

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2010-CP-22-1233

Appellate Case No. 2012-213524

First South Bank,

Respondent,

v.

South Causeway, LLC,

Appellant,

RECEIVED

NOV 19 2013

SC Court of Appeals

**RECORD ON APPEAL
VOLUME III**

Joel W. Collins, Jr.
Christian Stegmaier
James L. Floyd, III
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, SC 29211

Attorney for Respondent

James M. Griffin
Lewis, Babcock & Griffin L.L.P.
P.O. Box 11208
Columbia, SC 29211

Attorney for Appellant

INDEX

ORDERS and JUDGMENTS:

Order Denying Defendant's Motion to Dismiss Demand for Jury Trial, filed 11-17-11	1
Order Denying Plaintiff's Motion for Summary Judgment, filed 12-1-11	3
SC Court of Appeals Order of Dismissal, filed 2-21-12.....	9
Order of Foreclosure, filed 11-1-12	10
Supplemental Order of Foreclosure, filed 11-2-12	19
Order Denying Post Trial Motions, filed 11-5-12	27

PLEADINGS and MOTIONS:

Summons and Complaint, filed 8-5-10	39
Answer, filed 9-3-10	82
Amended Answer and Counterclaim, dated 10-4-10.....	84
Plaintiff's Motion for Summary Judgment, filed 6-3-11	108
Defendant's Memorandum in Opposition to Motion for Summary Judgment, filed 11-17-11 ...	388
Defendant's Post Trial Motions, filed 10-5-12	454
Affidavit of Attorneys Fees and Costs for Collins & Lacy, P.C, dated 10-8-12	468
Plaintiff's Opposition to Defendant's Post Trial Motions, filed 10-23-12	571
Plaintiff's Response/Consent to Defendant's Return in Opposition to Motion for Attorneys' Fees and Costs, dated 11-1-12	620
Notice of Appeal, filed 11-30-12	622

TRANSCRIPT:

Trial Transcript	655

OTHER MATERIALS OR DOCUMENTS:

Court's Exhibit 1	1749
Plaintiff's Exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 24, 26, 27, and 29	1758
Defendant's Exhibits 2, 5, 6, 7, 8, 9, 10, 11, 13, 14, 21, 27.....	1849

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2010-CP-22-01233

COUNTY OF GEORGETOWN

FIRST SOUTH BANK,

-vs-

SOUTH CAUSEWAY, LLC,

Defendant.

September 18-25, 2012

B E F O R E:

HONORABLE THOMAS A. RUSSO, SR.

A P P E A R A N C E S:

JOEL W. COLLINS, JR., Esquire
JAMES LEON FLOYD, Esquire
DONALD W. TYLER, JR., Esquire
Attorney for the Plaintiff

AUDRA M. BYRD, Esquire
MARK B. GODDARD, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

VOLUME III of VI
September 20, 2012

1 (Reconvened at 9:00 a.m., September 20,
2 2012).

3 THE COURT: Good morning, every one. Please
4 have a seat.

5 THE COURT: Anything we need to take up
6 before we bring the jury in?

7 MR. TYLER: No, Your Honor.

8 THE COURT: Anything from the defendant?

9 MS. BYRD: No, sir, Your Honor.

10 THE COURT: All right, let's ask the jury to
11 come in.

12 (The jury returned to the courtroom).

13 THE COURT: Good morning, everyone. I hope
14 you had a good evening and excited to be back and
15 go to work.

16 If you recall, as you heard yesterday, Miss
17 Byrd on behalf of the defense is presenting the
18 defense's case and so we'll pick up with her for
19 our next witness.

20 MS. BYRD: May it please the Court?

21 THE COURT: Yes, ma'am.

22 MS. BYRD: Your Honor, the defendants call
23 Mr. Wayne Lovelace.

24 THE COURT: All right. Mr. Lovelace, if you
25 will please come around and be sworn, sir.

1 THURMOND WAYNE LOVELACE, after being first duly
2 sworn, testified as follows:

3 THE CLERK: Please be seated and state your
4 full name for the record.

5 THE WITNESS: My full name is Thurmond Wayne
6 Lovelace.

7 DIRECT EXAMINATION BY MS. BYRD:

8 Q Mr. Lovelace, are you currently the senior
9 vice-president of First South Bank?

10 A I'm one.

11 Q And prior to your employment with First South
12 Bank did you work with First Palmetto Savings Bank?

13 A I did.

14 Q During your time with First Palmetto Savings
15 Bank you developed a personal relationship with
16 Peggy Wheeler-Cribb, is that correct?

17 A I developed a business relationship with Miss
18 Cribb.

19 Q You dealt with her and her son Darwin for
20 many years, didn't you?

21 A I did.

22 Q And you were aware of the loan that First
23 Palmetto made on the 19 acres of commercial
24 property on the South Causeway, is that correct?

25 A It is.

1 Q And when you left First Palmetto you knew
2 that that loan was a good and performing loan,
3 isn't that correct?

4 A That's correct.

5 Q And when you left First Palmetto Savings Bank
6 you contacted Miss Peggy Wheeler-Cribb, did you
7 not?

8 A I did.

9 MS. BYRD: May I approach, Your Honor?

10 THE COURT: Yes, ma'am.

11 Q Mr. Lovelace, I have shown you what has been
12 marked as Exhibit Number 8. Can you identify for
13 the record what that document is?

14 A It's an email from me to Miss Cribb dated
15 September 24th, 2007.

16 Q And that is your email address,
17 wlovelace@firstsouthbank?

18 A It is.

19 MS. BYRD: Your Honor, at this time we would
20 move Exhibit Number 8 into evidence.

21 THE COURT: Any objection?

22 MR. TYLER: No objection, Your Honor.

23 THE COURT: All right, without objection.

24 (September 24, 2007, email marked and
25 received in evidence as Defendant's

1 Exhibit Number 8).

2 BY MS. BYRD:

3 Q Mr. Lovelace, this is dated September 24th,
4 2007, is that correct?

5 A That's correct.

6 Q And in your email you're following up on a
7 telephone conversation that you had with Miss
8 Wheeler-Cribb on July the 23rd, is that correct?

9 A That's correct.

10 Q So, as early as July 23rd you had contacted
11 Miss Cribb about moving her loan from First
12 Palmetto to First South, is that correct?

13 A I contacted her and talked about possible
14 business opportunities, maybe not specifically
15 about that loan but --

16 Q I'm sorry.

17 A But I did contact her about developing a
18 relationship with the bank, right.

19 Q And were you interested in the 19 acres of
20 commercial property on South Causeway?

21 A That and possibly any other loan she could
22 see fit to send to us, right.

23 Q Did there come a time in April of 2008 where
24 you and Mr. Lyerly came to Pawley's Island to take
25 Miss Peggy and her son Darwin to lunch?

1 A There was.

2 Q And was the purpose of that lunch meeting to
3 discuss the development loan on the 19 acres of
4 property?

5 A The purpose of the luncheon was to talk, to
6 get, to allow Mr. Lyerly to meet Miss Wheeler, Miss
7 Cribb and Mr. Wheeler and to talk about their
8 general business plans for that property and any
9 other opportunities that they may have, but not
10 necessarily specifically that property.

11 Q At the lunch meeting you did discuss the 19
12 acres of property, correct?

13 A We did.

14 Q And at that meeting you told Miss Peggy,
15 didn't you, that First South Bank would be with her
16 through the development of this loan, did you not?

17 A No, ma'am, I did not. What we did, we told
18 her we were interested in possibly assisting with
19 the development financing for the property but it
20 would be subject to the normal credit underwriting
21 that most banks, all banks require and that would
22 be depending on their financial condition, tax
23 returns, things of that nature.

24 Q And in fact Miss Peggy and her son Darwin did
25 submit financial information to you, did they not?

1 A They did.

2 Q During that lunch meeting Miss Peggy
3 communicated to you that she was not willing to
4 cross collateralize this loan, did she not?

5 A I don't recall that specific comment but we
6 spoke more generally in terms of what their plans
7 were for that property and who they were talking
8 about being an anchor tenant.

9 Q But you don't deny, do you, that Miss Peggy
10 told you that she did not want to cross
11 collateralize that property?

12 A Not at that meeting, I don't recall that
13 specifically coming up.

14 Q How about after that meeting?

15 A Well, we already, that particular meeting was
16 subsequent to a loan we had already made to Miss
17 Cribb and Mr. Wheeler that we had a mortgage on
18 that property and so, I'm not sure if I understand
19 your question, I don't think it was at that
20 meeting, I don't think it was a couple days after
21 that meeting. At some point in time we talked
22 about the development loan in general and what we
23 would require as collateral. Now, whether it was
24 in the context you're talking about, I just don't
25 recall.

1 Q Do you recall during your time with First
2 Palmetto whether or not Miss Peggy had any loans
3 that contained or were secured by more than one
4 property, Mr. Lovelace?

5 A There was.

6 Q And during the time you were there you
7 actually assisted her, did you not, in decross
8 collateralizing those loans?

9 A I don't know whether I assisted her. I think
10 she gained assistance from someone, it wasn't
11 necessarily me. But we had a number of loans to
12 Miss Cribb and Mr. Wheeler that were cross
13 collateralized because of the amount of equity
14 connected with the property.

15 Q Your testimony to the jury today is that Miss
16 Peggy, you do not recall her telling you that she
17 did not want to cross collateralize this property
18 for the 19 acre loan?

19 A At that specific time, no.

20 Q How about anytime?

21 A Well, we talked about it prior to the closing
22 of that loan when we issued the email, excuse me,
23 when we issued the commitment letter that went to
24 her, her attorney and Mr. Wheeler I think on or
25 about May 29th or May 30. It listed the various

1 terms and conditions the bank would agree to to
2 make the loan we talked about on the 19 acres and
3 it included specific reference to 19 acres plus the
4 beach property which was the lot 4 that you are
5 obviously talking about.

6 Q After that meeting you and First South Bank,
7 you sent Miss Peggy flowers, did you not?

8 A No, ma'am, not that I can recall. There is
9 no reference to that in our files.

10 Q In May, mid May, 2008, did you send Miss
11 Peggy Wheeler-Cribb an email asking if she had
12 spoken with an attorney about the development of
13 this 19 acres?

14 A Ask that question again, I'm not quite sure.

15 Q Mr. Lovelace, I will show you what has been
16 pre-marked as Exhibit Number 9. Can you tell the
17 jury what that document is?

18 A It's an email to Miss Cribb from me dated May
19 15th, 2008.

20 Q Actually two emails, is it not?

21 A Oh, yes, ma'am, two emails, one dated May
22 14th.

23 Q And the May 14th email is from you, is that
24 correct?

25 A That's correct.

1 MS. BYRD: Your Honor, at this time I would
2 move Exhibit Number 9 into evidence.

3 THE COURT: Any objection.

4 MR. TYLER: No objection, Your Honor.

5 THE COURT: All right, Number 9 is in
6 evidence.

7 (Emails dated May 14 and 15 marked and
8 received in evidence as Defendant's Exhibit
9 Number 9).

10 BY MS. BYRD:

11 Q Your email, Exhibit Number 9, reads, "Peggy,
12 have you contacted Doug Hinds?" He is an attorney,
13 is that correct?

14 A That's correct, he was her personal attorney.

15 Q "About our desire to talk to him regarding
16 the South Causeway property?" Did I read that
17 correctly?

18 A That's correct.

19 Q Her response, the last sentence of her email
20 to you is, "I assured him we feel comfortable that
21 the bank's attorney will look out for our
22 interest." Did you respond to this email?

23 A Give me a second just to read this email.

24 Q Absolutely.

25 A If I'm reading this email correctly, all we

1 said was that -- I'm still a little confused, to be
2 honest with you.

3 Q Mr. Lovelace, my question is only if you
4 responded to that email.

5 A I'm sure I did. I mean, in some capacity but
6 I just, I can't recall this particular email.

7 Q And after your lunch meeting with Miss Peggy
8 and her son Darwin you requested that she forward
9 financial documents related to the project,
10 including traffic studies, environmental study,
11 that type document, is that correct?

12 A Well, we specifically at that time were more
13 interested in the financial aspects, the personal
14 financial, what it was going to cost to build the
15 so called spine infrastructure, the water, sewer,
16 roads, things of that nature because without that
17 we couldn't properly underwrite the loan they were
18 looking for.

19 Q And eventually, my question is, Miss Peggy
20 and her son Darwin forwarded those documents to
21 you, did they not?

22 A We only received financial information, we
23 never received all the documents normally one would
24 require, the bank requested connected with the
25 property development itself.

1 Q Mr. Lovelace, you said you would need those
2 documents to properly underwrite this loan, isn't
3 that correct?

4 A The financial documents, yes.

5 Q Okay. And are you telling me now that you
6 closed on this loan without having the documents
7 that were necessary to properly underwrite the
8 loan?

9 A We closed on the land portion of it. This
10 was a two phase credit. Part of the loan went to
11 refinance the property from the existing lender and
12 pay the normal customary closing costs you would
13 have to pay in order for the bank to gain a first
14 lien on the property and then the remaining balance
15 was held in abeyance until such time as the
16 pre-conditions for future advances were met by the
17 borrower.

18 Q And --

19 A Of which were enumerated in the loan
20 agreement.

21 Q Mr. Lovelace, as the vice-president of First
22 South Bank were you required to prepare a loan
23 summary and approval?

24 A I was.

25 Q And I have shown you what has been marked as

1 Exhibit Number 10. Is that the loan summary and
2 approval that you prepared related to this
3 property?

4 A Based on information we had at the time,
5 that's correct.

6 Q I'm sorry, you did prepare this, correct?

7 A That's correct.

8 MS. BYRD: Your Honor, at this time we would
9 move Exhibit Number 10 into evidence.

10 THE COURT: Any objection?

11 MR. TYLER: No objection, Your Honor.

12 THE COURT: All right, without objection
13 Defense 10.

14 (Loan summary and approval marked
15 and received in evidence as Defendant's
16 Exhibit Number 10).

17 BY MS. BYRD:

18 Q Mr. Lovelace, can you tell the jury what is
19 the loan amount shown on the loan summary and
20 approval, Exhibit Number 10?

21 A The loan amount that we requested approval
22 for was 6.5 million dollars.

23 Q And below that amount it indicates there is a
24 bank owed dollar figure, what is that?

25 A \$5,000,000.

1 Q I'm sorry?

2 A \$5,000,000.

3 Q And underneath that there is an indication of
4 total exposure. What does total exposure mean?

5 A Total exposure meant the amount the bank
6 would retain after a contemplated sale of a portion
7 of the loan to a participating lender, 1.5 million
8 dollars.

9 Q Listed on this, the total exposure of the
10 bank is listed as what?

11 A \$5,000,000.

12 Q And in the last sentence of purpose of the
13 loan it provides for a three year interest reserve
14 for \$850,000. Is that correct?

15 A That was the total interest reserve for the
16 three years, 300,000 for the first portion, the
17 land acquisition portion, and the balance, \$550,000
18 for the portion that would have been allocated to
19 the development itself once that was, once we got
20 all the documents and construction actually
21 proceeded.

22 Q And the term of the loan was for three years,
23 is that correct?

24 A That's correct.

25 Q And it was \$850,000 interest reserve, right?

1 A Total interest reserve of \$850,000.

2 Q Under the primary source of repayment it
3 lists the sale of various commercial out lots
4 derived from the development of this property. Is
5 that correct?

6 A That is what it says, right.

7 Q So at this time the bank at least anticipated
8 that parcels of this property would be sold. Is
9 that correct?

10 A That's correct.

11 Q Now, if you will go to the second page,
12 please, and there is a notation of loan conditions.
13 Do you see that, Mr. Lovelace?

14 A I do.

15 Q And it reads, "The loan approval is
16 conditioned upon First South Bank's ability to sell
17 a minimum of 1.5 million of the proposed loan to a
18 participating lender." Can you please tell the
19 jury what a participating lender is?

20 A A participating lender is one who would
21 desire to have, to play a part in the development
22 of the, ownership interest in a particular loan.
23 It could be for a variety of reasons, loan demand
24 in that particular area where that bank is located
25 is soft and they are looking to increase their loan

1 portfolio by participating in loans that are made
2 by another bank. It is very common for that to
3 take place and in this particular example we had
4 anticipated we would sell a portion of this
5 particular loan but we never did.

6 Q And the 1.5 million that you anticipated
7 selling, that was roughly equal to the amount for
8 the development, is that correct?

9 A That's right.

10 Q And I think you just told the jury but just
11 so we're clear, that was not done, you were not
12 able to find a lender to purchase that 1.5 million
13 dollar share, were you?

14 A We never sought a lender, we just decided not
15 to do it.

16 Q You decided not to do that?

17 A The primary reason for that is we, there was
18 a possibility that we were going to be asked to do
19 the construction financing on the grocery store
20 itself and which would have caused us to exceed our
21 legal lending limit and we were trying to look
22 ahead and try and determine how best we could
23 handle that and the best way would have been to
24 sell a portion of this loan to another lender so we
25 would free up additional lending capability to do

1 that but we never sought another lender to
2 participate in the loan, so it sort of became a
3 moot point at that time.

4 Q And again, if you will flip to what is number
5 seven of that document, in the top right corner.

6 A Sure.

7 Q That is the actual request that you made,
8 "This is to be submitted to the Board of Directors
9 of the bank." Isn't that correct?

10 A That's right, this was an estimated proposed
11 budget.

12 Q And above tht it says request. Is that
13 correct?

14 A That's right.

15 Q And you requested certain items which are all
16 listed here, one of which is the \$850,000 interest
17 reserve account?

18 A That's right.

19 Q And again, your approval was subject to
20 selling that 1.5 million dollars, correct?

21 A The approval was for the entire 6.5 million
22 dollars and the proposed use of the funds are
23 enumerated on the document Miss Byrd referenced but
24 the bank approved six and a half million dollars
25 but like I said, we never, we decided not to seek

1 additional participation on this loan and keep the
2 entire amount.

3 Q If you will flip to the next page, please.
4 And again, this is titled repayment and you again
5 write the primary source of repayment is to come
6 from the defendant and sale of the individual out
7 lots within the proposed site. Isn't that correct?

8 A That's correct.

9 Q In addition, in the second paragraph you
10 write, "The borrower's are also discussing a build
11 to suit arrangement"?

12 A That's right.

13 Q At least at that time the bank was aware that
14 the lease arrangement of Lowe's could require them
15 to build the Lowe's store?

16 A It started off as a ground lease and it moved
17 into a possible build to suit and that was the
18 reason we sought permission to sell a portion of
19 the loan so if the opportunity came along we had
20 the right of first refusal to assist in actually
21 helping construction, helping toward construction
22 of that particular grocery store we had the
23 capability of doing so.

24 Q If you will flip to page ten of that
25 document, Mr. Lovelace, under the heading

1 financial.

2 A Uh-huh (Affirmative).

3 Q Tell me if I read this correctly. "The
4 repayment for these notes is not dependent on the
5 personal income of the applicant," and that is in
6 bold and all caps. Is that right?

7 A That's right.

8 Q And you submitted this and recommended it be
9 approved. Is that correct?

10 A That's correct.

11 Q And the bank Board did approve this --

12 A That's right.

13 Q -- did they not?

14 A That's right.

15 Q And after the bank Board approved this loan
16 did you thereafter send Miss Peggy Wheeler-Cribb a
17 commitment letter?

18 A We did, I did.

19 Q And as a part of that commitment letter there
20 was a term that required Miss Peggy's son Darwin to
21 pledge as collateral a beach lot. Is that correct?

22 A That's correct.

23 Q And in response to your commitment letter
24 which is dated May the 30th, 2008 --

25 A All right.

1 Q -- did Miss Peggy respond?

2 A She did.

3 Q Mr. Lovelace, I have shown you what has been
4 marked as Defendant's Exhibit Number 11. Can you
5 tell the jury what that document is?

6 A It's an email from Miss Cribb to me dated
7 Sunday, June 1st, 2008, and it references her and
8 Mr. Wheeler's concern regarding paragraph Number 7
9 of the -- she references, she says letter of
10 intent but she is obviously referring to the
11 commitment letter I believe we sent on May the 29th
12 or 30th, and it says that, she said, "We have to
13 plan on the two additional lots at 334 Myrtle
14 Avenue to be available to us to bridge the loan, to
15 bridge any shortfalls we may have between now and
16 2010 when Lowe's Foods store opens. We feel sure
17 that we will need at least 500,000, maybe a million
18 to bridge this time period. Once before we had
19 everything cross collateralized and we vowed to
20 never do that again."

21 Q And --

22 MS. BYRD: Your Honor, at this time I would
23 move Exhibit Number 11 into evidence.

24 THE COURT: Any objection to Defense 11?

25 MR. TYLER: No, Your Honor, no objection.

1 THE COURT: All right, without objection.

2 (June 1, 2008 email was marked and received
3 in evidence as Defendant's Exhibit 11).

4 BY MS. BYRD:

5 Q And in this email the first sentence reads,
6 "Wayne. Darwin and I have read this and number
7 seven in letter of intent will not work for us."
8 Is that correct?

9 A That's correct.

10 Q "We thought the South Causeway property would
11 stand on its open." Is that right?

12 A That's right.

13 Q And she ends that by saying, "We vowed we
14 would never do that again"?

15 A That's correct. May I respond to that? May
16 I respond?

17 Q And after this letter was sent to you did you
18 not assure Miss Cribb --

19 MR. TYLER: Your Honor, the witness asked to
20 explain further.

21 THE COURT: All right. You can answer her
22 question, you don't need to ask if you can respond
23 if it's in response to her question.

24 A I responded to this email by highlighting why
25 this lot 4 was going to be required in this

1 particular case and I would like for the jury to
2 hear that.

3 Q And I will ask you a question and you will
4 have plenty of time to do that. I would like to
5 get through this in an orderly fashion.

6 A That will be fine.

7 MR. TYLER: Your Honor, if he wants to
8 explain I believe he should be allowed to go ahead
9 and explain.

10 THE COURT: Well, I mean, he did explain.
11 Apparently there is another portion in here he
12 wants the jury to hear and certainly you all are
13 going to have an opportunity to cross-examine, to
14 examine him.

15 MR. TYLER: Sure, Your Honor, as long as we
16 have the opportunity to make sure the whole story
17 is explained.

18 THE COURT: Absolutely.

19 BY MS. BYRD:

20 Q Mr. Lovelace, did you, after receiving that
21 email did you tell Miss Peggy that this property
22 would stand on its own and that additional
23 collateral would not be necessary? You said that,
24 didn't you?

25 A I did once the infrastructure was in place

1 and once the final, the final as completed value
2 exceeded a certain amount.

3 Q Mr. Lovelace, I have shown you what has been
4 marked as Exhibit Number 12. Can you identify what
5 that document is for the jury?

6 A I will. This is a letter that I hand
7 delivered to Mr. Wheeler and Miss Cribb at the
8 closing on June 25th, 2008, which enumerates three
9 items that any one of which, not together, but any
10 one of which would have, if they had provided us we
11 would have released our mortgage on lot 4 that Miss
12 Byrd is talking about.

13 Q And just to summarize, this is a letter that
14 outlines the conditions under which First South
15 Bank would release the beach lot, lot number 4,
16 from your loan, is that correct?

17 A That's correct.

18 Q And it is dated June 25th, 2008, which is the
19 day of closing, is that correct?

20 A That's correct.

21 Q And you hand delivered this letter to Miss
22 Peggy Wheeler-Cribb at closing?

23 A That's correct.

24 Q And why did you not mail it?

25 A Well, I thought I had addressed it in the

1 email in response to the one we were just talking
2 about a second ago that properly documented what
3 the terms and conditions were to release lot 4 and
4 I also avoided the copy to her attorney Doug Hinds,
5 so I didn't think there was necessarily a need, it
6 wasn't in letter form but we had enumerated, I had
7 enumerated exactly what the requirements would be
8 to release lot 4 at closing. I thought, "I will
9 just hand deliver it at closing because we all know
10 what the circumstances are."

11 Q Just to be clear for all of us, did you not
12 deliver this letter which is marked as Exhibit
13 Number 11, did you not deliver this letter to Miss
14 Peggy?

15 MR. COLLINS: Your Honor, that is Exhibit 12.

16 MS. BYRD: I'm sorry, thank you, Mr. Collins.

17 THE COURT: All right.

18 BY MS. BYRD:

19 Q You did not deliver this letter, this Exhibit
20 Number 12 to Miss Peggy or her attorney before the
21 day of closing, did you?

22 A No, but I conveyed the contents of what would
23 be in the letter prior to the closing.

24 Q Up until the day of closing, then, the
25 inclusion of lot 4 was still an issue, was it not?

1 A No, ma'am, I don't think so because I go back
2 to that email that we're going to discuss later,
3 there was no question that there was an
4 understanding that lot 4 would be part of our
5 collateral package, at least on the short term.

6 Q Mr. Lovelace, did you not tell Miss Peggy at
7 closing that the inclusion of this lot was just a
8 formality?

9 A I don't remember, recall that at all.

10 Q Do you recall that you testified previously
11 that this letter was given simply to comfort Miss
12 Peggy?

13 A That is probably true because I think she
14 would probably have felt she needed something in
15 writing indicating the bank's position but if you
16 want to call it a comfort letter, maybe there is
17 nothing wrong with that.

18 Q And in your explanation that you gave the
19 jury you said that this lot, this additional lot
20 was necessary because you needed a loan to value
21 ratio of 65 percent. Is that correct?

22 A We needed, in order to do the deal as it was
23 originally done, refinance the land and also to do
24 the infrastructure financing, to provide funds to
25 do the infrastructure we would not have, we would

1 not have had enough collateral had we not had the
2 lot 4, mortgage on the lot.

3 Q I'm sorry. Is it correct to say that you
4 needed lot 4 to have a loan to value ratio of 65
5 percent?

6 A We did not -- we did not have a, we did not
7 have the value of the land, the current, the
8 appraised value at that time, at the time the loan
9 closed, or the time the loan was approved, I should
10 say.

11 Q Can you tell me what is the loan to value
12 ratio? I understand that means the amount you loan
13 versus the appraised value of the property?

14 A The loan to value ratio is the amount of the
15 loan divided by the value of the property.

16 Q And in the case of development loans, what is
17 the, what is the necessary and required loan to
18 value ratio?

19 A Generally the more equity you have the
20 better, but I think the supervisory limit is 70
21 percent. In our case, on raw land, which is all we
22 had, the supervisory loan to value is 60 percent.

23 Q Wasn't this a development loan?

24 A Yes. It was a two phase credit. The first
25 part was to refinance the land from the existing

1 lender in order for us to have a first mortgage on
2 the property. The second phase was to develop the
3 property once all the necessary and required
4 documents were put in our hand and we knew exactly
5 what the project was going to cost. At that point
6 in time all we knew was what we had gleaned from
7 these conversations with engineers but we didn't
8 have a specific construction contract to know
9 exactly what the project was going to cost, so we
10 could not advance any additional money, one, until
11 we had a first mortgage on the property, second of
12 all, the construction phase we're talking about, we
13 had to wait until such time as we had that
14 information to do that.

15 Q Did you ever explain this was not a
16 development loan to Miss Peggy?

17 A It was a development loan. The first part
18 was just to refinance the land and get, to provide
19 First South Bank with a first mortgage on the
20 property.

21 Q And my question is did you ever explain that
22 to Miss Peggy, that you considered it a two part
23 loan, because everything I have heard you --

24 A The note plainly called for it to be a
25 multiple advance loan and the purpose of the loan

1 says acquisition and development of property
2 located at intersection of South Causeway Drive and
3 Highway 17 South on Pawley's Island and it is
4 outlined in the commitment letter.

5 Q Mr. Lovelace, at some point after the closing
6 of this loan did First South Bank not decide to
7 terminate the remaining 1.5 million dollar
8 development portion of this loan?

9 A Let me explain that. I think you're
10 referring to your terminology of freezing the loan.

11 Q No, actually I asked you did First South Bank
12 terminate the remaining 1.5 million dollar
13 development portion of this loan?

14 A We did at the suggestion of Miss Cribb.

15 Q Is it your testimony before this jury today
16 that the decision to terminate the loan was made by
17 Miss Peggy Wheeler-Cribb?

18 A We did not terminate the loan. What we did
19 was we reduced the amount that was allocated for
20 the development. She told us in a September 30th
21 email that since they had decided to sell the
22 property, list the property and sell it, there was
23 no need for the construction phase to be
24 outstanding anymore. We left it open, we didn't,
25 we were still prepared to do the development but

1 she at her own request asked us, told us it would
2 be okay if we did away with that portion of it.

3 Q Mr. Lovelace, do you recall that your
4 deposition was taken in this case, do you recall I
5 took your deposition in this case on September
6 16th, 2011?

7 A I do.

8 Q Do you recall whether I asked you whether or
9 not First South Bank froze this loan?

10 A You did but unfortunately those were your
11 words, not mine.

12 Q And what was your response?

13 A I agreed but I was trying to be accommodating
14 to your question. We never froze anything. It is
15 true that we didn't make any additional advances
16 other than the initial advance to refinance the
17 property but there were so many, there were a
18 number of pre-conditions had to be met by the
19 borrowers for us to make any subsequent advances
20 and they never met them, they never applied for a
21 subsequent advance and so we never made any
22 additional advances.

23 MS. BYRD: Your Honor, I need to publish the
24 deposition of Mr. Lovelace.

25 Q Mr. Lovelace, if you could, please flip to

1 page 51 of your deposition.

2 A Page again?

3 Q 51.

4 A All right.

5 Q At line 9 the question I asked is, "After
6 this loan was closed in June of 2008 there came a
7 time where the bank made the decision that it would
8 essentially freeze the loan. Is that right?" And
9 your response was?

10 A Excuse me. My response, my response was,
11 "That's correct."

12 Q Okay. And I would like for you to please
13 flip to page 54. At line 15 I asked you, "And as a
14 result of that meeting was that when the decision
15 was made by the bank to freeze the loan?" And if
16 you will please read your response.

17 A I'm sorry, which lines, 17 and 18?

18 Q Yes.

19 A "I don't recall the exact date when we agreed
20 to freeze the loan. I think it was a time when
21 Lowe's decided due to market conditions they were
22 not going to go forward with the transaction. That
23 along with the fact there was no evidence of any
24 work being done on the project, that is when we
25 decided that we would freeze the loan."

1 That's correct.

2 Q Okay. Now flip to the next page, please.

3 The question at line one, "And how was the decision
4 made to freeze the loan?" And your response was,
5 "It was a collective decision by Mr. Lyerly, me and
6 our credit administration area."

7 Is that correct?

8 A That's correct.

9 Q And if you will flip to page 64 of your
10 deposition.

11 A 64?

12 Q Yes.

13 Q And at line 18 my question, "And after the
14 bank decided to freeze the loan was the fact, was
15 that fact communicated to Miss Cribb or Mr.
16 Wheeler?" And your answer was?

17 A "I'm sure it was. Again I can't point to a
18 specific document or date but --"

19 Q And then my question was, "Who would have
20 communicated that to them?"

21 A "I would have probably been the one since I
22 was the relationship officer."

23 Q I'm sorry, it says I.

24 A "I would have probably been the one."

25 Q I asked, "What was their response?"

1 A "Well, I think they were concerned that we
2 weren't honoring our agreement to carry the project
3 through as they described it but there was no
4 project it appeared to us at the time when we
5 decided to do that since Lowe's had backed out of
6 the deal."

7 Q Mr. Lovelace --

8 MR. TYLER: Your Honor I move under Rule 106,
9 there is additional deposition testimony that is
10 relevant to this issue, I move under Rule 106 to
11 have that in evidence.

12 MS. BYRD: Your Honor, may we approach on
13 that issue?

14 THE COURT: Yes.

15 (Unrecorded bench conference)..

16 BY MS. BYRD:

17 Q Mr. Lovelace, prior to you communicating to
18 Miss Cribb that the loan would be frozen did she
19 not on several occasions ask you whether there was
20 anything that they were not doing under their loan
21 that they were required to do?

22 A Excuse me, I can recall one instance where in
23 response to a request to meet with she and Mr.
24 Wheeler to discuss the loan that she made that
25 reference, yes, ma'am.

1 Q You said one time, is that correct?

2 A That's the only time I can remember.

3 Q Mr. Lovelace, I have shown you what has been
4 marked as Exhibit Number 13. Is that correct?

5 A That's correct.

6 Q Can you identify what that document is for
7 the jury, please?

8 A This is an email from Miss Cribb to me with a
9 copy to Mr. Wheeler regarding the meeting that we
10 had requested to talk about the loan.

11 Q And did you receive this email?

12 A Yes, ma'am.

13 MS. BYRD: Your Honor, at this time I would
14 move Exhibit Number 13 into evidence.

15 MR. TYLER: No objection, Your Honor.

16 THE COURT: Without objection.

17 (Cribb to Lovelace July 30, 2008, email
18 marked and received in evidence as
19 Defendant's Exhibit Number 13).

20 BY MS. BYRD:

21 Q Mr. Lovelace, can you please read to the jury
22 the first sentence of the second paragraph of the
23 email.

24 A "Is there anything we aren't doing in
25 compliance with our loan agreement?"

1 Q And it goes on to say what?

2 A "If so, please advise us immediately."

3 Q Mr. Lovelace, did you respond to that email?

4 A I can't, I can't specifically recall an email
5 that specifically addresses this particular email,
6 no. There could be one, I just don't know off the
7 top of my head.

8 Q Isn't it true you didn't respond to that
9 email because you said it was not the bank's job to
10 do so?

11 A I believe I did say that, right.

12 Q And again, the date of that email is what,
13 sir?

14 A 7/30/2008.

15 Q Do you believe it is not the bank's job to
16 communicate to its customers if it believes they
17 are not doing something they are required to do?

18 A Well, what I believe is that at some point in
19 time they have to take responsibility for their own
20 actions and in this particular case we had made
21 several attempts to contact both Miss Cribb and Mr.
22 Wheeler regarding documents specific to the
23 construction phase of this transaction and they had
24 never responded. So, did I respond to this
25 particular email, I can't recall that I did but

1 (Wheeler-Cribb email marked and received in
2 evidence as Defendant's Exhibit Number 14).

3 BY MS. BYRD:

4 Q Mr. Lovelace, I have shown you what has been
5 marked Defendant's Exhibit Number 15. Would you
6 identify what document for the jury, please?

7 A This is a series of emails beginning
8 Thursday, August 14th, from me to Mr. Lyerly and
9 then from Mr. Lyerly back to me and then me back to
10 Mr. Lyerly.

11 Q All right. This is you forwarding Miss
12 Peggy's response for you all to come down and have
13 meetings, isn't that right, to Chip Lyerly?

14 A She had requested, she had offered or she had
15 invited us to come down, right.

16 Q And you forwarded that to Mr. Lyerly, is that
17 correct?

18 A That's correct, right.

19 MS. BYRD: Your Honor, at this time I would
20 move Exhibit Number 15 into evidence.

21 MR. TYLER: No objection on 15, Your Honor.

22 THE COURT: Without objection.

23 (Emails marked and received in evidence as
24 Defendant's Exhibit Number 15).

25 BY MS. BYRD:

1 Q And, Mr. Lovelace, can you please tell the
2 jury what Mr. Lyerly's response to that request
3 was?

4 A He asked me what kind of backup, quote,
5 unquote, she had from HT, obviously Harris-Teeter.
6 In other words did she have a letter of intent,
7 leases, sales contract, what exactly was she
8 talking about as far as Harris-Teeter's
9 involvement.

10 Q And I will read this portion, just let me
11 know if I read it correctly, okay. He writes, "I
12 think that it is better for us not to meet with her
13 and her attorney at the same time. I think that we
14 should gauge her level of real estate
15 sophistication on our own." Is that correct?

16 A That's correct.

17 Q And do you know why Mr. Lyerly didn't want to
18 meet with Miss Peggy and her attorney?

19 A It would be pure speculation on my part, I
20 just don't know.

21 Q And you responded to Miss Peggy's request for
22 you all to come down to that meeting, did you not?

23 A I did.

24 Q I have shown you what has been marked as
25 Exhibit Number 16. Would you please identify that

1 document for the jury?

2 A This is an email again from me to Miss
3 Wheeler, excuse me, Miss Cribb, and then a copy
4 from me to Mr. Lyerly.

5 Q And the first, it is two emails, is that
6 correct?

7 A That's correct.

8 Q The first is from you to Miss Peggy, is that
9 correct?

10 A That's correct.

11 Q And the second is you forwarding to Mr.
12 Lyerly your response to Miss Peggy, is that
13 correct?

14 A That's right.

15 MS. BYRD: Your Honor, at this time we would
16 introduce Exhibit 16 into evidence.

17 THE COURT: Any objection?

18 MR. TYLER: No objection, Your Honor.

19 THE COURT: Without objection, Defendant's
20 16.

21 (Emails marked and received in evidence as
22 Defendant's Exhibit Number 16).

23 BY MS. BYRD:

24 Q And, Mr. Lovelace, your response to Miss
25 Peggy's request for a meeting was that, "Thank you

1 for the invitation but I'm not sure that the
2 meeting scheduled for the 21st is a good date for
3 us as we have another bank related meeting we need
4 to attend." Is that correct?

5 A That's correct.

6 Q What bank meeting --

7 A We have, generally speaking, Thursdays are
8 set aside for internal meetings like any bank has
9 to talk about issues that are common to different
10 offices, credit meetings, things of that nature,
11 Thursday is the day it's done.

12 Q And Mr. Lyerly had indicated that he wanted
13 to gauge, he believed you all should gauge their
14 level of sophistication on your own, is that
15 correct?

16 A The previous emails, right.

17 Q And is that not something that you should
18 have gauged before you made the loan?

19 A Well, we think we did an adequate job at the
20 time the loan was made, which I believe we will
21 verify later on.

22 Q And you did not attend this meeting October
23 21st, did you?

24 A No, ma'am.

25 Q I'm sorry, September 21st.

1 A No, ma'am.

2 Q August 21st.

3 A The one referenced in this email, we did not
4 attend, right, I did not attend.

5 Q Attorney Don Tyler represents the bank, does
6 he not?

7 A Among others, yes, ma'am.

8 Q And Mr. Tyler, Attorney Tyler assisted the
9 bank in reviewing and revising the Lowe's lease, is
10 that correct?

11 A I'm not sure he was -- he responded to a
12 request for assistance from Mr. Geer, the law firm
13 that represented Miss Cribb, but he didn't, to my
14 knowledge he made no representations where he said
15 you can have this or can't have that, anything of
16 that nature.

17 Q Mr. Lovelace, I will show you what has been
18 marked as Exhibit Number 17. Would you identify
19 that document, please?

20 A This is an email from me to George Geer with
21 a copy to Chip Lyerly and Don Tyler.

22 Q You wrote this email, is that correct?

23 A That's correct.

24 MS. BYRD: Your Honor, at this time we would
25 move Exhibit Number 17 into evidence.

1 THE COURT: Any objection?

2 MR. TYLER: Your Honor, I don't have any
3 specific objection on this email, I'm just not sure
4 what the relevance is or where we're going.

5 THE COURT: This is Number 17?

6 MS. BYRD: Yes, sir, Your Honor.

7 THE COURT: All right. I assume you can tie
8 in the relevance?

9 MS. BYRD: Yes, sir.

10 THE COURT: All right.

11 (Lovelace to Geer email marked and received
12 in evidence as Defendant's Exhibit 17).

13 BY MS. BYRD:

14 Q Mr. Lovelace, you wrote to George Geer that
15 "Don Tyler," who is the attorney we just talked
16 about, correct?

17 A That's right.

18 Q "Chip Lyerly and I have a meeting scheduled
19 for 11:00 a.m. this morning to discuss the lease
20 and your latest revision and it would be helpful to
21 get an update." Is that right?

22 A That's correct.

23 Q At that meeting did you discuss revision of
24 the Lowe's lease agreement?

25 A We discussed -- I don't recall this specific

1 meeting but whatever we discussed would have been
2 primarily centered on is the lease sufficient to
3 pay the debt service that the bank expected to
4 incur, or the borrowers, we expect the borrower to
5 incur.

6 Q Again, for my information, and the jury, what
7 is the date and time of that email?

8 A September 30, 2008, 8:57 a.m.

9 Q Mr. Lovelace, I have shown you what has been
10 marked as Defendant's Exhibit 18. Can you identify
11 that document?

12 A This is an email from me to Miss Cribb with a
13 copy to Mr. Lyerly regarding South Causeway.

14 Q Okay. It's dated the same day as the
15 previous emails, is that correct?

16 A That's correct, yes, ma'am.

17 Q Which is Exhibit Number 17.

18 A That's correct.

19 Q And it is just later in the day, is that
20 correct?

21 A That's correct.

22 Q And in this email --

23 MS. BYRD: Your Honor, at this time we would
24 move Exhibit Number 18 into evidence.

25 THE COURT: Any objection?

1 MR. TYLER: No objection on 18, Your Honor.

2 THE COURT: Without objection.

3 (Lovelace to Cribb email marked and received
4 in evidence as Defendant's Exhibit 18).

5 BY MS. BYRD:

6 Q And again, this is an email from you to Miss
7 Peggy, is that correct?

8 A That's correct.

9 Q In your email you write, "Specifically we
10 would like to arrange a meeting with you and Darwin
11 in the near future. Specifically there are some
12 things in both the Lowe's lease and in your
13 proposal that might prove to be unworkable for us
14 going forward." Is that correct?

15 A That's what it says, right.

16 Q What were those things, those provisions that
17 were going to be unworkable for you?

18 A To be perfectly honest, I cannot recall. I
19 mean, it escapes me what those were at that point
20 in time.

21 Q And again this email was sent the same day as
22 your meeting with Attorney Tyler?

23 A Yes.

24 MR. TYLER: Again I object on the ground of
25 relevance. I'm really not sure where this is

1 going.

2 THE COURT: You need to tie this in, Miss
3 Byrd. Where is the relevance here?

4 MS. BYRD: Your Honor, I think the relevance
5 is that we have alleged -- may we approach?

6 THE COURT: Yes, ma'am.

7 (Unrecorded bench conference).

8 MR. TYLER: Your Honor, could we get a ruling
9 on the record on our objection?

10 THE COURT: Yes. Overruled.

11 BY MS. BYRD:

12 Q Mr. Lovelace, after these emails in September
13 there came a time in or about November of 2008 that
14 Miss Peggy approached you about making a loan on
15 another piece of property that she owned. Is that
16 correct?

17 A That's correct.

18 Q Okay. And what -- did she request that the
19 bank make her a loan on lot 3?

20 A On lot 3?

21 Q Yes.

22 A I'm not familiar with lot 3.

23 Q Okay. But you know it is property that was
24 not covered under your loan, right?

25 A I just don't recall where lot 3 is or where

1 in the scheme of things here, I don't know whether
2 she ever -- she did call but I don't know whether
3 she ever identified the lot you're talking about.

4 Q And you responded to her request for a loan
5 that First South Bank couldn't help her, is that
6 correct?

7 A I suggested that she seek financing from a
8 local lender. I didn't say we couldn't help her
9 but I said given the fact we already had a six and
10 a half million dollar exposure and our legal
11 lending limit at the time was 7.1 million, it would
12 be somewhat difficult to approve any additional
13 financing.

14 Q You didn't tell her that First South Bank
15 could not make her a loan?

16 A I don't recall, I didn't say we couldn't make
17 her a loan, I said it would be best if she sought
18 financing at an area bank where she lived.

19 Q And you're aware in fact that she did seek
20 financing from other sources, is that correct?

21 A Well, I didn't know -- well, I didn't know at
22 the time who she contacted. She never furnished us
23 any kind of information on whether she ever made
24 application to anybody but I just assumed that --
25 she asked for some suggestions and I gave her a

1 suggestion, "Check with her local bank," but what
2 she did from that point on I don't know.

3 Q And in early 2009 Miss Peggy told you, didn't
4 she, that she had found another lender, Kennedy
5 Funding?

6 A I don't know whether she told me that she
7 found -- I think the first I learned of Kennedy
8 Funding was from maybe her loan broker. I didn't
9 know who Kennedy Funding was at all, where they
10 were located or who they were or anything of that
11 nature.

12 Q But Miss Peggy did ask you to release lot 4
13 in able to take the loan from Kennedy Funding,
14 isn't that correct?

15 A Yes, ma'am -- no. At that particular time --
16 she did but we asked for some type of collateral
17 substitution in order to do that. We had a piece
18 of property that was, had an appraised value of a
19 million 400 thousand dollars and in our effort to
20 accommodate her we asked for a \$500,000 CD. We
21 were willing to take a major discount in the value
22 of the collateral securing that loan in order to
23 help accommodate her.

24 Q After you told her that you would release it
25 for \$500,000 did you then follow that up with two

1 options for the release of that lot?

2 A We did.

3 Q And you told her that \$500,000 is what the
4 bank would need to replenish the interest reserve
5 account to carry the loan through to its original
6 maturity date in July, 2011, correct?

7 A It was, the \$500,000 connected with the, in
8 order to continue with the original maturity date,
9 that would have been about right.

10 Q And an interest reserve account is an account
11 that the bank sets up and it basically debits it
12 each month for the payment of the loan. Is that
13 correct?

14 A That's correct.

15 Q And your initial commitment letter and loan
16 agreement called for an interest reserve account to
17 be set up by the bank for \$850,000, didn't it?

18 A 300 for the first phase of the loan and 550
19 for the second phase, that's correct.

20 Q And that is equal to \$850,000, correct?

21 A That's correct.

22 Q So if the bank had done that wouldn't that be
23 sufficient to carry the loan and such that the
24 \$500,000 would not be necessary?

25 A No, ma'am, that is not correct. That

1 particular interest reserve was strictly in support
2 of the project that was contemplated to be built at
3 South Causeway. And if you look at the loan
4 agreement, the release of that, I mean, there was
5 still these pre-conditions out there that hampered
6 us making any additional advances under the loan.
7 She never met the terms or conditions of those
8 pre-conditions that obligated the bank to make that
9 loan.

10 Q You suggested we look at the loan agreement
11 so I think we should do that, and that is Exhibit
12 Number 1 of the plaintiff's.

13 MR. FLOYD: Your Honor, for the record, to
14 assist, I actually think it is Number 2. The
15 commitment letter is Number 1, I believe.

16 A These are the commitment letters, not loan
17 agreements.

18 Q I gave you both, did I not?

19 A Yes, ma'am, I'm sorry.

20 Q Looking at Exhibit Number 1, which is the
21 loan commitment letter, is that right?

22 A That's correct.

23 Q Okay. And if you will flip to the second
24 page of that document. In paragraph B it provides
25 that -- I'm sorry. Paragraph D provides that

1 \$300,000 shall be disbursed into a restricted
2 access interest account, correct?

3 A That's correct.

4 Q Paragraph F provides \$550,000 will be put in
5 the interest reserve account at the earlier to
6 occur, the completion of the infrastructure and six
7 months from the date of the loan closing. Is that
8 correct?

9 A That's correct.

10 Q And if you add those two up it requires
11 \$850,000?

12 A That's correct.

13 Q And if that had been done that would have
14 been sufficient to carry the loan for three years,
15 is that correct?

16 A No, ma'am. The \$300,000 was advanced at
17 closing less an amount that we agreed to let them
18 withhold to pay disputed rollback taxes. It was
19 subsequently returned to the bank and it was
20 credited to her, so ultimately the \$300,000 she was
21 given credit for is an interest reserve for an
22 initial part of the loan. The \$550,000 was to be
23 advanced only upon the completion of the
24 infrastructure, and the loan agreement was very
25 specific about what can be advanced out of the loan

1 and so forth. So, on the one hand you're right,
2 there was \$850,000 for interest coverage but on the
3 other hand it was specifically designed to be used
4 solely for the South Causeway development.

5 Q And \$850,000 in interest, that would have
6 been sufficient to carry the loan for three years,
7 correct?

8 A If she qualified for it, yes, ma'am.

9 Q But that would have been sufficient?

10 A Well, based on our initial calculations it
11 probably would have. Now, if interest rates had
12 gone up as opposed to down, then based on that, it
13 might have been some concern there, but based on
14 our calculations where interest rates were at the
15 time the loan was made, I think the \$850,000 would
16 have been sufficient to do that until such time,
17 until such time as lease income started from the
18 Lowe's development, the Lowe's, the ground lease or
19 the build to suit deal, whichever they had decided
20 to select.

21 Q Did you ever have a discussion with Miss
22 Peggy personally regarding the two options First
23 South Bank was offering, the 300 versus the
24 \$500,000 option, did you ever discuss that
25 personally?

1 A We had a series of emails about it, yes,
2 ma'am.

3 Q Did you ever discuss it with Miss Peggy?

4 A By way of emails.

5 Q And part of the \$300,000 that was paid the
6 bank was used for payment of property taxes, is
7 that correct?

8 A That's correct.

9 Q And after the agreement was signed in April
10 of 2009 Miss Peggy actually paid the property
11 taxes, did she not?

12 A And we reimbursed her the same date. We
13 didn't realize she had made duplicate payment. We
14 paid it, Georgetown County treasurer returned it to
15 us telling us it had just been paid and we
16 immediately sent a check to her for, to reimburse
17 her for her expense.

18 Q And in fact her payment of those taxes, when
19 the agreement called for payment by First South,
20 did that in any way indicate to you that perhaps
21 she didn't understand the agreement?

22 A I think --

23 MR. TYLER: Your Honor, I object. That is
24 speculation on what Miss Wheeler-Cribb was
25 thinking.

1 THE COURT: Well, I mean, I don't think that
2 is the question. The question was would it not
3 have tipped you off that maybe --

4 MR. COLLINS: Your Honor, the court reporter
5 can read it back.

6 THE COURT: Yes.

7 THE COURT: She says did that indicate to you
8 perhaps she didn't understand the agreement. In
9 others words, what did that indicate to you. He
10 can answer that. He can't answer what Miss Cribb
11 did, obviously, but he can answer what that
12 indicated to him.

13 MR. TYLER: Thank you, Your Honor.

14 THE WITNESS: Nothing to me other than it was
15 a duplicate payment and we had, and we found out
16 that, you know, duplicate payments are made from
17 time to time by everybody and when we found out she
18 had made a payment that we expected to pay
19 ourselves we paid her directly to reimburse her
20 cost. I can't infer anything from that.

21 BY MS. BYRD:

22 Q Mr. Lovelace, I'm going to switch gears on
23 you a little bit.

24 A Sure.

25 Q Did you have a discussion with a realtor by

1 the name of Will Hudson, Keystone Properties,
2 regarding this 19 acres?

3 A Yes, ma'am. He among others.

4 Q And isn't it true that Mr. Hudson contacted
5 you with an offer that he had presented to Miss
6 Peggy?

7 A Yes, ma'am.

8 Q And didn't you respond to Mr. Hudson that it
9 was a good offer and she should accept it?

10 A She provided Mr. Hudson's name and I wouldn't
11 have known Will Hudson from Adam, frankly, and she
12 suggested that -- first of all you have to remember
13 this is a very sizeable loan for this bank and
14 anything that as far as contacting a realtor, there
15 is nothing wrong with that, that is why we're
16 trying to do due diligence or be prudent and
17 protecting the bank's funds and get some idea as to
18 what, how the property is being marketed.

19 Back to your question regarding Mr. Hudson,
20 Miss Wheeler, excuse me, Miss Cribb, she provided
21 us names of various realtors that had represented
22 her in the past, one of which was Mr. Hudson, and I
23 called Mr. Hudson to find out if there was any
24 movement on the property or did he know anything
25 about it and he divulged there was a client that

1 had made an offer that I believe was from Boca
2 Raton, Florida, if I'm not mistaken, and I just,
3 when he told me the amount I said, "Yes, it sounds
4 like a pretty good deal, maybe she ought to
5 consider it." That is all that was said.

6 Q You didn't say it was a good offer and Miss
7 Peggy should accept it?

8 A To my knowledge I don't recall using those
9 words at all.

10 Q After that conversation with Mr. Hudson did
11 Miss Peggy ask you to stop contacting her realtors?

12 A I don't recall whether she said stop
13 contacting realtors but she had made it plain that
14 if we wanted, in the past that if we wanted to
15 contact and get an update on property that were
16 being, what efforts were being made to sell the
17 property, that we could do that. Now, to answer
18 your question, I don't know whether she
19 specifically used those terms or not but I don't
20 recall specifically that being the case.

21 Q You don't recall Miss Peggy asking you to not
22 contact her realtors?

23 A Not in those words, not in so many words.

24 Q Not in so many words?

25 A Not that I can recall, no.

1 Q But in fact you did have other conversations
2 with other real estate agents, didn't you?

3 A She furnished us names of people she had
4 dealt with and I'm sure that over a period of time
5 I did contact realtors just to get an update on
6 where things were regarding sales activity.

7 Q Miss Peggy was giving you information and
8 keeping you updated of what was going on with the
9 property?

10 A Only when I called.

11 Q I'm sorry?

12 A Only if I inquired about it. There was
13 nobody, we had not told anybody or suggested to
14 anybody, "You need to call us on the first day of
15 every month from here on out until the property
16 sells and give us an update." We just maybe once a
17 month, maybe once every month and a half we would
18 call to see if anything was being done about
19 selling the property.

20 Q And in fact on or about May the 15th, 2010,
21 you called Christy Vintage Real Estate Auction
22 Company, didn't you?

23 A I did.

24 Q You spoke to Mr. Don Thomas, is that correct?

25 A That's correct.

1 Q And the purpose of your call to Mr. Thomas
2 was what, sir?

3 A To find out if the auction that was scheduled
4 was in fact going to be held.

5 Q Why didn't you call and ask your customer
6 that, why didn't you call and ask Miss Peggy that?

7 A For one thing, she told us on many occasions
8 before that she was, if this didn't happen or that
9 didn't happen she was going to have an auction, and
10 she never did, and I thought, she apprised us there
11 was going to be an auction but our experience in
12 the past was that the auctions that she had
13 scheduled never came about, she referenced, never
14 came about and, excuse me, and the only thing I did
15 was just call to find out if in fact this
16 particular auction was going to take place.

17 Q Your testimony to this jury was the sole
18 purpose for calling Mr. Thomas was to find out if
19 this auction was to take place?

20 A Absolutely.

21 Q And it was not, you were not calling Mr.
22 Thomas at the direction of Mr. Lyerly, were you?

23 A I don't recall that being the case but maybe
24 we did talk about it, yes, I think we did have an
25 interest in knowing if the property was going, if

1 the auction was going to take place, right.

2 Q And did you also have an interest in knowing
3 whether the auction company knew what the current
4 amount of the loan was?

5 A What I told Mr. Thomas was that we, we would
6 not accept partial releases and we would not accept
7 partial payments. That needs to be distinguished,
8 we will talk about that, but we would not take a
9 payment or payoff in drips and dabs, we wanted to
10 to be paid off in full and be done with this
11 project.

12 Q My question really is, you testified a moment
13 ago that the sole purpose of your call to Mr.
14 Thomas was to find out whether the auction is going
15 forward?

16 A That's right.

17 Q And I'm trying to clarify is that the case,
18 is that true, or were you calling to find out
19 whether they knew what the current amount of the
20 loan was?

21 A The primary reason for me calling was to find
22 out if the auction was going to take place.

23 Q And during your conversation with Mr. Thomas
24 you disclosed the amount due on the loan, did you
25 not?

1 A I believe he said I did, yes, ma'am.

2 Q And that information is confidential, isn't
3 it?

4 A Not necessarily, because there is evidence in
5 email correspondence that other people knew.

6 Q Mr. Lovelace, is the amount that a customer
7 owes on its loan with your bank confidential
8 information or not?

9 A No, ma'am. I mean, it is not in this
10 particular instance here because he obviously did
11 not know how much it was going to take for the bank
12 to be made whole and sell the property to a
13 purchaser.

14 Q So you're telling this jury that the bank is
15 free to call anybody they want and disclose to
16 anybody they want what the amount is owed on a
17 loan?

18 A No, ma'am, I'm not saying that. I'm just
19 saying in this particular instance that the auction
20 company obviously did not know what it was going to
21 take. Miss Cribb had not told them, apparently,
22 what it was going to take to pay the bank off in
23 full.

24 Q That is her decision, isn't it?

25 A According to Mr. Thomas she had, I think she

1 had a responsibility to tell, otherwise I don't
2 believe you could conduct an auction without
3 knowing, a proper auction without knowing all the
4 details, the auctioneering company.

5 Q Are you an auctioneer?

6 A No, ma'am.

7 Q You don't know what is required or what is
8 not, do you?

9 A No, ma'am.

10 Q And Miss Peggy worked with an auction
11 company, didn't she, to set those prices based on
12 what was owed, didn't she?

13 A Well, I found out that Mr. Wheeler was pretty
14 much calling the shots, not Miss Cribb, and the
15 auction was being held on behalf of South Causeway
16 of which Mr. Wheeler was not a member.

17 Q And you explained that fact to Mr. Thomas,
18 didn't you?

19 A Beg your pardon?

20 Q You explained that fact to Mr. Thomas?

21 A I said, you know, he needed to make sure that
22 whoever signed a contract on behalf of South
23 Causeway was eligible to do that.

24 Q And how did you determine that Mr. Wheeler
25 was involved at all?

1 A Mr. Thomas told me.

2 Q He told you that Mr. Wheeler was setting
3 prices?

4 A Not setting prices. He was the one that was
5 sort of the person that was acting on Miss Cribb's
6 behalf.

7 Q Going back to your disclosure of the amount
8 owed on the loan, that is not a public record, is
9 it?

10 A There are ways, I understand there is ways
11 you can get that information if you want to dig for
12 it but, no. It's a matter of public record what
13 the amount of the mortgage was, six and a half
14 million dollars.

15 Q So in this case what the public record shows
16 was 6.5 million dollars?

17 A That's right.

18 Q And you understand, don't you, how the
19 disclosure of that type of information, meaning the
20 balance owed on a loan, you understand how that
21 could harm your customer --

22 A No, ma'am, not in this case.

23 Q Please let me finish my question.

24 A Okay.

25 Q You understand how the disclosure of the

1 amount owed on a loan by your customers when they
2 are actively trying to sell the property could harm
3 them, do you understand that?

4 A I don't believe that's the case at all.

5 Q Okay. Let me give you an example.

6 MR. COLLINS: Your Honor, I believe he is
7 trying to answer a question here.

8 THE COURT: He doesn't need to interrupt your
9 question, you don't need to interrupt his answer.

10 MS. BYRD: Yes, Your Honor.

11 THE COURT: Go ahead, sir.

12 THE WITNESS: In this particular case the
13 reason that there was, the -- restate the question
14 again. I lost my train of thought. This
15 particular property didn't sell, I mean.

16 THE COURT: Hold on. Henry, go back and read
17 Miss Byrd's last question.

18 (The prior question was read to the witness).

19 THE WITNESS: In this particular case the
20 reason there might be a lower offer, not so much
21 the knowledge of the, what the loan balance was,
22 but was because commercial properties everywhere
23 had declined. There is not a person in this room
24 that hasn't or doesn't know somebody that hasn't
25 had property values decline over the last three or

1 four years, and the fact that somebody chose to
2 offer a low price is not because he knew what the
3 loan balance was, it was because the market was
4 dictating what the value of property really was.

5 BY MS. BYRD:

6 Q How do you know that, Mr. Lovelace?

7 A It is a documented fact that real estate
8 values in not only the coastal area but all through
9 the United States have declined precipitously over
10 the last three or four years.

11 Q That is not the portion I want explained.
12 Nobody would deny the economy is bad.

13 A Right.

14 Q But what I'm asking you to tell me, how do
15 you know that the offers that were made on this
16 property were solely a result of the market and not
17 because of disclosure that you made?

18 A Why would somebody pay more than the market
19 would dictate?

20 Q Why would somebody pay more than what they
21 know is owed by the bank when they know the bank is
22 about to start a foreclosure?

23 A The loan, we had not started foreclosure, the
24 loan had not matured yet.

25 Q At this time you had allowed a third party,

1 Lincoln-Harris, to review the loan documents of
2 South Causeway, had you not?

3 A We were approached by a group that was,
4 wanted to gauge our interest in selling the note
5 and mortgage on this property, that's correct.

6 Q And in fact a representative of
7 Lincoln-Harris was at the auction, were they not?

8 A I didn't know that until yesterday, yes,
9 ma'am.

10 Q Greg Curry was listed on the auction sign-in
11 sheet, wasn't he?

12 A That's correct, and I -- maybe he was down
13 here just visiting the site, I don't know, he
14 wasn't there as our representative, if that is what
15 you're implying.

16 Q No. I think he established he is with
17 Lincoln-Harris, isn't that correct?

18 A Correct.

19 Q Lincoln-Harris is the company that had come
20 and reviewed the bank documents, is that correct?

21 A That's correct.

22 Q You testified early that nobody knew yet and
23 the foreclosure had not been filed yet, is that
24 correct?

25 A That's correct. The note didn't mature until

1 July the 5th, I believe.

2 Q But you told Mr. Thomas during your
3 conversation when the note was due and that it
4 would not be renewed, didn't you?

5 A I don't recall specifically but I must have,
6 I think he testified to that.

7 Q Let me, by way of example, if you have your
8 house that you purchased many years ago for
9 \$200,000 and you paid your loan down and you owe
10 6,000 on it and the public records are going to
11 indicate that you have a \$200,000 mortgage on your
12 house, isn't that correct?

13 A Okay.

14 Q And is that -- is that correct?

15 A Do I?

16 Q No, my hypothetical I'm asking you.

17 A Oh.

18 Q That is what is disclosed.

19 A The original documents would have expressed
20 what the mortgage was at the time the loan was
21 taken out to buy the house, right.

22 MR. TYLER: Your Honor, I object to the
23 hypothetical of a fact witness.

24 MS. BYRD: Your Honor, he gave an opinion as
25 to whether or not they could harm their customer by

1 disclosing the amount owed on their loan and I
2 think I'm entitled to ask him a hypothetical to
3 clarify that opinion.

4 THE COURT: Overruled.

5 MS. BYRD: Thank you, Your Honor.

6 BY MS. BYRD:

7 Q And if your bank called potential purchasers
8 and disclosed to purchasers that you only owed --

9 THE COURT: Come up here.

10 (Unrecorded bench conference).

11 BY MS. BYRD:

12 Q So, continuing on, if your bank disclosed the
13 amount owed on your mortgage was only \$6,000; would
14 you not think that would affect a potential
15 purchaser's offer for your home?

16 A Not necessarily, no. They would offer what
17 they think the market is worth.

18 Q During your conversation with Mr. Thomas you
19 also disclosed the maturity date was July, 2010,
20 did you not?

21 A I must have, yes, ma'am.

22 Q And that fact was not public record either,
23 was it?

24 A I think that our mortgage has a maturity date
25 in it or a lot of mortgages do, I can't

1 specifically say in this case whether it does or
2 doesn't but usually this particular mortgage does
3 have a maturity date.

4 Q A maturity date of July, 2010, do you not
5 understand that that is based on an agreement that
6 the bank made in April of 2009 that we just
7 discussed?

8 A That's correct.

9 Q Okay, and that document is not a public
10 record, is it?

11 A Must not be. No, it is an agreement between
12 the bank and South Causeway.

13 Q And that is confidential information, too,
14 isn't it?

15 A Generally I guess it would be, right.

16 Q And you also disclosed to Mr. Thomas that the
17 bank would not consider partial payment. Isn't
18 that correct?

19 A Partial releases or partial payment, right.

20 Q And the bank wanted to get paid back, didn't
21 it?

22 A That's correct.

23 Q So why in the world would the bank not at
24 least consider allowing the repayment of some of
25 this money?

1 A The -- if you go back and look at the
2 totality of our relationship with Miss Cribb, there
3 were times, there were numerous times when she had
4 an opportunity to sell this property and for
5 apparently unrealistic reasons she chose not to
6 sell it. It all boils down to the fact that this
7 was a bad deal for the bank, we preferred to be
8 paid in full and get out and whether they sold a
9 quarter acre or they sold the entire 19 acre tract
10 made really no difference to us. The big thing we
11 wanted was a complete repayment of all of our loan,
12 that is it.

13 Q Your testimony is the bank wanted to get out
14 of this thing?

15 A That's right.

16 Q And the bank, though, from the beginning had
17 considered the repayment from the sale of out
18 parcels, hadn't it? Wasn't that in the loan
19 summary approval that you prepared?

20 A That's right, that was probably the secondary
21 source of repayment, right.

22 Q The bank's decision not to allow the sale of
23 any out parcels wasn't based on the fact that at
24 the time the bank was negotiating to sell this
25 property to a developer who wanted the entire 19

1 acres, was it?

2 A Of course not.

3 Q Before you made this call to Don Thomas did
4 you have Miss Peggy's permission to do so?

5 A I don't recall receiving that, no. I didn't
6 think it was necessary, I just called, all I did,
7 like I said a while ago, I called to see if the
8 auction in fact was going to be held.

9 Q Did you have Miss Peggy's permission to do
10 so?

11 A I didn't know I had to have it.

12 Q Did you have Miss Peggy's permission to do
13 so?

14 A I didn't know I had to have it.

15 Q Did you have it?

16 A I didn't call her, no.

17 Q Now I want to ask you about the proposed loan
18 sale to Lincoln-Harris.

19 A Okay.

20 Q That Lincoln-Harris deal was brought to you
21 by a gentleman by the name of Charles McCollum,
22 isn't that correct?

23 A He brought it, I mentioned it to Mr. Lyerly,
24 yes, ma'am.

25 Q And Mr. McCollum is a long time customer of

1 the bank and a personal friend of Mr. Lyerly, isn't
2 that correct?

3 A He's also an accomplished real estate
4 developer, too, right.

5 Q And in March of 2010 you sent Miss Peggy a
6 letter indicating that you had been approached by
7 someone to purchase this loan, is that correct?

8 A We did that as a courtesy to her, yes, ma'am.

9 Q I have shown you what has been marked as
10 Defendant's Exhibit Number 18. Would you tell the
11 jury what that is? I'm sorry, 19.

12 A This is a letter that we had drafted and sent
13 to South Causeway, LLC, attention Peggy
14 Wheeler-Cribb as the sole member of the LLC
15 alerting her that we had been approached by someone
16 with an interest in gauging our interest in selling
17 the note and mortgage on this property and we also
18 said that we didn't know whether it would lead to
19 anything but we were providing this to her for
20 information.

21 Q In response to that letter Miss Peggy asked
22 you, did she not, who was this third party that was
23 looking at the loan?

24 A She did.

25 Q And you disclosed to Miss Peggy, didn't you,

1 initially you refused to disclose that, didn't you?

2 A That's right. We had signed a
3 confidentiality agreement.

4 Q You had signed a confidentiality agreement
5 when?

6 A I don't recall the specific date but shortly
7 after the people that were interested made contact
8 with us and I believe it was at their request that
9 we enter into an agreement like that. We had it
10 reviewed by our attorney before we did.

11 Q And eventually, though, you responded to Miss
12 Peggy's request and told her that the third party
13 was Charles McCollum, didn't you?

14 A The third party, Mr. McCollum was their
15 agent, he was not acting specifically in his own
16 capacity about this property, as I recall.

17 Q But you responded and told her it was Mr.
18 McCollum, didn't you?

19 A I said -- I'm trying to recall. Mr. McCollum
20 had -- I'm having, I'm trying to, the sequence of
21 events, I'm trying to recall. In his capacity as
22 agent for Lincoln-Harris he asked could I arrange a
23 meeting with Miss Cribb so he could come down and
24 discuss possible scenerios that might lead to a
25 sale of the property.

1 Q I show you what has been makred as
2 Defendant's Exhibt Number 20. Can you identify for
3 the jury what that document is?

4 A It's two emails, the first one dated October
5 the 7th at 10:25 a.m. from Miss Cribb to me, and
6 the second is an email from me to Miss Cribb dated
7 the same date, April 7th, at 11:47 a.m., the same
8 date.

9 Q And in this email --

10 MS. BYRD: Your Honor, at this time we move
11 Exhibit Number 20 into evidence.

12 THE COURT: Any objection to Exhibit 20?

13 MR. TYLER: No objection, Your Honor.

14 THE COURT: All right, without objection.

15 (Emails marked and received in evidence as
16 Defendant's Exhibit Number 20).

17 BY MS. BYRD:

18 Q In this email you contacted Miss Peggy and
19 let her know that Mr. McCollum was interested in
20 meeting with her, is that correct?

21 A That's correct.

22 Q And you wanted to set up a meeting between
23 the two, is that correct?

24 A That's correct.

25 Q And you write that, "He's an experienced real

1 estate developer and a broker. While we do not
2 know what he will propose or what his plans may be
3 we do know he has a definite interest in the
4 property and maybe a participating partner with his
5 client who we know to be extremely capable both
6 financially and otherwise of bringing a major
7 development to the South Causeway site." Is that
8 correct?

9 A That's correct.

10 Q Anywhere in this email do you mention who his
11 client is?

12 A I don't think so, no, ma'am.

13 Q And you never told Miss Peggy it was
14 Lincoln-Harris, due to the confidentiality
15 agreement, is that right?

16 A I didn't, no.

17 Q I'm sorry?

18 A I didn't, no.

19 Q You didn't know?

20 A No. I did not, I knew who it was but that
21 was something that Mr. McCollum was going to
22 discuss with her. I didn't know the terms of what
23 he was proposing, frankly didn't really want to
24 know. I mean, he asked us could we arrange a
25 meeting so he could go down and talk to her about

1 some ideas that he had.

2 Q And you also knew at this time, didn't you,
3 that Lincoln-Harris had previously made an offer to
4 purchase this property for over \$12,000,000, didn't
5 you?

6 A It was -- we didn't connect the dots at the
7 time but eventually we did, Mr. Lyerly and I.

8 Q Moving ahead very quickly, did you speak to
9 any other developers about this property?

10 A I didn't call anybody. We had from time to
11 time people calling the bank asking what, if
12 anything, we could tell them about it. I guess
13 they picked it up through realty groups or maybe
14 public record information or something along those
15 lines.

16 MS. BYRD: Your Honor, this might be a good
17 time for a break if that is suitable to the Court.

18 THE COURT: Yes.

19 MS. BYRD: I think I have been going a
20 while.

21 THE COURT: I'm sure the jury won't object to
22 that.

23 Ladies and gentlemen, we're going to take a
24 short break, let you stretch. Please have no
25 conversation about the case. If you need anything,

1 let us know and we'll do whatever we can to
2 accommodate you.

3 (The jury was excused from the courtroom).

4 THE COURT: All right, we'll be in recess for
5 a few minutes.

6 MS. BYRD: Thank you, Your Honor.

7 MR. FLOYD: Thank you, Your Honor.

8 THE COURT: Mr. Lovelace, you can step down
9 during the break. Just don't have any conversation
10 about your testimony.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Yes, sir.

13 (Recessed at 10:44 a.m.).

14 (Resumed at 11:05 a.m.).

15 THE COURT: Okay, anything we need to take up
16 before we get started?

17 MS. BYRD: Your Honor, I'm not sure if I have
18 offered into evidence Exhibits 18, 19 or 20 and I
19 would like to offer those now.

20 THE COURT: You did 18 and 20, I think they
21 are in. 19, I didn't get, and I have a question
22 mark about 12.

23 12 is in. So 19 I think is the only one that
24 you haven't moved in. Any objection to 19?

25 MR. TYLER: No objection, Your Honor.

1 THE COURT: All right. So 18, 19 and 20 are
2 all in.

3 MS. BYRD: Thank you, Your Honor.

4 (Letter from bank to South Causeway was
5 received in evidence as Defendant's Exhibit
6 Number 19).

7 THE COURT: All right, anything else before
8 we bring the jury out?

9 MR. COLLINS: No, Your Honor.

10 MS. BYRD: No, sir.

11 THE COURT: Okay, bring them in.

12 (The jury returned to the courtroom).

13 THE COURT: All right, ladies and gentlemen,
14 we're ready to start back. If you recall, we are
15 still on Miss Byrd's examination of Mr. Lovelace
16 and we'll continue with that.

17 Miss Byrd.

18 MS. BYRD: If it please the Court?

19 THE COURT: Yes, ma'am.

20 BY MS. BYRD:

21 Q Mr. Lovelace, just to confirm before we move
22 on, during your telephone call to Don Thomas you
23 disclosed that the loan would not be renewed as
24 well, is that correct?

25 A I must have, yes, ma'am.

1 Q Now I want to go back to where we left off,
2 which was the Lincoln-Harris issue, and I asked you
3 whether or not you were aware of an offer
4 Lincoln-Harris had made to Miss Peggy Wheeler-Cribb
5 in 2008?

6 A I think I responded I was but after the fact.
7 I didn't connect the dots at the time but
8 subsequently I received information, I think by way
9 of discovery I learned that was the case.

10 Q I will show you what has been marked as
11 Defendant's Exhibit Number 21. Will you tell me
12 and the jury whether or not you recognize that
13 document?

14 A This particular document?

15 Q Yes, sir.

16 A Yes, ma'am, I have seen this before.

17 Q This appears to be an email from you, I'm
18 sorry, from Miss Cribb to you with a copy to her
19 son entitled Lincoln-Harris deal, dated July the
20 2nd, 2008. Is that correct?

21 A Yes, ma'am.

22 Q And with this is an attachment, there is a
23 PDF document, is that correct?

24 A Yes, ma'am.

25 Q And it reads, "Wayne, just to keep you

1 informed about interest in the property." Is that
2 right?

3 A That's correct.

4 Q And attached to that email is a letter of
5 intent for the purchase of real property sent by
6 Lincoln-Harris, is that correct?

7 A That's correct.

8 MS. BYRD: Your Honor, at this time I would
9 move Exhibit Number 21 into evidence.

10 THE COURT: Any objection?

11 MR. TYLER: No objection, Your Honor.

12 THE COURT: All right, without objection, 21
13 is in evidence.

14 (Email from Cribb to the bank was marked and
15 received in evidence as Defendant's Exhibit
16 Number 21).

17 BY MS. BYRD:

18 Q Mr. Lovelace, you don't deny you received
19 this email, do you?

20 A It's addressed to me so I must have gotten
21 it, yes, ma'am.

22 Q And you have also testified that you did not
23 disclose to Miss Peggy Wheeler-Cribb that
24 Lincoln-Harris was the company reviewing the bank's
25 file. Is that correct?

1 A That's right. During that period of time we
2 were under a confidentiality agreement, that's
3 right.

4 Q And if you had disclosed to Miss Peggy that
5 it was Lincoln-Harris could she not have reminded
6 you of this offer?

7 MR. TYLER: Your Honor, that calls for
8 speculation.

9 THE COURT: Sustained.

10 Q Going back to Exhibit Number 20, which is an
11 email from you to Miss Cribb, is that correct?

12 A Yes, ma'am.

13 Q You indicate that you were not sure of what
14 the intention of this third party was with regard
15 to the property. Is that correct?

16 A That's right.

17 Q But you knew, didn't you, at that time what
18 the intention of Lincoln-Harris was, didn't you?

19 A Well, that was about the time that I believe
20 we met -- well, I don't know whether I specifically
21 recall what their intentions were but I believe
22 this is about the time we met with, Mr. Lyerly and
23 I met with the two gentlemen from Lincoln-Harris in
24 Spartanburg.

25 Q And Lincoln-Harris is a development company,

1 correct?

2 A That's correct.

3 Q And you knew that either immediately, maybe
4 not immediately but sometime in the future their
5 plan was to develop this property, correct?

6 A Well, possibly. They could have bought the
7 note, they could have, they could have done any of
8 a number of things with it, held it for a period of
9 time until maybe the time was right to develop it,
10 I just don't know what their intentions were.

11 Q And Lincoln-Harris, though, is not a bank, is
12 it?

13 A No, ma'am.

14 Q And you and Mr. Lyerly proceeded with
15 negotiations with Lincoln-Harris, isn't that
16 correct?

17 A I believe -- well, I didn't, I wasn't
18 involved in any negotiations. I went with Mr.
19 Lyerly to Spartanburg just to meet with these
20 gentlemen and to talk, to show them documents that
21 we owned ourselves as the bank, the note, the
22 mortgage, the title insurance and nothing more.

23 Q And the primary point of contact within the
24 bank with Lincoln-Harris was Mr. Lyerly, correct?

25 A Yes, ma'am.

1 Q So, he would know more of the details of
2 that?

3 A I think so.

4 Q But you do know that Lincoln-Harris came to
5 your Spartanburg office and reviewed the bank file
6 of South Causeway?

7 A Just the documents that we owned, that were
8 bank documents. We never provided any financial
9 information nor did they ever ask for any.

10 Q Is it your testimony today that they never
11 asked for financial information?

12 A That's, as I recall, yes, ma'am, that's
13 correct.

14 Q After that meeting in Spartanburg you had no,
15 you personally had no further contact with anyone
16 from Lincoln-Harris, did you?

17 A That's right.

18 Q But you're aware, are you not, that after
19 Lincoln Harris' review of the confidential bank
20 files of South Causeway that Lincoln-Harris
21 submitted an offer to purchase the property for
22 \$4,000,000, isn't that correct?

23 A We received notice of that, I think they,
24 through their agent Mr. McCollum and they offered
25 an opportunity to either do a sale or possibly a

1 joint venture with Miss Cribb, depending on
2 whatever they could work out, I guess, I don't
3 know. I don't know any of the details about it
4 other than there was some offer made or some
5 representation made.

6 Q Just with regard to the numbers, the
7 \$4,000,000 was over \$8,000,000 less than their
8 offer in 2010. Is that correct?

9 A Yes, ma'am.

10 Q And, Mr. Lovelace, you can't tell this jury,
11 can you, that the offer made by Lincoln-Harris in
12 2010 and specifically the decrease in the offer was
13 not a result of their review of the confidential
14 files of First South Bank?

15 A All they did was review --

16 MR. COLLINS: Your Honor, that calls for
17 speculation.

18 THE COURT: It does, sustained.

19 Q And the bank filed -- I'm sorry. After the
20 Lincoln-Harris -- did the Lincoln-Harris loan sale
21 go through?

22 A No, ma'am.

23 Q Did you have an occasion to speak with any
24 other development companies or developers regarding
25 the sale of South Causeway property?

1 A Well, nothing that we initiated on our end.
2 I mean, like I said, from time to time we would
3 have somebody call and ask us the status of the
4 property or what I could tell them and I assume
5 they picked that up by the fact that there were
6 documents that were recorded in the courthouse that
7 maybe had my name on them as signing on behalf of
8 the bank, being the originating officer, or
9 something like that. Once in a while we would have
10 somebody call, as they did Mr. Lyerly.

11 Q I show you what has been marked as Exhibit
12 Number 22. Could you identify that document for
13 the jury, please?

14 A This is an email that was from me to Mr.
15 Lyerly dated June 9th, 2010, in reference to South
16 Causeway.

17 MS. BYRD: Your Honor, we would move Exhibit
18 Number 22 into evidence at this time.

19 THE COURT: Any objection?

20 MR. COLLINS: No objection, Your Honor.

21 THE COURT: All right, without objection.

22 (Lovelace to Lyerly email marked and received
23 in evidence as Defendant's Exhibit 22).

24 BY MS. BYRD:

25 A In your email you indicated you received a

1 call from a real estate developer in Charlotte,
2 North Carolina, is that correct?

3 A That's correct.

4 Q What is his name?

5 A I'm going to take a stab at it. Is it George
6 Moreon?

7 Q I couldn't say it either, that is why I put
8 it on you. Moreon, we'll just call him George.

9 "He said he was at the auction last week and
10 offered a bid on the property but apparently for an
11 amount that did not draw any attention." Is that
12 what you wrote?

13 A That is what he told me.

14 Q And going down a little further in your
15 email, in the second paragraph, the last sentence
16 you write, "I did not identify the borrower or
17 guarantors nor did I confirm the balance due."

18 Is that right?

19 A That's correct.

20 Q Why would you not do that, why would you not
21 disclose that?

22 A Well, he was calling us for information, I
23 didn't think at that particular time it was
24 appropriate to. I mean, he was just fishing, is
25 all he was doing, apparently.

1 Q What made this different from the other times
2 you disclosed this information?

3 A He just called and I think I listened to what
4 he had to say and that was it.

5 Q The final paragraph you write, "I told him to
6 call back in 30 to 45 days and we might have more
7 information that we could share." Is that correct?

8 A That's right. That was just a figure of
9 speech, I could have told him to call back in six
10 months, I just said 30 to 45 days but that is all
11 that meant to me.

12 Q And this email again is dated June the 9th,
13 2010, correct?

14 A That's correct.

15 Q And within 30 to 45 days you would have filed
16 a foreclosure, is that correct?

17 A The loan would have matured. I don't know
18 whether we would have made the decision at that
19 time to file the foreclosure.

20 Q But the bank did file this foreclosure,
21 right, in August of 2010?

22 A That's correct.

23 Q And at around that time you prepared a risk
24 rating report, did you not?

25 A That's right.

1 MS. BYRD: Your Honor, we would move Exhibit
2 Number 22 into evidence at this time.

3 THE COURT: It's already in.

4 Q I show you what has been marked Exhibit
5 Number 23.

6 THE COURT: Let me, before we go any farther
7 let me get you all to come up.

8 (Unrecorded bench conference).

9 THE COURT: All right. I think you had
10 mentioned moving 22 in, it is in, and so you may
11 continue.

12 MS. BYRD: Thank you, Your Honor.

13 BY MS. BYRD:

14 Q Mr. Lovelace, just to confirm, I just handed
15 you Exhibit 23, is that correct?

16 A That's correct.

17 Q And is that a risk rating report that you
18 prepared?

19 A Yes, ma'am.

20 Q And it is dated August the 3rd, 2010. Is
21 that correct?

22 A That's correct.

23 Q And in the first section you write, "The bank
24 is pursuing foreclosure action on the property as
25 it feels this is the best avenue for full repayment

1 of principal and interest on this credit. Borrower
2 is currently in negotiation with two buyers and
3 First South Bank believes foreclosure action will
4 motivate the borrower to accept and close one of
5 their offers." Is that correct?

6 A That's correct.

7 Q And is that why you filed the foreclosure
8 action, to get them to accept an offer?

9 A No, ma'am. They didn't pay the loan when it
10 was due, we made a formal demand and they didn't
11 pay it after the demand.

12 Q So this was just gratuitous comments by you?

13 A No, ma'am. This is part of our, every bank
14 uses a risk rating form in some form and this
15 particular credit had been risk rated several times
16 from the time it was made, until this particular
17 date here.

18 One of the things that the FDIC requires when
19 they come in to do a routine examination is they
20 ask to see our litigation files, and this was an
21 attempt to update our files and to show by virtue
22 of some information, as a result of some
23 information Miss Cribb had sent, what current
24 prospects were for this property. We had hoped she
25 would sell it but it didn't appear that was going

1 to be the case.

2 Q Mr. Lovelace, isn't it true that the bank
3 believed that South Causeway was not conducting its
4 business appropriately?

5 A South Causeway as an entity, I don't have
6 any, any opinion but Miss Cribb, there were time
7 and time and time again where she was offered
8 opportunity to sell the property and she just was
9 making unreasonable, we felt like were
10 unrealistically poor decisions to not sell.

11 Q Didn't you tell us earlier it wasn't the
12 bank's position or responsibility to get involved
13 in the business of its customers?

14 A That was just an opinion we had, we didn't
15 dictate to her what she needed to do other than
16 hoped she would take one of these offers and move
17 on.

18 Q Mr. Lovelace, very briefly I want to ask you
19 about your bank practices, policies and procedures
20 with regard to your customers.

21 MR. COLLINS: Your Honor, we submit that is
22 totally irrelevant, it is irrelevant to our
23 foreclosure, irrelevant to any defense they raised
24 and irrelevant to counter-claims they assert.

25 THE COURT: All right.

1 MS. BYRD: Your Honor --

2 THE COURT: Come on up.

3 (Unrecorded bench conference).

4 BY MS. BYRD:

5 Q Do you recall in April of 2010 that Miss
6 Peggy requested that you provide her with a copy of
7 her promissory note?

8 A I do.

9 Q And you responded by saying that she should
10 get that from her attorney. Correct?

11 A Well, I thought it might be a little bit
12 easier to do that since he was in Georgetown and
13 she was practically down here all the time, just a
14 matter of, I assume he had a copy of it and I
15 assume she got a copy at the closing.

16 Q She was requesting a copy from you, correct?

17 A Right.

18 Q And you have available to you a computer
19 scanning system that allows you to pull that up
20 right at your computer, don't you?

21 A That's right.

22 Q And so you could have pulled it up right
23 then?

24 MR. COLLINS: Objection, irrelevant, Your
25 Honor.

1 THE COURT: You established he didn't give it
2 to her.

3 MS. BYRD: Yes.

4 THE COURT: Move on.

5 MS. BYRD: Thank you, Your Honor.

6 BY MS. BYRD:

7 Q And did there also come a time when Miss
8 Peggy requested that you provide her a copy of an
9 appraisal?

10 A That's correct.

11 Q And you refused to provide that to her?

12 MR. COLLINS: Objection, irrelevant, Your
13 Honor.

14 THE COURT: Overruled.

15 Q Did you refuse to provide that to her as
16 well?

17 A Yes. That appraisal was performed solely for
18 the internal need of the bank or internal purposes
19 of the bank and we bought and paid for it. We
20 didn't feel like it was, I mean, if she wanted to
21 reimburse us for our costs we would be glad to
22 furnish her a copy of it.

23 Q Does the bank have a written policy that
24 provides that if a customer requests a copy of an
25 appraisal then you should provide it?

1 A The initial appraisal, yes.

2 Q And you allowed Lincoln-Harris to review that
3 appraisal, didn't you?

4 A They reviewed it but they didn't take a copy
5 out of the bank.

6 Q But you didn't even allow Miss Peggy to
7 review it, did you?

8 A We furnished her notice of, subsequent to her
9 request we furnished her a copy of what the
10 appraised value was. We let her know what the
11 appraised value was at that particular time. No,
12 we didn't give her a copy.

13 MS. BYRD: Your Honor, if I may beg your
14 indulgence?

15 THE COURT: Yes, ma'am.

16 MS. BYRD: Your Honor, I have no further
17 questions of this witness.

18 THE COURT: All right. Mr. Collins?

19 MR. COLLINS: Thank you.

20 CROSS EXAMINATION MR. COLLINS:

21 Q Mr. Lovelace, are you familiar with the
22 federal statute known as the Fair Credit Reporting
23 Act?

24 A Yes, sir.

25 Q And does that statute apply to consumer

1 loans?

2 A Yes, sir.

3 Q A consumer loan would be a loan made to a
4 homeowner or to an automobile owner, correct?

5 A Any loan for personal, family or household
6 use.

7 Q An that is different from a commercial loan,
8 isn't it?

9 A Substantially different.

10 Q And this loan to South Causeway, LLC, was a
11 commercial loan?

12 A In every aspect.

13 Q So, is there any regulation or statute that
14 makes it confidential, that makes confidential
15 anything related to a commercial loan?

16 A Not to my knowledge.

17 Q So, any information you gave to Mr. Thomas
18 was perfectly within your right, was it not?

19 A It was as far as I'm concerned, yes, sir.

20 Q And Mr. Thomas said he didn't disclose that
21 to anyone outside his company?

22 A That's correct.

23 Q And there was an auction and several people
24 came, we saw a sign in sheet, and not one person
25 made a bid. Isn't that right?

1 A That's correct.

2 Q This exhibit you saw a while ago offered into
3 evidence about an offer from, I believe it is in
4 evidence over here, from someone making an offer,
5 was that a post auction offer, sir?

6 A The one she referred to, previously referred
7 to?

8 Q You've still got it?

9 A Yes. Exhibit 21.

10 Q That was a post auction offer, was it not?

11 A That's right.

12 Q Okay. Now, the Lincoln-Harris offer that was
13 put into evidence, do you have that in front of
14 you, the Lincoln-Harris?

15 A Excuse me, sir.

16 Q Let me help you out here.

17 MR. COLLINS: Excuse me, if I may approach,
18 Your Honor?

19 THE COURT: Yes, sir.

20 Q I'm looking for the offer sent to you, here
21 it is, the Lincoln-Harris offer which is intent to
22 purchase real property, sent to you by Miss Cribb
23 on July 2nd, 2008. That would be before the --

24 A Yes.

25 Q This is for a price of -- you tell us, how

1 much were they offering?

2 A Lincoln-Harris was offering \$675,000 per
3 usable acre. Estimated usable acres was 18.3
4 acres.

5 Q 18.3 times 675,000, according to my math, is
6 \$12,352,500. Is that right?

7 A Yes, sir, I assume it is.

8 Q Okay. Well, I represent to you that it is.

9 A Okay.

10 Q And what did Miss Cribb say that she was
11 going to do with that offer?

12 A She didn't do anything, she never signed it.

13 Q Did she ever come back to them, to your
14 knowledge?

15 A To my knowledge, no.

16 Q Did she ever tell them a price she would
17 take?

18 A To my knowledge, no.

19 Q But if she had accepted that offer at that
20 price she would have roughly tripled her money on
21 the property she had bought, wouldn't she?

22 A That's correct.

23 Q Tripled it, would have made around about
24 \$8,000,000 profit, isn't that right?

25 A That's right.

1 Q Mr. Lovelace, we of course were planning to
2 call you as our witness as well so let me go back
3 and ask some questions that were not put to you
4 earlier. Where did you grow up?

5 A I was born and raised in Gaffney, South
6 Carolina, Cherokee County.

7 Q Tell us about your education.

8 A I graduated from Gaffney High School in 1969,
9 I entered the University of South Carolina in the
10 fall of '69, I finished in 1974.

11 Q Did you receive a degree?

12 A Yes, sir, in mathematics.

13 Q And then what?

14 A I went to work at First Citizens Bank and
15 worked there for 23 years and while I was there I
16 also attended the Banking School of the Southeast
17 at Louisiana State three years, two week sections
18 each year for three years.

19 Q Did you complete that program?

20 A I did.

21 Q Did you get a degree?

22 A I did.

23 Q And you have been in banking ever since?

24 A That's correct, 38 years.

25 Q Have you ever been terminated by a bank?

- 1 A No, sir.
- 2 Q Have you ever been demoted?
- 3 A No, sir.
- 4 Q Has anybody ever accused you of fraud other
5 than Peggy Wheeler-Cribb?
- 6 A No, sir.
- 7 Q Are you a member of any civic organizations?
- 8 A I have been a member countless times.
- 9 Q Are you a member of a church?
- 10 A Yes, sir.
- 11 Q Which one?
- 12 A St. John's Episcopel Church in Columbia.
- 13 Q Have you held leadership positions?
- 14 A I served as president of the church for one
15 year, I was a member, I was ex ficio member of the
16 vestry.
- 17 Q Now, you testified about your initial
18 business relationship with Miss Cribb and that came
19 about as a result of your employment at First
20 Palmetto Bank, is that correct?
- 21 A That's right, yes, sir.
- 22 Q Is there anything wrong with a bank pursuing
23 a customer?
- 24 A Not at all.
- 25 Q Is there anything wrong with a banker who

1 leaves one bank and has a relationship with a
2 customer, trying to establish that relationship
3 with his new bank?

4 A No, sir. It's done every day.

5 Q Does the fact you are seeking business from a
6 customer mean that you would waive or give up the
7 rights that banks have clearly defined in the loan
8 instruments that are executed?

9 A No, sir. It is part of my job to solicit new
10 business.

11 Q We have in evidence in this case the loan
12 documents which were offered into evidence in our
13 case in chief as Exhibits 1 through 15. Are you
14 familiar with the loan commitment letter that I
15 believe is -- well, they are out of order.

16 MR. COLLINS: Let me do this, Your Honor, let
17 me get Mr. Floyd to straighten all this out for me
18 and I can move on to something else and come back.

19 THE COURT: Yes, sir.

20 Q Earlier in the trial I made reference to a
21 photograph and I didn't make reference to a plat
22 but I'm going to do so at this time. I would like
23 for the court reporter to mark as plaintiff's next
24 this photograph.

25 MR. FLOYD: Your Honor, real quick, in going

1 through the documents, I believe Mr. Lovelace may
2 have Exhibits 1 and 2, just to cut down on time.

3 MR. COLLINS: Okay.

4 MR. FLOYD: Thank you, Your Honor.

5 MR. COLLINS: Your Honor, I'm showing this to
6 opposing counsel and we would move admission at
7 this time the plat which is Plaintiff's 16, and the
8 photograph which is Plaintiff's 17.

9 THE COURT: Any objection?

10 MR. GODDARD: May we approach, Your Honor?

11 THE COURT: Yes, sir.

12 (Unrecorded bench conference).

13 MR. COLLINS: Your Honor, I would like to
14 withdraw the request to admit on 17, the
15 photograph.

16 THE COURT: So there is no objection to 16,
17 correct?

18 MS. BYRD: That's correct, Your Honor.

19 THE COURT: All right.

20 (Plat marked and received in evidence as
21 Defendant's Exhibit Number 16).

22 BY MR. COLLINS:

23 Q Mr. Lovelace, have you seen this plat before?
24 Come down, if you would, please, in front of the
25 jury and let's orient them about what we have here.

1 A Sir?

2 Q You can step down.

3 MR. COLLINS: Can he step down, Your Honor?

4 THE COURT: Yes, sir.

5 Q Mr. Lovelace, this is the plat. You see the
6 Atlantic Ocean over here on the right side, right,
7 and we see a large building here; that is lots 1
8 and 2, and the large three story building is where
9 Miss Cribb and Mr. Wheeler live, is that right?

10 A That's correct.

11 Q And behind there is a parcel denominated as
12 lot 4. Is that right?

13 A Yes, sir.

14 Q And is that the lot that you took as
15 collateral for the six and a half million, up to
16 six and a half million dollar loan made to South
17 Causeway, LLC?

18 A That was the, the 19.2 acres plus this lot
19 right here, right here.

20 Q There we go. Thank you very much. And did
21 the commitment letter make it clear that a mortgage
22 on that lot would be required?

23 A Yes, sir, it did.

24 Q And was that lot already pledged as
25 collateral for an earlier \$550,000 loan the bank

1 had made?

2 A It was.

3 Q So that lot was already collateral and you
4 just simply required it to be collateral for this
5 loan as well?

6 A That's correct.

7 Q And the \$550,000 loan was paid off by the
8 proceeds of the new up to six and a half million
9 loan?

10 A It was rolled into the new loan.

11 Q Rolled in? So, that collateral had already
12 been pledged and remained pledged at the closing on
13 June 25, 2008?

14 A That's correct.

15 Q Okay. Now let's talk about that lunch
16 meeting. Miss Byrd told, asked you a lot of
17 questions about a meeting where you and Chip Lyerly
18 met with Miss Cribb and her son Mr. Wheeler. I
19 believe you said that you did not promise her that
20 you would see this project all the way to
21 completion. Is that right?

22 A We told her we were in no position to furnish
23 her any kind of financing guarantee at that
24 particular time because we didn't have the
25 financial information we needed to review and the

1 approval exceeded mine and Mr. Lyerly's corporate
2 authority to do so.

3 Q Does the bank ever tell a prospective
4 borrower, "Don't worry, we'll see you through as
5 long as it takes and we'll give you as much money
6 as it takes, you can count on us"?

7 A Never.

8 Q You never do that?

9 A Huh-uh (negative).

10 Q Was there any aspect of your conversation
11 with Miss Cribb and Mr. Wheeler at that lunch
12 meeting that was reduced to writing so as to comply
13 with the requirements of the commitment letter that
14 any obligations of the bank be documented in
15 writing and signed by both parties?

16 A None.

17 Q Do you recall the modification agreement that
18 was entered into on April 10, 2009?

19 A Yes, sir, I do.

20 Q Exhibit 11. Is this the agreement where the
21 bank agreed to let lot 4 be released so that it
22 could be used as collateral for a loan from Kennedy
23 Funding out of New Jersey?

24 A It was.

25 Q And was it, was Miss Cribb made aware of the

1 fact that she had two options with regard to this
2 agreement, namely, choice one was to have, choice
3 one was to have \$500,000 of the Kennedy Funding
4 money come to the bank to release lot 4 and the
5 maturity date would stay the same, and choice two
6 was for the bank to get \$300,000 and to move the
7 maturity date up a year?

8 A That's correct.

9 Q And was there an email exchanged between you
10 and Miss Cribb about that?

11 A There were a couple.

12 Q A couple? I'm going to show you a blow-up of
13 an email and I'm going to ask my able assistant to
14 find this.

15 MR. COLLINS: I please ask the court reporter
16 to mark this as plaintiff's next. I'm showing it
17 to opposing counsel, they have seen it before. I
18 understand it is without objection.

19 We offer Plaintiff's 18, Your Honor.

20 MS. BYRD: I have no objection.

21 THE COURT: All right.

22 (Email marked and received in evidence as
23 Plaintiff's Exhibit Number 18).

24 BY MR. COLLINS:

25 Q I will hand the document to you so you can

1 refresh your recollection. Did you get, is the
2 email a confirmation of the options you gave to
3 Miss Cribb?

4 A These are the two proposals we offered to
5 Miss Cribb, right.

6 Q Okay. The first one would be option one,
7 where the bank receives 500 -- well, 515,000 of the
8 loan proceeds would be delegated for those items
9 mentioned, right?

10 A That's correct.

11 Q Including an additional interest reserve
12 account contribution and then two payments of
13 \$65,000 for the real estate taxes, right?

14 A That's correct.

15 Q And option two would net her more money
16 because it only called for \$300,000 to come out,
17 the property tax payments of 65,000 and 65,000 and
18 then 10,000 attorney fees and 160,000 of additional
19 interest reserves. Isn't that right?

20 A That's correct.

21 Q And you called her attention at the bottom,
22 quote, "As you will note, option two requires
23 \$215,000 less in outlay," that would be for her,
24 "than option one because we are shortening the
25 maturity date of the loan by one year and we will

1 require payment in full on July 5, 2010," and that
2 is all spelled out, isn't it?

3 A Yes, sir, it is.

4 Q And did you get an email reply?

5 A We did.

6 Q From Miss Cribb?

7 A That's correct.

8 Q Okay.

9 MR. COLLINS: I will ask the court reporter
10 to mark this plaintiff's next.

11 For the record that is Plaintiff's 19, I will
12 show it to opposing counsel, Your Honor.

13 MS. BYRD: No objection, Your Honor.

14 THE COURT: Without objection.

15 (Email marked and received in evidence as
16 Plaintiff's Exhibit Number 19).

17 BY MR. COLLINS:

18 Q Without objection, Plaintiff's 19, and I hand
19 it to you. Mr. Lovelace, read us what Miss Cribb
20 said in response to your email of March 9, 2009.
21 Let the record show I'm displaying a copy on foam
22 board for the jury to see.

23 A This is an email from Miss Cribb to me dated
24 March 10. "To Wayne: Can you explain a question I
25 have on the loan? I have been reviewing your

1 proposal and Darwin and I are leaning toward option
2 two. We are reviewing the interest and the
3 interest reserve. The initial payment on August 6,
4 2008, was 31,698.16 which was was a very large
5 amount on the 4.8 million dollar note. The
6 subsequent months also seemed high, so if you could
7 clarify the rate calculation and what principal
8 amount was used initially. I appreciate you
9 working with us on this."

10 Q Now, does this email cause you to believe
11 that Miss Cribb understood her options that you
12 were giving her?

13 A Yes, sir.

14 Q Is there any basis upon which you believe she
15 could later claim that this was a big switch-a-roo
16 and a trick that was pulled on her?

17 A No, sir.

18 Q Have you seen the affidavit that Miss Cribb
19 gave in this Court which she gave to defeat a
20 summary judgment?

21 A I have seen it, it has been a while but I
22 have seen it.

23 MR. COLLINS: I will ask this document be
24 marked plaintiff's next, 20. This is filed in this
25 case, Your Honor, and we offer it at this time, I

1 understand without objection.

2 THE COURT: Plaintiff's 20.

3 MS. BYRD: No objection.

4 THE COURT: All right, without objection.

5 (Cribb affidavit marked and received in
6 evidence as Plaintiff's Exhibit 20).

7 BY MR. COLLINS:

8 Q Mr. Lovelace, let me hand you Miss Cribb's
9 affidavit that she gave and which is in evidence
10 now and I will ask you to turn to paragraph 22 of
11 that affidavit. And I will display a copy of that
12 page, page 4 of that affidavit to the jury.

13 If you would, please read to the jury
14 paragraph 22 of this affidavit.

15 A Paragraph 22, "At closing, after the 50,000
16 dollars has been paid we discovered that in
17 addition to the \$300,000 payment First South Bank
18 was taking back a year from South Causeway, LLC,
19 from South Causeway, LLC's, promissory note and
20 demanding an acceleration of the maturity date.
21 The bank demanded a new maturity date of July 5,
22 2010. I was taken completely off guard --"

23 Q Stop a minute. She said, "I was taken
24 completely off guard by the demand for the new
25 maturity date"?

1 A That's right.

2 Q Any basis in fact for that assertion?

3 A No, sir.

4 Q Go ahead, please.

5 A "I was completely taken off guard. If I
6 refused to close on the loan I would be forced to
7 forfeit the \$50,000 deposit. Additionally, if I
8 did not close the lot would remain subject to First
9 South Bank's mortgage, preventing us from closing
10 with Kennedy Funding. Faced with no other option,
11 I executed the closing documents. I would never
12 have voluntarily signed the purported loan
13 agreement but I felt I had no reasonable
14 alternative."

15 Q This \$50,000 fee that is referred to, \$50,000
16 deposit, was that a \$50,000 fee that Kennedy
17 Funding required up front on her loan?

18 A Yes, sir.

19 Q That wasn't money going to First South Bank?

20 A No, sir.

21 Q And you understand, Mr. Lovelace, that an
22 affidavit is a document submitted to the Court
23 where the person who signs it swears an oath just
24 like they do on the witness stand that it is true,
25 accurate and complete?

1 A That's correct.

2 Q Let's talk about Will Darwin Wheeler. He has
3 been in the courtroom, I don't see him right now --
4 oh, there he is in the blue shirt on the front row.
5 Have you had dealings with him?

6 A I have.

7 Q Is he a working member or representative of
8 the South Causeway, LLC?

9 A No, sir.

10 Q He is not a member?

11 A He's not a member.

12 Q But is he an agent of or a person who acts on
13 behalf of South Causeway?

14 A He --

15 MS. BYRD: Objection, Your Honor, it calls
16 for speculation.

17 THE COURT: He can answer if he knows.

18 Q Have you had dealings with him?

19 A Yes, sir.

20 Q Have you had dealings with him relating to
21 South Causeway?

22 A Yes, sir.

23 Q Does he appear to have authority to speak on
24 behalf of South Causeway?

25 A He does.

1 Q Does he attend the closings?
2 A Each time.
3 Q Did he sign a personal guaranty on the South
4 Causeway loan?
5 A He did.
6 Q Now let's talk about these closings. June
7 25, 2008, were you there?
8 A I was.
9 Q Did you sign the documents on behalf of the
10 bank?
11 A I did.
12 Q And did Mr. Wheeler sign documents at that
13 closing, too?
14 A Those that he was responsible for signing, he
15 did.
16 Q Right. They are in evidence in part of the
17 documents that we presented in our case in chief,
18 isn't that right?
19 A That's correct.
20 Q Are you aware that Miss Cribb has claimed
21 that she was under duress at this closing and that
22 because of the duress that she was under the note
23 and mortgage shouldn't be valid and you shouldn't
24 be able to foreclose?
25 A I am.

1 Q Did you notice anything at the closing that
2 would cause you to believe that she was mentally or
3 emotional so overwrought she didn't know what she
4 was doing?

5 A No, sir.

6 Q Mr. Lovelace, are borrowers frequently under
7 a certain amount of stress when they borrow money
8 from a bank?

9 A Most are, right.

10 Q Have you ever known a case where the borrower
11 comes in after the fact, after they have defaulted
12 and claimed duress and the bank having to
13 invalidate their note and mortgage?

14 A Not in my personal experience.

15 MS. BYRD: Objection.

16 THE COURT: Sustained.

17 MR. COLLINS: That's all right.

18 BY MR. COLLINS:

19 Q I asked you a few questions a while ago,
20 we'll come back to this document that I had, the
21 agreement, some people refer to it as a
22 modification agreement. There is a paragraph in
23 here, this agreement was entered into so that there
24 could be a loan obtained from Kennedy Funding by
25 Miss Cribb. Correct?

1 A That's correct.

2 Q By South Causeway, LLC?

3 A That's correct.

4 Q So --

5 A No, sir. I think the borrower in the Kennedy

6 Funding loan was a different entity.

7 Q That's right. Was lot 4 on that plat we just

8 saw deeded to a new entity called Pawley's Island

9 North, LLC?

10 A It was.

11 Q Who were the owners of Pawley's Island North,

12 LLC?

13 A I believe the same owners, I believe Darwin

14 was, Darwin Wheeler was.

15 Q Okay. So, when this agreement was executed,

16 and there are the signatures, there is a signature

17 on here that purports to be yours. You confirm

18 that is your signature, right?

19 A I do.

20 Q And in this agreement that was signed there

21 is a clause three that I would like for you to read

22 to the jury.

23 A Clause three. "Borrower and each guarantor

24 hereby and by these presence does on its, his and

25 her behalf respectively and on behalf of its, his

1 and her respective legal representatives, heirs,
2 successors and assignees, release and forever
3 discharge banks, its successors, assignees,
4 officers, directors, shareholders, employees,
5 attorneys, agents and servants and collectively and
6 individually the released party of any and all
7 manner of actions and causes of actions, suits,
8 debts, sums of money, accounts, reckonings, bonds,
9 bills, specialties, covenants, contracts,
10 controversies, agreements, promises, variances,
11 trespass and trespasses, damage and damages,
12 judgments, executions, claim and claims and demand
13 and demands whatsoever both at law and in equity
14 which against the said released parties and any of
15 them borrower and each guarantor have ever had, now
16 has or which borrower, each guarantor or its, his
17 or her respective personal representative, heirs,
18 successors and assigns hereafter can, shall or may
19 have for, upon or by reason of any matter, cause or
20 thing whatever from the beginning of the world up
21 to the day our amended execution of these presence,
22 including without limitation with respect to the
23 loan and any matter or thing whatever arising out
24 of the same either known or unknown, at this time
25 apparent or not apparent and both present and

1 future."

2 Q And the released parties was First South
3 Bank?

4 A Correct.

5 Q Have you every seen a release more inclusive
6 than that one? Is there anything left out of that
7 release, that you know of?

8 A Maybe a bottle of aspirin or something. But
9 to answer your question, no, I've never seen one
10 like that.

11 Q And do you believe the bank is entitled to
12 the benefit of that language?

13 A I do.

14 Q Now, was Miss Cribb represented by a lawyer
15 when that thing was signed?

16 A She was.

17 Q Who was that lawyer?

18 A Robert Gwin of the Gwin Law Firm.

19 Q Have you seen correspondence back and forth
20 involving him?

21 A I have.

22 Q And is there any reason for you to believe
23 that Miss Cribb didn't have the benefit of any
24 legal advice that he had to offer?

25 A None.

1 Q The document I think you had in front of you
2 is the loan commitment letter, it may be
3 Plaintiff's Number 1, can you put your hand on
4 that? I know you have a bunch of stuff up there.
5 See if you can find Plaintiff's Exhibit 1, the
6 commitment letter.

7 A It is over there, I believe.

8 MR. COLLINS: I apologize. Is it not in the
9 stack? I need my able assistant to give me a copy.

10 THE COURT: We're going to need to find the
11 document that is marked.

12 MR. COLLINS: It is.

13 THE COURT: Is that the one that has the
14 sticker?

15 MR. COLLINS: Yes, sir, right here.

16 THE COURT: Okay.

17 BY MR. COLLINS:

18 Q Now, Mr. Lovelace, I'm going to hand you
19 Plaintiff's Exhibit 1 that was entered into
20 evidence during our case in chief and I'm going to
21 ask you to turn to page 11 and read to the jury, if
22 you would, please, the second sentence of the top
23 paragraph on page 11, starting with the word any.

24 A "Any material adverse changes in the
25 condition," and parenthetically says, "financial,

1 business or otherwise of the borrower or any
2 guarantor shall at the bank's option release the
3 bank from any and all obligations under this
4 commitment."

5 Q So, then, by that language you were, the
6 borrower was obligated to tell you about any
7 material change in their financial condition?

8 A That's correct.

9 Q And if there was any adverse material change
10 in their financial condition the bank had at its
11 option the ability to stop any funding of the loan,
12 isn't that right?

13 A We did.

14 Q So, that was a right that was explained in
15 your letter and are there signatures on the back of
16 that letter?

17 A Yes, there are.

18 Q Who signed it?

19 A Peggy Wheeler-Cribb and Will Darwin Wheeler.

20 Q And was that executed at the time of the
21 closing?

22 A It was executed the -- the date of the letter
23 is May 30 and it was signed June 6th of 2008, prior
24 to the closing.

25 Q Before the closing?

1 A That's right.

2 Q And was Miss Cribb capable of having any
3 legal advice that she wanted before she entered
4 into that?

5 A She should have because I sent not only she
6 and Mr. Wheeler a copy of this, I copied her
7 attorney Doug Hinds with Hinds, Cowan, Strange &
8 Geer here in Georgetown a copy as well for his
9 review.

10 Q Did there ever come a time when South
11 Causeway, LLC, failed to pay its real estate taxes?

12 A Yes, sir.

13 Q Would that be the kind of adverse financial
14 event contemplated by that language in that
15 commitment letter?

16 A It is an event of default.

17 Q It's an event of default? If a borrower is
18 obligated to make the real estate tax payments and
19 they don't make those payments, even if the
20 maturity date of the loan is way out in the future
21 can the bank call the loan?

22 A We could, yes, sir.

23 Q You could call the loan and could you demand
24 payment?

25 A That's correct.

1 Q Could you not?

2 A Yes, sir.

3 Q And if payment was not made you could
4 foreclose?

5 A That's correct.

6 Q And that is your full legal right by the
7 terms of the agreement that you entered into?

8 A That's correct.

9 MR. COLLINS: Your Honor, may I inquire what
10 your preference is about a lunch break?

11 THE COURT: We'll go a little further.

12 MR. COLLINS: A little further, all right.

13 THE COURT: Yes, sir.

14 BY MR. COLLINS:

15 Q In addition to the offer that you testified
16 about from Lincoln-Harris made in July of 2008 in
17 the amount of \$12,352,000, were there other offers
18 made on this property that were sent to you by Miss
19 Cribb?

20 A There were.

21 Q Did you receive an offer from her from, well,
22 it was after the offer made by Robbie Buice,
23 B-u-i-c-e, and it was made in the amount of
24 \$9,550,000 and did you receive, and did you
25 exchange emails with Miss Cribb about this offer

1 and did you discuss it with her?

2 A I would have to look at the email
3 correspondence but I was made aware of that
4 particular offer, yes, sir.

5 MR. COLLINS: Your Honor, I will mark this
6 later and come back to this. This is a lengthy
7 document.

8 THE COURT: Yes, sir.

9 MR. COLLINS: Well, I will mark it now if
10 that's all right. This is from Martin Potts, I
11 believe, the broker is Robbie Buice, and attached
12 to this email is the email from Martin E. Potts
13 with the Potts Company, and we'll ask that be
14 plaintiff's next.

15 (Potts letter marked and received in
16 evidence Plaintiff's Exhibit Number 21).

17 BY MR. COLLINS:

18 Q Mr. Lovelace, is there anything wrong with
19 you telling Miss Cribb, "We think you ought to
20 really consider this offer, we think you ought to
21 move along with this and see if you can make a deal
22 to sell this property because you've got a mortgage
23 to pay off and it is our mortgage and we would like
24 to see it paid off, we would like to see you enter
25 into an agreement to sell your property," is there

1 anything wrong with that?

2 A I don't think I would go that far. I would
3 say I would tell her that, "It appears, based on
4 what we have been furnished, to be a good offer."
5 The decision would be solely hers to make but we
6 could offer our opinion but whether she decides to
7 sell or not we would leave to her.

8 Q And do you recall an offer also made to Miss
9 Cribb from Interface Properties?

10 A I do.

11 MR. COLLINS: Your Honor, we will ask this be
12 marked plaintiff's next.

13 (Interface Properties letter was and received
14 in evidence as Plaintiff's Exhibit 22).

15 MR. COLLINS: For the record, that is
16 Plaintiff's 22.

17 BY MR. COLLINS:

18 Q Was this sent to you by Miss Cribb?

19 A I believe it was sent to me by possibly her
20 agent -- well, someone who was broker for
21 Interface, Wilson Kepler.

22 MS. BYRD: No objection. We just ask for
23 copies of documents.

24 MR. COLLINS: We'll provide it. Mr. Floyd
25 can, I'm sure, provide them.

1 THE COURT: All right.

2 BY MR. COLLINS:

3 Q Mr. Lovelace, I'm going to show you that
4 which has been marked Plaintiff's Exhibit 22. We
5 moved its admission at this time.

6 THE COURT: It's in.

7 Q Is this an offer made to Miss Cribb from
8 Interface Property?

9 A It appears to be, yes, sir. It came to me by
10 way of an email from her to me dated June 10th,
11 2009.

12 Q Now, Mr. Lovelace, we all have the benefit of
13 20/20 hindsight, don't we?

14 A Yes, sir.

15 Q And nobody is offering that kind of money on
16 that property at this time, are they, sir?

17 A Not to my knowledge.

18 Q Real estate has dropped precipitously in
19 value, has it not, sir?

20 A All over, yes, sir.

21 Q Would that especially be true of undeveloped
22 commercial property?

23 A It would.

24 Q Have you been by and seen this lot?

25 A I have.

1 Q This property at South Causeway and Highway
2 17?

3 A Yes.

4 Q Is there a sign on it for sale now?

5 A Yes, sir.

6 MR. COLLINS: Please mark this as Plaintiff's
7 23.

8 THE COURT: 23?

9 MR. COLLINS: I believe so, Your Honor.

10 MR. COLLINS: Any objection?

11 MS. BYRD: No objection.

12 THE COURT: All right, Plaintiff's 23 in
13 without objection.

14 (Photograph marked and received in evidence
15 as Plaintiff's Exhibit Number 23).

16 BY MR. COLLINS:

17 Q Now, Mr. Lovelace, people who have commercial
18 real estate such as a 19.22 acre tract of land on
19 Highway 17 can list it with a commercial real
20 estate agent, can't they?

21 A Yes, sir.

22 Q And a commercial real estate agent then
23 invests time and money in letting people know about
24 its availability?

25 A Yes.

1 Q Advertising it, call on customers they know
2 might be interested in it and otherwise marketing
3 the land?

4 A That's correct.

5 Q And these commercial real estate brokers have
6 contacts that far exceed what an individual
7 property owner would have?

8 MS. BYRD: Your Honor, we object on the
9 grounds that he is leading his witness and he is
10 stating an opinion that Mr. Lovelace is not
11 qualified to give.

12 THE COURT: Well, he's on cross.

13 MS. BYRD: It is his own witness, Your Honor.

14 MR. COLLINS: Yes.

15 THE COURT: But you called him in your case
16 in chief.

17 MR. COLLINS: That's right.

18 MS. BYRD: Your Honor, I think the rule
19 provides that if you're cross-examining your own
20 witness then you are generally not allowed to lead.

21 THE COURT: All right. What was the other
22 objection you had other than leading?

23 MS. BYRD: He is asking him for opinion as to
24 whether it would be more beneficial to have an
25 agent as opposed to trying to sell it yourself. He

1 is not qualified.

2 MR. COLLINS: I don't think that was my
3 question, Your Honor.

4 THE COURT: Well, ask your question.

5 MR. COLLINS: Let me rephrase it.

6 BY MR. COLLINS:

7 Q Mr. Lovelace, can an individual, I know which
8 it was, does a commercial real estate agent
9 generally have more contacts among people who might
10 be interested in buying commercial real estate than
11 an individual property owner?

12 MS. BYRD: Again, Your Honor, we object.
13 Calls for speculation.

14 THE COURT: All right, it's sustained.

15 Q Mr. Lovelace, what has been your experience
16 about the best way to market commercial real estate
17 for development?

18 A In my 38 years of banking the best way that I
19 know is to have someone who has a national
20 reputation or certainly a regional reputation that
21 can tap those sources and move the property
22 quicker.

23 Q Do you know what the customary commission is
24 for commercial real estate agents?

25 A I think it is about 10 percent.

1 Q 10 percent? Now, here is Exhibit 22 --
2 Exhibit 23. It shows the sign that is down there
3 on the property. Is that the only sign on the
4 property that you know of?

5 A As far as I know, yes, sir.

6 Q It offers 19 acres for seven and a half
7 million and eleven and a half acres for five
8 million, and it gives a phone number and it's got
9 down here three agent commission. Do you know what
10 that means?

11 A I think they are willing to pay a three
12 percent sales commission on the property.

13 Q Is that the kind of commission that would
14 motivate -- I withdraw that.

15 Plaintiff's Exhibit 12 -- wait a minute.
16 Defense Exhibit, the letter you handed Miss Cribb
17 at the closing, the letter that they offered, I
18 believe as 14 or 15. Do you have the letter that
19 was, that you gave to Miss Cribb at the closing?

20 A I do.

21 Q And what exhibit is it?

22 A Exhibit 12.

23 Q Okay, thank you. Mr. Lovelace, read the
24 first sentence of that letter.

25 A "Please let this letter serve to confirm our

1 agreement as to when and under what conditions
2 First South Bank will agree to release its mortgage
3 on lot 4, 334 Myrtle Avenue, Pawley's Island, South
4 Carolina which partially secures our loan.

5 Q If Miss Cribb claims this letter comes as a
6 big surprise what you do you say to that?

7 A I say it is not correct. It certainly says
8 we have an agreement in place before.

9 Q But you felt like that agreement had to be
10 documented, right?

11 A I did.

12 Q That is the way banks do business, isn't it?

13 A I think so, yes.

14 Q Was that letter an attempt to achieve some
15 unfair advantage over Miss Cribb?

16 A No, sir.

17 Q Had the commitment letter already made it
18 clear lot 4 would be required as collateral?

19 A That's correct.

20 Q And you had had discussions with her?

21 A I had.

22 Q And that letter confirms the terms under
23 which you would be willing to release lot 4?

24 A It did.

25 Q And there came a time later on which you did

1 release lot 4, didn't you?

2 A That's right, yes.

3 Q And that mortgage on lot 4 executed by Mr.
4 Wheeler, which is Plaintiff's Exhibit 14, was
5 satisfied and marked off and that is in evidence as
6 Plaintiff's Exhibit 15. Correct?

7 A I think that's right, yes, sir.

8 Q As we sit here today is Miss Cribb still able
9 to sell that property?

10 A She owns the propety, South Causeway, which
11 she is the sole member, is the owner of the
12 property and if somebody walked in the door right
13 now offering her a contract she could sell it
14 subject to the debt on the property, yes, sir.

15 Q Now let's talk about Charles McCollum. We
16 have heard testimony about him. You understand he
17 was acting as an agent for Lincoln-Harris at the
18 time?

19 A Yes, sir.

20 Q Did he come to the office and look at the
21 file?

22 A No, sir.

23 Q Did he present an offer on behalf of
24 Lincoln-Harris at one time?

25 A Not to us but I assume --

1 Q To Miss Cribb?

2 A To Miss Cribb.

3 Q That is what I should have said.

4 A Right.

5 Q Mr. McCollum is a customer of First South
6 Bank?

7 A He is.

8 Q Have you ever done anything to try, to try to
9 achieve some advantage for Mr. McCollum so that he
10 could acquire this South Causeway property?

11 A No, sir, not any person, no, sir, or in
12 conjunction with anybody else.

13 MR. COLLINS: I need the affidavit of Miss
14 Cribb again. I apologize, Judge.

15 THE WITNESS: I've got it.

16 MR. COLLINS: You've got it?

17 THE WITNESS: Yes, sir.

18 BY MR. COLLINS:

19 Q Okay. Let's turn to that affidavit and find
20 the paragraph where, read paragraph 34 of her
21 affidavit, if you would, please.

22 A Paragraph 34. "We have never been provided
23 any information either orally or in writing from
24 First South Bank regarding why our loan was called
25 or why the bank refused to renew or otherwise

1 negotiate our loan. It is our belief that the
2 bank's motivation in calling the loan and
3 interfering with our attempts to sell the property
4 was to accommodate another bank customer in his
5 desire to purchase the South Causeway property and
6 to prevent us from finding a suitable purchaser."

7 Q You understand that customer she's referring
8 to to be Mr. McCollum?

9 A Yes, sir.

10 Q It couldn't be anybody else, could it?

11 A I don't think so, no, sir.

12 Q Mr. Lovelace, did First South Bank do
13 anything to interfere with First South, with South
14 Causeway selling their property?

15 A No, sir.

16 Q Did First South Bank hope that she would sell
17 her property?

18 A Absolutely.

19 Q We wouldn't be here today if she had sold her
20 property and paid off her mortgage. Is that
21 correct?

22 A That's correct.

23 Q In that paragraph you just read she says that
24 you never gave her any information about why you
25 were going to foreclose on her loan. Is that a

1 fair statement, Mr. Lovelace?

2 A Well, she was in default and we sent her a
3 demand letter telling her she was in default. She
4 hadn't complied, well, she hadn't, she didn't pay
5 the loan when due is basically the reason we --

6 Q And the loan had been made two years instead
7 of a three year loan by the terms of that
8 modification agreement?

9 A That's correct.

10 Q That she understood and signed. Correct?

11 A Right.

12 Q Is the bank obligated to do anything more
13 than send a demand letter when the loan matures?

14 A Not to my knowledge.

15 Q So, is there any truth to her claim that the
16 bank refused to give her information about why they
17 were taking this action?

18 A No.

19 MR. COLLINS: Judge, I'm nearly through but I
20 think I would be well served by a little break
21 where I can gather my documents. I may have a
22 question or two or three more, I don't know for
23 sure. Would you like to break for lunch now?

24 THE COURT: No, let's try to finish this
25 witness. It is 12:15, we'll take just a short

1 break.

2 Ladies and gentlemen, please have no
3 conversation about the case and I will get you back
4 out here as soon as we get these documents in
5 order.

6 (The jury was excused from the courtroom).

7 THE COURT: Let's do this, let's take all the
8 exhibits and let's get them up this way and let's
9 try to put them in order and as you hand a witness
10 an exhibit, ask whatever you all want and then when
11 you all are done let's get the exhibits back from
12 the witness.

13 MR. COLLINS: I totally agree, I have had
14 that experience many times.

15 THE COURT: I know it is hard to keep up
16 with, there is a lot of stuff.

17 MR. COLLINS: Witnesses leave with exhibits.

18 (Recessed at 12:16) p.m.).

19 (Resumed at 12:25 p.m.).

20 THE COURT: All right, ready to go?

21 MR. COLLINS: Yes, sir.

22 THE COURT: Is the defense ready to go?

23 MS. BYRD: Yes, Your Honor.

24 THE COURT: All right, ask the jury to come
25 in.

1 (The jury returned to the courtroom).

2 MR. COLLINS: We're ready, Your Honor.

3 THE COURT: All right. Ladies and gentlemen,
4 we'll continue with Mr. Collins' examination of Mr.
5 Lovelace.

6 MR. COLLINS: Thank you, Your Honor, for that
7 little break, that did help me get organized.

8 THE COURT: Yes, sir.

9 BY MR. COLLINS:

10 Q Mr. Lovelace, do you have the offer from
11 Interface up there?

12 A It was put back.

13 Q Do you recall the amount of the Interface
14 offer?

15 A I do. It was \$10,000,000.

16 Q \$10,000,000?

17 A Cash at closing.

18 Q Cash at closing. The next question is this.
19 Regardless of how much money the property sells
20 for, does the bank get any more than the amount
21 that is due?

22 A No, sir.

23 Q All you get is what is due on the note, with
24 the interest?

25 A The payoff.

1 Q The payoff, that's all you get?

2 A That's correct.

3 Q Now, is there a default interest rate that is
4 allowed by law in South Carolina, 14 percent?

5 A Yes, sir.

6 Q Did this note and mortgage call for the
7 default rate to go into effect when this borrower
8 went into default?

9 A No, sir.

10 Q What do they pay after default?

11 A Four percent, I believe.

12 Q Four percent, so the bank is getting a full
13 10 percent less than they could under the statutory
14 maximum in South Carolina, is that right?

15 A That's correct.

16 Q Okay. Let me show you that which we have
17 marked as Exhibit 24 and I believe counsel has
18 already seen it, an email exchange. I'll hand it
19 to you.

20 MR. COLLINS: We offer it in evidence at this
21 time, Your Honor.

22 THE COURT: Any objection?

23 MS. BYRD: No, sir, Your Honor.

24 THE COURT: Exhibit 24.

25 (Emails marked and received in evidenced as

1 Plaintiff's Exhibit Number 24).

2 BY MR. COLLINS:

3 Q Turn to -- first of all, is this a series of
4 emails that were exchanged between you and Miss
5 Cribb prior to the June 25, 2008, closing of this
6 loan?

7 A It is.

8 Q And turn to the second page, if you would,
9 please. Do you see the question she asked in
10 paragraph seven?

11 A Yes, sir.

12 Q Read that, if you would, please.

13 A Paragraph seven, "As we understand the
14 wording of this it is not acceptable. We will no
15 way secure this loan with our bench house," excuse
16 me, "beach house and lot. In speaking with you I
17 understood you were using lot 4 as extra collateral
18 until final lease was worked out with Lowe's, which
19 may be around six months."

20 Q And you responded to her question number
21 seven, didn't you, sir?

22 A Correct.

23 Q Read your answer to question seven.

24 A "It was never our intention to make a part of
25 our collateral package any properties other than

1 the 19.22 acres and lot 4 334 Myrtle Avenue. The
2 further, the reason for including lot 4 stems from
3 the fact we do not have a current appraisal upon
4 which to make a decision as to how much to allocate
5 toward our initial advance at closing."

6 Q Is that the full answer?

7 A You want me to read the full answer?

8 Q Yes, sir.

9 A I'm sorry. "The statutory advance against,
10 quote, unimproved property is 65 percent, 65
11 percent of the appraised value of the real estate
12 being purchased, slash, financed and a maximum of
13 75 percent against the appraised value of the
14 property, against the total value of the proposed
15 project. In the absence of a current land
16 appraisal we wanted to make sure that we were
17 sufficiently secured in the event that the property
18 appraised for less than expected and still be able
19 to fund your initial needs. As to the proposed
20 release of lot 4, your understanding is correct.
21 Subject to the maximum advance requirement stated
22 above, once we receive a copy of the engineer's
23 certificate evidencing that all the infrastructure
24 improvements have been installed, the development
25 is complete and is in compliance with all

1 applicable zoning requirements or we have been
2 furnished a final copy of the signed lease between
3 you and Lowe's Foods our collateral interest in lot
4 4 will terminate and our mortgage will be
5 released."

6 Q That's good. And this was an email exchange
7 in early June, weeks before the closing, isn't that
8 right?

9 A That's correct.

10 Q Do you believe there is any doubt about the
11 fact that you are going to require lot 4 as
12 collateral for this loan, based on this email
13 exchange?

14 A No, sir.

15 Q Is there any doubt that the loan commitment
16 letter clearly indicated that lot 4 would be
17 required?

18 A No, sir.

19 Q And we have Mrs. Cribb's affidavit which is
20 already in evidence and since you don't have it --
21 do you have her affidavit?

22 A No, sir.

23 Q Let me read this, then. Paragraph 16 of her
24 affidavit says, "During the closing on June 25,
25 2008, my son and I discovered that Lovelace had not

1 corrected the note and that in order to close my
2 son had to agree to mortgage his individual
3 property as security for the loan. At that point
4 we felt we had no other choice since the First
5 Palmetto loan was coming due and Lovelace assured
6 us that First South Bank would see the development
7 through its conclusion, reluctantly we agreed to
8 close."

9 So, then, the loan was coming due at First
10 Palmetto and what they did was refinance with you
11 so they could pay off First Palmetto before the due
12 date?

13 A That's correct.

14 Q Right?

15 A Yes.

16 Q They could have done that in this case,
17 couldn't they, they could have refinanced with
18 somebody else and paid it all, couldn't they?

19 A Yes, sir.

20 Q I next hand you that which has been marked as
21 Plaintiff's Exhibit 25, I showed it to opposing
22 counsel, I understand they do not object.

23 THE COURT: Number 25?

24 MS. BYRD: I'm not sure what it is, Your
25 Honor.

1 MR. COLLINS: We offer --

2 THE COURT: Any objection to 25?

3 MS. BYRD: No, sir, Your Honor.

4 THE COURT: All right.

5 MR. COLLINS: Thank you.

6 THE COURT: Without objection.

7 (Letter dated January 7, 2010, marked and
8 received in evidence as Plaintiff's Exhibit
9 Number 25).

10 BY MR. COLLINS:

11 Q Now, earlier there was some testimony or some
12 questions put to you by Miss Byrd suggesting that
13 you didn't give Miss Cribb any notice, you just
14 hauled off and foreclosed on her property. This
15 Exhibit 25, do you have it in front of you
16 there?

17 A I do.

18 Q This is dated January 7, 2010, right, that is
19 about five months before the maturity date,
20 correct?

21 A Yes, about six months.

22 Q About six months before the maturity date.
23 All right, read to us, if you would, please, the
24 first paragraph of this letter.

25 A "As you are aware, the promissory note

1 connected with the South Causeway property will
2 mature for payment on July 5th, 2010. During
3 previous conversations you and I have had you have
4 indicated that it was your intention to satisfy
5 this obligation on or before the due date by either
6 selling the property at auction or possibly a
7 refinance through another lender."

8 Q Skipping to the first sentence of the second
9 paragraph, read the second sentence, the third
10 sentence which starts off with the words First
11 South, about four lines down.

12 A "First South Bank has asked that I write you
13 at this time to suggest that it might now be
14 appropriate to begin canvassing other lenders in
15 your area to determine their appetite for loans of
16 this type, size and amount. While we appreciate
17 the opportunity to have provided financing to you
18 for the previous 18 months or so it will not be our
19 intention to grant a renewal or extension of the
20 loan past the July 5th maturity date."

21 Q So, any claim by Miss Cribb that you suddenly
22 without warning foreclosed would be untrue,
23 correct?

24 A That's correct.

25 MR. COLLINS: Your Honor, we reserve the

1 right to recall Mr. Lovelace in our case in chief
2 should we elect to. Hopefully we won't but we will
3 at this time say we have no further questions of
4 Mr. Lovelace.

5 THE COURT: All right.

6 Miss Byrd?

7 MS. BYRD: Very briefly.

8 THE COURT: Yes, ma'am.

9 REDIRECT EXAMINATION BY MS. BYRD:

10 Q Mr. Lovelace, Mr. Collins asked you whether
11 there were any regulation or statute that makes the
12 information in the bank file of your customers
13 confidential and you answered it did not in the
14 context of commercial loans, is that right?

15 A That's my understanding, yes, ma'am.

16 Q But you will agree that that information is
17 confidential regardless of whether there is a
18 regulation or statute, wouldn't you?

19 A I would say that it is not normal to publish
20 it in the local newspaper but we don't, that's not
21 the case here, we don't divulge it.

22 Q And because if it wasn't confidential you
23 would not have needed a confidentiality agreement
24 with Lincoln-Harris before they reviewed these
25 documents, correct?

1 A Right. I don't know, I think, to answer your
2 question, that's right.

3 Q And you testified that Miss Peggy did not do
4 anything in response to the Lincoln-Harris offer
5 for 12 million plus dollars. Is that correct?

6 A To my knowledge she didn't.

7 Q Okay. During my questioning did you not
8 testify that you did not even recall receiving that
9 offer?

10 A I didn't recall receiving it initially. It
11 was sometime after that that we sort of connected
12 the dots, if you will, as to who these people were.

13 Q Did you have any personal knowledge
14 whatsoever of what response, if any, Miss Peggy
15 gave to Lincoln-Harris regarding that offer?

16 A No but she obviously didn't accept it.

17 Q But you can't say she did not respond, which
18 you did earlier, correct?

19 A I don't -- no, not verbatim.

20 Q You also testified that if she had taken that
21 offer she would have made a huge profit. Didn't
22 you say that?

23 A Well, based on the information we had from
24 emails, yes.

25 Q Okay. And that is just based on the

1 information you had because you didn't know and
2 don't know what all monies have been put into this
3 property, do you?

4 A The only thing I know is what we've got, what
5 our mortgage debt is and what the offer was.

6 Q And you talked about the interest reserve
7 account with Mr. Collins and that the modification
8 agreement was made in order to provide additional
9 money in the interest reserve account, is that
10 correct?

11 A That's correct.

12 Q Because it was running down, correct?

13 A That's right.

14 Q You set that amount that was in the interest
15 reserve account, didn't you?

16 A We calculated based on what we understood her
17 needs to be from Kennedy Funding and tried to
18 adjust what our needs were at the bank, we tried to
19 come to some sort of compromise.

20 Q And you made that calculation, correct?

21 A I did.

22 Q And you also talked about Mr. Wheeler, Darwin
23 Wheeler, and you testified that you understood him
24 to be, he appeared to be an authorized agent on
25 behalf of South Causeway, correct?

1 A Well, everything that Miss Cribb was at he
2 was at and it seemed like he was involved in one
3 form or another in every decision that was made, so
4 I guess by extension, while he wasn't necessarily
5 an agent per se, he had some influence in what
6 decisions were made by the member.

7 Q So, your testimony earlier that he appeared
8 to be an agent, that is just not accurate?

9 A You know, a legal definition, he is not an
10 agent but he exerted influence on the person who
11 was the member, if that is what you are asking.

12 Q If he had been --

13 MR. COLLINS: Excuse me, Your Honor. Mr.
14 Lovelace, we're having a hard time hearing.

15 A I'm sorry.

16 Q If he had been an agent, then it would have
17 been totally fine, wouldn't it, for Don Thomas to
18 have talked with him, right?

19 A Yes, ma'am.

20 Q You read into the record a very lengthy
21 waiver that is contained in an April, 2009,
22 agreement. Do you recall that, a release, I'm
23 sorry?

24 A Yes, ma'am.

25 Q That releases everything from the beginning

1 of time until that date, correct?

2 A Yes, ma'am.

3 Q Did you have any input on drafting that
4 document?

5 A No, ma'am.

6 Q And do you have any knowledge why a release
7 would be necessary if the bank had done nothing
8 wrong?

9 A Well, that type of release is sort of
10 standard in contracts. So, I mean, we were talking
11 about a new transaction, basically, in this case
12 and anything, if there was anything, and we
13 maintain there wasn't, it would have been forever,
14 it would have been dealt with by that particular
15 item in that particular agreement.

16 MR. COLLINS: Speak up, Mr. Lovelace, I can't
17 hear you.

18 A Can you hear me now?

19 MR. COLLINS: Yes, sir, I can.

20 A That particular document, that particular
21 clause is pretty much standard in most contracts,
22 as I understand it, and that was the reason it was
23 in there. We have no reason to believe we did
24 anything wrong but it was just something that is
25 included in most contracts, that was included in

1 this one.

2 Q Do you recall testifying a few moments ago
3 that you had never seen anything like that before?

4 A I haven't -- the release, I mean that
5 standard verbiage in it.

6 Q Mr. Collins asked you about the failure of
7 South Causeway to pay real estate taxes. Is that
8 right?

9 A That's correct.

10 Q You testified they did fail to pay real
11 estate taxes, correct?

12 A That's correct.

13 Q Isn't it true those were not paid after this
14 foreclosure was filed?

15 A Say that one more time, I'm sorry?

16 Q The only failure to pay real estate taxes was
17 after the present foreclosure was filed, correct?

18 A No, ma'am. The taxes that we paid from
19 proceeds of the sale, the proceeds of the \$300,000
20 we got from the Kennedy Funding loan went to pay
21 past due taxes for 2008 which had not been paid and
22 to escrow for taxes that would be coming due in
23 2009 so we could pay them when the time came and
24 they were billed.

25 Q Mr. Lovelace, didn't you testify when I was

1 questioning you that Miss Peggy actually paid those
2 taxes and you credited her account?

3 A If you're talking about the \$71,000 amount,
4 she paid them and we reimbursed her, we sent the
5 check in to do that. She paid them from the
6 proceeds of the Kennedy Funding loan, she had no
7 visible means of paying them otherwise.

8 Q But they weren't unpaid?

9 A She couldn't have paid them, she could not
10 have paid them had she not closed on that Kennedy
11 Funding loan.

12 Q Isn't it true she had filed a request for an
13 adjustment of the taxes which was ultimately
14 granted by the county?

15 A There was some dispute about rollback taxes,
16 right.

17 Q And I want to ask you about the offer, email,
18 Exhibit Number 24, I believe, Interface. I'm
19 sorry, this is -- are all the exhibits here? Mr.
20 Lovelace, do you have any exhibits up there with
21 you?

22 A Just plaintiff's exhibits.

23 MS. BYRD: May I approach?

24 THE WITNESS: This one right here.

25 THE COURT: All exhibits that you're not

1 dealing with, take them back over there.

2 MS. BYRD: Okay.

3 BY MS. BYRD:

4 Q Exhibit Number 21, this is one of those big
5 offers that you were talking about that Miss Peggy
6 did not accept, isn't that correct?

7 A Apparently so, yes, ma'am.

8 Q Okay. If you will flip to what is Bates
9 labeled as 1011, which is page eight of the
10 attachment.

11 A All right.

12 Q Is that offer signed?

13 A No, ma'am. None of them, none of the offers
14 were signed.

15 Q Okay. So, these big offers that Miss Peggy
16 apparently did not accept weren't even signed by
17 the person making them, correct?

18 A She represented to us they were offers they
19 couldn't consider, that were being given to her or
20 forwarded to her by agents interested in selling
21 the property, it was just a simple matter of
22 signing the document and putting the contract in
23 force.

24 Q Where do you have that information, how do
25 you know that?

1 A What information are you talking about?

2 Q That all they had to do was sign?

3 A Well, pretty much every offer she received,
4 the offerer signed but she never signed to confirm
5 the deal.

6 Q In his email, in her real estate agent's
7 email do you not see there are certain things that
8 he recommends that must be changed before the
9 acceptance, including the time they request, the
10 parcel numbers that are listed in the offer? This
11 was not a bona fide offer, was it?

12 MR. COLLINS: Objection, Your Honor, there is
13 nothing to indicate lack of bona fide.

14 THE COURT: Overruled. Let him answer the
15 question.

16 A The email from Mr. Buice to Mr. Wheeler and
17 Miss Cribb, excuse me, says, "The offered price is
18 your asking price," and the way I would interpret
19 that would be this is the deal, if you want it all
20 you need to do is sign the contract and any
21 adjustment that needs to be made could be made at
22 that point in time.

23 Q You are familiar with real estate, I mean,
24 you're a banker, correct?

25 A I am. Maybe some of the nuances I'm not but

1 generally speaking, yes, ma'am.

2 Q Generally speaking, if someone is to make an
3 offer to you it is signed by them, correct?

4 A That's correct.

5 Q And you testified about the value of property
6 and how it has been significantly devalued because
7 of the economy, correct?

8 A That's correct.

9 Q What effect does the filing of a foreclosure
10 have on the value of property?

11 A That, I can't answer.

12 Q Would you agree with me that it decreases the
13 value of property?

14 A I don't necessarily think so. I mean, we
15 conveyed to Miss Cribb that we didn't think that
16 the auction was appropriate and generally people
17 that buy properties at an auction are ones that are
18 only willing to pay lowball prices on them, so --

19 Q Go ahead, complete your answer.

20 A That is all.

21 Q Is it your testimony that the filing of a
22 foreclosure does not cause the value of property to
23 decrease?

24 A I wouldn't think in every case, no, ma'am.

25 MS. BYRD: I have no further questions, Your

1 Honor.

2 MR. COLLINS: Thank you, Your Honor.

3 THE COURT: Thank you very much, sir. You
4 may step down.

5 THE WITNESS: Thank you.

6 (Witness excused).

7 THE COURT: Ladies and gentlemen, we're going
8 to break for lunch at this time. It is about 13
9 minutes until 1:00. I'm going to ask you if you
10 could be back here at 2:15. That gives you almost
11 an hour and a half.

12 Please continue to have no conversation about
13 the case, don't allow anyone to speak with you as
14 you leave the courthouse, just enjoy your lunch and
15 we'll see you back at 2:15, okay?

16 Everyone else please remain seated.

17 (Jury excused from the courtroom).

18 THE COURT: All right, anything we need to
19 take up before we break here?

20 MS. BYRD: No, sir, Your Honor.

21 THE COURT: You all please over the lunch
22 break look at the documents. As I said earlier to
23 a couple of you, those things that you can
24 stipulate to, you know, the things that clearly are
25 admissible but for laying a foundation which you

1 are probably confident you can do, go ahead and do
2 that, you can get with Henry before we start back
3 and we'll go on the record and mark those as
4 stipulated to. Obviously there may be some
5 exhibits that you object to because you feel they
6 are not admissible and clearly you can't agree on
7 everything, but the things you can agree on try to
8 do that and it will probably expedite things from a
9 time standpoint and I think it will give you all a
10 lot more effective examination of the witnesses to
11 not have to, you know, go through those hoops of
12 laying a foundation.

13 Okay?

14 MS. BYRD: Yes, sir.

15 THE COURT: So, if you all will do that.
16 We'll start back at 2:15.

17 MR. FLOYD: Thank you, Your Honor.

18 (Recessed at 12:50 p.m.).

19 (Resumed at 2:21 p.m.).

20 THE COURT: All right, anything we need to
21 take up, from the plaintiff?

22 MR. COLLINS: No, Your Honor.

23 THE COURT: Anything from the defense?

24 MS. BYRD: Yes, Your Honor. Two documents,
25 one of the plaintiff's exhibits, Number 21, we

1 would like to offer that by consent, and then we
2 have one of ours, 23.

3 THE COURT: So defense, excuse me,
4 Plaintiff's 21 and Defendant 23.

5 MS. BYRD: Yes, sir, Your Honor.

6 THE COURT: Then no objection to those?

7 MR. TYLER: Those were already discussed,
8 just a housekeeping matter.

9 THE COURT: Those are in, then, without
10 objection.

11 (Risk rating report marked and received in
12 evidence as Defendant's Exhibit Number 23).

13 THE COURT: We can at least start with them
14 in order, I realize they won't stay in order.

15 All right, anything further, Miss Byrd?

16 MS. BYRD: Yes, sir. Your Honor, just to
17 speed things along, you asked that we confer with
18 opposing counsel about our documents. We have done
19 so, there are several that they objected to and it
20 might be convenient for the Court and the jury if
21 we do that now before we start.

22 THE COURT: Are you all ready to do that?

23 MR. TYLER: Yes, Your Honor.

24 THE COURT: Okay, let's go ahead and address
25 that.

1 MS. BYRD: The first document that they have
2 objected to is an email from an agent of
3 Lincoln-Harris, and I have given, you all have the
4 copy?

5 MR. TYLER: Yes.

6 MS. BYRD: To Mr. Lysterly regarding the
7 proposed sale.

8 MR. TYLER: We object as hearsay. It's an
9 email from a third party not here, they are not a
10 party to this matter, they are not here and she
11 seeks to introduce an email from that person.

12 THE COURT: How is that not hearsay, Miss
13 Byrd?

14 MS. BYRD: Your Honor, we are not introducing
15 the email to show the truth of any of the facts
16 contained in the email. The only reason we are
17 introducing the email is to establish notice on the
18 part of Mr. Lysterly of what is contained in the
19 email. In other words, we're not alleging --

20 THE COURT: Okay, go ahead, I'm trying to
21 understand. Your purpose is to show that Mr.
22 Lysterly received this email?

23 MS. BYRD: Right, and there is a case on
24 point, Player versus Thompson, 259 600, which
25 provides words offered to show notice or knowledge

1 MS. BYRD: The part of him saying, "We're
2 comfortable getting interest payments"?

3 THE COURT: You just told me that that
4 establishes an issue in this case, so it is being
5 offered for the truth of the matter asserted.

6 MS. BYRD: Okay. And with regard to he has
7 been authorized to buy the property and secure some
8 of the commitments and have tenants, an anchor
9 tenant and enough private equity commitment to
10 proceed, I'm not offering that portion to show he
11 has done that, only that is what was communicated
12 to Mr. Lyerly and his failure to do anything about
13 it. If they had a confidentiality agreement he
14 should have told this person, "You can't go
15 communicate to third parties," that is our whole
16 case, is that they didn't just disclose it to
17 Lincoln-Harris but they had actual knowledge that
18 Lincoln-Harris was disclosing it to others.

19 MR. TYLER: Your Honor, I say, you know, as
20 to what advice we gave to other people who had
21 their own counsel and should the bank have been
22 telling others, I think it is clearly being offered
23 for exactly what it says.

24 THE COURT: I have ruled on that.

25 MR. TYLER: What he was telling the bank,

1 what Mr. Curry was telling the bank, he was
2 identified as a witness, Your Honor, and they could
3 have easily subpoenaed him.

4 MR. COLLINS: That's right, if she says this
5 is the heart of her case, what that means is she
6 didn't do any discovery on the heart of her case,
7 Lincoln-Harris is in Charlotte.

8 THE COURT: Here is the thing. I have ruled,
9 can we move on?

10 MS. BYRD: Yes, sir. And just to clarify so
11 that I don't, don't misstep, if I ask him on direct
12 if these things were communicated to him and he
13 denies that they were, then I may introduce the
14 email as impeachment evidence, correct? At that
15 point it is not offered to show the truth, only to
16 impeach him.

17 MR. TYLER: Your Honor, if she starts reading
18 from the email I'm going to object again. She is
19 offering it, offering in Mr. Curry's statement.

20 THE COURT: Miss Byrd, if it's hearsay we're
21 not going to do an end run around it.

22 MS. BYRD: Your Honor --

23 THE COURT: I mean, if this guy, excuse me,
24 but I don't know, Mr. Curry, if Mr. Curry is that
25 important to this case you should have subpoenaed

1 Mr. Curry and had him here.

2 MS. BYRD: Your Honor, we don't care whether
3 he, we don't care whether what he said was true.
4 What we want to know is what the bank knew. But,
5 Your Honor --

6 THE COURT: But listen to what you're saying,
7 listen to what you're saying.

8 MR. FLOYD: We don't care if what he says is
9 true or not but we want to tell this jury that
10 there was a willing buyer out there and they didn't
11 do anything about it.

12 MS. BYRD: I don't think that is what I'm
13 saying.

14 THE COURT: I don't know what you're saying.
15 All I know is you keep saying that you're not
16 offering this for the truth of the matter asserted
17 but you are because it is establishing --

18 MR. GODDARD: Your Honor, the question, I
19 think if we do a line of questioning that simply
20 asks, "Were you aware that Mr. Curry was shopping
21 this property," I think he can answer that
22 question.

23 THE COURT: I think he can answer that.

24 MR. GODDARD: And our question is, if he
25 directly declines that, denies that, then this is

1 impeachment evidence.

2 THE COURT: I think at that point it changes
3 the nature of this information.

4 MR. GODDARD: Thank you, Your Honor.

5 THE COURT: Miss Byrd, do you need this back
6 or is this just a copy? Do you need this back?

7 MS. BYRD: I will need that one back.

8 THE COURT: Yes.

9 MS. BYRD: There are a few more, Your Honor.

10 Let's see, was it First Palmetto 3538 that
11 you objected to?

12 MR. TYLER: Which one?

13 MS. BYRD: 3538.

14 MR. TYLER: Let me see.

15 Your Honor, the same objection, it is another
16 email from Mr. Curry.

17 MS. BYRD: Again, Your Honor, they have not
18 objected to the introduction of this document that
19 is attached to that email and all we would
20 introduce the email to show is it was sent to Mr.
21 Lyerly. They did not object to the attachment.
22 I'm just not clear --

23 MR. TYLER: I apologize but I wasn't sure
24 what was attached to this, I just got this one
25 page, Your Honor, but certainly if it was attached

1 to this and that is the basis for which they are
2 trying to get it in, then I would object to that as
3 well, Your Honor.

4 MS. BYRD: You object to the attachment?

5 MR. TYLER: I'm trying to understand are we
6 arguing about the attachment or the email?

7 MS. BYRD: You stipulated to the attachment.

8 THE COURT: If they stipulated to that that
9 is coming in. What is the significance of this?

10 MS. BYRD: To transmit the agreement.

11 THE COURT: You've got the agreement, that is
12 what you wanted in, right?

13 MS. BYRD: Yes.

14 THE COURT: You've got that, so why is this
15 relevant?

16 MS. BYRD: Again I think it is the same
17 issue.

18 THE COURT: There is apparently something in
19 here you want the jury to see.

20 MS. BYRD: Well, there is but I think the
21 Court has already ruled on it. I mean, the issue
22 is the notice that Chip had as to what Curry
23 expressed that they were doing.

24 THE COURT: Again, apparently the attachment
25 is not objected to and it's in, you can refer to

1 it, you can ask him about that attachment.

2 MR. TYLER: Your Honor, I just point out, I
3 think it is clear they are trying to get the couple
4 sentences in the middle of the email in about what
5 Lincoln-Harris was doing. Mr. Curry is not here to
6 discuss what Lincoln-Harris was or was not doing.

7 MS. BYRD: I think it is the same issue, Your
8 Honor has ruled and we'll accept it. We'll ask the
9 question and if he denies it we'll enter it that
10 way.

11 And the final one, Your Honor, this one is
12 different. This email, this is an email from --
13 I'm sorry.

14 MR. TYLER: Your Honor, again the same
15 objection, hearsay, Your Honor. I'm trying to read
16 through it again real quick. Your Honor, I would
17 also, this is very prejudicial with his statement
18 here, "The pending auction did not help matters
19 either." Again that is really the crux of what
20 they are trying to get to.

21 MS. BYRD: That's exactly right, that is
22 exactly what we're trying to get to.

23 THE COURT: Okay.

24 MS. BYRD: The effect on the hearer and the
25 motive for him calling the auction company.

1 THE COURT: So, for the truth of the matter
2 asserted?

3 MS. BYRD: Yes, sir, Your Honor. We're not
4 trying to prove that the pending auction didn't
5 help their sale, we're trying to show the effect
6 that that statement had on the hearer, which is not
7 hearsay, Your Honor. The sole purpose is to show
8 what effect that had on the hearer and, Your Honor,
9 it can't be clearer that is not hearsay. Watson
10 versus Wall, 239 109.

11 MR. FLOYD: Your Honor, this is, the effect
12 the hearer had on Chip, that goes to, I mean, this
13 is after the fact. They are trying to put it in to
14 show it had some chilling effect on the auction,
15 that's the truth of the matter asserted therein.
16 The effect on him, how he reacted to getting this
17 email has nothing to do with this case. That is
18 the point of the comment, the effect it has on him
19 when you get it, not when you get it beforehand, I
20 mean, I don't understand that, it is still hearsay.

21 THE COURT: This is sent on May 24th, 2010.

22 MS. BYRD: Yes, sir.

23 MR. FLOYD: I apologize, Your Honor, I
24 misread the date, I'm sorry.

25 THE COURT: What is it, Miss Byrd, how is it

1 relevant, the effect it had on Mr. Lyerly?

2 MR. TYLER: Your Honor, may I approach to
3 look at their documents real quick, Your Honor?

4 THE COURT: Yes.

5 MS. BYRD: The effect it had on Mr. Lyerly to
6 make the auction more difficult, to make the call
7 to have somebody there at the auction, we were not
8 trying to show that the pending auction didn't help
9 with their loan sale.

10 MR. TYLER: The point I'm making, they are
11 trying to call in the call made to Don Thomas with
12 this email. The call made to Don Thomas was made
13 on May 15th, which was nine days before, before
14 this email, so --

15 THE COURT: That is why I'm trying to get the
16 understanding.

17 MS. BYRD: The auction was not held until
18 June 1st.

19 THE COURT: But you just said the effect it
20 had and then the communications he made with Mr.
21 Thomas.

22 MS. BYRD: Right.

23 THE COURT: Well, the communications he made
24 with Mr. Thomas were prior to this.

25 MS. BYRD: Well, Your Honor, I think that

1 that establishes what Lincoln Harris' position was
2 and that the bank knew it.

3 THE COURT: Nine days after they already made
4 the communication?

5 MS. BYRD: Well, Your Honor, we just suggest
6 that it is the effect on the hearer that we're
7 trying to prove but --

8 THE COURT: All right. And if it is I don't
9 want, I don't want to eliminate it if it's
10 appropriate but the effect you're claiming it has
11 on the hearer is the actions of communicating that
12 information to Mr. Thomas and it couldn't have had
13 that because that had already occurred.

14 MS. BYRD: Well, Your Honor, as to that
15 statement, as to that one email, that came later
16 but if that is the position that Lincoln-Harris
17 had, they had that when the auction was announced,
18 I mean, they had to have it.

19 THE COURT: That's completely speculative.

20 MR. TYLER: Your Honor --

21 THE COURT: That's completely speculative.

22 MS. BYRD: Okay.

23 THE COURT: I would agree with you, this
24 doesn't have any effect on the hearer when it
25 occurs nine days after the hearer already acted.

1 MS. BYRD: Okay.

2 MR. TYLER: Your Honor, I would object again.
3 That is very prejudicial.

4 THE COURT: I have ruled it is not
5 admissible.

6 MR. TYLER: Thank you.

7 MS. BYRD: I can ask him if that was said to
8 him, correct?

9 THE COURT: Here is what is not going to
10 happen. You're not going to ask him if it was said
11 to him. He denies it and now you're going to try
12 to come up and hammer him and impeach him with
13 this. This is out.

14 MS. BYRD: Okay. So, I can't use that as
15 impeachment evidence either?

16 THE COURT: Where did you get that?

17 MS. BYRD: From him.

18 THE COURT: I understand that. But this
19 document you've got here is not admissible, all
20 right? Now, what you want to do is basically --
21 here is the problem, is that was conveyed nine days
22 after Mr. Lyerly made the communication with Mr.
23 Thomas, so if you ask him about his knowledge of
24 that and he tells you no, this doesn't establish it
25 because maybe, I don't know, Miss Byrd, because

1 obviously I'm not there and I don't know all of it
2 but you are trying to relate that back to actions
3 that occurred nine days prior to the sending of
4 that information. It may be that when he acted he
5 didn't have that information and it was subsequent
6 to him acting that he got that information, I don't
7 know. I mean, obviously I'm not there, but that is
8 the problem. This is a timing issue because I
9 think if this was sent prior to the auction I would
10 agree with you that it goes to the effect on the
11 hearer.

12 MS. BYRD: Your Honor, the other issue is
13 Greg Curry who authored this email also showed up
14 at the auction with full knowledge after his review
15 of the entire file and if what he is saying in this
16 email, this auction isn't helping matters, it is
17 not helping us, and he is at the auction, the
18 inference is he may have --

19 THE COURT: You're going to offer speculation
20 and inferences, you are speculating that, "Well, he
21 must have known this when he acted, he must have."

22 MS. BYRD: I don't think anybody would
23 dispute he knew this before.

24 MR. TYLER: Knew what before? I'm not real
25 sure.

1 MS. BYRD: Greg Curry had reviewed the
2 documents before this email and the auction.

3 MR. TYLER: I don't remember the timing
4 exactly when he reviewed the documents.

5 THE COURT: I don't either and that is where
6 it gets difficult, trying to make rulings prior to
7 somebody testifying.

8 MS. BYRD: I --

9 THE COURT: Because all this may be moot.

10 MR. COLLINS: Judge, it's irrelevant. This
11 whole inquiry into what happened at Lincoln-Harris
12 is, it fizzles and falls apart because of the
13 simple fact they never accepted an offer from
14 Lincoln-Harris. Lincoln-Harris made no bid at the
15 auction, they could have. The auctioneers, we
16 understand it, finally said is there any bid of any
17 amount whatsoever, and there was no one that bid.

18 There is an email from somebody who talks
19 about making a bid but that was after the auction.
20 At the auction itself, Mr. Thomas testified there
21 was no bid, so the idea that somebody at the
22 auction was influenced by some exchange of emails,
23 they have had the chance, Your Honor, to depose Mr.
24 Curry, they have had the chance to do all matter of
25 things. They come in here today saying it's the

1 heart of her case. Well, it's the heart of their
2 case today because everything else they have been
3 talking about has fallen apart on them and I submit
4 it never was the heart of their case, it is a very
5 irrelevant aside and they are trying to pump it up
6 into something big and important and it's not, Your
7 Honor.

8 MS. BYRD: I realize it is very unimportant
9 to them but it is important to us and I believe
10 that it would be totally improper to limit me on my
11 examination of Mr. Lyerly. I think it is
12 absolutely appropriate for me to ask him if this
13 fact was communicated to him.

14 THE COURT: I didn't say you couldn't ask him
15 that.

16 MS. BYRD: That is all I'm asking. If I ask
17 him was it communicated to him and he says no, then
18 this comes in as impeachment.

19 THE COURT: It doesn't unless you ask him,
20 "Was this communicated to you prior to your
21 communicating with Mr. Thomas," or if you ask him,
22 "Did you find this out nine days after you talked
23 to Mr. Thomas," you see, that is what makes it
24 relevant as far as for my ruling, because, and if
25 I'm misunderstanding you, Miss Byrd, I apologize,

1 but you're trying to say that this email that came
2 to Mr. Lyerly nine days after the communication
3 with Mr. Thomas, that, "Well, Judge, this came nine
4 days later but clearly they knew about it earlier,"
5 and that is not clear to me, that is not clear to
6 anybody.

7 I mean, I know about something when it's sent
8 to me but, now, did I know about it before, maybe I
9 did, maybe I didn't, I don't know, but this doesn't
10 prove I knew about it before, this doesn't prove,
11 if you ask me what I did about something I knew
12 about nine days earlier and I tell you I didn't
13 know about this nine days earlier, I knew about
14 this when I got this email, then the fact that I
15 got this email and this information here, that
16 doesn't prove that I knew about it nine days
17 earlier.

18 MS. BYRD: And I think I understand your
19 ruling and I certainly do --

20 THE COURT: So, even with impeachment
21 purposes, you know, if you ask him, "Isn't it true
22 on the 24th of, May 24th you knew this information
23 prior to the auction," and he says, "No, I didn't,"
24 then you've got maybe an impeachment basis for it
25 but not to show that this caused him to react and

1 make that communication with Mr. Thomas.

2 MS. BYRD: Okay. I just need to, then, in my
3 questioning make sure that it is clear that I'm
4 asking him if on this date, and not just generally
5 he told you the auction --

6 THE COURT: If it is even relevant, because
7 now it becomes a question of is it relevant.
8 Because if you are wanting to put it up to show his
9 reaction to it and that reaction was communicating
10 with Mr. Thomas whatever information was
11 communicated, then no, it is not relevant for that
12 purpose.

13 MR. GODDARD: Your Honor, the question again
14 wouldn't be limited, if she rephrased her question,
15 whether Mr. Lyerly had knowledge of the effect this
16 auction was having in the community.

17 MR. COLLINS: That's speculation.

18 THE COURT: That is pure speculation.

19 MR. GODDARD: If he had knowledge? It is his
20 knowledge.

21 THE COURT: What knowledge are you talking
22 about?

23 MR. GODDARD: If he was aware, we're not
24 asking, and we're not trying to prove it through
25 that, and I'm not even saying we can enter, we're

1 not talking about just getting the document in, but
2 the information, he can testify whether he was
3 aware that there was any, the auction was having
4 any type of chilling effect in the industry and if
5 he says yes, or no, that is his answer per your
6 ruling but I think he could have that.

7 MR. TYLER: Your Honor --

8 THE COURT: If he says the pending auction
9 did not help matters either, you're taking that and
10 turning that into a chilling effect. Maybe it was,
11 maybe it wasn't, I don't know, I don't think --

12 MS. BYRD: I just want to make sure because
13 I'm going to be the one asking the questions, I do
14 not want to run afoul of the Court.

15 THE COURT: Yes, ma'am.

16 MS. BYRD: Am I permitted to ask him whether
17 Greg Curry communicated to him that the pending
18 auction was not helping him to secure some of the
19 commitments for the property on May 24th?

20 THE COURT: What's the relevance?

21 MS. BYRD: First of all it would be a
22 violation of the confidentiality order that they
23 had and their failure to respond by doing anything
24 to stop them from, from further disclosing
25 information that they were bound by the

1 confidentiality order and, Your Honor, the fact
2 that he went to the auction and was present on the
3 day. That is already in evidence.

4 MR. FLOYD: Your Honor, this is a complex
5 problem created by a simple omission and that is
6 that Greg Curry is not here. It is an end run to
7 get around some kind of speculation as to what was
8 said before, what was stated to who before, and if
9 she is allowed to ask, "Did he tell you this
10 beforehand, did you have knowledge of this kind of
11 statement," it is speculation. I don't see how --

12 MS. BYRD: Your Honor --

13 THE COURT: Everybody, let me just say this,
14 we can't have people talking over each other.

15 MS. BYRD: I apologize, Your Honor.

16 MR. FLOYD: Sorry, Your Honor.

17 THE COURT: Now, I'm not as bright as Amanda
18 here but I'm not getting what your whole intention
19 is, but my understanding is the purpose of this
20 email was to show the effect it had on Mr. Lyerly,
21 that effect being that he then subsequently
22 contacted Mr. Thomas and there was some exchange of
23 information and stuff that went on.

24 MR. COLLINS: Mr. Lovelace.

25 THE COURT: Mr. Lovelace, whoever. But this

1 was sent nine days subsequent to that occurring so
2 that is the effect that this supposedly had on him,
3 the effect, and now if your question is if at
4 anytime prior to the auction, "Even after you
5 acted, you knew before the auction about this
6 sentence," then that doesn't have any relevance
7 because that didn't motivate his actions at all.

8 MR. GODDARD: Your Honor, briefly. The fact
9 that he did not make any, the fact he did not make
10 any affirmative action to cure the violation of the
11 confidentiality agreement is a direct, is also a
12 direct claim of ours and cause of action and that
13 goes directly to that.

14 MR. COLLINS: Judge --

15 MR. GODDARD: The hearer, that he did not,
16 the bank having knowledge that they are doing all
17 these things, did not do one thing to stop this.

18 MS. BYRD: And also, just so the Court is
19 aware of the totality of the circumstances because
20 on several occasions they have said, "Well, it's
21 because she didn't bring Greg Curry here."

22 First of all he is a resident of North
23 Carolina and they did not even disclose these
24 documents, much less his identity, until this
25 summer, so for them to say, and by that time we

1 were very close to the end of discovery, we would
2 have had to get an Order of Commission from the
3 Court and subpoena him. They submitted these
4 documents late. It wasn't as if we didn't subpoena
5 him.

6 THE COURT: I don't point fingers. Look, if
7 it was that important you could have done all those
8 things you just said and got him here. We're in
9 litigation now.

10 MS. BYRD: Sure.

11 THE COURT: All of what happened before, you
12 didn't do this, she didn't do that, I'm not
13 interested in that.

14 MR. COLLINS: Judge, one final point I would
15 like to make is this. The confidentiality
16 agreement was between First South Bank and
17 Lincoln-Harris, okay, they can talk to each other
18 all they want to.

19 THE COURT: You see, that is what I'm not
20 understanding.

21 MS. BYRD: If you read, I'm just not sure if
22 you read the email or not by --

23 THE COURT: This email?

24 MS. BYRD: No. I'm not sure if Joel has read
25 it but in the email it says they are securing some

1 of the commitments and that they had, "Nonbinding
2 meetings with county officials who understood our
3 concerns, then we met with majors to test their
4 interest and we received nonbinding interest," so
5 they breached the confidentiality agreement and
6 they did nothing about it.

7 THE COURT: All right. Who is Greg Curry
8 with?

9 MS. BYRD: He's with Lincoln-Harris.

10 THE COURT: Lincoln-Harris? The
11 confidentiality agreement was between them and
12 Lincoln-Harris?

13 MS. BYRD: Correct, for our benefit,
14 according to them.

15 THE COURT: All right. So they, how are they
16 in breach of a confidentiality agreement if
17 Lincoln-Harris then takes that information and goes
18 spouting off to somebody else?

19 MS. BYRD: No, Your Honor.

20 MR. FLOYD: Lincoln-Harris is in breach of
21 the confidentiality agreement.

22 THE COURT: Okay.

23 MS. BYRD: And First South Bank did nothing
24 to cure it, they knew what was happening.

25 THE COURT: Cure it how?

1 MS. BYRD: By saying don't do that, stop, you
2 can't do that, you can't sell our property when
3 these people own it, you have to go through this
4 part before you can go out and develop it yourself.

5 MR. TYLER: Your Honor, it is speculation as
6 to whatever he discussed with these third parties.
7 We don't even know if it was the confidential
8 information under the confidentiality agreement.

9 THE COURT: Here's the problem, here's the
10 problem, Miss Byrd, because I think you're
11 operating on speculation, because what you're
12 saying is they knew, they had this confidentiality
13 agreement and because of this email they knew that
14 Lincoln-Harris was violating it.

15 MS. BYRD: Exactly.

16 THE COURT: And they did nothing about it.
17 And you don't even know that.

18 MS. BYRD: Well --

19 THE COURT: Because you don't know that they
20 didn't have a conversation on the phone. I mean,
21 you see, this is why it's speculation, because what
22 if you get him on the stand and he says, "Oh, I
23 told them, I said Greg, you can't do that, Greg,
24 you all got to cut that out"?

25 MS. BYRD: That would be the answer, then.

1 MR. TYLER: But, Your Honor --

2 THE COURT: What have you got to say?

3 MR. GODDARD: We could not under your ruling
4 ask him if he did anything to cure it because we
5 have no way to ask him if he had knowledge of them
6 doing that.

7 THE COURT: Because you're relying on a
8 hearsay document.

9 MS. BYRD: Your Honor, if it is offered for
10 his notice it is by definition not hearsay.

11 THE COURT: So your point in this email has
12 nothing to do with the effect it had on his actions
13 in contacting Mr. Thomas or Mr. Lovelace, whoever
14 it was?

15 MS. BYRD: Well, Don Thomas, Lovelace
16 contacted Don Thomas.

17 THE COURT: Okay.

18 MS. BYRD: I think there is no way we could
19 argue that an email on the 24th caused Lovelace to
20 call Don Thomas but I think --

21 THE COURT: Let me ask you this. Again, you
22 guys know volumes more about the facts in this case
23 than I do but why couldn't couldn't you accomplish
24 what you're talking about doing by something along
25 these lines of, "You had a confidentiality

1 agreement with Lincoln-Harris, correct? Yes. And
2 at some point prior to the auction you came into
3 knowledge that Lincoln-Harris was breaching that
4 agreement. Isn't that correct?"

5 MS. BYRD: Yes, sir.

6 THE COURT: And if he says yes, I mean --

7 MR. TYLER: Your Honor, I think it is
8 speculation, reading these emails, even reaching
9 the result that he has breached the agreement.

10 THE COURT: Well, Mr. Tyler, if there is a
11 confidentiality agreement and you get an email
12 saying that, "We have met with a major tenant to
13 get their interest --"

14 MR. TYLER: Your Honor, the confidentiality
15 agreement goes to the terms of the note, the terms
16 of the documents that were, that were involved, not
17 whether or not, I mean, Lincoln-Harris is a
18 developer and they certainly have the ability to go
19 out and gauge interest in properties.

20 THE COURT: That is what I'm trying to
21 understand because of course I don't have the
22 confidentiality agreement in front of me. I'm not
23 even sure this is a violation.

24 MS. BYRD: The second page, number two,
25 reviewer must receive and hold, including any

1 proprietary information received by reviewer prior
2 to the date of this agreement --"

3 THE COURT: All right, I can read it.

4 All right, what does it define as proprietary
5 information?

6 MS. BYRD: On the first page --

7 THE COURT: I like that email, of course you
8 took it back, if I recall the email, I don't think
9 that email reflects that any proprietary
10 information was breached. You've got a development
11 company, there is no secret it's a development
12 company and they have an interest in a piece of
13 property and they start doing an investigation,
14 they start talking to county officials about this
15 property, "If we're going to develop it, is it
16 going to be a problem, can we get permits to do
17 this, that?"

18 I don't know what they did but I'm just
19 saying this proprietary information is all non
20 public relating to the loan in possession of the
21 bank, which is supplied or otherwise made available
22 to the viewer by the bank and its attorneys, the
23 proprietary information includes but is not limited
24 to underwriting information, analysis, financial
25 information with respect to the borrower. I mean,

1 that email doesn't give any indication that there
2 was a violation of this agreement.

3 MS. BYRD: Well, Your Honor, to disclose --

4 THE COURT: To disclose what? What did they
5 disclose?

6 MR. GODDARD: If you remember Mr. Lovelace's
7 testimony, he went up and even testified, "We gave
8 them the engineering work, we gave them all the --"

9 THE COURT: To Lincoln-Harris.

10 MR. GODDARD: To Lincoln-Harris.

11 THE COURT: I understand that.

12 MR. GODDARD: So it is not just the financial
13 information.

14 THE COURT: No, but he can do that because
15 this agreement is between them, the bank and
16 Lincoln-Harris.

17 MR. GODDARD: Correct, but the proprietary
18 information would include all of that and the
19 ability to know how to deal with it, with the other
20 company or the zoning issues.

21 THE COURT: That email simply says they went
22 out and did some preliminary investigation or
23 something.

24 MS. BYRD: The testimony that they have
25 offered is that Lincoln-Harris was just buying the

1 note but that's clearly not the case. They were
2 out getting commitments on the development and I
3 can't express how important that is, that at the
4 same time that these folks are trying to sell the
5 property Lincoln-Harris is out trying to sell the
6 property. I mean, it seems obvious to me.

7 MR. TYLER: Your Honor, I would just say, I
8 think they are trying to bring, Lincoln-Harris is a
9 developer, they all do due diligence before they
10 make an offer, they know what the property is
11 about, it is common to talk to planners and know.
12 That doesn't mean that they went in and said, "Hey,
13 do you know what the payment history is?" I mean,
14 I think those are two different --

15 THE COURT: I'm just going, listen, I don't
16 know, I'm trying to make a decision based on the
17 information in the email you wanted to use and that
18 email does not in any way reflect that there has
19 been a breach of this agreement.

20 MS. BYRD: Your Honor, the purpose of what
21 they have said is that this was a note purchase
22 agreement and that they entered that because they
23 were trying to sell the note, which they are
24 entitled to do. What they are not entitled to do
25 is sell the property that didn't belong to them and

1 so clearly what this is saying is, "We're out
2 meeting with major tenants," so if they were --

3 THE COURT: Right. Lincoln-Harris is.

4 MS. BYRD: Right, and they can't, if that's
5 the case, then they should have known that this
6 wasn't a loan purchase, that these people were
7 trying to buy the property.

8 MR. TYLER: Your Honor, Mr. Curry could come
9 in and explain, I mean, I'm assuming he knew what
10 he was buying, they weren't buying the property,
11 they were trying to buy the note and only end up
12 with the note and the mortgage and the other bank
13 documents, so I don't understand, I don't think
14 that anything here presents what, or Mr. Curry
15 could be here to explain what he thought he was
16 doing but, Your Honor, I don't even know why that
17 is relevant in this case. It is not First South
18 there trying to sell the property.

19 MS. BYRD: But they had notice that somebody
20 else was and that is the issue.

21 THE COURT: What difference --

22 MS. BYRD: Because --

23 THE COURT: Look --

24 MS. BYRD: I mean --

25 THE COURT: We're in recess, you all step

1 back here.

2 (Recessed at 3:10 p.m.).

3 (Resumed at 3:20 p.m.).

4 THE COURT: Please remain seated. We're
5 going to take just a few more minutes.

6 MR. GODDARD: Your Honor, we were trying to
7 do these admissions as evidence, I would ask he not
8 be allowed to go discuss the rules with him during
9 the break.

10 THE COURT: You don't need to have any
11 conversation about his testimony or anything like
12 that.

13 MR. COLLINS: Well, Mr. Lyerly is curious
14 about why it took so long, I was just going to tell
15 him we had a long drawn out discussion, you're
16 going to come in here and issue your ruling.

17 THE COURT: The judge is dumb as a post and
18 it takes a little while to get moving.

19 (Recessed at 3:21 p.m.).

20 (Reconvened at 3:58 p.m.).

21 THE COURT: All right, remember we have the
22 jury sitting back there.

23 MR. GODDARD: Judge, we have the bank policy,
24 Your Honor, we talked about. It directly involves
25 preforeclosure sharing of information to third

1 parties. The bank policy we think is directly
2 relevant in this case, whether they followed their
3 own policy, whether there was bad faith dealing
4 with their own client. It goes directly to our
5 defenses, as to them sharing any information.

6 THE COURT: All right.

7 Mr. Tyler?

8 MR. TYLER: Your Honor, do you want to read
9 it yourself? It deals with foreclosure sales, is
10 what it deals with. It basically deals with
11 anybody calling in on a foreclosure sale, to make
12 sure you don't interfere with a bid on foreclosure
13 sale.

14 THE COURT: All right.

15 MR. GODDARD: This is a little different.
16 This preforeclosure information sharing part that I
17 see here, I realize this says preforeclosure
18 information but it already refers to apparently
19 referring folks to the trustee. What we want to
20 show, Your Honor, is not that it says, that they
21 can't share the information, that they should refer
22 them to the trustee. We also want to show that
23 their policies are based on North Carolina
24 policies, not South Carolina. These are, there is
25 no need for a trustee in South Carolina and

1 therefore it would go directly to, if there is no
2 trustee, before foreclosure. That is the --

3 MR. TYLER: It is referring them to the
4 agents. That is what the trustee does in North
5 Carolina, they foreclose on the property, they sell
6 it, so I believe the application in South Carolina
7 would be if somebody calls you before the property
8 is getting ready to go to sale by the Master in
9 Equity. If somebody calls them about it you refer
10 them to the Master in Equity is the normal policy.

11 MR. GODDARD: Your Honor, I think it is up
12 for discretion, up for the jury to decide what that
13 means. I think the heading clearly says
14 preforeclosure and the inference is whether or not,
15 it doesn't say anything as to the Master or
16 anything else. What it says, they may not refer to
17 third parties the proposed bid amounts, may not
18 share the result of any appraisals, environmental
19 reports, et cetera, relating to the property, and
20 all third parties who express an interest in the
21 property prior to the foreclosure should be
22 referred to the trustee who will be conducting the
23 sale.

24 MR. TYLER: Your Honor, once again, it is
25 normal during the foreclosure, the day before the

1 sale, you get ten or fifteen guys calling in, they
2 call in, "Hey, what can you tell me about the
3 property?" This bank's policy is we don't tell
4 people. When it's going to the foreclosure sale
5 the Master conducts the sale, we don't tell people,
6 we don't give that information out. That is
7 completely different than what we have got going on
8 in this case, Your Honor. I think we're comparing
9 apples and oranges.

10 THE COURT: The way this reads is that --
11 now, you've got to understand, guys, we're talking
12 about foreclosure and foreclosure sale. Those are
13 two different things. You would agree when the
14 bank files foreclosure proceedings that is a
15 foreclosure, and at some point if they prevail,
16 then the property is sold at a foreclosure sale.
17 So, I don't think, I believe it is clear to me but
18 do you not have an expert who is going to testify?

19 MR. GODDARD: We are, Your Honor, but what we
20 want to show exactly is the only, in the 156 pages
21 of their bank policies and procedures the only
22 thing about sharing information is directly right
23 here and it is preforeclosure and they shouldn't be
24 doing so to third parties and we want to show
25 either this is your theory or you don't even

1 address whether you should be or should not be
2 giving third parties information.

3 MR. TYLER: Your Honor I just again say we're
4 grabbing at straws here trying to find some kind of
5 cause --

6 THE COURT: I'm going to allow it.

7 MR. GODDARD: Thank you, Your Honor.

8 MR. TYLER: Thank you, Your Honor.

9 THE COURT: And, folks, you can argue its
10 meaning, you have an expert that is going to take
11 the stand and discuss its, you can cross examine
12 them.

13 MS. BYRD: Your Honor, do you want me to go
14 ahead and place the premarked exhibit up there for
15 the witness? I think that was the purpose. Was
16 that the purpose --

17 THE COURT: What do you mean, the pre-marked
18 exhibits?

19 MS. BYRD: I'm sorry?

20 THE COURT: What do you mean, the pre-marked
21 exhibits?

22 MS. BYRD: The exhibits that we have offered.

23 MR. TYLER: There were a couple we did agree
24 to, Your Honor.

25 MS. BYRD: That we have offered.

1 THE COURT: Yes, let's go over the list of
2 those that have been stipulated or are in evidence.
3 The last one I have regarding the plaintiff was
4 number 25 and the last one I have regarding the
5 defense was number 23, so are there others beyond
6 those?

7 MR. FLOYD: Your Honor, I have a quick
8 question about this last one you just decided, I
9 don't understand if there is two pages to it.

10 THE COURT: I don't know there is two pages.
11 Is there? There may be two pages but only one page
12 is relevant.

13 MS. BYRD: It's a copy of the same page.

14 MR. FLOYD: Thank you, Your Honor.

15 MR. TYLER: We have another page but that's
16 not it.

17 MS. BYRD: So, 25 is --

18 THE COURT: I have Plaintiff's 25 is in and
19 Defense 23, that is the last one that I have.

20 MS. BYRD: And 24 is an email that we agreed
21 to.

22 THE COURT: 24 is in? Are you talking about
23 the plaintiff?

24 MS. BYRD: No, the defendant.

25 THE COURT: Defense 24, okay.

1 MS. BYRD: 24, I'm sorry.

2 THE COURT: 24 for the defense is without
3 objection.

4 MR. TYLER: We agree to 24.

5 THE COURT: Okay.

6 (Email marked and received in evidence as
7 Defendant's Exhibit Number 24).

8 MS. BYRD: Our 25 is the confidentiality
9 agreement.

10 THE COURT: Right here, or a copy of it at
11 least.

12 MS. BYRD: Okay.

13 THE COURT: And that is Defense 25 without
14 objection.

15 (Confidentiality agreement marked and
16 received in evidence as Defendant's Exhibit
17 Number 25).

18 MR. GODDARD: May I approach, Your Honor?

19 THE COURT: Yes, sir. That is at least a
20 copy.

21 MR. GODDARD: Thank you.

22 MS. BYRD: And there is a final exhibit, 26,
23 which is the policy that you just allowed in.

24 THE COURT: All right. Now, that is, that is
25 pursuant to objection.

1 MR. TYLER: Thank you.

2 THE COURT: So I want to note plaintiff's
3 objection to Defense 26, so that is over objection.

4 MR. TYLER: Thank you, Your Honor.

5 (Excerpts from bank policies marked and
6 received in evidence as Defendant Exhibit
7 Number 26).

8 MS. BYRD: Do I need to proffer these?

9 THE COURT: Now --

10 MR. GODDARD: Your Honor, do we need to
11 record the exhibits, your rulings on the others,
12 can we make court exhibits the other ones?

13 THE COURT: Do you want to make them a court
14 exhibit?

15 MR. GODDARD: Thank you, Your Honor.

16 THE COURT: We'll do that.

17 MR. GODDARD: We request to do that at the
18 end of the day.

19 THE COURT: Okay.

20 Ready?

21 Let's bring them out.

22 (The jury returned to the courtroom).

23 THE COURT: You all should have been with us,
24 we have been having such a good time. I apologize
25 to you. When I told you to come back at 2:15 we

1 certainly intended to get started with you at that
2 point but there were matters of law that I needed
3 to take up and they were somewhat involved and it
4 just went long longer than I anticipated. The
5 attorneys were here ready to work and I was here
6 and we just, it just took a lot longer than we
7 anticipated.

8 I don't want you to think that we, we didn't
9 want you to think we forgot about you back there,
10 we didn't, but there was really, you know, I
11 entertained the idea of maybe letting you go
12 outside and stretch your legs or whatever but I
13 didn't know how long it was going to take us, so
14 unfortunately it took longer than I anticipated it
15 would, but we have got those matters resolved and
16 we're ready to proceed, and if you recall before
17 you went to lunch we had finished with one of the
18 defense's witnesses and now we're going to continue
19 with the defense's case.

20 So, Miss Byrd.

21 MS. BYRD: May it please the Court?

22 THE COURT: Yes, ma'am.

23 MS. BYRD: The defense calls Mr. W. C.
24 Lyerly, III.

25 THE COURT: All right, Mr. Lyerly, come

1 around and be sworn.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 WILLIAM C. LYERLY, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Thank you. Please be seated,
4 state your full name for the record.

5 THE WITNESS: William C. Lyerly, III.

6 DIRECT EXAMINATION BY MS. BYRD:

7 Q Mr. Lyerly, you are currently the president
8 of First South Bank, is that correct?

9 A I am.

10 Q And were you involved in the negotiation of
11 the loan that is the subject of this action?

12 A I was involved to some extent. Mr. Lovelace
13 handled the majority of the negotiations but I was
14 kept informed and did meet with Miss Wheeler-Cribb
15 and her son I think in April of 2008.

16 Q Were you present during a telephone
17 conference call with Mr. Lovelace and Miss Peggy
18 Wheeler-Cribb?

19 A I could have been. I mean, conference call,
20 I mean, I very well could have been.

21 Q And the specific conference call that I'm
22 referencing is a conference call that occurred
23 prior to the closing of this loan in which the
24 issue of cross collateralization was discussed. Do
25 you recall that conversation?

1 A Not specifically but I'm sure there may be an
2 email or something you could show me that would
3 have that.

4 Q Do you recall, do you have any personal
5 memory, recollection of the issue of cross
6 collateralization coming up prior to the closing of
7 this loan?

8 A I remember them being, I guess, confused when
9 we sent the commitment letter out I think in late
10 May, about the term, the term beach property, and I
11 think they thought that it meant their other beach
12 properties and not lot 4.

13 Q Do you recall a meeting that occurred in
14 April of 2008 where you took, you and Mr. Lovelace
15 took Miss Peggy Wheeler-Cribb and her son Darwin to
16 lunch in Pawley's Island?

17 A Well, we met them at the restaurant, we drove
18 down from Columbia that morning.

19 Q And --

20 A I'm sorry, but we met there, then we went,
21 they wanted to show us their beach house and so we
22 then went and finished the meeting at their beach
23 house.

24 Q And during the discussion at lunch did Miss
25 Peggy Wheeler-Cribb tell you she was not willing to

1 cross collateralize her property for this loan?

2 MR. COLLINS: Your Honor, please note our
3 objection as previously stated to all matters
4 relating to occurrences prior to April 10, 2009.

5 THE COURT: All right, sir, and that
6 certainly is noted.

7 Proceed.

8 A I'm sorry, do you mind repeating?

9 Q During your discussion with Miss Peggy
10 Wheeler-Cribb and her son Darwin at lunch in April
11 of 2008 do you recall a concern of Miss Peggy
12 Wheeler-Cribb and a statement to the effect that
13 she was not willing to take this loan if it was
14 subject to cross collateralization?

15 A I mean, specifically I don't remember
16 everything that was discussed. I mean, it was kind
17 of me meet our customer, I had not met them before,
18 and it very well could have been discussed. I know
19 it was discussed later.

20 Q And do you recall whether or not Mr. Lovelace
21 during that lunch meeting told Miss Peggy
22 Wheeler-Cribb that he and First South Bank would be
23 with her through the development of this property?

24 MR. COLLINS: Your Honor, we state the same
25 objection and we also object on the ground of the

1 parole evidence rule and the contractual
2 requirements that require any varying terms to be
3 reduced to writing and signed by the parties.

4 THE COURT: All right, sir, that's noted.

5 A I certainly don't remember a statement like
6 that because that is not a statement that a banker
7 could commit to.

8 Q You're not saying that he didn't say that,
9 you're just saying you don't recall it?

10 A I don't -- well, you know, that would be so
11 unusual for a banker to make a statement, "We'll be
12 with you throughout the development," which never
13 took place.

14 Q And were you involved in the drafting of the
15 commitment letter that was sent to Peggy
16 Wheeler-Cribb and her son Darwin?

17 A Not -- I mean, I read it but our attorney
18 drafted it with input from us.

19 Q Do you --

20 A When I say us, I mean, you know, based on the
21 approval and so forth.

22 Q And the loan commitment letter that was
23 issued by your bank to Peggy Wheeler-Cribb and Will
24 Darwin Wheeler required a funding of \$850,000 in an
25 interest reserve account, is that right?

1 A In the aggregate but there was two
2 contingencies to the funding of the interest
3 reserve account.

4 Q Okay.

5 A On day one there was I think \$300,000 that
6 was funded. To get to the second pile of money, so
7 to speak, that was not advanced at closing certain
8 things had to happen. One, the infrastructure had
9 to be in, and two, it had to be six months, you
10 know, from the closing, provided the infrastructure
11 was in.

12 MS. BYRD: Your Honor, may we publish the
13 commitment letter that has been marked as Exhibit
14 1, Plaintiff's Exhibit 1?

15 THE COURT: Yes.

16 MS. BYRD: Thank you. We'll come back to it,
17 Your Honor, we're having a computer glitch.

18 THE COURT: All right.

19 BY MS. BYRD:

20 Q Did there come a time that First South Bank
21 determined that it would no longer provide funds --

22 MR. TYLER: Your Honor, I object. They have
23 stuff on the screen.

24 MS. BYRD: I'm sorry.

25 MR. TYLER: There is stuff on the computer

1 screen right now.

2 MR. GODDARD: I apologize.

3 BY MS. BYRD:

4 Q Mr. Lyerly, unfortunately after the loan
5 closed did First South Bank freeze this loan?

6 A No, ma'am.

7 Q In --

8 A May I? What do you mean by unfortunately
9 after?

10 Q Well, let me ask it this way. At anytime did
11 the bank freeze this loan?

12 A The bank never froze the funding of the loan.
13 They did not meet the requirements because they
14 didn't build the infrastructure, so that is not a
15 freezing of the loan. The borrower did not go from
16 step one to step two which was clearly outlined in
17 the commitment letter as well as the loan
18 agreement.

19 Q The bank, would you agree with me, terminated
20 the remaining balance of the loan, did it not?

21 A At some point we did. I don't remember the
22 date. I mean, it was sometime in December, long
23 after they decided they were going to put the
24 house, put the property on the market and were not
25 going to build the infrastructure.

1 Q And so your testimony is that the loan was
2 not frozen sometime in September or October as Mr.
3 Lovelace testified?

4 A Yes, that is exactly right.

5 Q He was inaccurate, is that right?

6 A We never froze the loan. I mean, that is a
7 terminology I believe you used, that is not our
8 terminology.

9 Q What is your terminology?

10 A Well, they didn't meet the requirements
11 because they weren't building the commercial
12 infrastructure.

13 Q And I'm going to show you --

14 MS. BYRD: May I approach, Your Honor?

15 THE COURT: Yes, ma'am.

16 Q Mr. Lyerly, this is Plaintiff's Exhibit 2.

17 A Yes, ma'am.

18 Q And that is a copy of the loan agreement.
19 Can you flip through that document and tell me
20 where in that document it allows the bank to
21 unilaterally terminate the balance of the loan?

22 A Excuse me, we did not unilaterally terminate
23 the balance of the loan, so that is a misstatement
24 of fact.

25 Q Okay. Did the bank terminate the balance of

1 the loan?

2 A We did when the borrower told us they were no
3 longer going to develop the property like they
4 originally intended.

5 Q And so your testimony to this jury is that
6 the contract was changed based on the oral
7 statement of your borrower?

8 A No. I think we have it in writing.

9 Q Okay. Do you have that document?

10 A I don't have any documents except what is up
11 here.

12 Q How about --

13 A I mean, there is an email to that effect from
14 them, which I think you have seen.

15 Q No, sir, I have not.

16 A Okay, I'm sorry.

17 Q Would you please review the loan document and
18 point me to the provision which allows the
19 termination of any portion of the loan?

20 A Okay. This is a lengthy document.

21 Q Okay. Take your time.

22 A Well, if you know where it is, if you would
23 tell me I would appreciate it.

24 Q I can't find it and that is why I'm asking.

25 A Okay. I mean, I think there are several

1 things in here. One, Section 5.13, use of proceeds
2 of the loan only to pay project costs and other
3 such uses as bank shall specifically approve in
4 writing.

5 Q I'm sorry, could you please tell me what page
6 you're reading from?

7 A I'm sorry, 12.

8 Q Okay. You pointed to what section?

9 A 5.13.

10 Q And which reads, "Use the proceeds of the
11 loan only to pay project costs and other such uses
12 as bank shall specifically approve in writing."

13 What about that provision allows the bank to
14 terminate the balance of the loan?

15 A That's the whole point. The borrower never
16 put the infrastructure in which was what the
17 balance of the loan was for.

18 Q And it is your testimony that Section 5.13 --

19 A That is one point. I do think there are
20 other sections in here. Section 4.6.

21 Q Which is what page?

22 A Well, page 10, number 7, paragraph 7, "Making
23 of any advance by bank shall not be deemed an
24 acceptance and approval --" I'm sorry, that is not
25 what I thought it said.

1 I think Section 4.6, the whole thing is
2 talking about advances and what has to happen in
3 order to get an advance, so those things never
4 happened, the borrower never, I don't want to keep
5 repeating myself but as we know, they abandoned the
6 idea that they were going to develop the property
7 and just sell it in its raw state.

8 Q Is that because the bank decided to freeze
9 their funds?

10 A No, ma'am, it's not.

11 Q And as you sit here on the witness stand you
12 can't point me to any specific provision other than
13 the two you have just cited?

14 A Well, I think there probably are other
15 provisions and, you know, Section 4.2, you know, it
16 goes through a whole list of things that need to
17 happen to be able to get a draw. Those things
18 never happened.

19 Q To get a draw, you mean to get additional
20 funds?

21 A To get additional advances beyond the date of
22 the closing, yes, ma'am.

23 Q But that is not what we're talking about.
24 We're talking about actually terminating the
25 balance of the loan, not just refusing to make an

1 advance, but terminating the balance of the loan.

2 A Okay. I mean, we have gone over this and
3 they never went from step one to step two and that
4 is clearly defined in here what you need to do. It
5 was clearly defined in the commitment letter.

6 Q And in front of you is what has been marked
7 as Defendant's Exhibit 25. Do you see that?

8 A 25?

9 Q I'm sorry, 24?

10 A Yes, ma'am.

11 Q Can you tell the jury what that document is?

12 A A series of emails, I guess, yes, two emails.

13 Q The first appears to be from Mr. Lovelace to
14 Terry Parker?

15 A Yes, ma'am.

16 Q With the bank, is that correct?

17 A Yes, ma'am.

18 Q And Frank Callison is also with the bank?

19 A Yes, ma'am.

20 Q And it appears you were also copied, Mr.
21 Lyerly?

22 A Yes, ma'am.

23 Q And Kathy Echlin, is that correct?

24 A Yes, ma'am.

25 Q And I will direct your attention to the

1 second paragraph of that email.

2 A Yes, ma'am.

3 Q The last sentence. "In this regard, Frank,
4 Chip and I have decided that it is in First South's
5 best interest to terminate the remaining unfunded
6 balance of our commitment because Lowe's will not
7 be the anchor or tenant." Is that right?

8 A Yes, ma'am. I think you ought to read the
9 first sentence in there and not take this out of
10 context.

11 Q I'm sorry, you want me to read the first
12 sentence of that paragraph?

13 A Or I will be glad to read it.

14 Q Okay, go ahead.

15 A "After several months of negotiations Lowe's
16 Foods has now informed the borrower they will not
17 pursue this site due to the economic uncertainty,
18 et cetera, and as a result the LLC is now actively
19 marketing the property with intent to sell all or
20 part of the tract. In this regard, Chip, Hank and
21 I have decided it is in FS's best interest to
22 terminate the remaining unfunded balance of our
23 commitment because Lowe's will not be the anchor
24 tenant."

25 Q Okay. So the bank decided that it was in its

1 best interest to terminate the remaining balance,
2 correct?

3 A Okay, I will answer again. The borrower
4 decided not to put the infrastructure in. The
5 remaining unfunded balance was for the
6 infrastructure and the interest reserve necessary
7 if they were putting the infrastructure in.

8 Q But what you were just asked to read to the
9 jury and they heard was not that the borrower had
10 decided not to put in infrastructure but the Lowe's
11 lease had fallen through, isn't that right?

12 A Well, it had but this is December, the loan
13 closed in June, okay, so --

14 Q When did the Lowe's lease fall through?

15 A I think it was sometime in October, mid
16 October.

17 Q And that is what led to the decision that you
18 freeze or terminate the balance of the loan?

19 A No, ma'am, we didn't. They made the decision
20 not to build the commercial development, we did not
21 make that decision.

22 Q They asked you not to provide them any
23 further money?

24 A Yes. I think there is an email in September,
25 I think, that says that they are not going to, they

1 are not going to develop it. This is actually
2 before Lowe's terminated their negotiations with
3 them and I think it was two weeks before and then I
4 believe that email says, which I know you have
5 seen, says they have been talking with an agent, I
6 forget who it was, and that they were going to,
7 decided not to do the development. When they
8 decided not to do the development they don't get to
9 step two to be eligible to draw any remaining
10 money.

11 Q Lowe's was not --

12 MR. COLLINS: Your Honor, we have found the
13 email he is referring to. Out of fairness should I
14 hand it to counsel for her to use?

15 THE COURT: I don't --

16 MR. COLLINS: If she wants to use it or not.
17 Let the record show I'm handing Miss Byrd an
18 email from Peggy Wheeler-Cribb dated September 30,
19 2008.

20 MS. BYRD: Your Honor, I think he is totally
21 improper and out of line and any email he wants to
22 ask this witness about he may do so.

23 THE COURT: All right. You may proceed.

24 MS. BYRD: Thank you, Your Honor.

25 BY MS. BYRD:

1 Q Do you know whether or not this loan was
2 conditioned upon the sale of 1.5 million dollars of
3 the loan to another lender?

4 A Initially it was, yes, ma'am.

5 Q And what happened with that condition?

6 A Contrary to, I know Mr. Lovelace said we did
7 not try, he is not the one that would sell a
8 participation, it is handled by credit
9 administration. I do know they talked to several
10 banks and nobody really was interested in doing it.
11 At this point remember the market had already
12 started a downward spiral, it had not hit bottom,
13 obviously, in 2008, and so the response we were
14 getting from these other banks, I can only, I only
15 know of one that I contacted, but I think some
16 others were contacted by Mr. Callison just to, you
17 know, see if they would be interested, I mean, you
18 know, just given a general outline of a commercial
19 development on Pawley's Island on Highway 17, you
20 know, and, "Would you like to buy a piece of it?"

21 Q Did you -- I'm sorry.

22 A What I was going to say, we were not
23 successful and so we went back to our Board to ask
24 that First South Bank in order to make the loan
25 commitment which didn't say anything about

1 participation, the loan commitment, be allowed to
2 fund the full amount and we got approval.

3 Q And so the inability to find a purchaser for
4 that 1.5 million dollars, that had nothing to do
5 with the termination of the loan balance?

6 A No. I mean, we knew before the loan was made
7 we didn't have a buyer so if that was a concern we
8 would have had we wouldn't have made a loan or we
9 would have put in the loan commitment subject to
10 the bank being able to sell off a portion of it,
11 which we did a number of loan commitments in that
12 nature.

13 Q Are you aware of a telephone call between Mr.
14 Wayne Lovelace and Mr. Don Thomas?

15 A Yes, I am.

16 Q And were you aware of that telephone call at
17 the time?

18 A Right after he -- I mean, he told me about
19 the phone call, yes. I mean, you know, after it
20 was made.

21 Q In fact you directed Mr. Lovelace to make
22 that call, didn't you?

23 A I don't know that I directed him. We
24 discussed that it was very strange that an auction
25 company, because we had been sent marketing

1 material by I guess Miss Cribb, you know, to show
2 they were holding the auction, and we thought it
3 was strange, since we had told Miss Cribb, or I say
4 we, Mr. Lovelace had told Miss Cribb for the
5 previous year that, one, we didn't think an auction
6 was a good idea, that an auction is a fire sale,
7 you do not get maximum value. Plus they had had
8 all these letters of intent before we ever made our
9 loan during, say, the First Palmetto period that
10 they had the loan, and subsequent to our loan they
11 had had all these big offers and you turn around
12 and then try to hold an auction? Auctions of real
13 estate are the last resort. You don't get the top
14 dollar. I mean, everybody comes to an auction for
15 real estate are bottom feeders.

16 Q And so is it your testimony that Mr. Lovelace
17 called Mr. Thomas at your direction because you
18 were concerned that the bank had not contacted you
19 regarding the amount of the payoff?

20 A You mean the auction company?

21 Q Yes.

22 A We were both concerned and thought it was odd
23 because we get calls from other realtors and I
24 would put the auction company in the category of a
25 realtor, you know, when they are trying to market

1 property and want to confirm, you know, they owe X
2 and not X plus, you know, and so, yes, we were
3 concerned that they had not contacted us. We had
4 told Miss Cribb on numerous occasions, we have that
5 very well documented, that the bank, if she chose
6 that way or any other way we were not going to
7 accept partial release that did not pay off our
8 entire loan balance.

9 Q And if you had already told your customer
10 that information why did you feel it was necessary,
11 then, to directly call or direct Mr. Lovelace to
12 call their auction company?

13 A Well, it became clear as a result of the call
14 that Miss Cribb had not been up front with the
15 auction company, so based on our previous
16 communications with Miss Cribb and maybe Mr.
17 Wheeler as well, I'm not sure, that we would not
18 accept less than full payment and so quite frankly
19 the auction company was their agent and we felt
20 like their agent needed to know this because -- let
21 me give you an example.

22 Let's just say they were able to get somebody
23 to bid on one parcel that they had, you know, an
24 overlay of a subdivision, even though the property
25 was not subdivided, but that on the marketing

1 material it showed, you know, I'm going to make
2 this up because I don't remember, but like five
3 acre tract, four acre tract, you know, everything
4 added up to 19 acres. But what if they only had
5 one offer and it was \$2,000,000, okay? So the
6 auction company went through all this trouble
7 unaware that the bank had already informed them
8 that we were not going to take less than the
9 payoff, we were not going to allow them to sell off
10 a piece of that and we had the remaining piece, I
11 mean, and it be, worth considerably less. It is
12 worth more in whole than it is in parcels of raw
13 land.

14 Q So, your concern was for the auction company
15 going through unnecessary trouble?

16 A Well, that was one concern. I mean, I
17 thought it was strange that an auction company had
18 not, they were doing the marketing and we made it
19 real clear and there are a series of emails and
20 stuff that we were not going to accept less than
21 the payoff, and there is a January, 2010, letter, I
22 think, that was just one of the documents that I
23 believe you have seen, that we were very clear to
24 Miss Cribb that, you know, we were not going to
25 accept less. The thing of it is they had all these

1 offers, letters of intent for, I mean, 10,000,000,
2 9,000,000, you know, and they were ignoring those.

3 Q Okay. How do you know that, Mr. Lyerly?

4 A Because she sent them to us.

5 Q Okay, and we talked about a few. You were
6 sitting in the courtroom. Have you seen any signed
7 offer for any millions of dollars, other than from
8 Charles McCollum, which was after the auction took
9 place?

10 A Miss Byrd, typically the way big commercial
11 real estate deals happen is you enter into a letter
12 of intent, or the prospective purchaser will give a
13 letter of intent that is some of the basic outline
14 and then they negotiate the final points that
15 eventually lead to a contract. But if you refuse
16 to even negotiate, then you will never sell the
17 property, and she had numerous offers of people,
18 developers wanting to purchase that property prior
19 to the maturity of the loan and they were making
20 unreasonable demands on these developers that no
21 developer would buy it at any price. I don't say
22 any price but at the kind of prices they were
23 willing to pay without a period of a due diligence.

24 Q Mr. Lyerly, you just gave a lot of testimony.
25 Where in the world did you get that information?

1 A Which information? You mean what I just said
2 about --

3 Q That they made unnecessary demands on
4 developers, they just refused to cooperate.

5 A There are a number of emails they sent us.

6 Q Did you ask Miss Peggy, have you ever asked
7 Miss Peggy about her negotiations with third
8 parties?

9 A I personally have never asked. I think her
10 and Mr. Lovelace have had discussions before but I
11 was not --

12 Q You don't have any personal knowledge of that
13 other than what Mr. Lovelace has told you?

14 A I have seen the emails, yes, I feel like that
15 is personal knowledge.

16 Q And again going back to the auction company,
17 you testified that you didn't want them to go
18 through any unnecessary trouble. You understand
19 that South Causeway, Miss Peggy, was paying the
20 auction company, don't you?

21 A I believe I found out later that she had paid
22 them a marketing fee or something.

23 Q They don't generally do those for free, do
24 they?

25 A I wouldn't think so. That is the whole

1 reason why if they want to have a successful
2 auction and there is a mortgage on the property
3 they need to verify what the lender will accept for
4 a release and I don't think Miss Cribb or Mr.
5 Wheeler told them about it. As it turns out, they
6 hadn't been.

7 Q Didn't you just say you discovered that
8 during the telephone call to Mr. Thomas, is that
9 what you said?

10 A I'm sorry, I said what?

11 Q How do you know what Miss Peggy and her son
12 Darwin did or did not tell their real estate
13 agents?

14 A I may be incorrect but I think I'm right. I
15 think that came out in Mr. Thomas' deposition this
16 year that -- I know they had set reserve prices and
17 again if you're going to try to sell it in pieces,
18 parts, and you get less, you have one buyer for one
19 piece and it is less than what we had clearly
20 communicated to our borrower, then that was not
21 going to be a successful auction.

22 Q Well, the bank is protected in any event,
23 right, if they had done that, if they had sold one
24 parcel and it wasn't enough to pay off the bank the
25 bank wasn't obligated to sign off to sell that

1 property, you had no --

2 A Absolutely not. We were not obligated but if
3 you're going to go and advertise and market, you
4 know, we're going to have this auction and, you
5 know, something that is one piece is sold and it
6 just happens to be the best three acres or two
7 acres of the project, of the whole tract, then it
8 could obviously devalue the rest of the property,
9 not, and I think this was said this morning, you
10 know, you've got 19 acres. Well, you know, one
11 acre on Highway 17 in the corner is worth more
12 than, you know, the one acre sitting back there in
13 the woods.

14 Q So if the bank couldn't get all its money it
15 didn't want any, right?

16 A We were not going to release the collateral
17 because we felt like it would devalue the remaining
18 parts significantly. Now, if they had sold it all
19 or sold enough in the aggregate to pay the loan
20 that would have been fine, they could have done
21 that but they didn't.

22 Q And you have no idea whether or not prior to
23 that telephone call the parcels were priced in such
24 a way that in the aggregate they would have paid
25 off First South Bank, you don't know that, do you?

1 A I don't think we or actually you all through
2 discovery ever knew what the original reserve
3 prices had been set but it is clear that they were
4 less than, you know, the 4.8 million dollars that
5 was owed.

6 Q I'm sorry, are you testifying that you didn't
7 know what the reserve prices were but you are
8 certain that if you add up the four prices for
9 those parcels it would not have equaled 4.8 million
10 dollars?

11 A I don't think I said that. If it implied
12 that, that is not what I meant.

13 Q I want to be sure. You're aware, aren't you,
14 that during Mr. Lovelace's call to Mr. Thomas he
15 disclosed not only the balance that was due on the
16 loan but he also revealed that the loan would not
17 be renewed. You know that, right?

18 A Only from Mr. -- well, from the email that we
19 saw, that Miss Wheeler sent said that.

20 Q And he also disclosed the date that the loan
21 was to mature. You're aware of that, right?

22 A Yes, ma'am, I am.

23 Q And that the bank would not consider partial
24 payment?

25 A That's exactly right.

1 Q And is it acceptable to you as the president
2 of First South Bank that one of your area
3 executives would call and disclose that type
4 information to a third party?

5 A I think in this case yes, and the reason why,
6 it was clear to us that Miss Cribb and Mr. Wheeler
7 were experiencing tremendous financial problems,
8 including foreclosures at that time, and there was
9 at least two foreclosures --

10 MS. BYRD: Your Honor, I object to this and
11 move to strike his comments. It has been the
12 subject of a court ruling where he was present.

13 THE COURT: Step up here.

14 (Unrecorded bench conference).

15 THE COURT: All right, I'm going to grant
16 Miss Byrd's objection and strike the previous
17 response, so go ahead, Miss Byrd.

18 MS. BYRD: Thank you, Your Honor.

19 BY MS. BYRD:

20 Q Mr. Lyerly, is it acceptable to you as the
21 president of First South Bank for an area executive
22 to call third parties and disclose the kind of
23 information that we just discussed?

24 A Normally they would not do that but in the
25 case of South Causeway we felt it was necessary to

1 make sure that the auction company knew what we had
2 previously been communicating to Miss Cribb for
3 over a year and they obviously didn't know that
4 information because they weren't told.

5 Q You don't treat all your customers this way?

6 A We don't have all our customers defaulting on
7 a 4.8 million dollar loan.

8 Q At this time prior to the auction South
9 Causeway was not in default at all, was it?

10 A You mean on that loan, no, it was not because
11 it still had interest reserve that we had funded
12 but it was about to run out.

13 Q They weren't in default?

14 A No, they weren't but they were heading toward
15 default.

16 Q Is it the general practice of banks in
17 general to disclose that type information? I mean,
18 do you go around doing that, disclosing that type
19 information to third parties?

20 A No.

21 Q Have you ever done that before?

22 A I have been in banking for 38 years, I may
23 have, and if I felt it would be helpful, and that
24 is what we thought in this case, that these were
25 agents of South Causeway and they had a right to

1 know that and they obviously had not been told that
2 prior to Mr. Lovelace's call.

3 Q If you will, please take a look at what has
4 been pre-marked and introduced into evidence as
5 Defendant's Exhibit Number 25 in front of you.

6 A Okay.

7 Q Would you identify what this document is for
8 the jury?

9 A It says confidentiality agreement.

10 Q What is that document?

11 A It is an agreement that was executed between
12 First South and Harris Investment Company.

13 Q Is that the Lincoln-Harris folks we have been
14 talking about?

15 A Yes, ma'am, I believe it is. It is a
16 subsidiary or something or other, I don't know.

17 Q And what is the date of that document?

18 A It was executed the 27th day of March, 2010.

19 Q And was this document generated as a result
20 of an offer brought to you by Mr. Charles McCollum?

21 A McCollum?

22 Q Yes.

23 A He didn't bring us an offer. I mean, he made
24 the introduction but there was no offer --

25 Q Okay.

1 A -- at that point, so it wasn't as a result of
2 that.

3 Q He made an introduction between you and --

4 A He introduced, I guess Harris Investment, you
5 know, called and told me who they are. I never
6 heard of them despite the fact that Mr. Lovelace
7 had been emailed a copy of a, you know, purported
8 contract for \$12,000,000 shortly after the loan
9 closed, so I didn't connect the dots because I had
10 never seen that until it came up in discovery.

11 Q I think what you're saying is before you
12 executed this confidentiality agreement you were
13 not aware that Lincoln-Harris had previously made
14 an offer to Miss Peggy on this property?

15 A I did not know that.

16 Q Since then you have been informed of that
17 fact?

18 A Only when we produced the document for
19 discovery, that was one of the electronic things I
20 saw for the first time.

21 Q And you were shocked, weren't you?

22 A Yes.

23 Q Why were you shocked?

24 A Well, because they hadn't told me that they
25 had previously made an offer on the property.

1 Q What would be shocking about that?

2 A I guess because they didn't tell me. I mean,
3 I was unaware that they had made a previous offer.
4 I was told that they had had some interest in the
5 property or knew of the property but I don't recall
6 them ever telling me that they had made, you know,
7 I guess issued a letter of intent.

8 Q And what difference would that have made to
9 you?

10 A Well, it wouldn't have made a bit of
11 difference to me when we were going to sell the
12 note. It was only afterward when we did not sell
13 the note that, I mean, we're talking, this is in
14 2010, probably 2011, early 2012 when I saw it, so I
15 mean, I was just surprised. I don't know shocked,
16 I was surprised.

17 Q And Lincoln-Harris was interested in
18 purchasing the loan from First South, is that
19 correct?

20 A Yes, ma'am.

21 Q And as a result of that they asked to review
22 the confidential bank file of South Causeway,
23 correct?

24 A Let me clarify because you have used that
25 term a number of times today with Mr. Lovelace.

1 What they looked at were the loan documents. They
2 did not look at the whole file, they did not look
3 at any financial statements, tax returns or
4 anything of personal information of Miss Cribb or
5 Mr. Wheeler, so I'm going to set the record
6 straight on that. They were only interested in
7 looking at the promissory note and the mortgage,
8 the loan agreement, title insurance, appraisals,
9 whatever we had in that part of the loan file.

10 Q And let's look at what is defined in this
11 agreement as confidential information that they
12 were asking and that you agreed to allow them to
13 review.

14 A But I just told you they did not. This is a
15 document drafted, I think they sent it to our
16 attorney but when you sell a loan or a prospective
17 buyer comes in to look they normally ask to see
18 that stuff, but they actually didn't ask to see it.

19 Q And nonetheless they did look at information
20 that you were obligated to treat as confidential,
21 correct?

22 A You know, title insurance, appraisals. So, I
23 mean, we have got the right to show that to a
24 prospective purchaser, every bank does.

25 Q Prospective purchaser of the note or of the

1 property?

2 A Yes, ma'am, of the note, thank you for
3 clarifying that.

4 Q It would not be proper to disclose this
5 information to a prospective purchaser of the
6 property?

7 A Yes. At that time I didn't know they had
8 been a prospective purchaser of the property.

9 Q If you had known that you would not have
10 disclosed it?

11 A You know, if they signed the confidentiality
12 agreement and this loan was headed for big trouble,
13 we knew that because of something I guess I can't
14 say so, you know, at that point we would have been
15 glad to sell the loan to anybody.

16 Q So, although you personally were not aware
17 that they were a potential purchaser of the
18 property, and I mean Lincoln-Harris, there is no
19 debate that Mr. Lovelace did, correct?

20 A No, there is no debate that he received an
21 email. I think he said he didn't connect the dots
22 and that was, you know, a year and a half, 20
23 months before, so I don't remember all the emails I
24 got, you know, then or two weeks ago.

25 Q And this information that Lincoln-Harris

1 reviewed was confidential or at least was required
2 to be treated as confidential, correct?

3 A Well, yes, I believe it said that, you know,
4 it would be treated confidentially with them.

5 Q And you're aware that after the review of the
6 bank documents, after that time Lincoln-Harris made
7 an offer to purchase this property for \$4,000,000.
8 Is that correct?

9 A I believe they did in June or July. They had
10 also made, they made an offer to buy the note but
11 it wasn't at a price we would sell it, so that
12 happened in this time frame of March, April, 2010.

13 Q And didn't you think that Lincoln-Harris was
14 trying to take advantage of the situation?

15 A Well, we had no control over what
16 Lincoln-Harris did subsequent to their inquiry
17 about the note purchase. I mean, we had no control
18 over that, we didn't know at the time, you know, I
19 figured they, you know, if they didn't buy the note
20 they would move on. I don't know how big they are
21 but they have got development, commercial
22 properties all over the southeast, from what I
23 recall being told.

24 Q And that was my next question, really, is
25 what measures, if any, did First South Bank take to

1 ensure that Lincoln-Harris didn't look at all this
2 information and then use it to the detriment of
3 your customer?

4 A We didn't, I mean, other than signing the
5 confidentiality agreement. I mean, we have no way
6 of policing them or anybody else.

7 Q The answer is you did nothing?

8 A I didn't know I was required to do anything.

9 MS. BYRD: Your Honor, may I beg the Court's
10 indulgence for one moment?

11 THE COURT: Yes, ma'am.

12 Q Are you aware of a communication from Miss
13 Peggy to you or Mr. Lovelace requesting the
14 identity of the third party that you were going to
15 allow to review their loan file?

16 A Yes, ma'am, I am.

17 Q And why did the bank refuse to provide the
18 identity?

19 A We're not required to.

20 Q Couldn't that have avoided this whole problem
21 if they had, if you had simply told her that it was
22 Lincoln-Harris?

23 MR. TYLER: Your Honor, I object,
24 speculation.

25 THE COURT: Sustained.

1 Q Does the bank have any obligation to do due
2 diligence on the person or entity that is
3 requesting to buy their note, to determine if they
4 are a potential purchaser, or do you just let
5 anybody who will sign a confidentiality agreement
6 come in and review people's loan files?

7 A Well, let me clarify one thing. We get very
8 few inquiries to do that so it is not just
9 everybody coming in and wanting to do that and we
10 actually did do a due diligence, we received a
11 financial statement from Mr. Harris, John Harris,
12 John Harris prior to their review that showed he
13 had the financial capacity to buy the loan, so we
14 did do that due diligence, yes, ma'am.

15 Q Your due diligence was related to whether or
16 not they could actually pay the bank rather than
17 whether or not they had actually made an offer to
18 purchase the property previously?

19 A Well, I mean, like I said, you know, if
20 somebody makes an inquiry, and I was not familiar
21 with Lincoln-Harris, certainly not Johnny Harris,
22 and so we wanted to make sure before we go to any
23 trouble that, you know, we're not dealing with
24 somebody who wouldn't be able to buy it, so we did
25 inquire, they sent a financial statement and it

1 showed he had the liquidity and the capacity to
2 write a check.

3 Q And my final line of questions involves what
4 has been pre-marked and introduced in evidence as,
5 in front of you as Exhibit Number 26. Do you see
6 that document?

7 A Yes, ma'am.

8 MR. TYLER: Your Honor, I renew my objection
9 on this.

10 THE COURT: All right. Overruled, I note
11 your objection.

12 Q Mr. Lyerly, can you identify for the jury
13 what this document is?

14 A It appears to be a page out of our loan, yes,
15 it would be loan policy manual.

16 Q This is your, being First South Bank's own
17 policy?

18 A Well, I wouldn't say it is our own policy.
19 We buy this type of document from a company in
20 North Carolina called Credit Risk Management, out
21 of Raleigh, and they provide these type of
22 documents, keep it updated for community banks in
23 the southeast, so we're one of many of their
24 clients, I guess.

25 Q But these are your loan policies, correct?

1 A Well, yes, they are loan policies as it
2 applies, so --

3 Q And I'm going to direct your attention to the
4 section entitled preforeclosure information
5 sharing.

6 Do you see that?

7 A I do.

8 Q And if you could, just please read that
9 paragraph.

10 A Okay. Let me, before I read it may I say one
11 thing?

12 Q If you could just read it first and then --

13 A Okay, sure. "The bank may not reveal to
14 third parties the bank's proposed bid amount prior
15 to the foreclosure sale. The bank may also not
16 share the result of any appraisals, environmental
17 reports, et cetera, linked to the property. All
18 third parties who express an interest in the
19 property prior to foreclosure should be referred to
20 the trustee who will be conducting the sale on
21 behalf of the bank."

22 Do you want me to read the next paragraph?

23 Q No, that's okay, that is all we need.

24 A Okay. Well, what I would like to clarify is
25 you don't have a trustee in South Carolina, this is

1 written really for a North Carolina bank, you know,
2 so it does not mean what you're implying.

3 Q I'm sorry, did I imply it meant something? I
4 thought I just asked you to read it.

5 A Well, I know where you're going, let's put it
6 like that.

7 Q And I will ask you, then, what does that
8 mean?

9 A Well, what this is saying here is this
10 applies to a property that is in foreclosure and
11 getting ready to go to the foreclosure sale similar
12 to the law in South Carolina where you have a
13 Master in Equity that conducts the foreclosure
14 hearing, you advertise the property, you know,
15 public advertisement and then it is sold on the
16 first Monday in, you know, in the Master's
17 courtroom. And so if you substitute the Master for
18 the Trustee, then that is the only change that
19 would be applicable.

20 But it is a property that is already in
21 foreclosure, getting ready to be sold and the
22 purpose of this is if we're going to bid, make up a
23 number, a hundred thousand dollars, we don't want
24 to share that, really, the number that we're going
25 to bid because somebody may be willing to out bid

1 us and, you know, and we don't have to own the
2 property and that is what, you know, lenders
3 generally want, is some other party to come in at
4 the foreclosure sale to out bid them, quite
5 frankly, so you don't own the property.

6 Q And so according to you, it is not in this
7 document but according to you this applies only
8 after the bank has filed a foreclosure action?

9 A Right before the sale, yes, ma'am.

10 Q And it provides that the bank may also not
11 share the result of any appraisals, environmental
12 reports, et cetera, related to the property. Is
13 that right?

14 A Yes, ma'am, it does, and the reason for that
15 is that information is not part of the public
16 record of a foreclosure and so banks generally do
17 not disclose, I mean, because if you buy something
18 at foreclosure the buyer is taking the risk.

19 Q Mr. Lyerly, if you can't disclose that after
20 more information has become public, then why in the
21 world would it be okay to disclose that before a
22 foreclosure?

23 A Well, the property was not in foreclosure
24 when we entered into the confidentiality agreement
25 with Harris Investment.

1 Q Right.

2 A This paragraph doesn't apply to what we did.

3 Q Do you have any policy at all about what
4 disclosures are permissible in the context of a
5 loan that is not in foreclosure and that is not in
6 default? What is your policy?

7 A You know, if you found one in this manual, I
8 mean, I'm not aware of one, so I'm just not aware
9 that there is a policy.

10 Q So your bank has absolutely no guidelines for
11 its employees about what information it may share
12 with third parties regarding their customers?

13 A I do not believe we do, I don't think we have
14 a written policy on that.

15 MS. BYRD: I have no further questions, Your
16 Honor.

17 THE COURT: Mr. Collins?

18 Mr. Tyler.

19 CROSS EXAMINATION BY MR. TYLER:

20 Q Mr. Lyerly, let's first of all talk about
21 what kind of loan we're dealing with. Is this a
22 commercial loan, is this a consumer loan? What
23 kind of loan?

24 A Obviously it's a commercial loan.

25 Q Certainly the disclosure requirements for a

1 consumer loan are vastly different than disclosure
2 requirement associated with a commercial loan, is
3 that correct?

4 A Yes, but may I say one other thing?

5 Q Go ahead.

6 A Banks are allowed to sell to third parties
7 consumer loans and that is done all the time by big
8 banks.

9 Q And would you be able to ever sell a note to
10 another bank if you didn't disclose this
11 information during that process?

12 A No.

13 Q Do banks sell notes like this all the time?

14 A Yes.

15 Q Let me go back real quick. Do you have
16 Exhibit 2 in front of you, the loan agreement
17 itself?

18 A Yes.

19 Q Would you look on page 15 of the loan
20 agreement?

21 A Okay.

22 Q Do you see in paragraph, paragraph 13, can
23 you please read paragraph 13?

24 A "If borrower shall abandon construction of
25 the improvements with the intent not to resume

1 construction for a period of five consecutive
2 days."

3 Q Okay. Can you read the provision in Section
4 7.1?

5 A Page 13?

6 Q Page 13, yes.

7 A Okay. Do you want me to start with --

8 Q I want you to read the Section 7.1.

9 A Okay, Section 7.1. "Any one or more of the
10 following shall constitute an event of default," in
11 parenthesis, "an event of default hereunder by
12 borrower."

13 Q Okay. So, paragraph 13, borrower shall
14 abandon construction for five days, once they do
15 that that constitutes under this agreement, the
16 loan agreement, an event of default. Isn't that
17 true?

18 A That is one of the events of default.

19 Q Look down at Section 7.2. Can you read the
20 first sentence of 7.2, Mr. Lyerly?

21 A "Upon the occurrence and continuation of an
22 event of default bank may --"

23 Q Keep going?

24 A "-- terminate all obligations of the bank to
25 borrower, including without limitations all

1 obligations to lend money under this agreement."

2 Q Stop right there, please. Let me get Defense
3 Exhibit 13.

4 Mr. Lyerly, I'm going to hand you one of the
5 exhibits that has been offered up by the
6 defendants.

7 MR. TYLER: Your Honor, may we approach?

8 THE COURT: Yes, sir.

9 (Unrecorded bench conference).

10 BY MR. TYLER:

11 Q Can you please, Mr. Lyerly, read this
12 paragraph, where that sentence starts?

13 A I'm sorry, starts --

14 Q Starts with if.

15 A Okay. That would be, "If you want or need to
16 do away with the construction part of the loan that
17 is fine but we fully expect you to honor your
18 commitment you made to us at the restaurant in
19 Pawley's."

20 Q Okay, that's good. So, when is the date of
21 this email, please?

22 A September 30, 2008.

23 Q So, as of September 30, 2008, Miss
24 Wheeler-Cribb sent an email to the bank wherein she
25 said if you want to do away with the construction

1 part of the loan that's fine with her. Is that
2 correct?

3 A That's correct.

4 Q And under the terms of the loan agreement
5 that we read you have the option then to terminate
6 any further lending obligation?

7 A Sure.

8 Q Mr. Lyerly, let's go back and talk about this
9 termination or frozen, whatever we want to call it.

10 A Yes, sir.

11 Q Was that an internal, internal decision, was
12 that decision to freeze the loan or -- excuse me,
13 I'm starting to use their terms now. Was that
14 decision to terminate, could that have been undone?

15 A Sure.

16 Q Can you explain, please?

17 A Well, all that did was remove an amount that
18 was never going to be funded based on the borrower
19 abandoning their plans to develop the property, so
20 it was never going to be funded and so banks, all
21 banks do this, if you have got an unfunded
22 commitment of something that is not going to be
23 funded you generally reduce that commitment
24 internally so you won't have to have a loan loss
25 reserve for it, for that amount, because it would

1 have cost us money that we weren't going to ever
2 earn any interest on.

3 Q But it is correct if something would have
4 happened you could have undone that internal bank
5 accounting?

6 A Yes. I mean, we could have done it. I mean,
7 if they had, in fact we had discussed this
8 internally, that, you know, somebody could come
9 along, you know, they could land a Harris-Teeter or
10 somebody that would want it developed and, you
11 know, we could have undone it.

12 Q Mr. Lyerly, just for everybody's purposes
13 here, can you explain what infrastructure is?

14 A Yes, I'm sorry. It's kind of a technical
15 term. Infrastructure is, just picture, say a
16 residential subdivision, which applies to this,
17 too, it would be the roads, the water, the sewer,
18 all utilities, you know. It could also mean a
19 traffic light at a busy intersection, so it would
20 be things of that nature, that is infrastructure
21 because you have to have the infrastructure in
22 before you can build anything, you know, coming up
23 out of the ground.

24 Q Okay. Now, did South Causeway, did Peggy
25 Wheeler-Cribb or Darwin Wheeler, did they ever, did

1 they ever submit or apply for any other money or
2 any other advances under the loan?

3 A No.

4 Q Okay. Mr. Lyerly, I'm going to hand to you
5 what has been marked as Defense Exhibit 10 real
6 quick.

7 A Okay.

8 Q Which is the loan summary. Can you explain
9 to the jury what the loan summary, what the purpose
10 of the loan summary is?

11 A When we have a loan request and we want,
12 after we have underwritten it the lender, in this
13 case Mr. Lovelace, prepared this internal document
14 for approval and it basically hit the high spots of
15 here is the loan amount, here is the guarantors,
16 here is, you know, the purpose. I mean, that is
17 key, lists the collateral, how long, the terms of
18 the loan and it is a broad document for approval.
19 It doesn't have all the nuts and bolts in it that
20 the final form will look like, which is the
21 commitment letter, but it's the general outline.

22 Q Okay.

23 A That was taken to the loan committee or to
24 the Board.

25 Q Now, is that document ever given to the

1 borrower?

2 A No.

3 Q What document controls between the borrower
4 and the bank?

5 A Well, it would be all the loan documents,
6 which would be the commitment letter, promissory
7 note, loan agreement, any security agreements, that
8 nature.

9 Q Have you ever known any internal bank
10 memorandum, someone tried to use it to somehow
11 excuse the bank from having to perform its
12 obligation under the loan agreement?

13 A No.

14 Q So, the loan agreement is what controls, and
15 the loan documents?

16 A Right, not this internal document.

17 Q Okay.

18 A And I will say this -- may I say something?

19 Q Please.

20 A The date on this is May 1st, 2008, you know,
21 almost 60 days before the loan actually closed and
22 something I would like to point out is in the
23 collateral section, if I may read, first mortgage
24 on 19.2 acres real estate located on corner of
25 South Causeway --

1 THE COURT: Hold on.

2 THE WITNESS: I'm sorry, I was trying to get
3 to the point I wanted to make, I apologize.

4 THE COURT: If you need to read it all that
5 is fine, if you want to read it outloud, but you're
6 going to have to slow down.

7 THE WITNESS: Yes. I'm about to get to that
8 but let me start over and read it slowly. "First
9 mortgage on 19.2 acre tract real estate located at
10 the corner of South Causeway and Highway 17,
11 Georgetown County, Pawley's Island, South Carolina,
12 and the proposed improvements to be constructed
13 thereon and a first mortgage on real estate
14 located," or excuse me, "described as lot 4, 334
15 Myrtle Avenue, Pawley's Island."

16 MR. TYLER: Your Honor, so we can end the
17 day, go ahead and get it over with, Your Honor, we
18 would like to go ahead and say we've wrapped up
19 with Mr. Lyerly as far as cross-exam, subject to
20 potentially recalling him later on in light of
21 trying to get the jury out of here today and we may
22 be finished with Mr. Lyerly.

23 THE COURT: All right. Any redirect? Miss
24 Byrd?

25 MS. BYRD: Just a few questions.

1 THE COURT: All right.

2 REDIRECT EXAMINATION BY MS. BYRD:

3 Q You mentioned that you didn't do, there is a
4 difference between the disclosure requirement
5 related to residential loans versus commercial
6 loans. Is that correct?

7 A I think we may have said consumer loans
8 versus commercial loans.

9 Q Tell me, is there a difference?

10 A When you say disclosure, what part of
11 disclosure are you referring to?

12 Q Does it make a difference if it's a
13 residential loan or a commercial loan or a consumer
14 loan, what obligation the bank has to keep the
15 private information of its customer private?

16 A There is no obligation on a commercial loan,
17 there are no privacy laws regulating commercial
18 loans, none.

19 Q I'm sorry, you said there is no
20 confidentiality -- what did you say?

21 A I said privacy laws.

22 Q There is no privacy laws but there still is
23 an obligation on the bank to keep information
24 private, correct?

25 A Sure.

1 MS. BYRD: No further questions, Your Honor.

2 MR. TYLER: Nothing further, Your Honor.

3 THE COURT: Thank you, sir. You may step
4 down.

5 (Witness excused).

6 THE COURT: I'm going to get you all to step
7 up real quick.

8 (Unrecorded beach conference).

9 MR. FLOYD: Is Mr. Lyerly excused?

10 MR. COLLINS: No, subject to recall.

11 THE COURT: Ladies and gentlemen, we're going
12 to end for the afternoon. I ask if you would be
13 back at 9:00 o'clock, we'll keep the same request
14 to you in place, no conversation, and we'll start
15 back first thing in the morning.

16 MR. COLLINS: Your Honor, will you tell us
17 what your plans are about possibly having court on
18 Saturday or when we might resume?

19 THE COURT: I'm inclined not to do that. You
20 know, obviously we're not going to get through
21 tomorrow, so I would imagine we will be back here
22 on Monday. I don't know that anyone wants their
23 weekend taken but that is my thought right at this
24 point, so we'll look at doing that.

25 Ladies and gentlemen, as I told you last

1 night or yesterday afternoon, try to get a good
2 night's rest. We'll start back first thing in the
3 morning. If you will be here at 9:00 we'll get
4 started as soon as everyone has reconvened.

5 Everybody else will remain seated. Ladies
6 and gentlemen, you're free to go. Thank you.

7 (Jury excused from the courtroom).

8 THE COURT: All right, anything that we need
9 to take up before we adjourn for the afternoon?

10 MR. COLLINS: No, Your Honor.

11 MR. GODDARD: Just briefly, Your Honor. Can
12 we please make these four emails that you ruled on
13 a court exhibit?

14 THE COURT: Yes, let's do that, go ahead and
15 mark those.

16 (Emails marked and received in evidence as
17 Court's Exhibit Number 1).

18 THE COURT: All right, we'll resume at 9:00
19 o'clock in the morning. You guys come up here.

20 (Unrecorded bench conference).

21 (Alternative juror Miss Johnson is
22 present).

23 THE COURT: All right, stand right there,
24 Miss Johnson.

25 Miss Johnson, what is your situation?

1 JUROR: It is kind of a personal matter.

2 THE COURT: It has to be on the record, no
3 one is left but the lawyers.

4 JUROR: Okay. I am the primary bread winner
5 of my family, my husband is self-employed and I do
6 not get paid when I'm not at work, my employer does
7 not pay me if I'm not there, I am a dental
8 hygienist, I'm very fortunate to make as much money
9 as I do make, it has kept my family afloat with the
10 economy being the way it is and my husband having
11 work every now and then.

12 THE COURT: Sure.

13 JUROR: Well, when I'm not there I don't get
14 paid, not only lose hourly but I lose commissions,
15 so I have lost this whole week and when it is time
16 to pay my light bill and my mortgage, you all are
17 not going to pay it, you know, so what am I
18 supposed to to? I mean, you all are talking about
19 going into next week. I don't mind doing my call
20 of duty, I just don't know how how I'm supposed to
21 pay my bills.

22 THE COURT: Well, let me just say this. It
23 may not make any difference to you. If we had to go
24 into next week I would not anticipate it going past
25 Monday. In other words, we may need an extra day,

1 which is why Mr. Collins asked, "Judge, do you
2 intend to come back on Saturday, on Monday," so I
3 don't want you to think that you will be here all
4 next week but I understand your position, I do. I
5 tell you why, and here is the thing.

6 JUROR: I have to pay my bills, though.

7 THE COURT: I understand that and I know this
8 doesn't matter to you either because you're
9 concerned about your bills and not necessarily that
10 person who sits in that seat or that other seat.
11 Everybody is in the same boat.

12 JUROR: I didn't say that.

13 THE COURT: No, I'm just saying if I'm in
14 your shoes and I'm over there in that chair and I
15 have an employer says, "I'm not going to pay you if
16 you're not here at work," I'm concerned about me, I
17 understand that some of my fellow jurors may be in
18 the same boat but I ain't, I don't have to worry
19 about their bills, I got to worry about mine.

20 JUROR: Exactly.

21 THE COURT: I understand the situation but on
22 the other hand I don't have, I have talked with the
23 attorneys, we're going to do our best, we're going
24 to try to resolve this case by tomorrow and get it
25 finished by tomorrow but there is a chance it is

1 going to go into Monday but let me say this and I
2 can do this. I will be honest with you, I couldn't
3 do this under a scenerio, you are the second
4 alternate, okay?

5 JUROR: Uh-huh (Affirmative).

6 THE COURT: The only way you would be in on
7 the deliberations is if two of the main panel got
8 sick and couldn't come back or whatever.

9 JUROR: Uh-huh (Affirmative).

10 THE COURT: I talked with the attorneys, they
11 also understand your situation.

12 JUROR: Uh-huh (Affirmative).

13 THE COURT: They have consented, you know,
14 and here is what I'm going to ask you to do. I'm
15 going to ask you to be back tomorrow and, like I
16 said, we're going to try to resolve it and get it
17 done.

18 JUROR: Yes, sir.

19 THE COURT: If we don't, I will excuse you.

20 JUROR: Yes, sir.

21 THE COURT: From having to come back on
22 Monday. But I need you to do me a favor.

23 JUROR: Uh-huh (Affirmative).

24 THE COURT: Don't tell anyone else on the
25 panel.

1 JUROR: I wouldn't do that.

2 THE COURT: Okay. Because there may be
3 others on the panel that are in the same situation
4 and, like I said, if you were on the main panel I
5 wouldn't be able to do this but because you are in
6 that second alternate seat, I would hate to have
7 you back here on Monday and then have you miss
8 Monday and then it get to the jury and they don't
9 need you because everybody is here and then it was
10 a waste of your Monday. So, if you would come back
11 tomorrow, don't say a word to anybody, if we get it
12 resolved it won't even be an issue, but if for
13 whatever reason when we get to the end of tomorrow
14 if we're not done and I give them instructions
15 about coming back on Monday or whatever, I'm
16 letting you know now that you will be excused, so
17 you will be done. When we end court tomorrow
18 regardless of the instruction I give the panel, you
19 will be done.

20 JUROR: Okay.

21 THE COURT: Just don't say anything.

22 JUROR: I won't.

23 THE COURT: We'll treat it that way.

24 JUROR: Like I said, I don't mind doing what
25 I'm supposed to do.

1 THE COURT: And I appreciate your work this
2 week.

3 JUROR: What do I do? I mean --

4 THE COURT: Well, let me tell you what you
5 do.

6 JUROR: If my husband was making what he used
7 to make it would be no problem.

8 THE COURT: Let me tell you what I have told
9 them, I have told the lawyers this and I say it
10 everywhere I go and I mean it but unfortunately a
11 lot of people don't take me at heart. Whoever your
12 legislators are who serve your district --

13 JUROR: Uh-huh (Affirmative).

14 THE COURT: -- talk to them, because I think
15 that they need to pass a law that says employers
16 must pay their employees who have jury duty.

17 JUROR: Yes.

18 THE COURT: And they can do that. They can
19 do that, so you need to talk to your legislators.
20 I think if we get enough people to do it we might
21 be able to get that thing going. But anyway, that
22 doesn't help you for right now but we'll help you
23 out at least to that extent so tomorrow when we're
24 done, if we're done, great, if we're not done you
25 are done.

1 JUROR: Okay.

2 THE COURT: Okay?

3 JUROR: I appreciate that.

4 THE COURT: All right.

5 JUROR: Thank you.

6 THE COURT: Thank you, Miss Johnson. Have a
7 good evening.

8 (Juror excused from the courtroom).

9 THE COURT: Okay. For the record, counsel
10 for the plaintiff and the defendant were in
11 agreement with the Court excusing Miss Johnson if
12 it goes into next week, and I think both sides have
13 consented that hopefully it wouldn't even be an
14 issue but they would both be willing to go with
15 less than twelve but not less than ten if we should
16 lose any other juror to illness or any other
17 reason.

18 Is that correct, Mr. Collins?

19 MR. COLLINS: That's correct, Your Honor.

20 THE COURT: Miss Byrd?

21 MS. BYRD: Yes, sir, Your Honor.

22 THE COURT: All right. And as I said,
23 hopefully that won't even be an issue but that is
24 where we're at.

25 Okay, we'll start at 9:00 o'clock in the

1 morning.

2 MR. FLOYD: Thank you, Your Honor.

3 (Recessed at 5:50 p.m., September 20, 2012).

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

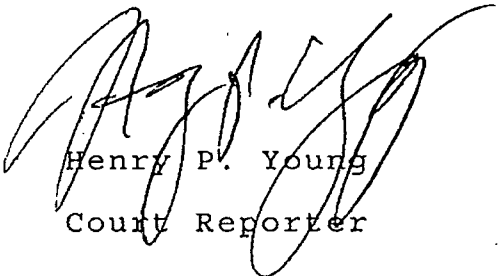
24

25

1
2
3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Georgetown County,
11 South Carolina, on the 20th day of September, 2012.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 March 14, 2013
15
16
17
18
19
20
21
22
23
24
25


Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2010-CP-22-01233

COUNTY OF GEORGETOWN

FIRST SOUTH BANK,

-vs-

SOUTH CAUSEWAY, LLC,

Defendant.

September 18-25, 2012

B E F O R E:

HONORABLE THOMAS A. RUSSO, SR.

A P P E A R A N C E S:

JOEL W. COLLINS, JR., Esquire
JAMES LEON FLOYD, Esquire
DONALD W. TYLER, JR., Esquire
Attorney for the Plaintiff

AUDRA M. BYRD, Esquire
MARK B. GODDARD, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

VOLUME IV OF VI
September 21, 2012

1 (Reconvened 9:50 a.m., September 21, 2012).

2 THE COURT: Anything we need to take up
3 before we get started?

4 MR. GODDARD: Yes, briefly, Your Honor.

5 THE COURT: Yes, sir.

6 MR. GODDARD: The defendant would like to
7 withdraw their answer to, I'm sorry, response to
8 plaintiff's request to admit on behalf of the
9 defendant South Causeway, number 13. After
10 conferring with counsel, it is the agreement, I
11 think it is important to recognize that request to
12 admit was sent November 29, 2010, and at that time
13 that was soon after this case was filed, after very
14 limited discovery had been done. At that time it
15 was admitted but it is important to recognize we
16 don't believe that is what the facts show and show
17 in the deposition of Bob Gwin. He is asked, he is
18 asked a question, "Were you at some point retained
19 and did you represent a company named South
20 Causeway, LLC, and a lady named Peggy Wheeler-Cribb
21 and a gentleman named Will Darwin Wheeler?" He
22 stated, "I was not retained by South Causeway LLC."

23 Your Honor, I think what is important the
24 testimony of Mr. Gwin will show, "I understand your
25 position that it is a one owner, Miss Peggy

1 Wheeler-Cribb," however the testimony is going to
2 show from this deposition taken March, 2011, that
3 he was not the attorney, he is going to say, he is
4 going to testify, "I offered her no legal advice or
5 counsel as to this agreement. In fact, I had no
6 idea what the terms of that agreement even were and
7 had I known I certainly would have, had I been her
8 attorney, that I would have advised her as such".

9 THE COURT: He was sitting right next to her,
10 he was involved in questioning, like you all do
11 witnesses.

12 MR. GODDARD: Yes, sir.

13 THE COURT: At the closing when she signed
14 that agreement he was sitting right next to her or
15 sitting there in the room with her?

16 MR. GODDARD: Yes, he was, Your Honor.

17 THE COURT: Okay.

18 MR. GODDARD: But pursuant to, I think the
19 evidence --

20 THE COURT: Because if this testimony is
21 going to be, "I represented her in the relationship
22 with Kennedy --" is it Kennedy?

23 MR. GODDARD: Yes.

24 THE COURT: "With Kennedy but I didn't
25 represent her as the CEO," or whatever, "of South

1 Causeway or whatever it is called and I'm sitting
2 next to her and I would have been her lawyer I
3 would have advised her not to do that," there is a
4 problem.

5 MR. GODDARD: Your Honor, what I'm not here
6 to say and I don't think he is going to offer any
7 testimony that he was going to tell her not to do
8 this or not to do that, because he can't do that,
9 he has said, "I never even read the agreement, it
10 was not part of what I was doing." He served as
11 the escrow agent that did nothing more than take
12 the money from the loan he represented her on and
13 hold it for them. He is going to testify, "I did
14 not represent them, I did not give them any legal
15 advice," and the bank asked him, this is important,
16 to serve as the escrow agent and he signed the
17 escrow agreement and, Your Honor, I don't think
18 there is any prejudice in this case because they
19 have taken this deposition, they took this
20 deposition four months after the request to admit
21 on this very issue. It wasn't noticed --

22 THE COURT: Mr. Goddard, here is the thing.
23 Again, the rules are in place to apply to everybody
24 equally and I understand, your motion is certainly
25 appropriate, I'm not saying that, but here is what

1 I have to look at. What the rule says, and does it
2 matter what anyone else says, if I ask you, "Mark,
3 when you bought your house, at your loan closing
4 were you represented by counsel during that
5 transaction," and you tell me yes, does it matter
6 that later on the lawyer goes, "Oh, I really didn't
7 represent him, I represented his wife"? I mean,
8 the request to admit is simply this and I don't
9 know the exact wording of it, but basically were
10 you represented by counsel or the opportunity to
11 confer with counsel, I don't know how it read, the
12 bottom line is --

13 MR. FLOYD: Your Honor, may I approach?

14 THE COURT: The response is, "Yes, I was."

15 MR. GODDARD: Your Honor, I think as to this
16 issue it is important to read what it says,
17 opportunity to confer with counsel, and she had
18 that opportunity, however I think what the case law
19 says is you have to have someone --

20 THE COURT: You can argue that.

21 MS. BYRD: Your Honor, I would just like to
22 add, I think it is an important issue and I'm sorry
23 to stand in the middle of Mark's argument but I
24 think the case law under Rule 11 provides, the cite
25 to this is Greenville, Commerce Center of Greenville

1 versus W. Powers McElveen, 347 SC 545, and what
2 that provides is the trial court may allow a party
3 to amend or withdraw its request to admit when the
4 presentation of the merits is furthered by the
5 admission and the party who obtained the admission
6 cannot demonstrate prejudice.

7 In this case, Your Honor, in this case the
8 plaintiff can't demonstrate prejudice. They had
9 all this information and they are trying to use
10 this as a formality. This was sent to me right
11 after this case was filed and perhaps we didn't
12 read it carefully enough, perhaps that is what
13 happened, but the fact is through discovery they
14 have known this fact since March of 2011 and there
15 is absolutely no prejudice, and for them to come
16 before the Court and say, "Listen, we have this
17 request to admit that was signed two and a half
18 years ago and should be able to present evidence
19 and the merits of this case would be furthered by
20 allowing the evidence, Your Honor," and we just
21 move to withdraw the request to admit answer.

22 MR. FLOYD: Your Honor, may it please the
23 Court, a couple quick points. The nature of this
24 request to admit in substance is whether or not
25 she, Miss Peggy, was acting on behalf at all times

1 of South Causeway. The one that we're here about,
2 being number 13, goes directly to whether or not
3 she was represented by counsel at the closing of
4 the modification agreement.

5 Now, this is not some factual issue of if we
6 need to do more discovery as to whether or not you
7 had an attorney, there is no timing issues under
8 the rules as to when one can be served. The whole
9 point is to eliminate what they are trying to do,
10 to present evidence when something has already been
11 established, just to narrow the issues. I think we
12 have all seen what happens this week when that
13 doesn't happen. That is what this was aimed at,
14 they admitted it and in my mind it is very simple.
15 The prejudice is we're here at trial, his
16 deposition was taken --

17 THE COURT: Do you have the request to admit
18 13?

19 MR. FLOYD: Yes, Your Honor. May I approach?

20 THE COURT: Read that for me.

21 MR. FLOYD: South Causeway's request to admit
22 number 13. Please admit Peggy Wheeler-Cribb on
23 behalf of the defendant executed the agreement
24 dated April 10, 2009, the agreement, in the
25 presence of and after an opportunity to confer with

1 its counsel, a true copy of which is attached
2 hereto as exhibit G hereto. Response, admitted.

3 And, Your Honor, I think for the record we
4 need to publish the remainder of Mr. Gwin's
5 deposition testimony. The question, "Were you at
6 some point retained and did you represent a company
7 named South Causeway, LLC, and a lady name Peggy
8 Wheeler-Cribb and a gentleman named Will Darwin
9 Wheeler in connection with a loan to be made by a
10 company named Kennedy Funding?

11 ANSWER: Okay, I was not retained, in my
12 opinion, by South Causeway, LLC. I did represent
13 Peggy Wheeler-Cribb and Will Darwin Wheeler in
14 connection with, the entity that I represented was
15 Pawley's Island North."

16 Next question. "Okay. Do you know who the
17 principals are, the members who own South Causeway,
18 LLC? Would it be Peggy Wheeler-Cribb, to your
19 knowledge?

20 ANSWER: I know she had some affiliation with
21 South Causeway, LLC. As to whether she was a
22 member, manager, whatever, I don't know what her
23 capacity was."

24 Your Honor, later in his deposition, which by
25 the way went to more than just whether or not he

1 represented her, they made a huge issue of his
2 observation of her in the closing. I don't think
3 anybody is going to dispute whether or not he was
4 there.

5 "QUESTION: Did you witness discussion of the
6 agreement by South Causeway, LLC, Peggy
7 Wheeler-Cribb and Will Darwin Wheeler?"

8 And he answered, "Yes, I did.

9 QUESTION: Okay. To your knowledge, at the
10 time that document was executed were any of those
11 parties under any legal or actual disability?

12 ANSWER: None to my knowledge.

13 QUESTION: Were you of the opinion the
14 document was validly executed and was valid and
15 binding?

16 ANSWER: The agreement was signed in
17 conjunction with all the closing documents. I
18 thought they were competent to sign documentation."

19 There was two purposes in taking the
20 deposition. This wasn't an issue, it was admitted
21 and I don't have the case Miss Byrd cited but I
22 know where we're at right now is probably
23 procedurally different. We're in the middle of a
24 trial, this thing could have been amended, this was
25 in 2010 it was stated, if they found new evidence

1 they can change it, otherwise the issue is hollow
2 once you get to trial.

3 MR. COLLINS: And, Judge, the item to
4 support, he was asked about it, that question was,
5 "Did you witness the discussion of the agreement?"
6 That is that agreement that we sometimes refer to
7 as the modification agreement. So, Judge, the
8 prejudice also is obvious. Here we are with no
9 opportunity to further develop our position or our
10 defense and the whole issue had to do with duress
11 and she was claiming that she --

12 THE COURT: All right, I'm going to
13 respectfully deny your motion. When that
14 deposition was taken, is it Mr. Gwin, is that the
15 gentleman?

16 MR. GODDARD: Yes, Your Honor.

17 THE COURT: When Mr. Gwin's deposition was
18 taken, you know, it may be your position that, you
19 know, "Judge, when we first did those requests, you
20 know, we were under a belief, mistaken belief that
21 she was represented, we then had found out at that
22 deposition she wasn't," that's the point that you
23 make your motion to amend and to correct, not when
24 we're four days into the trial and what I hope to
25 be near the end of the trial. Rule 36 is in place

1 for a reason. If parties are going to be able to
2 come in at anytime, and I'm not saying, again I
3 haven't read the case that Miss Byrd cited, but
4 based on just the little bit that she cited and
5 spoke about, it would appear to the Court that if
6 the motion to amend, amend that request to admit
7 was made after that information was discovered by
8 you, I agree there probably is no prejudice. I
9 think there may be a minimum amount of prejudice
10 four days into and near the end of this trial and
11 so I'm going to respectfully deny your motion but I
12 certainly want the record to reflect your exception
13 to that ruling.

14 MR. GODDARD: And all I would ask, Your
15 Honor, if we can enter the original deposition of
16 Mr. Gwin as a court exhibit?

17 THE COURT: Sure.

18 MR. GODDARD: Proffer it as a court's
19 exhibit.

20 THE COURT: Okay.

21 MR. GODDARD: Thank you, Your Honor. I
22 believe they have the original.

23 THE COURT: All right. We will, don't let me
24 forget we have marked that, okay?

25 MR. GODDARD: Yes, Your Honor.

1 (Deposition of Robert Gwin marked as
2 Court's Exhibit Number 2).

3 THE COURT: There is another thing -- well,
4 before I go to that, let me see, is there anything
5 further?

6 MR. GODDARD: Nothing further from the
7 defendant.

8 THE COURT: Anything further from the
9 plaintiff before we start?

10 MR. FLOYD: Nothing, Your Honor.

11 THE COURT: Well, we can address this later
12 as far as scheduling issues.

13 That is Mr. Gwin?

14 MS. BYRD: Yes.

15 THE COURT: That's marked as Court's Exhibit
16 2.

17 All right, let's bring the jury out.

18 (The jury returned to the courtroom).

19 THE COURT: Good morning, ladies and
20 gentlemen. Welcome back. We are ready to resume.
21 As you probably recall, Miss Byrd was still in the
22 process of presenting the defense's case and we
23 will allow her to continue this morning.

24 Miss Byrd, you may call your next witness.

25 MS. BYRD: Your Honor, we call William

1 Barksdale.

2 THE COURT: All right. Mr. Barksdale, if you
3 would please come around and be sworn, sir.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 WILLIAM COLLIER BARKSDALE, JR., after being first
2 duly sworn, testified as follows:

3 THE CLERK: Thank you. Please be seated and
4 state your full name for the record and spell your
5 last name for us, please.

6 THE WITNESS: My name is William Collier
7 Barksdale, Jr., B-a-r-k-s-d-a-l-e.

8 DIRECT EXAMINATION BY MR. GODDARD:

9 Q Mr. Barksdale, please introduce yourself to
10 the jury.

11 A Good morning. My name is William Barksdale,
12 Bill Barksdale, I'm a resident of Columbia, South
13 Carolina and part-time at the beach. I was raised
14 in Laurens, South Carolina, finished Laurens High
15 School, went to The Citadel to play baseball but
16 unfortunately didn't have the grades to do it so I
17 went to Carolina and got a degree in English. I
18 have been in, I was in the insurance business after
19 a short period of time in the military service and
20 somehow with a degree in English talked my way into
21 a job at the bank whereupon I found out I was a
22 pretty good reader but I couldn't count very well,
23 so I went back to the University of South Carolina
24 and I received a Master's Degree in business
25 administration in 1968.

1 Q After you're received your Master's Degree
2 from USC did you have any other education?

3 A Yes, I did. Banking is an industry in which
4 you continue to be educated because of changes in
5 laws and rules and regulations but there is
6 graduate banking schools that bankers aspire to
7 attend and do. In 1973 I finished the Astonia
8 Institute of Banking, Rutgers University, a program
9 you go for two weeks each summer for three years
10 and then you write a thesis, and after that I
11 continued working on my education with the American
12 Bankers Association, through their American
13 Institute of Banking. I attained their basic
14 standard, advanced and graduate certificate of the
15 American Bankers Association, American Institute of
16 Banking.

17 Q And after your education did you ever have
18 the opportunity to get into teaching banking
19 practices and procedures?

20 A Yes, I did. My first teaching experience was
21 teaching an accounting course and then I got into
22 the American Institute of Banking, teaching
23 principles of banking, principles of bank
24 operations, and I did that for probably fifteen or
25 more years.

1 And I continued to do that as kind of a give
2 back to the industry, as a member of a trade
3 association, Risk Management Associates, and a
4 member of the American Bankers Association, with
5 AIB. Then I retired, I stopped after 32 years of
6 teaching at the South Carolina Bankers School where
7 I taught commercial lending and problem loans and
8 workout.

9 From there my next teaching was on the
10 faculty of Stonier Graduate School of Banking where
11 I had my certificate from them and I taught
12 commercial loan portfolio management and risk
13 management and subjects of that nature for about 19
14 years. At the same time I was involved in banker
15 education with the American Bankers Association I
16 was on the faculty of the Commercial Lending
17 School, National Commercial Lending School at the
18 University of Oklahoma. Then I became a faculty
19 member on the National Commercial Undergraduate
20 School for the University of Oklahoma through the
21 American Bankers Association and I did serve on the
22 educational Boards at the same time.

23 Then with Risk Management Associates, RMA, I
24 have taught for them in the areas of uniform credit
25 analysis, which is cash flow, financial statement

1 analysis and problem loans and workout. While I
2 was working with the American Institute of Banking
3 and the American Bankers Association and ARMA, the
4 iron curtain fell and contracts were made available
5 and I went to eastern Europe, to Prague and the
6 Chec Republic once and to Warsaw Poland two times
7 teaching problem loans and work outs to former
8 communist government bank employees and we actually
9 had some of them come to the Daniel Management
10 Center at the University of South Carolina,.

11 Q Total, how many years have you been a member
12 of faculty or teaching some level of commercial
13 banking policies and procedures?

14 A I did that for -- well, I started in about
15 1970 and continued actively with that up until
16 about three years ago, and I was actually teaching
17 online courses for the American Institute of
18 Banking. They had changed from the textbook base
19 in the classrooms to online courses.

20 Q Outside of teaching, were you ever employed
21 at any bank?

22 A Yes.

23 Q Would you briefly describe your employment
24 history.

25 A Certainly. I went to work for South Carolina

1 National Bank in 1968, excuse me, in 1968 and
2 worked my way up through the commercial lending
3 area of the bank to become the senior credit
4 officer of the bank, which is I guess a four
5 billion dollar bank at the time I served in that
6 capacity.

7 After that, we had a merger and we had some
8 problems that we needed to attend to so I was
9 involved in the problem loan workout area and along
10 the way I supervised the OREO portfolio, that is
11 other real estate owned, where the bank has had to
12 foreclose or has had property deeded to them, where
13 you have to liquidate collateral. Loan policies
14 and procedures came under my purview, and also all
15 of our loan officer training and development within
16 the bank.

17 Q After South Carolina National Bank where did
18 you go?

19 A I was fortunate to be able to go to early
20 retirement in 1997 and I had been involved with the
21 Business Development Corporation of South Carolina,
22 which is a company that deals in Small Business
23 Administration guaranteed loans to the U. S. Small
24 Business Administration and also had a certified
25 development corporation that did financing using

1 504 debentures.

2 MR. COLLINS: Your Honor, in an effort to
3 save time we will concede his qualifications and
4 not object to his being allowed to give expert
5 opinion testimony.

6 MR. GODDARD: No problem.

7 THE COURT: All right, thank you.

8 MR. GODDARD: We'll move Mr. Barksdale as an
9 expert in commercial banking, commercial lending
10 policies and procedures and banking policies and
11 procedures.

12 THE COURT: All right. Ladies and gentlemen,
13 let me tell you briefly. When a witness is
14 presented to the Court as an expert witness and
15 that witness is in fact approved by the Court or
16 recognized by the Court as an expert, which Mr.
17 Barksdale, the Court does recognize him as an
18 expert in his field, what that means is simply
19 this. The difference between an expert witness and
20 a lay witness is simply this. Because of their
21 experience and their expertise in a particular
22 field an expert witness can give their opinion
23 about an issue that they are asked about, whereas
24 typically lay people are not allowed to give
25 opinion testimony.

1 You are to treat an expert witness' testimony
2 no different than you treat any witness' testimony.
3 You give it whatever weight and credit you think it
4 deserves.

5 But that is the main difference between a lay
6 witness and an expert witness, is Mr. Barksdale
7 will be allowed to give his opinions with regard to
8 his field of expertise.

9 All right.

10 BY MR. GODDARD:

11 Q Mr. Barksdale, have you been present in the
12 courtroom since the start of this trial and heard
13 the testimony presented in this case?

14 A Yes, I have.

15 Q Have you evaluated these facts and evidence
16 to arrive at opinions as to the banking policies
17 and procedures and commercial lending policies that
18 were used in conjunction with the loan between
19 South Causeway and First South Bank?

20 A Yes.

21 MR. COLLINS: Judge, we submit such policies
22 are irrelevant to the defense's counter-claims that
23 are asserted.

24 THE COURT: You may proceed, it is overruled.
25 I don't know that is an objection.

1 I say you may proceed.

2 MR. GODDARD: I'm sorry, I thought you said
3 approach.

4 THE COURT: I think the objection was just a
5 statement. You may proceed.

6 BY MR. GODDARD:

7 Q In your review of the evidence did you find
8 anything unusual about the initial loan of \$550,000
9 made to Peggy Wheeler-Cribb from First South Bank?

10 A Yes.

11 Q Can you tell me about that?

12 MR. COLLINS: Excuse me, Your Honor, I
13 object. The irregularities on the \$550,000 loan is
14 irrelevant.

15 THE COURT: Come on up.

16 (Unrecorded bench conference).

17 THE COURT: Overruled. You may proceed.

18 BY MR. GODDARD:

19 Q Would you like me to reask the question, Mr.
20 Barksdale?

21 A Please.

22 Q In your review of the evidence did you find
23 anything unusual about the initial loan of \$550,000
24 made to Peggy Wheeler-Cribb from First South Bank?

25 A Yes. That loan was made in December of 2007,

1 I believe. The purpose of the loan was for
2 development expenses on the South Causeway property
3 and the noted source of repayment was going to be
4 from two specified potential sources. One, I
5 believe it was Piggly Wiggly, that a developer
6 expressed interest in that, and the other was
7 another entity that escapes me, it may have been a
8 drugstore. That was the perceived source of
9 repayment, although First Palmetto still had a
10 three million dollar, three million five, three
11 million six loan outstanding which would have come
12 into play before they would have gotten repaid.

13 Also it appeared that it was almost an equity
14 loan in the South Causeway property because they
15 said it would be for the period of a year and they
16 built in an interest reserve of \$50,000 and
17 indicated that the source of repayment was not from
18 the borrower itself but from the sale of the
19 property, and the proceeds were used as an equity
20 investment in South Causeway development.

21 Q And --

22 A And that loan, to my knowledge, didn't have
23 any restrictions on how that money was going to be
24 used.

25 Q Okay. Do banks typically make loans without

1 giving restrictions?

2 A Well, it depends on the loan.

3 Q Commercial development?

4 A If it is a commercial development loan you
5 would want -- well, you would want to know, you
6 want to know what the money is going to be used for
7 and you want to know how they are going to pay it
8 back, and it is my opinion that this loan, they
9 were not relying on the makers to repay, they were
10 relying on a sale of assets, some other source of
11 repayment.

12 Q Did you feel that the \$550,000 loan was in
13 any way trying to create favor to get the big loan?

14 MR. COLLINS: Objection, leading.

15 THE COURT: Sustained.

16 Q Can banks typically make business development
17 loans?

18 A Yes.

19 Q And explain to the jury what that means.

20 A Well, you make a loan in hopes of getting the
21 entire relationship and I believe Mr. Lovelace
22 testified that shortly after he joined First South
23 in July, I believe, of 2007 he contacted Mrs.
24 Wheeler-Cribb and talked to her about her
25 relationship that he would like to develop with

1 her.

2 Q Did you, do you have an opinion on whether,
3 do you feel that the \$550,000 loan from First South
4 Bank was a business development loan in an attempt
5 to get the big loan?

6 A I feel it could be, yes.

7 Q And in your review of the evidence it was
8 clear that First South Bank did further
9 solicitation of what I am calling the big loan, but
10 the 6.5 million dollar loan that was eventually
11 worked out in this case, is that correct?

12 A Yes. I believe that they visited, Mr.
13 Lovelace and Mr. Lyerly, I believe they testified
14 they visited with her in early 2008 and talked to
15 her about the relationship that they could develop,
16 knowing that that land loan was at First Palmetto.

17 Q Did you find it, in your review of the
18 evidence and the policy and procedures from this
19 bank, anything unusual about this particular bank
20 going to get this particular loan?

21 A Would you state the question again?

22 Q Was this, was the collateral or the 19 acres
23 in this case, was this in the normal footprint of
24 First South Bank?

25 A I actually reviewed their policies and

1 procedures and it indicated that their market was
2 limited to Beaufort County and contiguous counties,
3 Richland County and contiguous counties,
4 Spartanburg and contiguous counties, and I believe
5 Buncomb County in North Carolina, and they had no
6 presence in this market. As far as a bank is
7 concerned, that would have been outside their
8 market.

9 Q Why would banks be trying to get loans
10 outside their typical market?

11 A Well, typically they want to stay in market
12 because they can get additional relationships
13 because they have a presence in that market with
14 branches or banking houses and they can service the
15 banking needs. That would be the reason that they
16 would try to stay in market but outside of market
17 could be just an investment loan to gain loan
18 volume.

19 Q Why would you want to gain loan volume during
20 this time period, why were banks trying to gain
21 loan volume?

22 A Well, the largest source of income for a
23 commercial bank is interest on loans.

24 Q In your review of the approval process for
25 this 6.5 million dollar loan did the bank's

1 directors require anything to approve the loan?

2 A Well, their procedure was to have a
3 presentation to the Board with an outline of what
4 the transaction was going to be and a memorandum or
5 documentation as to the creditworthiness and source
6 of repayment and how the loan would be structured
7 and to present to them about this is what they need
8 the money for, this is how they pay it back and
9 this is how the loan is going to be structured.

10 Q And would there be, was there any requirement
11 to try and sell off part of this loan?

12 A Well, in the approval process it indicated
13 that the loan would not be made unless they sold a
14 1.5 million dollar participation to another
15 financial institution.

16 Q And, selling off the 1.5 million dollars
17 would lower their interest, their amount they
18 actually owed on the property, is that correct?

19 A That would lower the amount, their exposure
20 in this loan.

21 Q Exposure?

22 A The loan was for \$6,500,000 and if they
23 participated out a million five they would have a
24 \$5,000,000 loan.

25 Q Did you ever find any indication that that

1 participation agreement, there was any interest in
2 that participation agreement?

3 A I found that they did not sell it. They must
4 not have been able to market it to another bank.

5 Q When First South Bank approached Miss Cribb
6 and Mr. Wheeler to move forward with this loan and
7 the development of the property do you think the
8 property was ready to be developed?

9 MR. COLLINS: Objection, Your Honor. This is
10 outside his field of expertise.

11 THE COURT: Sustained.

12 Q Was it your understanding that the borrower
13 in this case expressed hesitancy as to moving
14 forward with the development?

15 MR. COLLINS: Objection, leading. Judge,
16 this is an expert witness.

17 THE COURT: All right. Sustained as to
18 leading.

19 Q What type of information is necessary to move
20 forward with a development project such as this?

21 A Well, I'm not a developer but I understand
22 how --

23 Q From the bank's perspective, I'm sorry.

24 A I understand how development operates and
25 development loans are made generally to developers

1 with experience in the area of developing, whether
2 it is a shopping center or whether it is apartments
3 or whether it is an office building, some income
4 property, some commercial income property, and the
5 development is involved, if the development
6 involves coordination of a number of moving parts,
7 one is the acquisition, they are usually called
8 acquisition, development and construction loans,
9 the acquisition of the land which had already been
10 accomplished through the loans in First Palmetto,
11 then the construction phase would be when you put
12 in the infrastructure, lights, power, water, sewer,
13 all your necessary permits and zoning and those
14 kinds of things.

15 Q Can you typically do the full infrastructure
16 based solely on a letter of commitment, can you
17 begin construction from a major tenant?

18 A You can begin construction if you have the
19 money to do it but typically in order to move
20 forward with development you would want to have
21 your pieces in place. Typically you would have
22 somebody could stand on their own that is either
23 going to do a land lease on a piece of the property
24 or they would talk to the developer and if the
25 developer had the wherewithal they could build a

1 build to suit, "We'll build what you want in
2 accordance with your plans and specifications and
3 we have a lease on that property." But at the same
4 time you would want to be able to develop the rest,
5 you have to have a comprehensive plan for
6 developing the whole tract of property.

7 Q And you can't develop the comprehensive plan
8 until you have that major tenant directly in place?

9 MR. COLLINS: Objection to leading.

10 THE COURT: Sustained as to leading.

11 Q What is the main, what is the main component
12 necessary to have that developmental plan?

13 A Usually the lynchpin is a major credit
14 tenant, but at the same time you have got a number
15 of balls in the air and you're trying to make sure
16 that you're going to be able to move forward with a
17 comprehensive plan.

18 Q Could the infrastructure of the development
19 change based on who the major credit tenant would
20 be?

21 A Yes.

22 Q In this case did First, or did the decision
23 of First South Bank to move forward with the
24 development of this, with the funding of this loan
25 follow the standard banking, commercial banking

1 practices and procedures without that major credit
2 tenant?

3 MR. COLLINS: Objection, Your Honor. He
4 can't speak to the motives or decision making of
5 First South Bank.

6 MR. GODDARD: I think he can speak as to his
7 opinion as to whether their decision followed
8 standard banking practices.

9 THE COURT: He can address that issue, yes.
10 Overruled.

11 THE WITNESS: What's the question?

12 BY MR. GODDARD:

13 Q Knowing that there was not, there was nothing
14 more than a letter of intent from Lowe's Foods, did
15 it follow standard banking practices for the bank
16 to move forward with the closing of this loan?

17 A As I understand it, they moved forward with
18 the closing of the loan predicated on
19 contingencies. They moved the land loan from First
20 Palmetto, they folded in the \$550,000 loan, into
21 the transaction and then they said, "Any other
22 advances are predicated on you having basically a
23 comprehensive development plan which includes your
24 infrastructure, which includes your major credit
25 tenant, which includes being able to bring this

1 development to fruition."

2 Q Would you agree with me that is not how the
3 loan was predicated in the commitment letter, is
4 that correct? There was no, nothing in the
5 commitment letter from First South Bank to Peggy
6 Wheeler-Cribb that said, "We're going to go ahead
7 and fund the first part but not the second part
8 until you get the contract?" Actually didn't the
9 commitment letter require the contract before
10 closing?

11 A Well, the commitment letter, my
12 understanding, was for \$6,500,000, which had a
13 number of pieces. First was the land acquisition
14 and the folding in of the 550,000. The next was a
15 million four estimate of development costs. They
16 did not require a development plan, there wasn't a
17 written document or a writing or due diligence
18 about the development plan that in my opinion you
19 could rely on.

20 Also you had the closing costs and those
21 kinds of things but they had an interest rate
22 reserve built in. That means they said, "We're
23 going to lend ourselves the interest for a
24 significant period of time."

25 Q In your review of the commitment letter did

1 it require a signed construction contract?

2 A In order for them to get additional money you
3 had to have a signed construction contract from a
4 licensed, bonded contractor.

5 Q And in your review of the commitment letter
6 given to Peggy Wheeler-Cribb and Darwin Wheeler in
7 this case what was the collateral required to move
8 forward with the 6.5 million dollar loan?

9 A The collateral required for the 6.5 million
10 dollar loan was the 19 plus or minus acres and a
11 lot at Pawley's Island which had already been taken
12 as collateral for the \$550,000 loan.

13 Q From your hearing of the evidence did you
14 ever see, was there any indication that that was
15 not the desire of South Causeway, Peggy
16 Wheeler-Cribb, to include lot 4?

17 A I have heard that, yes.

18 Q And you have seen documents to that effect?

19 A I have read depositions and I have seen
20 discussion.

21 Q Okay. Would it have followed normal accepted
22 commercial banking practices for a lender to orally
23 represent that a change to the collateral
24 requirements at closing is just a formality?

25 MR. COLLINS: Objection, Your Honor.

1 Speculation, leading, irrelevant.

2 THE COURT: Overruled.

3 A State the question one more time.

4 Q Would it follow normally accepted banking
5 practices for a lender or an officer of the lender
6 to orally represent that a change to the collateral
7 required in the commitment letter is just a
8 formality?

9 A That would be inappropriate.

10 Q Should any representations be made, do you
11 have an opinion as to whether any representations
12 should be made as to potential changes to the
13 commitment letter before the closing that are not,
14 before a subsequent commitment letter is issued?

15 Let me ask a better question, strike that,
16 sorry about that, I was confused.

17 If there are changes to the commitment
18 letter, typically is it normal practice in the
19 field for a subsequent commitment letter with new
20 terms to be issued?

21 A Well, the commitment should be clear before
22 you go to closing.

23 Q And it was clear in this case it was not
24 clear, is that correct, as to what collateral was
25 going to be involved in this loan, there was not a

1 meeting --

2 MR. COLLINS: Your Honor, he asked the
3 question, I think he ought to let the witness
4 answer.

5 Q Sorry.

6 A All that I read said that they were going to
7 require the collateral that was pledged for the
8 existing loan, the \$550,000 was going to be
9 required in order for them to approve this loan and
10 fund this loan.

11 Q Correct. But you have seen deposition
12 testimony and heard and seen evidence, emails and
13 everything else that that is not, that that is not
14 the understanding that Peggy Wheeler-Cribb had in
15 this case?

16 MR. COLLINS: Objection, speculation,
17 leading.

18 THE COURT: He cannot speculate as to what
19 was going on in Miss Cribb's head, so sustained.

20 MR. GODDARD: I agree with that, Your Honor.

21 THE COURT: I mean, that is what you are
22 asking him to do.

23 MR. GODDARD: All right.

24 BY MR. GODDARD:

25 Q Let me ask a different way. Is it ever

1 proper for a lender to hand deliver at closing a
2 document that includes additional terms not
3 included in the commitment letter?

4 A That would be atypical, in my opinion.

5 Q Would that follow normally accepted
6 commercial banking practices, in your opinion, to
7 hand deliver a letter that changes the terms of the
8 commitment letter?

9 A It could. Let me couch it this way. A loan
10 closing is a loan closing, it is not a loan
11 opening, it is where all the documents are signed
12 that gets you in a position to foreclose if you
13 need to. In effect a loan closing is a dress
14 rehearsal for a foreclosure, so you want to have
15 everything understood and correct before the money
16 is advanced.

17 Q Did you feel that First South Bank's handing
18 of the letter that has been marked as Plaintiff's
19 Exhibit Number 12, I mean, I'm sorry, Defendant's
20 Exhibit Number 12 as to terms to release lot 4,
21 handing it to Miss Wheeler-Cribb at the closing
22 violated standard commercial banking practices?

23 A I would not say that it violated standard
24 commercial banking practices but it was something
25 that I would consider to be unusual and if I read

1 correctly, it was enunciated by the bank that this
2 was to keep them in compliance with banking
3 regulations that they could not advance more than
4 65 percent against value, appraised value of
5 property for a land acquisition loan, for a land
6 loan, which is what this was if that was the
7 requirement that they felt they needed to do.

8 Q What were they, in your review of the
9 documents, what type loan were they saying this was
10 to Miss Peggy Wheeler-Cribb?

11 A This loan was a land acquisition loan that
12 had additional contingencies connected with it for
13 future advances. It was, it was kind of hybrid, it
14 was an acquisition and then a development loan. In
15 my opinion they didn't have the if's covered when
16 they closed the loan. It was premature.

17 Q And you said it was unusual. In your
18 practice would you have hand delivered, in your
19 practice as the lender would you have hand
20 delivered a letter changing the terms?

21 MR. COLLINS: Objection, speculating.

22 THE COURT: It's not speculation.

23 A Only if it was absolutely understood this was
24 the reason that letter was being, was being
25 delivered. I mean, if they knew it was coming.

1 Q And if they didn't know it was coming it
2 would be improper?

3 A That would be a surprise, everybody would
4 have to sit down and talk about it.

5 Q Okay. During your deposition you were asked
6 whether the note and mortgage appeared to be valid.
7 Is that correct?

8 A Yes.

9 Q Okay. And at that time what do you base,
10 what are you basing that opinion on?

11 A That they signed the note and they signed the
12 mortgage, they were executed, promised to pay and
13 pledged.

14 Q You're not here to offer any testimony or
15 evidence or opinions as to whether those are
16 enforceable under the law but other than they were
17 validly signed, is that correct?

18 A That's correct. It is what it is.

19 Q Briefly describe the 6.5 million, you have
20 somewhat, just describe the terms of the 6.5
21 million dollar loan.

22 A Well, the terms, the way the credit write-up
23 was presented to the Board was, "We are going to
24 pay out the First Palmetto debt and we're going to
25 commit to lend a million four in development funds

1 and we are going to do an interest rate reserve,
2 we're going to make this loan for a period of three
3 years and we're going to do an interest rate
4 reserve of \$850,000," that they are going to lend,
5 and the interest rate reserves are addressed in
6 their loan policies.

7 The loan policy basically starts out this is
8 not something you really want to do, and I'm over
9 simplifying this, but if you do it you ought to
10 have a real good reason for doing it because you're
11 going to have interest rate reserve potential for
12 three years, you are lending yourself your earnings
13 for three years. You have advanced it as a loan
14 and now you're taking that demand deposit but you
15 are never really getting any cash for that interest
16 until that loan pays off, you are just accruing
17 that interest and it is going to be at the end is
18 when it is going to be paid.

19 Q And in your review of the commitment letter
20 presented to Peggy Wheeler-Cribb did you see any
21 description of how the interest reserve account
22 would be funded?

23 A Well, \$300,000 was the initial one and I
24 believe I heard testimony from somebody in a
25 deposition that, "Why did you do 300,000?" "Well,

1 we didn't want to pay interest on a larger amount."

2 Well, if you are lending yourself the
3 interest that doesn't make a lot of --

4 Q Then there was supposed to be a subsequent
5 \$550,000 payment. Correct?

6 A Yes, and I believe that was attached to the
7 development --

8 Q And I'm going to ask you --

9 A -- restrictions.

10 MR. GODDARD: May I approach, Your Honor?

11 THE COURT: Yes.

12 Q Please publish to the jury, which this is
13 Plaintiff's Exhibit 1, loan purpose on the second
14 page, can you please read F?

15 A Paragraph F states, "An additional \$550,000
16 in proceeds of the loan shall be disbursed by bank
17 into the account to fund monthly interest payments
18 due upon the loan, upon the earlier to occur of the
19 completion of the infrastructure and six months
20 from the date of the loan closing." That's it.

21 Q And that commitment letter, where it
22 describes how this interest reserve account is
23 going to be funded and was presented to Miss Peggy
24 Wheeler-Cribb, did you see anywhere where it gave
25 the bank any discretion as to funding that

1 \$550,000, does it say the earlier of?

2 A Yes.

3 Q And is there anything in there that says if
4 it goes past six months they don't have to do this?

5 A Not that I saw.

6 Q Okay. So is it your opinion that that
7 commitment letter says that this \$550,000 is to be
8 funded regardless of whether the construction
9 happens or not?

10 A If I read that correctly.

11 Q In your review of the evidence was that
12 \$550,000 ever funded?

13 A No, sir, it wasn't.

14 Q In your understanding and hearing the
15 testimony of Mr. Lyerly yesterday, he was asked
16 could he point to a loan document that says you can
17 terminate this loan, you can freeze this loan, you
18 can cap this loan, it all means the same thing, you
19 are going to hear various words, the same thing.
20 Is there anything, and one of the things he stated
21 was, well, they abandoned construction.

22 Was there anything in that bank document that
23 defined abandoning construction?

24 A Not that I saw.

25 Q Did you find, in your opinion, in the facts

1 of this case did you find any evidence of the
2 abandonment of construction?

3 A They didn't develop it as rapidly as they, as
4 it had been anticipated that they would.

5 Q Did you find anything in the loan document
6 that put a time line as to when this development
7 had to occur?

8 A Well, this was a three year commitment and
9 they predicated it on having an anchor tenant
10 arranged and a contract for the development and
11 these go hand in hand so, I mean, there should be
12 some negotiating room in there. I mean, if it
13 doesn't work out the way you anticipated you all
14 get in a room and figure out, "Well, we have an ox
15 in the ditch, we have a problem, let's get it
16 straightened out."

17 Q That would be good faith dealing with a
18 customer?

19 A Sure.

20 Q Do you have an opinion to a reasonable degree
21 of certainty whether, to a reasonable degree of
22 certainty in the commercial lending field whether
23 the bank's decision to terminate the loan and lower
24 the amount available on the, in their loan lending
25 violated the loan documents?

1 A Well, a loan is a contract and all contracts
2 are negotiable, in my opinion, so if they were
3 going to do that they should have negotiated with
4 the borrower on what their intentions were and how
5 they could work with each other in order to have
6 this brought to a successful conclusion.

7 Q In your opinion would that working together
8 include attending meetings with the borrower and
9 their attorneys?

10 A Sure.

11 Q At some point Peggy Wheeler-Cribb approached
12 First South Bank about needing to release lot 4 in
13 order to get an additional loan, is that correct?

14 A Yes, sir.

15 Q And did First South Bank offer to help her in
16 that case?

17 A It is my understanding First South Bank
18 suggested that she go to a local bank to get
19 funding for additional needs, indicating they
20 weren't a local bank.

21 Q And this lot 4, was it the same property that
22 Peggy Wheeler-Cribb thought should not have been
23 included in the original loan?

24 A That is my understanding.

25 Q In your opinion to a reasonable degree of

1 certainty in the commercial lending field did the
2 bank act in good faith in its negotiations of that
3 agreement?

4 A Tell me about the agreement.

5 Q To release the lot.

6 A Did they act in good faith?

7 Q Yes.

8 A Well, they offered options and when it came
9 time to release, as I understood it, that is when
10 the agreement was signed but that was more of a
11 forbearance agreement with releases and the whole
12 nine yards of getting everything taken care of.
13 Forebearance agreements is, "Yes, we agree to
14 forebear but you have to agree to these things.
15 We're starting over, this is a novation of our
16 relationship. What has happened in the past, we're
17 not going to talk about anymore." I'm not sure
18 Miss Cribb understood that.

19 Q At this time was the loan in default?

20 A Not to my knowledge.

21 Q And from your review of the evidence was Miss
22 Peggy Wheeler-Cribb and South Causeway approaching
23 them to do a forbearance agreement or were they
24 approaching them to do a release of collateral?

25 A They wanted a release of collateral.

1 Q And do you feel that the release of
2 collateral would have been standard to include all
3 the modifications and agreements that would be
4 normally included in a forbearance agreement?

5 A It wouldn't be necessary, no.

6 Q And the facts as they are, would it follow
7 standard practice in the industry to include all of
8 those terms in just a release of collateral?

9 A Here again, this all should have been
10 discussed and negotiated and everybody should have
11 been clear before, before they came to the final
12 solution. I believe as a result of this the money
13 that was ultimately paid was actually used to fund
14 a cash interest rate reserve and in the past they
15 had been advancing the interest.

16 Q And part of the outcome of this Kennedy
17 Funding loan, according to the bank, was to
18 replenish the interest reserve account. Is that
19 correct?

20 A Yes.

21 Q Would there have been any need, in your
22 opinion, to replenish the interest reserve account
23 had the bank funded the \$550,000 per the commitment
24 letter?

25 A No, if they had funded the \$550,000 interest

1 reserve, no.

2 Q In dealing with commercial real estate is it
3 ever proper to release private and confidential
4 information to a third party?

5 A Well, banks shouldn't release private
6 confidential information to a third party unless
7 there is a reason to do so pursuant to a court
8 order or the borrower wants you to give information
9 to someone who is doing due diligence on something
10 they are doing, they have given the bank as a
11 reference. You don't release confidential
12 information.

13 Q And you have heard evidence and testimony
14 from Mr. Lyerly and Mr. Lovelace there is no
15 statute that says you can't do this, is that
16 correct?

17 A I'm not aware of it but the standard in the
18 industry is that you don't do it. Risk Management
19 Associates, which is the, now the International
20 Association of Risk Managers, used to be bank
21 credit officers, now it's risk managers. They have
22 a code of ethics of credit information exchange and
23 if you're a member of RMA you abide by that code of
24 ethics.

25 Q And in those code of ethics would it include

1 the release of confidential information?

2 A Well, you give out confidential information
3 only when there is a legitimate request, you know,
4 for that.

5 Q Would you consider the maturity date on a
6 note to be confidential information?

7 A Yes.

8 Q Would you consider the amount due on the note
9 to be confidential information?

10 A Yes.

11 Q Would you consider whether or not the bank is
12 going to renew the loan to be confidential
13 information?

14 A Yes.

15 Q Can you explain to the jury why the release
16 of this information is damaging to the borrower, in
17 your opinion?

18 A It could have the potential of being damaging
19 if someone is trying to use that information to
20 their own advantage.

21 Q And how could they use that information to
22 their advantage?

23 A Well, they would know how much is owed on a
24 piece of property, it might help them make an offer
25 of some sort.

1 Q In your opinion to a reasonable degree of
2 certainty in the commercial lending field did Wayne
3 Lovelace's disclosure of private financial
4 information, including the maturity date, the
5 amount owed on the note and the bank's decision to
6 not renew the note to the auction company and to
7 Don Thomas violate the standard of practices in the
8 industry?

9 A I would put it another way. I think
10 everybody should have understood that he was going
11 to disclose that to the auction company and that
12 could have been handled by talking to the borrower
13 and say have you disclosed to them that we're not
14 going to release it except for the amount of our
15 debt.

16 Q You would agree with me that the borrower's
17 right to share that information is far different
18 than the auction, I'm sorry, than the bank's right,
19 is that correct?

20 A Yes.

21 Q And would you agree that absent the
22 borrower's agreement to release that information
23 they should not --

24 MR. COLLINS: Object to the leading, Your
25 Honor.

1 THE COURT: Sustained.

2 Q If there was no agreement between the
3 parties, do you have an opinion as to whether the
4 bank should have released that information to Don
5 Thomas?

6 A I think there should have been an agreement
7 among the parties.

8 Q And absent that should they have unilaterally
9 given them that information?

10 A Well, my answer is no.

11 Q Thank you. Now, you have heard testimony
12 about the bank's involvement with Lincoln-Harris,
13 is that correct, of trying to sell the note?

14 A Yes.

15 Q And typically a note is a negotiable
16 instrument and it is normally allowed to be sold by
17 the bank. Is that correct?

18 A Correct.

19 Q However, have you seen or do you have an
20 opinion whether the bank's involvement in trying to
21 sell the note in this case was improper?

22 A If Lincoln-Harris had, had an offer or a
23 letter of intent that the bank knew about prior to
24 the close of the \$6,500,000 loan and had I been the
25 banker and Lincoln-Harris had approached me about

1 purchasing the paper I would have a disconnect, I
2 would say, "Wait a minute, you have had an offer,
3 albeit two years ago, you had an offer outstanding,
4 now if I give you this file information you would
5 use that, or would it be potentially used to make
6 an offer that would help, that would help you make
7 an offer to purchase the property if you don't buy
8 the paper," and Lincoln-Harris didn't buy the
9 paper, so they must not have liked the price or the
10 bank said no, that is not enough money.

11 It is my understanding there was another
12 offer by Lincoln-Harris which is substantially less
13 than the \$12,000,000 they had offered in 2008, and
14 I understand that the real estate market had
15 deteriorated considerably but still --

16 Q So, the fact, do you have an opinion whether
17 the previous offer put them on notice that they
18 should be, should have a higher due diligence
19 period for Lincoln-Harris if they approached them
20 to sell this note?

21 A Due diligence period?

22 Q Or required to look into whether they were a
23 potential buyer or what they were planning to do?

24 A Well, what I'm saying is that the bank was on
25 notice that Lincoln-Harris has made a substantial

1 offer or made an offer on a proposal or whatever
2 you want to call it two years prior to that and now
3 they have come in, as I understand, they were
4 introduced to the bank by Charles McCollum, and
5 then come in and they wanted to do due diligence on
6 the paper to see if they wanted to buy it.

7 So, to me, I say they have offered once, now
8 they are coming to buy the paper and they didn't
9 buy, what happens if they don't buy the paper, are
10 they going to use this information for some other
11 reason? I understand it was confidential but
12 confidentiality agreements, they don't tell anybody
13 about it, especially the person who owes the money,
14 the borrower, so that to me, disclosure is the name
15 of the game, you don't want to do anything in the
16 back door.

17 Q And considering the evidence you have heard
18 and Mr. Lyerly's testimony that although they had
19 the email they weren't aware of it, without any
20 further investigation did you find it improper for
21 them to release, to give this financial information
22 to Lincoln-Harris without at least calling Miss
23 Peggy?

24 A Well, they put her on notice by a letter that
25 someone was interested in purchasing the paper but

1 they didn't say who it was.

2 Q If she had inquired as to who it was do you
3 think maybe in your opinion in these circumstances
4 where this was a previous purchaser would it have
5 been in good faith to tell Miss Peggy that?

6 MR. COLLINS: Judge, maybe questions are not
7 proper for an expert witness.

8 THE COURT: Sustained.

9 Q Typically banks don't have the requirement to
10 tell who is going to purchase, tell a borrower?

11 MR. COLLINS: Objection, leading.

12 Q Do banks typically have the requirement to
13 tell the borrower who is purchasing the note?

14 A Typically not but papers are negotiated
15 difference ways, consumer papers are sold all the
16 time, home mortgages are sold all the time, but
17 when you get into commercial loans you typically
18 don't sell them and the ones that are sold are sold
19 because the bank has said, "We want to get out of
20 the trap."

21 Q Okay. And with the facts as they are in this
22 case they were at least on notice of a previous
23 purchaser and Miss Peggy asked them who it was, do
24 you think it would have been, in your opinion as a
25 banker, in this case a good idea to at least tell

1 her, "Yes, Lincoln-Harris, we know they are a
2 previous purchaser but we're taking precautions to
3 make sure they don't use this against you"?

4 MR. COLLINS: Judge, what a witness thinks is
5 a good idea isn't a legal standard upon which this
6 jury can make any decision in this case. We
7 object.

8 MR. GODDARD: I believe I asked his opinion,
9 Your Honor.

10 THE COURT: It needs to be, I mean, it is an
11 opinion based on his area of expertise, not just
12 his lay person opinion.

13 MR. GODDARD: I understand.

14 BY MR. GODDARD:

15 Q Do you have an opinion based on your
16 experience in the commercial lending field whether
17 there was a higher level of obligation related to
18 the disclosure of the bank, related to the
19 disclosure of South Causeway's private financial
20 information?

21 A I will put it this way. If Lincoln-Harris
22 had bought that paper the borrower would have known
23 who bought the paper and would have said, "Wait a
24 minute, you all sold my paper to somebody that had
25 a letter of intent or a possibility of a purchase

1 for \$12,000,000, what's going on here?"

2 Q And would that, in your opinion to a
3 reasonable degree of certainty in the commercial
4 lending field, would that have been, the facts of
5 this case, where First South Bank released this
6 information, knowing the purchaser, with nothing
7 more than the confidentiality agreement, was that
8 improper?

9 A I would have done it differently. I probably
10 would not have let Lincoln-Harris look at the
11 information.

12 Q In your opinion would you have done it
13 differently, in your opinion in the field should it
14 have been handled differently?

15 A Well, I think it should have been handled
16 differently by virtue of the fact I would have
17 handled it differently.

18 Q And is it your opinion you would have handled
19 it according to the standard --

20 THE COURT: You know --

21 MR. GODDARD: I can ask the question
22 differently.

23 THE COURT: Come up here.

24 (Unrecorded bench conference).

25 MR. COLLINS: Judge, we would like to note

1 our objection to questions put to this witness
2 about what he would do or what he thinks might have
3 been a good idea. We believe those type questions
4 are beyond the scope of what an expert witness is
5 allowed to testify to in a court of law.

6 THE COURT: All right. I'm going to sustain
7 the objection to the extent that Mr. Barkdale's
8 opinions need to be presented with regard to not if
9 he was the banker in this case, but as to the
10 industry of which he has expertise in.

11 BY MR. GODDARD:

12 Q In the commercial lending field, given the
13 facts of this case, do you feel it was improper, is
14 it your opinion to a reasonable degree of certainty
15 under the commercial banking, in the commercial
16 banking industry, that given these facts, they were
17 improper in releasing the private confidential
18 information to Lincoln-Harris?

19 A Yes.

20 Q Thank you. Should the bank ever be involved
21 in the business operations and decisions of its
22 borrower?

23 A No.

24 Q And typically is there any fiduciary
25 relationship between a bank and it's borrower?

1 A There shouldn't be.

2 Q Did you find in your opinion, in the
3 commercial lending field that this transaction
4 created a fiduciary relationship?

5 A No.

6 Q Do you feel there was a higher, higher level
7 of relationship between First South Bank and South
8 Causeway, given the terms of the loan?

9 MR. COLLINS: Objection, Your Honor. First
10 of all it's leading. Second, what he feels is not
11 appropriate evidence to be elicited in this case.
12 He asked him what do you feel.

13 THE COURT: Talk about the standard. Sustain
14 the objection.

15 Q What type relationship can be created by an
16 interest reserve account?

17 A Well, an interest reserve account, as stated,
18 is an equity, it is established because there is a
19 lack of equity in the transaction. Interest
20 reserve accounts are usually established where
21 there is a clearly defined way for this loan to be
22 repaid. I mean, you start out with an acquisition,
23 development and construction loan and you are in a
24 subdivision, they buy the land and they put in the
25 infrastructure, then they sell the lots, then they

1 repay the loan or they generate paper that repays
2 the loan and an interest rate reserve would
3 probably be appropriate there because that is what
4 is going to happen.

5 Now, if you get into a commercial situation
6 and have an interest rate reserve, why does the
7 bank want to lend itself its own income, because
8 they really don't earn their income until they get
9 cash to repay the loan? And in the analysis of the
10 situation of interest rate reserves, their loan
11 policy indicated it is basically not a wise
12 practice but if you have got that borrower that
13 has, has outside resources and they just want to
14 leverage it by doing this and we get paid anyway
15 whether this worked or not, in the final analysis
16 typically you would want to get at least 50 percent
17 in cash. I believe those are the words in the
18 interest reserve policy.

19 Q Does the bank lending the interest reserve,
20 are they creating their own equity in the
21 situation?

22 A Well, no. They are creating a loan, is what
23 it boils down to, but if you are doing interest
24 rate reserves, for instance, on a pure land loan,
25 then what you're really doing is speculating on

1 land, is the land going to be able to be sold, and
2 I think in reading First Palmetto's summary back in
3 March of 2007 they said, "This is coming up for
4 renewal in October and if we extend it another six
5 months in order to establish another interest
6 reserve we're going to need to get additional
7 collateral."

8 Q Is it ever appropriate in the, do you have an
9 opinion to a reasonable degree of certainty in the
10 commercial lending field, is it ever appropriate
11 for the bank's attorneys to be assisting in the
12 lease negotiations with the credit tenant?

13 A Well, the bank should not get involved in the
14 negotiation of the lease or the transaction. Now,
15 they certainly can approve a lease that had been
16 brought to them for consideration.

17 Q Would the advice and assistance of the bank's
18 counsel in negotiating a lease violate the standard
19 practice in the commercial banking industry, in
20 your opinion?

21 A Yes, if the lawyer did that.

22 Q Is it ever right, in your opinion to a
23 reasonable degree of certainty in the commercial
24 lending field, is it ever appropriate to use
25 foreclosure as a weapon against a borrower?

1 A Well, duress is an interesting concept, "If
2 you don't do something I'm going to foreclose on
3 you," or, "If you don't do something by 4:00
4 o'clock on Friday afternoon and give us these
5 mortgages we're going to put you out of business on
6 Monday." So, foreclosure, you foreclose only
7 because the loan has matured, you have sent your
8 demand letter, they are not able to pay by
9 borrowing from another source or selling something
10 that they own and you go into foreclosure. That's
11 the way that operates.

12 But you do it only because the loan has
13 matured, you made a demand letter. Now we've got
14 no option but to foreclose. Now, how can we do
15 something to work this out? Then you deal in good
16 faith and you get a forbearance agreement going
17 and you figure out a way to avoid foreclosure
18 because the last thing a bank wants to have is the
19 property.

20 Q In your opinion to a reasonable degree of
21 certainty in the commercial lending field did you
22 feel that the bank acted in good faith to in any
23 way work with them on this loan, leading up to the
24 maturity date?

25 MR. COLLINS: That is a legal conclusion,

1 Judge, that goes into the realm of Rule 408.

2 THE COURT: Come up.

3 (Unrecorded bench conference).

4 THE COURT: Ladies and gentlemen, we're going
5 to take a short, we're going to take a short break.
6 I'm going to put you to work, we're going to talk
7 about this foreperson thing. I'm going to get you
8 during this time that we're on a break to elect a
9 foreperson.

10 Let me just give you a little information
11 with regard to the duties of the foreperson.
12 Anytime you have a group of folks that are going to
13 be, you know, discussing, deliberating, making
14 decisions you need to have, rather than dealing
15 with twelve individuals, it is easier for the Court
16 to deal with one individual who represents the
17 group.

18 The foreperson is basically the spokesperson
19 for the jury so that if when you're in the back and
20 you are going through your deliberations or
21 whatever if any one of you has a question for the
22 Court then the foreperson is basically going to be
23 the spokesperson who is going to take that
24 question, write it out on a piece of paper, pass it
25 out to me, I will read the question. Depending on

1 the question, I may just write back my response, I
2 may have the foreperson come out and give the
3 response and take it back or I may have you come
4 out as a panel and give my response. It just
5 depends on what the question is. But the bottom
6 line is rather than deal with everybody
7 individually the foreperson is the representative
8 of the jury in dealing with the Court.

9 The other role of the foreperson is that when
10 you do begin your deliberations, anytime you're
11 having deliberations there needs to be one person
12 who starts and stops, starts and stops the
13 deliberations. I will tell you now and tell you
14 later that when you are deliberating this case
15 everyone must be present during the deliberations.
16 What I mean by that, if someone needs to excuse
17 themselves to use the restroom, you know, for
18 example, then the foreperson would say, "Okay,
19 let's stop having conversation about the case," and
20 then when that person returns, then, "Okay, let's
21 go ahead and start back," and you would start back.

22 What is important for you to know is this.
23 You are all equal members of this jury. In this
24 and all cases your verdict must be unanimous, so
25 the foreperson's opinion, decision, their vote, so

1 to speak, carries no more weight than anyone else.
2 You are all equal on the jury. It is just that,
3 like I said, when you have a group of folks it is
4 easier to deal with one spokesperson versus
5 everybody individually.

6 So, that is essentially the role of the
7 foreperson. It is not a difficult job, it is not a
8 task to fear. When you do get the case for your
9 deliberations there will be a verdict form, the
10 foreperson will fill out that verdict form that
11 reflects your decision as a whole, the jurors'
12 decision as a whole, and he or she will just fill
13 that out and then return it with your verdict when
14 the time comes.

15 So, when you go back for this break please
16 elect among you a foreperson. Anyone on the jury
17 is eligible for that position except the two
18 alternates. Other than the two alternates, anyone
19 is eligible to serve as the foreperson. When you
20 do have a foreperson elected, whoever that is, if
21 you would just write your name on a piece of paper
22 and pass it out to the bailiff and then he will
23 give me that information so I will have it. Then
24 when you return to the courtroom the foreperson
25 will occupy this first seat and then the rest of

1 you sit wherever you're comfortable. Okay? So,
2 I'm going to get you all to do that while we take
3 this recess, okay?

4 (The jury was excused from the courtroom).

5 THE COURT: All right, we're going to take a
6 short recess. Mr. Barksdale, you certainly are
7 welcome to step down from there if you need to.
8 The only thing is just don't have any conversation
9 with anyone about your testimony, sir?

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Okay, we'll take a short break.

12 (Recessed at 10:34 a.m.).

13 (Resumed at 10:50 a.m.).

14 THE COURT: For your information, ladies and
15 gentlemen, the foreperson is juror, juror number
16 270, Michael Vicas.

17 All right. Is the defense ready to proceed?

18 MR. GODDARD: Yes, Your Honor.

19 THE COURT: Is the plaintiff ready to
20 proceed?

21 MR. COLLINS: Yes, sir.

22 THE COURT: All right, please bring the jury
23 out.

24 (The jury returned to the courtroom).

25 THE COURT: All right, Mr. Vicas, thank you

1 for your willingness to serve as the foreman of the
2 jury.

3 Ladies and gentlemen, we're going to now
4 continue with Mr. Goddard's examination of Mr.
5 Barksdale.

6 BY MR. GODDARD:

7 Q Mr. Barksdale, in your expert opinion does
8 the failure to negotiate with the borrower prior to
9 the institution of foreclosure actions violate the
10 standard of care in the banking industry?

11 MR. COLLINS: Objection, Rule 408,
12 attorney-client privilege.

13 THE COURT: I'm going to sustain the
14 objection under Rule 408.

15 Q Mr. Barksdale, in summary of the testimony
16 today, is disclosure of, I'm sorry, is the, in your
17 expert opinion is the maturity date of a loan
18 confidential information?

19 MR. COLLINS: Asked and answered, Your Honor.

20 THE COURT: Overruled.

21 A Yes.

22 Q In your expert opinion is the bank's decision
23 whether to renew the loan or not confidential?

24 A Yes.

25 Q In your expert opinion --

1 THE COURT: Hold on. I allowed it on that.
2 If we're going back, if we're going to basically
3 recap all his testimony --

4 MR. GODDARD: My last question, Your Honor.

5 THE COURT: All right.

6 BY MR. GODDARD:

7 Q In your expert opinion is the amount owing on
8 the note confidential information?

9 A Yes.

10 MR. GODDARD: Thank you. No further
11 questions, Mr. Barksdale.

12 THE COURT: All right.

13 MR. COLLINS: May it please the Court?

14 THE COURT: Yes.

15 CROSS EXAMINATION BY MR. COLLINS:

16 Q Have you ever heard the old adage whose bread
17 I eat the song I sing?

18 A Yep, the bird chirp the --

19 Q You're making \$300 an hour?

20 A That's correct.

21 Q \$300 an hour. Now, the last point made by
22 counsel was that the amount of the loan balance was
23 confidential?

24 MR. GODDARD: Objection, Your Honor. May we
25 approach?

1 THE COURT: Yes.

2 MR. COLLINS: We made reference to this
3 already, Your Honor.

4 (Unrecorded beach conference).

5 BY MR. COLLINS:

6 Q Mr. Barksdale, you were provided with the
7 files of South Causeway as part of your workup and
8 your preparation to come into court and testify, is
9 that right?

10 A Yes, sir.

11 Q And you were given copies of the emails that
12 were exchanged between Mr. Wheeler and others and
13 Miss Cribb and others, isn't that right?

14 A I did receive emails, yes, sir.

15 Q And did you receive an email from Miss
16 Wheeler-Cribb to Mr. Robbie Buice regarding this
17 project?

18 A I would have to look at it to remind me if I
19 saw it or not.

20 Q Okay.

21 MR. COLLINS: Your Honor we have the actual
22 one but this is the blowup.

23 THE COURT: All right, sir.

24 Q I will show it to the witness, with the
25 Court's permission.

1 A Okay. This is from Wheeler to, I believe
2 that is Mr. Darwin Wheeler, to his mother.

3 Q That's right?

4 A Waiting on answer --

5 MR. GODDARD: Your Honor, may we approach
6 again?

7 MR. COLLINS: Judge, I will just move on to
8 something else, I just think the jury is probably
9 tired of all these breaks.

10 Q Mr. Barksdale, you testified earlier that
11 these code of ethics of the RMA were not violated,
12 didn't you, sir?

13 A As far as credit information exchange is
14 concerned, was that in my deposition, is this what
15 you're saying?

16 Q No, sir, I don't get to answer questions, I
17 just get to ask them.

18 A Okay.

19 Q Isn't it true --

20 A Is the question that I have been asked this
21 testimony?

22 Q My question is, didn't you say earlier that
23 the RMA code of ethics was not violated?

24 A I said that there is an RMA code of ethics
25 that governs credit information exchange.

1 Q And you said it wasn't violated, correct?

2 A I don't recall saying it was violated or not.

3 Q Well, let's ask you now. Was it violated?

4 A They disclosed information from their file to
5 a third party. The third party had not requested
6 that information. Credit information exchange
7 under the RMA code of ethics is governed by
8 requests, legitimate requests for information. As
9 I understand it, they volunteered the information
10 to the auction company.

11 Q Mr. Barksdale, do you recall giving a
12 deposition in this case?

13 A Yes, sir.

14 MR. COLLINS: Your Honor, let the record show
15 I have in my hand the original sealed deposition of
16 Mr. William Barksdale and I will now open it and
17 present it to the court. It is glued pretty tight.
18 Here we go.

19 Q Mr. Barksdale, you were, you asked to see
20 this before it was filed, didn't you?

21 A I read it, yes.

22 Q So, you know, you not only testified but you
23 reviewed it and confirmed it, right?

24 A I have not confirmed it, I haven't been asked
25 to.

1 Q You didn't change anything?

2 A No, sir.

3 Q Don't you think that is confirming it?

4 A I received a draft. The normal course of
5 events is the recorder sends it to me with the
6 erata sheets and those kind of things, I never
7 received that.

8 Q Well, you haven't changed anything?

9 A No, sir, I haven't.

10 Q Now, this was taken I believe on Friday, the
11 7th of September of this year. Correct?

12 A Yes, sir.

13 Q I'm going to hand you the original and I have
14 got a copy over here at my table. I invite you to
15 turn to page 133.

16 A All right, sir.

17 Q Take a look on line 9.

18 A I see that.

19 Q Read that question and then read your answer.

20 A The question is, "Did the bank violate any
21 code of ethics?" And I said, "Not to my
22 knowledge."

23 Q And then what did you say in answer to the
24 next question?

25 A You said, "Okay, did the bank violate any

1 privacy law?" "Not that I know of."

2 Q Thank you, Mr. Barksdale. Keep that.

3 Now, Mr. Barksdale, you know in this case
4 that Miss Wheeler-Cribb received numerous offers
5 for nine, ten, up to twelve million dollars to sell
6 this property?

7 A I know there was communication based on the
8 grid that you provided me at my deposition that
9 there were entities that were involved in offers of
10 some sort. I do not know the nature of any of
11 them.

12 Q Well --

13 A Concerning the possibility of either doing a
14 development, as I understand it, or of probably
15 maybe an outside purchase, but here again I
16 reviewed none of those.

17 Q Well, did you know that in response to the
18 \$12,000,000 offer Miss Cribb sent an email saying
19 we wouldn't be interested?

20 A I think I recall an email to that --

21 A Wouldn't be interested in 12 million. Now,
22 if you were the banker holding this mortgage and
23 you had a customer that was turning down offers
24 time and time again or letters of intent time and
25 time again that would have paid off the loan in

1 full would you become concerned?

2 A Well, I would have to know the tenor of all
3 those offers.

4 Q But would you be concerned?

5 A Well, I would be interested, certainly, if
6 those numbers are in fact correct and I knew all
7 the strings that were attached and the fees that
8 were paid and what they needed to do and whether
9 they had a development plan and how much time they
10 needed to analyze the situation. I would say maybe
11 these aren't real good offers or maybe they are, I
12 don't know, I don't have that information, so I
13 can't opine.

14 Q Well, let's say a bona fide real estate
15 development company with a proven track record
16 offers \$12,000,000 and Miss Cribb says, "We would
17 not be interested." Would that not cause you to be
18 concerned as her banker that she wasn't exercising
19 good judgment?

20 A Well, I mean, it would be up to her to do her
21 due diligence on whether it was a bona fide offer
22 and whether that person was qualified to make that
23 offer.

24 Q But when it came time to evaluate this loan
25 and consider whether or not to renew the loan

1 wouldn't you take into consideration the business
2 judgment of your customer and how they are handling
3 things?

4 A (No response).

5 Q Answer, please.

6 A I certainly would be interested in offers
7 they had had and maybe turned down but here again,
8 I don't know the reason behind turning them down.

9 Q Mr. Barksdale, First South Bank was not under
10 any obligation to renew that loan, were they?

11 A If it legally matured, no.

12 Q And it did legally mature, didn't it?

13 A It matured, yes.

14 Q And they sent a letter upon its maturity
15 telling Miss Cribb that the loan had matured?

16 A Yes, sir, they sent the demand letter.

17 Q They sent the demand letter, and so the loan
18 had matured, they have already told Miss Cribb they
19 are not interested in renewing it, they notify her
20 that they intend to proceed with foreclosure. What
21 else were they required to do? Anything you can
22 think of?

23 A No, they sent the demand letter.

24 Q Okay. Now let's go back to this situation
25 with the disclosures. Do you recall at your

1 deposition my asking you about that? Turn to page
2 152 of your deposition, if you would, please.

3 A I'm on 152.

4 Q Okay. Take a look at line six.

5 A Yes, sir.

6 Q Read to the jury the question I put to you
7 starting on line six.

8 MR. GODDARD: Your Honor, I object. I
9 believe unless he can show there is an inconsistent
10 statement, further introduction of his deposition
11 is improper.

12 MR. COLLINS: Okay. I tell you what, Judge,
13 I will make it real short.

14 THE COURT: Sustained.

15 BY MR. COLLINS:

16 Q Start at page 17, Mr. Barksdale.

17 A Page 17 or line 17?

18 Q Line 17. Before I ask you to read anything
19 let me ask you this. Didn't you tell us at your
20 deposition that Miss Cribb should have told the
21 auction company about the amount of her loan and
22 about the notice that she had already received that
23 the bank was not interested in renewing the loan
24 and that they would not accept partial release,
25 they would not give partial releases?

1 A Well, I think I have testified also that in
2 that situation all the parties should have been
3 forthcoming about the auction so that they all
4 would be cooperating.

5 Q Mr. Barksdale, didn't you tell us under oath
6 at your deposition that the bank had told her the
7 exact circumstances, that no extension of the
8 maturity date would be given and no partial
9 releases would be given, and I asked you is that
10 something Miss Cribb really needed to tell the
11 auction company before they proceeded with that
12 auction, and you said, "Well, everybody should have
13 known what's going on"?

14 A Yes, that is what I just said.

15 Q Okay. And that everybody includes the
16 auction company, doesn't it?

17 A Yes, sir.

18 Q Okay. So if the auction company needed to
19 know that and Miss Cribb didn't tell them and they
20 were acting as agents for Miss Cribb there wasn't
21 anything wrong with Mr. Lovelace having that
22 conversation with Mr. Thomas, was there?

23 A Would you ask that question again?

24 Q Yes, I will. If Miss Cribb should have told
25 them these things and if Mr. Thomas was Mrs.

1 Cribb's agent conducting the auction and Mr.
2 Lovelace calls Mr. Thomas and clarifies those
3 points, it won't be renewed, et cetera, Mr.
4 Lovelace didn't do anything wrong, did he, because
5 Mr. Thomas was her agent?

6 A I still maintain that all three parties in
7 that scenario should have had a discussion about
8 why we're having an auction and what is the
9 strategy of the auction and part of that input of
10 meeting among all three parties would have been the
11 bank's input that, yes, we have a matured loan and
12 yes, this is our release price.

13 Q How about answering the question for me, if
14 you would, please?

15 A Is anything wrong with him talking to them?

16 Q Right.

17 A Well, I think that it should have been
18 disclosed to the borrower that he was talking to
19 them. I think she should have known that.

20 Q He didn't violate any banking standard, did
21 he, Mr. Barksdale?

22 A I think it just violates --

23 Q Did it, Mr. Barksdale?

24 A No banking standards.

25 Q Thank you.

1 A If there is a banking standard for that but I
2 think the bank ought to --

3 Q Are you backing up on your answer now?

4 A No, I probably was thinking outloud, which is
5 a scary thing.

6 Q Well, you agree that what you might have done
7 differently as compared to what Mr. Lyerly and Mr.
8 Lovelace did doesn't rise to the level of being a
9 wrongdoing that would give rise to liability for
10 fraud or tortuous interference?

11 MR. GODDARD: Object, Your Honor. May we
12 approach?

13 THE COURT: No, I sustain your objection to
14 that question.

15 Q The fact you would service the loan
16 differently from Mr. Lyerly and Mr. Lovelace
17 doesn't really matter in this case, does it?

18 A The way that I would service a loan?

19 Q Yes.

20 A Well, I think Mr. Lyerly testified yesterday
21 this was a bad loan and they wanted out.

22 Q Yes, sir, but you're not answering my
23 question. My question was, does it make any
24 difference if you service it somewhat different
25 than they did, that doesn't matter, does it, sir?

1 A No, but their principles of problem loans and
2 workout --

3 Q Your answer is no, right?

4 A Yes.

5 Q Is that what you said?

6 MR. GODDARD: Your Honor, I think he is
7 allowed to explain his answer if he wants.

8 Q Do you want to explain that?

9 A Well, there are ways to handle problem loans
10 and workout and there are ways not to handle
11 problem loans and workout. You want to have the
12 one that has the most successful conclusion.

13 Q Yes, sir.

14 A And they testified it was a bad loan and they
15 wanted out and they weren't going to release for
16 anything but the total amount of the debt.

17 Q And that was their right, wasn't it?

18 A They could do that if they wanted to but I
19 think you should discuss it with the borrower and
20 everybody come to a meeting of the mind on what
21 they want to do. In fact I think in the testimony
22 they said auction is a bad thing.

23 Q An don't you agree with that?

24 A The worst auction in the world is a
25 foreclosure sale when the bank has to take title to.

1 it.

2 Q That's right but you agree an auction sale
3 attracts bottom fishermen?

4 A Yes.

5 Q People who want to buy for a steal of a
6 price?

7 A Absolutely. If you have a bad loan in your
8 bank there are going to be bottom fishers.

9 Q If you have a foreclosure auction or
10 otherwise?

11 A Well, you have exhausted your alternatives.

12 Q Now, Mr. Barksdale, there is a paragraph, I
13 believe it is paragraph 7.1, in the loan agreement
14 that outlines the event of default.

15 Can you find that for me, Mr. Floyd? I
16 believe it is up here in the stack. Is that a
17 typical provision in a loan agreement?

18 A A loan agreement will have event of default
19 along with affirmative covenant and all the normal
20 things.

21 Q And in addition to not paying the loan when
22 it comes due, there can be a default when other
23 things occur?

24 A Of course.

25 MR. COLLINS: Your Honor, I'm referring to

1 paragraph 7.1, page 15, number 13, I believe, and
2 it is in evidence as Plaintiff's 2, the loan
3 agreement.

4 Q This paragraph says, "Upon the occurrence and
5 continuation of an event of default the bank may
6 terminate all obligations of the bank to borrower,
7 including without limitation all obligations to
8 lend money under this agreement."

9 That's a typical clause in a loan agreement,
10 isn't it?

11 A If they commit a default, yes.

12 Q And not paying your property taxes is an
13 event of default, isn't it, sir?

14 A Yes, it's typically in a loan agreement.

15 Q And if a borrower abandons construction, this
16 one says borrower, where the borrower abandons
17 construction of the improvements with the intent
18 not to resume construction for a period of five
19 consecutive days. That is an event of default
20 under this loan agreement?

21 A According to that language, yes, it is.

22 Q So, do you recall the email that Mrs. Cobb
23 sent, I believe it is Defendant's Exhibit.

24 A Miss Cribb or Miss Cobb?

25 Q Miss Cribb. Did I say Cobb?

1 A Yes.

2 Q It's Cribb, Miss Wheeler-Cribb sent a letter,
3 an email to Mr. Wayne Lovelace, it's in evidence in
4 this case, and she says, "If you want or need to do
5 away with the construction part of the loan that is
6 fine." She advises Mr. Lovelace that she and her
7 son are not planning to develop this property, is
8 that right?

9 MR. GODDARD: Object to the question. I
10 believe that mischaracterizes the evidence.

11 THE COURT: He read it off the document that
12 is in evidence.

13 MR. COLLINS: I read it right off it. I
14 don't need to make that point further, Your Honor,
15 it has been made before.

16 BY MR. COLLINS:

17 Q Now, Mr. Barksdale, you remember when we took
18 your deposition I had in front of me the pleadings
19 called the defendant's answer, defendant's amended
20 answer and counter-claim. Do you remember that?

21 A Yes, sir.

22 Q And I handed it to you and I had a copy and
23 we went through it paragraph by paragraph, didn't
24 we?

25 A We did.

1 Q And the first thing that you agreed with me
2 about --

3 MR. GODDARD: Object to the form, Your Honor.
4 I think this is something we need too approach on.

5 THE COURT: All right.

6 (Unrecorded bench conference).

7 BY MR. COLLINS:

8 Q In your review of the documents and in the
9 submission of your opinions before the deposition
10 you stated opinions about the conduct of First
11 South Bank both in the inception of this loan and
12 in the servicing of this loan. Isn't that right?

13 A Yes, sir.

14 Q And isn't it true that you concluded, based
15 open everything you reviewed, there was nothing
16 fraudulent done by First South Bank?

17 MR. GODDARD: Objection to the form. That
18 again calls for a legal conclusion, Your Honor.

19 MR. COLLINS: He is an expert witness, Your
20 Honor.

21 THE COURT: What are you asking him?

22 MR. COLLINS: I asked him isn't it true that
23 he, after reviewing all the evidence, rendered the
24 opinion that nothing fraudulent was done by First
25 South Bank.

1 MR. GODDARD: Objection.

2 THE COURT: Sustain the objection. That is a
3 legal conclusion that is not in his field of
4 expertise.

5 BY MR. COLLINS:

6 Q Well, let me ask you this, Mr. Barksdale. Do
7 you consider yourself to be knowledgeable about
8 what constitutes bank fraud?

9 A From what perspective? A teller stealing
10 money?

11 Q Practices by a bank, lending money, servicing
12 loans that would be fraudulent?

13 A Well, I mean, I would have to have some, I
14 would have to consult legal counsel to give me the
15 definition but they would have to conspire and
16 damage and do all kind of things. I know people
17 have gone to jail for bank fraud, they did strange
18 things, like fraudulent loans to people that don't
19 exist and that kind of things.

20 Q You don't claim to have any expertise in what
21 practices by a bank would be fraudulent?

22 A I know of some situations that would be
23 fraudulent but --

24 Q Well, in this case did you see anything that
25 would be a situation --

1 MR. GODDARD: Objection, Your Honor.

2 THE COURT: Sustained.

3 Q Did First South Bank do anything, Mr.
4 Barksdale, that in your opinion would render their
5 note and mortgage unenforceable?

6 MR. GODDARD: Objection, Your Honor, again
7 calls for a legal conclusion.

8 THE COURT: Sustained.

9 Q You have said that there is no fiduciary duty
10 owed by a bank to its borrower. Isn't that right?

11 A There shouldn't be unless it's in the trust
12 department.

13 Q And did you know that the South Causeway
14 counter-claim includes a claim of breach of
15 fiduciary duty?

16 A I understand that was a claim.

17 Q So if there is no such duty there could be no
18 such valid cause of action.

19 MR. GODDARD: Objection to form, same
20 objection.

21 THE COURT: Sustained.

22 MR. GODDARD: Your Honor --

23 THE COURT: All right, you all step up here.
24 (Unrecorded bench conference).

25 MR. COLLINS: Judge, I need to clear this

1 with you.

2 (Unrecorded bench conference).

3 BY MR. COLLINS:

4 Q Miss Cribb was a business person who had
5 experience with other commercial loans, wasn't she?

6 A I know that she had borrowed money on
7 property before.

8 Q And she had served on a bank Board, hadn't
9 she?

10 A I think she served on an advisory Board,
11 which is not serving on a Board.

12 Q And do you recall seeing an email where she
13 stated essentially, "When I was on the Board banks
14 didn't do things like this," complaining in her
15 letter or email to Mr. Lovelace or Mr. Lyerly?

16 A I don't recall that.

17 Q Let's talk about the modification agreement.
18 I believe it is just called an agreement?

19 A Yes, sir.

20 Q This agreement contains a release that has
21 been read into the record a couple times. It is
22 real long and verbose.

23 A From the beginning of time.

24 Q Yes, sir, that's right. Now, is it not true
25 that when banks enter into modification agreements

1 they generally require a release clause to be
2 signed by the borrower?

3 A That would be standard, pretty standard
4 practice if you are going into an extension and
5 modification agreement or forbearance agreement,
6 yes.

7 Q And you understand that Miss Cribb was
8 represented at the closing of this loan by attorney
9 Doug Hinds, right?

10 MR. GODDARD: Objection to the form, Your
11 Honor.

12 THE COURT: You can ask him if he knows.

13 Q At the loan closing?

14 A At the loan closing, I'm sorry, I thought you
15 were talk about the agreement, I apologize. At the
16 loan closing, my understanding is that Hinds
17 represented South Causeway and the guarantors of
18 the interested parties, yes, sir.

19 Q And Mr. Gwin was there at the closing on the
20 modification agreement which also included the
21 Kennedy Funding loan. Right?

22 A Well, he was in the room but I don't know
23 whether he was representing them or not. I have
24 listened to a good bit of back and forth on that.

25 Q Yes, sir. But Miss Cribb is a woman who

1 understands -- well, Miss Cribb has demonstrated
2 that she knows how to hire a lawyer to represent
3 her in real estate transactions, do you agree with
4 that?

5 A I would say she has hired lawyers to
6 represent her in real estate transactions.

7 Q And do you know of any reason why the release
8 language contained in that agreement of April 10th,
9 2009, should not be enforceable?

10 MR. GODDARD: Objection, Your Honor, calls
11 for a legal conclusion.

12 THE COURT: Sustained.

13 Q Now let's talk about the Lincoln-Harris
14 matter. Mr. Gwin, I think, not Gwin, but Mr.
15 Curry, Mr. Greg Curry represented Lincoln-Harris,
16 isn't that right?

17 A I have heard his name. I understand he lives
18 at DeBordeaux and has something to do with
19 Lincoln-Harris, that is about all I know.

20 Q Now, banks can and often do sell notes.
21 Right?

22 A Not usually commercial notes.

23 Q Well, banks can?

24 A It's a negotiable instrument and they can
25 sell them, yes, sir.

1 Q It's a negotiable instrument because it
2 starts off pay to the order of?

3 A That's correct.

4 Q That makes it negotiable, and I don't know if
5 you were asked this, banks can sell a note without
6 even telling the borrower that they have done so.
7 Isn't that right?

8 A They do it all the time.

9 Q Okay. And before anybody buys a note they
10 typically come in and want to see certain documents
11 so they can evaluate whether they want to buy that
12 note?

13 A They want to do due diligence on it.

14 Q Due diligence, and it is not improper for
15 that bank to show loan documents to that
16 representative of the entity contemplating buying
17 that note. Isn't that right?

18 A It is not improper.

19 Q Okay. So, you heard the testimony of Mr.
20 Lysterly yesterday that this representative of
21 Lincoln-Harris was not shown any personal financial
22 statements, any tax returns or other personal
23 documents. Correct?

24 A Correct.

25 Q Now, Lincoln-Harris thereafter made an offer

1 on this property for substantially less than they
2 had offered before and that offer was rejected,
3 wasn't it?

4 A You are talking about the buying of the note
5 or the property?

6 Q I'm talking about the offer made by
7 Lincoln-Harris to buy this property from Miss
8 Cribb.

9 A Yes, it was substantially less than the
10 \$12,000,000, by 8,000,000.

11 Q Yes, and she didn't take it, did she?

12 A No, sir.

13 Q So you're not here to testify that Miss Cribb
14 or South Causeway suffered any damage as a result
15 of the viewing of this loan file by a
16 representative of Lincoln-Harris and First South
17 Bank, are you, sir?

18 A Well, I think Lincoln-Harris was bottom
19 fishing.

20 Q But they didn't catch anything, did they?

21 A No.

22 Q So --

23 A Neither did the bank.

24 Q And therefore, I was making this point to
25 somebody yesterday, if a truck goes by 90 miles an

1 hour and doesn't hit anybody, nobody has got a
2 lawsuit against the truckdriver, do they?

3 A Except the patrolman.

4 Q Oh, yes, the highway patrolman, that's
5 different, but if the truck doesn't hit you and
6 you're not harmed you don't have a lawsuit against
7 that truck?

8 A No tortuous interference with my body.

9 Q No tortuous -- how about any tortuous
10 interference with contracts in this case?

11 MR. GODDARD: Object to the form, legal
12 conclusion.

13 THE COURT: Sustained.

14 A I'm sorry, I used the wrong word.

15 Q Now, you know that Miss Cribb has complained
16 that she was misled and tricked into shortening the
17 maturity date on her loan, isn't that right?

18 A Yes.

19 Q And you have seen the affidavit Miss Cribb
20 gave?

21 A Yes, I have read it.

22 Q And you know she gave that under oath?

23 A That's the way you do affidavits.

24 Q That's right. And she said in her affidavit
25 that at the closing, this will be the Kennedy

1 Funding closing, "We discovered that in addition to
2 the \$300,000 payment, First South Bank was taking
3 back a year from the South Causeway, LLC,
4 promissory note and demanding an acceleration of
5 the maturity date"?

6 A This was in 2009.

7 Q I believe you're right, it was April 10th,
8 2009.

9 A Yes.

10 Q Have you seen the emails where Miss Cribb
11 told Mr. Lyerly or Mr. --

12 A Yes, sir. She made the choice to go with
13 option two, if that is what you're getting at.

14 Q That's right. I was trying to find the
15 blowup of that. She made the option to go with
16 option two and she clearly indicated that she
17 therefore understood, that is in that email to Mr.
18 Lovelace, she comes back and says, "I will take
19 option two," but Mr. Lovelace in his email, find
20 that for me, in his email where Mr. Lovelace says,
21 "Option two will involve a new one year shorter
22 maturity date"?

23 A Yes, sir.

24 Q Isn't that right? Here it is.

25 A Yes, I've seen that.

1 Q I want the jury to see it. Option two
2 requires \$250,000 less in outlay than option one
3 because it shortens the maturity date of the loan
4 one year and will require payment in full on
5 7/5/2010 maturity date instead of 7/5/2012 maturity
6 date. And she made that choice, didn't she?

7 A She chose that, yes.

8 Q So you don't take any exception about how the
9 bank handled their negotiations with Miss Cribb
10 with regard to that modification agreement, do you,
11 sir?

12 A Well, here again I think the bank at that
13 point in time realized they had a, to quote them, a
14 bad loan on their hands and they wanted to get out
15 and shortening the maturity would be one way to do
16 it.

17 Q But my question was do you take exception to
18 how the bank handled their negotiations with Miss
19 Cribb with regard to that modification agreement?

20 A Well, they certainly offered her two choices
21 and she accepted a choice.

22 Q Do you have an exception to how they handled
23 it, sir?

24 A I just answered that, they gave her a choice
25 and she took the choice.

1 Q Do you take any exception with that?

2 A No.

3 Q Thank you. And do you understand that the
4 Kennedy Funding loan was made so that Miss Cribb
5 could pay some personal bills?

6 A I understand that that is what some of the
7 money was used for.

8 Q So this wasn't a loan to allow them to
9 develop that property, it was a loan for them to
10 pay personal bills, right?

11 A It was a loan for multiple purposes.

12 Q But with regard to the bank's position,
13 releasing that lot, the bank made a proper business
14 decision, did they not, to require some of that
15 Kennedy Funding money to come to fund an additional
16 interest account at the bank?

17 A They made a business decision to require some
18 consideration for releasing that collateral.

19 Q And that is a solid, sound and ethical
20 business practice, isn't it, sir?

21 A Yes, if you require consideration to release
22 collateral.

23 Q And this letter that was handed to Miss
24 Cribb, I need some help from one of my able
25 associates, the letter that was presented at the

1 closing, signed by Mr. Lovelace, I believe counsel
2 for the defendant characterized that as -- Exhibit
3 12, this letter right here, this is the letter that
4 was hand delivered to Miss Cribb -- no, that's not
5 it.

6 MR. FLOYD: It's a plaintiff's exhibit.

7 Q Here it is. This letter was hand delivered,
8 it says so, June 25th, 2008, to Miss Cribb and to
9 Mr. Wheeler and it says, "Please let this letter
10 serve to confirm our agreement as to when and under
11 what conditions First South Bank will agree to
12 release lot 4, Pawley's Island, South Carolina,
13 which partially secures our loan to South
14 Causeway."

15 A I recall that note.

16 Q That is not imposing a new condition on her,
17 is it?

18 A No. It is saying, "This is what we'll do to
19 release that loan," excuse me, release that
20 collateral.

21 Q It was an explanation and a clarification and
22 a confirmation of the earlier agreement that, "We
23 will give you the opportunity to release that lot 4
24 at some future time." That wasn't placing
25 additional requirements on her, that was giving her

1 a break, wasn't it?

2 A In fact it said under what circumstances it
3 would release that. It didn't say anything about
4 \$300,000 in additional interest rate reserves, it
5 said, "Once these other conditions had been met we
6 would consider releasing it."

7 Q But that is giving her a break, isn't it,
8 that is to say releasing collateral, isn't that
9 right, wouldn't that be a break for her?

10 A Well, it says, "This is the circumstances
11 under which we will release the collateral if
12 everything else happens the way we anticipate it to
13 happen."

14 Q And that is giving her a break, isn't it?

15 A It's giving her the opportunity to get
16 collateral released.

17 Q It is giving her a break, isn't it?

18 A Not necessarily a break.

19 Q It is giving her an advantage that she
20 otherwise wouldn't have?

21 A It's giving her an opportunity to have
22 collateral released.

23 Q All right. Mr. Barksdale, as you sit here
24 today, having reviewed all the files and heard all
25 the testimony, do you have any doubt about the fact

1 that Miss Cribb understood that lot 4 had to be
2 part of the collateral when she closed that loan on
3 June 25, 2008?

4 MR. GODDARD: Objection, object to the form,
5 legal conclusion and calls for speculation.

6 MR. COLLINS: Judge, it is an opinion based
7 on the evidence.

8 THE COURT: I don't know that he can testify
9 as to what she knew.

10 MR. COLLINS: Let me rephrase it.

11 BY MR. COLLINS:

12 Q Do you, Mr. Barksdale, based open everything
13 you have reviewed, do you, sir, have reason to
14 opine that there had been an inappropriate
15 inclusion of lot 4 in the collateral for this loan
16 closed on June 25, 2008?

17 MR. GODDARD: Same objection, Your Honor.

18 THE COURT: Overruled, that's an appropriate
19 question.

20 A They already had it as collateral, they just
21 folded the loan in with the package for the new
22 development loan and they needed it to meet the 65
23 percent advance on a land loan.

24 Q So, there wasn't anything wrong there, was
25 there?

1 A There was nothing wrong in asking for that.

2 Q And nothing wrong with the way it was
3 consumated, was it?

4 A Well, it was consumated, the documents were
5 signed.

6 Q But there wasn't anything wrong with it, was
7 there?

8 A No.

9 Q Thank you. Mr. Barksdale, you are not
10 offering, sir, are you, any opinion on what caused
11 the depreciation in value of the South Causeway
12 property?

13 A No. I mean, the market caused the property
14 to depreciate in value.

15 MR. COLLINS: Thank you, Mr. Barksdale.

16 THE WITNESS: Thank you, sir.

17 MR. GODDARD: Briefly, Your Honor.

18 THE COURT: All right.

19 REDIRECT EXAMINATION BY MR. GODDARD:

20 Q Mr. Barksdale, you were asked some questions
21 about disclosing the information to the auction
22 company and you, I believe your testimony was all
23 three parties, the standard practice in the
24 industry in your expert opinion would be all three
25 parties to get together and have a joint plan. Is

1 that correct?

2 A Correct.

3 Q Okay. In your opinion, in your expert
4 opinion in the industry, if that had not occurred,
5 all three parties had not gotten together, would it
6 be standard then for the bank to unilaterally make
7 that decision and release that information?

8 MR. COLLINS: Objection, speculation.

9 THE COURT: Overruled.

10 A They all should have gotten together,
11 everybody should have been party to that auction
12 where everybody understood everybody else's role.

13 Q I understand. Mr. Barksdale, in the event
14 that didn't happen, is it standard practice in the
15 industry for the bank, in your expert opinion --

16 A The answer to that is no, in the absence of
17 them doing that.

18 Q So if there wasn't an agreement and they all
19 didn't get together, then it wasn't standard
20 practice for the bank to do it unilaterally,
21 correct?

22 A That's my opinion.

23 Q And you were asked some questions about the
24 modification agreement and whether it was, whether
25 you had, I think, an exception to it. Is that

1 correct?

2 A I don't recall exactly.

3 Q He asked you that.

4 A Do I take any exception to it? I don't
5 recall what the words were.

6 Q My question to you, that inclusion of that
7 \$300,000 as a collateral release, it would not have
8 been necessary to put that in the interest reserve
9 account had it been funded as per the commitment
10 letter, is that correct?

11 A If the 850,000 had been funded, no.

12 Q At that point --

13 A In fact they wouldn't have needed that much
14 because interest rates had pretty much hit bottom.

15 Q If there was monies to be paid to release
16 this collateral it would have been standard in the
17 industry, in your expert opinion, to apply that to
18 the principal, is that correct?

19 MR. FLOYD: Objection, Your Honor, leading.

20 THE COURT: Overruled.

21 A Well, where they put it would be up to them
22 but they were actually funding, they are funding an
23 interest rate reserve because in the past they had
24 funded it by loan proceeds. They loaned themselves
25 their own interest, is what it boiled down to.

1 Q If the interest reserve was properly funded
2 per the commitment letter where would that \$300,000
3 have gone?

4 MR. COLLINS: That is speculation, Your
5 Honor.

6 THE COURT: Sustained.

7 Q In your expert opinion typically if monies
8 are not being used to fund an interest reserve
9 account --

10 THE COURT: Keep that question in mind, you
11 all step up here.

12 (Unrecorded bench conference).

13 BY MR. GODDARD:

14 Q Mr. Barksdale, you were asked some questions
15 about the code of ethics applicable in this case
16 and about your deposition testimony, whether the
17 code of ethics apply, that you were asked about,
18 apply to the sharing of information to third
19 parties in this case.

20 A Well, the code of ethics is for the, is for
21 the exchange of credit information and you respond
22 only when you get a legitimate request from
23 someone. I mean, they have given you as a
24 reference or you are trying to find out and confirm
25 that, "Yes, I bank with XYZ bank and give them a

1 call," and the credit department will call and they
2 will ask about the relationship and you will give
3 them the general information about that
4 relationship. You don't tell them what the exact
5 balance is in the checking account or the exact
6 balance on a loan but you do confirm that they do
7 have a relationship and it is satisfactory and the
8 general magnitude of that relationship. You are
9 not, it is confidential information but you get
10 information as a reference.

11 Q And that would apply if someone was inquiring
12 to you about that information, correct?

13 A Yes, and there are exceptions. You can't
14 pick up the phone and call for business development
15 reasons unless you absolutely disclose that.

16 Q It would be a violation to pick up the phone
17 and release that information to third parties?

18 MR. COLLINS: Objection to leading.

19 THE COURT: Sustained.

20 Q Following that same code of ethics, in your
21 expert opinion would it then, if it violated it to
22 share it, give it to third parties who call you,
23 does it violate it to unilaterally give that
24 information to people not calling you?

25 A It doesn't violate it if it is appropriate.

1 I see what you're saying. If they are calling for
2 business development reasons, I think it would
3 violate it if it is not a legitimate request for
4 information from the third party.

5 Q And did you find in your expert opinion that
6 this was a legitimate reason to give this
7 confidential information to the auction company?

8 A Here again, the auction company should do
9 their due diligence on the transaction and that
10 means talking to the customer that owns the
11 property and then they should discuss, well, what
12 are the release prices going to be, and of course
13 the bank is in a position they have got their
14 mortgage, it doesn't make any difference what they
15 sell it for, they propose to sell it for, if it
16 doesn't meet the minimum reserve it is not going to
17 get released because there is a mortgage on the
18 property and anybody that is going to be bidding
19 should do due diligence. There is a recorded
20 mortgage in place, that is public record.

21 Q You were asked whether they sent a demand
22 letter in this case in, I believe it would have
23 been July, 2010, about the default, is that right?

24 A Yes.

25 Q Did you ever see any other demand letter

1 throughout the term of this loan?

2 A I don't recall seeing a demand letter, no.

3 Q Okay. And you were asked about the
4 collateral released. I just want to be clear. All
5 the releases typical in a forbearance agreement
6 are not typical in a collateral release, correct? ,

7 MR. COLLINS: Objection, leading.

8 THE COURT: Sustained to the leading, Mr.
9 Goddard.

10 Q Is it typical -- I'm sorry. What type of
11 information is typical in a collateral release?

12 A It could be just a simple release of a
13 mortgage, satisfaction of the mortgage and they get
14 consideration for that and they move on. They
15 don't really have to have an agreement.

16 Q And what type information is in a
17 forbearance agreement?

18 A Well, a forbearance agreement is going to
19 have recitations about what the borrower is going
20 to do, what the bank is going to do and probably is
21 going to have releases and mutual consents and
22 those kind of things. It is a result of
23 negotiation and a workout.

24 MR. COLLINS: Judge, we object. There was no
25 forbearance agreement involved in this case, it's

1 irrelevant.

2 THE COURT: Come up here.

3 (Unrecorded bench conference).

4 BY MR. GODDARD:

5 Q Was it your understanding that the
6 modification here was a collateral release or a
7 forbearance agreement?

8 A Well, it was a collateral release, yes.

9 MR. GODDARD: I don't have any further
10 questions. Thank you.

11 THE COURT: All right, thank you very much,
12 sir. You may step down.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Any objection to Mr. Barksdale
15 being excused?

16 MR. COLLINS: We will be happy for him to
17 head back to Columbia.

18 THE WITNESS: I was going to Isle of Palms.

19 THE COURT: Wherever you would like to go.
20 Thank you, sir.

21 (Witness excused).

22 THE COURT: All right, ladies and gentlemen,
23 it's almost ten minutes until 12:00. We're going
24 to break a little early for lunch today, let you go
25 ahead and get lunch. I will ask you to be back

1 here at 1:15. That gives you almost an hour and a
2 half, right at an hour and a half. Please be back
3 at 1:15 and we'll resume. Have no conversation
4 about the case, see you back at 1:15.

5 (Jury excused from the courtroom).

6 THE COURT: How many more witnesses for the
7 defendant?

8 MS. BYRD: One.

9 MR. GODDARD: She may take awhile.

10 THE COURT: No question about it, you all
11 haven't gotten through any witness in less than
12 four or five hours.

13 THE COURT: Mr. Barksdale, you have the
14 dubious distinction of being the quickest witness
15 we have had during this entire trial.

16 THE WITNESS: I got a lot of experience.

17 THE COURT: You did good.

18 THE COURT: Okay. Anything before we break?
19 We'll start back at 1:15.

20 (Recessed at 11:51 a.m.).

21 (Resumed at 1:22 p.m.).

22 THE COURT: All right, anything before we
23 proceed?

24 MR. COLLINS: Judge, I would like to know, in
25 order to make plans, what arrangement I can make

1 about my class on Monday at 4:00 o'clock. My
2 client has agreed that if we get far enough along
3 to have summations Monday morning, that I can leave
4 and come back to Columbia, but if that doesn't work
5 out, I mean --

6 THE COURT: I have already told you you're
7 going to make that class.

8 MR. COLLINS: Sir?

9 THE COURT: I have already told you you're
10 going to make the class.

11 MR. COLLINS: I really appreciate that, Your
12 Honor.

13 THE COURT: We'll honor that, just have a
14 seat. Give me some, you all help me out with what
15 we've got ahead of us here.

16 MS. BYRD: Your Honor, we have our final
17 witness Miss Peggy and then we'll rest.

18 THE COURT: All right. Do you all anticipate
19 any further testimony?

20 MR. COLLINS: Well, Your Honor, we have, yes,
21 we probably need to recall Mr. Lyerly, consider
22 doing that, and then we have Mr. Brooks here, he is
23 our expert.

24 THE COURT: All right. We'll just see where
25 we're at as we get to the end.

1 MR. COLLINS: Your Honor, I understand you're
2 going to meet with counsel on Sunday afternoon to
3 go over the verdict form?

4 THE COURT: We had talked about that, doing
5 that maybe Sunday evening.

6 MR. COLLINS: If I may be excused from that,
7 I trust my able associate to handle that.

8 THE COURT: Okay.

9 MR. COLLINS: Thank you.

10 THE COURT: That's fine.

11 THE COURT: All right, anything from the
12 defense before we get started?

13 MS. BYRD: No, sir, Your Honor.

14 THE COURT: All right, bring them out.

15 (The jury returned to the courtroom).

16 THE COURT: All right, ladies and gentlemen,
17 welcome back and I hope everyone had a good lunch
18 break and are ready to get back to work. We will
19 now proceed with Miss Byrd with her next witness.

20 MS. BYRD: Your Honor, we call Miss Peggy
21 Wheeler-Cribb.

22 THE COURT: Ma'am, if you would, please come
23 around to the stand.

24

25

1 PEGGY WHEELER-CRIBB, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please be seated, state your full
4 name for the record.

5 THE WITNESS: Peggy Wheeler-Cribb.

6 DIRECT EXAMINATION BY MS. BYRD:

7 Q Miss Peggy, could you please introduce
8 yourself and tell the jury a little bit about your
9 background?

10 A I am a preschool teacher, I taught preschool,
11 I had my own Happy Times school for 33 years, two
12 sessions, 20 children in each class. I worked as a
13 school guard at a school crossing to help children
14 cross the road, to get in school before I went to
15 my preschool class, and in the afternoons I went
16 back to school crossing again.

17 I was married to Will Wheeler, who is
18 deceased and he is the father of my daughter Diane
19 Wheeler who is sitting on the second row, in the
20 black top, and my son Darwin Wheeler who is on the
21 back row, and my daughter has a son Jason who has
22 been here but he works at the Brandon Agency and he
23 had to be at work today, and then I have a ten year
24 old grandson now, but my first husband died and I
25 was single for eight and a half years, then I

1 married C. L. Cribb who is on the back row.

2 And after I was married to, after I married
3 C. L. I retired from preschool and I saw several
4 special needs kids in our church so I went to our
5 minister and asked him if I could start a Sunday
6 School class for special needs kids and he gave me
7 his blessings, so I did and then we started up a
8 whole program, we have an after school program now,
9 started out with five kids, we now have 18 with two
10 hired workers.

11 I don't know if I left anything out.

12 Q You covered a lot. Do you currently work?

13 A I do. I host at a funeral home for wakes and
14 funerals and I clean beach houses on Saturdays.

15 Q Miss Peggy, have you ever held yourself out
16 as a real estate developer?

17 A No, ma'am.

18 Q Would you tell the jury a little bit about
19 how you came to know Mr. Wayne Lovelace?

20 A We first had a relationship with him with
21 First Palmetto for five years, he was the only
22 person I talked to at First Palmetto five years, he
23 handled everything I needed and I trusted him.

24 Q Miss Peggy, are you a little nervous today?

25 A I am, very.

1 Q Is this the first time you have testified?

2 A No, I have done it one other time. I was
3 subpoenaed and I was nervous then, too.

4 Q Mr. Lovelace, did he work with you, while he
5 was at First Palmetto, on the actual purchase of
6 the 19 acres?

7 A We had a very close working relationship.

8 Q And when did Mr. Lovelace first contact you
9 about moving your loan?

10 A I think he called me or he wrote me and told
11 me he was moving to First South Bank and then
12 shortly after that I received a letter and he told
13 me he would like to bring the bank president down
14 to meet me and my son, so we went to lunch, he did
15 bring him down, I agreed, and --

16 Q And do you recall if that was a meeting in
17 April of 2008?

18 A It was.

19 Q And what did you discuss with Mr. Lovelace
20 and Mr. Lyerly at that meeting?

21 A Well, I made it very clear to them that the
22 property was appraised at \$11,000,000 and that I
23 thought that was enough for it to stand on its own
24 and that I had worked very hard to not cross
25 collateralize any properties and I did not want to

1 cross collateralize, that I wanted the property to
2 stand on its own.

3 Q What, if anything, did the bank tell you
4 about their commitment to the project?

5 MR. COLLINS: Objection, Your Honor. Statute
6 of Frauds, hearsay.

7 THE COURT: Let me hear the question again.

8 MS. BYRD: What if anything did the bank tell
9 you about their commitment?

10 THE COURT: That's not hearsay. Proceed,
11 overruled.

12 MS. BYRD: Thank you, Your Honor.

13 BY MS. BYRD:

14 Q Go ahead.

15 A First Palmetto told us they would like to
16 have a bank on the property so Mr. Lovelace told me
17 he was very familiar with the property and he
18 wanted to introduce it to his president, that they
19 would like to help me develop the property, that
20 they would see me through to the duration of it,
21 and I asked him what happens, because he had told
22 me that this was one of the biggest loans they had
23 ever made, I said what happens if when we get an
24 anchor, what do we do if we can't develop the rest
25 of the property, and he told me that they had

1 insurance companies and other agencies that he
2 could go to --

3 MR. COLLINS: Your Honor, this is improper
4 testimony.

5 THE COURT: Come foreward.

6 (Unrecorded bench conference).

7 THE COURT: All right,.

8 MR. COLLINS: Your Honor, our objection is
9 that independent of the loan agreement, commitment
10 letter, the note and the mortgage the bank cannot
11 be obligated by alleged oral representations that
12 have not been reduced to writing and we would ask
13 that you note a continuing objection to anything
14 along those lines while this witness testifies.

15 THE COURT: All right, sir. And I will note
16 that plaintiff objects to any testimony regarding
17 oral negotiations between the plaintiff and the
18 defense and that that objection, and I have
19 overruled the objection but rather than having you
20 to have to pop up I'm going to reserve your right
21 on the record, I'm going to note that that
22 objection is an ongoing objection to any testimony
23 regarding any oral alterations or changes or
24 anything regarding the negotiations.

25 MR. COLLINS: Thank you, Judge.

1 THE COURT: All right.

2 MS. BYRD: Thank you, Your Honor.

3 BY MS. BYRD:

4 Q Again, Peggy, do you remember the question or
5 would you like me to repeat it?

6 A You might want to restate it.

7 Q What, if anything, did the bank tell you at
8 that meeting with regard to their commitment?

9 A They told me that they wanted to see the
10 project through to the duration, they were very
11 interested in it, and I never heard of the
12 insurance company before but he told me they had
13 insurance companies and other agencies they could
14 probably go to to get up to \$20,000,000 to finish
15 the project, that I did not need to worry.

16 Q You mean as the lender?

17 A Yes.

18 Q And why was it so important to you that this
19 property stand on its own?

20 A I had just gone through the process, and Mr.
21 Lovelace knew it, of un-cross collateralizing my
22 properties and I thought they all had values to
23 stand on their own.

24 Q And did you work with anybody to do that, to
25 uncross collateralize the properties?

1 A Yes. Mr. Neal Motoene from New Jersey worked
2 with me and Mr. Lovelace to help me get that all
3 uncross collateralized.

4 Q And why did you believe it was important to
5 have those properties without a mortgage?

6 A Because I told him at that meeting that, you
7 know, we were, and I told him, "I really think this
8 is kind of premature because we do not have an
9 anchor store at this time and if we were to have an
10 anchor store and they didn't open on time, then we
11 would need a fallback," and I used the instance,
12 our church right across the street, I was on the
13 building program with the church and we had a plan
14 and we had planned to have it done in a year and we
15 didn't have it done in a year, it was another year
16 and another million dollars to finish the church,
17 so I knew that that was a possibility, that we may
18 not open on the date.

19 Q And after the meeting did First South Bank
20 make any other contact with you?

21 A When I returned home from the lunch there was
22 a huge bouquet of flowers sitting on my desk and I
23 looked at my husband and I said, "Now, I know you
24 didn't do this," I said, "Apparently some of the
25 renters must be celebrating an anniversary or

1 birthday," and he said, "No, they are to you." So
2 I opened the card and it said, "We're looking
3 forward to serving you, First South Bank."

4 Q And after that meeting what did you
5 understand that the bank would be willing to do?

6 A Whatever I needed.

7 Q And did they ask you to send them any
8 documents?

9 A Yes, they did.

10 Q Did you send that?

11 A I sent all our financial statements, I put
12 them in contact with my accountant and with Steve
13 Strickland with Earth Works and asked him to give
14 them any information they needed on what we had
15 already done and were doing on the property.

16 Q After you sent those documents did First
17 South Bank send you a commitment letter?

18 A Yes.

19 Q And was the commitment letter consistent with
20 what you discussed with the bank at lunch?

21 A No.

22 Q What was different?

23 A They had put the lot 4 on the commitment
24 letter.

25 Q And when you saw that what was your response?

1 A I was upset and I called him and he told me
2 he would fix it.

3 Q Who did you call?

4 A Mr. Lovelace.

5 Q And again, what was his response?

6 A He said he would fix it.

7 Q Do you remember, when he said he would fix
8 it, did you understand, what did you understand he
9 meant?

10 A I thought that meant take it off. That would
11 be the only thing that would fix it for me.

12 Q Okay. And do you recall when this loan
13 closed?

14 A I think it was June, I believe.

15 Q June, 2008, is that right?

16 A I believe so.

17 Q Do you recall who was present at the closing?

18 A When we went into the attorney's office my
19 attorney Doug Hinds was sitting at the table, my
20 son came with me, and there were three bankers at
21 the table.

22 Q Was one of those Mr. Lovelace?

23 A Yes, Mr. Lovelace and two other bankers were
24 at the table.

25 Q Did you have an opportunity to review the

1 documents at the closing?

2 A I did not. He handed me the documents in the
3 presence of everybody at the table.

4 Q And did you read it?

5 A I read it, I stepped over to the window, and
6 said I was not happy.

7 Q Why were you not happy?

8 A Because it included lot 4 and he told me he
9 would remove it.

10 Q Did he provide you with any document
11 regarding the lot 4, the release of lot 4?

12 A Not at that time.

13 Q Did he give you at closing a hand delivered,
14 did he hand deliver you a letter?

15 A Yes.

16 Q And did that relate to the lot 4?

17 A Yes.

18 Q And did you tell Mr. Lovelace that you
19 objected to lot 4 being included?

20 A I did. I even asked, because something came
21 up about rollback taxes which we told them there
22 were none, and then they wanted to know if the
23 taxes were paid and I said, "Yes, since we had
24 these issues, let's wait two weeks to do the
25 closing," and Mr. Lovelace said he had brought

1 these people from the bank and it needed to be done
2 that day.

3 Q And when you asked Mr. Lovelace about the
4 letter what did he tell you?

5 A About removing lot 4?

6 Q Yes.

7 A He said it was just a formality and as soon
8 as we got a contract from an anchor store he would
9 release it.

10 Q Miss Peggy, did you feel any pressure at that
11 closing?

12 A Well, my attorney said to me, because I was
13 so upset, he said, "Miss Peggy, they have told you
14 that they will be with you to the duration," so --

15 MR. COLLINS: Your Honor, we object to
16 anything her lawyer told her. That is definitely
17 hearsay.

18 THE COURT: Sustained, I agree.

19 Q Miss Peggy, did you feel pressured to close
20 that day?

21 A I did. When the bankers left I looked at my
22 son and my attorney, I said, "I feel like I have
23 been attacked by vultures."

24 Q And nonetheless, you signed those documents,
25 didn't you?

1 A I did. We had already paid off First
2 Palmetto, and told them, our loan was in good
3 standing with them, I could have asked them to
4 renew it, but Mr. Lovelace asked me to go with him
5 to his bank and he had already paid off that loan,
6 so what was I to do?

7 Q You felt like you didn't have any choice?

8 A I didn't feel like I had a choice.

9 Q And as a part of the loan closing did you
10 sign a certificate or affidavit?

11 A Yes.

12 Q Did you sign a great deal of documents that
13 day?

14 A Oh, yes.

15 Q After, after the closing can you tell the
16 jury what efforts you made to develop the property?
17 What were you all doing on the property?

18 A We were constantly working with Earth Works.
19 We, I had called Roger Henderson with Lowe's Foods
20 myself and asked him if he would be willing to work
21 with me and he said he would and he met with me and
22 Earth Works. I met with Joe Young about putting in
23 a traffic light, we were hauling dirt in and out,
24 we were constantly, it wasn't a day we didn't work,
25 except weekends and sometimes we worked the

1 weekends.

2 Q And at that time were you, had you put in the
3 actual infrastructure, the roads and sewer?

4 A We had planned for the service entrance to be
5 in the back, we had planned to have a bike route
6 through it. I mean, we have the plans, we had the
7 plans to have a little park where we could have
8 mini concerts and it was to be an ongoing, I mean,
9 it was to be a 24 hour project, we wanted stuff
10 going on in it all the time.

11 Q And at this time were you negotiating a lease
12 of the property?

13 A We were with Lowe's Foods, with Mr. Roger
14 Henderson.

15 Q And did anyone from the bank or their
16 attorney assist you in negotiating that lease?

17 A They asked to see the contracts and we sent
18 them back and forth and we have red line copies
19 where they marked them, where they received them
20 and reviewed them and sent them back, their
21 thoughts on them.

22 Q And at some point do you recall whether the
23 bank froze your loan?

24 A Well, Mr. Lovelace called me and asked me,
25 first we had called him and asked him to come to a

1 meeting with us and our attorney to make sure we
2 were following everything that they wanted done and
3 he did not respond. Then he called me and he said
4 he would like for my son and myself to meet them in
5 Columbia and I asked why, and he said, "We're not
6 going to be able to move forward with your loan."
7 I said, "What do you mean, you signed a contract
8 with us, how can you not move forward with my loan,
9 it doesn't make any sense, I mean, we have a signed
10 contract." And he said, "Well, we are just not
11 going to be able to honor it." I said, "I'm not
12 coming to Columbia, you are welcome to come to
13 Georgetown, meet with me and my attorneys," so he
14 did and my attorneys were probably more shocked
15 than I was, I thought they were going to fall out
16 of the chair.

17 Q And that meeting was sometime in the
18 beginning of October of 2008?

19 A Yes, ma'am.

20 Q And prior to that conversation with Mr.
21 Lovelace had you asked Mr. Lovelace whether or not
22 there was anything that you were doing or not doing
23 under your loan?

24 A I did.

25 Q And what was Mr. Lovelace's response?

1 A He did not respond.

2 Q After you were informed by the bank that your
3 loan was terminated what effect did that have on
4 your development plans?

5 A It killed it.

6 Q And then what did you decide?

7 A I put it on the market.

8 Q To sell the property?

9 A Yes.

10 Q And did you list it with any real estate
11 agent?

12 A I did, with Robbie Buice, and I think he was
13 with Prudential at the time.

14 Q And throughout the time of your listing with
15 Mr. Buice did you keep Mr. Lovelace and the bank
16 informed of what was going on with the property?

17 A I did. They had every offer that I received,
18 they received it.

19 Q Who is Will Hudson?

20 A I never met him but he called me and made me
21 an offer which was for the full amount but the
22 terms were very extended and I had been burned by
23 people holding the property long term and trying to
24 market it and then changing their mind. I told him
25 that the terms were not anything I could adapt to

1 and he said he had talked to my banker and my
2 banker said I should do it.

3 Q Should do what?

4 A Should accept his offer.

5 Q As a result of that call did you call Mr.
6 Lovelace?

7 A I called him and told him to back off, leave
8 me alone and let me market my property, that he
9 needed to stay out of my business.

10 Q And in about November of 2008 did you go back
11 to the bank and request an additional loan?

12 A I did.

13 Q And what was the bank's response?

14 A They told me they were not willing to help
15 me.

16 Q And what did you do?

17 A I called my friend Neal Motoene in New Jersey
18 and asked him if he could find me a loan, what I
19 was afraid was going to happen happened, we didn't
20 have an anchor store and we needed money to live on
21 or I was going to lose everything. So he found me
22 Kennedy Funding.

23 Q And you said he found Kennedy Funding. Is
24 that a lending company?

25 A It is.

1 Q And did they agree to give you a loan?

2 A Well, I had to pay a \$50,000 application fee
3 before they would review me for a loan and that was
4 nonrefundable.

5 Q And did you pay that?

6 A I did.

7 Q And what collateral did Kennedy Funding want
8 for their loan?

9 A They wanted lot 4.

10 Q And did you, is that the same lot 4 that
11 First South Bank had under their mortgage?

12 A Yes.

13 Q Is that right?

14 A Yes.

15 Q Did you ask or approach the bank about
16 releasing that lot?

17 A I did.

18 Q What was the bank's response?

19 A They told me no.

20 Q And did they subsequently agree to do that?

21 A Well, Mr. Motoene called them and they
22 refused to talk to him but he did tell me that they
23 would talk to me now.

24 MR. COLLINS: Judge, hearsay, it's
25 irrelevant.

1 THE COURT: Sustained.

2 Q If you could, just tell me what you know,
3 okay?

4 A Okay. I called them back and they sent me an
5 option, told me they would release it.

6 Q And was that for \$500,000?

7 A Yes.

8 Q And so did you then proceed with your Kennedy
9 Funding loan?

10 A I did.

11 Q I think you have already told us you paid
12 \$50,000 for them to consider it?

13 A Yes.

14 Q And after the \$50,000 was paid did First
15 South Bank then contact you with alternative
16 options to release the collateral?

17 A They did but --

18 Q You don't deny that you received those two
19 options, do you?

20 A No, I do not.

21 Q At the time that you saw those two options
22 from the bank did you understand the difference
23 between the two options?

24 A I looked at the dollar mark, I knew that we
25 needed the money and we had to do it or I was going

1 to lose the \$50,000 I had paid and I thought that
2 would just buy us more time to try to sell the
3 property.

4 Q And did you understand that one option would
5 require that you give up a year on your loan?

6 A I did not understand that.

7 Q And did the bank tell you that that \$300,000
8 was necessary to replenish an interest reserve
9 account which you had?

10 A They did.

11 Q And did that make sense to you?

12 A I told him it did not make sense to me
13 because I had \$500,000 in reserves.

14 Q And was that a portion of the \$850,000 that
15 we talked about in the commitment letter?

16 A Yes, it was.

17 Q And did the bank send an agreement with
18 regard to the \$300,000 and the collateral release?

19 A They did.

20 Q And did you discuss that agreement with an
21 attorney?

22 A I did not.

23 Q When did you first understand that the full
24 loan would become due in July, 2010, rather than
25 2011?

1 A After I left the closing I called Neal
2 Motoene in New York and was reading the papers to
3 him and he said, "You know what that means, they
4 have taken a year off your maturity?"

5 Q After you realized they had taken a year off
6 your maturity what did you do?

7 A I decided to have an auction.

8 Q And who did you hire to help you with the
9 auction?

10 A Don Thomas and Chuck Cooper, Christy's
11 Realty.

12 Q And did you meet with Mr. Thomas and Mr.
13 Cooper to develop a plan for the auction?

14 A I did.

15 Q And what plan did you come up with with Mr.
16 Thomas and Mr. Cooper, what did they tell you would
17 be the best way to do that?

18 A Well --

19 MR. COLLINS: This is hearsay.

20 THE COURT: Absolutely. Sustained.

21 Q As a result of your conversation and
22 discussion what was the plan you developed to
23 auction the property?

24 A We planned to try to auction it as a whole,
25 and if that did not work we would divide it into

1 lots.

2 Q And do you know how many lots?

3 A There was four lots, I think that's right. I
4 sat down with Mr. Thomas and we decided on the
5 price and marked the lots.

6 Q Miss Peggy, I will show you what has been
7 marked as Defendant's Exhibit 3, and this is the
8 original copy of the auction agreement that you
9 signed. Is that right?

10 A Yes, it is.

11 Q Now, Miss Peggy, I want to ask you in front
12 of the jury if you could turn to the first page of
13 the document. Do you see there is, do you see that
14 there is white out on the front page?

15 A Yes.

16 Q Okay. And using the back page, are you able
17 to see what the prices are that you originally set,
18 and if not that's fine, too?

19 A It's --

20 Q Can you see numbers there?

21 A Yes, 1 --

22 Q You can see there are numbers there, direct?

23 A One is 1.1, one is 2.5, and one is -- I
24 really can't make them out.

25 Q That's fine. But you can see there are

1 numbers there?

2 A Right.

3 Q And do you know what the circumstances were
4 for --

5 A I think I know what the prices were, I think
6 I can remember them.

7 Q Okay.

8 A 1.4, 1.5 and 2.5 and 1.1, I believe.

9 Q And added up that totals?

10 A 6.7 million was the total.

11 Q As the total for the large parcel?

12 A Right.

13 Q And did you, in speaking with Mr. Thomas and
14 Mr. Cooper, did you discuss, did you tell them
15 exactly the amount that was owed to First South
16 Bank?

17 A No, I did not.

18 Q Okay. Why not?

19 A Well, I'm pretty sure they thought I had
20 another year to sell it.

21 MR. COLLINS: Judge, that's speculation.

22 THE COURT: Sustained.

23 Q Why did you not tell Mr. Thomas and Mr.
24 Cooper how much was owed on the loan?

25 A Because I didn't want them to think we were

1 having a fire sale.

2 Q And did you tell them the maturity date?

3 A I did not.

4 Q For the same reason?

5 A The same reason.

6 Q And did you become aware of a conversation
7 between Mr. Lovelace and Mr. Cooper?

8 A I did.

9 Q I'm sorry, Mr. Thomas. Is that right, was it
10 Mr. Cooper or Mr. Thomas?

11 A Mr. Thomas.

12 Q And what was your response to that
13 conversation?

14 A I was livid.

15 Q And is that the conversation in which Mr.
16 Lovelace disclosed --

17 MR. COLLINS: Judge, she can't testify about
18 that -- Judge, I withdraw the objection. Side bars
19 are taking a lot of time. I don't want to take the
20 time.

21 THE COURT: Stay away from hearsay, that is
22 all I'm saying.

23 THE WITNESS: I received a phone call from my
24 son who received a phone call from Chuck Cooper, so
25 I called him myself and asked them, and Mr. Don

1 Thomas told me --

2 MR. COLLINS: Judge --

3 BY MS. BYRD:

4 Q Just a moment. Hearsay is when you testify
5 about what somebody else told you and it is not
6 admissible in court.

7 A I'm sorry. So, I can't tell you what Don
8 Thomas told me?

9 Q No. The jury has already heard that. So, if
10 you will just tell me what you did as a result?

11 A I called Mr. Wayne Lovelace.

12 Q And --

13 A And asked him what business he had going to
14 my real estate agent and telling them my personal
15 business.

16 Q And what was his response?

17 A He said he felt like it was a duty and he had
18 not done anything wrong.

19 Q That is what Mr. Lovelace told you?

20 A Yes.

21 Q And as a result did you then go back and meet
22 with Christy's and Mr. Thomas and Mr. Cooper?

23 A I did.

24 Q And what did you all do?

25 A Well, we both thought it was stupid but he

1 said he had to mark the prices that the bank had
2 given him, so all of them had to be marked with the
3 same identical price, no matter if they were one
4 acre or five acres.

5 Q And looking at the contract, what price did
6 you set them at, what are they marked at on there?

7 A They are all marked at 4.8 million each.

8 Q Regardless of the size or location?

9 A One acre or five acres or seven acres.

10 Q And did the auction proceed?

11 A It did.

12 Q And prior to the auction taking place did you
13 receive any offers on the property?

14 A Yes.

15 Q And that was during the time the auction was
16 being -- when was that?

17 A When it was being marketed.

18 Q And the auction did go forward, is that
19 right?

20 A It did.

21 Q And did you pay the auction company for their
22 work?

23 A I did.

24 Q And were there any sales as a result of the
25 auction?

1 A No.

2 Q And did there come a time when the bank
3 informed you that they were planning to sell your
4 loan to a third party?

5 A Yes, they did.

6 Q And how did they communicate that to you?

7 A Mr. Lovelace called me and told me there was
8 a third-party individual that was interested in
9 buying my loan, and again I was livid and asked him
10 why and who it was and he refused to tell me.

11 Q So, you asked the identity of the third
12 party?

13 A I did.

14 Q And again what was Mr. Lovelace's response?

15 A He said that he had a confidentiality clause
16 with him and he could not give it and I said, "I'm
17 your customer, how can you have a confidentiality
18 clause with somebody about my loan when I'm your
19 customer," and he would not give it to me.

20 Q At some point did Mr. Lovelace tell you that
21 it was Mr. McCollum?

22 A He called and asked me if I would meet with
23 this gentleman who was remarketing it for the
24 people who wanted to buy it and he asked me if I
25 would meet with him and I told him no to start with

1 and he called me probably two more times and talked
2 me into meeting with Mr. McCollum.

3 Q And did you meet with Mr. McCollum?

4 A I did.

5 Q And what did you discuss with him?

6 A We never discussed buying the loan, we just
7 really chit-chatted.

8 Q Did you ever learn at that time who, before
9 this litigation was filed, the bank was negotiating
10 with?

11 A I asked him who his customers were, he said
12 they were at the Master's and they did not have
13 phones on them.

14 MR. COLLINS: Hearsay.

15 THE COURT: Sustained.

16 Q We don't need to know what he told you.

17 A Okay.

18 Q Did you ever learn that Lincoln-Harris, I
19 mean before the present lawsuit did you learn that
20 that was the company looking to buy your loan?

21 A No, but I did recognize Mr. McCollum, he had
22 been to my house before and he admitted it and he
23 was also at the auction.

24 Q And if it had been disclosed to you that it
25 was Lincoln-Harris that was negotiating the loan

1 sale --

2 MR. COLLINS: Speculation, Judge.

3 THE COURT: Finish your question.

4 Q If it had been disclosed to you that
5 Lincoln-Harris was the party negotiating the loan
6 sale would you have recognized that name?

7 A Absolutely.

8 MR. COLLINS: Objection.

9 THE COURT: She asked would she have
10 recognized the name.

11 MR. COLLINS: Yes.

12 THE COURT: Overruled.

13 BY MS. BYRD:

14 Q Who is Lincoln-Harris?

15 A Lincoln-Harris is a development company who
16 had made me an offer of \$12,000,000 two years
17 prior.

18 Q But you didn't take that prior offer, you did
19 not know that it was Lincoln-Harris that was
20 reviewing your loan file?

21 A No, I did not.

22 Q Miss Peggy, do you believe that as a result
23 of Lincoln-Harris' review of the loan documents,
24 your loan documents, and Mr. Lovelace's disclosures
25 to third parties that you have been damaged?

1 A I believe --

2 MR. COLLINS: Your Honor, objection.

3 THE COURT: Hold on.

4 THE WITNESS: I'm sorry.

5 MR. COLLINS: We object. She's a fact
6 witness, this is an opinion question that is being
7 sought an answer to and we submit it is improper.

8 THE COURT: You can ask her what her damages
9 are, not what she thinks they might have been,
10 whatever, "What are your damages," you can ask her
11 that.

12 BY MS. BYRD:

13 Q What are your damages?

14 A Well, the difference between 12 million and
15 four million that they offered me after the
16 auction.

17 MR. COLLINS: Objection.

18 THE COURT: You all come up here.

19 (Unrecorded bench conference).

20 THE COURT: Ladies and gentlemen, I need you
21 to step back in your jury room. Don't have any
22 conversation about the case, we'll have you back in
23 just a little bit.

24 (The jury was excused from the courtroom).

25 THE COURT: All right, we're going to be in

1 recess for a minute. We're going to talk about it
2 before we go on the record.

3 MR. FLOYD: Yes, Your Honor.

4 (Recessed at 2:04 p.m.).

5 (Resumed at 2:12 p.m.).

6 THE COURT: Thank you, ladies and gentlemen,
7 have a seat.

8 MS. BYRD: Your Honor while the jury is out
9 we have a question.

10 THE COURT: All right.

11 MS. BYRD: Your Honor, we're going to offer
12 this next document as our next exhibit, the offer.

13 THE COURT: I assume you say it is a hearsay
14 document?

15 MR. COLLINS: Yes, sir.

16 THE COURT: How is it not hearsay?

17 MS. BYRD: It is an offer, which is not
18 hearsay by definition, an offer is not hearsay,
19 just showing that he made the offer. Your Honor, I
20 will give you a case cite, I had no idea that there
21 would be any dispute on that.

22 MR. COLLINS: Judge, Mr. McCollum is a local
23 witness, lives in DeBordeaux, they could have him
24 here.

25 MS. BYRD: We could have him, we didn't

1 believe and don't believe we need him to put an
2 offer in.

3 THE COURT: Show me the rule.

4 MS. BYRD: Okay, it is 803.

5 THE COURT: I looked at 803 but I don't see
6 an exception regarding an offer.

7 MS. BYRD: Your Honor, also, I'm sorry, I
8 have the cite now, this is in the South Carolina
9 evidence handbook, the cite is Wilson versus
10 Gordon, 73 SC 155.

11 MR. FLOYD: Would you repeat that.

12 MS. BYRD: Sure, Wilson versus Gordon, 73 SC
13 155. And Jones versus McNeil, 18 SC, this an old
14 case, 466.

15 THE COURT: All right. It appears that Rule
16 803, Subsection 15, would allow that as an
17 exception to hearsay.

18 MR. FLOYD: Your Honor, if I may, that
19 doesn't effect the interest in real property, so an
20 offer to purchase it doesn't, I don't understand
21 how the rule applies.

22 THE COURT: It says a statement contained in
23 a document purporting to establish or effect the
24 interest in property or effects an interest. That
25 establishes an interest in property.

1 MR. FLOYD: Thank you, Your Honor.

2 THE COURT: Those are the words. It
3 establishes their interest in the property.

4 MR. FLOYD: But it is an offer to purchase, I
5 don't understand how that effects an interest in
6 the property at all.

7 THE COURT: It establishes an interest, it
8 establishes their interest in the property.

9 MR. FLOYD: That she owns it.

10 THE COURT: It establishes their interest in
11 the property. Who is that, Lincoln-Harris?

12 MS. BYRD: Yes, Your Honor.

13 THE COURT: It establishes Lincoln-Harris'
14 interest in the property.

15 MR. FLOYD: I think -- that's fine, Your
16 Honor.

17 THE COURT: All right.

18 Anything else?

19 MS. BYRD: No, sir, Your Honor, thank you.

20 THE COURT: All right, bring the jury in.

21 (The jury returned to the courtroom).

22 THE COURT: All right, you may proceed.

23 MS. BYRD: Thank you, Your Honor.

24 BY MS. BYRD:

25 Q Peggy, before the break I asked you have you

1 been damaged. What are your damages as a result of
2 this?

3 A Well, I have had to, I was offered 12,000,000
4 and now I was offered 3,000,000.

5 Q And I have shown you what has been marked,
6 pre-marked for identification as Defendant's Number
7 27. Will you tell the jury what that document is?

8 A It's from Charles McCollum, representing
9 Lincoln-Harris.

10 Q What is the date of that document?

11 A July the 2nd, 2010.

12 Q And what is the document?

13 A Do you want me to read it?

14 Q What does it say? Just summarize it for the
15 jury, what is that document?

16 A Do you want me to read it?

17 THE COURT: Tell her what it says, ma'am.

18 A An outright purchase for the sum of 4,000,000
19 in cash at closing or a purchase for lesser price
20 at 3,000,000 but providing the landowner to
21 participate in development and sale in five years
22 of the project which would result in a purchase
23 price of 4.8 million.

24 Q And that is the offer that was submitted to
25 you by Mr. McCollum as an agent of Lincoln-Harris?

1 A Yes, ma'am.

2 Q Miss Peggy, Mr. Collins has asked, remarked
3 and you have heard the testimony about offers that
4 were made to you on this property, that you
5 rejected. Do you recall hearing that in this
6 court?

7 A Oh, yes, ma'am.

8 Q And can you, I want to ask you specifically
9 about the contract with Crescent that we discussed.
10 Tell the jury what that contract was about.

11 MR. COLLINS: Judge, the document speaks for
12 itself.

13 THE COURT: Overruled.

14 A The day that I signed on the loan I had a
15 telephone call on the way home from someone who
16 worked in the mapping and zoning office.

17 MR. COLLINS: Judge, hearsay.

18 THE COURT: She cannot testify as to what
19 someone told her.

20 Q Miss Peggy, did you just simply refuse to
21 accept that offer?

22 A No, ma'am, I did not accept that offer and
23 they tie it up for nine to ten months. We had, Mr.
24 Wilkins went to every planning and zoning meeting
25 with me, we had the property zoned for out parcels,

1 for an anchor store, we had the bike path put in,
2 we had all the roads, everything outlined. I
3 attended a faith training conference in Alabama the
4 week we were supposed to close on the property, I
5 flew home a day early to close on the property, I
6 was in my car going to the closing when Mr. Wilkins
7 called me and told me that they had --

8 Q Don't tell me what anybody else told you but
9 as a result did that property, did you sell the
10 property?

11 A It did not close.

12 Q Okay. Was your concern -- what was your
13 concern about some of these offers that have been
14 discussed?

15 A Well, they all wanted nine months to a year
16 and the bank had even told me not to do that but
17 the bank had recommended I take this one, that they
18 were bankable and not banking with them and didn't
19 even get a deposit from them.

20 Q Miss Peggy have you ever been rude or been
21 nonresponsive to someone that called and made an
22 offer on this property?

23 A No, ma'am. I have wasted many, many hours at
24 my dining room table.

25 Q Have you ever stiff armed anyone that made an

1 offer on this property?

2 A No, ma'am.

3 Q Briefly going back, when you moved your loan
4 from First Palmetto to First South what was the
5 status of your loan at First Palmetto?

6 A I was shocked. I have never missed a
7 payment, never been late on a payment, I might add.
8 I didn't know, I was shocked that Mr. McCollum was
9 out trying to market my property at the time I was
10 trying to have an auction.

11 MS. BYRD: No further questions. Please
12 answer any questions Mr. Collins or other counsel
13 may have.

14 MR. COLLINS: Thank you.

15 CROSS EXAMINATION BY MR. COLLINS:

16 Q Miss Cribb, that First Palmetto loan didn't
17 require payment, did it, it had an interest reserve
18 set up and it was being carried the same way as
19 this First South Bank loan?

20 A No, sir, not the first loan, it was not. We
21 made payments.

22 Q Mr. Lovelace was the loan officer who handled
23 that loan at First Palmetto?

24 A We had had two loans there.

25 Q You know what kind of loan that was.

1 A I really don't know. I trusted him and
2 relied on him and it hasn't been fruitful.

3 Q Miss Cribb, you haven't called a single
4 bidder who came to the action sale as a witness,
5 have you?

6 A I relied on my attorneys to call whoever they
7 need to and I think they relied on documents.

8 Q But you and your lawyers have not presented
9 and don't, and will not present anybody who went to
10 the auction, as a witness in this case?

11 A We have a list of them, you can see them if
12 you would like to see it, sir.

13 Q Miss Cribb, just answer my question, if you
14 would. If you need to explain it I will understand
15 but you're not going to call a bidder to testify as
16 a witness in this case, are you?

17 A I will be glad to and I will be glad to show
18 you video with Mr. McCollum --

19 MR. COLLINS: Judge, please instruct the
20 witness.

21 THE COURT: Ma'am, his question is you're not
22 calling a bidder from the auction to testify in
23 this trial this week, and that is a yes or no
24 answer.

25 THE WITNESS: I didn't call anybody, my

1 attorneys did.

2 BY MR. COLLINS:

3 Q All right. And you don't have a single
4 witness who was a potential bidder who said
5 anything like, "I talked to Mr. Thomas, I learned
6 information about South Causeway," you don't have
7 any potential bidder to call as a witness either,
8 do you?

9 A I did try to find one and they told me that
10 they still had to do business --

11 MR. COLLINS: Judge, this is hearsay.

12 THE COURT: You're not allowed to tell what
13 someone else told you, ma'am.

14 Q Miss Cribb, you don't have a real estate
15 appraiser to come and testify in this case for you,
16 do you?

17 A I have real estate appraisals.

18 Q Miss Cribb, please answer my question. If
19 you need to explain them the Court will let you.
20 But you haven't called and you are not going to
21 call a real estate appraiser to testify in this
22 trial, are you?

23 A I think we have one listed to call.

24 Q Miss Cribb, you don't have anybody coming
25 from Lincoln-Harris to testify in this trial, do

1 you?

2 A I wouldn't think anybody would come to
3 testify for me when they are out marketing my
4 property when I'm trying to sell it.

5 Q Miss Cribb, you're telling this jury that
6 there was all manner of impropriety involved in the
7 disclosure of information to Lincoln-Harris, you
8 could have gone up there and lined up Mr., what was
9 his name, Mr. Greg Curry, but we're not going to
10 hear any testimony from Mr. Greg Curry at this
11 trial, are we?

12 A I wouldn't think so because he was marketing
13 my property at the same time I was trying to hold
14 an action.

15 Q Miss Cribb, First South Bank wanted you to
16 sell your property so you could pay off their loan,
17 didn't they?

18 A No, sir.

19 Q They didn't?

20 A I think they wanted to sell it.

21 Q They would rather just sit there holding this
22 bad loan, tying up their mortgage foreclosure that
23 has been lasting over two years?

24 A They interfered with my sale every time I had
25 one.

1 MR. COLLINS: Your Honor, I ask that this
2 document be marked as plaintiff's next.

3 BY MR. COLLINS:

4 Q Miss Cribb, this is a little short email
5 marked as Exhibit 26 and I ask you if you recognize
6 that? Is that an email you sent?

7 A Yes, sir.

8 MR. COLLINS: Your Honor, we offer it in
9 evidence, Plaintiff's 26.

10 MS. BYRD: No objection, Your Honor.

11 THE COURT: All right, without objection,
12 Plaintiff's 26.

13 (July 2, 2008 Email marked and received in
14 evidence as Plaintiff's Exhibit Number 26).

15 BY MR. COLLINS:

16 Q This is an email that you sent to Wayne
17 Lovelace July 2nd, 2008, at 12:37 p.m., re,
18 Lincoln-Harris deal. This was sent shortly after
19 you got that \$12,000,000 offer from Lincoln-Harris?

20 A Yes, sir. The bank recommended I not take
21 this offer because they wanted to tie it up for
22 nine or ten months to a year.

23 Q You are telling this jury that First South
24 Bank recommended to you that you not take that
25 offer?

1 A Yes, sir, they did.

2 Q You have never said that before today, have
3 you, Miss Cribb?

4 A Yes, sir, I have.

5 Q Miss Cribb, let me let you read that to the
6 jury.

7 A They didn't put any earnest money down, they
8 not give me any indication that they were
9 interested in --

10 MR. COLLINS: Judge, would you --

11 THE COURT: Miss Cribb, you answer questions,
12 he asked you to read that document to the jury and
13 I need to get you to listen to the question and
14 answer the question, please. If you have to
15 explain an answer I will give you that opportunity.

16 Q Please read it.

17 A It is from Wheeler-Cribb, sent Wednesday,
18 July 2nd, 2008, 12:37 p.m., to Wayne Lovelace,
19 subject, re, Lincoln-Harris deal, causeway
20 property. "Information only. We would not be
21 interested in those terms."

22 MR. COLLINS: Your Honor, if I may I would
23 like to retrieve that from the witness and hand it
24 to the foreman of the jury and let the jurors see
25 it.

1 THE COURT: Yes, sir.

2 Q Now, Miss Cribb, this email doesn't say, "I'm
3 going to engage Lincoln-Harris in further
4 negotiations and see if I can work out a deal
5 because they have offered me the highest price
6 anybody has ever offered me on this property." You
7 didn't say that, did you?

8 A No, sir. We had done it.

9 Q Miss Cribb, this is a very curt email that
10 says, "We would not be interested"?

11 A Because we had sat for hours at my dining
12 room table discussing it.

13 Q Miss Cribb, you know that most big developers
14 or real estate companies who buy substantial
15 multi-million dollar tracts of land make offers and
16 include in their offer a period called a due
17 diligence period. You know about that, don't you?

18 A I also thought they put down --

19 Q Could you answer that? You know --

20 A I don't know that.

21 Q You don't know what a due diligence period
22 is?

23 A Yes, sir, I do. We had due diligence.

24 Q And a due diligence period allows that party
25 to come down to Georgetown, check on the

1 availability of water and sewer, check on the
2 zoning, check on the other available services that
3 might be needed and to find out if there are any
4 problems associated with this property such as
5 environmental problems, that sort of thing, so they
6 know what they're getting if they consummate the
7 deal, and that is good business, isn't it, Miss
8 Cribb?

9 A Yes, sir, and I sent them all that
10 information, everything we had already done.

11 Q But real estate companies like to do their
12 own due diligence, don't they?

13 A And they did, they met without my permission
14 with Planning and Zoning.

15 Q You mean to tell me you say that the
16 Lincoln-Harris people would have to have your
17 permission to do the due diligence?

18 A Unless we had a contract.

19 Q Oh, so they can't go to the Georgetown County
20 zoning office and find out how this property is
21 zoned without your permission, is that right?

22 A Well, apparently they can but I sent them the
23 entire PDF file on everything we had.

24 Q But, Miss Cribb --

25 A They were not willing to put any money down.

1 Q But, Miss Cribb, you could have negotiated
2 further with them, couldn't you?

3 A That's right. I spent hours at my table with
4 them.

5 Q Your email doesn't say anything like that, it
6 says, "We wouldn't be interested"?

7 A Yes, sir. By that time I was fed up.

8 Q I've got a whole box full of other offers
9 over here, we'll go through them one by one but you
10 had numerous other letters of intent, offers or
11 other such documents that indicated a variety of
12 companies from a variety of locations were
13 interested in buying your land for between nine and
14 twelve million dollars, isn't that right?

15 A And not a one of them put down any earnest
16 money.

17 Q Wait a minute. Isn't that right? Isn't that
18 right?

19 A Not legitimate offers, no, they are not
20 signed and they did not put down any money.

21 Q Miss Cribb, those are the kind of things you
22 can negotiate as further terms once you start
23 getting your minds together?

24 A Sir, I did negotiate.

25 Q Well, Miss Cribb, we don't see a thing in

1 discovery material that you gave us where you did
2 any negotiating or whatever with any of these
3 people that made these offers. You were obligated
4 to turn that over in discovery, weren't you?

5 A I don't have anything other than sitting down
6 talking. I do have a tape recording of Mr.
7 McCallam that you are welcome to have.

8 Q So, you tape recorded a conversation with Mr.
9 McCollum?

10 A I most certainly did. I called the sheriff's
11 department and asked them if I was allowed to do
12 it.

13 Q Miss Cribb, your expert Mr. Barksdale
14 testified earlier today that there had been a huge
15 down turn in the economy that affected real estate
16 values very much, didn't he?

17 A Yes, there has.

18 Q And that's something everybody in this room
19 knows, isn't it?

20 A Yes, sir.

21 Q So, you can't possibly expect this jury to
22 believe that you attribute the drop from
23 \$12,000,000 down to \$4,000,000 in an offer from
24 Lincoln-Harris to be the cause and the fault of
25 First South Bank?

1 A And they also don't know I have \$9,000,000 in
2 the property. You are making it sound like I just
3 have the \$4,000,000. I put \$9,000,000 in that
4 property.

5 Q Miss Cribb, you have not produced any
6 evidence or any documentation whatsoever to
7 substantiate your claim that you have that much
8 money in that property, have you?

9 A I believe you could go to the courthouse and
10 find those records.

11 Q Miss Cribb, if you have got that much money
12 in that property you would have canceled checks,
13 you would have all kind of records about that.

14 A I traded in four lots plus the money I paid.

15 Q Miss Cribb, you didn't produce us any
16 evidence of expenditures like you're describing.

17 MS. BYRD: Your Honor, I object. That is a
18 mischaracterization of the facts and those
19 documents have absolutely been provided and Mr.
20 Collins knows that.

21 THE COURT: Come here.

22 (Unrecorded bench conference).

23 THE COURT: All right, Mr. Collins, you may
24 proceed, sir.

25 BY MR. COLLINS:

1 Q Miss Cribb, you haven't brought into court or
2 offered into evidence any documentation that would
3 substantiate your claim about how much you invested
4 in this South Causeway property, have you, ma'am?

5 A I do believe we have.

6 Q Okay. Well, we'll let the jury decide that.

7 Miss Cribb, I have here the offer that was
8 made by Lincoln-Harris and I note that it was
9 submitted to you on 6/30/08, signed by William A.
10 McNeil, Executive Vice-President, CFO of
11 Lincoln-Harris Properties, 6/30/08. That would be
12 the last day of June in '08. Right?

13 A Do you want me to look at it? The one I have
14 here is dated July, 2010.

15 MR. COLLINS: It is in evidence I believe as
16 Defendant's Exhibit 21, Your Honor, and if I may
17 approach the witness, Your Honor?

18 THE COURT: Yes, sir.

19 Q I note for your attention, Miss Cribb, I want
20 to be fair to you, you got this offer, it is dated
21 6/30/08.

22 MS. BYRD: Your Honor, I hate to interrupt.
23 Is that an exhibit you're referring to?

24 THE COURT: It is your Exhibit Number 21.

25 MS. BYRD: Can the witness look --

1 MR. COLLINS: I will show it to her.

2 THE COURT: He's going to show it to her.

3 MS. BYRD: Okay. Thank you, Your Honor.

4 BY MR. COLLINS:

5 Q Do you know if you actually got this on the
6 30th?

7 A I don't know. I haven't even seen it.

8 Q Okay, here. Tell me if you recall getting
9 that on the 30th or was it mailed to you? How did
10 you get it? Do you know?

11 A It looks like an email.

12 Q Flip over to the next page, that is what
13 we're talking about. The signature is on the last
14 page, it says 5/30 -- excuse me, 6/30/08. Do you
15 see that?

16 A Yes, I do.

17 Q You don't remember how you got that?

18 A No, I don't.

19 Q But you couldn't have gotten it before the
20 30th of June, could you?

21 A I don't know if I had it because I have not
22 signed it.

23 Q I know, Miss Cribb. This is the offer from
24 Lincoln-Harris.

25 Could I have it back?

1 A Yes, sir.

2 Q Now, your email rejecting it comes two days
3 later on July 2nd.

4 MS. BYRD: Objection. He is
5 mischaracterizing the evidence. It is not a
6 rejection. It is an email to Wayne Lovelace who
7 did not make the offer. He is referring to an
8 email to Wayne Lovelace.

9 MR. COLLINS: Okay, I stand corrected, Your
10 Honor.

11 BY MR. COLLINS:

12 Q The email to Wayne Lovelace about this is
13 dated July 2nd but the thing I want to point out,
14 Miss Cribb, and you tell me if this isn't right,
15 you earlier said nobody was offering any earnest
16 money, isn't that right, didn't you say that?

17 A Not substantial.

18 Q Well, you told us a while ago that nobody
19 offered any earnest money.

20 A I said nobody offered any substantial amount
21 of earnest money.

22 Q Okay. I'm sure the record will show that but
23 there is earnest money mentioned right there. How
24 much deposit does it say they are willing to give
25 in earnest money?

1 A \$25,000.

2 Q That is earnest money, isn't it.

3 A It is. But how long would they have tied the
4 property up?

5 Q I'm just trying to point out that there was
6 earnest money made as part of that offer.

7 A And it says here earnest money deposit of
8 \$10,000 for each period.

9 Q That is for an extension.

10 A But they weren't going to put \$25,000 to
11 start with, they were going to put it in extended
12 payments.

13 Q Additional earnest money for an extension is
14 a routine provision of a offer for property like
15 this, too, isn't it?

16 A I don't know, because the first one I had
17 that held it up, the bank told me they were
18 bankable and I didn't need any earnest money.

19 Q Miss Cribb, are you telling the jury the
20 reason you turned down all these offers is because
21 the bank was telling you not to take them?

22 A Yes, sir.

23 Q Well, now, earlier in your testimony or in
24 your facts or presentation you complained about the
25 bank interfering with your business. You're saying

1 they are interfering to the point of telling you
2 not to accept offers?

3 A When I found out that they were not working
4 in my interest I did.

5 Q But, Miss Cribb, it has always been your
6 choice about whether to sell that land, isn't that
7 right? Isn't that right?

8 A If I had a substantial offer, yes.

9 Q Yes, but whether a substantial offer or not,
10 it is your call, isn't it, Miss Cribb, you can sell
11 it today, couldn't you?

12 A I don't think so.

13 Q You don't think you could sell it today?
14 Legally you could sell it, you still own it, don't
15 you?

16 A I didn't know that. It's in foreclosure.

17 Q Miss Cribb, that foreclosure --

18 A Nobody is making any offers because I'm
19 concerned it's tainted property, it's contaminated
20 as far as I'm concerned.

21 Q Okay. And you mean contaminated not in the
22 chemical sense but in --

23 A I'm talking about by the bank and their
24 talking about it and telling everybody my business.

25 Q So, you say this property is contaminated by

1 First South Bank's talking about it?

2 A Yes, sir.

3 Q Okay. And that makes it unmarketable?

4 A Yes, sir.

5 Q So, nobody will come down here and buy it at
6 any price because First South Bank has contaminated
7 the property, that is your testimony?

8 A Yes, sir.

9 Q And you want the jury to believe that?

10 A I do.

11 Q I've got a few other emails that I need to
12 show you.

13 MR. COLLINS: I will ask the court reporter
14 to mark this as Plaintiff's next.

15 Q Miss Cribb, let me hand you that which has
16 been marked Plaintiff's Exhibit 27 and ask if you
17 recognize it. Do you?

18 A Let me look. Yes, sir, I read it.

19 Q Okay.

20 MR. COLLINS: Your Honor, we offer in
21 evidence Plaintiff's 27.

22 THE COURT: Any objection?

23 MS. BYRD: No, sir, Your Honor.

24 THE COURT: Without objection Plaintiff's 27.

25 (Email marked and received in evidence as

1 Plaintiff's Exhibit Number 27).

2 BY MR. COLLINS:

3 Q Now, Miss Cribb, this email is a response to
4 an earlier email that outlined the two options that
5 you had with regard to the modification agreement
6 and the loan from Kennedy Funding. Is that right?

7 A Yes, sir.

8 Q And you were given these two options?

9 A Yes, sir.

10 Q The first of which would have netted you
11 more, the second of which netted you less, the
12 second of which required a new due date, shortened
13 by one year, is that right?

14 A Yes, sir.

15 Q And you exchanged emails with Mr. Lovelace
16 about this and this email that is in your hand is
17 where you made the final decision, isn't it?

18 A Yes, sir.

19 Q And it says, "Wayne, Darwin and I have
20 decided to go with option two. We're concerned
21 about the \$10,000 in attorney fees. We feel it's
22 extremely high." And then it goes goes on to say,
23 "We really appreciate you working with us on this."

24 Miss Cribb, if you were so bitter at First
25 South Bank for not loaning you money under that up

1 to 6.5 million dollar loan why were you thanking
2 Mr. Lovelace?

3 A Because they had refused to work with us and
4 so they had decided do so and I was very
5 appreciative of him doing it because he first told
6 me he would not do anything.

7 Q But you are saying here, "We really
8 appreciate --"

9 A I really did appreciate it.

10 Q " -- your working on this," and at the last
11 paragraph it is, "Again I want to thank you for
12 working with us."

13 A Yes, sir, I really did appreciate it.

14 Q Miss Cribb, this is long after you learned
15 that they would not give you another loan, they
16 were not going to loan you any more money, they
17 referred you to other local banks, you didn't have
18 any luck there so you went to Neal Motoene and got
19 referred to Kennedy Funding and you knew that was a
20 reasonable position for First South Bank to take
21 and you thanked Mr. Lovelace?

22 A No, sir. I thanked him for releasing the lot
23 where I could go borrow the money, that is what I
24 was thanking him for.

25 MR. COLLINS: Let the record show I'm handing

1 that email, Exhibit 27, to the foreman of the jury.

2 THE COURT: Yes, sir.

3 Q Before I get to the next one, in your
4 affidavit which is in evidence in this case, Miss
5 Cribb, you took a little bit different tone, didn't
6 you? In paragraph 22 of your affidavit, in that
7 paragraph you said, "At closing, after the \$50,000
8 had been paid we discovered that in addition to the
9 \$300,000 mortgage, First South was taking back a
10 year from the South Causeway promissory note and
11 demanding an acceleration of maturity date. We
12 discovered an acceleration of the maturity date."
13 That wasn't true, was it?

14 A I called him and asked him if he would give
15 me back my maturity date for the year if I would
16 give him the deed, I would write him a paper and
17 give him the deed if he would give me back my
18 maturity date.

19 Q Miss Cribb, it wasn't true when you put in
20 your affidavit in paragraph 22 that you discovered
21 at the closing --

22 A I did not discover it until I had left the
23 closing and I called Mr. Motoene on the phone and
24 was reading it, that's when I realized it and I
25 went home and I called Mr. Lovelace and told him I

1 would give him the deed to the property if he would
2 give me back my year and take his hands off it and
3 let me try to sell it and him not interfere.

4 Q Miss Cribb, this affidavit says, "At the
5 closing we discovered the acceleration of maturity
6 date," skipping over a few words. Isn't that what
7 it says? Isn't that what it says? Answer me.

8 A Yes..

9 Q Now, Miss Cribb, you gave this affidavit to
10 the Court, it is signed by you, you acknowledge
11 that, right?

12 A Yes, sir.

13 Q It is notarized by Diane Saxton. Do you know
14 who that is?

15 A I don't.

16 Q Does she work in your lawyers' office?

17 A I have no idea who she is. She might work in
18 Bob Gwin's office who was there for us to sign the
19 papers and as I remember, the papers were coming
20 through the fax and I was signing them as they came
21 through the fax.

22 Q Miss Cribb, I'm talking about when you signed
23 this affidavit. This affidavit is dated 26 July,
24 2011.

25 A I'm sorry, I thought you were talking about

1 the papers for the loan modification.

2 Q No, ma'am. This is long after the lawsuit
3 had been brought, okay, long after you
4 counter-claimed, okay, and you know that there was
5 a motion for summary judgment filed and you knew
6 that you needed to create a genuine issue of fact
7 or else the bank would get a summary judgment or
8 could get a summary judgment on your counter-claim,
9 isn't that right?

10 A You have to explain what a summary judgment
11 and all that is to me.

12 Q Well, let's read the second paragraph of your
13 affidavit, okay? Why don't you read that to the
14 jury, paragraph two, right there.

15 A "The information contained in this affidavit
16 is based upon my personal knowledge and the
17 affidavit is made in opposition to the motion for
18 summary judgment filed in the above matter."

19 Q So, your affidavit makes specific reference
20 to the pending motion for summary judgment, the
21 second paragraph in your affidavit, so you knew
22 that you were trying to create a genuine issue of
23 fact and keep this case going so it could come some
24 day in front of this jury, isn't that right?

25 A Yes.

1 Q So, you had plenty of time to carefully
2 select your words and carefully select what you
3 would put in this affidavit which you signed under
4 oath, isn't that right?

5 A I don't believe I have lied about anything.
6 I believe Jesus is coming soon and that is the last
7 thing I would do, is lie about something and go to
8 hell over a piece of property.

9 Q And you have heard all this discussion back
10 and forth about the inclusion of lot 4 in your
11 mortgage and you have seen all these emails going
12 back and forth about that and you know that there
13 was a clear requirement that that lot be included
14 and Mr. Lovelace gave you a letter at the closing
15 explaining to you when and how you might be able to
16 get a release of lot 4 and you went forward with
17 the closing on the 25th of June, 2008, isn't that
18 right?

19 A That's right.

20 Q That's right. But when you gave your
21 affidavit on July the 26th, 2011, you said in
22 paragraph 16, "During the closing on June 25, 2008,
23 my son and I discovered the," the choice of word is
24 discovered, "that Lovelace had not corrected the
25 note and that in order to close my son had to agree

1 to mortgage his individual property as security for
2 the loan."

3 You didn't discover that that day, did you?

4 A I discovered it on the way home. I guess it
5 was a poor choice of words to say I discovered it
6 at the closing because I really had nothing
7 discussed with me at the closing, I read it on the
8 way home.

9 Q Miss Cribb --

10 A I told you it was coming off a fax machine
11 and I was signing the papers as fast as they came
12 off the fax machine.

13 Q Miss Cribb, you had a substantial exchange
14 with Mr. Lovelace well before the closing. The
15 closing was June 25, 2008, and this email, I will
16 come back to that date, but it was before the
17 closing, I represent to you. And in this email you
18 ask in question number seven, "If we understand,
19 the wording of this it is not acceptable. We will
20 in no way secure this loan with our beach house and
21 lot. I understand you were using lot 4 as extra
22 collateral until final lease was worked out with
23 Lowe's, which may be around six months."

24 And Mr. Lovelace writes back, "It was never
25 our intention to make a part of our collateral

1 package any properties other than the 19.2 acres
2 and lot 4 at 334 Myrtle Avenue. The reason for
3 including lot 4 stems from the fact that we did not
4 have a current appraisal upon which to make a
5 decision as to how much to allocate toward our
6 initial advance at closing. The statutory advance
7 against unimproved property is 65 percent at
8 appraised value and the real estate being
9 purchased, financed, and a maximum of a 75 percent
10 against the total value of the project. In the
11 absence of a current land appraisal we wanted to
12 make sure that we were sufficiently secured in the
13 event that the property appraised for less than
14 expected and still be able to fund your initial
15 needs."

16 By the way, Miss Cribb, isn't it true that
17 lot 4 was appraised at well over a million dollars?

18 A I'm not sure but I do know that we had an
19 \$11,000,000 appraisal on the property and the bank
20 came back with an \$8,000,000 appraisal, and I think
21 that is referring to it because I was very upset
22 that we had done improvements on the property and
23 the bank came back with a much lesser appraisal.

24 Q Miss Cribb, I'm talking about lot 4.

25 A Well, I'm talking about lot 4, too, because

1 it wasn't needed because if we had gone with --

2 MR. COLLINS: Judge, would you please
3 instruct the witness?

4 THE COURT: Miss Cribb, listen to the
5 question and answer the question, please.

6 Q Miss Cribb, this email from Mr. Lovelace goes
7 on to say, "As to the proposed release of lot 4,
8 your understanding is correct. Subject to the
9 maximum advance requirement stated above, once we
10 receive a copy of the engineer's certificate
11 evidencing that all of the infrastructure
12 improvements have been installed, the development
13 is complete and is in compliance with all
14 applicable zoning requirements or we have been
15 furnished a final copy of the signed lease between
16 you and Lowe's Foods our collateral interest in lot
17 4 will terminate and our mortgage will be released.
18 Also we want the excess funds from the loan at
19 Palmetto and the excess funds from the original
20 \$550,000 from First South Bank to go to us in
21 closing."

22 There is no doubt about the fact he is
23 requiring lot 4 to be collateral for this loan, is
24 there, Miss Cribb?

25 A It's not but I'm telling you I objected to it

1 the whole time.

2 Q Yes, but in your affidavit you said, "At the
3 closing on June 25 my son and I discovered"?

4 A He told me he would take it out and he did
5 not take it out.

6 Q But, Miss Cribb, you can't expect anybody to
7 believe that you discovered for the first time that
8 lot 4 was going to have to be part of the
9 collateral?

10 A I believe they will because I don't lie.

11 Q Oh.

12 MR. COLLINS: Your Honor, this is Plaintiff's
13 Exhibit 24, this is the email I was just displaying
14 on a foam board and my co-counsel advises we may
15 not have yet moved this into evidence and we move
16 it into evidence at this time.

17 THE COURT: Plaintiff's 24 is in evidence.

18 MR. COLLINS: It is?

19 THE COURT: Yes, sir.

20 MR. COLLINS: Thank you. He was supplying it
21 to me because a while ago I was interested in the
22 date and we couldn't pin it down. Thank you for
23 telling me that.

24 BY MR. COLLINS:

25 Q The date on this email explaining the

1 requirement for lot 4 being included was June 3.
2 That would be 22 days before the closing. Isn't
3 that right, Miss Cribb?

4 A Yes, sir, but I talked to him and he told me
5 he would take it out.

6 MR. COLLINS: I ask this be marked as
7 Plaintiff's 28. I furnished a copy to opposing
8 counsel, Your Honor.

9 BY MR. COLLINS:

10 Q Miss Cribb, let me hand you that which has
11 been marked Plaintiff's Exhibit 28 and ask if you
12 recognize it. Is that an email from you to Chip
13 Lyerly?

14 A So far it is.

15 Q It is?

16 A Yes.

17 MR. COLLINS: Your Honor, we offer
18 Plaintiff's 28 into evidence.

19 MS. BYRD: No objection, Your Honor.

20 THE COURT: 28 without objection.
21 Plaintiff's 28.

22 (Email marked and received in evidence as
23 Plaintiff's Exhibit Number 28).

24 BY MR. COLLINS:

25 Q Miss Lovelace, I mean Miss Cribb, I'm not

1 going to ask you to read to the jury all this email
2 but I want to skip down to that last paragraph and
3 go down about five lines and there is a sentence
4 that read as follows. "I thought he had taken the
5 lot off but when we arrived at the closing he still
6 had the lot included."

7 A That's correct.

8 Q You knew that on June the 2nd and even prior
9 to that, isn't that right?

10 A He told me the morning before we came to the
11 closing he would take it off, he would fix it.
12 That is what I thought.

13 Q You had a lawyer there, didn't you?

14 A When I got to the table --

15 Q Wait a minute. You had a lawyer there?

16 A There were bankers there and my attorney was
17 there, I never talked with my attorney without the
18 bankers present.

19 Q Miss Cribb, you had a lawyer at the closing?

20 A I did.

21 Q You had ample opportunity to confer with your
22 lawyer prior to the closing?

23 A No, sir, I did not.

24 Q This email you sent to Mr. Lyerly and Mr.

25 Lovelace predates even that other one. This one is

1 dated May 14, 2010, well over a month before the
2 closing. Isn't that right?

3 MS. BYRD: Your Honor; he keeps talking about
4 the June 25th, 2008 closing and this email is dated
5 May 14, 2010.

6 MR. COLLINS: That's right.

7 MS. BYRD: I just want to clarify.

8 MR. COLLINS: You're correct, I stand
9 corrected, I apologize. This is well after that.

10 THE COURT: All right.

11 MR. COLLINS: I apologize.

12 BY MR. COLLINS:

13 Q This email goes on to say, "I thought I
14 needed to borrow on the lots last year. Your bank
15 had long stopped funding, I had to buy back the lot
16 when we got to closing without disclosing to us you
17 had moved the maturity date from July, 2011, to
18 July, 2010." But that had been fully disclosed to
19 you and you had made the decision to go with the
20 second option which moved the maturity date up by a
21 year. Isn't that right?

22 A I did not notice the maturity date until
23 after we had closed, I was interested in the money.

24 Q Yes, you were interested in the money but the
25 options that you had were well described by Mr.

1 Wayne Lovelace in his email to you of March 9,
2 2009, and you were clearly advised that option two
3 would require the maturity date of the loan to be
4 changed by one year and that was fully explained to
5 you, wasn't it?

6 A And I signed it. I sure didn't --

7 Q So, you didn't discover, it wasn't a big --
8 you didn't discover it but you signed it?

9 MR. COLLINS: Your Honor, I would ask that
10 email, one more sentence I'm going to, I want to
11 read.

12 Q The last paragraph of the first page, it goes
13 over to the second page, you had the property
14 listed with Caldwell Banker.

15 A "Mr. Lovelace insisted that he have the
16 report from our agent Robbie Buice. I feel Robbie
17 had to disclose this to his buyers and they thought
18 we were in dire need to sell the property."

19 Q Could I have that back?

20 A Sure.

21 Q Thank you. Your son Darwin had extensive
22 dealing, did he not, with Mr. Buice?

23 A Not that I know of.

24 Q Mr. Darwin Wheeler, your son, acted
25 frequently on behalf of South Causeway, LLC?

1 A No, sir. He wasn't even, he wasn't even in
2 the country most of the time and he was definitely
3 out of state. He had nothing to do with the
4 auction, I did all that, he was not even here, we
5 filmed it so he could see it.

6 MR. COLLINS: Your Honor, with the Court's
7 permission, I will hand that last exhibit, I
8 believe it is 28 --

9 I already gave it to the jury? Okay.

10 I would like to ask this be marked as our
11 next, 29.

12 BY MR. COLLINS:

13 Q Let me hand you that which has been marked
14 Plaintiff's Exhibit 29 and ask if you can identify
15 this?

16 MS. BYRD: Your Honor, we object to this
17 document. This email, it is the same issue we have
18 already discussed with Your Honor.

19 THE COURT: I can't recall. Have I seen it?

20 MR. COLLINS: Your Honor, I have an extra
21 copy here for you. This is from Darwin Wheeler to
22 Peggy Wheeler-Cribb.

23 THE COURT: Your objection is hearsay?

24 MS. BYRD: Hearsay.

25 MR. COLLINS: It is from her business

1 records, Your Honor, and Mr. Wheeler is an agent
2 for South Causeway, he was reporting to his mother
3 a matter of business.

4 THE COURT: You will have to talk to her
5 about whether she recognizes this, received this.

6 BY MR. COLLINS:

7 Q Miss Cribb, you know your son's email address
8 is willwheeler@SCRR.com?

9 A Yes, sir.

10 Q And he was engaged in dealings with Robbie
11 Buice, the real estate agent, wasn't he, ma'am?

12 A I think he just wrote Robbie, it sounds like
13 he said, "Mom is waiting for an answer." He said,
14 I believe he was the one recommended Robbie.

15 Q The first words here, he contacted, he picked
16 Mr. Buice, "We have picked Mr. Buice on behalf of
17 South Causeway," right?

18 A He recommended him, yes.

19 Q He says, "I picked you," so that means that
20 he was delegated the task of picking a real estate
21 agent, isn't that right?

22 A No.

23 MS. BYRD: Object to that question. It calls
24 for speculation. There is no reference here to
25 that.

1 THE COURT: Sustained.

2 MS. BYRD: It is not even entered in
3 evidence.

4 MR. COLLINS: Your Honor, she would know.

5 THE COURT: It is not in.

6 MR. COLLINS: She would know that she
7 authorized her son to deal with Mr. Buice, the
8 person to whom this is sent.

9 THE COURT: Well, ask her.

10 MR. COLLINS: I thought I just did.

11 THE WITNESS: Well, my son, yes, he wasn't
12 talking to anybody until Mr. Lovelace called and
13 told them they were not allowed to talk to him, he
14 wasn't a party to this, and for him to talk to them
15 about the auction or anything else to do with South
16 Causeway --

17 MR. COLLINS: Judge, would you please
18 instruct her not to run off on these --

19 THE COURT: She is answering your question.

20 MR. COLLINS: Her answer was yes and, Your
21 Honor, we submit if he was authorized by her as an
22 agent for South Causeway, LLC, this is an email
23 that should come into evidence as a business record
24 of South Causeway, LLC.

25 THE WITNESS: He made recommendations to me

1 as my son, not as an agent, as my son. My daughter
2 made recommendations to me, too, and so do my
3 friends.

4 MR. COLLINS: Judge --

5 MS. BYRD: Your Honor, may we approach?

6 THE COURT: Yes.

7 (Unrecorded bench conference).

8 BY MR. COLLINS:

9 Q Miss Cribb, isn't it true that you and your
10 son disclosed to Robbie Buice that your loan
11 balance was \$5,000,000 on the full tract, isn't
12 that true?

13 A That was back in 2008.

14 Q Yes, ma'am, but the point is there was a
15 disclosure that you and he made to Mr. Robbie Buice
16 in which you told them the loan balance, isn't that
17 right?

18 A Yes.

19 Q All right. But in this case you're taking
20 great exception to the fact that Mr. Lovelace gave
21 a loan balance to your agent.

22 A There is a lot of difference in my giving my
23 information and a bank giving it.

24 Q All right. At the time you were dealing with
25 Mr. Buice he had not been hired as your agent,

1 correct?

2 A Apparently he was in the process. He is also
3 a personal friend.

4 Q But when Mr. Wayne Lovelace called Mr.
5 Thomas, Mr. Thomas had already been hired as your
6 agent, isn't that right?

7 A But Mr. Lovelace did not own the property, I
8 did.

9 Q Miss Cribb, I'm trying to make some progress
10 here. Listen to me carefully. Mr. Buice was not
11 your agent at the time you were disclosing to him
12 your loan balance, isn't that right?

13 A I think he was.

14 Q Okay. Maybe he was. Well, then, Mr. Thomas
15 was your agent also when Mr. Lovelace --

16 A But I disclosed this information, not the
17 bank.

18 Q But the whole idea of it being a big secret
19 and super confidential goes out the window if
20 you're telling people that you haven't even hired
21 yet, perhaps, what your loan balance is?

22 A It is like two years difference in the time,
23 too.

24 Q Well, so it is two years difference in time.
25 If a loan balance is confidential, it is

1 confidential two years before and two years after?

2 A My personal business, I can tell who I want
3 to but I don't expect my bank to tell my business
4 any more than I would want my doctor to tell my
5 business.

6 Q But your bank has an interest in protecting
7 its interest in your collateral property and this
8 disclosure to Mr. Thomas was to make sure that
9 there wasn't going to be a great big waste of time
10 by bidders who did not know, for example, that they
11 couldn't get a partial release from the bank, isn't
12 that right?

13 A Mr. Lovelace pursued me for this loan, I had
14 had a working relationship, a good relationship
15 with him for five years, it changed when he changed
16 banks.

17 Q Miss Cribb, this bridge loan you got from
18 Kennedy Funding, that was primarily for your living
19 expenses?

20 A Absolutely.

21 Q It wasn't a loan to help you develop this
22 property, it was a loan --

23 A The bank had killed my developing the
24 property way before that and I didn't have an
25 anchor store I had expected to have to be bringing

1 me in income. I told them this may happen and I
2 would need a bridge loan from day one.

3 Q And, Miss Cribb, when you gave your
4 deposition on September the 22nd, 2011, you were
5 asked the simple question, "Miss Cribb, you
6 understood by selecting option two it would reduce
7 the term of the loan, the due date of the loan from
8 July 5th, 2011, to July 5th, 2010." And your
9 answer was, "I did but I had no option, I had to do
10 it." "But you understand that that is what the
11 option would do" "Under duress, I knew it would do
12 that."

13 But you knew, didn't you?

14 A I really did not know until I started home.
15 I don't know if I was shocked when I saw that I had
16 signed it and that was on there but I did sign it,
17 I don't say I didn't sign it. I think if they had
18 left me alone I could have sold the property. They
19 squashed my oxygen, there is emails trying to say
20 that is wht they tried to do, they had
21 Lincoln-Harris out there selling my property at the
22 same time I was having an auction.

23 Q Well, if that is what you say was going on,
24 Miss Cribb, why don't you have somebody here from
25 Lincoln-Harris to back you up? You don't have

1 anybody from Lincoln-Harris to substantiate that,
2 do you?

3 A We have documents, we have a video that you
4 can see where they went to the action, I have a
5 recorded conversation with Lincoln-Harris, with Mr.
6 McCollum.

7 THE COURT: Let me get the attorneys to step
8 up here again.

9 MR. COLLINS: Judge, I think I'm done with
10 this witness.

11 THE COURT: Okay.

12 (Unrecorded bench conference).

13 THE COURT: Mr. Collins, are you through?

14 MR. COLLINS: I am, Your Honor. Thank you
15 very much.

16 THE COURT: All right.

17 Miss Byrd?

18 MS. BYRD: Thank you.

19 Your Honor, I'M not sure, just to clarify
20 that I have done so, Exhibit Number 27 which was
21 marked and identified, we would move that into
22 evidence at this time.

23 THE COURT: Defense 27, is there any
24 objection?

25 MR. COLLINS: That is that letter you had

1 that big side bar. I thought you already admitted
2 it.

3 MS. BYRD: I just wanted to make sure on the
4 record.

5 THE COURT: It's in.

6 (Letter marked and received in evidence
7 as Defendant's Exhibit Number 27).

8 BY MS. BYRD:

9 Q Miss Peggy, do you still have the document
10 marked as Plaintiff's Exhibit Number 26?

11 Just to clarify, who is that email to?

12 A To Wayne Lovelace.

13 Q Okay. And what does the email say?

14 A "Information only, we would not be interested
15 in those terms."

16 Q And is that the email where you were
17 forwarding an offer that you received to Mr.
18 Lovelace that was received by you from
19 Lincoln-Harris?

20 A I don't think so.

21 Q Okay. Well, attached to that document, is
22 that Lincoln-Harris referenced?

23 A Yes, it is.

24 Q That is not a response to Lincoln-Harris, is
25 it?

1 A No.

2 Q It's to Mr. Lovelace?

3 A Right.

4 Q And, Miss Peggy, just to confirm, you do not
5 deny, do you, that you received the email with the
6 two options?

7 A No, I do not and I signed it.

8 Q And you don't, you have never denied that,
9 have you?

10 A No, ma'am.

11 Q Have you said --

12 MR. COLLINS: Objection, Your Honor, leading
13 and total contradicted by the testimony.

14 THE COURT: It is leading. What is your
15 question?

16 MS. BYRD: Has she ever denied she received
17 that email.

18 THE COURT: Sustained as to leading. Go
19 ahead.

20 THE WITNESS: I do not deny I received it.

21 MS. BYRD: I have no further questions, Your
22 Honor.

23 MR. COLLINS: No questions.

24 THE COURT: Thank you very much, ma'am. You
25 may step down.

1 (Witness excused).

2 THE COURT: Miss Byrd?

3 MS. BYRD: Your Honor, the defense rests.

4 THE COURT: All right. Ladies and gentlemen,
5 I have to take up some matters of law with the
6 attorneys at the close of the defendant's case so I
7 will get you to step back into your jury room. If
8 you need anything let us know, but have no
9 conversations about the case, please.

10 (The jury was excused from the courtroom).

11 MR. COLLINS: Judge, could I have your
12 permission to take off my coat?

13 THE COURT: Yes, sir.

14 All right, I will take up any motions at the
15 close of the defense's case at this time.

16 MR. FLOYD: Yes, Your Honor. The plaintiff
17 at this time would move for directed verdict on
18 numerous grounds.

19 THE COURT: All right, let's start with
20 number one.

21 MR. FLOYD: As an initial matter, Your Honor,
22 there has been no evidence which the jury could
23 reasonably find clear and convincing evidence of
24 fraud in the inducement. We know the nine elements
25 of fraud and there is a additional three for fraud

1 in the inducement. What we don't have here is any
2 evidence whatsoever of any kind of representation
3 or misrepresentation or misstatement that didn't
4 relate to some kind of fact into the future we're
5 going to stay with you throughout the term of the
6 loan, we will help you do X, Y, Z. That is a
7 statement about a future event that never happened.
8 That doesn't support fraud.

9 The corollary to that is the fact that, I
10 think we have gone through it until the horse is
11 dead, so to speak, it has been beaten so bad, she
12 understood, at least knew and could have known and
13 should have known, represented by counsel at the
14 first closing as to lot 4 and what the obligations
15 of the bank were under the loan and from there, if
16 you remember, Your Honor, before my beautiful Power
17 Point presentation we did some motions in limine
18 and one of the issues was that parole evidence
19 shouldn't come in except to that cause of action.

20 We get to the four corners of the documents,
21 that takes you to the release, she was represented
22 by counsel, we have argued that before, it has been
23 admitted in evidence. At that time she had an
24 opportunity to confer with him and she executed it.
25 So we request you direct a verdict for the

1 plaintiff based on all the claims before the April
2 10, 2009 date. We just don't think there is any
3 evidence, much less a reasonable ground to find
4 clear and convincing evidence that a reasonable
5 juror could find as to fraud in the inducement.

6 As to every cause of action, or counter-claim
7 they have asserted, you have got to have damages,
8 you can't just have speculation, you can't just
9 have this is what happened, this is the number.
10 There has been no testimony as to causation
11 whatsoever. I think Mr. Barksdale, their own
12 expert, referenced the bottom of the economy
13 falling out, and Don Thomas probably the economy, I
14 believe, I'm not trying to mischaracterize the
15 testimony, but there has been no one qualified or
16 even tried to give an opinion saying that what
17 First South Bank did had any causal relationship
18 whatsoever with any damage to South Causeway, LLC.

19 Additionally, there has been a counter-claim
20 for violation of South Carolina Unfair Trade
21 Practices Act. To establish that cause of action
22 you've got to show that there is some kind of
23 potential for repetition, that there is a public
24 interest and the act is unfair and deceptive.

25 There has been no evidence that can support a

1 reasonable finding as to that. This is a very
2 unique scenario, if nothing else. Even if the
3 parole evidence is admitted, which it can't be,
4 there is no unfair trade practice. This was a
5 commercial development loan between South Causeway,
6 a commercial entity, and First South Bank,
7 commercial lender, arms length transaction. They
8 didn't hoodoo anybody, there is no, this wasn't
9 even a standard document as far as a specific
10 commitment letter, there is no potential for doing
11 this over and over again and nothing in evidence
12 that could suggest it.

13 As to tortuous interference with contract and
14 prospective contract, let's start with contract.
15 One essential element is there is some evidence
16 showing that a contract was breached. Don Thomas
17 testified that his company performed the auction,
18 performed underneath the contract, their
19 obligations. No evidence as to that.

20 As to the prospective contract, the only
21 evidence that I have heard at all is that the
22 auction got no bids. We haven't heard about any
23 prospective contract. I think that their entire
24 case has been that the disclosure to Lincoln-Harris
25 prevented them, that is what the lowball offer was,

1 so the auction couldn't have had anything to do
2 with it and the disclosure to the auction couldn't
3 have had anything to do with that and there is no
4 evidence of any prospective purchasers that have
5 been detoured by that or any disclosure beyond the
6 employees, Vintage Real Estate, forgive me if I'm
7 getting that wrong, but the auction company.

8 Further, Your Honor, we feel there is no
9 evidence of breach of contract. For there to be a
10 breach of contract there has to be an obligation to
11 perform. They didn't develop the property, there
12 was no obligation under the clear terms of the loan
13 agreement to lend additional money because they
14 weren't going to develop it. That was the purpose.
15 The request for the loan was for personal expenses.
16 It is unfortunate but it is not a breach of a
17 commercial contract, which is what this is,
18 commercial development loan. It is just not any
19 evidence going to any of these elements.

20 Also, Your Honor, one of the claims here has
21 been a duress argument. I don't know if you phrase
22 it as a counter-claim, affirmative defense, but it
23 is thrown around a lot, it has been throughout the
24 pleadings. Duress cannot be self inflicted. You
25 can't create a problem under the law and then blame

1 somebody else for negotiating the arms length
2 transaction, which is what this is.

3 Mr. Barksdale testified there is no fiduciary
4 duty, they didn't do anything to make it, so there
5 is no evidence that First South Bank did or didn't
6 do anything that led to her needing money. I just
7 don't see evidence on that as well.

8 All these things should just be removed from
9 their hand and a verdict should be directed in our
10 favor.

11 If I could have one moment, Your Honor, to
12 make sure I covered all my bases.

13 THE COURT: Sure.

14 MR. FLOYD: Your Honor, also as to the
15 release, we spent a lot of time talking about that.
16 It is our position under the law a release that is
17 secured by duress is voidable. She didn't try to
18 jerk it back after she finds out the facts, after
19 the auction, they never said, "No, I don't want
20 that and we'll undo this loan, this transaction."
21 It is not automatically void, it is not void as a
22 matter of fact or else you could just claim duress
23 after the fact all the time. You could go back and
24 ask them not to enforce it, you don't get to
25 enforce it, you don't get to enforce it.

1 We also submit, Your Honor, as to the
2 affirmative defenses, many of which are equitable,
3 they are for your decision. Some appear to be at
4 least phrases that are grounded in law such as lack
5 of consideration, so just to preserve the record I
6 note there is no evidence whatsoever that there is
7 any lack of consideration if that would somehow not
8 be decided directly by you or should be a directed
9 verdict on that anyway.

10 There is also a claim of mitigation of
11 damages, which can be recognized as a legal
12 defense. A foreclosure was brought in August. I'm
13 not sure whether there is any basis in anything we
14 have seen that said First South Bank didn't
15 mitigate its damages, there is no evidence that
16 First South Bank has no damages since this loan was
17 not performed, they loaned money, haven't gotten it
18 back, nobody has disputed that and there is no
19 evidence to the contrary.

20 As to the eighth defense, condonation,
21 acquiescence, ratification, there is not any of
22 those theories whatsoever. Foreclosure actions was
23 instituted pursuant to the terms of the agreement,
24 they were enforceable, that is what they did.

25 Fraudulent inducement, the grounds are the

1 same for that defense. Unconscionability, there
2 has been no evidence that any of the terms of the
3 contract shocked the conscience or violated the
4 South Carolina policy.

5 As to duress, Your Honor, even as a defense
6 to the foreclosure there has got to be an external
7 force, it has to come from the defendant, in this
8 case the plaintiffs. Since it is a counter-claim
9 that is where the force has got to come from. The
10 Kennedy Funding loan was for personal expenses.

11 There are a lot of them. There is the
12 defense of unclean hands, which I believe is
13 equitable and you will decide.

14 There is estoppel and Laches, which you will
15 decide, I believe.

16 Waiver, if it is a legal claim there is
17 nothing waived whatsoever under this document,
18 there is no evidence of that but I just preserve it
19 for the record. Our position is that all these
20 should be decided by the Court and a verdict should
21 be directed, there is no evidence to support them.

22 The defense of imperil delicto requires some
23 kind of criminal act. There has been no evidence
24 that they violated general banking policies and
25 procedures presented in this case, much less that

1 they performed something criminal.

2 Your Honor, I would just also note under the
3 duress argument, the fact they were represented,
4 South Causeway was represented by counsel at all
5 times. That alone would prevent duress from
6 proceeding.

7 As to breach of contract accompanied by
8 fraudulent act, the same ground as breach of
9 contract claim but breach of contract accompanied
10 by a fraudulent act is a very unique and specific
11 claim with different elements which include the
12 fraudulent act would somehow be related to the
13 breach but not so close in proximity as to
14 constitute breach. I'm not exactly sure what
15 satisfies that. I just know I didn't hear anything
16 that satisfies it in the testimony or put into
17 evidence by anyone.

18 Breach of fiduciary duty, no breach, no
19 fiduciary duty, especially not between the parties
20 in an arms length transaction. There has been no
21 evidence of fraud, constructive fraud or
22 misrepresentation whatsoever, no evidence that a
23 reasonable juror could find that.

24 Also, Your Honor, I would ask, we would move
25 for directed verdict on the request for treble

1 damages under South Carolina Unfair Trade Practices
2 Act. There has been no evidence of any intentional
3 unfair act, no unfair act at all, definitely no
4 intentional unfair act.

5 And then also I ask you to direct a verdict
6 on punitive damages. There has been no evidence
7 that would allow a reasonable conclusion that clear
8 and convincing evidence was presented to warrant
9 punishing anybody.

10 If I may have one moment, Your Honor, to make
11 sure I have covered everything.

12 Your Honor, I would just point out to you the
13 the case of Kyman versus Ford Motor Company on the
14 issue of duress, it is 142 F Sup 2d 735. I will
15 repeat it because I definitely went to fast, 142 F
16 Sup 2d 735, and the specific page that we're citing
17 for this proposition is 745 to 746.

18 Your Honor, we just ask you direct a verdict
19 and take this out of their hands.

20 THE COURT: All right.

21 MR. FLOYD: Thank you, Your Honor.

22 THE COURT: Miss Byrd.

23 MS. BYRD: Thank you, Your Honor.

24 With regard to the misrepresentation, I just
25 kind of took notes as he was going so I will try to

1 address them in the same order but with regard to
2 the misrepresentation there has been substantial
3 evidence presented that there were representations
4 made about the collateral and what collateral would
5 be taken and representations that it wouldn't be
6 required. Miss Peggy testified to that.

7 Also there is a line of cases with regard to
8 the commitment being withheld through the
9 development of the property. There is a line of
10 cases that provide that a present intent not to
11 perform a future event, it can be an existing fact,
12 Your Honor, and her testimony is that she did not
13 know, she didn't appreciate what collateral would
14 be required and that he told her it would be taken
15 out.

16 Also another misrepresentation that was made
17 was that the 300,000 or 500,000, regardless of
18 which one, was necessary to fund an interest
19 reserve account when in fact it wasn't.

20 The damages, Your Honor, she has testified
21 that the party that made an offer two years prior
22 offered \$12,000,000, they reviewed the documents
23 and then offered four. Your Honor, she's provided
24 that testimony, so that is evidence.

25 With regard to the South Carolina Unfair

1 Trade Practices Act, the potential for repetition
2 is established through Mr. Lyerly's own testimony
3 that the bank had no policies and procedures about
4 disclosing information to third parties, so if
5 there are no policies and procedures in place
6 currently, and in this case we know that the
7 confidential information was disclosed twice, I
8 think we have met our burden there, Your Honor.

9 With regard to the tortuous interference with
10 contract, Mr. Don Thomas testified that he hoped
11 that they had performed their obligations, not that
12 they had. He also testified that he used his
13 professional judgment and skill in setting the
14 reserve prices and as a result of Mr. Lovelace's
15 directions they were changed.

16 With regard to the breach of contract claim,
17 we have presented substantial evidence through Mr.
18 Lyerly, Mr. Lovelace and Peggy that they have
19 breached their obligation of good faith and fair
20 dealing. Additionally, we have presented evidence
21 that they were required under the loan documents to
22 fund an \$850,000 interest reserve account and they
23 have not.

24 THE COURT: It is also in that document that,
25 there was testimony, because I noted it, that said

1 if certain things weren't done that they were no
2 longer obligated to continue funding.

3 MS. BYRD: Your Honor, first of all, the
4 commitment letter provides that it will be, and the
5 loan, actually the agreement, too, provides it will
6 be placed in this, this additional 550,000 would be
7 placed in a reserve account, notwithstanding either
8 six months or when the infrastructure was put in
9 place and what they have said is, "Well, no,
10 because you didn't meet development criteria, we
11 may have to put that money in an interest reserve
12 account," and they said, "If there is an event of
13 default we don't have to advance any further
14 money," but by their own document, including the
15 modification agreement, it provides there are
16 defaults. There was never a default until this
17 loan matured, so they had absolutely no right to do
18 that.

19 THE COURT: Your own witness said it was a
20 prerequisite, Mr. Barksdale said that it was a
21 prerequisite to any further funding that the
22 infrastructure be complete.

23 MS. BYRD: We don't dispute, they could not
24 have requested, they could not have requested
25 additional funding without having infrastructure

1 being completed but that is not what I'm talking
2 about. I'm talking about a separate, a completely
3 separate provision of the contract that requires
4 they fund an interest reserve account, not advance
5 money to these folks, but to take money and place
6 it in an interest reserve account. We're talking
7 about two totally different things. You're asking
8 me about advances to the borrower and I'm saying
9 they breached by not placing money in an interest
10 reserve account with their own bank.

11 Additionally, Your Honor, with regard to
12 duress, I think Miss Peggy testified, I know she
13 did, that she felt she had no other choice, that
14 she has provided testimony that she didn't create
15 this problem, that the bank did, and depending on
16 which agreement we're talking about, if it's the
17 modification it was because the bank refused to
18 advance, I'm sorry, to release the collateral or
19 took the collateral which it should not have done
20 so and misrepresented to her that her interest
21 reserve account had to be replenished when it
22 didn't.

23 THE COURT: Let me go back. She testified
24 that the bank was not going to require lot 4, the
25 original lot.

1 MS. BYRD: Yes.

2 THE COURT: When she got there, there was
3 some conversation, there was some communication
4 prior to her getting there that lot 4 was going to
5 be involved but when she got there she still
6 claimed she didn't realize lot 4, then she got that
7 letter or that document at the closing that lot 4
8 was going to be a part of this commitment and her
9 testimony was she was there with her lawyer and she
10 got that information, she signed it anyway.

11 MS. BYRD: She did, and she also said, "I
12 felt I had no other choice." Mr. Lovelace had
13 already communicated to First Palmetto that --

14 THE COURT: Her other choice is you don't
15 sign it, the deal is off.

16 MS. BYRD: Your Honor, the testimony and the
17 evidence before this Court is that she felt she had
18 no other choice. There were three bankers there,
19 she walked in, they were already there, they handed
20 her the document and she felt --

21 THE COURT: Miss Byrd, because she said, "I
22 don't have a choice," there has got to be evidence
23 in the record whereby a jury could find that
24 because of the Bank's actions she had no other
25 choice.

1 MS. BYRD: Your Honor --

2 THE COURT: Not just because she said it.

3 MS. BYRD: Well, she also testified that her
4 loan was current with First Palmetto Savings Bank
5 but Mr. Lovelace had communicated to them that she
6 no longer would do business with them, they were
7 moving the loan, so she didn't have any other
8 choice. What was she going to do? Her loan with
9 First Palmetto was set to mature. If she believed,
10 and I think duress is dictated by the state of mind
11 of the person who claims it, and that is what she
12 has done, and it is a question of fact, Your Honor,
13 we presented sufficient evidence to get to the jury
14 on that issue.

15 With regard to the release, Your Honor, she
16 never said, she absolutely did provide testimony,
17 she testified she called Mr. Lovelace and said, "I
18 will give you a deed if you will give me back my
19 year," and he said no, so I think that she actually
20 did express that during her testimony.

21 With regard to the lack of consideration, Mr.
22 Lovelace, and this is with regard to the
23 modification agreement, Mr. Lovelace testified the
24 bank got nothing, the bank got no consideration for
25 that, that was solely for her benefit.

1 With regard to mitigation of damages, the
2 bank offered no testimony, in fact refused to allow
3 sale of any out parcels as to take any amount to
4 pay off this loan amount.

5 With regard to fraud in the inducement, again
6 I think I addressed that back at the beginning.

7 Unconscionability. Your Honor, it is against
8 South Carolina public policy to disclose
9 confidential banking information to third parties.

10 THE COURT: Is there something that says
11 that?

12 (MS. BYRD: Well, I think Mr. Barksdale said
13 it and Mr. Lovelace said it, and Mr. Lyerly. I
14 mean, I directly asked them if you were permitted
15 to disclose confidential information and they said
16 no but in this circumstance it was different. That
17 was their testimony.

18 And imperil delicto, the Latin term, I don't
19 think there is any requirement of a criminal act.

20 The breach of fiduciary duty, generally we
21 would agree that there is no fiduciary duty between
22 a bank and a borrower but when the bank undertakes
23 to advise, which we have established, the testimony
24 of Chip Lyerly and the testimony of Mr. Lovelace,
25 they did get involved and therefore they imposed

1 upon themselves a higher standard of care.

2 And with regard to the request for treble
3 damages, even a single incident of unfair deceptive
4 acts or practice is sufficient to base a claim for
5 treble damages and it is a factual finding of
6 unfair deceptiive act and the requirement of treble
7 damages is mandatory under the Act.

8 Punitive damages, Your Honor, we have
9 sufficiently presented evidence to establish fraud
10 and intentional conduct on the part of the bank
11 such that punitive damages are appropriate.

12 I think that was all.

13 MR. FLOYD: May I respond briefly, Your
14 Honor?

15 MR. FLOYD: Briefly. I will take them, there
16 is law stating present intent not to perform.
17 There is no evidence of any present intent not to
18 perform. It is not just the fact it doesn't
19 happen. If that were the case then fraud would
20 always proceed. It is important to keep in mind
21 the standard of proof for a reasonable juror to
22 find, this is not a preponderance of the evidence
23 standard for the jurors, it is clear and
24 convincing. I mean, I would submit there is not
25 even a scintilla, but that being said, there is no

1 evidence has shown that. There is certainly not
2 enough evidence in the record to support fraudulent
3 inducement, any of the fraud claims whatsoever, to
4 find clear and convincing evidence of it, and that
5 goes to punitive damages as well. The standard is
6 higher for breach of any statute or any other
7 ground. There is no way that issue of punitive
8 damages or any of the frauds should go to this
9 jury.

10 THE COURT: What is this imperil delicto you
11 said requires a criminal act?

12 MR. FLOYD: I was under the understanding,
13 Your Honor, it required a criminal act, not unclean
14 hands, not just a bad act, but even as she
15 described it, I'm confused because there is no
16 fraud I think survives our argument but that is
17 based on First South Bank's position concerning the
18 evidence of fraud, misrepresentation, my
19 understanding being, Your Honor, the doctrine is
20 that you cannot enforce a contract that is illegal.
21 This is not illegal.

22 MR. TYLER: Your Honor, may I?

23 THE COURT: Yes.

24 MR. TYLER: Your Honor, I had never heard of
25 it before this case. I read some cases to try to

1 figure it out. What it is, if it is a gambling
2 contract, one party can't enforce another party's
3 breach of a gambling contract because the gambling
4 contract in its own nature is illegal so therefore
5 you can't come into court and ask the Court to
6 enforce an illegal contract. That is my
7 understanding of what imperil delicto, however you
8 say it, is. I don't think there is any evidence of
9 this in any of these documents or our agreement was
10 doing anything illegal.

11 MS. BYRD: And I trust Mr. Tyler, if he has
12 researched it and that is the case, if it is a
13 requirement that it be a criminal contract, we'll
14 just withdraw that defense.

15 THE COURT: You don't even know what it is.

16 MS. BYRD: I understood it was party to a
17 fraud, translated literally that is exactly what it
18 means.

19 MR. FLOYD: Your Honor, additionally there
20 was a claim about absent policies and procedures as
21 a commercial consumer, somehow it establishes
22 evidence that can support a finding on any of the
23 breach of duty claims. There has been no testimony
24 or evidence or law I'm aware of that requires a
25 policy and procedure. You can't establish a claim

1 for breaching a contract, a breach of fiduciary
2 duty when there is no requirement you have a policy
3 and procedure in the first place. I just don't,
4 that reasoning is lost on me. I don't understand
5 that aspect of things but I don't think there is
6 any evidence that they breached their policies and
7 procedures.

8 As to the breach of contract, and it goes to
9 the duress as well, Mr. Barksdale did testify when
10 he was asked about the two separate fundings of the
11 interest reserve, the initial one and then the
12 second one, that the second funding of the interest
13 reserve account was tied to the development of the
14 property, he testified to that. That didn't
15 happen. There is no evidence that it was intended
16 to happen, there is no evidence of breach of
17 contract in that regard or a failure to perform a
18 promise in the loan agreement because I don't think
19 it supports that.

20 We would also submit, Your Honor, in addition
21 to the mitigation clauses in the loan agreement and
22 note, the commitment letter, that any oral
23 representations, Your Honor, that there is no oral
24 misrepresentations outside the contract that have
25 induced us to rely on anything, there is no

1 evidence that should come in and be given to the
2 jury to decide that.

3 As to the duress argument that the First
4 Palmetto note was somehow maturing, coming due, I
5 did not hear that until, in evidence until right
6 just now. I haven't heard it mentioned.

7 THE COURT: I don't even know where that came
8 from.

9 MS. BYRD: Your Honor, she testified to that.

10 THE COURT: About what?

11 MS. BYRD: That Wayne Lovelace, she actually
12 said he paid it off, I believe that was done, "They
13 already knew we weren't doing business with them,"
14 that is what she testified to.

15 THE COURT: He paid what off?

16 MS. BYRD: She was saying he paid off First
17 Palmetto's loan.

18 THE COURT: That was the purpose of this
19 loan, to pay off First Palmetto.

20 MS. BYRD: But she was talking about with
21 regard to the closing, she was saying, she
22 testified that Mr. Lovelace had already told,
23 represented to her that he had told First Palmetto
24 that they weren't going to renew the loan with them
25 and she said at the same time she said that she

1 said he paid them off.

2 MR. FLOYD: I never heard that, Your Honor.

3 MS. BYRD: She did.

4 MR. FLOYD: It was not entered in evidence.
5 He paid them off, surely that can't support a
6 reasonable juror inferring that First Palmetto's
7 loan was coming due and somehow created independent
8 duress, that is not evidence of that. The
9 pleadings aren't evidence that they can consider as
10 to what is claimed in them as to what happened to
11 her. Also, it had an October 15th maturity date
12 which was long removed from the June transactions
13 that began a loan.

14 As to unconscionability argument, the
15 doctrine only applies to contracts and whether or
16 not terms of a contract are unconscionable, not the
17 actions. It is a fundamental defense of the terms
18 of a contract. There has been no evidence, no
19 testimony that the terms of First South Bank's loan
20 document she signed after conferring with her
21 attorney are somehow unenforceable or
22 unconscionable.

23 Also, Your Honor, personal damages of Miss
24 Wheeler Cribb or personal expenses which is the
25 only testimony as to the need for the Kennedy

1 Funding loan aren't relevant at all to duress. The
2 defendant in this case is South Causeway, LLC. If
3 Miss Wheeler-Cribb wanted to make a claim against
4 First South Bank she should have made it herself.
5 She doesn't get to use her own personal problems to
6 now jump the corporate forum and give a reason that
7 First South Bank was exerting pressure on South
8 Causeway with a mortgage foreclosure, the LLC is
9 the entity, we went through it early on. the
10 president of a corporation cannot claim that his
11 personal issues caused duress on the corporation.
12 It can't go to that. It is not relevant, it can't
13 support a finding by any reasonable juror.

14 THE COURT: Miss Byrd?

15 MS. BYRD: Your Honor, I don't think that was
16 the sole -- first of all I'm not sure if he is
17 referring to the modification, duress leading up to
18 modification or duress leading up to the initial
19 loan closing.

20 MR. FLOYD: I submit either, Your Honor.

21 MS. BYRD: Well, it wasn't, first of all, the
22 duress that she claimed and what she testified to
23 was she felt pressured by the bank when she got to
24 closing that it had to be closed that day, that,
25 they asked for them to wait two weeks and they

1 said, "We can't, we brought all these people here,
2 we've got to do it now," and she felt like she had
3 no choice. She testified, "I felt like I was being
4 attacked by vultures," and, Your Honor, that is
5 sufficient evidence --

6 THE COURT: She had a lawyer sitting right
7 there with her, she could have walked away.

8 MS. BYRD: Your Honor --

9 MR. FLOYD: Also, Your Honor, she had four
10 more months until it came due, to walk away.

11 MS. BYRD: That definitely is not in
12 evidence.

13 MR. FLOYD: That's fine, it is not in
14 evidence, there is nothing about the First Palmetto
15 loan's due date at all in evidence, I don't
16 understand why we're talking about it since the
17 jurors can't consider it.

18 MS. BYRD: The line of questioning was
19 because I said why did you sign it, she said, "What
20 else was I going to do because Wayne had already
21 paid off," and I know what her intent was, maybe
22 I'm not sure, we can go back and look at exactly
23 what the wording was but she said, "He had already
24 told them we weren't doing business with them," so
25 she has testified.

1 THE COURT: Whoa, whoa. She is saying that
2 Mr. Lovelace is telling her that she is no longer
3 doing business with First Palmetto?

4 MS. BYRD: Oh, no, no, no. Told First
5 Palmetto that they would be taking the loan, First
6 South Bank would be taking the loan, which
7 obviously --

8 THE COURT: So at the table why didn't she
9 say, "You told me that the beach property wasn't
10 going to be involved, you put it in here, I'm going
11 back to First Palmetto"?

12 MR. COLLINS: Exactly, exactly.

13 THE COURT: She had a lawyer with her, I
14 mean, the case law says duress rarely exists when
15 parties are sophisticated and represented by
16 counsel during negotiation.

17 MS. BYRD: Your Honor, again, this is from
18 Holder versus Holder, 356 SC 256, whether or not
19 duress exists in a particular case is to be
20 determined according to the facts of each case,
21 such as the age, sex and capacity of the party
22 influenced. This was a female, she was in a group
23 with three other people, and she is, I'm not, I
24 don't mean to offend you, but she is older and,
25 Your Honor, I think all that should be considered,

1 it goes to her state of mind.

2 THE COURT: So, what you're saying is anyone
3 who enters into a contract without any other
4 evidence to support it can just testify, "That I
5 felt stressed and pressured and I felt I had no
6 other option," and that gets you past the directed
7 verdict?

8 MS. BYRD: I don't think in every case, Your
9 Honor, no, but that is not --

10 THE COURT: That is what we have here.

11 MS. BYRD: It is not, Your Honor, she has
12 testified that she felt she had no other choice.

13 THE COURT: I understand that. That is
14 exactly what I just said.

15 MS. BYRD: That the First South Bank had
16 already been informed that they weren't going to,
17 they were moving this loan, she had, she testified
18 she had no choice. The evidence establishes that.

19 THE COURT: She had a lawyer sitting right
20 there who could have said, "You don't need to do
21 this, Miss Cribb, we don't have to do this today."

22 MS. BYRD: Well, she testified, again, that
23 she did request that it be postponed and that Wayne
24 Lovelace told her, "No, we have to do it today."

25 THE COURT: Then you tell Wayne Lovelace to

1 take a long walk off a short pier.

2 MS. BYRD: Again that is a fact question.

3 THE COURT: All right, okay.

4 MR. FLOYD: Your Honor, this is in evidence.
5 This is Plaintiff's Exhibit 10. It's a letter from
6 Mr. Hinds, her attorney at the closing of the
7 initial loan on June 25th, signed by Mr. Hinds and
8 it is in evidence, stating that the loan was
9 performed properly, that he represented South
10 Causeway, LLC, with regard to it, it certifies that
11 everything was done in accordance with South
12 Carolina law which concludes she was of the right
13 state of mind, understanding. I didn't hear any
14 testimony regarding her age or anything, lack of
15 sophistication to enter this by anyone and I don't
16 believe there is any evidence, there is nothing in
17 evidence as to that.

18 The facts of this case are that South
19 Causeway, LLC, is trying to avoid an enforceable
20 document through problems and issues that were self
21 created by Miss Wheeler-Cribb. Her personal
22 problems do not get her around the requirement that
23 South Causeway present evidence of duress, fraud,
24 anything to support all the multitude of
25 counter-claims and causes of action.

1 We have been here for five days, four days
2 actually receiving testimony and there was ample
3 time and opportunity to call witnesses, to put in
4 documents to support these theories. First South
5 Bank submits they just haven't done it. It is not
6 a scintilla of evidence standard, it is sufficient
7 evidence to support a reasonable juror. The
8 affidavits got them by summary judgment, it can't
9 get them by this and testimony that, "I had no
10 choice," has nothing to do with South Causeway.

11 MS. BYRD: Your Honor, the testimony that, "I
12 have no choice," she's the sole member of South
13 Causeway, so I'm not sure how else South Causeway
14 could testify other than through Miss Cribb.

15 MR. FLOYD: Your Honor, there could be
16 evidence that South Causeway somehow had no choice.
17 She needed a personal loan, it is not relevant to
18 South Causeway. South Causeway has to not have a
19 choice.

20 THE COURT: All right. I'm going to ask you
21 all to stop talking.

22 All right, anything else?

23 MR. FLOYD: Nothing from the plaintiff, Your
24 Honor, thank you.

25 THE COURT: All right, anything from the

1 defense?

2 MS. BYRD: I'm sorry. No, sir, Your Honor.

3 THE COURT: Okay. All right, I'm going to
4 take a few minutes to go back and digest this and
5 we'll start back in just a minute, okay?

6 MR. FLOYD: Thank you, Your Honor.

7 MS. BYRD: Thank you, Your Honor.

8 (Recessed at 4:08 p.m.).

9 (Resumed at 4:22 p.m.).

10 THE COURT: All right. I'm just going to go
11 through, with regard to the motions, and tell you
12 where I am on granting a directed verdict.

13 I'm granting a directed verdict as to duress.
14 That is out.

15 Breach of fiduciary duty, that's out.

16 Imperil delicto, I know I'm messing that up,
17 that is out.

18 You mentioned lack of consideration in your
19 argument, Miss Byrd. I said on that, the release
20 agreement, that the bank got nothing for that, that
21 was just releasing property, but they did in fact,
22 if I recall the agreement, they did in fact, they
23 got their maturity date reduced by a year, there
24 were two options there and so there was
25 consideration, so lack of consideration is out.

1 Tortuous interference with contract, I'm
2 directing a verdict with regard to that cause of
3 action.

4 I just, I mean, I'm not directing a verdict,
5 I have wrestled with the fraud issue, there is nine
6 elements of fraud, they all have to be proven by
7 clear and convincing evidence. I don't know that
8 that is here but I think it is a factual issue that
9 the jurors will have to decide.

10 So I'm not going to, I'm going to
11 respectfully deny your motions on the other,
12 remaining causes of action.

13 MR. FLOYD: That includes the tortuous
14 interference of prospective contract or tortuous
15 interference as to --

16 THE COURT: I don't see any tortuous
17 interference, any evidence of tortuous interference
18 of contract whereby a jury could find that on
19 anything.

20 MR. FLOYD: Okay.

21 THE COURT: That's out.

22 MR. FLOYD: Thank you, Your Honor.

23 THE COURT: All right. Anything else?

24 MS. BYRD: Your Honor, respectfully, with
25 regard to the tortuous interference with contract,

1 we would just ask the Court to reconsider because
2 we have established a --

3 THE COURT: I'm sorry?

4 MS. BYRD: For the record, Your Honor, do we
5 need to make a motion to reconsider this or is this
6 preserved for the record?

7 THE COURT: You can talk to me now.

8 MS. BYRD: Okay. With regard specifically to
9 the tortuous interference with the contract, Your
10 Honor, we believe that the evidence is there was an
11 auction agreement that is in evidence, that Mr.
12 Lovelace called, interfering with the contract.

13 THE COURT: Okay. Let me stop you right
14 there. Let's say Mr. Lovelace make no call. How
15 do you have an auction on this property without the
16 information that Mr. Lovelace gave to the auction
17 folks, without knowing that information?

18 MS. BYRD: Your Honor --

19 THE COURT: You don't.

20 MS. BYRD: Your Honor, Miss Wheeler, Miss
21 Wheeler-Cribb testified that she knew it, she knew
22 it but she chose not to disclose it.

23 THE COURT: The auction company has to have
24 that information, Miss Byrd. How do they auction a
25 piece of property that they don't know whether it's

1 encumbered or not?

2 MS. BYRD: Your Honor, I respectfully
3 disagree. If I'm selling my house I'm not required
4 to tell my real estate agent what I owe. I may
5 have to say this is what I got to get, and that is
6 what she did, that is what she testified, "I have
7 to get X amount," but you don't have to say, "I owe
8 \$5,219,000," you don't have to do that, and she,
9 they had formulated the plan and the contract based
10 on the professional judgment of Mr. Thomas and Mr.
11 Cooper, they had set the prices in an amount
12 sufficient to pay off the loan and after that call
13 they changed all the prices to 4.8 million,
14 regardless of the size or location of the parcels,
15 Your Honor, and we believe that that, that we have
16 established sufficient evidence on that basis. We
17 just respectfully ask the Court to reconsider at
18 least that issue.

19 THE COURT: Go ahead.

20 MR. FLOYD: Your Honor, if I may, there has
21 got to be evidence that they breached the contract.
22 Don Thomas came in here and said, "We properly
23 performed --"

24 THE COURT: It is a tortuous interference.

25 MR. FLOYD: Tortuous interference but there

1 still has to be a breach. You are talking about
2 prospective, there is two claims, there is tortuous
3 interference with contract and prospective
4 contract.

5 THE COURT: What is tortuous interference of
6 contract?

7 MR. FLOYD: That is the auction company, that
8 is how First South Bank interfered with Vintage, I
9 believe.

10 THE COURT: All right. What is the tortuous
11 interference of the prospective contract?

12 MR. FLOYD: I mean, I can't explain her
13 claims for her.

14 THE COURT: Miss Byrd, I will ask you. You
15 made two claims.

16 MS. BYRD: The first tortuous interference
17 with contract deals with the Christy's contract and
18 the interference with that contract.

19 THE COURT: Christy?

20 MS. BYRD: I'm sorry, Christy's, the auction
21 company.

22 THE COURT: I got you.

23 MS. BYRD: Sorry about that. The second
24 prospective contract was a claim that prior to the
25 auction there was a reasonable certainty that

1 offers, that there would be a contract made as a
2 result of the auction. We pled it as an offer.

3 THE COURT: That's out.

4 MS. BYRD: Okay.

5 MR. FLOYD: Your Honor, we would request,
6 First South Bank requests just as a matter of
7 clarification, since there are so many claims, at
8 least as to the counter-claims, if we could just go
9 through them one by one and say granted or denied.

10 THE COURT: That would be wonderful.

11 MR. FLOYD: That would be helpful, Your
12 Honor, I believe.

13 THE COURT: Miss Byrd, I'm going to get you
14 to go through your counter-claims and just call
15 them out.

16 MR. COLLINS: I can hand you up a copy of it,
17 Judge.

18 THE COURT: That would be great.

19 MR. FLOYD: Your Honor I didn't realize you
20 didn't have a copy.

21 THE COURT: If I had it in front of me I
22 wouldn't be asking.

23 All right, it starts with for a fifteenth
24 defense and first counter-claim, breach of
25 contract. I'm going to deny your motion as to

1 that, as to that claim, Miss Byrd.

2 I'm gong to have to get you to address again
3 your position on the breach of contract. My
4 understanding is that the breach of contract deals
5 with --

6 MS. BYRD: That is the breach of contract,
7 Your Honor, that is the bank.

8 THE COURT: You have breach of contract
9 accompanied by fraudulent act. What is the
10 fraudulent act that you are alleging there?

11 MS. BYRD: That First South Bank, it's the
12 same basis as our fraud claim, which are that they
13 would not require the additional collateral to
14 secure the loan, that it would support it in the
15 development of the property, that they wouldn't
16 leave them with the financial means such that they
17 couldn't complete it, the interest reserve account,
18 that they would fund that, carry the loan three
19 years.

20 THE COURT: All right.

21 Go ahead.

22 MR. FLOYD: Your Honor, this cause of action
23 requires a fraudulent act that is not too remote
24 from the breach of contract and somehow accompanies
25 it. I'm not really sure there is any evidence of

1 any fraud. Fraud requires reasonable reliance.
2 There is no reasonable reliance here. That kicks
3 them all out.

4 THE COURT: Well, if you believed, if you
5 believe the evidence that is in front of the jury,
6 the right to rely --

7 MR. COLLINS: Judge, I'm going to throw a
8 monkey wrench in this. The jury is sitting back
9 there. Are you going to resume this trial today?

10 THE COURT: Oh, yes.

11 MR. COLLINS: You are, okay. I was just
12 going to say if you don't you might want to --

13 THE COURT: I'm assuming, you indicated --

14 MR. COLLINS: We have a witness we would call
15 first who would take hours, I expect. It is Friday
16 afternoon, 4:30, they don't know what is going on.

17 THE COURT: All right, I'm going to bring the
18 jury out and release them until Monday morning.

19 MR. FLOYD: Yes, sir.

20 THE COURT: Bring them out.

21 (The jury returned to the courtroom).

22 THE COURT: All right, ladies and gentlemen,
23 I am still dealing with a matter of law and the
24 attorneys brought it to my attention you all are
25 still back there and that the next witness may be

1 very lengthy, or may not, I don't know, but bottom
2 line is we're going to adjourn for the afternoon
3 with you all. We're going to continue taking up
4 matters of law but we're going to excuse you all.

5 Now, you are going to be going into the
6 weekend and what I would ask you to do, I may not
7 have to ask you, you may do this anyway, I'm going
8 to ask you to put this case out of your mind for
9 the weekend, give your mind a break from this.
10 Clearly don't talk about the case. If you want to
11 go over in your head evidence or testimony that you
12 have heard all weekend you're welcome to do that
13 but clearly you're not to talk with anyone about
14 the case. The same admonitions I gave you about
15 doing your own investigation or conversing with
16 folks, that is still in place. You need to do
17 everything in your power to protect your ability to
18 be fair and impartial, so you need to maintain that
19 guard.

20 And then we'll start back on Monday morning
21 at 9:00 o'clock. I'm not, I'm going to tell you my
22 thoughts. I could be wrong, I'm hoping that we may
23 conclude on Monday but I don't know that. I do, I
24 can tell you I do not anticipate having you here
25 all next week but I do believe that, I mean,

1 clearly we need Monday to finish and it may go into
2 Tuesday, I don't know, but I do want you to have a
3 wonderful weekend and try to just rest mentally and
4 then if you would be back on Monday morning at 9:00
5 o'clock we will resume at that time.

6 And like I say, we'll do everything in our
7 power to get it in then if we can. If not, we'll
8 continue on but thank you for your attention and
9 your service all week long. You have been
10 wonderful, you have been an outstanding jury. If I
11 ask you to be here at 9:00 you're here at 9:00, if
12 I ask you to come back from lunch at 1:45 or 1:15
13 you're here at 1:15. I can't tell you how much I
14 appreciate that. Any delays that have gone on in
15 this case have not been because of you, it has been
16 because of me and they are not intentional, just
17 sometimes issues take a little longer to resolve
18 than we anticipate.

19 So, anyway, everyone else please remain
20 seated in the courtroom and, ladies and gentlemen,
21 you are excused, we'll see you Monday at 9:00 a.m.

22 (Jury excused from the courtroom).

23 THE COURT: We'll continue.

24 MR. COLLINS: Judge, I hope you will just
25 race through and give us a ruling.

1 THE COURT: I'm going to but --

2 MR. COLLINS: It has all been argued.

3 THE COURT: It won't surprise me if we hear
4 from Miss Johnson just to confirm her status.

5 THE COURT: Anyway, the breach of contract
6 accompanied by fraudulent intent, I deny your
7 motion.

8 I deny your motion as to South Carolina
9 Unfair Trade Practices Act.

10 I'm granting your motion as to the fourth
11 counter-claim, that being the breach of fiduciary
12 duty.

13 I'm denying your motion as to the fifth
14 counter-claim, which is basically a fraud
15 counter-claim.

16 I'm going to reconsider, deny your motion as
17 to tortuous interference with contract but I'm
18 going to grant your motion as to tortuous
19 interference with prospective contract.

20 And I don't, unless there is an amended
21 answer I don't see anything about duress in here.
22 Did we argue all that for nothing?

23 MS. BYRD: It is a defense, Your Honor.

24 THE COURT: I'm sorry?

25 MS. BYRD: It was a defense, Your Honor.

1 THE COURT: Oh, okay, yes. I ruled on that.

2 MR. GODDARD: Judge, just in the interest of
3 protecting the record we would like you to
4 reconsider the duress argument that is on the
5 record and I understand you have ruled.

6 THE COURT: Yes. It's respectfully denied.

7 MR. GODDARD: Thank you, Your Honor.

8 THE COURT: That is one of the main things I
9 wrestled with back there, I read a couple cases
10 while I was back there.

11 MR. GODDARD: Thank you, Your Honor.

12 THE COURT: Now let's talk about Monday. Mr.
13 Collins, what are your thoughts?

14 MR. COLLINS: Well, Judge --

15 THE COURT: You said your first witness may
16 be a lengthy witness.

17 MR. COLLINS: Well, it could be. Mr. Edwards
18 will be our witness.

19 THE COURT: All right, sir.

20 MR. COLLINS: We are contemplating calling
21 others, we're contemplating recalling Mr. Lyerly,
22 we will gather ourselves over the weekend and
23 decide, but I already have discussed with Mr.
24 Lyerly my situation with regard to my class and he
25 has agreed to let me leave, you know, of course

1 after lunch and I don't know what that does to our
2 trial but obviously, Judge, if we're ready for
3 closing argument he wants me to do the closing
4 argument, so --

5 THE COURT: Based on what you're telling me,
6 because I promised you and I'm going to stand by
7 you being able to make your class, so I don't see
8 how we would possibly be ready for closing argument
9 on Monday.

10 MR. COLLINS: Well, I agree.

11 THE COURT: I mean, I just don't see that
12 happening.

13 MR. COLLINS: Of course I will be here
14 Tuesday morning, my class is at 4:00 o'clock to
15 5:30 on Monday and Wednesday and I have missed it
16 two days already this week.

17 THE COURT: Now, having said that, ladies and
18 gentlemen, you tell me, I don't know that we need,
19 obviously we need to get together with regard to a
20 charge conference, it sounds to me like that is
21 something we can do Monday afternoon because we
22 have already established earlier that Mr. Collins
23 didn't need to be there if we got together Sunday
24 night, so rather than everybody leaving their
25 families and come down here on Sunday night we

1 might as well, everybody except Miss Byrd, she
2 lives here, I guess, but still you have to leave
3 your family to come to this meeting, so why don't
4 we plan on doing a charge conference Monday after
5 Mr. Collins is gone.

6 MR. COLLINS: That's a great idea.

7 THE COURT: That will make good use of our
8 time.

9 MR. COLLINS: And I wasn't planning to be
10 there anyway.

11 THE COURT: You weren't going to be there
12 anyway.

13 MR. COLLINS: Excellent, thank you very much,
14 Your Honor.

15 THE COURT: Sure. And that will be good use
16 of my Monday afternoon, Monday afternoon won't be
17 just vacation, okay? Now, having said that, please
18 be prepared Monday to submit any charges, any
19 requested charge. As I asked you early on, please
20 have your support staff, if they do it, to email it
21 in a word document format, not PDF, and keep in
22 mind also that we need any suggested special
23 interrogatories you want or you think is
24 appropriate so we can deal with those as well.

25 Okay?

1 MR. GODDARD: Just so we're fully prepared,
2 there will not be closings on Monday?

3 THE COURT: Well, you know, Mark, I can't
4 imagine there would be, based on the fact, I mean,
5 Joel has got to make his class in Columbia.

6 Joel, is that correct?

7 MR. COLLINS: Yes, sir.

8 THE COURT: So he has got to leave here, even
9 if we broke at lunch, he is going to be leaving,
10 even if we go a little bit long and he leaves at
11 1:00 o'clock --

12 MR. GODDARD: I understand.

13 THE COURT: I just don't think we will be
14 done with the case. I just don't want to be
15 surprised on Monday that, "We're not calling
16 anybody and let's close." I tell you why we're not
17 doing that because I've got a feeling from what
18 Joel said earlier that he intends to do the closing
19 and he is not going to be here, so clearly we won't
20 be doing that.

21 MR. GODDARD: Thank you.

22 THE COURT: But I will say this to the
23 plaintiffs. Please don't feel like you don't need
24 to finish on Monday, I would love to finish on
25 Monday so that Tuesday would simply be argue and

1 charge. But we'll see where we're at. I would
2 love, I mean, it would be wonderful if come 11:30
3 Monday morning we're done with the testimony. I'm
4 still going to adjourn until Tuesday morning and
5 let Joel do the closing for his clients.

6 MR. FLOYD: Thanks.

7 MR. COLLINS: Thank you, Your Honor.

8 THE COURT: Anything else before we adjourn
9 for the afternoon?

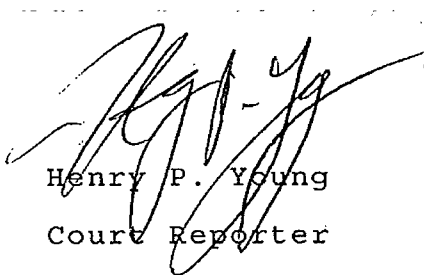
10 Okay.

11 (Recessed at 4:47 p.m., September 21, 2012).
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Georgetown County,
11 South Carolina, on the 21st day of September, 2012.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 March 14, 2013

15
16
17
18 
19 Henry P. Young
20 Court Reporter
21
22
23
24
25

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2010-CP-22-1233

Appellate Case No. 2012-213524

First South Bank,

Respondent,

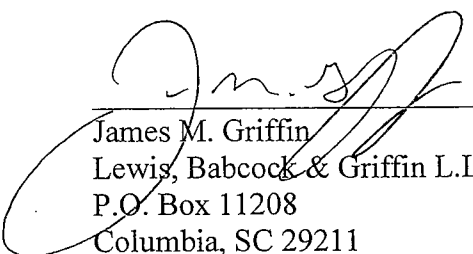
v.

South Causeway, LLC,

Appellant,

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



James M. Griffin
Lewis, Babcock & Griffin L.L.P.
P.O. Box 11208
Columbia, SC 29211
803-771-8000

Attorney for Appellant

November 19, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2010-CP-22-1233

Appellate Case No. 2012-213524

First South Bank,

Respondent,

v.

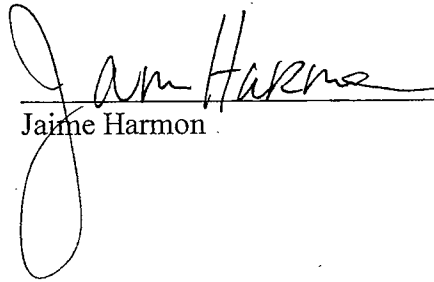
South Causeway, LLC,

Appellant,

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant South Causeway, LLC, do hereby certify that I have served a copy of the foregoing **Record on Appeal**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Joel W. Collins, Jr.
Christian Stegmaier
James L. Floyd, III
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, SC 29211


Jaime Harmon

Columbia, South Carolina
November 19, 2013