate files personally than you**
 22 **would at the office?**
 23 A Sharon Davis has her file. So, she has to keep the
 24 originals of.
 25 **Q All right. At what point in time -- Do you believe**

1 **cost.**
 2 **Q And what was your understanding if the tap fee cost**
 3 **five thousand dollars?**
 4 A If it cost five thousand dollars based on the
 5 contract coming back to me without me signing it, I
 6 was stuck with it.
 7 **Q If you had in there forty-three hundred dollars,**
 8 **was it you were agreeing to pay up to forty-three**
 9 **hundred dollars for a tap fee?**
 10 A Correct.
 11 **Q Before it was inserted in there, you would pay the**
 12 **whole thing.**
 13 A Exactly.
 14 **Q In your Complaint that you filed, Paragraph Twelve**
 15 **-- Do you have a copy of it?**
 16 A I think so.
 17 **Q If you could read Paragraph Twelve. If you could**
 18 **just read it out loud.**
 19 A On August the 3rd, 2006, the Plaintiffs, Woodson,
 20 had received a contract offer from DLI Properties
 21 acceptable to them in its then present form.
 22 Having recalled one minor detail previously
 23 discussed by the parties relating to a cap on the
 24 tap fee for the subject real property, they
 25 discussed this point with Melia C. Faile of Allen

1 Tate.

2 **Q Does that refresh your memory as to whether or not**

3 **you had actually sent back a corrected -- a copy of**

4 **the offer accepted in the present form?**

5 A Yes.

6 **Q And what does that recollection ---**

7 A On August 3rd, now I'm looking at the date. This

8 is saying that we had received the contract back.

9 That's all we're specifying here, and I did receive

10 that on the 3rd.

11 **Q All right.**

12 A Okay? On the 4th is when I noticed that we had

13 failed to put the forty-three hundred dollars on

14 the contract.

15 **Q Could you read Paragraph Thirteen?**

16 A In response to their inquiry on this point, they

17 were orally assured on August 4th, 2006 by Faile

18 that DLI Properties had agreed to this change and

19 to the contract as so modified. The Plaintiffs

20 were further instructed by the Defendant, Faile, to

21 bring the last contract form changed to include

22 this point and initialed by the Plaintiffs with

23 their deposit check to her office.

24 **Q Are you still stating that you had faxed a copy of**

25 **a contract without the forty-three hundred dollar**

1 A Until the 5th.

2 **Q Until the 5th, so that was Saturday morning the**

3 **5th?**

4 A She didn't call me until Friday after 5:00. It was

5 5:11 p.m. when she called me.

6 **Q What did you understand that the sellers needed to**

7 **do with the contract after you sent it back to**

8 **Melia?**

9 A As far as which contract, the one they had?

10 **Q The forty-three hundred.**

11 A The forty-three hundred? She told me to just

12 initial the changes and to leave them at her

13 office, because that had already been accepted.

14 **Q But did you feel that DLI was going to initial the**

15 **changes too?**

16 A Based on the forty-three hundred, yes.

17 **Q You understood they had to do that?**

18 A No. I didn't understand they had to do that. I

19 understand that they were going to do that.

20 **Q You were orally told they would do that?**

21 A Because as far as I was concerned I was going to

22 stick with the second contract. If the forty-three

23 hundred was an issue, I had already told her

24 there's no need to go back to them. I'm stuck. I

25 know it. I said at that point, I'm going to

1 **change and initial to the right of Paragraph**

2 **Eleven?**

3 A I believe so. Yes.

4 **Q Is that in contradiction to what you're saying in**

5 **your Complaint?**

6 A No.

7 **Q It's not?**

8 A No. It's not.

9 **Q Explain to me what ---**

10 A The contract had already been initialed by the

11 sellers. We had already received it. The forty-

12 three hundred dollars was not marked in Section

13 Eleven, and I told her on the 4th that I

14 acknowledge that it was my mistake. I said it's my

15 mistake. I failed to put the forty-three hundred

16 dollars in there that we had already spoken about.

17 So, I'm stuck with the contract as is, and I just

18 mentioned it. I didn't even ask her to go back to

19 her sellers. She volunteered to go back to the

20 sellers, because she had remembered the

21 conversation prior to this.

22 **Q But on August the 3rd is when you sent it back. Is**

23 **that correct?**

24 A Correct.

25 **Q And you did not deliver a check until when?**

1 fulfill the contract.

2 **Q Well, this is important. I still think that you're**

3 **stating that a contract was delivered to them**

4 **initialed correctly even without the forty-three**

5 **hundred. Is that your testimony?**

6 A Yes.

7 **Q And that was delivered by way of fax?**

8 A I believe so.

9 **Q And you can provide proof of that fax transmittal?**

10 A I believe so.

11 **Q And you are going to provide me with a copy of a**

12 **contract with just the initials beside Paragraph**

13 **Eleven with the blank in it with a line drawn**

14 **through right beside my clients' initials?**

15 A The only initials were your clients, not mine.

16 **Q But you would have initialed that to have made the**

17 **deal work?**

18 A I didn't need it at that point. It was a blank. I

19 didn't need to provide my initials for a blank

20 space, at least that's what I ---

21 **Q But my clients' initials were clearly on that part**

22 **of the contract. Did you not see that?**

23 A I saw that, yes.

24 **Q And you felt that you didn't need to do that again?**

25 A It was a blank. There were other blanks in the

1 contract that they didn't initial.

2 **Q Could you show me the other blanks?**

3 A Item Four, they didn't put any there.

4 MR. WRIGHT - What exhibit are we looking at?

5 WITNESS - Two.

6 **Q It says subject to financing, but it's not by**

7 **conventional seller, VA, FHA, or other terms?**

8 A Correct. We didn't cross a line through this blank

9 in this section.

10 **Q But it was checked. Septic tank was checked on**

11 **Paragraph Eleven. The other thing she asked you to**

12 **initial where it says can be connected to septic**

13 **tank. So, my clients had already initialed that**

14 **spot.**

15 A Section Seventeen.

16 **Q It says see addendum if applicable.**

17 A Right, but there was a blank. It was not crossed

18 through. It was not initialed.

19 **Q All right.**

20 A That's it.

21 **Q But you felt that even though she had a star here**

22 **beside it and marked it, and my clients initialed**

23 **it, you did not need to initial those places?**

24 A I didn't really feel that either of us needed to

25 initial those places as far as the blank lines.

1 Those are the only ones that she had brought up

2 that I did initial.

3 **Q And your testimony is you never saw this sheet**

4 **until after ---**

5 A Correct.

6 **Q The closing?**

7 A Correct.

8 **Q And how did you obtain a copy of this?**

9 A From Sharon Davis.

10 **Q And when did Sharon bring this to your attention**

11 **for the first time?**

12 A August the 9th, I believe.

13 **Q Now, I show you and ask if you can identify that?**

14 A Yes.

15 MR. GIVENS - If I could mark this.

16 WHEREUPON - A document was marked as

17 Defendant's Exhibit Number Five.

18 **Q If you can tell us what this is or what you did to**

19 **---**

20 A It's a Notice of Lis Pendens.

21 **Q And did you prepare that document yourself?**

22 A Yes.

23 **Q And how did you know to prepare a document of**

24 **Notice of Lis Pendens and how to file it and all?**

25 A Well, I called around to get an attorney, and I was

1 basically told by the attorneys in Charlotte that

2 they were not licensed for South Carolina. They

3 said well, need to get an attorney who can file a

4 Notice of Lis Pendens for you in South Carolina,

5 and they gave me some name of attorneys to call. I

6 called several. Left messages, but at that point I

7 hadn't got a return call. So, I went onto the

8 Internet sitting in my car. I found a Notice of

9 Lis Pendens document and modified it to match the

10 address, the correct address, the owners and so

11 forth.

12 **Q And that was filed after the day after your**

13 **conversations with Melia Faile on the 9th that**

14 **there was another contract?**

15 A When she told me that my contract had been

16 cancelled, that they accepted a better offer for

17 more money is what she said, I told her that I had

18 spent the week and time trying to get things done

19 for this particular property, and I should be

20 reimbursed for this, because no one mentioned

21 anything to me about my contract not being valid.

22 In fact, they had told me that had told me that I

23 had a valid contract.

24 **Q Who told you that?**

25 A Melia Faile.

1 **Q Now, from August the 5th when you dropped the**

2 **contract by, through August the 9th, you indicated**

3 **that you had spent some time and effort in doing**

4 **things to the property. Can you tell me exactly**

5 **you did and what money you expended?**

6 A I had contacted a soil engineer just to go by and

7 look at it.

8 **Q And who was that?**

9 A I can't think of his name off hand.

10 **Q Can you provide me ---**

11 A It's not a cost issue with them. He works for a

12 builder that I know. He stopped by just take a

13 look at it. Didn't cost me for that. I went to

14 Sun Trust to get the construction approved loan.

15 **Q Which loan officer?**

16 A Gary -- I believe his last name is McLeod.

17 **Q And where is that office located?**

18 A It's in Charlotte.

19 **Q And that would have been on Monday the 7th?**

20 A I went to him on Monday. I actually spoke to him -

21 - spoke to him on Friday before, and we did the

22 initial stuff over the Internet and then went to

23 the office to sign the papers.

24 **Q Do you have copy of those papers for the**

25 **application with you today?**

1 A Yeah. I do have those.
 2 **Q Okay. Could I look at them.**
 3 A Oh, I don't have them with them.
 4 MR. GIVENS - Okay, could they ---
 5 MR. FOSTER - They will be provided.
 6 **Q And did you pay a fee for the appraisal?**
 7 A No. I did not get it appraised.
 8 WHEREUPON - An off the record discussion was
 9 held and the deposition as continued.
 10 A Well, I had the original ones that were sent to me
 11 with him pulling my credit report.
 12 **Q Do you know if he pulled your credit report before**
 13 ---
 14 A He pulled it on the 8th according to the credit
 15 report. I do have the original application here,
 16 but this is the one that was just given to me as a
 17 copy. It was not the signed copies.
 18 **Q Did you pay your money down that day?**
 19 A I'm sorry?
 20 **Q Did you pay any money down to get the loan process**
 21 **going?**
 22 A I had to give him a check, but they did not cash
 23 it. Because, I got a call on the 9th. So, I
 24 called him and told him to hold it.
 25 **Q In your Lis Pendens document you indicated that you**

1 **were damaged to the extent of about three thousand**
 2 **dollars. Was that just an estimate of your time**
 3 **and effort spent?**
 4 A Yes.
 5 **Q You didn't really have any hard cost, but could you**
 6 **explain how you came up with that?**
 7 A Well, I had a hard cost in time and gas. I mean
 8 time is money for me.
 9 **Q All right.**
 10 A And that's what I felt it was worth. It was a week
 11 of my time.
 12 **Q And that's how you came up with three thousand**
 13 **dollars?**
 14 A Yes.
 15 **Q What other damages do you claim?**
 16 A I'm sorry. I didn't understand the question.
 17 **Q In the lawsuit you asked for damages against my**
 18 **client. What else do you claim?**
 19 A My attorney put that paperwork together.
 20 **Q Well, what do you expect my client to do today?**
 21 A I want to close on the land. In fact, even when I
 22 spoke with you about this early on in the process,
 23 you had mentioned to me that from what you
 24 understood the other offer was no more money than
 25 mine was. It was just that it was a quicker

1 closing.
 2 **Q And you heard testimony to that fact today. Did**
 3 **you not?**
 4 A Yes, and you and I talked about that early on. I
 5 stated that if this needs to be a cash closing and
 6 needs to be quick I can do that, and I said that.
 7 I don't know if you recollect that, but that's what
 8 I said.
 9 **Q Well, this is after the fact.**
 10 A Right.
 11 **Q Why did you not make a cash offer on August the**
 12 **3rd, 2006?**
 13 A Because I'd rather use the bank's money than mine,
 14 and that was the only reason.
 15 **Q All right.**
 16 A I didn't realize there as a rush for it, because
 17 the property had been listed for some time, but it
 18 wasn't told to me that it needed to be a quicker
 19 closing.
 20 **Q If you don't close on the property, what other**
 21 **damages do you claim from my client?**
 22 A At this point, again, we were planning to build a
 23 house on that lot. My wife had her heart set on
 24 it. We were ready to move in. If I had of built a
 25 house on the lot, I would have had a much greater

1 profit than I would than what I'm asking for, what
 2 I had asked for I should say on that date.
 3 **Q Since being in real estate and a licensed real**
 4 **estate agent, do you agree that in order to be an**
 5 **accepted contract all parties have to agree on the**
 6 **terms and conditions including any conditions of**
 7 **the sale?**
 8 **MR. FOSTER - Objection as to form. My client**
 9 **is not an attorney. As far as he can answer,**
 10 **I'm instructing him to do so.**
 11 A As far as I know, we have to agree to the terms
 12 which I did.
 13 **Q And my clients did not initial off on the forty-**
 14 **three hundred dollars?**
 15 A That came after we had already agreed to the
 16 existing terms.
 17 **Q But can you show me anywhere in writing or by**
 18 **initials where DLI Properties allowed you to have a**
 19 **condition that you pay up to only forty-three**
 20 **hundred dollars of a tap on fee?**
 21 A Again, that was the third contract that she asked
 22 me to bring in when I filled it out after being
 23 told to fill it out, but prior to that there was
 24 nothing in writing because I failed to catch it
 25 when I faxed it.

- 1 **Q Well, did you deliver a check for a thousand**
 2 **dollars with that contract without the forty-three**
 3 **hundred dollars included? Did you ever deliver**
 4 **that by fax, e-mail, or personal delivery?**
 5 A No. I wasn't asked to until the 4th.
 6 **Q But did you ever deliver the contract without the**
 7 **forty-three hundred dollars included in that as a**
 8 **change?**
 9 A Yes.
 10 **Q Was that ever delivered to Melia Faile?**
 11 A Yes, it was, but that's what I don't have with me
 12 today.
 13 **Q And is it in another file at your office or another**
 14 **file ---**
 15 A Sharon Davis is the one who actually sent that.
 16 So, it's in her file.
 17 **Q So, she sent that particular contract?**
 18 A Yes. I ---
 19 **Q I thought she was out of town during that time.**
 20 A She was out of town in the beginning at that point,
 21 but she came back in town.
 22 **Q When did Sharon get back in town?**
 23 A I have no idea. Honestly, you'd have to ask her.
 24 I honestly ---
 25 **Q Well, on August the 1st she was out of town. We**

- 1 **know that, because that's when y'all talked about -**
 2 **--**
 3 A No. She wasn't out of town August 1st.
 4 **Q When was she out of town?**
 5 A She was out of town that following week, the Monday
 6 through -- She came back, I think, on Wednesday or
 7 Thursday.
 8 **Q So, what days was she out of town?**
 9 A I believe it was just a couple of days during that
 10 week following, but I'd have to honestly ask her.
 11 I don't remember.
 12 **Q Well, why were you dealing directly with Melia on**
 13 **August the 1st?**
 14 A I had dealt with Melia several times prior to that.
 15 I found the property on my own, and at the time I
 16 was not licensed when I initially saw it, found the
 17 property. So, I had to get a broker, and I decided
 18 to call the broker who sold me my house in
 19 Charlotte, and at that point she got involved.
 20 **Q Well, on August the 3rd, on that fax, you said that**
 21 **Sharon did not give you a copy of the fax cover**
 22 **sheet. Were you not in the office that day or what**
 23 **was that?**
 24 A At that point, I wasn't -- I don't work in her
 25 office. Her office is her house. So, there was no

- 1 office really. She works out of her house.
 2 Sharon, if I remember correctly -- I'm trying to
 3 remember was she in town the 3rd or not. I
 4 honestly can't -- I can't remember if she was in
 5 town on that day. I just know that when Melia
 6 called me I didn't have the fax and asked her to
 7 fax it to me.
 8 **Q All right, but it's your testimony that on August**
 9 **the 3rd, you can produce evidence to me that there**
 10 **is a copy of a contract delivered without any**
 11 **forty-three hundred dollars?**
 12 A Without forty-three hundred dollars, yes.
 13 **Q And you can provide telephone records of a fax**
 14 **transmittal going to Allen Tate's office? Is that**
 15 **803-547-5984?**
 16 A I'm not sure what fax number it was sent to. I'll
 17 have to ask Sharon. When I get the cover sheet,
 18 I'll know.
 19 **Q You indicate you no longer work for Sharon's**
 20 **brokerage. Why did you leave her company?**
 21 A Just I initially started because it was convenient,
 22 and it was a small one person office. I told her
 23 that I had been taking my classes to get my real
 24 estate license, and she offered me a job. So, I
 25 went to work with them, but just really no

- 1 infrastructure that they had said they were going
 2 to put into place as far as opening an office and
 3 putting up a website and things that you need to
 4 have for a real estate firm. So, I decided to go
 5 with another company that ---
 6 **Q Which company is that?**
 7 A Alpha Omega.
 8 **Q Are you a full time real estate agent?**
 9 A Yes.
 10 MR. GIVENS - That's all I have. Thank you.
 11 EXAMINATION: (By Mr. Wright)
 12 **Q I missed when you were licensed in North Carolina.**
 13 A It was sometime in July.
 14 **Q Of '06?**
 15 A Yes.
 16 **Q And you first found this property or lot when?**
 17 A I believe it was early June, sometime in early
 18 June.
 19 **Q And that's when you contacted Melia?**
 20 A Correct.
 21 **Q And you told her that you were a licensed real**
 22 **estate broker?**
 23 A I told her I was in class at that point taking my
 24 exam.
 25 **Q So, you didn't tell her you were licensed in June?**

- 1 A No. I wasn't licensed in June.
- 2 **Q But did you tell her you were licensed in June?**
- 3 A No. I told her I was getting my license.
- 4 **Q I was making notes when you testified earlier, and**
 5 **I wrote down that you told you were a licensed**
 6 **broker, but you didn't actually tell her you were**
 7 **licensed you just told her you were taking courses.**
- 8 A I told her I was licensed before she put the
 9 contract together. The day that she put the
 10 contract together -- Well, the day we talked about
 11 the contract was August 1st. That's when I told
 12 her that I was licensed in North Carolina as a real
 13 estate broker.
- 14 **Q And when did you contact these attorneys that you**
 15 **said were licensed in Florida and New York about**
 16 **this initial issue?**
- 17 A On the 9th.
- 18 **Q You didn't contact them during the period of time**
 19 **that the contract was being signed, the 3rd, the**
 20 **4th?**
- 21 A No.
- 22 **Q So, what was your belief on the 3rd or 4th about**
 23 **the need initial things?**
- 24 A I thought we were done. Everything that needed to
 25 be initialed was initialed.

- 1 **Q And you came by that understanding as a result of**
 2 **what?**
- 3 A As a result of Melia Faile telling me that she had
 4 received everything and that we had a you know a
 5 contract, congratulations.
- 6 **Q But you had at that point you had been trained and**
 7 **were a licensed broker?**
- 8 A At that point, yes.
- 9 **Q And you understood the law of contract?**
- 10 A Well --
- 11 MR. FOSTER - Can I understand that my line of
 12 objections continues through this?
- 13 MR. WRIGHT - Certainly.
- 14 A As far as I knew we had a valid contract. Yes.
- 15 **Q But I'm trying to find out where this knowledge,**
 16 **your knowledge of the need or failure to need**
 17 **initialing, came from? Did it come from your**
 18 **training? Did it come from your experience? Did**
 19 **it come from Melia? Where did it come from?**
- 20 A All of the above.
- 21 **Q All of the above. So, in your training as a real**
 22 **estate agent you were taught that if there were**
 23 **changes on contracts, parties did not need to**
 24 **initial?**
- 25 A No. That's not what I'm saying. What I'm saying

- 1 that if there was a blank line, and one party
 2 decides to initial that blank line with a line
 3 through it, there's no need for initials there.
- 4 **Q And, again, that's part of your training?**
- 5 A As far as I know, yes.
- 6 **Q But on August 9th when the issue came up, you felt**
 7 **the need to contact counsel licensed in other**
 8 **states.**
- 9 A I contacted my family's attorney that I had known
 10 for years.
- 11 **Q I'm trying to figure out where this fax was sent**
 12 **from that you claim was sent to Melia Faile on, I**
 13 **believe, August 3rd. Was it sent by you ---**
- 14 A Sharon.
- 15 **Q Or was it sent by Sharon Davis?**
- 16 A Sharon Davis.
- 17 **Q So, why would you be looking in computer for a**
 18 **record of a fax sent by Sharon Davis?**
- 19 A I was looking for the fax that came back to me.
- 20 **Q So, you're not going to have a record on your**
 21 **computer that you faxed the contract you say you**
 22 **faxed to Melia Faile?**
- 23 A I didn't fax it. Sharon faxed it.
- 24 **Q Sharon Davis faxed it.**
- 25 A I would have the record of the fax coming inbound

- 1 that was initialed.
- 2 **Q And if Sharon faxed that would mean Sharon was in**
 3 **town on August 3rd?**
- 4 A Well, it's possible. I don't know. I don't know
 5 where she -- all I know is I was told it was faxed.
- 6 **Q Who told you that?**
- 7 A Sharon.
- 8 **Q Sharon told you it was faxed?**
- 9 A Yes.
- 10 **Q But you don't know where she was?**
- 11 A I'm not sure where she was. No.
- 12 **Q And you don't know where she faxed it from?**
- 13 A No. I don't know.
- 14 **Q And you can't tell us when she was in or out of**
 15 **town?**
- 16 A I can't.
- 17 **Q Alpha Omega Realty is owned by who? Do you know?**
- 18 A Alpha Omega Construction owns the company. The
 19 owners are Michael and Claudia Alhassan.
- 20 **Q Do they live in Charlotte?**
- 21 A Marvin.
- 22 **Q Can you spell their last name?**
- 23 A A-l-h-a-s-s-a-n.
- 24 **Q So, Alpha Omega Realty is owned by Alpha Omega**
 25 **Construction?**

- 1 A Well, I'm not sure exactly how the ownership is
2 established. It's a part of Alpha Omega Financial
3 Group which is the legal entity name. Alpha Omega
4 Realty is a d/b/a. I don't know how she set up the
5 ownership though.
- 6 **Q Did you ever have any contact with Mr. Cauthen, my
7 client?**
- 8 A No.
- 9 **Q Never talked to him at all?**
- 10 A No.
- 11 **Q Ever communicate with him in any way?**
- 12 A Just through the attorney.
- 13 **Q No e-mails directly to him?**
- 14 A No, no, nothing like that.
- 15 **Q You mentioned some contact with Mr. Givens. When
16 did you make contact with Mr. Givens?**
- 17 A Following the Lis Pendens I filed, he called me the
18 following Monday.
- 19 MR. WRIGHT - That's all I have.
- 20 EXAMINATION: (By Mr. Ogburn)
- 21 **Q Mr. Woodson, my name is Tate Ogburn, and I'm
22 representing Allen Tate and Melia Faile in this
23 matter. Why don't I try to summarize my
24 understanding of your testimony, your previous
25 testimony. You are aware that you filed suit for**

- 1 **Breach of Contract. Correct?**
- 2 A Yes.
- 3 **Q The contract that you are suing to enforce does not
4 include the forty-three hundred tap fee option.
5 Correct?**
- 6 A Correct.
- 7 **Q Do you believe that you also have a contract that
8 includes the forty-three hundred tap fee option?**
- 9 A No.
- 10 **Q Earlier today we made a big deal of playing a voice
11 mail from Ms. Faile that included -- that was the
12 transcript of a telephone call relating to a tap
13 fee -- the tap fee option. Correct?**
- 14 A Correct.
- 15 **Q And it's your position that that telephone call
16 does not create a contract that includes the forty-
17 three hundred tap fee?**
- 18 A That call reassured me that we were moving forward,
19 and that's how I took it. Whether it would be
20 without the forty-three hundred or with the forty-
21 three hundred didn't matter to me at that point. I
22 just got a confirmation that we were moving
23 forward.
- 24 **Q And I believe -- where's that transcript? I want
25 you to review that and I want you to tell me what**

- 1 **your understanding was after receiving that voice
2 mail.**
- 3 A At this point after she left this message, I was
4 told the forty-three hundred was good, and we had a
5 contract based on that.
- 6 **Q So, is it your understanding after receiving that
7 voice mail that the contract between the parties
8 included the forty-three hundred tap fee option?**
- 9 A Yes, at this point.
- 10 **Q Now, earlier today you testified that there is a
11 contract out there that does not include -- that is
12 fully executed by the parties that does not include
13 the tap fee option. Correct?**
- 14 A Correct. That was the first one I sent her.
- 15 **Q And you believe that is a valid contract?**
- 16 A Yes.
- 17 **Q You have filed suit for Breach of Contract. What
18 is your understanding of the contract you are suing
19 to enforce with regards to the forty-three hundred
20 tap fee option?**
- 21 A That I don't have that forty-three hundred dollar
22 maximum limit.
- 23 **Q So, it is not your position that the telephone
24 message from Ms. Faile agrees to the forty-three
25 hundred tap fee option?**

- 1 A No. It does agree to the forty-three hundred. The
2 telephone message does.
- 3 **Q Okay, but the contract you're suing to enforce does
4 not include it. Correct?**
- 5 A That was my opinion that we had a contract. I
6 acknowledged that I was accepting that contract as
7 is. However, we discussed the forty-three hundred.
8 I missed it. So, at that point, she volunteered to
9 call the sellers because it had been discussed
10 before is what she had admitted to me. She didn't
11 say it today, but she did admit that -- I remember
12 us discussing it. I'll call my sellers, but I
13 can't make any promises, and I said I understand I
14 have to fulfill the contract as is without the
15 forty-three hundred.
- 16 **Q And what I am trying to clarify is what your
17 understanding of the contract is that you have
18 filed suit against Mr. Cauthen.**
- 19 A My attorney filed suit --
- 20 **Q I understand.**
- 21 A On behalf of me.
- 22 **Q And did you review that Complaint before it was
23 filed?**
- 24 A I actually reviewed it the day after. It was
25 probably around the -- He sent it to me prior, but

- 1 I didn't get a chance to review it.
- 2 Q Okay.
- 3 A Right away anyway.
- 4 Q I'm sorry to belabor on this point. Is it your
5 understanding that the contract you have filed suit
6 to enforce includes the forty-three hundred tap fee
7 or does not include the forty-three hundred tap
8 fee?
- 9 A It was my understanding it was the one -- it was
10 for both, because they changed and accepted the
11 forty-three hundred.
- 12 Q So, you believe ---
- 13 A That was what I believe happened.
- 14 Q So, do you believe you have two contracts with DLI
15 that you can enforce?
- 16 A No. I don't believe -- I believe that the first
17 contract was valid, and I had agreed to take it.
18 Then when she called me and told me the second
19 contract was valid, I believe that that one was
20 valid and replaced the first one.
- 21 Q So, is the contract that you are filing suit on the
22 one that includes the forty-three hundred tap fee
23 option?
- 24 A Yes. I didn't know legally if you know how -- which
25 contract needs to be -- if it has to be one or

- 1 both, but that's what I'm assuming. I believe we
2 are suing for the final contract which is why I
3 produced the tapes.
- 4 Q I'm going to show you Plaintiff's Exhibit Three,
5 and down by Paragraph Eleven is there handwriting
6 in there including the forty-three hundred tap fee?
- 7 A Yes.
- 8 Q Have you and your wife initialed by that?
- 9 A Yes.
- 10 Q Do you have any documents where DLI has signed
11 indicating their approval of that change?
- 12 A No.
- 13 Q Do you have any documents where Melia Faile has
14 signed to approve that change?
- 15 A No.
- 16 Q Mr. Woodson, how old are you?
- 17 A Thirty-six.
- 18 Q Can you give me your birth date?
- 19 A
- 20 Q Can you give me your social security number please?
- 21 A
- 22 Q And I believe there have been several questions
23 today regarding your licensing status. Are you a
24 licensed real estate agent or a broker?
- 25 A Well, North Carolina is a broker only state.

- 1 Q Okay.
- 2 A So, I'm a broker.
- 3 Q So, in North Carolina the term is interchangeable?
- 4 A Correct. You are either a provisional broker or a
5 broker.
- 6 Q And then in South Carolina what's your
7 understanding of the difference in a broker and an
8 agent?
- 9 A Correct.
- 10 Q I'm sorry, what is your understanding?
- 11 A I understand that there is a broker and agent
12 separate.
- 13 Q What are you in South Carolina?
- 14 A I have reciprocal status as a broker, I believe.
15 That's what the license says.
- 16 Q After you believed you had a contract with DLI for
17 the sale of the property, you testified that you
18 had a soils guy go out there and look at the
19 property. You testified you went by Sun Trust Bank
20 to get a loan, apply for a loan. Is there anything
21 else that you did in reliance of -- on that
22 contract?
- 23 A Yes. I went and reviewed architectural plans for
24 different homes. Several trips back and forth to
25 the firm for that.

- 1 Q And what architect firm was that?
- 2 A It's one of the -- It's in Charlotte. I can't
3 think of the name of it. They make standard plans
4 for homes. Living Concepts is the book that I
5 found, but the firm was called something else, but
6 they -- I think they operate under two names.
- 7 Q Do you know about where they are located in town?
- 8 A Yeah. They were off of -- somewhere off of Carmel.
9 I just can't think of exactly where.
- 10 Q Carmel Road?
- 11 A You travel down Carmel to get to them.
- 12 Q Anything else you did in reliance to the contract?
- 13 A Just a lot of phone calls and priced, loan packages
14 with Bank of America, Sun Trust, Wachovia. I
15 talked to just different lenders about how to put
16 the construction and the actual mortgage together
17 as one closing instead of having to buy the land
18 then get a separate closing for the mortgage.
- 19 Q Did you have any out-of-pocket expenses for any of
20 these actions you took in reliance on the contract?
- 21 A Basically the -- just gas and time and the initial
22 checks for the deposit.
- 23 Q How much gas do you think you used?
- 24 A I have no clue.
- 25 Q How many miles do you think you drove?

- 1 A I have no clue.
- 2 **Q Do you have any records, evidence, of that?**
- 3 A No.
- 4 **Q How much time did you spend?**
- 5 A I spent from the 4th through August 9th.
- 6 **Q How many hours a day did you spend on this?**
- 7 A Honestly, I can't tell you. I spent a lot of time.
- 8 All pretty much that week that's what I was devoted
- 9 to. Just ---
- 10 **Q Did you spend an eight hour -- I'm sorry. I'm not**
- 11 **trying to interrupt you.**
- 12 A I understand. I honestly did a lot of research. I
- 13 spent quite a bit of time looking for the plans
- 14 that were going to work on that lot. I had three
- 15 different builders go out there to look at the lot
- 16 and to give me some suggestions as to what type of
- 17 house, where I could put a garage, where I could
- 18 put the house on the lot. Allen Tate Builders was
- 19 one of them. I had Melia Failes' builders. She --
- 20 she'll vouch for that I hope that they came out
- 21 there and met with me. I forget the name of their
- 22 company, and then -- there was three different
- 23 builders. I've got it somewhere. They all sent me
- 24 faxes or something at some point.
- 25 **Q Do you have any time records documenting the amount**

- 1 **of time you spent?**
- 2 A No.
- 3 **Q How did you come up with three thousand dollars?**
- 4 A Based on the fact that I thought I had a contract,
- 5 and I wasted a week. I didn't document my time,
- 6 because I thought we were moving forward.
- 7 **Q And you value a week of your time at three thousand**
- 8 **dollars?**
- 9 A I value what I spent on it. At that point I did,
- 10 yes.
- 11 **Q Were either Melia Faile or the seller aware of the**
- 12 **actions you were taking?**
- 13 A Melia was, because she had sent me the soil report,
- 14 because I told her I needed to just to make sure
- 15 that I can put the septic in where it needs to go.
- 16 She introduced me to some friends of hers who were
- 17 builders. I don't know if they were friends or
- 18 just business acquaintances, but she introduced me
- 19 to them. In fact, she met with me with them on one
- 20 occasion. I met with them several times, but she
- 21 only went with me once.
- 22 **Q Did she send you the soil report between August 4th**
- 23 **and August 9th?**
- 24 A I don't remember.
- 25 **Q Is it possible she sent you the soil report prior**

- 1 **to August 4th?**
- 2 A It's possible. I'm pretty sure I asked her for it
- 3 prior to that.
- 4 **Q Did she introduce you to construction people**
- 5 **between August 4th and August 9th?**
- 6 A She introduced me to them before the 4th initially
- 7 over the phone.
- 8 **Q Let me go back and reask the questions. Do you**
- 9 **have any evidence that either Melia Faile or the**
- 10 **seller were aware of the actions you took between**
- 11 **August 4th and August 9th in furtherance of the**
- 12 **contract?**
- 13 A Yes.
- 14 **Q How?**
- 15 A Because I called Melia about different questions I
- 16 had with regard to the lot. In fact, the bank
- 17 needed to have specific address information on the
- 18 lot, and I called her about that. I don't remember
- 19 which days I called her, to be honest with you. I
- 20 have to look through my records for that, but I
- 21 definitely spoke to Melia Faile after the 4th.
- 22 **Q And do you have records that would document phone**
- 23 **calls to Melia Faile?**
- 24 A Yes.
- 25 **Q What kind of records are they?**

- 1 A Most -- ninety percent of my calls are from my cell
- 2 phone. So, I have the call logs incoming and
- 3 outgoing.
- 4 **Q And I assume if we ask that you produce ---**
- 5 A Yes. I can.
- 6 **Q Let me ask you about the recorded statement that**
- 7 **was played earlier today. Where was this voice**
- 8 **mail message left?**
- 9 A It was left on my voice mail.
- 10 **Q What number is that?**
- 11 A 704-609-4141.
- 12 **Q Is that a cell phone?**
- 13 A Yes.
- 14 **Q How did you transcribe it? How did you transfer it**
- 15 **to the tape recorder you played it from today?**
- 16 A I played out in the open room in my house and
- 17 recorded it.
- 18 **Q Why did you decide to keep that voice mail?**
- 19 A I honestly didn't realize I had kept it. I had a
- 20 lot of messages on there. I had been in and out of
- 21 town basically for a while. Before that, I was
- 22 going back and forth to Florida before we even did
- 23 the contract and I had the voice messages that came
- 24 at like -- and I just never got around to clearing
- 25 it out.

1 **Q Do you regularly preserve voice mail messages?**

2 A Not really. I mean I'll preserve them if I don't
3 time to transfer it over to a written record or put
4 it into my card scan or something.

5 **Q Do you remember when you discovered you had it?**

6 A August 9th when I got the call from Sharon Davis
7 stating the contract was cancelled, or that a new
8 contract had been accepted.

9 **Q Who arranged to have Ms. Faile's oral statement
10 transcribed?**

11 A I provided copies to Mr. Foster, and I believe he
12 ordered the transcription.

13 **Q And when did you first contact Mr. Foster?**

14 A It was -- I want to say around the 15th of August,
15 15th or 16th. It was after the Lis Pendens. I
16 want to say it was probably Tuesday. Oh, September
17 1st. It was September 1st.

18 **Q And for the record you are testifying based on a
19 record your attorney has shown you?**

20 A Yes.

21 **Q When you purchased the property what kind of
22 financing were you looking at obtaining?**

23 A I was looking to obtain a loan that would allow me
24 to buy the lot and build the house and have the
25 mortgage all in one. They call it a construction

1 loan.

2 **Q How much money were you contemplating putting down?**

3 A Well, we honestly were looking at doing the initial
4 phase with thirty-five thousand, and then once the
5 construction started we were going to figure how
6 much we were going to need to keep ourselves from
7 having to pay PMI.

8 **Q Okay. So, you were going to put thirty-five
9 thousand down on the lot essentially?**

10 A Right.

11 **Q And then you were contemplating paying sufficient
12 money in cash after that to avoid paying PMI?**

13 A Right.

14 **Q How much were you contemplating spending on a house
15 or the construction of the house?**

16 A We were trying to keep the construction and the lot
17 right around four hundred combined.

18 **Q So, roughly three ten on construction?**

19 A Correct.

20 **Q You testified earlier that your wife had her heart
21 set on this lot.**

22 A After we had went and looked around North Carolina
23 into quite a few different places, she realized
24 that what I had been saying about the lot she could
25 appreciate at that point.

1 **Q Did she have her heart set on it?**

2 A At that point she did. After we decided to go
3 forward with the contract on August the 3rd, she
4 was set. Prior to that, I told you she was not
5 completely sold on it back in early June when we
6 first saw it, but we had not spent much time
7 looking around for other options at that point.
8 But once we decided August 1st to go ahead and move
9 forward with it, she was on board.

10 MR. OGBURN - If anybody wants to ask a couple
11 of questions and give me a second, I'll look
12 back through and see if I have anything else.

13 MR. FOSTER - Can we go off.

14 WHEREUPON - An off the record discussion was
15 held and the deposition was continued.

16 MR. FOSTER - We're pausing and I recited in
17 the interim the items that we have agreed to
18 provide to opposing counsel. Basically,
19 Sharon Davis' file on this matter, Mr.
20 Woodson's cell phone records from the relevant
21 period, which I would take it to be August 1st
22 through August 9th. I have no problem
23 providing others, but I assume that is the
24 relevant period.

25 MR. WRIGHT - I'm sorry. What's it?

1 MR. FOSTER - Cell phone records.

2 MR. WRIGHT - For what period, August 1st?

3 MR. OGBURN - Yes. He's saying August 1st
4 through the 9th.

5 MR. FOSTER - I'll give you more. I just want
6 to be sure that we have what we want.

7 MR. OGBURN - Yes. My thought would be like
8 get July 15th to August 15th, too.

9 MR. FOSTER - Fine.

10 MR. OGBURN - I mean just in case everybody's
11 okay about that?

12 MR. FOSTER - August 15th, '06. Copies of the
13 credit report run as a result of the
14 application. Copies of any faxes or any
15 correspondence with the builders that he
16 contacted. Copies of any application
17 documents, and I believe that's everything
18 that you thought of.

19 MR. OGBURN - And I guess copies of any
20 documents of the architectural firm.

21 MR. FOSTER - Copies of documents. Well, I
22 think that's the builders.

23 MR. OGBURN - Okay.

24 MR. FOSTER - But yes. Thank you for
25 clarifying architectural firms.

1 Q And I've got one more series of questions. I want
2 to clarify something that was talked about earlier.
3 You've been shown Defendant's Exhibit Number Two
4 several times. It's my understanding you did not
5 get a copy of that document until August 9th.
6 Correct?

7 A Yes. I believe so.

8 Q And then it's my understanding you believe a
9 version of Plaintiff's Number Two where you have
10 initialed next to Paragraph Eleven, Paragraph
11 Number Eight, Thirty-four. I guess the other
12 changes in Paragraph Eleven, Eight, and Thirty-
13 four. Correct?

14 A I never initialed next to Eleven.

15 Q Did you ---

16 A Until the forty-three hundred dollars came into
17 play.

18 Q Did you initial next to the other modification
19 Number Eleven that the seller had made where it
20 said that the tank can be hooked?

21 A No.

22 Q But you did make an initial to Number Thirty-four
23 you believe?

24 A Yes. I believe so. Yes. That was the -- yes.

25 Q How did you know to initial the change next to

1 Thirty-four and Number Eight?

2 A Because it stood out. It was blank before in the
3 initial contract, and it was all of sudden
4 handwritten text.

5 Q And then the change to Number Eight, not the strike
6 through the blank, but the one where it says that
7 the property can be hooked up?

8 A I honestly don't remember for sure on that one.

9 Q Don't remember whether you initialed it to send
10 that back?

11 A I'm just looking at it now, and I'm just not
12 remembering that issue being raised in Section
13 Eight.

14 Q So, there's a possibility that the contract that
15 was sent back to Ms Faile prior to the add of the
16 forty-three hundred tap fee issue did not initial
17 the other change to Paragraph Eight?

18 A I don't know until I see it. I'm positive that we
19 initialed what we needed to initial, but I just
20 don't remember that discussion.

21 MR. OGBURN - That's all the questions I have.

22 MR. FOSTER - I have one.

23 EXAMINATION: (By Mr. Foster)

24 Q Mr. Woodson, do you recall hearing from Ms. Faile
25 or talking with Ms. Faile, I should say, on the 9th

1 when you learned that this contract was -- or they
2 maintained that your contract with DLI had been
3 cancelled?

4 A Yes.

5 Q Can you narrate for us what you recall of that
6 conversation?

7 A Are you referring to all of the conversations that
8 led up to me finding out about it?

9 Q No, sir, just that one.

10 A I called her after Sharon called me. I told her
11 that -- how are you guys going to accept the
12 contract a week after we already have a contract
13 agreement. She said, I know this is wrong, but I
14 have to do what my seller told me to do.

15 Q Do you have -- go ahead.

16 A They've told me that they are not going to accept
17 your contract, that they are going to accept this
18 contract. I said, you can't do that, we have a
19 valid contract. She says, I'm sorry. My clients
20 have instructed me to do that. I said, Melia, I've
21 spent time and energy working on this project.
22 Your clients need to reimburse me for my time. She
23 says I will call my clients and call my broker in
24 charge and explain the situation. I didn't hear
25 from her after that, and that's why I filed the

1 Notice of Lis Pendens.

2 Q Do you recall anything else about that
3 conversation?

4 A Well, I told her prior, I reminded --

5 Q This is a previous conversation?

6 A I had reminded her in this conversation about the
7 prior conversation that the forty-three hundred
8 dollars was not an issue if her sellers didn't
9 agree to it.

10 Q The conversation that we've heard today as a
11 transcript and as a played tape?

12 A Correct. Before she left me that voice message --
13 What led to that voice message was the fact that I
14 mentioned to her that I recognize that I'm stuck,
15 but since we spoke about she volunteered to go back
16 to her seller.

17 Q Do you recall anything else about the conversation
18 with her on the 9th?

19 A The only thing I ended with was, I believe you guys
20 did this knowing that you were working another
21 deal, and she assured me she didn't.

22 MR. FOSTER - I have nothing further.

23 MR. WRIGHT - Nothing.

24 MR. FOSTER - Let's be sure if we're
25 through.

1 MR. OGBURN - I'm done.
2 WHEREUPON - The deposition was concluded
3 at 5:30 p.m.

Jan Dunkin
Court Reporter/Notary Public

(Recorded deposition tapes retained for fifteen days
from date of certification or until transcript has been
signed in cases when signature is not waived)

Deposition of Larius G. Woodson

SUBSCRIPTION OF DEPONENT

State of _____)

County of _____)

I, Larius G. Woodson, do hereby certify that
I have this day read the foregoing deposition and do
hereby declare that the same is a true and accurate
transcript of the proceedings had at the time and place
herein designated (except for the notations as
indicated on the attached errata sheet, if any).

Dated: _____

Larius G. Woodson

Sworn to and subscribed before me

this ____ day of _____, 2007.

Notary Public

My Commission Expires: _____

Deposition of Larius G. Woodson

STATE OF SOUTH CAROLINA }
COUNTY OF LANCASTER } IN THE COURT OF COMMON PLEAS

LARIUS G. WOODSON AND
MAURISSA WOODSON,

PLAINTIFFS,

VS.

DLI PROPERTIES, LLC,
ALLEN TATE CO., INC.,
MELIA C. FAILE, AND
ALAN L. CAUTHEN,

DEFENDANTS.

CASE NO. 06-CP-29-1354

ALAN L. CAUTHEN,

PLAINTIFF,

VS.

DLI PROPERTIES, LLC, LARIUS G.
WOODSON AND MAURISSA
WOODSON,

DEFENDANTS.

CASE NO. 06-CP-29-1195

DEPOSITION OF MELIA FAILE

ROCK HILL, SOUTH CAROLINA

APRIL 17, 2007

REPORTER: JAN DUNKIN

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2

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3

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Plaintiff's Exhibit 5 Bank of America Letter and Copy of Check	Page 21
Plaintiff's Exhibit 6 Contract	Page 31
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Defendant's Exhibit 1 Fax 8-1-6	Page 51
Defendant's Exhibit 2 Handwritten Notes	Page 53
Defendant's Exhibit 3 Fax to Barfield	Page 68

EXHIBIT

2

4

1 Deposition of Melia Faile, taken before me, Jan
2 Dunkin, a Notary Public for the State of South Carolina,
3 in the law offices of John Martin Foster, Rock Hill,
4 South Carolina, commencing at 1:17 p.m. on April 17,
5 2007, in accordance with the South Carolina Rules of
6 Civil Procedure.

7 It was stipulated by and between Counsel for the
8 Plaintiff(s) and Counsel for the Defendant(s) that this
9 deposition is taken for any purpose allowed under the
10 South Carolina Rules of Civil Procedure;

11 That the signing of the transcript of deposition by
12 the witness is not waived.

13 * * * * *

14 Melia Faile, first being duly sworn, deposes and says as
15 follows:

16 EXAMINATION: (By Foster)

17 MR. FOSTER - This is a deposition in the case
18 of Larius and Maurissa Woodson versus DLI
19 Properties, LLC, et al, 06-1354. Gentleman,
20 in terms of housekeeping before we start, it
21 did occur to me of course our companion case
22 Cauthen versus DLI Properties, LLC, et al,
23 does anyone have an objection to making this a
24 joint deposition and putting both captions on
25 it?

Deposition of Melia Faile

MR. WRIGHT - Not I.

MR. GIVENS - Not I.

MR. OGBURN - I'm not involved in the second case. I don't have any objection.

MR. FOSTER - Very well, sir. While I believe it to be required by the rules, I always like to ask beforehand, I assume as usual we are reserving all objections except to as matters of form. Is that correct?

MR. OGBURN - Yes.

MR. WRIGHT - Yes.

Q Would you state your name, please?

A Melia Faile.

Q And what's your address?

A 310 Brookside Drive.

Q And, ma'am, what is your social security number?

A

Q Have you ever given a deposition before?

A No, sir.

Q You had a chance I believe to talk to Mr. Ogburn.

A Yes, sir.

Q About how this goes?

A (Indicating yes)

Q I'm going to go through what a deposition is briefly.

Deposition of Melia Faile

A Okay.

Q If you have any questions, I hope you will stop me. I will stop and try to answer you. You understand that I'm going to ask you questions and that you're under oath?

A Yes, sir.

Q You understand that this lady here with her vast amount of equipment is taking down these depositions and your answers to questions?

A Yes, sir.

Q And you understand that if this matter will go to court either on motion or trial that this document taken down can presented as evidence of what you've stated under oath?

A Yes, sir.

Q If at anytime you don't understand a question I'm asking you, I have to rely upon you to stop and tell me that.

A Okay.

Q You understand that?

A Yes, sir.

Q Are you known by any names other than Melia Faile?

A No, sir.

Q Do you have any relatives in Lancaster County?

A No, sir.

Deposition of Melia Faile

Q What is your job?

A I am a realtor with Allen Tate, Fort Mill.

Q Is that a job that requires you to be licensed by the State of South Carolina?

A It does.

Q Are you licensed?

A Yes, sir.

Q Is it a job that requires training?

A Yes, sir.

Q Have you received that training?

A Yes, sir.

Q Can you briefly outline for us what that training was?

A Red Flags, Code of Ethics, is that what you are talking about?

Q I believe that for those of us who aren't as familiar with real estate lingo as you, I'm going to have you translate that into English for us. What is a Red Flag?

A A Red Flag is something that you want to avoid.

Q Would it be fair to say that it is a practice that you are not suppose to partake in as a realtor?

A As a realtor, you are supposed to watch out for your client.

Q Thank you. Where are those defined? Where are

Deposition of Melia Faile

they written down?

A I just took -- It's in a course that I take, that I've taken.

Q And where did you take the course?

A Columbia.

Q Under whose auspices was this course given?

A Chip -- I can't think of their name. It was a ---

Q Specifically, was this the South Carolina Real Estate Commission?

A (Indicating yes)

Q Okay.

A (Indicating yes)

Q And ---

MR. OGBURN - Just say yes or no.

A Yes.

Q Were you required to take this course only once?

A Yes.

Q Are you required to repeat that course at anytime?

A No, sir.

Q Are you required to take continuing education?

A Yes, sir.

Q What kind of continuing education do you have to take?

A You have to take eight hours every two years.

Q On which subjects?

Deposition of Melia Faile

1 A Code of Ethics is always a subject.
 2 Q Okay.
 3 A But it can be any subject that you might choose,
 4 and so far I've had to take Code of Ethics and
 5 that's what is offered twice.
 6 Q And do you have to repeat Code of Ethics every so
 7 often?
 8 A Yes, sir, every year.
 9 Q Every year?
 10 A (Indicating yes)
 11 Q And does that make up a certain number of hours of
 12 what you have to take?
 13 A Yes, sir. It does.
 14 Q How many does it make up?
 15 A Two hours.
 16 Q So, if I am saying correctly you can take more than
 17 two hours on Code of Ethics, but you have to take
 18 at least that?
 19 A Yes, sir.
 20 Q And that is every year?
 21 A Yes, sir.
 22 Q How long have you been a realtor?
 23 A Seven years.
 24 Q How many courses, if you can tell us, have you
 25 taken?

Deposition of Melia Faile

1 A Well, seven times two that's about fourteen. No,
 2 no, no, no. Seven times seven.
 3 Q Ma'am, where are you employed?
 4 A Allen Tate of Fort Mill.
 5 Q And how long have you been there?
 6 A I have been there -- It will three years September.
 7 Q And before that where were you?
 8 A Coldwell Banker of Fort Mill.
 9 Q And how long were you there?
 10 A Four, three and a half, four years.
 11 Q Is that the sum of the people you've worked for?
 12 A Yes, sir.
 13 Q So, you've worked for either one or the other of
 14 those two places?
 15 A Yes, sir.
 16 Q Do you recall whether in August, 2006 or thereabout
 17 while you were working with Allen Tate
 18 representing, I believe, it's DLI Properties in
 19 negotiations with Larius and Maurissa Woodson?
 20 A I do.
 21 Q And what piece of property was that negotiation in
 22 regard to?
 23 A Lot 30 Point Carpenter.
 24 Q Do you have either with you or available to you any
 25 notes or documentation relating to negotiations

Deposition of Melia Faile

1 between the Woodsons and DLI Properties?
 2 A Not with me, no, sir.
 3 Q Do they exist, ma'am?
 4 A Yes, sir. They do.
 5 Q And where would they be?
 6 A At my office at home.
 7 MR. FOSTER - Is it possible for us to
 8 stipulate that those be provided to us?
 9 MR. OGBURN - I don't have a problem giving
 10 them to you, but I want to make sure we're
 11 giving you everything you're asking for. Can
 12 you send a written request for it, and we will
 13 be happy to do it.
 14 MR. FOSTER - I presume the written request
 15 will need to be in formal style.
 16 MR. OGBURN - A letter is fine, but if you want
 17 to do it formally that's fine. I just want to
 18 make sure that we respond with everything you
 19 ask for, but other than that I think it's
 20 probably relevant to produce it.
 21 Q Ms. Faile, do you feel that you remember the
 22 situation adequately, and that your memory today
 23 would be in accord with what your notes at that
 24 time were?
 25 MR. OGBURN - Objection.

Deposition of Melia Faile

1 A I believe so.
 2 WHEREUPON - An off the record discussion was
 3 held and the deposition was continued.
 4 WHEREUPON - Documents were marked as
 5 Plaintiff's Exhibits One, Two and Three.
 6 Q Ms. Faile, I'm handing you what's been marked by
 7 pre-agreement as Plaintiff's One, Two and Three.
 8 A Yes, sir.
 9 Q Can you identify those as what we believe them to
 10 be which are successive stages of the offers and
 11 documentation between DLI and the Woodsons?
 12 A Yes, sir.
 13 Q Now, I'm going to direct your attention to the last
 14 of these documents Number 3. That document does
 15 have signatures of both parties except I believe on
 16 one item which I believe is paragraph eleven on the
 17 second page.
 18 A Yes, sir, that is correct.
 19 Q That paragraph eleven refers to a monetary cap on
 20 the tap.
 21 A Yes, sir.
 22 Q Now, ma'am, did discussion on that point arise
 23 between the parties after Number 2 here,
 24 Plaintiff's Two, was signed?
 25 A I don't understand what you are saying.

Deposition of Melia Faile

What I guess I'm asking is between Number 2 and Number 3 that you are holding in the stage of these things ---

A Yes, sir.

Q Did discussion arise about the terms of paragraph eleven and the monetary cap on the tap fee?

A No.

Q The parties never discussed that after Number 2? Let me be clear. This is my mistake. When I say discussion-wise, were there negotiations, whether directly or through you, relating to that item after Number 2 and before Number 3?

A If I can recall correctly, I had sent this over to Mr. Woodson, Item 2.

Q Number 2 was sent to him.

A Item 2 to get a final signature thinking that this would be a valid, executed contract.

Q Would it be fair to say you mean your final contract?

A Yes, sir.

Q Go ahead.

A Yes, sir, and Saturday -- No, Friday I get a call from Mr. Woodson, and he -- I think it was sometime Friday afternoon he had called and said I'm sorry I meant to put forty-three hundred dollars in Item

Deposition of Melia Faile

11.

Q At this point, your discussion was about what is now Plaintiff's 2?

A Yes, sir.

Q That stage of the thing?

A Yes, sir.

Q Go ahead.

A Or would that be 3. Oh, yeah, they are right. I told him, I said, I didn't know if my sellers would agree to that. There were enough contingencies in the contract as it was, and I really didn't know if they would agree to that. So, I hung up. called my sellers. My seller was very hesitant because there were already enough contingencies in there, and we discussed that.

Q Let me interrupt you, ma'am. You seller is DLI Properties?

A Yes, sir.

Q Go ahead.

A And we discussed it. We went over Item 11 several times, and DLI properties was almost like frustratingly said fine, because we had gone back and forth so many times with this as it was trying to come to a final contract.

Q What happened after that to your recollection?

Deposition of Melia Faile

A After that, Mr. Woodson did bring the signed off - I called Mr. Woodson back. I think, accordingly to the records and I guess it's my voice, and I did tell him that I thought we had us a deal, or we have a deal or whatever that says, and at the time I truly did think that we had us executed contract.

Q Do you remember when you made this call?

A I think it was later. Honestly, I didn't remember leaving it on voicemail. I thought I had spoken to Mr. Woodson directly. Probably I think according to the voicemail, or maybe I heard five o'clock maybe Friday.

Q By Friday do you remember what day that was?

A I think August 3rd. I believe August 3rd.

Q Let me show you what I think we might be able to agree as an unmarked calendar of August, 2006.

MR. OGBURN - Object.

Q I'm handing you that. Assuming that to be correct, I believe it was Friday that you left the message with Mr. and Ms. Woodson?

A Yes, sir.

Q And that I believe is the 4th. Is it not?

A It is.

Q Assuming that calendar to be correct. Now, ma'am, I'm going to ask Mr. Woodson who knows his

Deposition of Melia Faile

technology to go ahead and play that recorded message for your benefit and for the court reporter.

WHEREUPON - An off the record discussion was held and the deposition was continued.

WHEREUPON - The voice message was played.

Q Were you able to hear that?

A Yes.

Q Ma'am, is the voice on that recording yours?

A Yes, sir.

Q Is that an accurate recording as far as you are able tell ---

MR. OGBURN - Object.

Q Of the message you left?

MR. OGBURN - Objection.

Q That's lawyer's stuff. You go ahead.

A I suppose. I don't really remember saying it like that.

Q Do you recall having said something before that or after that?

A No, sir.

Q Does that seem to be the whole message?

A Yes, sir. I guess. I don't -- I don't recall really.

Q Do you have any recollection?

Deposition of Melia Faile

1 A (Indicates yes)

2 Q And I'm going to be asking to the best of your

3 memory whether anything has edited or left out of

4 what you just heard.

5 MR. OGBURN - Objection.

6 A As far as I know. I have no clue.

7 MR. FOSTER - We have here a CD copy of that

8 which I would like to place in evidence, a

9 tape. Do you have one of these?

10 MR. OGBURN - I do not have a copy. If you can

11 give us a copy.

12 MR. FOSTER - I can give you one.

13 MR. OGBURN - Okay.

14 MR. FOSTER - And we would like to enter this

15 into evidence.

16 WHEREUPON - A copy of a CD was marked as

17 Plaintiff's Exhibit Number Four.

18 Q Ms. Faile, this may be obvious, but the message

19 that you heard played was the message you left the

20 Woodsons?

21 A (Indicating yes)

22 Q And, ma'am, you need to say yes or no.

23 A Yes.

24 Q Based upon that message, and I'm referring now to a

25 transcript that's been made.

Deposition of Melia Faile

1 A Okay.

2 Q Does your reference in that to the forty-three

3 hundred, if I'm remembering correct Larius that

4 forty-three hundred is good, does that refer to the

5 tap fee?

6 A Yes, sir.

7 Q And that is in fact the amount shown then crossed

8 out and various other things on Number Three under

9 Page Eleven -- pardon Paragraph Eleven?

10 A Correct.

11 Q I can hand you a transcript that should refresh

12 your memory, but what we have in the transcript and

13 what I believe we heard was that you said the

14 seller said that's fine.

15 A Yes, sir.

16 MR. OGBURN - Martin, if you're going to refer

17 to the transcript, do you mind ---

18 MR. FOSTER - I'll be happy to -- I'm sorry,

19 let me hand her my copy.

20 MR. OGBURN - Okay.

21 Q Would you like to check that before you answer?

22 A Yes, sir, please.

23 Q Go ahead.

24 A Okay.

25 Q Ma'am, my question was according to what you've

Deposition of Melia Faile

1 heard and the transcript, the message -- that you

2 did state in the message the seller said that's

3 fine.

4 A Yes.

5 Q Would you like to listen to playback again to be

6 sure of that?

7 A I'm fine.

8 Q Was that statement accurate as of the time you made

9 it?

10 A It was.

11 Q I believe you indicated in what you narrated for us

12 that at the time you left that message you had, in

13 fact, talked to or had communication from DLI

14 Properties in which they had said it was fine.

15 A That is correct.

16 Q So, as of the time of this message DLI Properties

17 had approved that provision, Paragraph Eleven as

18 changed?

19 A Yes.

20 Q In the transcript and according to what you just

21 heard, can we agree you instructed or suggested, as

22 you please, to the Woodsons that they perform

23 certain acts, scratching through certain things,

24 putting the forty-three hundred in, initialing, and

25 dating?

Deposition of Melia Faile

1 A (Indicates yes)

2 Q Did they do that?

3 A Yes.

4 Q I didn't mean to cut you off.

5 A Say that again please.

6 Q Can we agree that in the transcript and what you

7 heard ---

8 A Yes.

9 Q That you instructed or suggested the Woodsons that

10 they scratch through certain things, put the forty-

11 three hundred some place, initial and date the

12 change?

13 A I did.

14 Q Did they, in fact, do that?

15 A They did.

16 Q Did they deliver to you or get to you what is now

17 Number Three with those changes on them?

18 A He did. Mr. Woodson did.

19 Q Do you have a recollection of when that occurred?

20 A Mr. Foster, I believe that was -- I don't know when

21 Mr. Woodson brought it, but it had to be sometime

22 Saturday.

23 Q When he brought it?

24 A Yes, brought the offer that he had signed off on

25 along with the earnest money check.

Deposition of Melia Faile

1 Q Okay.

2 A Because I went back into the office around two

3 o'clock and it was in my box.

4 Q So, you did not see him that Saturday?

5 A No, sir.

6 Q Did he, or he and his wife, do what you instructed

7 or suggested they do on this transcript in that

8 voice message?

9 A They did.

10 Q I'm showing you what I will state at this point to

11 be a copy of a check supplied by the Bank of

12 America front and back. I'm handing it to Mr.

13 Ogburn. Assuming from Mr. Ogburn's body language

14 that he has no objection to this, is that in fact a

15 copy of the check that was supplied to you and

16 Allen Tate on April 5th, the Saturday?

17 A Yes.

18 MR. GIVENS - Counsel would that be August the

19 5th?

20 MR. FOSTER - I'm sorry. Thank you.

21 WITNESS - August 4th was a Friday.

22 MR. FOSTER - Thank you. We would move this

23 into evidence as one exhibit.

24 WHEREUPON - Document marked as Plaintiff's

25 Exhibit Number Five.

Deposition of Melia Faile

1 Q After the events you've just stated, would it be

2 fair to state that DLI changed its mind about this

3 contract?

4 A Yes, sir.

5 Q When did that happen?

6 A I had a phone call Sunday. Well, first of all

7 let's back up. As soon as I received the offer

8 along with the earnest money check, I called my

9 sellers and let them know that we had them. One of

10 them was out of town.

11 Q Can I stop you, ma'am?

12 A Yes.

13 Q I don't mean to interrupt you. You called on what

14 day?

15 A I called them immediately that Saturday,

16 immediately after I picked the offer up with the

17 check.

18 Q Can you tell us what time Saturday?

19 A Probably I would say around two or three, probably

20 closer to three.

21 Q Go on with your narrative.

22 A I called my seller. I let him know that we had the

23 check and the offer signed off upon, and we could

24 get together Monday to get all parties' signature

25 on it since he was out of town.

Deposition of Melia Faile

1 Q He being who?

2 A Mr. Pitzulo was at the lake.

3 Q Who is here today?

4 A Yes.

5 Q Go ahead.

6 A So, in the meantime between then and Monday, Vickie

7 Barfield- Robertson with Barfield-Robertson Realty

8 called me about two o'clock. No, no, no, probably

9 closer to three or four on Sunday and was asking me

10 questions about Point Carpenter that she had a

11 gentleman that was very interested in it.

12 Q Now, let me stop you again. You say Point

13 Carpenter. I assume you mean what you have

14 identified specifically as the lot in question Lot

15 30 at Point Carpenter?

16 A I believe it's Lot 30, or is it 36? I cannot

17 remember.

18 Q The lot in question?

19 A Yes, sir.

20 Q Go ahead.

21 A And I told her we had an offer on the table

22 already, and she said, well, would you mind faxing

23 me over. I said but it has not been signed off on

24 as of yet. I said but -- I said but the offer is

25 on the table. She said would you send me a copy of

Deposition of Melia Faile

1 the plat and the covenants, and I disclosed to her

2 that it would take a special septic system to put

3 on the property. So, she had me send over where

4 DLI Properties had had the property tested by

5 Alternative Septic Solutions, and I sent that over.

6 I guess it was about three or four hours later she

7 called me back, and said if I bring you a cash

8 offer my seller -- I mean my buyer is very

9 interested in it. It was Mr. Cauthen. I've got a

10 cash offer, if I bring you this with an earlier

11 closing date. I said I can present it to my

12 seller. She says, but she said we would like to

13 meet with Glenn King who is with Alternative Septic

14 Solutions before we write the offer. We would like

15 to meet with him and discuss what needs to be done

16 as far as the septic goes.

17 Q Let me stop you. What day, and you're still

18 holding the calendar.

19 A (Indicating yes)

20 Q So, I'm referring you to it. What day this

21 conversation with -- what was the lady's name

22 again?

23 A Vickie Barfield-Robertson.

24 Q What day did the conversation take place with ---

25 A Sunday, which is the -- I think that's the 5th.

Deposition of Melia Faile

1 Q I believe it's the 6th.
 2 A You're right, 6th.
 3 Q Go ahead, ma'am.
 4 MR. OGBURN - I object. What question are you
 5 asking her?
 6 MR. FOSTER - To continue with her narrative.
 7 MR. OGBURN - I think the original question was
 8 what ---
 9 MR. FOSTER - When did they change their mind?
 10 MR. OGBURN - Okay.
 11 A Okay. So, Vickie -- I sent Vickie over everything
 12 she has asked for, and once again the only
 13 contingency that she was really concerned - well,
 14 if you want to call it a contingency - was about
 15 the septic being put on the property, and she was
 16 wanting to Mr. King. I believe it's Glenn King
 17 with Alternative Septic Solutions. She got in
 18 touch with Mr. -- She says I'm going to do this as
 19 quickly as possible, because I'm going to go ahead
 20 and get an offer in. As a matter of fact, she said
 21 I want to -- So, she tried to meet with Mr. King,
 22 and they were supposed to meet that Monday the 7th,
 23 August 7 that afternoon. They called him. It was
 24 my understanding Vickie Barfield-Robertson called
 25 Mr. King that morning, and he said he would try to

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1 meet them that afternoon which was Monday. He was
 2 not able to meet them. He said, but I can meet you
 3 first thing Tuesday morning.
 4 Q Tuesday the 8th of August?
 5 A Yes, sir.
 6 Q Go ahead, ma'am.
 7 A It's my understanding from Vickie Barfield-
 8 Robertson that they all met, all three, Mr.
 9 Cauthen, Vickie Barfield-Robertson, and Mr. King
 10 met at the Point Carpenter lot at 8:30 that
 11 morning.
 12 Q The 8th?
 13 A The 8th. Yes, sir, the 8th, and obviously Mr.
 14 Cauthen was okay with what Mr. King had told him
 15 and he says let's go forward with this.
 16 Q Go ahead.
 17 A So, Vickie got the offer together, and I told her I
 18 would like -- You know, since there was another
 19 offer on the table, I would like guarantee that we
 20 would go through with the earlier closing date and
 21 the no contingencies and have a five thousand
 22 dollar earnest money check, and it was then -- It
 23 was my understanding that she started getting the
 24 offer together, and a certified check for five
 25 thousand dollars which was the earnest money.

Deposition of Melia Faile

1 Q Let me stop you again. What you're narrating now
 2 about what she's getting together, this was after
 3 her meeting and your conversation with her on the
 4 eighth or thereafter?
 5 A Please say that again.
 6 Q You were narrating to me - my characterization, I'm
 7 not trying to put words in your mouth - that after
 8 they met with the man about the ---
 9 A Septic.
 10 Q Septic, thank you, that you had further
 11 conversations with Vickie Barfield-Robertson?
 12 A Yes, sir.
 13 Q And you were narrating what those were, and I'm
 14 just trying to ask was that on the 8th or
 15 thereafter, your recollection?
 16 A On the 8th to the best of my recollection.
 17 Q Go ahead.
 18 A That was Tuesday the 8th.
 19 Q So, you indicated to her what you felt was
 20 necessary.
 21 A (Indicating yes)
 22 Q What then happened and when did DLI change their
 23 mind?
 24 A Since Mr. Woodson's offer had not been initialed
 25 off on, I am to present all offers. So, another

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1 offer had come through, and I presented that offer
 2 to my seller.
 3 Q When was that offer presented?
 4 A I didn't let DLI know until Monday morning about
 5 Ms. Barfield-Robertson calling that Sunday, because
 6 I was not really sure if anything was going to come
 7 through. So, I called my seller early Monday
 8 morning, and let him know that another offer had
 9 come in, and there would be -- It was my
 10 understanding that it hadn't been written as of
 11 yet. She was working on that, or trying to get it
 12 worked on, because she was going to meet with
 13 Alternative Septic Solutions, and we should have an
 14 answer by Monday afternoon, which I thought at the
 15 time, but then they weren't able to meet. So, it
 16 carried on into Tuesday morning, and I said we
 17 should know by then. So, is that all you ---
 18 Q I'm still trying to pursue the question of when DLI
 19 actually changed their mind and made the decision
 20 that they were not going to go ahead with the
 21 Woodsons.
 22 A Multiple offers -- I want to say that multiple
 23 offers can be one of the most difficult things to
 24 deal with. It can get really testy sometimes. I
 25 called my broker in charge as a matter of fact,

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1 David Poole. I explained to him what was going on,
2 that another offer had come in, but I had given Mr.
3 Woodson okay Friday, but another offer -- I had --
4 a possible offer had -- I had a phone call Sunday
5 from Ms. Vickie Barfield-Robertson, and she was
6 trying to put together another offer, a cash offer
7 with no contingencies and an earlier closing date.
8 I told Mr. Poole, I said I want to make sure that
9 I'm following protocol here. Do we not need to
10 make Mr. Woodson know that another offer has come
11 in, and he said, no, we did not, that that would be
12 up to the seller, but we do not have to. So, I
13 call my seller back, Mo Pitzulo and we talked. I
14 told Mr. Pitzulo what David had said about we
15 didn't have to let Mr. Woodson know. I told him I
16 was torn as well as he was torn, I felt, too, as to
17 what to do. Then I did tell Mr. Pitzulo, I said at
18 the same time I'm afraid if we let Mr. Woodson know
19 that we might lose both offers. I said it's going
20 to be up to you. I said I'm really torn as to what
21 we need to do here. And Mr. Pitzulo said let's
22 just -- we won't tell him anything.
23 Q You've stated, but forgive me I didn't get it down,
24 what was the name of your -- is this your leading
25 broker as it's called that you talked to?

Deposition of Melia Faile

1 A Yes, sir, David Poole.
2 Q Can you spell his last name for me?
3 A P-o-o-l-e.
4 Q And he is out of which office?
5 A Fort Mill.
6 Q And he is the person you just narrated talking too?
7 A Yes, sir.
8 Q What day did the last conversation you've narrated
9 with Mr. Pitzulo take place in which you decided
10 not to inform the Woodsons, if you recall?
11 A I'm pretty sure it was Monday.
12 Q Okay.
13 A I'm pretty sure it was Monday.
14 Q What day did DLI Properties make the decision to
15 enter into a contract if that's what it is, I'm not
16 trying to use this in the legal sense, to enter
17 into a contract with Cauthen?
18 A Wednesday after we got all signatures.
19 Q No decision was made on Tuesday?
20 A No, sir, because, see, Cauthen was still waiting --
21 I guess thinking about septic or whatever.
22 Q And did that resolve on Wednesday?
23 A Honestly, I think it resolved Tuesday after they
24 met pretty much. That's a guess though. I mean I
25 can't speak for Vickie Barfield or Mr. Cauthen.

Deposition of Melia Faile

1 Q Was there any attempt to enter into the contract on
2 Tuesday? Again, I'm using contract without an
3 intent to make a judgement?
4 A I don't think so, but I don't think -- I'm not
5 sure.
6 Q Did you prepare, or did Ms. Barfield-Robertson
7 prepare, the offer and acceptance that was entered
8 into by Cauthen and DLI on Wednesday?
9 A She prepared it.
10 Q I am handing you a copy of the document from our
11 Complaint. MR. FOSTER - Can we go off?
12 WHEREUPON - An off the record discussion was
13 held and the deposition was continued.
14 WHEREUPON - Document was marked as Plaintiff's
15 Exhibit Number Six off the record.
16 Q I think we've gotten to the point marking as
17 Plaintiff's Six this document. Is that, in fact,
18 the offer and acceptance signed by DLI and Cauthen?
19 A Yes, sir.
20 Q Am I reading that correctly that it shows -- You
21 look at the last page. You can recite this more
22 quickly than I. Looking at the last page of that
23 document, the signatures, I believe, it has DLI
24 signing about 9:45 in the morning on the 9th?
25 A No, sir. That is Cauthen.

Deposition of Melia Faile

1 Q Oh, my mistake. Cauthen signing at 9:45 in the
2 morning?
3 A Yes, sir.
4 Q And DLI then about two in the afternoon?
5 A Yes, sir.
6 Q What time exactly?
7 A 2:20.
8 Q Were you present at both signatures?
9 A Yes, sir.
10 Q To your understanding, did DLI, upon signing the
11 document which is Plaintiff's Six, regard
12 themselves as entered into a binding contract?
13 A With Cauthen, yes, sir.
14 Q That's your understanding?
15 A Yes, sir.
16 Q At what point and on what day were the Woodsons
17 informed that their contract was now regarded as
18 being superceded or thrown out?
19 MR. OGBURN - Objection.
20 Q At what point were the Woodsons informed that
21 another offer and acceptance had been entered into?
22 A As soon as I got back home.
23 Q From what?
24 A From a signing off on this.
25 Q So, late on the afternoon of the 9th?

Deposition of Melia Faile

- 1 A (Indicating yes)
- 2 Q I think you have underneath there what we've agreed
- 3 is the August calendar?
- 4 A Yes, sir.
- 5 Q The 9th was Wednesday?
- 6 A Yes, sir.
- 7 Q So, this would be the Wednesday after the Saturday
- 8 they came in with the changed contract that's
- 9 Number Three and the check?
- 10 A That is correct.
- 11 Q What was the purchase price on the Cauthen
- 12 contract?
- 13 A Eighty -- eighty-eight nine.
- 14 Q And is that the same purchase amount as on the
- 15 Woodsons' contract?
- 16 A Yes. It is.
- 17 Q The difference then as I understand it were that
- 18 there was no cap on the tap on fee in Paragraph
- 19 Eleven?
- 20 A There were no contingencies period.
- 21 Q What closing date was indicated on Plaintiff's
- 22 Three the last document that was sent to the
- 23 Woodsons? I think it's in front of you. I could
- 24 be wrong. It's not here?
- 25 A I need my glasses, please.

Deposition of Melia Faile

- 1 Q I've handed you Number Three. I'm handing you
- 2 Number Six again. What are the closing dates
- 3 indicated on those two?
- 4 A Mr. Woodson had changed it. I think that's
- 5 September the 29th.
- 6 Q Okay.
- 7 A Mr. Woodson's contract.
- 8 Q And Plaintiff's Six Mr. Cauthen was for?
- 9 A August 18th.
- 10 Q In your discussions with DLI and its
- 11 representatives about the Woodson offer or
- 12 contract, whichever we characterize it as, was
- 13 there any discussion of an attempt to use the offer
- 14 by Cauthen to remove the contingencies from his
- 15 offer to make in effect make a better offer to DLI?
- 16 A No, sir.
- 17 Q Do you have any knowledge of why that was?
- 18 MR. GIVENS - Objection.
- 19 Q You are shaking your head ma'am, which I take to
- 20 indicate no.
- 21 A I do not.
- 22 Q I may have asked and I may not. What is the amount
- 23 offered on Plaintiff's Six, the purchase price?
- 24 A I'm sorry. Which one?
- 25 Q It should be marked Plaintiff's Six.

Deposition of Melia Faile

- 1 A Oh, okay, eighty-eight nine.
- 2 Q Which was the same amount?
- 3 A Yes, sir.
- 4 Q You indicated that you've been a realtor for seven
- 5 years?
- 6 A That is correct.
- 7 Q In your experience, is it normal behavior for a
- 8 buyer to rely upon a phone call such as that you
- 9 left and to act in accordance with it in making
- 10 their decisions and actions?
- 11 MR. OGBURN - Object. You can answer.
- 12 Q Would you like me to rephrase?
- 13 A Please.
- 14 Q To your understanding as a realtor and based on
- 15 your experience, if a buyer understands that he has
- 16 a final contract is it a normal practice for him or
- 17 her to act on that understanding?
- 18 MR. OGBURN - Objection. You can answer it.
- 19 A That can vary from realtor to realtor.
- 20 Q No, ma'am. I'm not asking about the realtor. I'm
- 21 asking about the client if you are able to answer.
- 22 Would you like me to rephrase again?
- 23 A (Indicating yes)
- 24 Q I'm asking based on your experience --
- 25 A Yes, sir.

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- 1 Q Whether it is normal for a buyer, who understands
- 2 they have a final contract, to act upon that
- 3 understanding?
- 4 MR. OGBURN - Objection. You can go ahead and
- 5 answer.
- 6 A Mr. Foster, it's my understanding that Mr. Woodson
- 7 had a buyer's agent, who was Sharon Davis as
- 8 broker-in-charge, and I would have thought she
- 9 would have followed up if there had been no
- 10 communication between that -- me receiving it
- 11 Saturday and giving him his answer, Mr. Woodson's
- 12 answer, Wednesday.
- 13 Q To go back to my question, is it your understanding
- 14 based on your experience as a realtor, that a buyer
- 15 who has been told they have a final contract would
- 16 act upon that understanding?
- 17 MR. OGBURN - Objection. The same one.
- 18 MR. FOSTER - You can consider this continuing.
- 19 I'm not trying to shut you up, but yeah.
- 20 MR. OGBURN - I didn't ---
- 21 MR. FOSTER - I'm not trying to play games.
- 22 MR. OGBURN - Well, I didn't know if you were
- 23 done with your question.
- 24 MR. FOSTER - No. I'm looking for an answer I
- 25 believe if the lady can give it.

Deposition of Melia Faile

- 1 A I don't know how to answer that.
- 2 Q Do you have an opinion as to how long a broker,
- 3 such as the person you understand was representing
- 4 Mr. Woodson, Ms. Davis I believe you said, how long
- 5 would she have taken to understand that something
- 6 unusual was occurring because there was no
- 7 response?
- 8 A If I had not -- Now, this is me as a realtor. If I
- 9 had not received a signed off -- what we considered
- 10 the forty-three hundred dollars a counter offer, I
- 11 would have called the buyer's -- the buyer's agent.
- 12
- 13 Q When?
- 14 A Probably -- I would have probably at least given it
- 15 a day, a couple of days.
- 16 Q A couple of days?
- 17 A Yes, sir.
- 18 Q Those would be business days?
- 19 A Yes, sir.
- 20 Q You indicated, I believe, that you informed the
- 21 Woodsons that there was another offer and
- 22 acceptance on the 9th?
- 23 A Yes, sir.
- 24 Q After Plaintiff's Six had been signed by Cauthen
- 25 and DLI?

Deposition of Melia Faile

- 1 A Yes, sir.
- 2 Q Do you recall what time that occurred?
- 3 A I think I talked to Mr. Woodson probably about 4:00
- 4 o'clock.
- 5 Q Okay.
- 6 A No. Let's back up. I called Sharon Davis, his
- 7 broker-in-charge, and notified her about 4:00
- 8 o'clock.
- 9 Q And when, if ever, did you talk to Mr. Woodson
- 10 about this?
- 11 A Mr. Woodson called me about fifteen minutes later
- 12 upset.
- 13 Q Was it your intention to call him about this
- 14 matter?
- 15 A No.
- 16 Q You were going to call his broker-in-charge?
- 17 A I called his broker-in-charge. I'd been trying to
- 18 deal with his broker-in-charge who I had understood
- 19 was his buyer's agent.
- 20 Q Ma'am, going back to your narrative of the events
- 21 that took place on Friday, and just prior to them
- 22 bringing in what's Plaintiff's Three, the message
- 23 that we heard played and that we've handed you the
- 24 transcript of, did you make an attempt to reach Ms.
- 25 Davis or someone in her office either before or

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- 1 after you left that message with the Woodsons?
- 2 A I did not.
- 3 Q If you recall, when was the last time prior to that
- 4 message on Friday left on the machine that you
- 5 talked with Ms. Davis or someone from her office?
- 6 A Well, Mr. Woodson -- Ms. Davis kept going out of
- 7 town, and Mr. Woodson would call me. So, probably
- 8 the last person I spoke with was Mr. Woodson.
- 9 Q What I'm trying to communicate, how long before
- 10 that Friday, if you recall, you had actually talked
- 11 to Ms. Davis or someone in her office?
- 12 A Before or after that Friday?
- 13 Q Before that call that we listened to on Friday, how
- 14 long before?
- 15 A I did not speak to anyone until I called -- I
- 16 talked to Mr. Woodson when he called me about the
- 17 forty-three hundred dollars on that Friday.
- 18 Q Okay.
- 19 A Then I left that message. Which I didn't talk to
- 20 him, I left a message. I did not talk to anyone
- 21 else, Sharon Davis or Mr. Woodson, until that
- 22 Wednesday about 4:00 o'clock.
- 23 Q Thank you. That was going to be my next question,
- 24 but let me go back and clarify. What I'm trying to
- 25 find out, if you recall, how long before that

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- 1 message on Friday was what the 4th? Let me hand
- 2 you the calendar again. How long before that had
- 3 you talked to Ms. Davis or someone in her office?
- 4 A I hadn't talked to Ms. Davis -- I don't know. I
- 5 don't remember.
- 6 Q I'm not trying to ask you to say anything that you
- 7 cannot swear to.
- 8 A Okay.
- 9 Q Do you have a recollection of was it days or was it
- 10 more than a week?
- 11 A Maybe days.
- 12 Q Would this be noted down in your notes that you've
- 13 kept or your records that you've kept, on this
- 14 case?
- 15 A No, sir, because I don't remember. I kept talking
- 16 -- I tried to talk to Sharon, and then I talked to
- 17 Mr. Woodson.
- 18 Q Is it a practice in your branch or in your office
- 19 of Allen Tate to note down every call that's made?
- 20 A No.
- 21 Q So, ma'am, we're on the 9th.
- 22 A Yes, sir.
- 23 Q You called Ms. Davis. Did you reach her?
- 24 A I did.
- 25 Q Do you recall the substance of that conversation?

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- 1 A Yes, sir.
- 2 Q Can you narrate it for us?
- 3 A I told Ms. Davis that another offer had come in on
4 Point Carpenter. It was a -- It matched Mr.
5 Woodson's price. There were no contingencies and
6 an earlier closing date, and Ms. Davis did ask me,
7 she said is there -- she said can we reconsider it.
8 I said we've already accepted this other contract.
- 9 Q Is that the sum total of what you remember about
10 that conversation?
- 11 A Yes.
- 12 Q You've indicated what you previously said about
13 what you remembered it was fifteen minutes when Mr
14 Woodson called?
- 15 A Right.
- 16 Q What time of day do we now have?
- 17 A Probably 4:15, 4:30 maybe.
- 18 Q You were where, at your office or at your house?
- 19 A I was at my house.
- 20 Q And Mr. Woodson called?
- 21 A Yes, sir.
- 22 Q On your cell phone or on your land line if you
23 recall?
- 24 A I don't recall.
- 25 Q What do you recall of the substance of that

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- 1 conversation?
- 2 A Mr. Woodson he was upset. And he says I'm sitting
3 here with my builder as we speak. I told him I was
4 sorry, and I said but another offer had come in
5 with no contingencies and an earlier closing date,
6 and my seller had decided to go with that offer.
- 7 Q What else, if anything, do you recall about that
8 conversation?
- 9 A I just remember him being upset. I did tell him, I
10 do what my seller tells me to do because I
11 represent my seller. I really felt ---
- 12 Q I'm not trying to get you to say anything that you
13 don't -- Do you recall anything else about that
14 conversation?
- 15 A No, sir.
- 16 Q Do you ---
- 17 A Yes. I do.
- 18 Q Go ahead.
- 19 A Mr. Woodson was upset. He says, well, your seller
20 is going to pay for what -- my time that I've
21 already put into this.
- 22 Q Anything else that you recall at this point that
23 either you said or he said?
- 24 A No, sir. I don't think so.
- 25 Q Do you recall saying to Mr. Woodson words to the

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- 1 effect, of I know this is wrong, but I have to do
2 what my seller tells me?
- 3 A I don't recall saying it was wrong, but I did say
4 about doing what my seller tells me. Yes.
- 5 Q Are you able to state conclusively that you didn't
6 use that phrase?
- 7 A I'm pretty sure I did not.
- 8 Q Let me take you back to what you've identified in
9 Plaintiff's Five as the check that was presented on
10 ---
- 11 A Yes, sir.
- 12 Q August 5th by the Woodsons.
- 13 A (Indicating yes)
- 14 Q I believe if you read the information at the bottom
15 of the second page, it will indicate that this
16 check was deposited on August 21st, 2006.
- 17 A Yes, sir.
- 18 Q Is it normal for a check of that kind to wait for
19 fifteen days before it is deposited?
- 20 A No, sir, it is not.
- 21 Q Are you able to tell us why it was, in fact,
22 deposited on the 21st of August?
- 23 A I had actually -- Since we had not -- We didn't
24 have a ratified contract, I did not deposit it. I
25 don't deposit any, or give it to my OA to deposit

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- 1 it, until we have a fully executed ratified
2 contract.
- 3 Q Not trying to cut you off, but for those of us who
4 don't know. What is an OA?
- 5 A Office Administrator.
- 6 Q So, what happened, ma'am, that you did present this
7 check or did deposit it, if you know or remember?
- 8 A Well, I held it, because I did not feel we had a
9 ratified contract. Well, we didn't have a ratified
10 contract, and I had gotten the paperwork together
11 to send the monies back to Mr. Woodson, and the
12 paperwork actually has to be -- It's a release of
13 escrow or wait a minute -- A release from contract
14 I believe it was, but I was to send the money back.
15 I had gotten it together.
- 16 Q Okay.
- 17 A And then all this started going on. I had talked
18 to Mr. Givens. At first Mr. Givens thought we had a
19 contract, and then we talked about it for a little
20 bit, and I said -- I said I haven't even deposited
21 the earnest money check, because I figured we did
22 not have a contract. He thought we had a contract,
23 and I told my broker-in-charge that Tommy was
24 thinking that we had -- Mr. Givens that we had a
25 contract.

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- 1 Q With the Woodsons?
- 2 A Yes, sir. So, upon that David Poole, my broker-in-charge, said let's go ahead and deposit it.
- 3 Q This would be on or just before the 21st of August?
- 4 A Yes, sir.
- 5 Q Who actually makes the deposits in your office?
- 6 Well, let me go back. Do you know who actually made the deposit of this check?
- 7 A No, sir. I do not.
- 8 Q Going back to my former question, who normally makes the deposits?
- 9 A The OA, the office administrator.
- 10 Q Who is?
- 11 A Sara Allen.
- 12 Q Do you know what type of account that money was placed into?
- 13 A All I know is it is a non-interest bearing account.
- 14 Q Do you have a special account for escrowed monies?
- 15 A Yes, sir, we do.
- 16 Q Would it be that account it went into to your knowledge?
- 17 A Yes, sir. I would think.
- 18 Q Since that time and to your knowledge, has DLI executed a Deed to this property to Cauthen?
- 19 A Yes, sir.

Deposition of Melia Faile

- 1 Q When was that closing if you know?
- 2 A Mr. Foster, I cannot remember. I don't remember.
- 3 Q Did your office, Allen Tate and yourself, receive a commission from that sale?
- 4 A Yes, sir, we did.
- 5 Q To your knowledge did Allen Tate or yourself give any notice to the Woodsons and myself that the property had been closed upon?
- 6 A No, sir. I don't think so.
- 7 Q Has the money held in your escrow account been proffered to the Woodsons at any point?
- 8 A Say that again.
- 9 Q Has anyone to your knowledge or yourself, your attorney, any agent through Allen Tate, proffered the money back to the Woodsons?
- 10 A Gave it back to them is what you're saying?
- 11 Q What ---
- 12 A What's proffered?
- 13 Q Lawyer talk, offered. Here is your money back?
- 14 A No, sir. They have not.
- 15 Q Going back to your conversations with Mr. Woodson on Friday the 3rd I believe it was, do you have the calendar?
- 16 A (Indicating yes)
- 17 Q You do.

Deposition of Melia Faile

- 1 A Friday the 4th.
- 2 Q Friday the 4th, thank you.
- 3 A I was thinking it was the 3rd, too.
- 4 Q Thank you, ma'am.
- 5 A It was the 4th.
- 6 Q You narrated having a conversation with Mr. Woodson?
- 7 A Yes, sir.
- 8 Q Do you recall him acknowledging as he talked about the cap on the tap fee?
- 9 A (Indicating yes)
- 10 Q That he knew and acknowledged that he had, at that point before the tap fee matter was raised, a binding contract in his eyes?
- 11 A Yes. Before the tap fee, it was my understanding we had all come to an agreement before the tap fee was put in there. Yes.
- 12 Q He then raised this question of the tap fee?
- 13 A (Indicating yes)
- 14 Q And your client -- Well, you've narrated what your client did.
- 15 MR. FOSTER - Ma'am, I believe I had nothing further.
- 16 WHEREUPON - An off the record discussion was held and the deposition was continued.

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- 1 EXAMINATION: (By Mr. Givens)
- 2 Q Melia, I'm Thomas A. Givens, and we've known each other for sometime. Is that correct?
- 3 A Yes, sir.
- 4 Q And you heard the same information at the very beginning concerning what a deposition is and the answers and all. Is that correct?
- 5 A Yes.
- 6 Q Prior to August 1st of 2006, had Mr. Woodson made any other offers on this same piece of property?
- 7 A He did.
- 8 Q And who did he make the offers through? Was he dealing with a broker out of Charlotte during that time?
- 9 A Yes, he was.
- 10 Q Do you recall how far before August 1st did he first make an offer on the property?
- 11 A I can't remember that date. It would have to be a guesstimate. He did make one offer, and we never heard back. I called him back. I do remember he was wanting some closing cost, and DLI did not want to pay closing cost. I got back with Sharon Davis, his broker-in-charge, and told him -- I'm sure I talked to Sharon. I told her we weren't going to pay any closing costs, and I'm trying to think

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1 here. In a few hours, or maybe a day went by, Mr.
 2 Givens, and I hadn't heard anything. I don't know
 3 if it was a day or maybe it was just a few hours.
 4 I don't recall that.
 5 Q This was on a previous offer that's not in the
 6 record today?
 7 A Right. Right.
 8 Q But do you know how much time may have gone by
 9 between the initial offer that never was accepted
 10 and when he contacted you on August the 1st?
 11 A Probably I would have to -- I think I've got it in
 12 my records when that first contract was written.
 13 Q All right.
 14 A And then I never heard back from anybody. So, I
 15 called Sharon back to see what was going on with
 16 the first contract, because I had not heard
 17 anything from the Woodsons, well, from Sharon who
 18 represented the Woodsons. Had not heard anything,
 19 and she told me, if I can recall, correctly that
 20 she thought they had found another piece of
 21 property and weren't going to go through with it or
 22 something, and so that's where we were left there.
 23 And then maybe, I don't know I would have to look
 24 in my records, three four weeks, maybe five, Mr.
 25 Woodson did call back and was wanting to know you

Deposition of Melia Faile

1 know if the property was still available. I told
 2 him I thought I had an offer at the time coming
 3 through, and the people ended up not qualifying.
 4 So, I got back with him, and I let him know that.
 5 Q Would that have been around August the 1st?
 6 A Yes.
 7 Q Now, prior to this have you ever had any dealings
 8 with Sharon before, the broker-in-charge?
 9 A Yes, very nice lady. Yes.
 10 Q Have you had any contracts that were executed and
 11 resulted in closings occurring?
 12 A No.
 13 Q Did you supply information to her concerning this
 14 particular lot prior to August the 1st, if you
 15 know?
 16 A I could have. I'm just not certain. There's so
 17 much time. Once again, Ms. Davis, she kept coming
 18 in and out of the picture, because she was out of
 19 town, and then Mr. Woodson, I think, was trying to
 20 represent himself perhaps.
 21 Q Did you know at the time was he a licensed real
 22 estate agent in the State of North Carolina?
 23 A I did not know that.
 24 Q All right. Did he ever tell you that he was a
 25 licensed real estate agent?

Deposition of Melia Faile

1 A No, sir.
 2 Q In the August 1st contract which has been
 3 identified as Plaintiff's Exhibit Number One, was
 4 that the contract that you and Mr. Woodson talked
 5 about as far as the terms that he was interested in
 6 offering?
 7 A We did.
 8 Q And, in fact, did you fax it to him? I show you a
 9 copy of a fax cover sheet.
 10 A Yes.
 11 Q Who did you address that to?
 12 A Larius and Sharon.
 13 WHEREUPON - A document was marked as
 14 Defendant's Exhibit Number One.
 15 Q And I show you, if you will just publish what you
 16 said in the fax cover sheet to Larius and Sharon?
 17 A Larius per our conversation make sure Sharon helps
 18 you. I left some blanks vacant and ---
 19 Q It's cut off at the end. Do you know ---
 20 A Makes sure she helps you. I've got the original.
 21 I believe it's be sure she helps you, because he
 22 kept marking out some of the dates, and he would
 23 forget to initial off, and ---
 24 Q And that was attached to the August 1st contract?
 25 A Yes.

Deposition of Melia Faile

1 Q That you had handwritten with no -- there was no
 2 signatures, of course.
 3 A Right.
 4 Q But with what you understood the terms would be as
 5 to what he would be offering. Is that correct?
 6 A Right.
 7 Q And your understanding is that Sharon was out of
 8 town during this time?
 9 A Yes.
 10 Q And then if you will look at the August 3rd offer
 11 that came back to you, that's Plaintiff's Exhibit
 12 Number Two, I believe. Is that the one Mr.
 13 Woodson marked through several things and initialed
 14 and sent back to you for signatures for your
 15 client, DLI Properties?
 16 A Yes, sir.
 17 Q And then DLI Properties initialed where it needed
 18 to be initialed plus they initialed other areas in
 19 that contract that would be done. Okay?
 20 A Yes.
 21 Q And did you send a fax? I show you a copy of this.
 22 A Okay.
 23 Q And was that the fax cover sheet that you sent to
 24 Sharon at the real estate office with that, with
 25 the changes that you needed to have made on the ---

Deposition of Melia Faile

- 1 A I did.
- 2 Q All right.
- 3 MR. GIVENS - I'd like to have this marked as
- 4 an exhibit.
- 5 WHEREUPON - A document was marked as
- 6 Defendant's Exhibit Number Two.
- 7 Q Why were you being so specific in that e-mail
- 8 concerning the initialing in places that were
- 9 missed before?
- 10 A I was wanting to make sure the contract was valid.
- 11 MR. FOSTER - Clarification, I think you mean
- 12 fax.
- 13 MR. GIVENS - I apologize, the fax.
- 14 Q Why were you being so specific in that fax?
- 15 A I was just wanting to make sure -- I just didn't --
- 16 He seemed like he new as being a realtor, and I was
- 17 just trying to help him so I could help -- we could
- 18 get us a contract for my seller.
- 19 Q So, at that point in time, Plaintiff's Exhibit
- 20 Number Two, I believe, was sent back and that form
- 21 not having Mr. and Ms. Woodsons initials on the
- 22 changes that were made ---
- 23 A Right.
- 24 Q By DLI plus the changes that Mr. Woodson had not
- 25 initialed in his previous offer. Is that ---

Deposition of Melia Faile

- 1 A That is correct.
- 2 Q And you were expecting that if he did everything
- 3 that was outlined in that fax back to you that, as
- 4 you said, you would have a ratified offer meaning
- 5 everything had been initialed by all parties?
- 6 A Yes, sir.
- 7 Q Now, at what point in time after that was faxed,
- 8 and does it have a time line on your faxes when
- 9 that would have been sent? Not the ---
- 10 A My fax machine, I don't know if it is cheap or
- 11 what, but I do not have a time line. Like it won't
- 12 put a stamp on like this.
- 13 Q Right.
- 14 A When I receive them, I have to sit there and wait
- 15 for it to go through to make sure it goes through.
- 16 When I sent this I dated it August 3rd at 5:20
- 17 p.m., and I physically sat there and waited to make
- 18 sure all six pages went through.
- 19 Q So, this is on August 3rd 5:00 p.m which would have
- 20 been on a Thursday. Is that ---
- 21 A 5:20, yes, sir. Yes.
- 22 Q Now, after you faxed it, did you have any
- 23 conversations as he received that fax or shortly
- 24 thereafter?
- 25 A I do not believe we did until he called me that --

Deposition of Melia Faile

- 1 I honestly don't recall. I think the next time is
- 2 when he called me to put the forty-three hundred in
- 3 there.
- 4 Q So, you faxed that to him late on August the 3rd?
- 5 A Yes.
- 6 Q And then at some point in time when did he call you
- 7 back?
- 8 A That Friday to put the -- He told me he was sorry.
- 9 If I'm doing this right. Yeah, it was that -- It
- 10 was that Friday. Yes, Friday.
- 11 Q August 4th according to the calendar?
- 12 A Yes.
- 13 Q Had he delivered that particular contract that you
- 14 sent to him back to you with all he initials and
- 15 without the change of the forty-three hundred
- 16 dollars?
- 17 A He had not.
- 18 Q All right.
- 19 A No.
- 20 Q And is that what he called you about when you said
- 21 he was sorry?
- 22 A Yes. He called, because he was wanting to put the
- 23 forty-three hundred dollars in, and that's when he
- 24 ended up doing that, and when he delivered the
- 25 contract Saturday all the initialing had been done

Deposition of Melia Faile

- 1 that needed to be done.
- 2 Q He put in the forty-three hundred?
- 3 A Including the forty-three hundred.
- 4 Q But at that time my client had not initialed off on
- 5 any of the forty-three hundred?
- 6 A Right.
- 7 Q All right.
- 8 A Exactly.
- 9 Q And did Mr. Woodson say why he hadn't brought this
- 10 up before in the initial offer, in the initial
- 11 counter offer that he changed dated August the 3rd,
- 12 Plaintiff's Exhibit Number Two?
- 13 A No, sir. I don't ---
- 14 Q I mean you said he said he was sorry. Was he sorry
- 15 that he didn't include that in there? Was that
- 16 your understanding?
- 17 A Yes. He was sorry he didn't -- He meant to put
- 18 that forty-three hundred dollars in there.
- 19 Q And he asked you to check with your client to see
- 20 if they would agree to that?
- 21 A Consider that.
- 22 Q Consider that, all right.
- 23 A And I told him you know there were enough
- 24 contingencies in there. I didn't know how the
- 25 seller would react to that.

Deposition of Melia Faile

- 1 Q And over the phone you got some information from
 2 your client that he would be willing to agree to
 3 that, but did he say that he wanted to look at it?
 4 A I don't remember him saying that.
 5 Q What was the purpose in the conversation that you
 6 listened to that he needed to initial and write in
 7 forty-three hundred and send it back to you?
 8 A (Indicating yes)
 9 Q What was the reason for your telling him that?
 10 A Well, we would need him to initial off on it should
 11 my client, DLI Properties, decide they wanted -- I
 12 mean -- say it again.
 13 Q What was the reason that you told Mr. Woodson that
 14 he had to fill in the forty-three hundred and
 15 initial and date beside it?
 16 A I, at the time, thought my sellers had agreed that
 17 the forty-three hundred would be okay.
 18 Q And in order to have a ratified contract, would
 19 they not need to initial the same change?
 20 A Yes, sir. They would.
 21 Q Now, on Plaintiff's Exhibit Number Three, let's see
 22 where that might be. This was delivered to you on
 23 August the 4th, is that correct, based on your
 24 prior testimony?
 25 A Is that the third one and final one that ---

Deposition of Melia Faile

- 1 Q Yes. This is the one that ---
 2 A He initialed off on, Mr. Woodson did. That is it.
 3 Yes, sir.
 4 Q And there were no initials beside the forty-three
 5 hundred. Is that correct?
 6 A Right, except for the Woodsons'. Yes, sir.
 7 Q Except for the Woodsons'?
 8 A (Indicating yes)
 9 Q And in Paragraph Eighteen concerning the expiration
 10 of the offer, it still had August the 4th on there.
 11 A (Indicating yes)
 12 Q That was not changed by Mr. Woodson to give the
 13 seller another day or two to sign off on it. Is
 14 that correct?
 15 A That is correct.
 16 Q Now, as soon as you received -- You went into your
 17 office around 2:00 o'clock that afternoon which
 18 would have been on August the 5th, I believe.
 19 A That's a Saturday.
 20 Q Okay.
 21 A That was Saturday.
 22 Q Did you see Mr. Woodson on August the 4th?
 23 A No.
 24 Q All right.
 25 A Just talked to him on the phone.

Deposition of Melia Faile

- 1 Q But he delivered the check and this document to you
 2 on August the 4th at your office, but you didn't
 3 physically see it until the 5th?
 4 A No. It was -- wait a minute. That is correct.
 5 Q All right.
 6 A Yes.
 7 Q And when you ---
 8 A Tommy, I think that's correct. Let me look at the
 9 calendar.
 10 Q Okay.
 11 A I don't think Mr. Woodson -- I think Mr. Woodson
 12 delivered it on that Saturday morning, but I'm not
 13 certain.
 14 Q All right.
 15 A And then I picked it up. I went into the office
 16 for a little while, saw that it was in my box,
 17 picked it up, went through it, called my seller,
 18 and let him know that we had received an earnest
 19 money check and the final contract or where Mr.
 20 Woodson had initialed off on everything.
 21 Q You knew that your client had to initial off on the
 22 change made by Mr. Woodson?
 23 A That is correct.
 24 Q Then over the weekend by Monday morning you knew
 25 that there would be -- there was another offer

Deposition of Melia Faile

- 1 coming in on the property?
 2 A Yes.
 3 Q Now, with the hours that are required, that you go
 4 through, in getting a license, there are certain
 5 ethic requirements that you have to go through. Is
 6 that correct?
 7 A That is correct.
 8 Q Now, ethically, in your experience, are you allowed
 9 to tell other agents what the terms and conditions
 10 of any other offer that might be on the table at
 11 that time?
 12 A Yes, we can.
 13 Q And what boundaries do you have in telling another
 14 agent what other offers are there?
 15 A I have to go through my seller first.
 16 Q All right.
 17 A And make sure he's okay with what I say.
 18 Q Now, Mr. Woodson was not -- you were not a buyer's
 19 agent for him.
 20 A No.
 21 Q He had his own broker. Is that correct?
 22 A That is correct.
 23 Q And from August the 5th, the morning of August 5th,
 24 through Wednesday August the 9th, are you aware of
 25 any phone calls that Sharon may have made to you or

Deposition of Melia Faile

1 Mr. Woodson?
 2 A No, sir, none.
 3 Q And did you, as a real estate agent, have the
 4 authority from DLI to initial or sign any contracts
 5 on their behalf?
 6 MR. FOSTER - I'm going to the question as to
 7 form if she is being asked for a legal
 8 opinion. She can, of course, give what she
 9 understands.
 10 A I don't understand.
 11 Q Did you have authority from my client to initial or
 12 sign any contracts on his behalf orally or in
 13 writing? Did you have any authority to bind him to
 14 any contracts?
 15 A No.
 16 Q And the attractive part of the other offer was that
 17 it was a cash deal for the same price closing a
 18 month earlier than the other offer. Is that
 19 correct?
 20 A That is correct.
 21 Q And under your ethics, you had the obligation to
 22 present that offer and notify your client to that
 23 other offer?
 24 A Absolutely. Yes.
 25 Q Did you have any reason to contact the buyer, Mr.

Deposition of Melia Faile

1 Woodson, and inform him of any other offers coming
 2 to the table?
 3 A No. I didn't have to.
 4 MR. GIVENS - That's all I have. Thank you.
 5 EXAMINATION: (By Mr. Wright)
 6 Q I'm Phil Wright.
 7 A Hey, Mr. Wright.
 8 Q I think we've talked on the phone.
 9 A We did.
 10 Q Do you have any record from your file of the first
 11 time that you and I talked about this incident?
 12 A No, sir, I don't think I do.
 13 Q Did you tell Mr. Woodson in any conversation when
 14 you discussed the change to Paragraph Eleven that
 15 one of the partners at DLI was out of town on
 16 vacation?
 17 A (Indicating yes)
 18 Q You have to say yes or no.
 19 A Yes. Yes, I did.
 20 Q And what was the purpose of telling Mr. Woodson
 21 that one of the partners of DLI was out of town?
 22 A Because I couldn't get the contract signed off on
 23 until that Monday.
 24 Q And do you remember when you told Mr. Woodson about
 25 that person being on vacation?

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1 A No, sir. I do not.
 2 Q When you talked with your seller at DLI, let's name
 3 this individual who was out of town?
 4 A Mo Pitzulo was at the lake, and it was my
 5 understanding that his partner had gone, Mr. --
 6 Ronnie ---
 7 Q I'm sorry?
 8 A Ronnie Willoughby had gone out of town too.
 9 Q So, Mr. Willoughby was out of town?
 10 A (Indicating yes)
 11 Q And Mo was at the lake?
 12 A Yes.
 13 Q And by the lake you mean which lake?
 14 A Well, I don't know.
 15 Q A lake.
 16 A He just said I'm at the lake. That's all that was
 17 said.
 18 Q Somewhere by the water. Now, so when you talked
 19 with Mo about the contract that had been sent back
 20 by Mr. Woodson with the change to Paragraph Eleven
 21 ---
 22 A Yes.
 23 Q And the notation forty-three hundred dollars August
 24 4th, did Mr. -- did Mo tell you that that contract
 25 was okay with him?

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1 A Say that again, please.
 2 Q When you got in touch with Mo and told him you got
 3 a contract back from the Woodsons that had a change
 4 in it ---
 5 A Yes.
 6 Q To Paragraph Eleven, did Mo tell you that that
 7 change was okay with him?
 8 A No. I don't think he did.
 9 Q Do you remember what Mo did tell you?
 10 A I honestly don't think he told me anything. We
 11 just had agreed to sign off on it when we all could
 12 get together Monday or Tuesday or whenever we could
 13 get together. It was Monday we were going to try
 14 to get together.
 15 Q Well, what I'm trying to figure out it is after you
 16 talked to Mo did you think you had a deal?
 17 A Yes.
 18 Q And is that when you called Mr. Woodson and
 19 conveyed that in the telephone message you left
 20 that we heard?
 21 A Yes.
 22 Q Did you know at that time that Mr. Willoughby, who
 23 was out of town, had not yet seen that change?
 24 A I don't know. I don't know if Mo had called or --
 25 I don't know.

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1 Q Well, let me go back with the chronology. Mr.
 2 Woodson delivered the contract with the change.
 3 A (Indicating yes)
 4 Q You looked at it. You called your seller.
 5 A Right.
 6 Q You talked to Mo the seller.
 7 A (Indicating yes)
 8 Q And after that conversation with Mo, you thought
 9 you had a deal.
 10 A Yes.
 11 Q During that conversation, did Mo call Mr.
 12 Willoughby?
 13 A No.
 14 Q Did he have any contact with Mr. Willoughby that
 15 you know of?
 16 A I don't know.
 17 Q So, how would Mr. Willoughby know about the change?
 18 Can you tell me how at that point? If you don't
 19 know that's fine.
 20 A I don't.
 21 Q Okay.
 22 A I don't.
 23 Q So, if I understand your testimony today, you
 24 thought you had a deal with Mr. Woodson on
 25 Saturday. Correct?

Deposition of Melia Faile

1 A Yes.
 2 Q The 5th?
 3 A Yes. Is that the 5th? Yes. That is correct.
 4 Q But the very next day you got a call from the
 5 broker.
 6 A Yes.
 7 Q Vickie Barfield?
 8 A Yes, sir.
 9 Q Who said we want to make an offer?
 10 A (Indicating yes)
 11 Q You have to say yes or no.
 12 A Yes.
 13 Q Why didn't you just tell Ms. Barfield the property
 14 was sold?
 15 A Because it had not been signed off on it.
 16 Q Tell me the difference between having the deal and
 17 signing off.
 18 MR. FOSTER - I think I need to say again,
 19 because I think the lady is being asked to
 20 make a legal opinion.
 21 WITNESS - Yes.
 22 MR. FOSTER - She can give her opinion.
 23 Q In your opinion as a realtor, what's the
 24 difference?
 25 A Well, now Real Estate 101, I mean learned verbals

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1 hold no weight. It has to be signed off by all
 2 parties to be an executed contract.
 3 Q And following that principle when you called Mr.
 4 Woodson and said we have a deal, did you have a
 5 deal?
 6 MR. FOSTER - Same objection.
 7 A At the time, I thought we did.
 8 Q At some point did -- Well, you accepted the offer
 9 from Ms. Barfield. Correct?
 10 A (Indicating yes)
 11 Q You have to say yes or no.
 12 A Yes, after I talked to my seller.
 13 Q And at some point, there became an issue as to
 14 whether or not the Woodsons' contract or the
 15 Cauthen contract was binding, which one was the one
 16 you were going to use. Right?
 17 A Right.
 18 Q And do you remember talking with an attorney named
 19 Brian Trimnal, who was the closing attorney for Mr.
 20 Cauthen?
 21 A I do.
 22 Q And did you relate a set of circumstances to Mr.
 23 Trimnal about these events?
 24 A Mr. Wright, I don't think so, but I'm not certain.
 25 Q Did Vickie Barfield request that you write up a

Deposition of Melia Faile

1 summary of what had happened?
 2 A Yes.
 3 Q And did you send that summary to Ms. Barfield?
 4 A I did.
 5 Q Is this that summary?
 6 A Yes. Yes, it is.
 7 Q That is a twenty-five page summary which includes
 8 the contracts that have been introduced related to
 9 Woodson negotiations. Is that right?
 10 A Yes, sir.
 11 WHEREUPON - Documents were marked as
 12 Defendant's Exhibit Number Three.
 13 WHEREUPON - An off the record discussion was
 14 held and the deposition was continued.
 15 Q Ms. Faile, you have identified the twenty-five page
 16 fax, and the fax date on it is August 27th, 2006 as
 17 what you sent to Vickie Barfield. Is that correct?
 18 It is now marked as Exhibit Three, Defendant's
 19 Three.
 20 A Yes, sir. This looks like it.
 21 Q On your calendar that you have in front of you,
 22 August 27th is what day of the week?
 23 A A Sunday.
 24 Q And can you tell me if that, in fact, is the day
 25 you sent it to Ms. Barfield?

Deposition of Melia Faile

- 1 A I believe. Yes, sir. I believe so.
- 2 Q Your fax machine imprints the appropriate date on the faxes when you send them?
- 3
- 4 A It must. This is the first time I've ever seen anything -- yes, sir.
- 5
- 6 Q All right.
- 7 A That's my phone number.
- 8 Q When you discussed the proposed contract with Vickie Barfield --
- 9
- 10 A Yes.
- 11 Q For Mr. Cauthen, did you intend for Mr. Cauthen and Ms. Barfield to rely on the fact that this property was available for sale?
- 12
- 13
- 14 MR. OGBURN - Objection.
- 15 A Say it again.
- 16 Q When you talked with Ms. Barfield in the negotiations with Mr. Cauthen before the contract was signed ---
- 17
- 18
- 19 A Got you.
- 20 Q Did you intend for them to rely on the fact that this contract -- that the property was available for sale?
- 21
- 22
- 23 A Yes.
- 24 Q And did you give them any reason why they should not rely on what you told them?
- 25

Deposition of Melia Faile

- 1 A I did tell them there was an offer on the table though.
- 2
- 3 Q You told them there was an offer on the table?
- 4 A Yes, sir.
- 5 Q In fact, did you not characterize that as a counter offer from Mr. Woodson to the seller?
- 6
- 7 A Yes. Yes.
- 8 Q And did you tell Ms. Barfield that the counter offer had not been accepted by the seller?
- 9
- 10 A I -- Yes, that is correct.
- 11 Q So, do you have any doubt in your mind that at the time Mr. Cauthen was negotiating through Ms. Barfield to buy this property, that he believed this contract was -- excuse me, this property was available for sale?
- 12
- 13
- 14
- 15
- 16 A Say it again. That was long.
- 17 Q Do you have any reason to believe that Mr. Cauthen had any idea this property was not available for sale?
- 18
- 19
- 20 A He knew it was for sale. I let him know it was for sale.
- 21
- 22 Q Now, when the issue came up regarding the Woodson contract after the Cauthen contract had been accepted, did you then get involved in some discussions with Vickie Barfield about some more of
- 23
- 24
- 25

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- 1 the details on the Woodson deal?
- 2 A Yes, sir. I did.
- 3 Q And that was when you wrote up this summary and sent her this fax which is stamp dated August 27th?
- 4
- 5 A Yes, sir.
- 6 Q Have you had an opportunity to look through the fax?
- 7
- 8 A It's been a while.
- 9 Q Would you take a minute and just -- some of the pages include -- For example, page two is a letter from you to Mr. Givens, this cover sheet looks like.
- 10
- 11
- 12
- 13 A Yes, sir.
- 14 Q And starting on page three is a letter to Mr. Givens that runs throughout the document which is interrupted by copies of the various contracts.
- 15
- 16
- 17 A Yes, sir.
- 18 Q But if you would just go through and look at your handwriting on the pages and be sure that your familiar with some of that, and I'll ask you a series of questions about that in just a minute.
- 19
- 20
- 21
- 22 A Yes, sir. That looks like my handwriting. Okay.
- 23 Q On page twelve of the exhibit at the top of the page you wrote, please note it is important to remember the attached contract was never delivered
- 24
- 25

Deposition of Melia Faile

- 1 executed.
- 2 A (Indicating yes)
- 3 Q Several changes had not been initialed off on by Mr. Woodson even after I had told him changes had to be initialed and dated. Items eight, eleven and thirty-four were initialed by my sellers but not Mr. Woodson. Are you referring to what we have identified as Contract Number Two in the proceeding today?
- 4
- 5
- 6
- 7
- 8
- 9
- 10 A Yes, sir. That's correct.
- 11 Q You think you were referring to Contract Number Two?
- 12
- 13 A Yes. Yes, sir.
- 14 Q Do you have Exhibit Two over there with you?
- 15 A Yes.
- 16 Q May I see it?
- 17 A Yes.
- 18 Q Exhibit Two is the one that on Page Two, Paragraph Eleven there is no notation in the margin about that forty-three hundred dollar change. Is that right?
- 19
- 20
- 21
- 22 A That is correct. Yes, sir.
- 23 Q Now, you refer in the next paragraph on Page Twelve of Defendant's Exhibit Three, you say the first time I saw the attached contract initialed off on
- 24
- 25

Deposition of Melia Faile

1 was when Mr. Woodson hand delivered the initialed
 2 off contract on August 4th with the counter offer
 3 of forty-three hundred dollars.
 4 A Yes, sir.
 5 Q And when you are talking in that paragraph are you
 6 talking about Exhibit Number Three which is the
 7 final contract ---
 8 A Yes.
 9 Q Which includes the initial - wait until I finish -
 10 which includes the initials on Page Two where he
 11 changed that to forty-three hundred dollars and put
 12 August 4th?
 13 A That was Contract Number Three.
 14 Q Number Three?
 15 A Yes.
 16 Q So, on Page Twelve, at first you are talking about
 17 the contract before he initialed it, and in the
 18 second paragraph you're talking about the contract
 19 after he initialed it and added the forty-three
 20 hundred dollars?
 21 A Right.
 22 Q And at the end of that paragraph you said, the very
 23 last sentence, my sellers never signed off on the
 24 counter.
 25 A True.

Deposition of Melia Faile

1 Q Is that correct?
 2 A Yes, sir.
 3 Q And then I'm looking on further in the exhibit, and
 4 Page Eighteen of the exhibit, you go through an
 5 explanation of the discussions with Mr. Woodson on
 6 August the 4th.
 7 A (Indicating yes)
 8 Q Is that correct?
 9 A Yes, sir. That looks like what I said.
 10 Q And August 4th, again, on the calendar would have
 11 been the Friday?
 12 A Yes, sir.
 13 Q So, at that point Mr. Woodson called you on Friday,
 14 and according to your note, tells me oh, my fault.
 15 I forgot.
 16 A (Indicating yes)
 17 Q I meant to put forty-three hundred in Item Eleven.
 18 I am sorry.
 19 A Right. He said he was sorry. He had just
 20 forgotten.
 21 Q And at that point you had not received the
 22 initialed contract back from Mr. Woodson.
 23 A Correct.
 24 Q And if I understand it correctly, he delivered that
 25 initial contract on the 5th which was Saturday.

Deposition of Melia Faile

1 A Saturday, yes.
 2 Q Sometime during the morning hours you believe?
 3 A I believe. I didn't get there until about two
 4 o'clock. So, I don't ---
 5 Q You in the middle of Paragraph Eighteen, your
 6 paragraph reads, I called my seller, DLI
 7 Properties, and carefully read over Item Number
 8 Eleven. I explained to my seller I thought the
 9 forty-three hundred for tap and sewer would be too
 10 easy of an out in that I felt that it would be
 11 more.
 12 A (Indicating yes) I did.
 13 Q And then you quote your client who said, no, he
 14 felt it was only the tap fee and we should be okay.
 15 He said he probably needed to read it over again.
 16 A (Indicating yes)
 17 Q I wanted the seller to feel comfortable so I read
 18 over Item Number Eleven carefully again.
 19 A (Indicating yes)
 20 Q Is that right?
 21 A Yes, sir.
 22 Q Now, at that point you stopped talking about
 23 talking with your seller, and you go to I called
 24 Mr. Woodson back and told him.
 25 A (Indicating yes)

Deposition of Melia Faile

1 Q And you quote there, I think we have a deal.
 2 A Yes.
 3 Q Correct?
 4 A Yes.
 5 Q But we've heard the tape and that's not actually
 6 what you said.
 7 A Exactly.
 8 Q But you added after that but he, my seller, needed
 9 to check with his partner who was on vacation.
 10 A (Indicating yes)
 11 Q The partner said he felt there were too many
 12 contingencies, but he would think about it and
 13 before he got home from vacation the other offer
 14 came.
 15 A Right.
 16 Q So, I'm trying to figure out why in the paragraph
 17 where you're talking about talking with DLI, and
 18 you're saying that the client, who I take to be Mo,
 19 because that's who you've got on the phone ---
 20 A Right.
 21 Q I'm trying to understand why you didn't include in
 22 that paragraph the discussion about the vacation
 23 and the hesitancy and the waiting. Any idea why?
 24 A No, sir.
 25 Q On Page Nineteen of the exhibit in the middle of

Deposition of Melia Faile

1 the page with stars beside, the contract was never
 2 delivered with just the Woodsons' initials. Excuse
 3 me. The contract was never delivered with just Mr.
 4 Woodson's initials on the no amount.
 5 A (Indicating yes)
 6 Q It was delivered with the counter offer. The
 7 contract was never delivered with one set of
 8 initials. The contract was delivered with a
 9 counter offer, and that was your position as of the
 10 time you sent this to Ms. Barfield on August 27th?
 11 A Yes.
 12 Q And at that time were you writing this in an effort
 13 to get this transaction to close?
 14 A Yes, sir.
 15 Q You had a contract that you considered to be a
 16 binding contract with Cauthen?
 17 A Yes. I did.
 18 Q And you wanted him to close on the contract?
 19 A I did.
 20 Q And this was written to his realtor in an effort to
 21 submit to him to convince him that it was okay to
 22 close?
 23 A It was my understanding she wanted this. Ms.
 24 Barfield-Robertson said she wanted this to send to
 25 the Board of Realtors to file a complaint.

Deposition of Melia Faile

1 Q A complaint?
 2 A (Indicating yes)
 3 Q About what?
 4 A About Mr. Woodson not revealing that he was a
 5 realtor.
 6 Q So, you and Ms. Robertson talked about filing a
 7 complaint. When did that conversation take place?
 8 A That Sunday, I guess. That Sunday, because the day
 9 that I -- This was very late, if I remember, when I
 10 faxed this to her.
 11 Q How ---
 12 A She said that you -- Was it you or was it Trimnal
 13 was going to file the complaint? I cannot
 14 remember.
 15 Q Who brought up the issue of filing the complaint
 16 against Mr. Woodson?
 17 A Ms. Barfield.
 18 Q And do you remember whether it came up for the
 19 first time that day or it had come up previously?
 20 A Just the first time that day.
 21 Q That day?
 22 A (Indicating yes)
 23 Q So, you thought that was going to be a use of this
 24 document?
 25 A I did.

Deposition of Melia Faile

1 Q Do you remember when you spoke with me going over
 2 this document with me?
 3 A I do.
 4 Q And reviewing the contents of it?
 5 A Yes, sir.
 6 Q Did you at any time tell Ms. Barfield, I can't sell
 7 this property to Mr. Cauthen because Mr. Woodson
 8 has a contract?
 9 A No, sir. I did not.
 10 Q Did you ever tell me that?
 11 A I don't think so. I hope I didn't.
 12 Q Did you ever tell Mr. Trimnal that, the closing
 13 attorney?
 14 A I don't think so.
 15 Q How about Mr. Cauthen, the buyer?
 16 A No. Say that again what you said.
 17 Q Did you ever tell Mr. Cauthen he couldn't buy this
 18 property because the Woodsons had a contract?
 19 A No. I did not.
 20 Q As a result of negotiations with Mr. Cauthen, you
 21 are aware that -- in signing the contract with Mr.
 22 Cauthen you are aware that a couple of lawsuits
 23 have been filed over this deal?
 24 A I am.
 25 Q And are you aware that in buying the property Mr.

Deposition of Melia Faile

1 Cauthen and his realtor Ms. Barfield relied on what
 2 you were telling them as the seller's agent.
 3 A Yes.
 4 MR. OGBURN - Objection.
 5 Q And do you feel like you, as a seller's agent,
 6 fully disclosed everything about this transaction?
 7 A Yes.
 8 Q I don't see anything in the written documentation
 9 that you furnished on August 27th that says I
 10 really think that we had a contract with Mr.
 11 Woodson. Did you give them that opinion anywhere?
 12 A No, sir. I did not.
 13 Q But you testified today that at some point you felt
 14 that way.
 15 A Felt what way?
 16 Q That you had a contract with Mr. Woodson.
 17 A At the time when we first said fine, yes, sir. At
 18 the time I did until the Ms. Barfield-Robertson
 19 called me that Sunday.
 20 MR. WRIGHT - Thank you.
 21 EXAMINATION: (By Mr. Ogburn)
 22 Q Ms. Faile, I have one question for you to clarify
 23 something I want to make sure we're clear on. Mr.
 24 Foster asked you a question with regards to what's
 25 been labeled as Plaintiff's Exhibit Six.

Deposition of Melia Faile

- 1 A (Indicating yes)
- 2 Q That's the contract between Alan Cauthen and DLI
- 3 Properties.
- 4 A Yes.
- 5 Q And I believe he asked you if you were present when
- 6 both parties signed the contract.
- 7 A Yes.
- 8 Q And I wanted to just clarify, were you present when
- 9 both Mr. Cauthen and DLI Properties signed the
- 10 contract?
- 11 A No, sir.
- 12 Q Okay.
- 13 A Not with both of them. Wait a minute. Vickie
- 14 Barfield-Robertson sent this over. Yeah. She sent
- 15 this over.
- 16 Q And at the time you received it from Ms. Barfield-
- 17 Robertson, had it already been signed by Mr.
- 18 Cauthen?
- 19 A Yes, it had.
- 20 Q Were you present when the representatives from DLI
- 21 signed it?
- 22 A Yes, I was.
- 23 Q So, when you say you were present for the signing
- 24 of the contract what you meant was you were present
- 25 when the representatives of DLI signed the

Deposition of Melia Faile

- 1 contract. Correct?
- 2 A Yes.
- 3 MR. OGBURN - No further questions.
- 4 MR. FOSTER - We have referred to the
- 5 transcript. Does counsel have any problems
- 6 with my putting this in as an exhibit.
- 7 MR. WRIGHT - That's a transcript of the tape?
- 8 MR. FOSTER - Transcript of the tape, yes.
- 9 WHEREUPON - A document was marked as
- 10 Plaintiff's Exhibit Number Seven.
- 11 FURTHER EXAMINATION: (By Mr. Foster)
- 12 Q Ma'am, I have one follow up question.
- 13 A Yes, sir.
- 14 Q What to your understanding did Ms. Barfield-
- 15 Robertson feel Mr. Woodson had done or may have
- 16 done that would have merited a complaint to the
- 17 Real Estate Commission?
- 18 A On the South Carolina Contract, you were to reveal
- 19 whether you were a realtor or not.
- 20 Q Were you aware that he was a realtor?
- 21 A I was not.
- 22 Q Were you aware that he was what I would call a
- 23 candidate to become a realtor?
- 24 A No, sir.
- 25 MR. FOSTER - That's all I have.

Deposition of Melia Faile

- 1 MR. OGBURN - Nothing further.
- 2 MR. GIVENS - I'm good.
- 3 WHEREUPON - The deposition was concluded
- 4 at 3:35 p.m.

Jan Dunkin
Court Reporter/Notary
Public

(Recorded deposition tapes retained for fifteen days
from date of certification or until transcript has been
signed in cases when signature is not waived)

Deposition of Melia Faile

SUBSCRIPTION OF DEPONENT

State of _____)

County of _____)

I, Melia Faile, do hereby certify that
I have this day read the foregoing deposition and do
hereby declare that the same is a true and accurate
transcript of the proceedings had at the time and place
herein designated (except for the notations as
indicated on the attached errata sheet, if any).

Dated: _____

Melia Faile

Sworn to and subscribed before me
this ____ day of _____, 2004.

Notary Public

My Commission Expires: _____

Deposition of Melia Faile

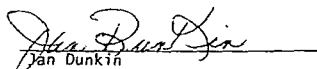
CERTIFICATE OF REPORTER

State of South Carolina)
County of York)

I, Jan Dunkin, a Notary Public for the State of South Carolina, do hereby certify that I placed under oath the aforesaid deponent; that I reported the foregoing proceedings at the time and place herein designated and that the foregoing pages are a true, accurate and correct transcript of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, nor in anyway interested in the event of said cause.

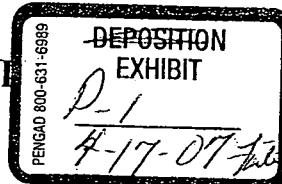
In witness my hand and official seal this the 21st day of May, 2009, in the City of Rock Hill; County of York, State of South Carolina.


Jan Dunkin
Court Reporter/Notary Public

My Commission Expires:
9-7-2014



AGREEMENT TO BUY AND SELL REAL ESTATE (FOR GENERAL USE AND LOTS/ACREAGE)



1. PARTIES: This legally binding Agreement entered into on August 1, 2006, between, Buyer(s), Larina Woodson and Maurice Woodson, (hereinafter called "BUYER"), and Seller(s), "DLI" Properties, (hereinafter called "SELLER"). The property shall be deeded in the name(s) of Larina Woodson and Maurice Woodson.

THE BUYER ~~IS~~ SELLER IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

2. PROPERTY TO BE SOLD: Subject to terms and conditions herein, Seller agrees to sell and Buyer agrees to buy the following described property with improvements and fixtures thereon:

Lot #36 Block _____ Section _____ Subdivision Lakeview Landing
Address Lot #36 Point Carpenter Rd.
Tax Map # _____ City Fort Mill Zip 29715
County of Lancaster, State of South Carolina.

3. PURCHASE PRICE shall be \$ 88,900⁰⁰ Eighty eight thousand nine hundred dollars. + 10/100-

4. METHOD OF PAYMENT: Purchase price shall be paid as follows: ☐ Cash; or ☒ Subject to Financing. Financing to be obtained by ☐ Conventional ☐ Seller ☐ VA ☐ FHA ☐ Other terms: _____

5. EARNEST MONEY: This offer is accompanied by an earnest money deposit of \$ 1,000⁰⁰ Buyer and Seller authorize Allen Tate, as Escrow Agent, to hold and disburse earnest money according to the terms of this agreement. Earnest money paid by ☐ Cash, ☒ Check, or ☐ Other. Broker does not guarantee payment of a check or checks accepted as earnest money. All escrow money received shall be deposited as required by South Carolina law and South Carolina Real Estate Commission Rules and Regulations. At the consummation of this sale, the earnest money deposit shall be credited to the Buyer.

THE PARTIES UNDERSTAND THAT, UNDER ALL CIRCUMSTANCES, INCLUDING DEFAULT, THE BROKER HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT.

6. LOAN PROCESSING AND APPLICATION: Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum 700 % loan (loan-to-value ratio) within 7 consecutive days from the execution of this Agreement and shall provide Seller with written satisfactory loan approval within 28 consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. Time is of the essence. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with the written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's credit-worthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these above conditions, Buyer shall be in default of this agreement subject to the terms of paragraph 22.

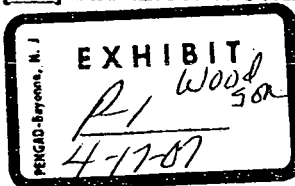
FHA Mortgage Insurance ☐ will ☒ will not be added to the mortgage. VA funding fee ☐ will ☒ will not be added to the mortgage.

7. CLOSING COSTS: Unless otherwise agreed, closing costs, including all loan charges and prepaid recurring items, shall be paid as follows:

(a) SELLER shall provide or pay for preparation of deed, any recording charge based on value of property, and all costs necessary to deliver a marketable title, including recording of satisfactions and property taxes to the day of closing.

(b) BUYER shall pay, unless otherwise agreed herein, the cost of the Buyer's credit report, property insurance, appraisal, survey, cost of obtaining loan, discount points, title examination, escrow deposits, and prepaid expenses. The Buyer shall also pay, if applicable, interim interest and mortgage insurance premium or VA funding fee. Buyer's hazard insurance policy shall provide coverage as required by lender. Other terms: No Closing Costs to be paid by Seller.

☐ BUYER ☐ BUYER ☐ SELLER ☐ SELLER HAVE READ THIS PAGE



8. **OPTION TO TERMINATE AFTER DUE DILIGENCE:** (A) Seller grants to Buyer a 10 day right ("Termination Right") from the date of this agreement during which Buyer may do any or all of the following:

1. Conduct at Buyer's sole expense whatever due diligence, inspections, examinations, surveys and testing, if any, Buyer deems appropriate to evaluate the suitability of Property for Buyer's intended use including but not limited to, zoning, governmental regulations, environmental concerns, availability of utilities and whether the soil on Property will support a septic system of a size and type of desired Buyer (hereinafter collectively referred to as "Buyer's Due Diligence");

(B) Seller acknowledges and agrees that Buyer and/or his agents and employees may have free access during normal business hours to visit Property for the purpose of conducting Buyer's Due Diligence. Buyer hereby agrees to indemnify and hold Seller, Broker and Broker's Affiliated Licensees harmless from and against any and all loss, injury, cost or expense associated with Buyer's inspection of and entry upon Property.

(C) If Buyer decides to exercise Buyer's right to terminate this Agreement, Buyer must give notice of the same to Seller prior to the expiration of the Termination Right. If Buyer fails to give such notice timely, the Termination Right shall automatically expire and shall no longer be part of this agreement, and Buyer shall be deemed to have accepted Property "as-is". The expiration of the Termination Right shall not, however, remove or terminate and other contingencies to which the Agreement may be subject, or limit any other rights which Buyer may have under this Agreement.

9. **BUILDING PERMIT:** This Agreement ☐ is ☐ is not contingent upon Buyer's ability to acquire all required licenses and permits from the appropriate governmental authority to build on Property. If Buyer notifies Seller in writing within _____ days after the complete execution of this agreement that Buyer is unable to acquire all required licenses and permits for the appropriate governmental authority to build on Property, then in such event this Agreement shall terminate. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

10. **REZONING:** This Agreement ☐ is ☒ is not contingent upon Property being rezoned to N/A on or before the N/A day of N/A, N/A by the appropriate governmental authorities. For purpose herein, the term rezoned shall mean that the above referenced zoning has been fully approved by the appropriate governmental authority and any period to appeal such rezoning has expired without an appeal being filed. The ☐ Buyer ☐ Seller shall be responsible for pursuing such rezoning, and paying all associated costs. All rezoning applications shall be submitted to Seller for Seller's approval prior to filing, which approval shall not be unreasonably withheld. All parties agree to cooperate, to sign the necessary documentation and to support the rezoning application. If Buyer notifies Seller or Broker in writing within forty-eight hours after the above date the Property cannot be so rezoned, then in such event this Agreement shall automatically terminate and Broker shall promptly refund the Earnest Money to Buyer. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

11. **WELL, SEPTIC TANK, SEWER AVAILABILITY:** It shall be the responsibility of the Buyer to obtain approval from the South Carolina Department of Health and Environmental Control or other proper South Carolina authority prior to closing in the event a well and/or septic tank is needed to be placed on the property.

In the event that the Buyer applies for well or septic tank approval and DHEC or other proper authority denies approval or issues a preliminary opinion showing that the property is not suitable for the installation of a well and/or a conventional septic system suitable for the Buyer's intended home or other structure, then in such event, the Buyer may elect to rescind this Agreement and receive a refund of the earnest money deposit. If the property is capable of being connected to a water and/or sewerage line maintained by a private or public utility for a normal tap fee and at a cost to complete tap not to exceed \$ _____, then in such event, the Buyer shall contract such authority to obtain confirmation that the subject property is properly tapped for water and sewer system or may be tapped into the water and sewerage system.

Seller represents that the property is connected to ☐ public sewer system or to ☒ septic tank or to ☒ public water or to ☐ well system or to ☐ other _____

12. **SURVEY:** Upon the acceptance of this offer, the property shall be surveyed by a licensed surveyor at the expense of the ☒ BUYER ☐ SELLER. The surveyor shall set and flag all property pins, showing encroachments and easements. Property must be _____ x _____ or having at least _____ acres. The survey to be approved in writing by Buyer prior to closing. The purchase price is based upon \$ _____ per _____ (acre, sq. ft., or front ft.) and shall be adjusted in accordance with the area set forth in such a survey, if applicable.

13. **CONVEYANCE SHALL BE MADE:** Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing, and transaction closed on or before Sept. 15, 2006, no later than 9:00 p.m. Time is of the essence. Seller and Buyer authorize their respective attorneys and the settlement agent to furnish to Listing Broker and Selling Broker copies of the final HUD-1 settlement statement for the transaction for their review prior to closing.

14. **POSSESSION:** Possession of said property will be given to Buyer on the day of closing. Seller agrees to deliver property free of debris and in a clean condition. Possession by Buyer before closing or by Seller after closing shall be subject to the terms and conditions of a separate agreement to be executed prior to closing or occupancy.

☐ BUYER ☐ BUYER ☐ SELLER ☐ SELLER HAVE READ THIS PAGE



15. **CONDITION OF PROPERTY:** Seller shall not remove any timber, dirt, minerals or otherwise affect the condition of the property after the signing of this Agreement. All timber, dirt, minerals, etc., shall remain with the property and be a part of the property and be transferred to the Buyer. The Seller shall not bring any trash, refuse, debris, medical or hazardous waste, or other improper materials upon the property. In the event any condemnation proceeding is brought by any governmental authority, agency, utility, etc., prior to the closing, then the Buyer may elect to rescind the agreement.

16. **EXPIRATION OF OFFER:** The offer from Buyer shall be withdrawn at 7 o'clock P M on Aug. 3, 2006 unless countered or accepted by Seller in written form prior to such time. Time is of the essence.

17. **SPECIAL STIPULATIONS:** The following stipulations concerning restrictions, and easements affecting desired use, drainage, hazardous waste, availability of water and sewer, soil test, wetlands study, subordination, lot releases, etc., should be included here. If conflicting with printed matter, the following stipulations shall control: (See addendum if applicable) _____

18. **ADJUSTMENTS:** Taxes, water, all sewer assessments, sewer charges, fuel oil, rents as when collected, insurance premiums, if applicable, and other assessments, including homeowner's association fees, shall be adjusted as of the date of closing. Tax prorrations pursuant to this Agreement are to be based on the tax information available on the date of closing, and are to be prorated on that basis. **BUYER IS TO BE RESPONSIBLE FOR APPLYING FOR ANY APPLICABLE TAX EXEMPTIONS.** Property taxes and rent, as well as other expenses and income of the property, if applicable, shall be apportioned to the date of closing. Annual expenses or income shall be apportioned using 365 days. Monthly property expenses or income shall be apportioned by the number of days in month of closing. Prorrations at closing shall be final.

19. **NON-RESIDENT TAX:** Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

20. **ROLLBACK TAXES (IF ANY):** When rollback taxes are subsequently determined and billed to the Buyer, the Seller and Buyer agree that the rollback taxes shall be paid by ☒ Buyer or ☐ Seller.

21. **RISK OF LOSS OR DAMAGE:** In case the property herein referred to is destroyed wholly or partially by fire or other casualty prior to delivery of deed, Buyer or Seller shall have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Agreement.

22. **DEFAULT:** If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 23); or terminate this Agreement with a five day written notice. If terminated, both parties shall execute a written release of the other from this contract and both shall agree to hold the Escrow Agent harmless. If either Buyer or Seller refuses to execute release, Escrow Agent will hold the earnest money in trust until said releases are executed or until a court of competent jurisdiction dictates legal disposition.

23. **ACTUAL COST INCURRED** shall include all costs and expenses incurred or obligated for by Buyer, Seller or Broker in an effort to consummate this sale. Such costs shall include, but are not limited to, cost of credit report, appraisal, survey, inspections and reports, title examination, and Broker's fee or commission for this sale.

24. **SURVEY, TITLE EXAMINATION, AND INSURANCE:** The Listing and Cooperating Broker(s) and their Agent(s) recommend that Buyer have a survey of the subject property made, have examination as to the title to the property, obtain owner's title insurance, and that Buyer obtain appropriate hazard insurance coverage effective with the time of closing. All hazard insurance to be canceled and new policies furnished by Buyer at closing unless otherwise stipulated in this Agreement. Flood insurance, if required by Lender at Buyer's option, shall be assigned to Buyer with permission of carrier, and premium prorated to date of closing.

25. **APPRAISED VALUE:** (check one)

☐ This agreement is not contingent on the lot or parcel with building and improvements thereon, if any, appraising, according to the lenders appraisal or other appraisal as agreed, for the selling price.

☒ This agreement is contingent on the lot or parcel with building and improvements thereon, if any, appraising, according to the lenders appraisal or other appraisal as agreed, for the selling price or more; if the lot or parcel with building and improvements thereon appraises for less than the selling price, the seller may elect to sell for the appraised value. In such case, the Buyer agrees to proceed with the consummation of this sale at the reduced price. However, if Seller does not agree to sell at the appraised value, the Buyer shall have the option of proceeding with the consummation of the Agreement without regard to the amount of the appraised valuation, or terminate the agreement without penalty.

26. **SPECIAL STUDIES AREA, WETLANDS, AND ENVIRONMENTAL PROTECTION MATTERS:** All reports and certifications called for by the lending agencies and any governmental body, by the Buyer concerning any special study area, wetlands or for any environmental protection matter shall be at the expense of the Buyer. In the event such studies are wanted or required, the studies must be furnished by the proper parties within 10 days of complete execution of the agreement. The Buyer and Seller must have access to all studies within five (5) days of receipt of the studies. If Buyer fails to meet these deadlines, Buyer is deemed to have waived any and all rights under this paragraph. If the Buyer is not satisfied with the results, the Seller shall have the option of correcting the problem. If the Seller elects not to correct the problem, the Buyer's obligations under this Agreement terminate.

27. **COASTAL TIDELANDS & WETLANDS ACT:** In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures at ☒ Buyer's ☐ Seller's expense.

☐ BUYER ☐ BUYER ☐ SELLER ☐ SELLER HAVE READ THIS PAGE



Rev. 10/05 - 2pt
PAGE 4 OF 5

THIS IS A LEGALLY BINDING AGREEMENT. BOTH BUYER AND SELLER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

BUYER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

SELLER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

SELLER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

LISTING AGENT AND COMPANY Melia C. Faile Allen Long Fort Mill

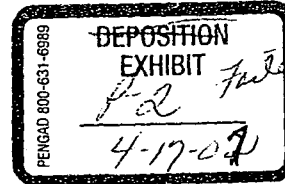
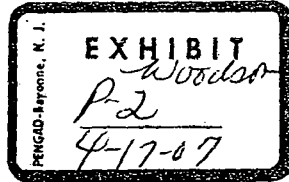
SELLING AGENT AND COMPANY _____

SELLING AGENT IS PRESENTING THIS OFFER AS A ☐ BUYER'S AGENT OR ☐ SUBAGENT OF THE SELLER.

ESCROW AGENT ACKNOWLEDGMENT _____

The foregoing form is available for use by the entire real estate industry. The use of the form is not intended to identify the user as a REALTOR®. REALTOR® is the registered collective membership mark which may be used only by real estate licensees who are members of the NATIONAL ASSOCIATION OF REALTORS® and who subscribe to its Code of Ethics. Expressly prohibited is the duplication or reproduction of such form or the use of the name "South Carolina Association of REALTORS®" in connection with any written form without the prior written consent of the South Carolina Association of REALTORS®. The foregoing form may not be edited, revised, or changed without the prior written consent of the South Carolina Association of REALTORS®.





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08/03/2008 11:55 FAX 5618289244

DAVIS
HOMEBUYERCONNECTION

PAGE 81/85
001/005

08/01/2008 18:10 FAX 303 545 3801

ALLEN TATE

002/008



AGREEMENT TO BUY AND SELL REAL ESTATE (FOR GENERAL USE AND LOTS/ACREAGE)

1. PARTIES: This legally binding Agreement entered into on August 3, 2006 between, Buyer(s), Marissa Woodson and Harrison Woodson, (hereinafter called "BUYER"), and Seller(s), "D.I." Properties (hereinafter called "SELLER"). The property shall be deeded in the name(s) of Marissa Woodson and Harrison Woodson

THE BUYER & SELLER IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

2. PROPERTY TO BE SOLD: Subject to terms and conditions herein, Seller agrees to sell and Buyer agrees to buy the following described property with improvements and fixtures thereon:

Lot #36 Block _____ Section _____ Subdivision Lakewood Landing
Address Lot #36 Point Computer Rd.
Tax Map # _____ City Fort Mill Zip 29715
County of South Carolina, State of South Carolina.

3. PURCHASE PRICE shall be \$ 88,900⁰⁰ Eighty eight thousand nine hundred dollars. + 10/100

4. METHOD OF PAYMENT: Purchase price shall be paid as follows: ☐ Cash; or ☒ Subject to Financing. Financing to be obtained by ☐ Conventional ☐ Seller ☐ VA ☐ FHA ☐ Other terms: _____

5. EARNEST MONEY: This offer is accompanied by an earnest money deposit of \$ 1,000⁰⁰. Buyer and Seller authorize Allen Tate as Escrow Agent, to hold and disburse earnest money according to the terms of this agreement. Earnest money paid by ☐ Cash, ☒ Check, or Other. Broker does not guarantee payment of a check or checks accepted as earnest money. All escrow money received shall be deposited as required by South Carolina law and South Carolina Real Estate Commission Rules and Regulations. At the consummation of this sale, the earnest money deposit shall be credited to the Buyer.

THE PARTIES UNDERSTAND THAT, UNDER ALL CIRCUMSTANCES, INCLUDING DEFAULT, THE BROKER HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT.

6. LOAN PROCESSING AND APPLICATION: Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum 750 % loan (loan-to-value ratio) within 7 consecutive days from the execution of this Agreement and shall provide Seller with written satisfactory loan approval within 30 consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. Time is of the essence. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with the written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's creditworthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these above conditions, Buyer shall be in default of this agreement subject to the terms of paragraph 22.

FHA Mortgage Insurance ☐ will ☒ will not be added to the mortgage. VA funding fee ☐ will ☒ will not be added to the mortgage.

7. CLOSING COSTS: Unless otherwise agreed, closing costs, including all loan charges and prepaid recurring items, shall be paid as follows:

(a) SELLER shall provide or pay for preparation of deed, any recording charge based on value of property, and all costs necessary to deliver a marketable title, including recording of satisfaction and property taxes to the day of closing.
(b) BUYER shall pay, unless otherwise agreed herein, the cost of the Buyer's credit report, property insurance, appraisal, survey, cost of obtaining loan, discount points, title examination, escrow deposits, and prepaid expenses. The Buyer shall also pay, if applicable, interim interest and mortgage insurance premium on VA funding fee. Buyer's hazard insurance policy shall provide coverage as required by lender. Other terms: No Closing Costs to be paid by Seller

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8. OPTION TO TERMINATE AFTER DUE DILIGENCE: (A) Seller grants to Buyer a 30 day right ("Termination Right") from the date of this agreement during which Buyer may do any or all of the following:

1. Conduct at Buyer's sole expense whatever due diligence, inspections, examinations, surveys and testing, if any, Buyer deems appropriate to evaluate the suitability of Property for Buyer's intended use including but not limited to, zoning, governmental regulations, environmental concerns, availability of utilities and whether the soil on Property will support a septic system of a size and type of desired Buyer (hereinafter collectively referred to as "Buyer's Due Diligence");

(B) Seller acknowledges and agrees that Buyer and/or his agents and employees may have free access during normal business hours to visit Property for the purpose of conducting Buyer's Due Diligence. Buyer hereby agrees to indemnify and hold Seller, Broker and Broker's Affiliated Licensees harmless from and against any and all loss, injury, cost or expense associated with Buyer's inspection of and entry upon Property.

(C) If Buyer decides to exercise Buyer's right to terminate this Agreement, Buyer must give notice of the same to Seller prior to the expiration of the Termination Right. If Buyer fails to give such notice timely, the Termination Right shall automatically expire and shall no longer be part of this agreement, and Buyer shall be deemed to have accepted Property "as-is". The expiration of the Termination Right shall not, however, remove or terminate and other contingencies to which the Agreement may be subject, or limit any other right which Buyer may have under this Agreement.

9. BUILDING PERMIT: This Agreement is ☐ is not contingent upon Buyer's ability to acquire all required licenses and permits from the appropriate governmental authority to build on Property. If Buyer notifies Seller in writing within 30 days after the complete execution of this agreement that Buyer is unable to acquire all required licenses and permits for the appropriate governmental authority to build on Property, then in such event this Agreement shall terminate. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

10. REZONING: This Agreement is ☐ is not contingent upon Property being rezoned to ALA on or before the 30 day of 11/11/06 by the appropriate governmental authority. For purposes herein, the term rezoned shall mean that the above referenced zoning has been fully approved by the appropriate governmental authority and any period to appeal such rezoning has expired without an appeal being filed. The ☐ Buyer ☐ Seller shall be responsible for pursuing such rezoning, and paying all associated costs. All rezoning applications shall be submitted to Seller for Seller's approval prior to filing which approval shall not be unreasonably withheld. All parties agree to cooperate, to sign the necessary documentation and to support the rezoning application. If Buyer notifies Seller or Broker in writing within forty-eight hours after the above date the Property cannot be so rezoned, then in such event the Agreement shall automatically terminate and Broker shall promptly refund the Earnest Money to Buyer. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

11. WELL, SEPTIC TANK, SEWER AVAILABILITY: It shall be the responsibility of the Buyer to obtain approval from the South Carolina Department of Health and Environmental Control or other proper South Carolina authority prior to closing in the event a well and/or septic tank is needed to be placed on the property.

In the event that the Buyer applies for well or septic tank approval and DHEC or other proper authority denies approval or issues a preliminary opinion showing that the property is not suitable for the installation of a well and/or a conventional septic system suitable for the Buyer's intended home or other structure, then in such event, the Buyer may elect to rescind this Agreement and receive a refund of the earnest money deposit. If the property is capable of being connected to a water and/or sewerage line maintained by a private or public utility for a normal tap fee and at a cost to complete tap not to exceed \$ 1250 then in such event, the Buyer shall contract such authority to obtain confirmation that the subject property is properly tapped for water and sewer system or may be tapped into the water and sewerage system.

Seller represents that the property is connected to ☐ public sewer system or to ☒ septic tank or to ☐ public water or to ☐ well system or to ☐ other.

12. SURVEY: Upon the acceptance of this offer, the property shall be surveyed by a licensed surveyor at the expense of the ☒ BUYER ☐ SELLER. The surveyor shall set and flag all property pins, showing encroachments and easements. Property must be 30 x 30 or having at least 30 acres. The survey to be approved in writing by Buyer prior to closing. The purchase price is based upon \$ 1250 per sq. ft. (acre, sq. ft., or front ft.) and shall be adjusted in accordance with the area set forth in such a survey, if applicable.

13. CONVEYANCE SHALL BE MADE: Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing, and transaction closed on or before 11/11/06, no later than 4:00 p.m. Time is of the essence. Seller and Buyer authorize their respective attorneys and the settlement agent to furnish to Listing Broker and Selling Broker copies of the final HUD-1 settlement statement for the transaction for their review prior to closing.

14. POSSESSION: Possession of said property will be given to Buyer on the day of closing. Seller agrees to deliver property free of debris and in a clean condition. Possession by Buyer before closing or by Seller after closing shall be subject to the terms and conditions of a separate agreement to be executed prior to closing or occupancy.

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15. **CONDITION OF PROPERTY:** The Seller shall not remove any timber, dirt, minerals or otherwise affect the condition of the property after the signing of this Agreement. All timber, dirt, minerals, etc., shall remain with the property and be a part of the property and be transferred to the Buyer. The Seller shall not bring any trash, refuse, debris, medical or hazardous waste, or other improper materials upon the property. In the event any condemnation proceeding is brought by any governmental authority, agency, utility, etc., prior to the closing, then the Buyer may elect to rescind the agreement.

16. **EXPIRATION OF OFFER:** The offer from Buyer shall be withdrawn at 7 o'clock P M on Aug 4, 2006 unless countered or accepted by Seller in written form prior to such time. Time is of the essence.

17. **SPECIAL STIPULATIONS:** The following stipulations concerning restrictions, and easements affecting desired use, drainage, hazardous waste, availability of water and sewer, soil test, wetlands study, subordination, lot releases, etc., should be included here. If conflicting with printed matter, the following stipulations shall control: (See addendum if applicable)

18. **ADJUSTMENTS:** Taxes, water, all sewer assessments, sewer charges, fuel oil, rents as when collected, insurance premiums, if applicable, and other assessments, including homeowners' association fees, shall be adjusted as of the date of closing. Tax provisions pursuant to this Agreement are to be based on the tax information available on the date of closing, and are to be prorated on that basis. **BUYER IS TO BE RESPONSIBLE FOR APPLYING FOR ANY APPLICABLE TAX EXEMPTIONS.** Property taxes and rent, as well as other expenses and income of the property, if applicable, shall be apportioned to the date of closing. Annual expenses or income shall be apportioned using 365 days. Monthly property expenses or income shall be apportioned by the number of days in month of closing. Provisions at closing shall be final.

19. **NON-RESIDENT TAX:** Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

20. **ROLLBACK TAXES (IF ANY):** When rollback taxes are subsequently determined and billed to the Buyer, the Seller and Buyer agree that the rollback taxes shall be paid by Seller or Buyer.

21. **RISK OF LOSS OR DAMAGE:** In case the property herein referred to is destroyed wholly or partially by fire or other casualty prior to delivery of deed, Buyer or Seller shall have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Agreement.

22. **DEFAULT:** If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 23), or terminate this Agreement with thirty day written notice. If terminated, both parties shall execute a written release of the other from this contract and both shall agree to hold the Escrow Agent harmless. If either Buyer or Seller refuses to execute release, Escrow Agent will hold the earnest money in trust until said releases are executed or until a court of competent jurisdiction dictates legal disposition.

23. **ACTUAL COST INCURRED** shall include all costs and expenses incurred or obligated for by Buyer, Seller or Broker in an effort to consummate this sale. Such costs shall include, but are not limited to, cost of credit report, appraisal, survey, inspections and reports, title examination, and Broker's fee or commission for this sale.

24. **SURVEY, TITLE EXAMINATION, AND INSURANCE:** The Listing and Cooperating Broker(s) and their Agent(s) recommend that Buyer have a survey of the subject property made, have examination as to the title to the property, obtain owner's title insurance, and that Buyer obtain appropriate hazard insurance coverage effective with the time of closing. All hazard insurance to be cancelled and new policies furnished by Buyer at closing unless otherwise stipulated in this Agreement. Flood insurance, if required by Lender at Buyer's option, shall be assigned to Buyer with permission of carrier, and premium prorated to date of closing.

25. **APPRAISED VALUE:** (check one)

☐ The agreement is not contingent on the lot or parcel with building and improvements thereon. If any, appraising, according to the lender's appraisal or other appraisal as agreed, for the selling price.

☒ This agreement is contingent on the lot or parcel with building and improvements thereon, if any, appraising, according to the lender's appraisal or other appraisal as agreed, for the selling price or more; if the lot or parcel with building and improvements thereon appraises for less than the selling price, the seller may elect to sell for the appraised value. In such case, the Buyer agrees to proceed with the consummation of this sale at the reduced price. However, if Seller does not agree to sell at the appraised value, the Buyer shall have the option of proceeding with the consummation of the Agreement without regard to the amount of the appraised valuation, or terminate the agreement without penalty.

26. **SPECIAL STUDIES AREA, WETLANDS, AND ENVIRONMENTAL PROTECTION MATTERS:** All reports and certifications called for by the lending agencies and any governmental body, by the Buyer concerning any special study area, wetlands or for any environmental protection matter shall be at the expense of the Buyer. In the event such studies are waived or required, the studies must be furnished by the proper parties within 30 days of complete execution of the agreement. The Buyer and Seller must have access to all studies within five (5) days of receipt of the studies. If Buyer fails to meet these deadlines, Buyer is deemed to have waived any and all rights under this paragraph. If the Buyer is not satisfied with the results, the Seller shall have the option of correcting the problem. If the Seller elects not to correct the problem, the Buyer's obligations under this Agreement terminate.

27. **COASTAL TIDELANDS & WETLANDS ACT:** In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures after Buyer's or Seller's expense.

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20. DISCLAIMER BY BROKERS AND AGENTS: The parties acknowledge that the Listing and Cooperating Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the property or as to condition of or existence of improvement services or systems, thereto; included but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage, electric systems, and to the structure; (2) Give no warranty, express or implied, as to the merchantability or fitness for a particular purpose as to the property or such improvements thereto and any implied warranty hereby disclaimed; (3) Give no warranty as to title; (4) Give no guaranty or warranty concerning (a) any certification or inspection concerning the condition of the property, (b) any matters which would be reflected by current survey of the property, and (c) the accuracy of the published square footage of the property; (5) Buyer acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Buyer regarding (a) projected income or economic benefit for Buyer from rentals; (b) rental arrangements except that Buyer may rent the unit if Buyer so desires or (c) other economic benefits to the Buyer.

29. MEDIATION CLAUSE. Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this Agreement pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud.

Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; (e) the filing of an interpleader action to resolve earnest money disputes. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

30. ENTIRE BINDING AGREEMENT: This written instrument, including the additional terms and conditions set forth on any documents intended by the parties to be included, expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Seller. It can be changed only by a subsequently written instrument signed by both parties. Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein. The benefits and obligations shall inure to and bind the parties hereto and their heirs, assigns, successors, executors, or administrators. Whenever used, singular includes plural, and use of any gender shall include all.

31. SURVIVAL: If any provision herein contained which by its nature and effect is required to be observed, kept or performed after the closing, it shall survive the closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed.

32. FACSIMILE AND OTHER ELECTRONIC MEANS: The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the Internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

33. EXTENSION AGREEMENT: If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 30 consecutive days from the original closing date. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date. Time is of the essence.

34. CONTINGENCIES: Those stipulations shall preempt printed matter herein (attach and reference addendum if necessary).

*Addendum
THIS PROPERTY IS VACANT LAND & IS NOT CONNECTED
TO PUBLIC WATER OR SEWAGE TANK. HOWEVER
BOTH ARE AVAILABLE
ALL
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THIS IS A LEGALLY BINDING AGREEMENT. BOTH BUYER AND SELLER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER [Signature] - Larius Woodson Date 8/3/06 Time 11:30 am

WITNESS: _____ Date _____ Time _____

BUYER [Signature] - Maurissa Woodson Date 8/3/06 Time 11:30 am

WITNESS: _____ Date _____ Time _____

SELLER [Signature] DLE Date 8/3/06 Time 1:15 PM

WITNESS: [Signature] Date 8/3/06 Time 1:16 pm

SELLER [Signature] DLE Date 8/3/06 Time 1:16 PM

WITNESS [Signature] Date 8/3/06 Time 1:16 pm

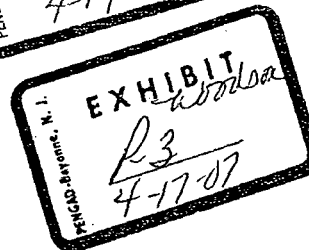
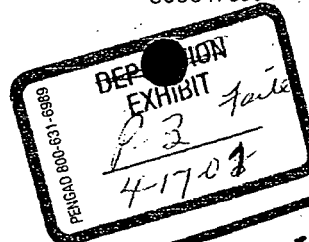
LISTING AGENT AND COMPANY [Signature] Allen Tate Integrity Real Estate

SELLING AGENT AND COMPANY SHARON DAVIS DAVIS INTEGRITY REALTY

SELLING AGENT IS PRESENTING THIS OFFER AS A BUYER'S AGENT OR A SUBAGENT OF THE SELLER.

ESCROW AGENT ACKNOWLEDGMENT _____

This form is a multiple-use form for use by the real estate industry. The use of the form is not intended to identify the user as a REALTOR. REALTOR is the registered suffix of a realtor's name and may be used only by real estate licensees and the members of the NATIONAL ASSOCIATION OF REALTORS and who subscribe to its Code of Ethics. Expressly prohibited is the duplication or reproduction of such form or the use of the name "South Carolina Association of REALTORS" in connection with any written form without the prior written consent of the South Carolina Association of REALTORS. The foregoing term may not be altered, amended, or changed without the prior written consent of the South Carolina Association of REALTORS.



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ALLEN TATE

002/008



AGREEMENT TO BUY AND SELL REAL ESTATE (FOR GENERAL USE AND LOTS/ACREAGE)

1. PARTIES: This legally binding Agreement entered into on August 3, 2006 between, Buyer(s), Marina Woodson and Raymond Woodson, (hereinafter called "BUYER"), and Seller(s), "DLI" Properties (hereinafter called "SELLER"). The property shall be deeded in the name(s) of Marina Woodson and Raymond Woodson.

THE BUYER IS SELLER IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE.

2. PROPERTY TO BE SOLD: Subject to terms and conditions herein, Seller agrees to sell and Buyer agrees to buy the following described property with improvements and fixtures thereon:

Lot #36 Block Section Subdivision Lakeview Easting
Address Lot #36 Point Carpenter Rd.
Tax Map # City Fort Mill SC 29715
County of Anderson, State of South Carolina.

3. PURCHASE PRICE shall be \$ 88,900.00 Eighty eight thousand nine hundred Dollars.

4. METHOD OF PAYMENT: Purchase price shall be paid as follows: ☐ Cash; or ☒ Subject to Financing. Financing to be obtained by ☐ Conventional ☐ Seller ☐ VA ☐ FHA ☐ Other terms:

5. EARNEST MONEY: This offer is accompanied by an earnest money deposit of \$ 1,000.00 Buyer and Seller authorize Allen Tate as Escrow Agent, to hold and disburse earnest money according to the terms of this agreement. Earnest money paid by ☐ Cash, ☐ Check, or Other. Broker does not guarantee payment of a check or checks accepted as earnest money. All escrow money received shall be deposited as required by South Carolina law and South Carolina Real Estate Commission Rules and Regulations. At the consummation of this sale, the earnest money deposit shall be credited to the Buyer.

THE PARTIES UNDERSTAND THAT, UNDER ALL CIRCUMSTANCES, INCLUDING DEFAULT, THE BROKER HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT.

6. LOAN PROCESSING AND APPLICATION: Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum 75% loan (loan-to-value ratio) within 7 consecutive days from the execution of this agreement and shall provide Seller with written satisfactory loan approval within 28 consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. Time is of the essence. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with the written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's creditworthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these above conditions, Buyer shall be in default of this agreement subject to the terms of paragraph 22.

FHA Mortgage Insurance ☐ will ☒ will not be added to the mortgage. VA funding fee ☐ will ☒ will not be added to the mortgage.

7. CLOSING COSTS: Unless otherwise agreed, closing costs, including all loan charges and prepaid recurring items, shall be paid as follows:

(a) SELLER shall provide or pay for preparation of deed, any recording charge based on value of property, and all costs necessary to deliver a marketable title, including recording of satisfaction and property taxes to the day of closing.
(b) BUYER shall pay, unless otherwise agreed herein, the cost of the Buyer's credit report, property insurance, appraisal, survey, cost of obtaining loan, discount points, title examination, escrow deposits, and prepaid expenses. The Buyer shall also pay, if applicable, interim interest and mortgage insurance premium on VA funding fee. Buyer's hazard insurance policy shall provide coverage as required by lender. Other terms: The Closing Costs to be paid by Seller.

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8. **OPTION TO TERMINATE AFTER DUE DILIGENCE:** (A) Seller grants to Buyer a 30 day right ("Termination Right") from the date of this agreement during which Buyer may do any or all of the following:

1. Conduct at Buyer's sole expense whatever due diligence, inspections, examinations, surveys and testing, if any, Buyer deems appropriate to evaluate the suitability of Property for Buyer's intended use including but not limited to, zoning, governmental regulations, environmental concerns, availability of utilities and whether the soil on Property will support a septic system of a size and type of desired Buyer (hereinafter collectively referred to as "Buyer's Due Diligence");

(B) Seller acknowledges and agrees that Buyer and/or his agents and employees may have free access during normal business hours to visit Property for the purpose of conducting Buyer's Due Diligence. Buyer hereby agrees to indemnify and hold Seller, Broker and Broker's Affiliated Licensees harmless from and against any and all loss, injury, cost or expense associated with Buyer's inspection of and entry upon Property.

(C) If Buyer decides to exercise Buyer's right to terminate this Agreement, Buyer must give notice of the same to Seller prior to the expiration of the Termination Right. If Buyer fails to give such notice timely, the Termination Right shall automatically expire and shall not be part of this agreement, and Buyer shall be deemed to have accepted Property "as-is". The expiration of the Termination Right shall not, however, remove or terminate and other contingencies to which the Agreement may be subject, or limit any other rights which Buyer may have under this Agreement.

9. **BUILDING PERMIT:** This Agreement ☐ is not contingent upon Buyer's ability to acquire all required licenses and permits from the appropriate governmental authority to build on Property. If Buyer notifies Seller in writing within 30 days after the complete execution of this agreement that Buyer is unable to acquire all required licenses and permits for the appropriate governmental authority to build on Property, then in such event this Agreement shall terminate. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

10. **REZONING:** This Agreement ☐ is not contingent upon Property being rezoned to ALD on or before the 30 day of 9/1/08 by the appropriate governmental authority. For purpose herein, the term rezoned shall mean that the above referenced zoning has been fully approved by the appropriate governmental authority and any period to appeal such rezoning has expired without an appeal being filed. The ☐ Buyer ☐ Seller shall be responsible for pursuing such rezoning, and paying all associated costs. All rezoning applications shall be submitted to Seller for Seller's approval prior to filing which approval shall not be unreasonably withheld. All parties agree to cooperate, to sign the necessary documentation and to support the rezoning application. If Buyer notifies Seller or Broker in writing within forty-eight hours after the above date the Property cannot be so rezoned, then in such event this Agreement shall automatically terminate and Broker shall promptly return the Earnest Money to Buyer. If Buyer fails to provide said notice, then this contingency shall be deemed to have been waived by Buyer.

11. **WELL, SEPTIC TANK, SEWER AVAILABILITY:** It shall be the responsibility of the Buyer to obtain approval from the South Carolina Department of Health and Environmental Control or other proper South Carolina authority prior to closing in the event a well and/or septic tank is needed to be placed on the property.

In the event that the Buyer applies for well or septic tank approval and DHEC or other proper authority denies approval or issues a preliminary opinion showing that the property is not suitable for the installation of a well and/or a conventional septic system suitable for the Buyer's intended home or other structure, then in such event the Buyer may elect to rescind this Agreement and receive a refund of the earnest money deposit. If the property is capable of being connected to a water and/or sewerage line maintained by a private or public utility for a normal tap fee and at a point to complete tap not to exceed \$ 4,300.00 then in such event the Buyer shall contract such authority to obtain confirmation that the subject property is properly tapped into water and sewer system or may be tapped into the water and sewerage system.

Seller represents that the property is connected to ☐ public water system or to ☒ septic tank or to ☐ public water or to ☐ well system or to ☐ other.

12. **SURVEY:** Upon the acceptance of this offer, the property shall be surveyed by a licensed surveyor at the expense of the ☒ BUYER ☐ SELLER. The surveyor shall set and flag all property pins, showing encroachments and easements. Property must be x or having at least 1 acre. The survey to be approved in writing by Buyer prior to closing. The purchase price is based upon 5 per 1 acre (acre, sq. ft. or front ft.) and shall be adjusted in accordance with the area set forth in such a survey, if applicable.

13. **CONVEYANCE SHALL BE MADE:** Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing, and transaction closed on or before 9/1/08 at 2:00 p.m. Time is of the essence. Seller and Buyer authorize their respective attorneys and the settlement agent to furnish to Listing Broker and Selling Broker copies of the final HUD-1 settlement statement for the transaction for their review prior to closing.

14. **POSSESSION:** Possession of said property will be given to Buyer on the day of closing. Seller agrees to deliver property free of debt and in a clean condition. Possession by Buyer before closing or by Seller after closing shall be subject to the terms and conditions of a separate agreement to be executed prior to closing or occupancy.

BUYER BUYER SELLER SELLER HAVE READ THIS PAGE

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Std Form 6030



Form 1008-201
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16. CONDITION OF PROPERTY: The Seller shall not remove any timber, dirt, minerals or otherwise affect the condition of the property after the signing of this Agreement. All timber, dirt, minerals, etc., shall remain with the property and be a part of the property and be transferred to the Buyer. The Seller shall not bring any trash, refuse, debris, medical or hazardous waste, or other improper materials upon the property. In the event any condemnation proceeding is brought by any governmental authority, agency, utility, etc., prior to the closing, then the Buyer may elect to rescind the agreement.

18. EXPIRATION OF OFFER: The offer from Buyer shall be withdrawn at 7 o'clock P M on Aug 4, 2006 unless countered or accepted by Seller in written form prior to such time. Time is of the essence.

17. SPECIAL STIPULATIONS: The following stipulations concerning restrictions, and easements affecting desired use, drainage, hazardous waste, availability of water and sewer, soil test, wetland study, subdivision, lot releases, etc., should be included here. If conflicting with printed matter, the following stipulations shall control: (See addendum if applicable)

19. ADJUSTMENTS: Taxes, water, all sewer assessments, sewer charges, fuel oil, rents as when collected, insurance premiums, if applicable, and other assessments, including homeowner's association fees, shall be adjusted as of the date of closing. Tax provisions pursuant to this Agreement are to be based on the tax information available on the date of closing, and are to be prorated on that basis. **BUYER IS TO BE RESPONSIBLE FOR APPLYING FOR ANY APPLICABLE TAX EXEMPTIONS.** Property taxes and rent, as well as other expenses and income of the property, if applicable, shall be apportioned to the date of closing. Annual expenses or income shall be apportioned using 365 days. Monthly property expenses or income shall be apportioned by the number of days in month of closing. Prorations at closing shall be final.

10. NON-RESIDENT TAX: Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-53C (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

20. ROLLBACK TAXES (IF ANY): When rollback taxes are subsequently determined and billed to the Buyer, the Seller and Buyer agree that the rollback taxes shall be paid by Seller or Buyer.

21. RISK OF LOSS OR DAMAGE: In case the property herein referred to is destroyed wholly or partially by fire or other casualty prior to delivery of deed, Buyer or Seller shall have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Agreement.

22. DEFAULT: If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 23), or terminate this Agreement with a five day written notice. If terminated, both parties shall execute a written release of the other from this contract and both shall agree to hold the Escrow Agent harmless. If either Buyer or Seller refuses to execute release, Escrow Agent will hold the earnest money in trust until said releases are executed or until a court of competent jurisdiction dictates legal disposition.

23. ACTUAL COST INCURRED shall include all costs and expenses incurred or obligated for by Buyer, Seller or Broker in an effort to consummate this sale. Such costs shall include, but are not limited to, cost of credit report, appraisal, survey, inspections and reports, title examination, and Broker's fee or commission for this sale.

24. SURVEY, TITLE EXAMINATION, AND INSURANCE: The Lending and Cooperating Broker(s) and their Agent(s) recommend that Buyer have a survey of the subject property made, have examination as to the title to the property, obtain owner's title insurance, and that Buyer obtain appropriate hazard insurance coverage effective with the time of closing. All hazard insurance to be canceled and new policies furnished by Buyer at closing unless otherwise stipulated in this Agreement. Flood insurance, if required by Lender at Buyer's option, shall be assigned to Buyer with permission of carrier, and premium prorated to date of closing.

25. APPRAISED VALUE: (check one)

☐ This agreement is not contingent on the lot or parcel with building and improvements thereon. If any, appraising, according to the lender's appraisal or other appraisal as agreed, for the selling price.

☒ This agreement is contingent on the lot or parcel with building and improvements thereon. If any, appraising, according to the lender's appraisal or other appraisal as agreed, for the selling price or more; if the lot or parcel with building and improvements thereon appraises for less than the selling price, the seller may elect to sell for the appraised value. In such case, the Buyer agrees to proceed with the consummation of this sale at the reduced price. However, if Seller does not agree to sell at the appraised value, the Buyer shall have the option of proceeding with the consummation of this Agreement without regard to the amount of the appraised valuation, or terminate the agreement without penalty.

26. SPECIAL STUDIES AREA, WETLANDS, AND ENVIRONMENTAL PROTECTION MATTERS: All reports and certifications called for by the lending agencies and any governmental body, by the Buyer concerning any special study area, wetlands or for any environmental protection matter shall be at the expense of the Buyer. In the event such studies are wanted or required, the studies must be furnished by the proper parties within 20 days of complete execution of the agreement. The Buyer and Seller must have access to all studies within five (5) days of receipt of the studies. If Buyer fails to meet these deadlines, Buyer is deemed to have waived any and all rights under this paragraph. If the Buyer is not satisfied with the results, the Seller shall have the option of correcting the problem. If the Seller elects not to correct the problem, the Buyer's obligations under this Agreement terminate.

27. COASTAL TIDELANDS & WETLANDS ACT: In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-33-10, et seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures and Buyer's or Seller's expense.

BUYER BUYER BUYER SELLER SELLER HAVE READ THIS PAGE

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26. DISCLAIMER BY BROKERS AND AGENTS: The parties acknowledge that the Listing and Cooperating Broker(s) and their Agent(s): (1) Give no warranty or warranty of any kind, express or implied, as to the physical condition of the property or as to condition of or existence of improvements, systems or systems, fixtures, included but not limited to kitchen damage, roof, basement, swimming pool, and air conditioning systems, plumbing, electrical, sewer, and to the structure; (2) Give no warranty, express or implied, as to the merchantability or fitness for a particular purpose as to the property or any improvements thereon and any implied warranty hereby disclaimed; (3) Give no warranty as to title; (4) Give no warranty on warranty concerning (a) any certification or inspection concerning the condition of the property, (b) any matters which would be reflected by current survey of the property, and (c) the accuracy of the published access footage of the property; (5) Buyer acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Buyer regarding (a) projected income or economic benefit for Buyer from rental; (b) rental arrangements except that Buyer may rent the unit if Buyer so desires or (c) other economic benefits to the Buyer.

27. MEDIATION CLAUSE: Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the said, purchase, financing, condition or other aspect of the property to which this Agreement pertains, including without limitation allegations of fraud, misrepresentation, negligence and/or fraud.

Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of appellate courts; (e) the filing of an interpleader action to resolve earnest money disputes. The filing of a judicial action to enforce the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

30. ENTIRE BINDING AGREEMENT: This written instrument, including the additional terms and conditions set forth on any documents hereto by the parties to be included, expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Seller. It can be changed only by a subsequently written instrument signed by both parties. Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein. The benefits and obligations shall inure to and bind the parties hereto and their heirs, assigns, successors, executors, or administrators. Whenever used, singular includes plural, and use of any gender shall include all.

31. SURVIVAL: If any provision herein contained which by its nature and effect is required to be observed, kept or performed after the closing, shall survive its closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed.

32. FACSIMILE AND OTHER ELECTRONIC MEANS: The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the Internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents to the handwriting of each party.

33. EXTENSION AGREEMENT: If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 30 consecutive days from the original closing date. Closing shall occur within this time extension, but no event shall closing occur later than the above extension date. Time is of the essence.

34. GOVERNING LAWS: These stipulations shall prevail printed matter hereon, (each and reference addendum if necessary)

Added: THIS PROPERTY IS VACANT LAND & IS NOT CONNECTED TO PUBLIC WATER OR SEWER. TAXES, HOWEVER BOTH ARE AVAILABLE. (ALL) (SEE) (MSP) 913206

BUYER BUYER SELLER SELLER HAVE READ THIS PAGE

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Form 1000-204
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THIS IS A LEGALLY BINDING AGREEMENT. BOTH BUYER AND SELLER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT, BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: [Signature] - Larius Woodson Date 8/3/06 Time 11:30 am

WITNESS: _____ Date _____ Time _____

BUYER: [Signature] - Maurissa Woodson Date 8/3/06 Time 11:30 am

WITNESS: _____ Date _____ Time _____

SELLER: [Signature] DLI Date 8/3/06 Time 1:15 PM

WITNESS: Melia C. Tate Date 8/3/06 Time 1:16 pm

SELLER: Sammie L. Lundy DLI Date 8/3/06 Time 1:15 PM

WITNESS: Melia C. Tate Date 8/3/06 Time 1:16 pm

LISTING AGENT AND COMPANY: Melia C. Tate Allen Tate & Son LLC

SELLING AGENT AND COMPANY: SHARON DAVIS DAVIS INTEGRITY REALTY

SELLING AGENT IS PRESENTING THIS OFFER AS ☒ BUYER'S AGENT OR ☐ SUBAGENT OF THE SELLER.

ESCROW AGENT ACKNOWLEDGMENT _____

This form is provided for use by the real estate industry. The use of this form is not intended to constitute an offer of insurance. REALTOR is the registered collective membership mark which may be used only by real estate brokers who are members of the NATIONAL ASSOCIATION OF REALTORS and who are licensed in the State of South Carolina. It is the responsibility of each user of the name "South Carolina Association of REALTORS" in connection with any written form without the prior written consent of the South Carolina Association of REALTORS. The foregoing form may not be edited, revised, or changed without the prior written consent of the South Carolina Association of REALTORS.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

SIXTEENTH JUDICIAL CIRCUIT

LARIUS G. WOODSON AND
MAURISSA WOODSON,

Plaintiffs,

v.

ANSWERS TO
INTERROGATORIES PROPOUNDED
BY DEFENDANTSDLI PROPERTIES, LLC;
ALLEN TATE CO., INC.;
MELIA C. FAILE; AND
ALAN L. CAUTHEN,

Defendants.

C.A. No. 06-CP-29-1354

Answers to First Set of Interrogatories propounded by Plaintiff pursuant to Rule 33, S.C.R.C.P., and served by mailing of July 2, 2007.

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Insofar as the form of the Request would require the Responding Party to give information known by, or as easily available to, the Requesting Party and its counsel as to the Responding Party, the request is objected to as burdensome and overbroad.

Insofar as the form of the question (or of later questions) would require the Plaintiff to give information as to, or copies of, documents which represent or embody confidential communications between Plaintiffs and their counsel, or which represent the work-product of Plaintiffs' counsel, the same is objected to.

References below to "the transaction" are intended to refer to all events referenced in, and comprising the events involving, the subject matter of this civil action.

Preserving the objection(s) above, the following are provided:



Alan Cauthen,
DLI Properties
Registered Agent Name: Morris J Pitzulo
4350 Cole Creek Dr
Fort Mill, SC 29715

No written or recorded statement, other than transaction documents signed by, or originating from, him, copies of which are referenced herein and attached.

The person listed above is expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

Agent(s) or employee(s) of:
Allen Tate Realtors
501 Springcrest Drive
Fort Mill, SC 29715
Office: (803) 547-1185

No written or recorded statement, other than transaction documents signed by, or originating from, him, copies of which are referenced herein and attached.

The person listed above is expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

Vickie Barfield-Robertson
Barfield-Robertson Realty
8913 Laurelwood Ln
Waxhaw, NC 28173-9357
Phone: (704) 843-4650

No written or recorded statement.

The person listed above is expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

Sharon Davis
Davis Integrity
8818 Redmayne St.
Weddington, NC 28173
704-608-0197

No written or recorded statement, other than any transaction documents signed by, or originating from, her, copies of which are referenced herein and attached.

The person listed above is expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

Agent(s) or employee(s) of:
Delote Builders
PO Box 25003
Charlotte, NC 28229
(704) 619-2974

No written or recorded statement, other than any transaction documents signed by, or originating from, the said agents or employees, copies of which are referenced herein and attached.

The person listed above is expected to testify to the events surrounding the Plaintiffs'

dealings relative to the construction of their residence, as well as to any statements made by the parties at those times.

Agent(s) or employee(s) of:

DLI Properties, LLC

c/o Thomas A. Givens

McKinney Givens Tucker & Rhea, LLC

PO Box 11784

Rock Hill, SC 29721

Office: (803) 328-1848

No written or recorded statement, other than any transaction documents signed by, or originating from, the said agents or employees, copies of which are referenced herein and attached.

The person(s) listed above is or are expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

Melia Faile

501 Springcrest Drive

Fort Mill, SC 29715

Office: (803) 547-1185

No written or recorded statement, other than any transaction documents signed by, or originating from, her, copies of which are referenced herein and attached.

The person listed above is expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

Gary R. McLeod

Suntrust Mortgage Inc. Mid-Atlantic

The Morrison Building

Charlotte, NC 28211

704-364-0214

No written or recorded statement, other than any transaction documents signed by, originating from, or received by, him or the agents or employees of SunTrust, copies of which are referenced herein and attached.

The person listed above is expected to testify to the events surrounding the Plaintiffs' dealings relative to the financing of the purchase and construction of their residence, as well as to any statements made by the parties at those times.

Agent(s) or employee(s) of:

Suntrust Mortgage Inc. Mid-Atlantic

The Morrison Building

Charlotte, NC 28211

704-364-0214

No written or recorded statement, other than any transaction documents signed by, originating from, or received by the agents or employees of SunTrust, copies of which are referenced herein and attached.

The person(s) listed above is or are expected to testify to the events surrounding the Plaintiffs' dealings relative to the financing of the purchase and construction of their residence, as well as to any statements made by the parties at those times.

Larius G. Woodson and Maurissa Woodson
c/o JM Foster
223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100

No written or recorded statement, other than transaction documents signed by, or originating from, them, or either of them, copies of which are referenced herein and attached.

The person(s) listed above is or are expected to testify to the events surrounding the transaction, as well as to any statements made by the parties at those times.

2. Set forth a list of photographs, sketches, or other prepared documents in possession that relate to the claims or defenses in the case.

Insofar as the form of the Request would require the Responding Party to give information known by, or as easily available to, the Requesting Party and its counsel as to the Responding Party, the request is objected to as burdensome and overbroad.

Insofar as the form of the question (or of later questions) would require the Plaintiffs to give information as to, or copies of, documents which represent or embody confidential communications between Plaintiffs and their counsel, or which represent the work-product of Plaintiffs' counsel, the same is objected to.

Preserving the objection(s) above, the following are provided:

- A. Residential Mortgage Application, Application Viewing from SunTrust Mortgage, Inc. for Larius G. Woodson, assigned to loan officer 8/7/2006, accessed 5/7/2007, 8 pages
- B. Conventional Loan Financing Agreement, Borrowers Larius G Woodson and Maurissa J Woodson, dated August 14, 2006, 12 pages
- C. SunTrust Privacy Policy, dated August 14, 2006, 6 pages
- D. SunTrust Amendment to Contract, Disbursement of Construction Loan Proceeds
- E. SunTrust General Information for Your Construction/Permanent Loan, 2 pages
- F. Hold Harmless Agreement SunTrust Mortgage, Inc., Loan No.: Lot 36, Point Carpenter Road
- G. Information About Construction-Permanent Loan Portfolio & EZ Options ARM with Option to Modify, Loan No.: dated August 14, 2006, 4 pages
- H. Truth-In-Lending ARM Disclosure, dated August 14, 2006, 3 pages
- I. SunTrust Mortgage, Inc. Custom Builder Information Form
- J. Good Faith Estimate for Larius G Woodson, Maurissa J Woodson, application dated 8/14/2006
- K. Federal Truth-In-Lending Disclosure Statement, Larius G Woodson and Maurissa J Woodson, dated 8/14/2006
- L. Uniform Residential Loan Application, Lot 36 Point Carpenter Road, Fort Mill, SC 29715, executed by Gary McLeod 8/14/06, 4 pages
- M. Verizon Wireless Invoice for Larius G Woodson, dated July 21, 2006, 8 pages
- N. Verizon Wireless Invoice for Larius G Woodson, dated August 21, 2006, 17 pages

- O. Delote Builders, es. .ate, dated 9/6/06, 5 pages
- P. Offer to Purchase and Contract- Vacant Lot/ Land, Buyer Larius Woodson, Maurissa Woodson Seller DLI Properties, Inc., dated July 31, 2006, 4 pages
- Q. Exclusive Right to Represent Buyer, Larius Woodson, Maurissa Woodson ("Buyer"), Davis Integrity [Firm Name], dated July 31, 2006, 3 pages
- R. Confirmation of Agency Relationship, Appointment & Compensation, to Melia Faile (Allen Tate) from Sharon Davis (Davis Integrity), dated July 31, 2006
- S. Fax of Agreement to Buy and Sell, from Melia to Larius, dated 8/1/06, 18:10, 6 pages
- T. Fax of Agreement to Buy and Sell, from Melia to Larius and Sharon, dated 8/1/06, 18:29, 6 pages
- U. Fax of Agreement to Buy and Sell, from Melia to Larius and Sharon, (Draft 2) dated 8/1/06, 6 pages
- V. Agreement To Buy and Sell Real Estate, Buyers Larius Woodson and Maurissa Woodson Sellers "DLI" Properties, signed by Woodsons only dated August 3, 2006, 6 pages
- W. Agreement To Buy and Sell Real Estate, Buyers Larius Woodson and Maurissa Woodson Sellers "DLI" Properties, signed by Woodsons and DLI, dated August 3, 2006, 2
- X. (apparently identical) copies, 10 pages total
- Y. Fax cover sheet from Melia to Sharon Davis, dated Aug. 3, 06 5:20 PM, 3 (apparently identical) copies
- Z. Notice of Lis Pendens, Larius Woodson and Maurissa Woodson vs. DLI Properties, LLC and Lonnie Willaby, dated and recorded in LP06 to PG 642-642 on August 10th, 2006
- AA. Fax cover sheet from Melia Faile to Sharon Davis, dated 8/16/06 10:05 PM, 2 (apparently identical) copies; no attachments
- AB. Merged Credit Report for Larius G Woodson and Maurissa J Woodson, dated 08/08/06, 17 pages

Included in the Deposition:

[The items listed below are those exhibits not already included above. None of the items below are supplied, having already been copied to the requesting party.]

- AC. Agreement to Buy and Sell Real Estate (Allen Tate) Buyers Larius Woodson and Maurissa Woodson Seller "DLI" Properties, dated August 1, 2006, 5 pages (Exhibit P-1)
- AD. Agreement to Buy and Sell Real Estate (Allen Tate) Buyers Larius Woodson and Maurissa Woodson Seller "DLI" Properties, dated August 3, 2006 (Exhibit P-3)
- AE. Letter and check from Bank of America to Maurissa J Woodson and Marius G Woodson, February 1, 2007, 2 pages (Exhibit P-5)
- AF. Agreement to Buy and Sell Real Estate, Buyer Alan L. Cauthen Seller DLI Properties, dated 8-9-06, 6 pages (Exhibit P-6)
- AG. Transcription of Recorded Audio CD by Dallas Reporting, 2 pages (Exhibit P-7)
- AH. TX Report of fax cover sheet from Melia to Larius and Sharon, dated 8/1/06 (Exhibit D-1)
- AI. Fax cover sheet from Melia to Vickie Barfield-Robertson Aug. 27, 2006 10:30 am, no attachments, with the following documents within Exhibit D-3:
 - AJ. Fax and letter from Melia Faile to Tommy Givens, Attorney, Aug. 20, 06 10:25 am,
 - AK. TX Report of fax of Agreement to Buy and Sell Real Estate (Allen Tate) Buyers Larius Woodson and Maurissa Woodson Seller "DLI" Properties, dated 8/1/06 18:29, 6 pages
 - AL. Notes dated August 3, 2006

- AM. Fax from M. Tate to Sharon Davis dated Aug. 3, 06 5:20 PM, 2 pages
- AN. Fax of Agreement to Buy and Sell Real Estate (Allen Tate) Buyers Larius Woodson and Maurissa Woodson Seller "DLI" Properties, dated August 3, 2006, faxed 8/3/06 11:29am, 5 pages
- AO. Notes dated August 4, 06, 2 pages
- AP. Fax of Agreement to Buy and Sell Real Estate (Allen Tate) Buyers Larius Woodson and Maurissa Woodson Seller "DLI" Properties, dated August 3, 2006, faxed 8/3/06 12:29 PM, 5 pages
- AQ. Copy of Personal check #1050 from Maurissa J. Woodson and Larius G. Woodson to Allen Tate for \$1,000.00, for "Point Carpenter Rd", dated 8/4/06

All of the above being Exhibit D-3.

3. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by you.

The Plaintiffs' Complaint sets out or references their claimed damages as to their causes of action.

If, as the Plaintiffs assert, they possess the superior equitable claim to the subject real property, they have lost the time and cost of this suit to enforce their claims. They have lost the use and enjoyment of the real property until final determination. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is quantified. The Plaintiffs acknowledge that against such damages, they must set off the interest and payments which they would have paid if their contract had been honored.

If The Plaintiffs have lost the real property, to the extent the Court may find that that Defendant CAUTHEN has a superior equitable claim, they have lost the real property and have incurred the costs of this civil action. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is determined.

As allowed under the Plaintiffs' causes of action, they have asserted UFTPA, which allows them triple their actual damages, plus their reasonable costs and attorneys' fees.

As allowed under the Plaintiffs' causes of action, they have asserted fraud and negligent misrepresentation, which causes allow them a claim to punitive damages, which amount can only be quantified by the trier of fact.

4. List the names and addresses of any expert witnesses whom you propose to use as witnesses at the trial of the case.

Insofar as the form of the Request would require the Responding Party to give information known by, or as easily available to, the Requesting Party and its counsel as to the Responding Party, the request is objected to as burdensome and overbroad.

Plaintiff reserves the right to use any of the persons listed in response to Interrogatory No. 1. above, who are familiar with the practices and procedures of real estate brokering, and who are knowledgeable as to the legal and ethical requirements for such work, to testify as to the

procedures, rules, regulations, requirements or mechanics of such business.

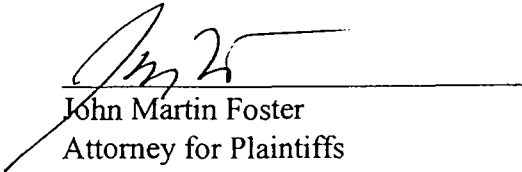
To the extent that the opinions of such person(s) are known to Plaintiff or its counsel at this time, the same are set out in the documents produced by such person(s), referenced in Interrogatory No. 2 and produced herewith.

Plaintiff also reserves the right to name and use third parties as experts as to the same issues above. Upon retention of such experts, their names and a summary of their opinions held will be supplied to opposing counsel.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Defendants of the important facts known to or observed by such witness, or provide a copy of any written or recorded statement taken from such witness.

Insofar as the form of the question (or of later questions) would require the responding party to give information as to, or copies of, documents which represent or embody confidential communications between that party and his, her or its counsel, or which represent the work-product of Plaintiffs' counsel, the same is objected to.

See response to Interrogatory No. 1 above.



John Martin Foster
Attorney for Plaintiffs

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, S. C. 29730

Post Office Box 106
Rock Hill, S. C. 29731-6106

803 324-8100
803 324-8109
jmfoster@comporium.net

August 17, 2007

Rock Hill, South Carolina

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STATE OF SOUTH CAROLINA]
COUNTY OF LANCASTER]

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

LARIUS G. WOODSON and]
MAURISSA WOODSON,]

Plaintiffs,]

v.]

DLI PROPERTIES, LLC,]
ALLEN TATE CO., INC.,]
MELIA C. FAILE, and]
ALAN L. CAUTHEN,]

Defendants.]

MEMORANDUM ON MOTION

FOR SUMMARY JUDGMENT

BY DEFENDANTS ALLEN TATE CO., INC.

and MELIA FAILE

C.A. No. 06-CP-29-1354

FACTUAL BACKGROUND:

This case involves a contract to purchase unimproved real property on Point Carpenter Road in Lancaster County by Plaintiffs LARIUS and MAURISSA WOODSON. DLI PROPERTIES, LLC (hereafter "DLI") was the owner of the property. MELIA FAILE (hereafter "FAILE"), a broker working for ALLEN TATE CO., INC., (hereafter "ALLEN TATE") represented DLI in its attempts to sell the property.

In August, 2006, DLI and the WOODSONS were in negotiations for the Plaintiffs to buy this property. On August 3, 2006, the WOODSONS had received a counter-offer from DLI acceptable to them. They raised a detail on putting a cap on the tap fee with FAILE.

On Friday, August 4, 2006, they received a recorded phone message from FAILE as set out in the transcript of the conversation in Exhibit 7 to her deposition, and verified by her. [DEPOSITION OF FAILE, p.16,6 - 17,23.] That message was:

Larry, its - - - hey, Melia. It's about five o'clock. Larry, that forty-three hundred is good.¹

The seller said that's fine. So, just initial off, kind of scratch through that line and put

¹ In her deposition, FAILE confirmed that this figure referred to the tap fee. [DEPOSITION OF FAILE, p.18,2 - 6.]

forty-three hundred dollars somewhere, initial and date, yours and Marissa's and just send it back over to me, fax it back over. And, I'm glad we've got it resolved and just the thousand dollar earnest money I don't know how you want to - - - if you want to drop that off by work or how we want to do that right now, but we'll touch base on that, too, okay. Thanks, Larry, it's 803-448-7099. I'm here at home now, though, 803-547-5984. Thanks, Larry.

On Saturday, August 5, 2006, the WOODSONS delivered the re-marked and signed contract to FAILE's office and left their check for the requested down payment of \$1,000.00. A copy of this check is attached and incorporated in the Complaint. This check was retained and deposited by ALLEN TATE.

Over the next few days, in reliance on FAILE's message, the WOODSONS, in addition to those actions set out above, contacted a soil engineer to look at the property [DEPOSITION OF LARIUS WOODSON, p.44,1 - 13]; went to SunTrust to apply for their construction loan, filed out an application and had a credit report pulled [DEPOSITION OF LARIUS WOODSON, p.44,13 - 45,17.] He reviewed architectural plans. [DEPOSITION OF LARIUS WOODSON, p.63,16 - 64,11.] He also dealt with a builder. [DEPOSITION OF FAILE, p.42,2 - 3.]

During the same period after August 5, 2006, DLI, through FAILE and ALLEN TATE received another inquiry and offer on the real property from the Defendant CAUTHEN. FAILE, ALLEN TATE, by its broker in charge, and DLI, by its member Mo Pitzulo, made a conscious decision to keep the WOODSONS uninformed of these actions. [DEPOSITION OF FAILE, p.28, 18 - 29,22.] Throughout his deposition, Mr. WOODSON testified that he was uninformed of these facts until contacted by FAILE on August 9, 2006.

On Wednesday, August 9th, 2006, DLI and CAUTHEN signed an agreement to sell and buy the property, respectively. After both those parties had signed, late on the afternoon of August 9th, FAILE called the WOODSONS and informed them that another contract had been entered into. [DEPOSITION OF FAILE, p.32,20 - 33,10.] By Mr. WOODSON's testimony, "she [FAILE] said, I know this is wrong, but I have to do what my seller told me to do." [DEPOSITION OF LARIUS WOODSON, p.75,5 - 14.]

As of the date of taking FAILE's deposition on April 17, 2007, the WOODSONS' down payment had not been proffered or returned to them. [DEPOSITION OF FAILE, p.46,10 - 20.]

PROCEDURAL BACKGROUND:

By their Complaint filed October 21, 2006, the WOODSONS allege fraud and negligent misrepresentation causes against DLI, ALLEN TATE and FAILE. The also allege Unfair Trade Practices and breach of good faith.

By their Answer, ALLEN TATE and FAILE plead, inter alia, the Statute of Frauds. [ANSWER of above, Third Defense, p.12.]

ARGUMENT: STATUTE OF FRAUDS

The Movants argue that the failure of DLI to execute the contract places it squarely within the grounds of protection afforded by the Statute of Frauds, S.C. Code Ann. § 32-3-10 (Law.Co-op.)

The Plaintiffs assert this matter is removed from the operation of the Statute. It has long been recognized in this State, as in most American jurisdictions, that the doctrine of equitable estoppel may be invoked to preclude a party to the contract from asserting the enforceability of a contract by reason of the fact that it is not in writing as required by the Statute of Frauds. *Smith v. Williams*, 141 S.C. 265, 139 S.E. 625 (1925); *Pollock v. Pegues*, 72 S.C. 47 (1905); *Atlantic Wholesale Co. v. Solondz*, 283 S.C. 36, 3210 S.E.2d 720 (Ct.App. 1984); 73 AM.JUR.2D *Statute of Frauds* § 471 (2002).

The elements of such an estoppel are listed by the Court of Appeals in *Powers Construction Co. v Salem Carpets*, 283 S.C. 302, 322 S.E.2d 30 (Ct.App. 1984) as:

- (1) the presence of a promise unambiguous in its terms;
- (2) reasonable reliance upon the promise by the party by whom the promise is made;
- (3) the reliance is expected and foreseeable by the party who makes the promise; and
- (4) the party to whom the promise is made must sustain injury in reliance on the promise.

[*Id.*, 283 S.C. at 307, FT.4.]

Of the above elements, the unambiguity of the promise, or representation, is obvious: the agreement existed in written form, agreed to by all parties, lacking only the signature of DLI, which had been promised by FAILE in her recorded conversation.

The WOODSONS relied on the representation of FAILE and such reliance was reasonable. There was no ambiguity in her wording and they were, deliberately, told nothing by any Defendant or agent to indicate there was not a binding contract in existence.

By the standards of a reasonable man, the reliance by the WOODSONS on FAILE's representation and silence was expected and foreseeable. They were not told to wait for final approval, nor was any reason given for them to do so. They were told that they had an agreement as to all terms, with only technical issues to clean up.

Finally, there can be no question that proof exists that the WOODSONS have suffered damage by reason of the Defendants' failure to honor their contract. The WOODSONS have acted, and expended time and monies in reliance. There is no real dispute on this point by the Movants.

ARGUMENT: FRAUD

It is well established that nondisclosure is fraudulent where there is a duty to speak. *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct.App. 1993). In this case, there was intentional nondisclosure of the existence of another offer and of DLI's intent to treat the agreement with the WOODSONS as contingent. [DEPOSITION OF FAILE, p.28, 18 - 29,22.]

When does a duty to speak exist? Our Supreme Court has developed the following formula:

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

[*Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, ____ (Ct.App. 1993), citing *Jacobsen v. Yaschik*, 249 S.C. 577, ____, 155 S.E.2d 601, 605 (1967).]

In the case at hand, the Plaintiffs WOODSON do not argue that the Defendants had a fiduciary relationship with them [situation (1) above], nor that the contract was "intrinsically fiduciary" or called for "perfect good faith and full disclosure" [situation (3) above.] They do argue that they had the right to expressly repose trust and confidence in ALLEN TATE and FAILE with regard to this transaction [situation (2) above]. Their basis for this is S.C. Code Ann. § 40-57-137 (Law.Co-op.), which sets out the duties of real estate brokerage companies, such as ALLEN TATE, and licensees, such as FAILE. It provides, in relevant part:

(O) (1) Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. . . .

(2) A licensee offering services to a customer shall:

. . .

(e) be fair and honest and provide accurate information in all dealings.

(4) A licensee offering services to a customer may not knowingly give a party in a real estate transaction false information; however, the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false and discloses to the party the source of the information. . . . No licensee is liable for failure to disclose a matter other than those matters enumerated in this subsection. Violations of this subsection do not create liability on the part of the real estate licensee absent a finding of fraud on the part of the licensee.

Counsel is unaware of any other type of transaction, or dealing between private individuals in South Carolina, and which is not traditionally designated as fiduciary, in which such requirements are placed upon the agents of one party. S.C. Code § 40-57-137(O) places those requirements on a real estate transaction where a brokerage company or licensee agent is used. The requirement applies not only to the company and broker, but upon the seller, by reason of its

use of a broker bound to those requirements. To use the language of Ardis and Jacobsen, *supra*, the statutory requirements of S.C. Code § 40-57-137(O) constitute "circumstances", state that the "nature of the [parties'] dealings", or define the parties' "position towards each other", such that a trust and confidence requiring disclosure, a duty to speak, is necessarily implied.

The duty to speak existed when the facts changed ; the failure to speak is proof of fraud.

ARGUMENT: LIABILITY OF AGENTS

The Movants have invoked the general rule that an agent is not liable for lawful acts done within the scope of his, her or its authority for or on behalf of a disclosed principal. *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957); 3 AM.JUR.2D *Agency* § 291 (2002). It is certainly true that DLI's status as principal was fully disclosed, and that, as recited above, there is evidence that the decision to keep the WOODSONS ignorant of the Defendants' actions was with DLI's full consent and knowledge. [DEPOSITION OF FAILE, p.28, 18 - 29,22.]

The Plaintiffs would make two arguments. First, in light of the requirements of S.C. Code § 40-57-137(O) (Law.Co-op.), quoted above, the Movants cannot demonstrate that there actions and inaction were lawful. By the evidence adduced, those matters were in direct conflict with the statutory directives of this State.

Second, and more generally, it has long been recognized that agency law does not insulate an agent from liability for his, her or its torts. *Lawlor v. Scheper*, *SUPRA*; 3 AM.JUR.2D *Agency* § 298 (2002). This is because an agent's tort liability is not based on the contractual relationship between the principal and agent, but on the common law obligation that every person must so act or use that which he, she or it controls as not to injure another. 3 AM.JUR.2D *Agency* § 298 (2002), *CITING*, *INTER ALIA*, *Hopkins v. Clemson Agr. College*, 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911).

The causes of action plead by the WOODSONS against ALLEN TATE and FAILE are for fraud and negligent misrepresentation, respectively. All elements of those causes have been plead and evidence for each element exists.

The Plaintiffs acknowledge that S.C. Code § 40-57-137(O)(4) (Law.Co-op.), quoted above, contains language exempting a licensee such as FAILE from liability "for failure to disclose a matter other than those matters enumerated in this subsection". Since that Subsection (O) of the

Statute under 2(e), also quoted above, contains the requirement that the licensee has the responsibility to "be fair and honest and provide accurate information in all dealings", Plaintiffs argue the exemption is a distinction without a difference.

ARGUMENT: UNFAIR TRADE PRACTICES

The Movants argue that the WOODSONS cannot establish any of the elements of an unfair or deceptive trade practice as defined under S.C. Code Ann. §§ 39-5-01 *ET SEQ.* (Law.Co-op.) Their argument, however, is based mainly on the lack of a public impact, as required under the early case of *Noack Enterprises v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986), one of the first and basic interpretation of the SC UFTPA Statutes.

Since *Noack*, our Supreme Court has clarified the requirement of public interest in *Daisy Outdoor Advertising v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996). There, the Court equated proof of impact on the public as synonymous with a potential for repetition. It also discussed what evidence of that element would consist of, stating:

Plaintiffs in prior cases generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence [*citation omitted*], or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts [*citations omitted*]. Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent. Conversely, it will sometimes be apparent that an action has no real potential for repetition. For example, unfair or deceptive acts in the sale of a business itself, or in sales outside the ordinary course of business, are not readily susceptible to repetition and, therefore, have no impact on the public interest. . . .

Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright-line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.

[*Id.*, 322 S.C. at 496-97, 473 S.E.2d at __; *underlining added for emphasis.*]

In this case, the Plaintiffs argue that the potential for repetition, and thus the impact on the public is shown by the very fact that such behavior has been the subject of legislative enactment.

S.C. Code Ann. § 40-57-137 (Law.Co-op.) The General Assembly obviously found that the dealings between a buyer of real estate, and a real estate brokerage company or licensee, had sufficient impact on the public, and that the forbidden practices had enough chance of repetition, to warrant legislative action. The Plaintiffs submit that finding is conclusive on the subject, and that the alleged actions and inaction of the Defendants ALLEN TATE and FAILE, as alleged, constitute unfair trade practice *PER SE*.

ARGUMENT: PROOF OF DAMAGES

The Movants allege a failure of proof based upon the Plaintiffs' failure to allege actual amounts of damage in their discovery. First, counsel is unaware that there is a requirement to set out more than general categories of damage in response to a Motion for Summary Judgment. Secondly, and in specific response to this allegation, counsel would quote the response given on this point to Movant's Interrogatory No. 3:

The Plaintiffs' Complaint sets out or references their claimed damages as to their causes of action.

If, as the Plaintiffs assert, they possess the superior equitable claim to the subject real property, they have lost the time and cost of this suit to enforce their claims. They have lost the use and enjoyment of the real property until final determination. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is quantified. The Plaintiffs acknowledge that against such damages, they must set off the interest and payments which they would have paid if their contract had been honored.

If The Plaintiffs have lost the real property, to the extent the Court may find that that Defendant CAUTHEN has a superior equitable claim, they have lost the real property and have incurred the costs of this civil action. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is determined.

As allowed under the Plaintiffs' causes of action, they have asserted UFTPA, which allows them triple their actual damages, plus their reasonable costs and attorneys' fees.

As allowed under the Plaintiffs' causes of action, they have asserted fraud and negligent misrepresentation, which causes allow them a claim to punitive damages, which amount can only be quantified by the trier of fact.

[*Id.*]

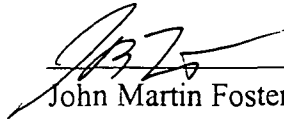
The WOODSONS have adequately presented evidence of their reliance on the Defendants' assurances and their losses in consequence. If the Movants require a loss to which a dollar figure can be attached, it will be remembered that they have admitted to holding the Plaintiffs' downpayment for the better part of a year before proffering it back. [DEPOSITION OF FAILE, p.46,10 - 20.] Even if they are denied the equitable remedy of specific performance, they are entitled to pre-judgment interest on their downpayment from August 21, 2006 [the date it was cashed] until the date the same was proffered. This is sufficient to respond to the Movants' point.

CONCLUSION

The evidence in this case, especially in light of the requirements of Summary Judgment that the same be construed in the light most favorable to the Plaintiffs, is more than sufficient to meet each of the Movants arguments based upon evidence.

As noted above, the majority of the Movants' points are legal. On those, the WOODSONS rely on the law and precedent set out above.

Respectfully submitted,



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July 6, 2008

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

LARIUS WOODSON and
MAURISSA WOODSON,

Plaintiffs,

vs.

DLI PROPERTIES, LLC, ALLEN
TATE CO., INC., MELIA C. FAILE,
and ALAN L. CAUTHEN,

Defendants.

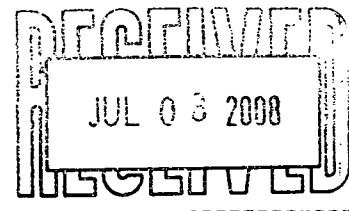
IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 04-CP-29-1354

**MEMORANDUM IN SUPPORT OF
DEFENDANTS ALLEN TATE CO., INC.
AND MELIA FAILE'S MOTION FOR
SUMMARY JUDGMENT**

NOW COME Defendants Allen Tate Co, Inc. ("Allen Tate") and Melia C. Faile ("Faile"), by and through undersigned counsel, and file this memorandum of law in support of their motion for summary judgment. As explained below, there are no material issues of fact, and the claims against Allen Tate and Faile should be dismissed as a matter of law.

FACTUAL BACKGROUND

In 2006, Defendant DLI Properties, LLC ("DLI"), engaged Allen Tate and Faile, a real estate agent with Allen Tate, to act as its agent on its behalf in the sale of certain real property owned by DLI, located in Lancaster, South Carolina and known as Lot 36, Phase 1, Lakeview Landing, as shown on a plat thereof recorded as Plat No. 15788, Office of the Clerk of Court for Lancaster County, South Carolina (the "Property"). Faile Dep., p. 10, Complaint p. 2. On August 1, 2006, pursuant to Plaintiff Larius Woodson's ("Woodson") request, Faile sent the Woodsons a draft of an Agreement to Buy and Sell Real Estate (the "Woodson Offer") in which Faile had filled out many of the blanks required for an offer by the Plaintiffs to purchase the Property for \$88,900.



The Woodsons changed several material terms on the Woodson Offer, initialed the changes, signed the Woodson Offer and sent it back to Faile on August 3, 2006 for consideration by DLI. Woodson Dep., p. 16. Faile then discussed the Woodson Offer with DLI. DLI made additional material changes to the Woodson Offer, initialed those changes, signed the Offer and Faile sent it back to the Plaintiffs for consideration and final approval of DLI's changes. Faile Dep., p. 13.

On August 4, 2006, Woodson called Faile to say that he had forgotten to include a \$4,300 limit on the cost of tapping into the existing water or sewer system. Faile Dep., pp. 13-14. Faile indicated to Woodson that she did not know if DLI would agree to that additional term, but she agreed to contact DLI to discuss the term. Faile Dep., p. 14. Faile and DLI discussed the additional \$4,300 limit on the tap fee and the DLI representative frustratingly told Faile that DLI would agree to the limitation. Id. Faile then contacted Woodson and left a voicemail message for Plaintiffs at 5:00 pm on Friday, August 4, 2006 stating that DLI would agree to the change and directing Woodson to make the change to the Woodson Offer, initial the change and deliver it to her. Her message to Woodson follows:

Larry, it's --- hey, Melia. It's about five o' clock. Larry, that forty-three hundred is good. The seller said that's fine. So, just initial off, kind of scratch through that line and put forty-three hundred dollars somewhere, initial and date, yours and Marissa's and just send it back over to me, fax it back over. And, I'm glad we've got it resolved and just the thousand dollar earnest money. . I don't know how you want to ---if you want to drop that off by work or how we want to do that right now, but we'll touch base on that, too, okay. Thanks, Larry, it's 803-448-7099. I'm here at home now, though, 803-547-5984. Thanks, Larry.

Faile Deposition, p. 19, (Exhibit 4, Transcript of Recorded Audio CD, p.2.) The Woodsons initialed the prior changes to the Woodson Offer made by DLI, wrote into the contract the proposal for the new \$4,300 limit on the tap fee and initialed that change as well. Faile Dep.,

p. 20. The Woodsons delivered the Woodson Offer with the \$4,300 tap fee limitation initialed by them to Faile's office along with a check for the \$1,000 earnest money deposit. Faile Dep., pp. 20-21. Faile then contacted DLI to obtain final signatures on the Woodson Offer. Faile Dep., pp. 22-23. One of the partners of DLI was out of town, so Faile planned to have DLI execute the Woodson Offer to approve the final change on Monday, August 7, 2006.

On Sunday, August 6, 2006, the Defendant Alan L. Cauthen ("Cauthen"), through his real estate agent Vickie Barfield-Robinson, contacted Faile about putting an offer on the Property. Id. Faile notified DLI about the inquiry from Cauthen on August 7, 2006. Faile Dep., p. 28). Cauthen visited the Property on Tuesday, August 8, 2006 with an expert to evaluate the suitability of the Property to support a well. Cauthen then delivered an offer ("Cauthen Offer") to purchase the Property for the same amount as the Woodson Offer, but with no contingencies and an earlier closing date. Faile Dep., pp. 24, 33. DLI signed and accepted the Cauthen Offer on Wednesday, August 9, 2006 at approximately 2:20 p.m. Faile Dep., p. 32. Once DLI signed and accepted the Cauthen Offer on August 9, 2006, Faile notified the Woodsons that afternoon that DLI did not accept the Woodson Offer and instead decided to sell the Property to Cauthen. Faile Dep., pp. 37-38.

On October 27, 2006, the Woodsons filed a complaint against DLI, Faile, Allen Tate and Cauthen for fraud, negligent misrepresentation and unfair trade practices. The claims against Allen Tate and Faile are in the alternative, to the extent that Allen Tate or Faile acted without the authority of DLI. The claims against Faile and Allen Tate are without merit, as the Woodsons have produced no evidence that Faile or Allen Tate acted outside of the scope of their authority. Additionally, when Woodson was asked at his deposition about his damages, he was unable to identify any evidence of his alleged damages. See Woodson Dep., pp. 44, 46, 64, 65. Therefore,

Allen Tate and Faile are entitled to judgment as a matter of law pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

ARGUMENT

Summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” S.C.R.Civ.P. 56(c). The party seeking summary judgment “has the initial burden of demonstrating the absence of a genuine issue of material fact.” George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001). However, once the moving party carries its initial burden, the opposing party must “do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. The party opposing summary judgment cannot simply rest on mere allegations or denials contained in pleadings.” Id. In this matter, there are no issues of material fact as to the claims against Allen Tate and Faile and the Woodsons claims must be dismissed.

I. The Woodsons have produced no evidence that Faile or Allen Tate acted outside of the scope of their authority from DLI.

The Woodson’s claims against Faile and Allen Tate are expressly alleged in the alternative and only to the extent that Faile or Allen Tate acted without the authority of DLI. In the almost two years that this case has been pending, the Woodsons have not produced any evidence from the record to support their allegations that Faile and Allen Tate acted outside of the scope of their authority from DLI. Further, DLI has made no claim against Faile or Allen Tate alleging that Faile or Allen Tate acted outside of the scope of their authority. On this

ground alone, Faile and Allen Tate are entitled to judgment as a matter of law and the Woodsons' claims should be dismissed.

II. Plaintiffs' Claims Against Allen Tate and Faile Fail Because the Woodson Offer Does Not Satisfy the Statute of Frauds' Requirement of a Writing for the Sale of Land.

The South Carolina Statute of Frauds states “(n)o action shall be brought whereby . . . (t)o charge any person upon any contract or sale of lands . . . (u)nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith. . . .”. S.C. Code Ann. § 32-3-10(4) (2007). The Woodson Offer does not satisfy the Statute of Frauds because DLI did not initial Woodson's new \$4,300 limit to the tap fee, which constitutes a material change to the prior offer. Therefore, the Woodsons cannot claim that the Woodson Offer is a valid contract for the sale of property, because the Woodson's final material change was not signed by DLI.

The Woodsons also cannot argue that any partial performance removed the oral agreement to include the tap fee limit in a contract for the sale of real property from the writing requirement of the Statute of Frauds. In order to remove an oral contract to convey real estate from the Statute of Frauds, “[a party] must show part performance of the oral contract.” Bradshaw v. Eurig, 297 S.C. 242, 245, 376 S.E.2d 264, 266 (1989) (citations omitted). “Performance may be proved by evidence of the following: (1) improvements to the real estate; (2) possession of the real estate; (3) payment of the purchase price.” Id. Of these three ways, improvements to the real estate and possession of the real estate are the strongest evidence of part performance and payment of the purchase price is not only the weakest evidence but will not suffice on its own to remove a contract from the Statute of Frauds. Id. The Woodsons did not perform any improvements to the property, did not take possession of the real estate and did not pay the purchase price to DLI.

Here, Plaintiffs claim that the Woodson Offer is a valid contract with DLI for the sale of land, despite the fact that the Woodson Offer does not satisfy the Statute of Frauds because DLI did not sign the Woodson Offer to approve the final material change. Further, Plaintiffs are unable to sidestep the Statute of Frauds requirements, as they are unable to provide any sufficient evidence of part performance. Because the Woodson Offer fails to satisfy the Statute of Frauds all of Plaintiffs' claims are without merit and this Court should grant summary judgment in favor of Allen Tate and Faile.

III. Plaintiffs Have Failed to Establish the Necessary Elements for Their Claims of Fraud and Negligent Misrepresentation against Faile and Allen Tate.

Even if the Woodsons demonstrate an issue of material fact as to whether Faile and Allen Tate acted outside of the scope of their authority from DLI, the Woodsons cannot establish the elements of a claim for fraud or negligent misrepresentation against Faile or Allen Tate.

To prevail on a claim of fraud, one must show the following:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury.

M.B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980) (citations omitted). To prevail on a claim for negligent misrepresentation, one must show:

(1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the defendant in making the statement; (3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff; (4) the defendant breached the duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation.

Ama Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (1992). “The failure to prove any element of fraud or misrepresentation is fatal to the claim.” Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 240 (2007).

In the present case, Plaintiffs have not and cannot establish that Faile and Allen Tate made fraudulent or negligent misrepresentations. At the time Faile told Woodson that DLI would agree to the \$4,300 limit on the tap fee, Faile believed that the statements were true based on her conversations with DLI. Faile Dep., p.15. Cauthen did not submit the revised Woodson Offer with the new limit on the tap fee to Faile until more than a day after Faile left the message for Woodson. Faile also did not act recklessly because DLI told her that they would agree to the limit on the tap fee. Faile Dep., p. 14. Because Plaintiffs cannot establish an essential element of both fraud and negligent misrepresentation, namely the promulgation of false information, Plaintiffs’ claims must necessarily fail.

IV. Plaintiffs’ Have Not Suffered Any Damages in This Matter Recoverable from Allen Tate or Faile.

In the Complaint, Plaintiffs ask the Court to award specific performance of the Woodson Offer, requiring DLI to covey the Property to the Woodsons. This request does not involve recovering anything from Allen Tate or Faile. Regardless, since the Woodson Offer does not satisfy the Statute of Frauds and does not constitute an enforceable contract for the sale of real property, the Woodsons are not entitled to specific performance.

Plaintiffs also seek to recover from Allen Tate and Faile their actual damages they claim to have suffered. When Woodson was asked in his deposition about his “out of pocket damages,” as opposed to his claim for the real property, he stated “just gas and time and the initial checks for the deposit.” Woodson Dep., p. 64. With respect to how much he spent on gas, he replied, “I have no clue” and with respect to how much time he spent, he replied,

“Honestly, I can’t tell you”. Woodson Dep., p. 65. Woodson was unable to identify any actual damages that he asked the court to award against Allen Tate and Faile. Therefore, this Court should grant summary judgment in favor of Allen Tate and Faile and the Woodsons’ claims should be dismissed.

V. Plaintiff Cannot Establish the Necessary Elements for Their Claim of Unfair Trade Practices

To recover in an private action under the South Carolina Unfair Trade Practices Act (UTPA), S.C. Code Ann. § 39-5-10 (2007), “the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts.” Wright v. Craft, 372 S.C. 1, 19, 640 S.E.2d 486, 498 (2006). Plaintiff cannot establish any of the elements of this cause of action, and summary judgment in favor of Allen Tate and Faile is proper.

In Noack Enter., Inc. v. Country Corners Interiors, Inc., 290 S.C. 475, 351 S.E.2d 347 (1986), the South Carolina Court of Appeals held, “An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act’s embrace”. Id. at 479, 351 S.E.2d at 349-350 (citations omitted). The Court in Noack Enter., Inc., cited a Georgia case, Zeeman v. Black, 273 S.E.2d 910 (Ga. App. 1980), which held that purchasers of a home from a private homeowner did not to have a cause of action under the Georgia Fair Business Practice Act “because the sale was an isolated act of an individual and not a transaction potentially harmful to the consumer public.” Noack Enter., Inc., 290 S.C. at 479, 351 S.E.2d at 349-350. “The act is not available to redress a private wrong where the public interest in unaffected.” Id.

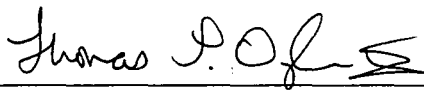
Because, as shown above, the Plaintiffs cannot prevail against Allen Tate or Faile on their claims of fraud and negligent misrepresentation, they likewise cannot prove the first element for a cause of action under the UTPA. Second, Plaintiffs cannot prove the second element, that the alleged unfair or deceptive act affected the public interest. If Plaintiffs could establish they have suffered any damages, which they cannot, the harm would be, at best, a private harm, not one capable of repetition and not a threat to the consuming public. As the Court said in Noack, “. . . the complaint nowhere alleges any facts demonstrating that these acts or practices adversely affect the public.” Noack Enter., Inc., 290 S.C. at 480, 351 S.E.2d at 350. Finally, as aforementioned, at his deposition, Woodson could not identify any loss resulting from the Defendants’ alleged unfair or deceptive acts. See Woodson Dep., pp. 64-65. Accordingly, Plaintiffs cannot establish a claim against Allen Tate and Faile under the UTPA and Allen Tate and Faile’s motion for summary judgment should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant Allen Tate and Faile’s motion for summary judgment and dismiss the Woodsons’ claims, with prejudice.

This 15th day of July, 2008.

POYNER & SPRUILL LLP

By: 
Thomas L. Ogburn, III
S.C. Bar Number 11761
301 South College Street, Suite 2300
Charlotte, NC 28202
Telephone: 704.342.5250
Facsimile: 704.342.5264
Email: togburn@poynerspruill.com
ATTORNEYS FOR DEFENDANT
ALLEN TATE CO., INC., MELIA C.
FAILE.

CERTIFICATE OF SERVICE

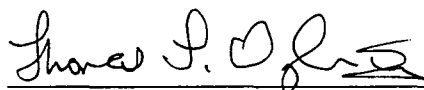
I hereby certify that I have this day served a copy of the foregoing *Memorandum of Law in Support of Motion for Summary Judgment* by facsimile and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses which are the last addresses known to me:

John Martin Foster
223 East Main Street, Suite 520
P.O. Box 106
Rock Hill, SC 29731-6109
ATTORNEYS FOR PLAINTIFF

Thomas A. Givens
McKinney, Givens, Tucker & Rhea
303 Saluda Street
Post Office Box 11784
Rock Hill, South Carolina 29731-1784
ATTORNEYS FOR DLI PROPERTIES

Phillip E. Wright
Phillip E. Wright, P.A.
408 N. Main Street
Lancaster, South Carolina 29720
ATTORNEY FOR ALAN CAUTHEN

This the 1st day of July, 2008.



Thomas L. Ogburn, III
Poyner & Spruill LLP
301 South College Street, Suite 2300
Charlotte, NC 28202
704.342.5250
ATTORNEYS FOR ALLEN TATE
CO., INC. AND MELIA FAÏLE

STATE OF SOUTH CAROLINA]
COUNTY OF LANCASTER]
LARIUS G. WOODSON and]
MAURISSA WOODSON,]
Plaintiffs,]
v.]
DLI PROPERTIES, LLC,]
ALLEN TATE CO., INC.,]
MELIA C. FAILE, and]
ALAN L. CAUTHEN,]
Defendants.]

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

NOTICE and MOTION:
TO ALTER OR AMEND JUDGMENT

Pursuant to:
RULE 59(a) and (e), S.C.R.C.P.

C.A. No. 06-CP-29-1354

To: Defendants ALLEN TATE CO., INC.
and MELIA C. FAILE and
Thomas I. Ogburn, III
Poyner & Spruill, LLP
Attorney for Defendants ALLEN TATE CO., INC. and MELIA C. FAILE
301 S. College St. Suite 2300
Charlotte, North Carolina 28202

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CLERK OF COURT
LANCASTER COUNTY, SC

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion herein, as follows:

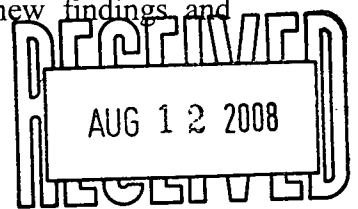
DATE AND TIME: To be set by the Clerk of the Court, or as soon thereafter as counsel may be heard.

PLACE: Court of Common Pleas
104 North Main Street
Lancaster, South Carolina 29720,
or at such other place as the Court may designate

MOTION FEE PAID

Pursuant to Rule 59, S.C.R.C.P., the Plaintiffs, by and through their attorney, move this Court:

For an Order reopening the Order of this Court dated July 13, 2008 and entered on July 17, 2008, a copy of which was received by counsel for the Movants on July 22, 2008, amending the findings of fact and conclusions of law or making new findings and conclusions, and directing the entry of a new Order; and



For such other and further relief as this Court may deem just and proper.

on the grounds that the Order of the Court is contrary to law and on the following bases:

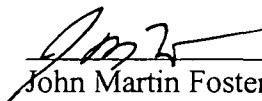
1. To the extent allowed in Rule 59 motions, the Movants reallege and re-urge the grounds, legal and factual, set out in their Complaint, pleadings and any memoranda submitted to this Court.
2. The Order of the Honorable Court determines that no issues of material fact are in dispute between the Plaintiff and the Defendants ALLEN TATE CO., INC. and MELIA FAILE, and on this bases grants summary judgment dismissing those Defendants.
3. On knowledge and information, the main issue in dispute between the parties is whether the dismissed Defendants have tort liability by reason of their deliberate failure, at the instruction of the Defendant DLI PROPERTIES, LLC, to inform the Plaintiffs that the Defendants' previous communication approving a contract was no longer treated by those Defendants as true or binding.
4. For all those reasons set out in its Memorandum submitted to the Court on July 7, 2008, the Plaintiffs argue that, as a licensed real estate brokerage company and licensee, ALLEN TATE CO., INC. and MELIA FAILE had a duty to the Plaintiffs as customers greater than those owed by simple agents to members of the public at large, and that that duty was violated by their deliberate failure to disclose.
5. The Movants also argue that their interpretation of the duties of a real estate brokerage company or a licensee are also those enforced by the professional standards to which South Carolina real estate brokers adhere.
6. The Movants would note the argument of Defendants' counsel, during the Motion hearing on July 7, 2008, that by raising the question of a broker duties as defined under S.C. Code § 40-57-137 (Law.Co-op.), the Plaintiffs were asserting a new cause of action. The Movants respond that their pleadings adequately fulfilled the requirements of Rule 8(a), S.C.R.C.P. in that they have set out all facts, including the status of the said Defendants,

needed to raise this issue. They argue that there is no requirement under our rules of pleading to allege all statutory bases that go to define the duty of those involved in a civil action.

On knowledge and information, counsel for the Movants are not required by Rule 11, S.C.R.C.P. to consult with opposing Counsel or attempt in good faith to resolve the matter contained in this Motion by reason of the dispositive nature thereof.

The basis for this Motion is the applicable law and rules of procedure, the above-cited Rules and Statutes, the records of these civil actions, and any Supporting Memorandum which the Movants may submit herein.

Respectfully submitted,



John Martin Foster
Attorney for Plaintiffs

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803 324-8100
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July 28, 2008

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

LARIUS G. WOODSON and
MAURISSA WOODSON,
Plaintiffs,

v.

DLI PROPERTIES, LLC,
ALLEN TATE CO., INC.,
MELIA C. FAILE, and
ALAN L. CAUTHEN,
Defendants.

CERTIFICATE OF SERVICE

C.A. No. 06-CP-29-1354

The undersigned, counsel for Plaintiffs LARIUS G. WOODSON and MAURISSA WOODSON, in the civil action above, hereby certifies that on July 28, 2008 he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

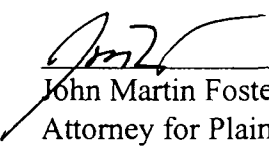
Notice and Motion to Alter or Amend Judgment Pursuant to Rule 59(a) and (e),
S.C.R.C.P.; and this Certificate of Service

the original of which Motion and Certificate were sent to be filed with the Clerk of the Court for the Court named above, by depositing the same with the United States Postal Service on the date above, with sufficient postage affixed and directed to the respective last known address(es) of those attorney(s) and/or persons set out below, as follows:

Thomas L. Ogburn, III
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ALLEN TATE CO. and MELIA FAILE

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July 28, 2008

Rock Hill, South Carolina

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CLERK OF COURT
LANCASTER COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

LARIUS G. WOODSON and
MAURISSA WOODSON,

Plaintiffs,

v.

DLI PROPERTIES, LLC,
ALLEN TATE CO., INC.,
MELIA C. FAILE, and
ALAN L. CAUTHEN,

Defendants.

IN THE COURT OF COMMON PLEAS

SIXTH JUDICIAL CIRCUIT

MEMORANDUM ON MOTION
TO ALTER OR AMEND JUDGMENT

Pursuant to:
RULE 59(a) and (e), S.C.R.C.P.

C.A. No. 06-CP-29-1354

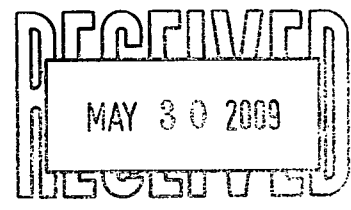
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FACTUAL BACKGROUND:

This case involves a contract to purchase unimproved real property on Point Carpenter Road in Lancaster County by Plaintiffs LARIUS and MAURISSA WOODSON. DLI PROPERTIES, LLC (hereafter "DLI") was the owner of the property. MELIA FAILE (hereafter "FAILE"), a broker working for ALLEN TATE CO., INC., (hereafter "ALLEN TATE") represented DLI in its attempts to sell the property.

In August, 2006, DLI and the WOODSONS were in negotiations for the Plaintiffs to buy this property. On August 3, 2006, the WOODSONS had received a counter-offer from DLI acceptable to them. They raised a detail on putting a cap on the tap fee with FAILE.

On Friday, August 4, 2006, they received a recorded phone message from FAILE as set out in the transcript of the conversation in Exhibit 7 to her deposition, and verified by her. [DEPOSITION OF FAILE, p.16,6 - 17,23.] That message was:



Larry, its - - - hey, Melia. It's about five o'clock. Larry, that forty-three hundred is good.¹ The seller said that's fine. So, just initial off, kind of scratch through that line and put forty-three hundred dollars somewhere, initial and date, yours and Marissa's and just send it back over to me, fax it back over. And, I'm glad we've got it resolved and just the thousand dollar earnest money I don't know how you want to - - - if you want to drop that off by work or how we want to do that right now, but we'll touch base on that, too, okay. Thanks, Larry, it's 803-448-7099. I'm here at home now, though, 803-547-5984. Thanks, Larry.

On Saturday, August 5, 2006, the WOODSONS delivered the re-marked and signed contract to FAILE's office and left their check for the requested down payment of \$1,000.00. A copy of this check is attached and incorporated in the Complaint. This check was retained and deposited by ALLEN TATE.

Over the next few days, in reliance on FAILE's message, the WOODSONS, in addition to those actions set out above, contacted a soil engineer to look at the property [DEPOSITION OF LARIUS WOODSON, p.44,1 - 13]; went to SunTrust to apply for their construction loan, filed out an application and had a credit report pulled [DEPOSITION OF LARIUS WOODSON, p.44,13 - 45,17.] He reviewed architectural plans. [DEPOSITION OF LARIUS WOODSON, p.63,16 - 64,11.] He also dealt with a builder. [DEPOSITION OF FAILE, p.42,2 - 3.]

During the same period after August 5, 2006, DLI, through FAILE and ALLEN TATE received another inquiry and offer on the real property from the Defendant CAUTHEN. FAILE, ALLEN TATE, by its broker in charge, and DLI, by its member Mo Pitzulo, made a conscious decision to keep the WOODSONS uninformed of these actions. [DEPOSITION OF FAILE, p.28, 18 - 29,22.] Throughout his deposition, Mr. WOODSON testified that he was uninformed of these facts until contacted by FAILE on August 9, 2006.

On Wednesday, August 9th, 2006, DLI and CAUTHEN signed an agreement to sell and buy the property, respectively. After both those parties had signed, late on the afternoon of August 9th, FAILE called the WOODSONS and informed them that another contract had been

¹ In her deposition, FAILE confirmed that this figure referred to the tap fee. [DEPOSITION OF FAILE, p.18,2 - 6.]

entered into. [DEPOSITION OF FAILE, p.32,20 - 33,10.] By Mr. WOODSON's testimony, "she [FAILE] said, I know this is wrong, but I have to do what my seller told me to do." [DEPOSITION OF LARIUS WOODSON, p.75,5 - 14.]

As of the date of taking FAILE's deposition on April 17, 2007, the WOODSONS' down payment had not been proffered or returned to them. [DEPOSITION OF FAILE, p.46,10 - 20.]

PROCEDURAL BACKGROUND:

By their Complaint filed October 21, 2006, the WOODSONS allege fraud and negligent misrepresentation causes against DLI, ALLEN TATE and FAILE. They also allege Unfair Trade Practices and breach of good faith.

By their Answer, ALLEN TATE and FAILE plead, inter alia, the Statute of Frauds. [ANSWER of above, Third Defense, p.12.]

Defendants ALLEN TATE CO., INC. and MELIA FAILE moved for Summary Judgment as to all causes of action.

After argument and the submission of Memoranda by counsel on July 7, 2008, this Court issued its Order dated July 13, 2008 and filed July 17, 2008, a copy of which was received by Movants on July 22, 2008. Their Motion to Alter or Amend was filed and served July 31, 2008.

ARGUMENT: GENERAL

To the extent allowed in Rule 59 motions, the Movants reallege and re-urge the grounds, legal and factual, set out in their Complaint, pleadings and any earlier memoranda submitted to this Court.

The Plaintiff-Movants understand the main issue in dispute in this civil action to be the effect of S.C. Code Ann. § 40-57-137(O) (Law.Co-op.) and the resulting duties of Defendants ALLEN TATE CO., INC. and MELIA FAILE. By this Memorandum, they restate and expand their earlier arguments relevant to that point. It is not their intention thereby to abandon the other arguments set out in their earlier memorandum.

ARGUMENT: FRAUD

Nondisclosure is fraudulent where there is a duty to speak. *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct.App. 1993). In this case, there was intentional nondisclosure of the existence of another offer and of DLI's intent to treat the agreement with the WOODSONS as contingent. [DEPOSITION OF FAILE, p.28, 18 - 29,22.]

Our Supreme Court has developed the following formula to delineate the duty to speak:

The duty to disclose may be reduced to three distinct classes:

(1) where it arises from a preexisting definite fiduciary relation between the parties;

(2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied;

(3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

[*Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, ____ (Ct.App. 1993), citing *Jacobsen v. Yaschik*, 249 S.C. 577, ____, 155 S.E.2d 601, 605 (1967); *paragraphing added*.]

In the case at hand, the Plaintiffs WOODSON maintain that they had the right to expressly repose trust and confidence in ALLEN TATE and FAILE with regard to this transaction [(2) under *Ardis* above]. They rely on S.C. Code Ann. § 40-57-137 (Law.Co-op.), which sets out the duties of real estate brokerage companies such as ALLEN TATE, and licensees such as FAILE. That statute provides, in relevant part:

(O) (1) Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. . . .

(2) A licensee offering services to a customer shall:

...

(e) be fair and honest and provide accurate information in all dealings.

(4) A licensee offering services to a customer may not knowingly give a party in a real estate transaction false information; however, the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false and discloses to the party the source of the information. . . . No licensee is liable for failure to disclose a matter other than those matters enumerated in this subsection. Violations of this subsection do not create liability on the part of the real estate licensee absent a finding of fraud on the part of the licensee.

Movants are not aware of any other type of transaction, or dealings between private individuals in South Carolina, where such dealings are not traditionally designated as fiduciary, in which such requirements are placed upon the agents of one party. S.C. Code § 40-57-137(O) places those requirements on a real estate transaction where a brokerage company or licensee agent is used. The requirement applies not only to the company and broker, but upon the seller, by reason of its use of a broker bound to those requirements. To use the language of *Ardis* and *Jacobsen*, *supra*, the statutory requirements of S.C. Code § 40-57-137(O) constitute "circumstances", state the "nature of the [parties'] dealings", or define the parties' "position towards each other", such that trust and confidence requiring disclosure, and a duty to speak, are necessarily implied.

The position argued above is also that recognized by the commentators of AMERICAN JURISPRUDENCE 2D:

A party who makes a statement which at the time is true, but who subsequently acquires new information that makes it untrue or misleading, must disclose such information to anyone whom the party knows to be acting on the basis of the original statement or be guilty of fraud. [Ftn.7, citing *Peddinghaus v. Peddinghaus*, 314 Ill.App.3d 900, 248 Ill.Dec. 122, 733 N.E.2d 797 (1st Dist. 2000), *appeal denied*, 191 Ill.2d 536, 250 Ill.Dec. 459, 738 N.E.2d 928 (2000); *Bradford v. Vento*, 997 S.W.2d 713 (Tex.App. Corpus Christi 1999), *rev'd on other grounds*, 48 S.W.3d 749 (Tex. 2001); RESTATEMENT SECOND, TORTS §551(b), *comment f*.

The rule as stated by the commentators of AMERICAN JURISPRUDENCE 2D and of the SECOND RESTATEMENT on Torts is directly on point. ALLEN TATE and FAILE made representations;

new information made those representations untrue or misleading. Their duty to speak existed when the facts changed; their failure to speak is proof of fraud.

ARGUMENT: LIABILITY OF AGENTS

ALLEN TATE and FAILE invoke the general rule that an agent is not liable for lawful acts done within the scope of his, her or its authority for or on behalf of a disclosed principal. *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957); 3 AM.JUR.2D *Agency* § 291 (2002). It is certainly true that DLI's status as principal was fully disclosed, and that, as recited above. The evidence shows that the decision to keep them ignorant of the Defendants' actions was with DLI's full consent and knowledge. [DEPOSITION OF FAILE, p.28, 18 - 29,22.] It is the Plaintiffs understanding that this fact is not disputed.

The Plaintiffs respond with two arguments. First, in the light of S.C. Code § 40-57-137(O) (Law.Co-op.), quoted above, ALLEN TATE and FAILE cannot demonstrate that their actions and inaction were lawful. By the evidence cited and under the reasoning set out above, their actions were in direct conflict with the statutes of this State.

Second, and more generally, it has long been recognized that agency law does not insulate an agent from liability for his, her or its torts. *Lawlor v. Scheper*, *SUPRA*; 3 AM.JUR.2D *Agency* § 298 (2002). This is because an agent's tort liability is not based on the contractual relationship between the principal and agent, but on the common law obligation that every person must so act or use that which he, she or it controls as not to injure another. 3 AM.JUR.2D *Agency* § 298 (2002), *CITING, INTER ALIA, Hopkins v. Clemson Agr. College*, 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911).

The causes of action plead by the WOODSONS against ALLEN TATE and FAILE are for fraud and negligent misrepresentation, respectively. All elements of those causes have been plead and evidence for each element exists.

The Plaintiffs acknowledge the language of S.C. Code § 40-57-137(O)(4) (Law.Co-op.), quoted above, exempting a licensee such as FAILE from liability "for failure to disclose a matter other than those matters enumerated in this subsection". Since, however, that Subsection (O) of the Statute, under 2(e), also quoted above, contains the requirement that the licensee has the

responsibility to "be fair and honest and provide accurate information in all dealings", Plaintiffs argue the exemption is a distinction without a difference.

ARGUMENT: UNFAIR TRADE PRACTICES

ALLEN TATE and FAILE argue that the WOODSONS cannot establish any of the elements of an unfair or deceptive trade practice as defined under S.C. Code Ann. §§ 39-5-01 *ET SEQ.* (Law.Co-op.) Their argument, however, is based mainly on the lack of a public impact, as required under the early case of *Noack Enterprises v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986), one of the first and basic interpretation of the SC UFTPA Statutes.

Since *Noack*, our Supreme Court has clarified the requirement of public interest in *Daisy Outdoor Advertising v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996). There, the Court equated proof of impact on the public as synonymous with a potential for repetition. It also discussed what evidence of that element would consist of, stating:

Plaintiffs in prior cases generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence [*citation omitted*], or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts [*citations omitted*]. Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent. Conversely, it will sometimes be apparent that an action has no real potential for repetition. For example, unfair or deceptive acts in the sale of a business itself, or in sales outside the ordinary course of business, are not readily susceptible to repetition and, therefore, have no impact on the public interest. . . .

Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright-line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.

[*Id.*, 322 S.C. at 496-97, 473 S.E.2d at ___; *underlining added for emphasis.*]

In this case, the Plaintiffs argue that the potential for repetition, and thus the impact on the public is shown by the very fact that such behavior has been the subject of legislative enactment. S.C. Code Ann. § 40-57-137 (Law.Co-op.) The General Assembly found that the

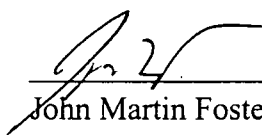
dealings between a buyer of real estate, and a real estate brokerage company or licensee, had sufficient impact on the public, and that the forbidden practices had enough chance of repetition, to warrant legislative action. The Plaintiffs submit that statutory finding is conclusive on the subject, and that the alleged actions and inaction of the Defendants ALLEN TATE and FAILE, as alleged, constitute unfair trade practice *PER SE*.

CONCLUSION

The evidence in this case, especially in light of the requirements of Summary Judgment that the same be construed in the light most favorable to the Plaintiffs, is more than sufficient to meet each of the moving Defendants' arguments based upon evidence.

As noted above, the majority of the moving Defendants' points are legal. On those, the WOODSONS reiterate their arguments from the law and precedent set out above.

Respectfully submitted,



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May 27, 2009

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

LARIUS G. WOODSON and
MAURISSA WOODSON,

Plaintiffs,

v.

DLI PROPERTIES, LLC
ALLEN TATE CO., INC.,
MELIA C. FAILE, and
ALAN L. CAUTHEN,

Defendants.

CERTIFICATE OF SERVICE

C.A. No. 06-CP-291354

CLERK OF COURT
LANCASTER COUNTY, SC

2009 MAY 29 A 9:06

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OFFICE OF CLERK
OF COURT

The undersigned, counsel for Plaintiff in the civil action above, hereby certifies that on May 27, 2009 he served copies of the following pleadings, documents or papers in the above-captioned and numbered civil action:

Memorandum on Motion to Alter or Amend Judgment dated May 27, 2009; and
this Certificate of Service

by depositing the same with the United States Postal Service on the date above, with sufficient postage affixed and directed to the respective last known address(es) of those attorney(s) and/or persons set out below, or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein:

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May 27, 2009
Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

LARIUS WOODSON and
MAURISSA WOODSON,

Plaintiffs,

vs.

DLI PROPERTIES, LLC, ALLEN
TATE CO., INC., MELIA C. FAILE,
and ALAN L. CAUTHEN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 06-CP-29-1354

**DEFENDANTS ALLEN TATE CO., INC.
AND MELIA C. FAILE'S MEMORANDUM
OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION TO ALTER OR
AMEND JUDGMENT**

NOW COME Defendants Allen Tate Co., Inc. ("Allen Tate") and Melia C. Faile ("Faile"), by and through undersigned counsel, and file this memorandum of law in opposition to Plaintiffs' Motion to Alter or Amend Judgment (the "Motion"), which was originally served on July 28, 2008. As explained below, this Court has already correctly determined that Allen Tate and Faile are entitled to summary judgment on Plaintiffs' claims and there is no reason that the Order Granting Summary Judgment in favor of Allen Tate and Faile entered on July 17, 2008 should be altered or amended.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Defendant DLI Properties, LLC ("DLI"), engaged Allen Tate and Faile, a real estate agent with Allen Tate, to act as its agent in the sale of certain real property located in Lancaster, South Carolina (the "Property"). Faile Dep., p. 10. On August 1, 2006, pursuant to Plaintiff Larius Woodson's ("Woodson") request, Faile sent the Woodsons a draft of an Agreement to Buy and Sell Real Estate (the "Woodson Offer") in which Faile had filled out many of the blanks required for an offer by the Woodsons to purchase the Property for \$88,900.

Although Woodson was a licensed real estate broker in North Carolina, he and his wife used Sharon Davis as his real estate broker for this transaction in South Carolina. Woodson Dep. p 50, 53-54. Since Sharon Davis was out of town for parts of the relevant time period, some of the communications regarding this transaction took place directly between Faile and Woodson. Faile Dep. p. 39.

The Woodsons changed several material terms on the Woodson Offer, initialed the changes, signed the Woodson Offer and sent it back to Faile on August 3, 2006 for consideration by DLI. Woodson Dep., p. 16. Faile then discussed the Woodson Offer with DLI. DLI made additional material changes to the Woodson Offer, initialed those changes, signed it and Faile sent it back to the Woodsons for consideration and final approval of DLI's changes. Faile Dep., p. 13.

On August 4, 2006, Woodson called Faile to say that he had forgotten to include a \$4,300 limit on the cost of tapping into the existing water or sewer system. Faile Dep., pp. 13-14. Faile indicated to Woodson that she did not know if DLI would agree to that additional term, but she agreed to contact DLI to discuss the term. Faile Dep., p. 14. Faile and DLI discussed the additional \$4,300 limit on the tap fee and the DLI representative frustratingly told Faile that DLI would agree to the limitation. Id. Faile then contacted Woodson and left a voicemail message for the Woodsons at 5:00 pm on Friday, August 4, 2006 stating that DLI would agree to the change and directing Woodson to make the change to the Woodson Offer, initial the change and deliver it to her. Faile Dep., p. 19.

The Woodsons initialed the prior changes to the Woodson Offer made by DLI, wrote into the contract the proposal for the new \$4,300 limit on the tap fee and initialed that change as well. Faile Dep., p. 20. The Woodsons delivered the Woodson Offer with the \$4,300 tap fee limitation

initialed by them to Faile's office along with a check for the \$1,000 earnest money deposit. Faile Dep., pp. 20-21. Faile then contacted DLI to obtain final signatures on the Woodson Offer. Faile Dep., pp. 22-23. One of the partners of DLI was out of town, so Faile planned to have DLI execute the Woodson Offer to approve the final change on Monday, August 7, 2006.

On Sunday, August 6, 2006, Defendant Alan L. Cauthen ("Cauthen"), through his real estate agent Vickie Barfield-Robinson, contacted Faile about making an offer on the Property. Faile Dep. pp. 23-24. Before Cauthen submitted a formal written offer, he wanted to investigate the possibility of installing a septic system on the property. Id. Faile notified DLI about the inquiry from Cauthen on Monday, August 7, 2006. Faile Dep., p. 28. On the same day, Faile asked DLI if it wanted her to tell the Woodsons about Cauthen's interest in the Property and potential offer to purchase the Property. DLI instructed Faile not to tell the Woodsons about Cauthen's interest in the Property. Faile Dep., pp. 29, 30.

Cauthen visited the Property on Tuesday, August 8, 2006 with an expert to evaluate the suitability of the Property to support a septic system. Cauthen then delivered a formal written offer ("Cauthen Offer") to purchase the Property on August 9, 2006. Faile Dep. pp. 26, 31. The Cauthen Offer was for the same amount as the Woodson Offer, but contained no contingencies and provided for an earlier closing date. Faile Dep., pp. 24, 33. DLI signed and accepted the Cauthen Offer on Wednesday, August 9, 2006 at approximately 2:20 p.m. Faile Dep., p. 32. Once DLI signed and accepted the Cauthen Offer, Faile notified the Woodsons' broker, Sharon Davis, that afternoon that DLI did not accept the Woodson Offer and instead decided to sell the Property to Cauthen. Faile Dep., pp. 37-38.

On October 27, 2006, the Woodsons filed a complaint against DLI, Faile, Allen Tate and Cauthen for fraud, negligent misrepresentation and unfair trade practices. The claims against

Allen Tate and Faile were in the alternative, to the extent that Allen Tate or Faile acted without the authority of DLI. The claims against Faile and Allen Tate were without merit, as the Woodsons produced no evidence that Faile or Allen Tate acted outside of the scope of their authority. Additionally, when Woodson was asked at his deposition about his damages, he was unable to identify any evidence of his alleged damages. See Woodson Dep., pp. 44, 46, 64, 65.

Allen Tate and Faile filed a motion for summary judgment on March 28, 2008. At the hearing on July 7, 2008, counsel for the Woodsons conceded that neither Allen Tate, nor Faile acted outside of the scope of their authority from DLI. Instead, counsel for the Woodsons argued that Faile had a duty to notify the Woodsons when DLI received notice of Cauthen's interest in the Property. However, when Faile had asked DLI about disclosing the Cauthen's interest in the Property, DLI had directed her not to tell the Woodsons about Cauthen's interest. Faile Dep., pp. 29, 30. Essentially, counsel for the Woodsons argued in opposition to the motion for summary judgment that Faile, the agent for DLI, had a legal obligation to the Woodsons to ignore instructions from DLI and tell the Woodsons about Cauthen's interest in the property. This argument was based, primarily, on S.C. Code § 40-57-137.

Having reviewed the pleadings and heard the arguments of counsel, this Court entered an Order Granting Summary Judgment in favor of Allen Tate and Faile on July 17, 2008 that dismissed the Woodsons' claims against Allen Tate and Faile with prejudice. On July 28, 2008, the Woodsons filed a Motion to Alter or Amend Judgment pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, seeking to amend the Order Granting Summary Judgment entered on July 17, 2008.

ARGUMENT

The purpose of Rule 59(e) is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Pye v. Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510

(2006). Allen Tate and Faile's original motion for summary judgment was pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, which states that a judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c). In their motion to alter or amend judgment, the Woodsons do not contend that the Court has overlooked an issue of material fact. Instead, they allege that Faile owed the Woodsons a legal obligation to inform the Woodsons about Cauthen's interest in the property pursuant to S.C. Code § 40-57-137.¹ This issue was previously raised during the prior hearing on July 7, 2008. Nothing contained in the Woodsons' motion to alter or amend the judgment should change the outcome of the previous hearing.

I. S.C. Code § 40-57-137 Does Not Create Any Duties or Obligations from Allen Tate or Faile to the Woodsons.

In their brief opposing the motion for summary judgment and in the present Motion, the Woodsons claim that S.C. Code § 40-57-137 creates a legal obligation for Faile to notify them about Cauthen's interest in the property, despite the fact that Faile represented DLI in the transaction. The primary purpose of S.C. Code § 40-57-137 is to define the types of relationships that may be established between a real estate licensee and his or her client.

The statute begins by defining the four types of formal agency relationships: 1) seller agency; 2) buyer agency; 3) disclosed dual agency or 4) subagency. S.C. Code § 40-57-137(a). The statute creates formal legal obligations between a real estate licensee and their clients who have executed a formal agency agreement, including, but not limited to, the obligations to: 1)

¹ To the extent that the Woodsons argue in support of their Motion any of the other issues previously raised during the summary judgment hearing, Faile and Allen Tate refer the Court to their previously-filed Memorandum in Support of Defendants Allen Tate Co., Inc. and Melia Faile's Motion for Summary Judgment.

present in a timely manner all offers and counteroffers, 2) disclose all relevant facts concerning the transaction known to the licensee, 3) advise the client to obtain expert advice on matters beyond the expertise of the licensee, 4) comply with laws, rules and regulations, and 5) preserve confidential information. S.C. Code §§ 40-57-137(c) and 40-57-137(h).

The statute goes on to define a prospective seller or purchaser of *unlisted* real property who chooses not to establish a formal agency relationships with a real estate licensee, but who still uses the services of a licensee, as a “customer” of the real estate licensee. S.C. Code § 40-57-137(O)(1). A licensee has fewer legal obligations to a customer than they have to a client who has entered into a formal agency relationship with the licensee. For example, a real estate licensee does not have a legal obligation to advise the seller to obtain expert advice on matters beyond the expertise of the licensee; disclose all relevant facts concerning the transaction known to the licensee; or even preserve confidential information provided by the customer.

As shown below, the Woodsons were not customers of Faile and Allen Tate because the Woodsons were represented by Sharon Davis in this transaction. However, even if the Woodsons were considered customers of Faile and Allen Tate, they fully satisfied the obligations to customers set out in the statute.

A. The Woodsons could not be customers of Faile and Allen Tate because they were represented by Sharon Davis in this transaction.

The Woodsons’ claim that Faile and Allen Tate had an obligation to disclose Cauthen’s interest in the Property to them because the Woodsons were “customers” of Faile and Allen Tate. However, the Woodsons had a formal agency relationship with Sharon Davis, a licensee, for this transaction. Woodson Dep. p 50, 53-54. Faile and Allen Tate were already parties to a formal agency agreement with DLI to sell the Property and the property was listed. Although the Woodsons communicated directly with Faile during the times Sharon Davis was out of town, the

Woodsons had their own licensee serving as their agent in this transaction. Because the Woodsons were in a buyers' agency relationship with Sharon Davis and Davis Integrity Realty, Inc., pursuant to S.C. Code Ann. § 40-57-137(h), the Woodsons were not and could not have been "customers" of Allen Tate and Faile under S.C. Code Ann. § 40-57-137(O). Sharon Davis was already providing the Woodsons services as a buyers' agent. Faile and Allen Tate were providing services to DLI as a sellers' agent. One simply cannot simultaneously be in a buyers' agency relationship and also be the "customer" of the sellers' agent. Therefore, the Woodsons were not "customers" of Faile and Allen Tate and the Order Granting Summary Judgment in favor of Faile and Allen Tate should not be altered or amended.

B. Even if the Woodsons were customers of Faile and Allen Tate, Faile and Allen Tate did not provide false information to the Woodsons.

Even if Faile and Allen Tate could somehow be in a sellers' agency relationship with DLI, while simultaneously advising the Woodsons as customers, Faile would only have an obligation to provide accurate information to the Woodsons and to not provide false information. The statute says that a licensee that provides services to a customer must not "*knowingly* give a party in a real estate transaction false information." S.C. Code Ann. § 40-57-137(O)(4) (emphasis added). In fact, the statute also provides that "*the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false* and discloses to the party the source of the information." *Id.* At no time did Faile provide false information to Woodsons. When Faile left the message on Woodson's voice mail on Friday, August 4, 2006 saying that DLI would agree to the addition of the tap fee limit, she had not been contacted by Cauthen's real estate agent and was not aware of Cauthen's interest in the property. Cauthen did not even present a formal written offer to DLI until August 9, 2009. Faile notified Sharon Davis that DLI had accepted the Cauthen Offer the

same day DLI received it. At all times in her dealings with the Woodsons, Faile provided accurate, truthful information. Therefore, the Woodsons' claims that Faile and Allen Tate somehow violated S.C. Code § 40-57-137 are without merit and the Order Granting Summary Judgment should not be altered or amended.

- C. Even if the Woodsons were customers of Faile and Allen Tate, Faile and Allen Tate were not required by S.C. Code § 40-57-137 to disclose Cauthen's interest in the Property.

Finally, even if the Woodsons were considered customers of Faile and Allen Tate, S.C. Code Ann. § 40-57-137(O)(4) limits the information that Faile and Allen Tate are required to provide to the Woodsons. The statute specifically states that a licensee is not liable for failure to disclose a matter not included in S.C. Code § 40-57-137(O)(4). That subsection does not require a licensee to tell a customer about competing interest in the property or even a competing offer. Therefore, Allen Tate and Faile cannot be liable for failing to disclose Cauthen's interest in the property to the Woodsons.

II. Faile and Allen Tate Properly Honored Their Legal Obligations to DLI.

The Woodsons' reliance on S.C. Code Ann. § 40-57-137 to create a legal obligation for Faile to inform the Woodsons of Cauthen's interest in the Property, in violation of her explicit instructions from DLI, is entirely misplaced. As agents of DLI, the statute required Faile and Allen Tate to present all offers on the Property to DLI and to disclose to DLI all relevant facts concerning the transaction. Faile and Allen Tate did so when they advised DLI of Cauthen's interest in the property and later conveyed Cauthen's written offer. The statute contains no obligation for Faile or Allen Tate to disclose Cauthen's interest in the property to the Woodsons, who were represented by their own independent agent. Faile and Allen Tate acted in accordance with the instructions and directions given by DLI. No principal-agent or licensee-customer

relationship was ever established between Faile and Allen Tate and the Woodsons. Therefore the Woodson's claims against Faile and Allen Tate are baseless.

CONCLUSION

This Court properly granted summary judgment in favor of Faile and Allen Tate in the Order Granting Summary Judgment entered on July 17, 2008. Plaintiff has demonstrated no reason why the Court's order should be altered or amended.

This 27th day of May, 2009.

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CERTIFICATE OF SERVICE

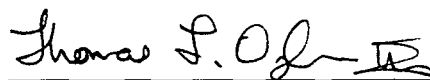
I hereby certify that I have this day served a copy of the foregoing *Memorandum of Law in Opposition to Plaintiffs' Motion to Alter or Amend Judgment* by electronic mail and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses which are the last addresses known to me:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Master in Equity

Case No. 06-CP-29-1354

Larius G. Woodson and Maurissa Woodson..... Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile
and Alan L. Cauthen,

of whom;

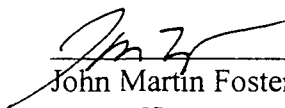
Allen Tate Co., and

Melia C. Faile are..... Respondents.

AMENDED NOTICE OF APPEAL

Larius G. Woodson and Maurissa Woodson appeal the Order of the Honorable Brooks P. Goldsmith Granting Summary Judgment dated July 13, 2008 and filed July 17, 2008, and the Order Denying Plaintiffs' Motion to Alter or Amend Judgment dated June 11, 2009 and filed June 12, 2009. Appellant received written notice of entry of the second Order above on June 22, 2009.

August 17, 2009


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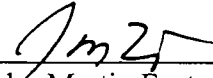
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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April 15, 2010

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354

Larius G. Woodson and Maurissa Woodson Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan L. Cauthen,

of whom:

Allen Tate Co., and
Melia C. Faile are the Respondents.

PROOF OF SERVICE

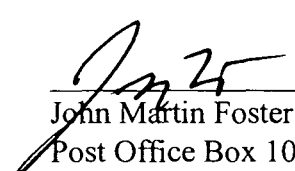
I certify that I have served three (3) copies of the Record on Appeal on the following counsel of record:

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by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

April 16, 2010


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354

Larius G. Woodson and Maurissa Woodson Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan L. Cauthen,

of whom:

Allen Tate Co., and
Melia C. Faile are the Respondents.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. THE APPELLANTS' REASONABLE RELIANCE ON THE STATEMENTS AND NONDISCLOSURE OF RESPONDENTS, AND THEIR CONSEQUENT EXPENDITURE OF TIME AND MONEY, PLACE THIS DISPUTE OUTSIDE THE STATUTE OF FRAUDS.
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4. THE RESPONDENTS BEAR AN INDIVIDUAL LIABILITY FOR THEIR ACTIONS AND FOR THEIR FAILURE TO SPEAK.
5. THE RESPONDENTS' ACTIONS CONSTITUTE UNFAIR AND DECEPTIVE TRADE PRACTICES.
6. THE APPELLANTS HAVE ADEQUATELY PLEAD THEIR DAMAGES.

STATEMENT OF THE CASE

This Appeal involves a contract to purchase unimproved real property in Lancaster County by Appellants LARIUS and MAURISSA WOODSON. DLI PROPERTIES, LLC (hereafter "DLI") was the owner of the property. MELIA FAILE (hereafter "FAILE"), a broker working for ALLEN TATE CO., INC., (hereafter "ALLEN TATE") represented DLI in its attempts to sell the property.

DLI and the WOODSONS negotiated for the sale of the property. On Friday, August 4, 2006, the WOODSONS received a recorded phone message from FAILE stating that agreement had been reached and instructing them to drop off their deposit and the signed contract.

On Saturday, August 5, 2006, the WOODSONS delivered the contract to FAILE's office and left their check for the down payment. This check was retained and deposited by ALLEN TATE. Over the next few days, in reliance on FAILE's message, the WOODSONS contacted various persons and acted to secure a loan and employ a builder.

During the same period after August 5, 2006, DLI, through FAILE and ALLEN TATE received another offer on the real property from the Defendant CAUTHEN. FAILE, ALLEN TATE, by its broker in charge, and DLI, did not inform the WOODSONS of these facts.

On Wednesday, August 9th, 2006, after DLI and CAUTHEN had signed an agreement on the property, FAILE informed the WOODSONS that another contract had been entered into.

After filing suit but prior to the filing of the Motions for Summary Judgment, the retained down payment was proffered to the Appellants.

By their Complaint filed October 21, 2006, the WOODSONS alleged fraud and negligent misrepresentation causes against DLI, ALLEN TATE and FAILE. They also alleged Unfair Trade Practices and breach of good faith, and prayed for unspecified damages.

By their Answer, ALLEN TATE and FAILE plead, *inter alia*, the Statute of Frauds. [Record on Appeal, p.37, ANSWER of above, Third Defense, p.12.] The Respondents ALLEN TATE CO., INC. and MELIA FAILE moved for Summary Judgment. The Circuit Court granted Respondents Summary Judgment as to all causes of action by Order dated July 13, 2008.

The Appellants filed a Motion to Alter or Amend which was denied. This Appeal followed.

FACTS

This case involves a contract to purchase unimproved real property on Point Carpenter Road in Lancaster County by Appellants LARIUS and MAURISSA WOODSON. DLI PROPERTIES, LLC (hereafter "DLI") was the owner of the property. MELIA FAILE (hereafter "FAILE"), a broker working for ALLEN TATE CO., INC., (hereafter "ALLEN TATE") represented DLI in its attempts to sell the property.

In August, 2006, DLI and the WOODSONS were in negotiations for the Appellants to buy this property. On August 3, 2006, the WOODSONS had received a counter-offer from DLI acceptable to them. They raised a detail on putting a cap on the tap fee with FAILE.

On Friday, August 4, 2006, they received a recorded phone message from FAILE as set out in the transcript of the conversation in Exhibit 7 to her deposition, and verified by her. [Record on Appeal, p.67 - 68, DEPOSITION OF FAILE, p.16, 6 - 17, 23.] That message was:

Larry, its - - - hey, Melia. It's about five o'clock. Larry, that forty-three hundred is good.¹ The seller said that's fine. So, just initial off, kind of scratch through that line and put forty-three hundred dollars somewhere, initial and date, yours and Maurissa's and just send it back over to me, fax it back over. And, I'm glad we've got it resolved and just the thousand dollar earnest money I don't know how you want to - - - if you want to drop that off by work or how we want to do that right now, but we'll touch base on that, too, okay.

¹ In her deposition, FAILE confirmed that this figure referred to the tap fee. [RECORD ON APPEAL, p.68, DEPOSITION OF FAILE, p.18, 2 - 6.]

Thanks, Larry, it's 803-448-7099. I'm here at home now, though, 803-547-5984. Thanks, Larry.

On Saturday, August 5, 2006, the WOODSONS delivered the re-marked and signed contract to FAILE's office and left their check for the requested down payment of \$1,000.00. A copy of this check is attached and incorporated in the Complaint. This check was retained and deposited by ALLEN TATE.

Over the next few days, in reliance on FAILE's message, the WOODSONS, in addition to those actions set out above, contacted a soil engineer to look at the property [Record on Appeal, p.54, DEPOSITION OF LARIUS WOODSON, p.44, 1 - 13]; went to SunTrust to apply for their construction loan, filed out an application and had a credit report pulled [Record on Appeal, p.54-55, DEPOSITION OF LARIUS WOODSON, p.44, 13 - 45, 17.] He reviewed architectural plans. [Record on Appeal, p.59, DEPOSITION OF LARIUS WOODSON, p.63, 16 - 64, 11.] He also dealt with a builder. [Record on Appeal, p. 59, DEPOSITION OF WOODSON, p.63, 20 - 64, 11.]

During the same period after August 5, 2006, DLI, through FAILE and ALLEN TATE received another inquiry and offer on the real property from the Defendant CAUTHEN. FAILE, ALLEN TATE, by its broker in charge, and DLI, by its member Mo Pitzulo, made a conscious decision to keep the WOODSONS uninformed of these actions. [Record on Appeal, p.70 - 71, DEPOSITION OF FAILE, p.28, 18 - 29, 22.] Throughout his deposition, Mr. WOODSON testified that he was uninformed of these facts until contacted by FAILE on August 9, 2006.

On Wednesday, August 9th, 2006, DLI and CAUTHEN signed an agreement to sell and buy the property, respectively. After both those parties had signed, late on the afternoon of August 9th, FAILE called the WOODSONS and informed them that another contract had been entered into. [Record on Appeal, p.71 - 72, DEPOSITION OF FAILE, p.32, 20 - 33, 10.] By Mr. WOODSON's testimony, "she [FAILE] said, I know this is wrong, but I have to do what my seller told me to do." [Record on Appeal, p.62, DEPOSITION OF LARIUS WOODSON, p.75, 5 - 14.]

As of the date of taking FAILE's deposition on April 17, 2007, the WOODSONS' down payment had not been proffered or returned to them. [Record on Appeal, p.75, DEPOSITION OF FAILE, p.46, 10 - 20.] Prior to the filing of the Motions for Summary Judgment, the sum was proffered to the Appellants.

By its Order of July 13, 2008, the Circuit Court granted Summary Judgment as to all claims against the Respondents ALLEN TATE and FAILE.

ARGUMENT
STANDARD OF REVIEW

An appellate court reviews the grant of Summary Judgment under the same standard applied by the Trial Court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).² The Trial Court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), S.C.R.C.P.; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). A Court considering Summary Judgment makes neither factual determinations nor considers the merits of competing testimony. *David v. McLeod Reg'l Med. Ctr.*, *SUPRA*, 367 S.C. at 250, 626 S.E.2d at 5. However, Summary Judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Id.* To survive a motion for Summary Judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Steele v. Rogers*, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992).

In setting out its arguments herein, the Appellants would note that, to their knowledge, there is no dispute over the facts in this case. They note that the Circuit Court has issued only a "generic" order granting the Respondents Summary Judgment, without any specific findings of fact or conclusions of law. Given this background, the Appellants have reiterated in their Brief the arguments presented to the Circuit Court below as to all points raised by the Respondents' Motions for Summary Judgment.

1. THE APPELLANTS' REASONABLE RELIANCE ON THE STATEMENTS AND NONDISCLOSURE OF RESPONDENTS, AND THEIR CONSEQUENT EXPENDITURE OF TIME AND MONEY, PLACE THIS DISPUTE OUTSIDE THE STATUTE OF FRAUDS.

² This paragraph is quoted, with stylistic changes only, from *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct.App. 2009).

The Respondents argue that the failure of DLI to execute the contract places it squarely within the grounds of protection afforded by the Statute of Frauds, S.C. Code Ann. § 32-3-10 (Law.Co-op.)

The Appellants assert this matter is removed from the operation of the Statute. It has long been recognized in this State, as in most American jurisdictions, that the doctrine of equitable estoppel may be invoked to preclude a party to the contract from asserting the enforceability of a contract by reason of the fact that it is not in writing as required by the Statute of Frauds. *Smith v. Williams*, 141 S.C. 265, 139 S.E. 625 (1925); *Pollock v. Pegues*, 72 S.C. 47 (1905); *Atlantic Wholesale Co. v. Solondz*, 283 S.C. 36, 320 S.E.2d 720 (Ct.App. 1984); 73 AM.JUR.2D *Statute of Frauds* § 471 (2002).

The elements of such an estoppel are listed by the Court of Appeals in *Powers Construction Co. v Salem Carpets*, 283 S.C. 302, 322 S.E.2d 30 (Ct.App. 1984) as:

- (1) the presence of a promise unambiguous in its terms;
 - (2) reasonable reliance upon the promise by the party by whom the promise is made;
 - (3) the reliance is expected and foreseeable by the party who makes the promise; and
 - (4) the party to whom the promise is made must sustain injury in reliance on the promise.
- [*Id.*, 283 S.C. at 307, FT.4.]

Of the above elements, the unambiguity of the promise, or representation, is obvious: the agreement existed in written form, agreed to by all parties, lacking only the signature of DLI, which had been promised by FAILE in her recorded conversation.

The WOODSONS relied on the representation of FAILE and such reliance was reasonable. There was no ambiguity in her wording and they were, deliberately, told nothing by any Defendant or agent to indicate there was not a binding contract in existence.

By the standards of a reasonable man, the reliance by the WOODSONS on FAILE's representation and silence was expected and foreseeable. They were not told to wait for final approval, nor was any reason given for them to do so. They were told that they had an agreement as to all terms, with only technical issues to clean up.

Finally, there can be no question that proof exists that the WOODSONS have suffered damage by reason of the Defendants' failure to honor their contract. The WOODSONS have acted, and expended time and monies, in reliance. There is no real factual dispute on this point.

2. THE EVIDENCE OF FRAUD AND TORT ON THE PART OF THE RESPONDENTS PRECLUDES THEM FROM USING THE STATUTE OF FRAUDS AS A DEFENSE.

In further response to argument based upon the Statute of Frauds, Appellants argue that a tortfeasor cannot be permitted to use the Statute of Frauds as a defense to a wrongful act, or as a means to consummate a fraudulent design. 73 AM.JUR.2D *Statute of Frauds* § 492 (2002) and precedent cited thereunder. As argued herein and before the Circuit Court, the Appellants have produced sufficient evidence of fraud and tort to warrant a full trial on those causes. If sufficient grounds exist to try the issues of fraud and tort, the defense of Statute of Frauds is not available to the Respondents.

3. THE APPELLANTS HAVE PRODUCED SUFFICIENT EVIDENCE OF FRAUD ON THE RESPONDENTS' PART, AND HAVE SHOWN THAT APPELLANTS HAD A DUTY TO SPEAK.

It is well established that nondisclosure is fraudulent where there is a duty to speak. *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct.App. 1993). In this case, there was intentional nondisclosure of the existence of another offer and of DLI's intent to treat the agreement with the WOODSONS as contingent. [Record on Appeal, p.70 - 71, DEPOSITION OF FAILE, p.28, 18 - 29, 22.]

Our Supreme Court has set out the circumstances under which a duty to speak exists.

The duty to disclose may be reduced to three distinct classes:

(1) where it arises from a preexisting definite fiduciary relation between the parties;

(2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied;

(3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

[*Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, ____ (Ct.App. 1993), citing *Jacobsen v. Yaschik*, 249 S.C. 577, ____, 155 S.E.2d 601, 605 (1967); *paragraphing added.*]

The Appellants do not argue that ALLEN TATE or FAILE had a fiduciary relationship with them [situation (1) above], nor that the contract was "intrinsically fiduciary" or called for "perfect good faith and full disclosure" [situation (3) above.] They do argue that they had the right to expressly repose trust and confidence in ALLEN TATE and FAILE with regard to this transaction [situation (2) above]. Their basis is S.C. Code Ann. § 40-57-137 (Law.Co-op.), which sets out the duties of real estate brokerage companies, such as ALLEN TATE, and licensees, such as FAILE. That statute provides, in relevant part:

(O) (1) Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. . . .

(2) A licensee offering services to a customer shall:

. . .

(e) be fair and honest and provide accurate information in all dealings.

. . .

(4) A licensee offering services to a customer may not knowingly give a party in a real estate transaction false information; however, the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false and discloses to the party the source of the information. . . . No licensee is liable for failure to disclose a matter other than those matters enumerated in this subsection. Violations of this subsection do not create liability on the part of the real estate licensee absent a finding of fraud on the part of the licensee.

Appellants are unaware of any other type of transaction, or dealing between private individuals in South Carolina, and which is not traditionally designated as fiduciary, in which such requirements are placed upon the agents of one party. S.C. Code § 40-57-137(O) places those requirements on a real estate transaction where a brokerage company or licensee agent is used. The requirement applies not only to the company and broker, but upon the seller, by reason of its use of a broker bound to those requirements. To use the language of *Ardis and Jacobsen, supra*, the statutory requirements of S.C. Code § 40-57-137(O) constitute "circumstances", state

that the "nature of the [parties'] dealings", or define the parties' "position towards each other", such that a trust and confidence requiring disclosure, a duty to speak, is necessarily implied.

The position argued above is also that recognized by the commentators of AMERICAN JURISPRUDENCE 2D:

A party who makes a statement which at the time is true, but who subsequently acquires new information that makes it untrue or misleading, must disclose such information to anyone whom the party knows to be acting on the basis of the original statement or be guilty of fraud.

[FTN.7, citing *Peddinghaus v. Peddinghaus*, 314 Ill.App.3d 900, 248 Ill.Dec. 122, 733 N.E.2d 797 (1st Dist. 2000), *appeal denied*, 191 Ill.2d 536, 250 Ill.Dec. 459, 738 N.E.2d 928 (2000); *Bradford v. Vento*, 997 S.W.2d 713 (Tex.App. Corpus Christi 1999), *rev'd on other grounds*, 48 S.W.3d 749 (Tex. 2001); RESTATEMENT SECOND, TORTS §551(b), comment f .] [37 AM.JR.2D *Fraud and Deceit* § 209 (2002).]

The rule as stated by the commentators of AMERICAN JURISPRUDENCE 2D and by the SECOND RESTATEMENT on Torts is directly on point. ALLEN TATE and FAILE made representations; new information made those representations untrue or misleading. Their duty to speak existed when the facts changed; their failure to speak is proof of fraud.

4. THE RESPONDENTS BEAR AN INDIVIDUAL LIABILITY FOR THEIR ACTIONS AND FOR THEIR FAILURE TO SPEAK.

The Respondents have invoked the general rule that an agent is not liable for lawful acts done within the scope of his, her or its authority for or on behalf of a disclosed principal. *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957); 3 AM.JUR.2D *Agency* § 291 (2002). It is certainly true that DLI's status as principal was fully disclosed, and that, as recited above, there is evidence that the decision to keep the WOODSONS ignorant of the Defendants' actions was with DLI's full consent and knowledge. [Record on Appeal, p.70 - 71, DEPOSITION OF FAILE, p.28, 18 - 29, 22.]

The Appellants make two arguments. First, in light of the requirements of S.C. Code §. 40-57-137(O) (Law.Co-op.) quoted above, the Respondents cannot come within the general rule as to agents cited above: they cannot demonstrate that their actions and inaction were lawful. By the evidence adduced, those matters were in direct conflict with the statutory directives of this

State. Insofar as the Respondents engaged in unlawful acts, their position as agents affords them no protection.

Second, and more generally, it has long been recognized that agency law does not insulate an agent from liability for the agent's own torts. *Lawlor v. Scheper*, *SUPRA*; 3 AM.JUR.2D *Agency* § 298 (2002). This is because an agent's tort liability is not based on the contractual relationship between the principal and agent, but on the common law obligation that every person must so act or use that which he, she or it controls as not to injure another. 3 AM.JUR.2D *Agency* § 298 (2002), citing, *INTER ALIA*, *Hopkins v. Clemson Agr. College*, 221 U.S. 636, 31 S.Ct. 654, 55 Ed. 890 (1911).

The causes of action plead by the WOODSONS against ALLEN TATE and FAILE are for fraud and negligent misrepresentation, respectively. All elements of those causes have been plead and evidence for each element exists.

The Appellants acknowledge that S.C. Code § 40-57-137(O)(4) (Law.Co-op.), quoted above, contains language exempting a licensee such as FAILE from liability "for failure to disclose a matter other than those matters enumerated in this subsection". Since that Subsection (O) of the Statute under 2(e), also quoted above, contains the requirement that the licensee has the responsibility to "be fair and honest and provide accurate information in all dealings", Appellants argue the exemption in (O)(4) is a distinction without a difference.

5. THE RESPONDENTS' ACTIONS CONSTITUTE UNFAIR AND DECEPTIVE TRADE PRACTICES.

The Respondents have argued that the WOODSONS cannot establish any of the elements of an unfair or deceptive trade practice as defined under S.C. Code Ann. §§ 39-5-10 *ET SEQ.* (Law.Co-op.) As stated in their submission to the Circuit Court, their argument, however, is based mainly on the lack of a public impact, as required under *Noack Enterprises v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986), one of the first and basic interpretations of the SC UTPA Statutes.

Since *Noack*, our Supreme Court has clarified the requirement of public interest by its holding in *Daisy Outdoor Advertising v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996). There, the Supreme Court found that impact on the public was synonymous with a potential for repetition. It also discussed what evidence of that element would consist of, stating:

Plaintiffs in prior cases generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence [*citation omitted*], or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts [*citations omitted*]. Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent. Conversely, it will sometimes be apparent that an action has no real potential for repetition. For example, unfair or deceptive acts in the sale of a business itself, or in sales outside the ordinary course of business, are not readily susceptible to repetition and, therefore, have no impact on the public interest. . . .

Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright-line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.

[*Id.*, 322 S.C. at 496-97, 473 S.E.2d at __; *underlining added for emphasis.*]

Appellants argue that the potential for repetition, and thus the impact on the public, is shown by the very fact that such behavior has been the subject of legislative enactment in S.C. Code Ann. § 40-57-137 (Law.Co-op.) The General Assembly obviously found that the dealings between a buyer of real estate, and a real estate brokerage company or licensee, had sufficient impact on the public, and that the practices forbidden by the Statute, had enough chance of repetition, to warrant legislative action. The Appellants submit that finding is conclusive on the question of public impact, and that the alleged actions and inaction of the Respondents ALLEN TATE and FAILE, as alleged, can constitute unfair trade practices *PER SE*.

6. THE APPELLANTS HAVE ADEQUATELY PLEAD THEIR DAMAGES.

The Respondents have argued a failure of proof based upon the Plaintiffs' failure to allege actual amounts of damage in their discovery. First, counsel is unaware that there is a requirement to set out more than general categories of damage by the Complaint or in response to a Motion for Summary Judgment. Secondly, and in specific response to this allegation, counsel would quote the response given on this point to Movant's Interrogatory No. 3:

The Plaintiffs' Complaint sets out or references their claimed damages as to their causes of action.

If, as the Plaintiffs assert, they possess the superior equitable claim to the subject real property, they have lost the time and cost of this suit to enforce their claims. They have lost the use and enjoyment of the real property until final determination. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is quantified. The Plaintiffs acknowledge that against such damages, they must set off the interest and payments which they would have paid if their contract had been honored.

If The Plaintiffs have lost the real property, to the extent the Court may find that that Defendant CAUTHEN has a superior equitable claim, they have lost the real property and have incurred the costs of this civil action. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is determined.

As allowed under the Plaintiffs' causes of action, they have asserted UFTP, which allows them triple their actual damages, plus their reasonable costs and attorneys' fees.

As allowed under the Plaintiffs' causes of action, they have asserted fraud and negligent misrepresentation, which causes allow them a claim to punitive damages, which amount can only be quantified by the trier of fact.³

[*Id.*]

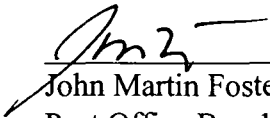
The WOODSONS have adequately presented evidence of their reliance on the Defendants' assurances and their losses in consequence. If the Respondents require a loss to which a dollar figure can be attached, it will be remembered that they have admitted to holding the Plaintiffs' downpayment for the better part of a year before proffering it back. [Record on Appeal, p.75, DEPOSITION OF FAILE, p.46, 10 - 20.] Even if the Appellants are to be denied the equitable remedy of specific performance, they are entitled to pre-judgment interest on their downpayment from August 21, 2006 [the date the check was cashed] until the date the same was proffered. This is sufficient to respond to the Respondents' argument.

³ The language from the Interrogatory quoted above was placed before the Circuit Court by inclusion in the Appellants' Memorandum in response to the Motions for Summary Judgment. The inclusion thereof was not contested by the Respondents.

CONCLUSION

The applicable law and evidence in this case, especially in light of the requirements of Summary Judgment that evidence be construed in the light most favorable to the Appellants, is more than sufficient to meet each of the Respondents' arguments based upon evidence. The Respondents were not entitled to Summary Judgment. The Appellants are entitled to have the Order granting the same set aside.

Respectfully submitted,



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May 14, 2010

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

Case No. 06-CP-29-1354

Larius G. Woodson and Maurissa Woodson..... Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile
and Alan L. Cauthen,

of whom:

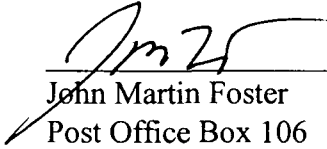
Allen Tate Co., and

Melia C. Faile are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 210(b),
S.C.A.C.R.

May 14, 2010.



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PROOF OF SERVICE

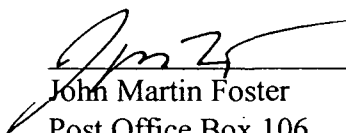
I certify that I have served the Brief of Appellants, dated May 14, 2010, on the following counsel of record:

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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

May 14, 2010


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
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Brooks P. Goldsmith, Circuit Court Judge

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v.

DEI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile
and Allen L. Cauthen

of whom

Allen Tate Co., Inc. and Melia C. Faile are Respondents

FINAL BRIEF OF RESPONDENTS ALLEN TATE CO., INC.
AND MELIA C. FAILE

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QUESTIONS PRESENTED

Whether the Trial Court properly granted summary judgment in favor of Respondents on Appellants' claims for fraud and negligent misrepresentation when the Appellants produced no evidence that Respondents acted outside the scope of their authority.

Whether the Trial Court properly granted summary judgment in favor of Respondents on Appellants' claim that Respondents acted outside of the scope of their authority of their client, DLI, and committed fraud and negligent misrepresentation when the Appellants are unable to show that Respondents made a false statement or otherwise had a duty to disclose information to Appellants.

Whether the Trial Court properly granted summary judgment in favor of Respondents on Appellants' claim that Respondents violated S.C. Code Ann. § 39-5-10, when the Appellants are unable to establish the elements to show a violation of the statute.

Whether the Trial Court properly granted summary judgment in favor of Respondents on Appellants' claims when the underlying contract fails to satisfy the Statute of Frauds.

STATEMENT OF THE CASE

1. Procedural History

Appellants/Plaintiffs Larius and Maurissa Woodson (collectively, the "Woodsons") filed their Complaint on October 27, 2006, primarily requesting an order for specific performance compelling Defendant DLI Properties, LLC ("DLI") to perform an alleged contract for DLI to sell real property to the Woodsons and requesting a declaratory judgment as to the rights and duties of Woodsons and DLI with regards to the alleged contract. (R. pp. 3-7). The Woodsons' Complaint also contains alternative claims for fraud and negligent misrepresentation against DLI and against Defendants Melia C. Faile ("Faile") and Allen Tate Co., Inc. ("Allen Tate"), DLI's real estate agents, to the extent that Faile and Allen Tate acted outside of the scope of their authority from their client, DLI. (R. pp. 7-12). Finally, the Woodsons' Complaint contains a claim against DLI for breach of a duty of good faith and fair dealing and against all of the Defendants for unfair trade practices. (R. pp. 12-15).

Faile and Allen Tate filed their Answer on January 23, 2007, denying the Woodsons' allegations and raising several affirmative defenses, including the Statute of Frauds. (R. pp. 26-40). On March 28, 2009, Faile and Allen Tate filed their Motion for Summary Judgment, which was heard by the Court on July 7, 2008. (R. pp. 41-107). On July 17, 2008, the Honorable Brooks P. Goldsmith entered an Order Granting Summary Judgment, granting summary judgment in favor of Faile and Allen Tate and dismissing the Woodsons' claims against Faile and Allen Tate. (R. p. 1). The Woodsons filed a Motion to Alter or Amend Judgment on July 28, 2008. (R. pp. 127-130). Finding no basis for granting the Motion to Alter or Amend Judgment, Judge Goldsmith denied the Woodson's motion by order entered on June 12, 2009. (R. p. 2). The Woodsons served

their Notice of Appeal on July 14, 2009. (Amended Notice of Appeal at R. p. 150) The Woodsons' claims against DLI and Cauthen remain pending.

2. Factual Summary

In 2006, DLI engaged Allen Tate and Faile, a real estate agent with Allen Tate, to act as its agent in the sale of certain real property it owned in Lancaster, South Carolina (the "Property"). (R. p. 66) (Faile Dep., p. 10, lines 16-23). On August 1, 2006, pursuant to Appellant/Plaintiff Larius Woodson's ("Woodson") request, Faile sent the Woodsons a draft of an Agreement to Buy and Sell Real Estate (the "Woodson Offer") in which Faile had filled out many of the blanks required for an offer by the Woodsons to purchase the Property from DLI for \$88,900.00. (R. pp. 46-47) (Woodson Dep., p. 12, line 25-p.13, line 16; p. 15, lines 7-14). Although Woodson was a licensed real estate broker in North Carolina, he and his wife used Sharon Davis and Davis Integrity Realty, Inc. as his South Carolina real estate broker for the offer to purchase the Property. (R. pp. 56-57) (Woodson Dep., p. 50, lines 12-19; p. 53, lines 4-13; p. 54, lines 6-8. Since Sharon Davis was out of town for parts of the relevant time period, some of the communications regarding this transaction took place directly between Faile and the Woodsons. (R. p. 73) (Faile Dep., p. 39, lines 6-8).

The Woodsons changed several material terms on the Woodson Offer, initialed the changes, signed the Woodson Offer and sent it back to Faile on August 3, 2006 for consideration by DLI. (R. p. 47, 48) (Woodson Dep., p. 16, lines 7-p. 17, line 21). Faile then discussed the Woodson Offer with DLI. DLI made additional material changes to the Woodson Offer, initialed those changes, signed it and Faile sent it back to the Woodsons for consideration and final approval of DLI's changes. (R. p. 67) (Faile Dep., p. 13, lines 13-20).

On August 4, 2006, Woodson called Faile to say that he had forgotten to include a \$4,300 limit on the cost of tapping into the existing water or sewer system. (R. p. 67) (Faile Dep., p. 13, line 22-p. 14, line 4). Faile told Woodson that she did not know if DLI would agree to that additional term, but she agreed to contact DLI to discuss the term. (R. p. 67) (Faile Dep., p. 14, lines 8-15). Faile and DLI discussed the additional \$4,300 limit on the tap fee and the DLI representative frustratingly told Faile that DLI would agree to the limitation. (R. p. 67) (Faile Dep., p. 14, lines 16-24). Faile then contacted Woodson and left a voicemail message for the Woodsons at 5:00 pm on Friday, August 4, 2006 stating that DLI would agree to the change and directing Woodson to make the change to the Woodson Offer, initial the change and deliver it to her. (R. p. 68) (Faile Dep., p. 19, line 11-p. 20, line 1).

The Woodsons initialed the prior changes to the Woodson Offer made by DLI, wrote into the contract the proposal for the new \$4,300 limit on the tap fee and initialed that change as well. (R. p. 68) (Faile Dep., p. 20, lines 6-15). On Saturday, August 5, 2006, the Woodsons delivered the Woodson Offer with the \$4,300 tap fee limitation initialed by them to Faile's office along with a check for the \$1,000 earnest money deposit. (R. pp. 68-69) (Faile Dep., p. 20, line 16-p. 21, line 19). The terms of the Woodson Offer provided that Defendant Allen Tate would hold the \$1,000 earnest money deposit as "Escrow Agent."¹ (R. pp. 86-90) (Woodson Dep., Ex. 1, § 5). Faile then contacted DLI to obtain final signatures on the Woodson Offer. (R. p. 69) (Faile Dep., p. 22, line 6-p. 23, line 4). One of the partners of DLI was out of town, so Faile

¹ In fact, the express terms of the Woodson Offer make it clear that Allen Tate cannot release the funds until both the Woodsons and DLI "have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement." (R. pp. 86-90) (Woodson Dep., Ex. 1, § 5). Defendant Allen Tate still has possession of the funds and has never received an agreement executed by DLI and the Woodsons directing the release of the funds.

planned to have DLI execute the Woodson Offer to approve the final change on Monday, August 7, 2006. (R. p. 69) (Faile Dep., p. 22, lines 22-25).

On Sunday, August 6, 2006, Defendant Alan L. Cauthen ("Cauthen"), through his real estate agent Vickie Barfield-Robinson, contacted Faile about making an offer on the Property. (R. p. 69) (Faile Dep., p. 23, line 6-p. 24, line 16). Before Cauthen submitted a formal written offer, he wanted to investigate the possibility of installing a septic system on the property. (R. p. 69) (Faile Dep., p. 24, lines 12-16). Faile notified DLI about the inquiry from Cauthen on Monday, August 7, 2006. (R. p. 70) (Faile Dep., p. 28, lines 3-17). On the same day, Faile asked DLI if it wanted her to tell the Woodsons about Cauthen's interest in the Property and possible offer to purchase the Property. DLI instructed Faile not to tell the Woodsons about Cauthen's interest in the Property. (R. p. 71) (Faile Dep., p. 29, lines 1-22, p. 30, lines 8-13).

Cauthen visited the Property on Tuesday, August 8, 2006 with an expert to evaluate the suitability of the Property to support a septic system. (R. p. 70) (Faile Dep., p. 25, line 11-p. 26, line 15). Cauthen then delivered a formal written offer ("Cauthen Offer") to purchase the Property on Wednesday, August 9, 2006. (R. pp. 70, 71) (Faile Dep., p. 26, lines 17-25; p. 31, lines 6-25). The Cauthen Offer was for the same amount as the Woodson Offer, but contained no contingencies and provided for an earlier closing date. (R. pp. 69, 72) (Faile Dep., p. 24, lines 9-11; p. 33, lines 17-20). DLI signed and accepted the Cauthen Offer on Wednesday, August 9, 2006 at approximately 2:20 p.m. (R. p. 71) (Faile Dep., p. 32, lines 1-7). Once DLI signed and accepted the Cauthen Offer, Faile notified the Woodsons' broker, Sharon Davis, the same afternoon that DLI

did not accept the Woodson Offer and instead decided to sell the Property to Cauthen. (R. p. 73) (Faile Dep., p. 37, line 20-p. 38, line 19).

Only four days passed between the time that Faile received the Woodson Offer on Saturday, August 4, 2006 and the time that Faile notified the Woodsons that DLI had accepted the Cauthen Offer on Wednesday, August 9, 2006. During that time, Woodson says that he contacted a soil engineer, met with a bank, reviewed architectural plans and met with a builder. (R. pp. 54-55) (Woodson Dep., p. 44, line 1-p. 45, line 24). Woodson testified at his deposition that he did not incur any out-of-pocket costs during that time, other than “gas and time,” although he was unable to identify the amount of gas he used or the time that he spent. (R. pp. 54-55, 59-60) (Woodson Dep., p. 44, line 1-p. 46, line 14; p. 64, line 12-p. 66, line 2). With respect to how much he spent on gas, Woodson testified at his deposition, “I have no clue” and with respect to how much time he spent, he replied, “Honestly, I can’t tell you” (R. p. 59-60) (Woodson Dep., p. 64, line 23-p. 65, line 7).

On October 27, 2006, the Woodsons filed a Complaint against DLI, Faile, Allen Tate and Cauthen for specific performance of the alleged contract, declaratory judgment, fraud, negligent misrepresentation and unfair trade practices. (R. pp. 4-17). The Woodsons’ primary claims are against DLI, for specific performance of the Woodson Offer to sell the Property, declaratory judgment of the rights and duties between the Woodsons and DLI concerning the Woodson Offer and for breach of a duty of good faith and fair dealing. (R. pp. 4-17). The Woodsons’ Complaint includes claims against Faile and Allen Tate for fraud and negligent misrepresentation that are plead in the alternative, to the extent that Allen Tate or Faile acted without the authority of DLI, and for unfair

trade practices. (R. pp. 4-17). The claims against Faile and Allen Tate are without merit, as the Woodsons have produced no evidence that Faile or Allen Tate acted outside of the scope of their authority, nor have they produced any evidence that the acts of Faile and Allen Tate constitute fraud, negligent misrepresentation or an unfair trade practice.

3. Standard of Review

An appellate court “reviews the granting of summary judgment under the same standard applied by the Trial Court under Rule 56(c), SCRCP.” Gignilliat v. Gignilliat, Savitz & Bettis, LLP, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009). Summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP.

The party seeking summary judgment “has the initial burden of demonstrating the absence of a genuine issue of material fact.” George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001). However, once the moving party carries its initial burden, the opposing party must “do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. The party opposing summary judgment cannot simply rest on mere allegations or denials contained in pleadings.” Id. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009).

The Woodsons admit in their brief that there is no dispute over the facts in this case, so the Trial Court's decision to grant summary judgment was appropriate. For the reasons set forth below, the Trial Court properly granted summary judgment in favor of Allen Tate and Faile. In addition to the arguments set forth below, Allen Tate and Faile request that the Court affirm the Trial Court's granting of summary judgment in their favor upon any ground(s) appearing in the Record on Appeal, in accordance with Rule 220(c), SCACR.

ARGUMENT

- 1) THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FAILE AND ALLEN TATE, AS THE WOODSONS PRODUCED NO EVIDENCE THAT FAILE OR ALLEN TATE ACTED OUTSIDE OF THE SCOPE OF THEIR AUTHORITY FROM DLI.;
- 2) THE WOODSONS CANNOT SATISFY THE ELEMENTS OF FRAUD AND NEGLIGENT MISREPRESENTATION;
- 3) THE WOODSONS CANNOT ESTABLISH THE NECESSARY ELEMENTS FOR A CLAIM OF UNFAIR AND DECEPTIVE TRADE PRACTICES; AND
- 4) ALL OF THE WOODSONS' CLAIMS AGAINST ALLEN TATE AND FAILE FAIL BECAUSE THE WOODSON OFFER DOES NOT SATISFY THE STATUTE OF FRAUDS' REQUIREMENT OF A WRITING FOR THE SALE OF LAND.

- I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FAILE AND ALLEN TATE, AS THE WOODSONS PRODUCED NO EVIDENCE THAT FAILE OR ALLEN TATE ACTED OUTSIDE OF THE SCOPE OF THEIR AUTHORITY FROM DLI.

The Woodsons' claims against Faile and Allen Tate in the Complaint for fraud and negligent misrepresentation are alleged in the alternative and only to the extent that Faile or Allen Tate acted without the authority of DLI. At no point in time have the Woodsons produced any evidence to support their allegations that Faile and Allen Tate acted outside of the scope of their authority from DLI. Further, DLI has made no

allegation that Faile or Allen Tate acted outside of the scope of their authority. Notably, in their appellate brief, the Woodsons clearly state that Faile's actions were with DLI's full consent and knowledge. Woodsons' Brief, p. 8. Thus the Woodsons appear to have completely abandoned the argument that Faile and Allen Tate acted outside of the scope of their authority.

On this ground alone--that the claims against Faile and Allen Tate for fraud and negligent misrepresentation were plead in the alternative and only to the extent that Faile and Allen Tate acted outside of the scope of their authority and there is no evidence at all that Faile and Allen Tate acted outside of the scope of their authority--Allen Tate and Faile were entitled to judgment as a matter of law as to the Woodsons' claims for fraud and negligent misrepresentation. Therefore, the Trial Court properly granted summary judgment as to the claims for fraud and negligent misrepresentation in favor of Faile and Allen Tate.

II. THE WOODSONS CANNOT SATISFY THE ELEMENTS OF FRAUD AND NEGLIGENT MISREPRESENTATION.

The Woodsons cannot establish the necessary elements for independent claims against Faile and Allen Tate for fraud or negligent misrepresentation, as they cannot show that Faile made a false statement concerning Cauthen's interest in the Property, nor can they establish that Faile had an duty to disclose Cauthen's interest in the property to the Woodsons. Therefore, the Trial Court properly granted summary judgment in favor of Faile and Allen Tate on the claims for fraud and negligent misrepresentation.

A. Faile did not make false statements.

The Woodsons argue that Faile and Allen Tate acted outside of the scope of their authority from DLI and that Faile's actions in (1) leaving a message for Woodson that

DLI agreed to the changes to the Woodson Offer and (2) failing to inform the Woodsons of Cauthen's interest in the property constitute fraud and negligent misrepresentation. To prevail on their claim of fraud, the Woodsons must show the following:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury.

M.B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980) (citations omitted). To prevail on a claim for negligent misrepresentation, the Woodsons must show:

(1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the defendant in making the statement; (3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff; (4) the defendant breached the duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation.

Ama Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (1992). "The failure to prove any element of fraud or misrepresentation is fatal to the claim." Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 240 (2007).

The Woodsons cannot establish that Faile and Allen Tate made any express fraudulent or negligent misrepresentations, because they cannot show that any statements made by Faile were false. At the time Faile left the message for Woodson that DLI would agree to the \$4,300 limit on the tap fee, Faile believed that the statements were true based on her conversations with DLI. (R. p. 67) (Faile Dep., p.15, lines 1-6). Additionally, at the time she left the message, Faile was not even aware of Cauthen's interest in the property, as she was not first contacted by Cauthen's agent until two days

later. (R. p. 69) (Faile Dep., p. 23, line 6-p. 24, line 25). Faile also did not act recklessly in leaving the message because DLI had told her that they would agree to the limit on the tap fee. (R. p. 67) (Faile Dep., p. 14, lines 8-24). Because the Woodsons cannot establish an essential element of both fraud and negligent misrepresentation, that Faile made a false representation, summary judgment in favor of Faile and Allen Tate on those causes of action was proper.

B. Faile and Allen Tate had no duty to disclose Cauthen's interest in the Property to the Woodsons and S.C. Code Ann. § 40-57-137 does not create such a duty.

Since the Woodsons cannot establish that Faile made a false representation to the Woodsons, they resort to arguing that Faile's non-disclosure of Cauthen's interest in the Property and eventual offer to purchase the property constitutes fraud or negligent misrepresentation. However, the Woodsons ignore the fact that DLI specifically instructed Faile, its agent, not to tell the Woodsons about Cauthen's interest in the Property. (R. p. 71) (Faile Dep., p. 29, lines 1-22). Instead, the Woodsons argue that Faile had a legal obligation to them (despite the fact that Faile did not represent them and they had their own real estate agent) to disclose Cauthen's interest in the Property and Faile should have completely disregarded the instructions from DLI to not disclose that information to the Woodsons.²

In their Appellants' brief, the Woodsons claim that that they reposed "trust and confidence" in Faile and Allen Tate such that Faile had a legal duty under S.C. Code Ann. § 40-57-137 to notify them about Cauthen's interest in the property. Woodsons'

² As to any claim relating to the disclosure of the Cauthen Offer itself (as opposed to disclosing Cauthen's interest in the Property), DLI both received the Cauthen Offer and signed the Cauthen Offer on Wednesday, August 9, 2006. That same afternoon, Faile informed the Woodsons' real estate agent that DLI did not accept the Woodson Offer and instead decided to sell the Property to Cauthen. (R. pp. 71,73) (Faile Dep., p. 32, line 20-p. 33, line 10, p. 37, line 20-p. 38, line 19). Therefore, even if Faile and Allen Tate had a duty to notify the Woodsons once the Cauthen Offer was accepted by DLI, they timely did so.

Brief, pp. 6-7. Rather than alleging a relationship of “trust and confidence” in their claim for fraud in the Complaint, the Woodsons now state that S.C. Code Ann. § 40-57-137 created a relationship of “trust and confidence” between Faile, the agent representing the seller of the property, and the Woodsons, the buyers of the property, who were independently represented by their own agent in this transaction. S.C. Code Ann. § 40-57-137 simply does not create such an obligation, as the Woodsons were not Faile’s “customers” under that statute.

S.C. Code Ann. § 40-57-137 establishes the types of relationships that may be established between a real estate licensee and his or her client. The statute defines the four types of formal agency relationships between licensees and clients: 1) seller agency; 2) buyer agency; 3) disclosed dual agency or 4) subagency. S.C. Code Ann. § 40-57-137(a). The statute also sets out the formal legal obligations a real estate licensee has to clients who have executed a formal agency agreement, including, but not limited to, the obligations to: 1) present in a timely manner all offers and counteroffers, 2) disclose all relevant facts concerning the transaction known to the licensee, 3) advise the client to obtain expert advice on matters beyond the expertise of the licensee, 4) comply with laws, rules and regulations, and 5) preserve confidential information. S.C. Code Ann. §§ 40-57-137(c) and 40-57-137(h).

The portion of the statute that the Woodsons claim created a duty for Faile to disclose Cauthen’s interest in the Property to the Woodsons defines a prospective seller or purchaser of *unlisted* real property who chooses not to establish a formal agency relationships with a real estate licensee, but who still uses the services of a licensee, as a “customer” of the real estate licensee. S.C. Code Ann. § 40-57-137(O)(1). Under the

statute, a licensee has fewer legal obligations to a customer than they have to a client who has entered into a formal agency relationship with the licensee. For example, a real estate licensee does not have a legal obligation to advise the seller to obtain expert advice on matters beyond the expertise of the licensee; disclose all relevant facts concerning the transaction known to the licensee; or even preserve confidential information provided by the customer.

The Woodsons could not be customers of Faile and Allen Tate because the Woodsons had chosen to establish a formal agency relationship with Sharon Davis and Davis Integrity Realty, Inc., a licensee, for this transaction. (R. pp. 56) (Woodson Dep., p. 50, lines 12-19). Further, in this transaction, Faile and Allen Tate had a formal agency agreement with DLI to sell the Property and the property was listed. Although the Woodsons communicated directly with Faile during the times Sharon Davis was out of town, the Woodsons had their own licensee serving as their agent in this transaction. Because the Woodsons were in a buyers' agency relationship with Sharon Davis and Davis Integrity Realty, Inc., pursuant to S.C. Code Ann. § 40-57-137(h), the Woodsons were not and could not have simultaneously been "customers" of Allen Tate and Faile under S.C. Code Ann. § 40-57-137(O). Therefore, the portion of the statute cited by the Woodsons in support of their claim that Faile and Allen Tate had a duty to disclose Cauthens' interest in the property simply does not apply.

Even if Faile and Allen Tate could somehow be in a sellers' agency relationship with DLI, while simultaneously advising the Woodsons as customers, Faile would only have an obligation to provide accurate information to the Woodsons and to not provide false information. The statute says that a licensee that provides services to a customer

must not “*knowingly* give a party in a real estate transaction false information.” S.C. Code Ann. § 40-57-137(O)(4) (emphasis added). In fact, the statute also provides that “*the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false and discloses to the party the source of the information.*” Id. As stated above, at no time did Faile provide false information to Woodsons. When Faile left the message on Woodson’s voice mail on Friday, August 4, 2006 saying that DLI would agree to the addition of the tap fee limit, she had not been contacted by Cauthen’s real estate agent and was not aware of Cauthen’s interest in the property. Cauthen did not even present a formal written offer to DLI until August 9, 2009. Faile did notify Sharon Davis that DLI had accepted the Cauthen Offer the same day DLI received it. At all times in her dealings with the Woodsons, Faile provided accurate, truthful information to the Woodsons. Therefore, the Woodsons’ claims that Faile and Allen Tate somehow violated S.C. Code Ann. § 40-57-137 are without merit and the Trial Court properly granted summary judgment in favor of Faile and Allen Tate.

III. THE WOODSONS CANNOT ESTABLISH THE NECESSARY ELEMENTS FOR A CLAIM OF UNFAIR AND DECEPTIVE TRADE PRACTICES.

To recover in a private action under the South Carolina Unfair Trade Practices Act (UTPA), S.C. Code Ann. § 39-5-10 (2007), “the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts.” Wright v. Craft, 372 S.C. 1, 19, 640 S.E.2d 486, 498 (2006). Because the Woodsons cannot establish any

of the elements of this cause of action, summary judgment in favor of Allen Tate and Faile was proper.

The Woodsons cannot establish that Faile or Allen Tate engaged in an unfair or deceptive act, the first element for a cause of action under the UTPA, because they cannot establish any false representation Faile or Allen Tate made to the Woodsons. Additionally, as discussed above, DLI had instructed Faile to not disclose Cauthen's interest in the Property and Faile did not have any independent obligation to disclose Cauthen's interest in the Property to the Woodsons.

Second, the Woodsons cannot establish that any alleged unfair or deceptive act affected the public interest. In Noack Enter., Inc. v. Country Corners Interiors, Inc., 290 S.C. 475, 351 S.E.2d 347 (1986), the South Carolina Court of Appeals held, "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace" Id. at 479, 351 S.E.2d at 349-350 (citations omitted). The Court in Noack Enter., Inc., cited a Georgia case, Zeeman v. Black, 273 S.E.2d 910 (Ga. App. 1980), which held that purchasers of a home from a private homeowner did not have a cause of action under the Georgia Fair Business Practice Act "because the sale was an isolated act of an individual and not a transaction potentially harmful to the consumer public." Noack Enter., Inc., 290 S.C. at 479, 351 S.E.2d at 349-350. "The act is not available to redress a private wrong where the public interest in unaffected." Id.

Similarly, the Woodsons simply cannot satisfy the second element of an unfair trade practices claim, that the alleged unfair or deceptive act affected the public interest. If the Woodsons could establish they have suffered any damages, which they cannot, the

harm would be, at best, a private harm, not one capable of repetition and not a threat to the consuming public. As the Court said in Noack, “. . . the complaint nowhere alleges any facts demonstrating that these acts or practices adversely affect the public.” Noack Enter., Inc., 290 S.C. at 480, 351 S.E.2d at 350. This dispute results from a private transaction involving the sale of real property, and this is not the type of transaction that is potentially harmful to the consumer public. Therefore the Trial Court properly granted summary judgment in favor of Faile and the Woodsons on this cause of action.

Finally, at his deposition, Woodson could not identify any monetary or property loss resulting from the Allen Tate and Faile’s alleged unfair or deceptive acts. See (R. pp. 59-60) (Woodson Dep., p. 64, line 12-p. 66, line 2). To the extent that the Woodsons argue that they have suffered damages because Allen Tate has failed to return the \$1,000 earnest money deposit to the Woodsons, the Woodsons are ignoring the express language of the Woodson Offer (which they signed), which provides that “the broker holding the earnest money deposit will not disburse it to either party until both parties have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement.” Woodson Dep., Ex. 1, § 5, (R. pp. 86-90). The Woodsons have not produced any evidence that there is a signed agreement to return the earnest money deposit, nor has there been an court order requiring the earnest money deposit to be returned to the Woodsons. Therefore, the Woodsons have not suffered any damages because Allen Tate has honored its obligations as Escrow Agent under the terms of the Woodson Offer. Since the Woodsons cannot establish any monetary or property loss, they cannot satisfy the third element of a claim for unfair trade practices and the Trial

Court properly granted summary judgment in favor of Allen Tate and Faile on the claim for violation of the unfair trade practices statute.

IV. ALL OF THE WOODSONS' CLAIMS AGAINST ALLEN TATE AND FAILE FAIL BECAUSE THE WOODSON OFFER DOES NOT SATISFY THE STATUTE OF FRAUDS' REQUIREMENT OF A WRITING FOR THE SALE OF LAND.

The South Carolina Statute of Frauds states “(n)o action shall be brought whereby . . . (t)o charge any person upon any contract or sale of lands . . . (u)nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith. . . .” S.C. Code Ann. § 32-3-10(4) (2007). The Woodson Offer did not satisfy the Statute of Frauds because DLI did not initial the Woodsons’ new \$4,300 limit to the tap fee, which constituted a material change to the prior offer. Therefore, the Woodson Offer was not a valid contract for the sale of property, because the Woodsons’ final material change was not signed by DLI.

A. The Woodsons have not established the necessary requirements to remove the Woodson Offer from the Statute of Frauds.

The Woodsons argue that Faile and Allen Tate are equitably estopped from raising a defense to the Woodson Offer that the entire contract was not enforceable because the final change was not signed by DLI. The Woodsons cite the general requirements for promissory estoppel in support of their argument.³ However, the standards required to remove a contract for the conveyance of real estate from the requirements of the Statute of Frauds are more stringent than those required to establish promissory estoppel generally. In order to remove an oral contract to convey real estate

³ The Woodsons’ reliance on the general elements of promissory estoppel set out in Powers Constr. Co., v. Salem Carpets, 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984), is misplaced. Powers Constr. Co. does not involve a contract governed by the Statute of Frauds and does not discuss the requirements for removing a contract from the Statute of Frauds.

from the Statute of Frauds, “[a party] must show part performance of the oral contract.” Bradshaw v. Eurig, 297 S.C. 242, 245, 376 S.E.2d 264, 266 (1989) (citations omitted). “Performance may be proved by evidence of the following: (1) improvements to the real estate; (2) possession of the real estate; (3) payment of the purchase price.” Id. Of these three ways, improvements to the real estate and possession of the real estate are the strongest evidence of part performance and payment of the purchase price is not only the weakest evidence but will not suffice on its own to remove a contract from the Statute of Frauds. Id. The Woodsons do not allege that they performed any improvements to the property, that they took possession of the real estate and or paid the purchase price to DLI. Instead, they allege that in the four days between the time they delivered the Woodson Offer to Faile and the time they were notified that DLI had accepted the Cauthen Offer, they spent time speaking with a soil engineer, a bank and a builder, for which they incurred no costs. Because the Woodson Offer fails to satisfy the Statute of Frauds, all of the Woodsons’ claims are without merit and the Court properly granted summary judgment in favor of Allen Tate and Faile.

B. The Woodsons cannot establish fraud or tort by Faile and Allen Tate as a defense to the Statute of Frauds.

The Woodsons further argue that a tortfeasor cannot use the Statute of Frauds as a defense to a wrongful act. Woodsons’ Brief, p. 6. Even if the Woodsons are correct that the Statute of Frauds does not apply where there is fraud or other torts involved, the Woodsons cannot establish the necessary elements for fraud or any other tort as against Faile and Allen Tate, as discussed above. Therefore, the Woodson Offer remains subject to the Statute of Frauds and is not enforceable because DLI did not sign the Woodson

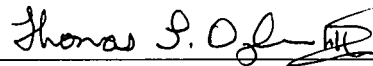
Offer to approve the final material change and, therefore, there was not a valid contract between DLI and the Woodsons.

CONCLUSION

For the foregoing reasons, Defendants/Appellees Faile and Allen Tate respectfully request that this Court affirm the Honorable Judge Brooks Goldsmith's decision to grant Summary Judgment in favor of Faile and Allen Tate.

Respectfully Submitted,

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May 6, 2010.
Charlotte, North Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 06-CP-29-1354

Larius G. Woodson and Maurissa Woodson..... Appellants,

v.

DLI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile
and Allen L. Cauthen,

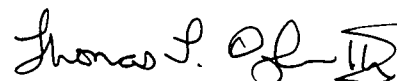
of whom

Allen Tate Co., Inc. and Melia C. Faile are..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

This the 6th day of May, 2010.



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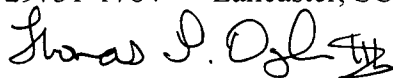
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true copies of the Brief Of Respondents Allen Tate Co., Inc. and Melia C. Faile in the above-referenced case have been served upon opposing counsel by depositing in the United States mail addressed to the parties below on this 6th day of May, 2010.

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