

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

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Case No. 2010-CP-23-1621

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J. P. Morgan Chase Bank NA, Plaintiff

V.

Thomas R. Irby, Roy C. Irby a.k.a. Roy C. Irby II,  
Bank of America NA, and Charles H. Knight LLC Defendants

Of Whom Roy C. Irby a.k.a. Roy C. Irby II and  
Bank of America NA are Respondents

And Thomas R. Irby is the Appellant

Appellate Case No. 2013-001441

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RECORD ON APPEAL

---

Thomas R. Irby Pro Se  
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Pelzer, SC 29669  
(864) 243-4015  
Appellant pro se

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Bank of America, NA

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Roy C. Irby II

**RECEIVED**

JUN 30 2014

**SC Court of Appeals**

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Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chase Home Finance, LLC,

Plaintiff,

vs.

Thomas R. Irby, Roy C. Irby a/k/a Roy C.  
Irby II and Bank of America, N.A.,

Defendants.

FILED-CLERK OF COURT  
GREENVILLE  
PAUL B. WICKENSIMMER

Case No.: 2010-CP-23-1621  
2011 AUG 26 P 2:47

ORDER

ENTERED COMPUTER

This matter came before the undersigned for hearing on August 17, 2011, in Greenville, South Carolina, on multiple motions filed by Defendants Thomas R. Irby and Roy C. Irby. After careful consideration of the arguments of the parties and the record in this matter, the Court rules as follows.

1. Thomas R. Irby's Motion for Leave to Amend Cross-Claim

The motion is granted in part and denied in part. Thomas R. Irby failed to properly serve a proposed Amended Cross-Claim against any party. However, Thomas R. Irby presented a proposed Amended Cross-Claim to the Court and parties at the hearing, and each party waived proper service thereof. The additional claims asserted against Bank of America, N.A. ("Bank of America") in the proposed Amended Cross-Claim are (1) Negligence, (2) Breach of Contract with Fraudulent Act, (3) Breach of Trust with Fraudulent Act, and (4) Violation and Breach of Duty of Trust.

The request for leave to add the cause of action for Breach of Trust with Fraudulent Act is denied because this is a cause of action based on the criminal code and is therefore not appropriate in a civil action. Any claims by Thomas R. Irby based on the criminal code are barred. The request for leave to add the cause of action for Violation and Breach of Duty of Trust is also denied because this is not a cognizable claim under South Carolina law.

APPROVED  
AUG 26 2011

## Exhibit A

attempt to amend and add these two causes of action is futile and the request for leave as to these two causes of action is denied.

The request for leave to add the causes of action against Bank of America for Negligence and Breach of Contract with Fraudulent Act and against Roy Irby is granted, and Thomas R. Irby may file the Proposed Amended Complaint in the form presented to the Court with the causes of action for Breach of Trust with Fraudulent Act and Violation and Breach of Duty of Trust against Bank of America removed.

2. Thomas R. Irby's Motion to Compel Discovery from Roy Irby

The motion is granted. Thomas Irby is provided ten (10) days from the date of this Order to file and serve Roy Irby with revised written discovery requests. Following service, Roy C. Irby has thirty (30) days to comply and respond to the written discovery requests. If he fails to respond, all claims by Roy C. Irby has made against Thomas R. Irby shall be barred.

3. Thomas R. Irby's Motion to Bifurcate

The motion is denied. Thomas R. Irby has moved for the trial against Bank of America to be tried separately from his claims against Roy C. Irby. The motion is denied because the causes of action involving Bank of America, Thomas R. Irby, and Roy C. Irby arise out of the same operative facts and therefore the causes of action are not proper for bifurcation. Furthermore, bifurcation could allow for inconsistent results and would be a burden upon the judiciary.

4. Roy C. Irby's Motion

The motion is granted in part. (A) Chase Home Finance, LLC ("Chase") will provide a copy of its title policy to Roy C. Irby within twenty-one (21) days from the date of this Order. (B) Chase and Bank of America will each provide Reinstatement Letters to Roy C. Irby within twenty-one (21) days of the date of this Order. (C) Chase will produce any correspondence as to

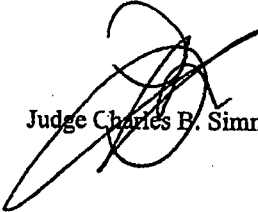
EXHIBIT A

the assignment of the mortgage to it within twenty-one (21) days of the date of this Order. Any remaining requests by Roy C. Irby are denied or withdrawn.

5. Other Motions and Matter Information

Any other pending motions, including Thomas R. Irby's Motion to Compel against Bank of America, are withdrawn or denied. The Court further orders that it will order mandatory mediation for all the parties to this action at an undetermined date no less than sixty (60) days from the date of this Order.

AND IT IS SO ORDERED.

  
Judge Charles B. Simmons, Jr.

Greenville, South Carolina

August 24, 2011

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE )

C/A NO: 2010-CP-23-1621

Chase Home Finance )  
Plaintiff )

Order 2012 MAR -2 P 3:33  
as to various motions

v. )

Thomas R Irby, Bank of America  
NA, et al

Defendants )

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
WICKENS

On February 8, 2012, a hearing disposed of several motions. Present at the hearing was Erica Lybrand for Plaintiff Chase Home Finance, Lawrence Hershon for Bank of America NA, and David C. Alford for Thomas Irby.

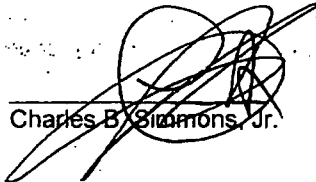
First, Bank of America NA (BoA) filed its Motion for Summary Judgment on its cross claims by and between it and Thomas Irby. In support of its Motion, BOA submitted its Memorandum with various Exhibits. Thomas Irby submitted his Affidavit. Following argument, and review of the exhibits, BoA's Motions are denied as to its claims against Thomas Irby, and denied as to Thomas Irby's claims against BoA for breach of contract and negligence. Thomas Irby's claim as to breach of contract by fraudulent act and any other claim of fraud against BoA is dismissed. There is a question of fact as to the written demand by Thomas Irby to close the BoA account, and BoA's subsequent conduct relating to the collection and credit reporting of the account.

Second, there was a pending Motion to Bifurcate the foreclosure action by Chase from the underlying cross claims between the various Defendants. This Motion is granted. Chase is to proceed with its foreclosure action, to include sale of the property. However, before a deficiency judgment can be entered following the foreclosure action, if any, the cross claims between the Defendants must be resolved and a hearing may be held subsequent to the resolution to determine whether such a judgment may be entered. To the extent that any Motion or challenge to the sale or potential deficiency is to be raised by any Defendant, Defendants shall raise such matters following a determination of the resulting deficiency damage, if any.

Third, as to the cross claims between the various Defendants, Defendant Thomas Irby is granted leave to file discovery requests related to the negotiation concerning the subordination agreement entered in to by BoA. The matter of cross claims between the Defendants will be reviewed in 45 days for possible requirement for mediation as between the parties, with subsequent scheduling for trial. Counsel for Defendant Thomas Irby noted on the record that Thomas Irby requested a jury trial as to his claims.

Date:

3/1/12

  
Charles B. Simmons, Jr.

|                         |   |                                                    |
|-------------------------|---|----------------------------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS                       |
|                         | ) |                                                    |
| COUNTY OF GREENVILLE    | ) | THIRTEENTH JUDICIAL CIRCUIT                        |
|                         | ) |                                                    |
| Thomas R. Irby,         | ) | C/A No. 2010-CP- <sup>23</sup> <del>92</del> -1621 |
| Plaintiff               | ) |                                                    |
|                         | ) |                                                    |
| v.                      | ) | Verdict                                            |
|                         | ) |                                                    |
| Bank of America,        | ) |                                                    |
| Defendant               | ) |                                                    |

---

As to the claims for Breach of Contract:

       We, the jury, find for Plaintiff Thomas Irby against Defendant Bank of America actual damages in the amount of \$                     .

OR

X We, the jury, find for Defendant Bank of America against Plaintiff Thomas Irby actual damages in the amount of \$ 1,510.61.

OR

       We, the jury, find for the Defendants (no recovery for either party).

  
Foreperson

30 May, 2013

|                         |   |                                                    |
|-------------------------|---|----------------------------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS                       |
|                         | ) |                                                    |
| COUNTY OF GREENVILLE    | ) | THIRTEENTH JUDICIAL CIRCUIT                        |
|                         | ) |                                                    |
| Bank of America,        | ) | C/A No. 2010-CP- <sup>23</sup> <del>32</del> -1621 |
| Plaintiff               | ) |                                                    |
|                         | ) |                                                    |
| v.                      | ) | Verdict                                            |
|                         | ) |                                                    |
| Roy C. Irby, II,        | ) |                                                    |
| Defendant               | ) |                                                    |

---

As to the claims for Breach of Contract:

X We, the jury, find for Plaintiff Bank of America against Defendant Roy Irby actual damages in the amount of \$ 21,508.46.

OR

       We, the jury, find for the Defendant Roy Irby.

  
Foreperson

30 May, 2013

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) |                              |
| COUNTY OF GREENVILLE    | ) | THIRTEENTH JUDICIAL CIRCUIT  |
|                         | ) |                              |
| Thomas R. Irby,         | ) | C/A No. 2010-CP-32-1621      |
| Plaintiff               | ) |                              |
|                         | ) |                              |
| v.                      | ) | Verdict                      |
|                         | ) |                              |
| Roy C. Irby, II,        | ) |                              |
| Defendant               | ) |                              |

---

As to the claims for Breach of Contract:

☒ We, the jury, find for Plaintiff Thomas Irby against Defendant Roy Irby actual damages  
in the amount of \$ 31,700.

OR

☐ We, the jury, find for the Defendant Roy Irby.

  
Foreperson

30 May, 2013

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

FILED-CLERK OF COURT  
IN THE COURT OF COMMON PLEAS  
JAN 14 2010

Thomas R. Irby,

Plaintiff,

vs.

Roy C. Irby, Bank of America and  
Chase Home Finance, LLC OH4-7830

Defendant

2010 JAN 14 A 9:26

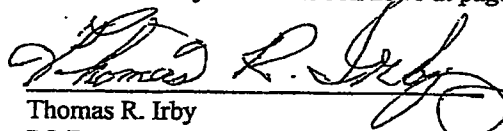
LIS PENDENS  
2010LP23

NOTICE is hereby given that an action is being commenced in the Court of Common Pleas for Greenville County, South Carolina upon a Complaint of Plaintiff concerning certain real property as described below:

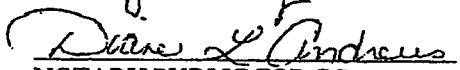
All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina, County of Greenville, located on Pearson road, being shown and designated as containing 1.43 acres, more or less, as is shown on a plat entitled "Property of Thomas R. Irby" on a plat dated June 4, 2004 and recorded on March 6, 2007 in the RMC Office for Greenville County in Plat Book 1032 at page 61, and having the metes and bounds, courses and distances as upon said plat appear.

This is the same property conveying a one-half (1/2) interest unto Roy C. Irby by deed of Thomas R. Irby dated March 16, 2007 and recorded on March 23, 2007 in the RMC Office for Greenville County in Deed Book 2258 at page 437. The said Thomas R. Irby did thereafter convey his remainder interest unto Roy C. Irby by deed dated March 16, 2007 and recorded on November 13, 2008 in the RMC Office for Greenville county in Deed Book 2346 at page 1649.

TMS#0597010100104

  
Thomas R. Irby  
PO Box 827  
Pelzer, SC 29669

Sworn to before me this 13<sup>th</sup>  
day of January, 2010.

  
NOTARY PUBLIC FOR SC  
My Commission Expires: 10-28-19

RECORDED IN BOOK BB4 PAGE 004



**STATE OF SOUTH CAROLINA**

**COUNTY OF GREENVILLE**

**Chase Home Finance, LLC,**  
**Plaintiff**

**Vs.**

**Thomas R. Irby, Roy C. Irby II,  
and Bank Of America  
Defendants**

**In The Court of Common Pleas**

**Case No: 2010-CP- 23-1621**

**DEFENDANTS AFFIDAVITT  
Thomas R. Irby, co-defendant**

**I, Thomas R. Irby, as co-defendant hereby submit this affidavit for the courts records in the above captioned case.**

- 1. On July 6, 2004, I sold to Roy C. Irby II a 1.43 acre tract of land on which he was to construct a home for himself and his daughter.**
- 2. On April 20, 2007, Being gainfully employed and with good credit I co-signed a mortgage for defendant Roy C. Irby with Community First Bank for funds to continue the construction of the home. Roy C. Irby was to make all payments on the mortgage and pay all expenses thereof. I retained by deed an undivided one half ownership of the property as security for this mortgage.**
- 3. On May 16, 2007, I co-signed a home equity mortgage with Bank of America for additional construction funds. I retained my half ownership as security for this mortgage.**
- 4. On August 17, 2007 I co-signed a mortgage with M & T Bank in the amount of Ninety Five Thousand Dollars. This mortgage was to pay off and close the existing two mortgages and provide funds to pay off the Home Depot Credit card of Roy C. Irby. I retained my deed to one half ownership of the property as security for this mortgage. The next week I learned that I was no longer employed.**
- 5. On or about June of 2008 Roy C. Irby moved to Nashville, Tennessee to live with his sister and her husband. He left his daughter to care for the home and property. His stated reason for leaving was to have surgery by a Nashville clinic. He made every assurance that he would return to his new home.**
- 6. On or about September 15, 2009 I learned that Roy C. Irby was attempting to sell the home and property at auction. He ordered his daughter to vacate the premises.**
- 7. On October 3, 2009 Roy Irby refused delivery of a certified letter from me requesting information on the situation. The letter was returned to me unopened on October 23, 2007.**

- 8. On or about October 15, 2009 the property was auctioned and Roy C. Irby refused the bid.**
- 9. On or about November 6, 2009 I received a delinquent notice from Bank of America for a payment of Two Hundred Seven Dollars and Ninety One cents on a balance of Sixty Nine Thousand Dollars. I tried to contact Roy Irby and could not do so. I made a payment of Two Hundred Seven Dollars and Ninety One cents on November 13, 2009. I requested Bank Of America to sent me a copy of the account history. They did not send it. I checked my files to review the copies I had retained of all the transactions. All of my files were missing except an unsigned copy of the M & T mortgage.**
- 10. I recovered copies of the mortgages and deed(s) from the county records office. I discovered that on November 13, 2008 Roy C. Irby II had filed a second deed that relinquished me of "any remaining interest in and to the property". That deed was filed without my knowledge or consent.**
- 11. On or about November 27, 2009 I received a second delinquent payment notice from Bank of America. On December 4, 2009 I made a second payment of One Hundred Ninety Eight dollars and Twenty Cents. I again requested the account history and did not receive it. I attempted to Contact Roy C. Irby several more times without success.**
- 12. December, 2009 I began receiving delinquent payment calls from Chase Bank and Bank of America. I learned that Chase Bank had purchased the M & T Bank mortgage in September of 2007.**
- 13. On January 14, 2010 Attorney Gregg Jones filed a Lis Pendens with the Greenville County Clerk of Court. This was filed when a review of the HUD Statement for the Chase Mortgage shows the Bank of America mortgage and the Community First mortgage were paid off by the Chase Mortgage. That Attorney has requested the account history from Bank of America and has not received it.**
- 14. On February 12, 2010 I personally contracted Knight Realty Co. to sell the house. The second deed relinquished me of any ownership of the property so I have no legal right to sell it. A Limited Power of Attorney allowing me to sell the property was mailed to Roy C. Irby II and he failed to return it. The realtor is still actively marketing the property and has developed significant interest in it.**

**I have been informed that Roy C. Irby obtained funds, without my approval, from Bank of America in the amount of Sixty Nine Thousand Dollars at or near the time he filed the second deed to the property and after that bank's mortgage was paid off.**

In The Court of Common Pleas

Case No: 2010-CP- 23-1621

From these funds he loaned his sister, Mrs. Larry C. (Sherrine) Hester, a sum of at least Twenty Two Thousand Dollars as down payment on a home which she has now abandoned. From these funds he also purchased a boat and a truck.

I believe that Bank of America should have notified me if their mortgage had not been paid off by the Chase mortgage. I also believe I should have been informed of any attempt by Roy C. Irby to obtain more funds from their mortgage once it had been paid off. If the Bank of America mortgage had been closed out the property could have been sold shortly after the Chase account became delinquent.

I believe that once Roy C. Irby filed the deed relinquishing me of any ownership in the property Bank of America was willing to provide him with the Sixty Nine Thousand Dollars. Therefore I do not believe I should in any way be responsible for these funds. The mortgage that I co-signed was paid off in full by the mortgage Chase now holds.

I am informed that it is illegal to falsify a HUD statement. The HUD statement shows that Bank of America was paid off.

I have been unemployed for over two years and now live on Social Security of \$1,685.00 monthly plus an annuity of \$227.54 monthly. I cannot service the debt.

Signed: Thomas R. Irby

Date: May 11, 2010

Notary:

Personally appeared before me this the 11<sup>th</sup> day of May, 2010 Thomas R. Irby who states that he personally prepared the foregoing document and the information and statements therein are true according to his understanding of existing documents and copies in his possession and according to information he considers reliable. Any obvious opinions expressed in this document are derived from known records and his personal interpretation of them and other relative information.

Diane L. Andrews  
Notary signature

Notary Public of South Carolina

Thomas R. Irby  
Thomas. R. Irby

My commission expires: 10-18-19

Page 3 of 3

STATE OF SOUTH CAROLINA

In The Court of Common Pleas

COUNTY OF GREENVILLE

FILED JUL 19 PM 1:38

Case No: 2010-CP- 23-1621

Thomas R. Irby

Cross Complainant, Pro Se

Vs.

Bank of America,  
Roy C. Irby II, and  
Chase Bank

Defendants

CROSS COMPLAINT

Thomas R. Irby, as Cross Complainant in the above referenced action, hereby alleges as follows:

As to Bank of America and Roy C. Irby II

1. Complainant Thomas R. Irby, having records of evidence, information, and other knowledge, believes that Bank of America and Defendant Roy C. Irby II did act, jointly or individually, in attempts to defraud the complainant of sums in excess of Sixty Nine Thousand Dollars (\$69,000.00).
2. Complainant is informed and believes that the Bank of America home equity account was legally closed when it was paid off by the M&T first mortgage on date of August 22, 2007 and that his responsibility for that loan was terminated.
3. Complainant believes that Bank of America deliberately ignored all closing documents and instructions from the closing attorney to "close, block, and satisfy said mortgage".
4. Complainant is informed or believes that Bank of America deliberately provided an incorrect payoff total to the closing attorney. From the date of origination of the payoff statement to the closing date, Bank of America disbursed funds to Roy C. Irby II that amounted to \$10,600.00 more than the payoff total given. Bank of America failed to notify the Closing attorney or to provide him with a corrected payoff statement.
5. Complainant believes that Roy C. Irby II continued to acquire funds from the Bank of America equity account even though he knew the account was closed as of August 22, 2007. He also knew that if the account remained open the complainant could be responsible for repaying any funds he received.

**CROSS COMPLAINT**

Case No: 2010-CP- 23-1621

6. Bank of America prevented the complainant from reviewing the account history and activity from November 13<sup>th</sup>. 2009 until June 11<sup>th</sup>. 2009. This prevented the complainant from knowing or understanding the status of the account.

7. By attempting to hold the complainant responsible for the continuing sums provided to Roy C. Irby II, Bank of America and Roy C. Irby II have deliberately jeopardized the complainants reputation, financial stability, and personal welfare.

**As to Bank of America and Chase Bank**

8. Complainant believes and is informed that he and Roy C. Irby II signed each mortgage with specific responsibilities. In both cases each bank knew that Roy C Irby was to be the person paying the installments and all relative costs generated by the mortgages. When the complainant questioned each bank about the status of the accounts Roy C. Irby's contact data was removed from the billing procedures. Each bank attempted to collect the delinquencies only from the complainant. The foreclosing attorney for Chase Bank has prepared a complaint holding the complainant to be the singular borrower and responsible party.

9. Both Banks are aware that the complainant signed the mortgages under conditions which no longer exist. Both mortgages were signed when the complainant was gainfully employed. Complainant is now Seventy three years old, unemployed, and lives on social security plus a small monthly annuity.

10. As collateral to protect his responsibility for both mortgages the Complainant held by deed a one half ownership of the property. In November of 2008 Roy C. Irby filed a second deed that transferred sole ownership to him. That deed was filed without the complainant's approval or knowledge. That deed was not discovered until December of 2009.

11. Chase Bank failed to notify the complainant of the account delinquencies until the account was too far in arrears to be brought current.

NOW THEREFORE the cross-complainant, Thomas R. Irby, prays as follows:

A. That the court will declare the complainant to be free from responsibility for any debt to Bank of America as generated by Roy C. Irby II.

B. That the closing instructions from Attorney Gregg Jones, with the payoff check, to Bank of America on August 22<sup>nd</sup>. 2007 terminated and satisfied the complainant's obligation for that mortgage and no further obligation to Bank of America exists from the complainant, and Bank of America is to collect any sums due from Roy C. Irby II.

**CROSS COMPLAINT**

**Case No: 2010-CP- 23-1621**

**C. That any actions of civil and/or criminal violations determined to have been committed by Roy C. Irby II and Bank of America, be forwarded to the appropriate criminal courts for immediate prosecution thereof.**

**D. That the Court levies any and all applicable penalties, fines, and punitive charges deemed appropriate for the actions of Roy C. Irby II and Bank of America.**

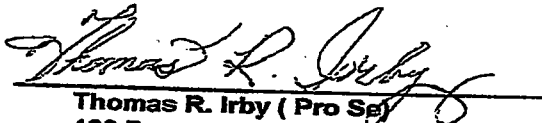
**E. That any punitive damages the court may apply to Bank of America and Roy C. Irby be paid at least in part to the complainant.**

**F. That the Complainants rights to file a complaint against Bank of America and Chase Bank with the office of the Comptroller of Currency be protected.**

**G. The foreclosure Attorneys for Chase Bank are asking the court for a carte blanc decision allowing Chase to take possession of a \$220,000.00 home and property and sell it for less than the mortgage total, then attempt to collect whatever they choose from the complainant. Such a decision would be prejudicial and open to corruption without court ordered guidelines for the sale of the property. When the complainant co-signed the mortgage he knew M&T Bank was getting a two hundred plus percent collateral to cover their mortgage. Chase Bank is well aware of the value of the property. The Chase Bank attorney's are attempting to distract from the fact that theirs is a collateral mortgage with substantial collateral that can pay Chase a profit over and above the accrued balance on the mortgage. The complainant therefore prays for the court to set aside any obligations other than the collateral property as described within the mortgage. Upon receiving title to the collateral property Chase bank should have no further claim against Thomas R. Irby.**

**Respectfully submitted to the Court this date of May 18, 2020**

**Signed:**



**Thomas R. Irby ( Pro Se)  
160 Pearson Road  
Belton, SC 29627  
Phone: (864)243-4015**

10/13/10

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Thomas R. Irby

Cross Complainant, Pro Se

Vs.

Bank of America,  
Roy C. Irby II, and  
Chase Bank  
Defendants

In The Court of Common Pleas

Case No: 2010-CP- 23-1621

2010 OCT 12 P 12:28

**AMENDMENT TO CLARIFY  
CROSS COMPLAINT**

Thomas R. Irby, as Cross Complainant in the above referenced action, respectfully responds as follows:

(A) That each allegation in the Cross Complaint as originally filed is made based on the historical records, documents, and eyewitness testimony relative to this matter.

(B) The validity of each item in the Cross Complaint is emphasized herein exactly as originally written.

(C) The allegations against Chase Bank are dismissed by mutual agreement between Council for Chase Bank and Thomas R. Irby.

(D) The Court is respectfully referred to the "South Carolina Code of Laws, Section 29, "Mortgages and Deeds of Trust Generally", in entirety.

(E) The Court is specifically referred to Section 29-3-310 to which Bank of America has failed to comply by continued gross and wanton negligence.

(F) SECTION 29-3-320, Liability for failure to enter satisfaction: Penalty for failure to comply is "not exceeding one half the amount of the debt or twenty five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees", etc. Complainant Thomas R. Irby believes that in this matter the amount of penalty should be Twenty Five Thousand Dollars plus all actual damages, costs, and attorney's fees.

(G) Section 29-3-360 and Section 29-3-370: In compliance thereof Complainant Thomas R. Irby requests that the Court Serve on Bank of America to show cause for failure to comply with Section 29-3-310.

**CROSS COMPLAINT**

**Case No: 2010-CP- 23-1621**

6. Bank of America prevented the complainant from reviewing the account history and activity from November 13<sup>th</sup>. 2009 until June 11<sup>th</sup>. 2009. This prevented the complainant from knowing or understanding the status of the account.

7. By attempting to hold the complainant responsible for the continuing sums provided to Roy C. Irby II, Bank of America and Roy C. Irby II have deliberately jeopardized the complainants reputation, financial stability, and personal welfare.

**As to Bank of America and Chase Bank**

8. Complainant believes and is informed that he and Roy C. Irby II signed each mortgage with specific responsibilities. In both cases each bank knew that Roy C Irby was to be the person paying the installments and all relative costs generated by the mortgages. When the complainant questioned each bank about the status of the accounts Roy C. Irby's contact data was removed from the billing procedures. Each bank attempted to collect the delinquencies only from the complainant. The foreclosing attorney for Chase Bank has prepared a complaint holding the complainant to be the singular borrower and responsible party.

9. Both Banks are aware that the complainant signed the mortgages under conditions which no longer exist. Both mortgages were signed when the complainant was gainfully employed. Complainant is now Seventy three years old, unemployed, and lives on social security plus a small monthly annuity.

10. As collateral to protect his responsibility for both mortgages the Complainant held by deed a one half ownership of the property. In November of 2008 Roy C. Irby filed a second deed that transferred sole ownership to him. That deed was filed without the complainant's approval or knowledge. That deed was not discovered until December of 2009.

11. Chase Bank failed to notify the complainant of the account delinquencies until the account was too far in arrears to be brought current.

**NOW THEREFORE the cross-complainant, Thomas R. Irby, prays as follows:**

A. That the court will declare the complainant to be free from responsibility for any debt to Bank of America as generated by Roy C. Irby II.

B. That the closing instructions from Attorney Gregg Jones, with the payoff check, to Bank of America on August 22<sup>nd</sup>. 2007 terminated and satisfied the complainant's obligation for that mortgage and no further obligation to Bank of America exists from the complainant, and Bank of America is to collect any sums due from Roy C. Irby II.



(H) Section 29-3-380 Submission to Jury: Whereas Bank of America continues to deny any wrongful acts, Complainant Thomas R. Irby requests the Court to bring this matter before a jury "to be decided immediately in a summary manner."

(J) Section 16-13-240. Fraud: Bank of America, has continuously refused to correct the matter and continues their fraudulent efforts to force the complainant to pay sums to them that he should not owe.

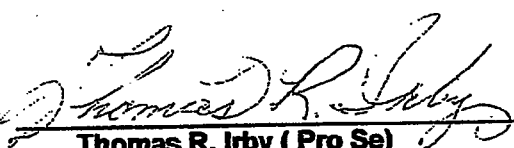
(K) Section 16-17-410 Conspiracy: Bank of America and Roy C. Irby II conspired in unison to defraud Thomas R. Irby of a sum exceeding Sixty Nine Thousand Dollars (\$69,000.00) plus all the additional costs he has incurred.

(K) The complainant feels that in addition to the penalty established in Section 29-3-320, a substantial punitive judgment should be levied against Bank of America to assure their negligence is not repeated.

(L) In addition to costs and Damages specified in paragraph (F) Thomas R. Irby believes he should be compensation for loss of his good credit. The mortgage and contract with Bank of America were based on the Good Credit Record of Thomas R. Irby. Due to the multiple acts of wanton negligence by Bank of America, the complainant's good credit is destroyed in a manner that denies recovery in his lifetime.

(M) This amendment is respectfully submitted to clarify the intent (and offer some basis of law) of the original Cross Complaint. Complainant Thomas R. Irby will continue to exercise his right to discovery by researching the Code of Laws of South Carolina and the United States Constitution for other applicable law including Breach of Contract, Breach of Trust, Conspiracy, conspiracy to defraud, fraud, embezzlement, and negligence, etc.. The right to subpoena specific witnesses and evidence will be exercised.

Signed: \_\_\_\_\_

  
Thomas R. Irby ( Pro Se)  
160 Pearson Road  
Belton, SC 29627  
Phone: (864)243-4015

Date: \_\_\_\_\_

10/11/2010

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

CHASE HOME FINANCE, LLC  
Plaintiff

Vs.

THOMAS R. IRBY, ROY C. IRBY II  
and BANK OF AMERICA  
Defendants

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-23-1621

DEFENDANT THOMAS R. IRBY'S

GENERAL AMENDMENT

To His

CROSS COMPLAINT

2011 SEP -6 A 10:39

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
SEP 6 2011

I, Thomas R. Irby, as Cross Complainant in the above referenced action, respectfully offer this General Amendment to my original complaint as follows:

(A) Each allegation in the Cross Complaint and my amendment to clarify as previously filed is referenced herein, in entirety, as originally written.

(B) The allegations against Chase Bank are dismissed by mutual agreement between Council for Chase Bank and myself.

(C) I hereby reaffirm my request for a Trial Before a Jury.

### **AMENDMENTS**

#### **AS TO ROY C. IRBY II;**

(1) The court is respectfully referred to: [SC ST SEC 34-3-110] Crimes against a federally chartered or insured financial institution, which provides the following:

(A) *A person knowingly may not execute, or attempt to execute, a scheme or artifice to:*

(a) *Defraud a federally chartered or insured financial institution; or*

(b) *Obtain monies, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises.*

- (c) *A person who violates the provisions of subsection (A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned for not more than five years, or both.*

(2) Each withdrawal or Advance by Roy C. Irby II after August 22, 2007 is also a violation of the South Carolina Code of Laws Section: 16-13- 230, Breach of Trust with Fraudulent intent. *"A person who violates the provisions of this section is guilty of a Felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is five thousand dollars or more."*

(3) (a) There can be no question that an agreement of trust (duty) existed between me and Roy C. Irby II. In Murray v. Bank of America the South Carolina Court of Appeals clarifies "Duty" as: *"the obligation to conform to a particular standard of conduct toward another."* Shipes v. Piggly Wiggly St. Andrews 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). .....*An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance(s).*

(b) Roy C. Irby violated his pledge of "Duty" to me that he would faithfully service, maintain, and pay all debts, costs, payments due, etc., for the H.E.L.O.C. until the account was paid off, closed, and terminated or until I was released of all responsibility for the account. He also pledged that he would protect my best interests at all times.

(c) The Duty of trust from Roy to me is confirmed by the BOA and Chase accounts. Roy maintained the accounts until he decided to default. I made no payments for any costs relative to the two mortgages until December of 2009.

(4) In addition to the Breach of Trust by Roy C. Irby II against myself, it is obvious that he deliberately and without reservation continued withdrawing sums from the H.E.L.O.C. account with Bank of America until the limit on the account was maximized.

(5) Roy Irby Continued to withdraw funds while knowing that the account was closed on August 22, 2007. His knowledge that the account was closed is in evidence by his signature on the Closing documents of the M&T/Chase mortgage.

(6) Roy C. Irby knew that closing Attorney Gregg Jones and I considered the account to be closed on August 22, 2007. Roy knew the account was closed on that date.

(7) All funds obtained from the account by Roy Irby, during and after the closing and/or payoff procedure, were fraudulently obtained. The South Carolina Court of Appeals in *Weston v. Weston medical Center*, No. 2008-UP-240, states: "A Fraudulent act" is broadly defined as any act characterized by dishonesty in fact or unfair dealing.

(8) Roy C. Irby has, by his own pleadings, stated that he knew the H.E.L.O.C. would not be closed. He thus had a duty to notify Bank of America of their error instead of taking advantage of the negligence. He also had a duty to notify me that the account was not closed.

(9) Each withdrawal from the account by Roy C. Irby, during and after the payoff procedure, was a deliberate and individual violation of the above referenced [SC ST SEC 34-3-110]. Therefore each violation (withdrawal or advance) should be punishable as a Separate (individual) felony at the Court's discretion.

(10) Roy C. Irby has expert knowledge and experience unknown by me. Records from Spartanburg County include the following:

(a) Roy C. Irby has been a defendant in six (6) different Foreclosure Procedures prior to this action. He is now experienced as defendant in eight (8) foreclosure actions.

(b) Roy C. Irby has been party to 46 mortgages and 32 deeds prior to this action. With this action he has been party to 48 mortgages and 33 deeds.

**AS TO BANK OF AMERICA:**

(1) I believe that when Bank of America submitted a payoff statement with the payoff balance noted, the bank knew or should have known the Equity Line of Credit was in a Payoff Procedure.

(2) Bank of America knew or should have known that no additional withdrawals were to be made during and after the payoff process.

(3) Bank of America knew or should have known that the letter from Attorney Jones directing the bank to "close, block, and satisfy" the equity line mortgage was in compliance with condition #20 on page #6 of the "Equity Line of Credit Maximizer Agreement". That condition states:

**"Suspension or Termination by You. Each of you has the right, upon proper written notice to us, to suspend the privilege of obtaining new advances. If a request to suspend the privilege of obtaining advances, even if made by only one of you, will be effective against all of you.....If one of you requests termination of the account, the account will be terminated for all all of you".....**

Condition #21 states:

**"If your account is suspended or terminated for any reason, you will nonetheless remain obligated to pay the account balance according to the terms of this agreement."**

**Thus an unpaid balance is not cause to ignore instructions to block the account.**

(4) Bank of America knew or should have known that by ignoring the above conditions of the agreement the bank breached its written contract with me. The breach is therefore deliberately gross, malicious, and wanton.

(5) Bank of America knew or should have known the risk for the potential damages that occurred from their breach of contract. B.O.A. accepted that risk through the bank's own negligence.

(6) Bank of America violated the bank's duty of care to me when the Bank failed to notify Attorney Jones or myself that the account was not closed.

(7) Bank of America has egregiously and reprehensibly continued the breach of contract, breach of trust, and violation of duty of care at least from August 22, 2007 until now.

(8) Bank of America records verify that B.O.A. was notified of the violations by phone on 12/29/09. That notification was within Three weeks from the time Thomas Irby discovered the Bank's negligence. The Bank has ignored all attempts since that date to correct the matter.

(9) The continuing negligence of B.O.A. is the primary contributing factor that enabled and encouraged the fraudulent acts of Roy C. Irby II. The Bank has directly contributed to the violations for which the Bank claims it is innocent. The Bank has thus voluntarily made itself a participant and accessory in the violations committed by Roy Irby.

(10) There can be no doubt that the Bank ignored any obligation of "Duty of Care" to me. In *Murray v. Bank of America*, the existence of a "Duty of Care" was established even though the Plaintiff never had a written contract or an account with the Bank. The Court found for the plaintiff and awarded \$300,000.00 in damages on a negligence claim that included minimal compensatory costs. The Appeals Court of South Carolina affirming the Trial Court's Decision states the following:

*In order to establish a claim for negligence the plaintiff must prove the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant's negligent act or omission; (3) the plaintiff was damaged; and (4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 76, 81 (1998)*

*Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Shipes v. Piggly Wiggly St. Andrews 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). .....An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance.*

(11) All the provisions required to establish a claim for Negligence resulting in violations of a "Duty of Care", Breach of Contract, and Breach of trust by B.O.A. are confirmed by the allegations of actions and documentation in my Complaint. Thomas Irby was damaged and the damages resulted directly from the violations.

(12) Bank of America continues attempts to force me to pay the balance due on the H.E.L.O.C. B.O.A. claims that the payoff check of \$9,998.92 left an unpaid balance of \$10,700.73 on August 24, 2007. On September 12, 2007, seventeen days later, a payment of \$13,000.00 was credited to the account. When that payment was applied back to the existing unpaid balance a credit balance of \$2,299.29 remained to be credited forward from August 24, 2007. I notified B.O.A. to terminate advance privileges on August 22, 2007. Any Balance that the Bank could have claimed I owed then was paid off by the September deposit.

### **PUNITIVE DAMAGES**

1. I hereby reaffirm my request for Punitive Damages to be determined by the Jury.
2. Counsel for Bank of America references three cases by which he claims that punitive damages levied against Bank of America Violate the Fourteenth Amendment (and other Amendments) of the United States Constitution.
3. To support Bank of America's claim for exemption from Punitive Damages Council for the bank offers in reference the following three cases:
  - (I).....*BMW of North America v. Gore*, 517 U.S. 424 (1996)
  - (II)..... *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*,  
532 U.S. 424 (2001)
  - (III).....*State Farm Insurance Co. v. Campbell*, 538 U.S. 408 (2003)
4. I hereby refer the court to the following additional Specific Cases:
  - (IV).....*Pacific mutual life insurance co. V. Haslip, et al.* U.S. supreme court.  
89-1270, march 4, 1991.
  - (V)..... *TXO Productions Corp. v. Alliance Resources Corp.* U.S. Supreme  
Court No. 92-479 - June 25, 1993
  - (VI)..... *Mathias v. Accor Economy Lodging Inc. and Motel 6*, U.S. Court of  
Appeals No. 03-1010 and No. 03-1078, Sept. 3, 2003 and Oct. 21, 2003.
  - (VII)..... *Webb v. CSX Transportation, Inc., S.C. Dept of Transportation, and  
Anderson County*: S. C. Supreme Court No. 26004, June 20, 2004.

**(VIII)..... Atkinson v. Orkin Exterminating Co. Inc. South Carolina Supreme Court No. 25883, October 25, 2005**

**(IX)..... Jerome Mitchell, Jr. V. Fortis insurance co. Inc. Opinion no. 26718, South Carolina state supreme court, Jan. 22, 2009 – Sept. 14, 2009**

**(X).....Bank of America v. Sanjiv Narula, et. al. State of Kansas, Johnson County Civil Court Department, Case No. 04-CV-06279, Div. 17., Chapter 60. June 11, 2009. This Case is the same in principal as the Cross Complaint filed by me against Bank of America.**

5. **None of the ten cases referenced make any claim that Punitive Damages are a violation of the Fourteenth Amendment or any other Amendment. In fact punitive penalties are supported in each case. Only the disparity between actual (compensatory), and punitive damages (relative to historic factors) may infringe on the intent of the Fourteenth Amendment or other Amendments.**
6. **The relative ratio of Punitive Damages to Compensatory damages of the referenced cases range from nine to one (9/1) up to Five Hundred Twenty Six to one (526/1).**
7. **None of the above referenced cases support a claim that an appropriate levy of Punitive Damages violates any other Amendment to the Constitution of The United States.**
8. **The primary purpose for Punitive Levies in all cases where referenced is to Deter and Punish in order to prevent the wrong doer from repeating his error.**
9. **Bank of America has reprehensibly and egregiously denied any wrongful act and has willfully done so at least since December 29, 2009. On that date B.O.A. was notified by me that I was not responsible for the account.**
10. **Bank of America failed (refused) to act in good faith to reconcile the problem and has acted only to profit from the Bank's negligence.**



11. In Paul Weston, MD v. Margaret J. Weston Medical Center, South Carolina court of Appeals, Opinion 2008-UP- 240, February 12, 2008 – Filed April 18, 2008 Conditions for a charge of Breach of contract Accompanied by a Fraudulent Act are defined as:

*To recover punitive damages for breach of contract accompanied by a fraudulent act, the plaintiff must prove three elements: (A) a breach of contract; (B) a fraudulent intent in breaching the contract; and (C) a fraudulent act accompanying the breach. Id. at 53-54, 336 S.E.2d at 503-04.*

12. B.O.A. breached the contract and the duty of care with me. (B) The Bank attempts to retain First Mortgage status to the \$220,000.00 property and profiteer on the \$69,000.00 H.E.L.O.C. (C) B.O.A. provided funds to Roy C. Irby II after withdrawals were terminated and the account was closed. The Bank also failed to notify Attorney Gregg Jones or myself that the account was not closed. The negligence remained undetected for more than two years.

13. B.O.A. continues attempts to hold First Mortgage Status even though they received and accepted the Payoff Check and the letter from Attorney Jones instructing them to block and close the mortgage and H.E.L.O.C.

14. Bank of America is a Recidivist (repeat) Violator. In BMW v. Gore Jr. the U.S. Supreme Court states: "Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. See *Gryger v. Burke*, 334 U.S. 728, 732 (1948)."

15. In Murray v. Bank of America, a Negligence/Breach of Duty of Care case, the South Carolina Court of Appeals noted that, "The Bank Failed to follow it's own procedures, (and) did not timely close the account."

16. In Bank of America v. Narula, Johnson County Kansas District Court , case no. 04-CV-06279. Div. 17, Chapter 60, a breach of trust case: The court confirmed a punitive award to the Defendant of \$750,000.00. In confirmation the Court commented that:

***"The Court is convinced that the plaintiff intentionally defrauded the defendants and intentionally failed to act with due regard for the defendants' interests as their fiduciary or trusted financial advisor. The court does not believe that the plaintiff will now or ever recognize or accept the wrongfulness of its actions....."***

### **COMPENSTORY DAMAGES**

- (1) The U.S. Supreme Court, in *State Farm v. Campbell* States: "Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Ibid. (citing Restatement (Second) of Torts §903, pp. 453—454 (1979) The Campbell's were awarded \$1,000,000.00 for 18 months of emotional distress. ( $\$1,000,000.00/2 = \$500,000.00$  for one person for 18 months)
- (2) Compensatory Damages also include: (a) Potential costs and expenses plus (b) potential damages that could have incurred through continued time lost, distress, anxiety, outrage, and humiliation
- (3) In *United States v. Burke*, the Supreme Court described the traditional harms associated with personal injury as "pain and suffering, emotional distress, harm to reputation, or other consequential damages (e.g., a ruined credit rating)."
- (4) I am financially vulnerable. Bank of America has an unfair advantage. In *Mathias v. Accor*, the United States Court of Appeals very accurately described the situation now at hand:
  - (a) ***"Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee."***
  - (b) ***"In other words, the defendant is investing in developing a reputation intended to deter plaintiffs." It is difficult otherwise to explain the great stubbornness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included."***

(5) I have reviewed my case in detail with at least nine attorneys and I'm still trying to find counsel. No attorney will accept the case on contingency and there are no funds otherwise to finance the case.

### **CALCULATED DAMAGES**

#### **DAMAGES BY BANK OF AMERICA**

(A) In Murray vs. Bank of America, Murray was awarded \$300,000.00 for a violation of approximately one month of stress and anxiety. That equals \$10,000.00 per day. Bank of America has attacked me since November of 2009. The case will remain for 90 days from June 29, 2011. That equals 667 days at \$10,000.00 or \$6,670,000.00. In State Farm vs. Campbell the Campbell's were awarded \$1,000,000.00 for 18 months of stress and anxiety. Thus 547 days for \$1,000,000.00 equals \$1,828.16 per day. \$1,826.16 per day for 667 days equals \$1,219,382.72.

(B) My wife has been placed on Zoloft by her physician to control severe anxiety attacks. I am under treatment from Dr. Jackson Bruce for stress, sleep deprivation, fatigue, and depression. The last report from my Cardiologist notes severe stress symptoms. I was hospitalized in June for severe head pains resulting in a charge of \$12,930.00 plus \$125.00 for Greenville County EMS referral to the emergency room.

- |                                                                   |              |
|-------------------------------------------------------------------|--------------|
| (1) Costs & expenses as of 7/10/2011 (remain in accrual)-----     | \$ 36,696.00 |
| (2) Stress and Anxiety (see State Farm v. Campbell)-----          | \$750,000.00 |
| (3) Loss of Credit (Chase Foreclosure-6 years to repair)-----     | \$ 75,000.00 |
| (4) Loss of Reputation & good name (irreparable)-----             | \$ 75,000.00 |
| (5) Potential Damage (B.O.A. \$69,0000.00 plus fees & costs)----- | \$ 85,000.00 |
| (6) Outrage, Humiliation and <u>foreshortened life</u> -----      | \$150,000.00 |

Total Through 7/10/2011-----\$1,171,696.00

**DAMAGES BY ROY C. IRBY II**

(C) If Bank of America had closed the account and terminated withdrawal privileges as directed, Roy C. Irby could not have taken money from the account. Because the actions of Roy Irby are wantonly fraudulent without excuse He should be responsible to pay separate damages relative to his actions.

|                                                                    |              |
|--------------------------------------------------------------------|--------------|
| (1) Costs & expenses as of 7/10/2011 (in accrual)-----             | \$ 18,300.00 |
| (2) Emotional Distress and anxiety-----                            | \$300,000.00 |
| (3) Loss of Credit (Chase Foreclosure min. 6 years to repair)----- | \$ 37,000.00 |
| (4) Loss of Reputation & good name (irreparable)-----              | \$ 37,000.00 |
| (5) Potential Damage (B.O.A. \$69,000.00 plus fees & costs)-----   | \$ 69,000.00 |
| (6) Outrage, Humiliation and <u>foreshortened life</u> -----       | \$ 75,000.00 |
| Total Through 7/10/2011-----                                       | \$536.300.00 |

(D) All costs and damages listed herein are based on the status as of July 10, 2011 and are to be adjusted relative to the date of trial. All Costs and damages listed thus remain in accrual.

(E) No costs or damages awarded by the court will be used to offset the amount of the other party. The court has ruled previously that because someone else pays a debt the party who actually owed it does not get a free ride. Roy Irby is not responsible to pay for Bank of America's violations nor is the Bank responsible to pay for Roy's violations.

(F) These damages are based on awards from similar cases and on actual costs and expenses including time spent. Costs are also relative to my earning ability of \$43.00 per hour on my last payroll employment. I have applied these damages in entirety as stated against Bank of America and in entirety as stated against Roy C. Irby II.

**CAUSES OF ACTION**

(A) As of the date of this document I have not been able to locate specific references or statutes (laws by book, chapter & verse) for Negligence, Breach of Trust, Breach Of Contract, and Breach of Duty of Care in order to reference them applicably.

**CAUSE OF ACTION AGAINST BANK OF AMERICA**

**(Negligence, breach of contract, Breach of Trust, Violation of Duty of Trust)**

1. Bank of America has egregiously, reprehensibly, and obstinately refused to admit to any error for the twenty one (21) Months since I notified the Bank on December 29, 2009. They knew the breach existed in August of 2007. For more than four years Bank of America has allowed the violations to exist without applying corrective measures. The Bank holds the same documented proof of their negligence as I do. The documents and records are irrefutable.

2. I appeal to the court to levy a penalty against Bank of America in at least the amount of funds the Bank continues to force me to pay.

**CAUSE OF ACTION AGAINST ROY C. IRBY II**

**(Breach of contract with fraudulent intent, breach of trust with fraudulent intent.)**

**( Breach of Contract, Breach of Trust, and Breach of duty of trust. )**

1. Roy C. Irby II has violated the agreement and duty of trust with me since August 22, 2007. He has also Slandered and libeled me and my good name before the court and to others. Roy Irby's actions should have criminal implications.

2. I appeal to the court to review the actions of Roy C. Irby relative to criminal charges both Federal and State, and that the Court bring charges against Roy Irby on any criminal violations so determined.

3. I request that if Roy Irby is to face criminal charges, actions on such charges should not be delayed because of this action.

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**(F) I ask the Court to allow me to present my case to the Jury as soon as possible.**

**(G) I ask also that the court dismiss all claims and counterclaims by Bank of America and Roy C. Irby II based on their lack of evidence to support any valid claim.**

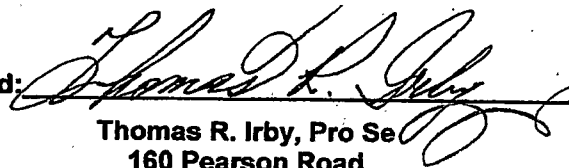
**(H) I appeal to the Court that the jury be charged to find Bank of America and Roy Irby responsible to pay all court costs, attorney fees, and any other costs and expenses incurred and/or relative to this matter.**

**(J) I ask also that any Judge, Mediator, or other referee, who is to hear this case will take enough interest to review all the evidentiary issues prior to any hearing procedures.**

**(K) I also request that the court protect my best interest in all actions, matters, procedures, and decisions relative to this action.**

**Submitted this Date of September 6, 2011.**

**Signed:**



**Thomas R. Irby, Pro Se  
160 Pearson Road  
Belton, SC 29627  
Phone: (864) 243-4015**

|                         |   |                             |
|-------------------------|---|-----------------------------|
| STATE OF SOUTH CAROLINA | ) | 9-08-2011                   |
| COUNTY OF GREENVILLE    | ) | IN THE COURT OF             |
| Plaintiffs              |   | COMMON PLEAS                |
| Roy C. Irby II          | ) |                             |
| P O Box 196             | ) | Case No: 2010-CP-23-1621    |
| Williamston, SC 29697   | ) | Amended Cross Complaint and |
|                         | ) | Action                      |
| Vs.                     | ) |                             |
| Charles H. Knight, LLC. | ) |                             |
| 404 East Main Street    | ) |                             |
| Williamston, SC 29697   | ) |                             |

2011 SEP -9 P 3:36  
 CLERK OF COURT  
 GREENVILLE CO. S.C.  
 WILLIAMSTON, S.C.

This is a formal action for damages due to Charles H. Knight, LLC Real Estate Broker negligence, malice and mal practice in listing my property without written permission in the upstate Real Estate MLS Listing #20104998. See attached MLS listing via internet dated 6-9-2010 which further enhanced the foreclosure, judgment actions in Case #2010-CP-23-1621.

- 1) Mr. Knight did do his due diligence to discover the real ownership before placing in multi listing.
- 2) The property was listed with Mr. Knight in multiple listings from February 12, 2010 through June 2010.

#### Damages

Malpractice with malice to do harm—did not do title research —Errors and Omissions real estate fund for South Carolina————\$500,000.00.

Plaintiff's subpoena's all records concerning said listing Defendant have a duty to provide such documentation. Plaintiff seeks a Court Order, commanding Defendant to give Plaintiff

an accounting of all information and documentation concerning the MIS Listing and any showing of said property with potential client's names and address.

I pray upon this court for consideration and full damages warranted. I also pray for any other consideration the court may seem fair and equitable and to protect my full interest in said matter.

CC:

Parker & Poe/PA

Bank of America

PO Box 1509

Columbia, SC 29202

Scott Law Firm/PA

Chase Home Finance

2712 Middleburg Drive Suite 200

Columbia, SC 29204

Greg F. Jones/PA

PO Box 158

Williamston, SC 29697

Diane L. Andrews/Notary

PO Box 158

Williamston, SC 29627

Thomas R. Irby



PO Box 827

Pelzer, SC 29669

Knox L. Haynsworth, III/PA

George L. Sands/ Fidelity National Title Insurance of New York

PO Box 2464

Greenville, SC 29602

  
\_\_\_\_\_  
Roy C. Irby II      9/9/2011  
Date

1)

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Home > 2 listings found > 156 Pearson Rd.

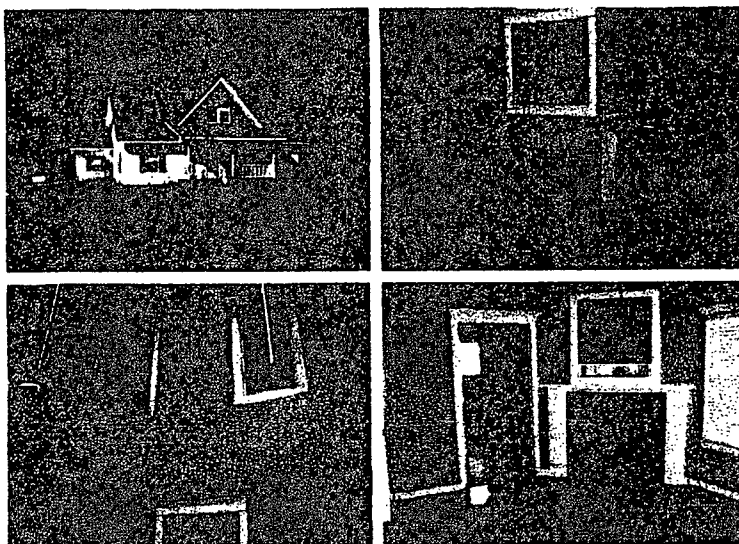
Listing 1 of 2

Save Listing Send to Friend Share Print

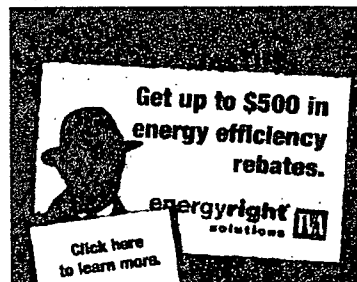
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### Property Information for 156 Pearson Rd.

Save Listing

Nice Country Home 3 Or 4 Bedrooms- 3 Fireplaces With Gas Logs; 2 Car Attached Garage Plus 3 Car Detached Workshop.

### Property Features

- Single Family Property
- Status: Active
- Area: 403-Greenville County, SC
- County: Greenville
- 3 total bedroom(s)
- 3 total bath(s)
- 3 total full bath(s)
- Story and a half
- Style: Ranch
- Living room
- Dining room
- Bathroom(s) on main floor
- Bedroom(s) on main floor
- Hardwood floors
- Fireplace(s)
- 2 car garage
- Heating features: Electricity, Heat Pump, More Than One Type, Natural Gas
- Forced air heat
- Cooling features: Heat Pump
- Inclusions: Built-In Microwave, Dishwasher, Electric Hot Water Heater, Electric Range/Oven
- Exterior construction: Vinyl Siding
- Roofing: Architectural Shingles
- Utilities present: Well - Private, Septic Tank
- Elementary School: Ellen Woodside
- Middle School: Woodmont
- High School: Woodmont

### Interior Features

Sq Ft Range 2000-2249, Building Age Is Approximately 1-5 Years, 2 Bedrooms On The Main Level, 2 Full Bathrooms On The Main Level, Foundation Is: Crawl Space., Flooring: Ceramic Tile., 2-Story Foyer, Ceiling Fan, Dryer Connection-Electric, Electric Garage Door, Gas Logs, Multiple Fireplaces, Walk-In Closet, Washer Connection, Breakfast Area, Loft, Storage Space Available In Garage, Outbuildings., Master Suite Features: Full Bath, Master On Main Level, Shower - Separate.

### Exterior Features

[http://www.realtor.com/realestateandhomes-detail/156-Pearson-Rd\\_Belton\\_SC\\_29627\\_111...](http://www.realtor.com/realestateandhomes-detail/156-Pearson-Rd_Belton_SC_29627_111...) 6/9/2010

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

THOMAS R. IRBY,

PLAINTIFF,

-VS-

ROY C. IRBY, II  
AND BANK OF AMERICA, N.A.,

DEFENDANTS.

2010-CP-23-01621

TRANSCRIPT OF RECORD

MAY 29 - 30, 2013  
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE G. EDWARD WELMAKER

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

DAVID C. ALFORD, ESQUIRE

ATTORNEYS FOR DEFENDANTS:

JERRY A. GAINES, ESQUIRE  
LAWRENCE M. HERSHON, ESQUIRE  
L. DWIGHT FLOYD, ESQUIRE

SUSAN W. HUDGINS  
CIRCUIT COURT REPORTER

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1           (Whereupon Plaintiff's exhibits 1 - 6 and Plaintiff's  
2 exhibits 8 - 11 were marked for identification)

3           **THE COURT:** All right. Gentlemen, before we have our  
4 jury come up, this is the case of Thomas Irby versus Roy  
5 Irby and Bank of America. What I propose we do -- I  
6 understand there's some outstanding motions that we need to  
7 take care of. We've had our jury waiting an hour now. Of  
8 course, I had to take a verdict in the other trial.

9           But I propose that we go ahead and select our jury and  
10 send them out for an extended lunch, and then we can take  
11 care of these motions, get a bite to eat, and then be ready  
12 to start the case up soon thereafter. Do y'all foresee that  
13 the motions could be done in thirty minutes or longer?

14          **MR. HERSHON:** Thirty ---

15          **THE COURT:** Thirty, forty-five, okay.

16          **MR. HERSHON:** Less than forty-five.

17          **THE COURT:** Okay. I'll try to judge that on when to  
18 have the jury come back. The potential witnesses, other  
19 than the Irbys would be Gregg Jones, Diane Anders, Grant  
20 Allred and Roddy Jordan. Is that all the potential  
21 witnesses?

22          **MR. HERSON:** Diane Anders. Diane Anders doesn't need  
23 to be on there.

24          **THE COURT:** No chance? I mean I can call the name out  
25 if you think there ---

1           **MR. ALFORD:** No, we can strike Diane.

2           **THE COURT:** Okay. I'll strike Diane Anders then.

3           **MR. HERSHON:** She's still a, I mean, she's still a  
4 relevant person.

5           **THE COURT:** Is her name going to be used? I mean, I'll  
6 just ask the jury if they know -- I'll list her and then --  
7 she doesn't have to be called.

8           **MR. GAINES:** I don't think that included our witnesses,  
9 Your Honor.

10          **THE COURT:** Excuse me?

11          **MR. GAINES:** I don't think that included our potential  
12 witnesses.

13          **THE COURT:** Oh, okay. Who have you got as potential  
14 witnesses?

15          **MR. GAINES:** Bob Leonardi.

16          **THE COURT:** Bob Leonardi.

17          **MR. GAINES:** Dan Braken and Maggie Holloway.

18          **THE COURT:** Who was the last one?

19          **MR. GAINES:** Holloway. H-O-L-L ---

20          **THE COURT:** First name?

21          **MR. GAINES:** Maggie.

22          **THE COURT:** Maggie Holloway, H-O-L-L-O-W-A-Y? All  
23 right. So that would include all potential witnesses. I  
24 also understand from the jury coordinator that from your  
25 printed list, juror 15 will not be available because of an

1 emergency that came up. 29 and 32 are all not to be -- not  
2 to be on the panel.

3 MR. ALFORD: Would you repeat those numbers, 15 ---

4 THE COURT: Number 15, number 29 and number 32. And  
5 we'll do a head count when they come up. Number 25 may not  
6 be available. He was still thirty minutes away. And I  
7 don't know whether he's here yet or not, but we'll do a  
8 count and find out whether or not he's here. We'll  
9 certainly let you know that.

10 As I told you in chambers when we were talking about  
11 some of the administrative matters we had about the proper  
12 captions and issues and so forth, we'll strike -- I'll  
13 qualify the jury. If any of those names are disqualified  
14 for any reason, we will strike that name. And, of course,  
15 you will know that. But we will not renumber any of these.  
16 It's ever how many are gone.

17 And whatever's left you'll be striking from the first  
18 twenty. Plaintiff will have four strikes. The Defense will  
19 have four. And then the next three names will be the  
20 alternates for one alternate. Plaintiff will strike one of  
21 the three. Defense will strike one of the remaining two.  
22 And then we'll have one alternate.

23 I'll caption the case to the jury as a matter involving  
24 Thomas Irby versus Roy Irby and Bank of America. It  
25 involves issues involving possible negligence, breach of

1 contract and breach of contract with possible fraudulent  
2 intent.

3 For the record and for your benefit, I've been trying  
4 to think about -- banks change their names so much, and I  
5 apologize to the bankers here that I can't keep up with who  
6 I have. I don't believe I bank at Bank of America, but I  
7 believe I pay a credit card -- I write a check every month  
8 to Bank of America. So I guess my credit card must go  
9 through Bank of America.

10 If any of y'all feel that that would be a  
11 disqualification for me hearing this case, what I'm going to  
12 do is I'm -- we'll go on and pick our jury. It won't be  
13 sworn in. We'll take the break, and y'all can talk with  
14 your clients individually about that.

15 And when we get back on the record, I would ask that  
16 Mr. Alford just be the spokesman for the -- he can poll all  
17 the lawyers and the parties, of course. And if any of the  
18 parties or the lawyers feel that this would create a  
19 conflict with me hearing this case, then I'll appoint Mr.  
20 Alford as the spokesperson.

21 I don't need to know who objects. I just need to know  
22 that there is an objection. And we'll try to handle that at  
23 the appropriate time if there is such an objection.

24 Any other matters that we need to take up before I have  
25 our jury come up and get them selected?

1       **MR. ALFORD:** Not from the Plaintiff, Your Honor.

2       **THE COURT:** Okay. Anybody?

3       **MR. GAINES:** Nothing, Your Honor.

4       **THE COURT:** Okay. All right. Let's have our jury  
5 come. If you'll send them up.

6       (Pause)

7       **THE COURT:** Mr. White is here, I understand. So number  
8 25 will be included.

9       (Pause)

10       **THE BAILIFF:** Your Honor, the panel of 32 is ready.

11       **THE COURT:** Bring them in.

12       (Whereupon the jury panel entered the courtroom at  
13 11:45 am)

14       **THE COURT:** Ladies and gentlemen, some of you at least  
15 have learned the protocol. As I told some of you yesterday,  
16 you've been qualified to serve as a juror for this week. On  
17 Tuesday morning Judge Verdin qualified you. We're about to  
18 start another case, and I need to make sure that we have  
19 twelve fair and impartial jurors who'll be qualified on this  
20 particular case that we're about to try.

21       This involves a dispute between certain parties. Mr.  
22 Thomas Irby is making a claim against Roy Irby and also  
23 against the Bank of America involving negligent breach of  
24 contract and different acts. And there's other claims by  
25 the other parties against each other.

1           We need to find twelve fair and impartial jurors to  
2   hear this case, make a decision as to what the facts are in  
3   light of the evidence that's presented by all the parties,  
4   and in light of the law that I give you at the conclusion of  
5   the case. I need to ask you some additional questions.

6           First of all, is there anyone on the jury panel who has  
7   any prior knowledge about this particular dispute that we're  
8   here on today between the Irbys and Bank of America? Either  
9   you heard about it on the news media or you heard someone --  
10   overheard someone talking at the coffee shop. If you have  
11   any prior knowledge from whatever source about this  
12   particular incident, would you please stand.

13           (No response)

14           **THE COURT:** Thank you. There is no response.

15           Is there any member of the jury panel related by blood  
16   or marriage to Mr. Thomas Irby or Mr. Roy C. Irby? If so,  
17   would you please stand. Yes, ma'am, you're related?

18           **UNIDENTIFIED FEMALE:** I'm Mr. Irby's ---

19           **THE COURT:** No, ma'am. You're not one of the jurors.  
20   You don't need to respond to my questions, please, ma'am.

21           **UNIDENTIFIED FEMALE:** I'm sorry. I didn't know.

22           **THE COURT:** Only the jurors need to respond. Thank you  
23   very much.

24           **UNIDENTIFIED FEMALE:** I didn't know.

25           **THE COURT:** Is there any member of the jury panel have

1 a close business or a social or a personal relationship with  
2 either Mr. Thomas Irby or Mr. Roy C. Irby? If so, would you  
3 please stand.

4 (No response)

5 **THE COURT:** Is there any member of the jury panel who  
6 is a stockholder in Bank of America? If so, would you  
7 please stand.

8 (No response)

9 **THE COURT:** Thank you. There is no response.

10 Among the potential witnesses, not all of these may be  
11 called, but there's a chance that these particular people  
12 may be called as witnesses in the case. I'm going to read  
13 those names out to you, ladies and gentlemen. If you'll  
14 listen carefully.

15 Among the witnesses might be Grant Allred, Diane  
16 Anderson, Gregg Jones, Roddy Jordan, Bob Leonardi, Dan  
17 Braken, Maggie Holloway. Is there any member of the jury  
18 panel related by blood or marriage to any of these potential  
19 witnesses? If so, would you please stand.

20 (No response).

21 **THE COURT:** Is there a member of the jury panel who has  
22 a close business or a social, a personal relationship with  
23 any of these potential witnesses? If so, would you please  
24 stand.

25 (No response)

1           **THE COURT:** Thank you. There is no response.

2           This particular incident involves a bank loan. Is  
3   there any member of the jury panel or a member of your  
4   immediate family ever been involved in a foreclosure action?  
5   If so, would you please stand.

6           (No response)

7           **THE COURT:** Thank you. There is no response.

8           Is there any member of the jury panel ever been  
9   involved in any lawsuit of any kind, automobile accident, a  
10   contract dispute, employment? If you've been involved in  
11   any lawsuit; either filing a lawsuit or a lawsuit been filed  
12   against you, would you please stand. All right. And your  
13   name, please, ma'am?

14          **THE JUROR:** Alyssa McKenney.

15          **THE COURT:** And your last name again?

16          **THE JUROR:** McKenney.

17          **THE COURT:** McCutty?

18          **THE JUROR:** McKenney.

19          **THE COURT:** All right. What was the general nature of  
20   that lawsuit? Was it a ---

21          **THE JUROR:** Automobile accident.

22          **THE COURT:** Were you the one who filed the suit or  
23   someone sue you?

24          **THE JUROR:** I filed the suit.

25          **THE COURT:** Okay. And how long ago did that take



1 place?

2 THE JUROR: It hasn't been settled yet, but it's been  
3 almost two years.

4 THE COURT: It's still pending?

5 THE JUROR: Uh-huh (affirmative).

6 THE COURT: Would that affect your ability to be a fair  
7 juror in this case?

8 THE JUROR: No.

9 THE COURT: Thank you. You may be seated. Yes, sir,  
10 your name, please?

11 THE JUROR: Donald Anderson.

12 THE COURT: All right, sir. And what kind of suit was  
13 it?

14 THE JUROR: Medical malpractice lawsuit.

15 THE COURT: A what kind?

16 THE JUROR: Medical malpractice suit.

17 THE COURT: Okay. And how long ago did that take  
18 place?

19 THE JUROR: Over ten years ago.

20 THE COURT: All right. Would that affect your ability  
21 to be a fair juror, the fact that you've been involved in  
22 this litigation in the past?

23 THE JUROR: I don't think so.

24 THE COURT: Do you have any hesitancy at all? Do you  
25 believe that it could affect your ability to be a fair juror

1 to these parties?

2 THE JUROR: No.

3 THE COURT: All right. Thank you, sir. Yes, sir, your  
4 name?

5 THE JUROR: Larry Poole. I had an IRA with Bank of  
6 America. I forgot I had it.

7 THE COURT: You had an IRA in the Bank of America?

8 THE JUROR: Yeah.

9 THE COURT: All right. Do you believe that would  
10 affect your ability to be a fair juror in this case?

11 THE JUROR: I don't think so.

12 THE COURT: Well, in other words, you have an account  
13 there, but an IRA. I guess others have checking accounts.  
14 Do you believe that the fact that you have funds in that  
15 bank would ---

16 THE JUROR: No.

17 THE COURT: --- affect your ability?

18 THE JUROR: No.

19 THE COURT: You could be fair to both sides? To the  
20 Irbys and to the bank as well?

21 THE JUROR: Yes.

22 THE COURT: All right. Thank you, sir. You may be  
23 seated. Yes, ma'am, your name, please?

24 THE JUROR: Kyndall Robinson. I have a court custody  
25 battle going on.

1           **THE COURT:** In Family Court?

2           **THE JUROR:** In Family Court.

3           **THE COURT:** All right. Do you believe the fact that  
4 you're involved in that litigation would affect your ability  
5 to be a fair juror in this case in any way?

6           **THE JUROR:** No, sir.

7           **THE COURT:** All right. Thank you, ma'am. You may be  
8 seated. Thank you for sharing that information with us.

9           Is there any member of the jury panel or a member of  
10 your immediate family ever worked in the banking or mortgage  
11 lending industry? If so, would you please stand. Your  
12 name, please?

13          **THE JUROR:** Christina Bartosch.

14          **THE COURT:** Was that you or a family member?

15          **THE JUROR:** I worked at a credit union previously.

16          **THE COURT:** All right. And how long ago was it you  
17 worked there?

18          **THE JUROR:** About five years ago.

19          **THE COURT:** The fact that you had that knowledge of  
20 working at the, in the credit industry, would that affect  
21 your ability to be a fair juror?

22          **THE JUROR:** No.

23          **THE COURT:** All right. Thank you, ma'am. You may be  
24 seated. Your name, please?

25          **THE JUROR:** Kimberly Silvers.

1           **THE COURT:** And did you work or a family member?

2           **THE JUROR:** I worked for the First Savings Bank about  
3 twenty years ago.

4           **THE COURT:** Okay. And that experience that you had,  
5 would that interfere with your ability to be a fair juror in  
6 this case?

7           **THE JUROR:** No, sir.

8           **THE COURT:** Thank you very much. You may be seated.

9           Is there any member of the jury panel formed or  
10 expressed an opinion in any way about the facts in this  
11 case? If so, would you please stand.

12           (No response)

13           **THE COURT:** Is there any member of the jury panel aware  
14 of any bias or prejudice that would interfere with your  
15 ability to be a fair juror in this case if you were called  
16 upon to serve? If so, would you please stand.

17           (No response)

18           **THE COURT:** Thank you. There's no response.

19           At this time, I'll ask the attorneys, if you would,  
20 please, stand and introduce yourselves to the jury. Mr.  
21 Alford.

22           **MR. ALFORD:** Thank you, Your Honor. My name is David  
23 Alford. I represent the Plaintiff, Thomas Irby. That's  
24 Erin Frazier. She's an intern in my office. My office is  
25 up in Spartanburg.

1           **THE COURT:** All right. Thank you. Mr. Gaines.

2           **MR. GAINES:** My name is Jerry Gaines. And I represent  
3 Roy Irby sitting here. And I'm also in Spartanburg. And my  
4 client, Roy, lives in Easley. Thank you.

5           **MR. HERSHON:** Ladies and gentlemen, I'm Lawrence  
6 Hershon. Also with me is Dwight Floyd. We're both  
7 attorneys at Parker Poe down in Columbia. Also here is  
8 Grant Allred. He's an employee with Bank of America out of  
9 Greensboro.

10          **THE COURT:** Thank you, gentlemen. Is there any member  
11 of the jury panel related by blood or marriage to any of  
12 these attorneys, or their staff or members of their firms?  
13 If so, please stand.

14           (No response)

15          **THE COURT:** Is any member of the jury panel have a  
16 social, or a business or a personal relationship with any of  
17 these attorneys or members of their firms? If so, would you  
18 please stand.

19           (No response)

20          **THE COURT:** Is there any member of the jury panel ever  
21 been represented in any action by any of these attorneys or  
22 been involved in any litigation in which any of these  
23 attorneys represented the opposing side? If so, would you  
24 please stand.

25           (No response)

1       **THE COURT:** Thank you. There is no response.

2       Both Mr. Thomas Irby and Mr. Roy Irby and the Bank of  
3 America, they're in this courtroom today seeking fair and  
4 impartial jurors to hear this case, to make a determination  
5 of the facts involved in the case in light of the law that I  
6 give you. They not only desire to have fair and impartial  
7 jurors, they deserve to have the same.

8       Is there any member of the jury panel aware of any  
9 reason whatsoever that in this particular case you believe  
10 you could not be fair to all the parties and render a  
11 verdict that would speak the truth based upon the evidence  
12 that's presented, the law that I give you, and that alone?  
13 If for any reason you believe in this case you could not be  
14 a fair juror, would you please stand.

15       (No response)

16       **THE COURT:** Thank you. There is no response.

17       Any other questions from the Plaintiff?

18       **MR. ALFORD:** None, Your Honor?

19       **THE COURT:** From either Defendants?

20       **MR. HERSHON:** No, Your Honor.

21       **MR. GAINES:** No, sir, Your Honor.

22       **THE COURT:** All right. Let's empanel a jury.

23       **MADAME CLERK:** Plaintiff strikes first.

24       **MR. ALFORD:** Plaintiff strikes number 3.

25       **MADAME CLERK:** Plaintiff strikes number 3.

1           **MR. HERSHON:** Number 21.

2           **MADAME CLERK:** Defendant strikes number 21.

3           **MR. ALFORD:** Plaintiff strikes number 10.

4           **MADAME CLERK:** Plaintiff strikes number 10.

5           **MR. HERSHON:** Bank of America strikes number 11.

6           **MADAME CLERK:** Defendant strikes number 11.

7           **MR. ALFORD:** Plaintiff strikes 12.

8           **MADAME CLERK:** Plaintiff strikes number 12.

9           **MR. HERSHON:** Defendant strikes number 14.

10          **MADAME CLERK:** Defendant strikes number 14.

11          **MR. ALFORD:** Plaintiff strikes number 16.

12          **MADAME CLERK:** Plaintiff strikes number 16.

13          **MR. HERSHON:** Defendant strikes number 13.

14          **MADAME CLERK:** Defendant strikes number 13.

15          Alternates, 22 through 24.

16          **MR. ALFORD:** Plaintiff strikes 22.

17          **MADAME CLERK:** Plaintiff strikes 22.

18          **MR. HERSHON:** Number 23.

19          **MADAME CLERK:** Defendant strikes number 23. Gentlemen,

20          I'm going to call these back to you. Plaintiff strikes

21          number 3, number 10, number 12, number 16, and number 22.

22          **MR. ALFORD:** Correct.

23          **MADAME CLERK:** Defendant strikes number 11, 13, number

24          14, number 23.

25          **THE COURT:** 21.

1           **MADAME CLERK:** And 21.

2           **MR. HERSHON:** Correct.

3           **MADAME CLERK:** Ladies and gentlemen, when I call your  
4 name, please gather your things and come have a seat over in  
5 our jury box. Johnny Lesley, Danetta Holzer, Michael Dodd,  
6 Christina Bartosch, Kyndall Robinson, Jill Lee, Tara Brown,  
7 Lillie Gravely, Christopher Kelley, Leslee Boan, Donald  
8 Anderson, Carlos Lopez. And our alternate is Tamara  
9 Johnson.

10          **THE COURT:** Any matters we need to take care of as far  
11 as the selection of the jury in this case from the  
12 Plaintiff?

13          **MR. ALFORD:** None from the Plaintiff, Your Honor.

14          **THE COURT:** From either Defendant?

15          **MR. GAINES:** No, sir, Your Honor.

16          **MR. HERSHON:** No, sir.

17          **THE COURT:** All right. Thank you very much. Ladies  
18 and gentlemen who were not selected, I'll ask, if you would,  
19 just report back downstairs to the assembly room. There  
20 will be instructions for you then as to when you need to  
21 call back or when you need to report back. Thank you very  
22 much for your patience. Everyone else please remain seated  
23 while this jury departs.

24               (Pause)

25          **THE COURT:** Ladies and gentlemen, you've seen the



1 process by which you were selected. These parties believe  
2 you're the twelve best people to hear this case, to make a  
3 determination of what the facts are.

4 We have thirteen jurors. We have an alternate. That  
5 alternate is every bit as much a part of a jury as anyone  
6 else. She'll be participating. That'll be her seat that  
7 she'll occupy.

8 We pick an alternate in the event that if some  
9 emergency were to happen to one of the first twelve of you,  
10 or illness befall one of you, we wouldn't have to start the  
11 process all over again. We can just let that alternate step  
12 in and the case can continue.

13 You're going to be the judges of the facts in this  
14 case. You may never have had an opportunity to serve as a  
15 juror. You're scratching your head, figuratively at least,  
16 as to why you're sitting in this jury box. How did you get  
17 picked? And thinking about the lack of skill you have to be  
18 a judge.

19 I've given you that title. You're a judge. I wear the  
20 robe. I'm called the Judge, but you're every bit as much a  
21 judge as I am because you're going to be judging the facts  
22 in the case.

23 Whatever anxiety you may have about the role you're  
24 filling, let me do my best to put you at ease. You're going  
25 to be well qualified to be judges of the facts in this case

1 because you collectively bring into this courtroom the  
2 everyday experiences you have in the workforce, in the home,  
3 in social activities. You bring into this courtroom the  
4 good common sense with which you've been blessed. And  
5 that's what you're going to need to utilize to be the fact-  
6 finder, to be the judge of the facts.

7 I'm aware that you're here at a sacrifice. I'm going  
8 to do everything in my power to keep the trial running in a  
9 smooth manner so that your downtime is at a very minimal.  
10 Sometimes, of necessity, there is some downtime for you, but  
11 I'll do my very best and pledge to you that I'll certainly  
12 be conscious of the time that you're sitting in your jury  
13 room. In those times we'll be taking care of matters out  
14 here, I can assure you.

15 It makes me proud that you've accepted this  
16 responsibility, that you've made a commitment to all these  
17 parties to try this case and be the fair and impartial  
18 jurors that I'm sure you will be.

19 You're going to be deciding the facts on the evidence  
20 and the testimony, any documents that may be introduced into  
21 evidence. I'll provide you the law at the end of the case.  
22 You will accept that law and apply the law as I state it to  
23 you.

24 Cases take place in stages. Normally, there are  
25 opening statements made by the attorneys that will give you

1 an overview of what they expect to present or what they  
2 expect the trial to unfold, and how it will.

3 After that, there will be witnesses called by different  
4 parties. They'll be administered an oath. They'll sit  
5 there in that chair. They'll be examined and cross examined  
6 by the various attorneys.

7 After all the evidence is in, then the attorneys will  
8 again have a chance to address you in their closing  
9 statements. I'll then instruct you on what the law is. And  
10 then the case will be yours to decide.

11 While the case is in progress, you shouldn't be  
12 discussing the case one with another. That would just be  
13 conjecture on your part and speculation.

14 If you hear part of the testimony and start trying to  
15 analyze it and talk about it, that would be improper, ladies  
16 and gentlemen, because you need to keep that open mind and  
17 be able to listen to everything that's presented, including  
18 my instruction on the law before you start that deliberation  
19 process. That's part of your commitment that you'll not  
20 discuss it with each other until the end.

21 By the same token, you shouldn't be discussing it with  
22 others, family members or business associates. When we take  
23 lunch, you may be inclined to meet with some friends or  
24 family and want to tell them all about the case, or even  
25 after hearing some testimony tonight when you go in,

1 obviously your loved ones are going to be curious. Did you  
2 get picked, and what's the case about and those kind of  
3 things.

4 While the case is in progress, ladies and gentlemen,  
5 we're in a process by which these parties are putting their  
6 faith in you to maintain the purity of that process so that  
7 no one influences you by what you hear. At the restaurant,  
8 if you're at a restaurant and overhear some conversation,  
9 some of the parties or witnesses are talking about it, you  
10 take the initiative. You move to another table or another  
11 booth, make sure you're not influenced by anything anyone  
12 says.

13 If someone were to want to share information with you  
14 or ask you questions about this case, you just let that  
15 person know you're a juror and you can't be talking about  
16 it. If anyone were to persist and want to share that with  
17 you, just excuse yourself as soon as you can.

18 If possible, get the name of that person, report it  
19 back to me, and I assure you, I'll take care of that. But I  
20 don't expect anything like that to happen. But I want to  
21 alert you to how important it is that you maintain that  
22 purity of the process that we're now in.

23 You're going to have plenty of time to share with your  
24 friends and family and your loved ones when this case is  
25 concluded, your experience and what the testimony was and

1     what the evidence was. But while the case is in progress,  
2     that's not the time to do that.

3             Because of the information age we're now in and the  
4     opportunity for research and social media, our Chief Justice  
5     of the South Carolina Supreme Court has issued an order  
6     that's applicable to all the jurors sitting where you are  
7     that have been empaneled in a jury. And I've been  
8     instructed as a trial Judge to share that order with you.

9             During the course of the trial in which you've been  
10    selected, there's not to be any social media or any kind of  
11    posts about your experience, about what someone said, or  
12    what all's going on in the trial. That would be improper  
13    for you to do that.

14            Again, after the trial is over you'll have, certainly,  
15    the opportunity to share with whomever you wish. But while  
16    we're in this process of the trial, that's not the time to  
17    do that.

18            You have ample means to do independent research and  
19    check names or if you hear some terms that you're not  
20    familiar with and you want to go look on-line or go to the  
21    library and check out a book to find out about that, that  
22    would be improper as well, ladies and gentlemen. These fine  
23    attorneys are going to give you all the information you're  
24    going to need right here in this courtroom.

25            And that's what you're committed to make a decision on,

1 what is presented here and not from any extraneous source.  
2 So I remind you of that and how important it is that our  
3 Chief Justice has issued that order to you.

4 Part of my job as the judge of the law is not only to  
5 give you instructions at the end of the case on what the law  
6 is applicable to the case, but to conduct the trial of the  
7 case. Normally, we will go an hour, hour and a half,  
8 depending on testimony and whether it's a good break time.  
9 We'll take a break at the morning. We'll take one in the  
10 afternoon.

11 Sometimes, you may need a break and I haven't called  
12 for a break. If that occurs, please get my attention. I've  
13 told you before, your job is to be the fact-finder. So of  
14 necessity, that means you need to be comfortable and be able  
15 to focus and listen to what's being said, to watch the  
16 activity during the trial, to watch the demeanor of the  
17 witness. If you're uncomfortable in any way, then you  
18 certainly need to get my attention.

19 We have the bailiffs. You've had a chance to meet them  
20 already. To your right is Mr. Dougherty and Mr. Christ in  
21 the back of the room. Either of these gentlemen will  
22 certainly assist you in any way they can.

23 Ms. White has called your name and empaneled you in the  
24 jury box. She's from the Clerk's Office, along with Ms.  
25 Coker, to her right. Certainly, these ladies will be of

1 assistance to you in any way they can.

2 Directly in front of me is Ms. Susan Hudgins. She's  
3 the court reporter. She's going to be taking down  
4 everything that's said during the course of this trial,  
5 things I say, the lawyers say, and the witnesses say.  
6 She'll be marking exhibits and keeping up with those and  
7 making sure that everything is going according to the way it  
8 should be from the court reporting standpoint.

9 David Brown is the young man seated beside me, a recent  
10 law school graduate, admitted to the South Carolina Bar.  
11 You may see him coming and going up here, taking care of  
12 things back in the office, a valuable asset that I have as  
13 well. Any of these folks that are around here will  
14 certainly assist you in any way that they can.

15 My job is to rule upon the law. Sometimes in the  
16 course of a trial, just by the timing, there are legal  
17 matters that have to be taken care of.

18 Sometimes objections are made. Some cases are tried  
19 without any objections at all. But if an objection is made  
20 by one of the lawyers as to the way a question is phrased or  
21 a document that has been offered, one side feels it  
22 shouldn't come in, my job is to rule upon those objections.

23 Sometimes, I can do that rather quickly by saying  
24 sustained or overruled. Sometimes, you may see me call the  
25 lawyers up here at the bench and we can huddle up and try to

1 work out a legal matter or a scheduling matter for getting a  
2 witness here or whatever else it may be.

3 Sometimes, though, there may be a matter of law that I  
4 may need to take care out of your presence. It might be  
5 that I have to hear testimony that wouldn't even be properly  
6 presented before a jury. I may need to hear some arguments  
7 from the lawyers, review some law books or statutes to make  
8 that determination.

9 As the judge of the law, I want to make the very best  
10 decision I possibly can to follow the law. And sometimes in  
11 order for me to do that, I may need to excuse you, that you  
12 have no concern with that, and I can make that decision, and  
13 then call you back in when we're ready to present more  
14 evidence.

15 We're both judges. You're going to judge the facts and  
16 I'm going to judge the law. When you decide this case and  
17 based on the evidence, you make your decision, even though  
18 I'm a judge like you, I'm not going to be back in the jury  
19 room with you. That's your prerogative to decide what the  
20 facts are, not mine.

21 And you'll take care of that side of the case, deciding  
22 what the facts are. I'll decide the law side of the case.  
23 So I hope you understand if we are having legal issues out  
24 here, that we're working on those and will call you back  
25 just as quick as we can.



1        Sometimes in the course of coming and going, as we take  
2        breaks, or lunch breaks, or in the morning, you may come  
3        into the courthouse and get on the elevator or walking down  
4        the hall and you see one of these lawyers, and they seem to  
5        high-hat you and walk the other way, or don't make eye  
6        contact with you, they're friendly by nature, I assure you.  
7        They're not being disrespectful to you.

8        That's the training that lawyers have. They want to  
9        avoid any appearance of any impropriety that they're talking  
10       with a juror, even though it may be innocent conversation  
11       about the weather or a sports score or anything else can be  
12       perceived wrongly that they're talking to a juror. So if  
13       they seem a little distant to you, please don't hold that  
14       against them or their clients. That's just the way they've  
15       been trained. And they want to make sure that things look  
16       right as the trial is progressing.

17       Normally, we will take a lunch break about 1:00. We  
18       have some legal matters we need to take care of. Rather  
19       than just keeping you waiting, I think we'll let you break  
20       for lunch a little early. We'll get those matters taken  
21       care of.

22       Then we'll have time for us to get a sandwich and then  
23       be ready to start the case with the attorneys making their  
24       opening statements to you. We'll have an opportunity to  
25       perhaps mark some exhibits that can be agreed upon, and get

1 some of that administrative duties out of the way so that  
2 when we do start with you, we'll be going in an expedient  
3 manner for you.

4 If you'd be back at a quarter of two, based upon the  
5 estimation that I have from the lawyers as to some of the  
6 matters we need to take care, hopefully, we'd be through by  
7 then. And that'll give you a little longer lunch than we'll  
8 have, but that way we'll be able to start hopefully at a  
9 quarter of two.

10 If you'll be back then, that'll give you about an hour  
11 and a half, and we'll be ready for your services then. Have  
12 a good lunch, ladies and gentlemen. If you'll go with Mr.  
13 Dougherty now, he'll show you where your jury room will be  
14 and also where you're to report back. Everyone else please  
15 remain seated.

16 (Whereupon the jury exited the courtroom at 12:18 pm)

17 **THE COURT:** All right. What matters do we have by way  
18 of motion or otherwise? I don't know about the exhibits,  
19 whether y'all have agreed to any of those. Certainly, that  
20 would help the jury.

21 I've sort of made a commitment for you, that if there  
22 are any that you can agree to, then maybe y'all can do that  
23 over lunch or before we start back as well. Are there any  
24 particular motions that we need to ---

25 **MR. ALFORD:** Well, Your Honor, on behalf of the

1 Plaintiff, we filed a motion in limine to exclude the  
2 designated expert by Bank of America on the basis that the  
3 disclosure was made more than eighteen months after  
4 discovery was closed. No new facts had come up.

5 The only discovery exception allowed by order of the  
6 court to go after subordination between Chase, who's the  
7 original plaintiff, and Bank of America with respect to the  
8 first mortgage position. And I was allowed to pursue some  
9 discovery as to that subordination agreement.

10 That would be our issue. I know we talked briefly  
11 about it. You know, obviously, I guess if Mr. Jones opens  
12 up something to allow it in, I'm not prepared to get into --  
13 I don't intend to get into testimony as to banking practices  
14 in general. I just want to know what Mr. Jones did or did  
15 not do for this closing.

16 **THE COURT:** Was there a proposed expert over banking  
17 practices or over legal ---

18 **MR. ALFORD:** I think over closings.

19 **THE COURT:** Loan closings?

20 **MR. ALFORD:** Yeah.

21 **THE COURT:** Okay. Mr. Hershon? Yes, sir.

22 **MR. HERSHON:** But, Your Honor, that would get into  
23 banking practices dealing with it. And this is a  
24 contractual issue that I think paragraph twenty of the  
25 contract says what the requirements are. So it's not a -- I

1 think that's what this hinges upon.

2       **THE COURT:** Mr. Hershon, tell me why I should let the  
3 witness testify at this late date, since discovery has been  
4 closed.

5       **MR. HERSHON:** Yes, Your Honor. Well, first of all,  
6 Bank of America was, I think, was living up to its  
7 obligations under Rule 33(b) to update its -- to update its  
8 discovery responses. As soon as it had made a decision on  
9 an expert, that was the reason that -- but that's not the  
10 reason why I believe that he should be admitted at this  
11 time.

12       There's a lot of case law on this from the Court of  
13 Appeals and the Supreme Court. And what they're normally  
14 dealing with is a situation where an expert witness or a  
15 witness who's never identified shows up at trial, and  
16 there's never notice of any kind to the other party.

17       What we have here is a situation where notice of that  
18 witness came up two months before -- in excess of two months  
19 before trial, about ten weeks before trial. I sent two  
20 letters to Mr. Alford to offer Mr. Jordan, the proposed  
21 expert, for testimony. I sent a general letter about it and  
22 then sent the letter with proposed dates. Those letters  
23 were never responded to.

24       Your Honor, there's a Supreme Court case, Barnette  
25 versus Adams Brother's Logging from 2003. And while the

1 court noted that the trial court is allowed to make its  
2 decision at its discretion, the court there held that the  
3 trial court abused its discretion in excluding an expert  
4 witness when there was no disobedience in any court order  
5 and no prejudice to the opposing party other than the  
6 necessity of further discovery.

7 The only prejudice that happened of any kind here was  
8 exactly that, that Mr. Irby potentially needed to take a  
9 deposition of this expert to learn of his opinions. That  
10 opportunity was granted and given freely to Mr. Thomas Irby,  
11 and the opportunity wasn't taken.

12 There was an order for discovery to be closed in this  
13 matter. In fact, it's an order that this Court entered  
14 early on in the case for discovery to only last ninety days.  
15 However, Your Honor, I would say that this is not a  
16 disobedience of that order, instead it's the parties -- Bank  
17 of America after mediation and seeing where this case was  
18 going, updating how it wanted to, what strategy it wanted to  
19 take in this case.

20 **THE COURT:** Well, I'll defer ruling on that until after  
21 I hear Mr. Jones' testimony. I don't know how far he's  
22 going to go into what he did or what should be done by  
23 lawyers. I'll wait until after I hear that testimony as to  
24 whether or not I'll allow this person.

25 Certainly, I'll give you -- and if I do allow the

1 witness, I'll allow you, Mr. Alford, a chance to talk with  
2 him beforehand, find out what he's going to say. I don't  
3 know that you need a deposition, but I'll certainly give you  
4 time to find out what the gist of his testimony will be.

5 But I don't know. I'm bothered that the -- I know 33  
6 says to keep it open, but -- or to supplement. But when an  
7 order's signed, it ends, and the bank relied upon that  
8 several times in its paperwork. That bothers me to let it  
9 in now.

10 I certainly don't want to let it in to prejudice the  
11 Plaintiff. But if the Plaintiff's witnesses get into that  
12 field, then I'll reconsider that and allow the witness to  
13 testify. Any other matters?

14 **MR. HERSHON:** Yes, Your Honor. Bank of America has a  
15 pending Rule 12(c) motion. Also, following on that motion  
16 there are a couple of evidentiary motions in limine that  
17 Bank of America has that are unfiled motions, but would like  
18 to bring to the attention of the Court to help things run  
19 smoothly when we have the jury in here.

20 **THE COURT:** Your 12(c) motion is related to whose  
21 pleadings?

22 **MR. HERSHON:** It is related, Your Honor, to -- it's a  
23 motion on a pleadings for -- to dismiss the negligence claim  
24 asserted by Thomas Irby against Bank of America. I have a  
25 memorandum of law for the Court. It's not something that

1 was submitted previously.

2 As Your Honor knows, this matter is about an equity  
3 line. It's about a contract. And it's -- there were  
4 certainly some convoluted pleadings. I think as the Court  
5 tried to look through what's happened here, there were some  
6 convoluted pleadings.

7 There have been some claims that were dismissed. There  
8 were attempts of claims of fraud by Thomas Irby against the  
9 bank. Things of a fraud nature were dismissed. What was  
10 left was a breach of contract claim and a negligence claim.

11 To pursue a claim of negligence, the first requirement  
12 is that there's a duty running between the parties. Now,  
13 Bank of America in this situation certainly admits that  
14 their duties run in contract. There's an equity agreement,  
15 equity line agreement. There's certainly duties that run  
16 there.

17 But in terms of the issue of duty, South Carolina case  
18 law makes clear that the issue of duty is a question of law  
19 for the Court. There are a number of decisions that have  
20 stated that -- Vale (phonetics) versus the South Carolina  
21 Department of Juvenile Justice, Houck (phonetics) v. State  
22 Farm. These are both Supreme Court Cases from 2002 and  
23 2005, respectively. Houck specifically says, quoting, the  
24 existence of a duty owed is a question of law for the  
25 courts.

1           And case law further makes clear in this State that  
2   there is no duty -- there is no general duty in tort between  
3   a bank and its customer. That case is the case of Regions  
4   Bank versus Schmock (phonetics), a Court of Appeals case  
5   from 2003. And these are cases cited in the brief for Your  
6   Honor.

7           That case makes clear that there is no general duty.  
8   So how could there be a duty in this case? There would need  
9   to be some kind of statement, or action or advice by Bank of  
10   America to Mr. Thomas Irby that was relied on.

11          Like, an example that I would think of is if something  
12   more of like a stock account or an IRA, if the bank was  
13   providing advice about that to Mr. Irby, you know, that  
14   could potentially create some duties. Here there are no  
15   allegations in the pleadings of statements that Bank of  
16   America made to Mr. Thomas Irby for him to rely on. There's  
17   just nothing in those pleadings. And that's why we would  
18   move at this time for that claim of negligence to be  
19   dismissed.

20          Also, Your Honor, just as a general concept that we are  
21   dealing here with a contract. The claims are all about what  
22   happened and whether the bank correctly did something under  
23   -- I think as Mr. Alford noted, I think it's paragraph  
24   twenty of the equity line agreement. So we're dealing with  
25   whether the bank did something correct under a contract.



1           There is no such thing as a negligent breach. You've  
2   either breached an agreement or you haven't. That comes  
3   under contracts. That's not a negligence claim. For that  
4   second reason, this negligence claim should go ahead and be  
5   dismissed.

6           The third reason is that we are -- is the Economic Loss  
7   Rule. When we're dealing with a claim here out of the  
8   contract, it comes out of the contract, the only kind of  
9   damages that should be available are those of an economic  
10   nature. And to pursue that claim of negligence when the  
11   parties here are in clear privity of contract, violates the  
12   Economic Loss Rule.

13          Your Honor, those are further discussed in the brief,  
14   but in order for brevity I wanted to bring each of those  
15   three points to your attention. And for those reasons the  
16   claim for negligence should be dismissed prior to trial.

17          **THE COURT:** Mr. Alford, why should it stay?

18          **MR. ALFORD:** Your Honor, for several reasons. Judgment  
19   on the pleadings is kind of interesting because there's  
20   already been a motion for summary judgment by Bank of  
21   America on all causes of action. The only ones that  
22   survived that motion was breach of contract and the  
23   negligence claim. So I'm not real sure ---

24          **THE COURT:** Didn't Judge Stilwell's order sort of say  
25   that it was iffy, though?

1           **MR. ALFORD:** Iffy, Your Honor.

2           **THE COURT:** Yeah.

3           **MR. ALFORD:** But I'm saying we can't really just say  
4 it's judgment on the pleadings at this point because we had  
5 a ton of documents in.

6           **THE COURT:** Okay.

7           **MR. ALFORD:** The maximizer agreement raises a question  
8 that I think's a question of fact on the negligence issue.  
9 We are talking probably the Economic Loss Rule. And I just  
10 had it in front of me. If I can pull it up.

11           What we would argue to the jury and to this Court that  
12 distinguishes the negligence claim from the possibly breach  
13 of contract is under the Economic Loss Rule there is a  
14 theory that we're relying upon the Prosser and Keeton on  
15 Torts. I don't think this issue's been addressed in South  
16 Carolina."

17           And I have -- I don't have a formal memo, but we were  
18 anticipating this issue being raised. Until we got the memo  
19 two minutes ago, I wasn't real sure of the precise grounds.

20           But under the Economic Loss Rule, there's not a duty to  
21 perform that's contractual. But there rather -- there is a  
22 duty to prevent reliance, something in the future, some type  
23 of conduct in the future that Thomas Irby can rely upon that  
24 would arise by some future activity.

25           Now, this case -- our position is and I think what it

1 boils down to is at the closing the closing attorney sends a  
2 letter to the bank that says close the equity line. Now,  
3 that's pursuant to, what I call paragraph twenty of the  
4 maximizer agreement.

5 Now, they may argue, well, it wasn't signed, was it  
6 not? I would argue that it certainly complies with that.  
7 Now, if that right then and there had been the issue, I  
8 think we'd be strictly in a breach of contract.

9 But we advance forward from August of 2007 to sometime  
10 in 2010 after about seventy thousand dollars has been  
11 allowed out of this contract or out of this account, and I  
12 think Mr. Irby, absent any notice from Bank of America, to  
13 the contrary we have a right to -- some type of right of  
14 reliance that they perform their duty not to cause him  
15 further harm.

16 Now, I realize that it's not Black Letter Law. It's  
17 not maybe strong, but also there is no case law addressing  
18 this point as to future occurrence or future events that Mr.  
19 Irby could rely upon.

20 I think we would be in a completely different posture  
21 right now if in response to Mr. Jones' closing letter the  
22 bank had sent a letter back and said, no, no, we're not  
23 closing this account. Now we would be firmly, I think,  
24 under the terms of the contract.

25 But because the bank opted not to even respond, not to

1 even give that modicum of response, the parties proceed on  
2 relying upon the bank to have done their duty. And, in  
3 fact, they did not. And that's where I would argue the  
4 negligence claim arises on the future performance promised  
5 by the bank.

6 I would also refer Your Honor ---

7 **THE COURT:** Let me ask you this. He didn't get a  
8 monthly statement of how much payment was due or anything in  
9 all of that time?

10 **MR. ALFORD:** I don't believe Thomas did, Your Honor.  
11 Roy may have, but Thomas never did.

12 **THE COURT:** Okay.

13 **MR. ALFORD:** And, Your Honor, having been handed this,  
14 their memo, I don't know if there's other points in it that  
15 are raised. I would at least like the opportunity tonight  
16 to respond to it.

17 **THE COURT:** Well, maybe not tonight. Maybe during  
18 lunch. We'll see. I'll read it during lunch. Maybe you  
19 can, too. I know you've got other things you need to be  
20 doing during lunch, but we'll see how that -- anything in  
21 response, Mr. Hershon?

22 **MR. HERSHON:** Yes, sir, a quick reply. I think first,  
23 on the judgment of the pleadings, I'm still waiting to hear  
24 something in the pleadings that creates that duty. I don't  
25 think I've heard anything. I don't think the Court's heard

1 anything. And so those arguments, I think, still stand  
2 without anything in the pleadings against them as to whether  
3 a duty exists by the bank.

4 The other thing, just in response to this idea that  
5 there was a -- that Mr. Irby here is attempting to rely on a  
6 non-statement of the bank. Non-statement of the bank, not  
7 something the bank went out and did, he's trying to rely on  
8 a non-statement to create a -- I don't see it as something  
9 that gets around the Economic Loss Rule.

10 Your Honor, I would like to conclude my arguments on  
11 the rule 12(3) motion -- I'm sorry, 12(c) motion.

12 **MR. ALFORD:** Very briefly, Your Honor. And I realize  
13 we're not dealing with fraud, but a fraud cause of action  
14 acknowledges the omission of a material statement is an  
15 actionable misrepresentation. I would argue here by  
16 corollary that the bank's non-response to the letter would  
17 be a material omission fact that either in its absence  
18 somebody could certainly rely upon it.

19 And, lastly, Your Honor, if there's a judgment on the  
20 pleadings, and we've already argued this, I think it becomes  
21 a motion for summary judgment because I'm obviously relying  
22 upon documents that have been submitted to this Court based  
23 on their previous motions.

24 **MR. HERSHON:** I believe all of those documents are  
25 attached to the pleadings, Your Honor. And I don't see

1 anything. I would ask the Court -- that the pleading itself  
2 is relying on the pleadings.

3 **THE COURT:** All right. Any other matters we got that  
4 we need to take care of? I'll read this over during lunch.

5 **MR. ALFORD:** And, Your Honor, the last point is he says  
6 there's nothing in the pleadings raising this. The pro se  
7 answer filed by Mr. Thomas, it's the clocked-in September 6,  
8 2011, Defendant Thomas R. Irby's general amendment to his  
9 cross-complaint, paragraph ten, nine and ten talks about the  
10 negligence and kind of going forward.

11 **THE COURT:** The cross-complaint is against Bank of  
12 America?

13 **MR. ALFORD:** Yes, sir.

14 **THE COURT:** Okay. Paragraph nine and ten.

15 **MR. HERSHON:** I just want to make sure, while the  
16 Court's looking, there was a cross-complaint that was  
17 improperly filed that was not allowed in. And then there  
18 was a later cross-complaint that was allowed in. And I'm  
19 not sure which one that may be. That's why we've got  
20 pleadings here that are -- but I think either way, the  
21 pleading doesn't raise the issue ---

22 **THE COURT:** Okay. What was the date of that ---

23 **MR. ALFORD:** September 11th, Your Honor.

24 **THE COURT:** Of what year?

25 **MR. ALFORD:** Of 2011. September 6, 2011.

1           **THE COURT:** The 6th? September 6th?

2           **MR. ALFORD:** Yes.

3           **THE COURT:** That's the amended cross-claim. All right.  
4 I'll try to find those pleadings as well.

5           **MR. HERSHON:** Your Honor, a couple of evidentiary items  
6 I'd like to bring up if the Court will allow.

7           **THE COURT:** Well, let me see -- anything else you got?

8           **MR. ALFORD:** No, sir.

9           **THE COURT:** All right. All right. Mr. Hershon.

10          **MR. HERSHON:** Something that I -- I think it certainly  
11 appears that Thomas Irby would like to bring in -- to give  
12 you a little bit of background. While this case was  
13 proceeding, there was an issue between Chase Bank had  
14 originally filed the foreclosure and then Thomas Irby and  
15 Roy Irby and Bank of America were named as Defendants.

16          There was an issue at that time of whether Chase was  
17 first in line in the foreclosure or Bank of America was  
18 first in line of the foreclosure. There was a settlement  
19 that Bank of America had with the title insurer for Chase  
20 about -- and what the results of that was that Bank of  
21 America agreed that it would be -- subordinate itself and be  
22 second in line.

23          There was a fifty thousand dollar payment to Bank of  
24 America under that agreement. The foreclosure, as we've  
25 discussed off the record, moved forward.

1 I believe in order for the -- there's not some issue in  
2 terms of bringing this up in front of the jury, Bank of  
3 America is certainly not looking to recover twice in this  
4 matter. That's certainly not something they're looking to  
5 do.

6 However, this fifty thousand dollar amount is an issue  
7 of set-off. And in set-off, there are decisions also from  
8 the Supreme Court and Court of Appeals that set-off is  
9 completely an equitable matter. It's a matter for the Court  
10 to take care of.

11 There's a 1975 case, Kirkland versus Providence  
12 Washington, 216 SE2d 518, but that's stating that set-off is  
13 an inherent power of the Court. There's also a Court of  
14 Appeals case from 2012, Smith versus Widener, 724 SE2d 188  
15 that says it's a post-trial matter.

16 And what I'm requesting is that this issue of something  
17 like this that's an insurance payment, first of all brings  
18 up an evidentiary rule issue of whether insurance should be  
19 brought in front of the jury.

20 Second of all, though, it complicates matters for the  
21 jury. It's something that happened well after the fact. It  
22 happened during the litigation. It's not something that's  
23 relevant to the claims. The claims that we're talking  
24 about, again, are this paragraph twenty, whether that was  
25 followed, what happened in the time up there, up until the



1 suit.

2 Some payment that came afterwards is something that  
3 could make the jury think, okay, Bank of America's already  
4 been paid. They don't need to be paid any further. And  
5 then most significantly, it's something that's simple math  
6 that the Court can do and deal with after the fact.

7 So Bank of America's requesting that no evidence  
8 related to this title insurance come in or that there's been  
9 settlement of some kind in this proceeding to be brought in  
10 front of the jury.

11 **THE COURT:** Mr. Alford?

12 **MR. ALFORD:** Your Honor, I think that's the gist of  
13 this case. Bank of America started this action in a first  
14 lien position.

15 Now, even disregarding the payments that they allowed  
16 out, if they take the position, well, we never closed the  
17 account because you never instructed us properly, now,  
18 they're in first lien position. They gave first lien  
19 position away. The jury certainly can consider that in  
20 questioning why they should then have a right to demand  
21 monies back from the debtors.

22 The second thing is, the fact they gave it away for  
23 fifty thousand. I don't know what we make out of that, but  
24 I think it's certainly -- the jury can look at that, and  
25 look at the conduct of the Bank of America and just say,

1 well, why did you give away a first lien position? And have  
2 them explain it.

3 Now, I don't know why they did. We tried to do  
4 discovery on it, couldn't really get into any analysis. So,  
5 obviously, they felt they should have been -- maybe the  
6 account should have been closed.

7 I don't really care so much about the money. We can  
8 just say they paid them X. But I think the money and the  
9 fact that they gave up the first lien position is extremely  
10 critical for the jury's understanding of this case.

11 **MR. HERSHON:** Your Honor, we're in a case here where  
12 Thomas Irby wants to sit as the Plaintiff. He's the  
13 Plaintiff. He brought this action against Bank of America.  
14 So to act like something has been done by Bank of America,  
15 if I understand it, is when the claims have been originally  
16 brought by him, is a little bit mind boggling to me.

17 The other thing is that there was discovery on this.  
18 We produced everything, including attorney correspondence  
19 between me and the attorneys for the title insurer.

20 In terms of that, that decision of that payment has  
21 been -- and the idea of the lien position here has nothing  
22 to do with this claim whatsoever. When someone has an  
23 equity line, the bank has two options. There are two --  
24 there's one security on a mortgage, but the bank never has  
25 to use that. I mean, it can be the easier route to go down.

1 The bank always has the chance to say, oh, we don't want  
2 that property, we're just going to go after you  
3 individually.

4 So in that respect, Your Honor, that issue of lien  
5 priority has absolutely nothing to do -- and so I'd like to  
6 also add that issue of the lien and what was going on in the  
7 foreclosure suit, again, has nothing to do with this claim.  
8 What has to do with this claim is an equity line agreement  
9 entered into in 2007 and what happened to it with  
10 instructions that were received in 2007, not what happened  
11 in a foreclosure lawsuit that's been going on since 2010.

12 **THE COURT:** Mr. Alford, I'm having a hard time figuring  
13 out why the, I guess, Bank of America -- or they were owed  
14 about sixty-nine thousand at that time and took fifty for  
15 it; is that right?

16 **MR. ALFORD:** That's what I'm assuming, Your Honor.

17 **THE COURT:** I thought I read in the papers there it was  
18 about ---

19 **MR. ALFORD:** That's correct.

20 **THE COURT:** --- sixty-nine; is that about right?

21 **MR. HERSHON:** That's ---

22 **THE COURT:** Sixty-nine and they took fifty for it?

23 **MR. HERSHON:** That's correct. And there's discovery to  
24 them. And it doesn't need to be an assumption. We'd sent a  
25 letter stipulating to that amount.

1           **MR. ALFORD:** And, Your Honor, we weren't party to that  
2 discussion at all.

3           **THE COURT:** Yeah. But when they've got another person  
4 making a claim against them, why should this jury be  
5 involved with that settlement between them? Why ---

6           **MR. ALFORD:** Because as we start, if Bank of America is  
7 arguing that the equity line was not closed August of 2007,  
8 then to turn around and say, well, we gave up our first lien  
9 position for fifty thousand dollars, that's arguing and  
10 taking it both ways.

11           They either take the position the equity line was not  
12 closed and should not be closed to anybody, be it Chase, be  
13 it my client. Or they're saying, well, yeah, maybe we  
14 weren't -- we didn't have the first lien position. And I  
15 think the jury gets to hear from, at least gets to question  
16 why Bank of America having a first lien position is willing  
17 to give it up.

18           We wouldn't be here if they had first lien position and  
19 foreclosed. The fact that they had an option under which  
20 remedy they want, then fine. The jury can ask the question,  
21 well, you know, why did you pick one remedy versus another?  
22 I think it's very germane that the fact that they gave up  
23 the first lien position -- if they're trying to argue the  
24 equity line was not closed.

25           **THE COURT:** Yes, sir.

1           **MR. HERSHON:** One reason for, I mean, one reason for  
2 the settlement is because of this strange situation. The  
3 bank has to make a decision. And there's not a case law  
4 that makes a clear determination what happens in this  
5 situation.

6           You know, a lot of that issue, what we described, would  
7 be the business decision of a settlement, and the reasons  
8 for going into that settlement. I don't see how that's  
9 proper providence of the jury.

10           That issue of first and second lien was not clear.  
11 That's why Bank of America was settling. But, I think,  
12 primarily here -- what we're here about today is a note and  
13 what was filed under that note, not what was under a  
14 mortgage.

15           **THE COURT:** How did the foreclosure proceed in the  
16 Master in Equity? Was it through Chase or through Bank of  
17 America?

18           **MR. ALFORD:** Chase.

19           **MR. HERSHON:** Chase was the one who brought it and  
20 Chase was the one who did the foreclosure.

21           **THE COURT:** Okay. All right. And Bank of America  
22 really wasn't a party to that, I guess?

23           **MR. ALFORD:** Well, they were named because they had the  
24 first lien position.

25           **MR. HERSHON:** Again, that's ---

1           **THE COURT:** But was that -- was the settlement already  
2 made or was it made during the foreclosure?

3           **MR. HERSHON:** The settlement was during the  
4 foreclosure. The foreclosure suit had been brought, this  
5 settlement was made, the foreclosure was then completed.  
6 When that cleared everything up, foreclosure could proceed  
7 and it's complete at a later date.

8           **MR. ALFORD:** And, Your Honor, I made an objection at  
9 the time to the subordination agreement because, depending  
10 on how it was used, it could have potentially prejudiced my  
11 client. And that is literally what we have right now.

12           If I can't raise that, then I should have had the right  
13 to object because if Chase was demanding money from my  
14 client, I could have said, they have first position, keep  
15 them in. At least we would have an allocation of money by  
16 lien.

17           The fact that I raised the objection -- and I think  
18 Judge Simmons ruled against me. He said, well, it's not  
19 prejudicial. Well, now, I can't even rely upon it to show  
20 that the Bank of America's arguing two different positions.

21           **THE COURT:** Well, I ---

22           **MR. HERSHON:** The bank's not arguing two different  
23 positions. If anything, Thomas should be happy that he's  
24 gotten a fifty thousand dollar gift that came from somewhere  
25 else.

1           **THE COURT:** Well, the bank certainly is entitled to  
2     make business decisions in litigation, you know, to decide  
3     how to cut losses that they may have. And I guess I'm  
4     having a hard time tying in the fact that they made the  
5     agreement with Capital [sic], says they don't have a first  
6     lien.

7           I mean, maybe that's just a business decision. Lawyers  
8     are expensive. I'm sure, you know, do we want to go through  
9     all of that, and the Appellate Court decide that, let's just  
10    cut our losses and move on? But I'll let y'all know about  
11    that after lunch, too. I'll think that one over. What else  
12    do we have?

13          **MR. HERSHON:** Your Honor, I'd also like to bring up the  
14    issue of non-economic damages that may be brought in by Mr.  
15    Thomas Irby. There's several things in the pleadings that  
16    bring up that he's concerned with mental anguish, concerned  
17    with medical visits he's had, things of that nature. We  
18    certainly feel like that those items of physical injury  
19    could be coming in.

20          The witness list that was provided does not show that  
21    any doctors are going to testify. There's no doctors listed  
22    as witnesses in the -- to the specific interrogatory  
23    question about fact witnesses. There are no doctors listed  
24    as expert witnesses in the disclosures by Mr. Thomas Irby.

25          Again, the idea that we're dealing with a contract,

1 even if we still have a negligence issue here, if the Court  
2 determines that a negligence issue should survive, there  
3 hasn't been -- the item that we're talking about, whether a  
4 letter closed out an account certainly doesn't have to do  
5 with the physical trauma or a threat of physical trauma. So  
6 for that reason, there shouldn't be that kind of testimony.

7       Secondly, without those other witnesses, under Rule  
8 701, Thomas Irby would need to -- if he's going to present  
9 evidence about mental anguish and those issues, he would  
10 need to have an expert, a qualified expert to come to  
11 corroborate that and talk about what those damages are.  
12 Again, we don't have that expert. He's not allowed to  
13 testify on that on his own.

14       There are several cases that have dealt with this. One  
15 was dealt with whether someone could testify about  
16 reasonableness of hospital bills. That case is Spartanburg  
17 Regional Medical Center versus Bulsa, 308 SC 322, said that  
18 that witness, as a lay witness, couldn't testify about the  
19 reasonableness of medical bills.

20       There are cases of people trying to testify about their  
21 own repressed memories, or abuse or about loss of sleep.  
22 One of those cases was Moriarty versus Garden Sanctuary.  
23 And there's also Hanson versus Scalise. In both of those  
24 cases, you couldn't have a non-expert testify on those  
25 issues.



1           Also, another item that Mr. Irby appears to be likely  
2   to testify about is, again, the loss of credit or damage to  
3   his credit reputation. To me -- to courts it's similar to a  
4   libel or slander claim, essentially.

5           Again, those are non -- those still qualify also as  
6   these non-economic type damages that in this type of case  
7   should not be permitted to go in front of a jury. If the  
8   jury's going to hear those kinds of issues on something that  
9   they're not allowed to make a fact-finding decision on, it  
10   certainly has a chance to prejudice the jury.

11          **THE COURT:** Mr. Alford, what damages are listed in the  
12   pleadings as far as what he's claiming?

13          **MR. ALFORD:** I think the loss of credit, to discuss it,  
14   could be an incidental damage since they're coming after him  
15   for the money. I think that sort of naturally flows from  
16   their conduct. The fact that they allowed ---

17          **THE COURT:** Doesn't consequential damages have to be  
18   specifically pled?

19          **MR. ALFORD:** Well, incidental would be a natural  
20   consequence of them allowing more monies to come out of the  
21   equity line, building up debt to equity, the debt to income  
22   ratios, you know. I think that is, what I would call, a  
23   natural consequence or incidental damage.

24          **THE COURT:** But isn't that economic loss that he didn't  
25   get what he should have on the foreclosure sale because the

1 money was depleted? How's that non-economic?

2 MR. ALFORD: Well, I think that would be more economic.

3 THE COURT: So what are the non-economic ---

4 MR. ALFORD: Oh, the non -- well, I think if we get  
5 into the negligence issue, we can talk about, you know, what  
6 the whole conduct of the Bank of America has caused. I  
7 think that's something the jury can certainly consider as  
8 ---

9 THE COURT: Well, what are his damages?

10 MR. ALFORD: Your Honor, there are no -- and he could  
11 talk about coming back and forth to court and paying  
12 attorney fees, but ---

13 THE COURT: Well, how are you going to get punitive  
14 damages without actual damages, Mr. Alford?

15 MR. ALFORD: Well, that's a tough one, Your Honor.

16 THE COURT: Yes, sir, that's very tough. All right.  
17 I'm granting that. We're not going -- I don't know what  
18 we're going to do about the negligence thing yet. But even  
19 if that goes in, that'll just be for -- I don't -- based on  
20 what Mr. Alford has said, I'm not going to allow any issues  
21 on the mental anguish and those kind of things.

22 MR. HERSHON: Thank you, Your Honor. I had a couple of  
23 other things I think are mostly housekeeping. One, under  
24 Rule 615 and if Mr. Jones isn't to testify first or whenever  
25 he does testify, I think under the rule that he can't stay

1 in the courtroom while other witnesses are testifying. I'd  
2 like to invoke that rule.

3 THE COURT: Well, I understand he's probably going to  
4 be first.

5 MR. HERSHON: Well, if he's going to be first, then  
6 that's fine.

7 THE COURT: We'll see. If not, we'll -- just remind me  
8 of that to sequester him if need be.

9 MR. HERSHON: Sure. The other thing I need is just in  
10 terms of the Court's -- what the Court's practices are in  
11 terms of use of any blow-ups of any documents during opening  
12 statements. I have a couple of those ---

13 THE COURT: Are they going to be in evidence? If  
14 there's a chance that they're not going to be admitted into  
15 evidence, then ---

16 MR. HERSHON: I know they're both in the packet that  
17 Mr. Alford has. And I'll go ahead and talk about it during  
18 lunch to make sure he's okay with the way the exhibits look.

19 THE COURT: Okay. And he's marked some. Y'all can see  
20 how many of those y'all can agree to.

21 MR. HERSHON: That's it for Bank of America.

22 THE COURT: All right. All right. Let's take a lunch  
23 break, and I'll do a little study.

24 MR. ALFORD: Just very briefly, Your Honor?

25 THE COURT: Yes, sir.

1           **MR. ALFORD:** Going back to your non-economic damages.

2       I understand the mental anguish medical. What was your  
3       ruling impacting credit? Is that an economic?

4           **THE COURT:** Impact on his credit?

5           **MR. ALFORD:** Are we going to treat that as an economic  
6       damage?

7           **THE COURT:** Has he got some proof of his credit being  
8       damaged?

9           **MR. ALFORD:** Well, this lawsuit.

10          **THE COURT:** This lawsuit?

11          **MR. ALFORD:** And the Chase lawsuit.

12          **THE COURT:** Okay. Well, let me listen to what he has  
13       to say, and I'll rule on any objection that may be made.  
14       Maybe that'll be nothing that we have to spend a lot of time  
15       on. All right. Let's take a lunch break. Be back at a  
16       quarter til.

17          **MR. HERSHON:** Thank you, Your Honor.

18          **MR. ALFORD:** Thank you, Your Honor.

19       (Whereupon court was in recess at 12:55 pm)

20       (Whereupon Defendant Irby exhibits 1 - 3 were marked  
21       for identification)

22       (Whereupon court resumed at 2:14 pm)

23          **THE COURT:** All right. Mr. Alford, what you got to  
24       tell me about the -- contemplate with me. Did you talk with  
25       your client? Did everybody talk to their ---

1           **MR. ALFORD:** There were no objections raised by any of  
2 the parties, Judge.

3           **THE COURT:** All right. Okay. Let the record reflect  
4 that I disclosed my credit card there. All right.  
5 Gentlemen, in the brief time we've had I've tried to read  
6 the cases. And I think I've ruled on some of the things  
7 already about the expert and so forth.

8           So that you know, I believe the Defendant's motion to  
9 strike the negligence cause of action is appropriate. I  
10 will do that at this time. So we'll be going on a contract  
11 claim.

12           Defendant's motion to disallow the evidence of the  
13 Chase/Bank of America agreement, I deny that motion. I will  
14 allow the Plaintiff to bring up whatever evidence he wants.

15           Obviously, that should not be getting into a insurance  
16 payment or things of that nature. But I think the bank,  
17 certainly through their representative, they can explain a  
18 business decision that's made and what other factors were  
19 involved in that. But I will allow that, with limitations.

20           You know, we don't need to try two different cases  
21 here. I hope you understand that I'll allow that, Mr.  
22 Alford. But we're not going to -- we're trying this case,  
23 not other cases that took place in Judge Simmons' Court.

24           The expert witness, I told you I'd wait and see what  
25 Mr. Jones has to say. Anything else that y'all need to know

1 about before you address the jury?

2 **MR. HERSHON:** Your Honor, as for a clarification on the  
3 Chase agreement. I think, you know, in response I can bring  
4 up discussions of settlement of the ---

5 **THE COURT:** We're not going to talk about the  
6 settlement. We're just going -- that doesn't talk about  
7 settlement of this case. It's just that -- I guess the  
8 foreclosure is going to be made that Chase was -- is Chase  
9 going to be named or anybody going to talk about Chase at  
10 all in this case?

11 **MR. ALFORD:** No, sir. I'm just going to talk about the  
12 first lien position and they gave it up.

13 **MR. GAINES:** I actually -- I thought I -- that it, you  
14 know, could certainly come up?

15 **THE COURT:** Chase? Because they were the ones that was  
16 lending the money when Mr. Jones made the closing, rather?

17 **MR. GAINES:** Correct.

18 **THE COURT:** Chase will probably -- the jury's going to  
19 know about Chase anyhow probably. I figured it's going to  
20 come up somewhere in the -- in all the discussion just that  
21 there was a bank and that they worked it out. Well, you say  
22 they gave up their first mortgage, you know.

23 **MR. ALFORD:** I understand that.

24 **THE COURT:** That's ---

25 **MR. ALFORD:** I don't want to try Chase. I don't want

1 to try the actual dollar amount ---

2       **THE COURT:** They can explain what they did from a  
3 business standpoint. This case has been going on for, what,  
4 six years? Four years?

5       **MR. HERSHON:** Three.

6       **THE COURT:** Only three? It just seems like six?

7       **MR. HERSHON:** Correct.

8       **THE COURT:** Okay. Well, it's been going on a while.  
9 So I will allow Mr. Alford to get into that. So we're going  
10 to be talking about contracts and breaches of contracts and  
11 those kind of matters. All right.

12       And Mr. Alford will go first, and then Mr. Gaines. And  
13 then there will be all your opening statements and  
14 presenting of witnesses and cross examination and so forth.

15       **MR. GAINES:** Your Honor, we've kind of agreed to  
16 presenting witnesses. And I may not have any ---

17       **THE COURT:** Okay. If you want to waive to them,  
18 that'll be fine.

19       **MR. ALFORD:** Your Honor, for the record, I believe the  
20 parties have stipulated on Plaintiff's exhibits 1, 2, 4, and  
21 5 being admitted. And I think they're marked Defendant 1,  
22 2, and 3, and it's really Bank of America, if I understand,  
23 Defendant 1, 2, 3.

24       **MR. GAINES:** It's actually ---

25       **THE COURT:** It's Mr. Irby's 1, 2, 3, I think.

1           **MR. ALFORD:** Oh, okay. There's two deeds and a lis  
2   pendens, and those have been stipulated to. Okay. I'm  
3   sorry. Those are yours.

4           (Whereupon Plaintiff's exhibits 1, 2, 4, and 5 were  
5   admitted into evidence)

6           (Whereupon Defendant Irby's exhibits 1, 2, and 3 were  
7   admitted into evidence)

8           **THE COURT:** All right. Very good. Let's have our jury  
9   come in if they're ready.

10          **THE BAILIFF:** Yes, sir.

11          **THE COURT:** Mr. Christ, you can just bring them in if  
12   we're not talking. Whenever they get lined up, you just  
13   bring them on in.

14          **THE BAILIFF:** All right. Thank you, sir.

15          (Whereupon the jury entered the courtroom at 2:20 pm)

16          **THE COURT:** Ladies and gentlemen, I apologize for  
17   keeping you waiting. Sometimes our estimate of time goes a  
18   little awry. But I try to do my best. I know your time is  
19   as valuable as ours is.

20          We're ready to begin the case now. The attorneys are  
21   going to make an opening statement to you. Let me remind  
22   you that what the lawyers have to say to you is not  
23   evidence. They're going to give you an overview of what  
24   they feel is important about the case as it develops and  
25   perhaps what you need to be listening to.



1 But the evidence is going to come from the witness  
2 stand and from documents that may be introduced. I urge you  
3 to listen carefully to the lawyers address you. However,  
4 I'm confident they can give you some insights that perhaps  
5 help you to be alert as the case develops and this testimony  
6 is offered.

7 Before the attorneys address you in their opening  
8 statements, I'm going to have the clerk administer an oath  
9 to you. I urge you, ladies and gentlemen, to listen  
10 carefully to this oath that's given to you. This is an oath  
11 that's time-honored. It's been in existence since well  
12 before the foundation of our Country.

13 In England, they gave such an oath. Jurors such as you  
14 sat there. They're sitting throughout America today in  
15 different states in the mid-west, in the north, and every  
16 other section of our Country. People like you are taking an  
17 oath very similar to this, to well and truly try the case.

18 So I urge you to listen carefully as the oath is given,  
19 afterwhich the attorneys will make their opening statements  
20 to you. Ms. White, if you'll swear the jury, please.

21 **MADAME CLERK:** Ladies and gentlemen, please stand and  
22 raise your right hand.

23 (Whereupon all jurors stood and raised their right  
24 hand)

25 **MADAME CLERK:** I'm going to give you the oath in this

**OPENING STATEMENTS - MR. ALFORD**

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1 case. And your response shall be I will. You shall well  
2 and truly try case number 2010-CP-23-1621, Thomas R. Irby  
3 versus Roy C. Irby and Bank of America, N.A., and a true  
4 verdict rendered according to the law and the evidence, so  
5 help you God.

6 **THE JURY:** I will.

7 **MADAME CLERK:** Thank you.

8 **THE COURT:** Mr. Alford, you may address the jury.

9 **MR. ALFORD:** Thank you, Your Honor. Good afternoon.  
10 You've been here a long day. This case goes back a lot  
11 longer. This case started back in August of 2007, six years  
12 ago.

13 At that time, my client, Thomas Irby, uncle to Roy  
14 Irby, trying to help him out. And you've heard the old  
15 saying that no good deed shall go unpunished. There's  
16 property at 156 Pearson Street. He sells it to Roy, but  
17 more importantly co-signs for him with lenders. And they  
18 take out a note and what's called a mortgage on the  
19 property. And a mortgage is like having a title to the car.  
20 It protects the lender.

21 Now, back in 2007, in August, they refinance this  
22 property. And while it's not really germane to the suit,  
23 but just to understand kind of how we get to this position,  
24 and they had a first mortgage and a second mortgage on the  
25 property starting in August of 2007.

**OPENING STATEMENTS - MR. ALFORD**

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1           They go to a lender, turns out, Chase, to refinance.  
2       And Thomas Irby is going to testify he thought he's paying  
3       off the two mortgages. And to do that, he actually puts the  
4       note in his name, the IOU. But because he'd been given and  
5       was giving the property to Roy, they both were on the  
6       mortgage.

7           Mr. Gregg Jones is going to testify that he did the  
8       closing. And as part of that closing, he received payoff  
9       information from, I think, it was Community Bank had the  
10      first mortgage and Bank of America, which had a line of  
11      credit. And he sent the money off to Bank of America. Sent  
12      the money off to Community Bank.

13          The testimony's going to show that lo and behold, Mr.  
14      Roy Irby is still pulling money out on the line of equity.  
15      The payoff, when they sent it to Mr. Jones, was ninety-nine  
16      hundred and seventy-eight dollars, something like that.

17          He pulls out about ten thousand dollars, all within  
18      about a week. You'll be able to see that on the payment  
19      statements. And then over the course of the next year or  
20      two, runs it up to about sixty-nine thousand dollars.

21          Does he tell his uncle? No. Does he tell Mr. Jones at  
22      closing? No. He gets the money. The question is, does he  
23      have any income to pay it back? On one hand Thomas is upset  
24      at his nephew for draining that account when supposedly he's  
25      closing it out all for the benefit of Roy.

**OPENING STATEMENTS - MR. ALFORD**

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1           Fast-forward to about 2010. This lawsuit is filed. It  
2    was filed in the name of Chase on the first mortgage for  
3    they were the lender in 2007. They name Thomas because he's  
4    on the note, and they name Roy because they're both on the  
5    mortgage. And lo and behold, they name Bank of America,  
6    because it turns out the mortgage never was satisfied with  
7    Bank of America, I guess. More importantly, Bank of America  
8    says, hey, we still have a line of credit and you owe us  
9    sixty-nine thousand dollars.

10          Testimony's going to show that when Mr. Jones, the  
11   closing attorney, sent the payoff information to Bank of  
12   America, he did it exactly in agreement with what's called a  
13   maximizer agreement, the line of credit. And these are  
14   going to be the documents that you're going to see today.

15          Paragraph twenty of the maximizer agreement, you'll be  
16   able to read it later. Probably we're going to show you  
17   this paragraph ad nauseam. We're going to show it to you  
18   over, and over, and over again. Because on here it says, by  
19   Bank of America instructions, if you notify us in writing to  
20   close the account, meaning the line of credit, it's closed  
21   to all parties. Here's Mr. Jones' letter, close the  
22   account. It never got closed.

23          Thomas is upset with Bank of America because now  
24   they're saying, well, he owes the money, too. And during  
25   all of this is Roy took the money and Bank of America had

1     never even followed its own contractual statement right  
2     here. Plain as day.

3             That's what this case is about. A breach of contract  
4     against Bank of America. And we've got some claims against  
5     Roy for essentially taking the money out and running. And  
6     he left Thomas, in essence, holding the bag. And that's  
7     what this case is about. And this started about six years  
8     ago.

9             **THE COURT:** Mr. Gaines.

10            **MR. GAINES:** Thank you, Your Honor. Hello, ladies and  
11     gentlemen. Again, I introduced myself earlier. It's Jerry  
12     Gaines. And I represent Mr. Roy Irby.

13            And as you heard, Roy and his uncle had a partnership  
14     to build a house. And this case is very much like a scene  
15     from the movie where a car is headed toward the cliff. And  
16     usually what happens in that movie is right before they get  
17     to the cliff, everybody jumps out and everybody's saved.  
18     And that's what should have happened in this case, but it's  
19     not what happened.

20            As you heard earlier, Roy and his uncle borrowed money  
21     to build a house. There were a number of homes. There were  
22     four total. And in the last one, Roy wasn't even on the  
23     note. He had to sign the mortgage because the property was  
24     in his name, but he didn't even sign to obligate himself  
25     under the note. His uncle did that.

1 But there clearly were some errors in payments. And  
2 what we think the testimony will show is that everybody had  
3 some blame, even my client, Roy, had some blame. Bank of  
4 America had some blame, and we believe Thomas had some  
5 blame.

6 And we also believe what the evidence will show is that  
7 none of this had to happen, that there was a way to jump out  
8 of the car right before it went off the cliff. And that's  
9 because Roy was able to get a sale, a contract to sell the  
10 house before foreclosure ever started.

11 And the sale, had it gone through, would have paid off  
12 Chase Bank. It would have paid off Bank of America. It  
13 would have ended the liability of Roy. It would have ended  
14 the liability of Thomas. And none of this would have been  
15 necessary. But there's a reason that didn't happen. And  
16 the reason is Thomas.

17 There's going to be evidence where we show you that he  
18 filed what's called a *lis pendens*. And that's something you  
19 can file with the records to notify the world that there's a  
20 dispute in this property, that there's a problem.

21 And you'll also hear testimony from attorneys that say,  
22 hey, we can't close on this property because there's a *lis*  
23 *pendens*. We can't do anything with it. It's created a  
24 cloud, a problem.

25 And so while Roy had the chance, he and his uncle, to

1     jump out of that car, to sell the property, to remove the  
2     liability, his uncle, instead, filed a *lis pendens* and  
3     decided they'd go over the cliff together, that the house  
4     would go through foreclosure. And you'll also see the  
5     evidence that shows shortly after he filed that *lis pendens*,  
6     the foreclosure started.

7             And so what we're asking, is you, the jury, just to  
8     hear the evidence, weigh the testimony, is at the end of  
9     this that you don't find that my client is responsible to  
10    Bank of America for any money, that if there's any money due  
11    Bank of America, it should be the responsibility of Thomas  
12    because he's the one that kept us from selling the property.

13            And we also don't believe that you should find that my  
14    client owes any money to Thomas. And that's because, as  
15    you'll see from the evidence and the testimony, is he deeded  
16    this property to my client. He'd given it to him. It was  
17    his. And if he obligated himself to help pay, then that was  
18    his choice. But he'd given the property over to him. So  
19    there was nothing else owed to him by my client, Roy.

20            So we just ask that, again, after you've heard the  
21    testimony, that you rule that Roy doesn't owe any money.  
22    Thank you.

23            **THE COURT:** Mr. Hershon.

24            **MR. HERSHON:** Thank you, Your Honor. Ladies and  
25    gentlemen, as I was introduced earlier, I'm Lawrence

OPENING STATEMENTS - MR. HERSHON

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1     Hershon, the attorney for -- one of the attorneys for the  
2     bank. Also here, again, is Dwight Floyd, and a  
3     representative for Bank of America, Grant Allred, who,  
4     again, is up from Greensboro.

5             Banks have certainly been cast in a negative light over  
6     the last two years. There's no doubt about that. There's  
7     been the bail-out crisis, and other things like that. This  
8     is not one of those cases. You have a very different story  
9     here today. The story doesn't involve those issues in any  
10    way.

11            Instead -- now, you've heard a little bit of opening  
12    statements here from both the other parties. And you can  
13    certainly tell there's a family fight going on here. That's  
14    certainly the case.

15            And so -- and you've heard all these complicated terms.  
16    And there's these real estate -- there are different real  
17    estate documents. There's lots of different timing going  
18    on.

19            But really this case boils down to something very  
20    simple. It's about honoring the contracts you enter into.  
21    There's a line at the end of the document, you sign that,  
22    that means something. That means something in our society.  
23    It means something to everyone. And there's an obligation  
24    that Thomas signed his name to. There's an obligation that  
25    Roy signed his name to.



1           Now, here today what we're talking about is an equity  
2   line. I want to show you this right now, at least what the  
3   first page of that document looks like. Now, I apologize,  
4   you know, you're not going to be able to read much on this  
5   document right now, but you'll be able to see this up close  
6   later. It's also been referred to here as a maximizer  
7   agreement. For short, I'm just going to be calling it an  
8   equity line.

9           Now, I apologize for those of you that it's a repeat or  
10   you already know what an equity line is. But an equity line  
11   from a bank is just like a loan. It's very similar to a  
12   loan.

13          And when you normally think of a loan. You know, let's  
14   say a loan in the amount of sixty-nine thousand dollars, you  
15   would normally think of a check being written from the bank  
16   to the borrower and the money is just out at that point.

17          Equity line functions a little bit differently. You  
18   can have an equity line in the amount of sixty-nine thousand  
19   dollars, means that you can draw on that equity line at any  
20   time. If you want to draw five thousand dollars, you can do  
21   that and make payments over time. You can pay it back, take  
22   out, and you can take out any amount within that range. So  
23   it gives -- and the borrowers in that situation can do  
24   really whatever they want with that money. That's up to  
25   them.

OPENING STATEMENTS - MR. HERSHON

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1           Now, here, looking at this loan in particular -- and I  
2    know you've already heard a little bit of the story of the  
3    time-line, but I'd like to take you back through that again.  
4    And, again, I'm sorry for repeating this a little bit.

5           But here we have, you know, the borrowers' name on this  
6    document, Thomas Irby, Roy Irby. Notice Thomas Irby's name  
7    is first. He's the primary borrower on this loan. He used  
8    -- it's his credit, his history of being, of whatever his  
9    past life was able to -- that builds up in your credit.  
10   report, it's his credit that's used as the primary  
11   determination of things such as the interest rate that's  
12   listed here, of the amount of the credit limit, things of  
13   that nature.

14          Just to show you a couple of things in this document,  
15   and I've actually got something to zoom-in a little bit so  
16   that you can see it a little bit clearer. And I hope this  
17   makes it a little more readable, legible for you.

18          You and your and the term borrower are used in this  
19   account all the time. Those refer to each person that signs  
20   this agreement. Each person because they're co-borrowers.  
21   Under the agreement, they're essentially almost like one  
22   person. They both can draw on this account. They both have  
23   the ability to at any time.

24          Now, in paragraph two here, it talks about the promise  
25   that Roy and Thomas were entering into here. It states, you

1     promise to pay the lender the total of all advances plus  
2     finance charges, together with all fees and charges under  
3     the terms in the agreement. You will pay your account  
4     according to the terms set forth below.

5             If there's more than one borrower, each is jointly and  
6     severely liable on this agreement. This means we can  
7     require any borrower to pay all amounts due under this  
8     agreement, including credit advances made to any borrower.

9             So this agreement was entered into in May of 2007.  
10    They applied for -- the way it basically works is you apply  
11    for a loan, the bank approves it. And so this loan function  
12    -- and Thomas and Roy Irby had the ability to draw from it.

13            Now, since it's not a check that's sent out at one  
14    time, instead what can happen and what happened here, is  
15    there are devices that you can use to draw on this account.  
16    There can be checks that can be used to draw on this  
17    account. Essentially, a card that you would use just like  
18    an ATM card at an ATM machine to be able to draw funds from  
19    the account. You can also link it to your other accounts at  
20    the bank, such as your checking account or savings account.  
21    So, again, the account is opened and moves forward.

22            The key moment in time here, the key moment that we  
23    really need to pay attention to in this case is in August of  
24    2007. As was alluded to earlier, the Irbys seek to  
25    refinance their loan. What that means, again, trying to

1 break that down, is that they're getting a new loan from  
2 another bank to pay off their loans that they have in here  
3 with Bank of America.

4 There's certain steps that have to take place for that  
5 to occur. And there are really -- there are two main steps  
6 that have to happen. One, there has to be a written  
7 instruction from the borrower, not just from anybody out  
8 there, from the borrower to close the equity line. The  
9 second thing is that it has to be paid off in full.

10 And what's important here is it's not just any written  
11 instruction. Here, what the agreement says, and, you know,  
12 this is that paragraph twenty that's been referred to  
13 earlier. Each of you has the right upon proper written  
14 notice to us, to suspend the privilege of obtaining new  
15 advances.

16 These terms in these contracts are very important.  
17 And, again, this is not just something that can just come  
18 from anyone. And the facts will show that Bank of America  
19 not only had these requirements in the agreement, it's  
20 required to do this by federal law and regulations.

21 And the reason that there needs to be a proper, there  
22 needs to be proper written notice, is to protect the  
23 consumer. You don't want -- if you had -- if there was an  
24 equity line out there of some kind, the bank needs to know  
25 that these -- that the borrower himself really wants the

1 equity line closed. For that to close and it not have been  
2 the right instruction could cause all kinds of issues down  
3 the line that'll be discussed later in this case.

4 So what happened in this particular situation? There  
5 was a payoff requested by the Irbys. That payoff is seeking  
6 the amount that's due that's needed to pay off the loan.  
7 That payoff amount is sent back to the Irbys. Again, this  
8 is in August of 2007.

9 What is then done is they have their closing attorney,  
10 as referred to earlier, Mr. Gregg Jones. There's a payoff  
11 statement. There's a payoff statement sent. The other big  
12 thing that's sent are written instructions. So the payoff  
13 tells you again the amount that's needed to pay off the loan  
14 in full.

15 What's also sent are some instructions that need to be  
16 followed, that are that proper written notice that we talked  
17 about earlier, for what needs to be -- what needs to be  
18 provided back to the bank so that the loan can actually be  
19 closed out, so that no funds can be borrowed any further  
20 from it.

21 And what you'll notice here, particularly, there's a  
22 line here that says, I authorize Bank of America to block  
23 the account to make further advances and a signature line.  
24 And then in bold type -- and I know you can't read that from  
25 where you're sitting. But it states, borrower's signature

1 is required to block and close the line of credit account.

2 Please sign and date the authorization above.

3 And so as was discussed earlier, there's a closing  
4 attorney, Gregg Jones. He sends back the two-page document  
5 and a check. He sends back a document here that basically  
6 says, we're enclosing the check, the amount that was in that  
7 payoff statement of about ninety-nine hundred dollars.

8 What's important here, there's a signature of Gregg  
9 Jones. There's no signature from Thomas Irby. There's no  
10 signature from Roy Irby. It states to close the account,  
11 but Bank of America doesn't know Gregg Jones from Tom Jones,  
12 from Bill Jones. Gregg Jones here, we don't know anything.  
13 The bank does not know anything as to how he is tied to  
14 Thomas and Roy Irby.

15 That letter that I showed you before, that second page  
16 was sent back. The signature line is blank. Blank.  
17 There's nothing there. There's no signature for Thomas.  
18 There's no signature from Roy.

19 So what's the bank to do in this situation? Again,  
20 there were two things that had to be done for the bank to  
21 close this equity line. One that I told you about is there  
22 needed to be a written instruction. We don't have that.

23 The other big thing that occurred is during this time,  
24 ten thousand, seven hundred dollars is withdrawn between the  
25 date of that payoff that was sent and the date of this check

1     being sent back to Bank of America. So when the bank  
2     receives this check, there's still a ten thousand, seven  
3     hundred dollar balance.

4             Under the terms of the contract, under the rules that  
5     Bank of America is required to follow, through different  
6     federal regulatory bodies, it cannot close the account. It  
7     doesn't have an instruction. The two key items, two key  
8     items have not been met.

9             And, furthermore, there's even -- there's a third thing  
10    that hasn't been done here. Those access devices that I  
11    told you about, they're never returned to the bank. There's  
12    that little ATM card that's got Thomas' name on it and it  
13    has Roy's name on it that's still floating out there, and  
14    it's still being used.

15            What happens after this time in August of 2007? Bank  
16    of America, based on the documents it receives, has to keep  
17    the account open. It doesn't have the authority to contact  
18    Gregg Jones as the Plaintiff will tend to argue. It can't  
19    do that for various privacy reasons.

20            So the account remains open. The Irbys continue to  
21    withdraw on this account. They make withdrawals, make some  
22    payments. This happens from 2007 into 2009. Irbys made  
23    more than eighty withdrawals. The balance goes from what we  
24    were talking about, ten thousand, seven hundred dollars to  
25    sixty-nine thousand dollars.

1           Thomas Irby attempts to make a couple of payments on  
2   the account in late 2009. He makes payments in about the  
3   amount of four hundred while the account was closed at that  
4   time. But the Irbys, at the end of the day, did not make  
5   their payments to the account. There's a balance owed to  
6   Bank of America. And so, again, we have a contract. Thomas  
7   and Roy Irby signed that contract, and they haven't paid the  
8   bank back.

9           Again, you're going to hear some other stories about  
10   some family in-fighting and some things like that, but the  
11   case is really simple. It's about that honoring a contract,  
12   about when you sign something it means something. And so  
13   for that reason, I ask that Thomas' claims against Bank of  
14   America be denied and that judgment be entered in favor of  
15   Bank of America against both Thomas and Roy. Thank you.

16         **THE COURT:** Mr. Alford, you may call your first  
17   witness.

18         **MR. ALFORD:** Thank you, Your Honor. Plaintiff calls  
19   Mr. Gregg Jones.

20         **MADAME CLERK:** Mr. Jones, please place your left hand  
21   on the Bible and raise your right hand. You do solemnly  
22   swear that the testimony you're about to give in this case  
23   will be the truth, the whole truth and nothing but the truth  
24   so help you God?

25         **MR. JONES:** I will.



1           **MADAME CLERK:** Thank you. Will you please state your  
2 full name for the record?

3           **MR. JONES:** Gregg, G-R-E-G-G, F. Jones, J-O-N-E-S.

4           **MADAME CLERK:** Thank you. You may be seated.

5           **MR. ALFORD:** Your Honor.

6           **THE COURT:** Yes, sir, you may proceed.

7           **MR. ALFORD:** Thank you.

8           **Direct Examination by Mr. Alford:**

9           Q. Mr. Jones, what profession are you in?

10          A. I'm an attorney. I've been practicing law for thirty-  
11 five, thirty-six years.

12          Q. And where is your office?

13          A. Williamston, South Carolina.

14          Q. Are you familiar with Thomas Irby?

15          A. Oh, yes, sir.

16          Q. Are you familiar with Roy Irby?

17          A. Yes, sir. They contacted me several years ago about  
18 doing a closing for them.

19          Q. Was this the closing we referred to in August of 2007  
20 or had you done other closings?

21          A. David, I think it was -- I think I did three closings  
22 for them. And I can't remember who the first one was. Then  
23 I did one for Community First Bank. I did one for Bank of  
24 America. And I believe the other one was M.I.T. [sic] that  
25 later got sold to Chase.

1 Q. Chase being the one that you heard -- you were in the  
2 courtroom and we referred to?

3 A. Yes, sir.

4 Q. Okay. So the one that you call M&T, or I refer to as  
5 Chase, that closing occurred when?

6 A. August of 2007.

7 Q. Okay. And how large is your office? Who's in there?

8 A. Just me, my secretary, and one -- my paralegal and one  
9 other secretary.

10 Q. Okay. And do you handle most of the closing yourself?

11 A. Yes, sir. I handle all of the closings myself, as far  
12 as all the paperwork. I've got a paralegal that prepares  
13 all of that for me and sends off payoffs, that kind of  
14 thing.

15 Q. Okay. For the closing in August of 2007, you probably  
16 call it the M&T closing or the Chase closing, what were you  
17 doing in that closing? And let me hand you what's been  
18 admitted as -- or marked as 10, Plaintiff's 10, which is the  
19 HUD.

20 A. Okay. David, I was in the closing in the conference  
21 room with the clients. And, of course, I had all of the  
22 paperwork from M&T Bank.

23 Q. Okay.

24 A. And I proceeded to explain the documents to everybody,  
25 and we closed the loan.

1 Q. All right. I've handed you what's been marked as  
2 Plaintiff's exhibit 10. Are you familiar with that?

3 A. Yes, sir, I am.

4 Q. What is that?

5 A. This is a HUD-1 form, a closing statement showing all  
6 the costs disbursements that come out of the closing.

7 Q. Okay. And you prepared it?

8 A. Yes, sir.

9 MR. ALFORD: I'd move to admit that as Plaintiff's 10.

10 THE COURT: Any objection?

11 MR. GAINES: None.

12 MR. HERSHON: None.

13 THE COURT: Without objection exhibit 10 is admitted  
14 into evidence and may be published to the jury.

15 MR. ALFORD: Thank you, Your Honor.

16 (Whereupon Plaintiff's exhibit number 10 was admitted  
17 into evidence)

18 Q. Now, on this exhibit, you have -- if I may publish it.  
19 Do you have a copy of that in your file?

20 A. I'm sure I do. Give me a second.

21 Q. I tell you what. You just hold onto it, and we'll  
22 publish it in a minute.

23 A. Okay.

24 Q. What's the purpose or what were you doing financially  
25 on this closing?

1 A. I was paying off the first -- well, there were -- at  
2 that time, there were two mortgages and then there was some  
3 closing costs. I was paying all of those off. And there  
4 was going to be a first mortgage to M&T Bank for ninety-five  
5 thousand dollars.

6 Q. And when you paid off the first and second mortgages --  
7 I hand you what's been previously admitted as Plaintiff's 4.  
8 Are you familiar with that?

9 A. Yes, sir. This is the payoff to Bank of America, that  
10 home equity line.

11 Q. Okay. How much did you send them?

12 A. Nine thousand, nine hundred and ninety-eight dollars  
13 and ninety-two cents.

14 Q. Now, how would you know how much to send them?

15 A. We had contacted Bank of America to get a payoff. And  
16 then the morning of closing we always contact them again to  
17 get a verification. And this was the amount they sent.  
18 They had also, I believe at one point, and I could be wrong  
19 on this, had sent me a written statement of what their  
20 payoff was.

21 Q. Okay. How do you obtain that payoff statement from  
22 somebody like Bank of America?

23 A. Usually, you call them and then they will say --  
24 they'll fax it to me. They usually won't give it to you  
25 over the telephone, but they will fax it within twenty-four

1 hours.

2 Q. Okay. Do you have in your record how you obtained  
3 that? Did you have a fax or a request?

4 A. I don't. I'm sure it was faxed just from my experience  
5 with Bank of America.

6 Q. Does the client have to sign anything?

7 A. I'm sorry?

8 Q. Does the client, the borrower, have to sign anything?

9 A. For Bank of America? I would say, no. But I could be  
10 wrong.

11 Q. Okay.

12 A. It's been seven years ago. Well, six years ago.

13 Q. But it would be in your file if there was something  
14 that was to be signed?

15 A. Yes, sir. And I do not have anything in my file to be  
16 signed in order to get a payoff.

17 Q. Okay. Now, you sent that in with the payoff. And is  
18 that the -- I'm going to just hand you -- we showed this  
19 exhibit before. Your letter -- is that in essence your  
20 letter of the bottom half of this exhibit?

21 A. Yes, sir, it is.

22 Q. Okay. After that closing did you ever receive  
23 anything, correspondence, phone call, letter, fax, from Bank  
24 of America?

25 A. No, sir.

1 Q. Would you read your letter, Plaintiff's exhibit 4, to  
2 the jury, please.

3 A. Yes. It says, enclosed herein, please find my trust  
4 check in the sum of nine thousand, nine hundred and ninety-  
5 eight dollars, ninety-two cents to be applied to the above  
6 mortgage. If there is a balance due, please contact this  
7 office immediately. If no balance is due or if this is an  
8 equity line, you are directed and authorized to close and  
9 block and satisfy said mortgage and forward to my office.  
10 If you have any questions, please do not hesitate to advise.  
11 Gregg F. Jones.

12 Q. And did you ever -- as you testified, you never  
13 received anything in response to that, did you?

14 A. No, sir, not from Bank of America.

15 Q. Do you know if that nine thousand, nine hundred and  
16 ninety-eight dollar check was negotiated?

17 A. You mean was it deposited?

18 Q. Yes.

19 A. Yes. My trust account is balanced every month. And by  
20 the first of the next month my paralegal had balanced and it  
21 had gone through.

22 Q. All right. Now, if you could, just to help the jury  
23 understand when we talk about a first mortgage and a  
24 refinance and, you know, a first and second mortgage, can  
25 you explain to us what a mortgage is?

1 A. Yeah. A mortgage secures your note. If you sign a  
2 note for -- in this situation, ninety-five thousand dollars,  
3 you sign a note that says I owe it. You sign a mortgage  
4 that says, I pledge my property as collateral. And in this  
5 situation, there was a recision. Under federal law if it's  
6 a primary residence, you have three business days to change  
7 your mind. And this was dated August 17th. It did not  
8 disburse until August 22nd.

9 Q. And that's the date of your letter to Bank of America?

10 A. And that's correct.

11 Q. So you had to wait for the statutory recision period  
12 before you could disburse funds?

13 A. Right. And I'm sure probably Bank of America didn't  
14 even send me the money until the day I disbursed funds.  
15 That's usually how it works.

16 Q. You mean M&T?

17 A. Yeah. I'm sorry.

18 Q. Now, what do you mean a first mortgage and a second  
19 mortgage?

20 A. Okay. The first mortgage is -- and you're going to  
21 have to be more specific. The first mortgage is your  
22 primary mortgage that you pay for your home. Equity line  
23 is, like y'all were explaining a while ago, it's a credit  
24 line.

25 It's like in this situation, I believe, the total

1 amount was maybe sixty thousand. You can write up to sixty  
2 thousand. You may only owe five thousand. You could owe  
3 twenty thousand, but you can go up to sixty. It's a second  
4 mortgage that is also secured by your property.

5 Q. All right. So what happens if you have two mortgages  
6 securing the same property? Is there any priorities  
7 involved?

8 A. Yeah. First mortgage is first mortgage. It's who was  
9 recorded first and who's recorded second. And a lot of  
10 times on the equity line, it will say this is a second  
11 mortgage, subordinate to Chase or whoever.

12 Q. So how do you determine which is a senior or junior  
13 mortgage holder?

14 MR. FLOYD: Objection, Your Honor. That's a legal  
15 opinion, conclusion beyond the scope of his faculties?

16 THE COURT: All right. I -- do you --

17 MR. ALFORD: I'll withdraw it, Your Honor.

18 THE COURT: All right.

19 Q. If you have mortgages, why do you have to pay those  
20 mortgages off?

21 A. I'm sorry?

22 Q. Why do you have to pay those mortgages off?

23 A. Well, because you have pledged and promised in your  
24 note that you would pay the sum due and owing.

25 Q. Okay. But if M&T lends the money, do you have to clear



1 out the other mortgages?

2 A. What other mortgages?

3 Q. The first and the second?

4 A. Yeah. Yeah, you do.

5 Q. Okay.

6 A. And that's what I'm showing on my HUD-1 Form. I paid

7 off Community First. And at this point in time, on August

8 17th, Community First was owed and so was Bank of America.

9 And I wrote checks to both of those companies.

10 Q. All right. Please answer any questions of opposing

11 counsel.

12 **Cross Examination by Mr. Floyd:**

13 Q. Good afternoon, Mr. Jones?

14 A. Good afternoon.

15 Q. Let's look at this letter you talked about at the time

16 of closing. I'm trying to get this where everybody can see.

17 Can you see that?

18 **THE JURY:** (Affirmative nods).

19 Q. Do you recall this letter, Mr. Jones?

20 A. Yes, I do.

21 Q. This is the letter that you sent to Bank of America?

22 A. That's correct.

23 Q. And it was a letter with an enclosure; isn't that

24 right?

25 A. Yes, it was.

1 Q. And the enclosure that we talked about earlier would be  
2 a check and this instruction?

3 A. That is correct. That's correct.

4 Q. Now, Mr. Jones, in this letter you don't ever say  
5 you're anybody's lawyer, do you?

6 A. Sir?

7 Q. You don't ever say you're anybody's lawyer, do you?

8 A. No, sir.

9 Q. You don't ever say that you're acting on behalf of  
10 Thomas or Roy Irby or anybody else; right?

11 A. I've just got RE: Thomas Irby, the account number under  
12 that.

13 Q. Right. And so the funds that you sent in got applied  
14 to that account; didn't it?

15 A. Correct.

16 Q. But you never said you were their lawyer?

17 A. That's correct.

18 Q. And there was no way for Bank of America to know that  
19 from this letter, that you were Mr. Irby's lawyer, did they?

20 A. I don't know how their operations work. Just off the  
21 top of my head, I'm going to say no, from that letter.

22 Q. And certainly, there's no power of attorney or anything  
23 ---

24 A. No.

25 Q. --- that you ---

1 A. No. No.

2 Q. --- sent with it?

3 A. No.

4 Q. The power of attorney, is that something that you're  
5 familiar with at closings?

6 A. Of course.

7 Q. A power of attorney is something where a client will  
8 sign a document that says that you have power to act on  
9 their behalf; right?

10 A. That's correct.

11 Q. And that's something that's commonly done in closings?

12 A. I don't know if it's commonly done. It was not done in  
13 this closing.

14 Q. And certainly nothing -- you never sent a power of  
15 attorney showing that you were acting on behalf of Mr.  
16 Thomas Irby?

17 A. No, sir. I never did.

18 Q. And certainly you're not aware of anything that Thomas  
19 Irby or Roy Irby sent to the bank separately to say you were  
20 acting on their behalf?

21 A. Oh, no. I'm not aware.

22 Q. And, in fact, in this letter, you don't even hint that  
23 you know what kind of an account this is, do you? When you  
24 say -- you say, if this is an equity line. You see that  
25 there?

1 A. Yes, sir. That is my standard payoff letter that my  
2 paralegal punches a button in the computer and it spits it  
3 out.

4 Q. So this is a form letter?

5 A. Yeah. We change the in RE: up at the top and the  
6 account number, what's ever appropriate.

7 Q. But regardless of your form letter and the button that  
8 you push to spit out your form letter ---

9 A. Uh-huh (affirmative).

10 Q. --- you did return the form that Bank of America  
11 requires; correct?

12 A. Yes, sir, unsigned.

13 Q. Thank you, sir. It was unsigned. The section down  
14 about three-quarters of the way down that says, I authorize  
15 Bank of America and there's a blank that's checked, to block  
16 the account to further advances and close the account?

17 A. Uh-huh (affirmative).

18 Q. So that box is checked. It's dated?

19 A. Correct.

20 Q. And then underneath that you said it was unsigned.  
21 There's a signature line that's got no signature on it?

22 A. That's right.

23 Q. And underneath that signature line it says, borrower's  
24 signature is required to block and close a line of credit  
25 account. Please sign and date the authorization above.

- 1 A. That's correct.
- 2 Q. And did you read that?
- 3 A. At some point I did. How it got out of my office, I
- 4 don't know. To be honest, I just don't know.
- 5 Q. Certainly, you and Mr. Irby didn't follow the bank's
- 6 instructions, did you?
- 7 A. As far as that's concerned, no, we did not. Which Mr.
- 8 Irby, Thomas or Roy?
- 9 Q. Either one?
- 10 A. No. No, we didn't.
- 11 Q. Once all these documents went in, once the letter went
- 12 in, once the check went in, did you do anything to confirm
- 13 that the payment had been received by the bank?
- 14 A. The next -- this was on like, the 24th, I believe, it
- 15 cleared my account. The bank statement would have come the
- 16 first of the next month, and we reconciled the trust
- 17 account. We reconcile it the first of each month, and the
- 18 check had cleared.
- 19 Q. But you never called the bank to confirm ---
- 20 A. No.
- 21 Q. --- that it was closed?
- 22 A. No. No. We sent it -- I believe we sent it certified
- 23 mail. And I could be wrong.
- 24 Q. So you knew it was received?
- 25 A. Yeah.

1 Q. But you never called them to make sure that it was  
2 closed?

3 A. No, no. No, I didn't.

4 Q. And you never called to see if there was any balance  
5 remaining?

6 A. No.

7 Q. And you never checked with the register of deeds to see  
8 if there was a satisfaction of mortgage that had been filed?

9 A. No.

10 Q. Do you ever do that?

11 A. Rarely, because I do an attorney SAT. In the State of  
12 South Carolina, we can sign -- if we know our check is  
13 cleared, the Bar will allow us to sign a SAT. And usually  
14 on credit lines, that's what you have to do because the  
15 banks do not send your satisfied mortgage.

16 Q. But the register of deeds would get a satisfied  
17 mortgage ---

18 A. Oh, sure.

19 Q. --- if it was paid off and closed; correct?

20 A. If the bank sent it, yeah.

21 Q. But you never checked to see if that had happened?

22 A. Probably not.

23 Q. Mr. Jones, if I may?

24 A. Sure.

25 Q. Bear with me just one moment, Mr. Jones.

1 A. Okay.

2 Q. Mr. Jones, looking at Plaintiff's exhibit number 10,  
3 that was the settlement statement ---

4 A. Uh-huh (affirmative).

5 Q. --- that you'd looked at with Mr. Alford?

6 A. Yes.

7 Q. Look with me, if you will, on line 303.

8 A. Uh-huh (affirmative).

9 Q. It's got a listing of cash flowing in different  
10 directions from and to borrowers, from and to banks;  
11 correct?

12 A. Right.

13 Q. And line number 303, tell me what that shows?

14 A. It shows cash to borrower, twenty-three thousand,  
15 nineteen dollars and seven cents.

16 Q. Who is the borrower here?

17 A. Thomas R. Irby is who was up here. I believe -- it was  
18 Thomas and Roy. It was both of them.

19 Q. So you're saying from this closing Thomas Irby got  
20 twenty-three thousand dollars?

21 A. I don't know who I handed the check to. I either  
22 handed it to Thomas or Roy.

23 Q. But cash went to one or both of them?

24 A. You know, I don't know. I don't have -- it says right  
25 here to borrower. And up here it says, borrower, Thomas R.

1 Irby. Roy was at the closing. So I don't know how I cut  
2 the check to be honest with you, if I did it to both of them  
3 or just one of them or how I did it.

4 Q. But there was certainly cash that changed hands?

5 A. Yes, there was.

6 MR. FLOYD: If I may, Your Honor, just one second?

7 THE COURT: Yes, sir.

8 (Pause)

9 MR. FLOYD: Your Honor, may I approach for an  
10 evidentiary issue?

11 THE COURT: Yes, sir.

12 (Whereupon a bench conference was held off the record  
13 in the presence of the jury, but out of their hearing)

14 Q. Thank you, Mr. Jones.

15 A. Oh, thank you.

16 THE COURT: Yes, sir.

17 MR. GAINES: All right. Thank you.

18 **Cross Examination by Mr. Gaines:**

19 Q. Mr. Jones, real quick. Do you make it a habit in your  
20 practice of giving checks to people who aren't borrowers?

21 A. No.

22 Q. Okay. So I find it odd that you've just testified that  
23 you don't know whether you gave the check to Thomas Irby or  
24 Roy Irby.

25 A. I can go through and get my disbursement summary for



1     you, if that's what you would like.

2     Q.   Well, you could. But that's not necessary because can  
3     you tell me whether you usually give people money who aren't  
4     the borrower?

5     A.   No.

6     Q.   Okay. So was Roy Irby in this closing a borrower?

7     A.   I doubt if I did. More than likely my -- the way my  
8     computer program is set up, you push a button and it spits  
9     out the checks. So the check would have, more than likely,  
10    gone to Thomas R. Irby. I would have given it to Tom. And  
11    what he did from then on, I have no idea.

12    Q.   Okay. So it's safe to say that you're just pressing  
13    buttons? Roy Irby's name is not on this settlement; is that  
14    correct?

15    A.   That's correct.

16    Q.   So in all likelihood, your check was made to Thomas  
17    Irby?

18    A.   That's correct.

19    Q.   And can you tell us again what the amount of that check  
20    was?

21    A.   Twenty-three thousand, nineteen dollars and oh seven  
22    cents.

23    Q.   Okay. And since Roy Irby was not a borrower, is the  
24    only document that he had to sign the mortgage?

25    A.   I don't have the whole packet in front of me. More

1     than likely, yeah. Yeah.

2     Q.   And really, he would not even have to attend the  
3     closing; is that correct?

4     A.   No. He would have had to have signed the mortgage.

5     Q.   Right. But he wouldn't have to sit through all the  
6     documents, in other words?

7     A.   No, he wouldn't have to, no.

8     Q.   Would he even have a right to see the other documents?

9     A.   In this situation, probably -- no. Well, I don't know,  
10    to be honest with you. I would say, he was pledging his  
11    property. Yeah, he would. He would have a right.

12    Q.   Okay. Is his signature on that HUD statement?

13    A.   No.

14    Q.   Okay. So we can't say for sure whether he even saw  
15    that note at closing?

16    A.   From this, no.

17    Q.   Okay. And when you have a closing where you represent  
18    multiple borrowers, who is your client in that case?

19    A.   Whoever the bank tells me the primary borrower is. If  
20    there is a co-borrower, then, of course, they are, too.

21    Q.   Okay. And so you've also done some other work for the  
22    Irbys; is that correct?

23    A.   Could you be more specific?

24    Q.   You've prepared deeds on their behalf?

25    A.   Yeah. Yeah.

1 Q. Okay. And, in fact, you prepared two deeds in March of  
2 2007.

3 A. I remember one deed.

4 MR. GAINES: Your Honor, I think we've already  
5 stipulated to the deeds.

6 A. Could I see?

7 THE COURT: What exhibit number is it?

8 MR. GAINES: Exhibit 1 and exhibit 2.

9 THE COURT: All right. Those are admitted into  
10 evidence, Defendant's exhibit 1 and 2, without objection.  
11 You may show them to the witness.

12 Q. Now, let's explain, if you would, how a deed conveys an  
13 interest in property to people, if you can.

14 A. Okay. Well, in this situation, Tom would have -- he  
15 would have signed a document giving -- and I think you're  
16 getting all his undivided right, title and interest in the  
17 property to Roy.

18 Q. Okay.

19 A. And he would have signed a document that would have  
20 been notarized, witnessed, and later recorded.

21 Q. I'm going to hand you the two deeds there.

22 A. Yeah.

23 Q. Would you typically on the same day have a deed going  
24 to a person giving a half interest, and at the same time  
25 having a deed giving an entire interest?

1 A. You'll have to give me a second and let me look at  
2 these.

3 Q. Okay.

4 (Pause)

5 A. I don't know what the purpose of this was, except we  
6 wanted to make sure Roy had all interest in the property.  
7 For some reason we had -- one says no title examination  
8 performed. The other does not say that.

9 Q. Okay. So if you wanted to make sure Roy had the entire  
10 interest in the property, then the deed giving the half  
11 interest wasn't necessary, was it?

12 A. No. No.

13 Q. Can you tell me why two deeds were done, one giving the  
14 half interest, one giving the full ---

15 A. I can't tell you that. I'll be honest with you.

16 Q. Do you do opinion letters for banks?

17 A. Yes, sir, I do.

18 Q. And would you recall whether or not in May of 2007 you  
19 prepared an opinion letter for Bank of America?

20 A. I don't recall.

21 Q. But you did handle that Bank of America closing for Roy  
22 and Thomas?

23 A. When was that dated?

24 Q. In and around May of 2007.

25 A. Oh, oh, May. Yeah. Yeah. Yeah.

1 Q. Okay. And do you recall reporting on your opinion  
2 letter that both Roy and Thomas had an interest in the  
3 property?

4 A. I don't recall.

5 Q. Would you agree that at that point Thomas did not have  
6 an interest in the property?

7 A. Thomas or Roy?

8 Q. Thomas. In May of 2007, based on the deeds that you  
9 prepared for them in March, did Thomas have an interest in  
10 that property anymore at that time?

11 A. Okay. Hold on. Let me read the derivation here.  
12 Okay. Thomas R. Irby got the property first in '99, when he  
13 got it in '99. And then he conveyed in March of '07 the  
14 property to Roy.

15 Q. Okay.

16 A. So what was your question?

17 Q. So my question was, as of May 2007, did Thomas have an  
18 interest in that property?

19 A. No, he would not have.

20 Q. Okay. But yet when you did that closing you also had  
21 both of them sign the mortgage; is that correct?

22 A. That's correct.

23 Q. Can you tell me why you would have had both of them  
24 sign the mortgage?

25 A. I don't know unless his name was pre-printed on it.

1 That's the only thing I can think.

2 Q. Do you know if there was any agreement between Roy and  
3 Thomas about Roy holding onto a deed to record later on?

4 A. Roy holding on or Thomas holding on?

5 Q. Roy holding onto one of those deeds to record later?

6 A. No, sir. I believe Thomas was going to hold onto the  
7 deed in case something happened to him. It was signed in my  
8 office and we witnessed. And I'm thinking Tom was afraid if  
9 something happened to him, he died or what have you, Roy  
10 would not have anything. So that's why we did the deed.

11 And I understand that Tom was just going to sit on it in his  
12 safe until whatever happened happened.

13 Q. Yeah. Now, you told me earlier that you represent both  
14 Tom and Roy?

15 A. Correct.

16 Q. Isn't that risky for Roy to not have that deed  
17 recorded?

18 A. Not 'cause -- no, 'cause his -- he was there when it  
19 was done and that was done with his permission.

20 Q. Okay. What if, in the interim, while that deed is not  
21 recorded ---

22 A. Uh-huh (affirmative).

23 Q. --- Mr. Irby had gone and deeded his property to  
24 someone else?

25 A. That's right. He could have.

1 Q. Okay. And then that would have been bad for Roy,  
2 wouldn't it?

3 A. Yeah.

4 Q. So it is a problem that that deed wasn't recorded?

5 A. It's a problem however you want to look at it. That  
6 could happen. And it could not have happened. I don't know  
7 how to answer that.

8 Q. Okay. Well, in this state recording the deed gives  
9 notice to third parties; isn't that correct?

10 A. Yes, it does.

11 Q. And whoever records first would generally have the  
12 superior claim; right?

13 A. That's correct.

14 Q. So it's very vital to record deeds?

15 A. Sir?

16 Q. So it's vital to record deeds?

17 A. Yes, sir. Let me look at this deed. Okay. This one  
18 was done in -- one was recorded in March of '07. It gave a  
19 one-half interest to Roy. It wasn't until -- and for some  
20 reason it was not recorded. I don't know who took it to the  
21 RMC to be recorded. It was not recorded until November of  
22 2008 giving all remaining interest. So I would think that  
23 this deed here, giving all remaining interest in and to  
24 below described property, was the one that Tom held.

25 Q. Do you generally ---

1 A. He already had a one-half interest. They both did.

2 Q. Well, the way it works in South Carolina, though, is  
3 really upon it being signed the interest was conveyed to  
4 Roy, right?

5 A. Do what?

6 Q. Isn't it the way in South Carolina that as soon as that  
7 deed was signed that that interest was conveyed?

8 MR. ALFORD: Objection.

9 THE COURT: Excuse me.

10 MR. ALFORD: Can we approach?

11 THE COURT: Yes, sir.

12 (Whereupon a bench conference was held off the record  
13 in the presence of the jury, but out of their hearing)

14 Q. Is it your general practice to record deeds for your  
15 clients or do you generally hand the deeds to them?

16 A. Both. Some people do not want them recorded, in which  
17 case I just hand them to them.

18 Q. But you would agree that you were present when both  
19 deeds were recorded in March 16th, 2007?

20 A. When they were recorded?

21 Q. I mean when they were witnessed and ---

22 A. Yes, sir.

23 MR. GAINES: May I approach, Your Honor.

24 THE COURT: Yes, sir.

25 MR. GAINES: I have an issue.



1           **THE COURT:** All right.

2           (Whereupon a bench conference was held off the record  
3   in the presence of the jury, but out of their hearing)

4   Q.   Let me ask you again, regardless of who gave you -- who  
5   you gave the deeds to, did you advise Roy at all of the  
6   possible problems of that deed not being recorded?

7   A.   I'm going to be honest with you. This was back in  
8   2007. I don't recall.

9   Q.   Okay. Would a better way of having dealt with that  
10   issue, would it not have been to have Thomas deal with that  
11   in his will? If there's some sort of issue that he's  
12   concerned about the property being conveyed?

13   A.   Well, we can go what if all day long. I could say,  
14   yes. I could say, no, to that. If he got sick, he might  
15   want it to go to Roy now before died. I can't answer that.

16   Q.   Okay. All right.

17           **MR. GAINES:** That's all I have.

18           **THE COURT:** Any redirect?

19           **MR. ALFORD:** One short question, Your Honor.

20   **Redirect Examination by Mr. Alford:**

21   Q.   In response to the Bank of America question about your  
22   letter indicating to Bank of America you're representing  
23   them, is there a Diane in your office?

24   A.   Yes. She's my paralegal.

25   Q.   Okay. Are you familiar with the telephone number 864-

1 847-5999?

2 A. That's my fax number.

3 Q. Thank you.

4 **THE COURT:** All right. Thank you, sir. You may step  
5 down.

6 **MR. JONES:** Oh, good. Your Honor, could I be excused?

7 **THE COURT:** Any objection to this witness being  
8 excused?

9 **MR. ALFORD:** None from the Plaintiff, Your Honor.

10 **MR. HERSHON:** No.

11 **THE COURT:** Thank you, sir. You may be excused.

12 **MR. JONES:** Thank you.

13 **THE COURT:** Thank you for being here.

14 **MR. ALFORD:** Your Honor, the Plaintiff would call Bank  
15 of America, I believe his name is Grant Allred, if I  
16 pronounced it right.

17 **MADAME CLERK:** Mr. Allred, please place your left hand  
18 on the Bible and raise your right hand.

19 **MR. ALLRED:** Sure.

20 **MADAME CLERK:** You do solemnly swear or affirm that the  
21 testimony you're about to give in this case will be the  
22 truth, the whole truth and nothing but the truth so help you  
23 God?

24 **MR. ALLRED:** Yes, ma'am.

25 **MADAME CLERK:** Thank you. Please state your full name

1 for the record.

2 MR. ALLRED: Thomas Grant Allred.

3 MADAME CLERK: Thank you. You may be seated.

4 MR. ALLRED: Thank you.

5 Direct Examination by Mr. Alford:

6 Q. Mr. Allred, what do you do for Bank of America?

7 A. I'm an Assistant Vice President. I manage charged-off,  
8 HELOC and second mortgages.

9 Q. What's a HELOC?

10 A. It's a home equity line of credit, ---

11 Q. Is that ---

12 A. --- like the one evidenced here today.

13 Q. --- what we're talking about today, this maximizer  
14 agreement?

15 A. Yes, sir.

16 Q. That's a form of a HELOC?

17 A. It is a HELOC.

18 Q. It is a HELOC?

19 A. Yes.

20 Q. And how long have you been with Bank of America?

21 A. Just a little bit over seven years.

22 Q. Now, are you familiar with this file?

23 A. Yes, sir.

24 Q. Have you had an opportunity to look through all the  
25 documents Bank of America has on the Irbys?

1 A. I've had a chance to review them all. I don't know if

2 I've got them all memorized, but I've seen them all.

3 Q. Do you know how Mr. Jones' office obtained a payoff

4 from Bank of America for the August 2007 closing?

5 A. No, sir. I don't know.

6 Q. I'm going to hand you what's been marked as Bank of

7 America document 443. Would you have any reason to dispute

8 that that is your document? And when I say you, I'm talking

9 about Bank of America?

10 A. No. This looks like our document.

11 Q. And up in the right hand corner, is there a name there?

12 A. Yes, sir.

13 Q. What does that read, please?

14 A. It looks like it says attention Diane. And then it's

15 followed by a phone number or a fax number.

16 Q. And what's that phone number?

17 A. 864-847-5999.

18 Q. Okay. Now, is that handwritten?

19 A. It is.

20 Q. Okay. And what is that document you're holding?

21 A. It looks like a -- it's a little fuzzy, but it looks

22 like a payoff. And I believe it's the same payoff for this

23 particular account that was requested by Mr. Jones.

24 Q. For the Irby account?

25 A. Yes, sir.

1 Q. I call it the Irby account. Okay. For your line of  
2 credit?

3 A. Correct.

4 Q. And what's the amount of the payoff there?

5 A. I know from experience the amount, but I can't really  
6 make it out here. It's nine thousand, nine hundred, ninety-  
7 eight dollars and ninety-two cents, I believe.

8 Q. I think that's correct. Thank you.

9 A. Yes, sir.

10 MR. ALFORD: I'd move to mark and introduce this into  
11 evidence as Plaintiff's 12, if there's no objection.

12 THE COURT: Any objection?

13 MR. HERSHON: No, objection.

14 MR. ALFORD: Oh, I'm sorry.

15 MR. GAINES: No objection.

16 THE COURT: All right. Without objection, exhibit 12  
17 is admitted into evidence and may be published to the jury.

18 (Whereupon Plaintiff's exhibit 12 was marked and  
19 admitted into evidence)

20 Q. Now, you're familiar with the maximizer agreement, I  
21 assume?

22 A. Yes, sir.

23 Q. And I'm going to hand you what we've introduced,  
24 admitted as Plaintiff's exhibit 1. I'm trying to get these  
25 back in order so I don't fumble. Now, who signed that

1 maximizer agreement?

2 A. It's signed by Thomas R. Irby and Roy C. Irby, II.

3 Q. All right. Who's the other parties? Bank of America  
4 in that contract also?

5 A. Yes, sir.

6 Q. Okay. So the three of you have made an agreement?

7 A. That's correct.

8 Q. Now, would you -- and I know we're going to, at the end  
9 of the day, have this paragraph memorized. Would you look  
10 at paragraph twenty, please?

11 A. Okay.

12 Q. It's not the best. You've had a chance to see the  
13 twenty on this exhibit?

14 A. That's the same thing on here?

15 Q. Should be.

16 A. Yes, sir. It's the same.

17 Q. I'm just going to flip this out. Everybody maybe can  
18 follow along. Now, it says each of you has a right upon  
19 proper written notice. Is that how that phrase starts?

20 A. Yes, sir. Each of you has the right upon proper  
21 written notice ---

22 Q. What is and where is it defined in this agreement the  
23 definition of proper written notice?

24 A. I'm not sure. I haven't read through the entire home  
25 equity line agreement. But ---

1 Q. Is there anybody else coming to testify today who would  
2 have a better knowledge than you of what is contained in  
3 this maximizer agreement?

4 A. No, sir.

5 Q. Okay. Now, would you please turn to paragraph twenty-  
6 nine, please? And it's not real long. Would you read that  
7 to the jury?

8 A. Sure. Twenty-nine says, entire understanding. This  
9 agreement, together with a security instrument, constitutes  
10 the entire understanding and agreement between the parties  
11 as to the matters set forth in this agreement, and this  
12 security instrument and supercede all prior understanding  
13 and correspondences, written or oral, with respect to the  
14 subject hereof.

15 Q. Now, if I wrote you a letter, if I was the debtor and I  
16 said, I'm going to change the terms of this agreement and  
17 require you to do something else in order for you to get  
18 your monthly payment, could I do that?

19 A. No, sir.

20 Q. Why not?

21 A. Because you've already entered into the agreement. The  
22 bank does like modifications to help our customers that are  
23 in financial distress, but ---

24 Q. But don't both parties sign a modification?

25 A. Yes, sir.

1 Q. Okay. Other than the maximizer agreement and the  
2 mortgage, Plaintiff's 2, which has been previously admitted,  
3 would this be the security instrument you make reference to?

4 A. Yes, sir, this is it.

5 Q. Now, let's go back to paragraph twenty, please. The  
6 second sentence says a request to suspend the privilege.  
7 Can you read that?

8 A. Sure. A request to suspend the privilege of obtaining  
9 advances, even if made only by one of you, will be effective  
10 against all of you.

11 Q. So if Thomas made the request or if Roy made the  
12 request, it would be effective against both?

13 A. That's correct.

14 Q. Okay. Read the last sentence of that paragraph. It  
15 starts, advances will be reinstated.

16 A. What section again? I'm sorry.

17 Q. I'm sorry. Paragraph twenty.

18 A. Okay.

19 Q. That first full paragraph, the last sentence. Advances  
20 will be reinstated.

21 A. Okay. Advances will be reinstated upon our receipt and  
22 acceptance of a written reinstatement request signed by each  
23 of you, provided that no event permitting a suspension then  
24 exists.

25 Q. Okay. Now, that last sentence, and I'm looking at it



1 here, advances will be reinstated. But it says to be  
2 reinstated, the written reinstatement must be signed by  
3 each, Roy and by Thomas; correct?

4 A. That is correct. Provided that no event permitting a  
5 suspension exists.

6 Q. Yeah. But in that statement, to reinstate it, you want  
7 both debtors to physically sign the request to reinstate;  
8 isn't that correct?

9 A. That would be correct.

10 Q. That's what that sentence says?

11 A. Yes.

12 Q. Does the sentence say where it's terminating that the  
13 termination request must be signed by either debtor?

14 A. Yes.

15 Q. Where?

16 A. In that sentence or in that section?

17 Q. Yes, sir. In this contract right here.

18 A. In ---

19 Q. Paragraph twenty.

20 A. Yeah. Let's see. In the first part, which I've  
21 already read, it says each of you has the right, upon proper  
22 written notice to us, to suspend the privilege of obtaining  
23 new advances. A request to suspend the privilege of  
24 obtaining advances, even if made by only one of you, one of  
25 the Irbys, will be effective against all of you. So it's

1 saying that we have to receive the authorization to close  
2 the line from one of our customers, not a third-party.

3 Q. All right. Let's talk about a third-party. You gave a  
4 payoff to Mr. Jones?

5 A. No, I didn't give the payoff to Mr. Jones.

6 Q. Would you look at Plaintiff's exhibit 12?

7 A. Where is it?

8 Q. Bank of America provided him the payoff, didn't they?

9 A. Who?

10 Q. Diane, with a fax number in Mr. Jones' office.

11 A. We'll provide a payoff to a customer who either calls  
12 in or writes a letter authorizing a payoff to be sent.

13 Q. Do you have a letter in your files signed by either  
14 Irby allowing you to send a payoff to Mr. Jones?

15 A. Not that I'm aware of. But, again, a verbal request  
16 would be accepted over the phone after verifying  
17 information.

18 Q. Was that done?

19 A. I have no way of knowing that.

20 Q. In response to receiving the payoff and that letter,  
21 besides depositing the check, did Bank of America write any  
22 question to Mr. Jones or either Mr. Irby?

23 A. I would hope they wouldn't write anything to Mr. Jones.

24 No. The answer is no to that. To Mr. Irby, not that I'm  
25 aware of.

1 Q. Okay. I'm going to hand you Plaintiff's exhibit 5,  
2 which is the payment history, I believe, on this account  
3 previously admitted. Are you familiar with that document?

4 A. Yes, sir.

5 Q. And is that the payoff history for this -- or the  
6 payment history on this account?

7 A. It's the payment history as of November 16th, 2010.

8 Q. Okay. And I believe the date of closing was August the  
9 17th, 2007?

10 A. The date of what closing? When the loan was opened?

11 Q. When they -- no, I'm sorry. When they closed the HUD,  
12 Plaintiff's exhibit 10. When they did the closing, the  
13 refinance with M&T Bank, later Chase, what is the date on  
14 that?

15 A. It shows the settlement date is August 17th, 2007.

16 Q. Okay. Now, do you know when that payoff statement was  
17 provided to Mr. Jones' office?

18 A. The payoff statement. Do you mean the ---

19 Q. Plaintiff's exhibit 12?

20 A. No, sir. I'm not sure what date it was provided to his  
21 office.

22 Q. What does ODP advance mean on this form?

23 A. Overdraft protection advance.

24 Q. What is that?

25 A. When one of our customers has a home equity line of

1 credit, they have the option to attach it to their checking  
2 or savings account in case one of their charges is --  
3 overdrafts what they have available in their checking  
4 account.

5 Q. Do you know if there was an overdraft protection  
6 assigned for this account?

7 A. It would have been to be attached to the checking  
8 account.

9 Q. Do you know if one was?

10 A. I don't personally know. I mean, I haven't -- I  
11 haven't seen it. I do know that there's no way we would  
12 have attached it to a checking account without that checking  
13 account -- without that form being signed because that's  
14 where we obtain the checking account or savings account  
15 information to attach it to, if that makes sense.

16 Q. I'm going to hand you document June 27, 2010. Do you  
17 have any familiarity with that document?

18 A. No. I'm not familiar with this document. I mean, I've  
19 never seen it before in regards to this case.

20 Q. Okay. But does it have Bank of America on it?

21 A. It does.

22 Q. But you have no knowledge of it?

23 A. Not in particular to this case. I've never seen it in  
24 regards to this case. I've seen letters like this before.

25 It's something that Bank of America does send to our

1 customers.

2 Q. Okay. But a letter like that would be sent to a  
3 customer?

4 A. Yes, sir.

5 Q. Okay. Did you make any investigation as to who these  
6 ODP advances were made to?

7 A. Did I -- no, sir. I have not made any investigation  
8 into who the overdraft account was attached to.

9 Q. What's an electronic advance?

10 A. Electronic advance is an ATM withdrawal. So you would  
11 take an access card, like a debit card, take it, put it in  
12 the ATM and it gives you money, basically.

13 Q. For this account, for Thomas Irby and Roy Irby, what  
14 access cards were issued?

15 A. Access cards to Mr. -- the Irbys, Thomas and Roy Irby.

16 Q. Were they issued?

17 A. Yes, sir.

18 Q. What were their numbers on them?

19 A. I don't know.

20 Q. In the file and all the paperwork you provided my  
21 office, is there anything in there that substantiates that  
22 they had access to a card or cards?

23 A. Yes, sir.

24 Q. Do you have that with you?

25 A. This payment history right here that you provided to

1 me, it shows the electronic advances.

2 Q. Uh-huh (affirmative).

3 A. Those are the ATM card being used. If it were another  
4 type of advance, it would show as, like other advance or --  
5 I think it's even on here a couple of times, there's a  
6 balance advance. So that ---

7 Q. What's a balance advance?

8 A. If they went to like into a branch and made a request  
9 for an advance off of the line of credit. Or they could  
10 have gone like on-line banking, you know, make a transfer,  
11 something like that.

12 Q. But if you have an ATM card, does it go against this  
13 account or does it go against like your checking account?

14 A. It goes against this account, the home equity line of  
15 credit.

16 Q. And you would have a record of that. I mean, each card  
17 has a particular PIN identification, correct?

18 A. I don't know if it's protected by a PIN or not. I  
19 would assume so, but I'm not sure.

20 Q. And you don't know, as you sit there, whether or not,  
21 in fact, the bank issued to either of them an access card?

22 A. Yes. It shows the access card was utilized on this  
23 payment history.

24 Q. That's not my question, sir. My question is, do you  
25 have anything in your file today showing, in fact, that Bank

1 of America issued an access card?

2 MR. HERSHON: Objection. The question's been answered.

3 THE COURT: Overruled.

4 A. I mean, other than this, no. I don't have anything  
5 showing any card numbers or anything like that.

6 Q. How would a debtor or borrower obtain an access card  
7 once a line of credit is opened?

8 A. They would request it when the line of credit was  
9 opened. So when they go to, you know, obtain the line of  
10 credit, they ask at that time in the banking center whether  
11 they want access checks, or they want an ATM card, or how  
12 they want to make withdrawals on the line of credit.

13 Q. Were any access checks ever issued? Do you know?

14 A. I don't -- I don't know. I'm not sure. I don't show  
15 any on the pay history here. Usually the access checks will  
16 be -- they'll have like a check number beside them, and then  
17 shows the history.

18 Q. Well, one of the comments was made that the  
19 instructions say you've got to return all of the access  
20 cards when you close the account.

21 A. Uh-huh (affirmative).

22 Q. So my question is, as you sit here right now, what  
23 access cards, what specific access cards and checks were not  
24 returned?

25 A. The ones that were utilized to make withdrawals off the

1 line of credit.

2 Q. And which ones are those?

3 A. The access cards that are evidenced by these electronic  
4 advances on the pay history.

5 Q. That's on the pay history. Do you know, in fact, that  
6 there's a card out there?

7 A. Yes, sir. These are evidence that a card was used for  
8 an ATM withdrawal from an actual ATM machine.

9 Q. The payment history shows receiving on August 24th,  
10 2007, nine thousand, nine hundred and ninety-eight dollars  
11 and ninety-two cents.

12 A. That's correct. It shows it's a regular payment.

13 Q. All right. Now, the fact that a payment was made, how  
14 did Bank of America know what account to put it to?

15 A. How did they know what account to put the payment to?

16 Q. Yes.

17 A. I would assume through the account number.

18 Q. Okay. Is there any dispute that with Mr. Jones' letter  
19 you received a check?

20 A. No, sir.

21 Q. There's no dispute?

22 A. No. There was a check with the letter from Mr. Jones.

23 Q. So you knew that the money came in from Mr. Jones for  
24 this account?

25 A. We received a payment that included an account number,



1     that we processed and applied to the account. We're  
2     required by the OCC to do that.

3     Q.    So Bank of America was ready to accept the money, but  
4     didn't want to act on the letter?

5     A.    Well, the letter is not from an authorized party. Mr.  
6     Jones is not our customer. Mr. Thomas and Mr. Roy Irby are.  
7     It's against federal regulations for us to follow the  
8     instructions of a third-party.

9           It affects your credit. It'll negatively affect your  
10    credit if we close down an account without proper  
11    permission. And I think you kind of pointed it out that  
12    notice from either one of them would have been notice for  
13    all.

14          So if we'd have received an authorization from, say,  
15    Thomas Irby or Roy Irby that was signed that said, close  
16    this account, that's what we would have done. Otherwise,  
17    we'd be violating the law.

18    Q.    But you took their money?

19    A.    Yes, sir, and applied it as a payment. It was money  
20    owed.

21    Q.    You're familiar with the history of this lawsuit?

22    A.    Yes, sir.

23    Q.    Okay. In August 2007 Bank of America had a mortgage?

24    A.    That's correct.

25    Q.    Okay. What happened to that mortgage?

1 A. The original mortgage that we had was eventually  
2 foreclosed by Chase. We were in second lien position.  
3 Anytime there's a first mortgage foreclosure, it wipes out  
4 junior liens. So our interest in the property, our lien,  
5 was extinguished by the first mortgage foreclosure.

6 Q. Was your mortgage there prior to August 2007?

7 A. Was our mortgage there prior to August of ---

8 Q. 2007?

9 A. Our mortgage, I think, was open in May of 2007. It  
10 says it's dated May 16th, 2007 is the mortgage.

11 Q. Okay. So it was there ---

12 A. It was there.

13 Q. --- in August 2007?

14 A. Yes, sir.

15 Q. So why were you a second mortgage to Chase?

16 A. Well, when the loan was opened, when our HELOC was  
17 opened, it was opened as a second lien position loan. When  
18 Chase came through and tried to foreclose, they realized  
19 that their refinance, that they had -- I guess it was  
20 originally M&T and then subsequently Chase, their refinance  
21 didn't close out our HELOC.

22 So what they requested is for us to subordinate to  
23 their lien, which means that since we were an intended  
24 second mortgage, even though they refinanced, when they  
25 refinanced, they came in underneath us. I'm trying to give

1     you guys visuals. So that put us in first position.

2             Well, our loan, the HELOC, was always an intended  
3     second mortgage position. So what they did is they -- we  
4     entered into an agreement where we switched places. We  
5     agreed to subordinate or take the intended second lien  
6     position that we'd always wanted and just keep it, and let  
7     them have first mortgage priority.

8     Q. Did Bank of America do that out of the goodness of its  
9     heart?

10    A. I'd like to say so, but no. It was a business ---

11    Q. How much were they paid?

12    A. It was a business decision made by the bank.

13    Q. How much were they paid?

14    A. I believe it was fifty thousand dollars.

15    Q. I show you Plaintiff's exhibit 6.

16             **MR. ALFORD:** And move to admit that into evidence.

17             **MR. HERSHON:** What is that document?

18             **MR. ALFORD:** It's the subordination agreement.

19             **MR. HERSHON:** Your Honor, I object. That hasn't been  
20     stipulated.

21             **THE COURT:** Subject to the objection, I'll admit it  
22     over objection, exhibit 6.

23             (Whereupon Plaintiff's exhibit 6 was admitted into  
24     evidence)

25    Q. Is that where Bank of America was paid? I realize you

1 probably weren't party to that negotiation.

2 A. This is the -- this is the subordination. It's not  
3 necessarily where we were paid.

4 Q. Right.

5 A. This is the -- this is the agreement where we went from  
6 first to second. We subordinated to their lien.

7 Q. Okay. And that's where you went down?

8 A. I'm sorry?

9 Q. That's where you went from first position to second  
10 position?

11 A. Correct.

12 Q. If you had first position, could you have foreclosed?

13 A. Yeah. We could have foreclosed in first lien position.  
14 I mean, it's allowed by law.

15 Q. So I just wanted to be clear. You're not disputing  
16 that Bank of America ---

17 MR. HERSHON: Your Honor, I would object again. He's  
18 asking questions that have already been stipulated on the  
19 record.

20 MR. ALFORD: I wasn't clear about the fifty thousand  
21 dollars, Your Honor, that it's been stipulated to.

22 THE COURT: I believe he just testified to that, didn't  
23 he?

24 MR. ALFORD: I thought he said maybe or I thought it  
25 was qualified.

1           **THE COURT:** Okay. All right.

2       Q.    I just wanted -- we've stipulated that Bank of America  
3       was paid fifty thousand dollars in exchange for the  
4       subordination agreement?

5       A.    From the title insurance company, yes, sir.

6       Q.    Please answer any questions of your counsel.

7           **THE COURT:** This might be a good time for us to take a  
8       short break, ladies and gentlemen. I'll let you go back to  
9       your jury room. Don't discuss the case. As I've told you  
10      and I'll tell you each time, remember this is an on-going  
11      process. You can talk about other things.

12           We'll take a short break. Sometimes when you're back  
13      there, you may find that you need to make a phone call to  
14      check on a child that maybe was sick or get a cup of coffee.  
15      Whatever you may need as jurors, our bailiffs are there to  
16      serve you.

17           Sometimes it's good to have a liaison with the court,  
18      someone back there to sort of make the request known. I'm  
19      going to appoint Mr. Anderson as the Foreperson of the jury.  
20      He'll be the one who'll be the contact if some of you have a  
21      need. Just talk to him as the Foreperson. He'll get the  
22      word to the bailiff, or the Clerk's Office, or me or whoever  
23      it might need to be. That'll be the contact for that  
24      purpose.

25           Sometimes as exhibits are offered, they might want to

1 pass it around to the jury. They've shown them on big  
2 screens now, but the Foreperson will look at it, if the  
3 lawyers want to give it to him, pass it around to the other  
4 jurors.

5 Ultimately, what the foreperson will do is facilitate  
6 the discussion that you have. When all of the evidence is  
7 in, and I've instructed you on the law, that individual, the  
8 foreman of the jury will make sure everyone has their say  
9 into their view of the facts and on behalf of the jury fill  
10 out the verdict form that we'll provide at the appropriate  
11 time.

12 The foreperson normally would occupy the front-row  
13 seat, the one closest, the seat closest to the witness  
14 stand. So if Mr. Anderson will occupy that seat when you  
15 come back. And the alternate will continue to occupy the  
16 seat that she's in now.

17 The rest of you, as you come and go, you may want a  
18 front-row seat, you may want a back-row seat, left side or  
19 right side, you're certainly free to occupy any of those  
20 seats. We'll take a short break and be ready to resume with  
21 this witness. If you'll retire to your jury room. Everyone  
22 else please remain seated.

23 (Whereupon the jury exited the courtroom at 3:50 pm)

24 **THE COURT:** All right. Mr. Allred, you can step down.  
25 You can't be discussing your testimony with anyone during

1 the break. We'll take a short break and then we'll be ready  
2 to ---

3 **MR. ALFORD:** Your Honor, what's short?

4 **THE COURT:** You think we can be back at five after?  
5 Have you got more witnesses today?

6 **MR. ALFORD:** I was probably going to call Roy.

7 **THE COURT:** Okay. All right. Maybe we can get that.  
8 Maybe we can get your case in today. We'll see how we can  
9 do.

10 **MR. ALFORD:** Yes, sir, that's what I was hoping to try  
11 and do.

12 **THE COURT:** All right. We'll try to do that. Let's  
13 take, five after, fifteen minutes and be ready to proceed.

14 (Whereupon court was in recess at 3:51 pm)

15 (Whereupon court resumed at 4:10 pm)

16 **THE COURT:** If our jury's ready you can have them come  
17 in. Mr. Gaines, do you have questions of this witness?

18 **MR. GAINES:** Just a few, Your Honor.

19 **THE COURT:** All right. You'll go first, right? Okay.

20 (Whereupon the jury entered the courtroom at 4:11 pm)

21 **THE COURT:** Mr. Gaines, you may cross examine the  
22 witness.

23 **MR. GAINES:** Thank you, Your Honor.

24 **Cross Examination by Mr. Gaines:**

25 Q. I'm going to ask you a question just about the policy

1 of Bank of America. You just admitted that Bank of America  
2 has some rules where they will provide a payoff statement to  
3 an attorney; is that correct?

4 A. That's correct.

5 Q. And that was done in this case, from your  
6 understanding?

7 A. Yeah. I mean, the policies are there to be followed to  
8 a "T" as far as what we're able to release, when and to  
9 whom.

10 Q. And when you receive a check from an attorney, would it  
11 not generally be for a payoff?

12 A. No. I mean, payments come from all types of sources.

13 Q. But when you have an attorney that requests a payoff  
14 and then sends you a check, though, would that not generally  
15 be for a payoff?

16 A. No. I mean, you know, there's all sorts of legal  
17 matters that go on outside of just having a loan paid off.  
18 You know, for example, you could have an attorney request a  
19 payoff at that time that was used for a legal settlement  
20 between some parties. And then those payments would be  
21 applied to or sent in to the HELOC or a line of credit.

22 Q. Was this line ever considered to be accelerated?

23 A. Accelerated in the terms that you and I would know  
24 would be that we -- the loan went into default. And so we  
25 then accelerated the loan, meaning the balance became due on



1 -- the total amount past due was due at that point, yes, it  
2 was.

3 Q. Do you know if a notice of acceleration was ever sent  
4 to either Thomas or Roy?

5 A. Yes, sir, there was a notice sent. I've seen it in the  
6 exhibits, but I'm not sure. It's not in front of me  
7 currently.

8 Q. Okay. Previously, there was a discussion regarding a  
9 refinance, such as this case, has a three-day right of  
10 rescission; correct?

11 A. Yes, sir.

12 Q. Okay. And when a loan has a three-day right of  
13 rescission, isn't it true that a customer can just call and  
14 rescind the loan?

15 A. No. I believe it needs to be in writing. I think  
16 that's actually part of the loan document, the loan  
17 documents they receive at closing, that it has to be in  
18 writing, the right to rescission.

19 Q. Do you know of any occasion where Bank of America would  
20 have allowed someone to just verbally call and say, I want  
21 to rescind my loan, I don't want go through?

22 A. Not to my knowledge, no.

23 Q. Isn't it true that Bank of America provides in its  
24 rescission documents that someone can even just wire a notice  
25 of cancellation?

1 A. Wire a notice of cancellation?

2 Q. Yes.

3 A. How would you wire -- I'm not -- I may be ---

4 Q. Send a telegraph, a wire.

5 A. I'm not familiar with that. I'm not really sure. I've  
6 never even seen a wire, personally.

7 Q. Okay. Isn't it true that an attorney can call and say,  
8 the customer has decided to cancel the loan, so we're not  
9 going to go forward?

10 A. No. It would need to be in writing.

11 Q. Okay. You would accept a writing from the attorney if  
12 he said the customers told me they want to cancel?

13 A. No.

14 Q. Isn't that true?

15 A. No, it's not true. It would need to be from the  
16 customer.

17 Q. Okay. Earlier, your attorney in opening statements  
18 said that it would not be right for the bank to contact Mr.  
19 Jones to discuss the shortage in the payoff; is that  
20 correct?

21 A. That's correct.

22 Q. And why is that a problem?

23 A. Well, the bank has certain regulations. We're  
24 obviously not able to release information to just any person  
25 that sends in a letter. It's basically to protect Thomas

1 and Roy Irby. We wouldn't contact any third-party that sent  
2 in a letter because we want to protect their privacy.

3 Q. Couldn't you freeze the account?

4 A. No, sir, you can't freeze the account. It violates  
5 FCRA, the Fair Credit Reporting Act.

6 Q. Doesn't your loan agreement say if there's any kind of  
7 question as to ability to repay the loan we can freeze the  
8 account?

9 A. If there's question on the ability to repay the loan  
10 ---

11 Q. The debtors ---

12 A. --- we can freeze the account?

13 Q. --- to repay the loan?

14 A. Yes, we can -- we can freeze the loan at our -- at our  
15 discretion.

16 Q. Okay. So there are some instances where it's up to the  
17 Bank of America's discretion to freeze an account?

18 A. Right. Like for example, if the loan goes extremely  
19 past due, we'll freeze the account because we're not getting  
20 paid.

21 Q. Yeah, but that default is a separate kind of term to  
22 when it can be frozen? There's a general -- it's a Bank of  
23 America, if we decide there's a problem that the account can  
24 be paid, we have the right to freeze the account; correct?

25 A. Yes. If we see a problem, we have the right to freeze

1 the account.

2 Q. And can you tell me why there wasn't a notice given to  
3 either Mr. -- either Irby as to there being a shortage in  
4 the payoff?

5 A. Because we didn't receive any request from Mr. -- from  
6 Thomas or Roy Irby about the account. We received a check,  
7 a letter from a third-party that is not known to Bank of  
8 America and then a copy of our payoff letter that was not  
9 filled out completely.

10 Q. Okay. So it would be your testimony that those three  
11 things aren't enough for Bank of America to interpret that  
12 there may be some issue?

13 A. That's correct.

14 **MR. GAINES:** That's all I have.

15 **THE COURT:** Mr. Hershon.

16 **MR. HERSHON:** Your Honor, I do want to make sure on the  
17 record that I'll have the ability to call Mr. Allred during  
18 Bank of America's case in chief.

19 **THE COURT:** If need be, you may. If you feel the need  
20 to, I'll allow you, but I'm not going to let you examine him  
21 twice. If there's another issue, do you want to just ---

22 **MR. HERSHON:** I think there's ---

23 **THE COURT:** If you want to waive your examination now  
24 and call him later or do you want to do it now? But if  
25 there's something in reply briefly, you can do it the second

1 time. But we're not going to have him testify to the same  
2 thing twice.

3 **MR. HERSHON:** No, I'm not going to have that. I just  
4 have a couple of items in response to the questions here.

5 **THE COURT:** Okay. If it's new matters, I'll allow  
6 briefly for you to do that.

7 **Cross Examination by Mr. Hershon:**

8 Q. Hey, how are you?

9 A. Good. How you doing?

10 Q. Good.

11 A. Good.

12 Q. There's all this talk about the -- and I mentioned  
13 there was a stipulated amount as to this fifty thousand  
14 dollar issue, this settlement. Could you explain to the  
15 jury what was happening at that time, the time that there  
16 was a fifty thousand dollar payment to Bank of America?

17 A. At the time that there was a fifty thousand dollar  
18 payment to Bank of America there were no payments being made  
19 on the line of credit by either of the Irbys. The loan was  
20 in default at that point.

21 So a business decision was made at that time to accept  
22 the fifty thousand dollars to pay some of our balance down.  
23 We were owed seventy thousand dollars. So the opportunity  
24 to take fifty and apply it to the balance is obviously one  
25 that we -- we accepted.

1 Q. And this was a loan that was in default; correct?

2 A. Correct.

3 Q. And if Bank of America was going to move forward with a  
4 foreclosure, what kind of costs could be involved to the  
5 bank?

6 A. There's quite a bit of costs involved with foreclosure.  
7 Obviously, you have to hire a foreclosure attorney. There's  
8 a lot of filings, pleadings. If it becomes contested, a lot  
9 more legal fees on top of -- once the foreclosure actually  
10 takes place, then the bank has to pay like taxes, insurance,  
11 hazard insurance, upkeep of the property, winterizing,  
12 mowing the yard. Basically, just the day-in and day-out  
13 upkeep of the property, which is something obviously a  
14 bank doesn't want to do.

15 Q. And are there other financial risks that could be  
16 involved with a bank proceeding with foreclosure?

17 A. You know, yeah, sure. I mean, you know, we could get a  
18 lawsuit from one of the mortgage holders, another bank. We  
19 could get a lawsuit from one of the customers, Mr. Thomas  
20 Irby or Mr. Roy Irby.

21 Not to mention that, you know, we -- when we accept the  
22 money, we're just trying to pay down the balance and get it  
23 resolved. So more than anything it's really a service to  
24 the Irbys, I would say, in this matter because we're paying  
25 down the balance that they were owing on the loan.

1 Q. And is there any guarantee as to how much a piece of  
2 property will sell for after foreclosure?

3 A. No. Foreclosed properties are -- they go for a lot  
4 less than an actual sale. Like if I were to sell my  
5 property to you, I could sell it, just say for example, a  
6 hundred thousand dollars. Foreclosed property, I could  
7 probably sell it to you for sixty, seventy thousand dollars.  
8 So it substantially cuts down the amount that I would  
9 receive when it's a foreclosure.

10 Q. And did entering this agreement help prevent a dispute  
11 that would have been involved with Chase Bank?

12 A. Yes. It basically -- because at the time, Chase was  
13 suing, I believe, both of the Irbys, along with Bank of  
14 America because Bank of America was in first lien position.  
15 So by entering into this agreement and accepting the fifty  
16 thousand dollars from the title company, that ensured the  
17 original sale that went through, we basically got ourselves  
18 out of that litigation with Chase. And we allowed them to  
19 go into first lien position, at which point they commenced  
20 to foreclosing the property.

21 Q. And how -- in terms of what Bank of America's seeking  
22 here today, how would that fifty thousand dollars factor in?

23 A. Well, it would lower the amount that we're due and  
24 owing from the Irbys. So, you know, taking a seventy -- I  
25 think with the interest and everything, the balance was

1 around seventy-seven thousand dollars. So it would

2 drastically reduce the amount owing from the Irbys.

3 Q. Thank you, Grant. I'd like to, on all other issues,  
4 we'll discuss with you further during the case in chief for  
5 Bank of America.

6 A. Okay.

7 THE COURT: Any redirect?

8 MR. ALFORD: No, sir.

9 THE COURT: All right. Thank you, sir. You may step  
10 down.

11 MR. ALLRED: Thank you. Mr. Alford, did you want these  
12 exhibits back or ---

13 MR. ALFORD: Just leave them there. We'd call Roy C.  
14 Irby, II.

15 MADAME CLERK: Mr. Irby.

16 MR. ROY IRBY: Yes, ma'am.

17 MADAME CLERK: Place your left hand on the Bible and  
18 raise your right hand, best you can.

19 MR. ROY IRBY: Yes, ma'am.

20 MADAME CLERK: I'm sorry. You do solemnly swear or  
21 affirm that the testimony you're about to give in this case  
22 will be the truth, the whole truth and nothing but the truth  
23 so help you God?

24 MR. ROY IRBY: Yes, ma'am.

25 MADAME CLERK: Thank you. Please state your full name



1 for the record.

2 MR. ROY IRBY: Roy Calvin Irby, II.

3 MADAME CLERK: Thank you. You may be seated.

4 MR. ROY IRBY: Thank you.

5 **Direct Examination by Mr. Alford:**

6 Q. Mr. Irby, what is your relationship to Thomas Irby?

7 A. Thomas is my uncle.

8 Q. Usually, the next question a lawyer asks is how long

9 has he been your uncle.

10 A. All my life.

11 Q. The house that's the subject of this dispute has a  
12 mortgage on it is located at 156 Pearson; is that correct?

13 Pearson Drive, isn't it?

14 A. Yes, sir. That's the address.

15 Q. Before 2007, were you living in that house?

16 A. No, sir.

17 Q. Did you move into that house?

18 A. Yes, sir.

19 Q. And when did you move in?

20 A. I don't know the exact date, but I recall it was the  
21 latter part of 2007.

22 Q. Now, how did you come to get the house and the land?

23 A. By two deeds from my Uncle Tom.

24 Q. All right. So ---

25 A. He sold it to me.

1 Q. How much did he sell it to you for?

2 A. He sold it to me for ten thousand dollars an acre plus  
3 interest.

4 Q. And how many acres?

5 A. Well, it started out with 1.43 acres. That was the  
6 part that I knew about. Then there was a corrected deed  
7 filed, but I paid him on the 1.43 acres, plus interest. He  
8 figured it up. I just paid him what he said I owed him.

9 Q. Okay. Now, this 1.43 acres, was there a house already  
10 there?

11 A. No, sir.

12 Q. So did you build a house?

13 A. Thomas built the house. That was my grandfather's old  
14 homeplace. My dad was born there in one of the bedrooms.  
15 And it was the old homeplace for all our family. I mean ...

16 Q. But when was the house put on the land?

17 A. I can't recall. You would have to go back to the  
18 building codes, which you have in documentation.

19 Q. Was the house there in 2007?

20 A. Yes, sir, it was. I think he got the final C.O., which  
21 is certificate of occupancy, which allows someone to live in  
22 it and saying that the house is finished.

23 Q. So the house was started about when, 2005?

24 A. Somewhere in that neighborhood, I guess.

25 Q. Okay. Now, there was a loan with Community Bank and a

1 line of credit with Bank of America. Were you on those  
2 loans?

3 A. There was actually two loans with Community First. And  
4 then there was a loan with Bank of America. And, yes, I was  
5 on those loans.

6 Q. Why were you on those loans?

7 A. Well, because Thomas had deeded me half interest in the  
8 property and also gave me the remaining interest in the  
9 property on a deed.

10 Q. All right. Now, so essentially he sold you the land?

11 A. Yes, sir.

12 Q. And you had to take the money out from the banks on  
13 loan to build the house?

14 A. Yes, sir.

15 Q. So the loans with Community and the line of credit were  
16 to get the house built?

17 A. All the loans. All the loans was to finish the house.

18 Q. To finish the house?

19 A. Yes, sir.

20 Q. The house that you lived in?

21 A. Yes, sir.

22 Q. Okay. Now, in 2007, what was your income?

23 A. I -- I draw disability. It was about thirty thousand  
24 dollars net.

25 Q. Okay. So what did you do to work?

1 A. I didn't. I was on disability.

2 Q. Pure disability?

3 A. Yes, sir. Total.

4 Q. And how much were you receiving under disability?

5 A. I don't recall exactly the amount, but I know it was  
6 between a thousand and fifteen hundred from Social. And  
7 then I have a long-term disability policy.

8 Q. Okay. Well, I'm just trying to clarify it. Let me  
9 hand you what's been marked as Plaintiff's exhibit 11. Is  
10 that an extract of your taxes?

11 MR. GAINES: Your Honor, we object to this exhibit.

12 THE COURT: What's the ---

13 MR. ALFORD: If he had the ability to repay on the  
14 loan, Your Honor.

15 THE COURT: How's that relevant?

16 MR. ALFORD: He's getting the benefit of the loans.

17 THE COURT: I will allow it over the objection.

18 Q. Is that copies of your taxes?

19 A. Yes, sir.

20 Q. Now, does that show the disability?

21 A. It shows both. It shows the Social Security benefits  
22 and the disability benefits, yes.

23 Q. All right. So that was your income that you received?

24 A. Yes, sir.

25 Q. For each of those years?

1 A. Yes, sir.

2 Q. And I just copied the first page, '07, '08, '09, and  
3 2010; is that correct?

4 A. Yes, sir.

5 MR. ALFORD: I'd move to admit that as Plaintiff's ---

6 THE COURT: It's been admitted over objection.

7 (Whereupon Plaintiff's exhibit 11 was admitted into  
8 evidence)

9 Q. Okay. Now, that is a combination of your disability  
10 and did you say a long-term policy?

11 A. Yes, sir.

12 Q. Okay. And ---

13 A. It was about eighteen thousand from Social Security.  
14 And there was another twelve thousand on my long-term.

15 Q. Okay. Could you have afforded to have built that house  
16 strictly on your income?

17 A. Yes, sir, at that time.

18 Q. Could you have obtained a loan?

19 A. No, sir, not at that time because I have a prior  
20 divorce and a bankruptcy that hurt my credit.

21 Q. So you needed your Uncle Thomas to help you get the  
22 financing?

23 A. Yes, sir. He did help me.

24 Q. Were you present at the closing in August 17, 2007?

25 A. Yes, sir, I was present at all the closings.

1 Q. Okay. Now, we know this payment history. You were  
2 present at the closings, and the August 2007 closing. Do  
3 you know why the purpose of that refinance with M&T Bank,  
4 later Chase, was done?

5 A. Yes, sir. The house was not complete. As a matter of  
6 fact, it was just framed up, just dried-in and we were out  
7 of money. And Tom wanted to do the loan. And he pursued it  
8 to help finish the house.

9 Q. Okay. And that was to help finish your house?

10 A. Well, eventually, it was my house. It was his then,  
11 supposedly. But he had given me the deeds for the land.

12 Q. Okay. Now, did you pay Thomas at that closing ten  
13 thousand, eight hundred dollars?

14 A. Yes, sir.

15 Q. Why did you do that?

16 A. Because he asked for it. He told -- he told me that  
17 the only way he would do the loan is that I pay him that  
18 money and finish paying off what I owed him for the land.

19 Q. And where did you get the ten thousand, eight hundred  
20 dollars?

21 A. It came from the equity line.

22 Q. The Bank of America equity line?

23 A. Yes, sir.

24 Q. And that's the one you were paying off on August 17th,  
25 2007?

1 A. Wasn't paying off. It never was paid off.

2 Q. Well, we know that. How much money did you take from  
3 that account over the next couple of years?

4 A. Well, us combined together, we took all the funds that  
5 was on the account to finish the house and ---

6 Q. How did you get those funds?

7 A. How did we get those funds?

8 Q. Yeah.

9 A. Well, we were issued checks from Bank of America that  
10 had our, both our names on it. We had a joint account. We  
11 had a joint debit card. And that's how we got funds, both  
12 of us.

13 Q. So you're not disputing sixty-nine thousand dollars  
14 approximately came out of this account after August 2007?

15 A. No, sir.

16 Q. All right. Did you tell Mr. Jones or your uncle at  
17 that closing that the ten thousand, eight hundred dollars  
18 was coming out of the line of credit?

19 A. Yes, sir. I actually told them because there was --  
20 they required me to be there because the deeds had not been  
21 -- the second deed had not been recorded. And they asked me  
22 to be there so -- because the only one that was recorded was  
23 the half interest. So I only owned -- all I had was half  
24 interest in the property.

25 So for Tom to get the loan, they had to ask me to sign

1 the mortgage. So I came to the -- came to the closing.  
2 They mentioned that they were paying Bank of America nine  
3 thousand dollars. And I informed them that, you know, I had  
4 took out the other money to pay Tom as he had requested.

5 Q. And you said you paid him by a check?

6 A. No, sir. I paid him in cash.

7 Q. Cash?

8 A. He instructed me to pay him in cash. He instructed me  
9 on all transactions on this house to pay everything in cash  
10 for he -- he didn't want a record trail.

11 Q. Please answer any questions of other counsel.

12 THE COURT: Mr. Hershon.

13 **Cross Examination by Mr. Hershon:**

14 Q. Mr. Irby.

15 A. Hey, Mr. Hershon.

16 Q. You hanging in there?

17 A. I'm trying.

18 Q. Mr. Irby, I'm handing you what's already been admitted  
19 as Plaintiff's exhibit 1, the equity agreement, that we're  
20 discussing today.

21 A. Yes, sir.

22 Q. You admit to entering into this agreement; correct?

23 A. Yes, sir.

24 Q. And the amount of that agreement was sixty-nine  
25 thousand dollars; correct?



1 A. Yes, sir.

2 Q. And you admit that both you and Thomas Irby were  
3 responsible for all funds that were withdrawn on this  
4 account; correct?

5 A. Yes, sir.

6 Q. And you admit that there's a balance remaining still  
7 today that is unpaid; is that correct?

8 A. Yes, sir.

9 Q. And do you have any reason to dispute any of the  
10 amounts that have been presented as due?

11 A. No, not really, I don't. I had the house sold. He  
12 blocked my sale. So ...

13 Q. But you admit that you've executed this equity line  
14 agreement?

15 A. Yes, sir. Yes, sir. I agree to the amounts.

16 Q. I'm going to present to you what's already been entered  
17 as exhibit 5. Do you recognize that document? If you turn  
18 to page two. Have you seen that before?

19 A. No, sir, I have not. But it looks like a transaction  
20 sheet from Bank of America on the account for Thomas Irby.

21 Q. Correct. It states there that the customer name is  
22 Thomas Irby; correct?

23 A. Yes, sir.

24 Q. And that's the account that you and him have as co-  
25 borrowers; correct?

- 1 A. Yes, sir. Well, I was -- I was the co-borrower.
- 2 Q. On the Bank of America equity line?
- 3 A. Yes, sir. He was -- he was the main borrower.
- 4 Q. He's listed first in the ---
- 5 A. Yes, sir.
- 6 Q. --- agreement?
- 7 A. Yes, sir.
- 8 Q. If we look to the back of this document, it's numbered
- 9 as page five. And you see the date on here that says
- 10 November 16th, 2010?
- 11 A. Yes, sir.
- 12 Q. And as far as you know, do you have any reason to
- 13 believe that in November of 2010 that this amount here, this
- 14 approximately sixty-nine thousand dollar number, that that
- 15 would be incorrect at that time?
- 16 A. No. No, sir.
- 17 Q. So when you were discussing in August of 2007, in
- 18 August of 2007 this refinance that we were just discussing,
- 19 ---
- 20 A. Yes, sir.
- 21 Q. --- you admit that the Bank of America equity line was
- 22 not closed at that time?
- 23 A. It never was closed until I closed it. I actually
- 24 closed it in Nashville.
- 25 Q. When was that?

1 A. Somewhere around 2010, 2011 after all the things

2 started as far as foreclosure procedures and ---

3 Q. Okay. So after the default had taken place?

4 A. Yes. Yes, yes. I had to -- I had to do something.

5 Q. And you continued to make withdrawals after August

6 2007; is that correct? Both you and Thomas ---

7 A. Yes.

8 Q. --- continued to make withdrawals?

9 A. Yes, sir.

10 Q. The access devices they we were talking about, did that

11 -- you had like an ATM card; correct?

12 A. We had an ATM card. It was in both our names.

13 Q. It had both of your names, both your and Thomas' name?

14 A. Yes, sir. And we had both our checks, our checkbook

15 with both our names on it for the account.

16 Q. Did you -- were there any other specific times that you

17 recall of funds going directly to Thomas Irby out of the

18 account?

19 A. He -- I think he made some transactions -- I know he

20 did to pay some of the people that was working. He kept

21 some cash in his desk drawer. And he used that to get that

22 and so the funds -- and I actually withdrew some myself and

23 gave it to him to keep in the drawer. And he instructed me

24 to do so.

25 Q. He instructed you to withdraw funds from the Bank of

1 America equity line?

2 A. Yes, sir.

3 Q. And to give those funds back to Thomas Irby?

4 A. I gave them to him to pay for people that were working  
5 or materials for the house.

6 Q. Do you have any idea how much that may have been over  
7 the course of this time?

8 A. No, sir. I couldn't tell you the exact amounts.

9 Q. So these access devices we've been talking about, have  
10 they ever been returned to the bank in any way?

11 A. No, sir. Well, yes, sir. Excuse me. The card was.

12 Q. And when was that?

13 A. When I went in and closed the account.

14 Q. So you're talking 2010, 2011?

15 A. Yes, sir.

16 Q. When you were no longer making any withdrawals?

17 A. Yes, sir. They asked -- they asked for the checks, but  
18 I was in the flood there in Tennessee, and the checks were  
19 destroyed in the flood.

20 Q. And during all this time, again, from August 2007 on  
21 into 2009, did Thomas Irby have direct knowledge that you  
22 were using funds from the equity line?

23 A. Yes, sir.

24 **MR. HERSHON:** No further questions.

25 **THE COURT:** Mr. Gaines.

1           **MR. GAINES:** Your Honor, I'm going to also want to call  
2 Mr. Irby later. So if you want me to wait, I will.

3           **THE COURT:** All right, sir. Any redirect?

4           **MR. ALFORD:** No, sir.

5           **THE COURT:** All right. Thank you. You can step down,  
6 sir.

7           **MR. ROY IRBY:** Thank you, sir.

8           **MR. ALFORD:** The Plaintiff calls Thomas Irby.

9           **MADAME CLERK:** Mr. Irby, please place your left hand on  
10 the Bible, and raise your right hand, please.

11           (Whereupon a bench conference was held off the record  
12 in the presence of the jury, but out of their hearing)

13           **MADAME CLERK:** You do solemnly swear or affirm that the  
14 testimony you're about to give in this case will be the  
15 truth, the whole truth and nothing but the truth so help you  
16 God?

17           **MR. THOMAS IRBY:** I do.

18           **MADAME CLERK:** Thank you. Please state your full name  
19 for the record.

20           **MR. THOMAS IRBY:** Thomas Randolph Irby.

21           **MADAME CLERK:** Thank you, sir. You may be seated.

22           **Direct Examination by Mr. Alford:**

23           **Q.** Mr. Irby, where do you live?

24           **A.** 160 Pearson Road, Belton, 29627.

25           **Q.** And that's close to where this property is located?

1 A. Adjacent.

2 Q. Now, other than this property at 156 Pearson that Roy  
3 moved into, did you and Roy have any other properties you  
4 developed and built?

5 A. No. No, sir.

6 Q. Is this 156 Pearson -- why did you get involved in  
7 selling the land and financing with Roy?

8 A. He came to me, said he wanted a place to get out of  
9 Spartanburg County, wanted a place to have a home for  
10 himself and, as he put it, his baby girl, who his daughter's  
11 name, Jessica. She was, at that time, about fourteen,  
12 fifteen years old.

13 Q. So did you own the land at that point, ---

14 A. Yes, sir.

15 Q. --- the 156 Pearson?

16 A. That land was inherited from my mother, part of her  
17 estate.

18 Q. Now, explain to the jury what the -- kind of give us a  
19 time-line of when Roy came to you or you and Roy got  
20 together to -- on the selling of this land to build a house.  
21 Give us a time-line and up to the point of the, up to 2007.

22 A. Three to four years before the August the 7th date, the  
23 house stood -- he got far enough to get it framed in, ran  
24 out of funds. It stood there until the framing began to  
25 warp and the sub-floor bucked up in it. He couldn't roof it

1 out. It took over three years to build this house.

2 Q. All right. So you allowed him to build the house  
3 before you gave him the deed?

4 A. Do what?

5 Q. Was he building the house before you deeded the land to  
6 him?

7 A. I had given him a contract for a deed. And I think he  
8 started on the contract for the deed on the property.

9 Q. So that would have been around 2004, 2005?

10 A. In that neighborhood.

11 Q. Okay. At that early time, were you involved in any of  
12 the financing?

13 A. No.

14 Q. Okay. When did you become involved in the financing?

15 A. The first financing that I found for him -- after the  
16 house had stood for, like I say, until it began to warp and  
17 buck, he wanted to finish the house. He was out of money.

18 I went to a friend of mine at Community Bank. She gave  
19 us a short-term, fifty-something -- fifty thousand dollar  
20 note to get us what he said would finish the house.

21 Now, remember, the only construction I did on the  
22 house, other than help him occasionally, with my brother,  
23 who lived in front of me, was he told me I had to get the  
24 building permit in my name because he was going through a  
25 divorce and he didn't want it to become part of a divorce

1 settlement.

2 Q. Okay. So when did you get the loan from Community Bank  
3 for that fifty thousand dollars?

4 A. I'm trying to keep the time-line right. There was  
5 Community and then Bank of America, and then M&T Chase. To  
6 finish the house, probably 2006.

7 Q. Okay. So you got a loan from Community, fifty thousand  
8 dollars?

9 A. And we did not really use that much of it. Let me back  
10 up, that's probably closer because we didn't use that much  
11 of it. When Community Bank was to be paid off, we had not  
12 used all of the funds that were available from that loan.

13 Bank of America mortgage was made in May, somewhere in  
14 there. And Bank of America carried it on that HELOC because  
15 we'd gotten far enough along. I think they had a equity  
16 that they figured in the house, and they loaned it on that.  
17 And we had gotten far enough along until he was finishing up  
18 the house in August of 2007.

19 Q. Okay. Now, those first two loans, the Community and  
20 Bank of America loans, who was making the payments on those  
21 loans?

22 A. I never made payments on any loans. He made the  
23 payments.

24 Q. Okay. So you weren't making the payments?

25 A. No.



1 Q. Okay. 2007, what was the purpose of that loan?

2 A. 2007 what?

3 Q. August 2007, the loan with M&T, what's the purpose of  
4 that loan?

5 A. To consolidate and pay off the other two mortgages.

6 Q. And what was the condition of the house at that point?

7 A. Nearly complete.

8 Q. When you say ---

9 A. Very little. In fact, we went on a fishing trip in  
10 August, came back and he moved in permanently within two or  
11 three weeks.

12 Q. Who paid the various contractors?

13 A. He did.

14 Q. Did you --

15 A. I never paid any contractor.

16 Q. You never paid a contractor the first time?

17 A. No, sir.

18 Q. The proceeds from those first two loans, the Community  
19 and the Bank of America equity line, when it was taken out,  
20 did you ever -- how was that money managed?

21 A. It went -- he drew from each account. I never drew  
22 money from any account and then forward it to him. He had  
23 access.

24 Everything was jointly with Community and jointly with  
25 Bank of America and just like that HELOC with Bank of

1 America. And even on the Chase Mortgage, as far as I'm  
2 concerned on mortgages, it was his intention to service all  
3 the mortgages. He had to service them. I didn't have the  
4 extra money coming in. I live on Social Security. Been on  
5 it for twelve years.

6 Q. Okay. And that's all you receive, Social Security?

7 A. I have a two hundred and twenty-seven dollar a month  
8 annuity.

9 Q. How much did you get in Social Security back then?

10 A. Back then it was about sixteen hundred and thirty  
11 dollars a month. So I had a total of, what, eighteen  
12 hundred, nineteen hundred dollars a month income.

13 He had told us he had a thirty-six, thirty-seven  
14 hundred dollar a month income. He serviced the mortgage,  
15 just like he did the Bank of America mortgage and the Chase  
16 mortgage, as far as I know, he serviced them until he  
17 decided to default.

18 Q. Now, with the Bank of America line of credit, you're  
19 thinking that was in early '06? I don't want to put words  
20 in your mouth.

21 A. I think the mortgage was made in May.

22 Q. Of '06?

23 A. Then we -- then we were paying it off in August.

24 Q. We have the equity line here. Maybe it has a date on  
25 it. May 16th, 2007.

1 A. Uh-huh (affirmative).

2 Q. So that would be correct?

3 A. And see, we had not really run up a balance on it  
4 because it was -- the payoff at that time was nine thousand,  
5 nine hundred something dollars, and that's what we paid off.

6 Q. When you opened that line of credit with Bank of  
7 America and did that closing, what did you receive by way  
8 of, I call it, access cards or access devices?

9 A. Nothing.

10 Q. Did you receive any checks?

11 A. No. I got cash. I got -- he paid me a check for the  
12 balance of the property that was owed then.

13 Q. In May?

14 A. From that. I guess from that. He paid me -- when we  
15 left Gregg Jones' office ---

16 Q. No, I'm -- back when this was first signed?

17 A. At that time, he paid -- he paid me the balance of the  
18 property.

19 Q. Okay. Now, the -- but you had no access cards, checks  
20 in your control?

21 A. Never were issued, not to me.

22 Q. Okay. Did you receive them at the closing ---

23 A. No.

24 Q. --- when you signed that?

25 A. No. In fact, after the closing, I had no

1 correspondence with Bank of America whatsoever until I  
2 received a delinquent notice from them in November of 2009.

3 Q. All right. And that's the first time you were aware  
4 that that Bank of America account was delinquent?

5 A. Was that the what?

6 Q. Was that the first time you were aware that the Bank of  
7 America account was delinquent?

8 A. No, at that time, I thought that was the only mortgage  
9 I had. I had -- all the time I knew I wasn't supposed to  
10 have but one mortgage on that house. I was only supposed to  
11 be co-signer on one mortgage.

12 Q. And that was the M&T/Chase?

13 A. That was the last mortgage that paid off the other two  
14 was the M&T mortgage that Chase subsequently bought.

15 Q. But you never made a payment to M&T or Chase?

16 A. No. When I got the delinquent notice, I made a payment  
17 because I couldn't get in touch with him. I paid a second  
18 one. Couldn't contact him. I figured something's wrong  
19 when I discovered all the documents I had in the document  
20 trail on my desk were missing.

21 Q. Do you -- without talking about it, do you recognize  
22 this document I hand you?

23 A. Yes, sir.

24 Q. Who's that from or to?

25 A. Bank of America. It is from the consumer real estate

1 servicing department at Bank of America.

2 Q. And who's it addressed to?

3 A. It is addressed to Thomas R. Irby and Roy C. Irby, II,  
4 8008 Highway 100, Nashville, Tennessee.

5 MR. ALFORD: And, Your Honor, I move to admit this as  
6 -- I think we pre-marked it as 7.

7 THE COURT: Any objection?

8 MR. GAINES: None.

9 MR. HERSHON: None.

10 THE COURT: All right. Without objection, exhibit 7 is  
11 admitted into evidence and may be published to the jury.

12 (Whereupon Plaintiff's exhibit 7 was marked and  
13 admitted into evidence)

14 Q. Tell us what that letter -- is it in response to  
15 anything? How did you get that letter? How did it come in  
16 and what's the date of it?

17 A. When I discovered that I had two active mortgages or  
18 notes instead of one, I went to the courthouse. I couldn't  
19 find my documents. Everything gone. Went to the  
20 courthouse, ran fifty-six copies, which included the fact  
21 that I had two active mortgages, both of them in default.

22 Q. The two active mortgages were the ---

23 A. The HELOC and the Chase/M&T mortgage.

24 Q. The Bank of America line of credit and the Chase  
25 Mortgage?

1 A. Correct.

2 Q. Okay. And then what did you do?

3 A. I started trying to find out what's going on. Nobody  
4 could really tell me anything. I have returned mail that I  
5 mailed to him unaccepted. I couldn't call him. He wouldn't  
6 answer his phone.

7 So I contacted Bank of America. I want to know what  
8 the status was and what the balance was, what the funds was.  
9 It took me almost six months to get the account history. I  
10 finally got the account history.

11 Q. Would you read the letter that Bank of America wrote?

12 A. Dear customer, thank you for your inquiry regarding the  
13 above-referenced account number. This letter serves as  
14 notification that the research on your line of credit above  
15 has been completed. Our records indicate that the line of  
16 credit account is linked for overdraft protections from  
17 South Carolina checking number xxx8297 listed under the  
18 profile of Roy C. Irby, II.

19 We value your business and want to provide the best  
20 possible service. If you should have any additional  
21 questions, please feel free to call our customer service  
22 representative. And they give me the number.

23 Q. Okay.

24 MR. ALFORD: With the Court's permission, I'll publish  
25 this to the jury, Your Honor.

1           **THE COURT:** Yes, sir, you may.

2       Q.   Did you ever set up overdraft protection with a Bank of  
3   America checking account, with the Bank of America?

4       A.   That's the only account I'd ever had with Bank of  
5   America.

6       Q.   You never had a checking account?

7       A.   No.

8       Q.   In the life of that line of credit, Bank of America  
9   line of credit that opened in -- I think we said May 17th,  
10   if I read it right, May 16, 2007, did you ever withdraw  
11   money from that line of credit?

12      A.   No, sir.

13      Q.   Were you aware or what withdrawals were you aware of  
14   that Roy was taking from that line?

15      A.   The only thing he was supposed to be taking from that  
16   line after August 7th was absolutely nothing. He wasn't  
17   supposed to be taking the money, the ten thousand something  
18   dollars that he drew during the closing payoff process. He  
19   knew the account was being paid off.

20      Q.   Now, I want to talk about Bank of America for a minute.  
21   After you closed in August the 17th, a couple of months  
22   later, the M&T closing in Gregg Jones' office, did you ever  
23   receive any correspondence, communication or phone call from  
24   Bank of America regarding the closing of that account?

25      A.   No, sir. Not a call, not a fax, not a letter.

1 Q. Now, there was some question on the HUD-1 statement  
2 from the August 17th closing. There's twenty-three thousand  
3 dollars to borrower, down at the bottom.

4 A. Paid to Roy C. Irby by some check, some means. I think  
5 it probably was paid jointly in one check, and then he paid  
6 me from that for the rest of the property.

7 Q. So did any of the twenty-three thousand dollars go in  
8 your pocket?

9 A. Nothing except the property, which actually, he was  
10 incorrect in what he said about the amount I paid. Because  
11 there was an error in the original plat to the amount of .08  
12 acres of property that could be added back on the opposite  
13 side, so it didn't -- and it was actually added back and he  
14 actually paid for that. He paid me with my own money.

15 Q. Now, the property at 156 Pearson that you'd given Roy,  
16 in August of '07, at that time, what do you think that  
17 property would have been worth?

18 A. I had had it appraised before I ever made him the  
19 offer, ---

20 **MR. HERSHON:** Hearsay, Your Honor.

21 A. --- Charles Knight ---

22 **MR. HERSHON:** Objection, hearsay.

23 Q. I don't want a hearsay. I just want to know what did  
24 you value your land at?

25 **THE COURT:** Okay.



- 1 A. Fourteen thousand dollars an acre.
- 2 Q. Okay. And you had one acre?
- 3 A. 1.43, originally. Added .08 back to it.
- 4 Q. Okay. What was the value of the house that was built?
- 5 A. Two banks agreed at two hundred and twenty thousand
- 6 dollars, two hundred eighteen to two twenty.
- 7 Q. Okay. So that included the land and house?
- 8 A. Uh-huh (affirmative).
- 9 Q. How much was the Chase first mortgage?
- 10 A. Ninety-five.
- 11 Q. So there should have been a lot of equity in that land?
- 12 A. Do what?
- 13 Q. There should have been a lot of equity in that land?
- 14 A. That's exactly what I counted on. I was looking at --
- 15 okay. I was co-signer on a mortgage for ninety-five
- 16 thousand dollars on a house that's worth two twenty.
- 17 Q. Now, Chase foreclosed the house? They sold it?
- 18 A. Yes, sir.
- 19 Q. Do you know how much that was for?
- 20 A. At the foreclosure auction, if I remember correctly, it
- 21 brought eighty-four thousand dollars. The buyer sold it for
- 22 a hundred and fifty-four.
- 23 Q. Were you aware or did you agree to or have any
- 24 knowledge of Bank of America's subordinating its second
- 25 mortgage or its line of credit below the Chase mortgage?

1 A. Not that -- I don't even know -- I don't know what  
2 that's about.

3 Q. Okay. So in your view the house sold -- I'm sorry, you  
4 said for eighty-four thousand at the foreclosure auction?

5 A. Do what?

6 Q. How much did you say the house sold for at ---

7 A. Eighty-four. Resold for a hundred and fifty-four.  
8 That was a realtor's price.

9 Q. But none of that, like all of the equity out of that  
10 was to your benefit to pay off Bank of America?

11 A. No.

12 Q. And you've got to speak up. They might not can hear  
13 you.

14 A. No, no.

15 Q. What are your damages in this case, Mr. Thomas?

16 A. Do what?

17 Q. Or Mr. Irby. What are your damages? What are you  
18 seeking?

19 A. Well, I have carried it for -- from the time I  
20 discovered what was, what I felt like was really taking  
21 place, which was November through the first of December when  
22 I got the second notice and made the second payment. I had  
23 to carry this and keep it alive, at my expense and my cost,  
24 until you took my case in September of 2011. I've got trips  
25 to banks, I mean, trips to courthouses, trips to lawyer,

1 after lawyer, after lawyer.

2 Q. Let me ask you, did you ever pay Bank of America any  
3 money?

4 A. Not after the second payment.

5 Q. Now, tell us about the two payments.

6 A. That's right.

7 Q. What were the two payments?

8 A. The first one was over two, the next one was a little  
9 less than two. And actually, I got ---

10 Q. I'm sorry. Two what now? We've got to ---

11 A. Two hundred.

12 Q. Two hundred dollars, okay. And why were those made and  
13 when were they made?

14 A. I hand delivered them to Simpsonville Bank of America.

15 Q. About when?

16 A. The first notice that I received, delinquent notice,  
17 and I can't remember the exact date, but within about three  
18 weeks I paid that. The next payment was within the first  
19 two weeks of December.

20 Q. Okay. Now, the date on that letter in front of you is  
21 what?

22 A. This is -- that's a HUD statement.

23 Q. I'm sorry. The one we published, Plaintiff's exhibit

24 7. I think it has the date of January 2010.

25 A. June the 22nd, 2010.

1 Q. All right. Did the two hundred dollar -- the 2 two  
2 hundred dollar payments you made, were they before that  
3 letter?

4 A. Yes.

5 Q. Now, did you pay any money to Chase?

6 A. No.

7 Q. Or M&T?

8 A. No, not that I remember paying. From the time I found  
9 out what was happening, I didn't make anymore payments to a  
10 bank.

11 Q. All right. What other damages did you incur? What  
12 costs did you incur?

13 A. I can't hear you.

14 Q. I'm sorry. What other costs did you incur?

15 A. Well, since then, you, mediation, car expenses, copying  
16 expenses, document fees, time. To realistically calculate  
17 it all out right now, it's about forty thousand dollars out  
18 of my pocket.

19 Q. Is that the damage you're seeking from Bank of America  
20 and from Roy, Roy Irby?

21 A. As far as actual out-of-pocket expenditures it should  
22 be equal between the two of them. They're both responsible  
23 for it.

24 MR. ALFORD: Bear with me a minute.

25 (Pause)

1           **MR. ALFORD:** Please answer any questions of counsel.

2           **THE COURT:** Mr. Gaines.

3           **Cross Examination by Mr. Gaines:**

4           Q. Mr. Irby, can you describe for me exactly what was the  
5           agreement between you and Roy as far as building this house?

6           A. He was going to build the house. He was going to make  
7           the payments if I got him the money. In the beginning,  
8           there was no extra money asked for. He ran out of money to  
9           build the house.

10          Q. Okay. And what were you to receive?

11          A. Do what?

12          Q. And what were you to receive?

13          A. What do you mean to receive? I wasn't to receive  
14          anything. He was to pay for building the house.

15          Q. But you were supposed to ---

16          A. He was to service the mortgages.

17          Q. Were you going to receive some money for the land?

18          A. Do what?

19          Q. Were you going to ---

20          A. I took the money for the land. It didn't have anything  
21          to do with building the house.

22          Q. Okay. All I'm asking is -- I'm trying to get the full  
23          agreement that the two of you had.

24          A. Pay for the land.

25          Q. Okay. He had to pay you for the land?

- 1 A. And he paid for the land.
- 2 Q. How much was that?
- 3 A. Paid it out of my own money.
- 4 Q. How much did he pay you for the land?
- 5 A. Ten thousand dollars an acre times 1.51.
- 6 Q. Okay. And that was the amount you agreed to; is that
- 7 correct?
- 8 A. That's correct.
- 9 Q. And he paid you that; is that correct?
- 10 A. Yes. He paid out of money the bank wanted back from
- 11 me.
- 12 Q. And the money they wanted from him; is that correct?
- 13 A. The money what?
- 14 Q. That they also wanted from him?
- 15 A. Well, I'm the one they're trying to collect it from.
- 16 Q. And they're also trying to collect it from Roy, too,
- 17 aren't they?
- 18 A. Well, I don't know about that.
- 19 Q. All right. So the only obligation Roy had to you as
- 20 far as payment was for that land; is that correct?
- 21 A. And service the mortgages.
- 22 Q. Okay. And ultimately the property was supposed to be
- 23 his completely; isn't that correct?
- 24 A. Absolutely not.
- 25 Q. Okay. Then tell me about that agreement.

1 A. Okay. When we went to make the mortgage, when we went  
2 to make the deed, the original deed, I retained a fifty  
3 percent, half; undivided interest in the property as  
4 protection for my signature on those co-signed -- that co-  
5 signed mortgage.

6 Q. Okay. But you signed a deed giving him full interest  
7 in the property; isn't that true?

8 A. If you'll look at that deed, it plainly says across the  
9 top, there's been no deed search done on it, no title search  
10 been made. That deed is dated the same date as the deed of  
11 record that was filed and was supposed to keep me half  
12 interest in the property for my protection.

13 Q. Let me ask you this. Did you sign that deed that gave  
14 him full interest in the property?

15 A. Absolutely. I signed it.

16 Q. And that ---

17 A. Got my name on it.

18 Q. And that deed was to give him complete interest in the  
19 property?

20 A. No, it does not. It didn't give him anything unless I  
21 was dead or those mortgages were paid.

22 Q. I'm going to show you ---

23 A. I don't -- well, okay. I see.

24 Q. --- what's previously been admitted, exhibit 2.

25 A. Okay.

1           **MR. GAINES:** We would like to admit that into evidence  
2 if not previously done so.

3           **THE COURT:** I believe it's in. Plaintiff's exhibit 2  
4 or your exhibit? Plaintiff's exhibit 2?

5           **MR. GAINES:** Defendant's exhibit 2.

6           **THE COURT:** Is there any objection to Defendant's  
7 exhibit 2? I think it's already in.

8           **MR. ALFORD:** None, Your Honor.

9           **MR. HERSHON:** No, objection.

10          **THE COURT:** All right. Without objection, Defendant's  
11 exhibit Number 2 is admitted.

12 Q. So, again, just reviewing that deed, doesn't that deed  
13 say that you give -- let's read it together.

14 A. This deed plainly states, any remaining interest in and  
15 to the below described real estate to wit.

16 Q. Okay. And that's your signature on that deed; is that  
17 not correct?

18 A. There are no argument about that.

19 Q. Okay.

20 A. The deed of record was filed. This one was held.

21          **MR. GAINES:** I'd like to show that to the jury.

22          **THE COURT:** All right. You may publish it to the jury.  
23 That's exhibit 2.

24 Q. You knew that Thomas could not get a loan on his own;  
25 isn't that correct? I mean, that Roy could not. Excuse me.



1 That Roy could not get a loan on his own?

2 A. He told me he couldn't get a loan because he was going  
3 through the divorce bit.

4 Q. Okay. So you knew that he needed you to get the loan?

5 A. He needed help. I was helping him.

6 Q. All right. And you knew that by signing that, you bore  
7 some risk that there could be someone asking you for  
8 repayment of the loan; isn't that true?

9 A. Oh, I realize I took that risk. If he didn't pay, I  
10 was going to be held responsible. I trusted him to perform  
11 on the mortgages, just like I would have if they were my  
12 mortgages.

13 Q. Okay. So why is it you would trust someone that you  
14 knew couldn't get a loan on theirself?

15 A. I trusted what he told me. That was his reason. I had  
16 been through a divorce in 1972. I know what it's like.

17 Q. So why would you, again, trust someone who couldn't get  
18 a loan on their own to make the payments on it?

19 A. He told me he would.

20 Q. Okay.

21 A. I didn't take a hammer and beat him into it.

22 Q. You also would admit, would you not, that you filed a  
23 *lis pendens* in this?

24 A. Do what?

25 Q. You would admit you filed a *lis pendens* in this action;

- 1 right?
- 2 A. Absolutely.
- 3 Q. Okay. And who advised you to do that?
- 4 A. Gregg Jones.
- 5 Q. Did he help you prepare the *lis pendens*?
- 6 A. He prepared it.
- 7 Q. And what was the purpose of filing the *lis pendens*?
- 8 A. To notify people that I was going to protect myself.
- 9 Q. So what was your understanding what the *lis pendens*
- 10 would do?
- 11 A. It would put everybody on notice that there was going
- 12 to be legal action following.
- 13 Q. Did you know it would prevent the property from being
- 14 sold?
- 15 A. No. Nobody -- I didn't have to know that. Never mind.
- 16 Go ahead. Ask your questions.
- 17 Q. If you want to explain, I'm okay. But did you
- 18 understand that it would cause a problem with the property
- 19 being sold?
- 20 A. No.
- 21 Q. Okay. What was your understanding what it would do
- 22 then?
- 23 A. It would put people on notice that there would be a
- 24 legal action pending, following up. *Lis pendens* to me means
- 25 legal pending.

- 1 Q. Did you know of any prior credit trouble that Roy had?
- 2 A. No, I did not.
- 3 Q. Did you inquire before co-signing with him?
- 4 A. Did not. I took his word for it.
- 5 Q. Was it your testimony earlier that you did not receive
- 6 the check from the closing for M&T Bank? Or did you?
- 7 A. If I received a check, I don't remember it.
- 8 Q. Okay. And the check I'm referring to, just to be
- 9 clear, is from this -- the twenty-three thousand ---
- 10 A. I see where it says that. I've already seen that.
- 11 Q. Okay.
- 12 A. That's readily -- that's what it says. For two
- 13 peoples' signature on it, what's supposed to be.
- 14 Q. Well, let's clarify. Are there two signatures on
- 15 there?
- 16 A. Actually, there's only one.
- 17 Q. Whose signature is that?
- 18 A. Gregg Jones signed one, and I signed the other.
- 19 Q. Roy's signature is not on that; is that correct?
- 20 A. Yeah.
- 21 Q. All right. Let me ask you just one other question
- 22 about those deeds that were prepared. Do you know who took
- 23 those deeds from Mr. Jones' office? Were they given to you
- 24 or were they given to Roy?
- 25 A. I don't remember who actually walked out with the deeds

1 in-hand. But I do know both deeds were dated the same day.  
2 They were filed, what, eighteen months apart. Doesn't that  
3 seem a little strange?

4 Q. Do you remember who advised you to not record the deeds  
5 immediately?

6 A. Who advised who?

7 Q. Who advised you?

8 A. Nobody. The agreement was he wanted the deed in case  
9 something happened to me because he was afraid, because I  
10 had had three heart surgeries, he would have to go through  
11 probate problems. That's the way he told me, that's the way  
12 he told Gregg Jones, and he wanted a backup deed if  
13 something happened before he could get the mortgages paid  
14 off. If something happened to me, he wanted to be able to  
15 take full ownership of the property.

16 My copy of the deed stayed in a document tray on my  
17 desk in my house. When all of this started, I discovered I  
18 didn't have one document.

19 Q. And just to go back to the deeds, you were willing to  
20 sign the deed?

21 A. Man, I don't sign anything I'm not willing to sign.

22 Q. Okay.

23 MR. GAINES: That's all I have.

24 THE COURT: Mr. Hershon, Mr. Floyd?

25 **Cross Examination by Mr. Hershon:**

1 Q. Hello, Mr. Irby. How are you?

2 A. I'm all right.

3 Q. I'd like to talk to you a little bit about the equity  
4 line you entered into with Bank of America. Do you recall  
5 doing that?

6 A. Oh, I think I should have memorized the whole thing by  
7 heart by now.

8 Q. I'm presenting to you, again, this is Plaintiff's  
9 exhibit 1. Do you recognize that document, sir?

10 A. Uh-huh (affirmative).

11 Q. That's the same first page that's up here that the jury  
12 can see on this projector; is that correct?

13 A. That's correct.

14 Q. Let's look up top on that first page. You see where  
15 this borrower's name and address?

16 A. It says Thomas R. Irby and Roy C. Irby, II, 160 Pearson  
17 Road, Belton, South Carolina. Actually, that's my home  
18 address.

19 Q. Thank you. And your name is listed first; correct?

20 A. That's correct.

21 Q. Let's look a little bit further down. You see where  
22 there's a paragraph one? And there's a second indentation  
23 in there that starts with, in this agreement. Do you see  
24 that little paragraph?

25 A. Uh-huh (affirmative).

1 Q. Do you see how there's a sentence that says -- below  
2 the terms you, your, yours, and borrower refer to each  
3 person that signs this agreement; do you see that?

4 A. That's correct. Yeah, I see that.

5 Q. And you -- did you read this agreement before entering  
6 into it?

7 A. No.

8 Q. Did you sign this agreement?

9 A. Yes.

10 Q. Is that your signature on, I believe, on the last page?

11 A. I bet it is because nobody could forge my name. Okay.  
12 Yes, that's mine. And I recognize the second signature.

13 Q. Who else would sign there? Who else's signature is  
14 there?

15 A. Roy C. Irby.

16 Q. So the two of you both signed this agreement; correct?

17 A. That's correct. We were in agreement.

18 Q. As co-borrowers; correct?

19 A. Uh-huh (affirmative).

20 Q. If you could look back on that first page, on the first  
21 page, Mr. Irby.

22 A. Uh-huh (affirmative).

23 Q. There's a paragraph two. Do you see that where it says  
24 borrowers promise to pay?

25 A. Oh, yeah.

1 Q. Do you see where it says you promise to pay the lender  
2 the total of advances plus finance charges under the terms  
3 of this agreement? Do you see that?

4 A. Yes.

5 Q. So there's no surprise as to the terms of this  
6 agreement; is there?

7 A. None at all. The surprise is further into the  
8 agreement.

9 MR. HERSHON: Your Honor, I'd like to request that he's  
10 instructed to respond only to questions.

11 THE COURT: I'll allow him to explain his answers.

12 Overruled. You can ask your questions.

13 Q. Let's look at some pretty clear language here, Mr.  
14 Irby. Let's look at page two. There's a paragraph nine,  
15 advances. Do you see that, towards the bottom? Paragraph  
16 nine, advances?

17 A. Yeah. Okay.

18 Q. There's a last sentence -- I'm sorry. There's a second  
19 paragraph there. If there's more than one person authorized  
20 to use this credit line, you agree not to give us  
21 conflicting instructions, such as one borrower telling us  
22 not to give advances to the other. Do you see that?

23 A. Yeah.

24 Q. It's pretty clear; isn't it?

25 A. Sure.

1 Q. Okay. If you wouldn't mind, please turn to, turn to  
2 page six of the document. And it might have the number 143  
3 in the bottom right hand corner.

4 A. Uh-huh (affirmative).

5 Q. Do you see paragraph twenty-one? Where it says  
6 effective suspension of your account?

7 A. Yes, I do.

8 Q. I'd like to read that to you as well. If your account  
9 is suspended or terminated for any reason, you will  
10 nonetheless remain obligated to pay the account balance in  
11 accordance with the terms of this agreement. Do you see  
12 that?

13 A. That is readily understandable. That is -- directly  
14 goes back to the fact that the account was not closed  
15 because there was an outstanding balance? It should have  
16 been closed regardless of the balance.

17 Q. You're not a banker; correct?

18 A. I don't have to be.

19 Q. Let's look at paragraph thirty-five, page eight. That  
20 would be number 145 on the bottom, the bottom there.  
21 Sending of notices. Do you see that paragraph, paragraph  
22 thirty-five?

23 A. Which number?

24 Q. Thirty-five, Mr. Irby.

25 A. Sending of notices. Yeah, I see that.



1 Q. Okay. I'd like to read there the second sentence of  
2 that to you. Notice to any of you shall be deemed notice to  
3 all of you. Any billing statement or notice to you under  
4 this agreement will be sufficiently given if sent to your  
5 address on file in connection with this account or to a new  
6 address of which you have notified us in writing. That  
7 seems pretty clear; doesn't it?

8 A. Sending of notices. Except as otherwise provided in  
9 this agreement, all notices must be in writing. I believe  
10 they have been.

11 Q. And you'd mentioned earlier that you didn't receive  
12 anything from Bank of America after this equity line was  
13 opened in May of 2007; is that correct?

14 A. Not that I remember.

15 Q. Did that trouble you at all at that time, May of 2007?

16 A. No. I didn't know. I thought that was normal.

17 Q. When you opened ---

18 A. Roy was -- Roy was going to service the mortgage as  
19 long as he got it.

20 Q. You opened up an equity line in your name in the amount  
21 of sixty-nine thousand dollars; correct?

22 A. I had somebody that was supposed to pay it.

23 Q. You didn't care that you didn't see the balances?

24 A. I trusted him.

25 Q. You didn't care that the notices were just going to Roy

- 1    when you could have requested notices to go to you?
- 2    A.    I trusted him.
- 3    Q.    Okay.  You trusted him?
- 4    A.    Yeah.
- 5    Q.    And he betrayed that trust?
- 6    A.    Just like I trusted the bank.
- 7    Q.    He betrayed ---
- 8    A.    I trusted the bank.
- 9    Q.    He betrayed that trust of yours; correct?
- 10   A.    Absolutely.
- 11   Q.    But you signed the document that kept you as a co-
- 12   borrower with him; correct?
- 13   A.    Uh-huh (affirmative).
- 14   Q.    Did you ever receive anything, any document from Bank
- 15   of America saying, hey, Thomas, you're no longer responsible
- 16   for the funds drawn on this account?
- 17   A.    No.  No.  But I received something from Roy that did
- 18   that.  When he filed the second deed, I had no collateral
- 19   for the mortgage.
- 20   Q.    Well, again, though, regardless of your deal that you
- 21   had with Roy, how was Bank of America supposed to know that
- 22   the two of you weren't ---
- 23   A.    You were paid off.  Why was that even a concern of
- 24   mine?
- 25   Q.    Do you have something that shows the account amount,

1 account balance is zero?

2 A. No. You didn't balance it out. You didn't -- you took  
3 the money, but you didn't close the mortgage.

4 Q. Let's look at exhibit 5 from the Plaintiff that's been  
5 already introduced. Do you recognize this document, Mr.  
6 Irby?

7 A. We have enclosed the loan history transcript on the  
8 above-referenced loan as requested. Absolutely. I did  
9 request it. I subpoenaed it.

10 Q. You requested that? Do you notice -- do you notice the  
11 address that's on there? I think you talked about that.

12 A. Roy C. Irby. There is where your mistake is. I'm the  
13 principal. I'm the primary. Why are you sending my mail to  
14 Nashville, Tennessee?

15 Q. I think we've gone through that pretty clearly. And  
16 either borrower -- wasn't it correct that we looked at a  
17 provision that said either borrower could provide  
18 information as to an address change?

19 A. I do remember telling you ---

20 Q. And you decided to choose Mr. Roy Irby to manage this  
21 account; isn't that correct?

22 A. That's correct. Why is it addressed to me then? Why  
23 isn't it addressed to him?

24 Q. Are you both co-borrowers on the account, Mr. Irby?

25 A. That's correct.

1 Q. I think you'd answered ---

2 A. If he doesn't forward -- if you don't forward me a  
3 copy, how do I know what's going on?

4 Q. And what did you say this document was again?

5 A. What did what?

6 Q. What did you say this document was? I forgot ---

7 A. That document -- that document is finally, after six  
8 months of trying, I got the account history.

9 Q. Would you mind if I took a quick look at it?

10 A. Sure.

11 Q. I just wanted to point something out here. Let's look  
12 at that August 2007 time-frame.

13 A. Uh-huh (affirmative).

14 Q. Do you see here there's a line, August 24th, your  
15 payment, nine thousand, nine hundred and ninety-eight  
16 dollars and ninety-two cents?

17 A. You chose -- even though Gregg Jones sent the letter to  
18 pay it off with that amount ---

19 Q. I'm asking if you saw this?

20 A. I saw that where you entered it as a regular payment  
21 instead of a payoff.

22 Q. And what balance remains after that payment's been  
23 applied, Mr. Irby?

24 A. That's the amount Roy pulled in order to confuse the  
25 account.

1 Q. Confuse the account?

2 A. Yeah.

3 MR. HERSHON: I'd like to publish this document to the  
4 jury.

5 THE COURT: It's in evidence.

6 MR. HERSHON: Thank you.

7 Q. Going back to the -- do you recall ever seeing anything  
8 in this -- you said you'd nearly memorized this agreement;  
9 correct? The equity line agreement or you've looked at it  
10 so many times?

11 A. Enough of it.

12 Q. You know it pretty well?

13 A. Uh-huh (affirmative).

14 Q. Do you recall anything in that document that requires  
15 your consent for funds to be drawn on that account?

16 A. No. The account was actually drawable by both of us.  
17 I didn't draw it.

18 Q. But it was -- but both of you could draw from the  
19 account?

20 A. Do what?

21 Q. Both of you could draw from the account; correct?

22 A. That was my understanding.

23 Q. And you knew that Roy had access devices to be able to  
24 draw funds from the account; correct?

25 A. We've been through that. I trusted him. Yes.

1 Q. And did you ask in August of 2007 for him to return  
2 those devices to the bank?

3 A. I haven't corresponded with him. You have to be able  
4 to talk to somebody to ask them.

5 Q. You were still talking with him in August 2007;  
6 correct?

7 A. In August of 2007, I did not know the bank -- the  
8 account was not closed.

9 Q. Did you -- I'll ask again. In August of 2007 did you  
10 ask Roy to return any access devices for the account to Bank  
11 of America?

12 A. I didn't know he had any.

13 Q. You knew he had them before August 2007?

14 A. I did not.

15 Q. You knew he was using the account; correct?

16 A. I knew he was drawing money from it.

17 Q. How would he draw money from the account ---

18 A. I have no idea.

19 Q. You don't know?

20 A. No.

21 Q. You haven't learned anything today?

22 A. No. I had no cards. I had no checks.

23 Q. As we discussed earlier, you did make a couple of  
24 payments on this account, it was November and December 2009;  
25 that's right?

1 A. Correct.

2 Q. Approximately four hundred dollars?

3 A. Uh-huh (affirmative). Which he paid.

4 Q. Which who paid?

5 A. He paid -- he returned my two payments with an  
6 instruction from me to short sell the property.

7 Q. So those payments that you made, he's refunded to you?

8 A. Yes.

9 Q. You don't know where that money came from, but you know  
10 that you've -- you've been repaid ---

11 A. I guess he paid me with my own money again.

12 Q. What do you mean? Potentially money from this equity  
13 line?

14 A. You want the money. So if I'm going to have to cough  
15 the money, where's he going to get it? Where did he get it?

16 Q. I mean, the likely thing is he got this money from the  
17 equity line; correct?

18 A. Do what?

19 Q. He likely got the money from the equity line; correct?  
20 To pay you?

21 A. That's correct.

22 Q. Mr. Irby, this is exhibit 4, Plaintiff's exhibit 4,  
23 which you were -- I don't believe you've taken a look at  
24 while you've been up there.

25 A. I've seen it before.

1 Q. What is that document?

2 A. It says a home equity line of credit wire information.

3 Q. That's on the second page; right?

4 A. Uh-huh (affirmative). This is Gregg Jones' letter  
5 instructing Bank of America to close the account.

6 Q. Is your signature anywhere on those two pages?

7 A. Nope. He was my attorney, representing me and Roy at  
8 that time. I felt like his name ought to be recognized for  
9 what it is.

10 Q. What's your relationship like with Roy today?

11 A. What relationship?

12 Q. Is there no relationship?

13 A. No.

14 Q. You never talk anymore?

15 A. No.

16 Q. Now, you did attempt to orchestrate a short sale of  
17 this property in May of 2010; correct?

18 A. I did.

19 Q. Why did you want to do that?

20 A. Because he -- somewhere or another we have a letter  
21 instructing me to short sell the property. I still have the  
22 certified mail envelope that I think it came in.

23 Q. You wanted to do that because you knew you had  
24 liabilities on the debts that were on this 156 Person Drive  
25 property; correct?



1 A. Absolutely.

2 Q. You knew those debts were ---

3 A. If he would allow us to short sell the property and get  
4 me cleared from the mortgages, that's exactly what I wanted  
5 to do.

6 Q. You knew -- but, again, you knew there were certain  
7 debts that you were obligated to pay?

8 A. That's correct. I knew if he defaulted the bank would  
9 be after me. I wanted to -- and in the beginning, if I had  
10 not had but the ninety-five thousand dollar mortgage, if you  
11 had closed yours, I would be in the cat-bird seat. All I'd  
12 have to do is sell the property.

13 Q. Now, Bank of America never attempted to foreclose  
14 against you; correct?

15 A. No. You failed to close the mortgage. You kept the  
16 mortgage open deliberately when you were told to close it.

17 Q. And what happened in this -- did you assert claims  
18 first against Bank of America or did Bank of America first  
19 assert claims against you?

20 A. No, you started trying to collect from me. When it  
21 appeared that I didn't have any choice, I filed an action in  
22 June of 2010, which is almost eight months after I  
23 discovered the problem.

24 Q. You filed first; correct?

25 A. That's correct. Because you refused to correct the

1 error.

2 Q. And you had -- you talked about trust.

3 A. Do what?

4 Q. You talked about trust.

5 A. Yeah, trust.

6 Q. You trusted Roy Irby?

7 A. That's correct.

8 Q. Did Bank of America trust you when you signed your name  
9 on the equity line agreement?

10 A. And I trusted them, mutual.

11 Q. Correct.

12 A. Mutual.

13 Q. Right.

14 A. Why ---

15 Q. Have you lived up to that obligation? Have you paid  
16 the debts that are owed on this equity line?

17 A. Do what?

18 Q. Have you paid the debts that are owed on this equity  
19 line? Have you -- have you paid the debts that are owed on  
20 this Bank of America equity line?

21 A. No.

22 MR. HERSHON: That's all, Your Honor.

23 THE COURT: Any redirect?

24 MR. ALFORD: No, sir.

25 THE COURT: All right. Thank you, sir. You may step

1 down, Mr. Irby.

2 MR. THOMAS IRBY: Thank you.

3 MR. ALFORD: Plaintiff rests, Your Honor.

4 THE COURT: Mr. Foreman, ladies and gentlemen, thank  
5 you for going a little later today. We'll take a break for  
6 the evening. If we could, be ready to start back at 9:00 in  
7 the morning.

8 I don't know if we have any legal matters to take care  
9 of, but we'll try to take care of them tonight if there are  
10 any, unless they arise overnight. But I hope I won't keep  
11 you waiting. We'll be ready to start promptly then.

12 Let me remind you again not to talk about the case with  
13 anyone, not to do any kind of independent research, check  
14 any archives or news reports. If there were to be something  
15 on the television tonight about this case or something in  
16 the newspaper, just refrain from watching it.

17 You can let your family record it or clip out a  
18 newspaper article and you can read all of that after the  
19 case is over. And I want to impress upon you the importance  
20 of your maintaining that fair and impartial -- fairness and  
21 impartiality that you've committed to these parties.

22 We'll be ready to start back with the Defense case at  
23 9:00 in the morning. Have a good evening, ladies and  
24 gentlemen. I'll see you back tomorrow. Everyone else,  
25 please remain seated.

1 (Whereupon the jury exited the courtroom at 5:39 pm)

2 MR. GAINES: Your Honor, would you mind if my client  
3 stood up?

4 THE COURT: No, sir, you can stand up, Mr. Irby. Feel  
5 free to. Let me make sure, Mr. Alford, that my records  
6 reflect what's in exhibits.

7 MR. ALFORD: I wanted to do that, too.

8 THE COURT: 1, and 2, 4, 5, 6, 7, 11, and 12. Is that  
9 your ---

10 MR. ALFORD: 1, 2, 4, 5, 6, 7, 10, 11, 12.

11 THE COURT: 10. That's right. 10 is in. I forgot  
12 about that. Is that what you gentlemen reflect, too?

13 MR. HERSHON: That's accurate.

14 MR. FLOYD: We agree, Your Honor.

15 THE COURT: In other words, 8, 9 and 3 are not in.

16 MR. ALFORD: Correct.

17 MR. HERSHON: Correct.

18 THE COURT: Okay.

19 MR. ALFORD: And then there should be 3 -- well, it  
20 doesn't matter --

21 THE COURT: There's 1 through 3 of Defendant Roy Irby.  
22 So all three of those. *Lis pendens* been offered yet or not?  
23 I think it was in by consent anyhow. So those three are in.  
24 All right. That takes care of that.

25 Any matters we need to take care of before we break for

1 the evening and then be ready to start the Defense cases  
2 tomorrow?

3 **MR. HERSHON:** Your Honor, Bank of America moves for a  
4 directed verdict under Rule 50(a). That's all claims by  
5 Thomas Irby, which right now is only a breach of contract  
6 claim. If the Court would like to move forward with  
7 arguments on that motion.

8 **THE COURT:** Yes, sir, be glad to hear from you, Mr.  
9 Hershon.

10 **MR. HERSHON:** Thank you, Your Honor. As Your Honor  
11 ruled under Rule 58 the Plaintiff has the burden of proof to  
12 carry at trial. If there's no question of facts and all we  
13 are left with are questions of law, that's for the Court to  
14 determine here. If you go ahead and determine a verdict,  
15 then there's no reason for this case to go to the jury. And  
16 here that is certainly the case.

17 As the Court is well aware, the elements for breach of  
18 contract are the existence of a contract, its breach and  
19 damages. I think everybody agrees and I don't think there's  
20 any dispute we have a contract here.

21 There is a dispute, I think, if there's been any breach  
22 of any kind -- and, you know, while we read quite a few  
23 provisions to the jury, interpretation of a contract is  
24 certainly an issue of law for the Court unless there's been  
25 some kind of reason, that something in this agreement isn't

1 clear. I think we have the testimony, the fact that the  
2 document itself was clear.

3 So in that respect, Your Honor, there's been nothing  
4 established to show that Bank of America has breached this  
5 agreement. It's been established about no written notice  
6 has been sent in. That written notice wasn't sent in by  
7 borrower. That line is blank. It's not present. There's  
8 no signature present.

9 I think even more significant, though, Your Honor, is  
10 the issue of damages. The one number where we've heard some  
11 kind of damages today was about a four hundred dollar  
12 payment that Thomas Irby made to Bank of America. It was  
13 admitted that he'd been reimbursed that amount. So he can't  
14 be claiming damages for that.

15 His other claim of damages appear to be incurring  
16 litigation costs, attorney's fees, car expenses, copying  
17 expenses, document expenses and his time. I presume that  
18 he's trying to charge for his time in some way. But none of  
19 those are compensable damages under a breach of contract.

20 Furthermore, there's been no evidentiary support for  
21 what any of those damages are. And he's asking -- we're  
22 here on economic damages. He's asking the jury to guess as  
23 to what those damages might be. Listening to the testimony,  
24 I have no idea whether it could be a monetary amount on any  
25 of those.

1 But even without that, he's not an attorney. There's  
2 not an ability for him to request attorney's fees. If there  
3 was, an attorney's fee provision would certainly be  
4 something for the Court to determine.

5 Your Honor, on those couple -- in his presentation of  
6 the case, there has not been something that establishes  
7 these three -- I'm sorry, the final two required steps to  
8 seek a breach of contract action.

9 **THE COURT:** You say the evidence showed that the four  
10 hundred dollars was reimbursed?

11 **MR. HERSHON:** Yes. Thomas stated, like -- he had  
12 stated that he'd paid four hundred. And my questioning of  
13 him, he'd said Roy had repaid that four hundred dollars.

14 **THE COURT:** Okay. That was not from the bank, but from  
15 the co-defendant?

16 **MR. HERSHON:** Correct.

17 **THE COURT:** All right. Mr. Alford, I'll be glad to  
18 hear from you on the motion.

19 **MR. ALFORD:** Yes, sir. Well, we obviously admit  
20 there's a contract. There's been no allegation of ambiguity  
21 being raised. There's no question of a threshold for the  
22 Court to address. The contract is what it is.

23 We're claiming that they were put on notice to close  
24 the account, and they didn't. And it's up to the jury to  
25 make that determination. I think that's a question of fact.

1           The damages, in essence, are uncontested. I mean, I  
2 put them up there. There was no cross examination as to  
3 them.

4           Obviously, we've got three types of breach of contract.  
5 You've got actual. He testified some of this was his out-  
6 of-pockets, investigating what was going on, making copies,  
7 time back and forth. Counsel certainly had opportunity to  
8 break down those costs if he wanted to. So there's really  
9 uncontested testimony on that one.

10          The jury can probably go from zero to forty and the  
11 Court can always look at some type of, you know, post-trial  
12 motion on them, but the damages are there. I think the core  
13 issue though is, the argument that there's no dispute here,  
14 I think clearly there's a dispute for the jury.

15          **THE COURT:** All right. If I accept your premise on  
16 that that there is a factual dispute to the contract, can  
17 you, Mr. Alford, perhaps overnight you can do some research,  
18 tell me how the things that Mr. Irby testified to as his  
19 damages are recoverable under South Carolina law. I'd be  
20 glad to get a case on that about his inconvenience and how  
21 he's going to get the jury -- how can I instruct the jury  
22 that they are to find as an element of damages your fees and  
23 copying costs?

24          I mean, if he prevailed, that would be a cost of  
25 litigation that could be assessed by a Court. It seems to



1 me that, you know, you're entitled to filing fees and those  
2 kind of things if you prevail. But how are those elements  
3 of damages?

4 You might know that answer now. You might not need to  
5 do the research. But I'm troubled by how -- I presume car  
6 expense means gas and -- I don't know if he's wanting fifty  
7 cents a mile, like the government paid. I don't know  
8 exactly.

9 And the burden of proof is on the Plaintiff to prove  
10 the damages, not on the Defense to amplify them. So I'm  
11 bothered by that. And I know y'all talked settlement and  
12 discussions and all, but I've got to instruct the jury on  
13 the law of South Carolina. I can instruct them the law of  
14 contract, and meeting of the minds, and all those things,  
15 and breach, but where's the proof of damages?

16 **MR. ALFORD:** I'll take the overnight offer, Your Honor.

17 **THE COURT:** Okay. And maybe you can talk to your  
18 client about that. But as I understand the law of contract  
19 and -- I'm not aware of any cases that would award those  
20 things that he -- four hundred dollars, that could be a  
21 dispute as to whether or not -- I don't know what Mr. Roy  
22 Irby said about paying that back. But if he acknowledged  
23 that that was paid back, then maybe there's four hundred  
24 dollars of damages that I can -- but the jury can't -- you  
25 know the general charge speculative and conjectural damages,

1 windfalls, that's not allowable under the law.

2 And I'm going to have to instruct them and go through  
3 all the contract. But then ultimately I've got to say that  
4 if you find that the bank breached this contract, then Mr.  
5 Thomas Irby will be entitled to damages. And what am I  
6 going to tell them that they can assess as damages from the  
7 evidence? I'll be glad to listen to anything you have for  
8 me on that in the morning.

9 **MR. ALFORD:** Thank you, Your Honor.

10 **THE COURT:** Again, you and your client -- and, you  
11 know, I know this has been a laborious task for so many of  
12 you. And, you know, even once the case starts there's still  
13 opportunities for folks, if they feel inclined, to resolve  
14 matters, they can do that.

15 That's why we're here is to have a day in court. And  
16 that's why juries are selected. They make the fact-finding.  
17 But sometimes it's -- anytime you can get matters resolved,  
18 it's always better. But we're well through the trial, and  
19 I'm confident we can finish tomorrow if y'all can't reach  
20 any resolution. Any other matters we need to take care of  
21 today?

22 **MR. GAINES:** Your Honor, we would also move for a  
23 directed verdict as well.

24 **THE COURT:** Well, it's the same issue on damages ---

25 **MR. GAINES:** It's the same issue on damages, but it's

1 more, you know, looking at the breach of contract and breach  
2 of contract with fraud. The contract between the Irbys is a  
3 little bit different.

4 The only contract I hear of was payment of purchase  
5 price for the real estate. And there's been testimony that  
6 that's been paid. So there really is no breach as to any  
7 other contractual agreement.

8 So I would say that based on breach of contract, breach  
9 of contract with frauds, that's not been satisfied. And ---

10 **THE COURT:** Let's go around the damage issue now, Mr.  
11 Alford. Tell me about the factual dispute on the contract  
12 between the ---

13 **MR. ALFORD:** Well, I think we had -- Mr. Gaines  
14 characterized it at the very beginning, partners going into  
15 this endeavor. The testimony clearly was that Roy Irby  
16 couldn't afford to get the loan to build a house, so Thomas,  
17 in essence, pledges his credit he can use against it.

18 And the testimony clearly is that come the August 2007  
19 closing, my client's expectation was this account's closed.  
20 Meantime, Roy's draining the account, not telling anybody.

21 I think that would be a -- and the testimony was by  
22 Gregg, and I think by Mr. Roy Irby was he was present at the  
23 closing. Had opportunity to review all the documents.

24 So he's draining the account to the tune of sixty  
25 thousand dollars to his detriment. And I think you could

1 now, you know, either some type of breach of trust or fraud  
2 issue for all ---

3 **THE COURT:** You believe there's been sufficient  
4 evidence of all the elements of fraud?

5 **MR. ALFORD:** He was told, in essence, you know, I  
6 promise to pay all of this back. At the closing, there was  
7 no disclosure or at least I understand that's disputed. No  
8 disclosure of material fact as to, by the way everybody, I'm  
9 draining this account, pulling the money out of it, and I'm  
10 going to keep doing that, when the intention and expectation  
11 of this party was the account's closed.

12 Now, that would be conduct by silence of a material  
13 fact that, you know, maybe he could have known after the  
14 fact, November 2010 when he gets deficiency letters. But  
15 certainly, that's something he could certainly rely upon,  
16 you know, if it was a joint venture. And I use it in the  
17 partnership because that's how Mr. Gaines opened up in his  
18 opening.

19 **THE COURT:** Well, again, I'll need to hear something  
20 about the damage issue there as well.

21 **MR. GAINES:** Your Honor, we just go back -- going back  
22 to that, you know, the agreement was for him to pay the  
23 bank. There's no indemnity agreement between the two Irbys  
24 as to who would pay if one of them couldn't or anything like  
25 that. So, again, we just don't think the elements that they

1 had any contractual agreement between the two of them has  
2 been satisfied.

3 **THE COURT:** Well, again, I've got to weigh all the  
4 evidence in the light most favorable to Mr. Thomas Irby at  
5 this stage. But, again, if he can't prove any damages or if  
6 he hasn't established any damages, then it's probably going  
7 to not matter anyhow. But I'll take that one under  
8 advisement as well.

9 **MR. HERSHON:** Your Honor, do you have a question about  
10 -- in terms of the evidence that was presented today and in  
11 terms of the expert that Bank of America -- do you have a  
12 ruling on that? I'm just thinking about our witness will be  
13 traveling ---

14 **THE COURT:** You don't need your -- I'm not going to  
15 allow it. I don't think we got into the need of an expert  
16 on real estate closings from what Mr. Jones said. So I'm  
17 not going to allow that testimony.

18 **MR. HERSHON:** Thank you, Your Honor.

19 **THE COURT:** Based on what I have so far.

20 **MR. HERSHON:** Thank you, Your Honor.

21 **THE COURT:** All right. I'll see you -- be ready to go  
22 at 9:00. Why don't y'all be here about ten til and let me  
23 hear your law, Mr. Alford. I'm anxious to see those cases.

24 **MR. ALFORD:** Yes, sir.

25 **THE COURT:** And maybe, you know, I'm not putting it all

1 on you. The other side can maybe perhaps do some research,  
2 too. I don't want just you to have a work night. They can  
3 be working as well.

4 (Whereupon Court was in recess at 5:54 pm)

1     **THURSDAY, MAY 30, 2013:**

2             (Whereupon court resumed at 9:00 am)

3             **THE COURT:** All right. Mr. Hershon, I guess you've had  
4 a chance to look over the damage brief that Mr. Alford  
5 submitted.

6             **MR. HERSHON:** Yes, Your Honor.

7             **THE COURT:** You believe it to be sound?

8             **MR. HERSHON:** Well, I believe there are a couple of  
9 points that make it sound, but for the most part, no, Your  
10 Honor.

11            **THE COURT:** All right. What ---

12            **MR. HERSHON:** Well, I think, you know, the citing to  
13 this Whisenant case, Whisenant versus James Island is  
14 certainly -- is certainly important. It mentions that the  
15 existence, causation, or amount of damages can [sic] be left  
16 to conjecture, guess or speculation.

17            We've really been left here, again, you know, as we  
18 discussed yesterday, without any numbers for the jury to  
19 really make a determination. This is not, you know, this is  
20 not something where some numbers about all these damages  
21 issues have been presented in some way where the jury can  
22 then make an estimation and make some kind of calculation.

23            I think more importantly, and what we're looking at in  
24 this argument section is not really direct loss. This stuff  
25 about the loss and value from the Chase sale from the

1 mortgage that was involved there, that Chase foreclosure.  
2 happened regardless of whether Bank of America was involved  
3 in any way.

4       **THE COURT:** How about that, Mr. Alford? I mean, how --  
5 isn't that a different issue, the foreclosure?

6       **MR. ALFORD:** No, ---

7       **THE COURT:** Bank of America didn't bring the  
8 foreclosure.

9       **MR. ALFORD:** No, he didn't. But the client testified  
10 that the value of the home was there, there was equity, but  
11 having the second mortgage, he wasn't ---

12       **THE COURT:** Why didn't he ---

13       **MR. ALFORD:** --- able to sell it.

14       **THE COURT:** Why didn't he catch Chase up and not have a  
15 foreclosure?

16       **MR. ALFORD:** Because he couldn't cover -- he said he  
17 couldn't do both mortgages. That was his testimony.

18       **THE COURT:** Well, but there was no heat from Bank of  
19 America at that time, was there?

20       **MR. ALFORD:** At that time ---

21       **THE COURT:** Foreclosure?

22       **MR. ALFORD:** At that time, there was a mortgage on the  
23 property.

24       **THE COURT:** But was there a foreclosure action by Bank  
25 of America?



1           **MR. ALFORD:** No. There was no foreclosure action.

2           **THE COURT:** Well, why didn't he take care of the Chase  
3 matter and not have those damages?

4           **MR. ALFORD:** Because it would have been a frustration.  
5 He couldn't cover both -- he's testified he couldn't satisfy  
6 both mortgages.

7           **THE COURT:** How is the UCC applicable here? Is this  
8 saleable goods?

9           **MR. ALFORD:** I just put that in as sort of a corollary  
10 ---

11           **THE COURT:** Oh, okay.

12           **MR. ALFORD:** --- breach of contract damages.

13           **THE COURT:** Oh, okay.

14           **MR. ALFORD:** No. It's just a, looking at that, sort of  
15 a flowing of the damage here.

16           **THE COURT:** All right. Is there any testimony in the  
17 record of the incidental damages?

18           **MR. ALFORD:** Well, he testified that his actual out-of-  
19 pockets, that was the forty thousand he put up.

20           **THE COURT:** But did he show mileage receipts for the  
21 gas? Did he show any receipts? Did he come up with how  
22 many meetings he had? I mean, even if he were -- even if he  
23 were allowed to claim attorney's fees, did he give us a bill  
24 for attorney's fees?

25           **MR. ALFORD:** No, he didn't.

1           **THE COURT:** Well ---

2           **MR. ALFORD:** But he testified to it. They had the  
3 opportunity to have challenged it.

4           **THE COURT:** Well, but the burden of proof is on the  
5 Plaintiff to prove his damages. How has he proved his  
6 damages in this case?

7           **MR. ALFORD:** I think two ways. One is the -- sort of  
8 the loss of the equity, the losing the property, not being  
9 able to cover it because of the Bank of America mortgage on  
10 it. That's what I would call an expectancy in there because  
11 he believed he only had one mortgage on the property. There  
12 was lots of equity that he lost in that home when he  
13 couldn't handle it because of the two mortgages on the  
14 property.

15           **THE COURT:** And the second way?

16           **MR. ALFORD:** And the second one would be his actual,  
17 just what he claims his out-of-pocket expenses would be.

18           **THE COURT:** But ---

19           **MR. ALFORD:** I understand you can't recover attorney  
20 fees, Your Honor.

21           **THE COURT:** Well, but the incidental expenses, I mean,  
22 is that what you're referring to as consequential damages as  
23 a result of the breach?

24           **MR. ALFORD:** Well, on one hand you could argue the loss  
25 of the equity would be a consequential -- because not having

1 the mortgage cleared, everybody would have known that Bank  
2 of America was holding a lien on the property. But an  
3 incidental would just flow through naturally in the course  
4 of the breach. And those would be, what I call, the out-of-  
5 pocket effort he made. Plus, he had the four hundred  
6 dollars he paid to Bank of America.

7 MR. HERSHON: Your Honor, may I reply?

8 THE COURT: Yes, sir.

9 MR. HERSHON: I think a lot of this also just goes back  
10 to the oldest contract ruling we know of is named Hadley  
11 versus Baxendale (phonetics), about this idea of damages  
12 that are not expected at the time the contract was entered  
13 into.

14 We're talking about there's a side deal going on that  
15 really creates some of these damages. It's not something  
16 that Bank of America had or knew of or contemplated. I  
17 think that's a lot of what we're talking about here.

18 Also, with the Chase foreclosure that Mr. Irby had the  
19 chance, you know, if he's concerned that there was a loss  
20 and that it wasn't sold for the proper value at the auction,  
21 he had the option -- he had the right to bid there.

22 And I think the Court's correct that it's something --  
23 the foreclosure's a complete separate issue. But I just  
24 wanted to raise that as something that Mr. Irby could have  
25 done.

1           **MR. GAINES:** Your Honor, I ---

2           **THE COURT:** Yes, sir, Mr. Gaines.

3           **MR. GAINES:** I would just also say I'm a little  
4 confused by the issue of there being any equity. The deed  
5 to the property at that time was completely in my client's  
6 name. So if there's any equity in the property, he would  
7 have been the beneficiary of that equity. The only issue  
8 that he would have is whether or not he had a judgment for  
9 the note, not any equity from the sale.

10          **MR. ALFORD:** I think his testimony was that second deed  
11 that gave the entire property over to Roy was not supposed  
12 to have been delivered. That was a conditional delivery.

13          **THE COURT:** But it was delivered?

14          **MR. ALFORD:** He testified it was only delivered if he  
15 died or if the mortgages were paid off.

16          **THE COURT:** Was it recorded?

17          **MR. ALFORD:** Eighteen months later, November of '08.

18          **THE COURT:** What was the date of it, November of?

19          **MR. ALFORD:** '08.

20          **THE COURT:** '08. Well before all of this started?

21          **MR. ALFORD:** That is correct.

22          **THE COURT:** So the property is not in your client's  
23 name?

24          **MR. ALFORD:** It was not in his name at the time of the  
25 foreclosure.

1       **THE COURT:** So how does he have equity in it?

2       **MR. ALFORD:** Because the argument would be that that  
3 deed should be set aside giving him half interest ---

4       **THE COURT:** Where's the pleadings to set aside the  
5 deed? Is that before us today?

6       **MR. ALFORD:** I don't think so. But I think he argued  
7 in his pleadings against Roy that there was -- there was in  
8 the pleadings, and I could look, there was issues about the  
9 deed.

10       **THE COURT:** Well, where's the proof that the deed  
11 should be set aside?

12       **MR. ALFORD:** Well, his testimony was that the delivery  
13 of it was conditional.

14       **THE COURT:** Well, he said he kept it in his box. But  
15 how did it get recorded then?

16       **MR. ALFORD:** He does not know.

17       **THE COURT:** Okay.

18       **MR. ALFORD:** His testimony was at the time of the  
19 notice of the deficiency, he started investigating the  
20 mortgages, besides finding out Bank of America still has a  
21 mortgage on the property, that the deed went over to Roy.

22       **THE COURT:** So his damages for this jury is that he has  
23 equity in a piece of property that he does not own, and that  
24 he has consequential damages of travel expenses and all that  
25 he said were worth forty thousand dollars without any

1 receipts or any other documents? That's what the jury is to  
2 decide the damages; is that right?

3 **MR. ALFORD:** That would be correct, Your Honor. But in  
4 terms of the legal deed, I think he could argue that he  
5 would have had an equitable interest in the property since  
6 he had signed for the notes against the property. He would  
7 be liable. He would be liable on the notes secured by that  
8 property. So I would argue that he would have an equitable  
9 ownership stake in the property.

10 **THE COURT:** Did he take a mortgage on the property?

11 **MR. ALFORD:** No. Because he was obligated on the note  
12 to Bank of America and to Chase. Even if Roy records the  
13 deed later, I would argue that he would have an equitable  
14 interest in protecting the property. He would have to be  
15 named on the foreclosure suit.

16 Your Honor, I realize this is thin. I'm not ---

17 **THE COURT:** Yes, sir, I ---

18 **MR. ALFORD:** I understand that's why we're arguing.

19 But in that context, I would like to renew, because I think  
20 I need to preserve the record, this issue about the  
21 negligence claim, because that may be more where the damage  
22 lies.

23 And if I could, when we argued yesterday -- and I  
24 understand the Court's reasoning on the negligence claim on  
25 the Economic Loss Rule. We now have testimony.

1           The issue of Bank of America, which should have closed  
2     the account, and under his expectations, satisfied the  
3     mortgage, that duty flows when they took Mr. Jones' letter  
4     and check, and the letter that is Plaintiff's 4, wherever,  
5     but that duty arose then. If you read the maximizer  
6     agreement and the mortgage, which is Plaintiff's 1 and 2,  
7     there's nothing in there in terms of saying when you pay us  
8     off, we'll satisfy the mortgage.

9           So my argument is, Bank of America's duty arose at the  
10    time it received the instructions and accepted the money for  
11    the payoff from Gregg Jones. And they knew it was a payoff  
12    because the other exhibit we introduced, they sent to Gregg  
13    Jones' office as a payoff information.

14           **THE COURT:** But didn't that contract -- I haven't --  
15    y'all have read this thing, as you said, ad nauseam. I've  
16    never even seen it. But from the testimony, didn't it say  
17    that if there's a balance still owed that it wouldn't be?

18           **MR. ALFORD:** I would argue -- that is correct, Your  
19    Honor. That is correct.

20           **THE COURT:** And he obviously knew that because he  
21    signed the contract?

22           **MR. ALFORD:** He signed the contract.

23           **THE COURT:** All right.

24           **MR. ALFORD:** I would argue that if the bank received  
25    that letter from Jones, and the last thing it says, if

1   there's still a balance or whatever, questions, contact me.  
2   Not only did they not contact the closing attorney, there's  
3   no piece of paper they can point to, and I asked Mr. Allred,  
4   in their file where they either wrote a letter to either of  
5   the Irbys or made a telephone call to clarify the  
6   instructions or to say, we can't close the account because  
7   we don't understand who's signing this.

8         I would argue that that duty flows from their receipt  
9   of Jones' letter and acceptance of that money. And I just  
10   want to preserve the record. I ---

11        **THE COURT:** Yes, sir. I understand.

12        **MR. ALFORD:** Now, because of that, that's why I think  
13   we're having trouble maybe with contract damages. Because  
14   maybe these damages flow more from the negligence of the  
15   bank. Because but for their conduct, his testimony is when  
16   the Chase matter came up, he could have done something, but  
17   having the Bank of America mortgage on top of everything, he  
18   didn't feel it was possible.

19        So I really think that's -- Your Honor, as I say, I  
20   really couldn't argue that one yesterday because we didn't  
21   have any facts, testimony before us. I wanted to renew that  
22   or move to reconsider before the Defendants have a or had  
23   put their case on, without prejudice to anyone. But I think  
24   that's where the damages truly lie is in the bank's conduct  
25   in ignoring that letter, because that's essentially what



1 they did.

2 **THE COURT:** So a third-party contacting the bank about  
3 an account creates a duty to their customer?

4 **MR. ALFORD:** Once they accepted that money with  
5 instructions. Now, if they'd sent that whole package back  
6 to Mr. Jones, we probably wouldn't be here. But they  
7 accepted the money.

8 And in the payment history, Plaintiff's 5, they're  
9 showing it as a regular payment. But clearly, the fax over  
10 -- the closing payoff instructions from Bank of America to  
11 Jones' office, their own Bank of America document  
12 contemplates it as a payoff.

13 **THE COURT:** But that was contrary to the contract.

14 **MR. ALFORD:** It might have been, but they still had  
15 instructions to close the account. They didn't do anything.

16 **THE COURT:** But then he said, close the account. But  
17 if it's not enough, let me know. Something like that?

18 **MR. ALFORD:** Correct. Because we're trying to pay this  
19 off. So I would argue that upon receipt of that letter and  
20 cashing that check, created a duty, sort of conditioning, if  
21 you will, acceptance of the check.

22 **THE COURT:** Well, I think the ruling I made is -- I'll  
23 -- you're protected on the record, certainly, Mr. Alford,  
24 but I believe that the ruling I made was proper based upon  
25 the contract as I understand the law that was submitted on

**ROY IRBY, II - DIRECT EXAMINATION BY MR. GAINES**

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1 the -- by the brief of Mr. Hershon. All right.

2 I agree it's thin, but I'll deny the motion at this  
3 time for a directed verdict on behalf of both of the  
4 Defendants. Are you ready to proceed, gentlemen?

5 **MR. ALFORD:** Yes, sir.

6 **MR. GAINES:** Yes, sir, Your Honor.

7 **THE COURT:** All right. How many more witnesses we got?

8 **MR. GAINES:** One.

9 **THE COURT:** One?

10 **MR. HERSHON:** One for us.

11 **THE COURT:** Okay. All right. Have our jury come in if  
12 they're ready.

13 (Whereupon the jury entered the courtroom at 9:16 am)

14 **THE COURT:** Good morning, ladies and gentlemen. We're  
15 now ready to proceed with the trial of the case. Mr.  
16 Gaines, you may call your first witness.

17 **MR. GAINES:** Thank you, Your Honor. We'd call Roy  
18 Irby.

19 **THE COURT:** Mr. Irby, if you'd just come around and  
20 have a seat. I'll remind you, you're still under oath, sir,  
21 from your testimony yesterday.

22 **MR. ROY IRBY:** Yes, sir.. Thank you, sir.

23 **Roy Irby, II, being**  
24 **previously duly sworn testified as follows:**

25 **Direct Examination by Mr. Gaines:**

1 Q. Roy, if you would, tell us where you live now.

2 A. I live in Salem with a friend. Salem, South Carolina.

3 203 Long Reach Road.

4 Q. And how long have you lived there?

5 A. It's probably been six months.

6 Q. All right. And you did previously live at 156 --

7 what's the name of the property address for this?

8 A. 156 Pearson Road. That was my home.

9 Q. Okay. All right. Why did it take so long to build  
10 this house?

11 A. Well, the funds was a problem. And it was such a major  
12 house. I mean, this was a large home. It had four  
13 bedrooms, three full baths, a master bedroom with all garden  
14 tubs. I mean, you walked in the front door and the living  
15 room had a twenty-four foot vaulted ceiling. It had seven  
16 pitch points in it, granite, hardwoods. I mean, this house  
17 was immaculate. I mean, it was three fireplaces. It was  
18 just ...

19 Q. All right. And earlier you heard testimony that it was  
20 appraised for two hundred and twenty thousand dollars; is  
21 that correct?

22 A. Yes, sir. That was actually before it was completed.  
23 And that was an appraisal that was saying that the house was  
24 actually not even complete. And that was based on about a  
25 sixty-five percent, seventy-five percent value. And that

1 was ...

2 Q. You'll admit that was a lot of house for someone with  
3 your income; wasn't it?

4 A. Yes, sir.

5 Q. Okay. Let's talk about the last loan. I believe we've  
6 described it as an M&T loan. Are you familiar with that?

7 A. Yes, sir.

8 Q. Okay. What documents -- were you at that closing?

9 A. Yes, sir.

10 Q. What documents were you given to review at that  
11 closing?

12 A. The only document that I was given was the -- to co-  
13 sign on the mortgage.

14 Q. Did you receive the settlement statement or the HUD  
15 statement?

16 A. No, sir.

17 Q. I'd like to show you the settlement statement now, if I  
18 may, for that closing. And if you would, read line 303 for  
19 us.

20 A. It says cash, there's a place to check from. And then  
21 there's a check -- a place to check to borrower. And it's  
22 marked an X there. And there's twenty-three thousand and  
23 nineteen dollars and seven cents.

24 Q. Were you the borrower on this loan?

25 A. No, sir. Thomas R. Irby was.

1 Q. Okay. Did you receive a check at this closing?

2 A. No, sir.

3 Q. At some point there were some deeds that were assigned  
4 to this property to you; is that correct?

5 A. Yes, sir.

6 Q. Okay. Can you tell the Court when you received those  
7 deeds?

8 A. I received those deeds at the March closing for Bank of  
9 America. Mr. Gregg Jones gave me those deeds. There were  
10 two deeds. One was half interest and one was full interest.  
11 And they were signed and executed at that closing.

12 Q. All right. Once you had -- at some point it became  
13 difficult for you to pay for this loan; is that correct?  
14 The two loans?

15 A. Yes, sir.

16 Q. And what steps did you take to overcome that?

17 A. Well, I was in a major accident. I was in the  
18 hospital. I went through twenty spinal surgeries. I went  
19 through three years of rehab. Just five days ago, just got  
20 out of surgery for a spinal injection. I'm going to have to  
21 have further surgery.

22 At the time, that was causing me financial hardship.  
23 And I tried everything possible to keep the payments made.  
24 And I actually had to do a living estate sale because I  
25 couldn't keep the payments up and pay the medical bills.

1 Q. Tell us what that is. What is a living estate sale?

2 A. What that is is basically you sell everything you own.

3 I was at a hospital. I was at a rehab center. They were  
4 telling me that you're possibly going to a nursing home for  
5 the rest of your life.

6 And so they sold everything down to my dishes, to  
7 whatever else, just to raise money to help me. And then  
8 they had an auction on the home.

9 Q. Okay.

10 A. And the auction proceeded. They had a bidder that bid  
11 and they were short on the funds. I was considering it and  
12 because I was going to have to take the money, all of the  
13 money that they had given me for my material things in life,  
14 the only things I had left. And fortunately, I got another  
15 contract offered to -- Bob Leonardo [sic] from Maggie  
16 Holloway and Green Door Realty.

17 Q. Do you recall how much that contract was for?

18 A. Yes, sir. It was a hundred and seventy-seven thousand  
19 dollars.

20 Q. And at that time, approximately how much did you owe?

21 A. I didn't owe but a hundred and sixty-four thousand  
22 dollars.

23 Q. Okay. All right. And were you able to close on that  
24 contract?

25 A. No, sir. I was in ICU. And they actually brought the

1 contract to me. I signed it. It got faxed back to the  
2 auction company. We planned to close, and I went for worse.  
3 Actually, my heart stopped. They had to revive me several  
4 times.

5 Q. So your health did cause some delays. Is there  
6 anything else that delayed that closing?

7 A. Well, after I signed the contract and sent it back --  
8 and it was a contingency contract. They had a home in  
9 Pelzer, South Carolina. And they had to sell their home.  
10 Well, they sold their home. And I didn't find this out  
11 until I got out of ICU.

12 Q. Let me stop you there. So you said they sold their  
13 home?

14 A. Yes, sir. They -- they ---

15 Q. Okay.

16 A. --- sold their home. So the contract was going to go  
17 through. I was in ICU, you know, unconscious and this kind  
18 of stuff. When I came to and we could execute and do  
19 everything, I found out that Thomas Irby and Gregg Jones had  
20 filed a *lis pendens* on my house and stopped the sale. I  
21 couldn't sell the home.

22 Q. As far as this -- you got a listing agreement related  
23 to this property?

24 A. Yes, sir. With Broadmoor and Maggie Holloway.

25 **MR. GAINES:** Your Honor, I'd like to offer -- put the

1 exhibit -- Defense 4.

2 THE COURT: Have you shown it to the other parties?

3 MR. ALFORD: Your Honor, may we approach?

4 THE COURT: Yes, sir.

5 (Whereupon a bench conference was held off the record  
6 in the presence of the jury, but out of their hearing)

7 MR. GAINES: So may I proceed, Your Honor, or do you  
8 want me ---

9 THE COURT: Have they had a chance to look that over?  
10 All right. That's exhibit 4 that's being offered into  
11 evidence?

12 MR. GAINES: Yes.

13 THE COURT: All right. Over objection of the  
14 Plaintiff, it's admitted into evidence.

15 (Whereupon Defendant Irby exhibit number 4 was marked  
16 and admitted into evidence)

17 Q. And I'm going to show you exhibit 4. Can you tell us  
18 what that document is?

19 A. This is an exclusive right to sell agreement.

20 Q. All right. And was that -- did you sign this  
21 agreement?

22 A. Yes, sir, I did. I signed it on 9/24/09.

23 Q. And who's this agreement with?

24 A. It's with Broadmoor Auction Company and Real Estate in  
25 Greenville, South Carolina. It's the Auction Company. They



1 go by two different names.

2 Q. Now, I want to take you -- so you're familiar with this  
3 document?

4 A. Yes, sir.

5 Q. Does this accurately reflect the agreement you had with  
6 the Auction Company?

7 A. Yes, sir.

8 **MR. GAINES:** Your Honor, we'd offer ---

9 **THE COURT:** It's been admitted, exhibit 4, over  
10 objection.

11 Q. All right. If you would, look at paragraph two.

12 A. Yes, sir.

13 Q. Is there a discussion as to how much you would sell the  
14 house for in that paragraph? It's the second sentence.

15 A. Yes. I gave her the, basically the right to negotiate  
16 the property and sell it.

17 Q. Just read that for us, if you would.

18 A. Okay. It says for ---

19 Q. The second sentence

20 A. The second. It's number 2?

21 Q. Yes.

22 A. For a period commencing September 24th, 2009 and ending  
23 at midnight on November the 30th, 2009, the owner hereby  
24 grants to the agent the sole and exclusive right to  
25 negotiate for the sale of real property identified as 156

1 Pearson Road, Belton, South Carolina, 29627, for the sale  
2 price as follows; a hundred and seventy-seven thousand  
3 dollars minus selling price, including a ten percent buyer's  
4 premium.

5 Q. Okay. Thank you. And were you able to get a contract  
6 to sell the property for a hundred and seventy-seven  
7 thousand?

8 A. Yes, sir. That was that contract from Ms. Andrea and  
9 that Green Door Realty and Broadmoor Auction Company.

10 MR. GAINES: Your Honor, we'd like to mark it as  
11 Defense exhibit 5.

12 (Whereupon Defendant Irby exhibit 5 was marked for  
13 identification)

14 Q. All right. Mr. Irby, I'm going to hand you this  
15 document.

16 A. Yes, sir.

17 Q. Does this look familiar to you?

18 A. Yes, sir.

19 Q. And can you tell us what this document is?

20 A. This is the actual contract for sale from Andrea and  
21 Dennis Shaw from Green Door Realty and Broadmoor Auction  
22 Company for the sale of a hundred and seventy-seven thousand  
23 dollars.

24 Q. Okay. And section five of that contract, tell us what  
25 that says.

1 A. That's the contingency part where they were trying to  
2 sell their house at 326 Woodville Road, Pelzer, South  
3 Carolina, 29669. And they had the right to sell on or  
4 before 11/30/09.

5 Q. And do you know if that contingency was ever satisfied?

6 A. Yes, sir. They sold their home. Basically, they had a  
7 contract on their home and they were hoping that it would  
8 close. And it did close. And it closed in December.

9 Q. But you were never able to complete the sale from this  
10 contract; is that correct?

11 A. No, sir, I wasn't.

12 Q. Is there anything else that you tried to do to prevent  
13 this foreclosure?

14 A. Yes, sir.

15 Q. Okay. What else?

16 A. Well, I thought -- I thought I had it sold there. I  
17 approached -- there's a program -- I'm not sure of the name,  
18 but it was Greenville County, it was through the federal  
19 program, grant program. And I tried to refinance the home  
20 so that I could catch up the payments and then try to resell  
21 it again and help keep my credit good, satisfy Bank of  
22 America and Chase. So I applied for that loan with them.

23 Q. If you'd been able to sell this property, what's your  
24 understanding of what would have happened?

25 A. Both of the banks would have been paid. Everything

1     would have been satisfied. Everything would have been paid  
2     and everything would have gone away. And I would have been  
3     -- my credit would have been clean, and Thomas' would have  
4     been clean. But he stopped the sale with the *lis pendens*.  
5     It stopped me from refinancing, doing anything with the  
6     home.

7     Q.   Please answer any questions that the parties may have.

8     A.   All right. Thank you, sir.

9           **THE COURT:** Anything from the bank, first?

10          **MR. HERSHON:** No, Your Honor.

11          **THE COURT:** All right. Mr. Alford, you may cross  
12     examine the witness.

13     **Cross Examination by Mr. Alford:**

14     Q.   Do you recognize these two documents?

15     A.   Yes, sir.

16     Q.   What are they?

17     A.   It says the answers ---

18          **MR. GAINES:** Your Honor, I'd like to be able to see the  
19     documents.

20          **MR. ALFORD:** Oh, okay. I just wanted to know what they  
21     were so he could describe them.

22           (Pause)

23     Q.   Do you recognize these documents, sir?

24     A.   Yes, sir.

25     Q.   And just without going into details of them, can you

1 tell us what they are?

2 A. Well, I'm not a legal expert, but they're answers that

3 I was required to make concerning the foreclosure.

4 Q. All right. So you prepared those documents?

5 A. Yes, sir, alone.

6 Q. Now, your testimony has been that you were selling the

7 house in November of '09; is that correct?

8 A. The actual contract for the hundred and seventy-seven

9 thousand dollars was, yes, November of '09.

10 Q. Okay. And did you -- is it your testimony that you had

11 complete ownership of the property at that time to make that

12 sale?

13 A. Yes, sir.

14 Q. And how did you get complete ownership of the property?

15 A. By the two deeds that Mr. Jones had given me and the

16 recording of those deeds.

17 Q. And when did the contract for sale occur, the date on

18 that?

19 A. The date was 11/9/09.

20 Q. Okay. And it was supposed to close when?

21 A. It was supposed to close in December sometime.

22 Q. And it says 11/30/09 on that?

23 A. Yes, sir.

24 Q. Okay. When was this *lis pendens* filed?

25 A. The *lis pendens* was filed in January ---

1           **MR. GAINES:** Your Honor, I object. I think he's  
2   misstated the contract.

3           **THE COURT:** As far as the date, 11/30?

4           **MR. GAINES:** As far as the dates are concerned, I don't  
5   believe he's -- that's accurate.

6   Q.   Would you read that line that's checked?

7   A.   It says, which is under contract and due to close on or  
8   before 11/30/09.

9   Q.   Thank you.

10          **MR. GAINES:** Your Honor, again, that's not this house.  
11   That's the contingency house.

12   Q.   Oh, you were going to buy this house. I apologize.

13   A.   No, sir.

14   Q.   No?

15   A.   No, sir. They had a -- that was their contract to me  
16   to buy my home.

17   Q.   The 156 Pearson Road?

18   A.   Yes, sir. They had a contingency based upon the fact  
19   that their house would sell and close, and it did. And so  
20   we were going to proceed with the contract and sell it and  
21   pay the banks.

22   Q.   And when was this supposed to close?

23   A.   Well, we didn't set a closing date. As I told earlier,  
24   I was in ICU at Centennial Medical Center in Nashville,  
25   Tennessee and was unconscious and ---

1 Q. Did their home sell by 11/30/09?

2 A. They've sold their home.

3 Q. Do you know when?

4 A. I'm not sure exactly the date, but I know it -- I know  
5 it closed and they sold the property.

6 Q. But you don't know when?

7 A. All I know is that they sold the property and they were  
8 ready to close.

9 Q. And your testimony is that you had the right to sell  
10 the house because the deed was in your name?

11 A. Yes, sir.

12 Q. Okay. And the deed you're referring to are these two  
13 deeds that have been introduced, I think as Roy Irby 1 and  
14 2?

15 A. Yes, sir. Those were the original deeds that Mr. Gregg  
16 Jones performed at the Bank of America closing. He recorded  
17 one of them. He gave me the other one. I recorded the  
18 other one because -- well, when I was in the hospital. They  
19 told me I was fixing to, you know, possibly die or end up in  
20 a nursing home. And I didn't want to cause my uncle  
21 problems, and I had no choice. I had to sell everything I  
22 owned. I had to raise the money.

23 Q. Well, if you didn't want to cause any problems why were  
24 you trying to record that deed?

25 A. Well, that was the agreement that me and him had. If

1 anything happened to either one of us, you know, I had to  
2 satisfy the mortgages. That was my responsibility.

3 Q. But it wasn't, was it, that you could record the deed?

4 A. Yes, sir. He -- he gave it to me with that  
5 stipulation. If he died or if something happened to me,  
6 that I could record the deeds, record that deed and that  
7 would give me the right to sell it.

8 Q. If something happened to you ---

9 A. Yes, sir.

10 Q. --- you didn't come out of the hospital, how does it  
11 help your uncle if you record the deed, put all the property  
12 in your name?

13 A. I had to do that to list the property and sell it.

14 Q. He could have signed the listing agreement with you?

15 A. He -- he -- he wouldn't talk to me.

16 Q. Did you ...

17 A. He never even came to see me in the hospital.

18 Q. And when did you go in the hospital?

19 A. That started -- this is difficult for me to talk about.

20 And I didn't want ---

21 Q. Just give me a date, sir.

22 A. I had the car accident -- I was in Thomas' vehicle.  
23 And it happened in April of '09. And I went immediately to  
24 the doctor. They proceeded to put me in the hospital, run  
25 tests. And I had to be transferred to Baptist Hospital in



1 Nashville, Tennessee. And that was in May of '09, and they  
2 started to do surgeries.

3 Q. Now, when you listed this property for a hundred and  
4 seventy-seven thousand, what was the payoff of the first  
5 mortgage to Chase and what was the amount owed to Bank of  
6 America at that time?

7 A. Tom had a loan for ninety-five thousand that I had co-  
8 signed. And he also had the home equity line with Bank of  
9 America for sixty-nine thousand dollars that I co-signed.

10 Q. And if I add those two together, sixty-nine and ninety-  
11 five, I get how much?

12 A. I don't have a calculator in front of me, but I think  
13 it's a hundred and sixty-four.

14 Q. A hundred and sixty-four thousand?

15 A. Yes, sir.

16 Q. Okay. And how much was everybody getting out of this  
17 closing?

18 A. Well, there was going to be a hundred and seventy-seven  
19 thousand dollars. The only thing that I was required to pay  
20 was a commission to the real estate person.

21 Q. And how much was the commission?

22 A. Ten percent.

23 Q. What's ten percent of one seventy-seven?

24 A. Seventeen thousand dollars.

25 Q. And seven hundred?

1 A. No, seventeen thousand dollars. Well, I guess

2 seventeen seven, yes, sir.

3 Q. So if I take a hundred and seventy-seven thousand and

4 subtract seventeen seven, I'm left with, by my math, a

5 hundred and fifty-nine thousand, three hundred?

6 A. Yes, sir.

7 Q. How were you going to pay off a hundred and sixty-four

8 thousand dollars on both mortgages?

9 A. When they had the living estate, they had sent me the

10 check, and I told them that I would pay out of the living

11 estate the difference and the commission of five thousand

12 dollars or whatever that amount was. And it would have

13 satisfied everything.

14 Q. And, I'm sorry. Tell me one more time the date of your

15 car accident.

16 A. April '09.

17 Q. Okay. Prior to April of '09, had you gone in the

18 hospital?

19 A. That was the day that Thomas had taken me to the spinal

20 surgery center for injections.

21 Q. Okay. Prior to April of 2009, December of 2008, how

22 was your health?

23 A. I -- I had lower back problems.

24 Q. Okay. You weren't ---

25 A. I mean, I've had back problems my whole life, but

1 nothing like this. I mean ...

2 Q. Okay. You weren't -- nobody had diagnosed you with an  
3 illness or an accident, possibly fatal at that time, in  
4 December of 2008?

5 A. No. No. Fatal, no.

6 Q. Okay. This is the deed, Irby's exhibit 2, that gave  
7 you all the remaining interest in the property that you  
8 recorded. What is the date that is recorded in the Office  
9 of Deeds for Greenville County?

10 A. That was November the 13th, 2008.

11 Q. All right. Now, 2008 not great now, you've got aches  
12 and pains, but there was no imminent danger that you were  
13 going to lose your life, was there?

14 A. No.

15 Q. I'm sorry. I didn't hear that?

16 A. I said, no, sir. I may have my -- I may have the date  
17 of the accident actually wrong.

18 Q. Okay.

19 A. Because the accident was actually in 2008. So, yeah,  
20 that's right.

21 MR. ALFORD: No further questions for the witness, Your  
22 Honor.

23 THE COURT: Any redirect?

24 MR. GAINES: No, Your Honor.

25 THE COURT: All right. Thank you. You can step down.

1           **MR. ROY IRBY:** Thank you, sir.

2           **MR. ALFORD:** Your Honor, before Mr. Irby leaves, may I  
3 move just to reopen for one question?

4           **THE COURT:** Yes, sir. You can keep standing. One  
5 question?

6           **MR. ALFORD:** Yes, sir.

7           (Pause)

8           **MR. ALFORD:** No, that's okay.

9           **THE COURT:** All right. Thank you, sir. You can step  
10 down.

11          **MR. ROY IRBY:** Thank you, sir.

12          **MR. ALFORD:** Asked and answered.

13          **THE COURT:** All right. Mr. Gaines, you may call your  
14 next witness.

15          **MR. GAINES:** We don't have any further witnesses, Your  
16 Honor.

17          **THE COURT:** All right. Mr. Hershon, any witnesses that  
18 the bank wishes to put up?

19          **MR. HERSHON:** Yes, Your Honor. Mr. Grant Allred.

20          **THE COURT:** I remind you again, sir, you're under oath  
21 from yesterday.

22          **MR. ALLRED:** Yes, sir, Your Honor.

23          **MR. HERSHON:** If you'll give me just a minute, I want  
24 to get some of these exhibits in order for ---

25          **THE COURT:** All right, sir.

1 (Pause)

2 Thomas Grant Allred,

3 being previously duly sworn testified as follows:

4 **Direct Examination by Mr. Hershon:**

5 Q. Grant, how are you doing this morning?

6 A. I'm doing good. How are you?

7 Q. I'm good.

8 A. Good.

9 Q. Enjoying your stay in Greenville?

10 A. I actually really like this city a lot. It's really  
11 cool. It's got a really neat downtown district.

12 Q. Could you introduce yourself for our jury. I know you  
13 talked a little bit about your background yesterday, but  
14 where you're from and a little information?

15 A. Sure. My name's Thomas Grant Allred. I go by my  
16 middle name just to confuse people. I'm from Greensboro,  
17 North Carolina, which is about three hours away. So I'm a  
18 country boy, still.

19 I've got a six-year-old little boy. I've been working  
20 at Bank of America for about seven years. I started off as  
21 an associate and kind of worked my way up. So it's kind of  
22 turned into a career for me. I really like working there.

23 Q. I talked some yesterday about things that have been  
24 going on in the bank industry. Does Bank of America  
25 generally want to see a customer or borrowers go in default?

1     A.    Oh, no, not at all.  I mean, you know, our intent is  
2     for the customer to take out a loan and repay it as agreed.  
3     Once the customer goes into default, several things happen  
4     to the bank.  For example, when a customer goes into default  
5     or it charges-off, like this particular line of credit did,  
6     the bank is required to write that debt off or charge it off  
7     is what the banking term is for it.

8           And basically what that means, not to get too intricate  
9     with it, but the bank is required to write that asset off as  
10    a bad debt.  So we can no longer use it as, like, collateral  
11    or assets on our good balance sheet.

12          The other piece to it is obviously if the account goes  
13    into foreclosure, if there's equity in the property from a  
14    second lien position, you know, obviously the bank is not in  
15    the habit of being a homeowner.  That's not what they want  
16    to do.

17          There's a lot of expenses that are involved with owning  
18    a home, especially for a bank.  With you and me, we can go  
19    out and mow our own grass or do whatever maintenance we need  
20    on our house.  But from a bank's perspective, we have to pay  
21    quite a bit of money to have somebody go out and do that for  
22    us.

23        Q.    Sure.  And were there any things that happened in this  
24    particular case with the Irbys, where the bank looked at  
25    something to -- so that we wouldn't have to be here today?

1 A. Well, I mean, you know, I think we brought up the fact  
2 that, you know, the bank accepted some title insurance  
3 money. And that was a business decision that was made,  
4 simply because, you know, to be quite frank, there was no  
5 recoverability from a business perspective from either one  
6 of the Irbys.

7 Q. Did the bank look at any or did either of the Irbys  
8 request short sales or work-outs or anything like of that  
9 nature?

10 A. There were no work-out modifications or anything. I  
11 think at one point Thomas Irby had requested a short sale  
12 through the bank that they basically were required to send  
13 in a bunch of documentation, a packet of information. And I  
14 believe the particular one that Thomas sent in was declined  
15 because it was incompleated. It didn't have the full package  
16 along with it.

17 Q. He didn't finish that package?

18 A. He did not.

19 Q. Let's talk -- you've referred to HELOC. Could you  
20 explain what that is for the ladies and gentlemen of the  
21 jury?

22 A. Sure. I'm sorry that I keep calling it that. It's a  
23 home equity line of credit. And the way I like to describe  
24 it for people is it's like a credit card that's secured by  
25 property. So, you know, the same thing with a credit card,

1     you can borrow up to, we'll say in this case, sixty-nine  
2     thousand dollars. You can borrow it. You can pay it back.  
3     You can borrow it back up. So it's a lot like a credit  
4     card.

5         Whereas, a mortgage, just a plain mortgage, is you get  
6     a hundred thousand dollars to buy your house, and they give  
7     you all of that in one lump-sum. And then you pay it back  
8     over thirty years or however long.

9     Q.   And I know we talked a little bit about it yesterday,  
10    but just, you know, from the bank and from you as working  
11    with the bank, how does a borrower access that equity line?

12    A.   I mean, there's numerous ways. The ATM debit cards are  
13    access cards, is what we call them. Checks, so they're  
14    given checks with their names on it and, you know, a certain  
15    account number that ties it back to that line of credit.  
16    They can do like on-line banking transfers. They can attach  
17    it to their checking or savings account. And they can --  
18    they could go into a branch and have a check actually issued  
19    to them.

20    Q.   And are all these choices, are these at the selection  
21    of the borrower?

22    A.   They are.

23    Q.   Now, you've got a situation here where Roy and Thomas  
24    Irby are on an equity line. What does that mean to be --  
25    for these two to be co-borrowers?



1 A. It just basically means that they're both jointly and  
2 severely responsible, which seems like a funny way of saying  
3 that. You know, no matter who borrows the money, they're  
4 both responsible to pay it back. They've both joined-in  
5 their credit. They're almost like one borrower to the bank.

6 You know, obviously, there's a primary and a co-maker,  
7 is what we generally call it. Thomas was the primary on  
8 this particular loan, and Roy was the co-maker or co-signer.

9 Q. And let's look at -- I know we've already -- I'm sure  
10 the ladies and gentlemen of the jury, they've seen enough of  
11 this, but let's -- to be able to discuss it with the jury,  
12 give them another chance to look at this equity line  
13 agreement. I'm handing you what's been marked as  
14 Plaintiff's exhibit 1. Do you recognize that document?

15 A. I do.

16 Q. What is that?

17 A. This is the home equity maximizer agreement or you  
18 generally refer to it as the promissory note, which is --  
19 people are more familiar with.

20 Q. And is there really any, I mean, are those two terms  
21 equivalent, promissory note and equity line?

22 A. Yeah. I mean, they're -- it's basically the loan  
23 agreement. This is the agreement. And I think a lot of  
24 people get confused because, you know, with these types of  
25 loans you have a mortgage and you have the loan, the

1 promissory note or loan agreement. But basically this is  
2 the agreement where Thomas and Roy Irby said they were going  
3 to borrow this amount of money, and they were going to pay  
4 it back to Bank of America.

5 Q. And you had mentioned this. We've got the borrower's  
6 name and address at the top. And Thomas Irby is listed  
7 first?

8 A. Uh-huh (affirmative).

9 Q. What does that mean to be the primary on the ---

10 A. It's the first person on the loan. Generally speaking,  
11 the primary on the loan is the one who has the better  
12 credit, the one that qualifies better for the actual loan.

13 A lot of, you know, like, for example, when I went to  
14 college, my mom was the primary on my loan because I didn't  
15 have any credit. So somebody had to back me up. Luckily,  
16 she was there. But she had the credit. It's just basically  
17 the person that is more qualified for the loan.

18 Q. And she knew, you know, it was on her if you mess  
19 something up with that loan?

20 A. Well, I'm sure I would have gotten mine at the end.  
21 But, yes, she knew.

22 Q. And looking at the paragraph two that's in here. Okay.  
23 We've got this -- that's where there's this promise to pay  
24 you've talked about; correct?

25 A. Yes, sir.

1 Q. And what is it -- there's a question -- there's a line  
2 that starts, third line down, this means -- can you read  
3 that, that sentence?

4 A. Sure. It says this means we can require any borrower  
5 to pay all amounts due under this agreement, including  
6 credit advances made to any borrower.

7 Q. And what does that mean in terms of where the bank --  
8 if there hasn't been a payment, where they can recover from  
9 Thomas or Roy or either?

10 A. Basically, that's just saying that the bank doesn't --  
11 they don't -- not to sound insensitive, but they don't care  
12 who borrowed the money. We're holding you both responsible  
13 for repayment. You both signed together, jointly that  
14 you're both responsible. And we're just holding you to the  
15 contract, the agreement that you signed, that you're both  
16 responsible for repayment.

17 Q. If you wouldn't mind turning to page six of the  
18 agreement. That's, again, another issue that was brought up  
19 yesterday.

20 There's this paragraph twenty about suspension or  
21 termination of the account. And in there it discusses that  
22 each of you have the right upon proper written notice to us  
23 to suspend the privileges of obtaining advances. What does  
24 -- what does this document mean by upon proper written  
25 notice?

1 A. It means that you fill out the required documentation  
2 that the bank provides you. And I think it's one of the  
3 exhibits. We have a form that we send to the customer when  
4 they want to pay off their loan, that we require to be  
5 filled out. It's not only required internally, but it's  
6 actually our regulators require us to have that form filled  
7 out exactly to the "T" to protect the borrowers, actually.

8 Q. And why is that? How does that protect the borrowers?

9 A. Well, for several reasons. Number one, I mean, if you  
10 had a line of credit that you had open, you wouldn't want  
11 Joe Blow off the street to be able to go in and number --  
12 well, access it. But furthermore, you wouldn't want them to  
13 have the right to close it or to make decisions on it.

14 But number two, it also affects your credit. There's a  
15 law that the banks are required to adhere to. It's called  
16 the FCRA or Fair Credit Reporting Act. And basically, you  
17 know, there's intricacies in that particular law. But if  
18 the bank closes a line of credit or anything, a loan, a  
19 credit card or anything like that when it's not paid off, it  
20 can actually hurt your credit score.

21 Even if it's paid off, you know, down to a zero balance  
22 and the bank lets someone close that account that's not  
23 authorized to close it, it still hurts you because your  
24 credit score is affected by the amount of debt you have  
25 versus the amount of credit you have available. It's debt

1 to credit ratio.

2 Q. And another thing that it says here is about -- and  
3 you've already discussed this a little bit, you must notify  
4 us in writing. How important is that writing? And can that  
5 ever be -- can there ever be an exception to that rule, that  
6 a writing must be sent?

7 A. No. It's always required. And it's always required on  
8 our form, which is why I sent -- whenever we send like a  
9 payoff statement.

10 You know, I think we discussed yesterday that just  
11 because a customer requests a payoff statement doesn't  
12 necessarily mean they're paying it off. There's a number of  
13 reasons that, you know, the bank normally doesn't even know  
14 about, why they would request a payoff statement. But when  
15 that payoff statement is requested, they also send out that  
16 form for if their intention is to pay off the loan, it has  
17 to be filled out.

18 Q. But the bank normally has no idea or has no reason to  
19 have an idea of what people may be requesting the payoff  
20 for?

21 A. No. I mean, you take this case, for example. I mean,  
22 you know, if you really look at the history of what  
23 happened, common sense would tell me that the intent was not  
24 to pay off the loan. They immediately -- after those funds  
25 were sent in or prior to those funds even being sent in,

1 they started -- they drew out more money. And then  
2 subsequently, a day or two later, drew out more money.

3 So me, even if I weren't, you know, familiar with  
4 banking or familiar with how it works, I would say, well,  
5 the intent here wasn't to pay it off because they're drawing  
6 from the line over and over again.

7 Q. And continued to do so after that -- the date we talked  
8 about August of 2007?

9 A. All the way up to the max credit limit.

10 Q. We talked some about the access devices. Why is it  
11 important that those access devices be returned to the bank?

12 A. The access devices are really important for the bank to  
13 get returned. Because like, for example, those ATM cards  
14 that we provide, that's not a card that's actually sponsored  
15 by Bank of America. Bank of America has agreements with,  
16 say, VISA, MasterCard, American Express, Discover, whoever,  
17 who's an actual card provider.

18 So when a customer goes in they can, you know, up --  
19 depending on how VISA or MasterCard or whoever allows, they  
20 could go in and use that access card and draw out money even  
21 though we may have closed the account.

22 Now, it doesn't happen often. There are certainly  
23 things in place to prevent that from happening. But in the  
24 essence of making sure that a customer's not making  
25 unauthorized transactions, pulling more money off than

1 they're authorized to do, that's why we require those back.

2 Same thing with a check. I mean, they could go in and  
3 bounce a check to someone as well, write a check for ten  
4 thousand dollars when they have no money left in their  
5 account or when their account's been closed. They can write  
6 a check.

7 It's the same thing as a bounced check to the bank.  
8 You know, we get fees charged back to us from whatever bank  
9 processes that particular bounced check. So, you know, out  
10 of an abundance of caution, along with, you know, I think,  
11 what I would call common sense as well, we ask for all of  
12 those devices to be returned to us so we don't get in a  
13 situation like that.

14 Q. And in terms of this particular line that we're here  
15 talking about today, you're familiar with the -- some of the  
16 history of that loan, are you not?

17 A. Yes, sir.

18 Q. I hand to you which was marked, a document that was  
19 marked as Plaintiff's exhibit 12. Do you recognize that  
20 document?

21 A. I do. It's the payoff statement that was sent. It  
22 shows a total payoff amount of nine thousand, nine hundred  
23 and ninety-eight dollars and ninety-two cents.

24 Q. Okay. Take a step back for me. How is that document  
25 or how does that document get processed? How does it

1 eventually get to the borrower?

2 A. They can, you know, they can call in and request it or  
3 they can send in a letter requesting the payoff amount as of  
4 a certain date, and we send it over to them. I mean, it  
5 could be -- we could respond in writing. We could fax it to  
6 them. However, really, they requested.

7 Q. And this document has a date on it under payoff  
8 statement. Do you see that?

9 A. I do.

10 Q. What is that date on there?

11 A. 8/24/07.

12 Q. What's the significance of that date?

13 A. That's the payoff good-through date.

14 Q. And is that assuming that no other funds have been  
15 withdrawn on this account?

16 A. Yes, sir.

17 Q. Does it update basically what the interest amounts are  
18 that are due?

19 A. A payoff statement -- say I want a payoff statement for  
20 June the 15th, and I request it from my bank. Well, they're  
21 going to send me a payoff statement that shows everything  
22 that's going to -- like the interest, fees, everything  
23 that's going to accrue through June the 15th. And that's  
24 what happened here. Now, obviously, that assumes that I'm  
25 not going to go and draw more money off of it.



1 Q. Sure.

2 MR. HERSHON: I don't believe the jury has had a chance  
3 to look at this. I'm going to publish it to the jury.

4 Q. Now, there's a second page or a second document that's  
5 sent along with that payoff; correct?

6 A. Uh-huh (affirmative).

7 Q. And what is that document?

8 A. That document is the document I was referring to  
9 earlier, which is what the bank, along with our regulators,  
10 the Office of the Comptroller of Currency require to be  
11 filled out for us to close the line of credit.

12 Q. And I'm going to hand to you what was marked as  
13 Plaintiff's exhibit 4. It's page two -- is that the  
14 document that you're talking about?

15 A. Yes, sir, it is.

16 Q. Now, in this transaction, looking through -- there's a  
17 first page of that document as well and the second page. Do  
18 you recognize that first page as well?

19 A. I do.

20 Q. And you agree that this letter dated August 22nd, 2007  
21 was received by the bank; correct?

22 A. Yes. It was received by the bank.

23 Q. And, I guess, there was one other item that came with  
24 that. It was a check; right?

25 A. Correct.

1 Q. And we were talking about something about it yesterday,  
2 but there's no dispute that the bank received that check;  
3 correct?

4 A. That's correct.

5 Q. And that amount was applied to this loan?

6 A. That's correct. Which, I mean, we're required to do  
7 that. Anytime someone sends in a payment for a mortgage,  
8 you have to post it. I mean, otherwise, you're going to put  
9 somebody's mortgage past due. So it's not like we can just  
10 say, oh, we're not accepting this payment.

11 The only time that we're allowed to return a payment on  
12 a mortgage-backed product is if the account is in a  
13 foreclosure process and they have to go through a  
14 reinstatement where they basically have to pay all the  
15 amounts past due. That was not the case at this time for  
16 this particular account.

17 Q. All right. So this exhibit 4, we were talking about  
18 proper written notice. Is this proper written notice to the  
19 bank to close and block an equity line account?

20 A. Most certainly not.

21 Q. And why not?

22 A. Because this is from a third party. I don't know if  
23 it, I mean, it says that he's an attorney. But, you know,  
24 at the end of the day, the bank requires one of the Irbys to  
25 sign the document that we provide, which is page two, to say

1 close this line of credit. We can't just accept, you know,  
2 anyone off the street saying, hey, you know, close this  
3 account.

4 We never received a power of attorney for Gregg Jones.  
5 So as far as we know, he's not either of our customers'  
6 attorney. And basically, he just randomly sent in this  
7 letter saying, closing this account under his signature, his  
8 authorization, which is certainly not something that we did  
9 then and not something we do now.

10 Q. Now, there is a paragraph there I do want to raise to  
11 you. There's a part above this little, this signature area  
12 that says short payoffs. If a payoff is received for less  
13 than the amount due, Bank of America will attempt to contact  
14 the remitter to collect the remaining balance. And I think  
15 as we talked about it yesterday, there was no contact from  
16 Bank of America.

17 A. Uh-huh (affirmative).

18 Q. What's the reason for that provision? Does that have  
19 to do with the cover letter or what happened? Why would the  
20 bank not contact anyone?

21 A. Well, this person's not authorized on the account.  
22 Gregg Jones is an unauthorized third-party. In the bank's  
23 eyes, I mean, we could get into a whole lot of trouble by  
24 reaching out to Mr. Jones. Lawsuits.

25 Q. And is there a signature on any of these pages anywhere

1 to show you that Thomas or Roy Irby attempted to make any  
2 payment on this account?

3 A. No, sir. And I would say that, you know, it's quite --  
4 we quite frequently get payments from other sources than  
5 just a payoff. You know, as far as anyone's concerned, you  
6 know, there may be legal matters going on, inter-family  
7 matters going on, whatever the case may be. We receive  
8 payments from all types of sources.

9 Our requirement, though, is that if we're able to  
10 identify the account and post the funds, that's what we do.  
11 You're dealing with somebody's home. You know, you don't  
12 want to send back their payment and it, you know, it cause a  
13 hardship on them.

14 Q. Is there anything that we've looked at here today --  
15 let me rephrase that. Did the bank follow its practices  
16 related to equity line with how this account remained open  
17 in August of 2007?

18 A. Yes, sir, it most certainly did, to the "T". I would  
19 go on to say that this practice is currently still in place.  
20 If the same thing happened today, it would be handled the  
21 exact same way for the bank because that's what our  
22 regulators tell us to do. That's what our internal  
23 practices tell us to do. It would be handled exactly the  
24 same way as it was today.

25 Q. And ---

1 A. Or in regards to this case, I should say, I suppose.

2 Q. And did the bank -- did Bank of America have any  
3 knowledge whatsoever of -- we've heard some stuff about half  
4 deeds and deed transfers. Was the bank aware of any of that  
5 during this time in 2007?

6 A. No, sir.

7 Q. Does something about that show up anywhere on this  
8 equity line agreement?

9 A. No, sir.

10 Q. What happens -- so was there really any change in the  
11 status of this account in August of 2007?

12 A. Not from the bank's perspective. I mean, it paid the  
13 balance of the account down, but not off. There was still  
14 about ten thousand, seven hundred dollars left because of  
15 the advances that had been made. So as far as changing  
16 status, no. It was just still an open, active line of  
17 credit that was being borrowed from and paid back.

18 Q. So did this balance, the application of this check or  
19 anytime thereafter, did it ever get down to zero?

20 A. No, sir.

21 Q. In fact, there's still a balance today?

22 A. Yes, sir.

23 Q. I show you Plaintiff's exhibit 5. Do you recognize  
24 that document?

25 A. Yes, sir.

1 Q. What is it?

2 A. This is the loan history. So it's the cover letter  
3 that's basically from Bank of America saying here's the  
4 information you requested, followed by the payment history  
5 showing the payment history for the life of the loan or  
6 balance history for the life of the loan, I should say.

7 Q. If you don't mind, I'm going to look on with you.

8 A. Sure.

9 Q. At the top of the document we have a customer name?

10 A. Uh-huh (affirmative).

11 Q. And who is that?

12 A. Thomas R. Irby.

13 Q. And what's the date? What did you say the date of this  
14 document is?

15 A. Effective as of November 16th, 2010.

16 Q. I don't believe there would have been any withdrawals  
17 after that date; correct?

18 A. No, sir.

19 Q. So we have a first withdrawal. When did that first  
20 withdrawal take place?

21 A. The first withdrawal took place on June 18th, 2007, in  
22 the amount of two thousand, five hundred dollars.

23 Q. And you've already discussed there are a couple of ways  
24 that these funds could be withdrawn. But could you go  
25 through a couple of -- and the jury will get to see what

1     this looks like, ---

2     A.    Sure.

3     Q.    --- but where we've got a couple of things like  
4     electronic advance?

5     A.    Yeah, sure. Electronic advance is you're using the ATM  
6     or debit card that was provided to you. Regular payment is  
7     just a payment. We don't differentiate on how the payment's  
8     received. It could have been on-line. It could have been  
9     through a check. It could have been through a cashier's  
10    check, whatever the case may be. That's just a payment.

11         Then you've got ODP advance, which is overdraft  
12    protection advance, basically means that their checking  
13    account funds were inadequate to cover a charge, so the  
14    checking account withdrew money from the line of credit and  
15    placed it into their checking account to be available.

16    Q.    And there's nothing on this document that tells us  
17    whether it was Thomas or Roy Irby withdrawing the funds; is  
18    that right?

19    A.    No, sir.

20    Q.    I mean, not to be cold again, but does that matter to  
21    the bank?

22    A.    No. I mean, you know, again, like you say, not to be  
23    cold, but the bank -- both of these people signed for the  
24    loan. They both agreed to the terms in the contract that  
25    were provided to them. The bank doesn't care who withdrew

1 the funds because they both backed it. They both said,  
2 okay, whoever takes out the funds, we're both responsible  
3 for it. We're both going to cover it.

4 So, you know, to answer your question, no, the bank  
5 doesn't care who withdrew the funds, nor, to be perfectly  
6 honest, do they care who repays it. That's just what their  
7 expectation is that Thomas and Roy Irby are responsible for  
8 the repayment of the loan.

9 Q. But in a technical sense, anybody -- anybody could send  
10 in funds and say I want to make a payment on, you know, this  
11 account number ending in 74199?

12 A. Yes.

13 Q. Let's look at these August -- there are transactions in  
14 August, 2007. Does this show these additional withdrawals  
15 that you were talking about that were between the sending of  
16 this payoff statement and the receipt of a check by Bank of  
17 America?

18 A. Yes, sir, it does.

19 Q. Approximately how much more was withdrawn based on what  
20 you see here?

21 A. Approximately ten thousand, seven hundred dollars were  
22 withdrawn before the payment of nine thousand, nine hundred  
23 and ninety-eight dollars and ninety-two cents was applied.

24 Q. Now, there are quite a few pages here of withdrawals;  
25 is that correct?



1 A. Yes, sir.

2 Q. So what happens as we advance through in looking at a  
3 point where we get to the end and have a balance here,  
4 November 2010. What was generally happening with the  
5 account?

6 A. For a while, the account was being borrowed against and  
7 paid. So payments were coming, and customers were advancing  
8 funds off of the line of credit and then making the minimum  
9 payments due. At one point, I believe in '09, the customers  
10 had maxed-out their credit line and proceeded to stop paying  
11 on the loan.

12 Q. Now, these amounts and withdrawals, how they're done in  
13 an electronic way or even the overdraft, I mean, is there  
14 any reason for the bank to know how those funds are being  
15 used or does it -- is that really part of the agreement?

16 A. No. I mean, you know, the funds are -- we're basically  
17 giving them a loan on their credit, their income and the  
18 security that we have, so the equity that's in the home. We  
19 don't care how the funds are used.

20 I mean, obviously, we don't want them used in any  
21 illegal transactions, which the bank would report. But, no,  
22 I mean, it's a line of credit. It's for your personal use.  
23 A lot of people use them to do improvements on the house. A  
24 lot of people use them to pay for their kids braces or  
25 whatever.

1 Q. So it looks like we hit, you know, into 2009, somewhere  
2 in late 2009 essentially this credit line reaches its  
3 contracted maximum amount; is that correct?

4 A. Correct.

5 Q. I'd like to go over with you some of the balance, the  
6 balance that's due as of today in this account. Is the  
7 account in default?

8 A. It is.

9 Q. And does it remain in default even while we're here  
10 today?

11 A. It certainly does.

12 Q. Have the Irbys paid the balance that's due on this  
13 equity line?

14 A. No, sir.

15 Q. Do you -- do you recognize this document?

16 A. I do.

17 Q. Well, what -- what is it? What is that document?

18 A. This is a payoff quote for the line of credit as of  
19 April 5th, 2011.

20 Q. Is this document prepared in the ordinary course of  
21 Bank of America's business?

22 A. It is.

23 MR. HERSHON: I'd like to have this document entered as  
24 Bank of America's exhibit 1.

25 THE COURT: Have you shown it to the others?

1           **MR. GAINES:** .No objection, Your Honor.

2           **THE COURT:** All right. Without objection. That'll be  
3 exhibit 1, Bank of America.

4           (Whereupon Defendant, Bank of America, exhibit number 1  
5 was marked and admitted into evidence)

6       Q. And, again, we'll get to have the jury look at this,  
7 but when did you say -- when did you say that this debt on  
8 here, what is that payoff amount as of?

9       A. That's as of April 5th, 2011.

10      Q. Was that the -- I'm sorry. Let me make sure I  
11 understand. Is that the date of the letter?

12      A. That's the date that this payoff quote was processed;  
13 yes.

14      Q. Okay. And then the payoff date, I mean, I guess -- and  
15 then is there a date that says this debt is good through or  
16 -- is it like the payoff letter that we were talking about  
17 earlier?

18      A. Yes. It's the -- if you'll notice right here, it says  
19 payoff on April 20th, 2011. So it's good through April  
20 20th, 2011, and which it's seventy-two thousand, two hundred  
21 fourteen dollars and sixty-nine cents.

22      Q. All right. I notice it has an interest rate here of  
23 three point four nine percent. In fact, that's lower than  
24 what we have in the equity line agreement. I think there it  
25 was ---

1 A. I think it was eight point four nine originally.

2 Q. I believe somewhere in the document -- yeah, I think  
3 that's correct. What's the reason why the interest rate  
4 changes over time on an account like this?

5 A. The interest rate fluctuates based off the margin and  
6 the index that the Wall Street Journal publishes. It has to  
7 do with a lot of banking jargon that I'm not familiar with.  
8 I'm not going to lie. But it's how interest rates are  
9 calculated.

10 Same thing for, like your credit card, your car loan  
11 when you go to take it out, mortgage, whatever. They do it  
12 based off the index at that time. And then they give you a  
13 margin, which, say, the index is four percent, they may give  
14 you a margin of negative five percent. So your interest  
15 rate is three point five.

16 Q. And generally speaking, interest rates have been lower  
17 over the last few years?

18 A. Sure.

19 Q. And that would help the Irbys for how much they owe on  
20 this loan?

21 A. Yes, most certainly.

22 Q. This floating rate has, in fact, made it so that  
23 they've owed less money over the last few years?

24 A. Correct.

25 Q. So it's like a -- what do we have there as the

1 principal balance on this loan that's owed by both Thomas  
2 and Roy Irby?

3 A. On this payoff letter, the principal balance shows as  
4 sixty-nine thousand, ninety-three dollars and nine cents.

5 Q. And what other amounts does it -- does it show there?

6 A. It also shows an interest amount of two thousand, nine  
7 hundred and fifty-nine dollars and sixty-eight cents. And  
8 it shows an annual fee of one hundred and sixty-one dollars  
9 and ninety-two cents.

10 Q. And then so -- and then that brings us to a total  
11 payoff as of that April 20th, 2011; is that correct?

12 A. That's correct.

13 Q. In what ---

14 A. In the amount of seventy-two thousand, two hundred and  
15 fourteen dollars and sixty-nine cents.

16 Q. And so -- well, what's happened to -- if that's what  
17 was due as of April 20th, 2011, there has been one reason  
18 for that amount to decrease since then; is that correct?

19 A. That's correct.

20 Q. And you were on the stand yesterday talking about that.  
21 What is that amount?

22 A. It was for fifty thousand dollars.

23 Q. So did the payment that Bank of America accepted, that  
24 we talked about yesterday, did that lessen the amount that  
25 both Thomas and Roy owe the bank?

1 A. Yes.

2 Q. But it was Bank of America that worked on getting that  
3 money?

4 A. That's correct. The Irbys had no involvement in that  
5 at all. They weren't responsible for the payments, nor, to  
6 my knowledge, were they even aware of the negotiations that  
7 were going on at that time.

8 Q. So that would take down -- if we were to subtract that  
9 off as of April -- and still make it as of April -- just to  
10 make math simple, as of April 20, 2011, how much would have  
11 been due at that point?

12 A. If you take the fifty thousand dollars off of this, it  
13 would be twenty-two thousand, two hundred, fourteen dollars  
14 and sixty-nine cents.

15 Q. Now, as far as you know, has this interest rate stayed  
16 the same since then?

17 A. Yes, sir, it has.

18 Q. And so do you know what -- I guess, have you looked to  
19 see what interest is due since that time and what the total  
20 balance is on this account?

21 A. You know, as far as I know, it's the twenty-two  
22 thousand, two hundred and fourteen dollars and sixty-nine  
23 cents. However, there is a per day amount that would be  
24 calculated since the date of this letter, which was back in  
25 -- what did I say? April of 2011.

1           So the interest at this point, the per diem or per day  
2   amount is two dollars and twelve cents. So you would just  
3   take twenty-two thousand, two hundred and fourteen dollars  
4   and sixty-nine cents, and then however many days it's been  
5   since April 5th, 2011 to April 5th 2012, to April 5th, 2013.  
6   So you're looking at well over -- close to eight hundred  
7   days of two dollars and twelve cents per day interest. So,  
8   you know, you're looking at ---

9   Q.   Do you know what that total amount is? I know it's  
10   asking for a number off the top of your head. Do you have  
11   an approximate -- can you give it to me approximately?

12   A.   You're trying to make me look bad because I work for a  
13   bank. Two times -- two dollars, I mean, like sixteen  
14   hundred dollars, something like that.

15   Q.   Added to that previous balance that we discussed?

16   A.   Correct.

17   Q.   Okay. And so, again, very -- we've gone through this  
18   history of this loan, what's happening and where we are up  
19   through today. Has all of this been through the bank  
20   regular procedures in this circumstance? I mean, other than  
21   having been, be involved in a lawsuit. And otherwise is the  
22   bank following its normal practices with this equity line?

23   A.   Yes, sir. Everything that -- everything that's  
24   occurred with everything involved in this lawsuit, and with  
25   this actual account, was done exactly according to our

1 regulator's policies, our internal policies.

2 And, you know, being a consumer myself, I'm a bank  
3 customer, this is exactly how I would want my loan handled  
4 as well. I mean, you know, I want my privacy protected. I  
5 wouldn't want anybody to go out and access my account and be  
6 able to close it or open it. It was handled the way I would  
7 want things to be handled.

8 Q. All right. Thanks, Grant.

9 A. Yes, sir.

10 **THE COURT:** Mr. Gaines, any cross examination?

11 **MR. GAINES:** Yes, sir. Thank you, Your Honor.

12 **Cross Examination by Mr. Gaines:**

13 Q. Mr. Allred, isn't it true that Roy Irby requested to do  
14 a deed in lieu?

15 A. You know, you're right. I believe at one point, and I  
16 apologize, I do remember something, reading through the  
17 notes on the account, that a deed in lieu was requested.  
18 I'd kind of forgotten about that. I apologize. A deed in  
19 lieu was requested first. And then I think subsequently a  
20 short sale was requested by Thomas Irby.

21 Q. Okay.

22 **MR. GAINES:** Your Honor, I'd like to mark as Defense 6,  
23 I believe.

24 (Whereupon Defendant Roy Irby exhibit number 6, was  
25 marked for identification)



1 Q. All right. I'd like to hand this document to you. Can  
2 you tell me if that document looks familiar to you?

3 A. No. I'm not familiar with this document.

4 Q. Okay. Was that the one you were referring to when you  
5 said you thought you'd seen something where he'd requested a  
6 deed in lieu?

7 A. Yeah. What I saw was just reviewing the notes on the  
8 account whenever I was reviewing it for trial. I didn't see  
9 these documents. I'm sure we probably have them on file,  
10 but I didn't actually see these. I just saw in the notes  
11 where it said we'd received deed in lieu documents.

12 Q. Okay. And your counsel, I believe, provided those  
13 documents; is that not true? They've marked that document  
14 at the bottom?

15 A. This one?

16 Q. Yes.

17 A. Yeah. I assume so, yes, sir.

18 Q. And does that address and information as far as who it  
19 was going to look accurate?

20 A. I'm sorry?

21 Q. The address? The information as to who it was  
22 addressed to, and how it was sent, fax numbers, those  
23 things. Does that look like an accurate ...

24 A. It was sent to a fax number that's a 336 area code,  
25 followed by 805 prefix, which is my area code where I'm

1 from, along with an office prefix that I'm familiar with for  
2 our corporate office in Greensboro. But I don't know the  
3 fax number.

4 Q. Would you dispute whether or not the bank received that  
5 document?

6 A. No, I mean, I'm sure if we've got it and we've provided  
7 it in our evidence, then I'm sure we received it.

8 Q. Okay.

9 MR. GAINES: Your Honor, we'd offer that.

10 THE COURT: Any objection?

11 MR. ALFORD: No objection, Your Honor.

12 MR. HERSHON: No.

13 THE COURT: Without objection. Defense, Roy Irby's  
14 exhibit 6 is admitted.

15 (Whereupon Defendant Roy Irby exhibit number 6 was  
16 admitted into evidence)

17 Q. Could you just read for us the first three paragraphs?

18 A. Sure. It states, this letter is as you requested  
19 today. I am not living at the above address or will be able  
20 to due to a medical condition. I've had seven major spinal  
21 surgeries within the last year that has left me with the  
22 inability to live or pay for the above home. I would like  
23 to do a deed in lieu of foreclosure with Bank of America to  
24 protect your interest. I'm the sole owner now with the deed  
25 recorded in Greenville County records.

1 Q. When was that letter dated?

2 A. February 17th, 2010.

3 Q. And who signed that letter?

4 A. It's signed by Roy C. Irby, II.

5 Q. And are there certain requirements for the bank  
6 accepting a deed in lieu?

7 A. There are.

8 Q. Okay. And do you know what those are?

9 A. I'm not very familiar with them. I know generally we  
10 want to look at finances, so maybe tax returns, pay stubs,  
11 something along that sort. We usually ask for some sort of  
12 hardship letter. And then we may also request, because it's  
13 a deed in lieu, we may actually request like a title search  
14 or title report to verify all the liens are where they're  
15 supposed to be and you're giving us accurate information.

16 Q. Can you just explain to the jury what a deed in lieu  
17 is?

18 A. Sure. A deed in lieu is basically, in general terms,  
19 it's the same thing as a foreclosure. But basically, the  
20 customer is agreeing to deed the property back over to the  
21 bank in lieu of them having to foreclose.

22 So it helps -- it salvages the customer's credit a  
23 little bit. And then it also keeps the costs down for the  
24 bank so we don't have to hire a foreclosure attorney to come  
25 out. We don't have to pay foreclosure expenses. We don't

1 have to do all that.

2 Not to mention that, you know, it doesn't show up as a  
3 foreclosure in the property records, on the actual property.  
4 So our re-market value for the property when we go to resell  
5 it is not as low as it would be through a normal  
6 foreclosure.

7 Q. All right.

8 A. So it's a benefit to the bank. It's basically  
9 everybody trying to work together to get it resolved because  
10 the customer is in financial distress, and he's just trying  
11 to do the right thing, really, and give the property back to  
12 the bank.

13 Q. Thank you.

14 MR. GAINES: That's all I have.

15 A. Sure.

16 THE COURT: Mr. Alford.

17 MR. ALFORD: Thank you, Your Honor.

18 **Cross Examination by Mr. Alford:**

19 Q. That exhibit number 6 that you had, read that fourth  
20 paragraph, please.

21 A. Chase has the first mortgage on this property and time  
22 is of the essence.

23 Q. So would you say he was trying to give the property to  
24 Bank of America and shutout Chase so Chase didn't get it?

25 A. No, I wouldn't say that. I would say that they were

1 basically trying to give the property back to the bank so  
2 the bank could go in and satisfy the mortgages on the  
3 property and still re-market the property.

4 Q. But Bank of America was going to get it. Now, at that  
5 time did Bank of America still have the first mortgage?

6 A. I'm not sure what the lien priority was at that time in  
7 2010.

8 Q. Well, until you ---

9 A. I think it was in first position. I think our HELOC  
10 was in first mortgage position.

11 Q. Okay. As we talked about yesterday. So you could have  
12 foreclosed and you could have satisfied this entire mortgage  
13 by being in the first lien position?

14 A. Could have foreclosed on the property and satisfied the  
15 mortgage position. Feasibly, we could have accepted the  
16 deed in lieu if everything that was required and all the  
17 documents that we review meet our expectations and those of  
18 our regulators. At that point, we could have accepted the  
19 deed in lieu. But in this case, the deed in lieu was  
20 declined.

21 Q. But you could have also foreclosed; correct?

22 A. From a first mortgage position? Anyone can foreclose  
23 from any lien position, even homeowner's associations and  
24 tax assessors can foreclose on your property.

25 Q. Now, you're the only one here to ask because you're the

1    only one from the bank. I spent the morning going back  
2    through all these documents. And I think I asked you this  
3    yesterday, but I just want to be real clear. Are you aware  
4    of any document provided to us in the courtroom today that  
5    makes mention of what access devices were issued either to  
6    Roy Irby, Thomas Irby or both?

7    A. Yes, sir, the pay history that ---

8    Q. No, that's not my question. My question is, is there  
9    any document that describes exactly what access device has  
10   been provided?

11   A. Yes, your pay history.

12        **MR. HERSHON:** Your Honor, this question has been asked  
13   four times.

14        **THE COURT:** I'll allow him to answer it again.

15   A. The pay history that you provided tells me that the  
16   access card was used to draw funds from the line of credit.

17   Q. But you'll agree with me there's no document in here  
18   showing that the access card was issued, in whose name it  
19   was issued?

20   A. Well, the access card -- if there's two borrows on a  
21   loan, it's issued in both borrower's names. But I don't see  
22   a document -- I haven't seen a document that says that an  
23   access card was issued, other than the proof that the access  
24   card was utilized in the pay history.

25   Q. All we know is the pay history just shows that;

1 correct?

2 A. The pay history shows that the card was used.

3 Q. All right. Is there any document -- and, again, we  
4 covered this yesterday, but your testimony this morning --  
5 is there any document anywhere in here signed by either Roy  
6 Irby or Thomas Irby authorizing you, the bank, to send a  
7 payoff statement to a third party stranger, Gregg Jones?

8 A. Is there a document? No.

9 Q. Okay. So you were willing to release that information  
10 absent a signed piece of paper by either debtor?

11 A. No, sir.. We require either some sort of verbal  
12 authorization, contact from the customer or written  
13 authorization.

14 Q. These are all of your documents. Can you show me  
15 anywhere in here where that occurred?

16 A. Well, those aren't verbal. Those are written  
17 documents. So, I mean, if the customer were to call in and  
18 say, I need you to fax my payoff statement to attention:  
19 Diane at 864, whatever the rest of the fax number, they  
20 verify their information, provided everything that's  
21 necessary per our OCC Guidelines. Certainly, we would, as a  
22 service to our customer, provide that information.

23 Q. Did you receive that phone call?

24 A. Personally, no, sir.

25 Q. Okay.

1 Q. Since everybody gets to put their thing up one last  
2 time. And I asked you this before. In the maximizer  
3 agreement, is there anywhere defined what is proper written  
4 notice?

5 A. Is it defined ---

6 Q. Yes, sir?

7 A. --- as proper written notice? No, I don't think --  
8 let's see, was that number twenty, ---

9 Q. That was number twenty.

10 A. --- I guess? I mean, it -- it doesn't define proper  
11 written notice, I don't believe. I do see here it says to  
12 do so you, which I think we've already discussed, you/yours,  
13 that's all -- involves the customers, Thomas Irby and Roy  
14 Irby. It says, to do so, you must notify us in writing.

15 Q. Does it say signed?

16 (Pause)

17 Q. Isn't it true the only thing in that paragraph that is  
18 required to be signed by the debtor is ---

19 A. Hold on one second, please.

20 Q. --- if they're reinstating?

21 A. One moment, please. Let me read through it. Thank  
22 you.

23 (Pause)

24 A. Okay. I'm sorry. Go ahead, Mr. Alford.

25 Q. Isn't it true in paragraph twenty the only thing that



1 the bank requires to be signed by both debtors is the  
2 reinstatement after the account is closed?

3 A. The only thing required in this statement -- no. It  
4 says proper written notice as well to cancel the line of  
5 credit.

6 Q. But that -- my question is, advances will be reinstated  
7 upon our receipt and acceptance of a written reinstatement  
8 request signed by each of you. In that paragraph twenty,  
9 that's the only requirement in there requiring a signature;  
10 isn't that true?

11 A. I mean, I'm not a lawyer so I can't really speak to  
12 what this legally says. I can tell you that the bank's  
13 intent by proper written notice is the approved form that  
14 our OCC Regulators judge us by, which we require our  
15 customers to sign and send in to have their line of credit  
16 closed.

17 Q. Can you flip the page to your paragraph twenty-nine,  
18 next page?

19 A. Okay. Twenty-nine.

20 Q. This was the one we read yesterday about this agreement  
21 is the entire agreement between the parties?

22 A. Correct.

23 Q. So what you're telling this jury is the bank can go  
24 make up its own rules, regulators, federal government,  
25 they've got their own rules, not in this document and hold

1 the debtors to that?

2 A. No, sir. I mean, my interpretation of proper written  
3 notice wouldn't be, okay, payments, or Gregg Jones, or Mr.  
4 Joe Blow off the street, go send a letter to the bank and  
5 tell them to close my line of credit. If someone told me  
6 proper written notice, I would contact the bank and figure  
7 out what proper written notice is. So ---

8 MR. ALFORD: No further questions.

9 A. --- my testimony is not.

10 THE COURT: All right. Any redirect?

11 MR. HERSHON: Yes, Your Honor. Briefly.

12 **Redirect Examination by Mr. Hershon:**

13 Q. The exhibit that you're looking at, since Mr. Alford  
14 forgot to look at the first page, let's look at the first  
15 page of that document.

16 A. Sure.

17 Q. And there might be somewhere else they talked about  
18 signatures. If you look at paragraph two, I'm trying to  
19 give you the easiest way to find this.

20 A. Sure.

21 Q. I'll read it to you here. It's on the -- in the second  
22 paragraph, looking at the end of the third -- end of the  
23 third line. Each borrower authorizes any other borrower on  
24 his or her signature alone to cancel the credit line. Do  
25 you see that?

1 A. Yes, sir, I do.

2 Q. Is that a clear statement in this contract?

3 A. It seems pretty clear to me. Each ---

4 Q. I mean, ---

5 A. The borrower authorizes any other borrower on his or  
6 her signature alone to cancel the credit line. That says  
7 signature.

8 Q. Does it seem weird to you that Thomas Irby's  
9 essentially asking why did you not violate federal law for  
10 me?

11 A. It seems very odd. You know, again, I'll say,  
12 personally, this is exactly how I would want my account  
13 handled. And I would assume that Thomas and Roy would want  
14 their accounts handled the same way. It was to protect  
15 them, not to do any disservice by any means.

16 Q. And we were talking about this -- Mr. Alford mentioned  
17 this payoff statement letter. The date, again, and that's  
18 in 2007; right?

19 A. Correct.

20 Q. And that's approaching six years ago; correct?

21 A. That's correct.

22 Q. Are you aware, again, through looking at the bank's  
23 files, that every practice in dealing with an equity line  
24 was followed? Or do you have any indication that a practice  
25 was not followed?

1 A. No, sir. Every practice for Bank of America in this  
2 particular case was followed. And, again, if this exact  
3 situation were to happen again today, it would be followed  
4 exactly the same way.

5 Q. And the Plaintiff brought up foreclosure and what  
6 happened there. Did the bank ever file a foreclosure action  
7 against Thomas and Roy Irby?

8 A. No, sir.

9 Q. Who sued who first in this action?

10 A. Thomas Roy -- Thomas Irby sued, I believe, Roy and Bank  
11 of America and Chase, if I'm not mistaken.

12 MR. HERSHON: That's all I have, Your Honor.

13 THE COURT: Okay. Briefly, Mr. Gaines.

14 MR. GAINES: I will, Your Honor.

15 **Recross Examination by Mr. Gaines:**

16 Q. Going back to that foreclosure as you mentioned, isn't  
17 it true, though, if you had remained in first position and  
18 you had the foreclosure, your bank would have been paid  
19 first?

20 A. I'm sorry. If we were in first position ---

21 Q. If you hadn't given up your first position and you  
22 foreclosed, who gets paid -- out of all the other banks, who  
23 gets paid first?

24 A. The first position. Whoever foreclosed -- it doesn't  
25 matter who forecloses. That first trust deed is paid first.

1 Q. Okay. And they would be paid in full before anyone  
2 else was paid; isn't that correct?

3 A. Not necessarily in full, but they would be paid first.

4 Q. Well, I said paid in full before anyone else was paid?

5 A. Yeah. Yeah. I mean, I get what you're saying. We  
6 wouldn't -- depending on how much the proceeds from the sale  
7 were ---

8 Q. Correct.

9 A. --- it would depend on if you were paid in full or not.

10 Q. And do you recall hearing testimony that the proceeds  
11 from the foreclosure sale were eighty-four thousand dollars?

12 A. I do recall something like that, yes.

13 Q. Okay.

14 MR. GAINES: That's all I have.

15 THE COURT: All right. Thank you, sir. You may step  
16 down.

17 MR. ALLRED: Thank you, Your Honor. Judge, leave this  
18 here?

19 THE COURT: Just leave them there.

20 MR. HERSHON: Your Honor, no further witnesses from  
21 Bank of America.

22 THE COURT: All right. Anything in reply?

23 MR. ALFORD: Nothing in reply, Your Honor.

24 THE COURT: All right. Mr. Foreman, ladies and  
25 gentlemen, I'm going to ask you to go back to your jury

1 room. We have some matters of law we need to take care of.

2 You've heard all the evidence now. I need to instruct  
3 you on the law after the attorneys have a chance to address  
4 you in closing. But we'll have a little extended time, but  
5 hopefully not too long.

6 If you'll go back. Don't discuss the case. We'll take  
7 a break and call you back in a few moments. Everyone else,  
8 please remain seated.

9 (Whereupon the jury exited the courtroom at 10:48 am)

10 **THE COURT:** All right. Let's take just a real short  
11 break and then see -- a short break, ten minutes. And then  
12 see if we can work out verdict forms, and charges and things  
13 of that nature.

14 **MR. HERSHON:** In terms of additional directed verdict  
15 motions, do that after the break as well?

16 **THE COURT:** Let's do that after the break, too.

17 **MR. HERSHON:** Okay.

18 **THE COURT:** All right. Let's take just a real short  
19 break. Be back at ten or eleven, excuse me.

20 (Whereupon court was in recess at 10:49 am)

21 (Whereupon court resumed at 11:06 am)

22 **THE COURT:** All right. Any matters we need to take  
23 care of before we talk about charge and verdict forms?

24 **MR. HERSHON:** Yes, Your Honor. Bank of America moves  
25 to renew its motion for a directed verdict, and also as to

1 the claims by Thomas Irby against Bank of America. Also  
2 moves for a directed verdict as to the Bank of America's  
3 claims against both Thomas and Roy Irby.

4 I don't want to belabor what we've already -- what I  
5 already discussed as to the claims by Thomas Irby, but I do  
6 want to bring up that in terms of whether there's been a  
7 breach by Bank of America, not even getting into the damages  
8 issue, whether there's been a breach. There's been  
9 testimony by the real estate closing attorney for the Irbys  
10 that a document that was supposed to have a signature on it  
11 went back without a signature.

12 We're talking here about a contract where in  
13 yesterday's arguments, legal arguments in front of the  
14 Court, counsel for Thomas Irby admitted there is no  
15 ambiguity in the contract. In that situation, we're in a  
16 situation where the contract, interpretation of that  
17 contract is a matter of law for the Court.

18 It's clear, as we've gone over in testimony today and  
19 it's clear for the Court if it's had a chance to look at the  
20 equity line agreement, is that there's a requirement for  
21 notice to be in writing by the borrowers, specifically by  
22 the borrower. I don't think there's any question -- there  
23 can't be a question as to what that means, despite all  
24 attempts by counsel to somehow question that.

25 I think looking back and getting to that issue of

1 damages, and the Court noting that, yeah, there's a thin  
2 argument there, I'd certainly argue to the Court there's no  
3 argument on this issue of damages. There's perhaps been an  
4 argument that perhaps, about some kind of, almost as a  
5 defense to Bank of America's claim, but as a claim for  
6 damages, first of all, there really hasn't been any.

7 And, second of all, the Court, as the Court has  
8 correctly noted, the case law is strong about this idea in a  
9 contract of sending -- asking the jury to make some kind of  
10 determination out of thin air in a contract claim, on this  
11 idea of speculation of damages, that the evidence is simply  
12 not there for the jury to look at.

13 As to Bank of America's claims against both Thomas and  
14 Roy, they've both admitted that they signed the contract.  
15 They both admitted that payments haven't been made under the  
16 contract.

17 Now, perhaps we don't have the exact amount and that  
18 amount might need to go to the jury. But in terms of  
19 liability, liability is clear that there's finger pointing  
20 between them as to why something didn't happen, but both  
21 Thomas -- Roy and Thomas have both testified that payments  
22 were not made per the terms of the contract. I'm happy to  
23 go into that further with Your Honor, but I'd like to leave  
24 it at that for now.

25 **THE COURT:** All right. Thank you. Mr. Gaines, is



1     there any question of fact for a jury as to whether or not  
2     Mr. Roy Irby owes Bank of America money?

3           **MR. GAINES:** I believe my client testified that they  
4     defaulted on the terms of the loan. I think our question  
5     would be that, again, by giving up that first position, the  
6     bank gave up the chance to have gotten paid in full at that  
7     foreclosure sale. And they then just relied on getting  
8     their money and trying to get the rest from my client. And  
9     ---

10          **THE COURT:** Well, the letter, the fee in lieu or the  
11     deed in lieu letter from your client said Chase was first.  
12     That's not factual?

13          **MR. GAINES:** I think that's what he thought.

14          **THE COURT:** Okay. All right. I respectfully deny your  
15     motion, Mr. Hershon. I'll let the jury decide this one.  
16     Any other motions that we need to ---

17          **MR. ALFORD:** Briefly, Your Honor. There were -- we  
18     were in chambers prior to the case and I handed the Court  
19     what I thought was the claims from the pleadings. If I  
20     understand though that there are no claims being asserted by  
21     Roy Irby against the Bank of America or Thomas Irby?

22          **THE COURT:** Right. That's what I understand. Anything  
23     else that you've got, other than that about whose the claims  
24     are that you need to bring up now?

25          **MR. ALFORD:** No, Your Honor.

1           **THE COURT:** If we're getting into that, let me just say  
2 where I think we are, and then I'll be glad to hear y'all's  
3 input.

4           My verdict form -- I'm proposing I do three verdict  
5 forms. The first verdict form would be, we, the jury, -- it  
6 would be captioned, Thomas Irby versus Bank of America and  
7 Roy Irby. Excuse me. The first one would just say, Thomas  
8 Irby versus Bank of America. We, the jury, find for the  
9 Plaintiff, Thomas Irby, in the amount of X dollars actual  
10 damages. That's on the breach of contract.

11           Or, we, the jury, find for Bank of America on its  
12 counterclaim. And I'll explain to the jury that everybody's  
13 a plaintiff and everybody's a defendant, except for Mr. Roy  
14 Irby. We find for the Bank of America against Thomas Irby  
15 in the amount of X dollars on the note.

16           Or their option is, we find for Defendant, meaning  
17 everybody stays where they are, Defendant on both. The  
18 second verdict form would be, Thomas Irby versus Roy Irby.  
19 We find for Thomas Irby against Roy Irby X dollars actual  
20 damages. Or we find for Defendant, Roy Irby.

21           Third verdict form would be Bank of America versus Roy  
22 Irby. We find actual damages in the amount of X dollars on  
23 the breach of contract from Bank of America against Roy  
24 Irby. Or we find for the Defendant, Roy Irby, that he owes  
25 nothing. Does that sound like sort of where ---

1           **MR. ALFORD:** No objection from the Plaintiff, Your  
2 Honor.

3           **THE COURT:** And I've prepared these. Let me just let  
4 y'all all look at them now. I know reading to you sometimes  
5 you can't recall. Let me just let y'all take a moment, all  
6 three of you look at those and sort of see if you think that  
7 will adequately cut it. I'm sorry I don't have extra copies  
8 for you.

9           (Pause)

10          **MR. FLOYD:** Your Honor, I think we're in agreement ---

11          **THE COURT:** Except for one?

12          **MR. FLOYD:** Except for one change.

13          (Whereupon a bench conference was held off the record)

14          **MR. ALFORD:** Your Honor, very briefly. I assume you're  
15 going to just do a standard charge on breach of contract?

16          **THE COURT:** Right. Let me -- so that you'll all know,  
17 I am. But let me -- to help you in your arguments, let me  
18 sort of tell you.

19               I'm going to charge the jury, you know, obviously what  
20 -- sort of reiterate their duties are to be the fact-finder,  
21 accept the law, preponderance of evidence. I'm going to  
22 explain to them the burden of proof, preponderance of  
23 evidence.

24               And throughout I'll try to explain to them that the  
25 bank is Plaintiff, Thomas Irby is the Plaintiff, Roy Irby is

1 the Defendant. I'll explain to them direct and  
2 circumstantial evidence, 'credibility of witnesses we'll talk  
3 about. I'll explain that this is an action for breach of  
4 contract, define a contract. I don't know -- I guess  
5 there's no question about -- do any of you desire that I  
6 tell them about an offer and acceptance and consideration?  
7 I mean, there's no question there is a contract here.

8 MR. ALFORD: Not from the Plaintiff.

9 THE COURT: I'll leave that out. They don't -- I don't  
10 think there's any need for that. I gather I need to  
11 probably distinguish with them the contract you're suing Mr.  
12 Irby on is an oral contract. So I'll give them a little  
13 insight into an oral contract.

14 I'll also talk a little bit about a written contract,  
15 that you look at the document to determine what it means.  
16 Good faith and fair dealings in every contract. I'll sort  
17 of hit that.

18 And then a general damage charge about -- is pretty  
19 much what I would always charge, that it must flow from the  
20 contract, and it can't be speculative, but don't have to be  
21 proven to a mathematical certainty. These are the verdict  
22 forms.

23 MR. ALFORD: Were you going to include duty to  
24 mitigate?

25 THE COURT: That flows both ways. Did anybody plead

1     that? That's an affirmative pleading. I don't know if  
2     anybody pled that or not. But I'll -- does anybody have an  
3     objection to me pleading mitigation of damages? That's  
4     going to cut both ways, I guess.

5           **MR. HERSHON:** I mean, I'd like to see if they're going  
6     to assert it as an affirmative defense.

7           **THE COURT:** Did y'all ---

8           **MR. HERSHON:** I'd like to see a pleading for that that  
9     shows that.

10          **THE COURT:** --- put that down on yours?

11          (Pause)

12          **THE COURT:** Okay. Well, we'll see if it's a goose and  
13     gander thing here or not. Or either we can have consent.

14          (Pause)

15          **THE COURT:** Yes, sir.

16          **MR. HERSHON:** Your Honor, in Bank of America's latest  
17     -- it was an amended answer and counterclaim, there was a  
18     defense, the sixth defense was a failure to mitigate.

19          **THE COURT:** Did you want that charged? If I charge it  
20     ---

21          **MR. HERSHON:** It goes both ways.

22          **THE COURT:** It's going to work both ways.

23          **MR. HERSHON:** Right.

24          **THE COURT:** I'll be glad to -- I don't know if it's  
25     going to make a difference.

1           **MR. HERSHON:** No, I think it's -- if it's not in their  
2 pleadings, I'm inclined to not have it. It's not necessary.

3           **THE COURT:** Okay. How long do y'all intend to talk to  
4 the jury, gentlemen?

5           **MR. ALFORD:** Ten to fifteen minutes.

6           **MR. HERSHON:** About ten minutes.

7           **THE COURT:** Ten to fifteen? That's getting towards an  
8 hour, isn't it? Okay. Why don't we get them some menus now  
9 and let them go on and order and let's try to have it here  
10 about a quarter til one or so. So we'll just take a little  
11 longer. Y'all can get your thoughts together on your  
12 arguments. How about start a -- you want to briefly reply,  
13 I guess, to them?

14           **MR. ALFORD:** And I'll make it very brief.

15           **THE COURT:** Very brief. And then everybody will have  
16 one. And then you can sort of wrap it up, briefly, at the  
17 end. Ten mean ten or ...

18           **MR. HERSHON:** I'll certainly be under fifteen.

19           **THE COURT:** Okay. Fifteen, that's forty-five and  
20 fifteen to charge ---

21           **MR. HERSHON:** It's hard to ---

22           **THE COURT:** So we're an hour away. Yeah, about a  
23 quarter til. You can just have it here about a quarter til.  
24 Go on and let them fill them out now.

25           **MR. HERSHON:** Your Honor, as to the issue of damages

1 that will be talked about, the Court noted earlier about  
2 several of the items that Thomas Irby is looking at are  
3 really costs, and that are recoverable after trial. We'd  
4 request that things such as mileage, and attorneys fees,  
5 copying costs, those are not direct damages.

6 **THE COURT:** I'll see what Mr. Alford says on his  
7 damages, but my charge will not get into the specifics.  
8 I'll just say that they must be proven. So my -- I don't  
9 know whether he's going to talk about that specifically, but  
10 I ---

11 **MR. GAINES:** And, Your Honor, I just -- I don't know  
12 that I renewed my directed verdict, but I would do that.

13 **THE COURT:** Okay. It's denied as well.

14 **MR. ALFORD:** And, Your Honor, I don't know if I need to  
15 just also move to reconsider the denial of the negligence  
16 claim to protect the record ---

17 **THE COURT:** Your record is protected.

18 **MR. ALFORD:** Thank you, Your Honor.

19 **THE COURT:** I believe that ---

20 **MR. ALFORD:** My client was getting worried about that.

21 **THE COURT:** Well, that's the nice thing about being a  
22 trial judge, I've got a safety net down in Columbia that can  
23 correct my errors. So y'all -- I try not to make any, but  
24 when I do, they're there for me.

25 **MR. ALFORD:** Your Honor, I didn't find any mitigation

1 issues raised in ---

2 **THE COURT:** Okay.

3 **MR. ALFORD:** --- Thomas Irby's pleadings.

4 (Pause)

5 **THE BAILIFF:** We're good to go, Your Honor.

6 **THE COURT:** All right. Everybody ready to go? You  
7 need to take a stretch break?

8 **MR. ROY IRBY:** Yes, just for a second.

9 **THE COURT:** Let us know when you're ready. That'll be  
10 fine. Any other matters? We'll be ready for the argument,  
11 and I'll instruct the jury.

12 Oh, Mr. Gaines, our records didn't show -- I think it  
13 was over objection, exhibit 5 and 6, that number 5 had been  
14 offered into evidence. I don't know if you intended to  
15 offer it or just have it marked for identification. That is  
16 the contract of sale.

17 **MR. GAINES:** For some reason, I was thinking -- okay.  
18 Is that 5?

19 **THE COURT:** It was marked, but it was never offered. I  
20 didn't know what your intention was, whether to offer it or  
21 not. 6 is in, the letter.

22 **MR. GAINES:** I must have gotten my numbers mixed up. I  
23 was thinking the last one was the contract.

24 **THE COURT:** I'll let you look at them.

25 **MR. GAINES:** Intention was to offer 5.



1           **THE COURT:** All right. I think everybody understood  
2   that over objections that they were, that the intent was to  
3   offer those. And I'll allow those for the court reporter  
4   and the record, that they are admitted into evidence over  
5   objection.

6           (Whereupon Defendant Roy Irby exhibit number 5 was  
7   admitted into evidence)

8           **THE COURT:** All right. Now, we're ready for our jury.

9           (Whereupon the jury entered the courtroom at 11:43 am)

10          **THE COURT:** Thank you very much, ladies and gentlemen.  
11   We're now ready to have the closing statements of the  
12   attorneys.

13          I told you yesterday there are opening statements,  
14   there are closing statements. It's not evidence. All the  
15   evidence has been presented to you through testimony and  
16   through exhibits. I still urge you to listen as the lawyers  
17   address you. They'll give you a recap of, at least, their  
18   view of the evidence.

19          After they've had a chance to address you, I'm going to  
20   instruct you on the law. The case will then be yours to  
21   decide what the facts are. Mr. Alford, you may address the  
22   jury in your closing.

23          **MR. ALFORD:** Thank you, Your Honor. As I warned, you  
24   can see paragraph twenty, you can see it in your sleep. We  
25   wouldn't be here today but for two reasons. Roy Irby, not

**CLOSING ARGUMENTS - MR. ALFORD**

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1 draining the account when he couldn't pay it back. And,  
2 two, the Bank of America doing anything, doing something,  
3 when it got this letter from Gregg Jones, other than taking  
4 the money and putting it in the account.

5 All they had to do was pick up the phone and call. All  
6 they had to do was write a letter. All they had to do was  
7 do something if there was any confusion in their mind what  
8 was supposed to happen. So but for those two things, we  
9 wouldn't be here today.

10 I want to take you back to yesterday in our opening  
11 statements. And I wrote down some of the comments that Mr.  
12 Hershon opened with. The first one was, this case is about  
13 honoring the contracts you sign. He mentioned the  
14 instruction as to proper written notice, and he ended it  
15 with what was the bank to do?

16 Now, we've heard the testimony. Let's stick with Roy  
17 Irby first because the claims that you're going to be faced  
18 with is Thomas has sued Roy Irby for breach of contract.  
19 That's an oral contract. One of them was, he's going to pay  
20 on the mortgages.

21 We know that even though Thomas was the, quote, first  
22 borrower, whatever that really means, because they're going  
23 to sue them both, using his credit, he was on Social  
24 Security. Told us he got maybe twenty-six hundred to three  
25 thousand dollars a month. He already has a house. He

1     couldn't take this mortgage out and make payments on it.

2     And Roy Irby knew that. But to bring Thomas into this he  
3     said, oh, yeah, I'll make the payments.

4             So I have no idea where Roy's doing it because as he  
5     told us, his income returns included a disability and some  
6     other source. In 2007, he's making ten thousand dollars a  
7     year, the same amount in 2011.

8             So there's no way he was going to pay, not only Bank of  
9     America, their sixty-nine thousand dollars that he kept  
10    pulling out. He probably couldn't even make the payment to  
11    the Chase or the M&T mortgage. I don't know that, but he  
12    could have made one. So we know that Roy got the benefit of  
13    that money, didn't pay on the mortgage.

14            And more importantly, and this is where I think it gets  
15    real muddled, two deeds are given, Thomas to Roy on this  
16    property. The first one is recorded in March of '07, half  
17    interest. The second mortgage, and this is what Roy told  
18    us, he wanted it just in case something happened to him, if  
19    something happened to Thomas, that he'd be protected.

20            Well, he records this, and you can look up here, the  
21    Office of Deeds for Greenville County in November 2008, his  
22    testimony was that he was healthy. So I don't know what was  
23    happening to him, and Thomas is still here.

24            Unfortunately, the nephew just took advantage of  
25    Thomas. Made a bunch of promises. I'll pay this back,

1 drained the money out of the account. And then tries to  
2 tell Bank of America, well, I'll give you a short sale. You  
3 can have the property. You know, I don't know what in the  
4 heck's going to happen to Chase. That's Thomas' problem, I  
5 guess.

6 A contract can be oral, and every contract, oral or  
7 written, has a duty of good faith and fair dealing in it.  
8 And you're going to hear the Judge tell you that. So when  
9 you think about the facts of this case, put that right at  
10 the top, good faith, fair dealing. And ask yourself the  
11 question of what I heard of the conduct, is that fair? Was  
12 that in good faith?

13 I'm asking you to award Thomas sixty-nine thousand  
14 dollars that I think Roy Irby owes him. He recorded the  
15 deed, took out his half interest, sucked the money out,  
16 spent it, Thomas is left holding the bag.

17 Now, let's turn to Bank of America. Because, but for  
18 them responding to this letter, and when I say responding,  
19 anything, phone call, letter, you name it. Maybe they  
20 couldn't feel like they could talk to Gregg Jones, even  
21 though they took his money, even though they sent him a  
22 payoff statement, they could have certainly said, gee, I  
23 wonder what the intent here is?

24 Now, you heard Grant Allred, the bank rep, tell us  
25 that, oh, yeah, people pay this off all the time, but they

1     don't really mean it. Yeah, we're the bank. We know  
2     better. You're the debtor. You're doing a payoff out  
3     there, but you don't mean it. So we're not going to assume  
4     that you really want to pay this off.

5             No, I don't think they even care. I don't even think  
6     that portion goes through their mind. But if it did, it is  
7     very presumptive of the bank to assume it knows what the  
8     borrower wants to do.

9             Now, we could argue all day long about proper written  
10    notice. Did they/did they not? But I think this is the key  
11    when you look at this in the context that they got a check  
12    with this letter in response to a payoff request. And we  
13    can look at the documents. This is the payoff request they  
14    sent. And it talks about total amount, the payoff figure's  
15    valid or void after 08/24/07. They get this back, but I  
16    guess the bank knows better. No, they don't want to pay it  
17    off. We're just going to ignore this.

18            All they had to do was to say, wait a minute, maybe  
19    this doesn't seem right. All they have to do is ask the  
20    question. Here's the pay history. Roy, when he's attending  
21    the closing and pays Thomas some money for the land, draws  
22    it out of the account, doesn't tell anybody.

23            All Bank of America had to do was say, wait a minute,  
24    we've got some inconsistency here. We're getting this  
25    notice to payoff and close the account. Maybe there's a

1 balance due. Mr. Borrower, what do you really want to do?  
2 We don't understand. What was the bank to do? The bank did  
3 nothing. It wasn't a case of what was the bank to do? The  
4 bank didn't do anything.

5 Now, there is in this maximizer agreement, you get to  
6 look at, a little paragraph in here saying that you, the  
7 borrowers, are not going to give us inconsistent directions  
8 and instructions. I think that's good. So if we look at it  
9 that way, they got some inconsistency.

10 All they had to do -- what was the bank to do? Write a  
11 letter, pick up the phone, maybe check with each borrower.  
12 Say, wait a minute. We don't know what's going on. Because  
13 if they'd just stopped the account at that point, we  
14 wouldn't be here today. They did nothing.

15 Now, the question is, what are the damages to Thomas?  
16 And this is a tough one. Normally, you have a breach of  
17 contract -- I'm building a bridge and I stop. And you say,  
18 well, I want enough money so I can finish building the  
19 bridge or enough money to finish building the house.

20 This is strange because on one hand, unbeknownst to  
21 Thomas, Roy had taken the other half of the property. He  
22 recorded that deed as sort of a conditional delivery or  
23 whatever we want to call it, he recorded it. But I think we  
24 could have saved a bunch of equity in that property.

25 Because the first thing we know is Bank of America had

1 the first lien position. That means if they had gone and  
2 foreclosed, he testified the house was worth two-oh-two.  
3 Roy testified at the time of the '07, it was probably three  
4 hundred thousand. And we know it finally sold at a  
5 foreclosure sale for eighty-four to -- I guess Chase got or  
6 sold at the foreclosure sale got eighty-four.

7 But we know also that there's equity in this property.  
8 And I'll say that equity was probably worth fifty thousand  
9 dollars, which is the amount Chase paid to Bank of America  
10 in order to have Bank of America say, Mr. Chase, you can  
11 have first lien position.

12 Now, Thomas testified out-of-pocket costs of forty  
13 thousand. We didn't put anything in. I don't know about  
14 that. You can consider that. You can consider the  
15 credibility. Because out of the three parties that are in  
16 here, I'll submit to you Thomas is the only one who tried to  
17 do something, tried to be proactive in this when he found  
18 out he was being who-does. And he got upset with the Bank  
19 of America.

20 But if we look at an expectation, his testimony was  
21 when he found out Chase -- the Chase mortgage was  
22 delinquent, his thought was, well, I'm still protected by  
23 the house because that's why I wanted that half interest.  
24 I'm still protected to be able to cover that mortgage. And  
25 what was -- the mortgage was only like ninety-five thousand.

1           He lost that opportunity. He lost that equity, if you  
2   will, because when he found out Bank of America still had  
3   their mortgage and gosh darn, they wanted sixty-nine  
4   thousand dollars, he testified, I can't afford that. So he  
5   lost the property.

6           I'll submit to you that Bank of America breached the  
7   contract. And you can consider the contract this way, plain  
8   language right here. And if you look at paragraph twenty-  
9   nine -- we didn't make a blow-up of it, I don't think, but  
10   paragraph twenty-nine, it's on the last page. It talks  
11   about the entire understanding. This is it.

12          I don't know where we get into the Fair Credit  
13   Reporting Act, the bank regulators, all these other people  
14   that the bank has to conform with, and maybe they do. I  
15   don't see them signing on to that agreement. They could  
16   have put stuff like that in here. They didn't. Real  
17   simple. Give us written notice.

18          And what is interesting is the only time you'll hear  
19   that they want to see a signature is if you're trying to  
20   reinstate, after you close the account. I submit that when  
21   this came in with money attached to it, and they took that,  
22   they had an obligation at that point to close the account.  
23   Or if they thought, what were we to do? Pick up the phone  
24   and write some letters and get it clarified.

25          I don't think Thomas owes Bank of America a dime. They



1     want a breach of contract against Thomas. I'm asking you to  
2     tell Bank of America zero. I'm asking you to award fifty  
3     thousand dollars to Thomas from Bank of America for not  
4     following, not only its contract, but the instructions to  
5     close this off.

6             We know that Roy, in trying to sell the house, we don't  
7     know, he said he was in the hospital, didn't know when those  
8     other people sold their home. We don't even know if that  
9     contract was any good. But we do know he wasn't getting  
10    enough money.

11            Now, we say, well, gosh, he had money in the bank.  
12    Well, if he had money in the bank, why did he draw out  
13    sixty-nine thousand dollars off the Bank of America account?  
14    Maybe that's the money he had. I don't know.

15            And I don't know how he got the money. I showed Mr.  
16    Allred a stack of documents that thick. We're talking about  
17    these access devices, you get your money, your cards issued,  
18    it looks like an ATM card, checks. There's not the first  
19    reference in those documents that he could point to that  
20    even makes a mention that anything from the bank was given  
21    to either Roy or to Thomas.

22            And I think that's very important because, again, I  
23    don't know how he got the money. We do know, though, he had  
24    it linked to his personal checking account. Because in  
25    response to Thomas Irby's question, they researched the line

1 of credit and they know it was linked for overdraft  
2 protection to Roy Irby's personal account. Now, I don't  
3 know how he got it, but we know Roy was getting the money.

4 Good faith and fair dealing. When you go through the  
5 history of this and you look at an event, put that above it  
6 and then ask yourself the question, was it in good faith?  
7 Was it fair dealing? And I'll submit to you, no.

8 And, again, I go back to the bank's argument. If we  
9 had Fair Credit Reporting Act people, if we had bank  
10 regulators and he said, oh, we followed the policy and  
11 procedure. All they had to do was present, the outset of  
12 this case, here is the policy we followed. And you haven't  
13 seen the first internal policy of the bank.

14 So they can say anything they want, why they didn't do  
15 anything. What was the bank to do? All they had to do was  
16 do something. Thank you.

17 **THE COURT:** Mr. Gaines.

18 **MR. GAINES:** Thank you. Thank you, everyone. We  
19 appreciate your time. We know going through a trial can be  
20 tedious. So we appreciate your attentiveness.

21 We are dealing with two issues for Roy Irby, and that's  
22 a breach of contract. And there's one with Bank of America  
23 and there's one with his uncle, Thomas. And we agree that  
24 Roy had a contract with his uncle, and that was to buy  
25 property. And he did that. Both of them had admitted that,

1 but he's been paid for that property and ultimately is why  
2 the deeds were given to Roy, that he paid for it and that he  
3 could go record them. They would be his.

4 But what did his lawyer say at the very beginning? He  
5 said, no good deed goes unpunished. The rest of any claims  
6 he'd have are just that; they're good deeds. He was  
7 agreeing to help pay for a house that he wanted to be built  
8 on his property. Those are good deeds. Those are not a  
9 contract.

10 We submit to you the rest of any obligations for the  
11 Irbys to Bank of America, those are the rest of the  
12 contracts. There's a lot we've seen between Roy and his  
13 uncle. One thing we know is at the last closing we have a  
14 settlement statement. And at the bottom of that settlement  
15 statement it shows the borrower is getting twenty-three  
16 thousand dollars.

17 Now, Roy's testified that he didn't receive that money.  
18 Thomas has testified that he didn't receive that money, but  
19 what did the attorney who closed it say? He said Thomas'  
20 name is on the HUD, and I just hit the button on the  
21 computer, and the computer prints it out. So we can infer  
22 from that where that check went to and who it was made to.

23 The other thing that strikes me is that we know that  
24 Roy's not qualified for these loans. He had to have his  
25 uncle sign for these loans to get them. But the uncle isn't

1 asking any questions. He's not asking questions of how are  
2 you going to pay for this when the time comes? Where did  
3 you get this money to buy this land? How are you going to  
4 make payments along the way? Are you making the payments  
5 along the way?

6 He just signed for a ninety-five thousand dollar note.  
7 And what's his response? I just trusted it was going to  
8 happen. Somebody's going to pay it. That's a lot of trust.

9 I told you in the beginning that you'd hear a lot of  
10 testimony that said there's a lot of blame to go around.  
11 And I believe we've done that. I believe we've heard a lot  
12 of that testimony. There's a lot of blame on all the  
13 parties.

14 We've heard about maximizers. We've heard about  
15 subordinations, access devices. It goes on, and on and on.  
16 But I also said there'd be one thing that would have made  
17 the rest of it irrelevant. And that was the sale of the  
18 property.

19 Roy had a contract to sell that property. A hundred  
20 and seventy-seven thousand dollars. The debt at that time  
21 was somewhere around a hundred and sixty-four. And he  
22 testified that if there was a shortage, he'd sold all the  
23 things in his house. That's what he testified. He had a  
24 living estate auction and sold everything. So he had a  
25 little bit of money that could have made up the difference.

1           So Roy was willing to say, I bought too much house. I  
2   can't afford it. Let me get out of it. I'll sell it. But  
3   why couldn't he do that? We showed you. It was admitted.  
4   There was a *lis pendens* filed. He even named it what it  
5   said, litigation pending. So it told all the world, you  
6   can't sell this house. There's a problem. So now the sale  
7   can't go through.

8           Bank of America, we've admitted that they loaned the  
9   money. They've got to pay them back the money. Roy's been  
10   very honest about having to use that money to build the  
11   house. That's what it was used for. He attended the  
12   closing where he signed the mortgage. His understanding  
13   was, we're going to have a mortgage for Bank of America,  
14   we're going to have a mortgage with M&T. We're going to  
15   build the house.

16          The problem is that -- over this who has first  
17   position? Who's first? Who's second? Bank of America was  
18   willing to accept fifty thousand dollars and give up what  
19   could have been a first position. And as we heard right at  
20   the end, if you're in first position and you go through a  
21   foreclosure, you may not get everything, but you're going to  
22   get everything before anyone else gets paid in full.

23          So they had a chance to get their full sixty-nine  
24   thousand dollars or whatever else they were owed. The  
25   property sold at the foreclosure sale for eighty thousand or

1 eighty-four is what's been testified to. So they had a  
2 chance to have all of that, but they gave that up.

3 So we would say, was there a duty owed? Did we owe  
4 Bank of America? Yes. But they gave that right up. They  
5 got their fifty thousand dollars. So we don't think that we  
6 should owe them anything else. They were willing to take  
7 that fifty.

8 As for Roy and his uncle, as I said, the hope was --  
9 what was the plan? This was family property. Roy testified  
10 his grandfather had lived on that property. I could  
11 understand they wanted a house, a nice house on the family  
12 property where granddad had lived.

13 But there was a problem. They built too much house.  
14 They spent too much money. And we've heard one say that he  
15 couldn't afford to pay for it because he's on Social  
16 Security. We know Roy couldn't afford to pay for it because  
17 he didn't even qualify for the loan on his own.

18 So the issue is, though, Roy recognized that. He tried  
19 to sell it. He tried to refinance it. He tried to do the  
20 deed in lieu. He tried to get out of it once he realized  
21 this is just too much.

22 And the problem was his uncle didn't realize that the  
23 dream was over, and we couldn't have the house on the family  
24 property, that we couldn't just let someone else buy it. So  
25 he filed a *lis pendens* to prevent it.

1           So, again, what we're asking is that you say Roy  
2       doesn't owe any money to Bank of America. They had their  
3       chance. They gave it up. That he doesn't owe any money to  
4       his uncle. They didn't have a contract. They had an  
5       agreement, a nice agreement. It was a bad agreement. But  
6       as they said, it was a good deed, not a contract. Thank  
7       you.

8           **THE COURT:** Mr. Hershon.

9           **MR. HERSHON:** Everyone, ladies and gentlemen of the  
10      jury, I'd also like to thank you for your time. I certainly  
11      understand that, you know, this is two days out of your  
12      life. And I know talking about a contract is probably not  
13      the most exciting thing that could have happened to you  
14      today, but that's what we're left here to talk about.

15           Now, as Thomas Irby wants to present, is a story about  
16      a big bad bank. That's not the story that happened here.  
17      That's not the evidence that you heard.

18           What have you heard? You've heard this man here, Roy,  
19      this man, Thomas, they're fighting with each other. We're  
20      in the middle of a family dispute. Bank of America's in the  
21      middle and there's a cross-fire here. Bank of America's  
22      right in the middle of that. And that's what's been  
23      presented in this case, Thomas and Roy fighting.

24           Thomas said that he trusted Roy. Somewhere down the  
25      line, that trust was broken. Bank of America doesn't --

1    isn't a part of that, that trust, that trust that was  
2    broken. There were promises between them the bank never  
3    knew about. There's all this story about the deeds.

4           And as I mentioned during the opening statement, this  
5    case in terms of what relates to Bank of America is much  
6    simpler than all of that. Just as Thomas Irby's attorney  
7    mentioned, and I'm glad he recalled that from opening  
8    statement, this case is about honoring the contracts you  
9    enter into.

10           There's certainly -- I mean, there's certainly here a  
11   sympathetic story. Roy's had his personal injuries, you  
12   know, and Thomas, you know, has had a relationship with his  
13   nephew fall apart. But at the end of the day, we have -- we  
14   have a written agreement under this equity line.

15           And as you'll be instructed by the Judge, there are  
16   certain rules of law for how the contract is looked at, how  
17   -- what happens after a breach and what damages are supposed  
18   to be awarded if there is a breach.

19           Now, Thomas' attorney, Plaintiff's attorney, mentioned  
20   that, you know, there are two things of why we're here. I  
21   think there's clearly -- I think there's many reasons why  
22   we're here, but there are two things that didn't happen  
23   provided that Bank of America did not breach this contract.

24           We talked about this letter that came from Gregg Jones.  
25   And we talked about this blank here. And, you know, as



1 evidence that's here and that Gregg Jones testified, he  
2 didn't know how this letter got out without a signature on  
3 it. But he certainly admitted that it did get out without a  
4 signature on it.

5 Thomas' signature isn't on there. Roy's signature  
6 isn't on there. It's not on the letter. The admission  
7 there certainly from counsel is that the -- from their own  
8 real estate attorney is that what was needed to be sent into  
9 the bank didn't go.

10 These instructions are not just done, you know, to make  
11 life difficult for anyone. It's to protect the consumer.  
12 What if you had a loan with the bank and somehow it closed  
13 just because someone sent in a letter, you know, saying  
14 maybe that it was from you, but without your signature  
15 anyway, I think everyone in the jury can recognize the  
16 problems that could arise from that.

17 In fact, the claims that then, you know, could arise by  
18 Thomas or Roy Irby for an account being closed that they  
19 didn't want closed, the credit damage that occurred and  
20 other items that, you know, as Grant, Mr. Allred testified  
21 to you about. And that testimony from Gregg Jones, it was  
22 crystal clear. I don't think there's anything, and maybe  
23 why we didn't hear anything about that testimony from anyone  
24 so far, is because this document is so clear about what  
25 didn't happen.

1           Now, the question of who used the funds and who didn't,  
2   we heard two very different stories from Thomas and Roy.  
3   Thomas claiming, whoa, I didn't know. I didn't know these  
4   funds were going out. I signed my name to an equity line,  
5   but I didn't know. And I didn't care that statements  
6   weren't coming to me after this was entered into in May of  
7   2007, June, July. That didn't matter.

8           But all of a sudden when Roy breached the trust  
9   essentially with his uncle, that that somehow all of a  
10   sudden became Bank of America's responsibility to send him  
11   statements when -- as you'll have a chance to look at the  
12   equity line agreement again, that it says notice to one is  
13   notice to all. These two borrowers went into a business  
14   agreement together, essentially and understood that one  
15   statement goes out. That's what happened. Roy received  
16   those statements, but here they're co-borrowers. And when  
17   that notice goes out, it goes to all of them.

18           So what you've heard there isn't some breach by Bank of  
19   America. The bank did, as Mr. Allred testified, it did what  
20   its practices called for. There were two things that had to  
21   happen. There needed to be a signed, executed letter from,  
22   specifically, from the borrower. And the contract document  
23   specifically says it needs to be from the borrower. Second,  
24   the account needs to be drawn down to zero.

25           As you've heard multiple times, those two things never

1     happened. The account continues as normal. Roy and Thomas,  
2     for whatever reasons, are continuing to draw those funds.

3             What you've heard -- you've heard these different  
4     things thrown out there. I almost feel -- I almost feel  
5     like a room full of smoke based on what we've heard from  
6     Thomas on all these little things that happened, that, you  
7     know, where -- what were these access cards? Where were  
8     they? Grant was able to explain that pretty clearly, where  
9     they were. It didn't seem difficult to understand --  
10    understand to me. And I hope that's been something that's  
11    been clear for you, for the jury as well.

12            Now, Thomas has presented this stuff that he's been  
13    damaged somehow when Bank of America took steps on its own  
14    dime to lessen the amount of damages that are under this  
15    loan. And this is another issue that we do need to separate  
16    out, this idea of an equity line and a mortgage because  
17    they've been brought up so much in this case. They're two  
18    separate items.

19            I think as was explained in this case, they said  
20    there's a mortgage to provide security, but those debts can  
21    also just be recovered from the individuals themselves.  
22    They don't have to be recovered from the sale of the  
23    property.

24            And in this situation, the bank made a business  
25    decision, made a large recovery of money that went to the

1 benefit of Thomas and Roy. It drew this amount that was  
2 owed down. Those aren't damages to Thomas Irby. Those are  
3 damages that he's not -- those were amounts he doesn't have  
4 to pay to the bank. He's got the windfall. He should be  
5 thanking Bank of America in some ways for that.

6 Now, again, you know, I know both Roy and Thomas have  
7 had their financial troubles in being able to repay this.  
8 And I think as Bank of America made clear, it doesn't want  
9 to see anybody go into default. But that's what happened  
10 here. There were simply, in this contract, as we've been  
11 talking about, under this contract, you made a promise to  
12 pay, and those payments weren't made. And, again, this is  
13 some of the damages by Thomas.

14 I ask you, where's the evidence of this damage? What  
15 was presented -- what was presented in testimony that there  
16 were some number of -- I think at one point we heard that it  
17 was forty thousand and another it was fifty thousand.

18 Ladies and gentlemen of the jury, the Judge will  
19 instruct you about the preponderance of the evidence. There  
20 hasn't been -- there's been -- I cannot find any evidence.  
21 And I beg of you to see if there is any.

22 But the evidence isn't there for any damages for  
23 Thomas. He's gone through the lawsuit for a couple of  
24 years, so has Bank of America, so has Roy. There's not some  
25 specific amount that he discussed. He discussed four

1    hundred dollars that he paid to Bank of America on the  
2    equity line. Roy testified that he repaid that money. That  
3    money was returned.

4            The question was brought up about equity in the  
5    property. That equity amount was fifty thousand dollars.  
6    That's already been counted in. Bank of America is not  
7    trying to collect twice.

8            What it's attempting to recover here today is simply  
9    the amounts that are left due under the note. Those are  
10   what we talked about. What we've talked about today from  
11   Grant Allred is that we had an amount, seventy-two thousand,  
12   two hundred and fourteen dollars and sixty-nine cents that  
13   was due in April of 2011. A fifty thousand dollar credit  
14   that's been established that came from a title insurance  
15   payment.

16           Interest under that, was shown in that latest payoff  
17   document was that interest was computed at three dollars,  
18   sorry, three point four nine percent per day. That works  
19   out to two dollars and twelve cents per day on this balance  
20   that was remaining of twenty-two thousand, two hundred and  
21   fourteen dollars and sixty-nine cents.

22           And providing you -- and Mr. Allred was very close on  
23   his math in his head. The interest from there to today is  
24   approximately another sixteen hundred dollars. That draws  
25   the total amount due to twenty-three thousand, eight hundred

1     and fifty-two dollars and thirty-six cents. This is the  
2     amount that both Roy and Thomas owe jointly together to Bank  
3     of America.

4             So, again, I just want to say that, you know, again, we  
5     have this family in-fighting that Bank of America has been  
6     caught in the middle of. We're talking about a contract, a  
7     contract that was breached.

8             There's nothing that Bank of America has done wrong to  
9     Mr. Irby. I'm sorry that we're in this situation, but  
10    there's nothing that's been done wrong in that case.  
11    There's been no sign of any breach by Bank of America. It  
12    followed its practices. It did as it was supposed to do.

13            And in that regard, I just ask that you deny the claims  
14    here by Mr. Thomas Irby and award a judgment in favor of  
15    Bank of America. Thank you.

16            **THE COURT:** Briefly in reply, Mr. Alford.

17            **MR. ALFORD:** Thank you, Your Honor. It struck me the  
18    bank was not trying to collect twice on the fifty thousand.  
19    What dawned on me when I heard that is what we haven't seen.  
20    And this case has been filed since 2010, three years old.

21            You got one document. You got a pay history, which we  
22    put in showing the -- up until November 1st, 2010, the  
23    sixty-nine thousand total. They submitted one document to  
24    you. As of March 5th, 2011, here's the sixty-nine thousand  
25    plus accrued interest. If Thomas Irby had not introduced

1     this subordination claim -- have you seen any document from  
2     the bank showing you the account balance as of today? And  
3     I'll submit to you the reason is, if it hadn't been brought  
4     to their attention, they'd still be asking for sixty-nine  
5     thousand dollars because they haven't submitted the first  
6     piece of paper.

7             Faced with that, I think I'd reduce my damages, too.  
8     But you don't see an accounting as of today. And this case  
9     has been ready for three years in the making.

10            The other thing that had dawned on me when he said,  
11     well, there was an account status. And if we ask ourselves  
12     the question, well, what was the bank to do? There's not  
13     one document here submitted by the bank addressed to Roy  
14     Irby -- addressed to Thomas Irby at any address, telling  
15     them what the account balance is. This is a payoff quote.  
16     I've got no idea who this is going to.

17            They talk about they sent notice so they would know  
18     what's happening to the account. Well, there's been no  
19     testimony. And more importantly, they have the burden of  
20     proof. Because when they have a breach of contract, they  
21     have a burden of proof also.

22            And it dawned on me, there's not a piece of paper in  
23     here where they, number one, followed up with Gregg Jones'  
24     letter, nor any account statement to any of the borrowers.  
25     So how would the borrowers know? What was the bank to do?

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1 All they had to do was pick up the phone or write a letter.

2 MR. FLOYD: Your Honor, one moment very briefly before  
3 the charge, if I may? May I approach?

4 THE COURT: As to your claim? Yes, sir, as to what?  
5 If I can see the attorneys here:

6 (Whereupon a bench conference was held off the record  
7 in the presence of the jury, but out of their hearing)

8 THE COURT: Mr. Foreman and ladies and gentlemen of the  
9 jury, it's now my responsibility to instruct you on the law  
10 of the case. Let me remind you that you and I have had  
11 different duties to perform. As the trial judge, it's been  
12 my responsibility to preside over the trial of the case, to  
13 rule on the admissibility of evidence that's been offered  
14 during the trial of the case.

15 You're to consider only the evidence that is before  
16 you. Any other matters that an objection was made and it  
17 was sustained, then you should obviously disregard that.  
18 You're to consider the testimony that's been offered, the  
19 exhibits that have been made a part of the record and that  
20 alone.

21 My job also is to charge you the applicable law to the  
22 case. It's your duty as jurors to accept and apply the law  
23 as I state it to you now. You may have an idea of what the  
24 law is in a case such as this or even a notion what the law  
25 ought to be in a case like this. If you have such an idea



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1 and it's not in concert with what I now tell you the law is,  
2 then you must abandon such an idea because under your oath  
3 you've sworn to accept the law and apply the law just as I  
4 state it to you now.

5 Every case that's tried in this courtroom before a  
6 jury, that jury becomes the sole exclusive judge of the  
7 facts in a case. A trial judge can't comment on or make any  
8 statement whatsoever about the facts in the case. Our  
9 Constitution in South Carolina prohibits a trial judge such  
10 as I from stating any opinion about the facts.

11 So you're not to consider anything that has taken place  
12 during the trial of the case, any rulings I've made on the  
13 admissibility of evidence or otherwise. Anything I say to  
14 you now in the course of this instruction to you, that I  
15 have an opinion about the facts, I don't have an opinion  
16 about the facts. That's totally and exclusively up to you  
17 and you alone to decide. The law prohibits such an opinion  
18 by me.

19 Now, this is a case brought in the civil court where  
20 the burden of proof is by what's called a preponderance of  
21 the evidence. The preponderance of evidence simply means  
22 the greater weight of the evidence. It's evidence which as  
23 a whole shows that a fact sought to be proved is more likely  
24 true than not true.

25 Often the illustration is given, ladies and gentlemen,

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1 of the scales of justice where the -- if the blind lady of  
2 justice there holds the plates, they're evenly balanced. If  
3 those scales remain evenly balanced or tip ever so slightly  
4 in favor of the Defendant, then the Plaintiff would have  
5 failed to meet the burden of proof and not be entitled to  
6 recover. If, on the other hand, those scales tip ever so  
7 slightly in favor of a Plaintiff, then the Plaintiff will  
8 have met the burden of proof and should be entitled to a  
9 verdict.

10 The preponderance of evidence isn't determined by the  
11 number of witnesses who testify. It's determined by the  
12 greater weight of all of the evidence.

13 Now, in our courts no distinction is made between  
14 corporations and an individual. A corporation is a person  
15 in the eyes of the law and is entitled to the same fair and  
16 impartial consideration and to justice by the same legal  
17 standard as an individual.

18 Now, I've talked about the burden of proof and the  
19 preponderance of the evidence and the plaintiff and  
20 defendant. The plaintiff files the action. Oftentimes, as  
21 in this case, there's the denial about the material  
22 allegations by the defendants.

23 Sometimes defendants have what's called counterclaims.  
24 They then take the position of a plaintiff. So in this  
25 case, the Plaintiff, Mr. Thomas Irby, has brought a lawsuit,

1 but the bank has also counter-claimed and they've brought a  
2 lawsuit against him as well. So the burden of proof is on  
3 each of those to prove their particular claim. So when I  
4 use in this instruction a plaintiff or a defendant, then  
5 sometimes they're both. In Mr. Roy Irby's case, he's a  
6 Defendant only in this case.

7 Now, generally in a trial there's two types of  
8 evidence. There's direct evidence and there's  
9 circumstantial evidence. Direct evidence is the testimony  
10 of a person who claims to have actual knowledge of a fact,  
11 such as an eyewitness. That's evidence which immediately  
12 establishes the main fact to be proved.

13 Circumstantial evidence is proof of a chain of facts  
14 and circumstances that indicate the existence of a fact.  
15 It's evidence which immediately establishes collateral facts  
16 from which the main fact may be inferred.

17 Circumstantial evidence then is based on inference and  
18 not upon personal knowledge or observation. It's proof  
19 that, in other words, doesn't establish the fact in  
20 question, but asserts or describes something else from which  
21 you can either reasonably infer the truth of the fact or at  
22 least reasonably infer an increase in the probability that  
23 the fact is true.

24 Now, for circumstantial evidence to warrant a finding  
25 of fact, the circumstances must lead to that fact with

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1 reasonable certainty. The facts and circumstances should be  
2 considered in light of ordinary experience and common sense.  
3 The existence of a fact can't be based upon speculation, or  
4 conjecture or surmise.

5 The law makes absolutely no distinction between the  
6 value or the weight to be given either direct evidence or  
7 circumstantial evidence. Nor is a greater degree of  
8 certainty required of circumstantial evidence than of direct  
9 evidence. You can consider all of the evidence. And you  
10 should consider all the evidence in the case to determine  
11 what the facts are.

12 Now, necessarily, you must determine the credibility of  
13 witnesses who've testified in the case. Credibility simply  
14 means believability. It becomes your duty as jurors to  
15 evaluate the evidence and determine which evidence convinces  
16 you of its truth.

17 Now, in determining the believability of witnesses  
18 who've testified in this case, you can believe one witness  
19 over several witnesses. You can believe several witnesses  
20 over one witness.

21 In your discretion, you can believe part of the  
22 testimony of a witness. You can reject the remaining part  
23 of the testimony of that very same witness. You can believe  
24 the testimony of a witness in its entirety or you can reject  
25 the testimony of a witness in its entirety.

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1           You can consider whether the witnesses has an interest,  
2   or a bias, or any prejudice, whether the particular witness  
3   was consistent in his or her testimony or inconsistent. How  
4   did the witness come to know that particular fact to which  
5   that witness was testifying? How did that particular  
6   witness stack up with other evidence in the record? It's up  
7   to you to determine the value and the credibility of all the  
8   witnesses who have testified in the case.

9           Now, this is a case involving a breach of contract.  
10   And the Plaintiff claims that the Defendant breached the  
11   contract that existed between the parties. Now, in order to  
12   recover for breach of contract, a plaintiff must prove the  
13   claim by the preponderance or the greater weight of the  
14   evidence.

15          Now, ladies and gentlemen, a contract is an agreement  
16   entered into between two or more parties in which each party  
17   agrees to perform or not to perform certain acts. It may be  
18   shown by words, written or oral, or by conduct.

19          However, a contract is more than a mere exchange of  
20   promises. For the agreement to be considered a contract the  
21   parties must have intended to enter into a contract and must  
22   have reached a mutual understanding of the terms of that  
23   contract, something called a meeting of the minds. Each  
24   party must intend to mutually be bound by the agreement.

25          Now, I mentioned there is written contracts and there's

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1 oral contracts. And in this case you make that  
2 determination as to each. When there is a contract that's  
3 in writing, you must determine the intentions of the  
4 parties, primarily from the contents of the written document  
5 itself. The intention of the parties must be determined  
6 from the entire agreement and not from any particular clause  
7 or provision.

8 When the written contract is clear, its meaning must be  
9 determined by the contents of the document alone. Now, if  
10 the circumstances warrant, terms which do not contradict the  
11 written language of the contract may be implied in order to  
12 carry out the intentions of the party.

13 A party to a contract has a duty to read it and learn  
14 its contents before signing it. A party cannot complain of  
15 misrepresentation of the contents of contract if the truth  
16 could have been discovered by reading the contract.

17 Now, contracts may also be oral. The plaintiff is not  
18 required in that case to prove the exact words of the  
19 agreement. It's enough if the words, or deeds, or acts or  
20 silence on the part show an intention to make a contract.

21 In every contract, written or oral, there's unspoken, but  
22 legally enforceable promise of good faith and fair dealings.

23 Now, next the Plaintiff, again, the one claiming the  
24 other side breached the contract, must show by a  
25 preponderance or the greater weight of the evidence that the

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1 Defendant unjustifiably breached the contract. The word  
2 breach means the failure without legal cause to perform any  
3 promise that forms the whole or a part of the contract.  
4 This would include the refusal of a party to recognize the  
5 existence of the contract or the doing of something  
6 inconsistent with the existence of the contract. A party  
7 breaches a contract when the party does not perform as  
8 agreed under the contract by failing to carry out a term, a  
9 promise or a condition of that contract.

10 Now, finally, ladies and gentlemen, the Plaintiff, the  
11 one making the claim for the breach of contract must prove  
12 by the preponderance or the greater weight of the evidence  
13 that the Plaintiff suffered damages, which were proximately  
14 caused by the Defendant's breach of the contract.

15 The Plaintiff must prove damages by the preponderance  
16 or the greater weight of the evidence. This does not mean  
17 that the Plaintiff must prove damages to a mathematical  
18 certainty or produce evidence of an exact amount of damages  
19 suffered.

20 However, the amount of damages cannot be left to  
21 guesswork, or speculation or conjecture. It cannot be a  
22 windfall to a party through damages. Instead, the evidence  
23 presented by the Plaintiff must be enough to allow you to  
24 determine the amount of the damages with reasonable  
25 certainty and accuracy.

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1       The damages for a breach of contract are those that may  
2       fairly and reasonably be considered to arise naturally from  
3       the breach of the contract itself or those that may be  
4       reasonably supposed to have been in the minds of the parties  
5       at the time the contract was made.

6       Now, Plaintiff may not recover damages for a breach of  
7       contract unless the Plaintiff shows that the Plaintiff was  
8       -- had performed his or her part of the contract or at least  
9       was able, ready and willing to perform at the appropriate  
10      time. Damages are to compensate a plaintiff and put that  
11      plaintiff as closely as possible in the same position that  
12      he or she would have been in before the breach of the  
13      contract occurred.

14      Now, Mr. Foreman and ladies and gentlemen, there's  
15      possible verdicts. As I've stated to you, we have multiple  
16      plaintiffs. We have Mr. Thomas Irby, who's brought a  
17      lawsuit against Roy Irby and also against Bank of America.  
18      Bank of America has counter-claimed. Bank of America has  
19      also brought a suit for breach of contract against Mr. Roy  
20      Irby.

21      Mr. Foreman, I believe the verdict forms that I've  
22      prepared will be self-evident for you when you look at them.  
23      But there's three different forms here. The first form  
24      relates to the breach of contract between Thomas Irby and  
25      the Bank of America. And there's three possible verdicts



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1     you can find.

2             If you find that the Plaintiff, Thomas Irby, has proven  
3     by the preponderance of the evidence that the Bank of  
4     America breached the contract, then you would write in --  
5     check that block and write in the amount of damages that you  
6     believe he's entitled to.

7             Or the option would be if the Bank of America has  
8     proven by the preponderance of evidence that Mr. Thomas Irby  
9     breached the contract, then the bank is entitled to an  
10    amount of damages. Or your third option would be that you  
11    find for the Defendants, that'd be no recovery by either  
12    party.

13            So as to that verdict form, you'll have one of three  
14    choices. Mr. Thomas Irby is entitled to a monetary amount  
15    for the breach of contract by the bank, or that the bank is  
16    entitled to an amount from Mr. Thomas Irby for his breach,  
17    or that a verdict for the Defendants would mean that neither  
18    is entitled to recover from the other.

19            Mr. Thomas Irby also has brought a lawsuit against Mr.  
20    Roy Irby. There you have two choices. If you find that  
21    he's met his burden of proof by the preponderance of the  
22    evidence, then he would be entitled to a monetary amount for  
23    the breach of the contract that he had, that he's proven to  
24    you by the greater weight of the evidence against Mr. Roy  
25    Irby. You'd fill in the amount.

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1           Or if you find that Mr. Roy Irby did not breach the  
2   contract or there's not been proof by Mr. Thomas Irby that  
3   he did, then you'd find for the Defendant, Roy Irby.

4           And finally, of course, the last document would be as  
5   to the bank and Mr. Roy Irby. If you find the bank has  
6   proven its case, that Mr. Roy Irby breached the contract and  
7   owes them money, you'd fill in the amount. Or if you find  
8   that he does not owe the money or the bank has failed to  
9   prove that, you'd check that for the Defendant.

10          And on each of these just sign your name as Foreperson,  
11   date it, and we'll receive the verdicts back here in the  
12   courtroom.

13          All twelve of you must agree upon a verdict. It must  
14   be a unanimous verdict. Your verdict can't be based upon  
15   sympathy, or passion, or prejudice, or emotion or any other  
16   consideration not into evidence in the case.

17          At this time, Mr. Foreman, ladies and gentlemen, I'm  
18   going to ask you to retire back to your jury room. Don't  
19   start your deliberations just yet. There's a final matter  
20   of law I need to take care of with the attorneys.

21          We'll notify you as to whether or not I need to bring  
22   you back out here or either the bailiff or the clerk will  
23   bring you the exhibits with the verdict forms with  
24   instructions to begin your deliberations. But for right  
25   now, don't start any deliberations.

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1           As you know, we've ordered lunch for you. I don't know  
2   if it's here yet or not.

3           **THE BAILIFF:** I believe it is, Your Honor.

4           **THE COURT:** Okay. If it's here, you can go ahead and  
5   start your lunch, if you wish. But we'll give you  
6   instructions as to when you start your deliberations, but  
7   not right now. You may retire to your jury room. Everyone  
8   else, please remain seated.

9           (Whereupon the jury exited the courtroom at 12:45 pm)

10          **THE COURT:** All right. Other than what we had our  
11   bench conference about, are there any other exceptions to  
12   the charge from any party? Then we'll address that.

13          **MR. ALFORD:** None from the Plaintiff, Your Honor.

14          **MR. GAINES:** No.

15          **MR. HERSHON:** Nothing, Your Honor.

16          **THE COURT:** All right. We did have a bench conference  
17   before the charge to the jury. I believe Mr. Floyd raised  
18   an issue about an argument by Plaintiff's counsel on the  
19   subrogation agreement between Chase. If you want to  
20   articulate that on the record, either Mr. Hershon or Mr.  
21   Floyd.

22          **MR. FLOYD:** Yes, Your Honor. Thank you. With respect  
23   to Mr. Alford's reply closing argument, to which the bank  
24   was not entitled to any response, and which was not taken  
25   into account with respect to any instructions to the jury,

1 the bank submits that Mr. Alford made improper arguments to  
2 the jury with respect to the lack of evidence regarding  
3 accounting of the fifty thousand dollars that was paid by  
4 Chase's insurer to Bank of America as part of a business  
5 agreement with respect to the priority of the liens, and  
6 with respect to the uncertainty of the lawsuits in this  
7 case.

8 The fact of the matter is that this fifty thousand  
9 dollar payment has been known in discovery. It was shared  
10 about this among the parties for months, if not -- it's been  
11 more than a year since all this information was known.

12 In addition to that, Mr. Hershon, on May 22nd sent a  
13 letter to Mr. Alford and to Mr. Gaines that says  
14 specifically, Dear David and Jerry, as you know, the above  
15 referenced lawsuit is scheduled for trial the week of May  
16 28th. One item that has clearly been established in this  
17 matter is that Bank of America received a payment of fifty  
18 thousand dollars from Chase's title insurer.

19 With this in mind, Bank of America stipulates that this  
20 amount has been paid to Bank of America and such amount must  
21 be applied as a setoff against any damages award that Bank  
22 of America may receive. This was done on May 22nd.

23 In addition, during pre-trial discussions and  
24 discussions in chambers with the Court and among counsel, it  
25 was specifically discussed that the setoff, and it is a

1     setoff, which was pled in the pleadings, that the setoff was  
2     a matter of equity to be taken up by the Court, post-trial.  
3     The fifty thousand dollars is not a matter of evidence and  
4     it's not a matter with respect to damages. It is a matter  
5     of setoff for post-trial.

6             That was discussed with the Court. It was subject to  
7     pre-trial motions in which the Bank of America specifically  
8     requested that information not be a part of the case. In  
9     response to that, Mr. Alford argued that he was not  
10    interested -- specifically said he was not interested in  
11    calculations. He was not interested in numbers.

12            What he wanted to present to the jury was the idea that  
13    somehow the priority had been split, and that that was part  
14    of the deal, and that somehow his client had been harmed or  
15    that somehow his client was entitled to some defense because  
16    of that flipping.

17            The Court, in its ruling, allowed the evidence of the  
18    agreement with Chase in, the agreement. Nothing about  
19    accounting, nothing about numbers, nothing about setoff,  
20    none of those things, which, again, are proper only for  
21    post-trial equitable matters.

22            Nevertheless, with the way the evidence was introduced,  
23    it was again noted on the record that there had been a  
24    stipulation with respect to the fifty thousand dollars, that  
25    it had been paid, and that it would be applied. And that

1 was during the -- during direct examination and subject to  
2 another bench conference, I believe, at the time to make  
3 sure that everything was going forward properly.

4       Nevertheless, it occurred to Mr. Alford, and those are  
5 the exact words he used in his argument, it occurred to me  
6 that there was no accounting presented by Bank of America  
7 with respect to this fifty thousand dollars. And directly,  
8 at least insinuated, if not directly implied, it directly  
9 attributed bad faith, bad motives and a bad argument in this  
10 case with respect to those numbers and left that as the last  
11 note with this jury. That's what Mr. Alford did in his  
12 final argument.

13       We would submit, the bank would submit that the only  
14 way to cure that at this point is a curative instruction  
15 that that not be taken into account, that that was  
16 stipulated to. That is not a matter of controversy in this  
17 case. That's the only way that it can be cured at this  
18 point. Thank you, Your Honor.

19       **THE COURT:** All right. Mr. Alford.

20       **MR. ALFORD:** Your Honor, I would argue that the two  
21 reasons that that stipulation -- that was a letter to me --  
22 was waived by Bank of America. This morning's testimony,  
23 Mr. Allred mentioned that the fifty thousand dollars they  
24 received was a benefit to the borrowers.

25       And then in closing, Mr. Hershon -- and that's why I

1     wanted to address it -- stated that that fifty thousand  
2     dollars was a benefit to them and he made some comment, you  
3     would think they would thank Bank of America for that.

4             Now, if they're trying to work the subordination  
5     agreement as a, quote, benefit to them, really help them on  
6     this loan, I think it's appropriate to point out to the jury  
7     that they're trying to paint that as a benefit, then where  
8     is it? Where were they shown the benefit of it?

9             I pointed out that there are no accounting records  
10     other than the payment statement and the Bank of America  
11     exhibit number 1. There is no accounting in there, even  
12     ignoring the fifty thousand dollars ever been provided to  
13     either party.

14             So if they're going to try and paint this as a big  
15     benefit to the borrower, I think we sort of waived any  
16     stipulations. And I, you know, I know what we talked about  
17     in there, and I argued that we needed to show that the bank  
18     in this subordination sold out their interest for fifty  
19     thousand.

20             Now, I don't -- I don't -- I think it's harmless error  
21     is the fact -- because there is no accounting. Now, if they  
22     had an accounting here through today, and let's say it was  
23     sixty-nine thousand and they said, and, yes, we'll put the  
24     fifty thousand against it, I'm not sure I'd be raising that.  
25     But there is no accounting. So they can't argue harm.

1       **MR. FLOYD:** Your Honor, with all due respect, Mr.  
2       Alford can't have it both ways. There's no accounting  
3       because it's not in controversy. It was stipulated to. We  
4       argued vehemently that it shouldn't have even been a part of  
5       this case. It's all for post-trial.

6       Mr. Alford argued that it should be a part of this  
7       case, not with respect to the amount, because the amount is  
8       not in controversy. That's stipulated. There's no proof  
9       that anyone had to put up.

10       Mr. Alford, again, he would have it both ways, that we  
11       can't argue it -- that the bank loses regardless of how it's  
12       applied, post-trial, in trial, either way. It would not be  
13       harmless error. That's the last thing the jury was left  
14       with.

15       **MR. ALFORD:** I think if they're arguing it's a big  
16       benefit to the borrowers, it's fair game.

17       **THE COURT:** All right. I thought I heard before we  
18       started the trial here in court that, Mr. Alford, you'd  
19       pretty much said the amount didn't matter, it was just the  
20       fact that you wanted to know there was a subrogation.

21       **MR. ALFORD:** That is correct, Your Honor. It could  
22       have been ten thousand dollars.

23       **THE COURT:** Right.

24       **MR. ALFORD:** But if they're painting it as a benefit,  
25       look what we did for the clients, then I think they waive



1 any issue as far as -- and it could have been forty  
2 thousand, it could have been ten thousand. It's not the  
3 dollar amount.

4 **THE COURT:** But then why the argument that they haven't  
5 provided an accounting for the fifty thousand dollars?

6 **MR. ALFORD:** And I also said it in the same -- in the  
7 same term, they haven't provided an accounting on the  
8 account, period.

9 **THE COURT:** Right. But was it for the fifty thousand  
10 or was it because they hadn't added up their per diem?  
11 Didn't you say it occurred to me that there's no accounting  
12 on the fifty thousand?

13 **MR. ALFORD:** That nothing was shown.

14 **THE COURT:** Nothing was shown.

15 **MR. ALFORD:** In the calculation, that is correct,  
16 because he just said, well, the per diem is this. We'll  
17 multiply it, and we'll get sixteen hundred.

18 **THE COURT:** Right.

19 **MR. ALFORD:** So what I was trying to show is Mr.  
20 Hershon argued -- obviously, we didn't put any numbers, any  
21 receipts in. I'm arguing they didn't either.

22 **THE COURT:** Right.

23 **MR. ALFORD:** I'm not saying that they didn't get the  
24 fifty thousand.

25 **THE COURT:** Right.

1       **MR. ALFORD:** I'm not debating that.

2       **MR. FLOYD:** Your Honor, briefly?

3       **THE COURT:** Yes, sir.

4       **MR. FLOYD:** I'm not sure if we can check the record or  
5 not, but I believe the final comment was that if something  
6 hadn't been said about the fifty thousand dollars, they'd  
7 still be asking for the sixty-nine. That's at least ---

8       **THE COURT:** If what?

9       **MR. FLOYD:** That the bank would still be asking for the  
10 sixty-nine. That was the implication.

11       **THE COURT:** Even if what?

12       **MR. FLOYD:** If it hadn't been brought up by Mr. Alford,  
13 that the bank would still be seeking sixty-nine because they  
14 haven't accounted for it. He may have said that directly,  
15 Your Honor, but I don't have access to a transcript.

16       **MR. ALFORD:** I may have said something like that, but I  
17 don't recall the exact words.

18       (Pause)

19       **THE COURT:** All right. If I bring the jury back and  
20 tell them that it's been stipulated between the parties that  
21 a fifty thousand dollar payment received from the other  
22 mortgage holder by Bank of America was applied to the Irby  
23 debt, that all parties have stipulated to that, there's no  
24 requirement on the part of the bank, on the part of Bank of  
25 America to present an accounting for these funds, since by

1 stipulation of all the parties this amount was fully applied  
2 to the Irby debt, would that meet your need?

3 **MR. FLOYD:** Yes. Thank you, Your Honor.

4 **THE COURT:** Any objection, Mr. Alford?

5 **MR. ALFORD:** No objection, Your Honor.

6 **THE COURT:** All right. Let's have our jury come back  
7 in.

8 (Pause)

9 **THE COURT:** Let me show you, while we're waiting, the  
10 revised verdict forms, make sure that -- y'all can be  
11 looking those over.

12 **MR. ALFORD:** No objection from the Plaintiff, Your  
13 Honor.

14 **THE COURT:** All right.

15 **MR. HERSHON:** That looks good.

16 **THE COURT:** Everybody's all right with that then.

17 Okay. Y'all might want to go ahead now and -- we'll have  
18 the jury here in a minute -- and get all the exhibits, make  
19 sure they're in order and the verdict form. All right.

20 (Pause)

21 **THE COURT:** For your benefit, the jury's -- we ordered  
22 them lunch, and I think they're well into it. So we'll just  
23 be at ease for a moment. As soon as they finish eating, I  
24 think they just had sandwiches, we'll bring them back and  
25 give it to them. So if y'all just sort of hang available

**CHARGE OF THE COURT**

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1 for the next ten or fifteen minutes, hopefully they'll -- I  
2 don't want to interrupt their lunch, I'll give them this re-  
3 instruction.

4 **MR. GAINES:** Is the hallway close enough, Your Honor?  
5 Is the hallway close enough?

6 **THE COURT:** That'll be fine. Y'all can stretch your  
7 legs as long as you're close by.

8 (Whereupon court was in recess at 1:04 pm)

9 (Whereupon court resumed at 1:23 pm)

10 (Whereupon the jury entered the courtroom at 1:25 pm)

11 **THE COURT:** All right. Ladies and gentlemen, I  
12 understand you've finished your lunch. I needed to make one  
13 more statement on the law for you to make sure there was no  
14 miscommunication in my charge initially.

15 There's been a stipulation between the parties or among  
16 all the parties that the fifty thousand dollar payment  
17 received from the Bank of America was applied to the Irbys'  
18 debt. And there's no requirement on the part of the bank to  
19 present any accounting for these funds, since by stipulation  
20 of the parties this amount was fully applied to the Irby  
21 debt. I wanted that clarification given to you based upon  
22 the stipulation of the parties and the law as I gave you.

23 You're now ready to start your deliberations. We have  
24 the verdict forms and the exhibits for you. Mr. Foreman,  
25 you can go back and begin your deliberations. I think

**CHARGE OF THE COURT**

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1 everything will be clear there for you. I'll ask, if you  
2 would, retire at this time back to your jury room.

3 I'll ask the alternate, Dr. Johnson, if you would just  
4 stay. The rest of you, the twelve, can go back and begin  
5 your deliberations. They'll bring you the exhibits and the  
6 verdict forms back.

7 (Whereupon the jury exited the courtroom at 1:27 pm)

8 (Whereupon the exhibits and verdict forms were  
9 delivered to the jury, at which time they began their  
10 deliberations at 1:27 pm)

11 **DR. JOHNSON:** Do I stay?

12 **THE COURT:** You stay just for a moment. Any exception  
13 to the charge?

14 **MR. ALFORD:** No exception from the Plaintiff, Your  
15 Honor.

16 **MR. GAINES:** None.

17 **THE COURT:** From anyone?

18 **MR. HERSHON:** No, Your Honor.

19 **THE COURT:** Okay. Thank you very much for serving with  
20 us. You can hang out with us if you want to, but you're  
21 free to go for the week, too. You've been a good juror, and  
22 I appreciate your conscientious effort, but we only need  
23 twelve to deliberate and the other twelve survived. They  
24 didn't -- any of them have any kind of emergency.

25 So, again, we're grateful that you served with us this

1 week. You're free to go. You're free to stay if you want  
2 to. You can come in and out. We're not going to need any  
3 juries for the work we have to do the rest of the week. So  
4 after today, you won't need to call back or come back.

5 **DR. JOHNSON:** So I don't need to do anything?

6 **THE COURT:** No. Just -- they'll need to get your  
7 badge. And if you have other things you need to do -- If  
8 you want to go out and come back in, this is a public  
9 courthouse, so you can just come and go as you like. But  
10 thank you for your service this week. You're free to go at  
11 this time.

12 **DR. JOHNSON:** Thank you.

13 **THE COURT:** All right. We'll be at ease until we hear  
14 from our jury. If you guys want to get a bite to eat, if  
15 you'll just leave the clerk with your cell phone numbers,  
16 they'll call you if there's a question or if there's a  
17 verdict.

18 (Whereupon court was in recess at 1:28 pm)

19 (Whereupon court resumed at 2:27 pm)

20 **THE COURT:** All right. The jury has sent out a  
21 question for the Court. How much is BOA asking as  
22 settlement amount? That's the question from the jury.

23 I propose to bring the jury back. I'll instruct them  
24 again that the evidence is in, that I can't answer questions  
25 related to facts, that they're the finders of the fact, that

1 the court reporter's got recordings of all the testimony if  
2 they need anything played back, she can certainly do that  
3 with a little notice. But otherwise, I can't comment on the  
4 facts. Any input from any of you before I call the jury  
5 back?

6 **MR. ALFORD:** None from the Plaintiff, Your Honor.

7 **MR. GAINES:** No, sir, Your Honor.

8 **MR. HERSHON:** No, Your Honor.

9 **THE COURT:** Okay. Let's have our jury come in if  
10 they're ready. I'll mark this as Court exhibit 2 or 1?

11 **MADAME COURT REPORTER:** 1.

12 **THE COURT:** 1. That will be marked as Court exhibit  
13 number 1.

14 (Whereupon Court's exhibit number 1 was marked for  
15 identification)

16 **THE BAILIFF:** Your Honor, we have a second question.

17 **THE COURT:** All right.

18 (Pause)

19 **THE COURT:** All right. The next question I have, and  
20 we'll mark this as Court exhibit number 2, is what is Thomas  
21 Irby asking for? Please explain how amount is determined.  
22 Please break down into categories.

23 I'll give them the same answer again as to the evidence  
24 has been presented and it's up to them to make that  
25 determination. All right. If they're ready, you can have

1     them come in.

2             (Whereupon the jury entered the courtroom at 2:33 pm)

3             **THE COURT:** All right. Mr. Foreman, you've submitted a  
4     couple of questions for the jury. Reading those on the  
5     record, how much is BOA or Bank of America asking for in  
6     settlement amount? And the second list of questions, what  
7     is Thomas Irby asking for? Please explain how amount is  
8     determined. Please break down the categories.

9             I can answer questions relating to the law, Mr. Foreman  
10     and ladies and gentlemen. I can't answer questions relating  
11     to the facts. The facts have been presented to you. The  
12     evidence has been presented to you by the parties.

13             I'll certainly be glad to explain to you again about  
14     damages and the preponderance of evidence, is what is  
15     required of anyone seeking damages. Our court reporter has  
16     taken down everything that's been said, every question and  
17     every answer. She can certainly play back any testimony if  
18     you need to hear that testimony. But I can't comment on the  
19     facts.

20             The evidence is before you. You have the exhibits.  
21     I'll be glad to instruct you on any of the issues of the law  
22     that you need me to. Or certainly we can have any of the  
23     testimony played back that you feel like you need to hear.  
24     We just need enough warning as to what part of it so that  
25     the court reporter can find that testimony accurately before



**VERDICT OF THE JURY**

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1     that's done.

2             I hope that helps you. If you have other questions of  
3     law, I'll be glad to answer those for you. I'm going to ask  
4     if you would, please, return to your jury room and continue  
5     your deliberations.

6             (Whereupon the jury exited the courtroom at 2:35 pm)

7             **THE COURT:** Any exceptions from ---

8             **MR. ALFORD:** None from the Plaintiff, Your Honor.

9             **MR. GAINES:** No, Your Honor.

10            **MR. HERSHON:** No, Your Honor.

11            **THE COURT:** All right. All right. We'll be at ease  
12     until we hear from our jury.

13            (Whereupon Court's exhibit number 2 was marked for  
14     identification)

15            (Whereupon court was in recess at 2:35 pm)

16            (Whereupon court resumed at 3:28 pm)

17            **THE COURT:** All right. I understand the jury's reached  
18     a verdict on the cases. Are there any matters we need to  
19     take care of before we receive the verdict from the jury?  
20     From anyone?

21            (No response)

22            **THE COURT:** All right. If they're ready, you can have  
23     them come in.

24            (Whereupon the jury entered the courtroom at 3:29 pm)

25            **THE COURT:** Mr. Foreman, I understand the jury has

**VERDICT OF THE JURY**

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1     reached a verdict. Is that correct?

2             **MR. FOREMAN:** That is correct.

3             **THE COURT:** Is it a unanimous verdict as to all the  
4     verdict forms?

5             **MR. FOREMAN:** It is.

6             **THE COURT:** If you would, please, hand the verdict  
7     forms to the bailiff.

8             (Pause)

9             **THE COURT:** All right. Madame Clerk, you may publish  
10    the verdicts.

11            **MADAME CLERK:** Your Honor, this is case number 2010-CP-  
12    23-1621, Thomas R. Irby versus Roy C. Irby, II. As to the  
13    claims for breach of contract, we, the jury, find for  
14    Plaintiff, Thomas Irby, against Defendant, Roy Irby, actual  
15    damages in the amount of thirty-one thousand, seven hundred  
16    dollars. Donald Anderson, May 30th, 2013.

17            Bank of America versus Roy C. Irby, II. As to the  
18    claims for breach of contract, we, the jury, find for  
19    Plaintiff, Bank of America, against Defendant, Roy Irby,  
20    actual damages in the amount of twenty-one thousand, five  
21    hundred, eight dollars and forty-six cents. Donald  
22    Anderson, May 30th, 2013.

23            Thomas R. Irby versus Bank of America. As to the  
24    claims for breach of contract, we, the jury, find for  
25    Defendant, Bank of America, against Plaintiff, Thomas Irby,

**VERDICT OF THE JURY**

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1 actual damages in the amount of one thousand, five hundred,  
2 ten dollars and sixty-one cents. Donald Anderson, May 30th,  
3 2013.

4 If this is your verdict, so say you all, please signify  
5 by raising your right hand.

6 (Whereupon all jurors raised their right hand)

7 **MADAME CLERK:** Thank you.

8 **THE COURT:** Thank you. Is there any matters we need to  
9 take care of with the jury before they're discharged in this  
10 case? From the Plaintiff?

11 **MR. ALFORD:** Nothing from the Plaintiff, Your Honor.

12 **THE COURT:** From either Defendant?

13 **MR. HERSHON:** No, Your Honor.

14 **MR. GAINES:** No, Your Honor.

15 **THE COURT:** Thank you very much, ladies and gentlemen.  
16 You've been a delightful group for me to work with. You've  
17 been a conscientious group. You've listened carefully to  
18 the testimony, and you've been good fellow judges with me,  
19 judging the facts in this case. It's been an honor for me  
20 to serve with you. You have provided a valuable service to  
21 your community. It's not every day you're going to get to  
22 serve as a juror.

23 I hope you might remember from Judge Verdin qualifying  
24 you Tuesday morning that you get certain exemptions. You  
25 don't have to serve in this court more than once every three

1 years. I hope that if you were to get called next year that  
2 you'll waive that exemption and serve again. I'm confident  
3 that if one day you find yourself not sitting in the jury  
4 box, but sitting at one of these tables, you're going to  
5 want some good conscientious jurors such as yourself, solid  
6 citizens, to decide the facts in your case.

7       You've directly participated in your government. You  
8 remember from civics lessons back in school that there's  
9 three branches of government. We have a Legislative Branch.  
10 They pass the laws to decide what laws that we, as citizens,  
11 must comply with. As a citizen, we can't pass a law. We  
12 can write our congressman, or our senator or county council  
13 member about a pothole in the road or any other matters, but  
14 unless we get elected to one of those legislative positions,  
15 we can't pass the laws.

16       Same with the Executive Branch. We have executives who  
17 carry out those laws, the mayor of a town, or the Governor  
18 of our State or the President of the United States. One day  
19 you might get elected to one of those positions and be able  
20 to execute the laws that have been passed.

21       But the Judicial Branch of government, the third  
22 branch, you've directly participated in. You've been  
23 judges. And I appreciate so much your service to Greenville  
24 County.

25       Some of you may need statements for your employers that

1     you've been here this week. If that's the case, please stop  
2     back by the assembly room, and there'll be someone there to  
3     help you getting that statement for your employer.

4             The matters we have left for the rest of the week will  
5     not involve jurors. So you're going to be dismissed for the  
6     rest of the week. Thank you again for your service. You  
7     may be excused at this time.

8             I will ask the -- well, all the verdict forms are  
9     signed. You don't need to stay after all, Mr. Foreman.  
10    You're dismissed at this time. Thank you very much, all of  
11    you.

12            (Whereupon the jury exited the courtroom at 3:37 pm)

13            **THE COURT:** All right. Any other matters, gentlemen?

14            **MR. GAINES:** We would move for a judgment  
15    notwithstanding the verdict.

16            **THE COURT:** I deny your motion.

17            **MR. HERSHON:** We'll move for attorney's fees and costs  
18    at the appropriate time.

19            **THE COURT:** Okay. I'll be glad to hear it. But we'll  
20    -- I'll decide my ruling on that at the time when I see  
21    them. If you want to submit that, I'll be glad to at least  
22    review them.

23            **MR. HERSHON:** Thank you, Your Honor.

24            **MR. FLOYD:** Thank you, Your Honor.

25            **THE COURT:** Yes, sir. Mr. Alford.

1           **MR. ALFORD:** Your Honor, I think I can move -- I don't  
2 know if it would be -- I'm trying to figure out what motion  
3 it's under for my negligence claim for a new trial.

4           **THE COURT:** Well, I ---

5           **MR. ALFORD:** I just -- I wanted to renew the motion for  
6 the same reasons articulated earlier.

7           **THE COURT:** Yes, sir. You articulated them well. And  
8 I believe the law I relied on earlier is still substantial  
9 law. So I respectfully deny your motion. But you're  
10 certainly protected on the record.

11           **MR. ALFORD:** Thank you, Your Honor.

12           **THE COURT:** Y'all did a good job for your clients. I  
13 appreciate the cooperation y'all had, one with another. And  
14 I'm sorry this has taken so long to get resolved, but that's  
15 what we have juries for. They get to hear all the evidence  
16 and make their decision. And I'm grateful for them. Y'all  
17 have a good day. Thank you very much for your  
18 participation.

19           **MR. ALFORD:** Thank you, Judge.

20           **MR. HERSHON:** Thank you, Your Honor.

21           **MR. GAINES:** Thank you.

22           **MR. FLOYD:** Appreciate it.

23                           (Hearing ended at 3:39 pm)

24                           (End of requested transcript of record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 29th-30th day of May 2013.

I do further certify that I am neither of kin, counsel,  
nor interest to any party hereto.

December 6, 2013

Susan W. Hudon

Circuit Court Reporter



## BANK OF AMERICA EQUITY MAXIMIZER AGREEMENT AND DISCLOSURE STATEMENT

Property Serving as Security (the "Property"): 156 PEARSON RD, BELTON, GREENVILLE, SOUTH CAROLINA 29627-9236  
Borrower's Name and Address: THOMAS R IRBY, ROY C IRBY II, 160 PEARSON RD, BELTON, SOUTH CAROLINA 29627-9236

Lender's Name and Address: Bank of America, NA, National Banking Association, 100 North Tryon Street, Charlotte, North Carolina 28255

Date: MAY 16, 2007

Loan Number: 68118000674199

Maturity Date: MAY 16, 2032

Credit Limit: \$ 69,000.00

Annual Percentage Rate: 8.4900

Margin: .2400

Max Interest Rate: 24.0000

Draw Period: 120 Mos.

Repayment Period: 180 Mos.

Billing Cycle: MONTHLY

1. **Introduction.** This Bank of America Equity Maximizer Agreement and Disclosure Statement ("Agreement") governs your Home Equity Line of Credit Account (your "Credit Line" or "Account") with the lender named above ("Lender"). Your Account is a revolving credit arrangement in which we make loans to you by advancing funds ("Advances") at your direction, allowing you to repay those Advances and take additional Advances, subject to the terms of this Agreement. This Agreement will remain in full force and effect notwithstanding that the Account Balance under the Agreement may occasionally be reduced to an amount equal to or less than zero.

In this Agreement, the terms "we," "us," "our" and "Bank" refer to the Lender or to any subsequent assignee or transferee. Except as noted below, the terms "you," "your," "yours" and "Borrower" refer to each person that signs this Agreement or has authority to use the Credit Line. Read this Agreement carefully so that you know how your Account works and keep a copy of this Agreement for your records.

2. **Borrower's Promise to Pay.** You promise to pay to Lender the total of all Advances plus FINANCE CHARGES, together with all fees and charges under the terms of this Agreement. You will pay your Account according to the terms set forth below. If there is more than one Borrower, each is jointly and severally liable on this Agreement. This means we can require any Borrower to pay all amounts due under this Agreement, including credit advances made to any Borrower. Each Borrower authorizes any other Borrower, on his or her signature alone, to cancel the Credit Line, to request and receive credit advances, and to do all other things necessary to carry out the terms of this Agreement. We can release any Borrower from responsibility under this Agreement, and the others will remain responsible.

3. **Term.** The term of your Account will begin as of the date of this Agreement ("Opening Date") and will continue until all indebtedness under this Agreement, if not already paid pursuant to the payment provision below, will be due and payable upon maturity. The Draw Period of your Account will begin on the date after the Opening Date, when this Agreement is accepted by us in the State of North Carolina, following the perfection of the Security Instrument and the meeting of all of our other conditions and will continue for one hundred and twenty (120) months. You may obtain credit advances during the Draw Period. After the Draw Period ends, the Repayment Period will begin, and you will no longer be able to obtain credit advances. The length of the Repayment Period is one hundred and eighty (180) months depending on the repayment schedule set forth below. You agree that we may renew or extend the period during which you may obtain credit advances or make payments.

4. **Credit Limit.** This Agreement covers a revolving line of credit for the principal amount of SIXTY-NINE THOUSAND AND 00/100 DOLLARS (\$69,000.00) which will be your Credit Limit under this Agreement. You may not request an Advance from your Account that would cause your outstanding balance of Advances to exceed your Credit Limit nor are we obligated to pay any Advance request that would cause your outstanding balance of Advances to exceed your Credit Limit. If we do make an Advance that causes your outstanding balance of Advances to exceed your Credit Limit, this will not constitute an increase in your Credit Limit. You agree to immediately repay the amount by which your outstanding balance of Advances exceeds your Credit Limit.

5. **Security.** All amounts due under the Account are secured by a mortgage, deed of trust, or security deed ("Security Instrument") on the Property identified on page one of this Agreement. Borrower agrees to pay all amounts due, and perform all covenants and obligations required of Borrower under the Security Instrument. If it becomes necessary for us to advance funds to you above the Credit Limit to protect our security interest, those amounts in excess of the Credit Limit will be owed by you and will be secured by the Security Instrument unless Applicable Law prohibits the same. The Security Instrument and this Agreement are related documents and a default under either document will be treated as a default under both documents. To the extent permitted by Applicable Law, the lien of the Security Instrument will continue and will have the same priority if, with your consent, we renew, extend, amend, modify or substitute this Agreement. In such event, you agree to execute any additional documents necessary to achieve the action being taken.

6. **Terms And Definitions.** The following terms are defined as set forth in this Section. Other terms are defined elsewhere in this Agreement.

A. "Billing Cycle" is an interval of time that occurs regularly during the term of this Agreement and is used to determine the FINANCE CHARGES and other fees, charges, and credit insurance premiums that are due on your Account. The number of days in each Billing Cycle may vary from time to time. A Billing Cycle occurs regardless of whether there is a balance or any activity on your Account. Your Billing Cycle is stated on page 1 of this Agreement.

B. "Billing Statement" is a statement that we will furnish to you periodically that provides important information regarding your Account activity.

C. "Credit Limit" is the maximum aggregate amount of principal that we will extend to you under this Agreement. Your Credit Limit may change under certain circumstances. Your Credit Limit is stated on page 1.

D. "Draw Period" is the period of time during which you may request Advances from your Account. The Draw Period is stated on page 1.

E. "Maturity Date" is the date on which the entire Account Balance under this Agreement is due. The Maturity Date of your Account is stated on page 1.

F. "Minimum Payment" is the minimum amount you must pay on your Credit Account, as reflected on each periodic Billing Statement for each Billing Cycle. Your Minimum Payment during the Draw Period and during the Repayment Period will be calculated as described below under the heading "Payments."

THOMAS R IRBY/995071041456120

BANK OF AMERICA EQUITY MAXIMIZER AGREEMENT AND DISCLOSURE STATEMENT  
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EXHIBIT A



- G. "Outstanding Balance" is the new balance of the Account, which includes, if applicable, principal, accrued interest on the outstanding principal, fees and charges, Property Expenses and any voluntary insurance, Borrowers' Protection<sup>®</sup> Plan, or Line Protection<sup>™</sup> Plan.
- H. "Property Expenses" are expenses we incur because you do not fulfill all obligations of the Security Instrument for the Property that secures this Account.
- I. "Repayment Period" is the period of time that begins at the end of the Draw Period. During the Repayment Period, you may no longer request Advances from your Account.
- J. "Variable Rate Balance" is the balance during the Draw Period that equals the Outstanding Balance that is not part of a Fixed Rate Loan Option.
- K. "Variable Rate Principal Balance" is the principal balance that is not payable under a Fixed Rate Loan Option.

7. **Payments.**

A. **During the Draw Period.** During the Draw Period, the Total Minimum Payment Due is equal to the sum of: (1) the Variable Rate Balance Minimum Payment (described below); (2) the payment due, if any, for any outstanding Fixed Rate Loan Option; and any past due amounts from prior Billing Cycles. Some Fixed Rate Loan Options may have a different due date and are not figured into the Total Minimum Payment Due. At any time you may pay more than the Total Minimum Payment Due, make additional payments or pay in full or in part the Outstanding Balance. You will be required to pay the Minimum Payment Due each month there is an Outstanding Balance on your Account.

You may choose any of the following monthly payment options. Your billing statement will reflect the option you have chosen. You may change your Draw Period payment option at a later time.

B. **Variable Rate Balance Minimum Payment.** Your "Variable Rate Balance" is all of your Outstanding Balance that is not part of a Fixed Rate Loan Option. Depending on which payment option you choose for the Draw Period, the Variable Rate Balance Minimum Payment may vary. The Variable Rate Balance Minimum Payment will not be less than the amount of accrued interest and any voluntary insurance, plus any unpaid fees.

1. **Payment Options:**

a. **Interest Only (Plus Insurance) Option.** The Minimum Payment if you elect the Interest-Only (Plus Insurance) Option will be the amount of accrued interest plus any voluntary insurance, and unpaid fees.

b. **1.5% of Variable Rate Outstanding Balance Option.** The Minimum Payment if you elect the 1.5% of Variable Rate Outstanding Balance Option will be one and one half percent (1.5%) of the Variable Rate Outstanding Balance plus unpaid fees, or fifty dollars (\$50), whichever is greater, or the outstanding Variable Rate Balance if less than the Minimum Payment under this option.

c. **Fixed Payment Option.** The Minimum Payment if you elect the Fixed Payment Option will be at least one and one half percent (1.5%) of the Credit Limit plus any voluntary insurance, Line Protection<sup>™</sup> Plan and unpaid fees, or fifty dollars (\$50), whichever is greater, or the outstanding Variable Rate Balance if less than the Minimum Payment under this option.

C. **During the Repayment Period.** During the Repayment Period you will be required to make a payment each month. The length of Repayment Period will vary depending on the Outstanding Balance at the beginning of the Repayment Period, if any Property Expenses are incurred during the Repayment Period, and if you have any Fixed Rate Loan Options. The amount of the Total Minimum Payment due may vary due to increases or decreases in the index or if there are any Fixed Rate Loan Options that remain unpaid at the beginning of the Repayment Period.

Payments during the Repayment Period will be calculated as follows. The Total Minimum Payment Due will be an amount equal to the greater of 1/180th of the Variable Rate Principal Balance remaining on the last date of the Draw Period, plus accrued interest, unpaid fees, unpaid Property Expenses, or fifty dollars (\$50). If there are any Fixed Rate Loan Options that remain unpaid at the start of the Repayment Period, the Fixed Rate Loan Options payment previously established will continue to be billed.

For purposes of this Repayment Options section, the Variable Rate Principal Balance equals the amount of your Credit Limit on which you have not elected to convert to a Fixed Rate Loan as of the start of your Repayment Period.

D. **Fixed Rate Loan Option Payment Information.** A Fixed Rate Loan Option has a fixed interest rate and fixed term and is payable monthly. You may convert part or all of the Variable Rate Principal Balance, along with accrued interest, fees, and any voluntary insurance charge to a Fixed Rate Loan Option at any time during the Draw Period or the Repayment Period unless you are in default or if your Advance privileges are suspended or terminated. We will help you establish the amount of principal and interest sufficient to amortize the Fixed Rate Loan Option over the term you select. The maximum term of any Fixed Rate Loan Option may not exceed the repayment period maturity date of this Credit Line. The minimum amount for a Fixed Rate Loan Option is \$5,000. You may have up to three (3) Fixed Rate Loan Options open at any one time, but may not have more than four (4) Fixed Rate Loan Options open during any one statement period. The Fixed Rate Loan Option ANNUAL PERCENTAGE RATE is the Prime Rate plus the Fixed Rate Loan Option margin of 8.00%. However, we may make lower Fixed Rate Loan Option rates available from time to time. Please contact your Banking Center or Customer Service for the Fixed Rate Loan Option rate currently offered. Your payment will be a fixed dollar amount to be determined at the opening of the Fixed Rate Loan Option. You may arrange a different payment date for each Fixed Rate Loan Option. Fixed Rate Loan Option payments will be billed separately from your Regular Payment in accordance with the schedule you have arranged. For Fixed Rate Loan Options, you will receive a separate bill. However, the Variable Rate Balance statement will show all activity, including payments.

R. **Receipt of Payments and Payment Application.** All payments made by check, automatic account debit, electronic funds transfer, money order, or other instrument must be received by us at the remittance address on your periodic Billing Statement. Payments received at that address prior to 2:00 PM at the location specified, or a payment made at one of our banking centers in the state or our address indicated as the remittance address by 2:00 PM on any business day will be credited as of the date received. Business days are Monday through Friday, exclusive of legal holidays. If the due date falls on a Saturday, Sunday, or legal holiday, the due date will not be extended. Unless otherwise agreed or required by applicable law, payments and other credits will be applied to FINANCE CHARGES, other charges and fees, and principal in any order we choose without notice.

9. **Advances.** During the Draw Period, you may request Advances from your Account, and any amounts you repay will subsequently be available for Advances, subject to the limitations of this Agreement. If there is more than one of you, each of you may obtain Advances in accordance with the terms of this Agreement. Each of you is individually responsible for payment of the entire Account Balance regardless of who actually requested the Advance.

If there is more than one person authorized to use this Credit Line, you agree not to give us conflicting instructions, such as one Borrower telling us not to give advances to the other.

The words "Authorized Signer" on Special Convenience Checks and Bank of America ATM cards or Bank of America Check Card or Account Access cards as used in this Agreement means and includes each person who (a) signs the application for the Credit Line, (b) signs this Agreement, or (c) has executed a separate signature authorization card for this Credit Line.

You may obtain Advances under your Credit Line Account as follows:

A. **Credit Line Checks.** Writing a preprinted "Special Convenience Check" that we will supply to you.

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- B. Telephone Request.** Requesting a credit advance from your Account to be applied to your designated account by telephone upon proper identification and in accordance with procedures established by us. Except for transactions covered by the Federal Electronic Fund Transfers Act and unless otherwise agreed in your Deposit Account Agreement, you acknowledge and you agree that we do not accept responsibility for the authenticity of telephone instructions and that we will not be liable for any loss, expense, or cost arising out of any telephone request, including any fraudulent or unauthorized telephone request when acting upon such instructions believed to be genuine.
- C. Requests in Person.** Requesting a credit advance in person at any of our authorized locations.
- D. Automated Teller Machine ("ATM") Access.** (Not available in CT, ID, NY, WA or TX) Using your "Bank of America ATM card or Bank of America Check Card or Account Access Card" at any of our designated ATM locations to withdraw or transfer funds in excess of the available collected balance in the account.
- E. Bank of America Equity Maximizer VISA® Account Access Card (the "Account Access Card").** (Not available in CT, ID, NY, WA, or TX) Using the Account Access Card as described in this Agreement. Visa is a registered trademark of Visa International Service Association.
- F. Online Banking.** Transferring funds to a deposit account.
- G. Limitations on the Use of Checks.** We reserve the right not to honor Special Convenience Checks in the following circumstances:
1. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by paying the Special Convenience Check.
  2. **Post-dated Checks.** Your Special Convenience Check is post-dated. If a post-dated Special Convenience Check is paid and as a result any other check is returned or not paid, we are not responsible.
  3. **Stolen Checks.** Your Special Convenience Checks have been reported lost or stolen.
  4. **Unauthorized Signatures.** Your Special Convenience Check is not signed by an "Authorized Signer" as defined below.
  5. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we paid the Special Convenience Check.
- Other Special Convenience Check Limitations.** You may not make a payment on the Account with a Special Convenience Check. You notify us that you wish to stop payment of a Special Convenience Check; however, you will not hold us liable if we try to stop payment of Special Convenience Check and we are unable to do so. You may try to stop payment on a Special Convenience Check by notifying Customer Service at the number listed on your statement. Your stop payment order will remain in effect for six (6) months unless renewed.
- If you pay any Special Convenience Check under these conditions, you must repay us, subject to applicable laws, for the amount of the Special Convenience Check. The Special Convenience Check itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of a check is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. We may choose not to return Special Convenience Checks along with your periodic Billing Statements; however, your use of each Special Convenience Check will be reflected on your periodic statement as a credit advance. We do not "certify" Special Convenience Checks drawn on your Credit Line.
- H. Limitations on the Use of ATM Cards.** We reserve the right not to honor the Bank of America ATM card or Bank of America Check Card or Account Access Cards in the following circumstances:
1. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by honoring the Bank of America ATM card or Bank of America Check Card or Account Access Card charge.
  2. **Stolen ATM Cards.** Your Bank of America ATM card or Bank of America Check Card or Account Access Cards have been reported lost or stolen.
  3. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in this Agreement or could be if we honored the Credit Line charge.
  4. **Other ATM Card Limitations.** If we pay any Advance requested by use of the Bank of America ATM card or Bank of America Check Card or Account Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the Advance. The Advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an Advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Bank of America ATM card or Bank of America Check Card or Account Access Card will be reflected on your periodic statement as a credit advance.
- I. Transaction Requirements for Account Access Card.** The following transaction limitations will apply to the use of your Credit Line:
1. **Account Access Card Limitations:** The following transaction limitations will apply to your Credit Line and accessing by other methods.
  2. **Limitations on the Use of Account Access Card.** We reserve the right not to honor the Account Access Card linked to this Credit Line in the following circumstances:
    - a. **Credit Limit Violation.** Your Credit Limit has been or would be exceeded by paying the Account Access Card transaction.
    - b. **Stolen Account Access Card.** Your Account Access Card has been reported lost or stolen.
    - c. **Unauthorized Signatures.** Your Account Access Card is not used by a Borrower who has been issued one.
    - d. **Termination or Suspension.** Your Credit Line has been terminated or suspended as provided in the Agreement or could be if we paid the Account Access Card transaction.
  3. **Other Account Access Card Limitations.** If we pay any Advance requested by use of the Account Access Card under these conditions, you must repay us, subject to applicable laws, for the amount of the Advance. The Advance itself will be evidence of your debt to us together with this Agreement. Our liability, if any, for wrongful dishonor of an Advance is limited to your actual damages. Dishonor for any reason as provided in this Agreement is not wrongful dishonor. Your use of the Account Access Card will be reflected on your periodic statement as a credit advance.
  4. **Liability for Unauthorized Account Access Card Transactions.** You are not liable for unauthorized use of your Account Access Card. Notify us promptly if you believe your Account Access Card has been lost or stolen or if you discover any unauthorized transactions. We may require you to provide a written statement regarding claims of unauthorized Account Access Card transactions.
  5. **Limitations on Lender's Liability.** Lender's liability, if any, for wrongful dishonor of any Advance request is limited to Borrower's actual damages. Lender shall not be liable if any merchant, financial institution or ATM refuses to honor the Account Access Card.
- J. Lost Special Convenience Checks and Bank of America ATM card or Bank of America Check Card or Account Access Cards.** If you lose your Special Convenience Checks or Bank of America ATM card or Bank of America Check Card or Account Access Card(s) or if someone is using them without your permission you agree to let us know immediately. You can notify us at our address shown at the beginning of this Agreement.
- K. Future Credit Line Services.** Where permitted by applicable law, your application for this Credit Line also serves as a request to receive any new services (such as access devices), which may be available at some future time as one of our services in connection with this Credit Line. You understand that this request is voluntary and that you may refuse any of these new services at the time they are offered. You further understand that the terms and conditions of this Agreement will govern any transactions made pursuant to any of these new services.

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L. Credit Line Special Convenience Check, Telephone Request, In Person Request and ATM Access Limitations. There are no transaction limitations for the writing of Special Convenience Checks, requesting an Advance by telephone, requesting an Advance in person, or using the ATM.

10. Billing Statements. If you have a balance owing on your Account or have any Account activity, we will send to you a Billing Statement. Billing Statements will show, as applicable, credit advances, FINANCE CHARGES, other charges, payments made, other credits, your previous balance, and/or your new balance. Payments will be due as shown on the Billing Statements.

11. Automatic Payment. If you choose to have payments made from a designated account and have arranged with us to do so, we will automatically draft the payment. Drafts will be made on the payment due date or immediately after the payment due date (if the payment due date is on a Saturday, Sunday or legal holiday). If your account does not contain the payment amount due, you understand that it is your obligation without notice from us to make the full payment. Even if you make a manual payment, an automatic payment will be drafted from your designated account, unless you make such manual payment for the full payment due at least three (3) business days prior to the due date; however, if you make less than a full manual payment at least three (3) business days prior to the due date, only the remaining amount currently due will be drafted. To stop an automatic draft, you must contact us at least three (3) business days prior to the scheduled payment draft date. We may accept late payments, partial payments or checks and money orders marked "payment in full" (or similar notations) or payments accompanied by a letter stating that our acceptance of the payment indicates our agreement to the terms set forth in the letter without giving up, waiving or losing any of our rights under law or under this Agreement.

If you have authorized automatic payment above, then the following shall apply:

You hereby authorize the Bank to draft the described account for your loan payments. You agree to the Recurring Automatic Payment Authorization Terms and Conditions that will be enclosed with your Automatic Payment confirmation notice, unless you otherwise notify Lender. If you choose to establish automatic payment to draft your designated Bank of America account, the authorization will remain in full force and effect until the Bank has received written or verbal notification from you of its termination in such time and in such manner as to afford the Bank a reasonable opportunity to act on it. If at any time you select to terminate your automatic payment, your margin will increase by 1/4%.

## 12. ANNUAL PERCENTAGE RATE AND FINANCE CHARGE.

A. When FINANCE CHARGES begin to accrue. Periodic FINANCE CHARGES for Advances under your Credit Line will begin to accrue on the date Advances are posted to your Credit Line. There is no "free ride" period which will allow you to avoid FINANCE CHARGES on your Credit Line Advances.

B. How the Balance on which the FINANCE CHARGE is calculated is determined. The cost of the credit through the Credit Line is disclosed as a Finance Charge. Except for some closing costs (indicated in this Agreement), interest will not accrue until a credit advance is made. You will pay interest on each credit advance until it is fully paid off. We will determine the FINANCE CHARGE for each monthly billing period by using the following simple interest rate calculation. A FINANCE CHARGE is calculated daily on the Variable Rate Principal Balance, as defined above in the "Definitions" section of this Agreement, by multiplying the daily periodic rate (as indicated in "How The Rate Used To Calculate The Finance Charge Is Determined") by the daily Variable Rate Principal Balance.

To get the daily Variable Rate Principal Balance we (i) take the beginning Variable Rate Principal Balance for that day (ii) add to that amount all credit advances and sums advanced by us to fulfill any obligations under a Security Instrument (such as a mortgage, deed of trust, or security agreement), if any, for that day, then (iii) subtract all principal balance payments and credits for the Variable Rate Principal Balance for that day. All of the daily Variable Rate Principal Balance FINANCE CHARGES for the monthly billing cycle are added together to get the total Variable Rate Principal Balance FINANCE CHARGE for the monthly billing cycle. Transaction charges are added to the Variable Rate Principal Balance FINANCE CHARGE to get the total FINANCE CHARGE for the monthly billing cycle. For Fixed Rate Loan Option balances, the estimated FINANCE CHARGE is calculated at the establishment of the Fixed Rate and is included in the fixed payment amount.

C. How the Rate Used to Calculate the FINANCE CHARGE is determined. The initial Variable Rate Principal Balance daily periodic rate used to compute the Variable Rate Principal Balance FINANCE CHARGE is 1/365<sup>th</sup> of the initial Variable Rate Principal Balance ANNUAL PERCENTAGE RATE (as indicated under "Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE"). The Variable Rate Principal Balance ANNUAL PERCENTAGE RATE is a variable rate involving both an index and a margin, both described under "Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE" below. FINANCE CHARGES will accrue on an actual 365-day year basis (366 day year basis for leap year). If, however, you participate in a relationship account with a Bank of America Corporation affiliate (as offered from time to time), the Variable Rate Principal Balance Daily Periodic Rate and the Variable Rate Principal ANNUAL PERCENTAGE RATE may be reduced below the rates stated in this Agreement. The addition of a fee may cause the actual Variable Rate Principal Balance ANNUAL PERCENTAGE RATE for the monthly billing cycle to exceed the Variable Rate Principal Balance ANNUAL PERCENTAGE RATE stated in this Agreement.

If the Index is unavailable for any monthly billing cycle, we will use the Index for the most recently preceding monthly billing cycle in which the Index was available. If the Index ceases to be published during the term of this Agreement, we will select a substitute index and margin. The substitute index will be a historical movement substantially similar to the Index, and the substitute index and margin will result in an ANNUAL PERCENTAGE RATE at the time it is substituted that is substantially similar to the rate in effect at the time the Index became unavailable.

There is no limitation on the size of any interest rate adjustment or the number of interest rate adjustments that may be made on the Credit Line so long as the maximum ANNUAL PERCENTAGE RATE is not exceeded. Any increase or decrease in the Index that occurs would cause a corresponding increase or decrease in the Daily Periodic Rate, ANNUAL PERCENTAGE RATE, FINANCE CHARGES and possibly the Total Minimum Payment Due. You understand that adjustments based on an Index change will be applied automatically to the Credit Line and you will not receive advance notice of that adjustment.

The Finance Charge on a Fixed Rate Loan Option is determined on a simple interest basis. If you make a Fixed Rate Loan Option payment(s) before or after any date, either the amount of your originally scheduled final payment may be lower or higher than the amount initially established or additional payment(s) may be required.

Under some circumstances, your payment will not cover the FINANCE CHARGES that accrue and negative amortization will occur. Negative amortization will increase the total amount you may pay us and reduce the equity in the Property.

13. Periodic Rate and Corresponding ANNUAL PERCENTAGE RATE. We will determine the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE as follows. We start with an independent Index, which is the Prime Rate as published daily in the "Money Rates" table of *The Wall Street Journal* (the "Index"). When a range of rates has been published, the higher of the rates will be used. We will use the most recent Index value available to us as of the date of the ANNUAL PERCENTAGE RATE adjustment. The Index is not necessarily the lowest rate charged by us on our loans. If the Index becomes unavailable during the term of the Credit Line Account, we may designate a substitute Index (and, if necessary, a new margin) after notice to you.

A. Rate Computation. The ANNUAL PERCENTAGE RATE during the Draw Period is determined using the Index published as of the last business day prior to the first day of the next monthly Billing Statement plus a margin, as shown below, and will be effective on the first day of the next monthly billing cycle.

To determine the Periodic Rate that will apply during your Draw Period we add the margin shown below to the value of the Index and divide the value by the number of days in a year (daily). This result is the ANNUAL PERCENTAGE RATE for your Draw Period. To determine the Periodic Rate that will apply to your Repayment Period, we add the margin shown below to the value of the Index, then divide the value by the number of days in a year (daily). To obtain the ANNUAL

PERCENTAGE RATE we multiply the Periodic Rate by the number of days in a year (daily). This will result in the ANNUAL PERCENTAGE RATE for your Repayment Period. The ANNUAL PERCENTAGE RATE includes only interest and no other costs.

The current Index is 8.250 % per annum. The margin is .240 % The initial Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line Account are as stated below:

| Current Rates for the Draw Period |                       |                        |                     |
|-----------------------------------|-----------------------|------------------------|---------------------|
| Range of Balances or Conditions   | Margin Added to Index | ANNUAL PERCENTAGE RATE | Daily Periodic Rate |
| ALL                               | .240%                 | 8.490%                 | 0.02326%            |

| Current Rates for the Repayment Period |                       |                        |                     |
|----------------------------------------|-----------------------|------------------------|---------------------|
| Range of Balances or Conditions        | Margin Added to Index | ANNUAL PERCENTAGE RATE | Daily Periodic Rate |
| ALL                                    | .240%                 | 8.490%                 | 0.02326%            |

B. **Limits.** The Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE on your Credit Line Account will increase or decrease as the Index increases or decreases from time to time. There is no limit to the amount by which the ANNUAL PERCENTAGE RATE can increase or decrease over a 1-year period. Any increase in the Periodic Rate will take the form of higher payment amounts. Adjustments to the Periodic Rate and the corresponding ANNUAL PERCENTAGE RATE resulting from changes in the Index will take effect monthly. In no event will the corresponding ANNUAL PERCENTAGE RATE be more than the lesser of 24.000% or the maximum rate allowed by applicable law.

Notwithstanding any other provision of this Agreement, we will not charge interest on any undisbursed loan proceeds, except as may be permitted during any Right of Restraint period.

C. **Forgo Rate Increases.** If we forgo an ANNUAL PERCENTAGE RATE increase, at the time of a later adjustment we may return to the full Index value plus margin.

14. **Closing Costs.** In addition to the FINANCE CHARGES which will be added to your Credit Line each billing cycle, you will pay the following fees, including real estate closing and security filing fees:

15. **Other Charges:** You agree to pay the fees and charges listed below if the circumstances triggering their assessment apply. These fees and charges will be added to the Account balance and are payable as set forth in this Agreement.

A. **Late Charge:** If we do not receive the amount of your minimum monthly payment in full within ten (10) days after your payment due date, you will pay us a late charge equal to the greater of \$10.00 or five percent (5%) of the unpaid portion of your minimum monthly payment.

B. **Returned Payment Charge:** If a check or any other instrument or payment method with which you have made a payment on the Credit Line Account is returned to us unpaid for any reason, you will be charged a return payment charge of \$20.

C. **Returned Special Convenience Check:** \$20.

D. **Annual Fee:** \$0.

E. **Fixed Rate Conversion Fee:** \$0.

F. **Security Instrument Discharge Fee:** As permitted by Applicable Law, Lender may request that at the time you payoff your Credit Line, you pay the Lender's cost to record a discharge of the Security Instrument.

16. **Refund of Fees, Charges, and Costs.** The terms of this Agreement shall be construed to be consistent with Applicable Law. However, if a court of competent jurisdiction or other qualified authority determines that the loan charges and fees described in this Agreement exceed the limits that Applicable Law allows, the following shall occur. First, any such purportedly excessive charges or fees shall be reduced to the permitted amount. Second, any amounts collected that exceed the permitted amount will be returned to you, either by direct payment or by reducing the principal you owe on your Account. Your receipt of a refund made by direct payment to you or credited to your Account will constitute a waiver of any right of action you may have arising out of overcharges or allegedly excessive loan charges or fees.

17. **Property Insurance; Other Charges.** You agree to obtain property insurance against loss or damage to the Property, in the amounts, for the time period and against the risks that the Security Instrument and/or we require. You may obtain insurance from an insurance carrier of your choice so long as the insurance carrier is acceptable to us. If you fail to purchase and maintain acceptable property insurance, we may purchase insurance for you or on your behalf and at your expense as

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described in the Security Instrument. We have no obligation to obtain such insurance. Should we take this action, the equity in the Property and contents thereof may not be protected as you desire. Further, the cost of the insurance may significantly exceed the cost of such insurance that you could have obtained; this cost will be treated as an Advance.

**18. Additional Rights and Remedies.** In addition to the rights described elsewhere in this Agreement and in the Security Instrument, we also have the following rights:

**A. Termination and Acceleration.** We can terminate your Account and require you to pay us the entire outstanding Account Balance under this Agreement in one payment, and charge you certain fees, if any of the following occur: 1) You engage in fraud or make a material misrepresentation at any time in connection with your Account; 2) We do not receive the full amount of any Minimum Payment due or you fail to meet any of the other repayment terms of this Agreement; 3) Your action or inaction adversely affects the Property or our rights in it (for this purpose, the words "you," "your," and "yours" also refer to the owner of the Property, if different than you). Examples of these actions or inactions include, but are not limited to: a) Your death, if you are the sole Borrower on the Account; or the death of all but one Borrower which adversely affects our security; b) Illegal use of the Property, if such use subjects the Property to seizure; c) You transfer all or part of your interest in the Property without our written consent; d) All or part of the Property is taken by condemnation or eminent domain; e) Foreclosure of any senior lien on the Property; f) Failure to maintain required insurance on the Property; g) Waste or destructive use of the Property which adversely affects our security; h) Failure to pay taxes or assessments on the Property; i) Permitting the creation of a senior lien on the Property; j) Filing of a judgment against you, if the amount of the judgment and collateral subject to the judgment is such that our security is adversely affected.

We may, at our option, take lesser action than those described in this Section. Such lesser action may include, without limitation, suspending your Account and not allowing you to obtain any further Advances, reducing your Credit Limit, and/or changing the payment terms on your Account. If we take any such action, this shall not constitute a waiver of our right to exercise any rights or remedies under the remainder of this Section, the remaining provisions of this Agreement, the Security Instrument, or at law or in equity. We may take action under this Section only after complying with any notice or cure provisions required under Applicable Law. In the event we elect not to terminate the Account or take any lesser action as provided in this Section, we do not forfeit or waive our right to do so at a later time if any of the circumstances described above exists at that time.

**B. Suspension or Reduction.** We can refuse to make additional Advances or reduce your Credit Limit during any period of time in which any of the following are in effect: 1) The value of the Property declines significantly below the value as determined by us at the time you applied for your Account. This includes, for example, a decline such that the initial difference between the Credit Limit and the available equity in the Property is reduced by fifty percent (50%) or more, and may include a smaller decline depending on individual circumstances; 2) We reasonably believe you will not be able to meet the repayment requirements set forth in this Agreement due to a material change in your financial circumstances; 3) You are in default of a material obligation in this Agreement, including, without limitation, your failing to make a Minimum Payment on a date that it is due; 4) Government action prevents us from imposing the ANNUAL PERCENTAGE RATE provided for in this Agreement; 5) Government action impairs our security interest such that the value of our interest is less than 120 percent of your Credit Limit then in effect; 6) A regulatory agency which supervises us has notified us that continued Advances would constitute an unsafe and unsound practice; 7) The maximum ANNUAL PERCENTAGE RATE allowed under this Agreement is reached. If we refuse to make additional Advances or reduce your Credit Limit under this Section, we will send you a written notice stating the reason for such action. If, for any reason, you believe your ability to obtain Advances or your Credit Limit should be reinstated, you must send us a written request for reinstatement and include in the request the reasons why you believe your ability to obtain Advances or your Credit Limit should be reinstated.

**19. Collection Costs.** If you are in default and we require you to pay us immediately in full, we may also require that you pay our collection costs and expenses to the extent not prohibited by law. If we bring a lawsuit to collect, you will pay our attorneys' fees and court costs allowed by Applicable Law and set by the court.

**20. Suspension or Termination by You.** Each of you has the right, upon proper written notice to us, to suspend the privilege of obtaining new Advances. A request to suspend the privilege of obtaining Advances, even if made only by one of you, will be effective against all of you. Advances will be reinstated upon our receipt and acceptance of a written reinstatement request signed by each of you, provided that no event(s) permitting a suspension then exist.

To do so, you must notify us in writing. If one of you requests termination of the Account, the Account will be terminated for all of you. At our option, we may release some of you from liability under this Agreement and/or under Applicable Law without releasing all of you.

If you cancel your right to Advances under this Agreement, you must notify us and return all Special Convenience Checks and any other access devices. Any use of Special Convenience Checks or other Credit Line access devices following suspension or termination may be considered fraud. You will also remain liable for any further use of the Special Convenience Checks or other Credit Line access devices not returned to us.

**21. Effect of Suspension of Your Account.** If your Account is suspended or terminated for any reason, you will nonetheless remain obligated to pay the Account Balance in accordance with the terms of this Agreement. Upon termination of your Account by either you or us, you must return to us all Checks, Credit Cards, or other Account access devices given to you. If either you or we terminate your Account, you will not be entitled to a refund of any FINANCE CHARGES, fees, charges, or credit insurance premiums paid or payable under the Account.

**22. Change in Terms.** After you open your Account, we may modify or amend the terms of this Agreement and/or the other loan documents pertaining to the Account if any of the following conditions exist: 1) You consent in writing to our proposed modification or amendment at that time; 2) The modification or amendment unequivocally benefits you throughout the remainder of the term of this Agreement; 3) The modification or amendment results only in an insignificant change to the terms of this Agreement and/or the other loan documents; 4) The modification or amendment involves the substitution of a new Index and Margin, as provided in Section 9 above. Any Account balance on the effective date of any modification or amendment is subject to the modification or amendment.

**23. Prepayment.** You may prepay all or any amounts owing under this Credit Line at any time without penalty. However, we will be entitled to receive all accrued FINANCE CHARGES and any other accrued fees or charges.

**24. Tax Consequences.** You acknowledge that we (including our employees and representatives) have given you no assurances, representations or warranties that the FINANCE CHARGES and other fees and charges paid on your Account are tax deductible. You should consult your own tax advisor concerning the deductibility of the FINANCE CHARGES and other fees and charges for the Account.

**25. Review of Your Account.** Upon our request, you will provide us with current financial and credit information and will sign any additional or corrective documents in connection with this Agreement or the Account. You authorize us to release information about you to our affiliates or third parties as described in our privacy policy and our Fair Credit Reporting Act notice, provided you do not opt out of the applicable policy or as permitted by applicable law. You also authorize us to obtain credit reports on you at any time, at our sole option, and expense, for any reason, including but not limited to determining whether there has been an adverse change in your financial condition. We also may from time to time obtain a new valuation of the Property that secures the Credit Line at any time, including internal inspection, at our sole option and expense.

THOMAS R IRBY/995071041456120

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26. Use of the Credit Line. You may use the Credit Line Account subject to the following limitations:

A. **Legal Transactions.** Borrower agrees that Borrower will only use the Credit Line for transactions that are legal where Borrower resides. For example, Internet gambling transactions may be illegal in Borrower's state. Display by an on-line merchant of either Lender's logo or a Card Company's logo does not mean that an Internet transaction is legal where Borrower resides. Lender will not be liable if Borrower engages in an illegal transaction.

B. **Authorizations.** Some transactions require lender's prior authorization. For security purposes, lender may from time to time place or change limits on the number or amounts of transactions Borrower makes in a day at ATMs or point-of-sale terminals. Such limitations may not be the same at every ATM or point-of-sale terminal. The limitations placed on a "Bank of America ATM Card" or "Bank of America Check Card" when using an ATM or point-of-sale terminal may not be the same as the limitations placed on an Account Access Card used at the same ATM or point-of-sale terminal. No such limits are placed on the number or amounts of transactions Borrower makes at lender's banking centers, by writing a Special Convenience Check, by conducting an Overdraft Protection transaction (subject to the ATM limits, above), or by telephone. In addition, lender may deny authorization to any method of accessing the Credit Line if the Credit Line has been suspended or terminated or if Lender suspects fraudulent activity, lender shall not be liable for any failure to authorize a transaction for any of these reasons. However, Borrower is liable for any transaction Lender authorizes even if Lender should not have authorized it because Borrower is or would be in default as a result of the transaction.

C. **No Security Interest on Purchases.** This Agreement does not grant Lender a security interest in purchases Borrower charges to the Credit Line.

D. **Transactions With Merchants.** (a) If a merchant discloses a policy such as "no returns", "no refund", "no return or credit without receipt", "as is", "store credit only", or "all sales final", or similar language, Borrower will be bound by that policy when Borrower uses the Credit Line to buy goods or services from that merchant. (b) When using the Credit Line to make travel or lodging reservations, Borrower must obtain the merchant's cancellation policy and follow it if Borrower cancels. If Borrower cancels, Borrower must obtain the cancellation number that the merchant is required to give Borrower. The merchant may charge Borrower for a cancelled transaction unless Borrower can provide Lender with a correct cancellation number. If Borrower makes reservations or purchases of any kind, such as lodging reservation for several nights stay or a mail order purchase, the Credit Line may be immediately charged for the full amount of the reservation or purchase, regardless whether Borrower has received the goods or services requested at the time the Credit Line is charged. (c) If Borrower authorizes a merchant to charge the Credit Line for repeat transactions without the Account Access Card, then Borrower must notify the merchant when Borrower wants to discontinue the repeat transactions or if the Credit Line is closed or if a new Credit Line or Account Access Card number is issued by Lender. Otherwise, Borrower will be responsible to Lender for the amount of all such repeat transactions. (d) If Borrower disagrees with a transaction on Borrower's statement or has a dispute with a merchant as a result of a transaction, Borrower will provide Lender with information or assistance Lender reasonably requests. Otherwise, Borrower will pay Lender for any resulting loss Lender has, unless Lender is prohibited by applicable law from holding Borrower liable for Lender's loss. (e) If Borrower makes a transaction in a currency other than U.S. dollars, Visa will convert the charge or credit into a U.S. dollar amount. The conversion rate will be determined using Visa currency conversion procedures that are disclosed to institutions issuing Visa cards. The conversion rate on the processing date may differ from the rate on the date of Borrower's transaction. Currently, Visa uses a currency conversion rate of either: (1) a rate selected by VISA from a range of rates available in the wholesale currency markets for the applicable central processing date, which rate may vary from the rate VISA itself receives or (2) the government mandated rate in effect for the central processing date. In each case, Visa uses the rate in effect one day before the conversion date. In the event Visa chooses to change the currency conversion rate or the day on which the currency conversion rate is determined, then transactions on the Credit Line made in a foreign currency and processed after the change will reflect the change.

E. **Special Rule for Account Access Card Purchases.** If Borrower has a problem with the quality of goods or services that Borrower purchased with an Account Access Card, and Borrower has tried in good faith to correct the problem with the merchant, Borrower may not have to pay the remaining amount due on the goods or services. Borrower has this protection only when the purchase price was more than \$50 and the purchase was made in Borrower's home state or within 100 miles of Borrower's mailing address. (If Lender owns or operates the merchant, or if Lender mailed Borrower the advertisement for the property or services, all purchases are covered regardless of amount or location of purchase.)

F. **Overdraft Protection and Linked Accounts.** If the Credit Line Account is not blocked, suspended or terminated, you may request that the Credit Line Account be set up to provide overdraft protection for an associated checking or Money Market Savings account. If the total amount of checks, debit card or ATM transactions or other debits for a business day exceeds the available associated account balance, then an Advance will be made from the Credit Line Account ("Overdraft Protection"). If the Credit Line Account is used for Overdraft Protection, the minimum transfer amount is one hundred dollars (\$100) and incremental transfer amounts will be in multiples of one hundred dollars (\$100). However, if there is not \$100 available, but the available Credit Line amount can cover the overdraft transaction, then the amount of the available Credit Line will be advanced to cover the overdraft. For Idaho and Washington, the incremental advance is \$25. If the available credit on your Credit Line will not allow a \$25 increment to be advanced, no transfer will be made. If the associated account is closed or blocked, Overdraft Protection will stop. If you request that the Credit Line Account be connected to or "linked" to another Bank of America product, you understand and agree that a user on the "linked" account can make a transaction that exceeds the available balance on the "linked" account and cause an Advance to be made. Also, if an ATM access card is given to a user on the "linked" account, that user when using the ATM access card may access the Credit Line Account and obtain an Advance without making a transaction directly on the "linked" account. That user may or may not be a party obligated for this Agreement.

G. **Skip Payment Feature.** At our discretion, from time to time we may offer a feature that will allow you to skip one or more payments. FINANCE CHARGES will continue to accrue on the principal balance at the applicable interest rate. At the end of the skip payment period, the payment terms of this Agreement will be reinstated automatically without further notice.

27. **Borrowers Protection® Plan and Line Protection™ Plan** (Borrowers' Protection® Plan and Line Protection™ Plan are registered trademarks of Bank of America Corporation). Fixed Rate Loan Options may be protected by the Borrowers' Protection® Plan, and Variable Rate Balances that are not subject to a Fixed Rate Loan Option may be protected by the Line Protection™ Plan. Protection options for both plans include Disability, Involuntary Unemployment, and Accidental Death; or Disability and Accidental Death; or Involuntary Unemployment and Accidental Death. Borrowers' Protection® Plan and Line Protection™ Plan are optional and are not required to obtain a Credit Line. For each new Credit Line, you must specifically request Borrowers' Protection® Plan or Line Protection™ Plan. In addition, you must sign a separate Addendum to your Credit Line Agreement, even if you obtained Borrowers' Protection® Plan or Line Protection™ Plan for a prior Credit Line Agreement with Bank of America. Two Borrowers may purchase Protection for each Fixed Rate Loan Option, but they must select the same protection option, and there may be restrictions on which Borrowers may apply.

Fees for the Borrowers' Protection® Plan and Line Protection™ Plan are based on and payable with the regularly scheduled monthly payment of the Credit Line Agreement. Credit Line Agreements repaid in quarterly payments are not eligible for the Borrowers' Protection® Plan. Interest is not charged on the fees for Borrowers' Protection® Plan or Line Protection™ Plan.

The maximum term of the Borrowers' Protection® Plan is the shorter of the Credit Line Agreement term or 120 months. We may allow you to exceed the Credit Limit temporarily and from time to time, to accommodate the premiums for any voluntary insurance or the fees for Borrowers' Protection® Plan or Line Protection™ Plan.

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There are eligibility requirements, conditions and exclusions that can prevent you from receiving benefits under the Borrowers' Protection® Plan or Line Protection™ Plan as set forth in the Addendum describing the plan.

28. **Miscellaneous.** If this Agreement represents a renewal, modification, extension, substitution or consolidation of an obligation owed to us, then you acknowledge and agree that there are no claims, setoffs, avoidances, counterclaims or defenses or rights to claims, setoffs, avoidances, counterclaims or defenses to payment or enforcement of the prior obligation. If this Agreement is a renewal of a prior note or agreement with you, then it is the intent of the parties that the note or agreement evidencing the original extension of credit not be extinguished by the renewal unless required by applicable state law. Our records shall be evidence that this Agreement is a renewal.

You agree that if this Agreement is in default, including the failure to make a Minimum Payment by the due date, you will accept calls regarding the collection of this Agreement at any residence or place of employment. The calls can be automatically dialed and a recorded message may be played. You agree such calls will not be "unsolicited calls" for purposes of any federal, state or local law. To improve customer service and security our calls with you may be recorded. You agree that monitoring of recording may be done and that no additional notice to you or additional approval from you is needed. You authorize us, our parent company, Bank of America Corporation (or any successor company) and Bank of America Corporation's affiliates and subsidiaries ("Affiliates") to: (a) obtain other information deemed necessary concerning your credit experience and other information from credit reporting agencies, creditors, and any department of motor vehicle or similar state agency, your employer (past, present and future) and other persons (and all entities may release and/or verify such information to us at any time without notification to you or without your consent), and (b) share information with our Affiliates, except to the extent that you have opted out of such sharing as provided in our Privacy Policy for consumers.

29. **Entire Understanding.** This Agreement together with the Security Instrument constitutes the entire understanding and agreement between the parties as to the matters set forth in this Agreement and the Security Instrument and supersedes all prior understanding and correspondence, written or oral, with respect to the subject hereof.

30. **Delay in Enforcement.** We reserve the right to defer or delay the date certain changes are to occur without notice and without being liable for such delay or deferment. A court decree for divorce or separation or no-cont approved mutual agreement does not affect, eliminate or reduce any person's liability for the Agreement or the Account balance if we are not a party to the decree or agreement.

31. **Governing Law.** In addition to applicable federal law, this Agreement will be governed by and interpreted in accordance with federal law and the laws of the State of SOUTH CAROLINA, except for matters related to the exportation of interest (as defined by federal law) which will be governed by and interpreted in accordance with the laws of the State of North Carolina. However, if there ever is a question about whether any provision of this Agreement is valid or enforceable, the provision that is questioned will be governed by whichever state or federal law would find the provision to be valid and enforceable. The loan transaction, which is evidenced by the Credit Agreement and this Agreement has been approved, made, and funded, and all necessary loan documents have been accepted by us in the State of North Carolina.

32. **Severability.** If any portion of this Agreement conflicts with, contradicts or otherwise controverts applicable federal, state, tribal, or local law, then to the extent possible such portion shall be construed as being consistent with such Applicable Law, and further will be deemed changed to the extent necessary to accomplish this end. If any such conflicting or contradicting portion of this Agreement cannot be so construed or changed, it will be deemed severed from this Agreement and will not affect other provisions of this Agreement, which shall be given full effect without regard to the conflicting or contradicting portions.

33. **Irregular Payments.** We may accept late payments, partial payments, and items marked "payment in full" even if they are not full payments, without losing any of our rights under this Agreement, and you will remain obligated to pay amounts owed under this Agreement. All written communications concerning disputed amounts including any checks or other instruments that indicate a payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations as full satisfaction of a disputed amount must be mailed or delivered to us at the address shown on your periodic statement.

34. **Waiver of Notice.** Subject to Applicable Law, you waive presentment for payment, demand, protest, and notice of dishonor, notice of acceleration, notice of intent to accelerate, and notice of nonpayment.

35. **Sending of Notices.** Except as otherwise provided in this Agreement, all notices must be in writing. Notice to any of you shall be deemed notice to all of you. Any Billing Statement or notice to you under this Agreement will be sufficiently given if sent to your address on file in connection with the Account or to a new address of which you have notified us in writing at least 20 calendar days before the sending of the Billing Statement or notice. Any notice that you give to us must be provided to us at the address listed on page 1, or a different address if you are notified of the same.

36. **Transfer and Assignment.** We may transfer or assign this Credit Line Agreement, the Security Instrument and any other loan document relating to the Account to any person or entity without notice to you. You may not transfer, assign or delegate your duties under this Agreement. Subject to applicable law this Agreement is binding on you, your successors, heirs and personal and legal representatives.

37. **Assumption.** This Account is not assumable. This means that someone buying the Property may not take over this Account as his/her own obligation on the terms of this Agreement or on any other terms.

38. **Caption Headings.** Caption headings are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

THOMAS R IRBY/995071041456120

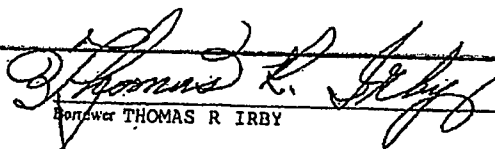
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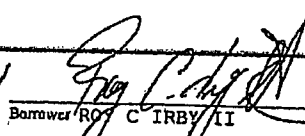
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Acknowledgement. You understand and agree to the terms and conditions of this Agreement. By signing this Agreement, you acknowledge that you have read this Agreement. You also acknowledge receipt of a completed copy of this Agreement, including the Fair Credit Billing Notice and the early home equity line of credit application disclosure, in addition to the handbook entitled *When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit* provided to you at application.

WITNESS: ACCEPTED AND AGREED TO:

  
Borrower THOMAS R IRBY

Date

  
Borrower ROY C IRBY II

Date

Borrower

Date

Borrower

Date

Borrower

Date

Borrower

Date

THOMAS R IRBY/995071041456120

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## BILLING ERROR RIGHTS YOUR BILLING RIGHTS

### KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

#### NOTIFY US IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR BILL

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than sixty (60) days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter give us the following information:

Your name and account number;

The dollar amount of the suspected error;

Describe the error and explain, if you can, why you believe there was an error. If you need more information, describe the item you think is wrong.

#### YOUR RIGHTS AND RESPONSIBILITIES AFTER WE RECEIVE YOUR WRITTEN NOTICE

We must acknowledge your letter within thirty (30) days, unless we have corrected the error by then. Within ninety (90) days, we must either correct the error or explain why we believe the bill is correct.

After we receive your letter, we cannot try and collect any amount you question, or report you as delinquent. We can continue to bill you for the amount in question, including FINANCE CHARGES, and we can apply any unpaid amount against your Credit Line. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find we made a mistake on your bill, you will not have to pay FINANCE CHARGES related to any questioned amount. If we didn't make a mistake, you may have to pay FINANCE CHARGES, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date on which it is due.

If you fail to pay us the amount that we think you owe, we may report you as delinquent. However, if your explanation does not satisfy us and you write to us within ten (10) days telling us that you still refuse to pay, we will tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone that we report you to that the matter has been settled between us when it finally is.

If we do not follow these rules, we can't collect the first \$50 of the questioned amount, even if your bill is correct.



After Recording Return To:

Bank of America, NA  
Consumer Post Closing Review ELB-700-04-21  
9000 Southside Blvd, Bld 700  
Jacksonville, Florida 32256  
Loan Number: 68118000674199



May 17, 2007 12:53:07  
Rec:\$19.00

Cnty Tax:\$0.00

State Tax:\$0.00

2007048990  
Book:MO 4779

MTD  
13 PGS  
Page:1103-1115

FILED IN GREENVILLE COUNTY, SC

[Space Above This Line For Recording Data]

## MORTGAGE

### DEFINITIONS

(A) "Security Instrument" means this document, which is dated MAY 16, 2007, together with all Riders to this document.

(B) "Borrower" is THOMAS R IRBY, ROY C IRBY II

the party or parties who have signed this Security Instrument.  
Borrower is the Mortgagor under this Security Instrument.

(C) "Lender" is Bank of America, NA

Lender is a National Banking Association organized  
and existing under the laws of THE UNITED STATES OF AMERICA  
Lender's address is 100 North Tryon Street, Charlotte, North Carolina.  
28255

Lender is the Mortgages under this Security Instrument.

(D) "Agreement" means the Home Equity Line of Credit Agreement signed by the Borrowers.

(E) "Account" means the Home Equity Line of Credit Account pursuant to which the Lender makes Advances to the Borrower at the Borrower's direction, allowing the Borrower to repay those Advances and take additional Advances, subject to the terms of the Agreement.

(F) "Credit Limit" means the maximum aggregate amount of principal that may be secured by this Security Instrument at any one time. The Credit Limit is \$69,000.00. Except to the extent prohibited by Applicable Law, the Credit Limit does not apply to interest, Finance Charges, and other fees and charges validly incurred by Borrower under the Agreement and this Security Instrument. The Credit Limit also does not apply to other advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

(G) "Account Balance" is the total unpaid principal of the Account, plus earned but unpaid Finance Charges, outstanding fees, charges, and costs.

(H) "Maturity Date" is the date on which the entire Account Balance under the Agreement is due. The entire Account Balance on your Account, as defined in the Agreement and this Security Instrument, is due on MAY 16, 2032

(I) "Property" means the Property that is described below under the heading "Transfer of Rights in the Property."

THOMAS R IRBY/995071041456120  
SOUTH CAROLINA HOME EQUITY LINE OF CREDIT MORTGAGE  
SCHSLHLC 10/12/08 Page 1 of 12

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EXHIBIT B

BOA 00058

## SCHEDULE "A"

All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina, County of Greenville, located on Pearson Road, being shown and designated as containing 1.43 acres, more or less, as is shown on a plat entitled "Property of Thomas R. Irby", on a plat dated June 4, 2004 and recorded on March 6, 2007 in the RMC Office for Greenville County in Plat Book 1032 at page 61, and having the metes and bounds, courses and distances as upon said plat appear.

This is a portion of that same property conveyed unto Thomas R. Irby by deed of distribution of the Estate of Elsie Chapman dated January 27, 1999 and recorded on January 27, 1999 in the RMC Office for Greenville County in Deed Book 1815 at page 149. The said Thomas R. Irby did thereafter convey a one-half interest to Roy C. Irby, II by deed dated March 16, 2007 and recorded on March 23, 2007 in the RMC Office for Greenville County in Deed Book 2258 at page 437.

## (J) "Secured Debt" means:

- (1) All amounts due under your Account, including principal, interest, Finance Charges, and other fees, charges, and costs incurred under the terms of this Security Instrument and all extensions, modifications, substitutions or renewals thereof.

- (2) Any advances made and expenses incurred by Lender under the terms of this Security Instrument

## (K) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- |                                      |                                                         |                                                   |
|--------------------------------------|---------------------------------------------------------|---------------------------------------------------|
| <input type="checkbox"/> 1-4 Family  | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Escrow Rider             |
| <input type="checkbox"/> Second Home | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Mortgage Insurance Rider |
| <input type="checkbox"/> Other(s)    |                                                         |                                                   |

(L) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(M) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(N) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(O) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Agreement and/or this Security Instrument.

(Q) "Approved Prior Lien" means a lien which is and which lender acknowledges and agrees will continue to have priority over the lien created by this Security Instrument.

### TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in the

COUNTY of GREENVILLE

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

SCHEDULE A ATTACHED HERETO AND MADE A PART OF.

THOMAS R IRBY/999071041456120

SOUTH CAROLINA HOME EQUITY LINE OF CREDIT MORTGAGE  
SCHEDULE 10/12/08

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which currently has the address of 156 PEARSON RD

4

BELTON  
[City]

SOUTH CAROLINA  
[State]

[Street]  
296279236  
[Zip Code]

("Property Address"):

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

**BORROWER COVENANTS** that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

**ADVANCES.** During the Draw Period described in the Agreement, the Borrower may repeatedly take and repay any advances that Lender makes to Borrower under the terms of the Agreement and this Security Instrument, subject to the terms that the Agreement and this Security Instrument impose. The Agreement and this Security Instrument will remain in full force and effect notwithstanding that the Account Balance under the Agreement may occasionally be reduced to an amount of equal to or less than zero.

Any amounts that Lender advances to Borrower in excess of the Credit Limit will be secured by the terms of this Security Instrument unless applicable law prohibits the same. Lender shall not be obligated to increase the Credit Limit formally or to make additional Advances in excess of the Credit Limit stated in the Agreement even though the Credit Limit has been exceeded one or more times. The Draw Period may or may not be followed by a Repayment Period, as described in the Agreement, during which additional Advances are not available. During both the Draw Period and the Repayment Period the Lender may, at its option, make Advances from the Account to pay fees, charges, or credit insurance premiums due under the Agreement or this Security Instrument, or make other Advances as allowed by this Security Instrument.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

**UNIFORM COVENANTS.** Borrower and Lender covenant and agree as follows:

1. **Payment of Secured Debt.** Borrower shall pay when due all Secured Debt in accordance with the Agreement and this Security Instrument. All payments shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Agreement or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Agreement or Security Instrument be by a method of Lender's choosing. These methods include, but are not limited to: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Billing Statement or at such other location as may be designated by Lender in accordance with the notice provisions provided in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Account current. Lender may accept any payment or partial payment insufficient to bring the Account current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Agreement and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. **Application of Payments or Proceeds.** All payments accepted by Lender shall be applied to the Secured Debt under this Security Instrument as provided in the Agreement unless Applicable Law provides otherwise. Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Agreement shall not extend or postpone the due date, or change the amount, of the Minimum Payment.

3. **Funds for Escrow Items.** Borrower shall not be required to pay into escrow amounts due for taxes, assessments, leasehold payments, or other insurance premiums unless otherwise agreed in a separate writing.

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4. **Charges; Liens; Prior Security Interests.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in a manner provided in Section 3.

Borrower shall promptly discharge any lien, other than the Approved Prior Loan, which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, other than the Approved Prior Loan, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth in this Section.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with the Agreement. Borrower shall pay when due, or shall cause to be paid when due, all sums required under the loan documents evidencing the Approved Prior Loan and shall perform or cause to be performed all of the covenants and agreements of Borrower or the obligor set forth in such loan documents. All of Lender's rights under this Covenant shall be subject to the rights of the Holder of the Approved Prior Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Agreement. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section shall become additional Secured Debt of Borrower and secured by this Security Instrument. These amounts shall be subject to the terms of the Agreement and the Security Instrument.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgagee clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgagee clause and shall name Lender as mortgagee and/or as an additional loss payee and Borrower further agrees to generally assign rights to insurance proceeds to the holder of the Agreement up to the amount of the outstanding Agreement Account Balance.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened.

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During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Agreement or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Agreement or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of the Agreement and Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower resides on the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Home Equity Line of Credit Application Process; Default.** Borrower shall be in default if, during the Account application process, or at any time during the term of the Agreement, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Account. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

Borrower is also in default if: 1) Borrower engages in fraud or makes a material misrepresentation at any time in connection with Borrower's Account; 2) Lender does not receive the full amount of any Minimum Payment due or Borrower fails to meet any of the other repayment terms of the Agreement; 3) Borrower's action or inaction adversely affects the Property or Lender's rights in it. Examples of these actions or inactions include, but are not limited to: a) Borrower's death, if Borrower is the sole person on the Account; or the death of all but one borrower which adversely affects Lender's security; b) Illegal use of the Property, if such use subjects the Property to seizure; c) Transfer of all or part of the Borrower's interest in the Property without Lender's written consent; d) All or part

of the Property is taken by condemnation or eminent domain; e) Foreclosure of any senior lien on the Property; f) Failure to maintain required insurance on the Property; g) Waste or destructive use of the Property which adversely affects Lender's security; h) Failure to pay taxes or assessments on the Property; i) Permitting the creation of a senior lien on the Property other than an Approved Prior Loan; j) Filing of a judgment against Borrower, if the amount of the judgment and collateral subject to the judgment is such that Lender's security is adversely affected.

Lender may, at its option, take lesser actions than those described at the beginning of this Section. Such lesser actions may include, without limitation, suspending Borrower's Account and not allowing Borrower to obtain any further Advances, reducing Borrower's Credit Limit, and/or changing the payment terms on Borrower's Account. If Lender takes any such actions, this shall not constitute an election of remedies or a waiver of Lender's right to exercise any rights or remedies under the remainder of this Section, the remaining provisions of the Agreement, the Security Instrument, or at law or in equity. Lender may take action under this Section only after complying with any notice or cure provisions required under Applicable Law. In the event Lender elects not to terminate the Account or take any lesser action as provided in this Section, Lender does not forfeit or waive its right to do so at a later time if any of the circumstances described above exists at that time.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Lender may without notice, perform or cause to be performed any covenant of Borrower in this Security Instrument, and Borrower appoints Lender as attorney in fact to sign Borrower's name. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take this action, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section.

Any amounts disbursed by Lender under this Section shall become additional Secured Debt of Borrower secured by this Security Instrument, payable according to the terms of the Agreement and this Security Instrument. These amounts shall bear interest at the Agreement rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. **Mortgage Insurance.** Borrower is not required to obtain Mortgage Insurance unless otherwise agreed in writing.

11. **Assignment of Miscellaneous Proceeds; Forfeiture.** All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or



Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in the Agreement and this Security Instrument.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the Secured Debt immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the Secured Debt immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, and Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, restate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be otherwise applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the this Security Instrument granted by Lender to Borrower or any Successors in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Agreement (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Agreement without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability

under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender.

**14. Agreement/Account Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Account is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other Account charges collected or to be collected in connection with the Account exceed the permitted limits, then: (a) any such Account charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Agreement or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Agreement). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

**16. Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Agreement conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Agreement which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

**17. Borrower's Copy.** Borrower shall be given one copy of the Agreement and of this Security Instrument.

**18. Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower

must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

**19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender or causes Lender to be paid all sums which then would be due under this Security Instrument and the Agreement as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

**20. Change of Servicer; Notice of Grievance.** The Agreement or a partial interest in the Agreement (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Servicer") that collects the amounts due under the Agreement and this Security Instrument and performs other mortgage loan servicing obligations under the Agreement, this Security Instrument, and Applicable Law. There also might be one or more changes of the Servicer unrelated to a sale of the Agreement. If the Agreement is sold and thereafter the Agreement is serviced by a Servicer other than the purchaser of the Agreement, the servicing obligations to Borrower will remain with the Servicer or be transferred to a successor Servicer and are not assumed by the Agreement purchaser unless otherwise provided.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party and allowed the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and reasonable time to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

**21. Hazardous Substances.** As used in this Section: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized

to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

**NON-UNIFORM COVENANTS.** Borrower and Lender further covenant and agree as follows:

22. **Acceleration; Remedies.** Lender shall give notice as required by Applicable Law prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument or the Agreement (but not prior to acceleration under Section 18 of the Security Instrument unless Applicable Law provides otherwise). Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. **Release.** Upon Borrower's request, and upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. **Homestead Waiver.** Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. **Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.** This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

26. **Future Advances.** The lien of this Security Instrument shall secure the existing indebtedness under the Agreement and any future advances, whether optional or obligatory, made under this Security Instrument up to 150% of the Credit Limit plus interest thereon, attorneys' fees and court costs.

THOMAS R IRBY/995071041456120

SOUTH CAROLINA HOME EQUITY LINE OF CREDIT MORTGAGE  
SCHESI HLC 10/12/06 Page 10 of 12

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(Space Below This Line For Acknowledgment)

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )

Personally appeared before me the undersigned  
 (first witness) and made oath that he/she saw the within named THOMAS R. IRBY, ROY C IRBY II

(grantor) sign, seal, and as his/her act and deed, deliver the within written mortgage, and that he/she, with  
other witnesses (second witness), witnessed the execution thereof.

Diane L. Archer  
 Witness

SWORN to before me this 16 day of May 2007.

[Signature] (LS)  
 Notary Public for South Carolina

(Seal)

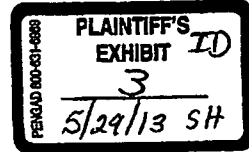
My commission expires: 10/10/16

FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD  
 2007048990 Book: NO 4779 Page: 1103-1115  
 May 17, 2007 12:53:07

Timothy J. Hanney

THOMAS R IRBY/995071041456120  
 SOUTH CAROLINA HOME EQUITY LINE OF CREDIT MORTGAGE  
 SCHEM HLC 10/12/06 Page 12 of 12

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Chase Home Finance, LLC,

Plaintiff,

vs.

Thomas R. Irby, Roy C. Irby a/k/a Roy C.  
Irby II and Bank of America, N.A.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.: 2010-CP-23-1621

) **AFFIDAVIT OF DONNA CARD**

Donna Card, under oath, being first duly sworn, pursuant to Rule 56(e) of the South Carolina Rules of Civil Procedure, hereby certifies as follows:

1. I am over eighteen (18) years of age, suffer from no known disability and am competent to testify to the facts set forth herein. The statements in this affidavit are made based upon my personal knowledge.

2. I am employed by Bank of America, N.A. ("Bank of America") as a Foreclosure Specialist in Greensboro, North Carolina.

3. On May 16, 2007, Thomas Irby and Roy Irby executed a Bank of America Equity Maximizer Line of Credit (the "Equity Line") providing a revolving line of credit for the principal amount of \$69,000.00 (the "Agreement").

4. A true and accurate copy of the Agreement is attached to the Memorandum of Law in Support of Bank of America's Motion for Summary Judgment as Exhibit A.

5. To secure payment under the Agreement, on May 16, 2007, Thomas Irby and Roy Irby executed a mortgage for certain real property in Greenville County located at 156 Pearson Road, Belton, South Carolina 29627 (the "Mortgage").

**EXHIBIT**   C  

PPAB 1875826v1

6. A true and accurate copy of the Mortgage is attached to the Memorandum of Law in Support of Bank of America's Motion for Summary Judgment as Exhibit B.
7. On August 14, 2007, Bank of America provided a payoff statement for the Equity Line, as requested by Gregg Jones, attorney for Thomas Irby and Roy Irby, with a payoff balance as of \$9,998.92.
8. On August 24, 2007, Bank of America applied a payment to the Equity Line in the amount of \$9,998.92. However, between August 17, 2007, and August 24, 2007, an additional \$10,700.73 has been withdrawn on the Equity Line.
9. A true and accurate copy of the Account Transaction History for the Equity Line is attached to the Memorandum of Law in Support of Bank of America's Motion for Summary Judgment as Exhibit E.
10. The Equity Line remained open for the withdrawal of funds because Thomas Irby and Roy Irby never paid the balance down to \$0.00, and Thomas Irby and Roy Irby never provided instruction for the Equity Line to be closed and blocked per the requirements of Exhibit F.
11. Exhibit F attached to the Memorandum of Law in Support of Bank of America's Motion for Summary Judgment is a true and accurate copy of a document received with a check from Gregg Jones in the amount of \$9,998.92. That document was never executed by either Thomas Irby or Roy Irby.
12. As of June 1, 2010, the balance under the Equity Line exceeded \$69,000.00.
13. A payment was last made on the Equity Line account on May 18, 2010.
14. The Equity Line never closed because the account balance always remained greater than \$0.00 and Thomas Irby and Roy Irby never provided proper notice to close and block the account.

15. The following itemized statement of account is true and correct for Bank of America Account Number 68118000674199 in the name of Thomas R. Irby and Roy C. Irby II:

- a. Principal as of November 1, 2011: \$69,093.09
- b. Interest as of November 1, 2011: \$4,247.93
- c. Accrued Late Charges and Fees: \$161.92

The total balance due as of November 1, 2011, exclusive of costs of litigation, costs of collection, attorneys' fees, and additional interest is \$73,502.94

16. On October 18, 2011, Bank of America executed a Subordination of Mortgage, indicating Bank of America's agreement to resolve a dispute with Chase Home Finance, LLC ("Chase") regarding seniority of each party's claim in the underlying foreclosure in this lawsuit in exchange for payment to Bank of America in the amount of \$50,000.00 from Chase's title insurer.

17. Accounting for the payment from Chase's title insurer, the net balance due as of November 1, 2011, exclusive of costs of litigation, costs of collection, attorneys' fees, and additional interest is \$23,502.94.

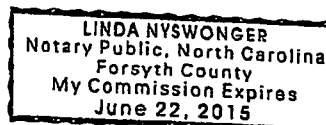
FURTHER, Affiant sayeth naught.

This 1<sup>st</sup> day of December, 2011.

Donna Card, AVP  
Donna Card

SWORN to before me this  
1<sup>st</sup> day of December, 2011.

Linda Nyswonger  
Notary Public for North Carolina  
My Commission Expires: June 23 2015







Telephone (884) 847-5535  
(884) 847-5999

Post Office Box 158

**Gregg F. Jones**  
Attorney and Counselor at Law  
1016 Anderson Drive  
Williamston, SC 29697

August 22, 2007

Bank of America  
Attn: Home Equity Payoff Dept.  
NC4-105-01-40  
PO Box 21983  
Greensboro, NC 27420

Re: Thomas R. Irby  
Acct No.: 68118000674199

To whom it may concern:

Enclosed herewith, please find my trust check in the amount of \$9,998.92, to be applied to the above mortgage. If there is a balance due, please contact this office immediately. If no balance is due or, if this is an equity line, you are directed and authorized to close, block and satisfy said mortgage and forward to my office. If you have any questions, please feel free to call me.

Sincerely,



Gregg F. Jones

GFJ/dla  
enc.

EXHIBIT D

BOA 00130



Bank of America  Higher Standards

Bank of America, NA  
Consumer Credit Services  
NCA-105-03-49  
4161 Piedmont Parkway  
Greensboro, NC 27410

Tuesday, November 16, 2010

THOMAS R IRBY  
ROY CIRBY II  
8008 HWY 100  
NASHVILLE, TN 37221

RE: Account Number - 68118000674199

Dear Thomas R Irby :

Thank you for your recent inquiry. We have enclosed the loan history transcript on the above referenced loan as requested.

If we may be of further assistance, please contact our Customer Service Department at:

Idaho and Washington: 1-877-459-2808  
California Customers: 1-800-621-1044  
East Coast, Mid West and Oregon Customers: 1-800-432-1000  
Small Business Customers: California 1-800-627-8499  
Small Business Customers: Idaho & Washington 1-800-627-8499

Thank you for banking with Bank of America

Sincerely,

Customer Service Representative

EXHIBIT E

BOA 00119

## Account Transaction History



Customer Name - THOMAS R IRBY  
Account Number - 68118000674199

Tuesday, November 16, 2010

Original Amount \$69,000.00 Maturity Date 12319999  
Origination Date 05/16/2007 Interest Rate 3.49

Next Payment Date 11/20/2010

| Effective Date | Posting Date | Description        | Transaction Amount | Principal  | Interest | Fees    | Balance     |
|----------------|--------------|--------------------|--------------------|------------|----------|---------|-------------|
| 01/06/2009     | 01/06/2009   | Electronic Advance | \$1,500.00         | \$1,500.00 |          |         | \$66,293.09 |
| 01/14/2009     | 01/14/2009   | Electronic Advance | \$800.00           | \$800.00   |          |         | \$67,093.09 |
| 01/16/2009     | 01/16/2009   | Electronic Advance | \$500.00           | \$500.00   |          |         | \$67,593.09 |
| 01/16/2009     | 01/16/2009   | Electronic Advance | \$500.00           | \$500.00   |          |         | \$68,093.09 |
| 01/20/2009     | 01/20/2009   | Regular Pmt        | \$201.78           |            | \$201.78 |         | \$68,093.09 |
| 02/20/2009     | 02/20/2009   | Regular Pmt        | \$190.93           |            | \$190.93 |         | \$68,093.09 |
| 03/09/2009     | 03/10/2009   | ODP Advance        | \$100.00           | \$100.00   |          |         | \$68,193.09 |
| 03/11/2009     | 03/12/2009   | ODP Advance        | \$100.00           | \$100.00   |          |         | \$68,293.09 |
| 03/13/2009     | 03/13/2009   | Electronic Advance | \$300.00           | \$300.00   |          |         | \$68,593.09 |
| 03/20/2009     | 03/20/2009   | Regular Pmt        | \$182.30           |            | \$182.30 |         | \$68,593.09 |
| 03/20/2009     | 03/23/2009   | ODP Advance        | \$100.00           | \$100.00   |          |         | \$68,693.09 |
| 04/07/2009     | 04/08/2009   | ODP Advance        | \$200.00           | \$200.00   |          |         | \$68,893.09 |
| 04/20/2009     | 04/20/2009   | Regular Pmt        | \$202.63           |            | \$202.63 |         | \$68,893.09 |
| 05/20/2009     | 05/20/2009   | Regular Pmt        | \$197.41           |            | \$197.41 |         | \$68,893.09 |
| 06/20/2009     | 06/22/2009   | Regular Pmt        | \$204.21           |            | \$204.21 |         | \$68,893.09 |
| 07/20/2009     | 07/20/2009   | Regular Pmt        | \$197.61           |            | \$197.61 |         | \$68,893.09 |
| 08/20/2009     | 08/20/2009   | Regular Pmt        | \$204.21           |            | \$204.21 |         | \$68,893.09 |
| 08/31/2009     | 09/01/2009   | ODP Advance        | \$100.00           | \$100.00   |          |         | \$68,993.09 |
| 09/20/2009     | 09/21/2009   | Regular Pmt        | \$204.21           |            | \$204.21 |         | \$68,993.09 |
| 09/21/2009     | 09/22/2009   | ODP Advance        | \$100.00           | \$100.00   |          |         | \$69,093.09 |
| 10/30/2009     | 10/30/2009   | Fee Assessed       | \$10.00            |            |          | \$10.00 | \$69,093.09 |
| 11/13/2009     | 11/13/2009   | Payment            | \$207.91           |            | \$207.91 |         | \$69,093.09 |
| 11/30/2009     | 11/30/2009   | Fee Assessed       | \$10.00            |            |          | \$10.00 | \$69,093.09 |
| 12/04/2009     | 12/04/2009   | Payment            | \$198.20           |            | \$198.20 |         | \$69,093.09 |
| 12/30/2009     | 12/30/2009   | Fee Assessed       | \$10.00            |            |          | \$10.00 | \$69,093.09 |
| 02/01/2010     | 02/01/2010   | Fee Assessed       | \$10.24            |            |          | \$10.24 | \$69,093.09 |
| 03/02/2010     | 03/02/2010   | Fee Assessed       | \$10.24            |            |          | \$10.24 | \$69,093.09 |
| 03/30/2010     | 03/30/2010   | Fee Assessed       | \$10.00            |            |          | \$10.00 | \$69,093.09 |
| 04/30/2010     | 04/30/2010   | Fee Assessed       | \$10.24            |            |          | \$10.24 | \$69,093.09 |
| 05/18/2010     | 05/18/2010   | Regular Pmt        | \$604.40           |            | \$604.40 |         | \$69,093.09 |
| 06/01/2010     | 06/20/2010   | Fee Assessed       | \$10.00            |            |          | \$10.00 | \$69,093.09 |
| 06/02/2010     | 06/02/2010   | Fee Assessed       | \$95.00            |            |          | \$95.00 | \$69,093.09 |

## Account Transaction History

Bank of America  Higher StandardsCustomer Name - THOMAS R IRBY  
Account Number - 68118000674199

Tuesday, November 16, 2010

Original Amount \$69,000.00 Maturity Date 12319999  
Origination Date 05/16/2007 Interest Rate 3.49

Next Payment Date 11/20/2010

| Effective Date | Posting Date | Description        | Transaction Amount | Principal  | Interest | Fees | Balance     |
|----------------|--------------|--------------------|--------------------|------------|----------|------|-------------|
| 03/20/2008     | 03/21/2008   | ODP Advance        | \$200.00           | \$200.00   |          |      | \$45,306.05 |
| 03/21/2008     | 03/21/2008   | Prin Reduction     | \$160.00           | \$160.00   |          |      | \$45,146.05 |
| 04/14/2008     | 04/15/2008   | ODP Advance        | \$100.00           | \$100.00   |          |      | \$45,246.05 |
| 04/20/2008     | 04/21/2008   | Regular Pmt        | \$237.16           |            | \$237.16 |      | \$45,246.05 |
| 04/21/2008     | 04/21/2008   | Payment            | \$237.16           | \$237.16   |          |      | \$45,008.89 |
| 04/21/2008     | 04/22/2008   | ODP Advance        | \$200.00           | \$200.00   |          |      | \$45,208.89 |
| 05/20/2008     | 05/20/2008   | Regular Pmt        | \$203.31           |            | \$203.31 |      | \$45,208.89 |
| 05/21/2008     | 05/21/2008   | Prin Reduction     | \$200.00           | \$200.00   |          |      | \$45,008.89 |
| 05/22/2008     | 05/22/2008   | Balance Advance    | \$400.00           | \$400.00   |          |      | \$45,408.89 |
| 05/27/2008     | 05/28/2008   | ODP Advance        | \$800.00           | \$800.00   |          |      | \$46,208.89 |
| 05/28/2008     | 05/29/2008   | ODP Advance        | \$100.00           | \$100.00   |          |      | \$46,308.89 |
| 06/20/2008     | 06/20/2008   | Regular Pmt        | \$210.34           |            | \$210.34 |      | \$46,308.89 |
| 06/20/2008     | 06/20/2008   | Payment            | \$210.34           | \$210.34   |          |      | \$46,098.55 |
| 06/20/2008     | 06/23/2008   | ODP Advance        | \$500.00           | \$500.00   |          |      | \$46,598.55 |
| 07/01/2008     | 07/02/2008   | ODP Advance        | \$100.00           | \$100.00   |          |      | \$46,698.55 |
| 07/20/2008     | 07/21/2008   | Regular Pmt        | \$199.13           |            | \$199.13 |      | \$46,698.55 |
| 07/21/2008     | 07/22/2008   | ODP Advance        | \$100.00           | \$100.00   |          |      | \$46,798.55 |
| 08/13/2008     | 08/13/2008   | Balance Advance    | \$2,000.00         | \$2,000.00 |          |      | \$48,798.55 |
| 08/20/2008     | 08/20/2008   | Regular Pmt        | \$207.28           |            | \$207.28 |      | \$48,798.55 |
| 08/20/2008     | 08/20/2008   | Payment            | \$207.28           | \$207.28   |          |      | \$48,591.27 |
| 08/21/2008     | 08/22/2008   | ODP Advance        | \$200.00           | \$200.00   |          |      | \$48,791.27 |
| 08/29/2008     | 09/02/2008   | ODP Advance        | \$100.00           | \$100.00   |          |      | \$48,891.27 |
| 09/02/2008     | 09/03/2008   | ODP Advance        | \$400.00           | \$400.00   |          |      | \$49,291.27 |
| 09/20/2008     | 09/22/2008   | Regular Pmt        | \$211.67           |            | \$211.67 |      | \$49,291.27 |
| 10/20/2008     | 10/20/2008   | Regular Pmt        | \$211.34           |            | \$211.34 |      | \$49,291.27 |
| 10/23/2008     | 10/24/2008   | ODP Advance        | \$200.00           | \$200.00   |          |      | \$49,491.27 |
| 11/03/2008     | 11/03/2008   | Payment            | \$218.88           |            | \$218.88 |      | \$49,491.27 |
| 11/10/2008     | 11/10/2008   | Electronic Advance | \$3,000.00         | \$3,000.00 |          |      | \$52,491.27 |
| 12/09/2008     | 12/09/2008   | Electronic Advance | \$8,000.00         | \$8,000.00 |          |      | \$60,491.27 |
| 12/17/2008     | 12/17/2008   | Payment            | \$3,296.68         | \$3,098.18 | \$198.50 |      | \$57,393.09 |
| 12/22/2008     | 12/22/2008   | Electronic Advance | \$300.00           | \$300.00   |          |      | \$57,693.09 |
| 01/05/2009     | 01/05/2009   | Electronic Advance | \$7,100.00         | \$7,100.00 |          |      | \$64,793.09 |

## Account Transaction History

Bank of America Higher Standards

Customer Name - THOMAS R IRBY  
Account Number - 68118000674199

Tuesday, November 16, 2010

Original Amount \$69,000.00 Maturity Date 12319999  
Origination Date 05/16/2007 Interest Rate 3.49

Next Payment Date 11/20/2010

| Effective Date | Posting Date | Description        | Transaction Amount | Principal   | Interest | Fees | Balance     |
|----------------|--------------|--------------------|--------------------|-------------|----------|------|-------------|
| 10/16/2007     | 10/16/2007   | Electronic Advance | \$1,000.00         | \$1,000.00  |          |      | \$23,522.47 |
| 10/17/2007     | 10/17/2007   | Electronic Advance | \$17,500.00        | \$17,500.00 |          |      | \$41,022.47 |
| 10/18/2007     | 10/19/2007   | ODP Advance        | \$200.00           | \$200.00    |          |      | \$41,222.47 |
| 10/19/2007     | 10/19/2007   | Payment            | \$112.83           |             | \$112.83 |      | \$41,222.47 |
| 10/19/2007     | 10/19/2007   | Payment            | \$137.17           | \$137.17    |          |      | \$41,085.30 |
| 10/19/2007     | 10/19/2007   | Prin Reduction     | \$137.17           | \$137.17    |          |      | \$40,948.13 |
| 10/19/2007     | 10/19/2007   | Electronic Advance | \$1,300.00         | \$1,300.00  |          |      | \$42,248.13 |
| 10/20/2007     | 10/22/2007   | Regular Pmt        | \$112.83           |             | \$112.83 |      | \$42,135.30 |
| 10/22/2007     | 10/23/2007   | ODP Advance        | \$300.00           | \$300.00    |          |      | \$42,435.30 |
| 10/26/2007     | 10/29/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$42,535.30 |
| 11/20/2007     | 11/20/2007   | Regular Pmt        | \$195.68           |             | \$195.68 |      | \$42,535.30 |
| 11/21/2007     | 11/21/2007   | Payment            | \$100.00           | \$100.00    |          |      | \$42,435.30 |
| 11/23/2007     | 11/26/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$42,535.30 |
| 12/14/2007     | 12/14/2007   | Balance Advance    | \$400.00           | \$400.00    |          |      | \$42,935.30 |
| 12/17/2007     | 12/18/2007   | Balance Advance    | \$1,150.00         | \$1,150.00  |          |      | \$44,085.30 |
| 12/20/2007     | 12/20/2007   | Regular Pmt        | \$279.25           |             | \$279.25 |      | \$44,085.30 |
| 12/20/2007     | 12/20/2007   | Payment            | \$200.00           | \$200.00    |          |      | \$43,885.30 |
| 12/20/2007     | 12/20/2007   | Payment            | \$79.25            | \$79.25     |          |      | \$43,806.05 |
| 01/15/2008     | 01/16/2008   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$43,906.05 |
| 01/18/2008     | 01/18/2008   | Payment            | \$300.00           | \$17.20     | \$282.80 |      | \$43,888.85 |
| 01/20/2008     | 01/22/2008   | Regular Pmt        | \$282.80           | \$282.80    |          |      | \$43,606.05 |
| 01/22/2008     | 01/23/2008   | ODP Advance        | \$600.00           | \$600.00    |          |      | \$44,206.05 |
| 01/23/2008     | 01/24/2008   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$44,306.05 |
| 02/19/2008     | 02/20/2008   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$44,406.05 |
| 02/20/2008     | 02/20/2008   | Regular Pmt        | \$278.54           |             | \$278.54 |      | \$44,406.05 |
| 02/20/2008     | 02/21/2008   | ODP Advance        | \$300.00           | \$300.00    |          |      | \$44,706.05 |
| 02/21/2008     | 02/21/2008   | Prin Reduction     | \$200.00           | \$200.00    |          |      | \$44,506.05 |
| 02/25/2008     | 02/26/2008   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$44,606.05 |
| 02/27/2008     | 02/28/2008   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$44,706.05 |
| 03/14/2008     | 03/17/2008   | ODP Advance        | \$300.00           | \$300.00    |          |      | \$45,006.05 |
| 03/17/2008     | 03/18/2008   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$45,106.05 |
| 03/20/2008     | 03/20/2008   | Regular Pmt        | \$236.85           |             | \$236.85 |      | \$45,106.05 |

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BOA 00121

## Account Transaction History

Bank of America  Higher StandardsCustomer Name - THOMAS R IRBY  
Account Number - 68118000674199

Tuesday, November 16, 2010

Original Amount \$69,000.00 Maturity Date 12/31/9999 Next Payment Date 11/20/2010  
Origination Date 05/16/2007 Interest Rate 3.49

| Effective Date | Posting Date | Description        | Transaction Amount | Principal   | Interest | Fees | Balance     |
|----------------|--------------|--------------------|--------------------|-------------|----------|------|-------------|
| 06/18/2007     | 06/18/2007   | Electronic Advance | \$2,500.00         | \$2,500.00  |          |      | \$2,500.00  |
| 06/27/2007     | 06/27/2007   | Electronic Advance | \$2,500.00         | \$2,500.00  |          |      | \$5,000.00  |
| 07/10/2007     | 07/10/2007   | Regular Pmt        | \$5.00             | \$0.35      | \$4.65   |      | \$4,999.65  |
| 07/20/2007     | 07/23/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$5,099.65  |
| 07/23/2007     | 07/24/2007   | ODP Advance        | \$500.00           | \$500.00    |          |      | \$5,599.65  |
| 07/24/2007     | 07/25/2007   | ODP Advance        | \$300.00           | \$300.00    |          |      | \$5,899.65  |
| 08/03/2007     | 08/03/2007   | Electronic Advance | \$4,000.00         | \$4,000.00  |          |      | \$9,899.65  |
| 08/14/2007     | 08/15/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$9,999.65  |
| 08/17/2007     | 08/20/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$10,099.65 |
| 08/20/2007     | 08/20/2007   | Regular Pmt        | \$36.30            |             | \$36.30  |      | \$10,099.65 |
| 08/20/2007     | 08/21/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$10,199.65 |
| 08/21/2007     | 08/21/2007   | Electronic Advance | \$4,000.00         | \$4,000.00  |          |      | \$14,199.65 |
| 08/22/2007     | 08/23/2007   | ODP Advance        | \$6,500.00         | \$6,500.00  |          |      | \$20,699.65 |
| 08/24/2007     | 08/24/2007   | Regular Pmt        | \$9,998.92         | \$9,998.92  |          |      | \$10,700.73 |
| 08/27/2007     | 08/28/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$10,800.73 |
| 08/30/2007     | 08/30/2007   | Electronic Advance | \$600.00           | \$600.00    |          |      | \$11,400.73 |
| 09/04/2007     | 09/04/2007   | Electronic Advance | \$400.00           | \$400.00    |          |      | \$11,800.73 |
| 09/04/2007     | 09/05/2007   | ODP Advance        | \$300.00           | \$300.00    |          |      | \$12,100.73 |
| 09/05/2007     | 09/06/2007   | ODP Advance        | \$2,600.00         | \$2,600.00  |          |      | \$14,700.73 |
| 09/06/2007     | 09/07/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$14,800.73 |
| 09/10/2007     | 09/10/2007   | Electronic Advance | \$1,000.00         | \$1,000.00  |          |      | \$15,800.73 |
| 09/10/2007     | 09/11/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$15,900.73 |
| 09/11/2007     | 09/12/2007   | ODP Advance        | \$4,500.00         | \$4,500.00  |          |      | \$20,400.73 |
| 09/12/2007     | 09/12/2007   | Payment            | \$13,000.00        | \$12,928.26 | \$71.74  |      | \$7,472.47  |
| 09/12/2007     | 09/13/2007   | ODP Advance        | \$4,200.00         | \$4,200.00  |          |      | \$11,672.47 |
| 09/13/2007     | 09/14/2007   | ODP Advance        | \$3,500.00         | \$3,500.00  |          |      | \$15,172.47 |
| 09/14/2007     | 09/14/2007   | Electronic Advance | \$500.00           | \$500.00    |          |      | \$15,672.47 |
| 09/17/2007     | 09/17/2007   | Electronic Advance | \$6,150.00         | \$6,150.00  |          |      | \$21,822.47 |
| 09/17/2007     | 09/18/2007   | ODP Advance        | \$100.00           | \$100.00    |          |      | \$21,922.47 |
| 09/20/2007     | 09/21/2007   | ODP Advance        | \$200.00           | \$200.00    |          |      | \$22,122.47 |
| 09/21/2007     | 09/24/2007   | ODP Advance        | \$200.00           | \$200.00    |          |      | \$22,322.47 |
| 10/01/2007     | 10/02/2007   | ODP Advance        | \$200.00           | \$200.00    |          |      | \$22,522.47 |

Account Transaction History

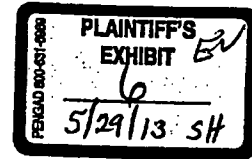


Customer Name - THOMAS R IRBY  
Account Number - 68118000674199

Tuesday, November 16, 2010

Original Amount \$69,000.00      Maturity Date 12319999      Next Payment Date 11/20/2010  
Origination Date 05/16/2007      Interest Rate 3.49

| Effective Date | Posting Date | Description  | Transaction Amount | Principal | Interest | Fees     | Balance     |
|----------------|--------------|--------------|--------------------|-----------|----------|----------|-------------|
| 06/30/2010     | 08/20/2010   | Fee Assessed | \$10.24            |           |          | \$10.24  | \$69,093.09 |
| 07/30/2010     | 08/20/2010   | Fee Assessed | \$10.00            |           |          | \$10.00  | \$69,093.09 |
| 08/02/2010     | 08/02/2010   | Fee Assessed | \$78.00            |           |          | \$78.00  | \$69,093.09 |
| 08/11/2010     | 08/11/2010   | Fee Assessed | \$250.00           |           |          | \$250.00 | \$69,093.09 |
| 08/30/2010     | 08/30/2010   | Fee Assessed | \$10.24            |           |          | \$10.24  | \$69,093.09 |
| 09/30/2010     | 09/30/2010   | Fee Assessed | \$10.24            |           |          | \$10.24  | \$69,093.09 |
| 11/01/2010     | 11/01/2010   | Fee Assessed | \$10.00            |           |          | \$10.00  | \$69,093.09 |



STATE OF SOUTH CAROLINA                     )  
                                                           )     SUBORDINATION OF MORTGAGE  
COUNTY OF GREENVILLE                    )

FOR VALUE RECEIVED, Bank of America, N.A. ("BoA"), the owner and holder of that certain Home Equity Line of Credit Agreement dated May 16, 2007 (the "HELOC"), from Thomas R. Irby and Roy C. Irby, III (collectively the "Borrower") in the original amount of \$69,000.00, which is secured by a Mortgage (the "HELOC Mortgage") executed and delivered by Borrower to BoA simultaneously with the Note and recorded on May 17, 2007, in the Greenville County ROD Office in Mortgage Book 4779 at Page 1103, does hereby subordinate the HELOC and the lien of said HELOC Mortgage to the indebtedness created by that certain promissory note from Thomas R. Irby to M&T Bank dated August 17, 2007, in the original amount of \$95,000.00 (the "Chase Note") and the lien created by that certain Mortgage securing the Chase Note from Borrower to M&T Bank dated August 17, 2007, and recorded August 28, 2007, in the Greenville County ROD Office in Mortgage Book 4840 at Page 234 (the "Chase Mortgage"), with the Chase Note and Chase Mortgage being subsequently assigned to Chase Home Finance, LLC, by Assignment of Real Estate Mortgage dated March 8, 2010, and recorded March 16, 2010, in the Greenville County ROD Office in Mortgage Book 5073 at Page 1350.

Except as expressly herein provided, all terms and provisions of the HELOC and HELOC Mortgage shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned has set its hand and seal this 18th day of October, 2011.

WITNESSES:

Bank of America, N.A.

By:

Kathy Clark

Title: Vice President



2011074567

SUB/MTG  
2 PGS

Book: MO 5137

Page: 4514-4515

November 02, 2011 03:52:13 PM

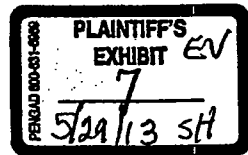
Rec: \$7.00

Cnty Tax: \$0.00

State Tax: \$0.00

FILED IN GREENVILLE COUNTY, SC





**Bank of America**



June 22, 2010

THOMAS R IRBY  
ROY C IRBY II  
8008 HWY 100  
NASHVILLE

TN 37221

RE: xxxxxxxxxx4199

Dear Customer:

Thank you for your inquiry regarding the above referenced account number.

This letter serves as notification that the research on your Line of Credit above has been completed. Our records indicate the Line of Credit account is linked for overdraft protection from South Carolina checking#xxxxxx8297, listed under the profile of Roy C Irby II.

We value your business and want to provide the best possible service. If you should have any additional questions please feel free to call our Customer Service representatives at:

|                                      |                |
|--------------------------------------|----------------|
| Northwest Customers:                 | 1.877-459-2808 |
| California Small Business Customers: | 1.800-627-8499 |
| Northwest Small Business Customers:  | 1.800-627-8499 |
| California Customers:                | 1.800-621-1044 |
| All other customers:                 | 1.800-432-1000 |

Sincerely,

Consumer Real Estate Servicing  
Bank of America

TIL

WIRE

M & T BANK  
828 GREEN VALLEY ROAD STE 308  
GREENSBORO NC 27408

MORTGAGE DIVISION  
PH 336-856-2824  
FAX: 336-856-2114

PLAINTIFFS  
EXHIBIT 7D  
8  
5/29/13 SH

**LOAN CLOSING CHECKLIST - REFINANCE**BORROWER: Thomas IronCLOSING DATE: 8-22-07DISBURSEMENT DATE: 8-22-07

IF YOUR PACKAGE WAS E-MAILED TO YOU, YOU ARE REQUIRED TO REVIEW IT TO BE SURE ALL DOCUMENTS PRINTED CLEARLY. CONTACT OUR CLOSING DEPT WITH ANY QUESTIONS.

**INSTRUCTIONS FOR HUD-1 STATEMENT AND ITEMS REQUIRED PRIOR TO CLOSING**

☒ PRELIMINARY HUD-1 STATEMENT (WE WILL NOT ISSUE A TRUTH IN LENDING UNTIL REVIEWED) - UPON RECEIPT, WE WILL FAX THE TRUTH IN LENDING.

☐ PMIP REQUIRED. PLEASE SHOW                      MO ON HUD-1 IN THE 1000'S SECTION.                      TIL MAKE SURE YOU HAVE THE BORROWER'S SIGN THE NOTICE OF RIGHT TO CANCEL PMI DISCLOSURE. FOUND IN THE CLOSING PACKAGE. THIS IS REQUIRED FOR FUNDING.

☐ CASH OUT IS OKAY. ☐ CASH OUT IS LIMITED TO \$                     

☒ HUD-1 STATEMENT MUST REFLECT PAYOFF TO: Community First Bank & Trust (Int + 2)  
judgments (\$414,635)

☒ DECLARATION PAGE ☐ HAZARD AND ☐ FLOOD INSURANCE POLICY. MUST HAVE 90 DAYS COVERAGE AND THE COVERAGE AMOUNT MUST BE AT LEAST GUARANTEED REPLACEMENT OR AMOUNT OF THE DWELLING. MORTGAGEE CLAUSE: M & T BANK, ITS SUCCESSORS AND OR ASSIGNS ATIMA, P.O. BOX 5738, SPRINGFIELD, OH 45501-5738

☒ BLANKET INURED CLOSING LETTER (ICL), (SPECIFIC ATTORNEY REFERENCE ONLY)

☐ CLEAR TERMITE REPORT (MUST BE SIGNED BY BORROWERS) ☐ SOIL TREATMENT GUARANTEE

☐ HOLD HARMLESS (CONVENTIONAL LOANS ONLY)

☐ CLEAR HEALTH AUTHORITY APPROVAL ☐ WELL ☐ SEPTIC

☒ OTHER: Collect \$935 on HUD for Hazard  
Provide a paid receipt for Hazard insurance showing the policy is paid current

☒ OTHER: Cash to close is \$14,619

☒ OTHER: Signed & notarized deed as trust

☒ OTHER: Signed 45067

**PRIOR TO DISBURSING ANY FUNDS: PLEASE FAX THE FOLLOWING ITEMS TO UPN FOR A FUNDING#.**

☒ SIGNED, FINAL HUD-1 STATEMENT WITH ALL CORRECTIONS.

☒ Send copy of wire instructions

☒ NOTE (MUST BE SIGNED AS TYPED) NO CORRECTIONS OR WHITE OUT

☒ right to cancel

☒ TITLE BINDER WITH ALL ALTA REQUIREMENTS AND M & T BANK AS LENDER

☐ NOTICE TO BORROWERS PRIVATE MORTGAGE INSURANCE CANCELATION FORM SIGNED

☐ HUD-1 FROM THE SALE OF PREVIOUS HOME NETTING \$                      AND REFLECTING PAYOFF TO:                      FOR PROPERTY LOCATED AT:                     

☐ FINAL INSPECTION: ☐ REPAIR INSPECTION WITH PHOTOS ☐ RECERT OF VALUE OF \$                     

☐ SIGNED TAX RETURNS AND ☐ PROFIT AND LOSS STATEMENT

☒ TAX INFORMATION SHEET COMPLETED BY ATTORNEY / CLOSING AGENT

☒ SIGNED AND DATED 1003 APPLICATION (AND ADDENDUMS 4 PAGE FHA & 2 PAGE VA)

☒ SIGNED TRUTH IN LENDING:

☒ OTHER: Signed servicing disclosure statement

☒ OTHER: Signed good faith estimate

**UPON RECEIPT AND APPROVAL OF ALL THE ABOVE FAXED ITEMS, WE WILL ISSUE A FUNDING#. YOU ARE NOT AUTHORIZED TO DISBURSE WITHOUT A FUNDING NUMBER!!!**

**LOAN CLOSING INSTRUCTIONS**

DATE: August 18, 2007  
LOAN #: 12306098

**GOV/STATE HOUSING CASE #:**

CLOSING AGENT: Gregg Jones, Attorney at Law  
1018 Anderson Drive  
Williamston, SC 29097

ATTN: greggjones@aol.com  
PHONE: (864) 847-5595  
FAX: (864) 847-5999  
CONTACT:

M&T Bank  
800 Green Valley Road  
Suite 104  
Greensboro, NC 27408

**ESCROW #:**

CLOSER: Chryslie Blackstock  
CLOSER'S FAX:

TITLE COMPANY: Fidelity National Title Insurance

PHONE:  
FAX:

**BORROWER(S) NAME(S):**  
THOMAS R IRBY

**HOME PHONE #:**  
(864) 243-4015

**WORK PHONE #:**  
(864) 827-0080

**SELLER:**

**PROPERTY ADDRESS:** 168 PEARSON ROAD  
Baton, SC 29827

**PURCHASE PRICE** : \$0.00  
**TERM** : 360  
**INTEREST ONLY PAYMENT (FOR INTEREST ONLY)**  
**PERIOD ONLY** : N/A  
**PRINCIPAL & INTEREST** : \$688.47  
**INTEREST RATE** : 6.003  
**30YR/MA SPLIT RATE**  
**FUNDING DATE** : August 22, 2007  
**# OF UNITS** : 1

**OCCUPANCY** : Primary Home  
**PROPERTY TYPE** : SFR 1 Unit  
**LOAN AMOUNT** : \$95,000.00  
**LOAN TYPE** : Fixed Rate  
**PRODUCT TYPE** : FixedRate 30Yr  
**LOAN MUST FUND BY** : August 22, 2007  
**1st PAYMENT DATE** : October 01, 2007  
**MATURITY DATE** : September 01, 2037  
**CLOSE DATE** : August 17, 2007

M&T Bank hereby authorizes the above referenced company to act as closing agent for this transaction. Enclosed are documents and instructions to be executed. If you do not receive a document checked in the sent column, please contact the Closer. Please comply strictly with all instructions.

**DOCUMENTS ENCLOSED:**

Sent Right/Left

☐ Mortgage Deed of Trust (Attach Schedule "A")  
☐ GEM/A Agreement  
☐ Fixed Rate Note  
☐ Biweekly Note  
☐ Arm Note  
☐ Balloon Note  
☐ Applicability Riders  
☐ Water Guarantee  
☐ Name Affidavit  
☐ Escrow Accrual  
☐ Tax Authorization (Attach Schedule "A")  
☐ Notice of Right to Cancel/Certificate of Non-Cancellation  
☐ Closing Affidavit  
☐ Privacy Policy  
☐ HUD Settlement Statement  
☐ Real Property Disclosure  
☐ Truth in Lending Disclosure  
☐ IRS 4506  
☐ IRS W-9  
☐ First Payment Letter  
☐ Final Typed Application  
☐ PMI Disclosure/PMI Notice

Sent Return/Left

☐ Escrow Delinquent  
☐ Co-Signer Notice  
☐ Smoke Alarm Affidavit  
☐ Funding Sheet  
☐ Amort. Schedule  
☐ PHAVA HUD Addendum  
☐ Certification of Loan Disbursement VA1820  
☐ Hotel Transient  
☐ Addendum to HUD-1  
☐ Servicing Disclosure  
☐ New Money Note  
☐ New Money Mortgage  
☐ Customer Survey  
☐ Rehabilitation Loan Agreement  
☐ Smoke Alarm & Carbon Monoxide Detector Affidavit  
☐ Commitment Letter  
☐ Construction Addendum to the Note  
☐ Construction Loan Agreement  
☐ Construction Agreement to Pay Fees at Modification

**GENERAL REQUIREMENTS**

- ▶ All closing documentation must be returned to M&T Bank within 48 hours from the date of signing.
- ▶ Closing Agent must deliver M&T Bank's Privacy Policy to borrower(s) at closing.
- ▶ Signatures on Note/Addendum and Security Instruments/Riders must conform in the exact manner indicated on the documents. If you have information indicating that names are spelled incorrectly, please contact our office immediately.
- ▶ There is to be no alteration to any document without the express consent of M&T Bank. If any corrections are made to the security instrument, they must be initiated by the borrower(s). No corrections may be made to the Note.

MT2159 (03/30/07)

Loan # 12306098

MAY-21-2013 09:29 FROM: GREGG JONES

8648475999

TO: 18645748871

P.5/8

## FUNDING SCHEDULE

PO: Greensboro Wholesale Sales FOR: THOMAS R IRBY DATE: 08/17/07  
 SETTLEMENT AGENT: Gregg Jones, Attorney at Law GOVT/STATE HOUSING CASE #  
 LOSE DATE: 08/17/2007 COST CENTER: 1109 STATUS: Ready to Roll  
 DISBURSEMENT DATE: 08/22/2007 CEMA: False REF TYPE: Outside LOAN # 12306098  
 PROPERTY ADDRESS: 158 PEARSON ROAD, Belton, SC 29827

Please send a check to M&T for \$ to pay off M&T loan # 0 or to cover closing costs (if loan number is blank).

BANK CITY ABA ST  
 CREDIT TO: A/C#:  
 FURTHER CR: A/C#:  
 Please pay all applicable Broker Fees to Elite Mortgage and forward checks to 44 J Pincknett Drive, Greenville, SC 29609

Mig Payoff Mig Payoff Inst Payoff  
 ELOC Payoff HEQ PD HEQ PD  
 H/E Bank Mig. Tax H/E Bor Mig. Tax #4821270 HELOC CC:  
 H/E Req. Fee #4821220 H/E ClsAgf Fee #4821000

Counseling Info:

INITIAL DRAW: \$

| Loan Origination ( 0.000 %) | Loan Discount ( 1.930 %)   | LOAN AMOUNT \$ | 95,000.00  |
|-----------------------------|----------------------------|----------------|------------|
| FEES:                       | Pd To POC                  | B amt S amt    | GL Net     |
| Origination Fee             | Elite Mortgage             | \$1,725.00     |            |
| Discount Fee                | M&T Bank                   | \$1,833.50     | \$1,833.50 |
| Credit Report               | Marquette Credit           | \$45.00        |            |
| Tax Service Fee             | First American Tax Service | \$72.00        | \$72.00    |
| Flood Cert Fee              | First American Flood Data  | \$8.00         | \$8.00     |
| Processing Fee              | Johnny Thompson -          | \$785.00       |            |
| Commitment Fee              | M&T Bank                   | \$550.00       | \$550.00   |
| @ Prepaid Interest          | M&T Bank                   | \$155.16       | \$155.16   |

PDSBY is B= Broker/Correspondent,  
 L= M&T, E= Employer, O= Other

@ Per diem interest From 8/22 To 9/1 is 10 \* days at 15.618438 per diem  
 MIP Refund 0 (display on HUD Line 902 as POC), Total MIP see HUD line 902 for balance due.

RESERVES: \* Indicates estimates only for escrow closing states; collect based on actual funding date

|                       |              |                   |          |
|-----------------------|--------------|-------------------|----------|
| Hazard Insurance      | 3 months at  | \$33.42 per month | \$100.28 |
| County Property Taxes | 10 months at | \$26.67 per month | \$266.70 |
|                       | months at    | per month         |          |
|                       | months at    | per month         |          |
|                       | months at    | per month         |          |
|                       | months at    | per month         |          |
|                       | months at    | per month         |          |
|                       | months at    | per month         |          |
|                       | months at    | per month         |          |

Aggregate Adjustment

-\$167.14

TOTAL CHECK / DEPOSIT / WIRE \$ 92,180.52

If your information differs, please contact this office immediately as the Truth in Lending statement may require revision.

PREPARER:

APPROVER:

Loan # 12306098

MT4580 (12/28/05)

Product Name: FannieMae 30Yr

Please provide two certified copies of the security instrument and any riders which are transmitted to the county recorder, and two certified copies of the Note. (Note: Sonyma requires original mortgage and riders)

- Secondary financing is not allowed unless prior-approved by M&T Bank
- Borrowers are not permitted to use powers of attorney unless prior-approved by M&T Bank
- If not already provided, please provide your ABA number, account number and account title for the account to be used for wiring/depositing funds.
- M&T Bank shortfall information (if applicable) When refinancing a mortgage currently being serviced by M&T Bank, it is imperative that shortfall checks be received by M&T Bank within 48 hours.
- The HUD-1 Settlement Statement must list points paid as both a dollar amount and as a percentage of the loan amount. It must also show the names of the following service providers:

Credit Reporting Company:  
Appraiser:

Private Mortgage Insurance Company:

- When fees must be allocated on the HUD-1 due to investor/lender guidelines (as opposed to reflected as a lump sum) and the provider of the credit did NOT designate to what items the credit should be applied, it is M&T Bank's policy to instruct the HUD-1 preparer to apply the credits as follows:
  - 1st, to prepaid items
  - 2nd, to non-APR closing costs
  - 3rd, to APR closing costs
- If a loan scheduled with M&T Bank cancels for any reason you must immediately call, then fax a Closing Postponement/Cancellation Notice to M&T Bank. If your account has been funded, the funds received must be returned to M&T Bank immediately. Please note that you will be charged a 7% daily penalty, based on the wire amount from the disbursement date if you do not return the funds immediately.

#### HAZARD INSURANCE REQUIREMENTS

- Hazard insurance coverage must be at least the loan amount or guaranteed replacement cost with an extended coverage endorsement. Please provide evidence that the first year's premium has been paid.
- A binder will be accepted in all states. A certificate of insurance will be accepted in Utah.
- The names of the borrowers and the address must be identical to those shown on the legal address.
- The policy must be effective on or before the disbursement date. If a pre-existing policy and impounds are being collected, please collect sufficient reserves to ensure that we have the funds necessary to pay the premium on the next anniversary date. If this is a refinance, the insurance premium must be paid up to four months.
- The policy must be issued by a company having a general rating classification of BIII or better in the most current edition of the Best Key Rating Guide.
- The maximum deductible allowed in a policy is the lower of one percent of the loan amount or \$1,000.00.
- If the property is a 2-4 family residence, insurance against rent loss is required. Evidence that the policy includes this coverage must be provided at closing.
- The loan policy must contain a standard mortgagee clause as follows: M&T Bank, P.O. Box 5738, Springfield, Ohio 45501-8738, and its successors and assigns or the clause that is shown on page 2 of our commitment letter if different. For SONYMA loans the mortgagee should read: State of New York Mortgage Agency, c/o M&T Bank, and its successors and assigns, P.O. Box 5738, Springfield, OH 45501-8738.

#### FLOOD INSURANCE REQUIREMENTS

If this loan is subject to the requirement of flood insurance, the borrower(s) must bring to closing the binder and paid one-year receipt, showing full replacement value, or coverage in the amount of the loan, or the maximum available. The policy must contain a standard mortgagee clause, the same as Hazard Insurance.

#### TITLE INSURANCE REQUIREMENTS

- A policy of title insurance in ALTA form with coverage in the amount of \$85,000.00 showing M&T Bank, its successors and/or assigns as the insured with the following endorsements attached is required.

|         |                                                   |
|---------|---------------------------------------------------|
| *** 100 | standard ALTA                                     |
| *** 118 | location of improvements (if survey not required) |
| *** 8.1 | environmental protection                          |
| *** 300 | survey exceptions                                 |

- If this loan is closing using MERS documents, Mortgage Electronic Registration Systems, Inc. must be listed as nominee for the insured, listed above, in Paragraph 4 of the policy

- The following endorsements are required if applicable to this transaction:

|          |             |         |                      |
|----------|-------------|---------|----------------------|
| 4        | condominium | 7       | manufactured home    |
| 5        | PUD         | Balloon | balloon payment loan |
| 6 or 8.1 | ARM         |         |                      |

- You may only close this loan and disburse loan proceeds if at the conclusion of the closing and at the time of recording of any necessary instruments, M&T Bank has a valid and enforceable debt in the full loan amount which is secured by a valid enforceable first priority lien against subject property, subject only to matters of record which are acceptable to secondary market investors such as Fannie Mae and Freddie Mac. The following exceptions from preliminary title report or commitment # are acceptable:

- All taxes, assessments and fees due prior to the first payment due date must be paid or collected at closing.

Mt2168 (03/30/07)

Loan # 12306008

**SPECIAL INSTRUCTIONS APPLICABLE TO FHA PURCHASE TRANSACTIONS ONLY**

The borrowers in this FHA-insured transaction must, from their own funds, make the required earnest money deposit, pay closing costs and make the down payment required by FHA, unless otherwise explained below. In order to assist in assuring that the borrowers in this transaction have met their financial obligations, you are to have executed the certifications contained on the form enclosed herewith by both the borrower and seller. You also are to execute and date the certification as indicated. Your executed certification notes receipt of the other certifications. You should make these certifications and addendum to the HUD-1 Settlement Statement and provide copies to all parties receiving copies of such statement. If you have actual knowledge that the source of such funds is other than from the borrower (except as described below) you are not to disburse any loan proceeds and must immediately notify the M&T Bank contact person shown on the last page of these instructions, at the phone number indicated.

You may only proceed with the closing upon receipt of written instructions from M&T Bank.

Source of funds other than from borrower NONE

The HUD-1 must be completed to show the amount and source of any funds being contributed on behalf of the borrower or deposited with the lender. For Purchase and No Cash Out Refinance transactions where the HUD-1 reflects cash back to the borrower, contact M&T Bank for approval.

Those charges which the borrower has prepaid to M&T Bank must be shown as "POC" followed by the prepaid amount next to the item description in Section 800 of the HUD-1 or the HUD-1A Settlement Statement. Only the balance of the charge which exceeds the amount prepaid should be shown in the column "Paid from Borrower's Funds at Settlement." Do not show items prepaid by the borrower(s) or credits from the seller or lender as lump sum credits.

**ADDITIONAL INSTRUCTIONS**

If this is a rescindable transaction, PRIOR TO DISBURSING ANY FUNDS at the expiration of the 3-day rescission period, you are responsible for confirming that none of the individuals who had the right to rescind the transaction (i.e. everyone who received a Notice of Right to Cancel) has cancelled/rescinded the transaction.

\*See Addendum - At Closing\*

If the loan does not fund by 8/24/07, please contact us for further instruction. If you have any questions, please contact  
 Chrystal Blackstock at (336) 856-2824

M&T Bank

Date

I hereby certify that all requirements contained within these instructions have been complied with in full.

Closing Agent, Gregg Jones, Attorney at Law

Date

M12158 (03/06/07)

Form # 12308098

Date: 08/15/2007

L/H 12300099

At Closing

Provide evidence of Hazard Insurance coverage at min of loan amount or 100% replacement cost.

Insurance must be on annual premium. Any amounts due, to bring insurance current or if initial premium is due, it is the responsibility of the closing agent to collect this at closing. Any unpaid taxes must also be paid at closing. Deductible must show on the Ded Page.

Rate loan approved at 6.0 % if locked rate exceeds 7.0 % or discount points exceed % loan must re-approved

Final HUD-1 is to be faxed to Broker for final approval of their fees. M&T is not responsible for fees not collected. Fax HUD-1 to branch for review and to initiate this TIL for borrower's signatures and date. DO NOT CLOSE W/O A TIL FROM M&T BANK.

Three Day Right Of Recession Applies

Credit documentation expires on 10/04/07

DO NOT DISBURSE W/O WRITTEN AUTHORIZATION FROM THIS OFFICE

Fax Insured Closing Protection Letter, Hazard Policy, Title Binder, Fee Sheet to 336-272-3569

Broker's check not to exceed 4% of loan amount (this includes mortgage broker fee paid by M&T Bank)

Final Title Policy to read: M&T Bank, ISAOA, ATIMA One Fountain Plaza Affn. Post-closing, 6th Floor Buffalo, NY 14203

Broker to provide the following disclosures: Servicing Disclosure Statement

JUDGEMENTS OF \$48.00 AND \$38.00 NEED TO BE PAID/SATISFIED \*\*8/14 SHOW EVIDENCE THESE ARE PAID - OR PAY AT CLOSING

YIELD SPREAD PREMIUM MAX IS 3% - AS DISCLOSED ON GOOD FAITH - ADDITIONAL COMPENSATION WILL REQUIRE REDISCLOSURE

Final Title Policy to read: M&T Bank, its successors and assigns and Mortgage Electronic Registration Systems, Inc., as their interests may appear.

Provide a clear/audible preliminary title report.

Evidence of payment in full of the following debt (through escrow): COMMUNITY FIRST BANK AND BANK OF AMERICA (1ST AND 2ND)

Maximum cash to close limited to \$ 18,619.00 or less.

Final typed loan application to be signed and dated by all borrowers and by loan officer.

Sign and date federal tax returns and 4508 as applicable

Pay hazard insurance premium at closing.

Hazard Insurance loss payee must read: M&T Bank, its successors and/or assigns; PO Box 5738, Springfield, OH 45501-5738.

Subordinate financing is not allowed.



**Fidelity National Title Insurance Company**

A Stock Company

Policy #: SC2196-10-GJ07-237-2008.2710740-75081514

**Loan Policy of Title Insurance**

**SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIDELITY NATIONAL TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:**

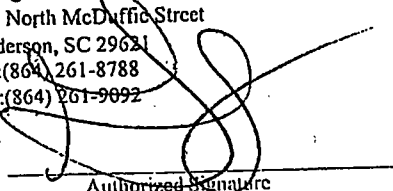
1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material;
  - a. arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
  - b. arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;



NOTICE IS HEREBY GIVEN THAT THIS POLICY IS SUBJECT TO THE PROVISIONS OF  
CHAPTER 48 OF TITLE 15 (SEC. 15-48-10 ET. SEQ.) OF THE SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED.)

Issued by: SC2196 GJ07-237  
George L. Sands, Jr.  
515 North McDuffie Street  
Anderson, SC 29621  
Tel: (864) 261-8788  
Fax: (864) 261-9092

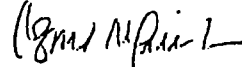
Countersigned:

  
Authorized Signature  
(Please print name below)  
George L. Sands, Jr.

FIDELITY NATIONAL TITLE INSURANCE COMPANY



By



President

ATTEST



Secretary

ALTA Loan Policy 1992 (10-17-92)  
For Use In South Carolina

FORM 11442 (4/03)

## A. SETTLEMENT STATEMENT

U.S. DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT

OMB NO. 2502-0265

PLAINTIFF'S  
EXHIBIT E

10

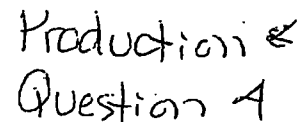
5/29/13 SH

|                                                                                                                                                                                                                                                                                 |       |                                             |                                                 |                                                                      |             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|---------------------------------------------|-------------------------------------------------|----------------------------------------------------------------------|-------------|
| 8. TYPE OF LOAN                                                                                                                                                                                                                                                                 |       | 9. FILE NUMBER                              |                                                 | 10. MORTGAGE INS CASE NUMBER                                         |             |
| 1. FHA                                                                                                                                                                                                                                                                          | 2. VA | 3. J. [ ]                                   | 4. Conv. Unit                                   | 5. 67-5983                                                           | 6. 12306098 |
| C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown; items marked "[X]" were paid outside the closing; they are shown here for informational purposes and are not included in the totals. |       |                                             |                                                 |                                                                      |             |
| D. NAME AND ADDRESS OF BORROWER                                                                                                                                                                                                                                                 |       | E. NAME AND ADDRESS OF SELLER               |                                                 | F. NAME AND ADDRESS OF LENDER                                        |             |
| Thomas R. Izby<br>156 Pearson Rd.<br>Belton, SC 29627                                                                                                                                                                                                                           |       |                                             |                                                 | M & T Bank<br>628 Green Valley Rd., Ste. 305<br>Greensboro, NC 27408 |             |
| G. PROPERTY LOCATION                                                                                                                                                                                                                                                            |       | H. SETTLEMENT AGENT                         |                                                 | I. SETTLEMENT DATE                                                   |             |
| 156 Pearson Rd.<br>Belton, SC 29627                                                                                                                                                                                                                                             |       | GREGG P. JONES, ATTORNEY<br>57-0724084      |                                                 | August 17, 2007                                                      |             |
|                                                                                                                                                                                                                                                                                 |       | PLACE OF SETTLEMENT                         |                                                 | Disburse: 08-22-07                                                   |             |
|                                                                                                                                                                                                                                                                                 |       | 1016 AMHERST DRIVE<br>WILLIAMSTON, SC 29697 |                                                 |                                                                      |             |
| J. SUMMARY OF BORROWER'S TRANSACTION                                                                                                                                                                                                                                            |       |                                             | K. SUMMARY OF SELLER'S TRANSACTION              |                                                                      |             |
| 100. GROSS AMOUNT DUE FROM BORROWER                                                                                                                                                                                                                                             |       |                                             | 400. GROSS AMOUNT DUE TO SELLER                 |                                                                      |             |
| 101. Contract Sales Price                                                                                                                                                                                                                                                       |       |                                             | 401. Contract Sales Price                       |                                                                      |             |
| 102. Personal Property                                                                                                                                                                                                                                                          |       |                                             | 402. Personal Property                          |                                                                      |             |
| 103. Settlement charges to borrower (line 1400) 7,251.28                                                                                                                                                                                                                        |       |                                             | 403.                                            |                                                                      |             |
| 104. Payoff 1st mortgage/Community First Bank 54,730.73                                                                                                                                                                                                                         |       |                                             | 404.                                            |                                                                      |             |
| 105. Payoff 2nd mortgage/Bank of America 9,998.92                                                                                                                                                                                                                               |       |                                             | 405.                                            |                                                                      |             |
| Adjustments for items paid by seller in advance                                                                                                                                                                                                                                 |       |                                             | Adjustments for items paid by seller in advance |                                                                      |             |
| 106. City/town taxes to                                                                                                                                                                                                                                                         |       |                                             | 406. City/town taxes to                         |                                                                      |             |
| 107. County taxes to                                                                                                                                                                                                                                                            |       |                                             | 407. County taxes to                            |                                                                      |             |
| 108. Assessments to                                                                                                                                                                                                                                                             |       |                                             | 408. Assessments to                             |                                                                      |             |
| 109.                                                                                                                                                                                                                                                                            |       |                                             | 409.                                            |                                                                      |             |
| 110.                                                                                                                                                                                                                                                                            |       |                                             | 410.                                            |                                                                      |             |
| 111.                                                                                                                                                                                                                                                                            |       |                                             | 411.                                            |                                                                      |             |
| 112.                                                                                                                                                                                                                                                                            |       |                                             | 412.                                            |                                                                      |             |
| 120. GROSS AMOUNT DUE FROM BORROWER 71,980.93                                                                                                                                                                                                                                   |       |                                             | 420. GROSS AMOUNT DUE TO SELLER                 |                                                                      |             |
| 200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER                                                                                                                                                                                                                                   |       |                                             | 500. REDUCTIONS IN AMOUNT DUE SELLER            |                                                                      |             |
| 201. Deposit or earnest money                                                                                                                                                                                                                                                   |       |                                             | 501. Excess deposit (see instructions)          |                                                                      |             |
| 202. Principal amount of new loan(s) 95,000.00                                                                                                                                                                                                                                  |       |                                             | 502. Settlement charges to seller (line 1400)   |                                                                      |             |
| 203. Existing loan(s) taken subject to                                                                                                                                                                                                                                          |       |                                             | 503. Existing loans taken subject to            |                                                                      |             |
| 204.                                                                                                                                                                                                                                                                            |       |                                             | 504. Payoff of first mortgage loan              |                                                                      |             |
| 205.                                                                                                                                                                                                                                                                            |       |                                             | 505. Payoff of second mortgage loan             |                                                                      |             |
| 206.                                                                                                                                                                                                                                                                            |       |                                             | 506.                                            |                                                                      |             |
| 207.                                                                                                                                                                                                                                                                            |       |                                             | 507.                                            |                                                                      |             |
| 208.                                                                                                                                                                                                                                                                            |       |                                             | 508.                                            |                                                                      |             |
| 209.                                                                                                                                                                                                                                                                            |       |                                             | 509.                                            |                                                                      |             |
| Adjustments for items unpaid by seller                                                                                                                                                                                                                                          |       |                                             | Adjustments for items unpaid by seller          |                                                                      |             |
| 210. City/town taxes to                                                                                                                                                                                                                                                         |       |                                             | 510. City/town taxes to                         |                                                                      |             |
| 211. County taxes to                                                                                                                                                                                                                                                            |       |                                             | 511. County taxes to                            |                                                                      |             |
| 212. Assessments to                                                                                                                                                                                                                                                             |       |                                             | 512. Assessments to                             |                                                                      |             |
| 213.                                                                                                                                                                                                                                                                            |       |                                             | 513.                                            |                                                                      |             |
| 214.                                                                                                                                                                                                                                                                            |       |                                             | 514.                                            |                                                                      |             |
| 215.                                                                                                                                                                                                                                                                            |       |                                             | 515.                                            |                                                                      |             |
| 216.                                                                                                                                                                                                                                                                            |       |                                             | 516.                                            |                                                                      |             |
| 217.                                                                                                                                                                                                                                                                            |       |                                             | 517.                                            |                                                                      |             |
| 218.                                                                                                                                                                                                                                                                            |       |                                             | 518.                                            |                                                                      |             |
| 219.                                                                                                                                                                                                                                                                            |       |                                             | 519.                                            |                                                                      |             |
| 220. TOTAL PAID BY/TO BORROWER 95,000.00                                                                                                                                                                                                                                        |       |                                             | 520. TOTAL REDUCTION AMOUNT DUE SELLER          |                                                                      |             |
| 300. CASH AT SETTLEMENT FROM/TO BORROWER                                                                                                                                                                                                                                        |       |                                             | 600. CASH AT SETTLEMENT TO/FROM SELLER          |                                                                      |             |
| 301. Gross amt due from borrower (line 120) 71,980.93                                                                                                                                                                                                                           |       |                                             | 601. Gross amount due to seller (line 420)      |                                                                      |             |
| 302. Less amt paid by/for borrower (line 220) 95,000.00                                                                                                                                                                                                                         |       |                                             | 602. Less reductions due seller (line 520)      |                                                                      |             |
| 303. CASH [ ] FROM [X] TO BORROWER 23,019.07                                                                                                                                                                                                                                    |       |                                             | 603. CASH [ ] TO [ ] FROM SELLER                |                                                                      |             |

The undersigned hereby acknowledge receipt of a completed copy of pages 1&amp;2 of this statement &amp; any attachments referred to herein

BORROWER  
Thomas R. Izby

BORROWER

Form 1040 (2007)

Production  
Question 4

Form **1040A** U.S. Individual Income Tax Return (99) **2008** Department of the Treasury — Internal Revenue Service

IRS Use Only — Do not write or staple in this space.

**Label** (See instructions.)

Your first name and initial **roy** Last name **C IRBY, II**

If a joint return, spouse's first name and initial \_\_\_\_\_ Last name \_\_\_\_\_

Home address (number and street). If you have a P.O. box, see instructions. **po box 273** Apartment no. \_\_\_\_\_

City, town or post office. If you have a foreign address, see instructions. **piedmont** State **SC** ZIP code **29673**

OMB No. 1545-0074

Your social security number \_\_\_\_\_

Spouse's social security number \_\_\_\_\_

**Use the IRS label.** Otherwise, please print or type.

**Presidential Election Campaign**

Check here if you, or your spouse if filing jointly, want \$3 to go to this fund (see instructions) . . . . . ☐ **You** ☐ **Spouse**

**Filing status**

1 ☐ Single

2 ☐ Married filing jointly (even if only one had income)

3 ☐ Married filing separately. Enter spouse's SSN above and full name here \_\_\_\_\_

4 ☒ Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here \_\_\_\_\_

5 ☐ Qualifying widow(er) with dependent child (see instructions)

Check only one box.

**Exemptions**

6 a ☒ Yourself. If someone can claim you as a dependent, do not check box 6a. . . . .

b ☐ Spouse . . . . .

c Dependents:

| (1) First name Last name | (2) Dependent's social security number | (3) Dependent's relationship to you | (4) <input checked="" type="checkbox"/> If qualifying child for child tax credit | No. of children on 6c who:<br>• lived with you . . . . . 1<br>• did not live with you due to divorce or separation (see instructions) . . . . .<br>Dependents on 6c not entered above . . . . . |
|--------------------------|----------------------------------------|-------------------------------------|----------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Jessica L Irby</b>    | <b>[REDACTED]</b>                      | <b>Daughter</b>                     | <input checked="" type="checkbox"/>                                              |                                                                                                                                                                                                 |
|                          |                                        |                                     |                                                                                  |                                                                                                                                                                                                 |
|                          |                                        |                                     |                                                                                  |                                                                                                                                                                                                 |
|                          |                                        |                                     |                                                                                  |                                                                                                                                                                                                 |

d Total number of exemptions claimed . . . . . **2**

**Income**

7 Wages, salaries, tips, etc. Attach Form(s) W-2. **12,939.**

8 a Taxable interest. Attach Schedule 1 if required. **8a**

b Tax-exempt interest. Do not include on line 8a. . . . . **8b**

9 a Ordinary dividends. Attach Schedule 1 if required. **9a**

b Qualified dividends (see instructions). . . . . **9b**

10 Capital gain distributions (see instructions). . . . . **10**

11 a IRA distributions . . . . . **11a** **11b Taxable amount** **11b**

12 a Pensions and annuities . . . . . **12a** **12b Taxable amount** **12b**

13 Unemployment compensation and Alaska Permanent Fund dividends. . . . . **13**

14 a Social security benefits . . . . . **14a** **18,004.** **14b Taxable amount** **14b** **0.**

15 Add lines 7 through 14b (far right column). This is your total income. . . . . **15** **12,939.**

**Adjusted gross income**

16 Educator expenses (see instructions) . . . . . **16**

17 IRA deduction (see instructions) . . . . . **17**

18 Student loan interest deduction (see instructions) . . . . . **18**

19 Tuition and fees deduction. Attach Form 8917 . . . . . **19**

20 Add lines 16 through 19. These are your total adjustments. . . . . **20.**

21 Subtract line 20 from line 15. This is your adjusted gross income. . . . . **21** **12,939.**

BAA For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see instructions. Form 1040A (2008)

Department of the Treasury — Internal Revenue Service

Form **1040**

**U.S. Individual Income Tax Return 2009**

(99) IRS Use Only — Do not write or staple in this space.

|                                                                                                                                           |  |                                                              |
|-------------------------------------------------------------------------------------------------------------------------------------------|--|--------------------------------------------------------------|
| For the year Jan 1 - Dec 31, 2009, or other tax year beginning _____, 2009, ending _____, 20                                              |  | OMB No. 1545-0074                                            |
| Your first name <b>roy</b> Last name <b>C IRBY, II</b>                                                                                    |  | Your social security number <b>[REDACTED]</b>                |
| If a joint return, spouse's first name _____ Last name _____                                                                              |  | Spouse's social security number _____                        |
| Home address (number and street). If you have a P.O. box, see instructions.<br><b>po box 273</b>                                          |  | You must enter your social security number(s) above.         |
| City, town or post office. If you have a foreign address, see instructions.<br><b>piedmont</b>                                            |  |                                                              |
| State <b>SC</b> ZIP code <b>29673</b>                                                                                                     |  | Checking a box below will not change your tax or refund.     |
| <input checked="" type="checkbox"/> Check here if you, or your spouse if filing jointly, want \$3 to go to this fund? (see instructions). |  | <input type="checkbox"/> You <input type="checkbox"/> Spouse |

|                      |                                                                                                                                                                                                                                                                                                                         |
|----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Filing Status</b> | 1 <input type="checkbox"/> Single<br>2 <input type="checkbox"/> Married filing jointly (even if only one had income)<br>3 <input type="checkbox"/> Married filing separately. Enter spouse's SSN above & full name here. <b>5</b> <input type="checkbox"/> Qualifying widow(er) with dependent child (see instructions) |
| Check only one box.  | 4 <input checked="" type="checkbox"/> Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here.                                                                                                                         |

| <b>Exemptions</b> | 6a <input checked="" type="checkbox"/> Yourself. If someone can claim you as a dependent, do not check box 6a.<br>b <input type="checkbox"/> Spouse<br>c Dependents: <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="width:30%;">(1) First name</th> <th style="width:20%;">Last name</th> <th style="width:20%;">(2) Dependent's social security number</th> <th style="width:20%;">(3) Dependent's relationship to you</th> <th style="width:10%;">(4) <input checked="" type="checkbox"/> If qualifying child for child tax credit (see instrs)</th> </tr> </thead> <tbody> <tr> <td>jessica L</td> <td>Irby</td> <td>[REDACTED]</td> <td>Daughter</td> <td><input type="checkbox"/></td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td><input type="checkbox"/></td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td><input type="checkbox"/></td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td><input type="checkbox"/></td> </tr> </tbody> </table> d Total number of exemptions claimed <b>2</b> | (1) First name                         | Last name                           | (2) Dependent's social security number                                                        | (3) Dependent's relationship to you | (4) <input checked="" type="checkbox"/> If qualifying child for child tax credit (see instrs) | jessica L | Irby | [REDACTED] | Daughter | <input type="checkbox"/> |  |  |  |  | <input type="checkbox"/> |  |  |  |  | <input type="checkbox"/> |  |  |  |  | <input type="checkbox"/> |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|-------------------------------------|-----------------------------------------------------------------------------------------------|-------------------------------------|-----------------------------------------------------------------------------------------------|-----------|------|------------|----------|--------------------------|--|--|--|--|--------------------------|--|--|--|--|--------------------------|--|--|--|--|--------------------------|
| (1) First name    | Last name                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | (2) Dependent's social security number | (3) Dependent's relationship to you | (4) <input checked="" type="checkbox"/> If qualifying child for child tax credit (see instrs) |                                     |                                                                                               |           |      |            |          |                          |  |  |  |  |                          |  |  |  |  |                          |  |  |  |  |                          |
| jessica L         | Irby                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | [REDACTED]                             | Daughter                            | <input type="checkbox"/>                                                                      |                                     |                                                                                               |           |      |            |          |                          |  |  |  |  |                          |  |  |  |  |                          |  |  |  |  |                          |
|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                        |                                     | <input type="checkbox"/>                                                                      |                                     |                                                                                               |           |      |            |          |                          |  |  |  |  |                          |  |  |  |  |                          |  |  |  |  |                          |
|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                        |                                     | <input type="checkbox"/>                                                                      |                                     |                                                                                               |           |      |            |          |                          |  |  |  |  |                          |  |  |  |  |                          |  |  |  |  |                          |
|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                        |                                     | <input type="checkbox"/>                                                                      |                                     |                                                                                               |           |      |            |          |                          |  |  |  |  |                          |  |  |  |  |                          |  |  |  |  |                          |

|                                                                                                |                   |
|------------------------------------------------------------------------------------------------|-------------------|
| <b>Income</b>                                                                                  |                   |
| 7 Wages, salaries, tips, etc. Attach Form(s) W-2 <b>Guaranteed Annuity</b>                     | 7 <b>12,942.</b>  |
| 8a Taxable interest. Attach Schedule B if required                                             | 8a                |
| b Tax-exempt interest. Do not include on line 8a                                               | 8b                |
| 9a Ordinary dividends. Attach Schedule B if required                                           | 9a                |
| b Qualified dividends (see instrs)                                                             | 9b                |
| 10 Taxable refunds, credits, or offsets of state and local income taxes (see instructions)     | 10                |
| 11 Alimony received                                                                            | 11                |
| 12 Business income or (loss). Attach Schedule C or C-EZ                                        | 12                |
| 13 Capital gain or (loss). Att Sch D if reqd. If not reqd, ck here <input type="checkbox"/>    | 13                |
| 14 Other gains or (losses). Attach Form 4797                                                   | 14                |
| 15a IRA distributions                                                                          | 15a               |
| b Taxable amount (see instrs)                                                                  | 15b               |
| 16a Pensions and annuities                                                                     | 16a               |
| b Taxable amount (see instrs)                                                                  | 16b               |
| 17 Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E | 17                |
| 18 Farm income or (loss). Attach Schedule F                                                    | 18                |
| 19 Unemployment compensation in excess of \$2,400 per recipient (see instructions)             | 19                |
| 20a Social security benefits <b>18,004.</b>                                                    | 20a               |
| b Taxable amount (see instrs)                                                                  | 20b               |
| 21 Other income                                                                                | 21                |
| 22 Add the amounts in the far right column for lines 7 through 21. This is your total income.  | 22 <b>12,942.</b> |

|                                                                                                                                 |                   |
|---------------------------------------------------------------------------------------------------------------------------------|-------------------|
| <b>Adjusted Gross Income</b>                                                                                                    |                   |
| 23 Educator expenses (see instructions)                                                                                         | 23                |
| 24 Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ | 24                |
| 25 Health savings account deduction. Attach Form 8889                                                                           | 25                |
| 26 Moving expenses. Attach Form 3903                                                                                            | 26                |
| 27 One-half of self-employment tax. Attach Schedule SE                                                                          | 27                |
| 28 Self-employed SEP, SIMPLE, and qualified plans                                                                               | 28                |
| 29 Self-employed health insurance deduction (see instructions)                                                                  | 29                |
| 30 Penalty on early withdrawal of savings                                                                                       | 30                |
| 31a Alimony paid b Recipient's SSN                                                                                              | 31a               |
| 32 IRA deduction (see instructions)                                                                                             | 32                |
| 33 Student loan interest deduction (see instructions)                                                                           | 33                |
| 34 Tuition and fees deduction. Attach Form 8917                                                                                 | 34                |
| 35 Domestic production activities deduction. Attach Form 8903                                                                   | 35                |
| 36 Add lines 23 - 31a and 32 - 35                                                                                               | 36                |
| 37 Subtract line 36 from line 22. This is your adjusted gross income.                                                           | 37 <b>12,942.</b> |

BAA For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see Instructions.

FD/A0112 03/17/09

Form 1040 (2009)

Production  
Question 4

Form  
1040A

Department of the Treasury—Internal Revenue Service  
U.S. Individual Income Tax Return (99)

2010

IRS Use Only—Do not write or staple in this space.

Name,  
Address,  
and SSN

Your first name and initial

roy C

Last name

IRBY, II

If a joint return, spouse's first name and initial

Last name

Home address (number and street). If you have a P.O. box, see instructions.

156 pearson road

Apt. no.

City, town or post office, state, and ZIP code. If you have a foreign address, see instructions.

belton SC 29627

OMB No. 1545-0074

Your social security number

Spouse's social security number

Make sure the SSN(s) above  
and on line 6c are correct.

See separate  
instructions.

Presidential

Election Campaign

Check here if you, or your spouse if filing jointly, want \$3 to go to this fund.

Checking a box below will not  
change your tax or refund.

Filing  
status

Check only  
one box.

1 ☐ Single

2 ☐ Married filing jointly (even if only one had income)

3 ☐ Married filing separately. Enter spouse's SSN above and  
full name here.

4 ☒ Head of household (with qualifying person). (See instructions.)

If the qualifying person is a child but not your dependent,  
enter this child's name here.

5 ☐ Qualifying widow(er) with dependent child (see instructions)

Exemptions

6a ☒ Yourself. If someone can claim you as a dependent, do not check  
box 6a.

b ☐ Spouse

c Dependents:

(1) First name Last name

jessica L irby

(2) Dependent's social  
security number

[REDACTED]

(3) Dependent's  
relationship to you

Daughter

(4) ☒ If child under  
age 17 qualifying for  
child tax credit (see  
page 16)

☐

☐

☐

☐

☐

☐

Boxes  
checked on  
6a and 6b

No. of children  
on 6c who:

• lived with  
you

1

• did not live  
with you due to  
divorce or  
separation (see  
instructions)

Dependents  
on 6c not  
entered above

0

0

0

0

0

Add numbers  
on lines  
above

2

If more than six  
dependents, see  
instructions.

d Total number of exemptions claimed.

Income

Attach  
Form(s) W-2  
here. Also  
attach  
Form(s)  
1099-R if tax  
was  
withheld.

If you did not  
get a W-2, see  
page 20.

Enclose, but do  
not attach, any  
payment. Also,  
please use Form  
1040-V.

7 Wages, salaries, tips, etc. Attach Form(s) W-2.

*Production Award*

12,942.

8a Taxable interest. Attach Schedule B if required.

8a

b Tax-exempt interest. Do not include on line 8a.

8b

9a Ordinary dividends. Attach Schedule B if required.

9a

b Qualified dividends (see instructions).

9b

10 Capital gain distributions (see instructions).

10

11a IRA

distributions.

11a

11b Taxable amount

(see instructions).

11b

12a Pensions and

annuities.

12a

12b Taxable amount

(see instructions).

12b

13 Unemployment compensation and Alaska Permanent Fund dividends.

13

14a Social security

benefits.

14a

14b Taxable amount

(see instructions).

14b

15 Add lines 7 through 14b (far right column). This is your total income.

15 12,942.

Adjusted  
gross  
income

16 Educator expenses (see instructions).

16

17 IRA deduction (see instructions).

17

18 Student loan interest deduction (see instructions).

18

19 Tuition and fees. Attach Form 8917.

19

20 Add lines 16 through 19. These are your total adjustments.

20

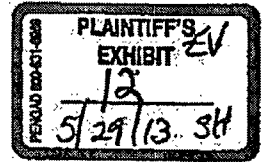
21 Subtract line 20 from line 15. This is your adjusted gross income.

21 12,942.

For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see separate instructions. BAA

Form 1040A (2010)

REV 02/2011 TUB0702X ONLINE



ATTN: Diane  
864-  
847-  
5999

Consolidated Bank - Payoff Statement

PAYOFF STATEMENT  
01/24/07

BANK OF AMERICA  
1001 Peachtree Street, NE  
Atlanta, GA 30309

PLEASE READ ENTIRE DOCUMENT FOR COMPLETE INSTRUCTIONS

|                   |                                      |
|-------------------|--------------------------------------|
| Account Number:   | 541100064101                         |
| Borrower Name:    | THOMAS M JES                         |
| Co-Borrower Name: | DOY C M JR II                        |
| Address:          | 1101 W 42ND ST<br>BILTMORE, NC 28612 |

This calculation is valid as of 01/24/07. A new payoff statement should be requested after this date.  
Interest is \$7.30 per day.

\*\* TOTAL AMOUNT PAYABLE \*\* \$9998.92

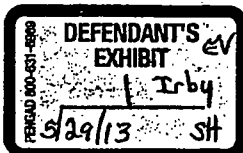
CALCULATION OF AMOUNT REQUIRED TO SATISFY ACCOUNT BALANCE AND RELATED FEES:

PAYOFF FIGURES VOID AFTER 06/24/07

|                       |              |   |   |   |
|-----------------------|--------------|---|---|---|
| Account Number:       | 541100064101 |   |   |   |
| Principal Balance:    | 2293.53      | 1 | 1 | 1 |
| Accrued Interest Due: | 94.27        |   |   |   |
| Late Fees Due:        |              |   |   |   |
| Other Fees Due:       |              |   |   |   |
| Annual Fees Due:      |              |   |   |   |
| Early Closure Fees:   |              |   |   |   |
| Payoff Statement Fee: |              |   |   |   |
| Administrative Fee:   |              |   |   |   |
| Loan Balance Fee:     | 5.20         |   |   |   |
| Total Amount:         | \$9998.92    | 1 | 1 | 1 |

These figures are subject to final verification upon receipt of funds by Bank of America. Bank of America reserves the right to adjust these figures and refuse any funds which are insufficient to pay the account in full for any reason, including but not limited to error in calculation of payoff amount, previously dishonored check or money order, interest accruals, subsequent delinquency, loan-day advances, insurance, fees or additional disbursements. Audit by Bank of America between the date of this payoff statement and the receipt of funds.

BOA00445



2007028188 DEED  
3 PGS  
Book: DE 2258 Page: 437-439  
March 23, 2007 12:11:56 Cons: \$5.00  
Rec: \$10.00 Cnty Tax: EXEMPT State Tax: EXEMPT

STATE OF SOUTH CAROLINA

FILED IN GREENVILLE COUNTY, SC  
TITLE TO REAL ESTATE

COUNTY OF GREENVILLE

KNOW ALL MEN BY THESE PRESENTS THAT I, THOMAS R. IRBY hereinafter, whether one or more, called Grantor, in the State aforesaid, in consideration of the sum of FIVE (\$5.00) DOLLARS, LOVE AND AFFECTION to Grantor in hand paid at and before the sealing of these presents by ROY C. IRBY, II hereinafter, whether one or more, called Grantee (the receipt whereof is hereby acknowledged), have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Grantee and Grantee's heirs, or successors, and assigns forever: **An undivided one-half interest in and to the below described real estate to-wit:**

All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina, County of Greenville, located on Pearson Road, being shown and designated as containing 1.43 acres, more or less, as is shown on a plat entitled "Property of Thomas R. Irby", on a plat dated June 4, 2004 and recorded on March 6, 2007 in the RMC Office for Greenville County in Plat Book 1032 at page 61, and having the metes and bounds, courses and distances as upon said plat appear.

This is a portion of that same property conveyed unto Thomas R. Irby by deed of distribution of the Estate of Elsie Chapman dated January 27, 1999 and recorded on January 27, 1999 in the RMC Office for Greenville County in Deed Book 1815 at page 149.

This conveyance is specifically made subject to any and all recorded rights-of-way, easements, conditions, restrictions and zoning ordinances pertaining to said premises, and in addition is subject to any of the foregoing which may appear from an inspection of said premises.

**ROLL-BACK TAXES:** Purchaser shall be responsible for the amount of any roll-back ad valorem property taxes for the year of closing and any prior years which result from a reclassification, if any, of the property. In the event purchaser desires to attempt to have the property retain any qualified agricultural classification, purchaser must apply promptly after closing for such classification.

TMS# 0597010100104

Grantee's Address:

PO Box 273  
Piedmont, SC 29673

TOGETHER with all and Singular the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said Premises before mentioned unto the said Grantee and Grantee's, Heirs, or Successors, and assigns forever.

And Grantor does hereby bind Grantor and Grantor's Heirs, Successors, Executors and Administrators to warrant and forever defend all and singular the said premises unto the said Grantee and Grantee's Heirs, Successors and assigns against Grantor and Grantor's, Heirs, Successors, Executors, Administrators and Assigns and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness Grantor's hand and seal this 16th day of March A.D. 2007.

Signed, Sealed and Delivered in the Presence of:

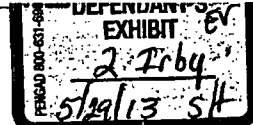
  
(Seal)



STATE OF SOUTH CAROLINA

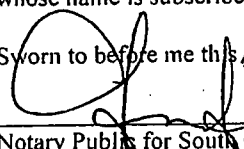
PROBATE

COUNTY OF ANDERSON



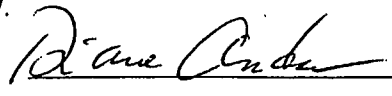
Personally appeared before me the undersigned witness and made oath that (s)he saw the within named Grantor sign, seal and as Grantor's act and deed deliver the within deed, and that (s)he with the other witness whose name is subscribed above witnessed the execution thereof.

Sworn to before me this 16<sup>th</sup> day of March A.D. 2007.

  
Notary Public for South Carolina

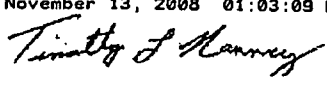
My Commission Expires: 4/17/16

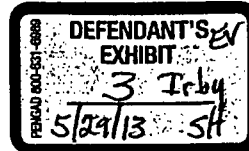
(Seal)

  
FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD

2008099636 Book: DE 2346 Page: 1649-1649

November 13, 2008 01:03:09 PM





STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

FILED-CLERK OF COURT  
IN THE COURT OF COMMON PLEAS

2010 JAN 14 A 9:26

Thomas R. Irby,

Plaintiff,

vs.

LIS PENDENS  
2010LP23 \_\_\_\_\_

Roy C. Irby, Bank of America and  
Chase Home Finance, LLC OH4-7830

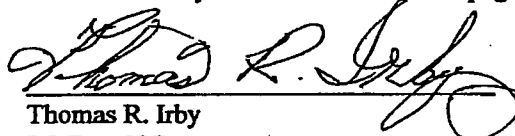
Defendant

NOTICE is hereby given that an action is being commenced in the Court of Common Pleas for Greenville County, South Carolina upon a Complaint of Plaintiff concerning certain real property as described below:

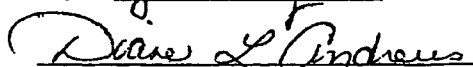
All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina, County of Greenville, located on Pearson road, being shown and designated as containing 1.43 acres, more or less, as is shown on a plat entitled "Property of Thomas R. Irby" on a plat dated June 4, 2004 and recorded on March 6, 2007 in the RMC Office for Greenville County in Plat Book 1032 at page 61, and having the metes and bounds, courses and distances as upon said plat appear.

This is the same property conveying a one-half (1/2) interest unto Roy C. Irby by deed of Thomas R. Irby dated March 16, 2007 and recorded on March 23, 2007 in the RMC Office for Greenville County in Deed Book 2258 at page 437. The said Thomas R. Irby did thereafter convey his remainder interest unto Roy C. Irby by deed dated March 16, 2007 and recorded on November 13, 2008 in the RMC Office for Greenville county in Deed Book 2346 at page 1649.

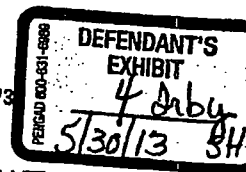
TMS#0597010100104

  
Thomas R. Irby  
PO Box 827  
Pelzer, SC 29669

Sworn to before me this 13<sup>th</sup>  
day of January, 2010.

  
NOTARY PUBLIC FOR SC  
My Commission Expires: 10-28-19

RECORDED IN BOOK BB4 PAGE 004



**THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO CHAPTER 48, UNIFORM ARBITRATION ACT, CODE OF LAWS OF SOUTH CAROLINA, 1976**

**EXCLUSIVE RIGHT TO SELL AGREEMENT**  
(Sale, Transfer, Auction or Exchange of Real Property)

In consideration of the covenants herein contained, Ray C. Jolly II (hereinafter called ("Owner") and The Auction Co. & Real Estate Inc. (hereinafter called "Agent") agree as follows:

1. Agent certifies that it is a real estate company, with its Broker-in-Charge and agents being duly licensed under the laws of South Carolina and members in good standing with National Association of Realtors.
2. For a period commencing September 24, 2009 and ending at midnight on November 30, 2009 the Owner hereby grants to the Agent the sole and exclusive right to negotiate for the sale of the real property ("Property") identified as 154 Pearman Road, Belton SC 29667

For the sale price as follows: \$177,000.00 minimum selling price including a 10% Buyers Premium;

**Terms of Sale:** A deposit of \$5,000 will be paid by Purchaser on sale day. Balance in full will be due at closing approximately 30 days after the effective sale date. A Buyers Premium of 10% will be paid by the buyer and added to the high bid to determine the final purchase price paid to the owner. Additionally, purchasers shall pay all costs in closing the sale of the property, including deed stamps, deed prep, and survey fees if any (subject to the provisions of Section 21 herein).

3. The Owner represents that he is now the owner in fee simple of said Property and that he will convey to the Buyer marketable and insurable title subject only to such mortgages, liens, restrictions and encumbrances of record. Owner warrants that, to his knowledge, there are no material defects, hidden or obvious, in or on the Property, which have not been disclosed to Agent in writing. Owner agrees to defend, indemnify and hold harmless the Agent, its agents, or subagents, including indemnification for attorney's fees and court costs, from any and all claims arising out of any information or omission of information presented to Agent by Owner.

4. The Owner agrees to enter into a contract of sale with and to convey the Property by good, sufficient and insurable deed to any prospective Buyer ready, willing and able to purchase the Property during the term of this Agreement for the sale price set out above, or, in the alternative, for such lesser price or on such different terms and conditions as Owner may hereafter approve.

5. The Agent is hereby authorized to place one or more "For Sale" signs on the Property, and shall: (i) afford the Owner the full benefit of judgment, experience and advice of the members of the Agent's organization and is authorized to exercise its sole discretion in respect to the policy to be pursued in selling the Property; (ii) make the Property known to and solicit the active cooperation of other real estate brokers who specialize in dealing with similar properties; (iii) is authorized to advertise the Property in such manner and in such brochures, publications, electronic marketing mediums and other media as in the Agent's sole discretion and judgment will most likely present an appropriate offering; (iv) Deleted, and (v) may take all such further steps as in the Agent's sole discretion and judgment will enhance the prospective sale of the Property. The Owner shall contribute towards the cost of advertising and the cost of preparation marketing materials and distribution of any brochures, the sum of \$2,500, which shall be paid to Agent by the Owner at the signing of this agreement.

6. During the term of this Agreement, the Owner shall refer to the Agent any and all inquiries received by the Owner from any source with respect to or concerning the Property, together with the name and address of each person or corporation making such inquiry. Agent shall diligently investigate each such inquiry as well as other inquiries or offers received or directed to the Agent and will use its best skills and efforts to produce a Purchaser for the Property. Owner understands the Broker makes no representation or guarantee as to the sale of the Property.

7. The Agent shall be entitled to receive and shall have earned a fee from the Owner of 2.1% (two and one tenth percent) based on the final gross selling price of the property being offered. If it is necessary to pay a referral fee to a participating 3rd party Broker, whose prospect pays and settles for the property, the Owner will pay an additional 0.4% commission to said 3rd party Broker. Owner agrees that Agent may decide in its sole discretion not to pay 3rd party Broker fees for Purchasers who are the referring Broker or family members of the referring Broker. Owner agrees that said fees shall be paid no later than the closing on subject property and Owner furthermore authorizes closing attorney to pay said fees from Owners proceeds at the time of closing.

Said fee shall be due in any of the following events:

- (a) the sale or exchange of the Property during the term of this Agreement or as a result of a contract secured during the term of this Agreement; or,
- (b) the presentation to Owner of a valid and bona fide written offer to purchase the Property which complies with the terms and conditions specified herein, and which the Owner refuses to accept;
- (c) the signing by Owner during the term of this Agreement of a valid contract to sell the Property but Owner fails to or refuses to complete the sale as agreed, or,
- (d) releasing a buyer, for any reason, from the purchase and sales agreement without the written consent of the Agent, or;
- (e) The withdrawal of this Agreement for any reason.

The fee will be due Agent even if the Owner or a third party sells or obtains the contract to sell the Property during the term of this Agreement. Owner agrees to pay all costs, including reasonable attorneys fees, should legal counsel be employed by Agent to enforce payment of the fee due under this Listing Agreement whether suit be brought or not.

8. At the expiration of this Agreement, the Agent may furnish to the Owner in writing within ten days a list of prospects with whom the Agent had discussed the Property or had negotiated regarding the Property or whom the Agent has made known to the Owner. If within 180 days thereafter, the Property or any interest therein is sold, or contracted to be sold, transferred, exchanged or leased to or with any such prospect, the Agent shall be entitled to receive from the Owner the full fee as outlined in paragraph (7) above.

9. The Agent shall NOT continue marketing the Property after an offer has been accepted, unless requested in writing by the Owner to do so.

10. Owner authorizes Agent to accept and hold, on behalf of Owner, any earnest money deposit or option money in accordance with the terms of

BOA00427

11. Owner directs Agent to offer cooperation with compensation to all licensed brokers and their agents as buyer's agents only.

12. Consent to disclosed dual agency/designated agency? (Initial Applicable Choices)

X Owner acknowledges receiving an explanation of the types of agency relationships that are offered by the brokerage and an Agency Disclosure Form at the first practical opportunity at which substantive contact occurred between the Broker and Owner. Owner acknowledges that after entering into this written agency contract, Broker might request a modification in order to act as a dual agent or a designated agent in a specific transaction.

If asked:

X Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If Owner agrees, Owner will execute a separate written Dual Agency Agreement.

X Permission to act as a designated agent will not be considered.

Permission to act as a designated agent may be considered at the time I am provided with information about the other party to a transaction. If Owner agrees, Owner will execute a separate written Designated Agency Agreement.

13. Owner has no knowledge of the existence of any hazardous or toxic wastes or substances or underground or other storage tanks on or affecting the Property except as set forth below. The Agent has not made and will not make any investigations, has not obtained and will not obtain any reports, and will not make any representations or warranties whatsoever regarding the existence or non-existence of hazardous or toxic wastes or substances or storage tanks on the Property. Any representation or warranty made by the Owner to a potential buyer regarding the non-existence or the extent of the existence of hazardous or toxic wastes or substances on or affecting the Property or the conditions of any underground or other storage tank(s), if any, or the results of any investigations or reports concerning such issues, shall be deemed to be the representations and warranties of Owner only, and not that of Agent, unless expressly acknowledged to be representations and warranties of Agent in a separate written document executed by Agent and delivered to the potential buyer by the Agent. Owner agrees to defend, indemnify and hold harmless the Agent, its agents, or subagents, including indemnification for attorney's fees and court costs, from any and all claims arising out of the condition of the property at the time of sale.

14. The Owner acknowledges:

- This Agreement specifically includes the right to offer subject Property at public auction on or about October 25, 2009, or at any other time and date the parties determine is in the best interest of the Owner, subject to the terms and conditions contained herein.
- That the Agent has an obligation to disclose any adverse factors, including environmental matters, regarding the Property to any potential Purchaser.

15. Nondiscrimination: It is agreed that this property is listed in full compliance with local, state and federal fair housing laws against discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin.

16. Disclosure By Lien Holders: Owner hereby authorizes anyone having a lien against the property to disclose complete information about the lien to the Agent.

17. Owner does agree n/a does not agree n/a for an M.L.S. lockbox containing keys to be installed on the property in order to facilitate the inspection of the property by Agent and cooperating agents. Owner further agrees that Agent is not an insurer against the loss of personal property and agrees to release Agent and M.L.S. from any responsibility therefore.

18. Mediation/Arbitration: Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS. Disputes shall include representations made by Owner or Broker in connection with the services to which this Agreement pertains, including without limitation, allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding. This Mediation clause shall survive for a period of 120 days after the date of the closing. All other disputes and disputes which arise after the 120 period shall be subject to Chapter 48 Uniform Arbitration Act Code of Laws of South Carolina 1975.

19. Other Conditions: Owner authorizes Agent to accept advance bids from prospective bidders, and to bid on bidders behalf, per bidders instructions during the auction. Owner specifically acknowledges that this practice will require Agent to withhold certain information from the Owner regarding the maximum price the purchaser may have been willing to pay for the property. Owners Initials X 10/24/09

20. Owner hereby authorizes and grants full authority to Agent to undertake legal action against a Buyer under any contract to purchase executed by Buyer in the event the Buyer defaults under said contract. The Agent is authorized to collect commissions lost as a result of a breach of contract by Buyer.

21. Owner agrees that all sales contracts may have a "quick close" provision that provides for the Owner to pay for deed preparation and deed stamps if the sale is closed at the law office of Babo and Brown, P.C. within fourteen (14) days of the date the contract is signed. Otherwise the Buyer will pay for deed preparation and deed stamps. Regardless of the quick close provision the purchaser will pay for the termite letter and surveys fee (if any). In the event the property does not close, the seller will be responsible for the termite letter & surveys fee (if any).

22. Deleted

The foregoing constitutes the entire agreement between the parties and shall be binding on each of them and their respective successors in interest. This agreement may not be changed or modified except in writing signed by the parties or their successors in interest. Wherever used herein, words of one gender shall be construed to include all genders, the singular numbers shall include the plural, and vice versa, as the sense requires. RECEIPT OF A COPY OF THIS AGREEMENT AND SCHEDULES IS HEREBY ACKNOWLEDGED.

X 156 Pearson Road  
Owners address

Bethel, NC 27627

The Auction Co. & Real Estate Inc.  
Agent SCAL 1313  
Mailing Address: 311 Pendleton St.

X [Signature]  
Owner  
X [Signature]  
Owner  
By: [Signature]

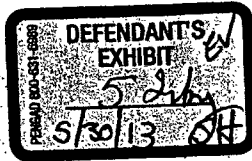
X 9/24/09  
Date  
X 9/24/09  
Date

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11/11/2009 23:11 8542242848

GREENDOORREALTY

PAGE 02



## CONTRACT FOR SALE

1. OFFER AND DESCRIPTION: Dennis Shawn - Andrea L. Davis (Purchaser)  
 agrees to buy and Roy C. Irby II (Seller)  
 agrees to sell all that lot or parcel of land, with the buildings and improvements thereon, if any located in  
Greenville County, South Carolina, (the "Property") and being described as follows:

Street 156 Pearson Road City Belton Zip 29627  
 Subdivision \_\_\_\_\_ Tax Map # 0597010100109 Legal Lot # \_\_\_\_\_

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

2. PRICE: The purchase price is One Hundred Seventy-seven thousand Dollars  
 (\$ 177,000) to be paid as follows: \$ 1,000.00 to be held in trust by  
Unleash Your Realty, Escrow Agent, as a deposit of earnest money until the sale is  
 closed, at which time it will be credited to Purchaser, or if no closing takes place, disbursed as herein provided.  
 At closing, the balance must be paid by certified funds or wire transfer to complete this transaction.

3. EARNEST MONEY: All cash monies or certified funds will be deposited within 48 hours of receipt. All other  
 monies will be deposited within 48 hours after the Effective Date. If a binding Contract is not executed by all  
 parties, the earnest money will be returned to Purchaser. The Listing and Selling Brokers and their Agents do  
 not guarantee payment of check(s) accepted as earnest money. In the event of default, the earnest money  
 will be disbursed in accordance with Paragraph 14.

4. FINANCING: The obligation of Purchaser to purchase the Property is contingent upon the Purchaser obtaining a  
 loan in an amount equal to ninety-five percent  
95 % of the purchase price, (this contingency is not applicable unless the preceding blank is completed)  
 of the following type: ☐ FHA ☐ VA ☒ Conventional ☐ Other \_\_\_\_\_

5. CONTINGENCY: The obligation of the Purchaser to purchase is also contingent upon:  
 a. ☒ The Property appraising for not less than the sales price as determined by lender's appraisal or other  
 appraisals obtained by the Purchaser.  
 b. ☐ The Purchaser completing the sale and closing of Purchaser's home located at: 536 Woodville Rd - Pelzer SC 29669  
☒ which is under contract and due to close on or before 11-30-09  
☐ which is not under contract. (Addendum, GGAR #504, Purchaser's Right of First Refusal, regarding  
 the contingency attached: ☐ Yes ☐ No)  
 c. ☐ Other Contingencies: \_\_\_\_\_

6. LOAN APPLICATION: Purchaser agrees to apply for financing, as indicated in Paragraph 4, from the  
 Lender of his choice within 3 calendar days after the Effective Date and to provide all documents or  
 information requested by the Lender in a prompt and timely manner. At the time of application, the Purchaser  
 will advance the necessary money to process any financing. Purchaser will take any reasonable action which  
 is needed or requested by the Lender to process the loan application. Purchaser shall direct Lender to disclose  
 pertinent information concerning the Purchaser's credit-worthiness or any other information needed for the loan  
 processing to the Listing or Selling Broker(s) or Agent(s), concerning the Purchaser's ability to obtain the financing.

7. CLOSING COSTS: All expenses necessary for the consummation of this sale, unless otherwise agreed  
 herein, will be paid as follows: (a) Seller will pay for deed preparation, deed recording fees, costs associated  
 with payoff and satisfaction of mortgages and any other liens, as well as any costs not allowed by the Lender  
 to be charged to Purchaser; (b) Purchaser will pay all other closing costs including, but not limited to, discount

Purchaser DSD Purchaser \_\_\_\_\_ Seller US Seller have read this page PAGE 1 OF 8

11/11/2009 23:11 8642242848

GREENDOORREALTY

PAGE 03

points, all non-recurring closing costs, prepaid items, Private Mortgage Insurance, FHA-MIP or VA Funding Fee, if applicable. Other terms: ~~None~~

**8. CONVEYANCE AND CLOSING DATE:** Seller agrees to convey marketable title and deliver to Purchaser a proper general warranty deed, free of liens and encumbrances, except subject to all reservations, easements, rights of way, and restrictive covenants of record on the Property (provided they do not make the title unmarketable or materially or adversely affect the use and value of the Property) and to all government statutes, rules, ordinances, and regulations.

The deed will be prepared in the name(s) of DENNIS SHAWN : ANDREA L. DAVIS and delivered to the office of the closing attorney, TBD or stipulated place of closing with the transaction to be closed no later than 4 PM on Dec. 15, 2009. Seller and Purchaser authorize their attorneys and/or Settlement Agent to furnish to the Listing Broker and Selling Broker copies of the preliminary and final HUD-1 Settlement Statement for the transaction.

**9. POSSESSION:** Possession of said Property will be given to Purchaser ☒ at the time of closing, provided any net proceeds of the sale have been disbursed or ☐.

Seller agrees to deliver the Property free of debris and in a clean condition. The Property, including but not limited to landscaping and/or lawn, will be maintained in the same condition from the Effective Date until possession is delivered, ordinary wear and tear excepted.

**10. PRORATIONS:** Taxes, fuel(s), rents, other fees associated with rentals, and homeowner's association fees, will be adjusted as of the date of closing. Tax prorations will be based on the tax information available on the date of closing and are to be prorated on that basis. Prorations at closing shall be final.

**11. NON-RESIDENT TAX:** Seller covenants and agrees to comply with the provisions of Section 12-8-580 of the Code of Laws of South Carolina, 1976, (as amended), regarding withholding requirements of owners who are not residents of South Carolina as defined in said statute.

**12. PERSONAL PROPERTY:** No personal property will be transferred or conveyed as a part of this sale, except as referenced in MLS or listed herein: WIGDEN TREATMENTS TO REMAIN. Personal property should be transferred or sold separately by a Bill of Sale.

**13. FIRE OR CASUALTY:** In the event the Property is destroyed or damaged by fire or other casualty prior to closing, Purchaser or Seller will have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Contract by written notification to the other party.

**14. DEFAULT:** If Purchaser or Seller fails to perform any covenant of this Contract, the other party may seek any available legal or equitable remedy, and may terminate this Contract. If termination is due to default by Purchaser, Seller shall be entitled to retain the earnest money deposit. If termination is due to default by Seller, Purchaser shall be entitled to a refund of the earnest money deposit, and Seller shall reimburse Purchaser for Purchaser's actual costs incurred, as defined hereinbelow. However, it is expressly understood and agreed that Escrow Agent shall not release any earnest money until both parties execute a written release of the other from this Contract and any rights, obligations and claims arising hereunder. Said release shall also provide Escrow Agent with conclusive instructions regarding the disbursement of the earnest money. If either party refuses to execute the release contemplated by this paragraph, Escrow Agent shall hold the earnest money in trust until said release is executed, or until the disposition of the matter by a court of competent jurisdiction. If litigation is required to resolve the matter, the prevailing party shall be entitled to an award of costs and expenses of the action, including reasonable attorney's fees. Furthermore, the parties expressly agree to indemnify and hold Escrow Agent harmless from any claims or damages arising from Escrow Agent's refusal to release the earnest money in a manner inconsistent with the provisions of this paragraph. For the purposes of this contract, "actual costs incurred" by the Purchaser shall include all documented costs, expenses or obligations incurred for or by Purchaser or Broker in an effort to consummate this sale. Such costs include, but are not limited to: costs of loan application, credit report, appraisal, survey, inspections and reports, title examination and broker's fee or commission for this sale.

**15. DISCLAIMER:** Except in the case of a new home being sold by the builder, the Purchaser acknowledges the Seller gives no guarantee or warranty of any kind, expressed or implied, as to the physical condition of

*[Signature]*

Purchaser

*[Signature]*

Purchaser

Seller

*[Signature]*

Seller

have read this page

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the Property, unless otherwise provided for in the Contract. Seller does not warrant the condition of any improvements, services, appliances or systems thereto, or as to the merchantability or fitness for a particular purpose of the Property or Improvements thereon. Any such implied warranties are hereby disclaimed by the Seller.

Purchaser and Seller will indemnify and hold listing and/or selling Brokers and their agents harmless from any breach of contract, and any negligent or intentional acts or omissions of any Inspectors, repair companies, or other service providers employed by Purchaser or Seller, including any and all such service providers introduced or recommended to Purchaser and/or Seller by listing and/or selling Brokers and their agents.

#### 16. INSPECTIONS, CONDITION, AND REPAIRS:

(A) **INSPECTION PERIOD:** Purchaser will have 5 calendar days from the Effective Date (the "Inspection Period") to conduct such inspections of the property as Purchaser deems necessary or desirable. Seller shall have the right to continue to market the Property during the Inspection Period and to accept backup offers thereon. Nothing in this paragraph shall be construed to modify the rights and obligations created by paragraph 16 (H) (Reinspection/Maintenance).

(B) **RIGHT TO TERMINATE:** Prior to the expiration of the Inspection Period, Purchaser ☒ will ☐ will not have the unilateral right to reject the condition of the Property and to terminate this Contract, upon written notice to Seller or Seller's Agent. If such termination rights are exercised, Purchaser shall be entitled to a return of the earnest money (subject to the release requirements of Paragraph 14). If Purchaser fails to notify Seller or Seller's Agent of such termination within the Inspection Period, or if, prior to the expiration of the Inspection Period, Purchaser submits the list of requested repairs described in Paragraph 16 (Inspections, Condition, and Repairs), this contingency shall be deemed satisfied, and any termination rights created by this paragraph shall automatically expire. If such termination rights are not exercised, Purchaser and Seller shall proceed as provided below.

(C) **INSPECTION:** Purchaser will have the right and responsibility to inspect or select an inspector(s) at Purchaser's expense to make any inspections, tests, or investigations, including, but not limited to testing for air quality, mold, radon gas and asbestos and to verify the square footage of the Property. Seller will make the Property available for all inspections and will have all utilities in service for the inspections, appraisals and final walk through or re-inspection. Purchaser will indemnify and hold the Seller harmless from any liability arising as a result of any negligent acts or omissions of any inspector(s) and/or their agents during such inspections, and will repair any damages to the property resulting from same. Prior to the expiration of the Inspection Period, as defined in paragraph 16A, Purchaser will provide Seller or Seller's Agent with a written and signed list of repairs requested, including CL-100, (using GGAR Form #502 Grv, Purchaser's Requested Repairs/Seller's Response or its equivalent), excluding appraisal and occupancy permit requirements. Failure of Purchaser to provide Seller or Seller's Agent GGAR form #502 (or its equivalent) and a copy of any inspection report(s), within the Inspection Period shall be deemed a waiver of Seller's obligation, if any, to make any repairs listed on the inspection report(s). Seller agrees to respond in writing to the Purchaser's list of requested repairs within 5 calendar days after receipt of said list by the Seller, acknowledged by Seller's signature and date. Failure by the Seller to provide a signed response to the Purchaser's written request for repairs within the specified time shall be deemed acceptance of Purchaser's request as submitted. Purchaser shall respond in writing to Seller's written response within 5 calendar days after receipt. Otherwise, failure by Purchaser to respond within the specified time shall be deemed acceptance of Seller's response to Purchaser's request.

(D) **RADON:** Notwithstanding any other provisions in this Contract, should test results indicate the presence of radon in excess of EPA standards for a habitable dwelling, the Purchaser will have the option to terminate this Contract and receive a return of the earnest money deposit subject to provisions in Paragraph 14 of this Contract, with neither party having any further rights hereunder. Should Purchaser elect not to terminate this Contract, the Seller will mitigate the presence of the radon that is in excess of EPA standards for a habitable dwelling, subject to subparagraph 16 (F) below.

(E) **WOOD INFESTATION/MOISTURE REPORT:** Purchaser will, at Purchaser's expense, have the property inspected and obtain a CL-100 Wood Infestation Report from a licensed and bonded pest control operator (see paragraph 16A). If new construction, a soil treatment letter will be provided by Seller. If any infestation, structural damage, or excessive moisture is found, the Seller agrees to have it corrected and/or repaired at Seller's expense, subject to subparagraph 16 (F) below.

(F) **REPAIRS:** To the extent the Purchaser has requested such repairs, the Seller agrees to make or pay for repairs to the following items: (1) Structural defects or damage; (2) Leaks to roof or basement; (3) Repairs required to place the heating, air conditioning, electrical and plumbing systems and any appliances to be conveyed in an operative condition and functioning property; (4) Repairs required to cause the sewer or septic system,

Purchaser [Signature] PurchaserSeller [Signature] Seller

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well or public water system, irrigation system, pool or spa and any related equipment to function properly; (5) Repairs required to mitigate the presence of any hazardous substances; (6) Replacement of any missing or cracked glass. The Seller will have no obligation to repair or replace any double glass panes which have lost their seal (fogged); (7) Repairs required pursuant to Paragraph 16 (D) above; (8) Repairs required pursuant to Paragraph 16 (E) above; and (9) Repairs required by a VA, FHA or other appraisal. If the Seller refuses to make or pay for repairs per items (1) through (9) above, the Purchaser will have the right to terminate this Contract and receive a return of the earnest money subject to provisions of Paragraph 14, and neither party will have any further rights hereunder.

If the Purchaser elects not to terminate this Contract, the Parties will proceed hereunder and any requested repairs refused by the Seller will be the sole responsibility of the Purchaser. Further, if the Seller agrees to make or pay for the cost of the repairs requested by the Purchaser, the Purchaser will not have the right to terminate this Contract and the Parties will proceed hereunder. The obligations of the Seller under Paragraph 16 terminate on the day of closing or on the day of possession, whichever occurs first. The Seller will not be required to make any repairs until the Purchaser's financing has been approved.

(G) OTHER: The property is sold with the following additional stipulations. \_\_\_\_\_

(H) REINSPECTION/MAINTENANCE: Seller agrees to allow Purchaser, or his designee, the right to re-inspect the Property and to perform a walk-through of the Property, prior to closing, to confirm any personal property to be transferred or conveyed is on the premises and that any required repairs or replacements have been made. The Seller will maintain the Property in the same condition, including lawn, shrubbery and grounds, as on the Effective Date, until the day of closing or possession, whichever occurs first, ordinary wear and tear excepted.

17. WATER/WASTE SYSTEMS: Seller represents that the Property is connected to ☐ public sewer system, ☒ septic tank, ☐ public water system, ☒ individual well system, ☐ other water well system.

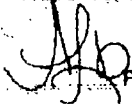
18. HOME WARRANTY: It is understood a third-party 1-year home warranty ☐ will, ☐ will not be provided through \_\_\_\_\_ Warranty Company at a cost not to exceed \$\_\_\_\_\_ at closing. If applicable, the cost will be paid at closing by ☐ Purchaser ☐ Seller. No additional home warranty will be provided if one is currently being offered by the Seller.

19. MEGAN'S LAW: The Purchaser and Seller agree the Listing and Selling Brokers and their agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. This information may be obtained from the local sheriff's department or other appropriate law enforcement agencies.

20. DISCLAIMER BY BROKERS AND AGENTS: The Listing Brokers or Selling Brokers and their Agents do not make any warranties or representations, either expressed or implied, as to the condition of the Property including, but not limited to: termite infestation or damage, excessive moisture or water, air quality, roof or basement leaks, appliances, heating or air conditioning systems, plumbing (including the presence or lack thereof of polybutylene piping), sewage disposal systems, electrical systems, building materials, the structural components of any buildings or the presence of any hazardous substances including radon gas, lead, electromagnetic fields, asbestos or mold. Further, the Listing Brokers, Selling Brokers and their Agents make no warranties or representations, either expressed or implied, as to the marketability of the Property, as to any matters which would be revealed by a current survey and plat of the Property, or as to the accuracy of the published square footage.

It is recommended the Purchaser obtain professional inspections of the Property, have an attorney examine the title to the Property, obtain a current survey and plat of the Property, and verify any information about which Purchaser may have questions.

21. ENTIRE CONTRACT; BINDING CONTRACT; TIME: This written Contract expresses the entire agreement between the parties, unless there is a written addendum or modification signed by Purchaser and Seller. Any response, counteroffer, or written communication which would alter any of the terms of this agreement must



Purchaser



Purchaser

Seller



Seller have read this page PAGE 4 OF 6

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be acknowledged in writing by each party. Both the Purchaser and Seller hereby acknowledge they have not received or relied upon any statements or representations by either Broker or their Agents which are not expressly stipulated herein. This Contract shall be binding on the Purchaser, the Seller and their heirs, personal representatives, successors and assigns. This is a legally binding Contract; the Purchaser and Seller should seek legal advice if the contents are not understood. **TIME IS OF THE ESSENCE IN EACH PARAGRAPH OF THIS CONTRACT WHERE A PERFORMANCE TIME IS STIPULATED.**

**22. MEDIATION CLAUSE:** Any dispute or claim arising out of or relating to this Contract, the breach of this Contract or the services provided in relating to this Contract, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Purchaser(s), Seller(s) or any Real Estate Broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the Property to which this Contract pertains, including without limitation, allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

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

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

**24. EXPIRATION OF ORIGINAL OFFER:** The original offer is deemed revoked if not accepted and a signed acceptance communicated by delivery to Purchaser or Purchaser's Agent by

11-13 20 09 at 4 ☐ AM ☒ PM

**25. COMMUNICATION OF ACCEPTANCE:** The acceptance of this offer or any counteroffer shall be ineffective unless and until such acceptance is communicated by the accepting party to the offering party by one of the acceptable methods set forth in paragraph 26 hereinbelow.

**26. ACCEPTABLE METHODS OF DELIVERY AND COMMUNICATION:** The parties agree that the offer, any counter offer and/or acceptance of any offer, as well as any other notice or response required to be given, may be communicated by hand delivery, Federal Express or other overnight courier, by facsimile or other secure electronic means, including, but not limited to, electronic mail. The signatures, initials and handwritten or typewritten modifications to any of the foregoing which are conveyed electronically shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

**27. EFFECTIVE DATE:** The Effective Date shall be the last date upon which the Purchaser or Seller signs or initials, dates, and delivers this Contract as evidenced by the date beside the name or initials of the last party to sign or initial.

**28. OTHER ADDENDA:**

(A) **LEAD-PAINT ADDENDUM:** Seller states house may have been built prior to 1978. ☒ No ☐ Yes.

(If yes, lead-paint disclosure form EPA-3 sales (rev. 5/99) must be attached and made part of this Contract.)

(B) **ADDITIONAL ADDENDA:** ☐ No ☒ Yes. If yes, 4 Pages, covering Sellers Disclosure

**29. REMARKS:**

*[Signature]*

Purchaser

Purchaser

Seller

*[Signature]*

Seller

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**30. ACKNOWLEDGEMENT OF AGENCY DISCLOSURE:** Purchaser and Seller acknowledge receipt of a copy of the South Carolina Agency Disclosure Brochure and acknowledge that agency relationships have been explained by the respective agents involved in the transaction. For the purpose of this transaction:

The Purchaser is a ☒ client or ☐ customer of Green Door Realty  
(Brokerage)

The Seller is a ☒ client or ☐ customer of Auction Co. Real Estate  
(Brokerage)

Andrew Davis  
Purchaser

11-11-09  
Date

9:30 pm  
Time

[Signature]  
Purchaser

11-11-09  
Date

9:30 PM  
Time

Roy C. Irby  
Seller

11/13/09  
Date

8:30 AM  
Time

Seller

Date

Time

Maggi Holloway / Auction Co. Real Estate  
Listing Agent & Company

525-6434  
Agent Telephone Number

Company Telephone Number

Martha Rasche / Green Door Realty  
Selling Agent & Company

221-7026  
Agent Telephone Number

Company Telephone Number

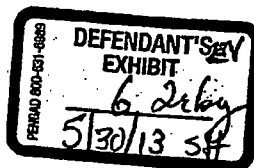
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|                                 |  |                   |
|---------------------------------|--|-------------------|
| <b>MONICA MICHELLE LAMBERT</b>  |  | <b>1744</b>       |
| LIC. 067813673                  |  | 09-48/531         |
| 320 WOODVILLE RD                |  |                   |
| PELZER, SC 29669                |  |                   |
| <b>Green Door Realty</b>        |  | <b>11-11-09</b>   |
| <b>thousand and 40/100</b>      |  | <b>\$ 1000.00</b> |
| <b>Go Tigers</b>                |  |                   |
| <b>AF Davis</b>                 |  |                   |
| <b>ESCROW</b>                   |  |                   |
| <b>053100449400077071141651</b> |  | <b>1744</b>       |



Bank Of America Fax#336-805-8727 2/17/2010  
Reference Account # 068118000674199  
Roy C. Irby II  
156 Pearson Road  
Belton SC 29627  
864 542 7661

This letter is as you requested today. I am not living at the above address or will be able to due to a medical condition.

I have had seven major spinal surgeries within the last year that has left me with the inability to live or pay for the above home.

I would like to do a Deed in Lieu of Foreclosure with Bank of America to protect your interest. I am the sole owner now with the deed recorded in Greenville county records.

Chase has the first mortgage on this property and time is of the essence.

Attached is a copy of insurance cancellation dated 3/31/2010. My proof of inability to sell/90 day listing is being faxed by The Auction Co./Bob Leonardo Auction Co & Real Estate by Mrs. Maggie Holloway; Greenville SC phone #864-233-6434.

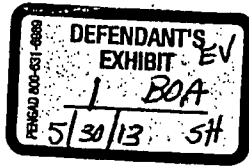
Please send the necessary documents to do a Deed in Lieu of Foreclosure to Roy C. Irby II 8447 Indian Hills Drive Nashville TN 37221 within seven days from the date of this letter.

Thank You,

A handwritten signature in black ink, appearing to read "Roy C. Irby II". The signature is written in a cursive, flowing style.

Roy C Irby II

ROA00434



Bank of America  
Bank of America  
NC4-105-02-41  
4161 Piedmont Parkway  
Greensboro, NC 27410

From: Bank of America

Date: 4/5/2011

Re: Payoff Quote

Loan/LOC Number: 68118000674199  
Account Title: Thomas R Irby

|                           |             |
|---------------------------|-------------|
| Principal                 | \$69,093.09 |
| Interest                  | \$2,959.68  |
| Annual Fee                | \$161.92    |
| Payoff on: April 20, 2011 | \$72,214.69 |

Daily Finance Charge: \$6.60  
Interest Rate: 3.49%

Send payoff check to address below:

U.S. Mail

Bank of America  
ATTN: Payoff Department  
NC4-105-01-40  
4161 Piedmont Parkway  
Greensboro, NC 27410

Overnight Delivery

Bank of America  
ATTN: Payoff Department  
NC4-105-01-40  
4161 Piedmont Parkway  
Greensboro, NC 27410

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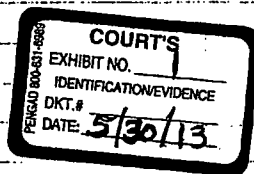
Thank you for banking with Bank of America. In exchange for loan payoff, lien will be released.

Sincerely,

Donna Card  
Officer  
Bank of America

BOA 00228

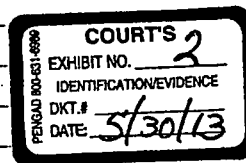
How much is BOA  
asking as  
settlement amount?



What Is Thomas  
Irby Asking For?

Please Explain How  
Amount ~~&~~ Is  
Determined.

Please Breakdown  
Into Categories



THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2010-CP-23-1621

J. P. Morgan Chase Bank NA,

Plaintiff

V

Thomas R. Irby, Roy C. Irby a.k.a. Roy C. Irby II,  
Bank of America NA; and Charles H. Knight LLC

Defendants

Of Whom Roy C. Irby a.k.a. Roy C. Irby II and  
Bank of America NA are Respondents

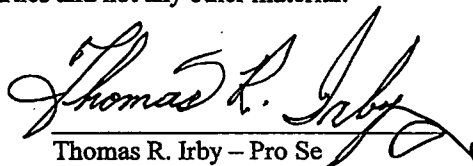
And Thomas R. Irby is the Appellant

Appellate Case No. 2013-001441

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material  
proposed to be included by any of the parties and not any other material.

June 26, 2014



Thomas R. Irby – Pro Se  
Post Office Box 827  
Pelzer, South Carolina 29669  
(864) 243-4015  
Appellant Pro Se



**PROOF OF SERVICE OF RECORD ON APPEAL**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals  
Appellate Case No. 2013-001441

**RECEIVED**  
JUN 30 2014  
**SC Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY**  
Court of Common Pleas

Edward G. Wellmaker, Judge

Case No. 2010-CP-23-1621

JP Morgan Chase Bank NA

Plaintiff

v.

Thomas R. Irby, Roy C. Irby,  
aka Roy C. Irby II, Bank of  
America NA, and Charles H.  
Knight LLC

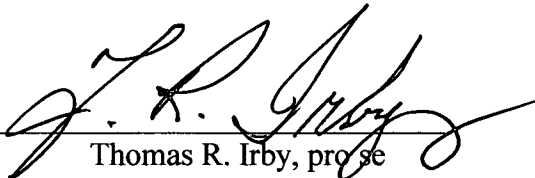
Defendants

Of whom Roy C. Irby aka Roy C. Irby II and Bank of America NA  
Are Respondents  
and Thomas R. Irby is the Appellant

**PROOF OF SERVICE**

I certify that I served one One unbound copy, Nine bound copies, and one CD in PDF format of the Appellants Record on Appeal to the Clerk of Court for the South Carolina Court of Appeals. I also certify that One bound Copy was served by Certified Mail, on this date of 6/26/2014 to Lawrence M. Hershon, Attorney for Bank of America NA, at P.O. Box 1509, Columbia, SC 29202-1509, and to Jerry A. Gaines, Attorney for Roy C. Irby, at P.O. Box 5504, Spartanburg, SC 29304-5504.

June 26, 2014

  
Thomas R. Irby, pro se  
Post Office Box 827  
Pelzer, SC 29669  
(864) 243-4015

cc: Lawrence M. Hershon  
Jerry A. Gaines