

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, ... Respondent,

v.

FONTAINE BUSINESS PARK, LLC, FONTAINE BUSINESS PARK 2, LLC,
FONTAINE BUSINESS PARK 3, LLC, FONTAINE BUSINESS PARK 4, LLC,
FONTAINE BUSINESS PARK 5, LLC, FONTAINE BUSINESS PARK 6, LLC,
FONTAINE BUSINESS PARK 7, LLC, FONTAINE BUSINESS PARK 8, LLC,
FONTAINE BUSINESS PARK 9, LLC, FONTAINE BUSINESS PARK 10, LLC,
FONTAINE BUSINESS PARK 11, LLC, FONTAINE BUSINESS PARK 12, LLC,
FONTAINE BUSINESS PARK 13, LLC, FONTAINE BUSINESS PARK 14, LLC,
FONTAINE BUSINESS PARK 15, LLC, FONTAINE BUSINESS PARK 16, LLC,
FONTAINE BUSINESS PARK 17, LLC, FONTAINE BUSINESS PARK 18, LLC,
FONTAINE BUSINESS PARK 19, LLC, FONTAINE BUSINESS PARK 20, LLC,
FONTAINE BUSINESS PARK 21, LLC, FONTAINE BUSINESS PARK 22, LLC,
FONTAINE BUSINESS PARK 23, LLC, FONTAINE BUSINESS PARK 24, LLC,
FONTAINE BUSINESS PARK 25, LLC, FONTAINE BUSINESS PARK 26, LLC,
FONTAINE BUSINESS PARK 27, LLC, FONTAINE BUSINESS PARK 28, LLC,
FONTAINE BUSINESS PARK 29, LLC, FONTAINE BUSINESS PARK 30, LLC,
and FONTAINE BUSINESS PARK 31, LLC, ... Appellants.

RECORD ON APPEAL
VOLUME II

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SC Court of Appeals

Brent B. Young
Mark A. Fulks
100 Med Tech Parkway, Suite 200
Johnson City, Tennessee 37604
(423) 928-0181

*Attorneys for Appellant
Fontaine Business Park, LLC*

Tucker S. Player
1415 Broad River Road
Columbia, South Carolina 29210
(803) 772-8008

*Attorney for Appellants
Fontaine Business Park 2-31, LLC*

Robert L. Widener
Paul D. Harrill
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
Attorneys for Respondent
DRV Fontaine, LLC

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Schedule 8

Initial Annual Budget

For the Months	Month 1 Jan-2008	Month 2 Feb-2008	Month 3 Mar-2008	Month 4 Apr-2008	Month 5 May-2008	Month 6 Jun-2008	Month 7 Jul-2008	Month 8 Aug-2008	Month 9 Sep-2008	Month 10 Oct-2008	Month 11 Nov-2008	Month 12 Dec-2008
Gross Revenue												
Potential Rental Revenue	\$242,539	\$243,001	\$243,762	\$243,761	\$245,222	\$245,223	\$247,449	\$247,454	\$247,544	\$259,380	\$259,477	\$259,568
Absorption & Turnover Vacancy												
Scheduled Base Rental Revenue	242,539	243,001	243,762	243,761	245,222	245,223	247,449	247,454	247,544	259,380	259,477	259,568
Expense Reimbursement Revenue	11,827	11,826	11,822	11,829	11,825	11,823	11,823	11,826	11,829	11,824	11,827	11,825
Total Gross Revenue	254,366	254,827	255,584	255,590	257,047	257,046	259,272	259,280	259,373	271,204	271,304	271,393
General Vacancy	(4,660)	(4,660)	(4,659)	(4,660)	(4,660)	(4,659)	(4,660)	(4,659)	(4,660)	(4,660)	(4,659)	(4,659)
Effective Gross Revenue	249,706	250,167	250,925	250,930	252,387	252,387	254,612	254,621	254,713	266,544	266,645	266,734
Operating Expenses												
Cleaning	8,455	8,455	8,455	8,453	8,454	8,456	8,485	8,482	8,486	8,777	8,777	8,778
HVAC/Mechanical	9,051	9,051	9,052	9,050	9,051	9,051	9,052	9,050	9,052	9,051	9,051	9,051
Utilities	25,900	25,900	25,902	25,901	25,902	25,901	25,935	25,937	25,934	26,248	26,245	26,246
General Building	13,477	13,476	13,478	13,475	13,478	13,476	13,476	13,477	13,477	13,476	13,477	13,476
CAM	10,830	10,829	10,829	10,829	10,830	10,828	10,830	10,829	10,829	10,829	10,830	10,828
Administrative	10,351	10,351	10,350	10,351	10,351	10,349	10,351	10,351	10,350	10,351	10,351	10,351
Management Fee	7,491	7,505	7,527	7,528	7,571	7,572	7,638	7,640	7,641	7,996	7,999	8,003
Insurance	2,039	2,039	2,039	2,038	2,039	2,039	2,039	2,038	2,039	2,039	2,039	2,038
Real Estate Taxes	344,864											
Total Operating Expenses	432,458	87,606	87,632	87,625	87,676	87,672	87,806	87,804	87,808	88,767	88,769	88,769
Net Operating Income	(182,752)	162,561	163,293	163,305	164,711	164,715	166,806	166,817	166,905	177,777	177,876	177,965
Leasing & Capital Costs												
Tenant Improvements							12,465			104,385		
Leasing Commissions							3,971			39,383		
Total Leasing & Capital Costs							16,436			143,768		
Cash Flow Before Debt Service & Taxes	(\$182,752)	\$162,561	\$163,293	\$163,305	\$164,711	\$164,715	\$150,370	\$166,817	\$166,905	\$34,009	\$177,876	\$177,965

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Recording Requested By:

When Recorded Mail to:

Greenwich Capital Financial Products, Inc.
 c/o Allen Matkins Leck Gamble Mallory &
 Natis LLP
 515 South Figueroa Street, 7th Floor
 Los Angeles, CA 90071-3398
 Attention: Gregg J. Loubier

Book 1384-3723

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Mortgage

Fee: \$27.00 County Tax: \$0.00 State Tax: \$0.00



2007110730 Richard W. Rodden

Richard County RCO

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MORTGAGE, ASSIGNMENT OF LEASES AND RENTS
 AND SECURITY AGREEMENT

BY

FONTAINE BUSINESS PARK, LLC,
 a Delaware limited liability company,

as Mortgagor,

TO

GREENWICH CAPITAL FINANCIAL PRODUCTS, INC.,
 as Mortgagee

Dated as of December 14, 2007

1. THIS INSTRUMENT COVERS FIXTURES AND CONSTITUTES A FIXTURE FILING FINANCING STATEMENT.
2. TO THE EXTENT PROVIDED IN THE NOTE OR ANY OTHER OBLIGATION WHICH THE LIEN OF THIS INSTRUMENT SECURES INTEREST OR DISCOUNT WILL BE DEFERRED, ACCRUED OR CAPITALIZED.

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MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT

MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT (this "*Mortgage*"), made as of December 14, 2007, by FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company, having an office at 5 Financial Plaza, Suite 205, Napa, California 94558 ("*Mortgagor*"), to GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation (together with its successors and assigns, hereinafter referred to as "*Mortgagee*"), having an address at 600 Steamboat Road, Greenwich, Connecticut 06830.

Mortgagor and Mortgagee have entered into a Loan Agreement dated as of the date hereof (as amended, modified, restated, consolidated or supplemented from time to time, the "*Loan Agreement*") pursuant to which Mortgagee is making a secured loan to Mortgagor in the aggregate original principal amount of \$16,300,000 (the "*Loan*"). Capitalized terms used herein without definition are used as defined in the Loan Agreement. The Loan is evidenced by a Note dated the date hereof made by Mortgagor to Mortgagee in such principal amount with a maturity date of January 6, 2018 (as the same may be amended, modified, restated, severed, consolidated, renewed, replaced, or supplemented from time to time, the "*Note*").

To secure the payment of the Note and all sums which may or shall become due thereunder or under any of the other documents evidencing, securing or executed in connection with the Loan (the Note, this Mortgage, the Loan Agreement and such other documents, as any of the same may, from time to time, be modified, amended or supplemented, being hereinafter collectively referred to as the "*Loan Documents*"), including (i) the payment of interest and other amounts which would accrue and become due but for the filing of a petition in bankruptcy (whether or not a claim is allowed against Mortgagor for such interest or other amounts in any such bankruptcy proceeding) or the operation of the automatic stay under Section 362(a) of Title 11 of the United States Code (the "*Bankruptcy Code*"), (ii) the costs and expenses of enforcing any provision of any Loan Document, and (iii) all future advances and readvances that may be made by Mortgagee to Mortgagor intended to be secured hereby (but nothing in this clause shall be deemed to create any obligation to make or borrow future advances or readvances), provided, however, that the aggregate secured hereby including future advances and readvances at any one time outstanding shall not exceed the principal sum of \$32,600,000 plus accrued interest, attorneys' fees and court costs (all such sums being hereinafter collectively referred to as the "*Debt*"), Mortgagor has given, granted, bargained, sold, alienated, enfeoffed, conveyed, confirmed, warranted, pledged, assigned and hypothecated and by these presents does hereby give, grant, bargain, sell, alien, enfeoff, convey, confirm, warrant, pledge, assign and hypothecate unto Mortgagee, all right, title and interest of the Mortgagor in the land described in Exhibit A (the "*Premises*"), and the buildings, structures, fixtures and other improvements now or hereafter located thereon (the "*Improvements*");

TOGETHER WITH: all right, title, interest and estate of Mortgagor now owned, or hereafter acquired, in and to the following property, rights, interests and estates (the Premises,

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the Improvements, and the property, rights, interests and estates hereinafter described are collectively referred to herein as the "*Property*");

(a) all the estate, right, title, claim or demand whatsoever of Mortgagor either in law or in equity, in possession or expectancy, of, in and to the Property or any part thereof;

(b) all easements, rights-of-way, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, rights to oil, gas, minerals, coal and other substances of any kind or character, and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances of any nature whatsoever, in any way belonging, relating or pertaining to the Premises and the Improvements; and the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road, highway, alley or avenue, opened, vacated or proposed, in front of or adjoining the Premises, to the center line thereof; and all the estates, rights, titles, interests, dower and rights of dower, courtesy and rights of courtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Mortgagor of, in and to the Premises and the Improvements and every part and parcel thereof, with the appurtenances thereto;

(c) all machinery, furniture, furnishings, equipment, computer software and hardware, fixtures (including all heating, air conditioning, plumbing, lighting, communications and elevator fixtures), inventory, materials, supplies and other articles of personal property and accessions thereof, renewals and replacements thereof and substitutions therefor, and other property of every kind and nature, tangible or intangible, owned by Mortgagor, or in which Mortgagor has or shall have an interest, now or hereafter located upon the Premises or the Improvements, or appurtenant thereto, and usable in connection with the present or future operation and occupancy of the Premises and the Improvements (hereinafter collectively referred to as the "*Equipment*"), including any leases of, deposits in connection with, and proceeds of any sale or transfer of any of the foregoing, and the right, title and interest of Mortgagor in and to any of the Equipment that may be subject to any "security interest" as defined in the Uniform Commercial Code, as in effect in the State where the Property is located (the "*UCC*"), superior in lien to the lien of this Mortgage;

(d) all awards or payments, including interest thereon, that may heretofore or hereafter be made with respect to the Premises or the Improvements, whether from the exercise of the right of eminent domain or condemnation (including any transfer made in lieu of or in anticipation of the exercise of such right), or for a change of grade, or for any other injury to or decrease in the value of the Premises or Improvements;

(e) all leases, subleases and other agreements or arrangements heretofore or hereafter entered into affecting the use, enjoyment or occupancy of, or the conduct of any activity upon or in, the Premises or the Improvements, including any extensions, renewals, modifications or amendments thereof (hereinafter collectively referred to as the "*Leases*") and all rents, rent equivalents, moneys payable as damages (including payments by reason of the rejection of a Lease in a Bankruptcy Proceeding or in lieu of rent or rent equivalents), royalties (including all oil and gas or other mineral royalties and bonuses), income, fees, receivables, receipts, revenues, deposits (including security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other consideration of whatever form or nature received by or paid to

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or for the account of or benefit of Mortgagor or its agents or employees from any and all sources arising from or attributable to the Premises and the Improvements, including all receivables, customer obligations, installment payment obligations and other obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of the Premises or the Improvements, or rendering of services by Mortgagor or any of its agents or employees, and proceeds, if any, from business interruption or other loss of income insurance (hereinafter collectively referred to as the "Rents"), together with all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Debt;

(f) all proceeds of and any unearned premiums on any insurance policies covering the Property, including the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Property;

(g) the right, in the name and on behalf of Mortgagor, to appear in and defend any action or proceeding brought with respect to the Property and to commence any action or proceeding to protect the interest of Mortgagee in the Property;

(h) all accounts (including reserve accounts), escrows, documents, instruments, chattel paper, claims, deposits and general intangibles, as the foregoing terms are defined in the UCC, and all franchises, trade names, trademarks, symbols, service marks, books, records, plans, specifications, designs, drawings, surveys, title insurance policies, permits, consents, licenses, management agreements, contract rights (including any contract with any architect or engineer or with any other provider of goods or services for or in connection with any construction, repair or other work upon the Property), approvals, actions, refunds of real estate taxes and assessments (and any other governmental impositions related to the Property) and causes of action that now or hereafter relate to, are derived from or are used in connection with the Property, or the use, operation, maintenance, occupancy or enjoyment thereof or the conduct of any business or activities thereon (hereinafter collectively referred to as the "Intangibles");

(i) all right, title and interest of each entity constituting Mortgagor, as tenants in common, under and pursuant to the Property Agreements, as defined in the Loan Agreement dated concurrently herewith between Lender and Borrower (the "Property Agreements"), including, without limitation, that certain Co-Ownership Agreement with respect to the Property (the "Tenant in Common Agreement"), including any rights of first refusal (including such rights arising under Section 363(f) of Chapter 11 of the United States Bankruptcy Code), purchase options or other similar rights afforded to any tenant in common under the Tenant in Common Agreement; and

(j) all proceeds, products, offspring, rents and profits from any of the foregoing, including those from sale, exchange, transfer, collection, loss, damage, disposition, substitution or replacement of any of the foregoing.

Without limiting the generality of any of the foregoing, in the event that a case under the Bankruptcy Code is commenced by or against Mortgagor, pursuant to Section 552(b)(2) of the Bankruptcy Code, the security interest granted by this Mortgage shall automatically extend to all

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Rents acquired by the Mortgagor after the commencement of the case and shall constitute cash collateral under Section 363(a) of the Bankruptcy Code.

TO HAVE AND TO HOLD the Property unto and to the use and benefit of Mortgagee and its successors and assigns, forever, subject to the Permitted Encumbrances, as defined in the Loan Agreement;

PROVIDED, HOWEVER, these presents are upon the express condition that, if Mortgagor shall well and truly pay to Mortgagee the Debt at the time and in the manner provided in the Loan Documents and shall well and truly abide by and comply with each and every covenant and condition set forth in the Loan Documents in a timely manner, these presents and the estate hereby granted shall cease, terminate and be void;

AND Mortgagor represents and warrants to and covenants and agrees with Mortgagee as follows:

PART I- GENERAL PROVISIONS

1. Payment of Debt and Incorporation of Covenants, Conditions and Agreements. Mortgagor shall pay the Debt at the time and in the manner provided in the Loan Documents. All the covenants, conditions and agreements contained in the Loan Documents are hereby made a part of this Mortgage to the same extent and with the same force as if fully set forth herein. Without limiting the generality of the foregoing, Mortgagor (i) agrees to insure, repair, maintain and restore damage to the Property, pay Taxes and Other Charges, and comply with Legal Requirements, in accordance with the Loan Agreement, and (ii) agrees that the Proceeds of Insurance and Awards for Condemnation shall be settled, held and applied in accordance with the Loan Agreement.

2. Leases and Rents.

(a) Mortgagor does hereby absolutely and unconditionally assign to Mortgagee all of Mortgagor's right, title and interest in all current and future Leases and Rents, it being intended by Mortgagor that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Such assignment shall not be construed to bind Mortgagee to the performance of any of the covenants or provisions contained in any Lease or otherwise impose any obligation upon Mortgagee. Nevertheless, subject to the terms of this paragraph, Mortgagee grants to Mortgagor a revocable license to operate and manage the Property and to collect the Rents subject to the requirements of the Loan Agreement (including the deposit of Rents into the Clearing Account). Upon an Event of Default, and after Mortgagee sends a revocation of license notice to the Mortgagor, the license granted to Mortgagor herein shall be revoked, and Mortgagee shall immediately be entitled to possession of all Rents in the Clearing Account, the Deposit Account (including all Subaccounts thereof) and all Rents collected thereafter (including Rents past due and unpaid), whether or not Mortgagee enters upon or takes control of the Property. Mortgagor hereby grants and assigns to Mortgagee the right, at its option, upon revocation of the license granted herein, to enter upon the Property in person, by agent or by court-appointed receiver to collect the Rents. Any Rents collected after the

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revocation of such license may be applied toward payment of the Debt in such priority and proportions as Mortgagee in its sole discretion shall deem proper.

(b) Mortgagor shall not enter into, modify, amend, cancel, terminate or renew any Lease except as provided in Section 5.10 of the Loan Agreement.

3. Use of Property. Mortgagor shall not initiate, join in, acquiesce in or consent to any change in any private restrictive covenant, zoning law or other public or private restriction, limiting or defining the uses which may be made of the Property. If under applicable zoning provisions the use of the Property is or shall become a nonconforming use, Mortgagor shall not cause or permit such nonconforming use to be discontinued or abandoned without the consent of Mortgagee. Mortgagor shall not (i) change the use of the Property, (ii) permit or suffer to occur any waste on or to the Property or (iii) take any steps to convert the Property to a condominium or cooperative form of ownership.

4. Transfer or Encumbrance of the Property.

(a) Mortgagor acknowledges that (i) Mortgagee has examined and relied on the creditworthiness and experience of the principals of Mortgagor in owning and operating properties such as the Property in agreeing to make the Loan, (ii) Mortgagee will continue to rely on Mortgagor's ownership of the Property as a means of maintaining the value of the Property as security for the Debt, and (iii) Mortgagee has a valid interest in maintaining the value of the Property so as to ensure that, should Mortgagor default in the repayment of the Debt, Mortgagee can recover the Debt by a sale of the Property. Mortgagor shall not sell, convey, alienate, mortgage, encumber, pledge or otherwise transfer the Property or any part thereof, or suffer or permit any Transfer to occur, other than a Permitted Transfer.

(b) Mortgagee shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Debt immediately due and payable upon Transfer in violation of this Paragraph 4. This provision shall apply to every sale, conveyance, alienation, mortgage, encumbrance, pledge or transfer of the Property (and every other Transfer) regardless of whether voluntary or not. Any Transfer made in contravention of this Paragraph 4 shall be null and void and of no force and effect. Mortgagor agrees to bear and shall pay or reimburse Mortgagee on demand for all reasonable expenses (including reasonable attorneys' fees and disbursements, title search costs and title insurance endorsement premiums) incurred by Mortgagee in connection with the review, approval and documentation of any Permitted Transfer.

5. Changes in Laws Regarding Taxation. If any law is enacted or adopted or amended after the date of this Mortgage which deducts the Debt from the value of the Property for the purpose of taxation or which imposes a tax, either directly or indirectly, on the Debt or Mortgagee's interest in the Property, Mortgagor will pay such tax, with interest and penalties thereon, if any. If Mortgagee is advised by its counsel that the payment of such tax or interest and penalties by Mortgagor would be unlawful, taxable to Mortgagee or unenforceable, or would provide the basis for a defense of usury, then Mortgagee shall have the option, by notice of not less than 90 days, to declare the Debt immediately due and payable. Payment of the Debt by

Borrower in connection with any such declaration shall be at par, and free of any yield maintenance or other prepayment penalty or fee.

6. No Credits on Account of the Debt. Mortgagor shall not claim or demand or be entitled to any credit on account of the Debt for any part of the Taxes or Other Charges assessed against the Property, and no deduction shall otherwise be made or claimed from the assessed value of the Property for real estate tax purposes by reason of this Mortgage or the Debt. If such claim, credit or deduction shall be required by law, Mortgagee shall have the option, by notice of not less than 90 days, to declare the Debt immediately due and payable. Payment of the Debt by Borrower in connection with any such declaration shall be at par, and free of any yield maintenance or other prepayment penalty or fee.

7. Further Acts, Etc. Mortgagor shall, at its sole cost, do execute, acknowledge and deliver all and every such further acts, deeds, conveyances, mortgages, assignments, notices of assignment, transfers and assurances as Mortgagee shall, from time to time, reasonably require, for the better assuring, conveying, assigning, transferring, and confirming unto Mortgagee the property and rights hereby mortgaged, given, granted, bargained, sold, alienated, enfeoffed, conveyed, confirmed, pledged, assigned and hypothecated or intended now or hereafter so to be, or which Mortgagor may be or may hereafter become bound to convey or assign to Mortgagee, or for carrying out the intention or facilitating the performance of the terms of this Mortgage, or for filing, registering or recording this Mortgage or for facilitating the sale and transfer of the Loan and the Loan Documents in connection with a Secondary Market Transaction as described in Section 9.1 of the Loan Agreement. Upon foreclosure, the appointment of a receiver or any other relevant action, Mortgagor shall, at its sole cost, cooperate fully and completely to effect the assignment or transfer of any license, permit, agreement or any other right necessary or useful to the operation of the Property. Mortgagor grants to Mortgagee an irrevocable power of attorney coupled with an interest for the purpose of exercising and perfecting any and all rights and remedies available to Mortgagee at law and in equity, including such rights and remedies available to Mortgagee pursuant to this paragraph. Notwithstanding anything to the contrary in the immediately preceding sentence, Mortgagee shall not execute any document as attorney-in-fact of Mortgagor unless (x) Mortgagor shall have failed or refused to execute the same within two (2) Business Days after Mortgagee's request therefor. Mortgagee shall give prompt notice to Mortgagor of any exercise of the power of attorney as provided for in this Paragraph 7, along with copies of all documents executed in connection therewith.

8. Recording of Mortgage, Etc. Mortgagor forthwith upon the execution and delivery of this Mortgage and thereafter, from time to time, shall cause this Mortgage, and any security instrument creating a lien or security interest or evidencing the lien hereof upon the Property and each instrument of further assurance to be filed, registered or recorded in such manner and in such places as may be required by any present or future law in order to publish notice of and fully to protect the lien or security interest hereof upon, and the interest of Mortgagee in, the Property. Mortgagor shall pay all filing, registration or recording fees, all expenses incident to the preparation, execution and acknowledgment of and all federal, state, county and municipal, taxes, duties, imposts, documentary stamps, assessments and charges arising out of or in connection with the execution and delivery of, this Mortgage, any Mortgage supplemental hereto, any security instrument with respect to the Property or any instrument of further assurance, except where prohibited by law so to do. Mortgagor shall hold harmless and

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Richard County ROD

Richard W. Rodden

indemnify Mortgagee, its successors and assigns, against any liability incurred by reason of the imposition of any tax on the making or recording of this Mortgage.

9. Right to Cure Defaults. Upon the occurrence of any Event of Default, Mortgagee may, but without any obligation to do so and without notice to or demand on Mortgagor and without releasing Mortgagor from any obligation hereunder, perform the obligations in Default in such manner and to such extent as Mortgagee may deem necessary to protect the security hereof. Mortgagee is authorized to enter upon the Property for such purposes or appear in, defend or bring any action or proceeding to protect its interest in the Property or to foreclose this Mortgage or collect the Debt, and the cost and expense thereof (including reasonable attorneys' fees and disbursements to the extent permitted by law), with interest thereon at the Default Rate for the period after notice from Mortgagee that such cost or expense was incurred to the date of payment to Mortgagee, shall constitute a portion of the Debt, shall be secured by this Mortgage and the other Loan Documents and shall be due and payable to Mortgagee upon demand.

10. Remedies.

(a) Upon the occurrence of any Event of Default, Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Mortgagor and in and to the Property, by Mortgagee itself or otherwise, including the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Mortgagee may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Mortgagee:

- (i) declare the entire Debt to be immediately due and payable;
- (ii) give such notice of default and of election to cause the Property to be sold as may be required by law or as may be necessary to cause Mortgagee to exercise the power of sale granted herein; Mortgagee shall then record and give such notice of Mortgagee's sale as then required by law and, after the expiration of such time as may be required by law, may sell the Property at the time and place specified in the notice of sale, as a whole or in separate parcels as directed by Mortgagee, or by Mortgagor to the extent required by law, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale, all in accordance with applicable law. Mortgagee, from time to time, may postpone or continue the sale of all or any portion of the Property by public declaration at the time and place last appointed for the sale and no other notice of the postponed sale shall be required unless provided by applicable law. Upon any sale, Mortgagee shall deliver its deed conveying the property sold, without any covenant or warranty, expressed or implied, to the purchaser or purchasers at the sale. The recitals in such deed of any matters or facts shall be conclusive as to the accuracy thereof;
- (iii) institute a proceeding or proceedings, judicial or nonjudicial, to the extent permitted by law, by advertisement or otherwise, for the complete foreclosure of this Mortgage, in which case the Property may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;

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(iv) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Mortgage for the portion of the Debt then due and payable, subject to the continuing lien of this Mortgage for the balance of the Debt not then due;

(v) sell for cash or upon credit the Property and all estate, claim, demand, right, title and interest of Mortgagor therein and rights of redemption thereof, pursuant to the power of sale, to the extent permitted by law, or otherwise, at one or more sales, as an entirety or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;

(vi) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein or in any other Loan Document;

(vii) recover judgment on the Note either before, during or after any proceeding for the enforcement of this Mortgage;

(viii) apply for the appointment of a trustee, receiver, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of the Mortgagor or of any person, firm or other entity liable for the payment of the Debt;

(ix) enforce Mortgagee's interest in the Leases and Rents and enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Mortgagor and its agents and employees therefrom, and thereupon Mortgagee may (A) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with the Property and conduct the business thereat; (B) complete any construction on the Property in such manner and form as Mortgagee deems advisable; (C) make alterations, additions, renewals, replacements and improvements to or on the Property; (D) exercise all rights and powers of Mortgagor with respect to the Property, whether in the name of Mortgagor or otherwise, including the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive Rents; and (E) apply the receipts from the Property to the payment of the Debt, after deducting therefrom all expenses (including reasonable attorneys' fees and disbursements) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, insurance and other charges in connection with the Property, as well as just and reasonable compensation for the services of Mortgagee, and its counsel, agents and employees;

(x) require Mortgagor to pay monthly in advance to Mortgagee, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of any portion of the Property occupied by Mortgagor, and require Mortgagor to vacate and surrender possession of the Property to Mortgagee or to such receiver, and, in default thereof, evict Mortgagor by summary proceedings or otherwise; or

(xi) pursue such other rights and remedies as may be available at law or in equity or under the UCC, including the right to receive and/or establish a lock box for all

Rents and proceeds from the Intangibles and any other receivables or rights to payments of Mortgagor relating to the Property.

In the event of a sale, by foreclosure or otherwise, of less than all of the Property, this Mortgage shall continue as a lien on the remaining portion of the Property.

(b) The proceeds of any sale made under or by virtue of this Paragraph 10, together with any other sums which then may be held by Mortgagee under this Mortgage, whether under the provisions of this paragraph or otherwise, shall be applied by Mortgagee to the payment of the Debt in such priority and proportion as Mortgagee in its sole discretion shall deem proper.

(c) Mortgagee may adjourn from time to time any sale by it to be made under or by virtue of this Mortgage by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and, except as otherwise provided by any applicable law, Mortgagee, without further notice or publication, may make such sale at the time and place to which the same shall be so adjourned.

(d) Upon the completion of any sale or sales pursuant hereto, Mortgagee, or an officer of any court empowered to do so, shall execute and deliver to the accepted purchaser or purchasers a good and sufficient instrument, or good and sufficient instruments, conveying, assigning and transferring all estate, right, title and interest in and to the property and rights sold. Mortgagee is hereby irrevocably appointed the true and lawful attorney of Mortgagor, in its name and stead, to make all necessary conveyances, assignments, transfers and deliveries of the Property and rights so sold and for that purpose Mortgagee may execute all necessary instruments of conveyance, assignment and transfer, and may substitute one or more persons with like power, Mortgagor hereby ratifying and confirming all that its said attorney or such substitute or substitutes shall lawfully do by virtue hereof. Any sale or sales made under or by virtue of this Paragraph 10, whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, shall operate to divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Mortgagor in and to the properties and rights so sold, and shall be a perpetual bar both at law and in equity against Mortgagor and against any and all persons claiming or who may claim the same, or any part thereof, from, through or under Mortgagor.

(e) Upon any sale made under or by virtue of this Paragraph 10, whether made under a power of sale or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, Mortgagee may bid for and acquire the Property or any part thereof and in lieu of paying cash therefor may make settlement for the purchase price by crediting upon the Debt the net sales price after deducting therefrom the expenses of the sale and costs of the action and any other sums which Mortgagee is authorized to deduct under this Mortgage or any other Loan Document.

(f) No recovery of any judgment by Mortgagee and no levy of an execution under any judgment upon the Property or upon any other property of Mortgagor shall affect in any manner or to any extent the lien of this Mortgage upon the Property or any part thereof, or

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any liens, rights, powers or remedies of Mortgagee hereunder, but such liens, rights, powers and remedies of Mortgagee shall continue unimpaired as before.

(g) Mortgagee may terminate or rescind any proceeding or other action brought in connection with its exercise of the remedies provided in this Paragraph 10 at any time before the conclusion thereof, as determined in Mortgagee's sole discretion and without prejudice to Mortgagee.

(h) Mortgagee may resort to any remedies and the security given by this Mortgage or in any other Loan Document in whole or in part, and in such portions and in such order as determined by Mortgagee's sole discretion. No such action shall in any way be considered a waiver of any rights, benefits or remedies evidenced or provided by any Loan Document. The failure of Mortgagee to exercise any right, remedy or option provided in any Loan Document shall not be deemed a waiver of such right, remedy or option or of any covenant or obligation secured by any Loan Document. No acceptance by Mortgagee of any payment after the occurrence of any Event of Default and no payment by Mortgagee of any obligation for which Mortgagor is liable hereunder shall be deemed to waive or cure any Event of Default, or Mortgagor's liability to pay such obligation. No sale of all or any portion of the Property, no forbearance on the part of Mortgagee, and no extension of time for the payment of the whole or any portion of the Debt or any other indulgence given by Mortgagee to Mortgagor, shall operate to release or in any manner affect the interest of Mortgagee in the remaining Property or the liability of Mortgagor to pay the Debt. No waiver by Mortgagee shall be effective unless it is in writing and then only to the extent specifically stated. All costs and expenses of Mortgagee in exercising its rights and remedies under this Paragraph 10 (including reasonable attorneys' fees and disbursements to the extent permitted by law and subject to the provisions of Section 10.29 of the Loan Agreement), shall be paid by Mortgagor immediately upon notice from Mortgagee, with interest at the Default Rate for the period after notice from Mortgagee, and such costs and expenses shall constitute a portion of the Debt and shall be secured by this Mortgage.

(i) The interests and rights of Mortgagee under the Loan Documents shall not be impaired by any indulgence, including (i) any renewal, extension or modification which Mortgagee may grant with respect to any of the Debt, (ii) any surrender, compromise, release, renewal, extension, exchange or substitution which Mortgagee may grant with respect to the Property or any portion thereof or (iii) any release or indulgence granted to any maker, endorser, guarantor or surety of any of the Debt.

11. Right of Entry. In addition to any other rights or remedies granted under this Mortgage, Mortgagee and its agents shall have the right to enter and inspect the Property after reasonable prior notice during business hours during the term of this Mortgage. The cost of such inspections or audits shall be borne by Mortgagor should Mortgagee determine that an Event of Default exists, including the cost of all follow up or additional investigations or inquiries deemed reasonably necessary by Mortgagee. The cost of such inspections, if not paid for by Mortgagor following demand, may be added to the principal balance of the sums due under the Note and this Mortgage and shall bear interest thereafter until paid at the Default Rate; provided, however, that Mortgagor's obligation to pay Mortgagee for the cost of such inspection shall not exceed \$750 for each inspection and Mortgagor shall not be obligated to pay for more than two such inspections in any calendar year.

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12. Security Agreement.

(a) This Mortgage is both a real property Mortgage and a "security agreement" within the meaning of the UCC. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Mortgagor in the Property. Mortgagor by executing and delivering this Mortgage has granted and hereby grants to Mortgagee, as security for the Debt, a security interest in the Property to the full extent that the Property may be subject to the UCC (such portion of the Property so subject to the UCC being called in this paragraph the "Collateral"). This Mortgage shall also constitute a "fixture filing" for the purposes of the UCC. As such, this Mortgage covers all items of the Collateral that are or are to become fixtures. Information concerning the security interest herein granted may be obtained from the parties at the addresses of the parties set forth in the first paragraph of this Mortgage. If an Event of Default shall occur, Mortgagee, in addition to any other rights and remedies which it may have, shall have and may exercise immediately and without demand, any and all rights and remedies granted to a secured party upon default under the UCC, including, without limiting the generality of the foregoing, the right to take possession of the Collateral or any part thereof, and to take such other measures as Mortgagee may deem necessary for the care, protection and preservation of the Collateral. Upon request or demand of Mortgagee, Mortgagor shall at its expense assemble the Collateral and make it available to Mortgagee at a convenient place acceptable to Mortgagee. Mortgagor shall pay to Mortgagee on demand any and all expenses, including reasonable attorneys' fees and disbursements, incurred or paid by Mortgagee in protecting the interest in the Collateral and in enforcing the rights hereunder with respect to the Collateral. Any notice of sale, disposition or other intended action by Mortgagee with respect to the Collateral, sent to Mortgagor in accordance with the provisions hereof at least ten days prior to such action, shall constitute commercially reasonable notice to Mortgagor. The proceeds of any disposition of the Collateral, or any part thereof, may be applied by Mortgagee to the payment of the Debt in such priority and proportions as Mortgagee in its sole discretion shall deem proper. In the event of any change in name, identity or structure of Mortgagor, Mortgagor shall notify Mortgagee thereof and promptly after request shall execute, file and record such UCC forms as are necessary to maintain the priority of Mortgagee's lien upon and security interest in the Collateral, and shall pay all expenses and fees in connection with the filing and recording thereof. If Mortgagee shall require the filing or recording of additional UCC forms or continuation statements, Mortgagor shall, promptly after request, execute, file and record such UCC forms or continuation statements as Mortgagee shall deem necessary, and shall pay all expenses and fees in connection with the filing and recording thereof, it being understood and agreed, however, that no such additional documents shall increase Mortgagor's obligations under the Loan Documents.

(b) Mortgagor hereby absolutely and unconditionally pledges and assigns to Mortgagee as additional security all of Mortgagor's right, title and interest in, to and under the Property Agreements, including without limitation, the Tenant in Common Agreement, effective immediately upon execution of each of the Property Agreements and without further notice to or by any party hereto (except that Mortgagor agrees to provide to Mortgagee true and correct copies of such agreements promptly after execution thereof); provided that Mortgagee shall have no obligation or liability under any of the Property Agreements.

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13. **Actions and Proceedings.** Mortgagee has the right to appear in and defend any action or proceeding brought with respect to the Property and to bring any action or proceeding, in the name and on behalf of Mortgagor, which Mortgagee, in its sole discretion, decides should be brought to protect its or their interest in the Property. Mortgagee shall, at its option, be subrogated to the lien of any mortgage or other security instrument discharged in whole or in part by the Debt, and any such subrogation rights shall constitute additional security for the payment of the Debt.

14. **Marshalling and Other Matters.** Mortgagor hereby waives, to the extent permitted by law, the benefit of all appraisal, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein. Further, Mortgagor hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Mortgage on behalf of Mortgagor, and on behalf of each and every person acquiring any interest in or title to the Property subsequent to the date of this Mortgage and on behalf of all persons to the extent permitted by applicable law. The lien of this Mortgage shall be absolute and unconditional and shall not in any manner be affected or impaired by any acts or omissions whatsoever of Mortgagee and, without limiting the generality of the foregoing, the lien hereof shall not be impaired by (i) any acceptance by Mortgagee of any other security for any portion of the Debt, (ii) any failure, neglect or omission on the part of Mortgagee to realize upon or protect any portion of the Debt or any collateral security therefor or (iii) any release (except as to the property released), sale, pledge, surrender, compromise, settlement, renewal, extension, indulgence, alteration, changing, modification or disposition of any portion of the Debt or of any of the collateral security therefor; and Mortgagee may foreclose, or exercise any other remedy available to Mortgagee under other Loan Documents without first exercising or enforcing any of its remedies under this Mortgage, and any exercise of the rights and remedies of Mortgagee hereunder shall not in any manner impair the Debt or the liens of any other Loan Document or any of Mortgagee's rights and remedies thereunder.

15. **Notices.** All notices, consents, approvals and requests required or permitted hereunder shall be in writing, and shall be sent, and shall be deemed effective, as provided in the Loan Agreement.

16. **Inapplicable Provisions.** If any term, covenant or condition of this Mortgage is held to be invalid, illegal or unenforceable in any respect, this Mortgage shall be construed without such provision.

17. **Headings.** The paragraph headings in this Mortgage are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

18. **Duplicate Originals.** This Mortgage may be executed in any number of duplicate originals and each such duplicate original shall be deemed to be an original.

19. **Definitions.** Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Mortgage may be used interchangeably in singular or plural form; and the word "*Mortgagor*" shall mean "each

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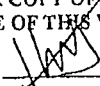
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Mortgagor and any subsequent owner or owners of the Property or any part thereof or any interest therein," the word "Mortgagee" shall mean "Mortgagee and any subsequent holder of the Note," the words "Property" shall include any portion of the Property and any interest therein, the word "including" means "including but not limited to" and the words "attorneys' fees" shall include any and all attorneys' fees, paralegal and law clerk fees, including fees at the pre-trial, trial and appellate levels incurred or paid by Mortgagee in protecting its interest in the Property and Collateral and enforcing its rights hereunder.

20. Homestead. Mortgagor hereby waives and renounces all homestead and exemption rights provided by the Constitution and the laws of the United States and of any state, in and to the Property as against the collection of the Debt, or any part thereof.

21. Assignments. Mortgagee shall have the right to assign or transfer its rights under this Mortgage without limitation. Any assignee or transferee shall be entitled to all the benefits afforded Mortgagee under this Mortgage.

22. Waiver of Jury Trial. MORTGAGOR HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THIS MORTGAGE OR ANY OTHER LOAN DOCUMENT, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY MORTGAGOR, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. MORTGAGEE IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY MORTGAGOR.

INITIALS: 

23. Consents. Any consent or approval by Mortgagee in any single instance shall not be deemed or construed to be Mortgagee's consent or approval in any like matter arising at a subsequent date, and the failure of Mortgagee to promptly exercise any right, power, remedy, consent or approval provided herein or at law or in equity shall not constitute or be construed as a waiver of the same nor shall Mortgagee be estopped from exercising such right, power, remedy, consent or approval at a later date. Any consent or approval requested of and granted by Mortgagee pursuant hereto shall be narrowly construed to be applicable only to Mortgagor and the matter identified in such consent or approval and no third party shall claim any benefit by reason thereof, and any such consent or approval shall not be deemed to constitute Mortgagee a venturer or partner with Mortgagor nor shall privity of contract be presumed to have been established with any such third party. If Mortgagee deems it to be in its best interest to retain assistance of persons, firms or corporations (including attorneys, title insurance companies, appraisers, engineers and surveyors) with respect to a request for consent or approval, Mortgagor shall reimburse Mortgagee for all costs reasonably incurred in connection with the employment of such persons, firms or corporations.

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24. Loan Repayment and Defeasance. Provided no Event of Default exists, the Lien of this Mortgage shall be terminated, released and reconveyed of record by Mortgagee (and the Mortgagee, to the extent required by law to effect a full and proper termination, release and reconveyance) prior to the Maturity Date only in accordance with the terms and provisions set forth in the Loan Agreement.

25. Governing Law. This Mortgage shall be governed by, and be construed in accordance with, the laws of the state in which the Property is located without regard to conflict of law provisions thereof.

26. Exculpation. The liability of Mortgagor hereunder is limited pursuant to Section 10.1 of the Loan Agreement.

27. Mortgagee; Successor Mortgagee. Mortgagee shall not be liable for any error of judgment or act done by Mortgagee, or be otherwise responsible or accountable under any circumstances whatsoever, except if the result of Mortgagee's gross negligence or willful misconduct. Mortgagee shall not be personally liable in case of entry by Mortgagee or anyone acting by virtue of the powers herein granted Mortgagee upon the Property for debts contracted or liability or damages or damages incurred in the management or operation of the Property. Mortgagee shall have the right to rely on any instrument, document or signature authorizing or supporting any action taken or proposed to be taken by Mortgagee hereunder or believed by Mortgagee to be genuine. Mortgagee shall be entitled to reimbursement for actual expenses incurred by Mortgagee in the performance of Mortgagee's duties hereunder and to reasonable compensation for such of Mortgagee's services hereunder as shall be rendered. Mortgagor will, from time to time, reimburse Mortgagee for and save and hold Mortgagee harmless from and against any and all loss, cost, liability, damage and reasonable expense whatsoever incurred by Mortgagee in the performance of Mortgagee's duties, but excluding however, any of same arising directly from Mortgagee's gross negligence or willful misconduct. All monies received by Mortgagee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other monies (except to the extent required by law) and Mortgagee shall be under no liability for interest on any monies received by Mortgagee hereunder. Mortgagee may resign by giving of notice of such resignation in writing to Mortgagee. If Mortgagee shall die, resign or become disqualified from acting in the execution of this trust or shall fail or refuse to exercise the same when requested by Mortgagee or if for any or no reason and without cause Mortgagee shall prefer to appoint a substitute Mortgagee to act instead of the original Mortgagee named herein, or any prior successor or substitute Mortgagee, Mortgagee shall, without any formality or notice to Mortgagor or any other person, have full power to appoint a substitute Mortgagee and, if Mortgagee so elects, several substitute Mortgagees in succession who shall succeed to all the estate, rights, powers and duties of the aforementioned Mortgagee. Each appointment and substitution shall be evidenced by an instrument in writing which shall recite the parties to, and the book and page of record of, this Mortgage, and the description of the real property herein described, which instrument, executed and acknowledged by Mortgagee, shall (i) be conclusive proof of the proper substitution and appointment of such successor Mortgagee or Mortgagees, (ii) duly assign and transfer all the estates, properties, rights, powers and trusts of Mortgagee so ceasing to act and (iii) be notice of such proper substitution and appointment to all parties in interest. In addition, such Mortgagee ceasing to act shall duly assign, transfer, and deliver any of

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the property and monies held by Mortgagee to the successor Mortgagee so appointed in its or his place. The Mortgagee may act in the execution of this trust and may authorize one or more parties to act on his behalf to perform the ministerial functions required of Mortgagee hereunder, including without limitation, the transmittal and posting of any notices and it shall not be necessary for any Mortgagee to be present in person at any foreclosure sale.

28. Special State Provisions.

(a) 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 thirty 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. 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 PREMISES.

(b) Additional Provisions. Any receiver appointed under this Mortgage shall have all of the usual powers and duties of receivers pursuant to South Carolina common and statutory law, including, but not limited to, South Carolina Code Section 15-65-10, as amended, modified and/or replaced from time to time.

(c) Compliance with Applicable Law. Anything elsewhere herein contained to the contrary notwithstanding:

1. In the event that any provision under this Mortgage shall be inconsistent with any provision of Article 7, Title 29 of the South Carolina Code of Laws (the "Foreclosure Article"), the provisions of the Foreclosure Article shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner inconsistent with the Foreclosure Article; and

2. If any provision of this Mortgage shall grant to Mortgagee (including Mortgagee acting as a mortgagee-in-possession) or a receiver appointed pursuant to provisions of this Mortgage, any rights or remedies prior to, upon or following the occurrence of an Event of Default which are more limited than the rights that would otherwise be vested in Mortgagee or such receiver under the Foreclosure Article in the absence of said provision, Mortgagee and such receiver shall be vested with the rights granted under the Foreclosure Article to the full extent permitted by law.

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IN WITNESS WHEREOF, the undersigned has caused these presents to be executed under seal as of the date first written above.

Signed, sealed and delivered in the presence of

Witness

Witness

FONTAINE BUSINESS PARK, LLC,
a Delaware limited liability company

By: U.S. COMMERCIAL LLC,
a Virginia limited liability company,
Its Manager

By:

H. Michael Schwartz,
President

ACKNOWLEDGMENT

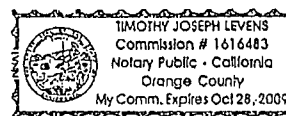
STATE OF CALIFORNIA)
COUNTY OF ORANGE)

On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared H. Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)



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EXHIBIT ALegal DescriptionTRACT 1 (FONTAINE I, 300 ARBOR LAKE DRIVE): TMS NO. 14207-02-01

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 5, FONTAINE I, CONTAINING 13.60 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 12, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION I BY METES AND BOUNDS.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30, AS AMENDED IN DEED BOOK D-1171 AT PAGE 350, AND AS FURTHER AMENDED IN DEED BOOK D-1187 AT PAGE 550.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 386.

TRACT 2 (FONTAINE II, ARBOR LAKE DRIVE): TMS NO. 14207-02-02

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 6, FONTAINE II, CONTAINING 9.08 ACRES, MORE OR LESS, ON THE "SUBDIVISION" PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE II BY METES AND BOUNDS.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30, AS AMENDED IN DEED BOOK D-1171 AT PAGE 350, AND AS FURTHER AMENDED IN DEED BOOK D-1187 AT PAGE 550.

Greenwich Capital/Anderson Station
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TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 393.

TRACT 3 (FONTAINE III, 200 ARBOR LAKE DRIVE): TMS NO. 14203-13-02

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 3-A, CONTAINING 0.82 OF AN ACRE, MORE OR LESS, AND LOT 3-B, CONTAINING 3.96 ACRES, MORE OR LESS, FONTAINE III, CONTAINING IN THE AGGREGATE 4.78 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE III BY METES AND BOUNDS.

TOGETHER WITH, ALSO, NONE EXCLUSIVE PERPETUAL EASEMENTS FOR ACCESS, OVER AND ACROSS THE AREAS IDENTIFIED AS PARCEL "B-1" AND PARCEL "C" ON THE ABOVE-DESCRIBED PLAT AND THE RIGHT OF PEDESTRIAN AND VEHICULAR ACCESS FOR INGRESS, EGRESS AND REGRESS OVER AND ACROSS ALL EXISTING INTERNAL DRIVES WITHIN THE PARKING LOT(S) NOW OR HEREAFTER LOCATED ON THE STATE OF SOUTH CAROLINA RETIREMENT SYSTEMS PROPERTY, AS SHOWN ON A PLAT RECORDED IN PLAT BOOK 54 AT PAGE 1448, AND AS DESCRIBED IN THE DEED FROM NATIONS BANK OF NORTH CAROLINA, N.A., AS TRUSTEE FOR THE NCNB REAL ESTATE FUND, TO THE STATE OF SOUTH CAROLINA RETIREMENT SYSTEMS, A DIVISION OF THE STATE OF SOUTH CAROLINA BUDGET AND CONTROL BOARD, DATED JULY 16, 1992 AND RECORDED ON JULY 16, 1992 IN RICHLAND COUNTY ROD DEED BOOK D-1100 AT PAGE 350.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENT, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30 AND AMENDED IN DEED BOOK D-1171 AT PAGE 350.

TRACT 4 (FONTAINE V, N/S ARBOR LAKE DRIVE): TMS NO. 14203-13-01

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE BEING SHOWN AS LOT 4, FONTAINE V, CONTAINING 2.32 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE II BY METES AND BOUNDS.

Greenwich Capital/Anderson Station
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TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENT, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30 AND AMENDED IN DEED BOOK D-1171 AT PAGE 350.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 405.

THIS BEING THE SAME PROPERTY CONVEYED TO FONTAINE BUSINESS PARK, LLC, ET. AL., BY DEED OF AP SOUTHEAST PORTFOLIO PARTNERS, L.P., DATED DECEMBER 18, 2007 AND RECORDED DECEMBER 18, 2007, IN RECORD BOOK 1384 AT PAGE 3712

Richland County ROD

Richard W. Rodden

Greenwich Capital/Anderson Station
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Instrument: 2007110733

Book/Page: R1384: 3763

Date/Time: 12/18/2007 9:41:42 AM

Recording Requested By:

When Recorded Mail To:

Greenwich Capital Financial Products, Inc.,
c/o Allen Matkins Leck Gamble Mallory &
Natsis LLP
515 South Figueroa Street, 7th Floor
Los Angeles, CA 90071-3398
Attention: Gregg J. Loubier

Book 1384-3763

2007110733 12/18/2007 09:41:42.880
Fee: \$45.00 County Tax: \$0.00

Assumption Agreement
State Tax: \$0.00



2007110733 Richard W. Rodden

Richland County ROD

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LOAN ASSUMPTION AGREEMENT (Additional Borrowers)

THIS LOAN ASSUMPTION AGREEMENT (the "Agreement") is entered into as of December 14, 2007, by and between each of the entities listed on Exhibit A hereto (each an "Additional Borrower"), FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company ("Original Borrower"), and GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation ("Lender"), with respect to the following facts:

A. Original Borrower and Lender have entered into a certain Loan Agreement dated as of December 14, 2007 (as amended, modified, restated, consolidated or supplemented from time to time, the "Loan Agreement") pursuant to which Lender has agreed to make a secured loan to Original Borrower in the maximum principal amount of \$16,300,000 (the "Loan"), which loan is evidenced by a Promissory Note dated as of December 14, 2007 (the "Note"). Capitalized terms used herein and not herein defined shall have the meanings assigned to such terms in the Loan Agreement.

B. Original Borrower's obligations to Lender under the Loan Agreement are secured by (a) a Mortgage, Assignment of Leases and Rents and Security Agreement (the "Instrument") dated concurrently with the Note made by Original Borrower, in favor of Lender, encumbering the real property described in Exhibit B attached hereto and incorporated herein by this reference (the "Property"), and (b) an Assignment of Leases and Rents dated concurrently with the Note made by Original Borrower in favor of Lender (the "Lease Assignment"), and (c) the other Loan Documents made by Original Borrower to evidence and secure the Loan. The Instrument and the Lease Assignment were duly recorded in the Official Records of Richland County, South Carolina.

C. The Loan Agreement contemplates that, from time to time, tenants-in-common will acquire ownership interests in the Property when tenants-in-common are added as "Borrower" under the Loan Agreement. Original Borrower desires to sell tenant-in-common interests in the Property to Additional Borrower in the percentage amounts set forth on Exhibit A hereto, and has requested Lender to consent to such sale and permit Additional Borrower to

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assume on a joint and several basis the obligations under the Loan Documents as hereinafter provided. Lender consents to the above-described transfer and loan assumption on the terms and subject to the conditions contained in this Agreement.

NOW, THEREFORE, in consideration of the foregoing and other consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Assumption of Obligations. Additional Borrower hereby assumes, on a joint and several basis with Original Borrower and any and all other tenants-in-common that have previously assumed the Loan, all of Original Borrower's obligations and agreements under the Loan Agreement, the Note, the Instrument, the Lease Assignment and all of the other Loan Documents (but expressly excluding the Guaranty of Recourse Obligations executed and delivered by Kevin Fitzgerald); all of the recitals, terms, waivers and conditions of which are incorporated herein by this reference, to the same extent and with the same effect as if Additional Borrower were an original party to each of such Loan Documents together with Original Borrower. All references to "Borrower" or "TIC Borrower" in the Loan Agreement, the Note, the Instrument and the other Loan Documents, "Assignor" in the Lease Assignment (but again excluding the Guaranty of Recourse Obligations) shall include Additional Borrower. Additional Borrower acknowledges and agrees that the liens created by the Instrument and the Lease Assignment and the other Loan Documents creating security interests encumber both presently owned and after-acquired real and personal property of Additional Borrower relating to the Property, that Additional Borrower has no defense or offsets against Lender under the Loan Documents or with respect to the Loan, and that no provision of any of the Loan Documents has been waived by the Lender.

2. No Consents Necessary. Original Borrower hereby represents and warrants to Lender that: (i) to its best actual knowledge, no Event of Default, breach or failure of condition has occurred, or would exist with notice or the lapse of time or both, under any of the Loan Documents (as modified by this Agreement); (ii) that to its best actual knowledge, all representations and warranties herein and in the other Loan Documents are true and correct as of the date hereof; and (iii) no consent to the transfer of the interest in the Property to Additional Borrower is required under any agreement to which Original Borrower is a party, including, without limitation, under any lease, construction agreement, operating agreement, deed of trust, mortgage or security instrument (other than the Loan Documents). Additional Borrower hereby represents and warrants to Lender that (x) to its best actual knowledge, all representations and warranties herein and in the other Loan Documents are true and correct as of the date hereof; and (y) no consent to the transfer of the interest in the Property to Additional Borrower is required under any agreement to which Additional Borrower is a party, including, without limitation, under any lease, construction agreement, operating agreement, deed of trust, mortgage or security instrument (other than the Loan Documents).

3. Knowledge of Loan Documents. Additional Borrower warrants that Additional Borrower has personal knowledge of all terms and conditions of the Loan Documents, and further agrees that Lender has no obligations or duty to provide any information to Additional Borrower regarding the terms and conditions of the Loan Documents. Additional Borrower further understands and acknowledges that, except as expressly provided in writing executed by Additional Borrower, Lender has not waived any right of Lender or obligation under the Loan

Documents and Lender has not agreed to any modification of any provision of any Loan Documents or to any extension of the Loan.

4. [Deleted]

5. Limited Recourse. Section 10 of the Loan Agreement includes certain provisions regarding limitation of the personal liability of Original Borrower for principal and interest evidenced by the Note and for the personal liability of Original Borrower for certain recourse carve-outs and exceptions to the limits on personal liability. Except as set forth in Section 10 of the Loan Agreement, neither the Additional Borrower, nor its members, shall have any liability to Lender other than Lender's remedies against the Property and other collateral given as security for the Loan.

6. Confirmation of Guaranty and Reaffirmation of Liability. Nothing contained herein is intended to terminate or revoke any guaranties or indemnities of liabilities and obligations of Kevin Fitzgerald as original Guarantor under the Guaranty of Recourse Obligations to Lender and all such guaranties shall continue in full force and effect.

7. Miscellaneous. No reference to this Agreement is necessary in any instrument or document at any time referring to the Loan Documents. Any reference to any Loan Documents shall be deemed a reference to such Loan Document as amended hereby.

8. No Other Amendments. Except as provided herein, the Loan Documents shall continue unmodified and remain in full force and effect.

9. Notice. Any notice, demand or other communication required or permitted to be given to any party under this Agreement shall be in writing and shall be personally delivered, mailed by United States mail, as certified or registered matter, return receipt requested,

If to Lender:

Greenwich Capital Financial Products, Inc., 600 Steamboat Road, Greenwich, Connecticut 06830, Attention: Mortgage Loan Department, Telecopier (203) 618-2052,

with a copy to:

Allen Matkins Leck Gamble Mallory & Natis LLP, 515 S. Figueroa Street, 7th Floor, Los Angeles, California 90071, Attention: Gregg J. Loubier, Telecopier: (213) 620-8816;

If to any Additional Borrower:

[Name of Borrower], 5 Financial Plaza, Suite 205, Napa, California 94558, Attention: Michael Schwartz and Stephen Corea, Telecopier: (707) 929-1600.

All notices given in accordance with this Section shall be effective when actually received; provided, however, that non-receipt of any notice as a result of a change of address of which the sending party was not notified or as a result of any party's refusal to accept delivery shall be

deemed receipt. Any party may change its address for notice purposes under this section by giving written notice of such change to the other in the manner provided for the giving of notice above.

[instrument continues next page]

Richard County ROD

Richard W. Rodden

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Instrument: 2007110733

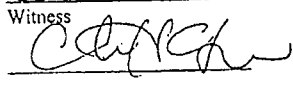
Book/Page: R1384 : 3767

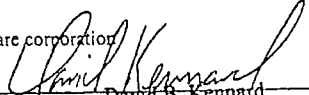
Date/Time: 12/18/2007 9:41:42 AM

LENDER

Signed, sealed and delivered in the presence of:

GREENWICH CAPITAL FINANCIAL PRODUCTS, INC.,
a Delaware corporation


Witness


By: 
Name: David B. Kennard
Title: Managing Director

Witness

ACKNOWLEDGMENT

STATE OF _____)
COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

[signatures continue next page]

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Richard County ROD

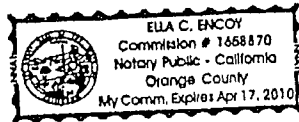
Richard W. Rodden

NOTARY ACKNOWLEDGMENT

STATE OF CALIFORNIA

COUNTY OF ORANGE

On December 13, 2007 (date), before me, Ella C. Encoy (name and title "Notary Public"), personally appeared David B. Kennard (name[s] of signer[s]), personally known to me (or proved to me on the basis of satisfactory evidence) to be the person[s] whose name[s] is/are subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(ies), and that by his/~~her/their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Signature Ella Encoy
(Signature of Notary Public)

My Commission expires: April 17, 2010

(This area for official seal)

Instrument: 2007110733

Book/Page: R1384: 3769

Date/Time: 12/18/2007 9:41:42 AM

IN WITNESS WHEREOF, Original Borrower, Additional Borrower and Lender have executed this Agreement as of the day and year first set forth above.

ORIGINAL BORROWER

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK, LLC,
a Delaware limited liability company

Witness

By: U.S. COMMERCIAL LLC,
a Virginia limited liability company,
Its Manager

Witness

By:

H. Michael Schwartz,
President

ACKNOWLEDGMENT

STATE OF California)
COUNTY OF ORANGE)

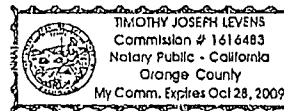
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared H. Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



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Instrument: 2007110733

Book/Page: R1384: 3770

Date/Time: 12/18/2007 9:41:42 AM

ADDITIONAL BORROWER

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 2, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

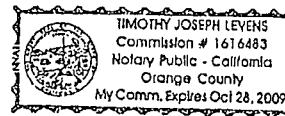
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]

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Instrument: 2007110733

Book/Page: R1384: 3771

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of

FONTAINE BUSINESS PARK 3, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

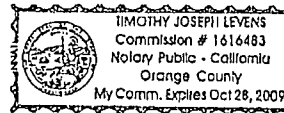
On 12/13/2007, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/~~she~~ they executed the same in his/~~her~~ their authorized capacity(ies); and that by his/~~her~~ their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

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Instrument: 2007110733

Book/Page: R1384 : 3772

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of: FONTAINE BUSINESS PARK 4, LLC,
a Delaware limited liability company

Witness

Gustavo Boron
Witness

By:

Michael Schwartz
Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

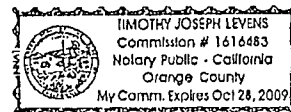
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



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Instrument: 2007110733

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Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:

Witness

Witness

FONTAINE BUSINESS PARK 5, LLC,
a Delaware limited liability company

By:

Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

STATE OF California)
)
COUNTY OF Orange)

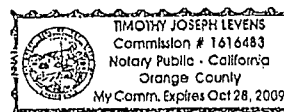
On 12/13/2007, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



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Instrument: 2007110733

Book/Page: R1384 : 3774

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence ofFONTAINE BUSINESS PARK 6, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

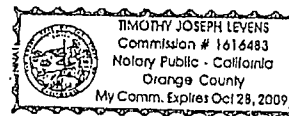
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



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Instrument: 2007 110733

Book/Page: R1384 : 3775

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:FONTAINE BUSINESS PARK 7, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

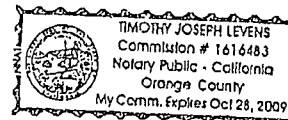
On 12/13/2007, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



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Instrument: 2007110733

Book/Page: R1394 : 3776

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of: Fontaine Business Park 8, LLC,
a Delaware limited liability company

By: [Signature]
Name: Michael Schwartz
Title: Vice President

Witness: [Signature]
Witness: Quintero Boron

ACKNOWLEDGMENT

STATE OF California)
COUNTY OF Orange)

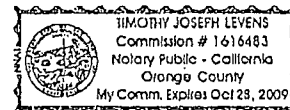
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature [Signature]

(SEAL)

[signatures continue next page]



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Instrument: 2007110733

Book/Page: R1384 - 3777

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 9, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

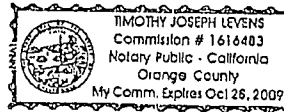
STATE OF CALIFORNIA)
COUNTY OF ORANGE)

On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)



[signatures continue next page]

778974.07/LA
03534-143/12-12-07/mnj/Amnj

Instrument: 2007110733

Book/Page: R1384 : 3778

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 10, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

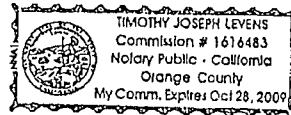
STATE OF CALIFORNIA)
COUNTY OF ORANGE)

On 12/19/2007, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)



[signatures continue next page]

178552 07/1.A
Q2554-143/12-12-07/mj/mnj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384: 3779

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of: FONTAINE BUSINESS PARK 11, LLC,
a Delaware limited liability company

[Signature]
Witness

By:

[Signature]
Name: Michael Schwartz
Title: Vice President

Quintero Bonds
Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

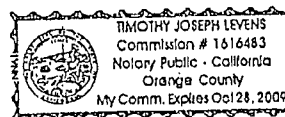
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature [Signature]

(SEAL)

[signatures continue next page]



778924.07/LA
03534-143/12-12-07/amyj/amyj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3780

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 12, LLC,
a Delaware limited liability company

Witness

By:

Name: Michel Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

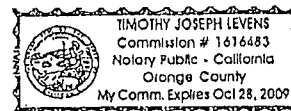
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michel Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



718924.07/LA
G:\334-143\12-17-07\mmj\hmmj

Instrument: 2007110733

Book/Page: R1384 : 3781

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:

Witness

Witness

FONTAINE BUSINESS PARK 13, LLC,
a Delaware limited liability company

By:

Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

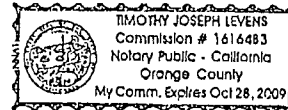
On 12/13/2007, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature

(SEAL)

[signatures continue next page]

778924.07/LA
G3334-143/12-12-07/inn/jm/hj

Instrument: 2007110733

Book/Page: R1384 : 3782

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:

Witness

Witness

FONTAINE BUSINESS PARK 14, L.L.C.,
a Delaware limited liability company;

By:

Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

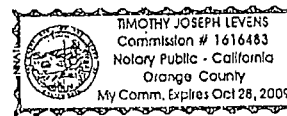
STATE OF California)
COUNTY OF Orange)

On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)



[signatures continue next page]

118024.07/LA
G3534-143/12-12-07:nmj/nmj

This document is not in scale

Instrument: 2007110733

Book/Page: R1384 : 3783

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 15, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF California)
COUNTY OF Orange)

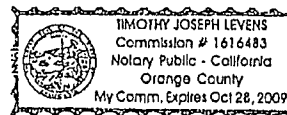
On 12/19/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]

778924.07/LA
03131-143/12-12-07/mnj/tmj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3784

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 16, LLC,
a Delaware limited liability company[Signature]
Witness

By:

Name: Michael Schwartz
Title: Vice PresidentQuintus Boron
Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

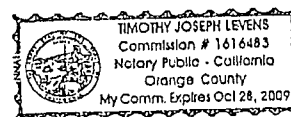
On 12/13/07, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]

778924.07/LA
03334-143/12-12-07/mnj/mnj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384: 3785

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:FONTAINE BUSINESS PARK 17, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

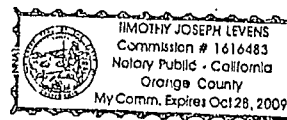
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]

778924.07/LA
G3534-143/12-12-07/nw/j/rmj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384: 3786

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence ofFONTAINE BUSINESS PARK 18, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF California)COUNTY OF Orange)

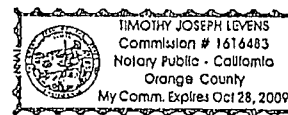
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



775924.07A.A
G3334-143/12-12-07/levisj/levisj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3787

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

[Signature]
Witness[Signature]
WitnessFONTAINE BUSINESS PARK 19, LLC,
a Delaware limited liability companyBy: [Signature]Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

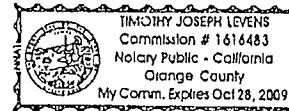
STATE OF CALIFORNIA)
COUNTY OF ORANGE)

On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature: [Signature]

(SEAL)



[signatures continue next page]

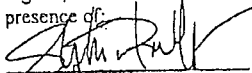
178024.07/LA
G3334-143/12-12-07/nmj/nmj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384: 3788

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:
WitnessGustavo Borer
WitnessFONTAINE BUSINESS PARK 20, LLC,
a Delaware limited liability company

By:

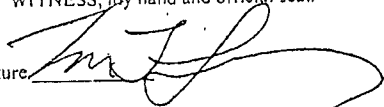
Michael Schwartz
Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

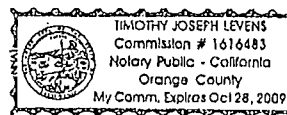
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature: 

(SEAL)

[signatures continue next page]

178924.07/LA
G3524-143/12-12-07/minj/minj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384: 3789

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:

Witness

Witness

FONTAINE BUSINESS PARK 21, LLC,
a Delaware limited liability company

By:

Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

STATE OF California)COUNTY OF Orange)

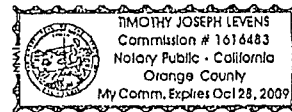
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



778924.07/LA
C3534-143/12-12-07/minj/minj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3790

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of:[Signature]
WitnessGustavo Bolo
WitnessFONTAINE BUSINESS PARK 22, LLC,
a Delaware limited liability company

By:

[Signature]
Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

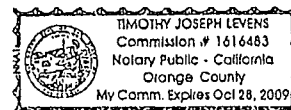
WITNESS, my hand and official seal.

Signature

[Signature]

(SEAL)

[signatures continue next page]

778924.07/LA
Q5554-143/12-12-07/mnj/mnj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3791

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 23, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF California)
COUNTY OF Orange)

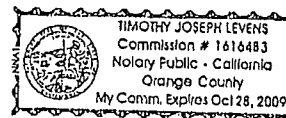
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



718924 07/LA
G3534-1-13/12-07/nmj/hnnj

Instrument: 2007110733

Book/Page: R1384: 3792

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 24, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

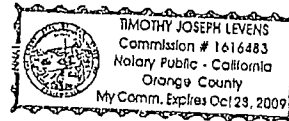
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



778924.07/LA
G3534-143/12-12-07/mnj/mnj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384, 3793

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 25, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF _____)

COUNTY OF _____)

STATE OF CALIFORNIA)COUNTY OF ORANGE)

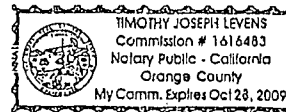
On 12/13/2007, before me Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]

778924.07/LA
G3134-143/12-12-07/mmj/mmj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 - 3794

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the
presence of: [Signature]FONTAINE BUSINESS PARK 26, LLC,
a Delaware limited liability company

Witness

By: [Signature]Name: Michael Schwartz
Title: Vice President

Witness

Quintan Proton

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

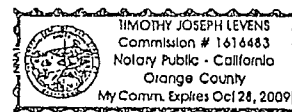
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature [Signature]

(SEAL)

[signatures continue next page]



178924.07/LA
03534-142/12-12-07/mnj/mnj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3795

Date/Time: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of: FONTAINE BUSINESS PARK 27, LLC,
a Delaware limited liability company

Witness

Witness

By:

Name: Michael Schwartz
Title: Vice President

ACKNOWLEDGMENT

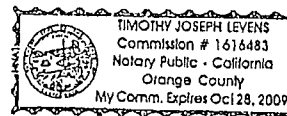
STATE OF California)
COUNTY OF Orange)

On 12/13/2007, before me, TIMOTHY JOSEPH LEVENS, the undersigned, a notary public for the state, personally appeared MICHAEL SCHWARTZ, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)



[signatures continue next page]

7:8924.07/L/A
G3534-143/12-12-07/nmj/nmj

Instrument: 2007110733

Book/Page: R1384 : 3796

DateTime: 12/18/2007 9:41:42 AM

Signed, sealed and delivered in the presence of

FONTAINE BUSINESS PARK 28, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

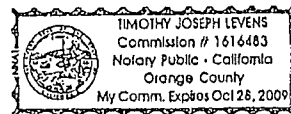
On 12/13/2007, before me, Timothy Joseph Levens, the undersigned, a notary public for the state, personally appeared Michael Schwartz, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature

(SEAL)

[signatures continue next page]



778924.07/LA
G3534-143/12-12-07/nnj/nnj

This document is not to scale

Instrument: 2007110733

Book/Page: R1384 : 3797

Date/Time: 12/18/2007 9:41:42 AM

ORIGINAL GUARANTOR (for the purposes of Section 6 above)

Signed, sealed and delivered in the presence of:

[Signature]
Witness[Signature]
KEVIN FITZGERALD, individually[Signature]
Witness

ACKNOWLEDGMENT

STATE OF California)
COUNTY OF Napa)

On December 13, 2007, before me, Maria Alana Lazzara, the undersigned, a notary public for the state, personally appeared Kevin Fitzgerald personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(~~s~~) whose name(~~s~~) is/~~is~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument the person(~~s~~) or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature [Signature] (SEAL)

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63554-443/12-12-07 noty insty

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EXHIBIT A
ADDITIONAL BORROWERS

<u>TIC Entity</u>	<u>Interest Percentage</u>
FONTAINE BUSINESS PARK 2, LLC	5.149%
FONTAINE BUSINESS PARK 3, LLC	5.149%
FONTAINE BUSINESS PARK 4, LLC	5.959%
FONTAINE BUSINESS PARK 5, LLC	8.454%
FONTAINE BUSINESS PARK 6, LLC	3.263%
FONTAINE BUSINESS PARK 7, LLC	8.454%
FONTAINE BUSINESS PARK 8, LLC	0.896%
FONTAINE BUSINESS PARK 9, LLC	1.957%
FONTAINE BUSINESS PARK 10, LLC	2.714%
FONTAINE BUSINESS PARK 11, LLC	1.264%
FONTAINE BUSINESS PARK 12, LLC	2.864%
FONTAINE BUSINESS PARK 13, LLC	4.136%
FONTAINE BUSINESS PARK 14, LLC	1.233%
FONTAINE BUSINESS PARK 15, LLC	1.240%
FONTAINE BUSINESS PARK 16, LLC	1.267%
FONTAINE BUSINESS PARK 17, LLC	2.871%
FONTAINE BUSINESS PARK 18, LLC	5.991%
FONTAINE BUSINESS PARK 19, LLC	1.267%
FONTAINE BUSINESS PARK 20, LLC	1.344%
FONTAINE BUSINESS PARK 21, LLC	0.843%
FONTAINE BUSINESS PARK 22, LLC	1.704%

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FONTAINE BUSINESS PARK 23, LLC	4.167%
FONTAINE BUSINESS PARK 24, LLC	8.454%
FONTAINE BUSINESS PARK 26, LLC	0.843%
FONTAINE BUSINESS PARK 28, LLC	12.740%

Richard County ROD

Richard W. Rodden

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-2-

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Instrument: 2007110733

Book/Page: R1384:3800

DateTime: 12/18/2007 9:41:42 AM

EXHIBIT BLegal Description of PropertyTRACT 1 (FONTAINE I, 300 ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 5, FONTAINE I, CONTAINING 13.60 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 12, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION I BY METES AND BOUNDS.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30, AS AMENDED IN DEED BOOK D-1171 AT PAGE 350, AND AS FURTHER AMENDED IN DEED BOOK D-1187 AT PAGE 550.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 386.

TRACT 2 (FONTAINE II, ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 6, FONTAINE II, CONTAINING 9.08 ACRES, MORE OR LESS, ON THE "SUBDIVISION" PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE II BY METES AND BOUNDS.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30, AS AMENDED IN DEED BOOK D-1171 AT PAGE 350, AND AS FURTHER AMENDED IN DEED BOOK D-1187 AT PAGE 550.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED

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DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 393.

TRACT 3 (FONTAINE III, 200 ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 3-A, CONTAINING 0.82 OF AN ACRE, MORE OR LESS, AND LOT 3-B, CONTAINING 3.96 ACRES, MORE OR LESS. FONTAINE III, CONTAINING IN THE AGGREGATE 4.78 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE III BY METES AND BOUNDS.

TOGETHER WITH, ALSO, NONE EXCLUSIVE PERPETUAL EASEMENTS FOR ACCESS, OVER AND ACROSS THE AREAS IDENTIFIED AS PARCEL "B-1" AND PARCEL "C" ON THE ABOVE-DESCRIBED PLAT AND THE RIGHT OF PEDESTRIAN AND VEHICULAR ACCESS FOR INGRESS, EGRESS AND REGRESS OVER AND ACROSS ALL EXISTING INTERNAL DRIVES WITHIN THE PARKING LOT(S) NOW OR HEREAFTER LOCATED ON THE STATE OF SOUTH CAROLINA RETIREMENT SYSTEMS PROPERTY, AS SHOWN ON A PLAT RECORDED IN PLAT BOOK 54 AT PAGE 1448, AND AS DESCRIBED IN THE DEED FROM NATIONS BANK OF NORTH CAROLINA, N.A., AS TRUSTEE FOR THE NCNB REAL ESTATE FUND, TO THE STATE OF SOUTH CAROLINA RETIREMENT SYSTEMS, A DIVISION OF THE STATE OF SOUTH CAROLINA BUDGET AND CONTROL BOARD, DATED JULY 16, 1992 AND RECORDED ON JULY 16, 1992 IN RICHLAND COUNTY ROD DEED BOOK D-1100 AT PAGE 350.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENT, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30 AND AMENDED IN DEED BOOK D-1171 AT PAGE 350.

TRACT 4 (FONTAINE V, N/S ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE BEING SHOWN AS LOT 4, FONTAINE V, CONTAINING 2.32 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE II BY METES AND BOUNDS.

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Instrument: 2007110733

Book/Page: R1384 : 3802

DateTime: 12/18/2007 9:41:42 AM

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN
DECLARATION OF EASEMENT, COVENANTS, CONDITIONS AND RESTRICTIONS
FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED
BOOK D-1096 AT PAGE 30 AND AMENDED IN DEED BOOK D-1171 AT PAGE 350.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE
EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED
DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN
RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 405.

THIS BEING THE SAME PROPERTY CONVEYED TO FONTAINE BUSINESS PARK,
LLC, ET. AL., BY DEED OF AP SOUTHEAST PORTFOLIO PARTNERS, L.P., DATED
DECEMBER 12, 2007 AND RECORDED DECEMBER 18, 2007, IN RECORD BOOK
1384 AT PAGE 3712

Richland County ROD

Richard W. Rodden

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Recording Requested By:

When Recorded Mail To:

Greenwich Capital Financial Products, Inc.,
c/o Allen Matkins Leck Gamble
Mallory & Natsis LLP
515 South Figueroa Street, 7th Floor
Los Angeles, CA 90071-3398
Attention: Gregg J. Loubier

Book 1399-3207
2008010611 02/08/2008 15:30:24:01
Fee: \$30.00 County Tax: \$0.00 State Tax: \$0.00
Assumption Agreement
2008010611 Richard W. Rodden
Richland County RCO

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FIRST AMENDMENT TO LOAN ASSUMPTION AGREEMENT
(TIC Borrowers)

THIS FIRST AMENDMENT TO LOAN ASSUMPTION AGREEMENT (the "Agreement") is entered into as of January 28, 2008, by and between each of the entities listed on Exhibit A hereto (each an "TIC Borrower"), FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company ("Original Borrower"), and GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation ("Lender"), with respect to the following facts:

A. Original Borrower and Lender entered into a certain Loan Agreement dated as of December 14, 2007 (as amended, modified, restated, consolidated or supplemented from time to time, the "Loan Agreement") pursuant to which Lender made a secured loan to Original Borrower in the maximum principal amount of \$16,300,000 (the "Loan"), which loan is evidenced by a Promissory Note dated as of December 14, 2007 (the "Note"). Capitalized terms used herein and not herein defined shall have the meanings assigned to such terms in the Loan Agreement.

B. Original Borrower's obligations to Lender under the Loan Agreement are secured by (a) a Mortgage, Assignment of Leases and Rents and Security Agreement (the "Instrument") dated concurrently with the Note made by Original Borrower, in favor of Lender, encumbering the real property described in Exhibit B attached hereto and incorporated herein by this reference (the "Property"), and (b) an Assignment of Leases and Rents dated concurrently with the Note made by Original Borrower in favor of Lender (the "Lease Assignment"), and (c) the other Loan Documents made by Original Borrower to evidence and secure the Loan. The Instrument and the Lease Assignment were duly recorded in the Official Records of Richland County, South Carolina.

C. The Loan Agreement contemplates that, from time to time, tenants-in-common will acquire ownership interests in the Property when tenants-in-common are added as "Borrower" under the Loan Agreement. Certain additional borrowers previously acquired tenant-in-common interests from Original Borrower and assumed obligations under the Loan

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substantially concurrently with the making of the Loan to Original Borrower pursuant to that certain Loan Assumption Agreement dated as of December 14, 2007.

D. Original Borrower desires to further sell tenant-in-common interests in the Property to TIC Borrowers in the percentage amounts set forth on Exhibit A hereto, and has requested Lender to consent to such sale and permit such TIC Borrowers to assume on a joint and several basis the obligations under the Loan Documents as hereinafter provided. Lender consents to the above-described transfer and loan assumption on the terms and subject to the conditions contained in this Agreement.

NOW, THEREFORE, in consideration of the foregoing and other consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Assumption of Obligations.

A. Each TIC Borrower undersigned below hereby assumes, on a joint and several basis with Original Borrower and all other tenants-in-common that have previously assumed the Loan, all of Original Borrower's obligations and agreements under the Loan Agreement, the Note, the Instrument, the Lease Assignment and all of the other Loan Documents (but expressly excluding the Guaranty of Recourse Obligations executed and delivered by U.S. Commercial LLC, a Virginia limited liability company, and Kevin Fitzgerald, an individual); all of the recitals, terms, waivers and conditions of which are incorporated herein by this reference, to the same extent and with the same effect as if each TIC Borrower were an original party to each of such Loan Documents together with Original Borrower. All references to "Borrower" or "TIC Borrower" in the Loan Agreement, the Note, the Instrument and the other Loan Documents, "Assignor" in the Lease Assignment (but again excluding the Guaranty of Recourse Obligations) shall include Each TIC Borrower.

B. Each TIC Borrower acknowledges and agrees that the liens created by the Instrument and the Lease Assignment and the other Loan Documents creating security interests encumber both presently owned and after-acquired real and personal property of each TIC Borrower relating to the Property, that each TIC Borrower has no defense or offsets against Lender under the Loan Documents or with respect to the Loan, and that no provision of any of the Loan Documents has been waived by the Lender.

2. No Consents Necessary.

A. Original Borrower hereby represents and warrants to Lender that: (i) to its best actual knowledge, no Event of Default, breach or failure of condition has occurred, or would exist with notice or the lapse of time or both, under any of the Loan Documents (as modified by this Agreement); (ii) that to its best actual knowledge, all representations and warranties herein and in the other Loan Documents are true and correct as of the date hereof; and (iii) no consent to the transfer of the interest in the Property to a TIC Borrower is required under any agreement to which Original Borrower is a party, including, without limitation, under any lease, construction agreement, operating agreement, deed of trust, mortgage or security instrument (other than the Loan Documents).

B. Each TIC Borrower hereby represents and warrants to Lender that (x) to its best actual knowledge, all representations and warranties herein and in the other Loan Documents are true and correct as of the date hereof; and (y) no consent to the transfer of the interest in the Property to such TIC Borrower is required under any agreement to which such TIC Borrower is a party, including, without limitation, under any lease, construction agreement, operating agreement, deed of trust, mortgage or security instrument (other than the Loan Documents).

3. Knowledge of Loan Documents. Each TIC Borrower warrants that such TIC Borrower has personal knowledge of all terms and conditions of the Loan Documents, and further agrees that Lender has no obligations or duty to provide any information to any TIC Borrower regarding the terms and conditions of the Loan Documents. Each TIC Borrower further understands and acknowledges that, except as expressly provided in writing executed by such TIC Borrower, Lender has not waived any right of Lender or obligation under the Loan Documents and Lender has not agreed to any modification of any provision of any Loan Documents or to any extension of the Loan.

4. Limited Recourse. Section 10 of the Loan Agreement includes certain provisions regarding limitation of the personal liability of Original Borrower for principal and interest evidenced by the Note and for the personal liability of Original Borrower for certain recourse carve-outs and exceptions to the limits on personal liability. Except as set forth in Section 10 of the Loan Agreement, neither a TIC Borrower, nor its members, shall have any liability to Lender other than Lender's remedies against the Property and other collateral given as security for the Loan.

5. Confirmation of Guaranty and Reaffirmation of Liability. Nothing contained herein is intended to terminate or revoke any guaranties or indemnities of liabilities and obligations of U.S. Commercial LLC, a Virginia limited liability company, and Kevin Fitzgerald, an individual, as original Guarantor under the Guaranty of Recourse Obligations to Lender and all such guaranties shall continue in full force and effect.

6. Miscellaneous. No reference to this Agreement is necessary in any instrument or document at any time referring to the Loan Documents. Any reference to any Loan Documents shall be deemed a reference to such Loan Document as amended hereby.

7. No Other Amendments. Except as provided herein, the Loan Documents shall continue unmodified and remain in full force and effect.

8. Notice. Any notice, demand or other communication required or permitted to be given to any party under this Agreement shall be in writing and shall be personally delivered, mailed by United States mail, as certified or registered matter, return receipt requested,

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If to Lender:

Greenwich Capital Financial Products, Inc., 600 Steamboat Road, Greenwich,
Connecticut 06830, Attention: Mortgage Loan Department, Telecopier: (203) 618-2052,

with a copy to:

Allen Matkins Leck Gamble Mallory & Natis LLP, 515 S. Figueroa Street, 7th Floor,
Los Angeles, California 90071, Attention: Gregg J. Loubier, Telecopier: (213) 620-8816;

If to any TIC Borrower:

[Name of Borrower], 5 Financial Plaza, Suite 205, Napa, California 94558, Attention:
Michael Schwartz and Stephen Corea, Telecopier: (707) 929-1600.

All notices given in accordance with this Section shall be effective when actually received;
provided, however, that non-receipt of any notice as a result of a change of address of which the
sending party was not notified or as a result of any party's refusal to accept delivery shall be
deemed receipt. Any party may change its address for notice purposes under this section by
giving written notice of such change to the other in the manner provided for the giving of notice
above.

[instrument continues next page]

IN WITNESS WHEREOF, the following parties have executed this Agreement as of the day and year first set forth above.

ORIGINAL BORROWER

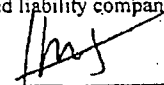
Signed, sealed and delivered in the presence of:

Witness

Witness

FONTAINE BUSINESS PARK, LLC,
a Delaware limited liability company

By: **U.S. COMMERCIAL LLC,**
a Virginia limited liability company,
Its Manager

By: 
H. Michael Schwartz,
President

ACKNOWLEDGMENT

SEE ATTACHED 
NOTARIAL CERTIFICATE

STATE OF _____)
COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

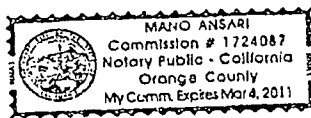
[signatures continue next page]

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Orange

On 02-01-08 before me, MAHO ANSARI, A NOTARY PUBLIC
Date Name and Title of the Officer
personally appeared H. Michael Schwartz
Name(s) of Signer(s)



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Maho Ansari
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney In Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer's Name: _____

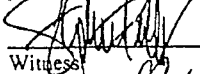
- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney In Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

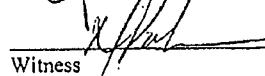
Signer is Representing: _____

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OF SIGNER
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GUARANTOR (as to Section 5 above)

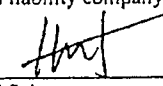
Signed, sealed and delivered in the presence of:

Witness 

Witness 

U.S. COMMERCIAL LLC,
a Virginia limited liability company,
Its Manager

By:


H. Michael Schwartz,
President

ACKNOWLEDGMENT

SEE ATTACHED 
NOTARIAL CERTIFICATE

STATE OF _____)

COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

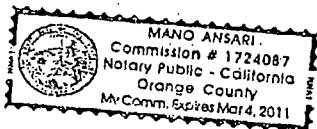
[signatures continue next page]

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Orange

On 02-01-08 before me, Mano Ansari, Notary Public
personally appeared H. Michael Schwartz



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mano Ansari

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
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Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

GUARANTOR (as to Section 5 above)

Signed, sealed and delivered in the
presence of

Witness

Witness

KEVIN FITZGERALD

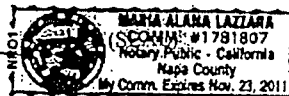
ACKNOWLEDGMENT

STATE OF California)
COUNTY OF Napa)

On Feb 1, 2008, before me, MARIA ALMA LAZZARA, the undersigned, a notary public for the state, personally appeared Kevin Fitzgerald (~~personally known to me~~ or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature



[signatures continue next page]

LENDER

Signed, sealed and delivered in the presence of:

GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation

By:

Name:

Title:

Ella Enay

Witness

Cuffe

Witness

ACKNOWLEDGMENT

STATE OF _____)

COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

[signatures continue next page]

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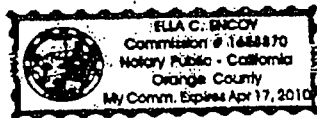
NOTARY ACKNOWLEDGMENT

STATE OF CALIFORNIA

COUNTY OF ORANGE

On February 1, 2008 before me, Ella C. Encov, personally appeared David B. Kennard, who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] is/are subscribed to the within instrument and acknowledged to me that he/~~she~~/they executed the same in his/~~her~~/their authorized capacity(ies), and that by his/~~her~~/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.



WITNESS my hand and official seal.

Signature Ella C. Encov
(Signature of Notary Public)

My Commission expires: April 17, 2010

(This area for official seal)

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TIC BORROWERS

Signed, sealed and delivered in the presence of

FONTAINE BUSINESS PARK 25, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

**SEE ATTACHED
NOTARIAL CERTIFICATE** *MC*

STATE OF _____)
COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

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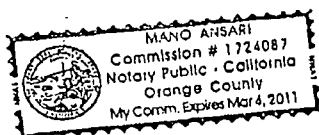
CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Orange

On 02-01-08 before me, Mano Ansari, Notary Public

personally appeared H. Michael Schwartz



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mano Ansari

Place Notary Seal Above

OPTIONAL

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☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney In Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney In Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 27 LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

SEE ATTACHED *am of*
NOTARIAL CERTIFICATE

STATE OF _____)

COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

[signatures continue next page]

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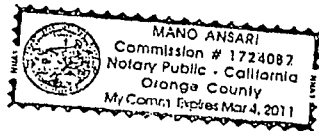
CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Orange

On 02-01-08 before me, Mano Ansari, Notary Public

personally appeared H. Michael Schwartz



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

Signature Mano Ansari

Place Notary Seal Above

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- ☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

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- ☐ Corporate Officer — Title(s): _____
- ☐ Partner — ☐ Limited ☐ General
- ☐ Attorney in Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 29, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

ACKNOWLEDGMENT

SEE ATTACHED *PH* *ct*
NOTARIAL CERTIFICATE

STATE OF _____)

COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

[signatures continue next page]

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Orange

On 02-01-08 before me, Mano Ansari, Notary Public

personally appeared H. Michael Schwartz



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within Instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mano Ansari

Signature of Notary Public

Place Notary Seal Above

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- ☐ Partner — ☐ Limited ☐ General
- ☐ Attorney in Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
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- Signer's Name: _____
- ☐ Individual
- ☐ Corporate Officer — Title(s): _____
- ☐ Partner — ☐ Limited ☐ General
- ☐ Attorney in Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 30, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

SEE ATTACHED *M. S.*
NOTARIAL CERTIFICATE

ACKNOWLEDGMENT

STATE OF _____)
COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

(SEAL)

[signatures continue next page]

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CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

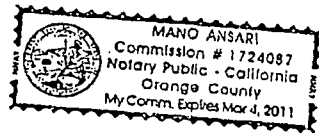
State of California

County of Orange

On 02-01-08 before me, Mano Ansari, Notary Public

personally appeared H. Michael Schwartz

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I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mano Ansari

Place Notary Seal Above

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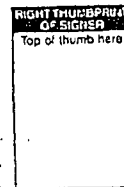
Signer Is Representing: _____



Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney In Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____



Signed, sealed and delivered in the presence of:

FONTAINE BUSINESS PARK 31, LLC,
a Delaware limited liability company

Witness

By:

Name: Michael Schwartz
Title: Vice President

Witness

SEE ATTACHED *MA*
NOTARIAL CERTIFICATE

ACKNOWLEDGMENT

STATE OF _____)
COUNTY OF _____)

On _____, before me, _____, the undersigned, a notary public for the state, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS, my hand and official seal.

Signature _____

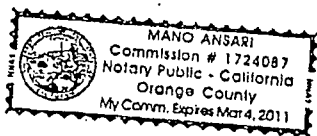
(SEAL)

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Orange

On 02-01-08 before me, Mano Ansari, Notary Public
personally appeared H. Michael Schuartz



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mano Ansari

Signature of Notary Public

Place Notary Seal Above

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☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

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Signer's Name: _____

- ☐ Individual
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☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

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EXHIBIT A
TIC BORROWERS

<u>TIC Entity</u>	<u>Interest Percentage</u>
FONTAINE BUSINESS PARK 25, LLC, a Delaware limited liability company	0.283%
FONTAINE BUSINESS PARK 27, LLC, a Delaware limited liability company	1.524%
FONTAINE BUSINESS PARK 29, LLC, a Delaware limited liability company	0.283%
FONTAINE BUSINESS PARK 30, LLC, a Delaware limited liability company	1.689%
FONTAINE BUSINESS PARK 31, LLC, a Delaware limited liability company	0.997%

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EXHIBIT B

Legal Description of Property

TRACT 1 (FONTAINE I, 100 ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 5, FONTAINE I, CONTAINING 13.60 ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 12, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 91 | 2, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION BY METES AND BOUNDS.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30, AS AMENDED IN DEED BOOK D-1171 AT PAGE 350, AND AS FURTHER AMENDED IN DEED BOOK D-1187 AT PAGE 550.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 386.

TRACT 2 (FONTAINE II, ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA, ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 6, FONTAINE II, CONTAINING 9.08 ACRES, MORE OR LESS, ON THE "SUBDIVISION" PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK 54 AT PAGE 91 | 2, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE II BY METES AND BOUNDS.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED BOOK D-1096 AT PAGE 30, AS AMENDED IN DEED BOOK D-1171 AT PAGE 350, AND AS FURTHER AMENDED IN DEED BOOK D-1187 AT PAGE 550.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED

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DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN
RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 393.

TRACT 3 (FONTAINE III, 200 ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE
PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA,
ON ARBOR LAKE DRIVE, BEING SHOWN AS LOT 3-A, CONTAINING 0.82 OF AN
ACRE, MORE OR LESS, AND LOT 3-B, CONTAINING 3.96 ACRES, MORE OR LESS.
FONTAINE III, CONTAINING IN THE AGGREGATE 4.78 ACRES, MORE OR LESS, ON
THE "SUBDIVISION PLAT OF FONTAINE BUSINESS CENTER" PREPARED BY W.K.
DICKSON ENGINEERS, PLANNERS AND SURVEYORS, DATED SEPTEMBER 21, 1993
AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND COUNTY ROD PLAT BOOK
54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS HEREBY MADE FOR A MORE
PARTICULAR DESCRIPTION OF FONTAINE III BY METES AND BOUNDS.

TOGETHER WITH, ALSO, NONE EXCLUSIVE PERPETUAL EASEMENTS FOR ACCESS,
OVER AND ACROSS THE AREAS IDENTIFIED AS PARCEL "B-1" AND PARCEL "C" ON
THE ABOVE-DESCRIBED PLAT AND THE RIGHT OF PEDESTRIAN AND VEHICULAR
ACCESS FOR INGRESS, EGRESS AND REGRESS OVER AND ACROSS ALL EXISTING
INTERNAL DRIVES WITHIN THE PARKING LOT(S) NOW OR HEREAFTER LOCATED
ON THE STATE OF SOUTH CAROLINA RETIREMENT SYSTEMS PROPERTY, AS
SHOWN ON A PLAT RECORDED IN PLAT BOOK 54 AT PAGE 1448, AND AS
DESCRIBED IN THE DEED FROM NATIONS BANK OF NORTH CAROLINA, N.A., AS
TRUSTEE FOR THE NCNB REAL ESTATE FUND, TO THE STATE OF SOUTH
CAROLINA RETIREMENT SYSTEMS, A DIVISION OF THE STATE OF SOUTH
CAROLINA BUDGET AND CONTROL BOARD, DATED JULY 16, 1992 AND RECORDED
ON JULY 16, 1992 IN RICHLAND COUNTY ROD DEED BOOK D-1100 AT PAGE 350.

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN
DECLARATION OF EASEMENT, COVENANTS, CONDITIONS AND RESTRICTIONS
FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED
BOOK D-1096 AT PAGE 30 AND AMENDED IN DEED BOOK D-1171 AT PAGE 350.

TRACT 4 (FONTAINE V, N/S ARBOR LAKE DRIVE):

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND (THE "FEE SIMPLE
PARCEL") LYING AND BEING SITUATE IN RICHLAND COUNTY, SOUTH CAROLINA,
ON ARBOR LAKE DRIVE BEING SHOWN AS LOT 4, FONTAINE V, CONTAINING 2.32
ACRES, MORE OR LESS, ON THE "SUBDIVISION PLAT OF FONTAINE BUSINESS
CENTER" PREPARED BY W.K. DICKSON ENGINEERS, PLANNERS AND SURVEYORS,
DATED SEPTEMBER 21, 1993 AND RECORDED ON NOVEMBER 1, 1993 IN RICHLAND
COUNTY ROD PLAT BOOK 54 AT PAGE 9112, TO WHICH PLAT REFERENCE IS
HEREBY MADE FOR A MORE PARTICULAR DESCRIPTION OF FONTAINE II BY
METES AND BOUNDS.

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Instrument Number: 2008010611 BookPage: R1399:3231 Datetime: 02/08/2008 15:36:24:617

TOGETHER WITH ALL APPURTENANT EASEMENT RIGHTS AS SET FORTH IN
DECLARATION OF EASEMENT, COVENANTS, CONDITIONS AND RESTRICTIONS
FOR FONTAINE BUSINESS CENTER RECORDED IN RICHLAND COUNTY ROD DEED
BOOK D-1096 AT PAGE 30 AND AMENDED IN DEED BOOK D-1171 AT PAGE 350.

TOGETHER WITH AN APPURTENANT AND RESERVED NON-EXCLUSIVE
EASEMENT FOR PURPOSES OF INGRESS AND EGRESS AS SET FORTH IN DEED
DATED NOVEMBER 22, 1993 AND RECORDED ON NOVEMBER 24, 1993 IN
RICHLAND COUNTY ROD DEED BOOK D-1171 AT PAGE 405.

THIS BEING THE SAME PROPERTY CONVEYED TO FONTAINE BUSINESS PARK,
LLC, ET. AL., BY DEED OF AP SOUTHEAST PORTFOLIO PARTNERS, L.P., DATED
DECEMBER 12, 2007 AND RECORDED DECEMBER 18, 2007, IN RECORD BOOK
1384 AT PAGE 3712.

TMS NO(S): 14207-02-01
14207-02-02
14203-13-02
14203-18-01

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C3534-1437-1-31-08(gj/gj)

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,
Plaintiff & Counter-Defendant,
v.
FONTAINE BUSINESS PARK, LLC, *et al.*
Defendants & Counter-Plaintiffs.

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)
)
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MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION
TO STRIKE JURY DEMAND

Defendant/Counter-Plaintiff Fontaine Business Park, LLC, ("Fontaine") submits this Response in opposition to the Motion to Strike Jury Trial Demand filed by Plaintiff/Counter-Defendant DRV Fontaine, LLC ("DRV").

DRV's Motion for to Strike Jury Demand should be denied because Fontaine has demanded a jury trial on its counterclaims, all of which are issues triable of right by a jury. Rule 71 of the South Carolina Rules of Civil Procedure provides that "[a]ctions to foreclose liens . . . shall be tried by the court, and shall *ordinarily* be referred to a master pursuant to Rule 53" (emphasis added). Likewise, Rule 53 of the South Carolina Rules of Civil Procedure provides that in "an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." However, Rule 53 provides that "[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court."

1. A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action.

This is no ordinary foreclosure action. Although DRV has pleaded its case in the placid verbal veneer of a routine foreclosure action, Fontaine has demonstrated the rough-hewn reality of

this matter through its Answer, Affirmative Defenses, and Counterclaims. In its Answer, Fontaine raised a litany of Counterclaims that are quintessentially jury issues.

Indeed, the *essentia* of Fontaine's counterclaims fall squarely within the province of the jury. Among other things, Fontaine has pleaded breach of contract, breach of fiduciary duty, tortious economic duress, tortious interference with contractual and/or business or prospective contractual relations, and reformation of the instruments. *Carolina First Bank v. BADD, LLC*, 733 S.E.2d 619 (S.C.App. Oct. 24, 2012) (A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action); *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (S.C. 2010) (An action seeking damages for breach of fiduciary duty is an action at law); *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (S.C.App. 2012) ("An action in tort for damages is an action at law"); *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (S.C.Ct.App. 2012) ("An action to construe a contract is an action at law"); *Abrens v. State*, 392 S.C. 340, 347-348, 709 S.E.2d 54, 58 (S.C. 2011) ("An action seeking damages for breach of contract is an action at law").

In support of these claims, Fontaine relies upon the allegations in its Answer, Affirmative Defenses, and Counterclaims ("Answer") and the following facts that have been developed during discovery, including:

- (1) DRV declared Fontaine in default under the Loan Agreement, in part, because Fontaine did not pay the reassessed monthly contributions to the reserve accounts (*Complaint*, pp. 21-23, ¶¶ 95-114; *Answer*, pp. 14-19, ¶¶ 68-84).
- (2) Fontaine has raised various defenses that relate to the inherent invalidity of the reassessments to the reserve accounts (*Answer*, pp. 24-27, ¶¶ 104-114).
- (3) Fontaine has alleged that DRV breached the Loan Agreement when it requested a three-year capital expense budget and when it used that budget to reassess the Capital Expense Reserve Account (*Answer*, pp. 14-19, ¶¶ 68-84 & pp. 27-36, ¶¶ 115-203).
- (4) The Loan Agreement only authorized DRV to reassess the monthly payment to the Capital Expense Reserve Account "in its reasonable discretion (based upon its

then-current underwriting standards)” (Plaintiff’s Exhibit A, *Loan Agreement*, p. 24, ¶ 3.4; Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 123-124, 127).

(5) Elliott Liffman had no education, training, or experience as a commercial real estate lender when Plaintiff purchased the Loan Agreement (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 14-16).

(6) Mr. Liffman had no education, training, or experience with underwriting reserve accounts in commercial real estate loans when Plaintiff purchased the Loan Agreement (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 14-16).

(7) Mr. Liffman’s understanding of underwriting standards was “formed by [his] experience” (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 40).

(8) Mr. Liffman’s “general interpretation” of underwriting standards was “not in the loan agreement” (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 37-38).

(9) Mr. Liffman did not refer to the terms of the Loan Agreement to gain an understanding of underwriting standards (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 39-41).

(10) Mr. Liffman does not believe that he needs to be authorized by the Loan Agreement to do anything (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 139, 146).

(11) DRV did not reassess the monthly contribution to the Capital Expense Reserves account based upon any underwriting standards (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 44, 52, 127-135, 194; Defendant’s Ex. B, *Plaintiff’s Discovery Responses*, pp. 9-10, 13-14; Defendant’s Ex. C, *Deposition of Paula Mathews*, p. 60:22-24).

(12) The reassessment of the reserve accounts was not the result of the exercise of “reasonable discretion,” as required by the Loan Agreement, because they were excessive, hypothetical, and resulted from a rejection of actual numbers (Defendant’s Ex. C, *Deposition of Paula Mathews*, pp. 56:14-17, 57:16-24, 60:17-18, 71:18-24, 72:10-11, 72:19-22, 73:10, 103:17-19, 104:9-11, 109:7-17, 110:7-8, 123:13-18, 125:12-16 & 19, 127:4-11, 128:5-11).

(13) DRV reassessed the monthly payment for the Capital Reserve Account from the original amount of \$5,249 to \$54,476.34 (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 126-127, 163-164).

(14) The reassessment amounted to a one-time increase of 1,037% (Defendant’s Ex. A, *Deposition of Elliott Liffman*, pp. 126-127, 163-164).

(15) The Loan Agreement authorized DRV “to increase (or decrease)” the monthly deposit to the Rollover Reserve Account “if the Lender determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing

Expenses" (Plaintiff's Exhibit A, *Loan Agreement*, pp. 24-25, ¶ 3.5; Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 123-124, 127).

(16) DRV increased the monthly deposit to the Rollover Reserve account from \$21,086.50 to \$159,472.91 (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 56:14-17).

(17) The increase in the monthly deposit to the Rollover Reserves account resulted in the imposition of a one-time increase of 756%.

(18) When DRV increased the monthly deposit to the Rollover Reserves account, there were no amounts due or to become due for Approved Leasing Expenses and the account balance was over \$600,000 (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 61:19-23).

(19) DRV based its reassessment of the reserve accounts on a three-year capital expense budget that it requested from CBRE without providing notice to the defendants as required under the Notice provision of the Loan Agreement (Plaintiff's Exhibit A, *Loan Agreement*, pp. 54, ¶ 6.1; Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 137-146, 172).

(20) Mr. Liffman asked Sandra Johnson of CBRE for the three-year capital expense budget without explaining that he intended to use the budget to reassess the reserve accounts while hiding behind the claim that he simply wanted to understand what they expected in the coming years (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 137-146, 172).

(21) The defendants had no reason to believe that the information would be used to reassess the reserve accounts because there is no provision in the Loan Agreement for a three-year capital budget and DRV did not explain its true intentions (Plaintiff's Exhibit A, *Loan Agreement*; Defendant's Ex. A, *Deposition of Elliott Liffman*, p. 137; Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 103:8-13, 104:23-25, 105:10-19, 110:24-25, 188:9-11 & 16-18).

(22) Upon receipt of the notice from DRV concerning the reassessments, Fontaine immediately objected to the reassessments because the reassessments were unreasonable and the three-year capital expense budget was not based upon Fontaine's actual expectations (Defendant's Ex. A, *Deposition of Elliott Liffman*, p. 165).

(23) When DRV reassessed the reserve accounts, it was not acting in accordance with generally accepted standards in the commercial real estate lending industry (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 53-54, 103:8-13, 124:21-24, 140:8-14 & 18).

In these instances, and others, Fontaine has alleged and shown that DRV has engaged in conduct that is arbitrary, capricious, outrageous, and unconscionable. Moreover, DRV's

unconscionable conduct preceded and procured Fontaine's alleged defaults under the Loan Agreement. Accordingly, Fontaine's demand for a jury trial should be granted.

2. Contractual jury trial waivers do not apply to claims that were not contemplated by the parties at the time the contract was entered.

DRV's reliance on contractual waivers in seeking to have this Court strike the defendants' demand for a jury trial is misplaced. As the South Carolina Court of Appeals recently explained, though a contractual jury waiver may be valid in a foreclosure action, such a waiver is not necessarily applicable to counterclaims raised in defense. *See Wachovia Bank v. Blackburn*, 716 S.E.2d 454 (S.C.App. 2011); *Partain v. Upstate Automotive Group*, 689 S.E.2d 602 (2010); *Aiken v. World Finance Corp. of South Carolina*, 644 S.E.2d 705 (S.C. 2007). Under *Blackburn*, *Partain*, and *Aiken*, contractual jury waivers do not apply to claims founded upon outrageous torts and egregious conduct that is unforeseeable to a reasonable person in the context of normal business dealings. This is so, the appellate courts have reasoned, because the aggrieved parties could not have contemplated that by signing a contract they would be waiving their right to a jury trial on claims arising from contumacious conduct.

Here, the improper nature of DRV's conduct is unprecedented in normal business relationships. Fontaine could not have conceived of such recalcitrant business dealings, much less foresee them. Fontaine could not foresee that an inexperienced party would buy the Loan Agreement and proceed to interpret the provisions of the agreement with complete disregard for the terms of the agreement, the course of performance under the agreement, and the general accepted underwriting standards for commercial real estate loans (*Supra*, pp. 2-4, ¶¶ 4-22). Otherwise, Fontaine certainly would have thought better of a jury waiver. Indeed, it would have thought better of entering into an assignable loan agreement with the Original Lender. DRV should not be permitted to wield the contractual jury waiver as a shield to protect it from a jury's evaluation of its

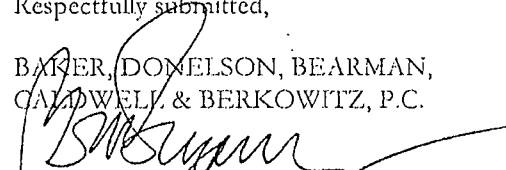
outrageous conduct. The facts presented here are exactly the type that justify avoidance or inapplicability of a contractual jury trial waiver.

CONCLUSION

This matter should remain in the Court of Common Pleas for a jury trial. Alternatively, if a reference for foreclosure is necessary, consistent with *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 282, 672 S.E.2d 816, 819 (S.C. Ct. App. 2009), Defendant/Counter-Plaintiff Fontaine's counterclaims should be tried by a jury before DRV's foreclosure action is referred to the Master-in-Equity.

Respectfully submitted,

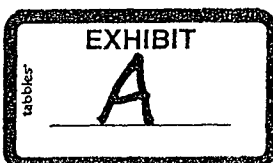
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.



Brent B. Young (S.C. Bar No. 74173)
Mark A. Fulks (Pro Hac Vice)
Attorney at Law
100 Med Tech Parkway, Suite 200
Johnson City, TN 37604
(423) 928-0181
byoung@bakerdonelson.com

Attorneys for Fontaine Business Park, LLC

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1 STATE OF SOUTH CAROLINA 2 COURT OF COMMON PLEAS 3 RICHLAND COUNTY 4 DRV FONTAINE, LLC, 5 Plaintiff/Counter-Defendant, 6 vs. 7 FONTAINE BUSINESS PARK, LLC, et al, 8 Defendant/Counter-Plaintiff. 9 10 V I D E O T A P E 11 D E P O S I T I O N 12 13 WITNESS: ELLIOT M. LIFFMAN 14 DATE: SEPTEMBER 20, 2013 15 TIME: 8:30 a.m. 16 LOCATION: McNair Law Firm 17 1221 Main Street, Suite 1600 18 Columbia, South Carolina 19 TAKEN BY: Attorneys for Defendant(s) 20 REPORTED BY: JEFFREY M. THOMAS 21 Registered Professional Reporter 22 23 ----- 24 COMPUSCRIPTS, INC. 25 A Full-Service Court-Reporting Agency Post Office Box 1727 Columbia, South Carolina 29202 803-988-0086 1-888-988-0086 www.compuscriptsinc.com	1 STIPULATION: It is stipulated by and 2 between Counsel that this videotape deposition is 3 being taken in accordance with the South Carolina 4 Rules of Civil Procedure, and that the deponent will 5 not read and sign the deposition transcript. 6 7 ----- 8 VIDEOGRAPHER: We're going on the 9 record at 8:53 a.m. This is Media Unit Number 1 in 10 the videotape deposition of Elliot M. Liffman taken 11 by the Defendant/Counter-Plaintiff in the matter of 12 DRV Fontaine, LLC versus Fontaine Business Park, et 13 al, filed in the Court of Common Pleas, State of 14 South Carolina, County of Richland. Case Number is 15 2012-CF-40-7752. 16 This deposition is being held at 1221 Main 17 Street in Columbia, South Carolina, on Friday, 18 September 20th, 2013. The videographer is James 19 Downie and the court reporter is Jeff Thomas, both 20 from the firm of CompuScripts Incorporated with 21 offices in Columbia, South Carolina. 22 Counsel and all present will now state 23 their appearances and affiliations for the record 24 after which the court reporter will swear in the 25 witness. MR. FULKS: My name is Mark Fulks.
Page 2	Page 4
1 APPEARANCES: 2 ATTORNEYS FOR PLAINTIFF: 3 MCNAIR LAW FIRM 4 BY: PAUL HARRILL, Attorney at Law 5 1221 Main Street, Suite 1800 6 Columbia, South Carolina 29201 7 8 ATTORNEYS FOR DEFENDANTS: 9 10 BAKER, DONELSON, BEARMAN, CALDWELL 11 & BERKOWITZ, PC 12 BY: MARK A. FULKS, ATTORNEY AT LAW 13 BRENT B. YOUNG, ATTORNEY AT LAW 14 100 Med Tech Parkway, Suite 200 15 P.O. Box 3038 16 Johnson City, Tennessee 37604 17 18 THE PLAYER LAW FIRM, LLC 19 BY: TUCKER S. PLAYER, ATTORNEY AT LAW 20 1415 Broad River Road 21 Columbia, South Carolina 29210 22 23 Also Present: 24 James Downie, CLVS 25 Paula Mathews (INDEX AT REAR OF TRANSCRIPT)	1 And I'm here on behalf of Fontaine Business Park, 2 LLC. 3 MR. YOUNG: My name is Brent Young, 4 I'm also here on behalf of Fontaine Business Park, 5 LLC. 6 MR. PLAYER: Tucker Player on behalf 7 -- here on behalf of Fontaine Business Parks 2 8 through 31, LLC. 9 MR. HARRILL: And Paul Harrill here 10 on behalf of the Plaintiff DRV Fontaine, LLC. 11 ELLIOT M. LIFFMAN, being first duly sworn, 12 testified as follow: 13 EXAMINATION 14 BY MR. FULKS: 15 Q. Good morning, Mr. Liffman. 16 A. Morning. 17 Q. We've met before. I'm Mark Fulks. And, 18 as you know, I'm one of the attorneys for Fontaine 19 Business Park. Have you ever given a deposition 20 before? 21 A. No. 22 Q. Okay. Do you understand the oath that you 23 just took? 24 A. Yes. 25 Q. Okay. So you understand you are here to



Page 13	Page 15
1 Q. Okay. M.B.A. Was there a major field of 2 study within the M.B.A. program there? 3 A. There was an unofficial concentration in 4 E-commerce. 5 Q. E-commerce? 6 A. (Nodded head.) 7 Q. So Internet websites and such? 8 A. Yes. 9 Q. Is that -- did you take that 10 concentration? 11 A. Yes. That was my unofficial 12 concentration. 13 Q. Okay. Did you take any other just general 14 business courses? 15 A. Yes. 16 Q. Did you ever take like a business law 17 course? 18 A. I don't believe so. 19 Q. A course on contracts? 20 A. No. 21 Q. Business communications? 22 A. Yes. 23 Q. Do you have any particular vocational 24 training such as electrical, plumbing? 25 A. No.	1 A. Yes. 2 Q. And then obviously, -- well, I don't know 3 if it's obvious. I assume it will be. You will 4 understand if I say DRV who I'm speaking about? 5 A. Actually not necessarily. We refer to 6 our -- we refer to our parent company as DRV. So if 7 you are going to -- I assume you would refer to DRV 8 Fontaine as DRV. 9 Q. Okay. Well, I'll do my best to keep those 10 two separate. The parent company I'll refer to as 11 DRV and I'll refer to the plaintiff in this 12 particular lawsuit as DRV Fontaine. 13 And I ever fail to make that distinction, 14 or if it's unclear, if you will just ask me to 15 clarify which entity I'm talking about I would 16 appreciate it. So prior to your current employment 17 did you have any experience in commercial real 18 estate transactions? 19 A. No. 20 Q. Prior to your current experience did you 21 have any experience relating to underwriting of 22 commercial real estate loans? 23 A. No. 24 Q. Prior to your current employment did you 25 have any experience related to the underwriting of
Page 14	Page 16
1 Q. Anything like that? Okay. During your 2 college -- your undergraduate or graduate 3 experience, did you ever have any courses that were 4 related to commercial real estate transactions? 5 A. No. 6 Q. Have you ever had any -- take any courses 7 that were related to the underwriting of real estate 8 loans? 9 A. No. 10 Q. Have you ever had any education or 11 training related to the underwriting of reserve 12 accounts established in a commercial real estate 13 loan agreement? 14 A. Not formal education or training. 15 Q. You had some informal training? 16 A. Experience. 17 Q. Okay. Did you -- do you have any job 18 experience working for or as a lender in commercial 19 real estate transactions? 20 A. Yes. 21 Q. Who did you work for? 22 A. I worked for R.C.C. Asset Management 23 Company, LLC. 24 Q. Prior to working for -- and will it be 25 okay if I just refer to it as R.C.C.?	1 reserve accounts in commercial real estate loans? 2 A. No. 3 Q. Do you have any professional licenses 4 issued by the state in which you live; Maryland? 5 A. No. 6 Q. Have you ever had a -- any type of 7 professional license? 8 A. No. 9 Q. Have you ever served in the military? 10 A. No. 11 Q. Okay. I asked already if you have ever 12 given a deposition before. Have you ever testified 13 in an administrative hearing or any judicial 14 hearings or trials of any kind? 15 A. Yes. 16 Q. And when was that? 17 A. In 2011 and in 2013. 18 Q. What was the nature of those proceedings? 19 A. It was a civil lawsuit. 20 Q. Were you the plaintiff or the defendant? 21 A. Plaintiff. 22 Q. Who was that lawsuit filed against? 23 A. It was a derivative action suit filed by 24 Realty Capital Company II, LLC, RCC Asset Management 25 Company, LLC against Jack Spector and Roslyn

Pages 13 to 16

Page 37 1 were the property manager for the property? 2 A. I don't recall when I became aware of the 3 fact that C.B.R.E. managed this property. 4 Q. But you did become aware of that? 5 A. Yes. 6 Q. Did you become aware of that before you 7 bought the loan or after you bought the loan? 8 A. I don't remember exactly. 9 Q. You don't remember? Would you have 10 received that information in writing? 11 A. Which information? 12 Q. About -- that you received from C.B.R.E.? 13 A. Perhaps. It may have been, you know, 14 provided over e-mail. It may have been over the 15 phone. 16 Q. Do you know what generally accepted 17 underwriting standards are in the commercial 18 mortgage industry? 19 A. I'm not sure I understand that term what 20 you -- the term you use is very broad. It could 21 mean a lot different things. 22 Q. Okay. With respect to this particular 23 loan for Fontaine Business Park, are you familiar 24 with what the term underwriting standards mean? 25 A. It means to whom?	Page 39 1 Q. All right. Are you generally familiar 2 with the terms of that agreement? 3 A. Generally, yes. 4 Q. Have you ever read this loan agreement? 5 A. I've referred to it as needed in the past. 6 Q. Okay. Have you ever referred to it with 7 regard to underwriting standards or guidelines? 8 A. I've read the section that discusses that, 9 yes. 10 Q. And which section would that be? 11 A. I believe it's the section that describes 12 the reserves. 13 Q. Does that section contain a definition of 14 what underwriting guidelines or standards are? 15 A. Not that I recall. 16 Q. Okay. Does the loan agreement contain a 17 definition section? 18 A. Does the loan agreement contain a 19 definition section? 20 Q. Yes. 21 A. Yes. 22 Q. Did you refer to the definition section to 23 decide what underwriting standards or guidelines 24 were? 25 A. No.
Page 38 1 Q. To you. 2 A. Yes. 3 Q. What does it mean? 4 A. It means prudent, reasonable decision 5 standards. 6 Q. Is that stated in the loan agreement 7 anywhere? 8 A. Is what stated in the loan agreement? 9 Q. What you just told me about the definition 10 of underwriting standards. 11 A. I told you generally what it means to me 12 in general. I don't believe my general 13 interpretation is in the loan agreement. 14 Q. Okay. Where did you come up with your 15 general understanding of what that term means? 16 A. My experience. 17 MR. FULKS: Let me get this out. 18 (Deposition Exhibit I marked for 19 identification.) 20 BY MR. FULKS: 21 Q. Mr. Liffman, we've handed you what has 22 just been marked Exhibit 1. Do you recognize that? 23 And you can take a minute to flip through it if you 24 need to. 25 A. It appears to be the loan agreement.	Page 40 1 Q. Why would you not refer to the loan 2 agreement to seek -- when you are looking for an 3 understanding of what the loan requires? 4 A. I didn't say that that is what I didn't 5 do. 6 Q. You said you didn't look for a definition 7 of underwriting guidelines. 8 A. I said I didn't refer to the definition 9 section to gain an understanding of the meaning of 10 the term "underwriting standards." 11 Q. Well, where did you look to gain an 12 understanding of what underwriting standards are? 13 A. I believe, like I said before, my 14 understanding of what underwriting standards are 15 have been formed by my experience. 16 Q. Okay. You know what contracts are? 17 A. Yes. 18 Q. And what is your general understanding of 19 the reason we have contracts? 20 A. To memorialize an agreement between two 21 parties. 22 Q. Okay. Would it be fair to say that it 23 defines the rights and obligations of the parties? 24 A. Yes. 25 Q. And it sets out the definitions that are

Pages 37 to 40

Page 41 1 to govern the parties' relationship? 2 A. It seeks to. Not every contract 3 successfully accomplishes that. 4 Q. That's true. Did this contract 5 successfully accomplish that? 6 A. It's a pretty broad question. 7 Q. Do you have anything in that agreement 8 that you think is not effectively set out? 9 MR. HARRILL: Object to the form. 10 BY MR. FULKS: 11 Q. You may not. I mean, it's a big 12 agreement. I know you've only referred to it 13 generally, so if you don't have anything that is 14 okay. I'm just trying to understand have you 15 read this -- anything -- when you referred to this 16 agreement, have you ever found something that you 17 did not think was clearly explained? 18 A. I'm not sure I can really answer that one 19 way or the other. 20 Q. Okay. So sitting here today as far as you 21 know this loan agreement is pretty clear? 22 A. Well, what I said was I'm not sure I could 23 say one way or the other as to what you're thinking 24 of when you ask me about its clarity. 25 Q. Well, it's not about what I'm thinking of.	Page 43 1 does have a definitions section? 2 A. Yes. 3 Q. Okay. So when you referred to the section 4 on reserves, and you saw the term "underwriting 5 guidelines" you just interpreted that according to 6 your understanding based on your experience in 7 deciding what it meant? 8 A. Yes. 9 Q. So you didn't look at the definitions 10 section? 11 A. I did look at the definition section, but 12 it didn't -- nothing in the definition section 13 defined specifically "underwriting standards." It's 14 not a defined term in the agreement. 15 Q. Could you turn to Page 17, please? Do you 16 see the section at the top of the Page 1.3, 17 Principles of Construction? 18 A. Yes. 19 Q. Could you read Subsection 5 for me, 20 please? 21 A. "Accounting terms not specifically defined 22 herein shall be construed in accordance with GAP." 23 Q. Do you know what GAP is? 24 A. Yes. 25 Q. What is GAP?
Page 42 1 It's about what you are thinking of with regards to 2 its clarity. 3 A. I'm not sure how you are defining 4 "clarity" is what I'm saying. 5 Q. You don't understand the meaning of 6 "clarity"? 7 A. I understand the meaning of "clarity." I 8 don't understand the context in which you are using 9 it. 10 Q. Do you understand this loan agreement? 11 A. Yes. 12 Q. Is there anything in this loan agreement 13 that you do not understand? 14 A. Nothing comes to mind. 15 Q. Okay. So back to the underwriting 16 standards and guidelines. You said you referred to 17 the section on reserves is where you found 18 underwriting standards or guidelines. 19 A. I believe that is where the phrase 20 appears. 21 Q. Okay. And I believe you agreed that that 22 section of the loan agreement does not contain a 23 definition of underwriting standards or guidelines? 24 A. Correct. 25 Q. And you've agreed that the loan agreement	Page 44 1 A. Generally accepted accounting principles. 2 Q. Okay. Do you not understand that part of 3 the loan agreement to say if something is not 4 defined here you go to generally accepted accounting 5 principles? 6 A. I understand it to mean that any 7 accounting terms not specifically defined shall be 8 construed in accordance with GAP. 9 Q. So is underwriting guidelines or standards 10 an accounting term? 11 A. I don't believe so. 12 Q. Okay. So your position is then that the 13 term "underwriting standards or guidelines," and I'm 14 using those two interchangeably. I don't think 15 there is a definitional difference. Is not defined 16 at all in the contract? 17 A. Correct. 18 Q. And you applied the contract based on your 19 understanding based on your experience of what that 20 means? 21 A. I applied the contract based on what I 22 understood the contract to mean. 23 Q. Okay. What happens if Fontaine Business 24 Park did not understand underwriting guidelines to 25 mean what you think it means?

Page 49 1 A. In my opinion they should have. 2 Q. In your opinion should they have known 3 what your understanding of underwriting guidelines 4 is? 5 A. Should they, Fontaine or Greenwich? 6 Q. Either one. Let's start with Fontaine 7 Business Park. 8 A. Neither of them knew me at the time. 9 Q. So they had no idea how you would apply a 10 term like underwriting guidelines when they entered 11 this contract? 12 A. I suppose not. 13 Q. Don't you think it's a little unfair to 14 come in later in the game and redefine the terms and 15 understandings? 16 MR. HARRILL: Object to the form. 17 THE WITNESS: I wouldn't say that I 18 redefined the term or understanding. 19 BY MR. FULKS: 20 Q. Are you aware that Fontaine Business Park 21 does not agree with your definition of "underwriting 22 guidelines"? 23 A. I'm aware of what Fontaine has -- 24 (Cell phone rang.) 25 MS. MATHEWS: Sorry.	Page 51 1 underwriting process and what did you do when you 2 bought the loan? 3 MR. HARRILL: Object to the form. 4 THE WITNESS: Those are two 5 questions. Which are you asking me? 6 BY MR. FULKS: 7 Q. Okay. My first question is what is your 8 underwriting process when you bought the loan? 9 A. What is our underwriting process? 10 Q. What was the underwriting process when you 11 bought the loan? 12 A. I understand your question to mean how did 13 we evaluate the financial situation of the loan. Is 14 that what you are asking? 15 Q. That's fine. And then explain to me how 16 you did that. 17 A. We evaluated the cash flow of the property 18 that was in place at the time by reviewing rent 19 rolls and income statements. We evaluated the 20 demand and supply in the market. 21 We evaluated the require debt service 22 payments at the time and how those compared to the 23 cash flow. And we evaluated the physical condition 24 of the asset the best we could, all of the things 25 that you do in evaluating an investment.
Page 50 1 THE WITNESS: I'm aware that Fontaine 2 Management, LLC, and Fontaine Business Park, LLC, 3 have claimed to disagree -- or actually not claimed. 4 Do disagrees with many of the things at issue here. 5 That is why we are here. 6 BY MR. FULKS: 7 Q. And how long was Fontaine Business Park 8 operating under this loan agreement before you 9 purchased it? 10 A. Fifteen months. 11 Q. You don't think that 15 months gives them 12 a better understanding of what the terms mean? 13 A. I don't know what their understanding is. 14 Q. Okay. Explain for me if you will the 15 underwriting process that you went through when you 16 purchased the loan. 17 A. In what respect? 18 Q. Well, it's an underwriting process. What 19 did you do? Do you know what an underwriting 20 process is? 21 A. Yes. However, I'm not sure what -- you 22 are asking me a very broad question. I'm just 23 trying to understand what specifically you are 24 interested in knowing. 25 Q. I'm just asking what do you consider an	Page 52 1 Q. Now, how did you -- what was your 2 underwriting process with respect to the reserve 3 account? 4 A. We looked at what the balances were in the 5 reserve accounts and what the anticipated 6 expenditures would be that are intended to be funded 7 by those reserves and evaluated whether or not those 8 reserves were adequate to meet their intended need. 9 Q. Now, going back to the underwriting 10 process for the loan, did you factor into your 11 analysis the amount that you paid for the loan? 12 A. Not in underwriting the loan itself, no. 13 Q. But in making the decision to purchase the 14 loan? 15 A. In making our purchase decision did we 16 factor in our purchase price? 17 Q. Uh-huh. 18 A. Of course. 19 Q. Okay. And what was your purchase price? 20 A. Approximately 12 million dollars. 21 Q. Approximately? What is your -- do you 22 have an idea of what your rate of error is? 23 A. There was a contract purchase price of, I 24 believe, 11.9 million dollars. That could have a 25 margin of error of a couple of hundred thousand

Page 121 1 contribution required to be made by borrowers to the 2 tax and insurance account." 3 Q. Do you believe it was reasonable to reject 4 the letter from the insurance agent and refuse to 5 reassess downward? 6 A. Well, you are asking me two questions 7 there. 8 Q. I don't think I did. 9 A. You asked me do I believe it's reasonable 10 to -- 11 Q. I didn't ask you -- Mr. Liffman, I ask the 12 questions. I didn't ask you what I asked you. I 13 gave you a question. I need you to answer it. 14 MR. HARRILL: And I'll object to it 15 as a multiple question, but you can answer it if you 16 can. 17 THE WITNESS: Would you repeat the 18 question, please? 19 BY MR. FULKS: 20 Q. I think the question was sufficiently 21 clear that it doesn't need to be repeated. 22 A. I apologize if that is the case, but I 23 would still ask you to repeat the question so I'm 24 sure I understand what you are asking. 25 Q. Well, I don't think the question needs to	Page 123 1 estimate was incorrect? 2 A. I don't believe it says that. 3 Q. Does that letter give you the same figure 4 that you used? 5 A. No. 6 Q. Okay. So then that letter would indicate 7 that your number was incorrect? 8 A. No. I don't agree with that statement. 9 Like I explained, I believe we are talking about 10 apples and oranges. 11 Q. Let's talk about the capital expense 12 reserve account. Are you familiar with that 13 provision? 14 A. Yes. 15 Q. Okay. What is your understanding of the 16 requirements of that provision? 17 A. That the borrower is to make payments into 18 the capital expense reserve in an amount that will 19 result in the reserve having adequate funds to cover 20 the costs of anticipated expenditures that fall 21 under the appropriate category contemplated by that 22 reserve. 23 Q. What does that provision say about 24 reassessments? 25 A. It's a pretty long provision. Would you
Page 122 1 be repeated. I would like you to just answer it as 2 it was phrased. 3 A. I don't recall what the question -- what 4 the question you are referring to was. I heard two 5 questions. 6 Q. Do you believe that it is reasonable to 7 reject the estimate from the insurance agent on the 8 policy? 9 A. I'm honestly not sure what you mean by 10 reject the estimate by the insurance agent on the 11 policy. 12 Q. Do you believe it's reasonable to reject 13 the estimate of the policy that is received from the 14 insurance agent? 15 A. I think that is exactly the same question 16 I told you I'm not sure what you mean by it. 17 Q. I don't -- the question is clear. And I 18 want an answer to it. 19 A. The best answer I can give you is I don't 20 believe I rejected anything from the insurance 21 agent. 22 Q. Did you decrease the contribution 23 downward? 24 A. After receiving this letter, no. 25 Q. But that letter tells you that your	Page 124 1 like me to read it? 2 Q. Let's go to the second sentence which 3 appears immediately after the parenthetical with 4 Capital Reserve Account in bold letters. 5 A. "Upon 30-day prior notice to borrower 6 lender may reassess the amount of the monthly 7 payment required under this Section 3.4 from time to 8 time in its reasonable discretion (based upon its 9 then current underwriting standards)." 10 Q. Let's talk about the word "notice." What 11 is your understanding of the word "notice" as it 12 appears in that provision of the loan agreement? 13 A. It means upon lender making borrower aware 14 of its intent or its assessment or its conclusion. 15 Communication from lender to borrower. 16 Q. What type of communication? 17 A. I don't really know. 18 Q. What type of communication did you send? 19 A. If I remember correctly, generally the way 20 that we communicated on the various reserves was by 21 sharing our escrow analysis. By sharing our escrow 22 analysis with the borrower's manager through the 23 drop box or e-mail. 24 MR. PLAYEP: That laughter was not 25 for Mr. Liffman. It was the crowing gamecock. I

Page 125 1 don't think Brent has ever heard that before. You 2 are in gamecock country now. 3 BY MR. FULKS: 4 Q. Let's back up a little bit why don't we. 5 Talking about the capital expense reserve provision. 6 And you have that in front of you? 7 A. Yes. 8 Q. On Page 24, Section 3.4? 9 A. Yes. 10 Q. Okay. And the first phrase in that 11 sentence that you read to me is, "Upon 30-days prior 12 notice to borrowers"? 13 A. Yes. 14 Q. And what type of notice did you give to 15 the borrowers that you were going to reassess the 16 capital expense reserves? 17 A. I'm not sure exactly which instance you 18 are talking about. I recall multiple exchanges of 19 information on the subject. I recall sending a 20 letter -- 21 Q. Okay. So you sent a letter? 22 A. I believe we did send a letter. 23 Q. And what did that letter say? 24 A. I imagine it said, we are reassessing the 25 capital reserve payment.	Page 127 1 Q. And the reassessment in this case went 2 from \$5,249 to \$54,476. Is that your understanding? 3 A. Yes. 4 Q. Is that reasonable to you? 5 A. I believe the increase was reasonable, 6 yes. 7 Q. Do you know what percentage of an increase 8 that constitutes? 9 A. I've heard the number a thousand percent 10 thrown around a few times. 11 Q. And a 1,000 percent increase is reasonable 12 to you? 13 A. Under the specific circumstances, yes. 14 Q. And there is the parenthetical, based upon 15 its then current underwriting standards? 16 A. Yes. 17 Q. And you didn't have any underwriting 18 standards, did you? 19 A. I wouldn't agree with that statement. 20 Q. Well, haven't you previously said that you 21 didn't have underwriting standards? 22 A. I don't think we said that. 23 Q. Do you recall responding to our 24 discovery -- our interrogatory requests? 25 A. Vaguely.
Page 126 1 Q. Okay. And then it also says you may 2 reassess the amount of the monthly payment from time 3 to time in its reasonable discretion? 4 A. Yes. 5 Q. Do you recall what the reassessment was, 6 the reassessment that gave rise to the dispute that 7 brought us here today? 8 A. I recall it was a significant increase. 9 It was a large increase. I don't recall the exact 10 amount. 11 Q. Does the name -- number \$5,249 sound 12 familiar? 13 A. That is the -- that was the level that 14 they were initially set at at loan funding. 15 Q. Well, in fact, that is the amount that is 16 in the actual loan agreement, is it not? 17 A. Yes. 18 Q. And did you reassess that to \$54,476.34? 19 A. We reassessed it to a significantly higher 20 number. And I wouldn't deny that the number you 21 just recited is the amount. 22 Q. And you agree that that provision says 23 that you can only reassess in your reasonable 24 discretion? 25 A. Yes.	Page 128 1 Q. Did you participate in the responses to 2 the interrogatories? 3 A. Yes. 4 Q. You provided information that led to the 5 statements that are in here? 6 A. Yes. 7 Q. Do you have any reason to believe that any 8 of these statements are incorrect? 9 A. No. 10 Q. Did you type this? 11 A. I didn't personally type it. 12 Q. Did you send information in writing to 13 answer these questions? 14 A. Yes. To the preparer of the document, 15 yes. 16 Q. Did you review this to make sure that it's 17 a fair representation of what you sent? 18 A. Yes. 19 Q. Do you recall this being an objection, 20 "DRV objects to this request to the extent it 21 assumes that DRV has underwriting guidelines for 22 commercial loans"? 23 A. I don't recall that specifically. 24 Q. Do you recall the response, "DRV objects 25 to this interrogatory because it presupposes that

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Page 129 1 DRV was the original lender on the loan, which it 2 was not, and because it assumes that DRV has 3 underwriting guidelines for the origination of 4 commercial loans?" 5 A. I don't specifically remember that 6 statement. 7 Q. Do you remember the following statement. 8 "DRV did not design or establish any underwriting 9 guidelines relating to this loan because it was not 10 the original lender?" 11 A. I pretty much don't remember anything that 12 is specifically written in that document. It's 13 pretty old. 14 Q. Well, would your attorney have sent us 15 something that has an inaccuracy or an incorrect 16 statement? 17 A. Of course not. 18 Q. You wouldn't have allowed him to do that, 19 would you? 20 A. I don't think he would have allowed me to 21 do it either. 22 Q. And you sent this response that says, "DRV 23 did not design or establish any underwriting 24 guidelines relating to this loan because it was not 25 the original lender"?	Page 131 1 Q. And immediately under that do you see 2 where the word "Answer" appears? 3 A. Yes. 4 Q. Okay. Can you read the first sentence of 5 that? 6 A. "DRV objects to this request to the extent 7 it assumes that DRV has underwriting guidelines for 8 commercial loans." 9 Q. Can you turn to the next page. Do you see 10 Paragraph Number 9 at the top of the page? 11 A. Yes. 12 Q. And do you see the paragraph that has 13 "Answer" in bold and underlined right under that? 14 A. Yes. 15 Q. Okay. Can you read for me, please, the 16 second sentence in that paragraph? 17 A. "DRV objects to this interrogatory -- " 18 Q. That is the first sentence. 19 A. Oh, I'm sorry. "DRV did not design or 20 establish any underwriting guidelines relating to 21 this loan because it was not the original lender." 22 Q. So you didn't have any underwriting 23 standards? 24 A. I don't believe that is what it says. 25 Q. That is not what it says?
Page 130 1 A. All I said was I don't remember 2 specifically what that document says. 3 Q. Well, is the statement that I just read to 4 you correct? 5 MR. HARRILL: Do you have a copy that 6 you could provide him? You are reading a portion of 7 a responses. 8 MR. FULKS: I do. 9 MR. HARRILL: But you are not going 10 to? Okay. 11 BY MR. FULKS: 12 Q. Did you swear to -- that the statements in 13 here were true and correct under oath? 14 A. In the interrogatory response? 15 Q. Yes. 16 A. Yes. 17 Q. Sorry. I lost my page. 18 VIDEOGRAPHER: Mr. Liffman, could you 19 slide your microphone back up. 20 THE WITNESS: Sorry. 21 BY MR. FULKS: 22 Q. I'll go ahead and hand that document to 23 you now. I will ask you to turn to Page 9. At the 24 bottom of Page 9 do you see Paragraph Number 8? 25 A. Yes.	Page 132 1 A. That is not what it says. 2 Q. DRV -- did you design underwriting 3 standards? 4 A. It says, "DRV did not design or establish 5 any underwriting guidelines." 6 Q. I didn't ask you what it said. I asked 7 you if you designed any underwriting standards? 8 A. When? 9 Q. With respect to this loan. 10 A. No, I didn't design any underwriting 11 standards. 12 Q. Did you establish any? 13 A. I didn't establish any. 14 Q. And what do you mean when you say that you 15 did not design or establish them because you were 16 not the original lender? 17 A. I believe the context of this is about -- 18 you know, let me take that back. Would you repeat 19 question, please? 20 Q. Did you design or establish any 21 underwriting guidelines -- I'm sorry. My question 22 was you end that sentence explaining that you didn't 23 design or establish underwriting guidelines because 24 you were not the original lender? 25 A. Correct.

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Page 133 1 Q. Why did you clarify that because you were 2 not the original lender? 3 MR. HARRILL: I'm going to object 4 because you are not reading the questions and 5 putting these answers in context in any way. 6 THE WITNESS: I will tell you that 7 the reason we said that is because the question asks 8 how we designed -- to identify and explain the 9 process through which DRV designed and established 10 its underwriting guidelines related to the loan 11 documents. 12 And what the answer seeks to convey is 13 that we did not author the loan documents. We were 14 not involved in the creation of the loan documents. 15 BY MR. FULKS: 16 Q. But Question Number 9 doesn't say, did you 17 create the loan documents, does it? 18 A. No. 19 Q. It asks if you created underwriting 20 standards with respect to the loan documents? 21 A. Actually it does not ask if we did. 22 Q. It's asking for information that indicates 23 that you did. 24 A. It asks what it says. 25 Q. Okay. And you answered, "DRV did not	Page 135 1 Q. Okay. So then if you cared when you got 2 to the reassessment of the capital expense reserve 3 you did that based upon your then current 4 underwriting standards? 5 A. We reassessed the capital reserve 6 according to the procedures set forth in the loan 7 agreement. 8 Q. Which is underwriting standards? 9 A. To the extent that underwriting standards 10 are part of the procedure, they were part of our 11 actions which were consistent with the procedure set 12 forth. 13 Q. But here you say you didn't have any? 14 A. We don't say that here. 15 Q. All right. Let's talk about what has been 16 referred to as the three-year capital expense 17 budget. You understand what I'm talking about when 18 I mention that phrase, is that correct? 19 A. Yes. 20 Q. Can you explain to me how the three-year 21 capital expense budget came to be in existence? 22 A. Around September of 2010, I believe, we 23 requested that C.B.R.E. prepare a three-year capital 24 budget. And around May of 2011 C.B.R.E. on behalf 25 of the borrower delivered to us a capital budget.
Page 134 1 design or establish any underwriting guidelines 2 relating to this loan because it was not the 3 original lender?" 4 A. Correct. We answered what we -- to the 5 extent that is verbatim from the answer, yes, that 6 is what we answered. 7 Q. Did you believe that you were not required 8 to have underwriting standards because you are not 9 the original lender? 10 A. I don't know that I believed anything one 11 way or the other. 12 Q. So when you read the capital reserve 13 account provision you just didn't even really care 14 what it said, did you? 15 A. Is that a question? 16 Q. Is "did you" a question? 17 A. Yes, "did you" is a question. No, I 18 didn't -- I disagree with the statement you made 19 prior to that. 20 Q. What do you disagree with? 21 A. That I didn't care what the loan agreement 22 said. 23 Q. Okay. So you did care? 24 A. Of course I care what the loan agreement 25 says.	Page 136 1 Q. So you requested it? 2 A. Yes. 3 Q. How did you extend that request to 4 Fontaine Business Park? 5 A. I asked their agent. 6 Q. And was that in writing? 7 A. At times. 8 Q. Okay. When was it in writing? 9 A. The first time I recall seeing it in 10 writing would have been in the fourth quarter of 11 2010. 12 Q. Was your first request in writing? 13 A. I don't believe so. 14 Q. What did you say -- and when you say you 15 asked their agent, who are you referring to? 16 A. C.B. Richard Ellis. 17 Q. And who at C.B. Richard Ellis did you 18 speak with? 19 A. I believe I -- I'm pretty sure I spoke 20 with Sandra Johnson. 21 Q. Did you ever speak with Aaron Dupree about 22 it? 23 A. Later on. Actually I don't know if I ever 24 spoke directly with Aaron about it or not. I may 25 have.

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Page 137 1 Q. Did you ever speak to Martin Moore about 2 it? 3 A. Not that I recall. 4 Q. What exactly did you request? 5 A. A three-year capital budget. 6 Q. Is that term defined anywhere in the loan 7 agreement? 8 A. I doubt it. 9 Q. Did you explain to them what you wanted 10 included in the three-year capital budget? 11 A. Not when I initially asked for it. They 12 may have asked for clarification. And if they did, 13 I would have answered them. 14 Q. Did they ask for clarification? 15 A. I believe -- I remember one instance where 16 they asked for a clarification. 17 Q. And what did they ask you to clarify? 18 A. They asked me to clarify what I was 19 looking for as far as their tenant improvement and 20 leasing commission projection. 21 Q. And what did you tell them? 22 A. I told them that I was looking to 23 understand what T.I. and L.C. they expected to incur 24 on spaces that were scheduled to rollover within the 25 next three years.	Page 139 1 let me back up and reanswer your previous question. 2 I don't believe the loan agreement -- I don't 3 believe I need any authorization to ask for 4 anything. 5 I believe the loan agreement requires the 6 borrower to provide certain information upon 7 request. And I believe that the three-year capital 8 budget would fall into that category. 9 Q. So, in other words, the loan agreement 10 does permit you to make that request? 11 A. The loan agreement requires borrower to 12 provide certain information, in my opinion, which 13 includes the capital budget that we are discussing 14 upon my request. 15 Q. Okay. You have the -- let's turn back to 16 the loan agreement itself. Do you have that in 17 front of you? 18 A. Yes. 19 Q. I want you to turn to Page 54. Are you on 20 Page 54? 21 A. Yes. 22 Q. Do you see at the top of the page the 23 paragraph that is numbered 6.1 and has the word 24 "Notices"? 25 A. Yes.
Page 138 1 Q. And who did you convey that to? 2 A. To Sandra I'm pretty sure. 3 Q. Were most of your communications at that 4 time to Sandra, Ms. Johnson? 5 A. As it related to the Fontaine loan, Sandra 6 was my primary point of contact. 7 Q. With respect to the initial request though 8 it was Ms. Johnson? 9 A. To the best of my recollection. 10 Q. Did you ever send a written request to 11 Fontaine Business Park? 12 A. Yes. 13 Q. And what did that written request say? 14 A. It was all the communication I had with 15 Sandra Johnson. Will you please give me a capital 16 budget. 17 Q. So all of those communications about that 18 capital budget were with Ms. Johnson? 19 A. The communication dealing with the request 20 for the capital budget were with Sandra. 21 Q. Okay. And it's your position that the 22 loan agreement authorizes you to make that request? 23 A. It's my understanding that it does. 24 Q. Do you recall where it does? 25 A. Probably in the section dealing with --	Page 140 1 Q. Would you read the first sentence of that 2 paragraph for me, please? 3 A. "All notices, consents, approvals, and 4 requests required or permitted hereunder -- 5 hereunder or under any other loan document "A" 6 notice shall be given in writing and shall be 7 effective for all purposes if either hand-delivered 8 with receipt acknowledged or by a nationally 9 recognized overnight delivery service such as 10 Federal Express or by certified or registered United 11 States Mail, return receipt requested, postage 12 prepaid, or by facsimile and confirmed by facsimile 13 answered back in each case addressed as follows." 14 Q. Okay. Let's stop right there for a 15 minute. Was your request to Ms. Johnson 16 hand-delivered with receipt acknowledged? 17 A. No. 18 Q. Was it sent by a nationally recognized 19 overnight delivery service such as Fed Ex? 20 A. No. 21 Q. Was it sent by certified or registered 22 United States Mail, return receipt requested, 23 postage prepaid? 24 A. No. 25 Q. Was it sent by facsimile and confirmed by

Page 141 1 facsimile answer back? 2 A. No. 3 Q. Okay. Now -- and I think you previously 4 read what is the sort of last phrase of that 5 sentence, in each case addressed as follows. Do you 6 see that? 7 A. Yes. 8 Q. Okay. And we go down toward right about 9 the middle of the page, it says, "If to borrower." 10 Do you see that? 11 A. Yes. 12 Q. Who does it say is supposed to receive 13 your request on behalf of the borrower? 14 A. What it says is, "If to borrower, Fontaine 15 Business Park, LLC, 5 Financial Plaza, Suite 205, 16 Napa, California 94558, attention Michael Schwartz 17 and Steven Corea." Apologies if I've mispronounced 18 that. "Telecopier (707) 929-1600. With a copy to 19 Powell Goldstein, LLP. One Atlantic Center, 14th 20 Floor, 1201 West Peachtree Street Northwest, 21 Atlanta, Georgia 30309-3488, attention Michael 22 Rafter and William H. Mathieu. Telecopier 23 (404) 572-6999." 24 Q. Okay. You can stop right there for a 25 minute. You didn't send your request for this	Page 143 1 Q. Okay. Did you ever receive a notice that 2 Sandra Johnson was authorized to accept notices 3 under the loan agreement on Fontaine Business Park's 4 behalf? 5 A. I don't know. 6 Q. Well, if you did that would be in writing, 7 wouldn't it? 8 A. I suppose. 9 Q. Well, wouldn't the loan agreement 10 provision that you've just read require that to be 11 in writing? 12 A. Yes. 13 Q. Did you send a copy of your request to 14 Powell Goldstein at the stated address, attention 15 Michael Rafter and William M. Mathieu? 16 A. No. 17 Q. Okay. Can you read for me the last 18 paragraph at the bottom of the page? 19 A. "A notice shall be deemed to have been 20 given in the case of hand-delivery at the time of 21 delivery, in the case of registered or certified 22 mail, when delivered, or the first attempted 23 delivery on a business day, or in the case of 24 overnight delivery upon the first attempted delivery 25 on a business day, or in the case of facsimile, upon
Page 142 1 three-year capital budget to Fontaine Business Park, 2 did you? 3 A. I did not send it to Fontaine Business 4 Park, LLC, 5 Financial Plaza, Suite 205. Is that 5 what you are asking? 6 Q. That is what I'm asking. 7 A. I did not send my notice to the address 8 indicated. 9 Q. But this is where the loan agreement says 10 you are supposed to send it? 11 MR. HARRILL: Object to the form. 12 BY MR. FULKS: 13 Q. Is that what it says? 14 A. The loan agreement says what it says. If 15 to borrower, that address. 16 Q. Is there anything in there that says you 17 can send a notice of such a request to Sandra 18 Johnson? 19 A. There are qualifiers in here that you 20 didn't ask me to read. 21 Q. Which ones? 22 A. For example, where you stopped me, the 23 rest of it is, "or to such other address or person 24 as a party shall designate from time to time by 25 notice to the other party."	Page 144 1 the confirmation of such facsimile transmission." 2 Q. Did any of those events that you just read 3 occur with respect to your request for the 4 three-year capital budget? 5 A. You mean -- 6 Q. Was it delivered by hand? 7 A. Yes. No. It was not delivered by hand. 8 It was not sent by registered or certified mail and 9 it was not sent by overnight delivery or facsimile. 10 Q.. Is there anything in this provision that 11 says a notice is deemed to have been given if it's 12 done by telephone? 13 A. Not from what I've just seen. 14 Q. And your request -- the initial request 15 was not in writing? 16 A. To the best of my recollection. 17 Q. Well, if you had such a writing you would 18 have provided it in discovery, wouldn't you? 19 A. To the extent that it answered one of the 20 discovery requests, we absolutely would have 21 provided it. 22 Q. So if it would be responsive to a 23 discovery request and we haven't received it, then 24 it doesn't exist? 25 A. Correct. Well, actually let me restate

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1 that. To the best of -- as far as we were aware at
2 the time that we sent it and as far as I am aware
3 now it doesn't exist.
4 I suppose it's possible that something
5 could be discovered at a later date at which point I
6 assume we would comply with whatever we are required
7 to comply with at that time.
8 Q. Well, does it exist or does it not?
9 A. To my knowledge it does not exist.
10 Q. Well, wouldn't that notice have come from
11 you?
12 A. Which notice?
13 Q. What notice are we talking about?
14 A. We've talked about a couple of notices.
15 We talked about a notice to authorize me --
16 Q. The notice -- your request for the
17 three-year capital budget, would that have come from
18 you?
19 A. Yes.
20 Q. Okay. Did you send it in writing?
21 A. Not that I remember. I'm pretty sure I
22 didn't the first time.
23 Q. And you didn't send it to Fontaine
24 Business Park?
25 A. I don't remember ever sending it. I'm as

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1 So I'm not -- I can't really point to what you just
2 described.
3 Q. Is it mentioned anywhere in this loan
4 agreement, a three-year capital budget?
5 A. That phrase does not appear in the loan
6 agreement to my knowledge.
7 Q. Is there any phrase that appears that
8 would apply to the three-year capital budget that we
9 are talking about?
10 A. I believe so, yes.
11 Q. And which one would that be?
12 A. I would have to, you know, spend a lot of
13 time digging through this, but my understanding is
14 generally speaking the borrower is required to
15 provide any information about the property that we
16 ask for as long as we are not being unreasonable.
17 Q. What is the basis of your belief?
18 A. My general -- my general recollection of
19 the specifics of this loan agreement and my
20 experience in general.
21 Q. What does your experience in general have
22 to do with what Fontaine Business Park is required
23 to do under this specific agreement?
24 A. I didn't say my experience had anything to
25 do with what Fontaine Business Park was required to

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1 certain as you can be without breaching the tenet
2 that anything is possible. I am about as sure as I
3 can be that the request was never sent in the manner
4 described by you. If it were, we would have given
5 it to you.
6 Q. Was it sent as described in the terms --
7 Paragraph 6.1 of the loan document?
8 A. To the best of my knowledge and
9 recollection, no. It was sent the way I described
10 before.
11 Q. And that is not the way I'm describing it.
12 That is the way the loan document describes it,
13 right?
14 A. Well, you've described it and the loan
15 document has described it. And I'm not suggesting
16 that one way or the other as to the consistency
17 between the two descriptions. I'm simply saying I
18 sent it as far as I'm aware the way I described it.
19 Q. Now, going back to the provision that
20 authorizes the request. Do you recall what
21 provision of the loan agreement that you consulted
22 in deciding that you were permitted to make that
23 request?
24 A. I believe I disagreed with the premise
25 that I need to be authorized to ask for something.

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1 do. You asked me a different question.
2 Q. Are you familiar with paragraph -- I'll
3 get you the page in just a second here. Can you
4 turn to Page 55? Do you see the heading numbered
5 6.3, Financial Reporting?
6 A. Yes.
7 Q. Okay. Is this provision and its
8 subdivisions the provision of the loan agreement
9 that you believe require Fontaine Business Park to
10 provide the three-year capital budget?
11 A. Not exclusively, but I believe it
12 certainly looks like this would be the subject --
13 the section that deals with what they are required
14 to provide.
15 Q. Well, which paragraph would it fall under?
16 A. Without acknowledging that it couldn't --
17 that it doesn't necessarily fall under multiple
18 paragraphs, one that jumps out at me right now is
19 6.3.4.
20 Q. Okay. What does that provision say?
21 A. "Original borrower on behalf of borrowers
22 shall furnish to lender within 10 business days
23 after request such further details and reasonable
24 information with respect to the operation of the
25 property and the financial affairs of borrowers or

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Page 161 1 A. It appears to be a version, possibly the 2 final version, of the three-year capital expense 3 budget. 4 Q. And that is -- do you understand that to 5 be a copy of an exhibit from Paula Mathews' 6 deposition from yesterday? 7 A. Based on what you just said, yes. 8 Q. Could you look at that information on that 9 document and compare it to the information on the 10 previous exhibit, being Aaron Dupree's e-mail, just 11 to see how well they correlate? 12 MR. FULKS: I don't know how much 13 time he will need for that. We can go off the 14 record to let him look at it for a minute if you 15 want, Paul. 16 MR. HARRILL: That would be fine with 17 me. 18 MR. FULKS: Do you need some time 19 or -- 20 THE WITNESS: Just a minute. 21 MR. FULKS: Okay. 22 THE WITNESS: Am I allowed to mark 23 either of these since you asked me to compare? 24 BY MR. FULKS: 25 Q. Yeah. You can if you -- you want	Page 163 1 MR. FULKS: Paul, I have the same 2 issue with this one. That is the July 11 letter. 3 And, again, it has my notation. 4 MR. HARRILL: That's fine. 5 MR. FULKS: My copies of that one 6 disappeared as well. And, again, I'll just state 7 for the record at the bottom there is a handwritten 8 notation which is mine taken -- just indicating 9 which exhibit it was, which has now been replaced 10 with the official exhibit in this record. 11 (Deposition Exhibit 6 marked for 12 identification.) 13 BY MR. FULKS: 14 Q. Mr. Liffman, I've handed you a letter. Do 15 you recognize that? 16 A. It appears to be a letter from DRV to 17 Fontaine Business Park, LLC. 18 Q. And who signed that letter? 19 A. There is no signature on this copy. It's 20 probably the e-mail copy, but I would have signed 21 it. 22 Q. Does your name appear at the bottom? 23 A. Yes. 24 Q. And can you tell us what that letter is? 25 A. It appears to be a notice of an increase
Page 162 1 a highlighter or a pen? 2 A. I prefer a pen. 3 Q. That is a Sharpie. Is that okay? 4 A. If it's okay with you, it's okay with me. 5 I can -- I've not gone thorough and compared every 6 single one to figure it out. I picked my head up. 7 I certainly could do that, but I can answer your 8 question generally and see just at a glance I notice 9 that some of the tenant names are the same, but 10 there are also differences. There have been changes 11 made in this final. And I'm not sure what type of 12 comparison you are asking for. 13 Q. Well, just a general overview, if it 14 appears to be consistent? 15 A. Like I said, these appear to be Aaron's 16 recommended assumptions for T.I. and L.C. on certain 17 spaces within the building. And at least some of -- 18 some of them appear to be on the capital budget. 19 They may all be on there. I don't know. 20 Q. That is all I need from you on that. If 21 you want to continue reviewing it to continue 22 testifying you are free to do so. 23 A. I'm here to answer your questions. 24 Q. Okay. You are the one that has to make a 25 4:00 o'clock flight or leave at 4:00 for a flight.	Page 164 1 in the reserve contribution. 2 Q. And when was that sent? 3 A. The letter is dated July 11, 2011. 4 Q. And can you look at that letter and tell 5 me what the capital expense reserve account was 6 reassessed from and to? 7 A. It was reassessed from 5,249 to -- first 8 for the period September 2011 through June 2012, so 9 I guess that would be 10 months, 54,476.34. Then 10 from July 2012 to November 2013, to be 16 months I 11 guess, 9,001.39. And then on December 2013 12 returning to the then present level of 5,249. 13 Q. Okay. Does that letter reflect the 14 reassessment to the tax and insurance? 15 A. It does not appear to. 16 Q. Now, what I would like to go to in the 17 exhibit that I handed to you right before we broke 18 for lunch. I do not recall what number that was. 19 Exhibit Number 3. Do you recognize that document? 20 A. Yes. 21 Q. And can you tell me what appears at the 22 top of the page at the text of the e-mail? 23 A. Forward: Scan from a Xerox Color. 24 Q. Directly below that. 25 A. Paula Mathews.

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1 Q. Correct. Does this appear to be an e-mail 2 from Paula Mathews to you? 3 A. Among others, yes. 4 Q. And there are courtesy copies to James 5 Berg and Sandra Johnson? 6 A. Yes. 7 Q. Okay. And what is the date of this 8 e-mail? 9 A. July 12, 2011. 10 Q. Okay. So that would be the day after you 11 wrote the letter reassessing the reserve account? 12 A. Yes. 13 Q. Okay. What is the -- what is Ms. Mathews 14 telling you or saying to you in that e-mail? 15 A. She is saying that she is trying to reach 16 me in response to the letter we just discussed which 17 she received by fax the day before on July 11th, and 18 asking me to contact her at my earliest convenience. 19 Q. So within one day of receiving your fax, 20 Ms. Mathew was attempting to contact you to discuss 21 your letter? 22 A. Yes. 23 Q. And what was your response? 24 A. Well, about 90 minutes later at 7:04 p.m. 25 I responded to say, "I'm traveling today and	1 Ms. Johnson was relaying to Paula Mathews? 2 A. What she says is, "Paula, the lender has 3 requested a three-year capital budget outlook for 4 the property to include estimated T.I. dollars and 5 commission for renewal of existing leases. Do you 6 have anything that I can use as a basis? I know 7 that the pro forma capital dollars were estimated on 8 a very low end. Guidance, please." 9 Q. Okay. With respect to your request for a 10 three-year capital budget and the contents of it, 11 does that appear to be accurate information? 12 A. I'm sorry? 13 Q. Did you request it to include estimated 14 T.I. dollars and commissions for renewal of existing 15 leases? 16 A. That's the gist of it. I think in context 17 we were both talking about the same thing. 18 Q. Okay. I mean, do you see an inaccuracy in 19 that? 20 A. Nothing jumps out. 21 Q. Okay. But it doesn't -- as the previous 22 document you reviewed on this subject, it does not 23 include new leases over the next three years, does 24 it? 25 A. No. I guess that would be an inaccuracy,
Page 166	Page 168
1 tomorrow. Back in the office Thursday. Then out 2 again until the following Thursday. Feel free to 3 call me on my cell." And I gave her my number. 4 Signed it, Best, Elliot. 5 Q. Do you recall if Ms. Mathews called you 6 that day? 7 A. I do not recall. 8 Q. Do you recall getting a telephone message 9 from her that day? 10 A. I do not recall. 11 MR. FULKS: Thought I had a copy 12 problem again, but I do not. I would like to have 13 that marked as the next exhibit. What number are 14 we -- 15 COURT REPORTER: Seven. 16 (Deposition Exhibit 7 marked for 17 identification.) 18 BY MR. FULKS: 19 Q. Mr. Liffman, I've handed you what has been 20 marked Exhibit Number 7. And I would ask you to 21 look at the -- about the middle of the page there 22 appears to be an e-mail from Sandra Johnson to Paula 23 Mathews. Do you see that? 24 A. Yes. 25 Q. Can you tell me what information	1 but not as it relates to the conversation between 2 Sandra and me or -- 3 Q. Well, did you ask that new leases be 4 included over the next three years? 5 A. I asked for leases rolling in the next 6 three years. 7 Q. Okay. Well, is that not what this one 8 says? 9 A. I was referring to an inaccuracy in 10 Ms. Mathews' testimony yesterday. 11 Q. Okay. Well, I don't recall asking you a 12 question about Ms. Mathews' testimony, but that 13 accurately reflects your request, rolling leases for 14 the next three years? 15 A. Yes, more or less. 16 Q. Now, so all you -- it's fair to say then 17 all you wanted for your reassessment of the reserve 18 accounts was rolling leases and not new leases? 19 A. I think it's fair to say that all I -- the 20 only guidance I gave on what I did want was what was 21 in the earlier e-mail you asked me to read. 22 Q. So in the final output of the budget they 23 gave you information that you didn't want? 24 A. They gave me information in excess of what 25 I had specifically requested.

Pages 165 to 168

Page 169 1 Q. And what excess did they provide? 2 A. This capital budget I believe also 3 includes anticipated leasing above and beyond, not 4 just limited to spaces that were rolling in the next 5 three years. 6 Q. It includes new leases or a projection for 7 new leases? 8 A. Well, the two aren't mutually exclusive, 9 but what I said is I think more accurate than what 10 you are saying. 11 Q. Okay. I don't think we really are 12 deferring. So the projected new leases you didn't 13 request? 14 A. I requested a three-year capital budget 15 and made -- gave a clarifying answer to a specific 16 question Sandra asked all of which we've just gone 17 over. 18 Q. When they provided you with excessive 19 information that you didn't request, you still used 20 that to increase the reserve accounts, didn't you? 21 A. I used it to -- I used what -- the budget 22 they gave me, which is their expectation of capital 23 expenditures over the next three years to assess the 24 adequacy of the current reserve funding. 25 Q. But you only requested rolling leases?	Page 171 1 Q. And what did she -- what does it appear 2 that she says to -- that Ms. Mathews said to Ms. 3 Johnson? 4 A. It appears that Ms. Mathews stated what I 5 see written here, that in her opinion there is no 6 possible way the property can support an additional 7 \$190,000 a month. She then shared with Sandra that 8 based on that fact, her conclusion that we are 9 trying to steal the property, and her promise that 10 we will have a big fight on our hands. 11 Q. So is it fair to say based on that e-mail 12 that at least with respect to her communication with 13 Ms. Johnson, Ms. Mathews was -- they were objecting 14 to the increased reserves? 15 A. I don't read it that way. 16 Q. Okay. Can you tell me what day that that 17 e-mail was sent? 18 A. July 12th. 19 Q. And that would be the day after the 20 reserves were increased? 21 A. Correct. 22 Q. Do you recall Ms. Johnson ever sharing 23 that information with you? 24 A. No, I don't recall. 25 Q. Do you have any idea why she would not
Page 170 1 A. Correct. 2 Q. Do you have any explanation for why the 3 information on the new leases was included in the 4 final? 5 A. I can only assume that the borrower 6 believed that this more accurately represented their 7 expected outlays than the more limited case I had 8 suggested. 9 Q. Okay. I'm going to have you look at 10 another document. 11 MR. FULKS: What are we up to now? 12 COURT REPORTER: Eight. 13 (Deposition Exhibit 5 marked for 14 identification.) 15 BY MR. FULKS: 16 Q. Number 8. And I've handed you, or more 17 accurate the -- you've been handed an e-mail that 18 has been marked Exhibit 8. Have you seen this 19 e-mail before? 20 A. Yes. 21 Q. Okay. Do you know what this e-mail is 22 about? 23 A. It appears to be Ms. Mathews sharing an 24 immediate reaction to the reserve increase in an 25 e-mail to Sandra Johnson.	Page 172 1 have shared that information with you? 2 A. I can only speculate. 3 Q. Was she not the person that you understood 4 to be the person to receive that request? 5 A. I'm sorry? 6 Q. Is she not the person that you directed 7 the request for the three-year budget to? 8 A. Yes, I directed the request for the budget 9 to Sandra. 10 Q. And most of your communications were with 11 her? 12 A. Most, yes. 13 Q. Okay. And she never relayed any 14 information to you that Ms. Mathews was unhappy with 15 the reserve reassessment? 16 A. I don't recall Sandra relaying what 17 appears to me to be a private conversation between 18 people inside the borrower's side of the table to me 19 nor would I necessarily expect her to. 20 Q. Now, can you look at the e-mail just below 21 that? 22 A. Yes. 23 Q. Okay. And what does that appear to be? 24 A. Sandra advising Paula that the borrower 25 notice address in the loan document had -- that

Page 193 1 Q. Yes, you did. 2 A. If I did, I didn't intend to. The 3 conversation, as I recall it, was Mr. Folks asked me 4 how many properties in South Carolina CBRE managed 5 for us. I responded that they managed three. 6 He asked me what kind they were. I 7 responded that they were commercial properties. He 8 asked me to be more specific. I said -- you know, 9 he said, like office parks? And I said, yech, two 10 office parks and one shopping center. He asked me 11 to name the two office parks, and I did; Carolina 12 Center and Village Medical Park. 13 Q. So it's your contention that they don't 14 manage Fontaine? 15 A. Not for us. 16 Q. In between November of 2012 and the 17 appointment of a receiver, who directed them as the 18 on-site manager of the facility? 19 A. Between what period? 20 Q. Between November of 2012 and the time a 21 receiver was actually appointed in this case, who 22 gave them directives as to what to do as the on-site 23 manager? 24 A. I seem to recall Fontaine Management 25 giving direction. I don't recall that we gave them	Page 195 1 A. Again, borrower gave me a schedule of what 2 it expected to need from these reserves. I simply 3 compared that to what was there now and did the math 4 on how much more had to be contributed. 5 Q. And you base that characterization on 6 what, exactly? 7 A. I don't understand your question. I just 8 told you what I based it on. 9 Q. You never sent any e-mails, any 10 communication of any kind, to anybody at CBRE or 11 Fontaine Management telling them what you wanted the 12 budget for, did you? 13 A. We talked a lot about the communication I 14 had asking for the budget. 15 Q. And you told them that you were 16 specifically going to use it to raise the reserve 17 account? 18 A. No, I didn't tell them that. 19 Q. Okay. And you specifically said, "I want 20 the expected costs for phantom tenants that are 21 going to come into the business park over the next 22 three years"? 23 A. No, I did not say that. 24 Q. You didn't say that, but you used it, 25 didn't you?
Page 194 1 direction beyond what we demanded in writing. 2 Q. Beyond don't do what Fontaine Management 3 tells you to do? 4 A. Whatever our written correspondence said. 5 Q. Okay. Please explain to me what 6 underwriting standards were utilized in raising the 7 capital reserve account on a monthly basis. 8 A. Essentially it -- based on what is 9 expected to be required to be funded from a reserve 10 account compared to what is actually in that reserve 11 account today are the two inputs along with how much 12 time remains between now and when the funds are 13 needed. And that is really it. The underwriting 14 standard is that there be enough money available in 15 the account. 16 Q. And do you recall how much was in the 17 account when you made that demand? 18 A. No. 19 Q. What about the specific circumstances that 20 justified increasing the rollover expense account 21 payments by \$138,000 a month? 22 A. What about them? 23 Q. You said there were specific circumstances 24 that rendered them reasonable, and I would love to 25 know what they are.	Page 196 1 A. Used what? 2 Q. You used that information. 3 A. What information? 4 Q. Mr. Liffman, please look at the schedule. 5 I know you've seen it before. And we'll just go to 6 2011. Let's go to Fontaine -- I don't think there 7 is a 4, is there? Fontaine. It's on the fourth 8 page. New lease, Suite 300, 10,000 square feet at 9 \$26 for T.I. and L.C. How much would the rent on 10 that space have to be to make a profit at \$26 for 11 T.I. and L.C.? 12 A. I'm sorry. Where are we? 13 Q. We are on the fourth page of the budget or 14 the projections. 15 A. Fontaine 2012 detail? 16 Q. No, 2011. 17 A. Maybe ours are in different order. 18 Q. They could be. It's a handwritten note at 19 the -- kind of the top of the page is a 4. 20 A. I see a -- is the Bates number CBRE 0004? 21 Q. I don't have a Bates number. I would 22 assume so. I'm just wondering, you know, where does 23 it say these are the expected costs? 24 A. On the front page where it says Fontaine 25 Business Park, three-year capital expense budget,

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-40-7752

DRV FONTAINE, L.L.C.,

Plaintiff,

v.

FONTAINE BUSINESS PARK, I.L.C.;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, I.L.C.;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, I.L.C.;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, I.L.C.;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

PLAINTIFF DRV FONTAINE, LLC'S
ANSWERS TO DEFENDANT FONTAINE
BUSINESS PARK, LLC'S FIRST SET OF
INTERROGATORIES AND RESPONSES
TO DEFENDANT FONTAINE BUSINESS
PARK, LLC'S REQUESTS FOR
PRODUCTION OF DOCUMENTS

To: Brent B. Young and Mark A. Fulks, attorneys for Defendant/Counter-Plaintiff
Fontaine Business Park, L.L.C.

FILED 2012-11-05 PM 4



FBPAPP-0584

The Plaintiff, DRV Fontaine, LLC ("DRV"), by and through its undersigned counsel, herewith answers Defendant/Counter-Plaintiff Fontaine Business Park, LLC's ("Fontaine") First Set of Interrogatories and Requests for Production, pursuant to Rule 33 and 34 of the South Carolina Rules of Civil Procedure, as follows:

GENERAL OBJECTIONS

A. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting production of documents that are not relevant to the subject matter of the lawsuit on the grounds that these discovery requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

B. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents that are subject to or constituting the attorney-client privilege, the work product doctrine, trial preparation material, or any other applicable privilege or discovery limit.

C. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents that contain or constitute trade secrets, personal or confidential proprietary information, or information subject to a confidentiality agreement or similar confidentiality restrictions. DRV will not provide any such information until an appropriate protective order is entered in this lawsuit.

D. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents outside DRV's possession, custody, or control, documents that can easily be obtained from public records, documents that have already been obtained or requested from other parties or non-parties, or documents already in Fontaine's possession because, in all such instances, the discovery requests are overly broad and unduly burdensome.

J) H. Michael Schwartz;

B) Paula Motheys;

C) James Berg;

D) Sandra Johnson;

E) Martin Moore;

F) Aaron Dupree;

G) Candace Leuphart;

H) Pat Freeman; and

I) Counsel for Fontaine and Property Manager.

DRV spoke with Fontaine's agents at CBRE regarding its request for a Capital Budget. DRV spoke with some of these representatives of CBRE, Fontaine and Property Manager on August 1, 2011 after issuing its letter notifying the Borrowers of the reassessment of the Reserve Account payments. The general content of the August 1, 2011 conversation is set forth in the Complaint. DRV had further communications with H. Michael Schwartz and Defendants' counsel regarding their alleged continued efforts to resolve the cash shortfall at the Property. DRV has had numerous and continuous conversations with the representatives of CBRE, which is an agent of Fontaine, regarding the status of the Property and finances at the Property.

8: Please identify any and all persons employed by or associated with DRV who have knowledge of DRV's underwriting guidelines for commercial Loans, the creation of the underwriting guidelines, and the application of the underwriting guidelines, including, but not limited to, the identity of any people involved, consulted, or informed of the process and the nature and extent of each person's involvement, consultation, or information.

ANSWER: DRV objects to this request to the extent it assumes that DRV has underwriting guidelines for commercial loans. Subject to that objection, the person with knowledge about

the standards applied in reassessing the Reserve Account payments is Elliot Liffman.

9. Please identify and explain the process through which DRV designed and established its underwriting guidelines related to the Loan Documents, including, but not limited to, the factors and characteristics considered; the process for selecting factors and characteristics for consideration; the types and sources of information consulted; and the types of quantitative analyses conducted.

ANSWER: *DRV objects to this Interrogatory because it presupposes that DRV was the original lender on the Loan, which it was not, and because it assumes that DRV has underwriting guidelines for the origination of commercial loans. DRV did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender. With regard to the reassessment of the Reserve Account payments of which the borrowers were notified on July 11, 2011, the underwriting guidelines that were followed by DRV are simple to determine. Using Fontaine's own estimated budget and projections, DRV determined in its reasonable discretion and judgment that the monthly payments into the Reserve Accounts had to be reassessed and increased. DRV used Fontaine's own estimated budget and projections, then applied a contingency factor in order to determine the amounts necessary to be paid in to the Reserve Accounts in order to maintain a sufficient balance in each Reserve Account between 2011 and 2013.*

10. Please identify and explain the process through which the Capital Projections were created, including the identity of the person who at DRV decided to request the Capital Projections, who at DRV initiated the request, who at CBRE and/or the Property Manager first received the request, the reasons for the request, the instructions given with the request, and the provision in the Loan Documents that authorizes, permits, supports, or justifies the request.

ANSWER: *DRV does not know how the "Capital Projections" were created because they*

communications between DRV and RBS Bank that relate to RBS Bank's assignment to DRV of all of its interest under the Loan Documents.

RESPONSE: *DRV objects to this Request because it seeks information that is not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce all documents evidencing the assignment of the loan documents to DRV by RBS Bank.*

4. Please produce all documents evidencing the transaction, contract, or agreement between RBS Bank and DRV pursuant to which DRV acquired the Loan Documents.

RESPONSE: *DRV objects to this Request because it seeks information that is not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce all documents evidencing the assignment of the loan documents to DRV by RBS Bank. DRV further objects to the extent the purchase price of the Loan is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Any such information contained in the documents will be redacted.*

5. Please produce all documents necessary to a complete understanding of DRV's analysis of the Loan Documents and DRV's decision to acquire the Loan Documents.

RESPONSE: *DRV objects to this request to the extent it seeks information subject to the attorney-client privilege and the attorney work product doctrine. DRV further objects to this Request because it is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce documents relating to the Loan that were provided to DRV for review prior to the assignment of the Loan.*

6. Please produce all documents necessary to a complete understanding of DRV's underwriting guidelines for commercial real estate loan agreements, including the

underwriting guidelines as they existed at the time DRV acquired the Loan Documents and at the time the Reserve Accounts were reassessed.

RESPONSE: *DRV objects to this Request because it presupposes that DRV was the original lender on the Loan, which it was not, and because it assumes that DRV has underwriting guidelines for the origination of commercial loans. DRV did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender. With regard to the reassessment of the Reserve Account payments of which the borrowers were notified on July 11, 2011, the underwriting guidelines that were followed by DRV are simple to determine. Using Fontaine's own estimated budget and projections, DRV determined in its reasonable discretion and judgment that the monthly payments into the Reserve Accounts had to be reassessed and increased. DRV used Fontaine's own estimated budget and projections, then applied a contingency factor in order to determine the amounts necessary to be paid in to the Reserve Accounts in order to maintain a sufficient balance in each Reserve Account between 2011 and 2013.*

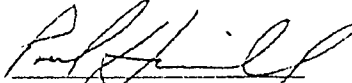
7. Please produce all documents necessary to a complete understanding of DRV's reassessment of the Reserve Accounts, including all documents that support your position that the reassessments were commercially reasonable or the exercise of reasonable judgment.

RESPONSE: *All information necessary for a complete understanding of DRV's reassessment of the Reserve Accounts is contained in the July, 2011 Notice of Reassessment and the attachment thereto. That document has previously been produced and will be produced in response to the Request.*

8. Please produce all documents necessary to a complete understanding of DRV's decision to request the Capital Projections from the Property Manager and/or CBRE.

McNAIR LAW FIRM, P.A.

By:



Paul D. Harrill

Post Office Box 11390

Columbia, SC 29211

P: (803) 799-9800

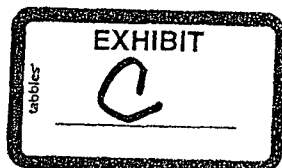
F: (803) 753-3278

pharrill@mcnair.net

Attorneys for the Plaintiff

May 21, 2013
Columbia, South Carolina

Page 1 1 STATE OF SOUTH CAROLINA 2 COUNTY OF RICHLAND COURT OF COMMON PLEAS 3 4 DRV FONTAINE, LLC, 5 Plaintiff, 6 v. 7 FONTAINE BUSINESS PARK, LLC; 8 FONTAINE BUSINESS PARK 2, LLC; 9 FONTAINE BUSINESS PARK 3, LLC; 10 FONTAINE BUSINESS PARK 4, LLC; 11 FONTAINE BUSINESS PARK 5, LLC; 12 FONTAINE BUSINESS PARK 6, LLC; 13 FONTAINE BUSINESS PARK 7, LLC; 14 FONTAINE BUSINESS PARK 8, LLC; 15 FONTAINE BUSINESS PARK 9, LLC; 16 FONTAINE BUSINESS PARK 10, LLC; 17 FONTAINE BUSINESS PARK 11, LLC; 18 FONTAINE BUSINESS PARK 12, LLC; 19 FONTAINE BUSINESS PARK 13, LLC; 20 FONTAINE BUSINESS PARK 14, LLC; 21 FONTAINE BUSINESS PARK 15, LLC; 22 FONTAINE BUSINESS PARK 16, LLC; 23 FONTAINE BUSINESS PARK 17, LLC; 24 FONTAINE BUSINESS PARK 18, LLC; 25 FONTAINE BUSINESS PARK 19, LLC; 26 FONTAINE BUSINESS PARK 20, LLC; 27 FONTAINE BUSINESS PARK 21, LLC; 28 FONTAINE BUSINESS PARK 22, LLC; 29 FONTAINE BUSINESS PARK 23, LLC; 30 FONTAINE BUSINESS PARK 24, LLC; 31 FONTAINE BUSINESS PARK 25, LLC; 32 FONTAINE BUSINESS PARK 26, LLC; 33 FONTAINE BUSINESS PARK 27, LLC; 34 FONTAINE BUSINESS PARK 28, LLC; 35 FONTAINE BUSINESS PARK 29, LLC; 36 FONTAINE BUSINESS PARK 30, LLC; 37 FONTAINE BUSINESS PARK 31, LLC, 38 Defendants. 39 40 41 42 43 44 45 CASE NO.: 2012-CP-40-7752.	Page 3 1 APPEARANCES: 2 ATTORNEYS FOR THE PLAINTIFF 3 DRV FONTAINE, LLC: 4 5 MCNAIR LAW FIRM P.A. 6 BY: PAUL D. HARRILL, ATTORNEY AT LAW 7 1221 Main Street 8 Suite 1800 9 Columbia, South Carolina 29201 10 (803) 799-9800 11 pharrill@mcnair.net 12 13 ATTORNEYS FOR THE DEFENDANTS 14 FONTAINE BUSINESS PARK 2-31, LLC: 15 16 PLAYER LAW FIRM, LLC 17 BY: TUCKER S. PLAYER, ATTORNEY AT LAW 18 1415 Broad River Road 19 Columbia, South Carolina 29210 20 (803) 772-6008 21 Tucker@PlayerLawFirm.com 22 23 FONTAINE BUSINESS PARK, LLC: 24 25 BAKER, DONELSON, BERPMAN, 26 CALDWELL & BERKOWITZ, PC 27 BY: MARK A. FULKS, ATTORNEY AT LAW 28 100 Med Tech Parkway 29 Suite 200 30 Johnson City, Tennessee 37604 31 (423) 975-7655 32 mfulks@bakerdoneelson.com 33 34 ALSO PRESENT: 35 ELLIOT LIFFMAN, DIVERSIFIED REALTY VENTURES 36 37 (INDEX AT REAR OF TRANSCRIPT) 38 39 40 41 42 43 44 45
Page 2 1 VIDEO DEPOSITION 2 WITNESS: PAULA MARGARET MATHEWS 3 DATE: Thursday, September 19, 2013 4 TIME: 9:50 a.m. 5 LOCATION: McNair Law Firm, P.A. 6 1221 Main Street 7 Suite 1800 8 Columbia, South Carolina 9 10 TAKEN BY: Attorneys for the Plaintiff 11 12 REPORTED BY: NISHA GORDON 13 Court Reporter 14 15 16 17 18 19 20 21 22 23 24 25 COMPUSCRIPTS, INC. Client Focused. Deadline Driven. CHARLESTON COLUMBIA HILTON HEAD GREENVILLE MYRTLE BEACH 1-888-955-0056 www.southcarolinacourtreporters.com	Page 4 1 (The deponent reserves the right to read 2 and sign the deposition transcript.) 3 4 PAULA MARGARET MATHEWS, being first 5 duly sworn, testified as follows: 6 7 EXAMINATION 8 BY MR. HARRILL: 9 Q. Ms. Mathews, I'm Paul Harrill. We've -- I 10 think we've met at least once or twice before, if not 11 directly, indirectly in relation to this lawsuit that's 12 been filed by my client, DRV Fontaine, LLC, against 13 Fontaine Business Park, LLC, and Fontaine Business Park, 14 LLCs, 2 through 31. 15 Let me give you a few directions as far as 16 the deposition before we get started, and let me ask you 17 a question in that regard first. 18 Have you had your deposition taken before? 19 A. Yes. 20 Q. Okay. How many times? 21 A. Once. 22 Q. All right. And can you tell me very 23 briefly, generally, what the nature of that deposition 24 was? 25 A. It had to do with deed restrictions. 26 Q. Okay. In relation to property you were 27 managing or --



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1 obligations of the borrowers in this loan?
 2 A. Well, I -- no, I'm not.
 3 Q. Okay. Do you know if there is, if this is
 4 a recourse loan?
 5 A. It was my understanding it was a
 6 non-recourse.
 7 Q. Okay. And explain what non-recourse loan
 8 means to you.
 9 A. Well, I don't know if I can fully explain
 10 it. I mean, non-recourse basically means if there is a
 11 situation that the -- the -- the investor -- the -- the
 12 lender cannot come after the investors or personally --
 13 personally come after the investors, my understanding.
 14 Q. Okay. And so if it's a non-recourse, that
 15 means the lender can look only to the collateral as
 16 means of recovering its loan?
 17 A. Yes.
 18 Q. Okay. And is it your understanding that
 19 that's the nature of this loan?
 20 A. That's my understanding, yes.
 21 Q. Okay. Do you understand that in
 22 non-recourse loan arrangements that there's a -- perhaps
 23 a greater emphasis put on the reserve accounts to
 24 maintain the value of the collateral?
 25 A. I don't think it -- no, I don't believe

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1 term custodial account in some legal manner, or is that
 2 just a descriptive term in your view?
 3 A. I believe it's the legal shoe.
 4 Q. Okay.
 5 A. Just like, I -- I have a mortgage payment
 6 every month. I send my mortgage payment in, but I also
 7 send excess money to pay my taxes.
 8 Q. Okay.
 9 A. As required by the loan.
 10 Q. All right. And -- and what's the basis of
 11 your understanding from a legal standpoint that that's a
 12 custodial account?
 13 A. Well, if we're giving money to the lender
 14 for reserves to make those payments and the lender
 15 decides they're not going to make those payments, then
 16 that's the -- that's a problem.
 17 Q. Is it your understanding under the DRV and
 18 Fontaine loan documents that in the event of a default,
 19 DRV has the right to sweep the reserve account monies?
 20 A. I believe the loan documents say that, yes,
 21 in the event of a default.
 22 Q. Okay. Is it your understanding that Judge
 23 Lee ultimately ruled in the receivership hearing that
 24 there has been an event of default in this case?
 25 A. Yeah, that's my understanding, yes.

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1 that.
 2 Q. Okay. Would you -- would you think it
 3 would be fair for the lender to place more importance on
 4 the upkeep and value of its collateral in a non-recourse
 5 loan?
 6 A. I think it -- you have to look to the loan
 7 documents and what the original agreement were. So
 8 whether it's non-recourse or recourse, period. I mean,
 9 there are certain requirements on the loan document to
 10 maintain the property.
 11 Q. Okay. And -- and those obligations existed
 12 in this loan.
 13 A. Always.
 14 Q. You've used the term regarding the tax
 15 insurance reserve and the other two reserve accounts as
 16 being custodial accounts.
 17 What do you mean by that?
 18 A. They are held by the lender, and those
 19 funds belong to the investors. And it's the -- the
 20 investors have the tax obligation to pay the taxes.
 21 The investors have a obligation to pay the insurance.
 22 And it's given to the lenders in a custodial capacity
 23 for the lender to pay on their behalf when the time
 24 comes.
 25 Q. Okay. Is that -- is -- are you using that

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1 Q. Okay. What is your understanding with
 2 regard to DRV's rights to increase or decrease the
 3 amounts required to be paid into the capital reserve
 4 account and rollover reserve accounts?
 5 A. Well, I believe the loan documents say that
 6 the lender has the right to reassess from time to time,
 7 but within reason, and based on normal pre-assessments.
 8 I mean --
 9 Q. I -- I -- I'm -- I don't understand the
 10 last part. You said normal.
 11 A. I guess -- I guess you'd say your -- your
 12 underwriting, you know, assessments -- you know, it's --
 13 you just don't -- you can't just tell the borrower -- I
 14 guess you can tell the borrower, look, we want to
 15 increase your reserves from 21,000 to 159,000 a month,
 16 but that's not reasonable. That's a 1000-percent
 17 increase.
 18 Q. Why is that not reasonable?
 19 A. It's 1037-percent increase. I've been
 20 doing this for almost 40 years. I've never seen
 21 anything like that this.
 22 Q. Okay. What's the highest increase in
 23 reserve accounts that you've ever seen prior to this?
 24 A. I believe initially we doubled. The --
 25 after 35th month on this original loan, the -- one of

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Page 57 1 the accounts went -- you know, it was doubled and went 2 to 21,000 a month, and it had been like 8 or 10 or 3 something like that in the 35th month, and that was 4 written into the loan. 5 Q. That -- that's your understanding on this 6 particular loan? 7 A. Yes. 8 Q. Okay. And who was holding the loan at that 9 time? 10 A. Greenwich was the original -- was the 11 originator of the loan. 12 Q. Okay. So you believe they increased the 13 payments required into the reserve accounts? 14 A. It was written into the original loan, yes. 15 Q. Okay. All right. 16 Let me go back to my question. What is the 17 highest increase that you've ever seen in your 18 experience to a reserve account before the increase by 19 DRV here? 20 A. 50 percent. 21 Q. Okay. And where was that? 22 A. Well, I -- I don't know. I can't remember 23 all the properties I've been involved in over the years. 24 Even 100 percent, but not 1000. 25 Q. All right. And -- and I think we've	Page 59 1 Q. -- and you can tell me where you think it 2 says that. 3 So you believe that in this case, the loan 4 documents didn't allow for reserves to be put in place 5 to cover anticipated future leases. 6 A. I do. 7 Q. Okay. And so where was the money going to 8 come from had Fontaine Management or Fontaine Business 9 Park or CB Richard Ellis leased several new spaces to 10 new tenants? 11 A. It was coming out of reserves, monthly 12 reserves. 13 Q. Okay. Were there going to be enough money 14 in the reserves? 15 A. If there wasn't enough money in the 16 reserves, then there would be a capital call. 17 Q. I see. 18 Has there ever been a capital call to the 19 investors at Fontaine? 20 A. Not on this property because they had 21 reserves set aside. 22 Q. All right. Let me ask you to look at 23 paragraph 13 of your affidavit. 24 A. Okay. 25 Q. There it -- at the end of that paragraph.
Page 58 1 --already discussed the fact that the reserve accounts are 2 in place to have money set aside for anticipated capital 3 expenditure costs or tenant improvement and lease 4 commission expenses, correct? 5 A. In this particular case, no. 6 Q. Okay. 7 A. The loan -- 8 Q. I didn't ask you about this particular 9 case. 10 A. Okay. 11 Q. Is that the basis for having reserve 12 accounts? 13 A. Yes. 14 Q. Okay. Now, tell me why you think that 15 wasn't the case in this particular loan. 16 A. I believe the loan documents provide for 17 advance payments of tenant and leasing commissions to 18 succinct because I believe the loan documents say that 19 we have the right to -- these are existing -- for 20 existing leases. And these are -- these increases were 21 based on potential future leases that still have not 22 happened. 23 Q. All right. Well, we'll look at the loan 24 document in just a minute -- 25 A. Okay.	Page 60 1 it refers to the fact that DRV may reassess the amount 2 of the monthly payment to the cap reserve account from 3 time to time. And then it says, Based upon its current 4 underwriting standards. 5 Do you see that? 6 A. I do. 7 Q. Okay. What does that mean? 8 A. I don't know because I don't know what 9 their underwriting standards were. 10 Q. Okay. Is it your contention that they 11 didn't follow their underwriting standards at DRV? 12 A. That who did? 13 Q. That DRV did not follow its underwriting 14 standards. 15 A. Yes, it is. 16 Q. Why? 17 A. Because it's excessive, and it's not based 18 on facts. 19 Q. If you don't know what the underwriting 20 standards are, how can you say that -- that DRV is not 21 following its underwriting standards? 22 A. We've never been able to -- they've never 23 been able to tell us what their underwriting standards 24 are. 25 Q. But your contention is that it -- it

Page 61 1 can't meet their underwriting standards because it's 2 excessive? 3 A. My contention is, I don't know what their 4 underwriting standards. We've asked for that. We've 5 never gotten that. 6 Q. Okay. So you don't know if the increase or 7 reassessment is in compliance with DRV's underwriting 8 standards. 9 A. No, I don't. 10 Q. Okay. All right. 11 If you'll turn over to paragraph 20 of 12 Exhibit 1. 13 A. (Complying.) 14 Q. All right. In that paragraph you say that 15 all times before DRV attempted to create an -- and then 16 you have in quotes -- an event of default -- unquote. 17 What do you mean by your allegation there 18 that DRV attempted to create an event of default? 19 A. I believe that that's what they did; that 20 there was a -- there is a floor of \$250,000 that we had 21 to maintain in the commission and leasing rollover 22 reserves, and at the time -- and there was over 600 -- I 23 believe \$600,000 or \$650,000 in that account. 24 Q. Okay. Well, I need you to help me and 25 explain further how you believe DRV attempted to create	Page 63 1 Q. Okay. And we'll talk more about this 2 later, but Fontaine and the borrowers did pay four 3 months of those increased reserves payments, did they 4 not? 5 A. Yes. 6 Q. Okay. All right. 7 Tell me why you believe DRV increased the 8 capital reserve account payments required each month. 9 A. Because they looked at a three-year 10 projection of capital expenditures that was produced by 11 CBRE that basically had the property being leased to 12 100 percent, and capital improvements made practically 13 every building, needed or not needed. And they took 14 those three year numbers, and they said, look, this 15 is -- it's going to be, you know, 3- or 4- or \$5 16 million. We need to increase these accounts. When in 17 reality, that hasn't happened. 18 Q. Okay. If -- and after the four month -- 19 months of payments of the increased capital reserve 20 payments, borrowers stopped making the increased reserve 21 payments, correct? 22 A. That's correct. 23 Q. Okay. And had the borrowers paid the 24 increased reserve account payments as required for the 25 additional six months, those monies would have been held
Page 62 1 an event of default. 2 A. By accelerating -- by basically coming back 3 to us and saying, your accounts now are going to go from 4 21,000 a month for one particular account to, I think it 5 was, 150,000 a month. And another one, there was a 6 hundred and thirty -- or a 736-percent increase, and the 7 other one was a 1037-percent increase. 8 So I believe they created that, trying to 9 come up with an event of a default. 10 Q. By -- by -- okay. 11 So you're saying they attempted to created 12 an event of default by increasing the reserve amount -- 13 amount -- 14 A. Yes. 15 Q. The reserve account payments they required 16 each month? 17 A. Exactly. 18 Q. Okay. How long were these increases to be 19 in place? 20 A. I believe it was ten months. 21 Q. So these increases were supposed to be paid 22 for ten months and then what happened to the reserve 23 account? 24 A. I think they were going to go back to some 25 lesser amount.	Page 64 1 by a lender, as you say, for the benefit of the 2 borrowers, correct? 3 A. Supposedly, yes. 4 Q. Yeah, so it -- it still would have been the 5 borrowers' money, correct? 6 A. Yes. 7 Q. Unless there was an event of default. 8 A. Supposedly, yes. 9 Q. Okay. When the brokers stopped making the 10 increased reserve account payments, did DRV authorize 11 that? 12 A. Authorize what? 13 Q. The -- the change in payments back to the 14 old reserve account payments? 15 A. I -- I don't believe so. 16 Q. Okay. Did the borrowers even ask DRV if 17 they could return to the old capital reserve and 18 rollover reserve account payments? 19 A. Yes, I believe that was part of those 20 original -- those letters that were sent by our legal 21 counsel. 22 Q. And you don't remember the date of the 23 first letters. 24 A. I -- I don't. 25 If you have a copy, I'll be happy to look

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Page 69 1 investors that you were going to turn over those 2 reserves on hand? 3 A. I don't believe I officially notified them 4 of that at the time, because my feeling on it was the 5 TIC's already knew we were closing the reserves for that 6 purpose, for future capital on TI's. Those were funds. 7 that would normally have been distributed to them, and 8 we had already said months before we're going to 9 start -- we're going to cease sales distributions, and 10 we're going to take these monies and we're going to use 11 them for reserves. 12 So when those monies were sent to 13 Mr. Liffman, again, we felt like, okay, this is -- he's 14 the custodian of all these monies. They're going into 15 reserves because he said we need to increase reserves. 16 Q. Okay. 17 A. So that's what the monies were for. 18 Q. All right. And you said you told him you 19 were paying those in good faith. 20 A. Yes. 21 Q. Are you sure that that's what you said? 22 A. I believe so, yes. 23 Q. Okay. Can you tell me to best of your 24 rec -- recollection exactly what you told Mr. Liffman 25 with regard to your willing to pay those first four	Page 71 1 payment of these monies in your phone call after you 2 received the July letter -- 3 A. Uh-huh. 4 Q. -- in 2011, did you indicate at that time 5 to Mr. Liffman that there would be no additional 6 payments toward the increased capital reserve and 7 rollover reserve accounts? 8 A. I did, because I told him exactly how much 9 money there was available. 10 Q. And so it's your testimony that you told 11 him that you're going to pay these four months' payments 12 and then you would stop. 13 A. That's correct. 14 Q. Okay. Did you and your counsel, Mr. Berg, 15 indicate that you all were going to put together some 16 sort of a plan to address the cash needs at the 17 property? 18 A. We had attempted to send Mr. Liffman the 19 revised numbers because they weren't real, and when 20 Sandra prepared those numbers, she prepared it based on 21 100-percent occupancy over a three-year period and a 22 wish list for every possible capital improvement you can 23 make month to the property, not understanding what 24 Mr. Liffman was going to be using those numbers for. 25 So we attempted to send revised numbers,
Page 70 1 months of the increased reserve payments? 2 A. I believe that's when we had the 3 conversation, and Jim Berg can probably attest to that 4 because he was on the line. 5 Q. So is Mr. Berg a witness in this case? 6 A. He could be for that phone call, I guess. 7 Q. Okay. All right. 8 And at -- and so then -- tell -- correct me 9 if I'm wrong, but for the subsequent four months, 10 beginning in September, the borrowers, which includes 11 Fontaine Business Park, LLC, and then the TIC 12 investors -- 13 A. Right. 14 Q. -- paid each of those months from September 15 to December the increased capital reserve accounts along 16 with the principal and interest payments? 17 A. Correct. 18 Q. Okay. Did you provide any transmittal 19 communication to DRV that this payment was being made in 20 good faith or under protest or anything like that? 21 A. I don't know that -- I don't believe 22 anything in writing went to DRV. 23 Q. Okay. 24 A. I think it was phone calls. 25 Q. When you and Mr. Liffman discussed the	Page 72 1 and we were told in an e-mail to Sandra he wasn't 2 interested in seeing revised numbers. So... 3 Q. So what's the answer to my question? 4 A. What's your question? 5 Q. My question was, Did you tell Mr. Liffman 6 in the conversation that you had with him and both your 7 counsel that you all were going to come up with a plan 8 to address the shortfall of funds at the property? 9 A. I don't recall having that conversation. I 10 recall talking about being -- getting real with the 11 numbers because the numbers were not realistic. 12 Q. Okay. And you never talked about coming up 13 with a -- a -- some sort of a plan to -- to address the 14 problems there. 15 A. I -- I don't recall having that 16 conversation. 17 Q. Okay. Are you denying that you said that, 18 or are you just saying you don't recall saying that? 19 A. I -- I'm not -- the -- the plan was to work 20 with Mr. Liffman to come up with more realistic numbers 21 because the numbers that he based his exorbitant 22 reassessments on were not real. They're not realistic. 23 Q. And those numbers were prepared by CERE. 24 A. Yes, and based on 100-percent occupancy. 25 There isn't a building in this area that's 100-percent

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1 occupied. 2 Q. And how do you know it's based on 3 100-percent occupancy? 4 A. I can -- I can see. It's based on 5 100-percent occupancy on every single space leasing up. 6 He had every space leasing in the entire property, 7 including the vacant 21,000-square-foot building. Every 8 building was 100-percent occupied. 9 Q. Okay. 10 A. Which is not realistic in any market. 11 Q. Okay. And you're confident that it -- 12 it -- the projections that -- that Ms. Johnson prepared 13 reflected 100-percent occupancy. 14 A. Yes. 15 Q. Okay. Let's talk about the -- let's talk 16 about the budget that was presented to DRV. 17 Is it your understanding that -- that a the 18 budget that was a three-year capital budget that was 19 presented to DRV was the basis of Mr. Liffman's decision 20 to reassess the reserve account payments? 21 A. Yes. 22 Q. Okay. And tell me, to the extent we 23 haven't covered this, where did that capital budget come 24 from? 25 A. It originally came from Sandra --	1 didn't you? 2 A. No, I did not. 3 Q. All right. 4 A. I had the approval. I told her to go ahead 5 and send it. But she created it along with Aaron Dupree 6 with input from Mr. Liffman on what tenant improvements 7 should be. 8 She was e-mailing me saying, I need to get 9 reimbursed for capital expenditures, and that he won't 10 reimburse me unless I submit this budget. 11 So I said, Go ahead and send it. 12 (Plaintiff's Exhibit Number 2, Sandra 13 Johnson E-mails, Bates Stamped CBRE0051, was marked for 14 identification.) 15 BY MR. HARRILL: 16 Q. All right. Ms. Johnson, I've handed you a 17 packet of documents. 18 MR. PLAYER: Mathews. 19 MR. HARRILL: Excuse me? 20 MR. PLAYER: You called her Johnson. 21 MR. HARRILL: Oh, I'm sorry. 22 MR. PLAYER: You were reading the e-mail. 23 BY MR. HARRILL: 24 Q. Yeah, I'm sorry. I was looking at the 25 e-mail when I said it.
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1 Q. Okay. 2 A. From CBRE. 3 Q. All right. Let me ask you to look at 4 paragraph 41 of your affidavit that's Exhibit 1. 5 All right. We will talk more about the 6 capital budget and how it was originated. 7 But I want you to look at the second 8 sentence of paragraph 41 there. 9 A. Okay. 10 Q. Okay. And I'm going to read that, and you 11 tell me if I read it correctly. 12 It says, That capital budget was submitted 13 to DRV by CBRE-Columbia without Fontaine's approval or 14 input. 15 Have I read that correctly? 16 A. Yes. 17 Q. Okay. That's just not true, is it? 18 A. We corrected that in my supplemental 19 affidavits, as you know. 20 Q. Ma'am, that's not my question. 21 You signed this affidavit under oath, and 22 this was submitted to Judge Lee at a hearing. That 23 statement there was incorrect, wasn't it? 24 A. Yes. 25 Q. Okay. You did have input into the budget,	1 Ms. Mathew, I've handed you a packet of 2 documents, each of which at the bottom bears a -- what 3 we call a Bates label that says CBRE, and then it has a 4 number next to it. 5 A. Yes. 6 Q. These are all documents, I think you are 7 aware, that were produced in this litigation by CBRE to 8 my client, DRV. 9 Have you seen these documents before? 10 A. Yes, I believe so. 11 Q. Okay. And I'd like you to just flip 12 through these to the extent you haven't previously and 13 tell me if these -- each of these documents reflects 14 correspondence through e-mails in which you were a party 15 to the e-mail. 16 A. Yes. 17 Q. Okay. All right. 18 Let me ask you to turn over to the second 19 page of this document, which is CBRE0053 at the bottom. 20 I'm ignoring the handwritten numbers that were -- 21 A. Oh, okay. 22 Q. -- written on there by somebody. I don't 23 know who did that, but -- 24 A. Okay. 25 Q. -- CBRE0053.

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Page 101 1 With Elliot and his counsel on the phone. It was 2 also -- it was -- it was also in multiple e-mails from 3 Sandra Johnson to Elliot. 4 Q. Have you produced those? 5 A. Yes, they're -- we've seen them. I've seen 6 them. 7 Q. Where Ms. Johnson is saying, how did you 8 come up with this? 9 A. Yes. 10 Q. Okay. 11 Sorry. I've only got one copy. 12 (Plaintiff's Exhibit Number 3, DRV Letter 13 and Schedule A, July 11th, 2011, sent via Fontaine 14 Business Park, LLC, was marked for identification.) 15 BY MR. HARRILL: 16 Q. Ms. Mathews, I have -- I have marked 17 Exhibit 3 to your deposition. It is a letter on DRV 18 letterhead dated July 11th, 2011, sent via FedEx to 19 Fontaine Business Park, LLC; is that accurate? 20 A. Yes. 21 Q. Have you seen this letter before? 22 A. I have. 23 Q. Okay. How soon after this letter was 24 received by Fontaine Business Park, LLC, did you see 25 this letter?	Page 103 1 A. I understand that there is an attempt to -- 2 yes, I understand that. 3 Q. Okay. In light of the fact that the 4 capital budget which -- the three-year capital budget 5 that you're well-familiar with was admitted to DRV, 6 what -- what should DRV have done differently as far as 7 reassessing the reserve accounts? 8 A. DRV should have disclosed what they were 9 doing. It's my experience that a lender does not go to 10 a property manager and ask a property manager to come up 11 with their reserve account needs. I've never seen that 12 before. It's usually a lender doing an underwriting 13 based on what they see in the operating reports. 14 And there's also a revenue against 15 expenses, and that's not what -- that's not what CBRE 16 produced. Basically what they produced was just -- if 17 this is the perfect world and we can lease the property 18 over three years to 100 percent and we have unlimited 19 funds, here's what it would cost. 20 Q. Okay. So -- so should DRV have produced it 21 own, you know, projections as far as the -- the 22 expenditures going forward? 23 A. Yes. 24 Q. Okay. And do you think these would have 25 been more favorable to the borrowers?
Page 102 1 A. How -- how soon? What? 2 Q. Yes. Well -- 3 A. I'm sorry? 4 Q. Well, let me ask it a different way. 5 Are you the person that would receive this 6 letter when it comes in the mail? 7 A. Yes. 8 Q. Okay. So it -- it comes in the mail and 9 goes directly to you. 10 A. Correct. 11 Q. All right. And this is the notification 12 letter whereby DRV informed the borrowers that it was 13 reassessing the capital and rollover reserve payments, 14 correct? 15 A. Yes. 16 Q. Okay. Did you review Schedule A to this 17 letter, which is the second page? 18 A. I did. 19 Q. Okay. Do you understand Schedule A? 20 A. I understand it's just numbers plugged in 21 here saying here's what we expect you to pay and for 22 what period of time. 23 Q. Okay. And do you understand that it is 24 attempting to prevent the reserve accounts from falling 25 below zero by increasing the reserve payments?	Page 104 1 A. Yes. 2 Q. Okay. Why do you think DRV was requesting 3 a three-year capital budget? 4 A. I honestly didn't know. 5 Q. So you had no idea why the lender would be 6 interested in a three-year capital budget for the 7 property? 8 A. If it was a true budget, that would be one 9 thing; but these, it was not a true budget. These were 10 just projections, like I said, with no offset for 11 revenues. So all you have is a lot of money going out 12 and no money coming in, which is not a budget. 13 Q. Okay. So let's call it projections. 14 A. Yeah, projections. 15 Q. And you reviewed the projections and had it 16 for five or six months before it went out. 17 A. Correct. 18 Q. Correct? 19 And you approved sending it to the lender. 20 A. Yes. 21 Q. Okay. So why did you think the lender 22 wanted those three-year capital projections? 23 A. I certainly never anticipated that they 24 were going to use it to inflate reserve accounts to that 25 extent.

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Page 105 1 Q. What did you anticipate they would do? Do 2 you -- 3 A. I think they would be looking at it going. 4 Well, let's see here. We've -- we know what their 5 capital expenditures are for 2011, 2012, 2013. So when 6 we get the operating budget for those years, let's see 7 if they jibe. Once we've have the projected revenue 8 against those expenditures, capital expenditures, and 9 let's see if that jibes. 10 Q. So as far as the capital expenditures that 11 are projected in the three-year capital budget as we've 12 call it, or you can call it projection if you want, you 13 don't -- you did not anticipate that the lender would 14 look at that and -- and use that to determine if there 15 might be a shortfall on the reserve account? 16 A. No, I do not. 17 Q. Never crossed your mind. 18 A. Never crossed my mind because there's no 19 revenue associated with any of that. 20 Q. What was the -- what -- what would the 21 revenue matter? 22 A. Mr. Harrill, you would not give someone \$2 23 and a half million if you didn't have leases with 24 revenues to offset some of that. 25 Q. If you made the capital call you might,	Page 107 1 pay for the TI and the lease commissions if they're 2 actually interested in leasing the space? 3 A. I'm not ever asked to prove that. No one 4 ever asked me to prove that. 5 Q. No one's ever asked you if you can fund TI 6 in this amount? 7 A. They assume that I can if I'm going to sign 8 a lease. 9 Q. Okay. 10 A. If they're going to sign a lease, then they 11 assume that we have the funds. When the leases go out 12 and if there's not enough funds, you get an approval 13 from the investors for a capital call at that time. 14 Q. Have you ever signed a lease in which there 15 weren't enough funds in -- in TI? 16 A. No. 17 Q. But you're saying in -- apparently in this 18 case on the property, if the projected leases had been 19 signed, there would not have been enough money and you 20 would have made a capital call rather than paying into 21 the capital reserve accounts and building upwards or -- 22 A. Yes. I wouldn't sign the lease. I would 23 go to the investors and say, Here's the deal. Here's 24 the rent. Here's how much it's going to cost to do this 25 deal. Do you want to do the deal? And I would
Page 106 1 wouldn't you? 2 A. What? 3 Q. What -- what -- 4 A. No, you wouldn't. You have to have a 5 lease -- 6 Q. Yeah. 7 A. -- with revenue before you give someone \$10 8 a square foot in TI's. 9 Q. But -- 10 A. You just don't give them monies. 11 Q. Ms. Mathews, isn't it, though, the standard 12 in the industry that if a tenant is looking at a space 13 at a commercial property -- 14 A. Uh-huh. 15 Q. -- they want to know that there's money set 16 aside for tenant improvements -- 17 A. Uh-huh. 18 Q. -- when they negotiate the lease. 19 A. Yes, some cases; otherwise, if there's not 20 enough money in the reserves, you do a capital call. 21 Q. And is that -- is that part of your 22 negotiations with the -- the -- the potential tenant? 23 A. Absolutely not. 24 Q. So -- so how do you prove to this 25 perspective tenant that you've got sufficient funds to	Page 108 1 recommends it. 2 Q. And what if they said no? 3 A. What do you mean, if they -- 4 Q. What if they said, No, we're not going to 5 do a capital call? We're not responding to a capital 6 call. 7 A. That's their prerogative. 8 Q. And then what -- what is the lender left 9 with? 10 A. What do you mean, what is the lender left 11 with? 12 Q. This is the lender's collateral we're 13 talking about. 14 A. I understand that. 15 Q. So you're putting the well-being of the 16 collateral in the hands of the lenders -- or, I mean, 17 excuse me, the borrowers, and if they don't want to make 18 a capital call or pay on a capital call, then the lender 19 missed out on leases -- 20 A. No. 21 Q. -- instead of having the TI and reserves? 22 A. No. We need to always have reserves. 23 There's reserves and there's excessive reserves. 24 Q. Are you saying that -- that the 25 excessive -- this Exhibit 3 that you have in front of

Page 109 1 you -- 2 A. Yes. 3 Q. What -- what is excessive about those 4 reserves if the capital budget, as presented by CBRE and 5 approved by you, Paula Mathews, is accurate? What -- 6 what is excessive about this document? 7 A. This is excessive because it's based on a 8 three-year capital projections that assumes that this 9 property is going to be 100-percent leased in three 10 years. 11 Q. Okay. Look? 12 A. The property's never been 100-percent 13 leased, and the average occupancy of this -- of 14 competing properties is 65 percent. I would never in my 15 operating budget that we submit every year for 16 approval -- never does it say we're going to lease up 17 the entire building in that period of time. Never. 18 Q. Okay. And, again, you approved this -- 19 this projection, three-year budget projection and 20 capital projection at -- before it was sent to DRV. 21 A. Correct. 22 Q. Okay. So let's assume for the sake of the 23 questions that I'm going to ask you at this point -- 24 A. Okay. 25 Q. -- that DRV had a right to rely on the	Page 111 1 reassess his reserve accounts. If we had known that, we 2 would have said, Wait a second. You're -- no way is 3 this going to be a 100-percent lease. We knew it was 4 going to be a 100-percent lease. 5 He instructed Sandra, This is what we 6 wanted. This is what we want to see, that all of the 7 property, leased up 100 percent and all capital, if you 8 can just do anything you wanted to. 9 And that's what she did. 10 Q. Okay. Let's -- let's go back to what you 11 said that minute ago too. 12 You said, This is a three-year capital 13 lease, and so these should have been spread out over 14 three years. 15 A. Uh-huh. 16 Q. In fact, if you look at the letter, the 17 increase payments are spread out over two-and-a-half 18 years, are they not? 19 A. It looks that way, yes. 20 Q. It's just that they're front-loaded for the 21 first ten months, right? 22 A. Right. 23 Q. Have you ever looked at your own capital 24 budget and compared it to what Mr. Liffman and DRV did 25 to determine if it's front-loaded here because your
Page 110 1 projections that were provided by the borrowers and its 2 manager, CBRE. Okay? 3 A. Okay. 4 Q. If DRV had a right to rely on these as 5 accurate, tell me what in Mr. Liffman's letter to you, 6 dated July 11th, 2011, is outrageous? 7 A. I've never in all of my almost-40 years 8 seen an increase of \$100,000 in one -- one account. And 9 if the plan was, okay, let's assume that all of this is 10 going to happen, and we need all of these monies 11 tomorrow -- which we didn't. It was a three-year 12 capital budget -- and we need all of these monies 13 tomorrow, okay, if this was a three-year capital budget, 14 why are these excessive increases not spread out over a 15 longer period of time? Because we've already shown that 16 in 2011, we used 5 percent of what it was. 17 Q. Well, let's not talk about what you 18 actually -- we're talking about DRV having the right to 19 rely on what you provided to it in the form of these 20 projections. Okay? 21 So if DRV has the right to rely only these, 22 I'm asking you, what's outrageous about the letter that 23 you got reassessing the reserve payments? 24 A. It was never disclosed to us that he was 25 using these -- these three-year capital projections to	Page 112 1 budget was front-loaded for 2011. 2 A. Right. Okay. 3 Q. Have you ever done that? 4 A. Yes. 5 Q. Okay. And is that accurate? 6 A. It seems to be accurate. 7 Q. Okay. So if he was relying on this budget 8 accurately, these numbers, as outrageous as you say they 9 are, track the expenditures that are necessary under the 10 budget and expected under the budget. 11 A. Yes. 12 Q. Okay. 13 (Plaintiff's Exhibit Number 4, E-mail 14 Correspondence, Bates Stamped EN000738, was marked for 15 identification.) 16 BY MR. HARRILL: 17 Q. Ms. Mathews, I have marked as Exhibit 4 to 18 your deposition now, another series of e-mails that have 19 been produced, I think by way of subpoena, to Fortaine 20 Management. 21 And I believe that each of these e-mails 22 contains communications either to or from you. 23 Would you look through these e-mails and 24 just confirm if that's the case. 25 A. Yes.

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Page 121 1 Q. Okay. And you don't know if either of 2 those cooling towers have ever been replaced. 3 A. I don't know. I could look it up on my 4 computer and look at the reports, the last report. 5 Q. Okay. And if they have not, would you know 6 why they would not have been replaced? 7 A. No. I mean, if they -- 8 Q. Would you -- would you make the decision 9 not to replace them but -- in order to save money? 10 A. Only if it was prudent. If the cooling 11 towers area about ready to explode, then obviously I'm 12 not going to do that. We're going to move ahead and 13 replace them. 14 Q. Well, were you aware that the replacement 15 towers were identified as something that needed to be 16 done by the report that was done when the loan was 17 closed back in 2007? 18 A. Yes, at some point they would be replaced. 19 Q. And then they were identified, at least 20 initially, by CBRE as something that needed to be 21 replaced in 2011, correct? 22 A. Correct. 23 Q. And you asked that one be deferred because 24 of the current financial situation. 25 A. I asked her if it was okay to defer it, and	Page 123 1 A. Correct. 2 Q. Okay. In this affidavit that's Exhibit 1 3 to your deposition, in paragraph 42, you say that the 4 reassessments were imposed arbitrarily and a 5 capricious -- capriciously. 6 What is the basis for that statement? 7 A. The basis of that statement was that once 8 the re -- the reassessments were made we immediately 9 tried to -- attempted to talk to the lender and say, 10 listen, you know, this is just not -- this is not 11 reality. This is not real. These -- these numbers are 12 excessive, not only from the standpoint that the 13 property could not support it, but it was just excessive 14 in the fact that it was all being -- you know, one of -- 15 a good deal of the money was wanted right upfront, and I 16 didn't think there was any substantiation for it. We 17 didn't have leases in place that were going to require 18 this kind of capital, not even close. 19 Q. Okay. Well, again, let me ask you to 20 assume for the purpose of my question that DAV had a 21 right to rely on the three-year capital expense budget 22 submitted by CBRE, your property manager, in May of 23 2011. If that is true, would you still believe that the 24 reassessments were arbitrary and capricious? 25 A. I will say that if I got a budget like
Page 122 1 if not, we would have to go ahead. 2 And she said, Yes, it can be deferred. 3 Q. It can be. It wasn't in -- 4 A. Yes. 5 Q. -- the best interest, not sure, but it 6 could be, correct? 7 A. It could be, yes. 8 Q. And so you directed her to defer it. 9 A. Correct. 10 Q. And you don't know whether they've been 11 replaced at this -- 12 A. I don't know. 13 Q. -- point or not? 14 If they have not been replaced, do you 15 think that is putting the property in jeopardy? 16 A. I don't know if I can answer that because I 17 don't know what, you know, what condition it's in. 18 Obviously if a cooling tower goes down, then -- then 19 there is a serious problem. We've never had a serious 20 problem at Fontaine because Sandra does an amazing job. 21 Q. All right. In paragraph 42 of your 22 affidavit that's Exhibit 1 -- and this is -- I think 23 we've made a general reference to it, but this is the 24 first of four affidavits you've submitted in this 25 lawsuit, correct?	Page 124 1 that, projections, I would apply some kind of 2 probability to, is this really? Is this going to 3 happen? 4 Every real estate analysis I do is a 50- 5 60-, 70-, 80-percent probability percent probability. 6 There was no probability applied to any of those 7 numbers. It was just assumed that all of this is going 8 to take place. 9 Q. Okay. Have you ever been a lender? 10 A. Yes. 11 Q. Okay. And give me your experience as a 12 lender? 13 A. When I worked for Trust Company of the 14 West. We did apartment loans. 15 Q. Okay. And did they -- did those apartment 16 loans involve reserve accounts? 17 A. Yes. 18 Q. Okay. Did -- did -- in any of those 19 instances, did the bank ever increase the reserve 20 accounts? 21 A. I -- I don't recall. Probably. But we 22 never -- we would never ask the property manager to -- 23 to do that analysis for us. We would ask -- you know, 24 we would do it on our own. 25 Q. Meaning the bank would do its own

Page 125 1 projection? 2 A. Correct, and present it to the borrower 3 and -- so the borrower has some idea what's happening. 4 Q. All right. I'm moving along in your 5 affidavit, Exhibit 1, and you say that the increase in 6 the reserve accounts on paragraph 44, and maybe other 7 places, were commercially unreasonable. 8 Do you agree with that? 9 A. I do. 10 Q. Okay. Why were they commercially 11 unreasonable? 12 A. It's not reasonable to expect that a 13 borrower is going to be able to pay a 1037-percent 14 increase in a reserve account. 15 Q. Why not? 16 A. It's just excessive. 17 Q. Well, if it's -- if it's based upon a 18 budget presented by the borrower, why is -- 19 A. Again, projections with no probability. 20 Q. Okay. 21 A. If Mr. Liffman had come back and said, 22 okay, this is what you believe could happen in three 23 years. What's really going to happen? Are you really 24 going to get your property 100-percent leased? Is 25 that -- is that reality? No.	Page 127 1 Q. But are -- are you incapable of using the 2 assumption I've asked you to use, which is -- 3 A. What is it? 4 Q. Okay. The assumption is, DRV has the right 5 to rely on these numbers that were submitted to it by 6 CBRE after you approved them. Okay? 7 If that's the case, do you believe that the 8 increases would still be commercially unreasonable? 9 A. Yes, I do. 10 C. Okay. Why? 11 A. They're outrageous. 12 Q. Okay. At what level would they not have 13 been outrageous, assuming, again, DRV had the right to 14 rely on these numbers that were submitted to it? 15 A. At what level? 16 Q. Yes. 17 A. With a probability level they have to go 18 back and look at a probability. Really? Do you really 19 think you're going to be the only person in Columbia 20 with 100-percent leased building. That -- there's no 21 probabilities on any of this. 22 Q. Okay. 23 A. It's just -- 24 Q. Okay. But at that stage, DRV is not 25 relying on the documents.
Page 126 1 Q. Is that the lender's responsibility to do 2 that? 3 A. I think it's a lender's responsibility to 4 talk to the borrower -- 5 Q. Okay. 6 A. -- about it. Yes, it is. 7 Q. Let me -- let me ask you this. Assuming, 8 again -- and I'm asking you to make this assumption. 9 I'm asking you to admit that it's true, but I'm asking 10 you to assume that. 11 DRV had the right to rely on the three-year 12 capital expense budget submitted to it by your on-site 13 property manager, CBRE, after you approved it. Okay? 14 Assuming that that is true, that DRV had the right to 15 rely on that documents and those numbers, what 16 percentage increase would have been commercially 17 reasonable? 18 A. Yeah, I don't -- I'd have to go back. If 19 if -- the lender -- the lender should have gotten on the 20 phone with the borrower at that point and said, Look, 21 here's what's going to happen here. Let's talk about 22 probability. 23 Q. Okay. 24 A. And there was not. There's none of that 25 done. So, I mean --	Page 128 1 A. I don't think he should have. I think they 2 should have picked up the phone and called us and said, 3 hey, let's talk about this. 4 Q. I -- I hear what you're saying. 5 I'm asking you to make the assumption for 6 the purpose of the question that DRV had the right to 7 rely on what was submitted to it by its borrower and its 8 and manager; and if that was the case and these numbers 9 were relied upon by DRV, were the re -- reassessed 10 numbers commercially unreasonable? 11 A. Yes. 12 Q. Okay. And then at what level would they 13 have not been commercially unreasonable? 14 Could -- could they have been increased 15 then by 100 percent, 500 percent? 16 A. I don't know if I can answer that. I'd 17 have to go back and look at each individual tranche. 18 Q. Did you ever ask Mr. Liffman or DRV to 19 spread these payments over, evenly over the three-year 20 period? 21 A. I believe we had the conversation when -- 22 on that first phone call. 23 Q. Okay. And did he say no? 24 A. Yeah. 25 Q. Okay. Who asked him that?

Pages 125 to 128

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FBPAPP-0601

Page 137 1 conversations with Elliot or not. She talked to him 2 frequently. 3 Q. Okay. Would she have had the authority to 4 say something that binds the borrowers? 5 A. No. 6 Q. Now, I can show you a letter if you want me 7 to, but I -- I want to ask you if you're aware of a 8 letter that I wrote to, I believe, Fontaine's counsel in 9 which DRV demanded that Fontaine Management be 10 terminated as the manager at the property. 11 Are you aware of that? 12 A. Yes. 13 Q. Okay. That was never done, correct? 14 A. That's correct. 15 Q. Why was that not done? 16 A. We didn't believe that we should have been. 17 Q. Okay. Was there notice provided to the TIC 18 investors that that demand had been made? 19 MR. FULKS: Objection. 20 I'm going to instruct her not to answer 21 that. I think that gets into an area that where we have 22 asserted privilege. 23 MR. HARRILL: Between -- and the 24 communication between Ms. Mathew's and the TIC owners? 25 MR. FULKS: Just a second.	Page 139 1 manager, being Fontaine Management, should be 2 terminated? 3 A. No. 4 Q. Okay. Do you know why a meeting or vote 5 was not held? 6 A. We don't initiate that. The investors 7 would initiate that. 8 Q. Okay. If they're advised of the issue, 9 right? 10 A. If they choose to do so, they can, and then 11 a ballot is sent out. That's the normal protocol. 12 Q. Have there been any votes taken under the 13 co-owners agreement since 2011? 14 A. I don't believe so. 15 Q. All right. And in paragraph 54 of your 16 first affidavit, Exhibit 1, you say there that the 17 alleged defaults upon which DRV relies -- and you go on 18 to say -- that were fabricated by DRV, correct? That's 19 your language. 20 A. It is. 21 Q. Okay. And, again, you're aware now that 22 Judge Lee, at least for the purpose of a receivership 23 hearing, has found that there has been an event of 24 default, correct? 25 A. I'm aware of that.
Page 138 1 MR. HARRILL: We can go off the record for 2 a moment if that's -- 3 MR. FULKS: All right. That's fine. 4 (Discussion off the record.) 5 BY MR. HARRILL: 6 Q. All right. Ms. Mathews, the lawyers have 7 discussed some issues off the record, and I'm going to 8 ask my question again of you. 9 Did you provide any notice to the TIC 10 owners that DRV had demanded that Fontaine Management be 11 terminated as property manager? 12 A. My normal protocol would be to do so, to 13 send a notice like that to -- to someone. I don't know 14 if it went to counsel or if it went to the TIC owners or 15 who it went to but... 16 Q. Okay. But you don't recall actually doing 17 it. 18 A. I write a lot of letters every day, so I 19 didn't know. I mean, and I transmit a lot of letters 20 every day. So the normal protocol would be they would 21 have been advised. 22 Q. Okay. 23 A. It would have been sent to them. 24 Q. Was -- was there ever a vote taken by the 25 co-owners of the property as to whether or not the	Page 140 1 Q. Okay. All right. 2 Let's go to paragraph 60. 3 In paragraph 60, you allege that DR engaged 4 in unauthorized contact with Fontaine Management's local 5 property manager CBRE-Columbia. 6 Why do you believe there was unauthorized 7 contact between DRV and CBRE? 8 A. Because I was told by Sandra Johnson that 9 Elliot Liffman was -- unbeknownst to her, was contacting 10 her accounting people. 11 Q. Okay. And why was that authorized? 12 A. A lender would never do that. A lender 13 should never be in touch with a third-party accounting 14 person and actually was calling her on her cell phone. 15 Q. Why -- why would a lender not be entitled 16 to talk to anyone related to the management of its 17 property? 18 A. Lenders always go through the borrower. 19 Q. Okay. Why would a lender not ever be 20 entitled to communicate with the property manager of its 21 real estate collateral? 22 A. It's not protocol. 23 Q. But the point -- based upon what? 24 A. They're not the borrower. They're a 25 third-party manager. The lender has a relationship with

Page 185 1 projection of capital expenses without accounting for or 2 projecting increased revenue generated through new 3 leases. 4 Is that what 21 says? 5 A. It is. 6 Q. And in the -- in 22, it says the same thing 7 about DRV and instructing CBRE to prepare the budget 8 without accounting for the outcomes of lease 9 negotiations with respect to tenant improvements. 10 Do you agree that that's what that says? 11 A. Yes. 12 Q. All right. Tell me what that second one 13 means, without accounting for the outcomes of lease 14 negotiations with respect to tenant improvements. 15 What does that mean? 16 A. That means there's no rents applied to this 17 and we're just making a blanket assumption that, okay, 18 we're going to -- we're going to lease this -- this -- 19 this space to a tenant, and we don't know who that 20 tenant is, and we don't know what kind of rent they're 21 going to pay; but we're going to give them \$15 a square 22 foot and TI's. 23 And it's one thing to do it on an annual 24 basis if we do every November, December; but looking 25 that far out, three years out, is not reasonable.	Page 187 1 you claimed DRV gave to CBRE? 2 A. Yes. 3 Q. To whom? 4 A. Sandra. 5 Q. And what did she tell you when you 6 objected? 7 A. She was in a complete panic, saying, We've 8 got to get this out. We've got to get this out. We've 9 got to get them something. 10 Okay, well get them something. 11 Q. And yet -- 12 A. And I've -- I also had conversations with 13 Aaron on the leasing. 14 Q. Did Aaron ever tell you what -- or any 15 instructions that he was given by DRV? 16 A. No. She -- that he was -- to my knowledge, 17 he may have been talking to Elliot directly because he 18 does have conversations with Elliot on a regular basis. 19 I don't know if he was talking to Elliot on this 20 particular thing. It was mostly Sandra. 21 Q. Okay. And you say that -- that Sandra was 22 panicked and urgent, and yet you all took at least five 23 months or more to generate this budget, correct? 24 A. That's correct because every -- everyone 25 she sent me was incorrect. The formatting was incorrect
Page 186 1 Q. So it's just your -- your contention that 2 the projection of TI per square foot was -- was an 3 unreasonable assumption to be made. 4 A. Yes. I think that all of it was -- not 5 that it -- the cost per square foot was unreasonable, 6 the probability of leasing a building to 100 percent was 7 unreasonable. 8 Q. I understand. 9 Is that what you're saying, though, in 10 paragraph 22? 11 A. Yes, uh-huh. 12 Q. That's what that means? 13 A. Yeah. 14 Q. All right. And was the -- in your opinion 15 was the budget that you reviewed and approved prepared 16 pursuant to those instructions by DRV? 17 A. It appears that way, yes. 18 Q. Okay. What about 21 was -- 19 A. 21? 20 Q. Yeah. 21 A. Yes. 22 Q. It was prepared pursuant to those 23 instructions as well? 24 A. Yes. 25 Q. Did you object to those instructions that	Page 188 1 and leasing assumptions were incorrect. She couldn't 2 get Aaron to focus on it. 3 Q. So you would send it back to her with 4 revisions and suggestions? 5 A. I'd send it back to her and say, What is 6 all this? 7 Q. Ms. Mathews, why did you think that DRV had 8 requested a three-year capital budget? 9 A. I don't know. I'd -- I -- I don't know why 10 they requested it. Normally it's done on an annual 11 basis. 12 Q. Okay. At the time you were communicating 13 with Sandra and, you know, from late 2010 all the way 14 through May of 2011, it never crossed your mind or you 15 never thought, gee, why is DRV asking for this? 16 A. No, I did not. And I certainly never 17 expected them to be using the information the way they 18 did. 19 Q. How did you expect them to use the 20 information? 21 A. I didn't know what they were doing. 22 Q. All right. I'd like you to turn over to 23 paragraph 30 of your second affidavit, Exhibit 6. 24 I'm just looking at the paragraphs and the 25 charts that you prepared in this affidavit. And I'm --

STATE OF
SOUTH CAROLINA

NOTICE OF MOTION SCHEDULING

December 18, 2013



Motion "MSTRIK - Motion to Strike Jury Trial Demand of Defendants" for Case: 2012CP4007752 - DRV Fontaine LLC vs Fontaine Business Park LLC, defendant, et al has been added to the following Motions Roster:

597 - MOTION ROSTER JANUARY 13, 2014 COURTROOM 3-B

This hearing of this motion has been scheduled for 1/13/2014 at 3:30 PM.

The above referenced case is scheduled for a Motion Hearing before Judge G. Thomas Cooper, Jr. The Plaintiff's Attorney is to notify the Defendant in writing of the time and date of all Default and Damages Hearings. All requests for continuances must be in writing with a \$25.00 filing fee and received by the Chief Administrative Judge prior to the hearing. A request for a continuance does not guarantee that a case will be continued. Please notify the Court in writing if the Motions are resolved prior to the hearing. Please file any briefs or memorandum the Wednesday before the week of the hearing. ALL ATTORNEYS MUST SEND A PROPOSED ORDER OR MEMORANDUM OF LAW BY Wednesday, January 8, 2014 FOR THE MOTION HEARING THAT IS BEING HEARD ON HARD COPY AND DISK: OR IT CAN BE SENT BY EMAIL TO GCooperLC@sccourts.org.

Mail Notice To:

Brent B. Young
PO Box 3038
Johnson City, TN 37602

Court Info:

Richland County Common Pleas
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201-9201

Judge L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, LLC;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

**MOTION FOR
APPOINTMENT OF RECEIVER**

2012 NOV 21 AM 11:04

CLERK OF COURT
C.C.P. & C.S.
02

RICHLAND COUNTY
CLERK OF COURT
11/21/12

TO: ALL DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that plaintiff, by and through its undersigned attorneys, hereby moves for the issuance of an Order appointing a receiver over the "Property" securing the "Loan" and "Note" (as each of those terms is defined in the Complaint) including, but not limited to, the rents and profits generated by the Property, for the purpose of collecting the rents, accounts receivable, and profits from said Property, and having the rents, accounts receivable and profits disbursed in accordance with the terms of the "Mortgage" and the "Assignment of Leases" with the receiver's fees and costs of managing the rents, accounts receivable and profits and collecting same, paid out by any rents received and collected.

Plaintiff seeks receivership for the duration of this foreclosure action, with the receivership ending on the date of the issuance of a foreclosure deed to the Property or court order terminating the receivership, whichever comes first.

This motion is based upon the following:

1. Pursuant to the terms of the "Mortgage" (as that term is defined in the Complaint), Fontaine Business Park, LLC granted to DRV's predecessors by assignment, an assignment over all leases and rents (as more fully defined therein) relating to the Property.
2. In order to further secure the indebtedness, Fontaine Business Park, LLC executed and delivered to Plaintiff, its successors and assigns, an "Assignment of Leases" (as that term is defined in the Complaint).
3. Pursuant to the Assignment of Leases, Fontaine Business Park, LLC assigned to Plaintiff all right, title and interest in all current and future Leases and Rents.
4. At least two events of default have now occurred, and Plaintiff is entitled to all rents and profits generated by and associated with the Property.

5. Pursuant to the Mortgage, Fontaine Business Park, LLC consented to the appointment of a receiver over the Property should an event of default occur.

6. Pursuant to paragraph 2 of the Mortgage, Fontaine Business Park, LLC agreed as follows:

Mortgagor hereby grants and assigns to Mortgagee the right, at its option, upon revocation of the license granted herein, to enter upon the Property in person, by agent or by court-appointed receiver to collect the Rents. Any Rents collected after the revocation of such license may be applied toward payment of the Debt in such priority and proportion as Mortgagee in its sole discretion shall deem appropriate.

7. Paragraph 10 of the Mortgage, Assignment of Leases and Rents and Security Agreement contains the following language:

Remedies.

(a) Upon the occurrence of any Event of Default, Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Mortgagor and in and to the Property, by Mortgagee itself or otherwise, including the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Mortgagee may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Mortgagee:

* * *

(viii) apply for the appointment of a trustee, receiver, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of the Mortgagor or of any person, firm or other entity liable for the payment of the Debt;

8. As a result of Defendants' default under the Loan Agreement, Note, Mortgage, and the Assignment of Leases, Plaintiff is entitled to the appointment of a receiver over the property under the express language of those documents.

9. Because the Property and the rents and income arising therefrom are in danger of being lost or materially injured or impaired, Plaintiff is also entitled to the appointment of a receiver pursuant to the provisions of Section 15-65-10, *et seq.* of the South Carolina Code of Laws.

10. The Property remains in the possession of the defendants at this time.

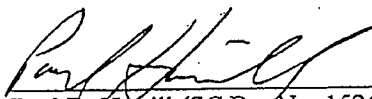
11. The rents and profits arising from the Property are in danger of being lost or materially injured or repaired due to the fact that the defendants in possession of the Property continue to collect the rents and profits but are not making the payments due and owing under the terms of the Note.

12. Plaintiff respectfully requests the Court appoint a receiver over the Property pursuant to Plaintiff's rights as set forth in the Mortgage, the Assignment of Leases, and South Carolina law.

This motion is further based upon (1) the pleadings herein, including the Complaint filed in this action and all exhibits attached thereto, each of which is hereby incorporated herein by reference, (2) the S.C. Rules of Civil Procedure, (3) applicable statutory and common law, (4) the Affidavit of Elliot M. Liffman, a copy of which is attached hereto as Exhibit A, and (5) upon a memorandum of law that may be filed prior to the hearing of this motion. For the purpose of this motion all capitalized terms shall have the meaning set forth in the Complaint.

McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By:


Paul D. Harrill (SC Bar No. 15268)
Attorneys for the Plaintiff

November 21, 2012
Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2012-CP-40- 7752

DRY FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
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FONTAINE BUSINESS PARK 15, LLC;
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FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

**AFFIDAVIT OF
ELLIOT M. LIFFMAN IN
SUPPORT OF PLAINTIFF'S
MOTION FOR APPOINTMENT
OF RECEIVER**

STATE OF MARYLAND)
)
IN THE COUNTY OF MONTGOMERY)

PERSONALLY APPEARED before me, Elliot M. Liffman who first being duly sworn,
deposes and states as follows:

1. I am the Manager of RCC Asset Management Company, LLC, the manager of DRV Fontaine, LLC (hereinafter "DRV" or "Plaintiff"). In that position I am personally familiar with the facts alleged in the Complaint filed herewith in the above-captioned action (the "Complaint").

2. In that position I am also personally familiar with the loan relationship between DRV and the Defendants named above and the status of that loan.

3. I am also personally familiar with the status of the Loan and Loan Documents, including the Loan Agreement, the Note, the Mortgage, the Assignment of Leases, and the Assignment of Agreements (as each of those capitalized terms are defined in the Complaint and/or herein).

4. Each capitalized term in this affidavit shall have the meaning set forth in the Loan Documents if not otherwise set forth herein.

5. DRV is now the holder of the Loan Agreement, the Note, the Mortgage, the Assignment of Leases, and the Assignment of Agreements as the successor in interest to The Royal Bank of Scotland plc ("RBS Bank"), which was the successor in interest to Greenwich Capital Financial Products, Inc. ("Greenwich Capital").

6. I have reviewed the Complaint being filed herewith in this action and find the allegations contained therein to be true and accurate.

7. I have reviewed each document attached as an exhibit to the Complaint and find each of them to be a true and authentic copy of an original that is maintained in the business records of DRV and is kept in the ordinary course of DRV's business.

8. In support of the motion for appointment of receiver filed herewith, I would also assert as follows:

Reserve Accounts Default

9. The real property encumbered by DRV's Mortgage includes the real property and improvements described in the Complaint, located in Richland County, consisting of four office buildings, and known as Fontaine Business Park (hereinafter the "Property").

10. Pursuant to the Loan Agreement, Defendants are required to deposit funds monthly into a "Capital Reserve Account" and a "Rollover Reserve Account" (collectively, the "Reserve Accounts"). The Reserve Accounts are necessary to properly maintain the Property and to attract and retain tenants at the Property.

11. DRV requested from Defendants a projected budget (the "Capital Budget") on multiple occasions between September 2010 and May 2011. At least as early as December 14, 2010, and on multiple occasions thereafter, Defendants' onsite property manager for the Property, Gullane I, LLC d/b/a CBRE Columbia ("CB Richard Ellis") advised DRV that it had submitted a Capital Budget to Defendants for review and was awaiting their approval before releasing it to DRV.

12. In May 2011, CB Richard Ellis released the Capital Budget to DRV. The Capital Budget reflected the capital needs for three years for repairs, replacements and construction of tenant improvements for existing and projected vacant spaces within the Property. Costs included in the Capital Budget were substantially greater than existing and projected balances in the

Reserve Accounts. A copy of the Capital Budget that was released to DRV by CB Richard Ellis is attached hereto as Exhibit 1.

13. On July 11, 2011, DRV provided notice to Defendants' representative of an increase in the amount of monthly payments required for the Reserve Accounts in order to cure the shortfalls projected in the Capital Budget furnished by Defendants' onsite property manager. This notice was given pursuant to the express terms of Sections 3.4 and 3.5 of the Loan Agreement.

14. During a teleconference with DRV representatives on August 1, 2011, Defendants' representatives agreed to develop a plan to address the cash needs of the Defendants to properly fund the Reserve Accounts.

15. Defendants paid the increased monthly payments into the Reserve Accounts for the next four months.

16. In January 2012, Defendants unilaterally returned to making the old monthly payments into the Reserve Accounts.

17. DRV objected to this as a breach and reminded Defendants of their agreement to develop a plan to fund the increased Reserve Accounts payments.

18. Defendants also have an obligation under the Loan Documents to make payments into reserve accounts for the payment of property taxes and insurance relating to the Property (the "Tax and Insurance Account").

19. On April 1, 2012, DRV advised CB Richard Ellis of an increase in the required monthly contributions into the Tax and Insurance Account.

20. Defendants paid the increased contributions into the Tax and Insurance Account in April, May and June of 2012.

21. In July 2012, Defendants unilaterally reduced the payments into the Tax and Insurance Account to a level they felt was sufficient. DRV does not believe that the amounts being paid into the Tax and Insurance Account by Defendants are sufficient. Moreover, Defendants' reduction in the payments to those reserve accounts without DRV's consent is not permitted under the Loan Agreement.

22. Despite the Defendants' failure to follow through on their agreements, DRV continued to give the Defendants the benefit of the doubt that they were working diligently and in good faith to find a solution to the shortfall in their cash needed to make the increased monthly Reserve Accounts payments. However, in July 2012, when Defendants had not presented a solution and then reduced the payments into the Tax and Insurance Account, it became apparent to DRV that no plan was forthcoming to address the shortfall.

23. DRV, therefore, provided notice to Defendants on July 27, 2012, that failure to make the full payments to the Reserve Accounts within ten days would constitute an Event of Default (as defined in the Loan Agreement).

24. Defendants did not make the demanded payment within ten days of the July 27, 2012 demand letter and have not made the demanded payment as of the date of this affidavit.

25. As a result of Defendants' failure to make the payments due on the Reserve Accounts, an Event of Default has occurred (the "Reserve Accounts Default").

Payment Default

26. Defendants failed or refused to pay the monthly debt service payment that was due for the month of October 2012.

27. Defendants' failure to pay the debt servicing payment constitutes an Event of Default under Section 8.1 of the Loan Agreement.

28. DRV provided notice, through counsel, that the failure to make the debt service payment for the month of October 2012 was an additional Event of Default under the Loan Documents (the "Payment Default").

29. As a result of the Payment Default, DRV accelerated the entire Debt pursuant to Section 8.2.1 of the Loan Agreement.

30. As a result of this Payment Default, DRV also exercised its right to apply the Default Rate of interest to the entire unpaid Debt pursuant to Section 2.2.2 of the Loan Agreement.

31. As a result of the Reserve Accounts Default and the Payment Default, DRV demanded, pursuant to Section 5.12.2 of the Loan Agreement, that the current management agreement for the Property be terminated and the property manager under that agreement, Fontaine Management, LLC, an affiliate of Original Borrower, US Commercial and Fitzgerald that sub-contracts materially all operational functions to CB Richard Ellis, be replaced with a replacement manager acceptable to DRV.

32. As of the date of this affidavit Defendants have failed or refused to comply with the demand to terminate the current management agreement with Fontaine Management, LLC.

33. As a result of the Reserve Accounts Default and the Payment Default, DRV also terminated Defendants' license to continue to collect rents and profits generated by the Property and directed that those funds be held by the onsite manager CB Richard Ellis pursuant to the Mortgage and the Assignment of Leases.

34. As of the date of this affidavit Defendants have failed or refused to comply with the termination of their right to collect rents and profits, have failed to direct CB Richard Ellis to

hold the rents and profits, and continue to exercise control over the rents and profits from the Property.

35. Through the date of this affidavit, Defendants have also failed or refused to make any payment on the Loan balance in the month of November 2012.

Right to Receiver

36. As a result of these Events of Default, Plaintiff is now entitled to collect all rents and profits generated by and associated with the Property pursuant to the Mortgage and the Assignment of Leases.

37. As set forth above, Defendants have refused to comply with the demands of Plaintiff to cease collecting rents and profits from the Property.

38. Pursuant to the Mortgage, the Defendants consented to the appointment of a receiver over the Property should an Event of Default occur.

39. The Mortgage contains the following language:

10. Remedies.

(a) Upon the occurrence of any Event of Default, Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Mortgagor and in and to the Property, by Mortgagee itself or otherwise, including the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Mortgagee may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Mortgagee:

(viii) apply for the appointment of a trustee, receiver, liquidator or conservator of the property, either personally or by its agents, nominees or attorneys and dispossess Mortgagor and its agents and employees therefrom, and thereupon Mortgagee may (A) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with the Property and conduct the business thereat; (B) complete any construction on the Property in such manner and form as Mortgagee deems advisable; (C) make alternations, additions, renewals, replacements and improvements to or on the Property; (D) exercise all rights and powers of Mortgagor with respect to the Property, whether in the name of Mortgagor or otherwise, including the right to make, cancel, enforce or modify

Leases, obtain and evict tenants, and demand, sue for, collect and receive Rents; and (E) apply the receipts from the Property to the payment of the Debt, after deducting therefrom all expenses (including reasonable attorneys' fee and disbursements) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, insurance and other charges in connection with the Property, as well as just and reasonable compensation for the services of Mortgagee, and its counsel, agents and employees;

40. As a result of the Events of Default, DRV is entitled to the appointment of a receiver over the Property pursuant to the express language of the Loan Agreement, the Note, the Mortgage, and the Assignment of Leases.

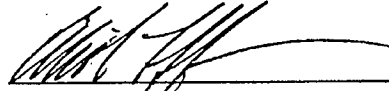
41. DRV further believes that it is entitled to the appointment of a receiver over the Property pursuant to South Carolina statutory authority..

42. The Property remains in the possession of the Defendants at this time.

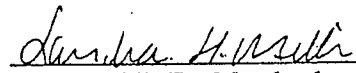
43. The rents and profits arising from the Property are in danger of being lost or materially injured or impaired due to the fact that the Defendants in possession of the Property continue to collect the rents and profits but did not make the payments due and owing under the terms of the Loan Agreement and the Note in October, including the debt service payment and the payments due for the Reserve Accounts, and have not, after acceleration, made any payments toward the accelerated balance of the Loan.

44. DRV seeks a receivership for the duration of the foreclosure action filed herewith, with the receivership ending on the date of the issuance of a foreclosure deed to the Property or court order terminating the receivership, whichever comes first.

FURTHER AFFIANT SAYETH NOT.


ELLIOT M. LIFFMAN

SWORN TO before me this 20
day of November, 2012


Notary Public For Maryland (Seal)

My Commission Expires: 2/17/13

COLUMBIA 1097425v1

SANDRA H. MILLER
NOTARY PUBLIC OF MARYLAND
MY COMMISSION EXPIRES FEBRUARY 17, 2013

EXHIBIT 1



Elliot Liffman <eliffman@drv-llc.com>

Fontaine - Three Year Capital Expense Budget

Sandra Johnson <Sjohnson@cbresc.com>
To: eliffman@drv-llc.com

Tue, May 10, 2011 at 5:16 PM

Attached is the above.

Let me know if you have questions.

Sandra Johnson| Property Manager
Asset Services
CB Richard Ellis| Columbia
1333 Main Street, Columbia, SC 29201
T 803 744 6854| F 803 256 6210
sandra.johnson@cbresc.com| www.cbre.com/columbia

Fontaine 3yr Capital Budget.pdf
46K

**Fontaine Business Park
Three Year Capital Expense Budget
2011 - 2013
Overview**

	2011	2012	2013
Site Improvements	\$ -	\$ 65,000.00	\$ -
Structural/Building Exterior	\$ -	\$ -	\$ -
Roofing	\$ -	\$ 257,000.00	\$ 85,000.00
Mechanical/Electrical/Plumbing	\$ 111,825.00	\$ 54,000.00	\$ 51,000.00
Interior	\$ -	\$ -	\$ -
Tenant Improvement (includes LC)	\$ 510,244.00	\$ 1,108,125.50	\$ 175,769.50
Totals	\$ 622,069.00	\$ 1,484,125.50	\$ 311,769.50

Notes:

Site Improvements:

Cost to add parking at Fontaine V

Structural/Building Exterior:

None

Roofing:

Roof replacement - Fontaine II and Fontaine III

Mechanical/Electrical/Plumbing:

Replacement of HVAC units all buildings; includes Cooling Towers replacement at Fontaine III

Tenant Improvement:

Renewal and new leases all buildings as existing leases roll

Fontaine - Three Year Capital Expense Budget
2011 Summary

	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Total
Site Improvements	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Structural/Building Exterior	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Roofing	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Mechanical/Electrical/Plumbing	-	-	-	-	15,000.00	12,000.00	10,825.00	-	-	74,000.00	-	-	\$ 111,825.00
Interior	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Ti/LC	-	-	-	-	-	-	84,805.00	88,859.00	-	48,804.00	280,000.00	29,976.00	\$ 510,244.00
2011 Total	\$ -	\$ -	\$ -	\$ -	\$ 15,000.00	\$ 12,000.00	\$ 95,630.00	\$ 88,859.00	\$ -	\$ 122,804.00	\$ 280,000.00	\$ 29,976.00	\$ 622,069.00

ROLLOVER RESERVES (Ti/LC)	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11
Beginning Balance (01/01/11) \$ 310,951.59												
Funding		21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	21,088.00
Drawdowns							(84,805.00)	(88,859.00)		(48,804.00)	(280,000.00)	(29,976.00)
Monthly Net		21,088.00	21,088.00	21,088.00	21,088.00	21,088.00	(63,719.00)	(65,773.00)	21,088.00	(27,518.00)	(238,914.00)	(8,890.00)
Reserve Balance	\$ 310,951.59	\$ 332,037.59	\$ 353,123.59	\$ 374,209.59	\$ 395,295.59	\$ 416,381.59	\$ 352,662.59	\$ 286,889.59	\$ 307,976.59	\$ 280,457.59	\$ 41,543.59	\$ 32,653.59

CAPITAL RESERVES	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11
Beginning Balance (01/01/11) \$ 86,610.71												
Funding	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00
Drawdowns					(15,000.00)	(12,000.00)	(10,825.00)			(74,000.00)		
Monthly Net	5,249.00	5,249.00	5,249.00	5,249.00	(9,751.00)	(6,751.00)	(5,576.00)	5,249.00	5,249.00	(68,751.00)	5,249.00	5,249.00
Reserve Balance	\$ 94,859.71	\$ 100,108.71	\$ 105,357.71	\$ 110,606.71	\$ 100,855.71	\$ 94,104.71	\$ 88,528.71	\$ 93,777.71	\$ 99,026.71	\$ 30,275.71	\$ 35,524.71	\$ 40,773.71

Fontaine I	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements							10,825.00						\$ 10,825.00
Interior													\$ -
Tenant Improvement (Includes LC)													\$ -
													\$ -
													\$ 28,581.00
Total Fontaine I	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,825.00	\$ -	\$ -	\$ -	\$ -	\$ 28,581.00	\$ 39,406.00

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Fontaine III	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements (2 units)						12,000.00							\$ 12,000.00
Replace Cooling Towers and Controls										74,000.00			\$ 74,000.00
Interior													\$ -
Tenant Improvement (Includes LC)													\$ -
													\$ 82,375.00
													\$ 280,000.00
Renewal Xerox 1,395sf; \$1.00 TULC												1,395.00	\$ 1,395.00
Total Fontaine III	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 12,000.00	\$ -	\$ 82,375.00	\$ -	\$ 74,000.00	\$ 260,000.00	\$ 1,395.00	\$ 429,770.00

Fontaine V	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Mechanical/Electrical/Plumbing													\$ -
Interior													\$ -
Tenant Improvement (Includes LC)													\$ -
Total Fontaine V	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -

Total 2011	\$ -	\$ -	\$ -	\$ -	\$ 15,000.00	\$ 12,000.00	\$ 95,630.00	\$ 86,859.00	\$ -	\$ 122,604.00	\$ 260,000.00	\$ 29,976.00	\$ 622,069.00

Fontaine - Three Year Capital Expense Budget
2012 Summary

	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-11	Nov-12	Dec-12	Total
Site Improvements	-	65,000.00	-	-	-	-	-	-	-	-	-	-	\$ 65,000.00
Structural/Building Exterior	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Roofing	-	-	-	-	257,000.00	-	-	-	-	-	-	-	\$ 257,000.00
Mechanical/Electrical/Plumbing	-	-	12,000.00	-	12,000.00	6,000.00	-	12,000.00	12,000.00	-	-	-	\$ 64,000.00
Interior	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
TU/LC	-	-	-	293,333.50	-	640,000.00	-	165,000.00	-	-	9,792.00	-	\$ 1,108,125.50
2012 Total	\$ -	\$ 65,000.00	\$ 12,000.00	\$ 293,333.50	\$ 269,000.00	\$ 646,000.00	\$ -	\$ 177,000.00	\$ 12,000.00	\$ -	\$ 9,792.00	\$ -	\$ 1,484,125.50

	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-11	Nov-12	Dec-12
ROLLOVER RESERVES (TU/LC)												
Beginning Balance (01/01/12)	\$ (6,930.41)											
Funding		21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00
Drawdowns			-	(293,333.50)		(640,000.00)		(165,000.00)			(9,792.00)	-
Monthly Net		21,086.00	21,086.00	(272,247.50)	21,086.00	(618,914.00)	21,086.00	(143,914.00)	21,086.00	21,086.00	11,294.00	21,086.00
Reserve Balance	\$ (6,930.41)	\$ 14,165.59	\$ 35,241.59	\$ (237,005.91)	\$ (216,919.91)	\$ (834,833.91)	\$ (813,747.91)	\$ (957,661.91)	\$ (936,575.91)	\$ (915,489.91)	\$ (904,195.91)	\$ (833,109.91)

	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-11	Nov-12	Dec-12
CAPITAL RESERVES												
Beginning Balance (01/01/12)	\$ 16,773.71											
Funding	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00
Drawdowns	-	(65,000.00)	(12,000.00)		(269,000.00)	(6,000.00)	-	(12,000.00)	(12,000.00)			
Monthly Net	5,249.00	(59,751.00)	(6,751.00)	5,249.00	(263,751.00)	(751.00)	5,249.00	(6,751.00)	(6,751.00)	5,249.00	5,249.00	5,249.00
Reserve Balance	\$ 22,022.71	\$ (37,728.29)	\$ (44,479.29)	\$ (39,230.29)	\$ (302,981.29)	\$ (303,732.29)	\$ (298,483.29)	\$ (305,234.29)	\$ (311,985.29)	\$ (306,736.29)	\$ (301,487.29)	\$ (286,238.29)

Fontaine - Three Year Capital Expense Budget
2012 Detail

Fontaine I	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements			12,000.00						12,000.00				\$ 24,000.00
Interior													\$ -
Tenant Improvement (Includes LC)													\$ -
NEW ROOF, 20,000 SF, 20% T.I.C.				105,412.60									\$ 105,412.60
Total Fontaine I	\$ -	\$ -	\$ 12,000.00	\$ 105,412.60	\$ -	\$ -	\$ -	\$ -	\$ 12,000.00	\$ -	\$ -	\$ -	\$ 129,412.60

Fontaine II	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Roof Replacements					257,000.00								\$ 257,000.00
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements					12,000.00			12,000.00					\$ 24,000.00
Interior													\$ -
Tenant Improvement (Includes LC)													\$ -
NEW ROOF, 20,000 SF, 20% T.I.C.				2,789.00									\$ 2,789.00
Renewal Fox Meadow 20,000 SF, 20% T.I.C.				185,122.00									\$ 185,122.00
Renewal Fox Meadow 3,264 sq ft; \$3.00 T.I.C.											9,792.00		\$ 9,792.00
Total Fontaine II	\$ -	\$ -	\$ -	\$ 187,921.00	\$ 269,000.00	\$ -	\$ -	\$ 12,000.00	\$ -	\$ -	\$ 9,792.00	\$ -	\$ 478,713.00

Fontaine III	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -

Roofing														\$ -
														\$ -
Mechanical/Electrical/Plumbing														\$ -
HVAC Replacements						6,000.00								\$ 6,000.00
														\$ -
Interior														\$ -
														\$ -
Tenant Improvement (includes LC)														\$ -
														\$ -
														\$ 390,000.00
Total Fontaine III	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 398,000.00	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 398,000.00

Fontaine V	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Total
Site Improvements													\$ -
Asphalt Paving/Additional Parking		65,000.00											\$ 65,000.00
													\$ -
Structural/Building Exterior													\$ -
													\$ -
Roofing													\$ -
													\$ -
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements													\$ -
													\$ -
Interior													\$ -
													\$ -
Tenant Improvement (includes LC)													\$ -
													\$ -
													\$ 250,000.00
													\$ -
													\$ 165,000.00
Total Fontaine V	\$ -	\$ 65,000.00	\$ -	\$ -	\$ -	\$ 260,000.00	\$ -	\$ 165,000.00	\$ -	\$ -	\$ -	\$ -	\$ 480,000.00

Total 2012	\$ -	\$ 66,000.00	\$ 12,000.00	\$ 293,333.50	\$ 269,000.00	\$ 646,000.00	\$ -	\$ 177,000.00	\$ 12,000.00	\$ -	\$ 9,792.00	\$ -	\$ 1,484,126.50

Fontaine - Three Year Capital Expense Budget
2013 Summary

	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Total
Site Improvements	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Structure/Building Exterior	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
Roofing	-	-	-	85,000.00	-	-	-	-	-	-	-	-	\$ 85,000.00
Mechanical/Electrical/Plumbing	-	-	-	9,000.00	15,000.00	-	-	12,000.00	15,000.00	-	-	-	\$ 51,000.00
Interior	-	-	-	-	-	-	-	-	-	-	-	-	\$ -
TULC	-	-	-	51,800.00	61,902.00	-	-	10,351.50	51,716.00	-	-	-	\$ 175,769.50
2013 Total	\$ -	\$ -	\$ -	\$ 146,800.00	\$ 76,902.00	\$ -	\$ -	\$ 22,351.50	\$ 66,716.00	\$ -	\$ -	\$ -	\$ 311,769.50

ROLLOVER RESERVES (TULC)	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13
Beginning Balance (01/01/12) \$ (883,109.91)												
Funding		21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00	21,086.00
Drawdowns	-	-	-	(51,800.00)	(61,902.00)	-	-	(10,351.50)	(51,716.00)	-	-	-
Monthly Net	-	21,086.00	21,086.00	(30,714.00)	(40,816.00)	21,086.00	21,086.00	10,734.50	(30,630.00)	21,086.00	21,086.00	21,086.00
Reserve Balance	\$ (883,109.91)	\$ (862,023.91)	\$ (840,937.91)	\$ (819,651.91)	\$ (798,467.91)	\$ (777,381.91)	\$ (756,295.91)	\$ (735,211.41)	\$ (714,126.41)	\$ (693,041.41)	\$ (671,956.41)	\$ (650,871.41)

CAPITAL RESERVES	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13
Beginning Balance (01/01/12) \$ (298,238.29)												
Funding	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00	5,249.00
Drawdowns	-	-	-	(94,000.00)	(15,000.00)	-	-	(12,000.00)	(15,000.00)	-	-	-
Monthly Net	5,249.00	5,249.00	5,249.00	(88,751.00)	(9,751.00)	5,249.00	5,249.00	(6,751.00)	(9,751.00)	5,249.00	5,249.00	5,249.00
Reserve Balance	\$ (298,238.29)	\$ (288,740.29)	\$ (279,242.29)	\$ (269,744.29)	\$ (260,246.29)	\$ (250,748.29)	\$ (241,250.29)	\$ (231,752.29)	\$ (222,254.29)	\$ (212,756.29)	\$ (203,258.29)	\$ (193,760.29)

Fontaine - Three Year Capital Expense Budget
2013 Detail

Fontaine I	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Mechanical/Electrical/Plumbing HVAC Replacements					9,000.00				15,000.00				\$ 24,000.00
Interior													\$ -
Tenant Improvement (includes LC)													\$ -
Revisions/Contingency								10,361.60					\$ 10,361.60
Total Fontaine I	\$ -	\$ -	\$ -	\$ -	\$ 9,000.00	\$ -	\$ -	\$ 10,361.60	\$ 15,000.00	\$ -	\$ -	\$ -	\$ 34,361.60

Fontaine II	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -
Mechanical/Electrical/Plumbing HVAC Replacements								12,000.00					\$ 12,000.00
Interior													\$ -
Tenant Improvement (includes LC)													\$ -
Revisions/Contingency					51,800.00								\$ 51,800.00
Total Fontaine II	\$ -	\$ -	\$ -	\$ 51,800.00	\$ -	\$ -	\$ -	\$ 12,000.00	\$ -	\$ -	\$ -	\$ -	\$ 63,800.00

Fontaine III	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Total
Site Improvements													\$ -
Structural/Building Exterior													\$ -
Roofing													\$ -

Roof Replacements				85,000.00									\$ 85,000.00
													\$ -
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements					6,000.00								\$ 6,000.00
													\$ -
Interior													\$ -
													\$ -
Tenant Improvement (Includes LC)													\$ -
													\$ -
					67,902.00								\$ 61,902.00
													\$ -
									61,716.00				\$ 61,716.00
													\$ -
Total Fontaine III	\$ -	\$ -	\$ -	\$ 85,000.00	\$ 67,902.00	\$ -	\$ -	\$ -	\$ 61,716.00	\$ -	\$ -	\$ -	\$ 204,618.00

Fontaine V	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Oct-13	Nov-13	Dec-13	Total
Site Improvements													\$ -
													\$ -
Structural/Building Exterior													\$ -
													\$ -
Roofing													\$ -
													\$ -
Mechanical/Electrical/Plumbing													\$ -
HVAC Replacements				9,000.00									\$ 9,000.00
													\$ -
Interior													\$ -
													\$ -
Tenant Improvement (Includes LC)													\$ -
													\$ -
Total Fontaine V	\$ -	\$ -	\$ -	\$ 9,000.00	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 9,000.00

Total 2013	\$ -	\$ -	\$ -	\$ 145,800.00	\$ 76,902.00	\$ -	\$ -	\$ 22,361.60	\$ 66,716.00	\$ -	\$ -	\$ -	\$ 311,769.50

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,)

Plaintiff,)

v.)

FONTAINE BUSINESS PARK, LLC, *et al.*)

Defendants.)

RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
APPOINTMENT OF RECEIVER

FILED
2012 DEC -6 AM 9:42
CLERK OF COURT
C.C.P. & C.S.

Defendant Fontaine Business Park, LLC, ("Fontaine") submits this Response in opposition to the Motion for Appointment of Receiver filed by Plaintiff DRV Fontaine, LLC ("DRV"). In doing so, Fontaine specifically incorporates, by reference, its Answer, Affirmative Defenses and Counterclaims that was recently filed herein.

"The appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." Midlands Utility, Inc. v. South Carolina Dept. of Health and Environmental Control, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (S.C. 1990) (Vasiliades v. Vasiliades, 231 S.C. 366, 98 S.E.2d 810 (1957).

A receiver may be appointed by a judge of the circuit court before the entry of judgment, on the application of either party, when the applicant "establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when judgment upon failure to answer may be had without application to the court." S.C. Code § 15-65-10.

Generally, a mortgagee is not entitled to the rents and profits from the mortgaged property as a legal incident to, or as a legal right growing out of, his mortgage. Sellars v. First Colonial Corp., 276 S.C. 548, 550-551, 280 S.E.2d 805, 806 (S.C. 1981) (citing 55 Am.Jur.2d Mortgages § 211; Hardin v. Hardin, 34 S.C. 77, 12 S.E. 936 (1891)). However, the general rule may be modified by agreement of parties to the mortgage. Id. (citing 55 Am.Jur.2d Mortgages § 217.)

“(T)he question whether the mortgagee can, before or pending proceedings for foreclosure, subject the rents and profits of the mortgaged premises to the payment of his debt, depends entirely upon the contract of the parties, as stated in the mortgage. If there is a stipulation therein that the mortgagee shall have a lien upon the rents and profits, as well as upon the land, then of course such lien may be made effective by the appointment of a receiver, under proper allegations and proofs;”

Id. (quoting Hardin v. Hardin, *supra*, at 937).

“[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings.” U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 375 n.9, 684 S.E.2d 199, 205 n.9 (S.C.App. 2009) (quoting 55 Am. Jur. 2d Mortgages § 604). “In a foreclosure proceeding, the lender bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice.” Id. (citing In re Foreclosure of Real Prop. for \$143,600.00, 156 N.C.App. 477, 577 S.E.2d 398, 406 (2003)).

Pursuant to the terms of the Loan Documents, upon the occurrence of an Event of Default, DRV may apply for the appointment of a receiver. Additionally, and consistent with certain other provisions of the Loan Documents, Fontaine assigned all current and future Rents related to the applicable Real Property to DRV, and received, in return, a revocable license to collect the same Rents. Fontaine's license to collect Rents may only be revoked upon the occurrence of an Event of Default. Accordingly, before DRV may seek the appointment of a receiver, and/or revoke Fontaine's license to collect Rent, DRV must establish that an Event of Default under the Loan Documents has occurred. Respectfully, DRV cannot carry this high burden.

DRV cannot establish its entitlement to appointment of a receiver or to revoke Fontaine's license to collect Rents under the terms of the Loan Documents, because no Event of Default has occurred. Indeed, although in its Motion DRV obliquely alleges that "at least two events of default have now occurred," DRV did not allege any facts to demonstrate that any of the Events of Default defined by the Loan Documents have, in fact, taken place. Fontaine is unaware of any facts or circumstances that would support DRV's unsubstantiated claims. Fontaine avers that no Events of Default under the Loan Documents have occurred. More particularly, Fontaine avers that all payments due under the Loan Documents are current, and that it has otherwise complied with all of its other obligations under the Loan Documents. To the extent that DRV relies upon its Complaint or the Affidavit of Elliot M. Liffman to establish grounds for appointment of a receiver, or to revoke Fontaine's license to collect Rents, Fontaine relies upon its Answer, Affirmative Defenses, and Counterclaims for its response.

Moreover, DRV cannot establish a right to appointment of a receiver under the terms of the Receivership Statute because it has not demonstrated that it has an "apparent right to property which is the subject of the action and which is in the possession of an adverse party." Fontaine is unaware of any facts or circumstances that would support such an *ipse dixit* claim. Fontaine avers that no Events of Default under the Loan Documents have occurred. More particularly, Fontaine avers that all payments due under the Loan Documents are current, and that it has otherwise complied with all of its other obligations under the Loan Documents. To the extent that DRV relies upon its Complaint or the Affidavit of Elliot M. Liffman to establish statutory grounds for appointment of a receiver, Fontaine relies upon its Answer, Affirmative Defenses, and Counterclaims for its response.

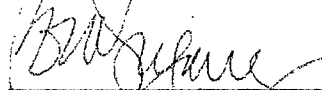
Finally, DRV cannot successfully seek the appointment of a receiver under the Statute by establishing that the Rents and Profits are in danger of being lost or materially injured or impaired.

Although DRV obliquely alleges that "the rents and income ... are in danger of being lost or materially injured or impaired," DRV did not allege any facts in support of that *ipse dixit* allegation. Fontaine is unaware of any facts or circumstances that would support DRV's unsubstantiated claim. Fontaine avers that no Events of Default have occurred. More particularly, Fontaine avers that all payments due under the Loan Documents are current, and that it has otherwise complied with all of its other obligations under the Loan Documents. To the extent that DRV relies upon its Complaint or the Affidavit of Elliot M. Liffman to establish grounds for appointment of a receiver, Fontaine relies upon its Answer, Affirmative Defenses, and Counterclaims for its response.

Premises considered, with a particular focus on the significant burden under South Carolina law that DRV must carry in order to have its Motion to Appoint Receiver granted, Fontaine respectfully submits that the instant Motion is not well-taken, and that it should, therefore, be denied.

Respectfully submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.



Brent B. Young (S.C. Bar No. 74173)
Attorney at Law
100 Med Tech Parkway, Suite 200
Johnson City, TN 37604
(423) 928-0181
byoung@bakerdonelson.com

*Attorneys for Fontaine
Business Park, LLC*

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

) CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff/Counter-Defendant,

v.

FONTAINE BUSINESS PARK, LLC, *et al.*

Defendants/Counter-Plaintiffs.

PLAINTIFF'S RULE 59(e) MOTION
TO ALTER OR AMEND

RICHLAND COUNTY
FILED
JUN 19 AM 11:50
JENNIFER W. HARRIS
CLERK, S.C.P. & S.S.

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and other applicable law, Fontaine Business Park, LLC ("Fontaine"), respectfully moves the Court to Alter or Amend its Judgment entered on June 4, 2013, granting Plaintiff/Counter-Defendant's Motion for Appointment of Receiver. As grounds for the instant Motion, Fontaine would respectfully show the Court as follows:

1. The Plaintiff was the first party to breach the Loan Agreement. In granting the Motion to Appoint Receiver, the Court concluded that Plaintiff/Counter-Defendant failed to prove that the reassessments to the Reserve Accounts were based upon current underwriting standards. The propriety of Plaintiff/Counter-Defendant's reassessments was squarely before the Court. Accordingly, Plaintiff/Counter-Defendant's failure to rebut or contradict Defendants' proof that the reassessments were not based upon underwriting standards, should result in the conclusion that Plaintiff/Counter-Defendant was the first party to breach the Loan Agreement.

Moreover, the Court found that "[t]here appears to be a dispute as to whether the monthly contributions were actually reassessed using current underwriting standards" and noted that "Plaintiff has not provided evidence that the monthly contributions to the Capital Reserve Account were reassessed under current underwriting standards." However, the fact that Plaintiff/Counter-

Defendant did not use any underwriting standards is no longer disputed. In an Affidavit submitted in opposition to Defendants' Joint Motion for a Temporary Restraining Order, Elliott Liffman swore that the methodology employed in reassessing the Reserve Accounts was explained in Plaintiff/Counter-Defendant's letter of July 11, 2011, and the attached schedule (See Exhibit 1, Affidavit of Elliott Liffman, ¶¶ 21-22 & Ex. A). More recently, in response to D Fontaine's Interrogatories numbers 8 and 9, Plaintiff/Counter-Defendant acknowledged that it "did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender" (See Exhibit 2, Plaintiff's Answers to Defendant's Interrogatories, ¶¶ 8-9). Plaintiff has now made it clear that it did not reassess the Reserve Accounts based upon underwriting standards and, instead, relied solely on the projected capital expenses that it requested. To the extent the existence of a dispute on this issue was considered in the Court's determination to appoint a Receiver, such a determination, respectfully, was in error. Moreover, as the first breaching party, Plaintiff/Counter-Defendant is barred from any remedy related to its breach. The Order Appointing Receiver should be altered or amended accordingly.

2. But for Plaintiff/Counter-Defendant's breach, Defendants would not have failed to pay the debt service payments for October and November 2012. Because Plaintiff/Counter-Defendant did not rely upon its then existing underwriting standards in reassessing the Reserve Accounts, the reassessments were imposed in breach of the Loan Agreement. That was the first breach, or genesis of this dispute. If Defendants had not been improperly required by Plaintiff/Counter-Defendant to pay the arbitrarily inflated payments to the Reserve Accounts, they would have had the cash to meet monthly debt service obligations. Since Plaintiff/Counter-Defendant was the first party to breach the Loan Agreement, it should be precluded from any relief under the equitable doctrines of unclean hands and first material breach. Moreover, because Plaintiff/Counter-Defendant breached reassessment clauses of the reserve account provisions, the increased monthly contributions

amounted to overpayments that Plaintiff/Counter-Defendant had no right to retain. Defendants were entitled to a refund of the overpayments or a credit of the overpayments to the debt service in October and November of 2012 (and thereafter), as requested. Plaintiff/Counter-Defendant's breach of the Loan Agreement and refusal to refund the overpayments, or credit the overpayments to the debt service, was the direct cause of Defendants' failure to meet the debt service payments in October and November of 2012. Accordingly, Defendant's failure to make those debt service payments should be excused. In either event, Plaintiff/Counter-Defendant is not entitled to benefit from its wrongful conduct though appointment of a Receiver.

In support of the instant Motion, Fontaine relies upon the identified Exhibits, the previously filed Affidavits, its Memorandum of Law in Support of Defendant's Motion to Alter or Amend Judgment, which is being filed contemporaneously herewith, and the record in this matter as a whole.

WHEREFORE, for the foregoing reasons, Fontaine respectfully requests that the Court alter or amend its prior Judgment/ Order to include the following:

- a. A declaration that Plaintiff was the first party to breach the Loan Agreement;
- b. A declaration that the October and November 2012 and all monthly debt service payments thereafter are excused under the doctrines of unclean hands, first material breach, impossibility of performance, and/or prevention of performance.
- c. A denial of Plaintiff's Motion to Appoint Receiver, thereby allowing Fontaine Management, LLC to regain and retain possession and control of the Real Property Collateral; and
- d. Such other and further relief to which it deems Fontaine entitled.

BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, P.C.

BY: Mark A. Fulks

Johnson City, Tennessee
June 14, 2013.

Brent B. Young (South Carolina Bar No 74173)
Mark. A. Fulks (Admitted Pro Hac Vice)
100 Med Tech Parkway, Suite 200
PO Box 3038
Johnson City, Tennessee 37602
(423) 928-0181
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Motion was served upon the following parties in interest herein by mailing same to the offices of counsel of said parties by first class United States Mail with sufficient postage thereon to carry the same to its destination.

Paul D. Harrill
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211

Tucker Player
Player Law Firm, LLC
1415 Broad River Road
Columbia, SC 29210

This 14 day of June 2013.

Mark A. Fulks
Attorney

RICHLAND COUNTY
FILED
2013 JUN 19 AM 11:50
JEANETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,)
Plaintiff/Counter-Defendant,) MEMORANDUM OF FACTS AND LAW
v.) IN SUPPORT DEFENDANT'S RULE 59(e)
FONTAINE BUSINESS PARK, LLC, *et al.*) MOTION TO ALTER OR AMEND
Defendants/Counter-Plaintiffs.)

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and other applicable law, Fontaine Business Park, LLC, ("Fontaine") respectfully submits the following Memorandum of Facts and Law in Support of its Motion to Alter or Amend the Court Order Appointing Receiver.

Statement of the Case/Introduction

Plaintiff/Counter-Defendant filed its Complaint in this matter on November 20, 2012, together with a Motion for Appointment of Receiver, and Motion for Order of Reference. Fontaine responded in opposition and tendered an Affidavit from Paula Mathews in support. Fontaine also filed an Answer, Affirmative Defenses, and Counterclaims on December 3, 2012.¹ Fontaine's affirmative defenses, included, among other things, several equitable defenses and a Counterclaims, including for breach of contract, all of which were based upon Plaintiff/Counter-Defendant's first breach of their contract by improperly reassessing the Reserve Accounts. Ms. Mathews' Affidavit explained that, but for Plaintiff/Counter-Defendant's breach, Defendants would not have missed the October and November 2012 debt service payments (*see Affidavit of Paula Mathews*, ¶¶ 76(d) & (e) and 77(d) & (e)). As a result of Plaintiff/Counter-Defendant's breach, Plaintiff/Counter-Defendant

¹ The other Defendants in this matter filed a similar, if not identical, Answer, Affirmative Defenses, and Counterclaims.

was improperly holding \$736,000.00 of Defendants/Counter-Plaintiffs' cash (*Id.*, ¶ 48). Without that cash, Defendants/Counter-Plaintiffs' could not make debt service payments.

A hearing was held on Plaintiff/Counter-Defendant's Motions on February 1, 2013.² While the Court had the Motion to Appoint Receiver under advisement, on February 20, 2013, Defendants filed a Joint Motion for Temporary Restraining Order, seeking to have Plaintiff/Counter-Defendant restrained from interfering in the operation and maintenance of the Real Property Collateral. Plaintiff/Counter-Defendant responded in opposition to the Motion and tendered an Affidavit from Elliott Liffman in support of its opposition. In that Affidavit, Mr. Liffman acknowledged that the reassessment of the Reserve Accounts was not based upon Plaintiff/Counter-Defendant's commercial mortgage underwriting standards. Instead, Mr. Liffman averred that the reassessments were based solely on the three-year Capital Expense Budget that Plaintiff/Counter-Defendant had requested from Defendants (*See* Exhibit 1, *Affidavit of Elliott Liffman*, ¶¶ 21-22 & Ex. A). The Motion for a Temporary Restraining Order was heard by Judge Hood on March 22, 2013, and taken under advisement.

On June 4, 2013, this Court entered an Order Appointing Receiver in which the Court concluded that Defendants' failure to make the debt service payments for October and November of 2012 constituted Events of Default under the Loan Documents and entitled Plaintiff/Counter-Defendant to appointment of a Receiver. The Court rejected Plaintiff/Counter-Defendant's contention that Defendants/Counter-Plaintiffs' failure to pay the reassessed monthly contributions to the Reserve Accounts constituted additional Events of Default under the Loan Agreement. In this regard, the Court found that Plaintiff/Counter-Defendant was only authorized to reassess the monthly contributions to the Reserve Accounts in its reasonable discretion "based upon its then

² The Court determined at the February 1, 2013 hearing, which it later confirmed in its June 4, 2013 Order, that the Motion for an Order of Reference would not be heard until all legal issues in the case have been resolved.

current underwriting standards." The Court noted that "[t]here appears to be a dispute as to whether the monthly contributions to the Capital Reserve Account were actually reassessed using current underwriting standards." Moreover, the Court found that "Plaintiff has not provided evidence that the monthly contributions to the Capital Reserve Account were reassessed under current underwriting standards."

Statement of Facts

With respect to the Capital Expense Reserves, section 3.4 of the Loan Agreement between Plaintiff/Counter-Defendant and Defendants/Counter-Plaintiffs provides, in pertinent part, that "Lender may reassess the amount of the monthly payment required under this Section 3.4 from time to time in its reasonable discretion (based upon its then current underwriting standards)." Similarly, Section 3.5 authorizes Plaintiff/Counter-Defendant to reassess the Rollover Reserve "in its reasonable judgment" if the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses." Finally, Section 3.3 authorize Plaintiff/Counter-Defendant to reassess the Tax and Insurance Reserve "if [it] determines in its reasonable judgment that the funds ... will be insufficient to pay (or in excess of) the Taxes and Insurance Premiums"

By letter dated July 11, 2011, Plaintiff/Counter-Defendant notified Defendants that it was increasing Defendants' monthly contribution to the Capital Reserve Account from \$5,249.00 to \$54,476.34, to the Rollover Reserve Account from \$21,086.50 to \$159,472.91, resulting in one-time increases of 1,037% and 756%, respectively. In April 2012, Plaintiff/Counter-Defendant notified Fontaine of the reassessment of the Insurance Reserve from \$722.00 to \$5,272.97, resulting in a one-time increase of 630%. Generally, the reassessments to were not based upon Plaintiff/Defendant's "reasonable judgment" or "reasonable discretion."

More particularly, the reassessment of the Capital Reserve Account was not based upon any underwriting standards. Instead, it was based upon a three-year Capital Budget prepared at Plaintiff/Counter-Defendant's instance (and without any indication for their purpose). In an Affidavit submitted in opposition to Defendants' Joint Motion for a Temporary Restraining Order, Elliott Liffman swore that the methodology employed in reassessing the Reserve Accounts was explained in his letter of July 11, 2011, and the attached schedule (*See Exhibit 1, Affidavit of Elliott Liffman*, ¶¶ 21-22 & Ex. A). That letter makes it clear that no underwriting standards were used in formulating the reassessments, and that Plaintiff/Counter-Defendant was insisting that Defendants fund the expense projections included in the Capital Expense Budget without consideration for whether the projected expenses actually proved necessary. More particularly, in response to Fontaine's Interrogatories numbers 8 and 9, Plaintiff/Counter-Defendant acknowledged that it "did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender" (*See Exhibit 2, Answers to Interrogatories*, ¶¶ 8-9). Indeed, Plaintiff/Counter-Defendant even objected to those Interrogatories because they "assume[d]" and "presuppose[d]" that Plaintiff/Counter-Defendant had underwriting standards for commercial loans (*Id.*).

After Defendants/Counter-Plaintiffs contested the legitimacy of the reassessments and reverted to the contractual monthly contribution amount, Plaintiff/Counter-Defendant declared an Event of Default and purported to accelerate the debt and avail itself of various other self-help remedies under the Loan Documents, including seeking the appointment of a Receiver. However, as Ms. Mathews' explained, but for Plaintiff/Counter-Defendant's breach of the reassessment provision of the Loan Agreement, Defendants would not have missed the October and November 2012 (or, presumably any other) debt service payments (*see Affidavit of Paula Mathews*, ¶¶ 76(d) & (e) and 77(d) & (e)). As a result of Plaintiff/Counter-Defendant's breach, it was improperly holding

\$736,000.00 of Defendants/Counter-Plaintiffs' cash (*Id.*, ¶ 48). Without that cash, the debt service payments could not be made.

Argument

A. Standard of Review. The purpose of a Motion under Rule 59(e) of the South Carolina Rules of Civil Procedure to alter or amend an order or judgment is to request that the judge reconsider matters properly encompassed in a decision on the merits. *Elam v South Carolina Department of Transportation*, 361 S.C. 9, 22; 602 S.E.2d 772, 779 (2004). Jurisprudence of South Carolina dictates that it is inherently fair to allow a party one final chance to call the court's attention appropriate arguments. *Id.* Moreover, legal commentators have opined that "[i]t is absolutely necessary to justice that there should, upon many occasions, be opportunities of reconsidering" the applicable cause. *Id.*; 11 *Wright, Miller & Kane* § 2801. Finally, South Carolina law also provides that a party may wish to file a motion under Rule 59(e) if it believes that the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule upon it. *Id.* at 23; 779. Because the Court here sat as the finder of fact at the trial of this matter on November 2, 2012, the Plaintiff also brings this Motion pursuant to SCRCP 52(b) to amend the Court's findings of fact.

B. Unclean Hands, First Material Breach, and Equity. The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in the matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat'l Bank of S.C. v Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App. 1998). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in

good conscience, complain in a court of equity. *Id.*; see *Wachovia Bank, N.A. v Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247-248 (S.C.App. 2010).

Likewise, it is well-settled that a party who precludes the other from performing under a contract by committing the first material breach of that contract cannot benefit from any subsequent non-performance by the other contracting party. *Continental Mortg. Investors v Quail Run Assoc.*, 280 S.C. 409, 312 S.E.2d 272 (S.C.App. 1984); *Propst Construction Co v N.C. Department of Transportation*, 56 N.C.App. 759, 290 S.E.2d 387 (1982); *Whitt v Gochuin*, 205 Va. 797, 139 S.E.2d 841 (1965); *Champion v Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404, 406 (S.C.App., 1984). See also, *SunTrust Mortg., Inc v United Guar. Residential Ins. Co.*, 806 F.Supp.2d 872, 887 (E.D.Va.2011) ("[T]he first material breach doctrine operates not as remedy requested by a party in its capacity as a plaintiff, but as an affirmative defense pled by a party in its capacity as a defendant."); cf. *Bayview Loan Servicing, LLC v Simmons*, 275 Va. 114, 121-22, 654 S.E.2d 898, 901 (2008) (holding that borrower was entitled to damages based on lender's violation of the terms of its remedies under its deed of trust).

C. Plaintiff/Counter-Defendant was the first party to breach. In granting the Motion to Appoint Receiver, the Court concluded that "Plaintiff has not provided evidence that the monthly contributions to the Capital Reserve Account were reassessed under current underwriting standards" (Order Appointing Receiver, p. 7). On the other hand, Defendants provided proof that current underwriting standards were not used. In her Affidavit, Ms. Mathews explained that Plaintiff/Counter-Defendant generally ignored Defendants' requests for substantiation of the reassessments through examination of the underwriting standards. (See *Affidavit of Paula Mathews*, ¶¶ 40-43.) Ms. Mathews also averred that the only explanation given by Plaintiff/Counter-Defendant was the three-year Capital Expense Budget, which did not constitute underwriting standards (*Id.*). Moreover, Ms. Mathews explained that Plaintiff/Counter-Defendant also breached the Loan Agreement by imposing unreasonable reassessments:

In my experience, these reassessments are unprecedented and outrageous in commercial real estate and financing. It is unreasonable to increase expenditures by . . . over 1,000% [in the case of the Capital Expense Reserves] on a mere 60 days' notice. Additionally, because unreasonable reassessments are not permitted under the Loan Documents, and [Plaintiff] has failed to demonstrate the adequate current underwriting grounds upon which they were based, the reassessments are not binding on [Defendant] and should not be enforced.

(*Id.*, ¶ 43.)

The existence of underwriting standards, or lack thereof, was squarely before the Court during the hearing. Fontaine's proof in that regard is uncontested. Moreover, assuming Plaintiff/Counter-Defendant could come forward with some argument that underwriting standards were used, it has made no attempt to demonstrate that an increases of over 1,037%, 756%, and 630% are commercially reasonable. Plaintiff/Counter-Defendant chose to leave that matter un rebutted. The improper reassessments of the Reserve Accounts occurred before the October and November 2012 debt service payments were due. Accordingly, and respectfully, the Court should conclude that Plaintiff/Counter-Defendant was the first party to breach the Loan Agreement. As the first party to materially breach an agreement, Plaintiff/Counter-Defendant should not now be allowed to benefit from that breach.

D. Plaintiff/Counter-Defendant does not dispute its failure to use underwriting standards. It should also be noted that the Court found that "[t]here appears to be a dispute as to whether the monthly contributions were actually reassessed using current underwriting standards" (Order, p. 7). As previously noted, in an Affidavit submitted in opposition to Defendants' Joint Motion for a Temporary Restraining Order, Elliott Liffman swore that the methodology employed in reassessing the Reserve Accounts was explained in Plaintiff/Counter-Defendant's letter of July 11, 2011, and the attached schedule (See Exhibit 1, *Affidavit of Elliott Liffman*, ¶¶ 21-22 & Ex. A). The "methodology" to which Mr. Liffman referred was nothing more than the three-year capital expense projections that Plaintiff/Counter-Defendant itself had requested--without any indication of how

the projections were to be used. Although Plaintiff/Counter-Defendant contended at the hearing on its Motion to Appoint Receiver that Defendants were responsible for the generation of the three-year capital projections, Mr. Liffman acknowledges that it was prepared at Plaintiff/Counter-Defendant's behest (*Sæ* Exhibit 1, ¶ 18). Moreover, an e-mail exchange between Mr. Liffman and Sandra Johnson, CBRE's onsite property manager, demonstrates that the parameters for the projections were established by Mr. Liffman, not Defendants (*Sæ* Exhibit 3, *E-mails Messages between Mr. Liffman and Ms. Johnson*). In a dispute between businesses engaged in the commercial mortgage industry, it should go without saying that budgeting for expenses is a process entirely distinct from the underwriting standards and their process.

More recently, Plaintiff/Counter-Defendant brought even more clarity to this issue. In response to Defendant/Counter-Plaintiff's Interrogatories numbers 8 and 9, Plaintiff/Counter-Defendant acknowledged that it "did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender" (*Sæ* Exhibit 2, ¶¶ 8-9). Thus, there can be no question that Plaintiff/Counter-Defendant did not reassess the Capital Expense Reserve account based upon any underwriting standards and, instead, relied solely on the projected capital expenses that it requested and defined. To the extent that determination swayed the Court's decision, the Court should now be advised that the facts as subsequently developed through discovery and other presentations of evidence lay to rest any question concerning Plaintiff/Counter-Defendant's disregard for its obligations under the Loan Agreement.

E. Plaintiff/Counter-Defendant is precluded from benefitting from its breach. Because of the impermissible reassessments, Plaintiff/Counter-Defendant held more than a half million dollars of Defendants/Counter-Plaintiffs' cash before October and November 2012. This Court noted that, from September to December 2012, Defendants/Counter-Plaintiffs paid Plaintiff/Counter-Defendant about \$736,000 to satisfy Plaintiff/Counter-Defendant's unreasonable

demands for satisfaction of the increased reserve contributions (Order, p. 4), which have been invalidated due to Plaintiff/Counter-Defendant's failure to use underwriting standards (Order, p. 7) and its failure to demonstrate commercial reasonableness in the percentage of the increase. As a result of the excess payments, in October and November 2012, Plaintiff/Counter-Defendant was in possession of \$736,000.00 of Defendants/Counter-Plaintiffs' money (Order, p. 5). Plaintiff/Counter-Defendant was not entitled to hold that money in opposition to Defendants' demands for its return or application to the debt service. And, without that cash, Defendants/Counter-Plaintiffs' could not make the debt service payments.

Under the doctrines of unclean hands and first material breach, Plaintiff/Counter-Defendant is precluded from benefitting from any subsequent breach by Defendants/Counter-Plaintiffs that was caused by its pre-existing breach. Because Plaintiff/Counter-Defendant did not prove that it relied upon its then existing underwriting standards in reassessing the Capital Expense Reserve account, this Court should find that the reassessments were imposed in breach of the Loan Agreement. Moreover, because Plaintiff/Counter-Defendant did not contest Defendants' proof concerning the unreasonableness of the reassessments, this Court should find that the reassessments were imposed in breach of the Loan Agreement. In both regards, this Court should conclude that Plaintiffs/Counter-Defendants breaches were the first in this controversy. Finally, this Court should also conclude that, as the first breaching party, Plaintiff/Counter-Defendant is precluded from any relief under the equitable doctrines of unclean hands, first material breach, impossibility of performance, and prevention of performance. Consequently, this Court should conclude that Defendants' failure to make the October and November 2012 debt service payments, or any others, is excused.

F. Plaintiff/Counter-Defendant's breach and Defendants' remedy are matters of equity. In granting the Motion to Appoint Receiver, the Court stated: "Despite Defendant's

contentions that the reassessed monthly contributions were unreasonable, there is no specific provision in the Loan Agreement that would allow Defendants to apply money previously paid into the reserve accounts to a debt service payment" (Order, p. 6). Respectfully, it is equally true that there is no specific provision in the Loan Agreement that would allow Plaintiff/Counter-Defendant to withhold overpayments against Defendants/Counter-Plaintiffs' demands for a refund. Moreover, the custodial nature of the Reserve Accounts (Order, p. 3), which is expressly established by the Loan Agreement, militates against any claim by Plaintiff/Counter-Defendant to retain the overpayments.

The determination of whether an overpayment must be refunded is a matter of equity. An action for money had and received is governed by equitable principles. *Okatie River, L.L.C. v Se Site Prep, L.L.C.*, 577 S.E.2d 468, 472-473 (Ga. App. 2003) (quoting *Town of Bennettsville v Bledsoe*, 84 S.E.2d 554, 556 (1954)). Such an action exists where a defendant has money belonging to the plaintiff which in equity should be repaid to the plaintiff. *Id.* (citing *Jackson v White*, 194 F. 677 (4th Cir. 1912) and 42 C.J.S. Implied Contracts § 11 (1991)). To recover, the plaintiff must show the following: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. *Myrtle Beach Hospital, Inc. v City of Myrtle Beach*, 532 S.E.2d 868, 872 (2000) "Examples of when an action for money had and received will lie are when the plaintiff paid money to the defendant under an unenforceable contract." *Okatie River*, 577 S.E.2d 468, 472-473. "Once the requirements of an action for money had and received are proven, the equitable principles of unjust enrichment and restitution provide a remedy." *Id.* (citing 42 C.J.S. Implied Contracts § 5 (1991)).

Here, all of the necessary elements to require a refund (or application to debt service) of Defendants' overpayments are present, entitling them to the appropriate relief. Plaintiff/Counter-

Defendant breached the Loan Agreement by reassessing the Reserve Accounts based upon budgeting procedures rather than underwriting guidelines. Thus, the reassessed amounts are unenforceable and Defendants are entitled to a refund. If Plaintiff/Counter-Defendant had refunded or applied the overpayments when requested by Defendants, the purported October and November 2012 debt service defaults would never have occurred. Under the circumstances, equity dictates that the overpayments to the Reserve Accounts be refunded or applied to debt service.

WHEREFORE, for the foregoing reasons, Fontaine respectfully requests that the Court grant its Motion to Alter or Amend, by awarding it the relief requested.

BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, P.C.

BY: 
Brent B. Young (South Carolina Bar No 74173)
Mark A. Fulks (Admitted Pro Hac Vice)
100 Med Tech Parkway, Suite 200
PO Box 3038
Johnson City, Tennessee 37602
(423) 928-0181
Attorneys for Plaintiff

Johnson City, Tennessee
June 14, 2013.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

)
)
)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, LLC;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

**AFFIDAVIT OF
ELLIOT M. LIFFMAN IN
OPPOSITION TO
DEFENDANTS' EMERGENCY
JOINT MOTION FOR
TEMPORARY RESTRAINING
ORDER AND INJUNCTIVE
RELIEF**



STATE OF MARYLAND)

COUNTY OF MONTGOMERY)

PERSONALLY APPEARED before me, Elliot M. Liffman who first being duly sworn, deposes and states as follows:

1. I am the Manager of RCC Asset Management Company, LLC, the manager of DRV Fontaine, LLC (hereinafter "DRV" or "Plaintiff").
2. In that position I am personally familiar with the facts alleged in the Complaint filed in the above-captioned action (the "Complaint").
3. In that position I am also personally familiar with the loan relationship between DRV and the Defendants named above and the status of that loan.
4. I am also personally familiar with the status of the Loan and Loan Documents, including the Loan Agreement, the Note, the Mortgage, the Assignment of Leases, and the Assignment of Agreements (as each of those capitalized terms are defined in the Complaint and/or herein).
5. Each capitalized term in this affidavit shall have the meaning set forth in the Loan Documents if not otherwise set forth herein.
6. Since April 2, 2009, DRV has been the holder of the loan documents, including the Loan Agreement, the Note, the Mortgage, the Assignment of Leases, and the Assignment of Agreements, as the successor in interest to The Royal Bank of Scotland plc ("RBS Bank"), which was the successor in interest to Greenwich Capital Financial Products, Inc. ("Greenwich Capital").
7. I have reviewed the Complaint and find the allegations contained therein to be true and accurate.

8. I have reviewed each document attached as an exhibit to the Complaint and find each of them to be a true and authentic copy of an original that is maintained in the business records of DRV and is kept in the ordinary course of DRV's business.

9. In opposition to the Emergency Joint Motion for Temporary Restraining Order and Injunctive Relief, I would also assert as follows:

10. DRV is the lender and holder of this non-recourse loan in the original amount of Sixteen Million Three Hundred Thousand and 00/100 (\$16,300,000.00) Dollars (the "Loan").

11. The Loan is evidenced and secured by those loan documents attached to the complaint, including but not limited to, the "Loan Agreement" (Exhibit A), the "Note" (Exhibit B), the "Mortgage" (Exhibit C), the "Assignment of Leases" (Exhibit D), and the "Assignment of Agreements" (Exhibit E).

12. Fontaine Business Park, LLC is the Original Borrower on the Loan Documents.

13. Fontaine Business Park, LLC ("Original Borrower" or "Syndicator") sold off all but one (1%) percent of its ownership interest in the Property to the remaining defendants/borrowers as Tenants in Common. They are: Fontaine Business Park 2, LLC, Fontaine Business Park 3, LLC, Fontaine Business Park 4, LLC, Fontaine Business Park 5, LLC, Fontaine Business Park 6, LLC, Fontaine Business Park 7, LLC, Fontaine Business Park 8, LLC, Fontaine Business Park 9, LLC, Fontaine Business Park 10, LLC, Fontaine Business Park 11, LLC, Fontaine Business Park 12, LLC, Fontaine Business Park 13, LLC, Fontaine Business Park 14, LLC, Fontaine Business Park 15, LLC, Fontaine Business Park 16, LLC, Fontaine Business Park 17, LLC, Fontaine Business Park 18, LLC, Fontaine Business Park 19, LLC, Fontaine Business Park 20, LLC, Fontaine Business Park 21, LLC, Fontaine Business Park 22, LLC, Fontaine Business Park 23, LLC, Fontaine Business Park 24, LLC, Fontaine Business Park 25,

LLC, Fontaine Business Park 26, LLC, Fontaine Business Park 27, LLC, Fontaine Business Park 28, LLC, Fontaine Business Park 29, LLC, Fontaine Business Park 30, LLC, and Fontaine Business Park 31, LLC (collectively, the "TIC Borrowers").

14. The TIC Borrowers agreed to be bound as borrowers to all of the Loan Documents by virtue of that Loan Assumption Agreement attached to the Complaint as Exhibit F and that Amendment to Loan Assumption Agreement (Exhibit I).

15. The Defendants are in default on the Loan for multiple reasons.

Reserve Accounts Default

16. The Loan Agreement requires that the Defendants make monthly payments into a "Capital Reserve Account" and a "Rollover Reserve Account" (as those terms are defined in the Loan Agreement).

17. The funds deposited into the "Capital Reserve Account" and the "Rollover Reserve Account" are necessary to properly maintain the Property (which is DRV's collateral) and to attract and retain tenants at the Property.

18. In approximately December 2010, due in part to a decline in tenancy at the Property, DRV requested that Defendants' onsite property manager, Gullane I, LLC d/b/a CBRE Columbia ("CB Richard Ellis"), submit a three year capital budget for the Property.

19. After multiple requests, in May 2011, CB Richard Ellis submitted to DRV a projected three year budget for 2011, 2012, and 2013 (the "Capital Budget"). The Capital Budget reflected the anticipated capital improvement needs for the Property for the next three years, the anticipated repairs, replacements, broker commissions and construction of tenant improvements for existing and projected vacant spaces within the Property and tenant renewals for the next three years. Costs included in the Capital Budget were substantially greater than existing and projected.

balances in the Capital Reserve Account and the Rollover Reserve Account.

20. On July 11, 2011, DRV provided notice to Defendants' representative of an increase in the amount of monthly payments required for the Capital Reserve Account and the Rollover Reserve Account (the "Reserve Accounts") in order to cure the shortfalls projected in the Capital Budget. This notice was given pursuant to the express terms of Sections 3.4 and 3.5 of the Loan Agreement. A copy of the notice letter is attached hereto as Exhibit I.

21. The notice letter and attached schedule explain my methodology in reassessing the Reserve Account payments.

22. Pursuant to the notice letter, DRV increased the monthly amounts required to be paid into the Capital Reserve Account and the Rollover Reserve Account significantly for a period of only ten (10) months (September 2011 through June 2012) in order to meet the projections of the Capital Budget.

23. During a teleconference with DRV representatives on August 1, 2011, Defendants' representatives agreed to develop a plan to address the cash needs of the company to properly fund the Reserve Accounts.

24. Defendants paid the increased monthly payments into the Reserve Accounts for the next four months – September through December 2011.

25. At no time during the discussions on or around August 1, 2011 or when Defendants made the increased Reserve Account payments did Defendants ever inform me or DRV that the payments were being made "under protest" or that the increases were "arbitrary, capricious, and unreasonable" as alleged in Defendants Answer.

26. In January 2012, Defendants unilaterally stopped making the full Reserve Account payments and returned to making the old monthly payments into the Reserve Accounts.

27. DRV objected to this as a breach and reminded Defendants of their agreement to develop a plan to fund the increased Reserve Accounts payments.

28. Defendants also have an obligation under the Loan Documents to make payments into reserve accounts for the payment of property taxes and insurance relating to the Property (the "Tax and Insurance Account").

29. On April 1, 2012, DRV advised CB Richard Ellis of an increase in the required monthly contributions into the Tax and Insurance Account.

30. Defendants paid the increased contributions into the Tax and Insurance Account in April, May and June of 2012.

31. In July 2012, Defendants unilaterally reduced the payments into the Tax and Insurance Account to a level they felt was sufficient. DRV does not believe that the amounts being paid into the tax and insurance reserve accounts by Defendants is sufficient. Moreover, Defendants' reduction in the payments to those reserve accounts without DRV's consent is not permitted under the Loan Agreement.

32. From August 2011 until March 2012, DRV waited patiently for Defendants to present their plan for addressing the projected cash shortfall in funding the Reserve Accounts. In March 2012, Defendants presented, through CB Richard Ellis, a Business Plan and Operating Budget that failed to address the cash shortfall projected in the Capital Budget.

33. In July 2012, it became apparent to DRV that no plan was forthcoming to address the shortfall in Defendants' cash needed to make the increased monthly Reserve Accounts payments. Therefore, DRV provided notice to Defendants on July 27, 2012, that failure to make the full payments to the Reserve Accounts within ten days would constitute an Event of Default (as defined in the Loan Agreement).

34. Defendants did not make the demanded payment within ten days of the July 27, 2012 demand letter and have not made the demanded payment as of the date of this affidavit.

35. As a result of Defendants' failure to make the payments due on the Reserve Accounts, an Event of Default has occurred (the "Reserve Accounts Default").

Payment Default

36. Defendants failed or refused to pay the monthly debt service payment that was due for the month of October 2012.

37. Defendants' failure to pay the debt servicing payment constitutes an Event of Default under Section 8.1 of the Loan Agreement.

38. DRV provided notice, through counsel, that the failure to make the debt service payment for the month of October 2012 was an additional Event of Default under the Loan Documents (the "Payment Default").

39. As a result of the Payment Default, DRV accelerated the entire Debt pursuant to Section 8.2.1 of the Loan Agreement.

40. As a result of this Payment Default, DRV also exercised its right to apply the Default Rate of interest to the entire unpaid Debt pursuant to Section 2.2.2 of the Loan Agreement.

41. As a result of the Reserve Accounts Default and the Payment Default, DRV demanded, pursuant to Section 5.12.2 of the Loan Agreement, that the current management agreement for the Property be terminated and the property manager under that agreement, Fontaine Management, LLC, an affiliate of Original Borrower, that sub-contracts materially all operational functions to CB Richard Ellis, be replaced with a replacement manager acceptable to DRV.

42. Defendants failed or refused to comply with the demand to terminate Fontaine Management, LLC. This constituted another immediate Event of Default pursuant to Section 5.12.2 of the Loan Agreement.

43. As a result of the Reserve Accounts Default and the Payment Default, DRV also terminated Defendants' license to continue to collect rents and profits generated by the Property and directed that those funds be held by the onsite manager CB Richard Ellis, all pursuant to the Mortgage and the Assignment of Leases. That request was made in a letter dated October 10, 2012, such letter being attached hereto as Exhibit 2.

44. Defendants failed or refused to comply with the termination of their right to collect rents and profits, failed to direct CB Richard Ellis to hold the rents and profits and continued to exercise control over the rents and profits from the Property.

45. Pursuant to the Assignment of Agreements, Defendants granted to DRV, all of their interest in all agreements, licenses and contracts relating to the Property, including all property management agreements.

46. As a result of the Reserve Accounts Default and the Payment Default, DRV exercised its rights under the Assignment of Agreements including the revocation of Defendants' license to utilize all property management agreements.

47. Pursuant to Section 6 of the Assignment of Agreements, DRV requested Defendants to notify CB Richard Ellis that all future performance of its obligations should be made at the direction of DRV. That request was made in a letter dated January 18, 2013, such letter being attached hereto as Exhibit 3.

48. Once again, Defendants failed or refused to comply with DRV's demands and the requirements to which they agreed in the loan documents, including the Assignment of

Agreements.

49. Pursuant to Defendants theory that no Events of Default have occurred, there would be debt service payments due each month, including payments to principal, interest and the Reserve Accounts. Defendants have not made alleged "debt service" payments for the months of October 2012, November 2012, February 2013 or March 2013.

50. Defendants have demanded the "debt service" payments for those months be set-off against the increased Reserve Account payments Defendants made for the four months of September through December 2011.

DRV's Right to Receiver

51. As a result of these Events of Default, and DRV's exercise of its rights under the Assignment of Leases, DRV is entitled to collect all rents and profits generated by and associated with the Property pursuant to the Mortgage and the Assignment of Leases.

52. As set forth above, Defendants have refused to comply with the demands of DRV to cease collecting rents and profits from the Property.

53. Pursuant to the Mortgage, the Defendants expressly consented to the appointment of a receiver over the Property should an Event of Default occur.

54. As a result of the Events of Default, DRV is entitled to the appointment of a receiver over the Property pursuant to the express language of the Loan Agreement, the Note, the Mortgage, and the Assignment of Leases.

55. DRV further believes that it is entitled to the appointment of a receiver over the Property pursuant to South Carolina statutory authority.

56. A hearing was held on DRV's motion for the appointment of a receiver on February 1, 2013. I was in attendance at that hearing. At the conclusion of the hearing, the presiding judge

took the matter under advisement. To my knowledge no ruling has been issued from the court as of the date of this affidavit.

Paula Matthews' Affidavit(s)

57. At the hearing on DRV's motion for appointment of receiver on February 1, 2013, Defendants' counsel argued that the Defendants are not in default in this case because the Capital Budget was not the "Defendants'" budget.

58. At the hearing, Defendants also relied significantly upon the Affidavit of Paula Matthews that was submitted in opposition to the motion for appointment of receiver. As set forth in Ms. Matthews' Affidavit, she works for both the Original Borrower/Syndicator, Fontaine Business Park, LLC, and its manager, Fontaine Management, LLC.

59. In an effort to distance itself from the Capital Budget, which formed the basis of the reassessed Reserve Account payments, Ms. Matthews stated in her sworn Affidavit that the "Capital Budget was submitted to DRV by CBRE-Columbia without Fontaine's *approval or input*." (*emphasis added*). That statement in Ms. Matthews' Affidavit has been proven to be patently false.

60. After the conclusion of the receivership hearing, DRV subpoenaed records from CB Richard Ellis relating to the Capital Budget. Attached hereto as Exhibit 4 are a sampling of some of the communications between CBRE and the Defendants that were produced to DRV after the receivership hearing.

61. Those documents prove that not only was Fontaine directly involved in the preparation and approval of the Capital Budget, but, in fact, it was Paula Matthews who was most directly involved in those discussions and the approval of the release of the Capital Budget to DRV. This inconsistency in Ms. Matthews' emails and her sworn Affidavit is inexplicable.

Current Status of Property Management

62. As set forth above, DRV requested the Defendants terminate Fontaine Management as the property manager pursuant to Section 5.12.2 of the Loan Agreement. This demand was originally made in the letter dated October 10, 2012 (Exhibit 2).

63. Pursuant to paragraph 4 of the Consent and Subordination of Manager dated December 14, 2007, Defendants and Fontaine Management agreed that DRV has the right to terminate the Management Agreement with Fontaine Management if the Defendants failed to terminate the Management Agreement pursuant to instruction by DRV in accordance with Section 5.12 of the Loan Agreement. A copy of the Consent and Subordination of Manager is attached hereto as Exhibit 5.

64. As set forth above, pursuant to the Assignment of Agreements, DRV has revoked Defendants' license to utilize the property management agreements as the result of the Events of Default.

65. Paragraph 6 of the Assignment of Agreements expressly states as follows:

Upon the occurrence and during the continuance of an Event of Default, Lender shall be entitled to all of the rights, remedies, powers and privileges available to a secured party under the Uniform Commercial Code in any jurisdiction whose laws may apply and this Assignment shall constitute a direction to and full authority to any person or entity which has contracted with or is a party to any of the Documents. (collectively, "**Contracting Parties**," and individually, a "**Contracting Party**") to perform its obligations under the Documents for the benefit of Lender without proof to any Contracting Party of the default of Assignor. In addition, Assignor agrees that it shall, promptly upon request of Lender following such Event of Default, execute and deliver notices to the Contracting Parties directing that future performance of such Contracting Parties' obligations be made at the direction of Lender. Assignor hereby irrevocably authorizes each of the Contracting Parties to rely upon and comply with any notice or demand by Lender issued in good faith for the performance by any such contracting party of its obligations under any Document for the benefit of Lender, and no Contracting Party shall have any right or duty to inquire whether an Event of Default has actually occurred, and until such Event of Default has been remedied or waived in accordance with the Loan Documents, Assignor shall have no right to countermand its authorization herein to the Contracting

Parties to perform for the benefit of Lender.

66. While CB Richard Ellis acknowledged DRV's rights and its obligations under paragraph 6 of the Assignment of Agreements, CB Richard Ellis initially proposed to continue its management of the Property by seeking mutual consent of Defendants and DRV for any management actions it took.

67. In the meantime, CB Richard Ellis would not discuss with or disclose to DRV financial information or any other status of the Property. DRV was informed that CB Richard Ellis's refusal to discuss or share such information with DRV was at the express direction of Fontaine Management and/or Defendants.

68. CB Richard Ellis's initial approach to management by mutual consent resulted in essentially a stalemate regarding the approval of expenses.

69. For example, Defendants refused to approve the payment of any funds toward DRV's Loan from the rents and profits in the Property operating account.

70. After the February 1, 2013 receivership hearing, DRV was provided notice and a request to fund certain tenant improvements related to a new tenant and two renewal tenants. DRV requested complete access to information relating to the leases and financial and tenancy information relating to the Property. DRV only received the complete information when CB Richard Ellis responded to DRV's subpoena on or about February 28, 2013.

71. On March 8, 2013, CB Richard Ellis provided notice to DRV and Defendants that as of March 11, 2013, CB Richard Ellis would continue to provide all communications and information to both "borrower and lender," but effective that date would begin taking direction from DRV with respect to "approving contracts, leases and payments."

72. On March 11, 2013, counsel for Fontaine Management sent correspondence

purportedly terminating the Sub-Management Agreement with CBRE immediately.

73. On March 14, 2013, DRV provided notice that it was terminating Fontaine Management immediately as the manager of the Property pursuant to Section 5.12.2 of the Loan Agreement and Section 4 of the Consent and Subordination of Manager.

74. CB Richard Ellis currently remains the onsite manager of the Property and DRV and CB Richard Ellis are maintaining the status quo with regard to its responsibilities and obligations to manage the Property.

75. DRV and CB Richard Ellis are working closely together at this time to resolve all outstanding issues relating to renewal and new leases at the Property, including the funding of tenant improvements and commissions.

76. DRV understands that each of the tenants seeking either a renewal or potential new lease has entered into a fully executed lease, and the new tenant is still in the planning phase of the build out that will require a landlord investment in "tenant improvements."

DRV's Damages To-Date

77. As set forth above, Defendants have failed to pay Capital Reserve Account and Rollover Reserve Account payments as required by the Loan Agreement.

78. As further set forth above, Defendants have also refused to make any payments toward debt servicing for the months of October 2012, November 2012, February 2013 and March 2013.

79. The difference between the amounts that Defendants should have paid for principal, interest and Reserve Account payments since January 2011 and the amounts that Defendants have actually paid since January 2011 is \$1,876,979.20. This figure does not include 5% late charges in that amount of \$93,848.96 to which DRV is entitled under the Loan Documents. This total also

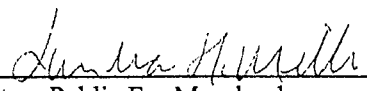
does not include the calculation of the 5% additional default interest in the amount of \$947,141.14,
to which DRV is entitled.

FURTHER AFFIANT SAYETH NOT.



ELLIOT M. LIFFMAN

SWORN TO before me this 21
day of March, 2013


_____(Seal)
Notary Public For Maryland

My Commission Expires: 2/17/17

SANDRA H. MILLER
NOTARY PUBLIC OF MARYLAND
MY COMMISSION EXPIRES FEBRUARY 17, 2017



Diversified Realty Ventures, LLC

8218 Wisconsin Avenue, Suite 209
Bethesda, Maryland 20814
Phone: 301 654 0660
Fax: 301 656 0548
www.drv-llc.com

Via FedEx

July 11, 2011

Fontaine Business Park, LLC
5 Financial Plaza, Suite 205
Napa, CA 94558
Attn: Michael Schwartz and Stephen Corea

Re: Promissory Note dated December 14, 2007 made by FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company, in the original principal amount of \$16,300,000.00 (the "**Note**") made payable to the order of GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation, and subsequently transferred to DRV FONTAINE, LLC, a Maryland limited liability company ("**DRV**"), together with all documents executed in connection with the Note (the "**Loan**").

Dear Sirs:

We are in receipt of your Three Year Capital Expense Budget 2011-2013 ("the **Budget**"). The Budget forecasts Capital Expenses and Leasing Expenses in the aggregate amount of \$2,417,964 during the applicable period. Based on your current reserve balances and scheduled monthly deposits, there is a projected deficit in each of the Capital Reserve Account and Rollover Reserve Account.

This correspondence constitutes notice to you that DRV, pursuant to Sections 3.4 and 3.5 of the Loan Agreement, has increased the amount of the monthly deposits beginning with the September 6, 2011 payment. The new monthly deposit schedule is as follows:

From	To	Capital Reserve Account	Rollover Reserve Account
--	August 2011	\$5,249.00	\$21,086.50
September 2011	June 2012	\$54,476.34	\$159,472.91
July 2012	November 2013	\$9,001.39	\$28,324.00
December 2013	--	\$5,249.00	\$21,086.50

A forecast of future reserve balances based on the new deposit schedule is attached hereto as Schedule A.

Sincerely,

Elliot Liffman
Manager

cc: Michael Rafter and William H. Mathieu; Powell Goldstein LLP (via facsimile)
Paula Matthews; Fontaine Management LLC (via facsimile)
Sandra Johnson; CB Richard Ellis (via email)

Bethesda, Maryland | Richmond, Virginia

FBPAPP-0664

Schedule A

Month	Capital Reserve				Rollover Reserve			
	Beginning Capital	Monthly Capital	UW Capital	Ending Capital	Beginning TI/LC	Monthly TI/LC	UW TI/LC	Ending TI/LC
	Balance	Contribution	Expenditure	Balance	Balance	Contribution	Expenditure	Balance
May-11	110,998.19	5,249.00	18,750.00	97,497.19	375,396.74	21,086.50	-	396,483.24
Jun-11	97,497.19	5,249.00	15,000.00	87,746.19	396,483.24	21,086.50	-	417,569.74
Jul-11	87,746.19	5,249.00	13,531.25	79,463.94	417,569.74	21,086.50	106,006.25	332,649.99
Aug-11	79,463.94	5,249.00	-	84,712.94	332,649.99	21,086.50	108,573.75	245,162.74
Sep-11	84,712.94	54,476.34	-	139,189.28	245,162.74	159,472.91	-	404,635.65
Oct-11	139,189.28	54,476.34	92,500.00	101,165.62	404,635.65	159,472.91	60,755.00	503,353.57
Nov-11	101,165.62	54,476.34	-	155,641.96	503,353.57	159,472.91	325,000.00	337,826.48
Dec-11	155,641.96	54,476.34	-	210,118.30	337,826.48	159,472.91	37,470.00	459,829.39
Jan-12	210,118.30	54,476.34	-	264,594.64	459,829.39	159,472.91	-	619,302.31
Feb-12	264,594.64	54,476.34	81,250.00	237,820.98	619,302.31	159,472.91	-	778,775.22
Mar-12	237,820.98	54,476.34	15,000.00	277,297.32	778,775.22	159,472.91	-	938,248.13
Apr-12	277,297.32	54,476.34	-	331,773.66	938,248.13	159,472.91	366,666.88	731,054.17
May-12	331,773.66	54,476.34	336,250.00	50,000.00	731,054.17	159,472.91	-	890,527.09
Jun-12	50,000.00	54,476.34	7,500.00	96,976.34	890,527.09	159,472.91	800,000.00	250,000.00
Jul-12	96,976.34	9,001.39	-	105,977.73	250,000.00	28,324.00	-	278,324.00
Aug-12	105,977.73	9,001.39	15,000.00	99,979.12	278,324.00	28,324.00	206,250.00	100,398.00
Sep-12	99,979.12	9,001.39	15,000.00	93,980.52	100,398.00	28,324.00	-	128,722.00
Oct-12	93,980.52	9,001.39	-	102,981.91	128,722.00	28,324.00	-	157,046.00
Nov-12	102,981.91	9,001.39	-	111,983.30	157,046.00	28,324.00	12,240.00	173,130.00
Dec-12	111,983.30	9,001.39	-	120,984.69	173,130.00	28,324.00	-	201,454.00
Jan-13	120,984.69	9,001.39	-	129,986.08	201,454.00	28,324.00	-	229,778.00
Feb-13	129,986.08	9,001.39	-	138,987.47	229,778.00	28,324.00	-	258,102.00
Mar-13	138,987.47	9,001.39	-	147,988.87	258,102.00	28,324.00	-	286,426.00
Apr-13	147,988.87	9,001.39	117,500.00	39,490.26	286,426.00	28,324.00	64,750.00	250,000.00
May-13	39,490.26	9,001.39	18,750.00	29,741.65	250,000.00	28,324.00	77,377.50	200,946.50
Jun-13	29,741.65	9,001.39	-	38,743.04	200,946.50	28,324.00	-	229,270.50
Jul-13	38,743.04	9,001.39	-	47,744.43	229,270.50	28,324.00	-	257,594.50
Aug-13	47,744.43	9,001.39	15,000.00	41,745.82	257,594.50	28,324.00	12,939.38	272,979.13
Sep-13	41,745.82	9,001.39	18,750.00	31,997.22	272,979.13	28,324.00	64,645.00	236,658.13
Oct-13	31,997.22	9,001.39	-	40,998.61	236,658.13	21,086.50	-	257,744.63
Nov-13	40,998.61	9,001.39	-	50,000.00	257,744.63	21,086.50	-	278,831.13
Dec-13	50,000.00	5,249.00	-	55,249.00	278,831.13	21,086.50	-	299,917.63

From: (301) 654-0660
 Elliot Liffman
 DIVERSIFIED REALTY VENTURES
 8218 Wisconsin Ave
 Suite 209
 Bethesda, MD 20814

Origin ID: OBTA



J11201104290225

Ship Date: 11JUL11
 ActWgt: 1.0 LB
 CAD: 3089013/INET3180

Delivery Address Bar Code



SHIP TO: (949) 429-6600

BILL SENDER

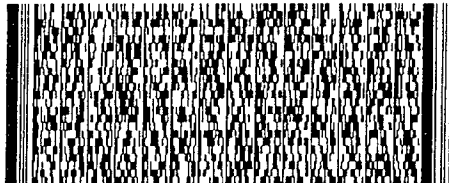
Michael Schwartz / Stephen Corea
 Fontaine Business Park, LLC
 5 FINANCIAL PLZ STE 205

NAPA, CA 94558

Ref # FBP Borrower
 Invoice #
 PO #
 Dept #

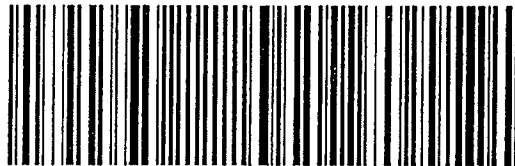
TUE - 12 JUL A4
 STANDARD OVERNIGHT

TRK# 7949 5923 3956
 0201



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94558
 CA-US
 OAK



50FG2/F556/F5F4

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Elliot Liffman <eliffman@drv-llc.com>

Message Sent: 17002639

faxagent@nextiva.com <faxagent@nextiva.com>
To: eliffman@drv-llc.com

Mon, Jul 11, 2011 at 2:16 PM

Delivery Information:

Message #: 17002639
Sender Name: Elliot Liffman
Sender Company: DRV
Sender Phone: (301) 654-0660 x301
Remote CSID: 9494296606Fax ServerFax Server
Total Pages: 3
Start Time: 7/11/2011 11:13:27 AM
End Time: 7/11/2011 11:21:56 AM
Duration: 7 min 43.416 sec
Delivery Count: 3

Recipient List:

Michael Rafter - +1 (404) 5726999
Paula Matthews - +1 (949) 4296606
William Mathieu - +1 (404) 5726999

[Click here to view this message online](#)

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 17002639.PDF
501K

MCNAIR
ATTORNEYS

October 10, 2012

Paul D. Harrill

Via Fax (949) 429-6606 and Certified Mail, return receipt requested

pharrill@mcnair.net
T (803) 799-9800
F (803) 753-3278

Fontaine Business Park, LLC and
Each Additional Borrower
111 Corporate Drive, Suite 120
Ladera Ranch, CA 92694
ATTN: Michael Schwartz and Stephen Corea

Re: DRV Loan No. 007-8699 (the "**Loan**"): pursuant to the Loan Agreement and all related documents (the "**Loan Documents**"), dated December 14, 2007, in the original principal amount of \$16,300,000.00, by and among Fontaine Business Park, LLC, a Delaware limited liability company, as Borrower together with its permitted successors and assigns (including each Additional Borrower set forth in Exhibit A hereto, collectively, "**Borrower**") and the original lender, Greenwich Capital Products, Inc., relating to the Borrower's acquisition of the property located in Richland County, South Carolina, known as the Fontaine Business Park (the "**Premises**").

Dear Messrs Schwartz and Corea:

As you are aware, DRV Fontaine, LLC (the "**Holder**") is the current owner and holder of the Loan. This letter is addressed to you as the Original Borrower and as representative of each TIC Borrower, as defined in the Loan Agreement.

You are hereby notified that the debt servicing payment on the Loan that was due for the month of October 2012 was not paid when due. Based upon recent communications with Borrower's counsel, Holder understands that Borrower has intentionally withheld the October 2012 payment without cause or consent. Holder hereby notifies Borrower that this failure to pay is an Event of Default pursuant to Section 8.1 of the Loan Agreement.

This Event of Default arising from Borrower's failure to pay the debt servicing payment due for the month of October 2012 shall hereinafter be referred to as the "**Payment Default**").

As a result of the Payment Default, Holder hereby accelerates the entire Debt according to 8.2.1 of the Loan Agreement. As a result of this Payment Default, Holder is also exercising its right to apply the Default Rate of interest to the entire unpaid Debt pursuant to Section 2.2.2 of the Loan Agreement.

Pursuant to Part I, Section 2 of the Mortgage, Assignment of Leases and Rents

McNair Law Firm, P. A.
1221 Main Street
Suite 1700
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

COLUMBIA 1093902v1

KENTUCKY LEXINGTON | NORTH CAROLINA CHARLOTTE | SOUTH CAROLINA ANDERSON BLUFFTON CHARLESTON COLUMBIA GREENVILLE HILTON HEAD MYRTLE BEACH PAWLEYS ISLAND

FBPAPP-0668

and Security Agreement and pursuant to Section 2 of the Assignment of Leases and Rents, Holder notifies Borrower that Holder hereby revokes Borrower's license to collect any Leases and Rents generated by or relating to the Premises. Holder demands that until further notice from Holder all funds currently held by or for Borrower and all funds received by or for Borrower after the date hereof shall be held by the current property manager Gullane 1, LLC d/b/a CBRE Columbia ("CBRE"). Holder further notifies Borrower that, pursuant to Section 3 of the Assignment of Leases and Rents, any rents being held or received by Borrower subsequent to receipt of this notice shall be held by Borrower as trustee for the benefit of Holder.

Holder demands that Borrower immediately notify all parties providing services with respect to the Premises to immediately account to Holder for all assets under such service provider's control. By copy of this letter to CBRE, we are advising CBRE of the demands made in this letter and demanding its compliance with such demands with respect to receipt and disposition of revenues relating to the Premises.

Pursuant to Section 5.12.2 of the Loan Agreement, Holder demands that Borrower immediately terminate the Management Agreement between Borrower and Fontaine Management, LLC ("Manager") and replace Manager with a replacement manager acceptable to Holder in Holder's discretion.

In addition to the above notices and demands, Holder reserves unto itself all additional rights and remedies provided under the Loan Documents and the exercise of the above rights or remedies shall not be deemed to be exclusive or a waiver of such additional rights and remedies that are enumerated in the Loan Documents.

Note that, by reason of the Payment Default, Holder may be entitled, in its sole discretion, to exercise certain rights and remedies under the Loan Documents. Notwithstanding the exercise of the foregoing rights or the commencement or continuation of discussions or negotiations, the acceptance of payments, or the postponement or delay in taking action or exercising rights or remedies, Holder has not and does not waive the existence of the default referred to above or waive the existence of any other defaults which may exist. Holder shall not be limited or restricted from enforcing any rights or remedies available to it at any time notwithstanding any deadlines set forth in this Notice, including, without limitation, commencing judicial or non-judicial foreclosure proceedings, seeking the appointment of a receiver to collect rents and profits, or otherwise administer the collateral.

No negotiations, making or acceptance of payments, delay in making demand or enforcing rights or remedies, or other action or inaction undertaken pursuant to this letter or under the Loan Documents shall constitute a waiver of the Holder's rights at law or under the Loan Documents unless specifically stated in a written agreement signed by the Holder.

Holder hereby makes demand upon you for payment of the total accelerated Debt owing on the Loan within ten (10) days of the date of this letter. Please send payment to the following address or you may contact me for wiring instructions:

DRV Fontaine, LLC
4920 Elm Street, Suite 325
Bethesda, MD 20814

If Holder does not receive full payment of the total accelerated Debt by ten (10) days from the date of this letter, Holder shall have no alternative but to take such additional steps as are necessary or desirable to protect its rights under the Loan Documents, including foreclosing on the Mortgage.

Acceptance by Holder of any partial payments of debt service or of any other amount from Borrower is not intended as, and will not constitute, a waiver of any rights or remedies afforded the Holder under the Loan Documents. In addition, any acceptance and/or application of any such payment(s) should not be construed in any way as a modification, rearrangement, compromise or extension of the Loan Documents or of any amounts due thereunder.

The cost incurred by Holder, including but not necessarily limited to the cost of using legal counsel, in the attempt to enforce the Loan will be Borrower's responsibility to the extent provided for in the Loan Documents and/or by law.

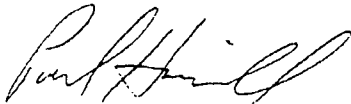
This notice is sent to you as a courtesy and is not an admission that any written notice is otherwise due you, nor is it an election of remedies or a waiver of Holder's right to exercise any rights or remedies that may be available at law or in equity. No delay by Holder in exercising any rights or remedies shall operate as a waiver of any rights or remedies Holder may have.

On behalf of Holder, we strongly encourage you to comply with the demands stated above.

Should you have any questions concerning the information in this letter, or the Loan, please contact me at the number listed above, or via email at pharrill@mcnair.net.

Sincerely,

McNAIR LAW FIRM, P.A.



Paul D. Harrill

PDH:sm
Enclosures

cc: Elliot M. Liffman (via e-mail, eliffman@drv-llc.com)
Joel Z. Silver, Esquire (via e-mail, jzsilver@sms-lawfirm.com)
Powell Goldstein LLP, Attn: Michael Rafter and William H. Matthieu (via certified mail,
return receipt requested and via fax 404 572-6999)
Kevin Stine, Esquire (via certified mail, return receipt requested and via e-mail –
kstine@bakerdonelson.com)
Gullane 1 LLC dba CBRE Columbia, Attn: Martin A. Moore, Principal (via fax 803 931-
8989 and via certified mail, return receipt requested)

EXHIBIT A

TIC Borrowers

1. Fontaine Business Park 2, LLC, a Delaware limited liability company
2. Fontaine Business Park 3, LLC, a Delaware limited liability company
3. Fontaine Business Park 4, LLC, a Delaware limited liability company
4. Fontaine Business Park 5, LLC, a Delaware limited liability company
5. Fontaine Business Park 6, LLC, a Delaware limited liability company
6. Fontaine Business Park 7, LLC, a Delaware limited liability company
7. Fontaine Business Park 8, LLC, a Delaware limited liability company
8. Fontaine Business Park 9, LLC, a Delaware limited liability company
9. Fontaine Business Park 10, LLC, a Delaware limited liability company
10. Fontaine Business Park 11, LLC, a Delaware limited liability company
11. Fontaine Business Park 12, LLC, a Delaware limited liability company
12. Fontaine Business Park 13, LLC, a Delaware limited liability company
13. Fontaine Business Park 14, LLC, a Delaware limited liability company
14. Fontaine Business Park 15, LLC, a Delaware limited liability company
15. Fontaine Business Park 16, LLC, a Delaware limited liability company
16. Fontaine Business Park 17, LLC, a Delaware limited liability company
17. Fontaine Business Park 18, LLC, a Delaware limited liability company
18. Fontaine Business Park 19, LLC, a Delaware limited liability company
19. Fontaine Business Park 20, LLC, a Delaware limited liability company
20. Fontaine Business Park 21, LLC, a Delaware limited liability company
21. Fontaine Business Park 22, LLC, a Delaware limited liability company
22. Fontaine Business Park 23, LLC, a Delaware limited liability company
23. Fontaine Business Park 24, LLC, a Delaware limited liability company
24. Fontaine Business Park 25, LLC, a Delaware limited liability company
25. Fontaine Business Park 26, LLC, a Delaware limited liability company
26. Fontaine Business Park 27, LLC, a Delaware limited liability company
27. Fontaine Business Park 28, LLC, a Delaware limited liability company
28. Fontaine Business Park 29, LLC, a Delaware limited liability company
29. Fontaine Business Park 30, LLC, a Delaware limited liability company
30. Fontaine Business Park 31, LLC, a Delaware limited liability company

MCNAIR
ATTORNEYS

January 18, 2013

Via Email Only kstine@bakerdonelson.com

Kevin A. Stine, Esquire
Baker Donelson Bearman Caldwell &
Berkowitz, PC
Monarch Plaza, Suite 1600
3414 Peachtree Road, N.E.
Atlanta, GA 30326

Paul D. Harrill

pharrill@mcnair.net
T (803) 799-9800
F (803) 753-3278

Via Email only tucker@playerlawfirm.com

Tucker Player, Esquire
Player Law Firm, LLC
1415 Broad River Road
Columbia, SC 29210

Re: DRV FONTAINE, LLC -v- FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK, LLC, et al.
Civil Action Number: 2012-CP-40-7752
Loan to Fontaine Business Park, LLC ("Original Borrower") and TIC
Borrowers (identified below) in the original principal amount of
\$16,300,000.00 (the "Loan").

Dear Borrowers:

As you are aware, this firm represents DRV Fontaine, LLC ("DRV"), the current owner and holder of the Loan. This letter is addressed to Mr. Stine as counsel for the Original Borrower, Fontaine Business Park, LLC and to Mr. Player as counsel for the additional "TIC Borrowers" (defined in the Loan Agreement). The Original Borrower and TIC Borrowers shall hereinafter be collectively referred to as the "Borrowers."

Borrowers were previously notified via my October 10, 2012 letter that certain Events of Default had occurred due to Borrowers' failure to make reserve account payments and failure to make debt service payments.

Borrowers were further notified that DRV revoked Borrowers' license to collect any Rents generated by or relating to the Premises. DRV demanded, pursuant to Section 5.12.2 of the Loan Agreement, that Borrowers immediately terminate the Management Agreement between Borrower and Fontaine Management, LLC ("Manager") and replace Manager with a replacement manager acceptable

McNair Law Firm, P. A.
1221 Main Street
Suite 1700
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

COLUMBIA 1102720v1

KENTUCKY LEXINGTON | NORTH CAROLINA CHARLOTTE | SOUTH CAROLINA ANDERSON BLUFFTON CHARLESTON COLUMBIA GREENVILLE HILTON HEAD MYRTLE BEACH PAWLEYS ISLAND

FBPAPP-0673

to DRV in DRV's discretion. Borrowers have failed to terminate the Manager and have failed to appoint an acceptable replacement manager within thirty (30) days. Therefore, Borrowers are hereby notified that an additional Event of Default has occurred pursuant to Section 5.12.2 of the Loan Agreement.

DRV has previously notified Borrowers that all rents and profits generated by the Property should be held by the sub-property management company for the benefit of DRV. DRV believes that the rents and profits are not being maintained for the benefit of DRV. Therefore, pursuant to this information and as a result of the Events of Default, DRV is revoking Borrowers' rights and interest in the Management Agreement with Manager and the Submanagement Agreement pursuant to the Assignment of Agreements, Licenses, Permits and Contracts dated December 14, 2007 (the "Assignment of Agreements"). Pursuant to Section 6 of the Assignment of Agreements, DRV also hereby requests that Borrowers execute and deliver notices to Manager and to Submanager, Gullane I, LLC, d/b/a CBRE Columbia, ("CBRE"), directing that future performance of Manager's and CBRE's obligations be made at the direction of DRV.

DRV also hereby demands, pursuant to Section 5.12.1(a)(iv) of the Loan Agreement, that each of the Borrowers "promptly deliver to [DRV] a copy of each financial statement, business plan, capital expenditure plan, and property improvement plan" relating to the Premises, and "any other notice, report, and estimate" received from the Manager under Borrowers' Management Agreement with Manager.

In addition to the above notices and demands, DRV reserves unto itself all additional rights and remedies provided under the Loan Documents and the exercise of the above rights or remedies shall not be deemed to be exclusive or a waiver of such additional rights and remedies that are enumerated in the Loan Documents.

No negotiations, making or acceptance of payments, delay in making demand or enforcing rights or remedies, or other action or inaction undertaken pursuant to this letter or under the Loan Documents shall constitute a waiver of the DRV's rights at law or under the Loan Documents unless specifically stated in a written agreement signed by the DRV.

Acceptance by DRV of any payments of debt service or of any other amount from Borrower will be applied to the accelerated balance of the Loan. Additionally, acceptance by DRV of any partial payments or any other amount is not intended as, and will not constitute, a waiver of any rights or remedies afforded the DRV under the Loan Documents. Any acceptance and/or application of any such payment(s) should not be construed in any way as a modification, rearrangement, compromise or extension of the Loan Documents or of any amounts due thereunder.

The cost incurred by DRV, including but not necessarily limited to the cost of using legal counsel, in the attempt to enforce the Loan will be Borrower's responsibility to the extent provided for in the Loan Documents and/or by law.

This notice is sent to Borrowers as a courtesy and is not an admission that any written notice is otherwise due them, nor is it an election of remedies or a waiver of DRV's right to exercise any rights or remedies that may be available at law or in equity. No delay by DRV in exercising any rights or remedies shall operate as a waiver of any rights or remedies DRV may have.

On behalf of DRV, we strongly encourage Borrowers to comply with the demands stated above.

Should you have any questions concerning the information in this letter, or the Loan, please contact me at the number listed above, or via email at pharrill@mcnair.net.

Sincerely,

McNAIR LAW FIRM, P.A.



Paul D. Harrill

PDH:ph

cc: Joel Z. Silver, Esquire (via e-mail, jzsilver@sms-lawfirm.com)
Lanneau W. Lambert, Esquire (via e-mail, LLambert@TurnerPadget.com)
Elliot M. Liffman (via e-mail, eliffman@drv-llc.com)

 **Sandra Johnson**

From: Sandra Johnson
Sent: Wednesday, December 29, 2010 12:39 PM
To: 'Paula Mathews'
Subject: Fontaine Capital Budget Outlook

Paula,

The lender has requested a 3 year capital budget outlook for the property, to include estimated TI dollars and commission for renewal of existing leases. Do you have anything that I can use as a basis? I know that the pro forma capital dollars were estimated on a very low end.

Guidance please!

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Suite 700 | Columbia, SC 29201
T 803 744 6854 | F 803 744 4450
sandra.johnson@cbresc.com | www.cbre.com

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Sandra Johnson

From: Paula Mathews <pmatthews@uscllc.us>
Sent: Wednesday, December 29, 2010 12:48 PM
To: Sandra Johnson
Subject: RE: Fontaine Capital Budget Outlook

Let me know when you are available to work on this together.

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:SJohnson@cbresc.com>]
Sent: Wednesday, December 29, 2010 9:39 AM
To: Paula Mathews
Subject: Fontaine Capital Budget Outlook

Paula,

The lender has requested a 3 year capital budget outlook for the property, to include estimated TI dollars and commission for renewal of existing leases. Do you have anything that I can use as a basis? I know that the pro forma capital dollars were estimated on a very low end.

Guidance please!

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Suite 700 | Columbia, SC 29201
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Sandra Johnson

From: Paula Mathews <pmatthews@uscllc.us>
Sent: Wednesday, December 29, 2010 1:05 PM
To: Aaron Dupree
Cc: Martin Moore; Sandra Johnson
Subject: Lender request for a 3 yr.capital budget for Fontaine

Aaron,

Please get with Sandra asap to give her leasing capital cost assumptions on roll overs and new deals for the next 3 years. Lender can not be put off any longer. This must be in their hands next week. Sandra is preparing the building capital portion but you need to provide her with your assumptions please.

Paula

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

53

Sandra Johnson

From: Sandra Johnson
Sent: Tuesday, January 04, 2011 6:11 PM
To: 'Paula Mathews'
Subject: RE: Capital budget projections for lender

Paula,

I will have a draft to you tomorrow.

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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-----Original Message-----

From: Paula Mathews [<mailto:pmathews@uscllc.us>]
Sent: Tuesday, January 04, 2011 6:33 AM
To: Sandra Johnson; Aaron Dupree
Cc: Martin Moore
Subject: Capital budget projections for lender

Pls forward the draft of this document so we can finalize and get to lender.

Sandra Johnson

From: Sandra Johnson
Sent: Wednesday, January 05, 2011 6:39 PM
To: 'Paula Mathews'
Cc: Aaron Dupree; Martin Moore
Subject: Three Year CapEx Budget
Attachments: Fontaine Three Year CapEx Plan 01-05-11.pdf

Paula,

Attached is the draft. Please let me know if you have questions/adjustments/etc.

Thanks

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Suite 700 | Columbia, SC 29201
T 803 744 6854 | F 803 744 4450
sandra.johnson@cbresc.com | www.cbre.com

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Sandra Johnson

From: Paula Mathews <pmathews@uscllc.us>
Sent: Tuesday, January 11, 2011 2:46 PM
To: Sandra Johnson
Cc: Martin Moore; Aaron Dupree
Subject: RE: 3yr Capital Budget

Follow Up Flag: Follow up
Flag Status: Flagged

Working on that right now. Will get back to you shortly.

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Tuesday, January 11, 2011 11:25 AM
To: Paula Mathews
Cc: Martin Moore; Aaron Dupree
Subject: 3yr Capital Budget

Paula,

Have you had a chance to review the Capital Budget?

Sandra Johnson

From: Sandra Johnson
Sent: Tuesday, January 18, 2011 1:25 PM
To: 'Paula Mathews'
Subject: RE: Capital budget revisions

ok

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Suite 700 | Columbia, SC 29201
T 803 744 6854 | F 803 744 4450
sandra.johnson@cbresc.com | www.cbre.com

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From: Paula Mathews [<mailto:pmathews@uscllc.us>]
Sent: Tuesday, January 18, 2011 1:27 PM
To: Sandra Johnson
Subject: RE: Capital budget revisions

That's necessary, just use an excel spreadsheet to show funds going into lender escrow account and monies coming out, when we need it per the revised budget.

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Tuesday, January 18, 2011 10:22 AM
To: Paula Mathews
Subject: RE: Capital budget revisions

Were you going to send me a format that you preferred I use?

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Suite 700 | Columbia, SC 29201
T 803 744 6854 | F 803 744 4450
sandra.johnson@cbresc.com | www.cbre.com

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From: Paula Mathews [<mailto:pmathews@uscllc.us>]
Sent: Tuesday, January 18, 2011 1:21 PM
To: Sandra Johnson
Subject: Capital budget revisions

Hey Sandra,
How are the revisions coming along?

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

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Sandra Johnson

From: Sandra Johnson
Sent: Tuesday, January 25, 2011 5:32 PM
To: 'Paula Mathews'
Subject: FW: Scanned from MFP-07159348 01/25/2011 17:20
Attachments: DOC012511.pdf

Attached is a re-format of the Capital Budget. I have not adjusted numbers yet. Just wanted to get your input on the format.

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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-----Original Message-----

From: shannon.lyon@cbresc.com [<mailto:shannon.lyon@cbresc.com>]
Sent: Tuesday, January 25, 2011 8:20 PM
To: Sandra Johnson
Subject: Scanned from MFP-07159348 01/25/2011 17:20

Scanned from MFP-07159348.
Date: 01/25/2011 17:20
Pages:1
Resolution:300x300 DPI

 Sandra Johnson

From: Paula Mathews <pmathe@uscllc.us>
Sent: Tuesday, January 25, 2011 8:32 PM
To: Sandra Johnson
Subject: RE: Scanned from MFP-07159348 01/25/2011 17:20

Great job with one exception, I would reverse Fundings and Draw downs, so you have funds going in before coming out.

-----Original Message-----

From: Sandra Johnson [<mailto:SJohnson@cbresc.com>]
Sent: Tuesday, January 25, 2011 2:32 PM
To: Paula Mathews
Subject: FW: Scanned from MFP-07159348 01/25/2011 17:20

Attached is a re-format of the Capital Budget. I have not adjusted numbers yet. Just wanted to get your input on the format.

Sandra Johnson | Property Manager

Asset Services

 CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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-----Original Message-----

From: shannon.lyon@cbresc.com [<mailto:shannon.lyon@cbresc.com>]
Sent: Tuesday, January 25, 2011 8:20 PM
To: Sandra Johnson
Subject: Scanned from MFP-07159348 01/25/2011 17:20

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Sandra Johnson

From: Paula Mathews <pmatthews@uscllc.us>
Sent: Friday, January 28, 2011 4:56 PM
To: Sandra Johnson
Subject: Re: Fontaine 3yr Capital Budget 01-26-11.xls

Follow Up Flag: Follow up
Flag Status: Flagged

Peed my pants thank you.

From: Sandra Johnson <Sjohnson@cbresc.com>
To: Paula Mathews
Sent: Fri Jan 28 13:41:34 2011
Subject: RE: Fontaine 3yr Capital Budget 01-26-11.xls

No worries. However, I was starting to get a little concerned that you may have fainted when you reviewed the numbers.

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
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sandra.johnson@cbresc.com | www.cbre.com

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From: Paula Mathews [<mailto:pmatthews@uscllc.us>]
Sent: Friday, January 28, 2011 4:35 PM
To: Sandra Johnson
Subject: RE: Fontaine 3yr Capital Budget 01-26-11.xls

My apologies for not getting back to you on this. I have been embroiled in closings this entire week. I will get back to you before the end of the day, I promise.

Paula

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Thursday, January 27, 2011 10:35 AM
To: Paula Mathews
Subject: Fontaine 3yr Capital Budget 01-26-11.xls

 **Sandra Johnson**

From: Sandra Johnson
Sent: Friday, February 04, 2011 6:14 PM
To: 'pmathews@usclic.us'
Subject: Capital Budget

Lender has requested again.






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Sandra Johnson

From: Sandra Johnson
Sent: Friday, February 18, 2011 6:08 PM
To: 'pmathews@uscllc.us'
Subject: Re: Fontaine 3yr Capital Budget 01-26-11.xls

Agree

----- Original Message -----

From: Paula Mathews <pmathews@uscllc.us>
To: Sandra Johnson
Sent: Fri. Feb 18 17:24:56 2011
Subject: RE: Fontaine 3yr Capital Budget 01-26-11.xls

Given the budget constraints I think we really need to do this, don't you?

Paula Mathews | EVP, Commercial Operations U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694 T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Friday, February 18, 2011 2:13 PM
To: Paula Mathews
Subject: RE: Fontaine 3yr Capital Budget 01-26-11.xls

We can. The reason for doing both is that they are both the same age and have the same issues. Doing one at a time will add some cost (approx. \$4,000) as we would have to get the crane a second time and a welder a second time, etc. Also, one tower doesn't back up the other. They serve separate areas of the building. Of course, the positive would be that we could salvage functional parts from the one that is removed and use should those same parts fail on the other, should any of those parts fail during the year.

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com <<mailto:sandra.johnson@cbresc.com>> | www.cbresc.com <<http://www.cbresc.com/>>

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From: Paula Mathews [<mailto:pmathews@uscllc.us>]
Sent: Friday, February 18, 2011 2:04 PM
To: Sandra Johnson
Subject: RE: Fontaine 3yr Capital Budget 01-26-11.xls

Sandra, can we push one of the cooling towers to next year?

Paula Mathews | EVP, Commercial Operations U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694 T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Thursday, January 27, 2011 10:35 AM
To: Paula Mathews
Subject: Fontaine 3yr Capital Budget 01-26-11.xls

Sandra Johnson

From: Paula Mathews <pmathews@uscllc.us>
Sent: Tuesday, May 03, 2011 12:40 PM
To: Sandra Johnson
Cc: Aaron Dupree
Subject: RE: Scan from a Xerox Color

Oh crap! Please re send it so I can approve and get this out asap. Is Aaron in today? Do we need to make some revisions based on his leasing plan?

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Tuesday, May 03, 2011 9:35 AM
To: Paula Mathews
Subject: Re: Scan from a Xerox Color

You never gave me the go ahead. I revised it and you were going to review.

----- Original Message -----

From: Paula Mathews <pmathews@uscllc.us>
To: Sandra Johnson
Sent: Tue May 03 12:36:35 2011
Subject: RE: Scan from a Xerox Color

Again? Didn't you give it to them already?

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Tuesday, May 03, 2011 9:26 AM
To: Paula Mathews
Subject: Re: Scan from a Xerox Color

Ok. By the way, the lender has requested the capital budget again.

----- Original Message -----

From: Paula Mathews <pmathews@uscllc.us>
To: Sandra Johnson
Sent: Tue May 03 12:13:31 2011
Subject: RE: Scan from a Xerox Color

IT would be easier but, we really need the paper trail.

Sandra Johnson

From: Paula Mathews <pmatthews@uscllc.us>
Sent: Wednesday, May 04, 2011 2:51 PM
To: Sandra Johnson
Cc: Aaron Dupree
Subject: FW: Fontaine 3yr Capital Budget 01-26-11.xls
Attachments: Fontaine 3yr Capital Budget 01-26-11.xls

Sandra,
Aaron and I have talked this morning and made changes accordingly. I think this is now ready to go to the lender. Thanks.

Paula

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Tuesday, May 03, 2011 9:46 AM
To: Paula Mathews
Subject: FW: Fontaine 3yr Capital Budget 01-26-11.xls

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Columbia, SC 29201
T 803 744 6854 | F 803 256 6210
sandra.johnson@cbresc.com | www.cbre.com/columbia
From: Sandra Johnson
Sent: Thursday, January 27, 2011 1:35 PM
To: 'Paula Mathews'
Subject: Fontaine 3yr Capital Budget 01-26-11.xls

Sandra Johnson

From: Paula Mathews <pmatthews@uscllc.us>
Sent: Sunday, July 31, 2011 8:58 AM
To: Sandra Johnson
Subject: Re: Fontaine - 3yr Cap budget

Yes or assume we would have a capital call

Sent from my iPhone

On Jul 29, 2011, at 4:49 PM, "Sandra Johnson" <Sjohnson@cbresc.com> wrote:

Working on the revisions. The summary page for each year shows the balance in the rollover reserves and the drawdowns to accommodate TI and LC. Do you want me to not go below the \$250,000 threshold and assume we would draw from Owner held reserves?

Sandra Johnson| Property Manager

Asset Services

CB Richard Ellis| Columbia

1333 Main Street, Columbia, SC 29201

T 803 744 6854| F 803 256 6210

sandra.johnson@cbresc.com| www.cbre.com/columbia

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CONSENT AND SUBORDINATION OF MANAGER

December 14, 2007

Greenwich Capital Financial Products, Inc.
600 Steamboat Road
Greenwich, Connecticut 06830

Reference is made to (i) that certain Property Management Agreement (the "*Management Agreement*") between FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company ("*Borrower*"), and the undersigned FONTAINE MANAGEMENT, LLC, a Delaware limited liability company (the "*Manager*") with respect to the property known as Fontaine Business Park and located in the City of Columbia, South Carolina (the "*Property*"), and (ii) that certain Loan Agreement (the "*Loan Agreement*") dated as of the date hereof, between the Borrower and Greenwich Capital Financial Products, Inc. (together with its successors and assigns, the "*Lender*"). Any capitalized terms used herein but not defined herein shall have the same meanings as are ascribed to them in the Loan Agreement.

A true, correct and complete copy of the Management Agreement is attached hereto as Exhibit A.

The Manager acknowledges and understands that delivery of this letter to you is a condition to the Lender making a certain loan to the Borrower pursuant to the Loan Agreement in the original principal amount of \$16,300,000 (the "*Loan*").

The Borrower and the Manager hereby agree as follows:

1. Borrower and Manager acknowledge that all of Borrower's right, title and interest in and to the Management Agreement has been collaterally assigned to Lender as additional collateral security for the Loan, pursuant to the terms of that certain Assignment of Agreements, Licenses, Permits and Contracts of even date herewith, executed by Borrower for the benefit of Lender.

2. The Management Agreement and all fees and commissions payable to Manager thereunder are and shall be subject and subordinate in all respects in lien and payment to the lien and payment of (i) the Mortgage, (ii) the Loan Documents, and (iii) any and all modifications, amendments, renewals and/or substitutions of the Mortgage and/or any of the other Loan Documents. Notwithstanding the foregoing, Manager shall not be obligated to Lender to return or refund any fee, commission or other amount duly owed to Manager to the extent that the same is (i) received by Manager prior to an Event of Default in payment under the Loan, and (ii) duly allocable to the time prior to such Event of Default. Further, if any such Event of Default is cured and Lender accepts such cure (and Lender shall have no obligation to accept any cure other than as expressly provided in the Loan Documents and under applicable law), then Manager may receive and retain any fee, commission, or other amount payable to Manager that accrued during the default. This Paragraph 2 shall be self-operative and no further instrument of subordination

Greenwich Capital/Fontaine Business Park
776952.04/LA
G3534-001/12-12-07/mnj/mnj

shall be required. If requested, however, the Borrower and/or the Manager shall execute and deliver such further instruments as the Lender may deem reasonably necessary to effectuate this subordination.

3. If there shall have occurred and be continuing an Event of Default and the Lender shall have obtained (i) title to the Property (or any portion thereof) whether by foreclosure, deed-in-lieu of foreclosure, bankruptcy sale or otherwise and/or (ii) possession of the Property (or any portion thereof) whether personally or through an agent, a receiver or a trustee, the Manager shall, if and to the extent requested in writing by the Lender, continue performance under the Management Agreement in accordance with the terms thereof so long as the Manager is paid compensation thereafter accruing under the Management Agreement and the Lender abides by the terms of the Management Agreement after the date of such Lender's request. The Borrower and the Manager understand, however, that nothing contained herein, in the Mortgage or in any of the other Loan Documents shall be construed to obligate the Lender to perform or discharge any of the Borrower's obligations, duties or liabilities under the Management Agreement arising prior to the date of such Lender request.

4. Upon the occurrence of any default by the Borrower under the terms of the Management Agreement, the Manager shall, promptly upon becoming aware thereof, shall use reasonable efforts to provide the Lender with notice in writing thereof, and after receipt of said notice, the Lender shall have the same time period within which to cure said default as the Borrower has under the Management Agreement although the Borrower and the Manager understand that the Lender shall not have any obligation to do so. Notwithstanding the foregoing, the failure by the Manager to notify the Lender of a default under the Management Agreement shall not be deemed to constitute a waiver by the Manager of such default. Furthermore, the Borrower and the Manager agree that the Lender may terminate the Management Agreement (i) in the event Borrower fails to terminate the Management Agreement after instruction to do so by Lender in accordance with Section 5.12 of the Loan Agreement, (ii) in the event that Borrower has given Manager written notice of an event of default by Manager under the Management Agreement beyond applicable cure periods, (iii) in the event of the Manager's gross negligence, malfeasance or willful misconduct, or (iv) by giving five days' notice to the Manager upon the Lender (or a successor owner, as the case may be) obtaining (A) title to the Property (or any portion thereof) whether by foreclosure, deed-in-lieu of foreclosure, bankruptcy sale or otherwise, and/or (B) possession of the Property (or any portion thereof) whether personally or through an agent, a receiver or a trustee. If the Lender elects to terminate the Management Agreement in accordance with this Paragraph 4, the Borrower and the Manager understand and agree that the Manager shall look solely to the Borrower for any and all fees, charges or other sums payable to the Manager under the Management Agreement. If the Management Agreement shall be so terminated by the Lender, the Manager agrees to reasonably cooperate with the Lender to ensure a smooth transition to the new property manager.

5. This letter shall inure to the benefit of the Lender and its successors and assigns, including the trustee in a Secondary Market Transaction. In the event of any inconsistency or conflict with the provisions of this letter and the provisions of the Management Agreement, the provisions of this letter shall control.

6. The Manager agrees that, other than the modification thereof to reflect the addition of any tenant in common owners, it shall not change, amend, modify or terminate the Management Agreement without the Lender's prior written approval in each instance, which approval may be given or denied by the Lender in its sole discretion. If the Manager does so amend, modify or terminate the Management Agreement without the Lender's prior written approval, such amendment, modification or termination shall be void *ab initio*.

7. This letter shall be governed by, and construed in accordance with, the law of the State of South Carolina.

8. Without limiting the generality of any other provisions contained herein or in the other Loan Documents, no failure on the part of the Lender to exercise, and no delay in exercising, any right hereunder or under any of the other Loan Documents shall operate as a waiver thereof, nor shall any single or partial exercise of any right preclude any other or further exercise thereof or the exercise of any other right. The rights and remedies of the Lender provided herein and in the other Loan Documents are cumulative and are in addition to, and are not exclusive of, any rights or remedies provided by law or in equity.

9. The Manager represents and warrants to the Lender that as of the date hereof (i) the Management Agreement is in full force and effect and has not been amended, modified, assigned, terminated or supplemented, (ii) the Manager is not in default under the provisions of the Management Agreement and there is no condition which, with the giving of notice and/or the lapse of time, would constitute such a default, and (iii) to the best of Manager's knowledge, the Borrower is not in default under the provisions of the Management Agreement and there is no condition which, with the giving of notice and/or the lapse of time, would constitute such a default.

10. Manager agrees that it shall not perform its duties under the Management Agreement or otherwise act in a manner which would result in Borrower's failure to be a "**Special Purpose Bankruptcy Remote Entity**" as defined in the Loan Agreement.

[Remainder of Page Intentionally Left Blank]

11. This letter may not be amended, modified, terminated or supplemented without the written approval of each of the Manager, the Borrower and the Lender.

Very truly yours,

USA FONTAINE MANAGEMENT, LLC,
a Delaware limited liability company

By: U.S. Commercial LLC,
a Delaware limited liability company,
Its Manager

By: _____

H. Michael Schwartz,
President

AGREED AND CONSENTED
TO AS OF DECEMBER __, 2007

FONTAINE BUSINESS PARK, LLC,
a Delaware limited liability company

By: U.S. COMMERCIAL LLC,
a Virginia limited liability company,
Its Manager

By: _____

H. Michael Schwartz,
President

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, LLC;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

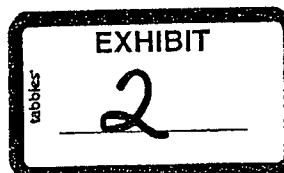
Defendants.

**PLAINTIFF DRV FONTAINE, LLC'S
ANSWERS TO DEFENDANT FONTAINE
BUSINESS PARK, LLC'S FIRST SET OF
INTERROGATORIES AND RESPONSES
TO DEFENDANT FONTAINE BUSINESS
PARK, LLC'S REQUESTS FOR
PRODUCTION OF DOCUMENTS**

To: Brent B. Young and Mark A. Fulks, attorneys for Defendant/Counter-Plaintiff
Fontaine Business Park, LLC:

COLUMBIA 1110549v1

1



FBPAPP-0697

The Plaintiff, DRV Fontaine, LLC ("DRV"), by and through its undersigned counsel, herewith answers Defendant/Counter-Plaintiff Fontaine Business Park, LLC's ("Fontaine") First Set of Interrogatories and Requests for Production, pursuant to Rule 33 and 34 of the South Carolina Rules of Civil Procedure, as follows:

GENERAL OBJECTIONS

A. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting production of documents that are not relevant to the subject matter of the lawsuit on the grounds that these discovery requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

B. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents that are subject to or constituting the attorney-client privilege, the work product doctrine, trial preparation material, or any other applicable privilege or discovery limit.

C. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents that contain or constitute trade secrets, personal or confidential proprietary information, or information subject to a confidentiality agreement or similar confidentiality restrictions. DRV will not provide any such information until an appropriate protective order is entered in this lawsuit.

D. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents outside DRV's possession, custody, or control, documents that can easily be obtained from public records, documents that have already been obtained or requested from other parties or non-parties, or documents already in Fontaine's possession because, in all such instances, the discovery requests are overly broad and unduly burdensome.

E. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine seeks to impose duties or obligations upon DRV that are greater than those imposed by the South Carolina Rules of Civil Procedure.

F. Plaintiff objects to these Interrogatories and Requests for Production to the extent that they seek disclosure of information or documents contained in public records equally available to Defendant or readily obtainable by Defendant from another source.

G. Plaintiff objects to these Interrogatories and Requests for Production to the extent that they seek information addressing purely legal issues or contain legal conclusions.

H. Any inadvertent production of any document or disclosure of information protected by a privilege, such as, but without limitation, the attorney-client privilege or the attorney work product privilege, shall not be deemed or construed to constitute a waiver of any right or privilege, and Plaintiff hereby expressly reserves its right to demand that Defendant return to it any and all materials that contain such information.

I. In responding to these Interrogatories and Request for Production, DRV will use the capitalized terms defined in the Fontaine's requests. Other capitalized terms shall have the meaning set forth in the Complaint and/or the Loan Documents.

ANSWERS TO INTERROGATORIES

1. Please give the names and addresses of persons known to you to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

A) *Paula Mathews*

Ms. Mathews is an agent for both Fontaine and Property Manager and is personally familiar with DRV's request for a three (3) year Capital Budget beginning the Fall of 2010 and continuing through May 2011. Ms. Mathews is also personally familiar with Fontaine's

and Property Manager's extensive involvement in the preparation of and approval of the "Fontaine Business Three Year Capital Expense Report 2011 – 2013" that was provided to DRV in May 2011 in response to DRV's request for a three (3) year Capital Budget. Ms. Mathews can also testify regarding the inaccuracies in her sworn affidavits that have been submitted to the Court, and Fontaine's and Property Manager's direction to CBRE not to provide information to DRV. Ms. Mathews can also testify regarding Fontaine's and Property Manager's payment of the reassessed Reserve Accounts payments that were noticed in July 2011, and Fontaine's unilateral decision to cease making the increased Reserve Accounts payments beginning in January 2012. Ms. Mathews should also be able to testify regarding Fontaine and Property Manager's interactions, notifications and communications with the TIC Borrowers regarding all of the above issues. Ms. Mathews should also be able to testify as to all other aspects of the management of the property from the date of the loan through April 2011. No written or recorded statements have been taken from this witness; however, she has provided multiple affidavits which are filed in this action.

B) Sandra Johnson
CBRE
1333 Main Street, Suite 700
Columbia, South Carolina 29201

Ms. Johnson has actively worked as the on-site property management for CBRE for the Property. Ms. Johnson should be able to testify regarding virtually all aspects of the on-site management of the Property during the time DRV has been the lender. Ms. Johnson can also testify regarding the creation of the "Fontaine Business Park Three Capital Expense Report 2011 – 2012" and numerous communications with Paula Mathews and others regarding the creation, modifications, revisions and approval of the "Fontaine Business Park Three Capital Expense Report 2011 – 2012." Ms. Johnson can all also testify regarding communications between CBRE and Fontaine and Property Manager regarding payment of debt service to DRV and failure to pay debt service to DRV. No written statements or

recordings have been taken from this witness.

C) *Martin Moore
CBRE
1333 Main Street, Suite 700
Columbia, South Carolina 29201*

Mr. Moore can testify regarding his knowledge of the on-site property management of the Property by CBRE and communications regarding the management of the Property with Fontaine and Property Manager. Mr. Moore can also testify regarding the instructions by Fontaine and/or Property Manager not to pay debt service payments on the Loan. No written statements or recordings have been taken from this witness.

D) *Aaron Dupree
CBRE
1333 Main Street, Suite 700
Columbia, South Carolina 29201*

Mr. Dupree is a Senior Associate for the Brokerage Services division of CBRE and provides brokerage services at the Property. Mr. Dupree is expected to testify regarding his involvement in the preparation of the "Fontaine Business Park Three Capital Expense Report 2011 - 2013," and his knowledge of the involvement of Fontaine and/or Property Manager in preparing the same. Mr. Dupree is also expected to be able to testify regarding the status of the Property and rentals at the Property since the litigation was commenced. Mr. Dupree can also testify about all aspects of brokerage issues at the Property since DRV has been the lender. No written statements or recordings have been taken from this witness.

E) *Elliot Liffman
Diversified Realty Ventures
4920 Elm Street, Suite 325
Bethesda, MD 20814*

Mr. Liffman is expected to testify regarding DRV's status as the current holder of the Loan, the numerous defaults on the Loan, the current amount due and owing on the Loan, and DRV's request and ultimate receipt of a three year capital budget for the property securing DRV's Loan. Mr. Liffman is also expected to testify regarding the manner in which

DRV reassessed the monthly Reserve Account payments in July 2011. Mr. Liffman is also expected to testify regarding his knowledge of all of the allegations set forth in DRV's Complaint and those allegations set forth in Defendants' answers, defenses and counterclaims. No written statements or recordings have been taken from this witness; although Mr. Liffman has submitted two affidavits to the court in relation to certain motions that have been heard.

F) H. Michael Schwartz
Fontaine Business Park, LLC

Mr. Schwartz can testify regarding Fontaine's purchase of the subject property and subsequent syndication of all but one percent of the ownership of the property to the TIC Borrowers. Mr. Schwartz can also testify regarding the relationship between Fontaine and Property Manager and the compensation Property Manager has made through the Management Agreement relating to the Property. Additionally, Mr. Schwartz can testify regarding the profit Fontaine has made through its syndication of the interests in the Property to the TIC Borrowers. Mr. Schwartz can also testify regarding his involvement, if any, in the creation of, input, revisions and approval of the "Fontaine Business Park Three Capital Expense Report 2011 - 2013." Mr. Schwartz can also testify regarding the agreement to institute a plan for addressing the cash shortfall at the Property in order to meet the anticipated expenses referenced in the "Fontaine Business Park Three Capital Expense Report 2011 - 2013." Mr. Schwartz should also be able to testify regarding Fontaine's direction to CBRE not to pay debt service payments for October and November, 2012 and February, March, April & May, 2013.

G) All of the TIC Borrowers

All of the TIC Borrowers should be able to testify regarding their knowledge of any of the allegations set forth in their answer, defenses and counterclaims. The TIC Borrowers should also be able to testify regarding all communications made to them by Fontaine or

Property Manager regarding the reassessment of payments to be made into the Reserve Accounts and the payment of the increased reassessed Reserve Accounts Payments for September through December, 2011. The TIC Borrowers can also testify regarding their knowledge of and communications with Fontaine and Property Manager regarding this litigation and whether or not any capital call has ever been made or contemplated in relation to the Loan and Property.

DRV reserves the right to call any other witnesses identified in the course of the discovery phase of this action.

DRV reserves the right to supplement this answer should any additional witnesses concerning the facts of this case be identified in the future.

2. For each person known to you to be a witness concerning the facts of this case, please set forth either a summary sufficient to inform Fontaine of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: *See answer to Interrogatory Number 1 above.*

3. Please set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claims or defenses in this case.

ANSWER: *DRV objects to this Interrogatory because it seeks information that is subject to attorney work product doctrine and documents prepared in anticipation of litigation. Subject to these objections, DRV responds pursuant to Rule 33(c) by producing the non-privileged documents that are responsive to the Requests for Production.*

4. Please set forth an itemized statement of all damages claimed to have been sustained by you.

ANSWER: *DRV's damages are set forth in the Complaint in this action. These damages continue to change as interest accrues and advances are made. In addition, any diminution*

in the value of DRV's collateral as a result of Defendants' delays and/or wrongful actions are elements of DRV's damages. DRV reserves the right to supplement these damages to include damages that may arise as a result of Defendants' wrongful acts including acts that would be considered exceptions to the non-recourse provisions of the Note and Guarantees.

5. Please describe in detail how you calculated the amount of any damages claimed to have been sustained by you.

ANSWER: DRV damages are calculated solely by applying any payments, the applicable interest rates, and applicable advances and fees to the principal amount due pursuant to the Loan Agreement. Attorneys' fees will be calculated based upon actual attorneys' fee incurred by DRV in collecting on the Loan which is in default.

6. Please list the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of this case.

ANSWER: DRV has not identified an expert witness whom it proposes to use as a witness in the trial of this case. If DRV identifies in the future an expert witness or witnesses whom it proposes to use as a witness at the trial of this case, this Interrogatory answer will be supplemented.

7. Please identify (by description if not by name) any and all persons employed by or associated with Fontaine with whom you spoke about any of the allegations in your Complaint or who you otherwise believe had any notice or knowledge of any such allegations. Please state specifically the substance of any and all such conversations.

ANSWER: DRV objects to this request to the extent it seeks a specific description of all responsive conversations between DRV and any person employed by or associated with Fontaine because such a request is overbroad and unreasonable in scope. Subject to the general objections and this objection, DRV has spoken with the following individuals who are employed by or associated with Fontaine regarding the allegations in the Complaint:

- A) H. Michael Schwartz;
- B) Paula Mathews;
- C) James Berg;
- D) Sandra Johnson;
- E) Martin Moore;
- F) Aaron Dupree;
- G) Candace Leaphart;
- H) Pat Freeman; and
- I) Counsel for Fontaine and Property Manager.

DRV spoke with Fontaine's agents at CBRE regarding its request for a Capital Budget. DRV spoke with some of these representatives of CBRE, Fontaine and Property Manager on August 1, 2011 after issuing its letter notifying the Borrowers of the reassessment of the Reserve Account payments. The general content of the August 1, 2011 conversation is set forth in the Complaint. DRV had further communications with H. Michael Schwartz and Defendants' counsel regarding their alleged continued efforts to resolve the cash shortfall at the Property. DRV has had numerous and continuous conversations with the representatives of CBRE, which is an agent of Fontaine, regarding the status of the Property and finances at the Property.

8. Please identify any and all persons employed by or associated with DRV who have knowledge of DRV's underwriting guidelines for commercial Loans, the creation of the underwriting guidelines, and the application of the underwriting guidelines, including, but not limited to, the identity of any people involved, consulted, or informed of the process and the nature and extent of each person's involvement, consultation, or information.

ANSWER: DRV objects to this request to the extent it assumes that DRV has underwriting guidelines for commercial loans. Subject to that objection, the person with knowledge about

the standards applied in reassessing the Reserve Account payments is Elliot Liffman.

9. Please identify and explain the process through which DRV designed and established its underwriting guidelines related to the Loan Documents, including, but not limited to, the factors and characteristics considered; the process for selecting factors and characteristics for consideration; the types and sources of information consulted; and the types of quantitative analyses conducted.

ANSWER: *DRV objects to this Interrogatory because it presupposes that DRV was the original lender on the Loan, which it was not, and because it assumes that DRV has underwriting guidelines for the origination of commercial loans. DRV did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender. With regard to the reassessment of the Reserve Account payments of which the borrowers were notified on July 11, 2011, the underwriting guidelines that were followed by DRV are simple to determine. Using Fontaine's own estimated budget and projections, DRV determined in its reasonable discretion and judgment that the monthly payments into the Reserve Accounts had to be reassessed and increased. DRV used Fontaine's own estimated budget and projections, then applied a contingency factor in order to determine the amounts necessary to be paid in to the Reserve Accounts in order to maintain a sufficient balance in each Reserve Account between 2011 and 2013.*

10. Please identify and explain the process through which the Capital Projections were created, including the identity of the person who at DRV decided to request the Capital Projections, who at DRV initiated the request, who at CBRE and/or the Property Manager first received the request, the reasons for the request, the instructions given with the request, and the provision in the Loan Documents that authorizes, permits, supports, or justifies the request.

ANSWER: *DRV does not know how the "Capital Projections" were created because they*

were created by CBRE, Fontaine and Property Manager. Mr. Liffman first began requesting a Three Year Capital Budget from CBRE, Property Manager and Fontaine in the late Summer or Fall of 2010. DRV believes that its first request for a Three Year Capital Budget was made to Sandra Johnson of CBRE. Because of DRV's concerns regarding the decline in tenancy at the Property and the age of various improvements, DRV requested a Three Year Capital Budget that would give reasonable estimate of the capital costs and rollover costs at the Property from 2011 to 2013.

DRV objects to this Interrogatory to the extent it assumes and implies that DRV's request for a three year capital budget must be authorized, permitted, supported, or justified by a provision in the Loan Documents. Because Borrowers did not object to the request and voluntarily provided the Capital Budget upon request, it is irrelevant whether Borrowers think they were obligated to do so pursuant to a provision in the Loan Documents. Nevertheless, Section 6.3.4 of the Loan Agreement provides that the Borrowers "shall furnish to lender, within 10 Business Days after request, such further detailed and reasonable information with respect to the operation of the Property . . ." this section of the Loan Agreement required Borrowers to provide the Three Year Capital Budget upon request.

11. For every time that you allege Fontaine breached any provision of the Loan Documents or defaulted under any provision of the Loan Documents, please provide the following information:

- (a) A detailed description of the type of breach, including identity of the Loan Document provision breached.
- (b) Identify who with Fontaine you spoke or corresponded with about the alleged breach or default,
- (c) Identify who with DRV spoke or corresponded with Fontaine about the alleged breach or default.

ANSWER: *The information sought by this Interrogatory is answered in the allegations of the Complaint. To the extent that any information sought by this Interrogatory is not answered by the Complaint, DRV shall respond to this Interrogatory by producing documents pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure.*

RESPONSES TO REQUESTS FOR PRODUCTION

1. Please produce each and every document to which you refer in your answers to the foregoing Interrogatories or which you relied upon in preparing your answers to the foregoing Interrogatories.

RESPONSE: *Responsive documents will be produced.*

2. For any witness retained or specially employed to provide expert testimony on your behalf, please produce the following:

- (a) Copies of any reports, documents, or notes containing a complete statement of all opinions to be expressed by each such witness;
- (b) Copies of the data or information considered by each such witness in forming such opinion;
- (c) Copies of any list of qualifications of each such witness; and
- (d) Copies of all documents setting forth the compensation to be paid to each such witness.

RESPONSE: *DRV objects to this request to the extent it seeks to impose obligations upon DRV or seeks information beyond that the obligations and information required by Rule 26(b) (4) SCRCivP. Further responding, DRV has not at this time identified an expert witness whom it proposes to use as a witness at the trial of the case. DRV reserves the right to identify an expert witness in the future, and if such an expert is identified, DRV will supplement this response.*

3. Please produce all documents evidencing any correspondence or

communications between DRV and RBS Bank that relate to RBS Bank's assignment to DRV of all of its interest under the Loan Documents.

RESPONSE: *DRV objects to this Request because it seeks information that is not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce all documents evidencing the assignment of the loan documents to DRV by RBS Bank.*

4. Please produce all documents evidencing the transaction, contract, or agreement between RBS Bank and DRV pursuant to which DRV acquired the Loan Documents.

RESPONSE: *DRV objects to this Request because it seeks information that is not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce all documents evidencing the assignment of the loan documents to DRV by RBS Bank. DRV further objects to the extent the purchase price of the Loan is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Any such information contained in the documents will be redacted.*

5. Please produce all documents necessary to a complete understanding of DRV's analysis of the Loan Documents and DRV's decision to acquire the Loan Documents.

RESPONSE: *DRV objects to this request to the extent it seeks information subject to the attorney-client privilege and the attorney work product doctrine. DRV further objects to this Request because it is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce documents relating to the Loan that were provided to DRV for review prior to the assignment of the Loan.*

6. Please produce all documents necessary to a complete understanding of DRV's underwriting guidelines for commercial real estate Loan agreements, including the

underwriting guidelines as they existed at the time DRV acquired the Loan Documents and at the time the Reserve Accounts were reassessed.

RESPONSE: *DRV objects to this Request because it presupposes that DRV was the original lender on the Loan, which it was not, and because it assumes that DRV has underwriting guidelines for the origination of commercial loans. DRV did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender. With regard to the reassessment of the Reserve Account payments of which the borrowers were notified on July 11, 2011, the underwriting guidelines that were followed by DRV are simple to determine. Using Fontaine's own estimated budget and projections, DRV determined in its reasonable discretion and judgment that the monthly payments into the Reserve Accounts had to be reassessed and increased. DRV used Fontaine's own estimated budget and projections, then applied a contingency factor in order to determine the amounts necessary to be paid in to the Reserve Accounts in order to maintain a sufficient balance in each Reserve Account between 2011 and 2013.*

7. Please produce all documents necessary to a complete understanding of DRV's reassessment of the Reserve Accounts, including all documents that support your position that the reassessments were commercially reasonable or the exercise of reasonable judgment.

RESPONSE: *All information necessary for a complete understanding of DRV's reassessment of the Reserve Accounts is contained in the July, 2011 Notice of Reassessment and the attachment thereto. That document has previously been produced and will be produced in response to the Request.*

8. Please produce all documents necessary to a complete understanding of DRV's decision to request the Capital Projections from the Property Manager and/or CBRE.

RESPONSE: *DRV objects to this request because it uses Fontaine's defined term "Capital Projections" as opposed to a three (3) year capital budget, which was requested by DRV. Subject to that objection, DRV will produce non-privileged, responsive documents.*

9. Please produce all documents evidencing any correspondence or communications between DRV and CBRE that relate to the Capital Projections or any draft of the Capital Projections, including any drafts, revisions or "mark-ups" of the Capital Projections.

RESPONSE: *DRV objects to this request because it uses Fontaine's defined term "Capital Projections" as opposed to a three (3) year capital budget, which was requested by DRV. Based upon Fontaine's definition of Capital Projections, the only responsive documents would be related to communications after the "Capital Projections" were received by DRV. Subject to this objection, responsive documents will be produced. There are no drafts, revisions or "mark-ups" of the "Capital Projections" that were exchanged between DRV and CBRE prior to the delivery of the Capital Budget to DRV in May, 2011.*

10. Please produce all documents evidencing any correspondence or communications between DRV and the Property Manager that relate to the Capital Projections or any draft of the Capital Projections.

RESPONSE: *See responses to Interrogatory No. 9.*

11. Please produce all documents evidencing any correspondence or communications between DRV and CBRE that relate to the reassessment of the Reserve Accounts.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to that objection, responsive documents will be produced.*

12. Please produce all documents evidencing any correspondence or

communications between DRV and the Property Manager that relate to the reassessment of the Reserve Accounts.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to that objection, responsive documents will be produced.*

13. Please produce all documents evidencing any correspondence or communications between DRV and CBRE relating to the release of the Capital Projections to DRV.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to that objection, responsive documents will be produced.*

14. Please produce all documents evidencing any input, guidance, or instructions from DRV to CBRE concerning the Capital Projections.

RESPONSE: *DRV did not provide "input, guidance or instructions" to CBRE regarding the creation and drafting of the Capital Projections. Subject to this assertion, all documents relating to communications between DRV and CBRE, relating to DRV's request for a three year capital budget prior to the delivery of the "Capital Projections" in May, 2011 will be produced.*

15. Please produce all documents evidencing any communication or correspondence between DRV and CBRE regarding any prospective tenants or leases from 2010 to present.

RESPONSE: *DRV objects to this Request because it is not relevant to the subject litigation and is not reasonably calculated to the discovery of admissible evidence.*

16. Please produce all documents evidencing any correspondence or communications between DRV and the Property Manager that relate to the increases in the

Reserve Accounts.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. DRV further objects to this request because it appears to be identical to Request 12. Subject to those objections, responsive documents will be produced.*

17. Please produce all documents evidencing any communications between Fontaine and DRV that relate to the increases in the Reserve Accounts.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to that objection, responsive documents will be produced.*

18. Please produce all documents necessary to a complete understanding of DRV's receipt, review, analysis, and decision to act or not act upon any request for funding of tenant improvements since October 2012.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to those objections, DRV is not aware of any responsive documents other than communications between counsel in this litigation.*

19. Please produce all documents necessary to a complete understanding of DRV's receipt, review, analysis, and decision to act or not act upon any request for funding of lease commissions since October 2012.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to those objections, DRV is not aware of any responsive documents other than communications between counsel in this litigation.*

21. Please produce all documents evidencing any correspondence or communications after September 2012 pursuant to which DRV provided CBRE or the Property Manager with monthly statements of the debt service and Reserve Account balances.

RESPONSE: *DRV is not aware of any responsive documents.*

22. Please produce all documents evidencing the location, disposition, and current balance of funds withdrawn from the Reserve Accounts, including the name of the financial institution in which the funds are held; account names and numbers; account statements; records of deposits, withdrawals, electronic funds transfers, and any other transactions; ledger balances; interest income; and account expenses.

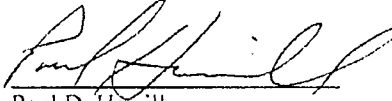
RESPONSE: *DRV objects to this request because it is based upon a false assumption that funds have been "withdrawn." The Reserve Accounts were hook entry accounts that ceased to exist at the time that they were applied to the accelerated debt. DRV will not produce financial information, including account numbers and the other information sought by this Request because that information is confidential, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.*

23. Produce all documents evidencing any correspondence or communications between counsel for DRV and counsel for CBRE that relates in any way to this litigation.

RESPONSE: *DRV objects to this Request to the extent that it seeks documents that are subject to the attorney-client privilege or the attorney work product doctrine. Subject to those objections, responsive documents will be produced.*

McNAIR LAW FIRM, P.A.

By:



Paul D. Harrill

Post Office Box 11390

Columbia, SC 29211

P: (803) 799.9800

F: (803) 753-3278

pharrill@mcnair.net

Attorneys for the Plaintiff

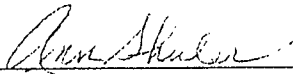
May 21, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, P.A., do hereby certify that I served a copy of **Plaintiff DRV Fontaine, LLC's Answers to Defendant Fontaine Business Park, LLC's First Set of Interrogatories and Responses to Defendant Fontaine Business Park, LLC's Requests For Production of Documents** upon counsel of record by depositing a copy in the U.S. Mail, postage paid, to the following address this the 21st day of May, 2013:

Brent B. Young, Esquire
Mark A. Fulks, Esquire
Baker, Donelson, Bearman, Caldwell
& Berkowitz, PC
100 Med Tech Parkway, Suite 200
Johnson City, TN 37604
Attorneys for Fontaine Business Park, LLC

Tucker S. Player, Esquire
Player Law Firm, LLC
1415 Broad River Road
Columbia, SC 29210
Attorneys for Fontaine Business Park 2-31, LLC



Ann Shuler

On Wed, Dec 29, 2010 at 12:55 PM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Three year capital budget, correct?

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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From: Elliot Liffman [<mailto:eliffman@drv-llc.com>]

Sent: Wednesday, December 29, 2010 12:43 PM

To: Sandra Johnson

Subject: Re: Reserve Request

Do you really want me to find something? There's no telling what else I'll find if I start digging around.

On Wed, Dec 29, 2010 at 12:39 PM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Well, I would be interested in knowing where in the loan documents this is referenced?

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

CBRE0046

45

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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From: Elliot Liffman [mailto:eliffman@drv-llc.com]

Sent: Wednesday, December 29, 2010 12:24 PM

To: Sandra Johnson

Subject: Re: Reserve Request

Should I pull a "Sandra" and invoke the loan documents on you?

On Wed, Dec 29, 2010 at 12:21 PM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Me. I've been extremely busy and haven't had the opportunity to sit down for any length of time and get numbers together.

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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CBRE0047

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From: Elliot Liffman [mailto:eliffman@drv-llc.com]
Sent: Wednesday, December 29, 2010 12:20 PM

To: Sandra Johnson
Subject: Re: Reserve Request

What is holding it up?

On Wed, Dec 29, 2010 at 12:16 PM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Doubtful – Does that keep you from disbursing funds per the loan documents?

Sandra Johnson | Property Manager

 Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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From: Elliot Liffman [mailto:eliffman@drv-llc.com]
Sent: Wednesday, December 29, 2010 11:55 AM

To: Sandra Johnson
Subject: Re: Reserve Request

Will I have the capital budget before year-end?

On Wed, Dec 29, 2010 at 11:54 AM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Will I have the reserve funds before year-end?

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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From: Elliot Liffman [<mailto:eliffman@drv-llc.com>]
Sent: Wednesday, December 29, 2010 11:04 AM
To: Sandra Johnson
Subject: Re: Reserve Request

Its in the pipeline. How about my capital budget?

From: "Sandra Johnson" <Sjohnson@cbresc.com>

Date: Wed, 29 Dec 2010 10:59:32 -0500

To: Elliot Liffman<eliffman@drv-llc.com>

Subject: Reserve Request

Just checking in to see if the requests have been processed and money wired?

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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Sandra Johnson

From: Aaron Dupree
Sent: Tuesday, January 04, 2011 4:36 PM
To: Sandra Johnson; Martin Moore
Subject: RE: Reserve Request

Fontaine I

Renewal – First Citizens Bank 9,527rsf; \$3.00 in TI and LC funded in 12/11
New Lease – 4,685rsf Suite 1300; \$22.50 in TI and LC funded in 4/12
Renewal – Maximus 10,354rsf; \$2.50 in TI and LC funded in 8/13

Fontaine II

Renewal – Biotel 2,903rsf, \$1.50/rsf in TI and LC funded in 3/11
Renewal – Patterson Dental 11,218rsf; \$7.00/rsf in TI and LC funded in 12/11
New Lease – 933/rsf Suite B300; \$3.00/rsf in TI and LC funded in 4/11
New lease – 3,352/rsf Suite B500; \$10/rsf in TI and LC funded in 6/11
Renewal – US Army 2,242rsf Suite B700; \$2.00/rsf in TI and LC funded in 8/11
Renewal – Limestone College 26,446rsf Suite A500; \$7.00/rsf in TI and LC funded in 4/12
Renewal – Fox Meadows 3,264rsf Suite B600; \$3.00/rsf in TI and LC funded in 11/12
Renewal – Clean Harbors 10,360rsf Suite B100; \$5.00/rsf in TI and LC funded in 4/13

Fontaine III

New lease – 4,750rsf Suite 120; \$22.50/rsf in TI and LC funded in 8/11
New lease - 10,000rsf Suite 300; \$26.00/rsf in TI and LC funded in 11/11.
Renewal - Xerox 1,395rsf Suite 110; \$1.00/rsf in TI and LC funded in 12/11.
New Lease – 15,000rsf Suite 200; \$26.00/rsf in TI and LC funded in 6/12
New lease – 3,258rsf Suite 125; \$19.00/rsf in TI and LC funded in 5/13
Renewal – Grange Insurance 7,388rsf; \$7.00/rsf in TI and LC funded in 9/13

Fontaine V

New lease – 10,000rsf front half of Suite 100; \$25.00 in TI and LC funded in 3/12
New lease – 11,000rsf back half of Suite 100; \$15.00 in TI and LC funded in 8/12

Let me know if you have any questions.

Thanks

Aaron M. Dupree, CCIM | Brokerage Services
CB Richard Ellis/Columbia
1333 Main Street, Suite 700, Columbia, SC 29201
T 803 744 6859 | F 803 744 4441 | C 803 466 3037
aaron.dupree@cbresc.com | www.cbre.com/columbia

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From: Sandra Johnson
Sent: Monday, January 03, 2011 5:31 PM

//

To: Aaron Dupree; Martin Moore
Subject: FW: Reserve Request

See below – what Elliot wants for capital budget.

Sandra Johnson | Property Manager
Asset Services
CB Richard Ellis | Columbia
1333 Main Street, Suite 700 | Columbia, SC 29201
T 803 744 6854 | F 803 744 4450
sandra.johnson@cbresc.com | www.cbre.com

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From: Elliot Liffman [<mailto:eliffman@drv-llc.com>]
Sent: Monday, January 03, 2011 5:22 PM
To: Sandra Johnson
Subject: Re: Reserve Request

Thanks. HNY to you too. I'd like to see TI for each space rolling in the next three years - Aaron's guess as to TI for a new tenant (I'm guessing \$20) and TI for a renewal. Same for LC, although I can figure that our pretty easily if he just gives me the current market rate.

On Mon, Jan 3, 2011 at 5:02 PM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

See attached.

HAPPY NEW YEAR! And yes, I'm working on the Capital Budget. One more question: I remember you saying to Aaron you wanted to see potential TI/Commission dollars. Was that only on existing leases that could potentially renew or any/all lease possibilities?

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com | www.cbre.com

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From: Elliot Liffman [mailto:eliffman@drv-llc.com]
Sent: Thursday, December 30, 2010 10:59 AM

To: Sandra Johnson
Subject: Re: Reserve Request

Ok. I'll need it when you get back. The wire went out this morning.

From: "Sandra Johnson" <Sjohnson@cbresc.com>

Date: Thu, 30 Dec 2010 10:54:15 -0500

To: <eliffman@drv-llc.com>

Subject: Re: Reserve Request

The "exhibit" is the proposal which matches the invoice. The proposal is based on the work letter included in the lease.

I'm traveling today. I won't be able to get the "exhibit" to you until late this afternoon.

----- Original Message -----

From: Elliot Liffman <eliffman@drv-llc.com>

To: Sandra Johnson

Sent: Thu Dec 30 10:33:54 2010

Subject: Re: Reserve Request

The Timmons contract is missing Exhibit A. The scope of work is an important piece.

On Wed, Dec 29, 2010 at 7:12 PM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Yes, it should be 2011. Here are the documents you've requested.

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

sandra.johnson@cbresc.com <<mailto:sandra.johnson@cbresc.com>> | www.cbresc.com <<http://www.cbresc.com>>

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From: Elliot Liffman [<mailto:eliffman@drv-llc.com>]
Sent: Wednesday, December 29, 2010 3:32 PM

To: Sandra Johnson
Subject: Re: Reserve Request

I need to see the lease amendment for Xerox. On the invoice, I think you meant to say Jan 1, 2011 commencement? And for the Great West buildout, can you please provide a copy of Timmons' contract for the file?

Thanks.

On Wed, Dec 29, 2010 at 10:59 AM, Sandra Johnson <Sjohnson@cbresc.com> wrote:

Just checking in to see if the requests have been processed and money wired?

Sandra Johnson | Property Manager

Asset Services

CB Richard Ellis | Columbia

1333 Main Street, Suite 700 | Columbia, SC 29201

T 803 744 6854 | F 803 744 4450

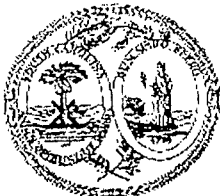
sandra.johnson@cbresc.com <<mailto:sandra.johnson@cbresc.com>> | www.cbresc.com <<http://www.cbresc.com>>

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NOTICE OF MOTION SCHEDULING

STATE OF
SOUTH CAROLINA

January 04, 2013



Motion "MAPREC - Motion For Appointment of Receiver" for Case:
2012CP4007752 - DRV Fontaine LLC vs Fontaine Business Park LLC
, defendant, et al has been added to the following Motions Roster:

452 - MOTION ROSTER FEBRUARY 1, 2013 COURTROOM 2-E

This hearing of this motion has been scheduled for 2/1/2013 at 9:30 AM.

The above referenced case is scheduled for an Motion Hearing before Judge Alison R Lee in Courtroom 2-E. The Plaintiff's Attorney is to notify the Defendant in writing of the time and date of all Default and Damages Hearings. All requests for continuances must be in writing with a \$25.00 filing fee and received by the Chief Administrative Judge prior to the hearing. A request for a continuance does not guarantee that a case will be continued. Please notify the Court in writing if the Motions are resolved prior to the hearing. ALL ATTORNEYS MUST SEND A PROPOSED ORDER OR MEMORANDUM OF LAW BY TUESDAY JANUARY 22, 2013 FOR THE MOTION HEARING THAT IS BEING HEARD ON. HARD COPY AND DISK: OR IT CAN BE SENT BY EMAIL TO aleesc@sccourts.org.

Mail Notice To:

Brent B. Young
PO Box 3038
Johnson City, TN 37602

Court Info:

Richland County Common Pleas
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201-9201

Judge L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, LLC;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

FILED
2012 NOV 21 AM 11:05
JEANETTE W. HOSKINS
C.C.P. & G.S.

PLAINTIFF'S MOTION FOR ORDER
OF REFERENCE

COLUMBIA 1095396v1

FBPAPP-0727

TO: ALL DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, DRV Fontaine, LLC (hereinafter "the Plaintiff"), hereby moves, pursuant to Rules 53 and 71 of the South Carolina Rules of Civil Procedure, for the Court to issue an Order referring the above captioned foreclosure to the Honorable Joseph M. Strickland, as Master-In-Equity for Richland County, with finality, with all appeals to be pled directly to the South Carolina Court of Appeals or the Supreme Court of the State of South Carolina as provided by the South Carolina Appellate Court Rules.

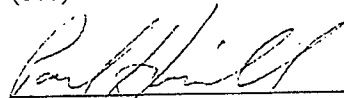
Pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, "[i]n an action where the parties consent, in a default case, or an action for foreclosure" (emphasis added) some or all causes of action "may be referred to a master or special referee by order of a circuit judge or the clerk of court." Pursuant to Rule 71 of the South Carolina Rules of Civil Procedure, "[a]ctions to foreclosure liens . . . shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." The present case is a foreclosure action that may be properly referred to the Richland County Master in Equity, pursuant to Rules 53 and 71.

This motion is based upon the South Carolina Rules of Civil Procedure, the pleadings filed in this action, applicable statutory and common law and in the interest and furtherance of justice.

Respectfully submitted,

McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By:



Paul D. Harrill (SC Bar No.: 15268)

Attorneys for the Plaintiff

November 21, 2012
Columbia, South Carolina

COLUMBIA 1095396v1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,	)	
<i>Plaintiff,</i>	)	
	)	
	)	RESPONSE IN OPPOSITION
v.	)	TO PLAINTIFF'S MOTION
	)	FOR ORDER OF REFERENCE
	)	
FONTAINE BUSINESS PARK, LLC, <i>et al.</i>	)	
<i>Defendants.</i>	)	
	)	

Defendant Fontaine Business Park, LLC, ("Fontaine") submits this Response in opposition to the Motion for Order of Reference filed by Plaintiff DRV Fontaine, LLC ("DRV").

DRV's Motion for Order of Reference should be denied. Rule 71 of the South Carolina Rules of Civil Procedure provides that "[a]ctions to foreclose liens . . . shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53" (Emphasis added). Likewise, Rule 53 of the South Carolina Rules of Civil Procedure provides that in "an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." However, Rule 53 provides that "[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court." Fontaine has demanded a jury trial on its Counterclaims, all of which are issues triable of right by a jury.

This is no ordinary foreclosure action. Although DRV has pleaded its case in the placid verbal veneer of a routine foreclosure action, Fontaine has demonstrated the rough-hewn reality of this matter through its Answer, Affirmative Defenses, and Counterclaims. In its Answer, Fontaine raised a litany of Counterclaims that are quintessentially jury issues. Carolina First Bank v. BADD,

LLC, --- S.E.2d ----, 2012 WL 5288129, *3 (S.C.Ct.App. Oct. 24, 2012) (A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action); Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (S.C. 2010) (An action seeking damages for breach of fiduciary duty is an action at law); Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 202, 723 S.E.2d 597, 602 (S.C.App. 2012) ("An action in tort for damages is an action at law"); Byrd v. Livingston, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (S.C.Ct.App. 2012) ("An action to construe a contract is an action at law"); Ahrens v. State, 392 S.C. 340, 347-348, 709 S.E.2d 54, 58 (S.C. 2011) ("An action seeking damages for breach of contract is an action at law").

Indeed, the *essentia* of Fontaine's Counterclaims fall squarely within the province of the jury. Among other things, Fontaine has pleaded breach of contract, breach of fiduciary duty, tortious economic duress, tortious interference with contractual and/or business or prospective contractual relations, and reformation of the instruments. In support of these claims, Fontaine relies upon, among other things: (1) the arbitrary and capricious reassessments of Fontaine's monthly contributions to the Capital Reserve Account, the Rollover Reserve Account, and the Tax and Insurance Account, which resulted in the imposition of one-time increases of 1,037%, 756%, and 630%, respectively; (2) DRV's acceptance of excessive payments and its subsequent refusal to refund the excess or apply it toward debt service; (3) DRV's refusal to provide justification and substantiation for its unreasonable actions; (4) DRV's refusal to provide monthly statements of the outstanding debt and the balances in the Reserve Accounts, and its refusal to provide an accounting of funds held in custodial accounts for Fontaine's benefit; and (5) DRV's attempts to coerce Fontaine into terminating a long-time business relationship with its property manager based upon alleged Events of Default fabricated through its manipulation of the previously mentioned Reserve Accounts. In these instances, and others, Fontaine has alleged that DRV has engaged in conduct that is arbitrary, capricious, outrageous, and unconscionable. Moreover, DRV's unconscionable

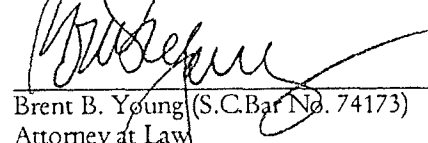
conduct preceded and procured Fontaine's alleged defaults under the Loan Agreement. Accordingly, Fontaine's demand for a jury trial should be granted.

DRV's plea to avoid a jury trial on the grounds of waiver, which is surely to be its reply, should fall upon deaf ears. As the South Carolina Court of Appeals recently explained, though a contractual jury waiver may be valid in a foreclosure action, such a waiver is not necessarily applicable to Counterclaims raised in defense. See Wachovia Bank v. Blackburn, 716 S.E.2d 454 (S.C.Ct.App. 2011); Partain v. Upstate Automotive Group, 689 S.E.2d 602 (2010); Aiken v. World Finance Corp. of South Carolina, 644 S.E.2d 705 (S.C. 2007). These cases support the proposition that contractual jury waivers do not apply to claims founded upon outrageous torts and egregious conduct that is unforeseeable to a reasonable person in the context of normal business dealings. This is so, the appellate courts reasoned, because the aggrieved parties could not have contemplated that by signing a contract they would be waiving their right to a jury trial on claims arising from contumacious conduct. Here, the improper nature of DRV's conduct is unprecedented in normal business relationships. Fontaine could not have conceived of such recalcitrant business dealings, much less foresee them. This is especially so, given that DRV is the second assignee of the Loan Documents, and that the original lender and the first assignee never hinted at such things. Otherwise, it certainly would have thought better of a jury waiver. DRV should not be permitted to wield the contractual jury waiver as a shield to protect it from a jury's evaluation of its inappropriate conduct.

This matter should remain in the Court of Common Pleas for a jury trial. Alternatively, consistent with Time Warner Cable v. Condo Services, Inc., 381 S.C 275, 282, 672 S.E.2d 816, 819 (S.C. Ct. App. 2009), Fontaine's counterclaims should be tried by a jury before DRV's foreclosure action is referred to the Master-in-Equity.

Respectfully submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.



Brent B. Young (S.C. Bar No. 74173)

Attorney at Law

100 Med Tech Parkway, Suite 200

Johnson City, TN 37604

(423) 928-0181

byoung@bakerdonelson.com

*Attorneys for Fontaine
Business Park, LLC*

STATE OF
SOUTH CAROLINA



NOTICE OF MOTION SCHEDULING

January 04, 2013

Motion "MORDRE - Motion For Order of Reference" for Case:
2012CP4007752 - DRV Fontaine LLC vs Fontaine Business Park LLC
, defendant, et al has been added to the following Motions Roster:

452 - MOTION ROSTER FEBRUARY 1, 2013 COURTROOM 2-E

This hearing of this motion has been scheduled for 2/1/2013 at 9:30 AM.

The above referenced case is scheduled for an Motion Hearing before Judge Alison R. Lee in Courtroom 2-E. The Plaintiff's Attorney is to notify the Defendant in writing of the time and date of all Default and Damages Hearings. All requests for continuances must be in writing with a \$25.00 filing fee and received by the Chief Administrative Judge prior to the hearing. A request for a continuance does not guarantee that a case will be continued. Please notify the Court in writing if the Motions are resolved prior to the hearing. ALL ATTORNEYS MUST SEND A PROPOSED ORDER OR MEMORANDUM OF LAW BY TUESDAY JANUARY 22, 2013 FOR THE MOTION HEARING THAT IS BEING HEARD ON. HARD COPY AND DISK: OR IT CAN BE SENT BY EMAIL TO aleesc@sccourts.org.

Mail Notice To:

Brent B. Young
PO Box 3038

Johnson City, TN 37602

Court Info:

Richland County Common Pleas
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201-9201

Judge L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF COMMON PLEAS
2012-CP-40-7752
DVR Fontaine, LLC)
vs.) TRANSCRIPT OF RECORD
Fontaine Business Park, LLC,)
et. al.)
DEFENDANTS) January 13, 2014
Columbia, SC

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

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

PAUL D. HARRILL, ESQ.
Attorney for the Plaintiff

TUCKER S. PLAYER, ESQ.
MR. FAULK, ESQ.
Attorneys for the Defendants

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, there were no witnesses called.)

1 THE COURT: Mr. Harrill, your motion?

2 MR. HARRILL: Yes, Your Honor.

3 THE COURT: You may proceed.

4 MR. HARRILL: Thank you, Your Honor. Your
5 Honor, this is -- well, just by way of a little background
6 in this case. This is a foreclosure case. It involves
7 property. You may be familiar with this Fountaine
8 Business Park. It's out off of I-277 when you're coming
9 into town. It's over on the right, has kind of that brick
10 gazebo, a little pond out there. You know, that's the
11 subject of the property, Your Honor. I represent the
12 plaintiff in the case. We filed the foreclosure action.
13 Subsequently, the defendants in the case filed some
14 defenses and eventually I think a counter claim and they
15 have demanded a jury trial on this case.

16 THE COURT: Both entities?

17 MR. HARRILL: Yeah, there are multiple entities,
18 Your Honor. This is an unusual deal I will get into.
19 It's called a tenant in common property deal where the
20 original owner buys it and then he syndicates out a bunch
21 of interest to other owners, so all those owners are
22 technically owners of the property. So there are about 30
23 owners that technically own the tenant in common interest
24 and gave their interest by way of mortgage and so they
25 joined in the loan. So all those entities are named as

1 defendants in this case.

2 THE COURT: They're all being treated as one as
3 far as the legal issues in this case?

4 MR. HARRILL: That's correct, Your Honor. Your
5 Honor, this is our motion to strike their jury trial
6 demand. There really two basis for it. One is that it is
7 an equitable action and even though they have attempted to
8 do it bring in defenses and counter claims, those don't
9 change the nature of the equitable action in question and
10 I'll address that in a moment. The other is the fact that
11 the defendants have expressly waived their right to a jury
12 trial.

13 THE COURT: Show me that?

14 MR. HARRILL: I will, Your Honor. I've got the
15 -- do you have the motion?

16 THE COURT: I got the motion and the exhibits.

17 MR. HARRILL: If I can show you in the motion --
18 I'll hand up a copy if you like, but otherwise if you look
19 at tab A.

20 THE COURT: Got tab A.

21 MR. HARRILL: Go all the way back to page 74 to
22 tab A.

23 THE COURT: Just hold on a minute. I got 74.

24 MR. HARRILL: Yes, sir, section 10.A.

25 THE COURT: 10.A, got it.

1 MR. HARRILL: It says in all caps each borrower
2 and lender hereby agree not to elect a trial by jury of
3 any issue triable by jury -- a triable of right by jury
4 and waive any right to trial by jury fully and to the
5 extent that any such right shall now or hereafter exist
6 with regard to the loan documents or any claim, counter
7 claim or other action arising in connection therewith.
8 And I think it's important there that counter claims have
9 been expressly included in the waiver, Your Honor. Next
10 in section B -- the first document was the loan
11 agreements. Next section B is the mortgage. And if you
12 turn to page 13 section 22 of that document.

13 THE COURT: Page 13.

14 MR. HARRILL: Page 13 section 22. You have
15 that, Your Honor?

16 THE COURT: I do, but there numbers on the top
17 and numbers on the bottom.

18 MR. HARRILL: I'm sorry. The number on the
19 bottom is the one I'm looking at.

20 THE COURT: Same language?

21 MR. HARRILL: Yes, sir. Essentially, maybe
22 slightly or the same language mortgagor hereby agrees not
23 to elect the trial by jury and it goes on and includes
24 counter claims. And they expressly agree not to pursue a
25 trial by jury with regard to any defenses, counter claims,

1 claims related. Attach C and D for the purpose of showing
2 that the -- these are the loan assumption agreements. As
3 I explained to you, this is a little bit of an unusual
4 transaction, which the original borrower buys the property
5 and gives the mortgage and then a bunch of -- then he
6 sells off or it sells off its interest to a bunch of other
7 entities. Then those entities then assume completely and
8 in whole the mortgage, the loan documents and all that.
9 And if you'll look at the loan assumption agreement at C
10 page two and paragraph one there, it references the fact
11 that the borrowers assume all of the documents. It
12 includes reference to the loan agreement, the note, the
13 instrument. The instrument is defined in this document,
14 this assumption agreement, as the mortgage. And it goes
15 on to say that they just assume it just as if they were
16 the original signers of the documents.

17 So each of the -- each of the defendants has
18 assumed the obligations, representations. And it include
19 if you'll read down on paragraph one, Your Honor, it also
20 includes any waivers. Let me just read part of it for the
21 record, Your Honor, if that's okay. Additional borrower
22 hereby assumes joint and several basis of the original
23 borrower and ending all other tenants in common that have
24 previously assumed the loan. All of original borrowers
25 and obligations and agreements under the loan agreement,

1 the note, the instrument, the lease assignment and all of
2 the other loan documents and then excludes a specific
3 guarantee. All the assignments terms, waivers and
4 conditions of which are incorporated here and by this
5 reference. And so, Your Honor, and then the same thing
6 occurs when there was a subsequent assumption. There's an
7 amendment to the loan assumption where some additional TIC
8 borrowers, tenant in common borrowers, did the same thing.
9 And the same language is contained in paragraph one, which
10 is exhibit D to our memorandum or to our motion.

11 Your Honor, each of those waivers pursuant to
12 South Carolina law are enforceable. They are bold,
13 conspicuous. They're not hidden in the language of the
14 document. They're not -- you know, they have a very clear
15 heading. And so again, they also referenced very
16 specifically the waiver of a counter claim. So it's our
17 position first and foremost that based upon the expressed
18 waiver contained in the loan documents, that these
19 defendants assertion of a right to a jury trial even on
20 their counter claims in this case is improper and it's
21 just serving to delay the case. And they don't have the
22 right to do that.

23 Your Honor, the point I raised was that, you
24 know -- and I have some case law I'll be happy to hand up,
25 Your Honor. There's a case Collier v. Green. It's a 1964

1 case, but it's still good law. It's 137 Southeastern
2 Second 277. Your Honor, if I can hand that case up?

3 THE COURT: Certainly. You didn't do a
4 memorandum, did you?

5 MR. HARRILL: I did not, no, sir. I thought I
6 provided enough. Your Honor, in the case of Collier v.
7 Green, it discusses the nature of a foreclosure as an
8 equitable action. And it goes on in great detail on the
9 document that I've given you on page four, bottom of page
10 four and really to the end of the case discussing the fact
11 that just because you assert defenses and counter claim in
12 a case, doesn't mean that it changes the nature of the
13 equitable foreclosure action. And it specifically talks
14 about the fact where questions are raised and defense and
15 counter claims about validity of a loan, the priority of a
16 loan and things like that. They don't change the
17 characteristic of a foreclosure from an equitable to
18 sudden illegal action.

19 And, Your Honor, you'll hear from the defendants
20 in a moment. But essentially every defense they've raised
21 and every counter claim they've raised is trying to say my
22 client has done something horrible and, you know,
23 terrible. But essentially at its heart what they are
24 ultimately trying to do is argue that there is no default
25 in the case. They're challenging whether there's been a

1 valid default.

2 THE COURT: Couldn't a master determine that?

3 MR. HARRILL: Absolutely, Your Honor, and that's
4 my point is that doesn't change the equitable nature of
5 the case. Ultimately, their counter claims are saying we
6 did something wrong, so they're not in default. If they
7 want to get into the facts of it, you know, they can do
8 that and I'll be happy to retort. But ultimately their
9 arguments on their counter claims and defenses is that my
10 client fabricated a default, so that he could foreclose.
11 Well, that's all stuff that Judge Strickland, the master
12 in equity, can determine. That's all part of the
13 underlying equitable action whether there's default,
14 whether there's a valid mortgage, whether there's a lien
15 priority all of that stuff as set forth in pages four and
16 five of the Collier case.

17 Your Honor, also got some cases -- Your Honor,
18 you ask me if I did a memorandum, I did not. I do have a
19 proposed order if you like me to hand it up at this point.
20 I can just wait until the end whichever suits you.

21 THE COURT: Well, I tell lawyers frequently, you
22 want me to read it, I guess I better have it. I'm not
23 making any decision one ---

24 MR. HARRILL: I understand, Your Honor. I'm
25 hoping you'll want to read it and you want sign it later.

1 THE COURT: Thank you.

2 MR. HARRILL: Yes, sir. Your Honor, I think,
3 you know, essentially that's our argument. I have more I
4 can say, but I'll maybe hold some of that for rebuttal. I
5 believe I know what they're going to argue, but we think
6 we're entitled to have the jury demand struck based upon
7 not only the expressed waivers, but the fact that really
8 at their heart the defenses and counter claims raised by
9 the defendants are just challenging our ability to declare
10 a default and whether or not there's a valid default in
11 this case. And that's an equitable issue that goes to the
12 foreclosure. Thank you.

13 THE COURT: Thank you. Now, Mr. Faulk, you are
14 pro hac?

15 MR. FAULK: Yes, Your Honor.

16 THE COURT: Well, I will tell you right now
17 before we get started in that you have a friend in court
18 in that my law clerk is from Johnson City, Tennessee.

19 MR. FAULK: Oh, really.

20 THE COURT: He told me there's some pretty good
21 lawyers in Johnson City.

22 MR. FAULK: We have one or two unfortunately
23 they couldn't be here today.

24 THE COURT: I think that was exactly his
25 language one or two. I take it that you're one of the

1 select ones.

2 MR. FAULK: Yes, Your Honor.

3 THE COURT: Have you and Mr. Player decided how
4 you want to proceed?

5 MR. FAULK: I guess, we just did since I got
6 called on first. And first, Your Honor, I would like to
7 thank the Court for accommodating my partner's request,
8 Mr. Young, that I be permitted to appear here without him
9 as he had conflicts in other matters.

10 Our position is -- the real issue before the
11 Court is not whether there are jury waivers in the
12 contract, it's whether or not they applied to the counter
13 claims that we've raised. And Mr. Harrill relies on a
14 case from 1964. We cited three cases Wachovia vs.
15 Blackburn, which is a 2011 case. Partaine vs. Upstate
16 Automotive, which is from 2010. Aiken vs. World Finance,
17 which is from 2007. And the principle of these cases
18 stand for is that waivers -- expressed waivers in contrast
19 do not apply when there's outrageous tortuous conduct,
20 egregious conduct. The types of things that are so
21 outrageous and contumacious that they were unforeseeable
22 at the time the contract was entered. And that's the
23 situation that we have here and we provided for the Court
24 it's just a brief synopsis of some of the facts that have
25 already been developed in discovery through the

1 deposition.

2 And basically, you know, we're dealing with a
3 circumstance where, Ms. Matthews who has testified on
4 behalf of Fontaine Business Parkidge, the primary -- sort
5 of the originator entity which still owns an interest in
6 the property who we represent. She's been in this
7 business for 40 years and she testified in her deposition
8 that she's never seen a lender act in the way that it has
9 acted in the way its handled these reserve accounts. As
10 we pointed out in our motion, the capital expense reserve
11 account was increased on very short notice 1,037 percent.
12 And it was done was without proper justification under the
13 loan agreements.

14 THE COURT: How does that affect your client?

15 MR. FAULK: Well, what we were dealing with is
16 -- and I think we have the numbers quoted. You know, they
17 budget these things on an annual basis basically dealing
18 with the rents that come in and those things. And all of
19 a sudden they get a notice from the lender that, you know,
20 in two months you have to start paying 1,037 percent more
21 than you've been paying previously. And that's a matter
22 of going from in one case about \$5,000 to -- let me see if
23 I have it here, so make sure I don't get this incorrect
24 \$54,000 on a monthly basis and that was one of the
25 reassessments. Another one went from 21,000 to 159,000,

1 that was the rollover reserve account, that's a 756
2 percent increase on very short notice. And what we have
3 is Ms. Matthews and the people at DRV Fountaine been in
4 the business for 40 years and never seen reserve accounts
5 increase like that.

6 THE COURT: What is the purpose of -- the stated
7 purpose of increase in the reserve accounts?

8 MR. FAULK: Well, the stated purpose was ---

9 THE COURT: 2008?

10 MR. FAULK: I'm sorry.

11 THE COURT: Was it in 2008?

12 MR. FAULK: That's when the -- when the loan
13 agreement was purchased by DRV or made when it was
14 originated. And the stated purpose for the capital
15 expense reserve is you set aside money for capital
16 expenses that may come up during the year. And so what
17 they deal with is how much money is coming in, what
18 tenants do we have and what prospects do we have. And
19 based on that, you know, these reserves were set up.

20 THE COURT: Are you saying that this caused or
21 precipitated the default?

22 MR. FAULK: That's correct, Your Honor. And not
23 only that, one it was a breach of the contract of the loan
24 agreement which only permits the capital expense reserve
25 account to be reassessed based upon current -- then

1 existing underwriting principles. We pointed out
2 attaching as one of our exhibits the responses to our
3 interrogatories where they explain that they didn't have
4 any then existing underwriting standards.

5 Mr. Lippman's (sic) deposition, what we took,
6 basically what he said is if he took a budgeting process
7 which also is not anywhere in the loan agreement, he just
8 sort of made this up and I'm going to call ask them for
9 originally it seems -- it appears that he wanted a five
10 year projection of what all capital expenses were going to
11 be for five years. Then that eventually was whittled down
12 to three years. And some of the numbers came from the
13 assumptions for that budget came from Mr. Lippman himself.
14 And what we ended up with was an exorbitantly exaggerated
15 capital expense projection. And basically what it did was
16 -- it was -- if you rent all vacant space and fix
17 everything that conceivable needed to be repaired, one of
18 the things included a parking lot, which the additional
19 parking spaces had been in contingency that had been
20 considered if a particular tenant came in who needed
21 additional space for that building.

22 And in fact, that's never even 'til this day no
23 tenant has gone into that building required the additional
24 parking spaces. So this thing -- it was completely
25 imaginary. It was, you know, just fill this thing up,

1 rent it completely 100 percent tenant occupancy, repair
2 everything that conceivably needed to be repaired. And it
3 was a budget Mr. Lippman took that and then reassessed the
4 reserve account based on that.

5 Now, if you look at the loan agreement, the loan
6 agreement says you can only reassess the capital reserve
7 account based upon then existing underwriting standards.
8 Now, underwriting standards or guidelines -- I don't
9 remember exactly which one it involves, but that's a term
10 of art in the commercial real estate industry. And it
11 doesn't mean a three year projection of capital
12 expenditures that includes 100 percent occupancy, which is
13 well above the market standard. There rarely any
14 properties of this nature that stay 100 percent occupied.
15 It called for a lot of repairs and to this day haven't
16 been done. It was basically just what turned out to be
17 just a wish list. And at the time he did this, first of
18 all, the notice was never formally sent to DRV Fountaine
19 in accordance with the loan agreement. Instead, Mr.
20 Lippmann just made a phone call to the local property
21 manager when in fact this notice is suppose to be in
22 writing sent to the primary manager, so we never really
23 got the formal notice. We got this informal request.
24 They went along with it did their best because, you know,
25 any debtor -- ours are no different than anybody else who

1 owes a lender a considerable sum of money. They just
2 wanted to give them the information they wanted, wanted to
3 keep them happy. There's no provision in the loan
4 agreement that addresses this scenario at all.

5 Mr. Lippman acknowledged in his deposition that
6 he never told them why he was asking for it. So they put
7 this information together and all of sudden they get, you
8 know, slammed with this outrageous increases that weren't
9 based on -- they were based on leasing assumptions that in
10 some instances were inflated as to the dollars per square
11 foot. It was based on some repairs that were unnecessary.
12 And I think the vast majority of those repairs to our
13 knowledge still haven't been made because they weren't
14 absolutely necessary then. And that's just the capital
15 expense reserves. The rollover reserve account was
16 increased 756 percent, that account per the loan agreement
17 can only be reassessed if -- it will be insufficient for
18 approved leasing expenses. At the time this account -- at
19 the time this was reassessed, there were no approved
20 leasing expenses. There were no expected lease expenses.

21 THE COURT: Okay. Let me get sort of the heart
22 of this thing if I can. Your position is that the
23 plaintiff forced by these various methods the foreclosure
24 or the default?

25 MR. FAULK: Well, correct. Now, our position is

1 that there wasn't really a default at the time because ---

2 THE COURT: I understand that.

3 MR. FAULK: But that's what it whittles down to
4 and ---

5 THE COURT: But they say it was a default
6 because you couldn't meet certain obligations that they
7 had imposed on you that are outside the loan documents or
8 loan agreement?

9 MR. FAULK: That's correct. That's correct.
10 But, you know ---

11 THE COURT: Maybe, you're not in default.

12 MR. FAULK: I beg your pardon.

13 THE COURT: I say maybe you are not in default.

14 MR. FAULK: Well, that's our argument that
15 there's not a default, but on the counter claims, we're
16 relying to get --

17 THE COURT: Wait a minute. Why do you need a
18 jury to determine that?

19 MR. FAULK: Well, that's one of the things, you
20 know, in consultation with our clients, they decided to
21 exercise the right. And under the cases that we've cited,
22 given the outrageous nature of the conduct involved, the
23 fact that, you know, as we showed in the motion that under
24 Wachovia Bank and Partaine and the Aiken cases all of
25 which are more recent than the authority cited by Mr.

1 Harrill they say if it's outrageous contumacious conduct,
2 that jury trial waivers do not apply in those situations
3 because you could not have foreseen this series of events
4 unfolding. And as I said, our ---

5 THE COURT: You seeking damages in addition to a
6 declaration that you're not in default?

7 MR. FAULK: Correct. We're seeking damages on
8 several grounds including punitive damages because of the
9 nature -- multiple breaches. There's tortuous
10 interference with our business relations, alleged support
11 of economic duress. All of these things and we're asking
12 for punitive damages and that basically goes to ---

13 THE COURT: Which a master cannot do?

14 MR. FAULK: Well, I think a master probably
15 could do that, but in our perspective, it's a matter of we
16 have a right to a jury trial.

17 THE COURT: Okay.

18 MR. FAULK: And we believe a waiver should not
19 apply because of the outrageousness of the conduct.

20 THE COURT: Mr. Player cannot wait to get out of
21 his chair, so I'll turn to him at this time.

22 MR. PLAYER: Your Honor, I think the delineation
23 is we're not in default, that's our defense, that's our
24 answer to the complaint. Counter claims, we're asking for
25 money and lots of it because we think the behavior -- and

1 that has been the focus -- and just as context Mr. Faulk
2 and Mr. Young represent the name at the top of the list.
3 I represent the other 30.

4 THE COURT: I was wondering about that.

5 MR. PLAYER: Yes, Your Honor. And our counter
6 claims did differ. I think we made a claim under the
7 South Carolina Unfair Trade Practices Act, but the focus
8 of our joint counter claims are the ones that mirror each
9 other are that the actions of DRV were outside of the
10 contract. He did not have any authority under the
11 contract to do what he did and that is a focus Partaine
12 and specifically the Wachovia case, which is the most fact
13 factually similar to what we have here that was real
14 estate transaction where the plaintiff or Wachovia was
15 trying to foreclose and the defendants then counter claim
16 against Wachovia because the thing that they said Wachovia
17 did wrong and misrepresented and also did not do what they
18 were obligated under other documents contracts between the
19 parties other than the loan documents. And the Court said
20 the focus of the Court is if the object or the actions
21 claimed in the counter claims are such that it would be
22 outside of the meeting of the minds where the contractor
23 has the jury waiver, then the jury waiver does not apply.
24 That's what the Court has decided is was the behavior so
25 far outside of the contract or so contumacious or

1 egregious that when the parties had the meeting of the
2 minds, which is assume since they sign the contract. If
3 the Court determines that the conduct could not have been
4 within that meeting of the minds, could not been within
5 that joint understanding of the parties, then the jury
6 waiver containment in the contract doesn't apply.
7 Everything that we say is he did stuff that's not in the
8 contract.

9 The entire theory of our counter claims are that
10 he acted outside of the contract. We had no idea this
11 could even happen when we sign the contract with the
12 original lender. And thus far they could not point to any
13 provision of the contract that allows them to do what he
14 did.

15 As a matter of fact, in his deposition, the
16 biggest number that jump -- that inflated the projections
17 he said they didn't even ask for. He just got it from the
18 good graces of somebody, just hadn't figured that out yet.
19 But our counter claims are about what he did outside the
20 contract. We said unfair trade practices and that it was
21 a gross misrepresentation. And he did try and manufacture
22 economic distress on the clients that eventually created
23 the default, but that's only part of the counter claims.
24 The part where they want the jury to decide is whether or
25 not DRV regardless if there was a default, regardless of

1 whether or not our theory that we actually paid enough
2 money to satisfy the loan servicing over time, if that's a
3 default, okay, but what he did he still can't get away
4 with what he did. And he would owe us money for the
5 monetary damages that we suffered as a result of him
6 inflating the monthly reserve accounts by a thousand
7 percent and that's why we think a jury should decide those
8 issues. It doesn't change the nature of the entire case.
9 I think all the defendants agree the foreclosure is
10 inequitable, but the legal issues in our counter claim
11 should be decided by a jury before they are entitled to
12 foreclosure.

13 THE COURT: There's been no reference in this
14 case?

15 MR. HARRILL: I move for reference a year and a
16 half ago, Your Honor. It's never been ruled upon.

17 THE COURT: Never been ruled upon?

18 MR. HARRILL: No. Judge Lee took it under
19 advised matter or deferred it when she ruled on the
20 receivership, which she ultimately granted. And she's
21 never ruled on the motion, the pending motion to have it
22 referred to Judge Strickland, which is still out there
23 pending.

24 THE COURT: Is that an impediment to this
25 motion?

1 MR. HARRILL: I don't think so, Your Honor.
2 What I'm asking is if you strike the jury trial, I demand
3 that you refer it to the master. Your Honor, a couple
4 quick things. They've done a masterful job as usual of
5 trying to cloud the issues and sit up here and tell long
6 winded story about how horrible my client is, but let me
7 tell you the other skewed facts.

8 There are reserved accounts in big loans like
9 this and they are set aside -- not only do you make your
10 monthly payment, but you set aside a reserve account and
11 that's to pay things like new tenants up fits and
12 commissions to realtors that have, you know, close new or
13 renew old leases and things like that. Those reserve
14 accounts are sitting there and must be maintained in order
15 to meet anticipated costs going forward. My client in --
16 and this case has been pending for two years now, Your
17 Honor, excuse me if I get the years wrong, but sometime I
18 think in late 2010 began asking for a budget. He said how
19 about show me a budget, what are your anticipating budgets
20 going to be for the next year. They, including the Ms.
21 Matthews that you've heard about, who initially said she
22 had no money to put in the budget. I didn't have a single
23 thing to do with budget. Then later when it was shown she
24 was involved in many many e-mails about budgets said, oh,
25 okay, well, I meant that I didn't, you know, actually do

1 this without -- they looked at the budget. They created
2 the budget. They sent it to my client. And what the
3 budget showed was my goodness we're going to have a huge
4 shortfall in cash. So my client increased the reserves
5 and granted they were significant increases but only for
6 ten months. They never want to say that. Ten month
7 increase in the reserve accounts.

8 And they, you know, got upset, but they paid the
9 increase reserve accounts for four or five months and then
10 unilaterally stopped paying. And, Your Honor, and then
11 they stopped paying the loan payments. They've not paid
12 loan payments forever. Now, the property is in
13 receivership or at least we're getting a little money out
14 of the receiver, but they quit paying the loan payments
15 completely and haven't for months and months and months.
16 And in here arguing about whether or not they're in
17 default and what our guy did wrong.

18 I do want to hand up to Your Honor this Wachovia
19 Blackburn case that they're so excited about, replying on
20 so much. I want to point out what I think I differ with
21 what they read this case to mean. They somehow say that
22 this case stands for the fact that, oh, if it's a -- if
23 it's somehow egregious, and tip of a hat to Mr. Faulk, I
24 had to look up contumacious to see what that meant.

25 THE COURT: You obviously never read any of

1 Ralph King Anderson's orders.

2 MR. HARRILL: I did. I just didn't understand a
3 whole lot of them, Your Honor. But any way, you know,
4 they want you to read this case and somehow understand it
5 that if there's an act that somehow egregious that it
6 can't possibly still be an act of all that. Well, first
7 of all, these acts aren't egregious as I've just explained
8 to you. They want to tell you how egregious it is and how
9 horrible he is and so forth. There are provisions for
10 increasing the reserve accounts, they can't deny it. They
11 say that he didn't technically follow what it says. But
12 it clearly says he can increase the reserve accounts in
13 his discretion and I say he, my client, is DRV. They keep
14 referring to one of the principles.

15 Your Honor, this Blackburn case really what it
16 said was it very clearly in the first half of the case
17 laid out said, hey, you can waive jury trial matters,
18 that's the first going in. You can waive jury trial
19 rights. In fact, it found the jury trial right was waived
20 as to everything except the counter claims. And then it
21 went on to say in the counter claims they found in that
22 case the express waiver of the counter claims was not
23 enough to be a waiver in this case. And I want to point
24 out there's a distinction in this language in the Wachovia
25 Blackburn case, there's no mention whatsoever of counter

1 claims in the jury trial waiver language, none whatsoever
2 as oppose to our records I showed you very clearly
3 provides for waiver of jury trial for counter claim.

4 This also what this case really says when you
5 get down to the holding on whether or not a counter claim
6 would fall under the jury trial waiver. One, I think you
7 got to show that it actually was intended to be waived and
8 then in our case it was. And what the case says and what
9 the Court said is when you get to this type situation
10 that's where you have to look at jury trial waiver as a
11 substantial right that must be strictly construed, so
12 they're strictly construing the waiver language. And in
13 this case, the waiver language didn't say anything about a
14 counter claim. And therefore, I think ultimately they
15 said, you know that's not enough, we're not going to find
16 that the counter claim was waived. So the counter claim
17 will go forward on a legal basis and the rest of the
18 foreclosure is equitable.

19 Your Honor, that's really all I have in
20 rebuttal. I think again none of the things they've raised
21 can't be decided by Judge Strickland. It's all a matter
22 of are we in default or aren't we in default. Are they in
23 default or aren't they, that's their argument. But when
24 it comes down to it, they're just trying to fight to say
25 we're not in default. They're coming up with anything

1 they can to say we didn't default. He did something
2 wrong. So the fact that we haven't paid for months and
3 months and months, the fact we didn't pay the increased
4 reserve accounts or paid every four months, that we
5 collaterally stopped paying them. None of that is a
6 default because he's a bad guy. And they only raise that
7 after the foreclosure suit was filed. None of that
8 changes the equitable nature of this case. And they've
9 expressly agreed to waive the jury trial.

10 THE COURT: All right. Let me get you to submit
11 a proposed order to me please ten days.

12 MR. PLAYER: Yes, Your Honor.

13 THE COURT: Good. Thank you very much.

14 MR. HARRILL: If I need to supplement mine or
15 anything can I do that.

16 THE COURT: I don't know. If you're satisfied,
17 then you don't need to supplement.

18 MR. HARRILL: I think I am, but I'll look at it
19 and I'll let you know.

20 THE COURT: Ten days. Thank you very much.

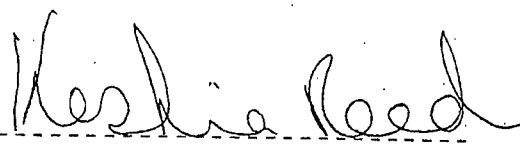
21 END OF REQUESTED TRANSCRIPT
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 27, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Richland
County, South Carolina, on the 13th day of January, 2014.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 31st
day of May 2014.



Keshia Reed, Court Reporter

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2) FIFTH JUDICIAL CIRCUIT
3 COUNTY OF RICHLAND)
4
5 DRV FONTAINE, LLC,)
6 Plaintiffs,)
7 Vs.) CASE NO. 2012-CP-40-07752
8 FONTAINE BUSINESS PARK,)
9 LLC, ET AL,)
10 Defendants.)
11 FEBRUARY 2, 2013
12 COLUMBIA, SOUTH CAROLINA
13 HONORABLE ALISON R. LEE, JUDGE
14 A P P E A R A N C E S:
15 BY: PAUL D. HARRILL, ESQUIRE
16 Attorney for the Plaintiff
17 BY: BRENT YOUNG, ESQUIRE
18 MARK FULKS, ESQUIRE
19 Attorney for the Defendants Fontaine Business
20 Park
21 BY: TUCKER S. PLAYER, ESQUIRE
22 Attorney for et al
23
24 BONNIE H. KELLY, CVR
25 CIRCUIT COURT REPORTER

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E X H I B I T S

NO.DESCRIPTIONID EX

(NO EXHIBITS INTRODUCED)

1 THE COURT: Before we get started, I think what we
2 decided after our discussion was that I would hear your
3 arguments and you would reference the affidavits that
4 are in the record. And then based upon those arguments
5 and the documents, I'll kind of review and kind of see
6 where we are. If in fact, I need additional testimony,
7 we'll figure out a mechanism by which to be able to get
8 that additional testimony.

9 Before we get started, for the court reporter, just
10 to make sure she understands who's talking, Mr. Harrill,
11 if you raise your hand. You represent the plaintiff?

12 MR. HARRILL: Yes.

13 THE COURT: Mr. Young, you represent which
14 defendant?

15 MR. YOUNG: DRV Fontaine -- I apologize. Fontaine
16 Business Park, LLC. The first listed defendant.

17 THE COURT: The first listed defendant?

18 MR. HARRILL: Yes, thank you.

19 THE COURT: And with you is Mark Fulks. If you'll
20 raise your hand, so she can see you. And then
21 Mr. Player represents all the remaining defendants.

22 MR. PLAYER: Yes, ma'am.

23 THE COURT: Okay. We square, Madam Court Reporter?

24 MRS. KELLY: Got them all.

25 THE COURT: Thank you. Additional matter just so I

1 make sure I have -- I have -- I will tell you the
2 documents that I have pulled out of the file that are in
3 the file. But in addition to the pleadings, I have the
4 motion for appointment of receiver filed by the
5 plaintiff on November 21, 2012. I also have the
6 affidavit of Elliott Lithman in support of the motion
7 for appointment of receiver filed the same day.

8 I have a -- there is a motion for appointment of a
9 receiver -- I'm sorry, for order of reference which was
10 filed also on November 21st, same day. I have a
11 response in opposition to the appointment of a receiver
12 that was filed on December 6th by Mr. Young. I have a
13 response in opposition to plaintiff's motion for order
14 of reference that was filed on December 6th by
15 Mr. Young.

16 What I have that was sent to me and I may not have
17 printed out all of the information, but I'll tell you
18 what I have with me in court is the tender of an
19 affidavit sent by Mr. Young and it is the affidavit of
20 Paula Matthews in opposition to the motion for
21 appointment of receiver.

22 From Mr. Player, I believe he's asked that I
23 consider that he joins in the information that was
24 submitted by Mr. Young; is that correct?

25 MR. PLAYER: Yes, Your Honor.

1 THE COURT: And, so, you did not send me any
2 additional information or affidavits or briefs or
3 motions or anything along those lines?

4 MR. PLAYER: No, Your Honor.

5 THE COURT: Good. Thank you. I just wanted to make
6 sure I had my information correct. I also have a letter
7 that was addressed to Judge Barber by the attorney's
8 letters to Judge Barber from December. And those were
9 sent to the file. One was from Mr. Harrill and one was
10 from Mr. Young. And there are attachments to that
11 material.

12 And then there's another -- there are two letters
13 from Mr. Harrill. One dated December 3rd, one dated
14 December 7th. And Mr. Young's letter is dated
15 December 4th. So I have that information.

16 Today Mr. Harrill has passed up a reply affidavit of
17 Elliot Lithman which he will get filed in the clerk's
18 office at the conclusion of this hearing. Do I have
19 everything?

20 MR. HARRILL: Your Honor, I just want to make sure
21 that Mr. Young got those sitting on counsel table?

22 MR. YOUNG: I got them. Thank you. Your Honor, one
23 other document that might be of assistance. Certainly
24 the plans are covered in the affidavits. We have filed
25 a motion to file a supplemental pleading relating to

1 actions that have happened since the filing of the
2 counterclaims. And the affidavit of Ms. Matthews
3 addresses those additional causes of action.

4 THE COURT: And that motion, you said you filed it
5 with the clerk's office.

6 MR. YOUNG: Yes. It's actually been set for a
7 hearing on the 19th of this month. Frankly, my hope is
8 that we can agree on and I thought I would discuss with
9 Mr. Harrill given the nature of Rule 15 after the
10 hearing today.

11 THE COURT: Okay.

12 MR. YOUNG: Thank you.

13 THE COURT: And I will tell you that that has not
14 yet made it to the file which means it's down in the
15 clerk's office. It's probably being scanned.

16 MR. YOUNG: Okay.

17 THE COURT: When it comes in and they file it, they
18 scan it before they put it in the file, so it hasn't
19 made it in the file yet. Okay. With that then, let us
20 begin and I'll hear from Mr. Harrill.

21 MR. HARRILL: Thank you, Your Honor. You know, we
22 -- I guess for the benefit of the record, I'll go over
23 some of the things we discussed back in chambers as far
24 as background and why we're here today.

25 This is a motion for appointment of receiver that's

1 being filed by our client, DRV Fontaine, LLC. Your
2 Honor, by way of background in this case, I think there
3 are a couple of things that are important to understand.
4 This is a nonrecourse loan. It's a \$16,000,000 loan and
5 it's a nonrecourse loan. And I know Your Honor
6 understands what that means.

7 For the record, the lender in this case has nowhere
8 to look for recovery of its loan except the proper. As
9 in most nonrecourse loans, there are some exception
10 clauses for bad acts by the Barber's where it may
11 trigger some personal liability. But other than that,
12 this is a nonrecourse loan. And, so, you know, the
13 Barber's who are here today, you know, really bear no
14 risk of loss. They have an initial investment in this
15 case, of course, but ultimately speaking, you know, they
16 can make and may have in fact made the decision at this
17 point that they're not willing to put any more money
18 into this property.

19 I'm not arguing one way or the other or stating that
20 as a fact, but when you have a large business loan like
21 this and it's a nonrecourse loan, if, you know, if the
22 rents start to diminish which is the case here, I think
23 that's referenced in some of the affidavits, that if the
24 occupancy begins to decline so that the property value
25 isn't, you know, matching up with the loan value, you

1 know, that the Barber's at that point have a decision to
2 make. Either put more money into the business, into the
3 property, or let the property go to the bank. And I
4 would submit to you and I'll address this a little
5 further later that the defendants in this case want to
6 have their cake and eat it, too. They don't want to put
7 more money in, but they also don't want to let the bank
8 take the property back. And that's why we find
9 ourselves at this sort of loggerhead stage.

10 The loan documents that you have, Your Honor, that
11 are all attached to the complaint, but I'll be happy to
12 hand you up a copy of this loan agreement if you want.
13 It's the first exhibit to the complaint.

14 THE COURT: Have you got an extra copy that I don't
15 have to waive through ---

16 MR. HARRILL: I do. It's still large and you may
17 have to waive through a little anyway, but it's a large
18 comprehensive document. But, Your Honor, the loan
19 document itself sets forth provisions which are very
20 typical in a nonrecourse loan such as this and they're
21 set forth in section three of the loan agreement. And
22 section three begins on page 22 for your reference.

23 Your Honor, as I said, when it's a nonrecourse loan
24 and the lender has only the property to look to, it is
25 very important from the lender's standpoint and these

1 borrowers agreed to this in the loan document that you
2 have in front of you that there would be certain reserve
3 accounts established.

4 There are several reserve accounts. One is the
5 capital reserve account. The capital reserve account is
6 for the type of things that you would expect, capital
7 expenditures. You know, if there's a new roof that
8 needs to be put on one of the buildings. There are four
9 buildings at this property, as I understand it. Four or
10 five. I believe, it's four. And, you know, if there's
11 a capital reserve account, it's there for the lender's
12 protection. And everyone agreed to that when they
13 signed the document and agreed to this loan.

14 But there needs to be money not only paying the
15 principle and interest and taxes each month, but you've
16 also got to pay these reserve accounts. And the reserve
17 accounts are there, sort of the rainy day fund. When
18 the big capital expenditure comes, you need a new roof,
19 you need a new air-conditioning system, you need
20 something like that, there's money already set aside for
21 those expenditures. That's the capital reserve account
22 and that's set forth and described in section 3.4 of the
23 loan agreement on page 24.

24 At the very bottom of page 24 there's also a
25 reference to the rollover reserve account and that's

1 described in detail in section -- well, on page 24, all
2 the way over to most of 25, and maybe even very top of
3 26.

4 Rollover reserve account, similar to the capital
5 reserve account is really set up for the purpose of
6 attracting tenants. Doing things like tenant upfits,
7 paying commissions when, you know, there's a tenancy
8 that's become open, space at the property is open, then
9 the rollover reserve is there to make sure that the
10 borrower can pay the commission to the realtor or
11 manager, whoever places the tenant there. And also,
12 tenants in Grade A office space expect there to be
13 certain allowances for, you know, converting maybe a
14 retail space into office space. Putting up walls,
15 putting in a new bathroom, those sorts of things. And
16 that's just standard in the industry, Your Honor.

17 So all of this is just by way of background for you
18 to understand the nature of these reserve accounts.
19 There's also, of course, an insurance and tax reserve
20 account. That's not terribly unlike any, you know, home
21 mortgage where you have a tax reserve account.

22 Your Honor, I don't remember, I guess it was not on
23 the record, but maybe prior to the hearing, Mr. Young
24 made some reference to, you know, there being prior
25 holders of this note and everything went smoothly and

1 everything was great with them. And now, you know, DRV,
2 the current holder, the plaintiff in this case takes it
3 and there's all these issues that have come up. Well,
4 first of all, the previous holders only held the
5 property for a very short time. This was not -- they
6 weren't holding it for years on end. It was months as
7 opposed to years.

8 And, you know, Your Honor, at some point and I
9 believe this is all referenced in the affidavit of
10 Mr. Lithman, the first affidavit, there became some
11 concern about the property because of some tenancy
12 changes and some occupancy changes and DRV began
13 requesting a capital budget from the manager -- from
14 borrowers' manager. And they asked for a budget to say,
15 "look, we're concerned. You know, our collateral is all
16 we got to look to. We are concerned. We want a capital
17 budget. What you project, what you think the expenses
18 are going to be for the property for the next three
19 years." And I would include those capital expenditures
20 and rollover expenditures.

21 And then without getting into a lot of detail, Your
22 Honor, at some point, a capital expense and budget was
23 provided to DRV. And I believe, Your Honor, that is
24 attached as an exhibit to Mr. Lithman's affidavit which
25 you should have. Mr. Lithman's affidavit was filed

1 separately and also attached to the motion itself. And
2 if you have a copy of that in front of you. Do you have
3 that, Your Honor?

4 THE COURT: Yes, I do.

5 MR. HARRILL: Okay. And, Your Honor, I would point
6 out a couple of things in that -- that budget. This is
7 a budget presented to DRV by C.B. Richard Ellis that
8 they actually have a different name. Delane, I can't
9 remember the full name, but they now are in C.B. Richard
10 Ellis, CBRE here in Columbia. And they are the property
11 manager for the borrowers in this case, for the
12 defendants. And they submitted this capital budget
13 which you have attached to the affidavit to my client.

14 And if you will note, I will try to walk you through
15 just briefly, I'm not going to try to get you to
16 understand this entire thing. I'm not sure I understand
17 every bit of it. But the first page of that, Your
18 Honor, that says, "Fontaine Business Park Three-Year
19 Capital Expense Budget," do you see that?

20 THE COURT: Yes.

21 MR. HARRILL: All right. The following page -- if
22 you'll flip to the next page, it says, "Fontaine
23 Three-Year Capital Budget, 2011 Summary."

24 THE COURT: Yes.

25 MR. HARRILL: Okay. If you'll look down and it

1 lists January through December 2011. Do you have a
2 colored copy in front of you, Your Honor?

3 THE COURT: I have a colored copy.

4 MR. HARRILL: Excellent. Thank you. If you look
5 down to the blue numbers which are adjacent to the
6 reserve balance way down to the left.

7 THE COURT: Under rollover reserves.

8 MR. HARRILL: Under rollover reserves; correct. If
9 you look at those blue or purple numbers, whatever those
10 are, you will see CBRE actually went ahead and did the
11 homework for my client. And based upon what their
12 projections of expenses were for the rollover expenses,
13 they listed what they believed the running balance would
14 be in the reserve account. And as you'll see, the
15 reserve balance started in January of 2011, 310,000 and
16 reduced by December to \$32,000.

17 Similarly, if you look at the capital reserves, the
18 starting reserve balance based upon expected
19 expenditures from CBRE started at \$94,000 and by
20 December it had reduced to \$40,000.

21 Now, if you flip over three or four more pages,
22 you'll get to what is the 2012 summary page. It looks
23 just the same as the 2012 summary.

24 THE COURT: Yes, sir.

25 MR. HARRILL: In 2012 for the rollover account, the

1 beginning based upon anticipated expenses, January 12th,
2 the reserve balance starts out at negative \$6,930. And
3 as you track it along, based upon the expenses that the
4 borrowers' own agent is telling us they anticipate on
5 the property. The reserve accounts that are required to
6 be maintained continued to drop until at some point in
7 August of 2012, and September of 2012, and October, and
8 all the way through the end of the year, the balance
9 that they're projecting that would be in the reserve
10 account is negative \$900,000.

11 If you follow the same path under the capital
12 reserve account and the capital reserve balance for
13 2012, these are again CBRE's projections, borrowers'
14 projections. It starts out at 22,000 in January of
15 2012, and by the end of 2012, they're projecting a
16 reserve account balance of almost \$300,000 negative.

17 And, Your Honor, then if you flip over. Again, this
18 was a three-year proposed and projection submitted by
19 borrower to DRV. I'll just point out, I won't go
20 through it in great detail, but the 2013 summary that
21 was presented to us again shows the reserve balance for
22 the rollover account starting at \$883,000 negative. And
23 by the end of that year, it remains \$826,000 in arrears.

24 With regard to the capital reserve account, the
25 starting balance projected for 2013 in January is

1 \$290,000 negative and by December 13, 2000 -- excuse me.
2 December 2013, the defendant's own projection is that
3 the reserve balance for the capital reserve account will
4 be negative 300 and -- I'm trying to read that, 69,000?

5 THE COURT: Yes.

6 MR. HARRILL: Anyway, 369,000 in the hole.
7 Negative. So I think that's -- those issues are very
8 important, Your Honor, to understand the information
9 that was provided to my client.

10 As set forth in Mr. Lithman's affidavit, DRV then
11 using the projections and this capital budget provided
12 to it by borrower, at that point utilizing the clauses
13 set forth in section 3.5 -- 4 and 3.5 of the loan
14 agreement that you have in front of you felt that it was
15 appropriate to reassess the required monthly payments
16 into those reserve accounts.

17 The language specifically, Your Honor, in section
18 3.4, I'll just point out to you there, based on
19 reciprocal language, similar language. 3.4 in the, I
20 guess, third sentence right after the debt division of
21 capital reserve accounts.

22 THE COURT: Yes, sir.

23 MR. HARRILL: It says, "Upon 30 days of prior notice
24 to borrowers, lender may reassess the amount of the
25 monthly payment required under this section 3.4 from

1 time to time its reasonable discretion based upon its
2 then current underlying standards." And that's what it
3 did.

4 Now, it's my understanding that, you know, opposing
5 counsel and opposing party is going to somehow argue
6 that -- and they have repeatedly in written documents,
7 answers, pleadings, affidavits that DRV's actions were
8 capricious and arbitrary and bad faith and there's just
9 no way that's the case, Your Honor.

10 I mean, based upon the facts you have in front of
11 you right now, they received a capital budget from their
12 property manager saying this is what we anticipate. And
13 so they reasonably set a budget and set reserve payments
14 that would then make sure that those expected and
15 projected expenses would be met and covered. And I'll
16 grant you that that entailed and required significant
17 increases in those reserve account payments. They'll
18 get up and tell you it was 1,000 percent increase or
19 700 percent increase and that's true.

20 You know, we're not running or hiding from that.
21 We're not embarrassed about that at all. What we took
22 was their agent's projected numbers, converted those
23 into using simple math to say, if we start out with this
24 much in our account balance, in the reserves, and this
25 is how much they're telling us we're going to have to

1 spend by 2013, how much do we need to put in each month
2 to make sure we get there? How do we get from A to B?
3 And that's what we did and that's how it was sentenced.
4 So all of that is extremely important to understand the
5 crux of the dispute in this case.

6 Mr. Lithman's affidavit goes on to say that he then
7 had meetings and discussions with the borrowers and I
8 don't know if they had meetings with the borrowers or
9 just the initial borrower. Your Honor, this is what's
10 called a TIC transaction. What that really means is
11 Fontaine Management or Fontaine Business Park, LLC was
12 the original investor, the original borrower. It is
13 syndicated or sold off its rights to a number of other
14 investors. Those are all of what we refer to at times
15 as the TIC investors or the TIC borrowers in this case.

16 MRS. KELLY: T-I-C?

17 MR. HARRILL: Yes. It stands for "Tenant In
18 Common." T-I-C, TIC investors. And those are the
19 people that are represented by Mr. Player here today.
20 The initial borrower, Fontaine Business Park, LLC is
21 also directly affiliated with the management company
22 that runs the property and that's Fontaine Management,
23 LLC.

24 You know -- so, Your Honor, they have come in and
25 they've argued, you know, somehow that our actions were

1 unreasonable and all that. You know, I don't see how
2 that can possibly be the case. DRV then met with folks
3 and, again, I don't know and I don't want to get outside
4 of what's in the affidavit, but I know that there were
5 meetings at least with the syndicator, the initial
6 borrower, however you want to call it. That's the first
7 named defendant that Mr. Young represents. And, you
8 know, I think there was obviously some concern expressed
9 over the property. You know, the increase in these
10 payments. But it's also undisputed, Your Honor, that
11 the borrower made the increased and reassessed capital
12 reserve payments and the increased rollover reserve
13 account payments for the next four months. I mean, no
14 one disputes that.

15 And that, I think, went from September to December
16 of 2011. And then beginning in January of 2011 -- or
17 2012, borrower unilaterally stopped making the increased
18 reserve account payments. And, you know, just did so
19 without consent, without any -- without getting consent
20 or permission from DRV. DRV notified them that they
21 thought that was event of default and was concerned
22 about that. And at some point subsequently, sent a
23 letter notifying them of the default.

24 At some point then, you know, the parties and I'll
25 say I don't want to get into, you know, settlement

1 issues, but the parties continued to try to talk and
2 work with each other to try to figure out what to do
3 about the property. And in October of 2012, this is all
4 again undisputed, the borrower did not make the monthly
5 debt service payment that was required under the loan
6 documents.

7 Now, their position is that somehow they were
8 entitled to go back and get credit for the four months
9 of the additional reserve payments they made. If that
10 makes sense -- if I'm making sense on that. You know,
11 they made those additional, those increased reserve
12 account payments. Their position was, well, you should
13 just set those off, we're entitled to that. Well, first
14 of all, the loan documents say there's no entitlement to
15 settlement. And they agreed to that in the loan
16 documents.

17 And I think I have a section I can quote to Your
18 Honor. I'll look that up in a moment. But, I think
19 it's 1015 -- section 1015. It says that, you know,
20 borrowers are not entitled to setoff. Your Honor, can I
21 just double check that to be sure? I want to make sure
22 I point you to the right section.

23 THE COURT: Page 75.

24 MR. HARRILL: Yes. Section 1015 on page 75 of the
25 loan agreement provides each party will hereby waive the

1 right to any offset -- to offset any obligations to make
2 payments prior to the loan documents.

3 You know, and I understand there hasn't been
4 discovery in this case, although it has been opportunity
5 for affidavits and that sort of thing. There is no
6 documentation. There's nothing in writing. We've not
7 ever seen anything that would suggest -- and
8 Mr. Lithman's reply affidavit that we submitted today
9 states that he is not aware of and was never told orally
10 or in writing that those payments, those four payments
11 that were made and then voluntarily or unilaterally
12 reduced again. He was never told that those payments
13 were to be used as a prepayment for debt servicing or
14 would be setoff or should be applied in the future to
15 make debt service payments.

16 So, Your Honor, at this point, I want to recap. We
17 have in our view, a clear event of default when the
18 borrowers stopped making the increased capital reserve
19 and rollover reserve account payments. That was an
20 event of default under the loan documents. Several
21 months later while we were still -- the parties were
22 still talking and, you know, trying to work out things,
23 at that point then, there was a clear payment default
24 under the loan documents for the debt servicing. They
25 did not make the October payment and they intentionally

1 -- they said they intentionally did not do that. And
2 then after the facts, they wanted us to apply those
3 monies we were holding to the October payment.

4 You know, our position certainly is at that point
5 there is an event of default. We notified them of the
6 event of default and the payment and accelerated the
7 balance. So I don't want to confuse or take an
8 inconsistent position, I'm not. But the borrowers then
9 also made no payment in November. We understand at that
10 point we could put them on notice that the loan had been
11 accelerated. But under their theory, the loan was not
12 in default. They still failed to make the November 2012
13 payment. And I guess wanted us to offset or apply
14 monies that they agreed they wouldn't do or they
15 couldn't do again for payments they told us were for
16 something else.

17 So, Your Honor, based upon all of this, we notified
18 the borrowers they were in default, we had accelerated
19 the loan. We also called, you know, and exercised our
20 rights and remedies under the mortgage and under the
21 assignment of rents and leases. And one of those rights
22 is to revoke the license given to borrowers to collect
23 rents and leases going forward.

24 As Your Honor knows that typical language -- I got a
25 copy of the assignment of leases if you'd like to have

1 one.

2 THE COURT: Yes.

3 MR. HARRILL: I will hand that and the mortgage,
4 Your Honor. That's a copy of the mortgage and this is a
5 copy -- which has the assignment of leases in it. And
6 this is a copy of the assignment of rents and leases.

7 THE COURT: You need to speak up and make sure the
8 court reporter can hear you.

9 MR. HARRILL: I'm sorry. Can you hear me okay?

10 MRS. KELLY: I just did it as a bench conference.

11 MR. HARRILL: So, Your Honor, at that point, we --
12 DRV exercised its rights under the mortgage and the
13 assignment of rents. And as I was saying, you know, the
14 assignment of leases and rents has the varying typical
15 language and those type of commercial documents which
16 provides that there's an absolute assignment of the
17 rents and leases to DRV. So the borrowers have assigned
18 those off. They have vested with DRV.

19 However, as typical, the lender grants back to the
20 borrower a license to collect those and, you know, use
21 them for their own purposes until and unless there's an
22 event of default. And based upon the event of default,
23 we've communicated with them by letter and I've got the
24 default letter if Your Honor would like to see it, but
25 we communicated with them and I don't think there's any

1 dispute about what we communicated. That we have
2 revoked their license and that all rents needed to then
3 be either turned over to us or held by the onsite
4 property manager for our benefit. And it is our belief
5 that that has not occurred. That the borrower has
6 continued to use monies and disburse monies without
7 asking for our permission, without asking consent, and
8 perhaps even using monies for their own personal
9 benefit.

10 Your Honor, in the reply affidavit of Mr. Lithman,
11 do you have that with you?

12 THE COURT: Yes, sir.

13 MR. HARRILL: Okay. Attached as an exhibit and I'll
14 go through this what he testifies about it, it says in
15 his affidavit, but attached to his affidavit is a letter
16 from the counsel that represents the onsite property
17 manager, C.B. Richard Ellis, and that is Lanny Lambert
18 who's here at the Turner Padget in Columbia.
19 Mr. Lambert submitted to all parties involved, the DRV
20 and the borrowers, a copy of cash flow statements that
21 related to the rents at the property for the Fontaine
22 Business Park. And there is one particularly troubling
23 entry and if there are others, you know -- Your Honor, I
24 want to make one thing clear before I get to this, a
25 very important point. You know, we're not trying to

1 prevent, you know, despite the fact that these are our
2 rents, we're not trying to prevent utilities from
3 getting paid at the property or, you know, maintenance,
4 that's not our desire. Honestly, we are seeking
5 receivership so someone will do those things. But we do
6 take the position that these are our rents based upon
7 the assignment of rents and our exercise of our rights
8 and remedies under the assignment of rents.

9 But in the cash flow statement for December of 2012,
10 which is the last page of the attachment to
11 Mr. Lithman's reply affidavit. There is a section under
12 -- it's the second major heading, "Total
13 Non-Reimbursable Expense/General Administrative
14 Expense," Your Honor. And about five down, there's a
15 heading for "Legal Expense" and there's an expense and
16 apparent disbursement from C.B. Richard Ellis of
17 \$32,922.90 for legal expenses.

18 Now, I've inquired as to where those went and I've
19 not gotten a response. Mr. Player has responded and
20 said it actually didn't go to his clients or him, but
21 I've never heard whether it went to the Fontaine
22 Management or to Fontaine Business Park the syndicator
23 and the original borrower. And that is a great concern
24 to us. We don't know where else that would have been
25 going unless it was reimbursing those parties for

1 expenses incurred by, you know, through their attorneys.
2 And we're not trying to point finger at the attorney,
3 but if those parties have then directed C.B. Richard
4 Ellis to disburse monies to either Fontaine Management
5 or Fontaine Business Park I, we'll call it, then that's
6 completely improper and that's using DRV's rents to fund
7 this litigation against DRV. And that is very troubling
8 indeed. And, you know, is a telling fact as to why we
9 believe that a receiver is appropriate and necessary in
10 this case.

11 The fees are, you know, the rents and profits are
12 still being completely collected by borrower through its
13 agent or otherwise. We're not getting any of those
14 except they are -- they have begun making the debt
15 service payments again in December, they began making
16 the debt service payments. And we've accepted those and
17 applied those to the accelerated balance.

18 Oh, Your Honor, the -- one moment, Your Honor. I'm
19 sorry. Your Honor, it's my understanding they have not
20 been making the reserve payments for 2012 either. They
21 have been making the debt service payment, but they have
22 not been making increased reserve payments. They've
23 continued to make the one where they drop back to the
24 ones that they think's appropriate they want to pay
25 unilaterally without doing that for us.

1 MRS. KELLY: Without what? I'm sorry.

2 MR. HARRILL: Without conferring with us that
3 they're making those payments without our consent.

4 THE COURT: So basically they're making the same
5 payments that were before September of 2011?

6 MR. HARRILL: Correct. Before the reassessment.
7 They're making the payments that they were making prior
8 to the reassessment, prior to the capital budget being
9 submitted to DRV.

10 And, Your Honor, I also point out then the cash flow
11 statements that show significant management fees are
12 being paid out of the rents. And we don't know how much
13 of that is going to C.B. Richard Ellis and how much of
14 that is still going to Fontaine Management who was
15 essentially, you know, turned over all responsibilities
16 to manage the property of C.B. Richard Ellis. Our
17 concern is that there's still money coming directly out
18 of the property to the borrowers, you know, when we've
19 exercised our rights to collect all those rents.

20 And, Your Honor, they're not allowed to pay
21 management fees after event of default. That's in the
22 loan documents.

23 THE COURT: Not allowed to make management fees to
24 anyone or to ---

25 MR. HARRILL: To Fontaine Management. Your Honor,

1 I'd like to point out something that is -- in my view, I
2 don't know troubling -- troubling is not the right word.
3 But to me it seems indicative of why we are where we are
4 and the borrowers' attitude and approach to all this
5 which we think is just fundamentally flawed. And that
6 is contained in the affidavit that was submitted by Ms.
7 Matthews from borrowers. And I'll wait for Your Honor
8 to get a copy. Do you have that?

9 THE COURT: Yes, sir.

10 MR. HARRILL: It is on -- it's near the very back,
11 it's on -- I'm looking particularly at paragraphs 76 D
12 and E. Just let me know when you've got that.

13 THE COURT: I have it.

14 MR. HARRILL: Okay. Your Honor, essentially what
15 Ms. Matthews is saying here is that their theory in this
16 case is that we are -- we have violated the terms of our
17 agreement and breached the implied covenant of good
18 faith and fair dealing in this loan transaction. And
19 see, there's a litany of reasons why they say we've done
20 that. And I think as far as A, B, C, and D, we've
21 refuted those things, you know. We're sorry that there
22 were quantum increases in the reserve payments, but that
23 was based upon their own capital budget submitted to us.

24 But if you go to D and E, this to me is indicative
25 of their position in this case which is so incredibly

1 flawed. She is saying that somehow we have breached the
2 covenant of good faith and fair dealing by imposing
3 unreasonable reassessments and monthly payments to the
4 reserve accounts and imposing an exorbitant amount that
5 are rendered Fontaine's performance under the contract
6 and possible. And then this is the key part. Given the
7 rents and profits that the applicable real property is
8 reasonably expected to generate. The amount of profits
9 and rents the property is expected to generate has
10 absolutely nothing to do with what they should be paying
11 under the loan documents as agreed.

12 As an example, Your Honor. My brother is buying a
13 beach house. You know, we rent the house out. You
14 know, the market has been bad in the last number of
15 years and, frankly, the house needed some work and
16 upfit. You know, so the rentals declined. We couldn't
17 make our mortgage payments, you know, based upon just
18 the rents that we were generating. So guess what we had
19 to do? We had to put money into the property. We had
20 to pay out of our own pockets and we had to do some
21 upfitting. We had to do some things to fix the house up
22 and make it more attractive for rental and low and
23 behold, the rentals have picked up a little bit and
24 we're getting back on track. That is what it appears in
25 this case.

1 The borrower's either don't understand or are
2 unwilling to accept sometimes your investment doesn't
3 work out the way you want it to. And Ms. Matthews is
4 suggesting that we're unreasonable because we're asking
5 them to pay more than the rents and profits can generate
6 and cover. And that's just completely -- a completely
7 flawed analysis of how a commercial loan works on a
8 rental property like this.

9 And, you know -- so, Your Honor, they can't have
10 their cake and eat it, too. If they want to make a
11 business decision and maybe they have already that this
12 property isn't going to generate the rents and profits
13 that they hoped it would to be able to make the loan
14 service payments, meet the reserve payments that they
15 need to make and be able to attract new tenants and get
16 this property back up to full occupancy so that the
17 rents then do pay off all of the debt servicing.

18 You know, if they made that decision they're not
19 willing to put any of their own capital back into the
20 property, then they either need to let the bank take the
21 property or they need to bite the bullet and step up and
22 do the right thing and pay the reserve accounts where
23 they need to based upon their own projections and pay
24 the debt servicing. And they're in default at this
25 point. We're not waiving the defaults. We're entitled

1 to the rents and profits. We think the rents and
2 profits are being dissipated and we're not being able to
3 control what happens to them. We think some of those
4 monies are going to pay management fees. We know they
5 are. And we believe some of those are going to pay
6 legal expenses to fight against us. Now, we don't know
7 that, but that's -- you know, they can tell us
8 otherwise. They haven't yet.

9 So based upon those things, Your Honor, we think
10 that, you know, we're absolutely entitled to the
11 appointment of receiver of the property. Keeping in
12 mind, the receiver really maintains the status quo. I
13 mean, they suggested the receiver somehow would just
14 devastate them. I mean, the receiver answers to the
15 Court. The receiver is the Court's agent and will do
16 whatever the Court, you know, Your Honor's order tells
17 the receiver to do. In general speaking, make sure that
18 there is no question here. And, you know, allows for
19 there not to be these concerns and disagreements as to
20 where the rents are going, and where they should go, and
21 that sort of thing.

22 So, Your Honor, we would ask that you grant the
23 motion appointing the receiver and, you know, we will be
24 happy to argue the other motion afterwards, but we think
25 we're entitled to the receiver and ask that you grant

1 that.

2 THE COURT: Let me ask you this. Is it your
3 argument that the rents and profits that are -- that can
4 be collected on a monthly basis would be able to meet
5 the payments for the reserve account and to pay the
6 expenses?

7 MR. HARRILL: We don't think so at this point, Your
8 Honor.

9 THE COURT: But your request to have the receiver
10 appointed is just to make sure that those rents and
11 profits that are collected go to pay the expenses and
12 don't pay other things that are not permitted pursuant
13 to the loan documents?

14 MR. HARRILL: That's correct. Those rents go to pay
15 the loan payments first and the property maintenance, of
16 course. You know, we've got to keep the lights on, keep
17 the lawn mowed, keep the maintenance of the property.
18 But then also -- and everything else needs to go to the
19 lender.

20 THE COURT: Say that one more time.

21 MR. HARRILL: We're not trying -- in other words,
22 we're not trying to say every dime of the rent has to go
23 to the lender. We understand the property has to be
24 maintained.

25 THE COURT: Sure.

1 MR. HARRILL: That's one of the things the receiver
2 would do. But otherwise, all of the money left over
3 after that needs to go to the lender for debt servicing
4 and reserve accounts.

5 THE COURT: So, in other words, if a receiver is
6 appointed, then the receiver would collect all of the
7 funds and then pay out the expenses associated with the
8 maintenance of the property which may or may not include
9 the reserve portion, but at least the utilities and all
10 those other expenses that occur on a monthly basis with
11 property? And then anything that is remaining would go
12 to the lender to either cover the underlying debt or to
13 cover reserves?

14 MR. HARRILL: That's right. And, Your Honor, I
15 mean, just from a technical standpoint, I mean, the
16 expense of operating the property includes the debt
17 servicing. So to include that really it's all a part of
18 the same thing.

19 THE COURT: But in terms of if there's not enough
20 money to go around to cover everything.

21 MR. HARRILL: But we would rather the tenants have
22 their lights on than, you know, than I guess the lender
23 get an extra \$100 from the rents. But I understand,
24 yes, we consider the debt servicing and the reserve
25 payments all a part of the cost of operating property.

1 THE COURT: And looking at the reply affidavit, you
2 talked about the maintenance fees that you were
3 concerned about. Are those reflected in the cash flow
4 statement? Or, I mean, you pointed me to the legal
5 fees.

6 MR. HARRILL: You're referring to the ---

7 THE COURT: The management fees. I'm sorry.

8 MR. HARRILL: Yes. There are places for instance on
9 the December, the page one of two where it says,
10 "reimburse cam expenses."

11 THE COURT: Yes, sir.

12 MR. HARRILL: Down below there's management fees for
13 office property year-to-date 90,000 for that month, it's
14 \$81,00. They're also asset management fees and leasing
15 commissions which we understand go first to Fontaine
16 Management and then, you know, if they pay them back to
17 CBRE, they may pay some or all of those back. But those
18 are also management type fees.

19 I mean, one of the things, Your Honor, that concerns
20 us and I don't want to get speculative here, but it's,
21 you know, as I said, this is a TIC loan and arrangement.
22 And the initial syndicator, initial borrower in this
23 case has sold off all its interest, but one percent.
24 And so all these other investors are out there they
25 bought at a premium. And the initial borrower and

1 syndicator, though also work out a deal where it has an
2 entrenched management company that it takes money out of
3 the property. It continues to get fees out of the
4 property. And it takes fees out. I don't know what
5 service it provides and I'm not going to sit here and
6 tell you it doesn't provide any, but I don't know what
7 it provides because it seems to delegate all of its
8 responsibilities of C.B. Richard Ellis who's actually
9 the onsite management company.

10 So, you know, Mr. Young's client has a very small
11 ownership percentage, but it's very vested in this
12 because it's also got a management company that's
13 running the place and taking money for its management
14 services at the property. And that's part of the thing
15 that we want to stop.

16 And, in fact, I don't want to get on a long tangent
17 on this, Your Honor, but one of the remedies we've also
18 asserted is we've asked them pursuant to our rights
19 after event of default is to terminate the relationship
20 with Fontaine Management, LLC. They've claimed that's
21 somehow a breach of duty and all this. It's part of our
22 loan documents. It's part of our remedy. If it's not
23 an event of default then fine, I guess we can't do it.
24 But it's not a breach of fiduciary duties, it's not an
25 interference with contract. But, you know, we're

1 concerned about their continuing involvement in this
2 matter. You know, which is how they make their money.
3 They've already sold off and made a lot of money on this
4 and now they still have the manager in place that's
5 taking money out of the property after it's basically
6 delegated all of its authority and management authority
7 to C.B. Richard Ellis.

8 And that's the type stuff we want the receiver to
9 get a hold of and be able to control and prevent things
10 like that to the extent they occur. That's all I have
11 on that motion, Your Honor. I will be happy to address
12 the other motion later.

13 THE COURT: Thank you.

14 MR. HARRILL: Thank you, Your Honor.

15 THE COURT: Mr. Young, somehow another I think
16 you're going to paint a different picture.

17 MR. YOUNG: It's a big surprise to you, I suspect,
18 Your Honor. It's a pleasure to appear before you. And
19 just up front, I guess, I refer Your Honor to our
20 proposed findings of fact and conclusions of law which
21 inevitably articulate much better than I can probably
22 articulate in person what the grounds and standing what
23 our arguments are.

24 With that being said, let me point out a few things
25 and, Your Honor, is correct. We take significant issue

1 with most of the things that have been reported. Let me
2 start off with kind of a bullet point because I've taken
3 notes while Mr. Harrill was making his argument on
4 behalf of his client.

5 The first thing he started out with, Your Honor, is
6 that this is a nonrecourse loan. No harm, no foul. The
7 complaint itself makes reference to the recourse
8 provisions. And, in fact, there have been threats that
9 the recourse provisions have been triggered. We would
10 hope, Your Honor, such statements would not cloud what
11 we think is going on here. They've threatened it and
12 they're going after it and there's no doubt about that.
13 So to make that argument rather than shoot, seems a
14 little -- well, it's quite interesting if not
15 incredulous to me.

16 Another bullet point. Your Honor, there has been no
17 event of default here. These reassessments which I'll
18 get into in great detail in just a few moments were
19 unreasonable. Not only were they unreasonable, but we
20 asked them pursuant to our rights under law and under
21 the loan agreement to substantiate them and to provide
22 us the grounds upon which the underlying principles
23 which the loan documents themselves say they must do, we
24 were ignored.

25 The client asked them on numerous occasions. My law

1 partner asked them in a letter to please substantiate.
2 They have the duty to substantiate. Under the loan
3 documents they have the duty to substantiate. Under the
4 covenant of good faith and fair dealing they have the
5 duty to substantiate. They ignored those requests.
6 We've not heard a word about that. That's why we
7 started out like paying those exorbitant amounts which
8 I'll get into in a minute while they're not proper and
9 why they weren't based frankly in reality. Because we
10 wanted to pay in good faith.

11 This has been a loan that had been on the books for
12 more than four years, there had been two previous
13 holders, no problems with the original lender, all went
14 well, mutually benefits were being in relationship, no
15 problems with the second. Same property. Same capital
16 expenses. Same rollover. Everything was fine. In
17 fact, it started out with DRV to be fine. But at some
18 point, obviously it devolved. And it chiefly revolves
19 around these reassessments.

20 Before I get into that, I would point out that as
21 we've pointed out in our proposed findings of fact and
22 conclusions of law, a statement I think pervades this
23 entire proceeding when it comes to the appointment of
24 receiver. And this is from the Supreme Court of South
25 Carolina in the Midland's case and I quote, "The

1 appointment of a receiver is a drastic remedy." It's a
2 drastic remedy. And should be granted only with
3 reluctance and caution. If there's any doubt, the
4 receiver should not be appointed. I think that's what
5 the Supreme Court is saying.

6 And with all due respect, there's nothing that has
7 been presented in either the pleadings, in the
8 affidavits, or frankly in argument today that
9 respectfully reaches that extraordinarily high burn.
10 Particularly at this juncture in the litigation which
11 obviously there are significant issues that need to be
12 resolved through discovery, through a jury trial, et
13 cetera, et cetera.

14 Let me now address those reassessments. Your Honor,
15 if you'll turn to page 24 of the loan agreement, please.
16 And I'm probably going to repeat some of the things that
17 pristine counsel referred to. But I just want to make
18 sure that we're all clear. In 3.4 -- paragraph 3.4,
19 that makes reference to capital expense reserves. And
20 you'll see there, Your Honor, the first sentence,
21 "Borrower shall pay the lender on the date hereof the
22 amount of \$5,249 and on each payment date hereafter the
23 amount equal to \$5,249."

24 Since the organization of this loan, that amount has
25 been paid every single month. Now there were four

1 months where we paid more than 1,000 percent of that in
2 good faith trying to get a basis upon which these
3 reassessments were made. When we did not -- when we
4 were not provided with that basis, we went back and
5 commenced or recommenced to pay the amount that we
6 agreed to pay.

7 THE COURT: Before you go on, Mr. Young, what was
8 the amount that you actually paid those four months or
9 ballpark.

10 MR. YOUNG: It went -- for the capital reserves,
11 Your Honor, it was suppose to be 5,200, and -- excuse
12 me, \$49 and it jumped to \$54,476.34. That's a monthly
13 payment. That's a one time increase of 1,037 percent.
14 Now, if that's not unreasonable, I guess I'm in the
15 wrong business.

16 THE COURT: And then with the roll -- I'm assuming
17 you'll get to the rollover?

18 MR. YOUNG: I will. And I point out, Your Honor,
19 again, reading further here in the loan agreement ---

20 THE COURT: Yes, sir.

21 MR. YOUNG: -- paragraph 3.4, the next sentence --
22 excuse me, the third sentence says, "Upon 30 days notice
23 to borrowers, lender may reassess the amount of the
24 monthly payment required under this section 3.4 from
25 time to time in its reasonable discretion based upon its

1 then current underwriting standards." They have to base
2 it upon something. They have to substantiate that. And
3 I'll get to the point.

4 In addition to this being unreasonable on its face
5 of 1,037 percent -- and I have a home mortgage. I pay
6 property -- property tax and insurance reserves. I
7 think most of us do that have a mortgage. But if I were
8 to get a 1,037 percent increase from one month to the
9 next, I would expect to be told why. We asked and were
10 never told and today have not been told. We've asked
11 for the underwriting statements upon -- the standards
12 upon which they were grounded. They've not been
13 provided. At some point, I'd like to, you know, ask
14 about those and look those over. Because I'm not aware
15 of any underwriting standards that allows such an
16 exorbitant increase without substantiation.

17 Further, Your Honor, further down -- let's see. It
18 would be 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 lines from the
19 bottom. I apologize, it's a long paragraph. It's a
20 sentence starting with "lender."

21 THE COURT: Yes, sir.

22 MR. YOUNG: Says, "Lender shall deposit the funds in
23 the capital reserve account as received in an interest
24 bearing account which meets the standards for custodial
25 accounts as required by the lenders from time to time."

1 Further, in the ultimate sentence starting with the word
2 "all interest." It states, "All interest earned on the
3 funds in the capital reserve account shall be added to
4 and become part of such funds and shall be for the
5 benefit of the borrower." These are custodial accounts.
6 It's not their money. It's these owner's money. It's
7 my client's money. That's why in good faith we paid
8 over \$736,000 in excess because it went into our
9 account. I'll grant you they were holding it, but it's
10 these owner's money. It's a custodial account. They
11 had to put it in an interest bearing account and they
12 had to keep tract of it and provide us how it was being
13 used. That never -- on these loan documents and under
14 the law frankly has it ever been a question as to whose
15 money that is.

16 I'm not quite sure that the plaintiff understands
17 what the nature of the custodial account is. If you're
18 holding a custodial account for someone, you have a
19 fiduciary duty. That's a duty -- that's probably about
20 as high as the burden we're talking about today in
21 appointing a receiver. And when you don't follow those
22 fiduciary obligations, those fiduciary duties, then
23 consequences result particularly if you're not operating
24 with reasonable discretion or substantiating upon the
25 underwriting principles that you are now saying these

1 1,037 percent increases are now merited.

2 Rollover reserves is the next paragraph, Your Honor.
3 As you'll see in the first sentence there, subparagraph
4 A at origination of the loan, our client and the owners
5 divided \$750,000. After three years, they were then
6 required to pay the sum on a monthly basis of
7 \$21,086.50. The rollover reserve requires -- they based
8 it as a four, it cannot go below \$250,000. And as we
9 mentioned back in the hallway when we were discussing in
10 the jury room, Your Honor, I think there's no dispute as
11 to, you know, the language of the documents. There's
12 obviously a dispute as to what it means.

13 I think there's also no dispute that until recently
14 when we were informed that the reserve accounts were
15 swept to apply against the accelerated debt, the money
16 of these owners was applied to go against accelerated
17 debt in the face of clearly a disputed question event of
18 default there's always been the money there. There's
19 always been the \$250,000. They have never missed a
20 payment. That money is used for approved tenant.

21 If we go to the next page, approved leasing
22 expenses. Approved leasing expenses as Mr. Harrill
23 indicated typically are commissions, build outs for new
24 tenants, things of that nature. Renewals. And,
25 frankly, Your Honor, as we sit here today, our client

1 has prospects for four new leases. And it can't enter
2 into those leases because the money that's suppose to be
3 used pursuant to the loan agreement has been taken from
4 them. This action is not only causing a great amount of
5 stress for our client and for the owners, Mr. Player's
6 clients, but it's going to put them out of business.

7 Let's now get to why we believe and we believe Your
8 Honor will agree with us -- let me go back. The
9 rollover increase, I don't think I ever told you, it
10 started at 21,000, that amount has always been paid.
11 The increase that they requested was to go to
12 \$159,472.91. From one month to the next. For four or
13 five years we're paying \$21,000, we've already put
14 \$750,000 in there, we've met the requirements of the
15 four, but from one month to the next, we're asked to go
16 from \$21,000 to almost \$160,000.

17 THE COURT: Before you move on, let me just recap.
18 As I understand, there's an initial deposit of \$750,000,
19 and that after the third year then there was an -- after
20 the initial deposit of 750, there were no rollover
21 reserves required to be made until the third year?

22 MR. YOUNG: That is correct. And I apologize if I
23 misspoke. That's correct.

24 THE COURT: That's okay. And it was 21,000 plus per
25 month?

1 MR. YOUNG: That's right.

2 THE COURT: But at all times there had to be a
3 balance maintained of \$250,000 in the account?

4 MR. YOUNG: That's correct.

5 THE COURT: If according to the terms, after the
6 fourth year, any of the reserves fell to less than 250,
7 then there were requirements to catch up?

8 MR. YOUNG: Replenish.

9 THE COURT: Replenish the 250 in addition to the 21?

10 MR. YOUNG: That's correct. And, Your Honor, it's
11 not even gotten close to the 250.

12 THE COURT: I just want to make sure I understand.
13 And I assume that's one of the things you're claiming is
14 that it never got below -- it never got down to 250 or
15 below?

16 MR. YOUNG: That's exactly right. And we're also
17 claiming that we've never missed a payment -- a payment
18 as agreed and that we have made exorbitant -- extra
19 payments to the tune of about \$736,000 that were never
20 substantiated, never supported. And since they never
21 supported -- substantiated those, we went back to the
22 payment that we had agreed to. And have continuously
23 made those and I don't think there is any argument that
24 we never missed those payments.

25 Now, that gets us to what may be if not the biggest

1 crux in the case, certainly one of them.

2 THE COURT: I'm sorry.

3 MR. YOUNG: Yes.

4 THE COURT: Based upon what you just said then, if I
5 understand what you've told me, is that based upon the
6 arguments that have been made here, for four months the
7 increased payments were made. After those four months,
8 the defendants returned to the original payments that
9 they were making?

10 MR. YOUNG: That's correct.

11 THE COURT: Either the 5,000 plus on the capital and
12 the 21?

13 MR. YOUNG: That's right.

14 THE COURT: And the event that the plaintiff says
15 caused the default was not the failure to make those
16 reserve payments, it was the other debt service, the
17 underlying principle?

18 MR. YOUNG: I think and I'll certainly defer to the
19 complaint of Mr. Harrill, I think they were actually
20 claiming two defaults. They're claiming --

21 THE COURT: I understand that, but ---

22 MR. YOUNG: -- lack of reassessment and then lack of
23 payment for October and November.

24 THE COURT: Right. And so the regular -- what I
25 call the regular payment for October and November, the

1 plaintiff says was based upon your request of a credit
2 against --

3 MR. YOUNG: Exactly.

4 THE COURT: -- the four months of high payments that
5 you made?

6 MR. YOUNG: That is correct.

7 THE COURT: So it wasn't that you didn't make the
8 reserve payments, you didn't make the regular payments
9 for two months because you were seeking to get the
10 credit for the overages because you claim they were ---

11 MR. YOUNG: Exactly. And with all due respect for
12 the record, we obviously claim that there's not been any
13 payments missed.

14 THE COURT: I understand. I understand. I just
15 wanted to make sure I understood what was being paid and
16 what was missed and I know that you all will fill me in
17 on the arguments as to why.

18 MR. YOUNG: Fair enough. Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. YOUNG: Now, that takes us to the document that
21 is attached to Mr. Lithman's affidavit. At the top it
22 says, Fontaine's Business Park Three-Year Capital
23 Expense Budget Overdue." That's the first page. I
24 guess it's actually the second page. The first page is
25 an attachment to an email. Now, I don't think

1 Mr. Harrill did this purposefully, but throughout his
2 argument I noticed and I did a little count, several
3 times where he said information was provided by
4 borrower. That's not true. This information was not
5 provided by any of the borrowers. This information was
6 provided by CBRE which is the onsite manager.

7 It's my understanding and the record will reflect
8 that those that Mr. Lithman requested on many occasions
9 this three-year capital expense budget. And I use the
10 term "budget" a little bit loosely, Your Honor, I would
11 prefer and frankly think this is more of a projection.
12 I would point out the fact, Your Honor, a few facts in
13 this. First, this projection done by CBRE assumes
14 100 percent occupancy. The average occupancy rate for
15 this type of property in Columbia currently is
16 64 percent, Your Honor. This assumes 100 percent
17 occupancy. It assumes 100 percent renewals.

18 Also, and again, I'm not a math major, I'm not an
19 accounting expert, but it seems to me currently the
20 occupancy rate is just under 70 percent. It seems to me
21 that if you're going to have a budget, budgets not only
22 have expenses, but budgets have revenue. What's coming
23 in and what's going out. This says nothing is coming
24 in. This is based on an assumption, 100 percent
25 occupancy, but retribution for revenue. I mean, in

1 addition to talking about wanting a 30 percent increase
2 in occupancy, they're saying everyone is going to stay.
3 People don't necessarily stay. And they're not making
4 any attribution for all its new rentals.

5 Further, in addition to assuming 100 percent
6 occupancy not attributing anything to revenue as is
7 indicated in Ms. -- or excuse me, Ms. Matthews'
8 affidavit, 95 percent of this stuff never happened.
9 2012, Your Honor, \$65,000 site improvements. You look
10 at the note there, cost to add parking at Fontaine IV,
11 Fontaine IV is a vacant building, Your Honor. It's been
12 vacant for a few years now. This projection includes a
13 \$65,000 payment to improve a parking lot for a vacant
14 building. There's no -- there's no attribution -- and
15 at the time that this projection and, again, I'm going
16 to call it "projection" rather than a "budget," there
17 were no major capital projects that had been authorized
18 and none were anticipated.

19 In fact, CBRE was never even told what this was for.
20 They didn't know that they were going to take these
21 numbers and extrapolate those out so that there could be
22 a 1,037 percent increase in capital reserves and a
23 756 percent increase in rollover reserves. We
24 understand and frankly we would have loved it if all
25 this came to pass, but it didn't. So how can you say

1 there's a breach, there's an event of default when the
2 basis you're using is flawed.

3 And we gave them the opportunity to explain it.
4 They called on numerous occasions, their counsel sent
5 them a letter pointing all this stuff out, and they
6 ignored us. They ignored it. They declared an event of
7 default, accelerated the debt, swept \$1,400,000 of these
8 people's money to apply against accelerated debt that
9 was wrongfully accelerated. These are custodial
10 accounts, Your Honor. They have fiduciary duties. If
11 you're not going to explain yourself, at least
12 understand that with a reserve especially when those
13 reserves are swept after we filed our counterclaims.

14 They brought this matter to the Court seeking
15 adjudication of this Court, and we filed a counterclaim
16 on December 3rd, on December 6th, we get a letter from
17 counsel for DRV saying, "oh, yes, by the way, the
18 \$1,400,000 of your money has been now applied against
19 this accelerated debt." They knew we disagreed. They
20 had the counterclaims in their hands when they swept
21 that money.

22 They then also sent letters as Mr. Harrill indicated
23 purporting to revoke licenses telling us to fire our
24 onsite manager, all of these things when they have not
25 even explained or substantiated pursuant to their own

1 documents. These exorbitant reassessments. And, again,
2 it's not rocket science. I have a fourth grader who can
3 see that from going from 5,000 to 54,000 and 21,000 to
4 150,000,000, that's not commercially reasonable. That's
5 not done in reasonable discretion. Especially when 95
6 percent of the stuff isn't even done. There were no
7 tenant improvements to be done. We didn't need to
8 repave a parking lot for a vacant building.

9 That's why in October and November, Your Honor,
10 after months and months and months of refusals to
11 acknowledge or to substantiate or to explain these
12 exorbitant increases which we pointed out were based on
13 nothing, were based on flawed analysis and a rent proper
14 when we had \$736,000 taken out of the accounts, we asked
15 them pursuant to law and sent them a letter saying, you
16 know, debt service can now -- should be taken from that
17 money that you're holding illegally.

18 You will note, Your Honor -- see if I can find it.
19 On page 24. Let's see. What I'm looking for, I may get
20 my esteemed colleague to help me out. Oh, here we go.
21 I apologize. It's on page 25. It would be the second
22 line, Your Honor, first -- well, second full sentence
23 starting with "if lender." Says, "If lender determines
24 in its reasonable judgements with the funds in the
25 rollover reserve account will be insufficient to pay or.

1 in excess of amounts due or become due for improving"

2 ---

3 MRS. KELLY: Sir, when you're reading, you have to
4 read a little bit slower.

5 MR. YOUNG: I apologize. I'm so sorry. I'll read
6 again. "If lender determines in its reasonable
7 judgement that the funds in the rollover reserve account
8 will be insufficient to pay or in excess of the amounts
9 due to become due for approving these expenses. Lender
10 may increase" -- and I want to point out is this
11 parenthetical. "Or decrease the monthly contribution
12 required to be made by borrowers to the rollover reserve
13 account." We asked them to decrease. They wouldn't
14 substantiate. They wouldn't provide us the underwriting
15 guidelines, so my partner sent them a letter saying,
16 "Pursuant to this provision, we request you decrease
17 these amounts and that you apply the debt service
18 payments for October/November against this \$736,000 that
19 you shouldn't have because you never substantiated it."

20 So pursuant to these loan documents and applicable
21 law particularly considering these are fiduciary duties,
22 these are custodial accounts, such a request was proper.

23 Based on all of these things, Your Honor, you're not
24 surprised to hear me say that my clients and I know
25 Mr. Player who will speak here shortly will say for his

1 clients, there has been no default. Through any default
2 or any breach, it's been by them. And that's the
3 essence of our counterclaims. We have a operating
4 business here. We have people who have invested their
5 retirement funds and otherwise and this concern and due
6 to these incredibly flawed, unreasonable, and yes,
7 capricious reassessments, it's all set to go up in
8 smoke.

9 Now, they want to say well, it's history of
10 property. You know, you win some, you lose some. All
11 they've got is \$500,000 invested, no big deal. It is a
12 big deal. Particularly even the actions they're taking
13 are improper and not substantiated pursuant to law.

14 I guess in closing and then I'll defer to
15 Mr. Player. I would just repeat what the Supreme Court
16 of South Carolina has said about appointment of
17 receivers. It's a drastic remedy and should be granted
18 only with reluctance and caution. With all due respect,
19 Your Honor, this one is not even close in our opinion.
20 And we would respectfully point out there are
21 counterclaims to be litigated, there are other things to
22 be resolved, and at this point to appoint a receiver
23 without a breach and under these circumstances would be
24 improper under the law. Thank you.

25 THE COURT: Mr. Young, before you have a seat, just

1 briefly go over with me again your discussion about the
2 custodial accounts.

3 MR. YOUNG: Yes, ma'am.

4 THE COURT: And the fiduciary relationship. As I
5 understand it, the reserve accounts and the rollover
6 accounts would be funds that would be available to the
7 defendants to be able to use for the property either to
8 upfit it for tenant or for other capital expenses and
9 repairs that would need to be made. That the money --
10 the monthly monies would be paid to the plaintiff, but
11 they will be placed into an account?

12 MR. YOUNG: Custodial account. Right.

13 THE COURT: Whether it's the reserve account -- or
14 the capital account or whether it's the rollover
15 account?

16 MR. YOUNG: That's correct.

17 THE COURT: And so you're claiming that because your
18 clients sent the money and the monies were to be held in
19 those accounts that for your clients' use and for the
20 benefit of the tenants of the property, that the
21 plaintiff's owed a fiduciary duty in how they handled
22 those accounts?

23 MR. YOUNG: Exactly. That is what we're claiming,
24 Your Honor.

25 THE COURT: Okay.

1 MR. YOUNG: Thank you.

2 THE COURT: Thank you. I just wanted to make sure I
3 understood it. Thank you.

4 MR. YOUNG: Appreciate it.

5 THE COURT: Mr. Player.

6 MR. PLAYER: Your Honor, I've worked with Brent for
7 several years. He's a really nice guy. Sometimes just
8 a little too polite. In this situation, I think he's
9 being a little too polite. DRV is a predator and they
10 are preying on my clients. Mr. Harrill points out that
11 this is a nonrecourse loan. He says they can just walk
12 away. But you have to look at the scheme that was put
13 in place by DRV. Okay. It's not a budget. There's no
14 income in these numbers. If CBRE were to get up here
15 and testify, they would tell you that those numbers are
16 not realistic for the determination of the capital
17 expenditure budget over a three-year time period.

18 The numbers that they estimated especially for a
19 tenant build out are way on the high side. They're
20 conservative to a fault that basically it never cost
21 more than what they bid in the numbers they put in that
22 budget. More importantly, those numbers were
23 unrealistic at the time that they were made and they did
24 not exist. There was no reasonable basis in rationality
25 for DRV to expect that money to be paid at the time that

1 they said we were in default. Okay. And I'll go
2 through those numbers specifically.

3 But more importantly, what happened is DRV buys the
4 loan. They demand this three-year budget, and this
5 three-year budget is to have no income in it. It is to
6 assume that in the worst market since the great
7 depression that a Class B suburban property in Columbia,
8 South Carolina is going to reach 100 percent tenancy and
9 that they get absolutely no income. They're going to
10 pay \$1,400,000 to put new tenants in the building, but
11 get no money for it.

12 So obviously were running, you know, a shelter for
13 -- except for Columbia Corporation since we're not
14 getting any money. They use this to jump the reserve
15 accounts 1,000 percent. We were paying less than 30 a
16 month, now we have to pay 150. So they snookered us to
17 do that for four months. Why? Because if they
18 manufacturer a default as they have before he gets that
19 money, he can't get our cash. If we have cash, it's
20 held with the manager which is where this money came
21 from, and reserve accounts with our management company,
22 they can't touch it because it's nonrecourse.

23 Once he manufacturers the reserve entries of
24 1200 percent and uses the contract to pressure us to put
25 that into place where he can snatch it, then he

1 manufactures the default so he can take the property and
2 take 1,400,000 of our cash which he could not do if we
3 were given the option to do what Mr. Harrill presented
4 which is just walk away. That wasn't the option.
5 That's not what happened. We paid \$750,000 in good
6 faith to try and save this property. We did exactly
7 what Mr. Harrill said we should do. We paid money to
8 try and save this property. And what do they do? They
9 still say even after those numbers cannot be justified,
10 were not justified, cannot be justified in any universe
11 that I'm aware of, they do not even entertain the
12 possibility of lowering these ridiculous, unattainable
13 reserve payments on a monthly basis. Because they're
14 going to put pressure, put pressure until we break,
15 snatch the property, and snatch our \$1,400,000 which is
16 exactly what they've done.

17 He called this a "rainy day fund." This is an
18 "Armageddon fund." This is -- we want enough money in
19 this reserve account so the lender has zero risk
20 forever. If there's anything that's got to be paid out,
21 I want that money in reserve. I'm not going to give you
22 any credit for what would be the income that would come
23 from putting a new tenant in there.

24 But let's go back and look at the numbers that this
25 budget is based on. In 2011, they had \$342,000 budgeted

1 -- budgeted, I use that word loosely for new tenants.
2 There were no new tenants in 2011. These were for two
3 tenant build outs in suites 120 and 300. That didn't
4 happen. So they're already -- take 340 off the top.
5 They doubled the actual cost of HVAC replacement, the
6 numbers that were provided to them show that we weren't
7 paying \$6,000 a unit, we're paying \$3,000 a unit.

8 The affidavits supplied by Paula Matthews showed us
9 how they tried to screw us on the insurance. The
10 insurance company that issued the bill said, look, the
11 most you're going to have to pay is a little over three.
12 DRV said, no, you're going to pay us five. You're going
13 to pay us 60 percent markup. Even though the insurance
14 company that issued the bill to us said they didn't have
15 to.

16 So they are not looking into protecting themselves,
17 they're looking into trying get to our cash in a place
18 where they can snatch it.

19 THE COURT: Let me can you this. If it appears that
20 the budget that's attached came from CBRE, is there
21 information or documentation that explains exactly how
22 the figures were prepared?

23 MR. PLAYER: No. We've asked for that for a year
24 and a half, your Honor, and we don't get it.

25 THE COURT: Well, would that not be from CBRE

1 because they prepared it?

2 MR. PLAYER: And CBRE didn't prepare this for an
3 expenditure or an analysis for in raising the
4 assessments number one; and number two, I don't want you
5 to get the idea that CBRE is some innocent third party
6 bystander. Okay. CBRE --

7 THE COURT: Well ---

8 MR. PLAYER: -- I mean, DRV has six properties in
9 the State of South Carolina in which they have interest..
10 Okay. They own five and then they have ours where they
11 have the loan.. Guess how many CBRE Columbia manages?
12 Four. So we're not talking about an independent party
13 that's looking out for my clients, they're looking out
14 for their commissions on four properties they have for
15 DRV.

16 THE COURT: And what I'm asking you is if CBRE
17 prepared the documents and they were asked to prepare
18 the document even though you may not have information
19 from DRV as to what was requested if they're your onsite
20 manager, would you not be able to get information from
21 them as to what was requested and how it was prepared?
22 From CBRE?

23 MR. PLAYER: I don't know that that information has
24 been obtained other than CBRE told us they had no idea
25 what DRV wanted the information for and have no idea

1 what they were planning on using it for. They were told
2 to assume 100 percent occupancy and tell us how much
3 that would cost. Not create a budget, tell us how much
4 it would cost to get this place to 100 percent occupancy
5 within three years.

6 THE COURT: And is there -- and as I stated, is
7 there documentation that says that?

8 MR. PLAYER: No. Even though it's been requested.
9 Your Honor, in 2012, they had budgeted -- lord, about
10 \$1,100,000 in new tenants. They're happy. And those
11 new tenants were suppose to obtain their properties
12 within Fontaine by August of 2012. And I guess an
13 argument that could be made as well, you know, when you
14 get a new tenant you're going to have to do a build out.
15 There's going to be some cost there. The first counter
16 is, yes, but we're also getting the income; and number
17 two, these numbers are just out of sight.

18 A perfect example is the amount that was budgeted
19 for the renewal of Limestone College. In that budget,
20 it's on building two in the month of April 2012, they
21 budgeted \$185,122 for tenant improvements on the license
22 renewal. Do you know how much was paid? Zero. They
23 paid \$25,000 in a lease convention and that's it. So
24 that money has to come off the top. There's no way that
25 they can claim that that's money that needs to be in the

1 reserve account. Because the license has been -- I
2 mean, the lease has been renewed, the company is there,
3 and there was no cost in an upfit. So there's \$160,000,
4 hard proof that money shouldn't be in the budget. Never
5 considered, they didn't even try to consider that in
6 some type of reduction of what should be paid in the
7 reserve account. They said, pay us the 1200 percent
8 increase or you're in default.

9 THE COURT: Let me ask you this, are there
10 provisions that require how much would be escrowed for
11 improvements for new tenants? Is it based upon square
12 foot? Is there a cost per square foot? Or is it
13 pursuant to each particular tenant and what they need to
14 have done? How is that determined?

15 MR. PLAYER: At the beginning of every year, a
16 budget is done by the onset manager in cooperation with
17 Fontaine Business Park Management or Fontaine
18 Management. And they have what they think to be a
19 realistic projection of what the cost and income and the
20 rental percentages of lease occupancy percentages to be
21 for the year. Those are done for purposes of figuring
22 out if you need a cash call from the investors. You
23 know, the one thing that I think is in the affidavits is
24 nobody that we've talked to, this has never happened
25 before. You know, it has to be reasonable. These

1 people have worked in the commercial real estate
2 business for 30 years and they've never had somebody
3 come forward and say, well, tell us how much it's going
4 to cost to be at 100 percent occupancy, but you can't
5 have any credit for an income. It's just -- they didn't
6 know what they were going to do with it because it's
7 never happened before. So that's the situation where we
8 don't have a whole lot of answers because, you know,
9 nobody saw this coming. Nobody else has every done
10 this. And that's why to me this is clear proof that
11 they're trying to take this property from the owners.

12 And as it was pointed out by Mr. Harrill,
13 Ms. Matthews runs the property for Fontaine Management.
14 These people are the owners. These people have put
15 their life savings in Fontaine Business Park and they
16 want to snatch it from them. They've already taken
17 \$1,400,000 from them under the auspices of accelerating
18 the debt after they increased the reserve requirements
19 by 1200 percent. Those are the people that are going to
20 suffer. This is not about the corporation from
21 California and a corporation from Maryland, it's about
22 the retirees whose entire life savings are tied up in
23 this property and are at risk and are trying to be
24 stolen by DRV.

25 Cooling towers. I think that was listed at \$270,000

1 or 257 -- no, the roof replacement. I apologize.
2 \$257,000 on building two. Never happened. No
3 complaints. No need for any immediate roof replacement
4 on building two.

5 The -- like I said, they've got the build out for
6 building five which is vacant and been vacant since
7 2005. Brick went out \$65,000 for a parking lot. Of
8 their \$2,400,000 budget that they say we have to put in
9 reserves, 415,000 of that is for renovating building
10 five.

11 And to go back to your question, Your Honor, in what
12 typically happens is you have a tenant who is interested
13 in a space. And it's all in negotiation. If they want
14 to rent a space for three years and they don't have
15 great credit, you're not going to pay \$25 a square foot
16 to renovate the space because you don't make a profit.
17 If they want to rent it for ten years and it's a
18 national company that you know is not going to be
19 insolvent, then you're willing to put more money out
20 there on the build out. It depends on who the tenant
21 is, what their needs are, and what you're getting.

22 Every single lease has to be analyzed from the basis
23 of what's going to make money. That's not what was done.
24 in this budget. This budget is, worse case scenario,
25 how much would you have to pay to put somebody in that

1 space? Because the numbers are 25 and 26 feet above --
2 \$26 a square foot. That's insane. They don't pay that
3 at Meridian. And this is in the Fontaine Business Park.

4 Now, is that possible? If State Farm wanted to rent
5 10,000 square feet, would you be willing to put that
6 kind of money out there? Yeah. But you're not going to
7 rent 50,000 square feet to people like State Farm or IBM
8 or whoever especially not in this market. That is
9 unrealistic. But they want us to pay it without giving
10 any consideration for the cash that would come in if we
11 were able to land somebody for that. They were trying
12 to manufacture. They were trying to fabricate a breach.
13 And that's what they did. But it pumped up the reserves
14 so they could snatch it away because they can't come
15 after us personally. They can't get any cash reserves
16 we held anywhere else or any of our other property, so
17 they have to snooker us into putting it some place where
18 they can get it and then manufacture the default so they
19 can take the property and the cash at the same time.

20 The budget he keeps saying is very important. I
21 agree. All you have to know when you go through those
22 numbers and I didn't get the pretty colors and all that
23 stuff, if you look at the monthly breakdown, you're
24 going to see -- that it's dark on my stuff, every one of
25 these numbers, it says, "new lease," didn't happen. And

1 they knew that. Every one of these new leases, I think
2 there might be a couple in 2013, but those did not
3 happen. That money was not required and those costs
4 were not incurred in 2012. They had not been incurred.
5 They had not been -- they had not come into existence.
6 And, quite frankly, we don't have any real prospects
7 except for, I think it's maybe suite 120 that we're
8 trying to get in there right now. Any prospects to rent
9 all this space.

10 So if they want us to pay to upfit a space for a
11 tenant that we don't have and we don't even know exists
12 and they may never exist. That's not reasonable and it
13 certainly is not calculated by any underwriting
14 standards that, you know, I'm aware of and that's in the
15 contract. This is their motion. This is their
16 foreclosure. Why isn't it in their affidavit. All they
17 say is, well, they said so. Well, you know, if a guy in
18 blue pajamas and a red cape walks in my house and tells
19 me he's superman, I'm not necessarily going to believe
20 him. I mean, there has to be some reasonable analysis
21 before they raise our monthly payments by \$150,000. And
22 they clearly don't think they have to.

23 I don't think it's that big of a question to solve
24 at this point. They still cannot explain other than
25 this budget which they knew was wrong. It has been

1 proven to be wrong at the time that they filed the
2 foreclosure, that's the entire basis.

3 I completely agree with Mr. Harrill. This is the
4 most important document at this hearing. Because it's
5 crap. It is not true. These numbers are not real. And
6 this is the only basis they have given us for raising
7 the reserves. This is it. And we know that we didn't
8 have to pay the money that's in this "budget."

9 So they cannot justify raising the reserves. They
10 did that in 2011 long before any payments were missed,
11 long before we even stopped paying these ridiculously
12 inflated reserves. They breached the contract first.
13 We've done everything we can to try and work with them.
14 We've asked over, and over, and over again, please, give
15 us the basis required under the contract for these
16 reserve increases and they won't do it. And they didn't
17 do it today, and they can't do it. And therefore,
18 there's been no breach. There's been no event of
19 default and you can't afford a receiver.

20 I mean, the property is not -- it's not dying, but
21 it ain't well. And right now to have to bring in a
22 receiver at an additional cost is quite frankly, I'm not
23 aware of somebody who would do it for free and who is
24 unexperienced with property to think that it's not going
25 to negatively effect the ability to run the property is

1 ridiculous.

2 And here's another thing. Okay. We just replaced
3 an HVAC unit on one of the buildings. Okay. They're
4 still accepting our payments every month, but when we
5 ask for reimbursement for a \$7,000 HVAC unit out of the
6 \$1,400,000 they're holding for us, they said, no.

7 MR. HARRILL: That's just not true, your Honor. I'm
8 tired of hearing the things up here that aren't true and
9 him testifying. That's not true. That's not what we
10 said. I'll address that in a minute, but I can't sit
11 here any longer and hear this.

12 MR. PLAYER: Maybe he'll get up and explain the
13 budget. But, you know, we have a tenant that we're
14 trying to sign that's going to cost \$120,000 to pay the
15 lease commissions and the upfit for the tenant. If we
16 don't get that tenant in there, then we lose the rental
17 income and, you know, this is not Atlanta or Charlotte,
18 it's a small community. We got four leases we're trying
19 to sign. If we don't sign the big one, if we tell them
20 we don't have the money to do \$120,000 upfit, nobody
21 will sign Fontaine. We're dead. And that's what DRV
22 wants. Don't give it to them. Please. Thank you.

23 THE COURT: Before I hear from you, we're going to
24 take a brief break and then come back.

25 (There was a short break taken)

1 THE COURT: Okay. I will hear from you, Mr. Harrill,
2 in rebuttal.

3 MR. HARRILL: All right. Thank you, Your Honor. And
4 I will try to be brief, but there are a few points that I
5 feel like I have to raise. And frankly, Your Honor, I'm
6 just -- I'm taken aback by Mr. Player's
7 presentation/argument. I didn't think you were going to
8 taking any testimony and I think 90 percent of what he
9 said was testifying about things that are in the
10 affidavits that aren't submitted to the Court.

11 You know, he chose not to submit any affidavits from
12 any of his clients. He rode on the coattails of Mr. Young
13 and his affidavit. And he got up and -- and just told
14 you, you know, facts and things that aren't in the record.

15 And -- and you know -- you know, I understand we're
16 not in Charlotte, but you know, calling documents "crap,"
17 and saying his clients "got screwed" and stuff, I'm just --
18 -- you know, I -- I'm a bit taken aback by the -- by the
19 tone and -- and the nature of his presentation, especially
20 when they didn't submit anything at all in support of --
21 or in opposition to this by way of affidavit or otherwise.

22 I will address some of the points that both of them
23 have raised, but I want to make -- I -- I want to seize
24 upon, you know, one of the things that they've said that
25 we agree with completely. And I think, again, that a lot

1 of this goes to show what I think is just a fundamental
2 misunderstanding from their standpoint of what -- what's
3 going on.

4 They -- they made a big point that Mr. Young did
5 about, you know, "Hey, this is our money. We put it in
6 these reserves and it's our money." We agree with that.
7 That's -- there's not any dispute as to that.

8 The only time it doesn't become their money is if
9 there's an event of default like there has been here; and
10 there's an acceleration and we're allowed, per the loan
11 documents, not illegally, improperly, all the other
12 allegations that they've made: "We stole this money from
13 them." That didn't happen, Your Honor.

14 Pursuant to the loan documents, we had every right to
15 go in and take the money and -- and sweep that if we're --
16 if we're forced to accelerate the loan. And I think
17 that's set forth in section 3.11 of the loan agreement --
18 3 -- 3 point 11 lays that out under the event of default.

19 For them to come in and say we've -- we've snookered
20 them and we've stolen their money or improperly taken this
21 money is just nonsense, Your Honor.

22 You know, they -- and it is their money and that's one
23 of the things that's sort of hard to fathom in all of
24 this. If they had paid the reserve accounts per their own
25 capital budget -- I'll get back into that again in a

1 little bit -- but per the capital budget. And they can
2 try to distance themselves from CBRE today, I guess, I --
3 I haven't done it to this point -- I mean, that's their
4 property manager, that's their on-site property manager.

5 Suddenly today, they're the enemy, according to Mr.
6 Player. I -- I -- again, I'm taken aback. I can't
7 believe that they're going to say that they're not the
8 borrower's agent or representing the borrowers when they
9 submit to us the capital budget for the property.

10 I mean, you know, I -- I don't even know what to say
11 to that, for him to -- to get in here and just testify
12 that somehow they're -- they're -- you know, our agent and
13 they're -- they're looking out for our interest rather
14 than his interest, according to the borrower's interest.

15 But Your Honor, it is -- it is their money. And so if
16 they had only paid the money into the reserve accounts, it
17 would have been their money. It would have stayed there
18 and it would have been their money. It wouldn't have been
19 a default; it would have been their money. We would have
20 only exercised the right to distribute it to them when
21 they went out and did things like: pave the parking lot,
22 fix the water cooler, repair the roof.

23 That's another very important issue that I think gets
24 back to -- you know, I pointed out to you that what I
25 think is the great fallacy in Ms. Matthews's affidavit,

1 where she apparently thinks that any time we reassess the
2 reserves at a level that the rents and profits can't
3 cover, that somehow we're breaching a fiduciary duty or
4 doing something in bad faith. That's just nonsense.
5 That's what those reserves are for. The reserves are
6 there to protect the lender's collateral.

7 You know, one of the gentlemen that argued said, you
8 know, "when DRV created this language." DRV didn't create
9 the language. DR -- Greenwich Capital did. DRV didn't
10 write the documents, it isn't DRV scheming to come in
11 here. To be accused of being a predatory lender, that's
12 just absolute nonsense, and is not true.

13 And there's no evidence of that, there's -- there's no
14 evidence to suggest that -- that DRV is a predatory
15 lender, there's no -- you know, they can't point to
16 another loan in which something like this occurred. It --
17 it -- again, I'm just taken a back by a lot of ---

18 THE COURT: Let me ask this, Mr. Harrill: Are there -
19 - is there -- are there any letters or documents or any
20 communications about how it came to be that the three-year
21 capital expense budget was prepared or what parameters
22 were set for preparing it?

23 MR. HARRILL: No. But Your Honor, I -- I think that
24 is a red herring raised by these folks. You might ask
25 them: Where are the letters asking for us to demonstrate

1 it?

2 Everyone understood, everyone understood when this
3 deal -- when -- when the reassessments were made -- and
4 there were multiple phone conversations between, you know,
5 the principals of the companies -- but the reassessment
6 was based completely on the capital budget submitted by
7 the agent for the Barbers, CBRE. This is the borrower's -
8 - I don't care what they say, this is the borrower's
9 capital budget.

10 I mean, all Mr. Lithman did -- and I'll do like Mr.
11 Player -- he took the numbers and figured out how much had
12 to go in each month in the reserve to get from A to B at
13 the end of the projected expenses, and that's what the
14 numbers were.

15 But you know, they're trying to create an obligation
16 that doesn't exist. All the loan document says is
17 something about the -- under the "then underwriting
18 standards." You know, the underwriting standards, if the
19 borrower submits to you a capital budget and says this is
20 how much it's going to cost, we believe them and we base
21 the reserves on that. That's what we did.

22 You know, they're coming in here, trying to make it
23 sound like we haven't given them anything. Where's the
24 correspondence and communication from them asking for it?
25 First time they ever asked for, you know, the -- the

1 methodology or the underwriting standards was when counsel
2 got involved over a year later and wrote the letter, just
3 trying to come up with some -- some way to -- to attack
4 the assessments so they could save this thing; so they
5 could do something to try to get out of this default or
6 claim that they weren't in default.

7 I'm not aware of any other writings. You know, we
8 haven't had discovery, but we're not aware of any other
9 requests that were made. They -- they said, I don't know
10 how many times, "numerous requests were made." We're not
11 aware of numerous requests being made as to how that was
12 done.

13 Everyone understood how the reassessment numbers were
14 -- were created. It was using the capital budget
15 submitted by the property manager.

16 So you know, don't -- don't get hung up on the red
17 herring that they've tried to create that somehow we've
18 got this fast obligation to respond to a request they make
19 a year later about: What were your underwriting standards
20 in doing this?"

21 Everyone knew what the basis was. They didn't ask at
22 the time it was done. They understood at the time it was
23 done. And so -- so I -- you know, I think that -- that,
24 you know, again, that's just them trying to create an
25 issue where there isn't one, you know.

1 But the budget -- and we went through the -- the
2 capital budget submitted by CBRE -- and again, shows where
3 the reserve accounts would have been depleted greatly had
4 they done the things that CBRE -- who's probably in the
5 best position to know what is needed to be done to the
6 property -- if those things were done, those reserve
7 accounts were going to get drained to 900,000 in the hole,
8 \$200/\$300,000 in the hole. So that's the basis of the --
9 of setting the reassessments.

10 Your Honor, the -- as I said at the beginning, first
11 of all -- well, let me go back, because one of the first
12 things Mr. Young said, you know, he -- he addressed my
13 commit that this is a nonrecourse loan.

14 We have -- we have addressed, you know, in either
15 pleadings or otherwise that if borrowers have taken bad
16 acts that would give rise to recourse liability, sure
17 we'll pursue those. But for him to say it is in -- you
18 know, somehow disingenuous for me to come up here and say
19 this is a nonrecourse loan is nonsense.

20 This is a nonrecourse loan. The only way we get to go
21 after the individuals is if we can show that they've taken
22 bad acts. If they're admitting that they've taken bad
23 acts and they've done things in violation of the non-
24 recourse exceptions, you know, I'd be happy to hear about
25 it and we'll -- and we'll amend the complaint.

1 But at this point, we've only reserved the right to
2 pursue that if we need to, which is typical in cases like
3 this.

4 So -- you know, so in a nonrecourse loan like this,
5 again, protecting the collateral is really the only
6 protection that the lender has. If they've let this -- if
7 they don't pave the parking lot and if they don't put a
8 new roof on the building because it's abandoned, I mean,
9 to me, that's just -- that -- that again gets to the whole
10 misunderstanding in this.

11 You know, they're the borrowers; they just want to sit
12 back and collect the rents and pay the management fee to
13 the manager and make, you know, debt service payment and
14 roll the loan. And they don't care, apparently, if the
15 tenancy is dropping and -- and depreciating.

16 That's going to be our problem. If ultimately this
17 property declines in occupancy to the point it can't even
18 meet the debt servicing, guess who's going to take over
19 the property by way of foreclosure, and then have a
20 property that has, you know, a horrible debt-to-value
21 ratio.

22 Their job is to keep the property up to -- the
23 reserves are there to -- to spend money, like on a parking
24 lot, to attract tenants. It's not to just say, "Well,
25 that's an abandoned building. Why in the world would we

1 spend money putting a new parking lot in an abandoned
2 building?"

3 That's exactly when you put a new parking lot in
4 there, so you can attract new tenants; or fix the roof on
5 the old building. That's the purpose for the reserve
6 account.

7 I -- I don't know if I said it was a "rainy-day fund,"
8 whatever. It is a fund set aside to make sure the
9 property is maintained and that you have money in there to
10 make capital improvements and you have money to attract
11 tenants to the property. And ultimately, in real estate -
12 - commercial real estate like this, the only value in the
13 -- in the collateral, the way you value it is the rents
14 generated by the property.

15 And you know, if -- if -- if it's their decision to
16 say, "Well, we didn't -- you know, we didn't spend that
17 money, Your Honor. You know, they wanted us to put a
18 parking lot in, in this budget. We just said to heck with
19 that. That was an abandoned building. What a stupid idea
20 that is."

21 And that's exactly what we wanted them to do. We want
22 them to attract -- because that's their obligation is to
23 maintain the property, attract new tenants, keep the thing
24 as highly occupied as possible. I mean, that is what
25 they're supposed to do, and -- and that seems to get back

1 to this whole misconception that they can just rely on the
2 rents generated and have no further obligation other than
3 what -- what the rents and profits, you know, that are
4 generated by the property.

5 Your Honor, that -- one other issue I would -- I would
6 point out is, you know, Mr. Young argues, on a few
7 occasions, somehow that -- you know, of course you can't
8 grant a receivership motion, because they've filed
9 counterclaims. Well, that has nothing to do with whether
10 or not you should grant the receivership.

11 I understand there's case law from the 1920s that
12 says, you know, receiverships are drastic remedies. But
13 you know, frankly, none of that has been addressed, and
14 there hasn't been a meaningful case dealing with
15 receiverships in South Carolina in -- in probably 50
16 years.

17 And there's a statute that provides directly for, you
18 know, the -- the appointment of a receiver, and that's
19 15-65-10. And you know, we've asserted in our motion that
20 pursuant to 15-65-10(A) -- I think it's "A" -- that --
21 that we've met those criteria.

22 We're entitled to the property; they're maintaining
23 the rents. We think the rents are in danger. I think
24 we've -- we've proved that through the affidavits and we
25 certainly argued that to Your Honor.

1 We're also absolutely entitled to a receiver according
2 to our loan documents. Both the mortgage and the
3 assignments of rents has provisions in there for the
4 appointment of a receiver. They agreed to that, if
5 there's an event of default, we're entitled to the
6 appointment of a receiver.

7 So Your Honor, I just don't want you to get caught up
8 in what I think are a bunch of red herrings with them
9 arguing these other issues. We relied on a budget they
10 provided to us; we reassessed based upon that fact.

11 But they -- you know, they never -- they never asked
12 us our methodology until I think Mr. Stein wrote a letter
13 about three or four months ago at the latest -- or the
14 earliest.

15 And you know, once we made those reassessments, they
16 had an obligation to pay. They did it for four months,
17 then they unilaterally stopped. That was a default. Then
18 several months later they unilaterally decided not to make
19 the October 2012 payment. Another event of default. Then
20 they didn't make the November payment or any payment in
21 November.

22 We -- we then accelerated, put them in default,
23 exercised our rights under the assignment of rents, and
24 they have not complied with those demands.

25 So all we're asking is that a receiver be appointed so

1 that we can monitor what's going on, so we -- someone has
2 control over these rents other than the manager, you know,
3 that -- that is related to the principal or primary
4 borrower in this case. And you know, we think we're
5 entitled to that, Your Honor, based upon the statutory law
6 and based upon our -- our -- our documents and the
7 contracts that they agreed upon. Thank you.

8 THE COURT: Thank you. Are -- are the various letters
9 that -- that may have been sent back and forth relating
10 either to demands for the acceleration or the requests
11 that the overages from the reserves be applied toward the
12 monthly debt service -- are those letters anywhere in the
13 record currently?

14 MR. HARRILL: They're not. I have them here, Your
15 Honor. And we were going to put them in with testimony,
16 if we did. But I have all those notice letters.

17 THE COURT: Is there any objection to me having those?

18 MR. YOUNG: I -- I wouldn't object if he would allow
19 us to -- to provide the similar documents that we were
20 going to put in the record through testimony.

21 THE COURT: Sure. I mean, I -- I have no problem with
22 that.

23 MR. YOUNG: Thank you.

24 THE COURT: And if -- I guess you all can -- I don't
25 know whether you have -- I assume that you have them all

1 here present, and -- and you can exchange them and present
2 them; and just give me a copy of them and I'll consider
3 that.

4 MR. YOUNG: That -- that works fine for us, Your
5 Honor.

6 MR. HARRILL: I -- I'm not -- I have them here I can
7 hand up.

8 THE COURT: He wants to put in his letters, too, the
9 ones that he would have, you know.

10 MR. HARRILL: Sure. I understand.

11 THE COURT: And I just want to make sure that you had
12 them here, so I wouldn't have to have you send them in.

13 MR. HARRILL: Yeah. Well, I -- I have mine here.

14 (Mr. Harrill confers with Mr. Young briefly regarding
15 letters.)

16 THE COURT: All right. All right.

17 MR. HARRILL: And Your Honor, I apologize. I had a
18 little bit of a coffee accident this morning. So you know
19 they're authentic if they have coffee stain on them. So
20 they're not too terribly damaged.

21 THE COURT: Just so long as I can read them.

22 MR. HARRILL: Oh, you will be able to.

23 THE COURT: All right. Is there anyone else that I
24 really need to hear from or -- I mean, I don't want to
25 keep going over the same information. If there's

1 something new, I'll be happy to hear it.

2 MR. YOUNG: I -- five minutes to reply, if that's all
3 right, Your Honor.

4 THE COURT: Yeah. I'll give you a few minutes to
5 reply. Just so long as it's not -- I don't -- I mean, I
6 think we can go back and forth all day. But I just want
7 to make sure it's going to be new information.

8 MR. YOUNG: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. YOUNG: And again, I -- I would just reiterate
11 that given the high burden from the statute and from the
12 Supreme Court case -- which, by the way, is a 1990 case,
13 not 1920 -- we feel it's clear they've not met their
14 burden.

15 Respectfully, I don't think fiduciary duties or
16 custodial accounts are red herrings.

17 The record indicates, pursuant to Ms. Matthews
18 affidavit, that we requested on multiple occasions the
19 substantiation that we referred to.

20 Previously there was an argument regarding set off.
21 Respectfully, because they were -- these were custodial
22 accounts -- and as we've now have heard from opposing
23 counsel, they agree it's our money -- you can't set off
24 your own money. So the payments in October and November,
25 we were just telling them how to use our money for those

1 debt service payments in October and November.

2 And then last week, in our proposed findings of fact
3 and conclusions of law that we submitted earlier, there
4 are some requests that we've made. Not surprising, I'm
5 sure, you -- you'll see that we have asked that the
6 reserve accounts be replenished to the point that they
7 were when they were swept; and that at least during the
8 pendency of this litigation, to the extent this motion is
9 denied, etc., we would -- we would request, respectfully,
10 that the status quo be -- be maintained.

11 In other words, that when we ask for a HVAC system to
12 be reimbursed, that it be reimbursed; that when we ask for
13 \$95,000 worth of build outs for one of four new leases to
14 be prepared, otherwise we can't do the leases, that --
15 that, you know, they be reasonably required to consider
16 and to fund those, pursuant to the loan agreements.

17 And -- and that's all I have. Thank you, Your Honor.

18 THE COURT: Okay.

19 MR. HARRILL: Your Honor, and -- and I only have one
20 point I -- I want to address. When he says it's -- it's
21 their money, again, I just want to make sure it's clear,
22 if there's an event of default, we have the right to sweep
23 those -- it's not their money. So we agree it's their
24 money, unless there's an event of default. Then the
25 reserves -- we have the right, under the loan agreements,

1 to sweep it. So just want to make sure that's clear.

2 MR. YOUNG: But at the time those payments were made,
3 they hadn't swept and they had not cleared a default for
4 the debt service.

5 THE COURT: Anything further, Mr. Player?

6 MR. PLAYER: Just that, you know, the -- the point
7 that I made that still has not been addressed, which is
8 the \$1.4 million in this budget for new tenant build outs,
9 never occurred; and that is in Ms. Matthews's affidavit.
10 She's the one that manages the property.

11 You know, I -- I participated with Mr. Young and --
12 and that group in advising what was submitted to Your
13 Honor, and I didn't want to give you double to read. It's
14 --

15 THE COURT: Okay.

16 MR. PLAYER: -- you know, I'm not, you know, being
17 lazy.

18 THE COURT: I don't think anyone's saying you're being
19 lazy.

20 (Courtroom laughter.)

21 THE COURT: A procedural question, Mr. Harrill.

22 MR. HARRILL: Yes.

23 THE COURT: Let's just say, for the sake of -- for the
24 sake of my question, that I would agree with you, in that
25 I believe that there should be a receiver appointed, to

1 the extent that there are issues or maybe issues relating
2 to new leases and up-fitting space and making capital
3 improvements and -- and using monies that would have been
4 in the roll-over account: How -- it -- what -- by what
5 mechanism does that get accomplished? Is that something
6 that the receiver can -- I understand that the money's no
7 longer in those accounts and that your client has full
8 control over that -- the -- that money at this particular
9 time and has either applied it to the debt service or
10 towards the -- the acceleration of the loan. So I'm just
11 -- I'm asking for -- you know, how do those things get
12 taken care of?

13 MR. HARRILL: And I need to fade to -- get the nod
14 from my client. But I think, to the extent there would
15 not be enough money in the operating account, then that
16 would be something we would -- we would fund.

17 (Mr. Harrill confers with his client.)

18 MR. HARRILL: Yeah. What that -- that would be --
19 yeah. We would fund that if there's not enough money in
20 the operating account. So I mean, it's not -- we want the
21 property ---

22 THE COURT: Because it's also to your benefit to do
23 that.

24 MR. HARRILL: Absolutely. We're -- we're trying to
25 maintain the value to the client, that's our goal here --

1 or to increase the value to the client.

2 THE COURT: What I ---

3 MR. HARRILL: And we've done that with taxes and
4 insurance already -- they -- they asked us to make
5 payments that -- on the property. And we did that out of
6 the money that had been swept. We've already done that
7 once at least.

8 MR. YOUNG: To that end, could we have an agreement
9 that they'll pay these -- these current leases? There's
10 build outs and things we -- that we can submit and if
11 they'll consider those, and to the extent operating does
12 not cover it, will you pay because it does enhance the
13 value of the property?

14 MR. HARRILL: I -- I can't agree to anything without
15 knowing what it is. But I assume if it's -- it is
16 beneficial to the property, I assume that that would be
17 something we'd agree to.

18 MR. YOUNG: Okay. Thank you.

19 THE COURT: I -- I -- I would assume that, between the
20 attorneys, that there would be ongoing discussions about
21 being able to protect the collateral and to ensure that
22 it's -- that there are tenants in the building who are
23 paying income --

24 MR. YOUNG: Yes, Your Honor.

25 MR. HARRILL: Absolutely.

1 THE COURT: -- that benefits both parties so ...

2 MR. YOUNG: Thank you, Your Honor.

3 THE COURT: As it relates -- as it relates to the --
4 to the order of reference, let me just put that aside for
5 the time being.

6 MR. HARRILL: That's fine, Your Honor.

7 THE COURT: I -- I understand that there -- there --
8 there are some arguments in the findings of fact and
9 conclusions of law that were submitted. And -- and I -- I
10 understand from our discussion before we began the
11 hearing, you know, what some of the issues are relating to
12 the reference.

13 But -- and certainly, you know, the law is -- to the
14 extent that there are legal claims that need to be decided
15 that arise out of the lawsuit, that those have to be taken
16 care of before the equitable matters are taken care of.

17 So I don't think that's -- that's a large question,
18 but I -- it -- it seems that we may not need to discuss it
19 at this particular point until there's been some further
20 resolution on the receiver issue.

21 Where I am at this particular point is to -- I've
22 heard all your arguments; I'd like to look at the
23 documents that you have, the -- that you'll submit to me
24 as well as the affidavits; and I -- I have the -- the loan
25 documents.

1 But the other -- the other letters and exhibits that
2 you would have presented as part of testimony, if -- if
3 you all can agree to them, I can look at them. And if I
4 need further clarification or further information about
5 those, then I'll be happy to contact you and tell you what
6 I need. And we can -- perhaps we can do a conference call
7 just to figure out how to go about gathering that
8 information.

9 MR. HARRILL: Sounds good.

10 THE COURT: Is that acceptable to everyone?

11 MR. HARRILL: Yes.

12 MR. YOUNG: Yes, Your Honor.

13 THE COURT: Thank you very much for your time. I
14 appreciate your -- your time and your patience in going
15 through it all. And thank you.

16

17 --- END OF REQUESTED TRANSCRIPT OF RECORD ---

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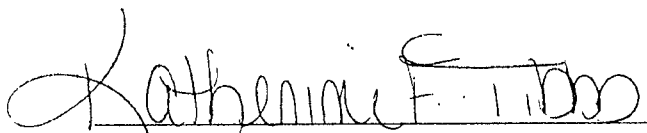
STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, KATHERINE F. TIBBS, Registered Professional Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Fifth Circuit for Richland County, South Carolina, on the 1st day of February, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

(This transcript was transcribed from the record taken by Bonnie H. Kelly, CVR)

October 14, 2014

A handwritten signature in cursive script, reading "Katherine F. Tibbs", written over a horizontal line.

Katherine F. Tibbs

Registered Professional Reporter

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF RICHLAND

3

4 DRV FONTAINE, LLC ,

5 Plaintiff,

6 v.

CASE NO.: 2012-CP-40-7752

7 FONTAINE BUSINESS PARK, LLC;
8 FONTAINE BUSINESS PARK 2, LLC;
9 FONTAINE BUSINESS PARK 3, LLC;
10 FONTAINE BUSINESS PARK 4, LLC;
11 FONTAINE BUSINESS PARK 5, LLC;
12 FONTAINE BUSINESS PARK 6, LLC;
13 FONTAINE BUSINESS PARK 7, LLC;
14 FONTAINE BUSINESS PARK 8, LLC;
15 FONTAINE BUSINESS PARK 9, LLC;
16 FONTAINE BUSINESS PARK 10, LLC;
17 FONTAINE BUSINESS PARK 11, LLC;
18 FONTAINE BUSINESS PARK 12, LLC;
19 FONTAINE BUSINESS PARK 13, LLC;
20 FONTAINE BUSINESS PARK 14, LLC;
21 FONTAINE BUSINESS PARK 15, LLC;
22 FONTAINE BUSINESS PARK 16, LLC;
23 FONTAINE BUSINESS PARK 17, LLC;
24 FONTAINE BUSINESS PARK 18, LLC;
25 FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC,

CERTIFIED COPY

23 Defendants.

24

25

Paula Margaret Mathews 9/19/2013

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1 V I D E O D E P O S I T I O N

2 WITNESS: PAULA MARGARET MATHEWS

3 DATE: Thursday, September 19, 2013

4 TIME: 9:50 a.m.

5 LOCATION: McNair Law Firm, P.A.
1221 Main Street
6 Suite 1800
Columbia, South Carolina

7 TAKEN BY: Attorneys for the Plaintiff

8 REPORTED BY: NISHA GORDON
9 Court Reporter

10 Y403 02/17/20

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1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF
3 DRV FONTAINE, LLC:

4 McNAIR LAW FIRM P.A.
5 BY: PAUL D. HARRILL, ATTORNEY AT LAW
6 1221 Main Street
7 Suite 1800
8 Columbia, South Carolina 29201
9 (803) 799-9800
10 pharrill@mcnair.net

11 ATTORNEYS FOR THE DEFENDANTS
12 FONTAINE BUSINESS PARK 2-31, LLC:

13 PLAYER LAW FIRM, LLC
14 BY: TUCKER S. PLAYER, ATTORNEY AT LAW
15 1415 Broad River Road
16 Columbia, South Carolina 29210
17 (803) 772-8008
18 Tucker@PlayerLawFirm.com

19 FONTAINE BUSINESS PARK, LLC:

20 BAKER, DONELSON, BEARMAN,
21 CALDWELL & BERKOWITZ, PC
22 BY: MARK A. FULKS, ATTORNEY AT LAW
23 100 Med Tech Parkway
24 Suite 200
25 Johnson City, Tennessee 37604
(423) 975-7655
mfulks@bakerdonelson.com

26 ALSO PRESENT:

27 ELLIOT LIFFMAN, DIVERSIFIED REALTY VENTURES

28

29 (INDEX AT REAR OF TRANSCRIPT)

30

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1 obligations of the borrowers in this loan?

2 A. Well, I -- no, I'm not.

3 Q. Okay. Do you know if there is, if this is
4 a recourse loan?

5 A. It was my understanding it was a
6 non-recourse.

7 Q. Okay. And explain what non-recourse loan
8 means to you.

9 A. Well, I don't know if I can fully explain
10 it. I mean, non-recourse basically means if there is a
11 situation that the -- the -- the investor -- the -- the
12 lender cannot come after the investors or personally --
13 personally come after the investors, my understanding.

14 Q. Okay. And so if it's a non-recourse, that
15 means the lender can look only to the collateral as
16 means of recovering its loan?

17 A. Yes.

18 Q. Okay. And is it your understanding that
19 that's the nature of this loan?

20 A. That's my understanding, yes.

21 Q. Okay. Do you understand that in
22 non-recourse loan arrangements that there's a -- perhaps
23 a greater emphasis put on the reserve accounts to
24 maintain the value of the collateral?

25 A. I don't think it -- no, I don't believe

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1 that.

2 Q. Okay. Would you -- would you think it
3 would be fair for the lender to place more importance on
4 the upkeep and value of its collateral in a non-recourse
5 loan?

6 A. I think it -- you have to look to the loan
7 documents and what the original agreement were. So
8 whether it's non-recourse or recourse, period. I mean,
9 there are certain requirements on the loan document to
10 maintain the property.

11 Q. Okay. And -- and those obligations existed
12 in this loan.

13 A. Always.

14 Q. You've used the term regarding the tax
15 insurance reserve and the other two reserve accounts as
16 being custodial accounts.

17 What do you mean by that?

18 A. They are held by the lender, and those
19 funds belong to the investors. And it's the -- the
20 investors have the tax obligation to pay the taxes.
21 The investors have a obligation to pay the insurance.
22 And it's given to the lenders in a custodial capacity
23 for the lender to pay on their behalf when the time
24 comes.

25 Q. Okay. Is that -- is -- are you using that

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1 Q. Okay. What is your understanding with
2 regard to DRV's rights to increase or decrease the
3 amounts required to be paid into the capital reserve
4 account and rollover reserve accounts?

5 A. Well, I believe the loan documents say that
6 the lender has the right to reassess from time to time,
7 but within reason, and based on normal pre-assessments.
8 I mean --

9 Q. I -- I -- I'm -- I don't understand the
10 last part. You said normal.

11 A. I guess -- I guess you'd say your -- your
12 underwriting, you know, assessments -- you know, it's --
13 you just don't -- you can't just tell the borrower -- I
14 guess you can tell the borrower, look, we want to
15 increase your reserves from 21,000 to 159,000 a month,
16 but that's not reasonable. That's a 1000-percent
17 increase.

18 Q. Why is that not reasonable?

19 A. It's 1037-percent increase. I've been
20 doing this for almost 40 years. I've never seen
21 anything like that this.

22 Q. Okay. What's the highest increase in
23 reserve accounts that you've ever seen prior to this?

24 A. I believe initially we doubled. The --
25 after 38th month on this original loan, the -- one of

1 the accounts went -- you know, it was doubled and went
2 to 21,000 a month, and it had been like 8 or 10 or
3 something like that in the 38th month, and that was
4 written into the loan.

5 Q. That -- that's your understanding on this
6 particular loan?

7 A. Yes.

8 Q. Okay. And who was holding the loan at that
9 time?

10 A. Greenwich was the original -- was the
11 originator of the loan.

12 Q. Okay. So you believe they increased the
13 payments required into the reserve accounts?

14 A. It was written into the original loan, yes.

15 Q. Okay. All right.

16 Let me go back to my question. What is the
17 highest increase that you've ever seen in your
18 experience to a reserve account before the increase by
19 DRV here?

20 A. 50 percent.

21 Q. Okay. And where was that?

22 A. Well, I -- I don't know. I can't remember
23 all the properties I've been involved in over the years.

24 Even 100 percent, but not 1000.

25 Q. All right. And -- and I think we've

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1 it refers to the fact that DRV may reassess the amount
2 of the monthly payment to the cap reserve account from
3 time to time. And then it says, Based upon its current
4 underwriting standards.

5 Do you see that?

6 A. I do.

7 Q. Okay. What does that mean?

8 A. I don't know because I don't know what
9 their underwriting standards were.

10 Q. Okay. Is it your contention that they
11 didn't follow their underwriting standards at DRV?

12 A. That who did?

13 Q. That DRV did not follow its underwriting
14 standards.

15 A. Yes, it is.

16 Q. Why?

17 A. Because it's excessive, and it's not based
18 on facts.

19 Q. If you don't know what the underwriting
20 standards are, how can you say that -- that DRV is not
21 following its underwriting standards?

22 A. We've never been able to -- they've never
23 been able to tell us what their underwriting standards
24 are.

25 Q. But you're contention is that it -- it

1 payment of these monies in your phone call after you
2 received the July letter --

3 A. Uh-huh.

4 Q. -- in 2011, did you indicate at that time
5 to Mr. Liffman that there would be no additional
6 payments toward the increased capital reserve and
7 rollover reserve accounts?

8 A. I did, because I told him exactly how much
9 money there was available.

10 Q. And so it's your testimony that you told
11 him that you're going to pay these four months' payments
12 and then you would stop.

13 A. That's correct.

14 Q. Okay. Did you and your counsel, Mr. Berg,
15 indicate that you all were going to put together some
16 sort of a plan to address the cash needs at the
17 property?

18 A. We had attempted to send Mr. Liffman the
19 revised numbers because they weren't real, and when
20 Sandra prepared those numbers, she prepared it based on
21 100-percent occupancy over a three-year period and a
22 wish list for every possible capital improvement you can
23 make month to the property, not understanding what
24 Mr. Liffman was going to be using those numbers for.

25 So we attempted to send revised numbers,

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1 and we were told in an e-mail to Sandra he wasn't
2 interested in seeing revised numbers. So...

3 Q. So what's the answer to my question?

4 A. What's your question?

5 Q. My question was, Did you tell Mr. Liffman
6 in the conversation that you had with him and both your
7 counsel that you all were going to come up with a plan
8 to address the shortfall of funds at the property?

9 A. I don't recall having that conversation. I
10 recall talking about being -- getting real with the
11 numbers because the numbers were not realistic.

12 Q. Okay. And you never talked about coming up
13 with a -- a -- some sort of a plan to -- to address the
14 problems there.

15 A. I -- I don't recall having that
16 conversation.

17 Q. Okay. Are you denying that you said that,
18 or are you just saying you don't recall saying that?

19 A. I -- I'm not -- the -- the plan was to work
20 with Mr. Liffman to come up with more realistic numbers
21 because the numbers that he based his exorbitant
22 reassessments on were not real. They're not realistic.

23 Q. And those numbers were prepared by CBRE.

24 A. Yes, and based on 100-percent occupancy.
25 There isn't a building in this area that's 100-percent

1 occupied.

2 Q. And how do you know it's based on
3 100-percent occupancy?

4 A. I can -- I can see. It's based on
5 100-percent occupancy on every single space leasing up.
6 He had every space leasing in the entire property,
7 including the vacant 21,000-square-foot building. Every
8 building was 100-percent occupied.

9 Q. Okay.

10 A. Which is not realistic in any market.

11 Q. Okay. And you're confident that it --
12 it -- the projections that -- that Ms. Johnson prepared
13 reflected 100-percent occupancy.

14 A. Yes.

15 Q. Okay. Let's talk about the -- let's talk
16 about the budget that was presented to DRV.

17 Is it your understanding that -- that a the
18 budget that was a three-year capital budget that was
19 presented to DRV was the basis of Mr. Liffman's decision
20 to reassess the reserve account payments?

21 A. Yes.

22 Q. Okay. And tell me, to the extent we
23 haven't covered this, where did that capital budget come
24 from?

25 A. It originally came from Sandra --

1 with Elliot and his counsel on the phone. It was
2 also -- it was -- it was also in multiple e-mails from
3 Sandra Johnson to Elliot.

4 Q. Have you produced those?

5 A. Yes, they're -- we've seen them. I've seen
6 them.

7 Q. Where Ms. Johnson is saying, How did you
8 come up with this?

9 A. Yes.

10 Q. Okay.

11 Sorry. I've only got one copy.

12 (Plaintiff's Exhibit Number 3, DRV Letter
13 and Schedule A, July 11th, 2011, Sent Via Fontaine
14 Business Park, LLC, was marked for identification.)
15 BY MR. HARRILL:

16 Q. Ms. Mathews, I have -- I have marked
17 Exhibit 3 to your deposition. It is a letter on DRV
18 letterhead dated July 11th, 2011, sent via FedEx to
19 Fontaine Business Park, LLC; is that accurate?

20 A. Yes.

21 Q. Have you seen this letter before?

22 A. I have.

23 Q. Okay. How soon after this letter was
24 received by Fontaine Business Park, LLC, did you see
25 this letter?

1 A. I understand that there is an attempt to --
2 yes, I understand that.

3 Q. Okay. In light of the fact that the
4 capital budget which -- the three-year capital budget
5 that you're well-familiar with was admitted to DRV,
6 what -- what should DRV have done differently as far as
7 reassessing the reserve accounts?

8 A. DRV should have disclosed what they were
9 doing. It's my experience that a lender does not go to
10 a property manager and ask a property manager to come up
11 with their reserve account needs. I've never seen that
12 before. It's usually a lender doing an underwriting
13 based on what they see in the operating reports.

14 And there's also a revenue against
15 expenses, and that's not what -- that's not what CBRE
16 produced. Basically what they produced was just -- if
17 this is the perfect world and we can lease the property
18 over three years to 100 percent and we have unlimited
19 funds, here's what it would cost.

20 Q. Okay. So -- so should DRV have produced it
21 own, you know, projections as far as the -- the
22 expenditures going forward?

23 A. Yes.

24 Q. Okay. And do you think these would have
25 been more favorable to the borrowers?

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1 A. Yes.

2 Q. Okay. Why do you think DRV was requesting
3 a three-year capital budget?

4 A. I honestly didn't know.

5 Q. So you had no idea why the lender would be
6 interested in a three-year capital budget for the
7 property?

8 A. If it was a true budget, that would be one
9 thing; but these, it was not a true budget. These were
10 just projections, like I said, with no offset for
11 revenues. So all you have is a lot of money going out
12 and no money coming in, which is not a budget.

13 Q. Okay. So let's call it projections.

14 A. Yeah, projections.

15 Q. And you reviewed the projections and had it
16 for five or six months before it went out.

17 A. Correct.

18 Q. Correct?

19 And you approved sending it to the lender.

20 A. Yes.

21 Q. Okay. So why did you think the lender
22 wanted those three-year capital projections?

23 A. I certainly never anticipated that they
24 were going to use it to inflate reserve accounts to that
25 extent.

1 Q. What did you anticipate they would do? Do
2 you --

3 A. I think they would be looking at it going,
4 Well, let's see here. We've -- we know what their
5 capital expenditures are for 2011, 2012, 2013. So when
6 we get the operating budget for those years, let's see
7 if they jibe. Once we've have the projected revenue
8 against those expenditures, capital expenditures, and
9 let's see if that jibes.

10 Q. So as far as the capital expenditures that
11 are projected in the three-year capital budget as we've
12 call it, or you can call it projection if you want, you
13 don't -- you did not anticipate that the lender would
14 look at that and -- and use that to determine if there
15 might be a shortfall on the reserve account?

16 A. No, I do not.

17 Q. Never crossed your mind.

18 A. Never crossed my mind because there's no
19 revenue associated with any of that.

20 Q. What was the -- what -- what would the
21 revenue matter?

22 A. Mr. Harrill, you would not give someone \$2
23 and a half million if you didn't have leases with
24 revenues to offset some of that.

25 Q. If you made the capital call you might,

1 you --

2 A. Yes.

3 Q. What -- what is excessive about those
4 reserves if the capital budget, as presented by CBRE and
5 approved by you, Paula Mathews, is accurate? What --
6 what is excessive about this document?

7 A. This is excessive because it's based on a
8 three-year capital projections that assumes that this
9 property is going to be 100-percent leased in three
10 years.

11 Q. Okay. Look?

12 A. The property's never been 100-percent
13 leased, and the average occupancy of this -- of
14 competing properties is 65 percent. I would never in my
15 operating budget that we submit every year for
16 approval -- never does it say we're going to lease up
17 the entire building in that period of time. Never.

18 Q. Okay. And, again, you approved this --
19 this projection, three-year budget projection and
20 capital projection at -- before it was sent to DRV.

21 A. Correct.

22 Q. Okay. So let's assume for the sake of the
23 questions that I'm going to ask you at this point --

24 A. Okay.

25 Q. -- that DRV had a right to rely on the

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1 projections that were provided by the borrowers and its
2 manager, CBRE. Okay?

3 A. Okay.

4 Q. If DR had a right to rely on these as
5 accurate, tell me what in Mr. Liffman's letter to you,
6 dated July 11th, 2011, is outrageous?

7 A. I've never in all of my almost-40 years
8 seen an increase of \$100,000 in one -- one account. And
9 if the plan was, okay, let's assume that all of this is
10 going to happen, and we need all of these monies
11 tomorrow -- which we didn't. It was a three-year
12 capital budget -- and we need all of these monies
13 tomorrow, okay, if this was a three-year capital budget,
14 why are these excessive increases not spread out over a
15 longer period of time? because we've already shown that
16 in 2011, we used 5 percent of what it was.

17 Q. Well, let's not talk about what you
18 actually -- we're talking about DRV having the right to
19 rely on what you provided to it in the form of these
20 projections. Okay?

21 So if DRV has the right to rely only these,
22 I'm asking you, what's outrageous about the letter that
23 you got reassessing the reserve payments?

24 A. It was never disclosed to us that he was
25 using these -- these three-year capital projections to

1 A. Correct.

2 Q. Okay. In this affidavit that's Exhibit 1
3 to your deposition, in paragraph 42, you say that the
4 reassessments were imposed arbitrarily and a
5 capricious -- capriciously.

6 What is the basis for that statement?

7 A. The basis of that statement was that once
8 the re -- the reassessments were made we immediately
9 tried to -- attempted to talk to the lender and say,
10 listen, you know, this is just not -- this is not
11 reality. This is not real. These -- these numbers are
12 excessive, not only from the standpoint that the
13 property could not support it, but it was just excessive
14 in the fact that it was all being -- you know, one of --
15 a good deal of the money was wanted right upfront, and I
16 didn't think there was any substantiation for it. We
17 didn't have leases in place that were going to require
18 this kind of capital, not even close.

19 Q. Okay. Well, again, let me ask you to
20 assume for the purpose of my question that DRV had a
21 right to rely on the three-year capital expense budget
22 submitted by CBRE, your property manager, in May of
23 2011. If that is true, would you still believe that the
24 reassessments were arbitrary and capricious?

25 A. I will say that if I got a budget like

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1 that, projections, I would apply some kind of
2 probability to, Is this reality? Is this going to
3 happen?

4 Every real estate analysis I do is a 50-,
5 60-, 70-, 80-percent probability percent probability.
6 There was no probability applied to any of those
7 numbers. It was just assumed that all of this is going
8 to take place.

9 Q. Okay. Have you ever been a lender?

10 A. Yes.

11 Q. Okay. And give me your experience as a
12 lender?

13 A. When I worked for Trust Company of the
14 West. We did apartment loans.

15 Q. Okay. And did they -- did those apartment
16 loans involve reserve accounts?

17 A. Yes.

18 Q. Okay. Did -- did -- in any of those
19 instances, did the bank ever increase the reserve
20 accounts?

21 A. I -- I don't recall. Probably. But we
22 never -- we would never ask the property manager to --
23 to do that analysis for us. We would ask -- you know,
24 we would do it on our own.

25 Q. Meaning the bank would do its own

1 projection?

2 A. Correct, and present it to the borrower
3 and -- so the borrower has some idea what's happening.

4 Q. All right. I'm moving along in your
5 affidavit, Exhibit 1, and you say that the increase in
6 the reserve accounts on paragraph 44, and maybe other
7 places, were commercially unreasonable.

8 Do you agree with that?

9 A. I do.

10 Q. Okay. Why were they commercially
11 unreasonable?

12 A. It's not reasonable to expect that a
13 borrower is going to be able to pay a 1037-percent
14 increase in a reserve account.

15 Q. Why not?

16 A. It's just excessive.

17 Q. Well, if it's -- if it's based upon a
18 budget presented by the borrower, why is --

19 A. Again, projections with no probability.

20 Q. Okay.

21 A. If Mr. Liffman had come back and said,
22 okay, this is what you believe could happen in three
23 years. What's really going to happen? Are you really
24 going to get your property 100-percent leased? Is
25 that -- is that reality? No.

1 Q. But are -- are you incapable of using the
2 assumption I've asked you to use, which is --

3 A. What is it?

4 Q. Okay. The assumption is, DRV has the right
5 to rely on these numbers that were submitted to it by
6 CBRE after you approved them. Okay?

7 If that's the case, do you believe that the
8 increases would still be commercially unreasonable?

9 A. Yes, I do.

10 Q. Okay. Why?

11 A. They're outrageous.

12 Q. Okay. At what level would they not have
13 been outrageous, assuming, again, DRV had the right to
14 rely on these numbers that were submitted to it?

15 A. At what level?

16 Q. Yes.

17 A. With a probability level they have to go
18 back and look at a probability. Really? Do you really
19 think you're going to be the only person in Columbia
20 with 100-percent leased building. That -- there's no
21 probabilities on any of this.

22 Q. Okay.

23 A. It's just --

24 Q. Okay. But at that stage, DRV is not
25 relying on the documents.

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1 A. I don't think he should have. I think they
2 should have picked up the phone and called us and said,
3 hey, let's talk about this.

4 Q. I -- I hear what you're saying.

5 I'm asking you to make the assumption for
6 the purpose of the question that DRV had the right to
7 rely on what was submitted to it by its borrower and its
8 and manager; and if that was the case and these numbers
9 were relied upon by DRV, were the re -- reassessed
10 numbers commercially unreasonable?

11 A. Yes.

12 Q. Okay. And then at what level would they
13 have not been commercially unreasonable?

14 Could -- could they have been increased
15 then by 100 percent, 500 percent?

16 A. I don't know if I can answer that. I'd
17 have to go back and look at each individual tranche.

18 Q. Did you ever ask Mr. Liffman or DRV to
19 spread these payments over, evenly over the three-year
20 period?

21 A. I believe we had the conversation when --
22 on that first phone call.

23 Q. Okay. And did he say no?

24 A. Yeah.

25 Q. Okay. Who asked him that?

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1 Q. Okay. All right.

2 Let's go to paragraph 60.

3 In paragraph 60, you allege that DR engaged
4 in unauthorized contact with Fontaine Management's local
5 property manager CBRE-Columbia.

6 Why do you believe there was unauthorized
7 contact between DRV and CBRE?

8 A. Because I was told by Sandra Johnson that
9 Elliot Liffman was -- unbeknownst to her, was contacting
10 her accounting people.

11 Q. Okay. And why was that authorized?

12 A. A lender would never do that. A lender
13 should never be in touch with a third-party accounting
14 person and actually was calling her on her cell phone.

15 Q. Why -- why would a lender not be entitled
16 to talk to anyone related to the management of its
17 property?

18 A. Lenders always go through the borrower.

19 Q. Okay. Why would a lender not ever be
20 entitled to communicate with the property manager of its
21 real estate collateral?

22 A. It's not protocol.

23 Q. But the point -- based upon what?

24 A. They're not the borrower. They're a
25 third-party manager. The lender has a relationship with

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1 and leasing assumptions were incorrect. She couldn't
2 get Aaron to focus on it.

3 Q. So you would sent it back to her with
4 revisions and suggestions?

5 A. I'd send it back to her and say, What is
6 all this?

7 Q. Ms. Mathews, why did you think that DRV had
8 requested a three-year capital budget?

9 A. I don't know. I'd -- I -- I don't know why
10 they requested it. Normally it's done on an annual
11 basis.

12 Q. Okay. At the time you were communicating
13 with Sandra and, you know, from late 2010 all the way
14 through May of 2011, it never crossed your mind or you
15 never thought, gee, why is DRV asking for this?

16 A. No, I did not. And I certainly never
17 expected them to be using the information the way they
18 did.

19 Q. How did you expect them to use the
20 information?

21 A. I didn't know what they were doing.

22 Q. All right. I'd like you to turn over to
23 paragraph 30 of your second affidavit, Exhibit 6.

24 I'm just looking at the paragraphs and the
25 charts that you prepared in this affidavit. And I'm --

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC, *et al*

Defendants.

AFFIDAVIT
OF PAULA MATHEWS
IN OPPOSITION TO THE MOTION
FOR APPOINTMENT OF RECEIVER

STATE OF CALIFORNIA

COUNTY OF ORANGE

PERSONALLY APPEARED before me, Paula Mathews, who first being duly sworn deposes and states as follows:

1. I am the Executive Vice President of Commercial Operations for U.S. Commercial, LLC, the sole member and manager of Fontaine Business Park, LLC ("Fontaine"), one of the tenants-in-common of the Real Property Collateral and a defendant in this case. U. S. Commercial, LLC is also the sole member and manager of Fontaine Management, LLC ("Fontaine Management") the entity which manages the Real Property Collateral. Among other things, my duties in this capacity include keeping the business records for Fontaine and Fontaine Management, which are kept in the regular course of business.

2. In that position, I am also personally familiar with, and do hereby verify, the facts alleged in the Answer, Affirmative Defenses, and Counterclaims filed by Fontaine (the "Answer"). I am personally familiar with the Loan Documents, the management of the Real Property Collateral, and



the status of the Loan Agreement. I am also personally familiar with the loan relationship between Fontaine and Greenwich Capital Financial Products, Inc. ("Greenwich Capital"), and its two successors-in-interest, The Royal Bank of Scotland, and the Plaintiff, DRV Fontaine, LLC ("DRV").

3. I have reviewed the Complaint, the Answer, and the Affidavit of Elliot Liffman filed by DRV in this matter.

4. Unless specifically designated otherwise, the defined terms in this Affidavit shall have the same meaning as those contained in the Answer.

5. On December 14, 2007, Fontaine accepted a loan from Greenwich Capital in the principal amount of \$16,300,000. The Loan Documents for the transaction included a Promissory Note; a Loan Agreement; a Mortgage, Assignment of Leases and Rents, and Security Agreement; an Assignment of Agreements, Licenses, Permits and Contracts; an Assignment of Leases and Rents; and other related documents, including various loan assumption agreements related to the purchases of interests in the Real Property by certain tenants-in-common investors.

6. The Loan Documents were subsequently assigned by Greenwich Capital to The Royal Bank of Scotland, which, in turn, assigned the Loan Documents to DRV. As a result of these assignments, DRV is the current holder of the Loan Documents.

7. The central issue in the dispute between DRV and Fontaine (as well as the other tenants-in-common) arises from DRV's unreasonable increases to the Reserve Accounts established by the Loan Agreement, DRV's subsequent unreasonable demands for payment of the unreasonable monthly contribution amounts, and DRV's failure and refusal to review, reduce and/or refund/properly apply the required monthly contribution to the Reserve Accounts despite repeated requests from Fontaine, as will be explained in more detail below.

The Loan Agreement

8. The Loan Agreement established various Reserve Accounts into which Fontaine was required to make monthly contributions, including, in particular, a Tax and Insurance Reserve Account, a Capital Reserve Account, and a Rollover Reserve Account.

9. The Tax and Insurance Reserve Account provision requires Fontaine to pay DRV one-twelfth of the taxes and insurance premiums that DRV estimates will be payable during the next year in order to accumulate sufficient funds to pay the taxes and insurance premiums at least 30 days before they are due.

10. DRV may only increase or decrease the monthly contribution that Fontaine is required to pay to this Tax and Insurance Reserve Account in accordance with the Loan Documents, based upon reasonable judgment and current underwriting standards.

11. The Tax and Insurance Reserve Account is a custodial account. Under the Loan Agreement, Fontaine is authorized to pay the taxes and insurance premiums directly and deliver receipts to DRV for reimbursement.

12. The Capital Reserve Account provision of the Loan Agreement requires Fontaine to make a monthly payment to the Reserve Account in the amount of \$5,249.

13. With 30 days' notice, in its reasonable discretion, DRV may reassess the amount of the monthly payment to the Capital Reserve Account, from time to time, based upon its current underwriting standards.

14. The Capital Reserve Account is also a custodial account.

15. The Capital Reserve Account is maintained by DRV for the benefit of Fontaine and the maintenance of the Real Property Collateral.

16. The Rollover Reserve Account provision required Fontaine to make an initial deposit in the amount of \$750,000 to fund Approved Leasing Expenses. Fontaine made this deposit in accordance with the Loan Agreement.

17. The Loan Agreement provides for "Approved Leasing Expenses," defined as "actual out-of-pocket expenses incurred by Borrower and payable to third parties that are not Affiliates of Borrower or Guarantor in leasing space at the Property pursuant to Leases entered into in accordance with the Loan Documents, including brokerage commissions and tenant improvements, which expenses (i) are (A) specifically approved by Lender in connection with approving the applicable Lease, (B) incurred in the ordinary course of business and on market terms and conditions in connection with Leases which do not require Lender's approval under the Loan Documents, or (C) otherwise approved by Lender, which approval shall be unreasonably withheld or delayed, and (ii) are substantiated by executed Lease documents and brokerage agreements."

18. Additionally, Approved Leasing Expenses includes actual out-of-pocket expenses incurred by Fontaine in leasing space at the Real Property.

19. Beginning on the thirty-eighth payment date, the Rollover Reserve Account provision required Fontaine to begin making monthly payments in the amount of \$21,086.50.

20. The Rollover Reserve Account is required to have a minimum balance of \$250,000. At all times before DRV attempted to create an "Event of Default" and accelerate the balance of the Note, the Rollover Reserve Account had a balance in excess of \$250,000.

21. The Loan Agreement provides that DRV may only increase or decrease Fontaine's monthly payment, if DRV determines in its reasonable judgment, and consistent with current underwriting standards, that the funds in the Rollover Reserve Account will be insufficient to pay, or will be in excess of, the amounts due or to become due for Approved Leasing Expenses.

22. The Rollover Reserve Account is also a custodial account.

23. The Rollover Reserve Account is maintained by DRV for the benefit of Fontaine.

DRV's Unreasonable Reassessments of Capital and Rollover Reserves

24. In July 2011, DRV notified Fontaine of the reassessment of the Capital Reserve Account and the Rollover Reserve Account. DRV based its reassessment on a pro forma capital budget from a third-party, CBRE-Columbia, which were only given to DRV as a "what if" scenario in the (highly unlikely) event that the Real Property Collateral were to achieve full occupancy levels within the next three years. DRV did not reveal, however, how those pro forma financial projections supported its demands or otherwise disclose any of the underwriting standards that DRV was obligated to rely upon. Indeed, more than 18 months later, and despite multiple requests from Fontaine, DRV has never revealed the underwriting standards and analysis that DRV supposedly employed to make these demands. Moreover, the contemplated projections deviate significantly from the actual.

25. At that time, DRV reassessed the monthly payment for the Capital Reserve Account from the original amount of \$5,249 to \$54,476.34, which constituted a one-time increase of 1,037%.

26. In addition to a lack of disclosure regarding DRV's underwriting standards, DRV did not otherwise provide any justification to Fontaine for the exorbitant increase in the amount of the contribution to the Capital Reserve Account.

27. When DRV reassessed the Capital Reserve Account, there were no expected major capital improvements on the horizon at the Real Property. Although CBRE-Columbia, the onsite property manager, had requested capital improvements in 2011 and 2012, ninety-five percent of those requests were not needed, nor undertaken. In fact, throughout the existence of the Loan there have always been sufficient Capital Reserves (except currently, due to the inappropriate actions of DRV--see below) to meet the capital expenditure requests of the onsite manager of the Real Property.

28. DRV reassessed the monthly payment for the Rollover Reserve Account from the original amount of \$21,086.50 to \$159,472.91, which constituted a one-time increase of 756%.

29. When DRV reassessed the Rollover Reserve Account, Fontaine had not incurred any out-of-pocket expenses in leasing space at the Real Property.

30. When DRV reassessed the Rollover Reserve Account, there were no Approved Leasing Expenses either due or to become due that might have caused a decrease of the balance of the Rollover Reserve Account below the minimum threshold requirement.

31. Fontaine immediately and repeatedly thereafter disputed the validity of the reassessments to the Capital Reserve Account and the Rollover Reserve Account, and sought justification and substantiation of the reassessments. To date, DRV has ignored these justification and substantiation requests.

32. Greenwich Capital never reassessed the Capital Reserve Account or the Rollover Reserve Account.

33. The Royal Bank of Scotland, the first assignee of the Loan Documents, never reassessed the Capital Reserve Account or the Rollover Reserve Account.

34. There was never a shortage in either the Capital Reserve Account or the Rollover Reserve Account while Greenwich Capital held the Loan Documents.

35. There was never a shortage in either the Capital Reserve Account or the Rollover Reserve Account while The Royal Bank of Scotland held the Loan Documents.

36. As a gesture of good faith while seeking a resolution to the dispute with DRV, Fontaine voluntarily added \$736,000 to the Reserve Accounts on a short-term basis.

DRV's Unreasonable Reassessment of the Tax and Insurance Reserve Account

37. In April 2012, DRV notified Fontaine of the reassessment of the Tax and Insurance Reserve Account. DRV claimed the reassessment was to correct a projected shortfall. The Tax and

Insurance payment was reassessed on the assumption that insurance premiums would increase at least 46% from the previous years' premiums.

38. The Tax and Insurance monthly payment was reassessed from \$722 to \$5,272.97, constituting a one-time increase of 630%.

39. On June 11, 2012, Ronald Guerena of Marsh Risk and Insurance Service advised DRV that Fontaine's premiums were not expected to increase as significantly as DRV purported. At that time, Mr. Guerena advised DRV that Fontaine's monthly payment should be \$3,100. A copy of his letter to DRV is attached as Exhibit "A."

DRV Failed to Substantiate the Reassessments

40. As required by the Loan Agreement, Fontaine asked DRV to justify and substantiate the reasonableness of all reassessments, including a detailed written explanation of the reassessments and the underwriting guidelines upon which the reassessments were based. These requests were generally ignored.

41. The only explanation provided by DRV concerning the reassessments to the Reserve Accounts related to the Capital Reserve Account, which DRV explained was based upon a capital budget it received from CBRE-Columbia. That capital budget was submitted to DRV by CBRE-Columbia without Fontaine's approval or input. Moreover, approximately 95% of the recommended expenditures never came to fruition. DRV has been made aware of the stark contrast between the pro forma capital budget from CBRE-Columbia and the actual budget, but has failed and refused to withdraw or even review its demands for increases of the monthly contributions.

42. As far as Fontaine can tell, the reassessments were imposed arbitrarily and capriciously and without regard for DRV's obligations under the Loan Agreement to reassess based upon the exercise of reasonable judgment and current underwriting standards.

43. In my experience, these reassessments are unprecedented and outrageous in commercial real estate and financing. It is unreasonable to increase expenditures by over 700% and over 1,000% on a mere 60 days' notice. Additionally, because unreasonable reassessments are not permitted under the Loan Documents, and DRV has failed to demonstrate the adequate current underwriting grounds upon which they were based, the reassessments are not binding on Fontaine and should not be enforced.

44. The parties to the Loan Documents intended for the reassessment of Reserve Accounts to be conducted in a commercially reasonable manner in consideration of, among other things, the rents and profits reasonably expected to be generated by the applicable Real Property. Neither party understood the Loan Documents to permit the reassessment of the Reserve Accounts in the amounts imposed by DRV. To the extent the Loan Documents say otherwise, the drafting process must not have captured the parties' intentions. If the Loan Documents are construed in the manner that DRV advocates, the current dispute between the parties over the reassessments to the Reserve Accounts demonstrate the existence of a mutual mistake concerning the holder's authority to unilaterally reassess Fontaine's contributions to the various Reserve Accounts in a commercially unreasonable manner.

DRV Improperly Declares an Event of Default

45. By January 2012, after DRV repeatedly failed to substantiate the unreasonable reassessments, Fontaine reverted to paying the agreed assessments to the Reserve Accounts in existence under the Loan Documents i.e., Fontaine continued making payments but only in the amounts set forth in the Loan Agreement.

46. On July 27, 2012, DRV claimed that Fontaine was delinquent in its monthly contributions to the Reserve Accounts. Fontaine responded on August 6, 2012, demonstrating that the funding increases were unreasonable and unsubstantiated and, therefore, invalid under the Loan

Documents. As of the filing of this Affidavit, Fontaine has continued to make all payments in accordance with the Loan Documents.

47. On October 10, 2012, in continued reliance upon its unreasonable and unjustified reassessments of the Reserve Accounts, DRV claimed that Fontaine had defaulted on the October 2012 debt service payment. In response, on October 18, 2012, Fontaine demonstrated that, as a result of the unreasonable reassessments, which Fontaine had initially paid voluntarily in a good faith effort to resolve the dispute, DRV was in possession of excess funds that should have been refunded to Fontaine or applied to the debt service payment. Fontaine also expressed its concern that DRV had manufactured an event of default through unreasonable and unsubstantiated, and intentionally exorbitant, reassessments of the Reserve Accounts and by refusing to refund the excess funds in its possession.

48. In reply, DRV ignored Fontaine's explanation and accused Fontaine of intentionally withholding the debt service payment. Fontaine attempted to continue the discourse in good faith, pointing out that DRV had still not responded to its request for justification of the reassessments and explaining that DRV remained in possession of excess funds of approximately \$550,424.00. Fontaine continued to dispute that any Events of Default had occurred, continued to demand justification of the unreasonable reassessments, and continued to demand a refund of excess funds or a credit toward the debt service payments.

49. As a result of the unreasonable and outrageous reassessments, DRV remained in possession of excess funds in an amount believed to be approximately \$550,424.00 when the Complaint was filed. Under the Loan Agreement, Fontaine is either entitled to a refund of the improper payments to the Reserve Accounts or to have the excess funds in the Reserve Accounts credited to the debt service. Fontaine requested that DRV refund or credit the excess funds, but those requests were ignored.

50. Although DRV is in possession of over \$500,000 in improper payments as a result of the unreasonable reassessments, which Fontaine voluntarily paid as a showing of good faith, DRV nevertheless refused to refund or apply the excess funds to the debts service and declared an Event of Default.

51. According to Fontaine's records, as of the date of the hearing on DRV's motion to appoint a receiver, all payments due and owing under the Loan Agreement are current.

DRV's Unreasonable Request to Terminate Fontaine Management

52. Fontaine has entered into a valid and enforceable contract with Fontaine Management, manager of the Real Property Collateral. Fontaine has a long-time business relationship with Fontaine Management. DRV is aware of the existence of this contract and the business relationship under the contract.

53. In reliance on the improperly declared default, DRV has demanded that Fontaine terminate Fontaine Management as the property manager.

54. The alleged defaults upon which DRV relies in demanding termination of the property manager were fabricated by DRV through manipulation of the reassessment process for the Reserve Accounts.

55. During the dispute over the reassessments of the Reserve Accounts, Fontaine has repeatedly asked DRV to reassess the Reserve Account payments, account for all funds paid by Fontaine, and provide substantiation for the reassessments, including the current underwriting guidelines. These requests have been ignored.

56. Despite Fontaine's multiple requests, DRV has not reassessed the Reserve Accounts, has not accounted for all funds paid by Fontaine, and has not provided substantiation for the reassessments.

DRV's Unreasonable Deviation from the Established Course of Business.

57. The established course of business between the holder of the Loan Documents—whether Greenwich Capital, then The Royal Bank of Scotland, or, most recently, DRV—includes the provision of monthly statements of the debt service and Reserve Account balances since then.

58. DRV continued that course of business until this dispute arose. DRV has stopped providing monthly statements of the debt service and Reserve Account balances.

59. DRV has not provided an accounting of the funds received from or on behalf of Fontaine and all funds claimed to be due and owing. Indeed, DRV has not itemized the amounts claimed to be due and owing under the Loan Agreement since depleting the balances of the Reserve Accounts and (supposedly) applying those funds against the accelerated balance of the Note.

DRV Continues to Conduct Itself Unreasonably

60. DRV filed its complaint for foreclosure on November 20, 2012. But, before doing so, DRV engaged in unauthorized contact with Fontaine Management's local property manager, CBRE-Columbia, in an attempt to interfere with Fontaine Management's contractual relationship with its local property manager and in an attempt to divert funds from Fontaine and the Real Property Collateral and convert them to its personal use.

61. On December 3, 2013, Fontaine filed its Answer and placed the dispute over the existence of a bona fide Event of Default before the Court. Meanwhile, Fontaine continued to perform in accordance with the terms of the Loan Documents.

62. Despite the fact that Fontaine has contested the reasonableness of DRV's reassessment of the Reserve Accounts since July 2011—as is its legal right under the Loan Documents—and despite the fact that DRV and Fontaine invoked the jurisdiction and authority of this Court to adjudicate the rights and obligations of the parties under the Loan Documents, DRV has continued to interfere with Fontaine's exercise of its rights and obligations under the Loan Documents.

63. On December 6, 2012, just three days after Fontaine responded to DRV's complaint and placed the legitimacy of the allegations of default before the Court, DRV notified Fontaine that it had drained the Reserve Accounts and converted the funds to its own use.

64. Additionally, sometime in the days leading up to January 8, 2013, DRV contacted Fontaine Management's local property manager in an attempt to divert funds, rents, and profits from the Real Property and convert them to its own use or divert them to prevent Fontaine from performing under the Loan Documents.

65. Finally, as recently as January 18, 2013, DRV once again attempted to interfere with Fontaine Management's contractual relationship with its property manager and its contractual relationship with its counsel, while also continuing in its efforts to divert funds, rents, and profits from the Real Property and Fontaine.

Current Management of the Property

66. For its part, Fontaine has continued to perform its obligations under the Loan Documents and remains current in all aspects.

67. Fontaine Management continues to manage the Real Property through its onsite property manager, CBRE-Columbia.

68. Fontaine and Fontaine Management continue to market the Real Property to prospective tenants with a view toward entering into lease agreements for the vacant space at the Real Property. Fontaine and Fontaine Management recently rented out a vacant space at the Real Property. Fontaine's request, pursuant to the Loan Documents, that DRV reimburse it for necessary tenant improvements to prepare the applicable space for the new tenant has been ignored.

69. Fontaine continues to collect the rents from current tenants and continues to provide DRV with monthly statements and reports concerning the rents, the fees and administrative expenses, and other operating expenses. Because DRV has continued access to the financial

information concerning the property, DRV knows that the rents and income are not in danger of being lost or materially injured or impaired.

70. Fontaine continues to preserve and maintain the Real Property, and continues to incur the expenses necessary for the care, preservation, and maintenance of the Real Property, including a recent HVAC repair at a cost of \$7,900. DRV has refused to reimburse that expense in breach of the Loan Agreement.

71. Fontaine continues to maintain an appropriate insurance policy to protect the Real Property.

72. Fontaine continues to maintain utilities at the Real Property.

73. Fontaine is making all payments that are due and owing under the Loan Agreement, including the debt service and agreed contributions to the Reserve Accounts. Fontaine is not in default on its obligation to fund the Reserve Accounts. Fontaine is not in default on its obligation to maintain the debt service payments.

74. Although DRV stopped providing Fontaine with monthly statement concerning the debt service and Reserve Account balances, Fontaine has continued to report all financial activity concerning the property to DRV and CBRE-Columbia, the onsite property manager. DRV has access to all of the financial information concerning the Real Property and will continue to be granted such access as long as there remains a balance owing under the Note and DRV remains the holder.

75. Fontaine is not committing or permitting any waste on the Real Property.

DRV Breached its Contract with Fontaine

76. The Loan Documents created a valid and binding contract between DRV and Fontaine. DRV has violated the terms of that contract and breached the implied covenant of good faith and fair dealing by, among other things:

(a) Imposing an unreasonable reassessment to Fontaine's monthly payment to the Capital Reserve Account from the original amount of \$5,249 to \$54,476.34, which represents a one-time increase of 1,037%, and demanding payment on 60 days' notice.

(b) Imposing an unreasonable reassessment to Fontaine's monthly payment to the Rollover Reserve Account from the original amount of \$21,086.50 to \$159,472.91, which represents a one-time increase of 756%, and demanding payment on 60 days' notice.

(c) Imposing an unreasonable reassessment to Fontaine's monthly payment to the Tax and Insurance Account from the original amount of \$722 to \$5,272.97, which represents a one-time increase of 630%, and demanding payment on 60 days' notice.

(d) Imposing an unreasonable reassessment to Fontaine's monthly payments to the Reserve Accounts and imposing such an exorbitant amount that it rendered Fontaine's performance under the contract impossible, given the rents and profits that the applicable Real Property is reasonably expected to generate.

(e) Imposing an unreasonable reassessment to Fontaine's monthly payments to the Reserve Accounts and imposing such an exorbitant amount that it has prevented Fontaine's performance under the contract, given the rents and profits that the applicable Real Property is reasonably expected to generate.

(f) Refusing to provide justification and substantiation of the reassessments—including requests for review of applicable underwriting guidelines.

(g) Refusing to provide monthly statements of the debt service and Reserve Account balances.

(h) Accepting excess payments for the Reserve Accounts and then refusing to refund the excess payments or, alternatively, refusing to credit the payments to the debt service.

(i) Declaring an Event of Default and invoking the Default provisions when no Event of Default has occurred.

(j) Manipulating the process of reassessment of Reserve Accounts to manufacture an Event of Default.

77. The Loan Documents created a confidential and fiduciary relationship between DRV and Fontaine, especially with respect to the maintenance and reassessment of the Reserve Accounts, which are custodial accounts, and other licensing agreements. DRV has violated its fiduciary duty to Fontaine by, among other things:

(a) Arbitrarily and capriciously reassessing Fontaine's monthly payment to the Capital Reserve Account from the original amount of \$5,249 to \$54,476.34, which represents a one-time increase of 1,037%, and demanding payment on 60 days' notice.

(b) Arbitrarily and capriciously reassessing Fontaine's monthly payment to the Rollover Reserve Account from the original amount of \$21,086.50 to \$159,472.91, which represents a one-time increase of 756%, and demanding payment on 60 days' notice.

(c) Arbitrarily and capriciously reassessing Fontaine's monthly payment to the Tax and Insurance Account from the original amount of \$722 to \$5,272.97, which represents a one-time increase of 630%, and demanding payment on 60 days' notice.

(d) Arbitrarily and capriciously reassessing Fontaine's monthly payments to the Reserve Accounts and imposing such an exorbitant amount that it rendered Fontaine's performance under the contract impossible, given the rents and profits that the applicable Real Property is reasonably expected to generate.

(e) Arbitrarily and capriciously reassessing Fontaine's monthly payments to the Reserve Accounts and imposing such an exorbitant amount that it has prevented Fontaine's

performance under the contract, given the rents and profits that the applicable Real Property is reasonably expected to generate.

(f) Refusing to provide justification and substantiation of the reassessments--including requests for review of applicable underwriting guidelines.

(g) Refusing to provide monthly statements of the debt service and Reserve Account balances.

(h) Accepting excess payments for the Reserve Accounts and then refusing to refund the excess payments or, alternatively, refusing to credit the payments to the debt service.

(i) Declaring an Event of Default and invoking the Default provisions when no Event of Default has occurred.

(j) Manipulating the process of reassessment of Reserve Accounts to manufacture an Event of Default.

[SIGNATURE PAGE TO FOLLOW]



PAULA MATHEWS

SWORN TO AND SUBSCRIBED
before me this the _____ day of January 2013.

NOTARY PUBLIC
My Commission Expires: _____

Please see attached.

CALIFORNIA JURAT WITH AFFIANT STATEMENT

GOVERNMENT CODE § 8202

- ☒ See Attached Document (Notary to cross out lines 1-6 below)
☐ See Statement Below (Lines 1-6 to be completed only by document signer[s], *not* Notary)

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Signature of Document Signer No. 1~~ ~~_____
Signature of Document Signer No. 2 (if any)~~

State of California

County of ORANGE

Subscribed and sworn to (or affirmed) before me

on this 25 day of JANUARY, 2013.

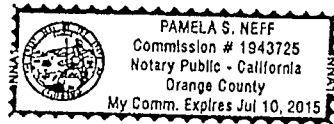
by Pamela Matthews
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me (.) ~~(.)~~
(and

(2) _____
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.)

Signature Pamela S. Neff
Signature of Notary Public



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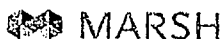
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OF SIGNER #1
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Ronald S. Guerena
Senior Vice President

Marsh Risk & Insurance Services
4695 MacArthur Court, Suite 700
Newport Beach, CA 92660
California Insurance License # 0437153
949 399 5909
Ronald.S.Guerena@marsh.com
www.marsh.com

Mr. Elliot Liffman
Diversified Realty Ventures
4920 Elm Street, Suite 325
Bethesda, MD 20814

June 11, 2012

Subject: Fontaine Insurance Reserve

Dear Elliot,

Paula Mathews of Strategic Capital Holdings asked me to confirm the insurance pricing last year on Fontaine and to provide an estimate of this point and time for the renewal, as you are adjusting your insurance reserve for the property.

We invoiced \$29,932 to Fontaine last year for all insurance on the location. On a monthly payment basis this works out to be about \$2,500 per month.

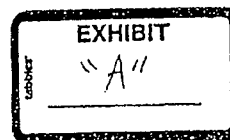
Although the renewal has not taken place yet, as it is on October 31st, we do not expect a large increase in premium. However, this can change based on losses or the market changing significantly due to a large catastrophic event or multiple events. Even with a 25% increase, which we are not expecting, the monthly charge would be just over \$3,100. So, if you are to budget an amount, our best estimate would be \$3,100 a month.

I hope this helps with your analysis.

Sincerely,

Ronald S. Guerena
Senior Vice President

Copy:
Paula Mathews



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FBPAPP-0891



Diversified Realty Ventures, LLC

8218 Wisconsin Avenue, Suite 209
Bethesda, Maryland 20814
Phone: 301 654 0660
Fax: 301 656 0548
www.drv-llc.com

Via FedEx

July 11, 2011

Fontaine Business Park, LLC
5 Financial Plaza, Suite 205
Napa, CA 94558
Attn: Michael Schwartz and Stephen Corea

Re: Promissory Note dated December 14, 2007 made by FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company, in the original principal amount of \$16,300,000.00 (the "Note") made payable to the order of GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation, and subsequently transferred to DRV FONTAINE, LLC, a Maryland limited liability company ("DRV"), together with all documents executed in connection with the Note (the "Loan").

Dear Sirs:

We are in receipt of your Three Year Capital Expense Budget 2011-2013 ("the Budget"). The Budget forecasts Capital Expenses and Leasing Expenses in the aggregate amount of \$2,417,964 during the applicable period. Based on your current reserve balances and scheduled monthly deposits, there is a projected deficit in each of the Capital Reserve Account and Rollover Reserve Account.

This correspondence constitutes notice to you that DRV, pursuant to Sections 3.4 and 3.5 of the Loan Agreement, has increased the amount of the monthly deposits beginning with the September 6, 2011 payment. The new monthly deposit schedule is as follows:

From	To	Capital Reserve Account	Rollover Reserve Account
--	August 2011	\$5,249.00	\$21,086.50
September 2011	June 2012	\$54,476.34	\$159,472.91
July 2012	November 2013	\$9,001.39	\$28,324.00
December 2013	--	\$5,249.00	\$21,086.50

A forecast of future reserve balances based on the new deposit schedule is attached hereto as Schedule A.

Sincerely,

Elliot Liffman
Manager

cc: Michael Rafter and William H. Mathieu; Powell Goldstein LLP (via facsimile)
Paula Matthews; Fontaine Management LLC (via facsimile)
Sandra Johnson; CB Richard Ellis (via email)

Bethesda, Maryland | Richmond, Virginia



FBPAPP-0892

Schedule A

Month	Capital Reserve				Month	Rollover Reserve			
	Beginning Capital Balance	Monthly Capital Contribution	UW Capital Expenditure	Ending Capital Balance		Beginning TI/LC Balance	Monthly TI/LC Contribution	UW TI/LC Expenditure	Ending TI/LC Balance
May-11	110,998.19	5,249.00	18,750.00	97,497.19		375,396.74	21,086.50	-	396,483.24
Jun-11	97,497.19	5,249.00	15,000.00	87,746.19		396,483.24	21,086.50	-	417,569.74
Jul-11	87,746.19	5,249.00	13,531.25	79,463.94		417,569.74	21,086.50	106,006.25	332,649.99
Aug-11	79,463.94	5,249.00	-	84,712.94		332,649.99	21,086.50	108,573.75	245,162.74
Sep-11	84,712.94	54,476.34	-	139,189.28		245,162.74	159,472.91	-	404,635.65
Oct-11	139,189.28	54,476.34	92,500.00	101,165.62		404,635.65	159,472.91	60,755.00	503,353.57
Nov-11	101,165.62	54,476.34	-	155,641.96		503,353.57	159,472.91	325,000.00	337,826.48
Dec-11	155,641.96	54,476.34	-	210,118.30		337,826.48	159,472.91	37,470.00	459,829.39
Jan-12	210,118.30	54,476.34	-	264,594.64		459,829.39	159,472.91	-	619,302.31
Feb-12	264,594.64	54,476.34	81,250.00	237,820.98		619,302.31	159,472.91	-	778,775.22
Mar-12	237,820.98	54,476.34	15,000.00	277,297.32		778,775.22	159,472.91	-	938,248.13
Apr-12	277,297.32	54,476.34	-	331,773.66		938,248.13	159,472.91	366,666.88	731,054.17
May-12	331,773.66	54,476.34	336,250.00	50,000.00		731,054.17	159,472.91	-	890,527.09
Jun-12	50,000.00	54,476.34	7,500.00	96,976.34		890,527.09	159,472.91	800,000.00	250,000.00
Jul-12	96,976.34	9,001.39	-	105,977.73		250,000.00	28,324.00	-	278,324.00
Aug-12	105,977.73	9,001.39	15,000.00	99,979.12		278,324.00	28,324.00	206,250.00	100,398.00
Sep-12	99,979.12	9,001.39	15,000.00	93,980.52		100,398.00	28,324.00	-	128,722.00
Oct-12	93,980.52	9,001.39	-	102,981.91		128,722.00	28,324.00	-	157,046.00
Nov-12	102,981.91	9,001.39	-	111,983.30		157,046.00	28,324.00	12,240.00	173,130.00
Dec-12	111,983.30	9,001.39	-	120,984.69		173,130.00	28,324.00	-	201,454.00
Jan-13	120,984.69	9,001.39	-	129,986.08		201,454.00	28,324.00	-	229,778.00
Feb-13	129,986.08	9,001.39	-	138,987.47		229,778.00	28,324.00	-	258,102.00
Mar-13	138,987.47	9,001.39	-	147,988.87		258,102.00	28,324.00	-	286,426.00
Apr-13	147,988.87	9,001.39	117,500.00	39,490.26		286,426.00	28,324.00	64,750.00	250,000.00
May-13	39,490.26	9,001.39	18,750.00	29,741.65		250,000.00	28,324.00	77,377.50	200,946.50
Jun-13	29,741.65	9,001.39	-	38,743.04		200,946.50	28,324.00	-	229,270.50
Jul-13	38,743.04	9,001.39	-	47,744.43		229,270.50	28,324.00	-	257,594.50
Aug-13	47,744.43	9,001.39	15,000.00	41,745.82		257,594.50	28,324.00	12,939.38	272,979.13
Sep-13	41,745.82	9,001.39	18,750.00	31,997.22		272,979.13	28,324.00	64,645.00	236,658.13
Oct-13	31,997.22	9,001.39	-	40,998.61		236,658.13	21,086.50	-	257,744.63
Nov-13	40,998.61	9,001.39	-	50,000.00		257,744.63	21,086.50	-	278,831.13
Dec-13	50,000.00	5,249.00	-	55,249.00		278,831.13	21,086.50	-	299,917.63

From: (301) 654-0660
 Elliot L. Uffman
 DIVERSIFIED REALTY VENTURES
 8218 Wisconsin Ave
 Suite 209
 Bethesda, MD 20814

Origin ID: OBTA



Ship Date: 11JUL11
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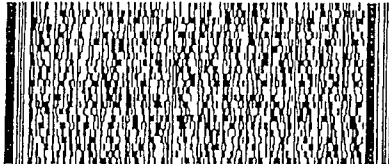
Michael Schwartz / Stephen Corea
 Fontaine Business Park, LLC
 5 FINANCIAL PLZ STE 205

NAPA, CA 94558

Ref # FBP Borrower
 Invoice #
 PO #
 Dept #

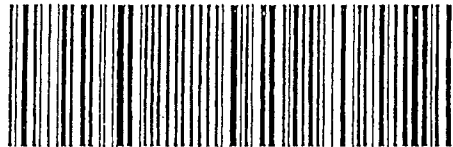
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Elliot Liffman <eliffman@drv-llc.com>

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Sender Phone: (301) 654-0660 x301
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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

) CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC, *et al.*

Defendants.

)
)
) SUPPLEMENTAL AFFIDAVIT
) OF PAULA MATHEWS
) IN OPPOSITION TO THE MOTION
) FOR APPOINTMENT OF RECEIVER
)
)
)

STATE OF CALIFORNIA)

COUNTY OF ORANGE)

PERSONALLY APPEARED before me, Paula Mathews, who, first being duly sworn, deposes and states as follows:

1. I am the Executive Vice President of Commercial Operations for U.S. Commercial, LLC, the sole member of Fontaine Business Park, LLC ("Fontaine") and Fontaine Management, LLC ("Fontaine Management"). Among other things, my duties include keeping the business records for both of these entities, which are kept in the regular course of business.

2. I am also personally familiar with, and do hereby verify, the facts alleged in the Answer, Affirmative Defenses, Counterclaims, Supplemental Pleading filed by Fontaine. I am personally familiar with the Loan Documents, the management of Fontaine and Fontaine Management, and the status of the Loan Agreement. I am also personally familiar with the loan relationship between



Fontaine and Greenwich Capital Financial Products, Inc., and its two successors-in-interest, The Royal Bank of Scotland, and the Plaintiff, DRV Fontaine, LLC ("DRV").

3. I have reviewed the Complaint, the Answer to the Counterclaims, the Affidavit of Elliot Liffman, and the Reply Affidavit of Elliot Liffman, all of which have been filed by DRV in this matter.

4. I was present for the hearing on the Motion to Appoint Receiver that was held on February 1, 2013, and anticipated being called as a witness for Fontaine.

5. During the hearing and in the affidavits filed with the Court, much has been/was said about the three-year Capital Expense projections, also referred to as the Capital Expense Budget, demanded by DRV and prepared by CBRE-Columbia ("CBRE") (the onsite property management company at the Real Property Collateral). However, the reporting requirements created by the Loan Documents and a comparison of projected and actual expenses at the Real Property Collateral as they relate to the funding of the Reserve Accounts have not been thoroughly addressed.

6. I am submitting this affidavit, among other things, to provide additional information concerning the reporting requirements of Fontaine to DRV under the Loan Documents; as well as to point out how the CBRE projected Capital Expenses differed from the actual expenditures incurred at the Real Property Collateral. If I had been called to testify, among other things, I would have provided the following information.

7. A main issue in the dispute between DRV and Fontaine arises from DRV's commercially unreasonable increases to Fontaine's monthly contributions to the Reserve Accounts established by the Loan Agreement, and DRV's subsequent unreasonable demands for payment of the unreasonable monthly contributions.

8. The Loan Documents create reporting requirements between the Borrower and the Lender.

Annual, Quarterly, Monthly, and Other Reports

9. Under Section 6.3.1 of the Loan Agreement, Fontaine maintains yearly records of all financial affairs, including income and expenses.

10. Under Section 6.3.2 of the Loan Agreement, Fontaine provides the Lender with Annual Reports. The Annual Reports include the property's annual financial statements, containing balance sheets and statements of profit and loss, annual net operating income, and a list of tenants and other leasing information.

11. Under Section 6.3.3 of the Loan Agreement, Fontaine provides the Lender with Monthly and Quarterly Reports. The Monthly Reports include monthly and year-to-date operating statements, balance sheets, and comparisons of the budgeted income and expenses and the actual income and expenses, an aged receivables report, and rent rolls. The Quarterly Reports include a statement of the actual Capital Expenses made during each months.

12. On this point, some explanation is necessary. At some point in this dispute, DRV stopped providing applicable monthly financial information to Fontaine. This information is necessary to properly complete the Monthly Reports related to the Real Property Collateral. After discussion on this missing information with CBRE, we determined to refrain from providing Monthly Reports until the provision of the month financial information by DRV was restored.

13. One other point from my previous affidavit requires clarification. In paragraph 68, I stated that DRV has failed to reimburse Fontaine for necessary tenant improvements. I was referring, in particular, to DRV's refusal to reimburse Fontaine for the \$7,900 expense for the replacement of the HVAC unit for Patterson Dental and, more generally, to the clear signals that Fontaine has received from DRV through its conduct, including the draining of the Reserve Accounts that are set up to pay for such things. The HVAC replacement is a capital expense for the

benefit of the tenants which also enhance the value of the Real Property Collateral. DRV refused to reimburse this expense after written request.

Three-Year Capital Expense Projections

14. No Loan Document requires Fontaine to provide the Lender with a three-year projection of any financial performance, including Capital Expenses.

15. The Loan Documents do not authorize the Lender to request or demand that Fontaine provide a three-year projection of any financial performance, including Capital Expenses.

16. The Loan Documents do not define what a three-year projection of any financial performance should contain. More particularly, the Loan Documents do not define what a three-year projection of Capital Expenses should contain, or be used for.

17. Under the Loan Documents, there is no need to supplement the financial reporting already required.

DRV's Demand for a Three-Year Capital Expense Projections

18. In the fall of 2010, despite the absence of authority to demand three-year Capital Expense projections, and despite the absence of any obligation for the preparation and submission of such projections, DRV repeatedly contacted CBRE and demanded that one be provided.

19. To the best of my knowledge, information, and belief, DRV instructed CBRE to generate a three-year projection of Capital Expenses of what it might cost to lease all existing vacant space at the Real Property Collateral, and to provide major capital improvements to the Real Property Collateral, whether warranted or not.

20. To the best of my knowledge, information, and belief, DRV instructed CBRE to generate a three-year projection of Capital Expenses based upon the assumption of the worst case scenario with respect to the costs of all projected Capital Expenses.

21. To the best of my knowledge, information, and belief, DRV instructed CBRE to generate a three-year projection of Capital Expenses without accounting for or projecting increased revenue generated through new leases.

22. To the best of my knowledge, information, and belief, DRV instructed CBRE to generate the three-year projection of Capital Expenses without accounting for the outcomes of lease negotiations with respect to Tenant Improvements, which are always taken into account in determining the proper rent and the amount of the costs borne by each party to the lease.

23. Based upon my 36 years of experience working with commercial mortgages and properties, I believe the instructions provided by DRV for completion of the three-year Capital Expense projections were unrealistic, arbitrary, unreasonable, and unsound.

24. To the best of my knowledge, information, and belief, DRV did not inform CBRE of its purpose for requesting a three-year projection of Capital Expenses.

25. DRV did not inform Fontaine or Fontaine Management of its purpose for requesting a three-year projection of Capital Expenses.

26. Despite the lack of guidance in the Loan Documents, the lack of explanation from DRV, and the lack of understanding of DRV's purposes, in a good faith effort to comply with DRV's request, I allowed CBRE to prepare the requested projections.

The 3-Year Capital Expense Projections Compared to Actual Expenditures

27. On May 10, 2011, CBRE submitted the three-year capital expense projections (the "CBRE projections") to DRV.

28. For 2011, the CBRE projections included \$111,825 for mechanical, electrical, and plumbing expenses and \$510,244 for Tenant Improvements and Leasing Commissions.

29. The actual expenditures for 2011 were \$31,950 for mechanical, electrical, and plumbing expenses and \$149,205 for Tenant Improvements and Leasing Commissions.

30. The CBRE projections and the Actual Expenses for 2011 are reflected in the chart below:

	CBRE Projections	Actual Expense
Mechanical, Electrical, and Plumbing	\$111,825	\$31,950
Tenant Improvements and Leasing Commissions	\$510,244	\$149,205
TOTAL	\$622,069	\$181,155

31. For 2011, the difference between the CBRE projections and the actual expenses is \$440,914.

32. For 2012, the CBRE projections included a \$65,000 site improvement to add parking at the building known as Fontaine V in the event the building was leased and the Tenant's use required additional parking as a result of increased office space; a \$257,000 expense for roofing at the buildings known as Fontaine II and Fontaine III; \$54,000 for mechanical, electrical, and plumbing expenses; and \$1,108,125 for Tenant Improvements and Leasing Commissions.

33. The actual expenditures for 2012 included no site improvements; no roofing expenses; \$23,553 for mechanical, electrical, and plumbing expenses; and \$88,309 for Tenant Improvements and Leasing Commissions.

34. The CBRE projections and the Actual Expenses for 2012 are reflected in the chart below:

	CBRE projections	Actual Expense
Site Improvements	\$65,000	\$0
Roofing	\$257,000	\$0

Mechanical, Electrical, and Plumbing	\$54,000	\$23,553
Tenant Improvements and Leasing Commissions	\$1,108,125	\$88,309
TOTAL	\$1,484,125	\$111,862

35. For 2012, the difference between the CBRE projections and the Actual Expenses is \$1,372,263.

36. Of the total Capital Expenses projected in 2011 for 2011 and 2012, only about 5% were actually incurred. About 95% of the expenses were not incurred, either because the projected new leases did not materialize or because the projected improvements and repairs were not needed.

37. The average occupancy rate for commercial real property in Columbia, South Carolina similar to the Real Property Collateral is 64.9%. The current occupancy rate at the Real Property Collateral is 69%. With pending new and renewal leases, Fontaine expects that the occupancy rate at the Real Property Collateral will increase to 80%.

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FURTHER AFFIANT SAITH NOT.



PAULA MATHEWS

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State of California

County of ORANGE

Subscribed and sworn to (or affirmed) before me

on this 8 day of February, 2013
Date Month Year

by PAULA MATTEWS
Name of Signer

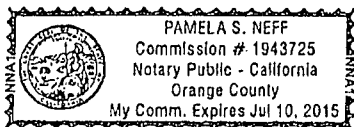
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(and

(2) _____
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.)

Signature Pamela S. Neff
Signature of Notary Public



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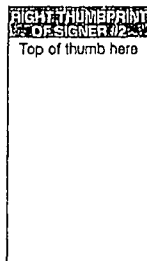
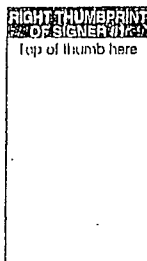
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
RICHLAND COUNTY

DRV FONTAINE, LLC,

Plaintiff/Counter-Defendant,
vs. Case No.: 2012-CP-40-7752

FONTAINE BUSINESS PARK, LLC, et al,

Defendant/Counter-Plaintiff.

V I D E O T A P E
D E P O S I T I O N

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WITNESS: ELLIOT M. LIFFMAN

DATE: SEPTEMBER 20, 2013

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1221 Main Street, Suite 1800
Columbia, South Carolina

TAKEN BY: Attorneys for Defendant(s)

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1 APPEARANCES:

2 ATTORNEYS FOR PLAINTIFF:

3 McNAIR LAW FIRM
4 BY: PAUL HARRILL, Attorney at Law
5 1221 Main Street, Suite 1800
6 Columbia, South Carolina 29201

6 ATTORNEYS FOR DEFENDANTS:

7

8 BAKER, DONELSON, BEARMAN, CALDWELL
9 & BERKOWITZ, PC
10 BY: MARK A. FULKS, ATTORNEY AT LAW
11 BRENT B. YOUNG, ATTORNEY AT LAW
12 100 Med Tech Parkway, Suite 200
13 P.O. Box 3038
14 Johnson City, Tennessee 37604

11

12 THE PLAYER LAW FIRM, LLC
13 BY: TUCKER S. PLAYER, ATTORNEY AT LAW
14 1415 Broad River Road
15 Columbia, South Carolina 29210

14

Also Present:

15

16 James Downie, CLVS
17 Paula Mathews

17

18 (INDEX AT REAR OF TRANSCRIPT)

19

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25

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1 A. Generally accepted accounting principles.

2 Q. Okay. Do you not understand that part of
3 the loan agreement to say if something is not
4 defined here you go to generally accepted accounting
5 principles?

6 A. I understand it to mean that any
7 accounting terms not specifically defined shall be
8 construed in accordance with GAP.

9 Q. So is underwriting guidelines or standards
10 an accounting term?

11 A. I don't believe so.

12 Q. Okay. So your position is then that the
13 term "underwriting standards or guidelines," and I'm
14 using those two interchangeably. I don't think
15 there is a definitional difference. Is not defined
16 at all in the contract?

17 A. Correct.

18 Q. And you applied the contract based on your
19 understanding based on your experience of what that
20 means?

21 A. I applied the contract based on what I
22 understood the contract to mean.

23 Q. Okay. What happens if Fontaine Business
24 Park did not understand underwriting guidelines to
25 mean what you think it means?

52

1 Q. Now, how did you -- what was your
2 underwriting process with respect to the reserve
3 account?

4 A. We looked at what the balances were in the
5 reserve accounts and what the anticipated
6 expenditures would be that are intended to be funded
7 by those reserves and evaluated whether or not those
8 reserves were adequate to meet their intended need.

9 Q. Now, going back to the underwriting
10 process for the loan, did you factor into your
11 analysis the amount that you paid for the loan?

12 A. Not in underwriting the loan itself, no.

13 Q. But in making the decision to purchase the
14 loan?

15 A. In making our purchase decision did we
16 factor in our purchase price?

17 Q. Uh-huh.

18 A. Of course.

19 Q. Okay. And what was your purchase price?

20 A. Approximately 12 million dollars.

21 Q. Approximately? What is your -- do you
22 have an idea of what your rate of error is?

23 A. There was a contract purchase price of, I
24 believe, 11.8 million dollars. That could have a
25 margin of error of a couple of hundred thousand

1 lender to an account, the tax and insurance
2 account."

3 Q. When you received those payments did you
4 transfer them to an account?

5 A. Yes.

6 Q. So there was actually a separate account
7 that those funds were deposited into?

8 A. Yes.

9 Q. That was not a book entry account?

10 A. It was not exclusively a book entry
11 account.

12 Q. So it was partially a book entry account?

13 A. There were book entries to record the
14 activity in the account.

15 Q. But the funds were kept separate for that
16 specific purpose?

17 A. Yes.

18 Q. Okay. Did you ever have occasion to
19 reassess the taxes and insurance?

20 A. Yes.

21 Q. And what process did you go through to
22 estimate how much -- how to do that reassessment?

23 A. We used the same process that the prior
24 lender had used.

25 Q. And what process was that?

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1 A. It's to -- essentially the process is to
2 estimate what amounts will be payable and when. And
3 based upon what is presently in the reserve, what
4 payments must be made on a monthly basis between now
5 and then in order to have what you need.

6 Q. Okay. How did you determine how much of
7 an increase was required? What was your estimate
8 based upon?

9 A. The increase is calculated based upon what
10 is expected to be needed and what is there now.

11 Q. Okay. How did you determine what was
12 expected?

13 A. How did we determine what was expected to
14 be needed?

15 Q. Yes.

16 A. It depends on what we are talking about.
17 We would use whatever information was available to
18 us to make a reasonable estimate.

19 Q. What information was available to you?

20 A. With respect to which increase?

21 MR. HARRILL: Tax or insurance is
22 what he's asking you, I think.

23 BY MR. FULKS:

24 Q. Okay. With respect to -- well, I asked if
25 either was reassessed. Isn't it one payment?

1 A. It is one payment.

2 Q. Okay. When it was reassessed, you
3 reassessed that one payment?

4 A. Correct.

5 Q. Okay. So you weren't asking me if it was
6 tax or insurance?

7 A. I was.

8 Q. Well, my questions were general as to how
9 you reassessed that.

10 A. You were --

11 Q. Let's talk about taxes. How did you --
12 what information did you use to estimate the taxes?

13 A. Generally speaking we would look at prior
14 years tax expense and assume some sort of growth
15 over the prior year.

16 Q. Did you -- when you reassessed the
17 contribution to that account did you increase that
18 portion going to taxes?

19 A. The increase in the single payment was
20 based on -- based on taxes.

21 Q. So that was part of it?

22 A. Taxes are part of it, yes.

23 Q. Okay. And did you also base the
24 reassessment in part on the insurance premium?

25 A. Which reassessment are you referring to?

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1 Q. If I'm asking about the insurance premium
2 which reassessment would I be asking about?

3 A. I don't know.

4 Q. Really?

5 A. Really. We've reassessed -- these
6 accounts -- these escrows are reassessed frequently,
7 and we have reassessed them more than once.

8 Q. And let's talk about the most recent
9 reassessment for the insurance premium. What
10 information did you base that reassessment on?

11 A. We based it on, if I remember correctly,
12 like I explained is our general practice, we base
13 our expected growth over the prior year on what
14 growth had happened the year before that.

15 Q. Growth in an insurance premium?

16 A. In that specific instance, yes.

17 Q. Did you get any information from the
18 insurance agent?

19 A. Not at the time we made the assessment.

20 Q. Were you subsequently provided information
21 from the insurance agent that indicated your
22 estimate was incorrect?

23 A. We received information from the insurance
24 agent that asserted that our assessment was
25 incorrect. Did not indicate it to me though.

1 Q. Because you know better what the insurance
2 was going to be than the actual agent?

3 A. I didn't say that.

4 Q. But you felt like the insurance agent's
5 information was inaccurate?

6 A. I felt that the insurance agent's
7 conclusion was inaccurate.

8 Q. So when you were told that the insurance
9 was -- by the insurance agent that the insurance
10 rate would not be what you anticipated it to be, did
11 you consider decreasing the monthly contribution?

12 A. I don't recall specifically what the
13 insurance agent said in his letter. What I do
14 remember is that nothing in the letter indicated to
15 me that it would be appropriate to modify or
16 assessment.

17 Q. I'm going to hand you a letter, Mr.
18 Liffman, and ask you if you recognize that?

19 A. It looks like the letter that Ms. Mathews
20 delivered to me.

21 Q. Do you have any reason to believe that
22 that is not a correct copy of the letter?

23 A. No.

24 Q. And is that letter addressed to you?

25 A. Yes.

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1 Q. And what does that letter say about the
2 insurance portion of the tax and insurance reserve?

3 A. The letter says, "Dear Elliot. Paula
4 Mathews of Strategic Capital Holdings asked me to
5 confirm the insurance pricing last year on Fontaine
6 and to provide an estimate at this point in time for
7 the renewal that you are adjusting your insurance
8 reserve for the property. We invoiced 29,932 to
9 Fontaine last year for all insurance on the
10 location. On a monthly payment basis this works out
11 to be about \$2,500 per month. Although the renewal
12 has not taken place yet, as it is on October 31st,
13 we do not expect a large increase in premium.
14 However, this can change based on losses or the
15 market changing significantly due to a large
16 catastrophic event or multiple events. Even with a
17 25 percent increase, which we are not expecting, the
18 monthly charge would be just over \$3,100. So if you
19 are to budget an amount, our best estimate would be
20 \$3,100 a month. I hope this helps with your
21 analysis. Sincerely, Ronald S. Duran, Senior Vice
22 President, copy to Paula Mathews."

23 Q. What part of that letter do you disagree
24 with?

25 A. I don't disagree with anything set forth

1 in this letter.

2 Q. You just testified that you disagreed with
3 the conclusion.

4 A. I disagreed with -- yeah, I should -- I
5 should restate that. Having read the letter, I now
6 see that it does not contain a conclusion that is
7 germane to the analysis we performed.

8 Q. How is it not germane to the analysis that
9 you performed?

10 A. Because we -- our analysis does not, as
11 this letter does, seek to simply amortize an annual
12 premium over 12 months.

13 Q. So the insurance agent tells you what the
14 premium is going to be and you rejected that?

15 A. That is incorrect.

16 MR. HARRILL: Object to the form.

17 BY MR. FULKS:

18 Q. Did you base the reassessment on that?

19 A. I received this after the reassessment.

20 Q. Did you take that and review your
21 reassessments and determine how accurate they were?

22 A. I reviewed the letter carefully and
23 carefully considered the information presented.

24 Q. You specifically remember reviewing this
25 carefully?

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1 A. I assume that I reviewed it carefully as I
2 explained I try to do when I'm given reports or
3 analyses.

4 Q. Well, you just asserted pretty clearly
5 that you, in fact, reviewed that letter carefully.
6 Did you or did you not?

7 A. I don't believe I asserted that as -- with
8 a certainty. If I did, I apologize. I will say
9 that I do not specifically remember my review of
10 this letter. I simply assume, based on my habits,
11 that I would have reviewed it carefully.

12 Q. Well, didn't that letter come to you with
13 a request that you reassess the insurance portion of
14 that account again?

15 A. I don't remember if that was included in
16 Ms. Mathews' transmittal or not.

17 Q. Well, then why would she send you that
18 letter?

19 A. You would have to ask her.

20 Q. You received it?

21 A. Yes.

22 Q. And you don't know why it was sent?

23 A. I can't know what was in Ms. Mathews'
24 head.

25 Q. Why would she send you a letter about what

1 the insurance premiums are supposed to be?

2 MR. HARRILL: Object to the form.

3 BY MR. FULKS:

4 Q. Why would you send a letter like that to
5 somebody?

6 A. For many reasons, but ultimately it all
7 boils down to I would send this letter to someone if
8 I wanted them to have the information contained in
9 the letter.

10 Q. Do you remember what the tax and insurance
11 monthly payment was before you reassessed it?

12 A. No.

13 Q. Does \$722 sound about right?

14 A. That does not sound right for the tax and
15 insurance assessment. I would -- if I had to guess
16 I would say it was in the neighborhood of \$40,000 a
17 month.

18 Q. \$40,000 a month for taxes and insurance?

19 A. I'm guessing. I honestly don't remember.

20 Q. But you think it would have been \$40,000 a
21 month, but he's telling you it would be how much?

22 A. 3,100 a month although he is not telling
23 me how much tax and insurance would be. He's -- all
24 he is saying is that -- what he expects the premium
25 to be amortized over a 12-month period would be a

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1 certain amount each month.

2 Q. Well, he's the insurance agent. Wouldn't
3 he know what it's going to be?

4 A. I only know what he told me.

5 Q. Do you remember the amount that the tax
6 and insurance monthly payment was reassessed to?

7 A. No.

8 Q. Does \$5,272.97 sound familiar?

9 A. That sounds like what we used for the
10 insurance component of the tax and insurance reserve
11 payment.

12 Q. Okay. So you increased the insurance
13 portion to \$5,272.97 a month?

14 A. If you say so.

15 Q. Do you have any reason to believe that is
16 incorrect?

17 A. No.

18 Q. But the insurance agent told you it would
19 be considerably less than that?

20 A. The insurance agent was addressing a
21 different question.

22 Q. What question were they addressing?

23 A. What the insurance agent said is based on
24 what he expects to be the premium, what that premium
25 divided by 12 would be.

1 Q. So how much it would cost per month?

2 A. Essentially he amortized his expected
3 premium over 12 months and reported to me on the
4 results of that math.

5 Q. An annual premium divided by 12 results in
6 a monthly payment, does it not?

7 A. No.

8 Q. That is not a monthly payment?

9 A. No.

10 Q. Do you know how many months there are in a
11 year?

12 MR. HARRILL: Objection.

13 THE WITNESS: I think I do.

14 BY MR. FULKS:

15 Q. How many do you think are in a year?

16 A. Twelve.

17 Q. Okay. So we get an annual premium. We
18 divide it by 12. What does that give you?

19 A. Your monthly accrued expense.

20 Q. And you've never been an insurance agent?

21 A. No.

22 Q. Never worked in the insurance industry at
23 all?

24 A. No.

25 Q. But you think you knew better what the

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1 insurance expense was going to be than the actual
2 agent on the policy for the property?

3 A. I didn't say that.

4 Q. Well, you didn't accept his analysis. You
5 said you disagreed with his conclusion.

6 A. I disagreed --

7 MR. HARRILL: Object to the form.

8 THE WITNESS: I said prior to you
9 showing me the letter that I disagreed with his
10 conclusion. And then after you showed me the letter
11 I amended my statement to correct it to say that,
12 in fact, now that my memory is refreshed, he did not
13 provide a conclusion that was germane to our
14 analysis.

15 BY MR. FULKS:

16 Q. How is the insurance agent's estimated
17 monthly payment not germane to your analysis?

18 A. It's apples and oranges.

19 Q. How is it apples and oranges?

20 A. In that it is answering a different
21 question.

22 Q. What question is that answering?

23 A. What the monthly premium amortized -- what
24 the annual premium amortized on a monthly basis is.

25 Q. The monthly payment?

1 A. No. That is just not correct. I'm sorry.

2 Q. How is that not correct?

3 A. First of all, there is no monthly payment.

4 It's an annual premium. There is an annual payment.

5 That is primarily how it's not correct.

6 Q. But he tells you what the monthly amount
7 of that annual premium would be?

8 A. He tells me what his expected annual
9 premium amortized monthly would be on a per month
10 basis, yes.

11 Q. So that is a way of calculating the
12 monthly payment?

13 A. There is no monthly payment. The
14 insurance carrier is paid annually.

15 Q. Does that letter tell you what 1/12th of
16 the annual insurance premium would be?

17 A. In his opinion, yes.

18 Q. And that is the insurance agent?

19 A. Yes.

20 Q. And you, with no experience in the
21 insurance industry, think your estimate is better?

22 A. I didn't say that.

23 Q. Then why did you not reassess the
24 insurance payment downward when you received that
25 letter?

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1 A. Because the information he gave us was not
2 germane to our analysis.

3 Q. How so?

4 A. We did not seek to calculate what the
5 annual premium amortized monthly would be.

6 Q. What did you seek to determine?

7 A. How much of a shortfall there was in the
8 insurance -- tax and insurance account at that point
9 in time.

10 Q. And how did you make that calculation?

11 A. By, as I explained before, taking a
12 reasonable estimate of what the outlays will be from
13 that account, looking at what the balance was as of
14 today, and simply doing the math.

15 Q. Let's go back to the taxes and insurance
16 provision if you would, please. We are on Page 23.
17 Do you see -- I guess that is in the first sentence,
18 see Roman Numeral II?

19 A. Yes.

20 Q. What does that say?

21 A. "1/12th of the insurance premium that
22 lender estimates will be payable at the renewal of
23 the coverage afforded by the policies upon the
24 expiration thereof in order to accumulate with
25 lender sufficient funds to pay all such insurance

1 premiums at least 30 days prior to the expiration of
2 the policies. Such amounts will be transferred by
3 lender to an account, the tax and insurance
4 account."

5 Q. So that tells you you are supposed to do
6 it exactly how the insurance agent did it, doesn't
7 it?

8 A. I don't believe so.

9 Q. Isn't that what you just said that he did
10 is 1/12th the annual insurance policy amortized over
11 12 months?

12 A. That is what he did, yes.

13 Q. And that is what the loan documents say?

14 A. That is what the sentence that I read did,
15 you requested said.

16 Q. Is that not the loan agreement?

17 A. It appears to be.

18 Q. And that is not what you did, is it?

19 A. What is not what I did?

20 Q. What that sentence you just read said.

21 A. That sentence says 1/12th -- that sentence
22 doesn't give an action.

23 Q. That tells you how to calculate the
24 insurance, does it not?

25 A. I'm not sure I agree with you.

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1 Q. Why don't you agree with me?

2 A. Because I'm not sure that is what it says.

3 Q. Read it to me and tell me what it says.

4 A. "1/12th of the insurance premiums that
5 lender estimates will be payable for the renewal of
6 the coverage afforded by the policy upon the
7 expiration thereof in order to accumulate with
8 lender sufficient funds to pay all such insurance
9 premiums at least 30 days prior to the expiration of
10 the policy."

11 Q. Does that say anything about doing a
12 calculation to determine a shortfall?

13 A. No.

14 Q. And it starts out saying, "Borrowers shall
15 pay to lender 1/12th of the insurance premiums." Is
16 that what it says?

17 A. Yes.

18 Q. And that is what the insurance agent gave
19 you?

20 A. He gave me 1/12th of what he expects the
21 annual premium to be.

22 Q. And that is the insurance agent?

23 A. We've established that, yes.

24 Q. On the policy for the property?

25 A. Yes.

1 Q. So his letter matches the term of the loan
2 agreement?

3 A. Again, I don't know that I agree with
4 that. What I agree with is what I said I agree
5 with, that the sentence you asked me to read says
6 1/12th of the insurance premiums. And what he
7 calculated is 1/12th of his -- what he expects the
8 insurance premium to be.

9 Q. Okay. But it says the insurance premium
10 that you estimate?

11 A. Correct.

12 Q. Well, he estimated it?

13 A. I'm sorry?

14 Q. That is what you just said he gave you was
15 an estimate?

16 A. He told me what the premium would be with
17 a 25 percent increase over the prior year.

18 Q. And then he told you what 1/12th of that
19 amount would be?

20 A. Yes, he did.

21 Q. And the loan agreement says, "Borrower
22 shall pay 1/12th of the insurance premium"?

23 A. Yes.

24 Q. But you didn't do anything with that
25 letter?

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1 A. I didn't say I didn't do anything with the
2 letter.

3 Q. Do you think it's reasonable to reject an
4 estimate that comes from the actual insurance agent
5 on the policy?

6 A. I didn't say I rejected the estimate.

7 Q. You didn't base the insurance contribution
8 based on the letter, did you?

9 A. I had already prepared the insurance
10 contribution prior to receiving the letter.

11 Q. Does the tax and insurance provision allow
12 you to reassess downward?

13 A. I will have to read it. I assume so. And
14 I hope it does because we have reassessed downward
15 in the past.

16 Q. Turn to Page 24, please. Thank you. Can
17 you read the last sentence of the paragraph --
18 partial paragraph at the top of the page?

19 A. If lender determines?

20 Q. That is the one.

21 A. "If lender determines in its reasonable
22 judgment that the funds in the tax and insurance
23 account will be insufficient to pay or in excess of
24 the taxes or insurance premiums next coming due
25 lender may increase or decrease the monthly

1 contribution required to be made by borrowers to the
2 tax and insurance account."

3 Q. Do you believe it was reasonable to reject
4 the letter from the insurance agent and refuse to
5 reassess downward?

6 A. Well, you are asking me two questions
7 there.

8 Q. I don't think I did.

9 A. You asked me do I believe it's reasonable
10 to --

11 Q. I didn't ask you -- Mr. Liffman, I ask the
12 questions. I didn't ask you what I asked you. I
13 gave you a question. I need you to answer it.

14 MR. HARRILL: And I'll object to it
15 as a multiple question, but you can answer it if you
16 can.

17 THE WITNESS: Would you repeat the
18 question, please?

19 BY MR. FULKS:

20 Q. I think the question was sufficiently
21 clear that it doesn't need to be repeated.

22 A. I apologize if that is the case, but I
23 would still ask you to repeat the question so I'm
24 sure I understand what you are asking.

25 Q. Well, I don't think the question needs to

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1 be repeated. I would like you to just answer it as
2 it was phrased.

3 A. I don't recall what the question -- what
4 the question you are referring to was. I heard two
5 questions.

6 Q. Do you believe that it is reasonable to
7 reject the estimate from the insurance agent on the
8 policy?

9 A. I'm honestly not sure what you mean by
10 reject the estimate by the insurance agent on the
11 policy.

12 Q. Do you believe it's reasonable to reject
13 the estimate of the policy that is received from the
14 insurance agent?

15 A. I think that is exactly the same question
16 I told you I'm not sure what you mean by it.

17 Q. I don't -- the question is clear. And I
18 want an answer to it.

19 A. The best answer I can give you is I don't
20 believe I rejected anything from the insurance
21 agent.

22 Q. Did you decrease the contribution
23 downward?

24 A. After receiving this letter, no.

25 Q. But that letter tells you that your

1 estimate was incorrect?

2 A. I don't believe it says that.

3 Q. Does that letter give you the same figure
4 that you used?

5 A. No.

6 Q. Okay. So then that letter would indicate
7 that your number was incorrect?

8 A. No. I don't agree with that statement.
9 Like I explained, I believe we are talking about
10 apples and oranges.

11 Q. Let's talk about the capital expense
12 reserve account. Are you familiar with that
13 provision?

14 A. Yes.

15 Q. Okay. What is your understanding of the
16 requirements of that provision?

17 A. That the borrower is to make payments into
18 the capital expense reserve in an amount that will
19 result in the reserve having adequate funds to cover
20 the costs of anticipated expenditures that fall
21 under the appropriate category contemplated by that
22 reserve.

23 Q. What does that provision say about
24 reassessments?

25 A. It's a pretty long provision. Would you

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1 like me to read it?

2 Q. Let's go to the second sentence which
3 appears immediately after the parenthetical with
4 Capital Reserve Account in bold letters.

5 A. "Upon 30-day prior notice to borrower
6 lender may reassess the amount of the monthly
7 payment required under this Section 3.4 from time to
8 time in its reasonable discretion (based upon its
9 then current underwriting standards).

10 Q. Let's talk about the word "notice." What
11 is your understanding of the word "notice" as it
12 appears in that provision of the loan agreement?

13 A. It means upon lender making borrower aware
14 of its intent or its assessment or its conclusion.
15 Communication from lender to borrower.

16 Q. What type of communication?

17 A. I don't really know.

18 Q. What type of communication did you send?

19 A. If I remember correctly, generally the way
20 that we communicated on the various reserves was by
21 sharing our escrow analysis. By sharing our escrow
22 analysis with the borrower's manager through the
23 drop box or e-mail.

24 MR. PLAYER: That laughter was not
25 for Mr. Liffman. It was the crowing gamecock. I

1 don't think Brent has ever heard that before. You
2 are in gamecock country now.

3 BY MR. FULKS:

4 Q. Let's back up a little bit why don't we.
5 Talking about the capital expense reserve provision.
6 And you have that in front of you?

7 A. Yes.

8 Q. On Page 24, Section 3.4?

9 A. Yes.

10 Q. Okay. And the first phrase in that
11 sentence that you read to me is, "Upon 30-days prior
12 notice to borrowers"?

13 A. Yes.

14 Q. And what type of notice did you give to
15 the borrowers that you were going to reassess the
16 capital expense reserves?

17 A. I'm not sure exactly which instance you
18 are talking about. I recall multiple exchanges of
19 information on the subject. I recall sending a
20 letter --

21 Q. Okay. So you sent a letter?

22 A. I believe we did send a letter.

23 Q. And what did that letter say?

24 A. I imagine it said, we are reassessing the
25 capital reserve payment.

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1 Q. Okay. And then it also says you may
2 reassess the amount of the monthly payment from time
3 to time in its reasonable discretion?

4 A. Yes.

5 Q. Do you recall what the reassessment was,
6 the reassessment that gave rise to the dispute that
7 brought us here today?

8 A. I recall it was a significant increase.
9 It was a large increase. I don't recall the exact
10 amount.

11 Q. Does the name -- number \$5,249 sound
12 familiar?

13 A. That is the -- that was the level that
14 they were initially set at at loan funding.

15 Q. Well, in fact, that is the amount that is
16 in the actual loan agreement, is it not?

17 A. Yes.

18 Q. And did you reassess that to \$54,476.34?

19 A. We reassessed it to a significantly higher
20 number. And I wouldn't deny that the number you
21 just recited is the amount.

22 Q. And you agree that that provision says
23 that you can only reassess in your reasonable
24 discretion?

25 A. Yes.

1 Q. And the reassessment in this case went
2 from \$5,249 to \$54,476. Is that your understanding?

3 A. Yes.

4 Q. Is that reasonable to you?

5 A. I believe the increase was reasonable,
6 yes.

7 Q. Do you know what percentage of an increase
8 that constitutes?

9 A. I've heard the number a thousand percent
10 thrown around a few times.

11 Q. And a 1,000 percent increase is reasonable
12 to you?

13 A. Under the specific circumstances, yes.

14 Q. And there is the parenthetical, based upon
15 its then current underwriting standards?

16 A. Yes.

17 Q. And you didn't have any underwriting
18 standards, did you?

19 A. I wouldn't agree with that statement.

20 Q. Well, haven't you previously said that you
21 didn't have underwriting standards?

22 A. I don't think we said that.

23 Q. Do you recall responding to our
24 discovery -- our interrogatory requests?

25 A. Vaguely.

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1 Q. Did you participate in the responses to
2 the interrogatories?

3 A. Yes.

4 Q. You provided information that led to the
5 statements that are in here?

6 A. Yes.

7 Q. Do you have any reason to believe that any
8 of these statements are incorrect?

9 A. No.

10 Q. Did you type this?

11 A. I didn't personally type it.

12 Q. Did you send information in writing to
13 answer these questions?

14 A. Yes. To the preparer of the document,
15 yes.

16 Q. Did you review this to make sure that it's
17 a fair representation of what you sent?

18 A. Yes.

19 Q. Do you recall this being an objection,
20 "DRV objects to this request to the extent it
21 assumes that DRV has underwriting guidelines for
22 commercial loans"?

23 A. I don't recall that specifically.

24 Q. Do you recall the response, "DRV objects
25 to this interrogatory because it presupposes that

1 DRV was the original lender on the loan, which it
2 was not, and because it assumes that DRV has
3 underwriting guidelines for the origination of
4 commercial loans"?

5 A. I don't specifically remember that
6 statement.

7 Q. Do you remember the following statement.
8 "DRV did not design or establish any underwriting
9 guidelines relating to this loan because it was not
10 the original lender"?

11 A. I pretty much don't remember anything that
12 is specifically written in that document. It's
13 pretty old.

14 Q. Well, would your attorney have sent us
15 something that has an inaccuracy or an incorrect
16 statement?

17 A. Of course not.

18 Q. You wouldn't have allowed him to do that,
19 would you?

20 A. I don't think he would have allowed me to
21 do it either.

22 Q. And you sent this response that says, "DRV
23 did not design or establish any underwriting
24 guidelines relating to this loan because it was not
25 the original lender"?

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1 A. All I said was I don't remember
2 specifically what that document says.

3 Q. Well, is the statement that I just read to
4 you correct?

5 MR. HARRILL: Do you have a copy that
6 you could provide him? You are reading a portion of
7 a responses.

8 MR. FULKS: I do.

9 MR. HARRILL: But you are not going
10 to? Okay.

11 BY MR. FULKS:

12 Q. Did you swear to -- that the statements in
13 here were true and correct under oath?

14 A. In the interrogatory response?

15 Q. Yes.

16 A. Yes.

17 Q. Sorry. I lost my page.

18 VIDEOGRAPHER: Mr. Liffman, could you
19 slide your microphone back up.

20 THE WITNESS: Sorry.

21 BY MR. FULKS:

22 Q. I'll go ahead and hand that document to
23 you now. I will ask you to turn to Page 9. At the
24 bottom of Page 9 do you see Paragraph Number 8?

25 A. Yes.

1 Q. And immediately under that do you see
2 where the word "Answer" appears?

3 A. Yes.

4 Q. Okay. Can you read the first sentence of
5 that?

6 A. "DRV objects to this request to the extent
7 it assumes that DRV has underwriting guidelines for
8 commercial loans."

9 Q. Can you turn to the next page. Do you see
10 Paragraph Number 9 at the top of the page?

11 A. Yes.

12 Q. And do you see the paragraph that has
13 "Answer" in bold and underlined right under that?

14 A. Yes.

15 Q. Okay. Can you read for me, please, the
16 second sentence in that paragraph?

17 A. "DRV objects to this interrogatory -- "

18 Q. That is the first sentence.

19 A. Oh, I'm sorry. "DRV did not design or
20 establish any underwriting guidelines relating to
21 this loan because it was not the original lender."

22 Q. So you didn't have any underwriting
23 standards?

24 A. I don't believe that is what it says.

25 Q. That is not what it says?

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1 A. That is not what it says.

2 Q. DRV -- did you design underwriting
3 standards?

4 A. It says, "DRV did not design or establish
5 any underwriting guidelines."

6 Q. I didn't ask you what it said. I asked
7 you if you designed any underwriting standards?

8 A. When?

9 Q. With respect to this loan.

10 A. No, I didn't design any underwriting
11 standards.

12 Q. Did you establish any?

13 A. I didn't establish any.

14 Q. And what do you mean when you say that you
15 did not design or establish them because you were
16 not the original lender?

17 A. I believe the context of this is about --
18 you know, let me take that back. Would you repeat
19 question, please?

20 Q. Did you design or establish any
21 underwriting guidelines -- I'm sorry. My question
22 was you end that sentence explaining that you didn't
23 design or establish underwriting guidelines because
24 you were not the original lender?

25 A. Correct.

1 Q. Why did you clarify that because you were
2 not the original lender?

3 MR. HARRILL: I'm going to object
4 because you are not reading the questions and
5 putting these answers in context in any way.

6 THE WITNESS: I will tell you that
7 the reason we said that is because the question asks
8 how we designed -- to identify and explain the
9 process through which DRV designed and established
10 its underwriting guidelines related to the loan
11 documents.

12 And what the answer seeks to convey is
13 that we did not author the loan documents. We were
14 not involved in the creation of the loan documents.

15 BY MR. FULKS:

16 Q. But Question Number 9 doesn't say, did you
17 create the loan documents, does it?

18 A. No.

19 Q. It asks if you created underwriting
20 standards with respect to the loan documents?

21 A. Actually it does not ask if we did.

22 Q. It's asking for information that indicates
23 that you did.

24 A. It asks what it says.

25 Q. Okay. And you answered, "DRV did not

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1 design or establish any underwriting guidelines
2 relating to this loan because it was not the
3 original lender"?

4 A. Correct. We answered what we -- to the
5 extent that is verbatim from the answer, yes, that
6 is what we answered.

7 Q. Did you believe that you were not required
8 to have underwriting standards because you are not
9 the original lender?

10 A. I don't know that I believed anything one
11 way or the other.

12 Q. So when you read the capital reserve
13 account provision you just didn't even really care
14 what it said, did you?

15 A. Is that a question?

16 Q. Is "did you" a question?

17 A. Yes, "did you" is a question. No, I
18 didn't -- I disagree with the statement you made
19 prior to that.

20 Q. What do you disagree with?

21 A. That I didn't care what the loan agreement
22 said.

23 Q. Okay. So you did care?

24 A. Of course I care what the loan agreement
25 says.

1 Q. Okay. So then if you cared when you got
2 to the reassessment of the capital expense reserve
3 you did that based upon your then current
4 underwriting standards?

5 A. We reassessed the capital reserve
6 according to the procedures set forth in the loan
7 agreement.

8 Q. Which is underwriting standards?

9 A. To the extent that underwriting standards
10 are part of the procedure, they were part of our
11 actions which were consistent with the procedure set
12 forth.

13 Q. But here you say you didn't have any?

14 A. We don't say that here.

15 Q. All right. Let's talk about what has been
16 referred to as the three-year capital expense
17 budget. You understand what I'm talking about when
18 I mention that phrase; is that correct?

19 A. Yes.

20 Q. Can you explain to me how the three-year
21 capital expense budget came to be in existence?

22 A. Around September of 2010, I believe, we
23 requested that C.B.R.E. prepare a three-year capital
24 budget. And around May of 2011 C.B.R.E. on behalf
25 of the borrower delivered to us a capital budget.

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1 Q. So you requested it?

2 A. Yes.

3 Q. How did you extend that request to
4 Fontaine Business Park?

5 A. I asked their agent.

6 Q. And was that in writing?

7 A. At times.

8 Q. Okay. When was it in writing?

9 A. The first time I recall seeing it in
10 writing would have been in the fourth quarter of
11 2010.

12 Q. Was your first request in writing?

13 A. I don't believe so.

14 Q. What did you say -- and when you say you
15 asked their agent, who are you referring to?

16 A. C.B. Richard Ellis.

17 Q. And who at C.B. Richard Ellis did you
18 speak with?

19 A. I believe I -- I'm pretty sure I spoke
20 with Sandra Johnson.

21 Q. Did you ever speak with Aaron Dupree about
22 it?

23 A. Later on. Actually I don't know if I ever
24 spoke directly with Aaron about it or not. I may
25 have.

1 Q. Did you ever speak to Martin Moore about
2 it?

3 A. Not that I recall.

4 Q. What exactly did you request?

5 A. A three-year capital budget.

6 Q. Is that term defined anywhere in the loan
7 agreement?

8 A. I doubt it.

9 Q. Did you explain to them what you wanted
10 included in the three-year capital budget?

11 A. Not when I initially asked for it. They
12 may have asked for clarification. And if they did,
13 I would have answered them.

14 Q. Did they ask for clarification?

15 A. I believe -- I remember one instance where
16 they asked for a clarification.

17 Q. And what did they ask you to clarify?

18 A. They asked me to clarify what I was
19 looking for as far as their tenant improvement and
20 leasing commission projection.

21 Q. And what did you tell them?

22 A. I told them that I was looking to
23 understand what T.I. and L.C. they expected to incur
24 on spaces that were scheduled to rollover within the
25 next three years.

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1 Q. And who did you convey that to?

2 A. To Sandra I'm pretty sure.

3 Q. Were most of your communications at that
4 time to Sandra, Ms. Johnson?

5 A. As it related to the Fontaine loan, Sandra
6 was my primary point of contact.

7 Q. With respect to the initial request though
8 it was Ms. Johnson?

9 A. To the best of my recollection.

10 Q. Did you ever send a written request to
11 Fontaine Business Park?

12 A. Yes.

13 Q. And what did that written request say?

14 A. It was all the communication I had with
15 Sandra Johnson. Will you please give me a capital
16 budget.

17 Q. So all of those communications about that
18 capital budget were with Ms. Johnson?

19 A. The communication dealing with the request
20 for the capital budget were with Sandra.

21 Q. Okay. And it's your position that the
22 loan agreement authorizes you to make that request?

23 A. It's my understanding that it does.

24 Q. Do you recall where it does?

25 A. Probably in the section dealing with --

1 let me back up and reanswer your previous question.
2 I don't believe the loan agreement -- I don't
3 believe I need any authorization to ask for
4 anything.

5 I believe the loan agreement requires the
6 borrower to provide certain information upon
7 request. And I believe that the three-year capital
8 budget would fall into that category.

9 Q. So, in other words, the loan agreement
10 does permit you to make that request?

11 A. The loan agreement requires borrower to
12 provide certain information, in my opinion, which
13 includes the capital budget that we are discussing
14 upon my request.

15 Q. Okay. You have the -- let's turn back to
16 the loan agreement itself. Do you have that in
17 front of you?

18 A. Yes.

19 Q. I want you to turn to Page 54. Are you on
20 Page 54?

21 A. Yes.

22 Q. Do you see at the top of the page the
23 paragraph that is numbered 6.1 and has the word
24 "Notices"?

25 A. Yes.

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1 Q. Would you read the first sentence of that
2 paragraph for me, please?

3 A. "All notices, consents, approvals, and
4 requests required or permitted hereunder --
5 hereunder or under any other loan document "A"
6 notice shall be given in writing and shall be
7 effective for all purposes if either hand-delivered
8 with receipt acknowledged or by a nationally
9 recognized overnight delivery service such as
10 Federal Express or by certified or registered United
11 States Mail, return receipt requested, postage
12 prepaid, or by facsimile and confirmed by facsimile
13 answered back in each case addressed as follows."

14 Q. Okay. Let's stop right there for a
15 minute. Was your request to Ms. Johnson
16 hand-delivered with receipt acknowledged?

17 A. No.

18 Q. Was it sent by a nationally recognized
19 overnight delivery service such as Fed Ex?

20 A. No.

21 Q. Was it sent by certified or registered
22 United States Mail, return receipt requested,
23 postage prepaid?

24 A. No.

25 Q. Was it sent by facsimile and confirmed by

1 facsimile answer back?

2 A. No.

3 Q. Okay. Now -- and I think you previously
4 read what is the sort of last phrase of that
5 sentence, in each case addressed as follows. Do you
6 see that?

7 A. Yes.

8 Q. Okay. And we go down toward right about
9 the middle of the page, it says, "If to borrower."
10 Do you see that?

11 A. Yes.

12 Q. Who does it say is supposed to receive
13 your request on behalf of the borrower?

14 A. What it says is, "If to borrower, Fontaine
15 Business Park, LLC, 5 Financial Plaza, Suite 205,
16 Napa, California 94558, attention Michael Schwartz
17 and Steven Corea." Apologies if I've mispronounced
18 that. "Telecopier (707)929-1600. With a copy to
19 Powell Goldstein, LLP. One Atlantic Center, 14th
20 Floor, 1201 West Peachtree Street Northwest,
21 Atlanta, Georgia 30309-3488, attention Michael
22 Rafter and William H. Mathieu. Telecopier
23 (404)572-6999."

24 Q. Okay. You can stop right there for a
25 minute. You didn't send your request for this

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1 three-year capital budget to Fontaine Business Park,
2 did you?

3 A. I did not send it to Fontaine Business
4 Park, LLC, 5 Financial Plaza, Suite 205. Is that
5 what you are asking?

6 Q. That is what I'm asking.

7 A. I did not send my notice to the address
8 indicated.

9 Q. But this is where the loan agreement says
10 you are supposed to send it?

11 MR. HARRILL: Object to the form.

12 BY MR. FULKS:

13 Q. Is that what it says?

14 A. The loan agreement says what it says. If
15 to borrower, that address.

16 Q. Is there anything in there that says you
17 can send a notice of such a request to Sandra
18 Johnson?

19 A. There are qualifiers in here that you
20 didn't ask me to read.

21 Q. Which ones?

22 A. For example, where you stopped me, the
23 rest of it is, "or to such other address or person
24 as a party shall designate from time to time by
25 notice to the other party."

1 Q. Okay. Did you ever receive a notice that
2 Sandra Johnson was authorized to accept notices
3 under the loan agreement on Fontaine Business Park's
4 behalf?

5 A. I don't know.

6 Q. Well, if you did that would be in writing,
7 wouldn't it?

8 A. I suppose.

9 Q. Well, wouldn't the loan agreement
10 provision that you've just read require that to be
11 in writing?

12 A. Yes.

13 Q. Did you send a copy of your request to
14 Powell Goldstein at the stated address, attention
15 Michael Rafter and William M. Mathieu?

16 A. No.

17 Q. Okay. Can you read for me the last
18 paragraph at the bottom of the page?

19 A. "A notice shall be deemed to have been
20 given in the case of hand-delivery at the time of
21 delivery, in the case of registered or certified
22 mail, when delivered, or the first attempted
23 delivery on a business day, or in the case of
24 overnight delivery upon the first attempted delivery
25 on a business day, or in the case of facsimile, upon

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1 the confirmation of such facsimile transmission."

2 Q. Did any of those events that you just read
3 occur with respect to your request for the
4 three-year capital budget?

5 A. You mean --

6 Q. Was it delivered by hand?

7 A. Yes. No. It was not delivered by hand.
8 It was not sent by registered or certified mail and
9 it was not sent by overnight delivery or facsimile.

10 Q. Is there anything in this provision that
11 says a notice is deemed to have been given if it's
12 done by telephone?

13 A. Not from what I've just seen.

14 Q. And your request -- the initial request
15 was not in writing?

16 A. To the best of my recollection.

17 Q. Well, if you had such a writing you would
18 have provided it in discovery, wouldn't you?

19 A. To the extent that it answered one of the
20 discovery requests, we absolutely would have
21 provided it.

22 Q. So if it would be responsive to a
23 discovery request and we haven't received it, then
24 it doesn't exist?

25 A. Correct. Well, actually let me restate

1 that. To the best of -- as far as we were aware at
2 the time that we sent it and as far as I am aware
3 now it doesn't exist.

4 I suppose it's possible that something
5 could be discovered at a later date at which point I
6 assume we would comply with whatever we are required
7 to comply with at that time.

8 Q. Well, does it exist or does it not?

9 A. To my knowledge it does not exist.

10 Q. Well, wouldn't that notice have come from
11 you?

12 A. Which notice?

13 Q. What notice are we talking about?

14 A. We've talked about a couple of notices.
15 We talked about a notice to authorize me --

16 Q. The notice -- your request for the
17 three-year capital budget, would that have come from
18 you?

19 A. Yes.

20 Q. Okay. Did you send it in writing?

21 A. Not that I remember. I'm pretty sure I
22 didn't the first time.

23 Q. And you didn't send it to Fontaine
24 Business Park?

25 A. I don't remember ever sending it. I'm as

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1 certain as you can be without breaching the tenet
2 that anything is possible. I am about as sure as I
3 can be that the request was never sent in the manner
4 described by you. If it were, we would have given
5 it to you.

6 Q. Was it sent as described in the terms --
7 Paragraph 6.1 of the loan document?

8 A. To the best of my knowledge and
9 recollection, no. It was sent the way I described
10 before.

11 Q. And that is not the way I'm describing it.
12 That is the way the loan document describes it,
13 right?

14 A. Well, you've described it and the loan
15 document has described it. And I'm not suggesting
16 that one way or the other as to the consistency
17 between the two descriptions. I'm simply saying I
18 sent it as far as I'm aware the way I described it.

19 Q. Now, going back to the provision that
20 authorizes the request. Do you recall what
21 provision of the loan agreement that you consulted
22 in deciding that you were permitted to make that
23 request?

24 A. I believe I disagreed with the premise
25 that I need to be authorized to ask for something.

1 Q. Correct. Does this appear to be an e-mail
2 from Paula Mathews to you?

3 A. Among others, yes.

4 Q. And there are courtesy copies to James
5 Berg and Sandra Johnson?

6 A. Yes.

7 Q. Okay. And what is the date of this
8 e-mail?

9 A. July 12, 2011.

10 Q. Okay. So that would be the day after you
11 wrote the letter reassessing the reserve account?

12 A. Yes.

13 Q. Okay. What is the -- what is Ms. Mathews
14 telling you or saying to you in that e-mail?

15 A. She is saying that she is trying to reach
16 me in response to the letter we just discussed which
17 she received by fax the day before on July 11th, and
18 asking me to contact her at my earliest convenience.

19 Q. So within one day of receiving your fax,
20 Ms. Matthew was attempting to contact you to discuss
21 your letter?

22 A. Yes.

23 Q. And what was your response?

24 A. Well, about 90 minutes later at 7:04 p.m.
25 I responded to say, "I'm traveling today and

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1 have shared that information with you?

2 A. I can only speculate.

3 Q. Was she not the person that you understood
4 to be the person to receive that request?

5 A. I'm sorry?

6 Q. Is she not the person that you directed
7 the request for the three-year budget to?

8 A. Yes, I directed the request for the budget
9 to Sandra.

10 Q. And most of your communications were with
11 her?

12 A. Most, yes.

13 Q. Okay. And she never relayed any
14 information to you that Ms. Mathews was unhappy with
15 the reserve reassessment?

16 A. I don't recall Sandra relaying what
17 appears to me to be a private conversation between
18 people inside the borrower's side of the table to me
19 nor would I necessarily expect her to.

20 Q. Now, can you look at the e-mail just below
21 that?

22 A. Yes.

23 Q. Okay. And what does that appear to be?

24 A. Sandra advising Paula that the borrower
25 notice address in the loan document had -- that

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1 Sandra Johnson to Paula Mathews under the subject
2 line, Fontaine three-year cap budget, sent on
3 July 29 in which Sandra, based on the context,
4 appears to be advising Paula that she is working on
5 revisions that Paula had requested and asking for
6 further direction on how low she should go with her
7 assumptions.

8 Q. Okay.

9 (Deposition Exhibit 10 marked for
10 identification.)

11 BY MR. FULKS:

12 Q. Mr. Liffman, I'm going to give you what
13 has been marked Exhibit 10 and ask if you recognize
14 this document? Have you ever seen this?

15 A. Yes.

16 Q. What does this e-mail chain appear to be?

17 A. It appears to be e-mail correspondence
18 back and forth between Paula Mathews and Sandra
19 Johnson with copy to Martin Moore and Aaron Dupree
20 in reference to the three-year capital budget, again
21 in which Paula is expressing with great urgency the
22 need for C.B. Richard Ellis to convince me to accept
23 a new version of their budget that would
24 significantly reduce their investor's obligations.

25 Q. And what does Ms. Johnson tell Ms. Mathews

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1 direction beyond what we demanded in writing.

2 Q. Beyond don't do what Fontaine Management
3 tells you to do?

4 A. Whatever our written correspondence said.

5 Q. Okay. Please explain to me what
6 underwriting standards were utilized in raising the
7 capital reserve account on a monthly basis.

8 A. Essentially it -- based on what is
9 expected to be required to be funded from a reserve
10 account compared to what is actually in that reserve
11 account today are the two inputs along with how much
12 time remains between now and when the funds are
13 needed. And that is really it. The underwriting
14 standard is that there be enough money available in
15 the account.

16 Q. And do you recall how much was in the
17 account when you made that demand?

18 A. No.

19 Q. What about the specific circumstances that
20 justified increasing the rollover expense account
21 payments by \$138,000 a month?

22 A. What about them?

23 Q. You said there were specific circumstances
24 that rendered them reasonable, and I would love to
25 know what they are.

2/1/13

Diversified Realty Ventures Mail - FW: Scan from a Xerox Color



(Quoted text hidden)

FW: Scan from a Xerox Color

(Quoted text hidden)

Paula Mathews <pmathews@usclic.us>
To: Elliot Liffman <eliffman@drv-llc.com>
Cc: James Berg <jberg@strategiccapital.net>, Sandra Johnson <Sjohnson@cbresc.com>

Tue, Jul 12, 2011 at 5:27 PM

Dear Mr. Liffman,

I am trying to reach you in response to the attached letter dated July 11, 2011 which was faxed to my office yesterday concerning Fontaine Business Park in Columbia, SC. Please contact me at your earliest convenience.

Sincerely,
Paula Mathews

—Original Message—

From: Color 550 [mailto:scan@strategicstoragetrust.com]
Sent: Tuesday, July 12, 2011 2:22 PM
To: Paula Mathews
Subject: Scan from a Xerox Color

Please open the attached document. It was scanned and sent to you using a Xerox Color.

Number of Images: 2
Attachment File Type: PDF

Device Name: Color 550
Device Location:

For more information on Xerox products and solutions, please visit <http://www.xerox.com/>

img-712142145-0001.pdf
338K

Elliot Liffman <eliffman@drv-llc.com>
To: Paula Mathews <pmathews@usclic.us>
Cc: James Berg <jberg@strategiccapital.net>, Sandra Johnson <Sjohnson@cbresc.com>

Tue, Jul 12, 2011 at 7:04 PM

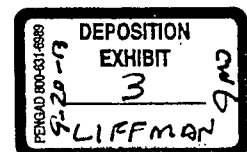
I'm traveling today and tomorrow, back in the office Thursday, then out again until the following Thursday. Feel free to call me on my cell. 301-529-8069.

Best,
Elliot

Sent from my iPhone.

[Quoted text hidden]

> <img-712142145-0001.pdf>



DRV_001892

<https://mail.google.com/mail/ca/u/0/?ui=2&ik=a4ee995049&view=pt&q=after%3A2011%2F07%2F01%20AND%20before%3A2012%2F07%2F01%20AND%20label%3Aasset...> 1/1

FBPAPP-0957



Diversified Realty Ventures, LLC

8218 Wisconsin Avenue, Suite 209
Bethesda, Maryland 20814
Phone: 301 654 0660
Fax: 301 656 0548
www.drv-llc.com

Via FedEx

July 11, 2011

Fontaine Business Park, LLC
5 Financial Plaza, Suite 205
Napa, CA 94558
Attn: Michael Schwartz and Stephen Corea

Re: Promissory Note dated December 14, 2007 made by FONTAINE BUSINESS PARK, LLC, a Delaware limited liability company, in the original principal amount of \$16,300,000.00 (the "Note") made payable to the order of GREENWICH CAPITAL FINANCIAL PRODUCTS, INC., a Delaware corporation, and subsequently transferred to DRV FONTAINE, LLC, a Maryland limited liability company ("DRV"), together with all documents executed in connection with the Note (the "Loan").

Dear Sirs:

We are in receipt of your Three Year Capital Expense Budget 2011-2013 ("the Budget"). The Budget forecasts Capital Expenses and Leasing Expenses in the aggregate amount of \$2,417,964 during the applicable period. Based on your current reserve balances and scheduled monthly deposits, there is a projected deficit in each of the Capital Reserve Account and Rollover Reserve Account.

This correspondence constitutes notice to you that DRV, pursuant to Sections 3.4 and 3.5 of the Loan Agreement, has increased the amount of the monthly deposits beginning with the September 6, 2011 payment. The new monthly deposit schedule is as follows:

From	To	Capital Reserve Account	Rollover Reserve Account
--	August 2011	\$5,249.00	\$21,086.50
September 2011	June 2012	\$54,476.34	\$159,472.91
July 2012	November 2013	\$9,001.39	\$28,324.00
December 2013	--	\$5,249.00	\$21,086.50

A forecast of future reserve balances based on the new deposit schedule is attached hereto as Schedule A.

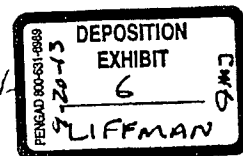
Sincerely,

Elliot Liffman
Manager

cc: Michael Rafter and William H. Mathieu; Powell Goldstein LLP (via facsimile)
Paula Matthews; Fontaine Management LLC (via facsimile)
Sandra Johnson; CB Richard Ellis (via email)

Bethesda, Maryland | Richmond, Virginia

Mathieu



FBPAPP-0958

Schedule A

Month	Capital Reserve				Rollover Reserve			
	Beginning Capital Balance	Monthly Capital Contribution	UW Capital Expenditure	Ending Capital Balance	Beginning TI/LC Balance	Monthly TI/LC Contribution	UW TI/LC Expenditure	Ending TI/LC Balance
May-11	110,998.19	5,249.00	18,750.00	97,497.19	375,396.74	21,086.50	-	396,483.24
Jun-11	97,497.19	5,249.00	15,000.00	87,746.19	396,483.24	21,086.50	-	417,569.74
Jul-11	87,746.19	5,249.00	13,531.25	79,463.94	417,569.74	21,086.50	106,006.25	332,649.99
Aug-11	79,463.94	5,249.00	-	84,712.94	332,649.99	21,086.50	108,573.75	245,162.74
Sep-11	84,712.94	54,476.34	-	139,189.28	245,162.74	159,472.91	-	404,635.65
Oct-11	139,189.28	54,476.34	92,500.00	101,165.62	404,635.65	159,472.91	60,755.00	503,353.57
Nov-11	101,165.62	54,476.34	-	155,641.96	503,353.57	159,472.91	325,000.00	337,826.48
Dec-11	155,641.96	54,476.34	-	210,118.30	337,826.48	159,472.91	37,470.00	459,829.39
Jan-12	210,118.30	54,476.34	-	264,594.64	459,829.39	159,472.91	-	619,302.31
Feb-12	264,594.64	54,476.34	81,250.00	237,820.98	619,302.31	159,472.91	-	778,775.22
Mar-12	237,820.98	54,476.34	15,000.00	277,297.32	778,775.22	159,472.91	-	938,248.13
Apr-12	277,297.32	54,476.34	-	331,773.66	938,248.13	159,472.91	366,666.88	731,054.17
May-12	331,773.66	54,476.34	336,250.00	50,000.00	731,054.17	159,472.91	-	890,527.09
Jun-12	50,000.00	54,476.34	7,500.00	96,976.34	890,527.09	159,472.91	800,000.00	250,000.00
Jul-12	96,976.34	9,001.39	-	105,977.73	250,000.00	28,324.00	-	278,324.00
Aug-12	105,977.73	9,001.39	15,000.00	99,979.12	278,324.00	28,324.00	205,250.00	100,398.00
Sep-12	99,979.12	9,001.39	15,000.00	93,980.52	100,398.00	28,324.00	-	128,722.00
Oct-12	93,980.52	9,001.39	-	102,981.91	128,722.00	28,324.00	-	157,046.00
Nov-12	102,981.91	9,001.39	-	111,983.30	157,046.00	28,324.00	12,240.00	173,130.00
Dec-12	111,983.30	9,001.39	-	120,984.69	173,130.00	28,324.00	-	201,454.00
Jan-13	120,984.69	9,001.39	-	129,986.08	201,454.00	28,324.00	-	229,778.00
Feb-13	129,986.08	9,001.39	-	138,987.47	229,778.00	28,324.00	-	258,102.00
Mar-13	138,987.47	9,001.39	-	147,988.87	258,102.00	28,324.00	-	286,426.00
Apr-13	147,988.87	9,001.39	117,500.00	39,490.26	286,426.00	28,324.00	64,750.00	250,000.00
May-13	39,490.26	9,001.39	18,750.00	29,741.65	250,000.00	28,324.00	77,377.50	200,946.50
Jun-13	29,741.65	9,001.39	-	38,743.04	200,946.50	28,324.00	-	229,270.50
Jul-13	38,743.04	9,001.39	-	47,744.43	229,270.50	28,324.00	-	257,594.50
Aug-13	47,744.43	9,001.39	15,000.00	41,745.82	257,594.50	28,324.00	12,939.38	272,979.13
Sep-13	41,745.82	9,001.39	18,750.00	31,997.22	272,979.13	28,324.00	64,645.00	236,658.13
Oct-13	31,997.22	9,001.39	-	40,998.61	236,658.13	21,086.50	-	257,744.63
Nov-13	40,998.61	9,001.39	-	50,000.00	257,744.63	21,086.50	-	278,831.13
Dec-13	50,000.00	5,249.00	-	55,249.00	278,831.13	21,086.50	-	299,917.63

From: (301) 654-0660
 Elliot Liffman
 DIVERSIFIED REALTY VENTURES
 8218 Wisconsin Ave
 Suite 209
 Bethesda, MD 20814

Origin ID: OBTA



Ship Date: 11JUL11
 ActWgt 1.0 LB
 CAD: 3089013/NET3180

Delivery Address Bar Code



SHIP TO: (949) 429-6600

BILL SENDER

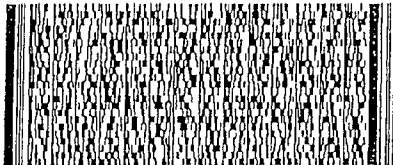
Michael Schwartz / Stephen Corea
 Fontaine Business Park, LLC
 5 FINANCIAL PLZ STE 205

NAPA, CA 94558

Ref # FBP Borrower
 Invoice #
 PO #
 Dept #

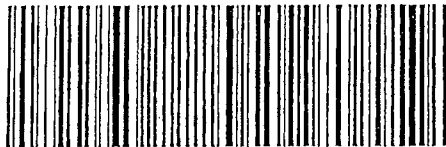
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Elliot Liffman <eliffman@drv-llc.com>

Message Sent: 17002639

faxagent@nextiva.com <faxagent@nextiva.com>
To: eliffman@drv-llc.com

Mon, Jul 11, 2011 at 2:16 PM

Delivery Information:

Message #: 17002639
Sender Name: Elliot Liffman
Sender Company: DRV
Sender Phone: (301) 654-0660 x301
Remote CSID: 9494296606Fax ServerFax Server
Total Pages: 3
Start Time: 7/11/2011 11:13:27 AM
End Time: 7/11/2011 11:21:56 AM
Duration: 7 min 43.416 sec
Delivery Count: 3

Recipient List:

Michael Rafter - +1 (404) 5726999
Paula Matthews - +1 (949) 4296606
William Mathieu - +1 (404) 5726999

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 17002639.PDF
501K

Sandra Johnson

From: Paula Mathews <pmatthews@uscllc.us>
Sent: Thursday, August 25, 2011 4:19 PM
To: Sandra Johnson
Cc: Martin Moore; Aaron Dupree
Subject: RE: Fontaine 3yr Capital Budget 01-26-11 (rv 07-29-11).xls

I don't care. He based his initial increased amounts on the original 3 yr. capital projections and those have clearly changed which significantly reduces the investor's obligation to fund. We need to get him to concur with this argument.

Paula

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Thursday, August 25, 2011 1:12 PM
To: Paula Mathews
Cc: Martin Moore; Aaron Dupree
Subject: Re: Fontaine 3yr Capital Budget 01-26-11 (rv 07-29-11).xls

I have not sent a revised version to Elliot. Based on our conference call with him, he stated he didn't want to see a revision.

----- Original Message -----

From: Paula Mathews <pmatthews@uscllc.us>
To: Sandra Johnson
Cc: Martin Moore; Aaron Dupree
Sent: Thu Aug 25 16:07:05 2011
Subject: RE: Fontaine 3yr Capital Budget 01-26-11 (rv 07-29-11).xls

Did you send the revised version to Elliott? We need to get the increased monthly amount reduced based on our more reasonable projections.

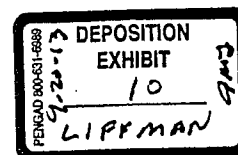
Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [<mailto:Sjohnson@cbresc.com>]
Sent: Thursday, August 25, 2011 1:00 PM
To: Paula Mathews
Subject: Re: Fontaine 3yr Capital Budget 01-26-11 (rv 07-29-11).xls

I'm out of the office right now and not sure what time I'll be back.

----- Original Message -----

From: Paula Mathews <pmatthews@uscllc.us>
To: Sandra Johnson



103

CBRE0104

Sent: Thu Aug 25 15:53:56 2011
Subject: RE: Fontaine 3yr Capital Budget 01-26-11 (rv 07-29-11).xls

Sandra are you available to chat about this?

Paula Mathews | EVP, Commercial Operations
U.S. Commercial, LLC
111 Corporate Drive, Suite 120 | Ladera Ranch, CA 92694
T (949) 429-6600 | F (949) 429-6606

From: Sandra Johnson [mailto:Sjohnson@cbresc.com]
Sent: Sunday, July 31, 2011 9:35 AM
To: Paula Mathews
Subject: Fontaine 3yr Capital Budget 01-26-11 (rv 07-29-11).xls

Okay. I've revised the summary sheet for each year, keeping the rollover reserves within the \$250,000 threshold. The anticipated cash calls or disbursement of funds from owners' reserves are as follows:

11/2011 - \$47,000

Total for 2011 = \$47,000

04/2012 - \$469,534

05/2012 - \$37,375

11/2012 - \$84,792

Total for 2012 = \$591,791

Let me know if this looks good and if you want to forward to the lender before the call tomorrow morning.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-40-7752

DRV FONTAINE, I.L.C.,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, I.L.C.;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, I.L.C.;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

PLAINTIFF DRV FONTAINE, LLC'S
ANSWERS TO DEFENDANT FONTAINE
BUSINESS PARK, LLC'S FIRST SET OF
INTERROGATORIES AND RESPONSES
TO DEFENDANT FONTAINE BUSINESS
PARK, LLC'S REQUESTS FOR
PRODUCTION OF DOCUMENTS

To: Brent B. Young and Mark A. Fulks, attorneys for Defendant/Counter-Plaintiff
Fontaine Business Park, LLC:

The Plaintiff, DRV Fontaine, LLC ("DRV"), by and through its undersigned counsel, herewith answers Defendant/Counter-Plaintiff Fontaine Business Park, LLC's ("Fontaine") First Set of Interrogatories and Requests for Production, pursuant to Rule 33 and 34 of the South Carolina Rules of Civil Procedure, as follows:

GENERAL OBJECTIONS

A. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting production of documents that are not relevant to the subject matter of the lawsuit on the grounds that these discovery requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

B. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents that are subject to or constituting the attorney-client privilege, the work product doctrine, trial preparation material, or any other applicable privilege or discovery limit.

C. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents that contain or constitute trade secrets, personal or confidential proprietary information, or information subject to a confidentiality agreement or similar confidentiality restrictions. DRV will not provide any such information until an appropriate protective order is entered in this lawsuit.

D. DRV objects to Fontaine's First Set of Interrogatories and Requests for Production to the extent Fontaine is requesting documents outside DRV's possession, custody, or control, documents that can easily be obtained from public records, documents that have already been obtained or requested from other parties or non-parties, or documents already in Fontaine's possession because, in all such instances, the discovery requests are overly broad and unduly burdensome.

- A) H. Michael Schwartz;
- B) Paula Mathews;
- C) James Berg;
- D) Sandra Johnson;
- E) Martin Moore;
- F) Aaron Dupree;
- G) Candace Leaphart;
- H) Pat Freeman; and
- I) Counsel for Fontaine and Property Manager.

DRV spoke with Fontaine's agents at CBRE regarding its request for a Capital Budget. DRV spoke with some of these representatives of CBRE, Fontaine and Property Manager on August 1, 2011 after issuing its letter notifying the Borrowers of the reassessment of the Reserve Account payments. The general content of the August 1, 2011 conversation is set forth in the Complaint. DRV had further communications with H. Michael Schwartz and Defendants' counsel regarding their alleged continued efforts to resolve the cash shortfall at the Property. DRV has had numerous and continuous conversations with the representatives of CBRE, which is an agent of Fontaine, regarding the status of the Property and finances at the Property.

8. Please identify any and all persons employed by or associated with DRV who have knowledge of DRV's underwriting guidelines for commercial Loans, the creation of the underwriting guidelines, and the application of the underwriting guidelines, including, but not limited to, the identity of any people involved, consulted, or informed of the process and the nature and extent of each person's involvement, consultation, or information.

ANSWER: *DRV objects to this request to the extent it assumes that DRV has underwriting guidelines for commercial loans. Subject to that objection, the person with knowledge about*

the standards applied in reassessing the Reserve Account payments is Elliot Liffman.

9. Please identify and explain the process through which DRV designed and established its underwriting guidelines related to the Loan Documents, including, but not limited to, the factors and characteristics considered; the process for selecting factors and characteristics for consideration; the types and sources of information consulted; and the types of quantitative analyses conducted.

ANSWER: *DRV objects to this Interrogatory because it presupposes that DRV was the original lender on the Loan, which it was not, and because it assumes that DRV has underwriting guidelines for the origination of commercial loans. DRV did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender. With regard to the reassessment of the Reserve Account payments of which the borrowers were notified on July 11, 2011, the underwriting guidelines that were followed by DRV are simple to determine. Using Fontaine's own estimated budget and projections, DRV determined in its reasonable discretion and judgment that the monthly payments into the Reserve Accounts had to be reassessed and increased. DRV used Fontaine's own estimated budget and projections, then applied a contingency factor in order to determine the amounts necessary to be paid in to the Reserve Accounts in order to maintain a sufficient balance in each Reserve Account between 2011 and 2013.*

10. Please identify and explain the process through which the Capital Projections were created, including the identity of the person who at DRV decided to request the Capital Projections, who at DRV initiated the request, who at CBRE and/or the Property Manager first received the request, the reasons for the request, the instructions given with the request, and the provision in the Loan Documents that authorizes, permits, supports, or justifies the request.

ANSWER: *DRV does not know how the "Capital Projections" were created because they*

communications between DRV and RBS Bank that relate to RBS Bank's assignment to DRV of all of its interest under the Loan Documents.

RESPONSE: *DRV objects to this Request because it seeks information that is not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce all documents evidencing the assignment of the loan documents to DRV by RBS Bank.*

4. Please produce all documents evidencing the transaction, contract, or agreement between RBS Bank and DRV pursuant to which DRV acquired the Loan Documents.

RESPONSE: *DRV objects to this Request because it seeks information that is not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce all documents evidencing the assignment of the loan documents to DRV by RBS Bank. DRV further objects to the extent the purchase price of the Loan is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Any such information contained in the documents will be redacted.*

5. Please produce all documents necessary to a complete understanding of DRV's analysis of the Loan Documents and DRV's decision to acquire the Loan Documents.

RESPONSE: *DRV objects to this request to the extent it seeks information subject to the attorney-client privilege and the attorney work product doctrine. DRV further objects to this Request because it is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, DRV will produce documents relating to the Loan that were provided to DRV for review prior to the assignment of the Loan.*

6. Please produce all documents necessary to a complete understanding of DRV's underwriting guidelines for commercial real estate Loan agreements, including the

underwriting guidelines as they existed at the time DRV acquired the Loan Documents and at the time the Reserve Accounts were reassessed.

RESPONSE: *DRV objects to this Request because it presupposes that DRV was the original lender on the Loan, which it was not, and because it assumes that DRV has underwriting guidelines for the origination of commercial loans. DRV did not design or establish any underwriting guidelines relating to this Loan because it was not the original lender. With regard to the reassessment of the Reserve Account payments of which the borrowers were notified on July 11, 2011, the underwriting guidelines that were followed by DRV are simple to determine. Using Fontaine's own estimated budget and projections, DRV determined in its reasonable discretion and judgment that the monthly payments into the Reserve Accounts had to be reassessed and increased. DRV used Fontaine's own estimated budget and projections, then applied a contingency factor in order to determine the amounts necessary to be paid in to the Reserve Accounts in order to maintain a sufficient balance in each Reserve Account between 2011 and 2013.*

7. Please produce all documents necessary to a complete understanding of DRV's reassessment of the Reserve Accounts, including all documents that support your position that the reassessments were commercially reasonable or the exercise of reasonable judgment.

RESPONSE: *All information necessary for a complete understanding of DRV's reassessment of the Reserve Accounts is contained in the July, 2011 Notice of Reassessment and the attachment thereto. That document has previously been produced and will be produced in response to the Request.*

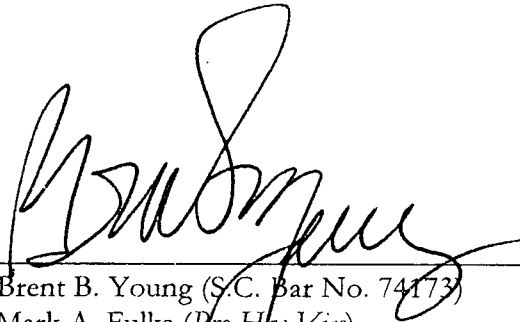
8. Please produce all documents necessary to a complete understanding of DRV's decision to request the Capital Projections from the Property Manager and/or CBRE.

CERTIFICATE OF APPELLANT'S COUNSEL

We certify that the Record on Appeal contains all material proposed to be included by the parties and not any other material.

Date: January 12, 2015

Respectfully submitted,



Brent B. Young (S.C. Bar No. 74173)
Mark A. Fulks (*Pro Hac Vice*)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
Attorneys at Law
100 Med Tech Parkway, Suite 200
Johnson City, TN 37604
(423) 928-0181
byoung@bakerdonelson.com
mfulks@bakerdonelson.com

Attorneys for Fontaine Business Park, LLC

Tucker S. Player w/ permission
granted via telephone
on 1/12/15 [signature]

Tucker S. Player (S.C. Bar No. 16217)
Player Law Firm
1415 Broad River Rd.
Columbia, SC 29210
(803) 772-8008
tucker@playerlawfirm.com

Attorneys for Fontaine Business Park 2-31, LLC

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JAN 15 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, ... Respondent,

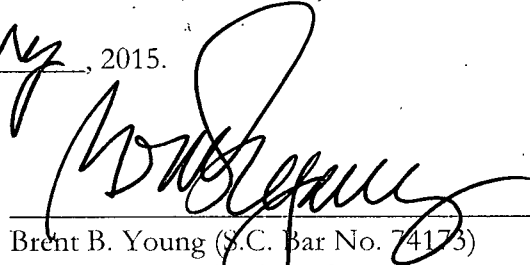
v.

FONTAINE BUSINESS PARK, LLC, FONTAINE BUSINESS PARK 2, LLC,
FONTAINE BUSINESS PARK 3, LLC, FONTAINE BUSINESS PARK 4, LLC,
FONTAINE BUSINESS PARK 5, LLC, FONTAINE BUSINESS PARK 6, LLC,
FONTAINE BUSINESS PARK 7, LLC, FONTAINE BUSINESS PARK 8, LLC,
FONTAINE BUSINESS PARK 9, LLC, FONTAINE BUSINESS PARK 10, LLC,
FONTAINE BUSINESS PARK 11, LLC, FONTAINE BUSINESS PARK 12, LLC,
FONTAINE BUSINESS PARK 13, LLC, FONTAINE BUSINESS PARK 14, LLC,
FONTAINE BUSINESS PARK 15, LLC, FONTAINE BUSINESS PARK 16, LLC,
FONTAINE BUSINESS PARK 17, LLC, FONTAINE BUSINESS PARK 18, LLC,
FONTAINE BUSINESS PARK 19, LLC, FONTAINE BUSINESS PARK 20, LLC,
FONTAINE BUSINESS PARK 21, LLC, FONTAINE BUSINESS PARK 22, LLC,
FONTAINE BUSINESS PARK 23, LLC, FONTAINE BUSINESS PARK 24, LLC,
FONTAINE BUSINESS PARK 25, LLC, FONTAINE BUSINESS PARK 26, LLC,
FONTAINE BUSINESS PARK 27, LLC, FONTAINE BUSINESS PARK 28, LLC,
FONTAINE BUSINESS PARK 29, LLC, FONTAINE BUSINESS PARK 30, LLC,
and FONTAINE BUSINESS PARK 31, LLC, ... Appellants.

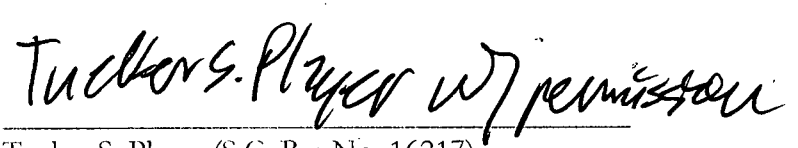
PROOF OF SERVICE

We certify that a copy of the Record on Appeal was served on the opposing party on January 12, 2015, by U.S. Mail, postage prepaid, addressed to Appellee's Counsel of Record, Paul Harrill and Robert L. Widener, P.O. Box 11390, Columbia, S.C. 29211.

This 12th day of January, 2015.


Brent B. Young (S.C. Bar No. 74173)
Mark A. Fulks (*Pro Hac Vice*)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
Attorneys at Law
100 Med Tech Parkway, Suite 200
Johnson City, TN 37604
(423) 928-0181
byoung@bakerdonelson.com

Attorneys for Fontaine Business Park, LLC


Tucker S. Player (S.C. Bar No. 16217)
Player Law Firm
1415 Broad River Rd.
Columbia, SC 29210
(803) 772-8008
tucker@playerlawfirm.com

*granted via telephone
on 1/12/15*

Attorneys for Fontaine Business Park 2-31, LLC