

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-29-01187
Appellate Case No. 2015-000904

RECEIVED
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SC Court of Appeals

Kenneth R. Gainey..... Appellant,

v.

Timothy M. Gainey..... Respondent.

RECORD ON APPEAL

PHILIP E. WRIGHT
408 North Main Street
Lancaster, SC 29720
(803) 286-4343
SC Bar No. 6241
ATTORNEY FOR APPELLANT

LUCY L. MCDOW
Post Office Box 767
Rock Hill, SC 29731-6767
(803) 327-1700
ATTORNEY FOR RESPONDENT

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STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

Kenneth Ray Gainey

Plaintiff(s)

vs.

Timothy M. Gainey, et al.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2012 - CP - 29 - 1187

(Please Print)

Submitted By: Philip E. Wright

Address: 408 North Main Street
Lancaster, SC 29720.

SC Bar #: 6241

Telephone #: (803) 286-4343

Fax #: (803) 286-9996

Other:

E-mail: civil@pewpa.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☒ Other (199)
<u>Corporate Dissolution</u> | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)
_____ | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)
_____ | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)
_____ |
| Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)
_____ | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)
_____ | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)
_____ | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)
_____ |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Other (699)
_____ | | |

Submitting Party Signature: _____

Date: August 22, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR.**
 Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA.)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-29- 1187

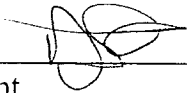
Kenneth Ray Gainey,)
Plaintiff,)

vs.)

Timothy M. Gainey, individually,)
and A List Properties, LLC,)
Defendants.)

SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber hereof at his office within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for a judgment by default to be rendered against you for the relief demanded in the Complaint.


Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343

ATTORNEY FOR PLAINTIFF

August 22, 2012
Lancaster, South Carolina

Cause of Action For: Judicial Dissolution of Corporation
To Be Tried By: Court

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-29- 1187

Kenneth Ray Gainey,

Plaintiff,

vs.

Timothy M. Gainey, individually,
and A List Properties, LLC,

Defendants.

COMPLAINT

The Plaintiff would respectfully show the Court that:

1. The Plaintiff is a resident of Lancaster County, South Carolina and is a 50% shareholder in the Defendant corporation A List Properties, LLC.
2. The Defendant Timothy M. Gainey is a resident of Lancaster County, South Carolina and is a 50% shareholder in the limited liability company A List Properties, LLC.
3. A List Properties, LLC is a limited liability company organized and existing under the laws of the State of South Carolina doing business in Lancaster County whose principal office is located in Lancaster, South Carolina.
4. A List Properties, LLC was incorporated on April 29, 2011 as a South Carolina limited liability company.
5. The primary asset of the business is a commercial building located on Highway 200 South near Lancaster, South Carolina.
6. The LLC rented the building for use as a restaurant in April 2011.
7. The Defendant Gainey has refused to cooperate with the Plaintiff Gainey in the operation of the rental business in that the Defendant Gainey refused to contribute to the capital

needs of the rental business, has received half the rent from the tenant but refuses to account for that rent to the Plaintiff or the LLC, has used the building for his personal use and storage of window and door units related to his personal employment and, upon information and belief, recently served the restaurant tenant with eviction papers causing the tenant to vacate the premises in the middle of the second year of a lease.

8. The Plaintiff brings this action pursuant to Title 33, Chapter 14, Section 300(2) of the South Carolina Code of Laws of 1976, as amended, for purposes of judicially dissolving the corporation known as A List Properties, LLC on the grounds that:

- (i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;
- (ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation);
- (iii) the corporate assets are being misapplied or wasted;
- (iv) the corporation has abandoned its business and has failed, within a reasonable time, to dissolve, to liquidate its affairs, or to distribute its remaining property among its shareholders.

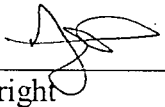
9. The Plaintiff seeks relief from the Court pursuant to Section 33-14-310(c) including issuance of an injunction, appointment of a receiver or custodian pendente lite with all powers and duties as the Court directs pursuant to Section 33-14-320, take action to preserve the corporate assets and to protect the interests of the shareholders until a full hearing may be held.

10. The Plaintiff seeks an order judicially dissolving the corporation and granting the relief set forth above.

11. The Plaintiff seeks an order requiring the Defendant Gainey to surrender his keys to the premises and to prevent the Defendant Gainey from entering the premises until the receiver is appointed or this matter is tried.

WHEREFORE, the Plaintiff prays:

- a. that the Court judicially dissolve the corporation known as A List Properties, LLC.
- b. that the Court take such action as is necessary under Title 14 of Chapter 33 of the South Carolina Code of Laws of 1976, as amended, to protect the rights of the Plaintiff as a shareholder of that corporation including all the remedies allowed for by the statutory scheme of Title 14.
- c. that the Court appoint a receiver or custodian of the corporate assets to avoid further loss or prejudice to the Plaintiff.
- d. for such other and further relief as the Court deems proper.



Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343

ATTORNEY FOR PLAINTIFF

August 22, 2012
Lancaster, South Carolina.

3

6

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 12-CP-29-1187

Kenneth Ray Gainey,
Plaintiffs,

v.

Timothy M. Gainey, individually,
And A List Properties, LLC;
Defendants.

Answer

Defendants respond to the correspondingly numbered paragraphs in Plaintiff's Complaint as follows:

1. The allegations of paragraph 1 are admitted.
2. The allegations of paragraph 2 are admitted.
3. The allegations of paragraph 3 are admitted.
4. The allegations of paragraph 4 are admitted.
5. The allegations of paragraph 5 are admitted.
6. The allegations of paragraph 6 are admitted.
7. Defendants admit that Plaintiff and Defendant Gainey have used the building for personal storage. The remaining allegations of paragraph 7 are denied.
8. The allegations of paragraph 8 state a legal conclusion and/or prayer for relief to which no response is required, to the extent a response is required, denied.
9. The allegations of paragraph 9 state a legal conclusion and/or prayer for relief to which no response is required, to the extent a response is required, denied.

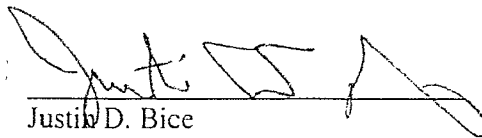
10. The allegations of paragraph 10 state a legal conclusion and/or prayer for relief to which no response is required, to the extent a response is required, denied.

11. The allegations of paragraph 11 state a legal conclusion and/or prayer for relief to which no response is required, to the extent a response is required, denied.

WHEREFORE, Defendants prays that the Court:

1. Dismiss Plaintiff's Complaint with prejudice;
2. Tax Plaintiff the costs and expenses of this action;
3. Allow all issues triable by a jury to be so tried; and
4. Award Defendants all other relief, both legal and equitable, which the Court deems just and proper.

BICE LAW LLC



Justin D. Bice
justin@bicelaw.us
1012 Market St, Ste 301
Fort Mill, SC 29708
(803) 639-8777 - Telephone
(704) 612-0273 - Facsimile
Attorney for Defendants

Fort Mill, South Carolina
October 26, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-29-01187

Kenneth Ray Gainey,)
)
Plaintiff,)

AMENDED COMPLAINT

vs.)

Timothy M. Gainey, individually,)
and A List Properties, LLC,)
)
Defendants.)
_____)

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CLERK OF COURT
LANCASTER, SC

The Plaintiff would respectfully show the Court that:

1. The Plaintiff is a resident of Lancaster County, South Carolina and is a 50% shareholder in the Defendant corporation A List Properties, LLC.

2. The Defendant Timothy M. Gainey is a resident of Lancaster County, South Carolina and is a 50% shareholder in the limited liability company A List Properties, LLC.

3. A List Properties, LLC is a limited liability company organized and existing under the laws of the State of South Carolina doing business in Lancaster County whose principal office is located in Lancaster, South Carolina.

FOR A FIRST CAUSE OF ACTION

4. A List Properties, LLC was incorporated on April 29, 2011 as a South Carolina limited liability company.

5. The primary asset of the LLC business was rent from a commercial building located on Highway 200 South near Lancaster, South Carolina and titled to the Plaintiff and the individual Defendant as co-tenants.

6. The LLC rented the building for use as a restaurant in April 2011.

7. The parties as the only two members of the LLC are deadlocked in the management of corporate affairs, cannot break the deadlock and the business affairs of the corporation can no longer be conducted because of the deadlock.

8. The Defendant Gainey as the member in control of the LLC has acted in a manner that is fraudulent, oppressive and illegal as to the corporation and the Plaintiff as the other member. The assets of the corporation have been misapplied and the corporation has failed as a business enterprise.

9. The Plaintiff brings this action pursuant to Title 33, Chapter 14, Section 300(2) of the South Carolina Code of Laws of 1976, as amended, for purposes of judicially dissolving the corporation known as A List Properties, LLC on the grounds that:

- (i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;
- (ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation);
- (iii) the corporate assets are being misapplied or wasted;
- (iv) the corporation has abandoned its business and has failed, within a reasonable time, to dissolve, to liquidate its affairs, or to distribute its remaining property among its shareholders.

10. The Plaintiff seeks an order requiring the Defendant Gainey as the member in control the LLC to account for the income and expenses of the LLC. The Plaintiff further seeks an order judicially dissolving the corporation and granting the relief set forth above.

FOR A SECOND CAUSE OF ACTION
(Indemnification – Breach of Contract)

11. The Plaintiff incorporates the allegations of the First Cause of Action herein by reference.

12. The parties, Kenneth Ray Gainey and Timothy M. Gainey, bought the subject real estate as co-tenants from C.H. Hendrix, the owner of a furniture store that did business there for many years. The Plaintiff paid for his half of the purchase price in cash. The Defendant Gainey borrowed money from First Citizens Bank to obtain funds to finance his part of the purchase price. The building and land were used as collateral to secure the mortgage required by First Citizens to secure the loan to the Defendant Gainey.

13. The express agreement between the Plaintiff and the Defendant Gainey was that the Defendant Gainey would be solely responsible for paying the note and mortgage to First Citizens Bank. The Defendant Gainey received and used all the funds from the original First Citizens loan for his own personal use.

14. The Defendant Gainey later refinanced the mortgage and requested that the Plaintiff sign another mortgage to First Citizens to accomplish the refinancing. The Plaintiff agreed with the same agreement that the Defendant Gainey would be responsible for all the payments on the mortgage. The Defendant Gainey refinanced the property and used all the funds from the second loan not only to pay off the first mortgage from First Citizens but also to pay his personal debt. As a result, the Defendant Gainey paid off substantial personal debt. The Defendant Gainey agreed to be solely responsible for repayment to the First Citizens debt without contribution from the Plaintiff.

15. The building owned by the parties and managed by the LLC eventually rented the building to a restaurant enterprise.

16. When the tenant began to pay rent, the rent was split between the parties by the tenant. The Defendant Gainey was paid his full half of the rent each month. The tenant paid the Plaintiff less than his full half of the rent each month because the Defendant Gainey refused to contribute to the costs incurred by the Plaintiff and Defendant Gainey as landlord and owner of the property. The original rent was \$3,500.00 and rose to \$3,750.00 after one year.

17. Because the Defendant Gainey refused to participate in any costs or repairs to the building under the obligations of the landlord, now A List Properties, LLC as the entity formed to run the building business, the Plaintiff had to bear all the costs of the repairs to meet the standard of Paragraph 1v of the lease in order to fulfill the obligations of the parties as owners of the building to the tenant.

18. The tenant wanted to upgrade the building so it would be suitable for use as a restaurant. The tenant up-fitted the building to some extent. However, the upgrades made by the tenant were deducted from the rent paid to the Plaintiff. The tenant paid a full half rent payment to the Defendant Gainey because the Defendant Gainey would not cooperate with the tenant but the Plaintiff would cooperate with the tenant.

19. As a result, the Plaintiff bore all the cost of the landlord's obligation while the Defendant Gainey collected rent without contribution to expenses related to the landlord's obligations.

20. The Defendant Gainey never cooperated with the tenant and eventually evicted the tenant unilaterally during the second year of the lease without notice to or approval by the Plaintiff, the co-owner of the building.

21. The Defendant Gainey stopped making the mortgage payments to First Citizens and the mortgage went into foreclosure. With the tenant gone and no funds to pay the mortgage, the Plaintiff could not prevent the foreclosure. The property was sold at judicial sale on April 5, 2014.

22. As a result of the foreclosure, the Plaintiff lost his interest in the building including all the money he spent to repair the building and meet the obligations owed by the owners to the tenant.

23. The Plaintiff seeks judgment against the Defendant Gainey for indemnification for the loss of the Plaintiff's interest in the building including the investment of the Plaintiff which was proximately caused by breach of the agreement between the parties for the Defendant Gainey to pay the mortgage debt upon which the Defendant Gainey defaulted, thus causing the foreclosure of the mortgage and the foreclosure sale of the building.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

24. The Plaintiff incorporates the allegations of the First and Second Causes of Action herein by reference.

25. The Defendant Gainey initially opposed the lease to the tenant but eventually agreed to the lease.

26. The Defendant Gainey antagonized, harassed and disturbed the tenant during the term of the lease.

27. The Defendant Gainey intentionally, deliberately and unilaterally evicted the tenant who was paying rent that was the source of funds for the Defendant Gainey to pay the mortgage which he unilaterally owed to First Citizens Bank.

28. The Defendant Gainey knew or should have known that by evicting the tenant he would bring about the circumstances that led to his refusal and failure to pay the mortgage to First Citizens Bank.

29. The Defendant Gainey knew or should have known that failure to make the mortgage payments would result in the foreclosure by First Citizens Bank on the real estate jointly owned with the Plaintiff.

30. The Defendant Gainey had already pulled his equity out of the building by the use of the second mortgage proceeds to pay off his debt on the building and to pay off his personal debts so the foreclosure of the mortgage would cause him no substantial harm.

31. The Defendant Gainey knew that the result of his actions would be to the financial detriment of the Plaintiff in that the Plaintiff would lose his interest in the building upon foreclosure.

32. The actions of the Defendant Gainey constitute the breach of his agreement with the Plaintiff by a series of fraudulent acts that renders the Defendant Gainey's breach of the agreement with the Plaintiff a tort for which the Defendant Gainey is personally chargeable with actual and punitive damages.

33. The Plaintiff is entitled to judgment against the Defendant Gainey for breach of the agreement by fraudulent acts and seeks actual and punitive damages.

WHEREFORE, the Plaintiff seeks judgment against the Defendant Timothy M. Gainey:

- a. for dissolution of the corporation known as A List Properties, LLC.
- b. for an accounting of the proceeds of the rents received and any costs paid by both parties in relation to the lease to the restaurant business.

c. for judgment against the Defendant Timothy M. Gainey for breach of contract, actual damages.

d. for judgment against the Defendant Timothy M. Gainey for breach of contract by fraudulent acts for actual and punitive damages.

e. for such other and further relief as the Court may deem appropriate.



Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343

ATTORNEY FOR PLAINTIFF

July 31, 2014
Lancaster, South Carolina:

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
FOR THE
SIXTH JUDICIAL CIRCUIT

Kenneth R. Gainey,)
)
Plaintiff,)
)
)
)
v.)
)
Timothy M. Gainey and, A List)
Properties, LLC,)
)
Defendants.)
_____)

CIVIL ACTION NO. 12-CP-29-1187

**ANSWER TO AMENDED
COMPLAINT**

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LANCASTER, SC

NOW COME the Defendants, Timothy Gainey and A List Properties, LLC, by and through the undersigned counsel, and responds to the Plaintiff's Amended Complaint as follows:

FIRST AFFIRMATIVE DEFENSE

1. Upon information and belief, the allegations contained in paragraph 1 of the Amended Complaint are admitted.
2. The allegations contained in paragraph 2 of the Amended Complaint are admitted.
3. The allegations contained in paragraph 3 of the Amended Complaint are admitted.

FIRST CAUSE OF ACTION

4. The allegations contained in paragraph 4 of the Amended Complaint are admitted.
5. It is admitted that the corporate defendant received rent as an asset during the time the commercial building was rented. It is denied that the rent was the primary asset in that the commercial building itself was titled in the name of the corporate defendant at the time the lease was executed.
6. The allegations contained in paragraph 6 of the Amended Complaint are admitted.
7. It is admitted that in the past the individual parties to this action were in a deadlock as to the corporate affairs. As of the date of this Answer, the corporate entity still exists, but is not a going business concern in any capacity. As such, all of the allegations as to the current business affairs are denied.
8. The allegations contained in paragraph 8 of the Amended Complaint are denied.

9. The allegations contained in paragraph 9 of the Amended Complaint and its subparts are denied.

10. Paragraph 10 does not contain any allegations, and thus, no response is required. To the extent that a response is required, they are denied.

SECOND CAUSE OF ACTION

11. The responses contained in paragraphs 1 through 10 are reasserted as if set forth fully herein.

12. It is admitted that Defendant Gainey purchased the commercial property as tenants in common with Plaintiff Gainey. It is further admitted that Defendant Gainey financed his portion of the purchase price with First Citizens Bank. Except as admitted, the allegations contained in paragraph 12 of the Amended Complaint are denied.

13. The allegations contained in paragraph 13 of the Amended Complaint are denied.

14. It is admitted that Defendant Gainey refinanced the original loan. Except as admitted, the allegations contained in paragraph 14 of the Amended Complaint are denied.

15. It is admitted that the building purchased by the Plaintiff and Defendant Gainey was ultimately rented for use as a restaurant. It is, however, denied that the building was owned by the individual parties and "managed" by the corporate defendant during the lease.

16. It is admitted that the rent was to be paid to Plaintiff Gainey and Defendant Gainey in separate payments. It is further admitted that the rent for the first year was \$3,500.00 and was increased to \$3,750.00. Except as admitted, the allegations contained in paragraph 16 of the Amended Complaint are denied.

17. The allegations contained in paragraph 17 of the Amended Complaint are denied.

18. The allegations contained in paragraph 18 of the Amended Complaint are denied.

19. The allegations contained in paragraph 19 of the Amended Complaint are denied.

20. The allegations contained in paragraph 20 of the Amended Complaint are denied.

21. It is admitted that the property went into foreclosure. Except as admitted, the allegations contained in paragraph 21 of the Amended Complaint are denied.

22. The Defendants are without knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 22 of the Amended Complaint, and therefore, they are denied.

23. Paragraph 23 does not contain any allegations, and thus, no response is required. To the extent that a response is required, they are denied.

THIRD CAUSE OF ACTION

24. The responses contained in paragraphs 1 through 23 are reasserted as if set forth fully herein.

25. The allegations contained in paragraph 25 of the Amended Complaint are denied.

26. The allegations contained in paragraph 26 of the Amended Complaint are denied.

27. The allegations contained in paragraph 27 of the Amended Complaint are denied.

28. The allegations contained in paragraph 28 of the Amended Complaint are denied.

29. The allegations contained in paragraph 17 of the Amended Complaint are denied.

30. The allegations contained in paragraph 30 of the Amended Complaint are denied.

31. The allegations contained in paragraph 31 of the Amended Complaint are denied.

32. The allegations contained in paragraph 32 of the Amended Complaint are denied.

33. Paragraph 33 does not contain any allegations, and thus, no response is required. To the extent that a response is required, they are denied.

SECOND AFFIRMATIVE DEFENSE

The Defendants move this Court to dismiss the Plaintiff's claims in their entirety pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

The Defendants plead the applicable statutes of limitation as a complete and total bar to the Plaintiff's claims.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by waiver.

SIXTH AFFIRMATIVE DEFENSE

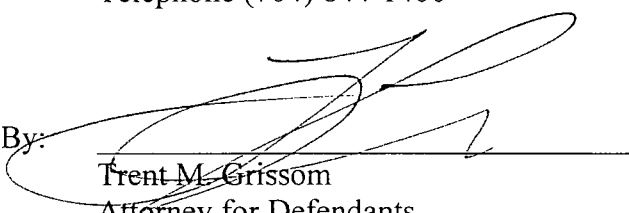
Any recovery had by Plaintiff should be reduced or eliminated by his failure to mitigate his damages.

WHEREFORE, the Defendants pray unto the Court for the following:

1. That the Plaintiff have and recover nothing of the Defendants under any of the claims asserted in his Amended Complaint.
2. That all of the Plaintiff's claims be dismissed with prejudice.
3. That the costs of this action be taxed against the Plaintiff.
4. That this matter be tried before a jury.
5. For such other and further relief as this Court may deem just and proper.

This the 15th day of October, 2014.

WEAVER, BENNETT & BLAND, P.A.
196 North Trade Street
Post Office Box 2570
Matthews, North Carolina 28106
Telephone (704) 844-1400

By: 

Trent M. Grissom
Attorney for Defendants
SC Bar No. 77718

PAGES DELETED FROM TRANSCRIPT

Pages 1-17 of the Transcript are not included.
These pages include jury qualification and selection
and are not relevant to the appeal.

1 MR. WRIGHT: No, Your Honor.

2 THE COURT: Anything from the defense?

3 MR. GRISSOM: I do have a pretrial brief to present.

4 THE COURT: Okay. You can go ahead and hand that up.

5 Do we have any pretrial matters that we need to address
6 tomorrow morning before we get started.

7 MR. WRIGHT: No, Your Honor.

8 THE COURT: All right. I will see y'all tomorrow
9 morning.

10 (Court recessed for the day and resumed at 9:15

11 A.m., On March 17, 2015.)

12 THE COURT: Gentleman, the jury sent out a note that
13 Jeff Tores, Juror 131, has been selected as foreperson. So
14 I will mark this sheet as Court's Exhibit 1. Anything
15 preliminary that we need to do before we bring the jury in?

16 MR. WRIGHT: None, Your Honor.

17 THE COURT: Anything from the defense?

18 MR. GRISSOM: No, Your Honor.

19 THE COURT: All right.

20 (The jury entered the courtroom.)

21 THE COURT: Welcome back. I hope everyone had a good
22 evening. Now can everyone hear me okay? Good. I
23 understand that Mr. Tores, you have been selected as
24 foreperson; is that correct?

25 THE JUROR: Yes.

1 THE COURT: All right. Thank you for serving in that
2 capacity, if you would always occupy the seat where you now
3 sit. And let's see, our alternates are Mr. Lamb and Mr.
4 Turner? If you would occupy those alternate seats unless
5 you become a part of the regular jury. As I said, the rest
6 of you are at liberty to sit in whatever seat you would
7 like, whether it be the same seat or alternating seats,
8 whatever the case may be. Now, we're getting ready to
9 start the trial. This is the case, as I told you
10 yesterday, of Kenneth R. Gainey versus Timothy M. Gainey
11 and A-list Properties, LLC. If you haven't gathered by now
12 juries just like witness are constantly taking oaths. I
13 need the jury, if you would please stand while the clerk
14 administers the oath for you to serve as jurors on this
15 particular case.

16 (The jury was sworn.)

17 THE COURT: Is there any member of the jury that did
18 not respond to the oath by saying I will or I do? If so,
19 please stand. Thank you very much. Ladies and gentlemen,
20 as I told you we are getting ready to start the trial of
21 the case of Kenneth R. Gainey versus Timothy M. Gainey and
22 A-list Properties, LLC, but before we do that let me go
23 over some preliminary charges with you so that you can
24 better understand what is happening and what is expected of
25 you during the trial of this case. I know from watching

1 movies, TV shows, reading books, things for entertainment
2 trials are often full of a lot of excitement, a lot of
3 adventure, a lot of suspense, and while that might be the
4 case in this trial, it probably won't be. The primary
5 function of this trial is a search for the truth, what
6 happened, and that is often a slow, deliberate, repetitive
7 process, the exact opposite of what you might expect when
8 you review trials for entertainment in a movie or a TV show
9 or a book or something of that nature. But I hope you do
10 find the trial entertaining and I hope that you do find it
11 educational. And I want to thank you from the outset for
12 serving as jurors in this case because this is the only way
13 that the parties can resolve their dispute. The attorneys
14 appearing before you are advocates for the parties they
15 represent, but first and foremost they are officers of the
16 Court. They are sworn to uphold the integrity and the
17 fairness of our judicial system. You can expect them to be
18 professional, competent and ethical in the representation
19 of their client's interest. Likewise they'll expect you to
20 be professional, reasonable and ethical as you serve on
21 this jury. Now, first as I told you yesterday, we have
22 some preliminary instructions that we have to go over. I
23 understand they don't allow cellphones so we don't have to
24 worry about any communication devices going off during the
25 trial. However, I want to let you know if you did

1 inadvertently bring in any cellphones or paging devices or
2 anything of that nature, if you would turn them off now.
3 Also, we will be taking breaks for lunch and things of that
4 nature and when you're asked to be back please be on time
5 so that we aren't further delayed. I want to apologize for
6 keeping you in the jury room for so long, and that happens
7 from time to time, but we are conducting the Court's
8 business and we can't do that without your being here, so
9 please be prompt when you are asked to be back. Last but
10 certainly not least, I ask that you pay close attention
11 during the trial of this case. This trial is very
12 important to the parties, and it is the only way that they
13 can resolve their disputes. Now I'll let you know why you
14 are here. As the jury in this case you are sole judge of
15 the facts of this case. Your job is to determine what the
16 facts of this case are. You are to determine the facts
17 only from the testimony you hear and any other evidence
18 that is presented during the trial of this case. You
19 should not be influenced by any opinions or statements you
20 may have heard outside of the court. If at any time I make
21 a comment which leads you to believe that I have an opinion
22 about the facts of this case, you're to disregard my
23 comment. You and you alone must determine what the facts
24 of this case are based upon the testimony and the evidence
25 presented at trial. Now, the same law that makes you the

1 judge of the facts of this case makes me the judge of the
2 law. The law as I give it to you is the only law that you
3 can consider. You must accept and follow the law as I give
4 it to you even though you might disagree with it. Just as
5 I cannot tell you what the facts of this case are, you
6 cannot disagree with me about the law to be applied in this
7 case. Your job is to take the law as I give it to you and
8 apply it to the facts as you find those facts to be. Until
9 I advise you to begin your deliberations, you must not
10 discuss this case with anyone, whether it be your family,
11 friends or even your fellow jurors. During the trial you
12 are not to read or listen to any news accounts about the
13 case, if there is any. You are not to conduct any
14 independent investigation into the case. You are not to go
15 on the internet or read any newspaper accounts. You're not
16 to watch any television reports if there are any or listen
17 to any radio reports if there are any. It's important that
18 you keep an open mind and not decide any issue in this case
19 until all of the evidence has been presented to you, then
20 when you're instructed to start your deliberations you can
21 then discuss the case but only in the jury room with your
22 fellow jurors. Now, in just a moment the attorneys will
23 make what's called opening statements. These opening
24 statements are not evidence, it is simply the attorneys'
25 explanation as to what they think the issue in this case

1 are, or at least what they feel the evidence will show to
2 you. After these opening statements the evidence in this
3 case will be presented to you by testimony of the sworn
4 witnesses from the witness stand and any other exhibits
5 that might be introduced into evidence. Now, as the judge
6 of the law I determine what evidence is admissible at
7 trial. As the judge of the facts you determine what
8 evidence or testimony is believable. Once testimony is
9 admitted into evidence, whether or not you believe it is
10 solely for you to determine. In deciding whether to
11 believe a witness you have the right to consider whether
12 the witness has an interest in the result of the trial,
13 whether the witness is prejudiced towards either the
14 plaintiff or the defendant, the opportunity for the witness
15 to have seen the matters and things about which the witness
16 may testify, and the way the witness acts on the witness
17 stand. You have the right to consider anything that is in
18 the record that will help you evaluate the testimony of the
19 witnesses, that means that it is your duty to pay close
20 attention to these witnesses, to observe them and to listen
21 to them. Is there any additional charges or challenges to
22 the opening charges by the plaintiff?

23 MR. WRIGHT: No, Your Honor.

24 THE COURT: Any by the defendant?

25 THE JUROR: None from the defendant.

OPENING STATEMENTS

1 THE COURT: All right, ladies and gentlemen, we'll
2 begin the trial with the opening statements from the
3 attorneys. And as I said, these opening statements are not
4 evidence in this case, it is just the attorneys' contention
5 as to what they think the issues in this case are. All
6 right, Mr. Wright?

7 MR. WRIGHT: May it please the Court?

8 THE COURT: Yes, sir.

9 MR. WRIGHT: Good morning. My name is Phillip Wright,
10 I'm an attorney which is why I'm standing here in front of
11 you right now. I came here in 1977, I've been practicing
12 here 38 years, and during the 38 years that I have been
13 practicing I've found out a few things, one is that the
14 worst cases that I have are family cases. Families can get
15 madder about anything, at anybody quicker and stay mad.
16 These are brothers. And yesterday some of the questions
17 that were asked of you were about your feelings about that
18 and whether you've been involved in those type of disputes
19 and whether that would affect your decision in this case,
20 and I'm asking you to begin with, these are business
21 partners. They're related as brothers but they are
22 business partners. This is a business case. This is not a
23 family case, it's a business case. So to the extent that
24 you can sit there as 12 jurors and look at this as two
25 individuals who entered into business together and things

OPENING STATEMENTS

1 went wrong and that business failed, and as a result my
2 client is here saying he's been damaged because of what his
3 business partner did. So that's one of the first things I
4 want to try to get you to look at this as. The judge just
5 told you that there's not going to be a lot of drama in
6 this case. It's a business case, it's a little bit dry, so
7 my job is to try to get you from going to sleep. If you go
8 to sleep that fellow in the corner will come wake you up.
9 So please, I don't think it will be a long trial, but
10 please try to stay awake and listen. And I have a stack of
11 paper over here I am going to inundate you with. Yesterday
12 the judge -- and you heard him praising about the great
13 technical advances of our courtroom and all of these other
14 things, and I'm going to confess to you that I'm a
15 dinosaur. I feel better when I can touch it, feel it, look
16 at it, and if I hit a button it doesn't go away. So
17 instead of putting everything up on the screens and TV's --
18 we have a wonderful projector system here, I'm not going to
19 demonstrate to you because I will hand up the paper and I
20 will let y'all look at it and you will get to take it to
21 the jury room and look at it. So I'm sorry I'm not
22 technologically advanced, but I do good to keep up with my
23 smart phone. So I will give you the paper to look at and
24 to consider. This case is about two business partners who
25 decided to by the old Hendrix Furniture building down there

OPENING STATEMENTS

1 on South 200, I'm sure most of you know where it is.
2 People who live in Indian Land, if you never come down here
3 probably don't know where it is, but people who live in
4 this general area know where the old Hendrix Furniture
5 Store used to be. It has been closed for many years. They
6 bought the building in 2004, and they bought it as
7 cotenants, they owned it together. They used it for their
8 own purposes for a long time. And then in 2011 they leased
9 it to a restaurant that was going to go in, up-fit the
10 building and make a restaurant so they would have a stream
11 of income. The building is sitting there not producing any
12 income, it was a burden so they wanted to make some money
13 out of it. I'll digress a minute and go back. When they
14 bought the building in 2004 my client was fortunate or
15 unfortunate to have cash to pay for his half of the
16 purchase price. His business partner didn't have that much
17 cash and so his business partner needed to borrow money to
18 finance his part of the purchase. And so he went to the
19 First Citizens Bank, and the bank will loan you money but
20 they won't loan you money with collateral that you only own
21 half of, so in order for him to get the loan my client had
22 to sign on the mortgage that said, okay, if he doesn't pay
23 this loan and the bank forecloses I understand that's going
24 to happen. But that is the important part of this case.
25 This business partner, the defendant, was borrowing money.

OPENING STATEMENTS

1 This business partner had cash. The obligation to pay the
2 loan, my client will testify, was agreed to be the person
3 that borrowed it. His brother was supposed to pay the loan
4 back. The brother paid the loan back for five years, it
5 was a balloon note and it had to be refinanced after five
6 years, the bank wants to look at things, how things are
7 going after five years and they refinanced in 2009. And
8 once again, my client signed a mortgage so the bank would
9 have a good security so they could make the loan, and the
10 bank made the loan and the business partner continued to
11 make the payments. But then they got a tenant in the
12 building and there were issues and we'll get into that as
13 we get into the trial, but the bottom line is the business
14 partner evicted the tenant and ended the income stream that
15 was coming to pay the mortgage. Well, when that happens
16 and the mortgage doesn't get paid the bank forecloses. If
17 you don't pay your house payment the bank forecloses. He
18 didn't pay -- he didn't pay the bank payment, my client
19 couldn't pay the bank payment, the bank foreclosed and the
20 property was lost. So all of the cash that my client put
21 into that building was gone. Nothing. Nothing. That's
22 what we're here about today is to obtain a verdict against
23 the business partner who broke the agreement that he would
24 make that mortgage payment, and he could have done that if
25 he'd left that tenant alone, but he ran the tenant off,

OPENING STATEMENTS

1 served them with an eviction notice, there went the income
2 stream. That's what this case is about. It's very simple,
3 very straight forward. So you listen to the facts, you
4 decide the facts. This case involved big numbers. I hope
5 big numbers don't scare you. Commercial buildings cost
6 money, foreclosures create big losses so we're talking six
7 figures in money here, but that's what it's going to take.
8 Your job is to assess liability if the business partner
9 owes it, and secondly how much the number is that he owes.
10 That's what this is all about and so you decide those
11 things. The judge will explain the law to you at the end
12 of the case. I will try not to bore you, but I will put
13 the evidence in in paper so you can go back and look at it
14 and get this done today hopefully and you'll be through the
15 rest of the week.

16 MR. GRISSOM: Good morning. I thank you for your
17 service. Again, I'm Trey Grissom with Weaver, Bennett and
18 Bland out of Matthews and I do represent Mr. Tim Gainey,
19 the defendant in this matter. And most of what Mr. Wright
20 said we don't quibble with, we don't disagree with. These
21 guys are brothers but they did also enter into a business
22 transaction where they bought this building on Highway 200.
23 Mr. Ken Gainey paid for his half in cash and my client had
24 to finance his half. And our contention is that the only
25 agreement that was made at that time and at the refinance

OPENING STATEMENTS

1 was between Tim Gainey and First Citizens Bank. He agreed
2 "I'm going to make my payments to you in exchange for you
3 loaning me the money to buy this building." What I think
4 you're going to hear from plaintiff is that somehow in that
5 was an agreement between these two gentlemen that not only
6 did he agree to pay the bank, but he agreed he would always
7 make the payments also on behalf of Mr. Gainey or otherwise
8 if he didn't he owed Mr. Gainey his half of the building,
9 and our position is that no such agreement to that affect
10 existed. You've got a building that's owned by two people,
11 one is a cash investor, one is a financed investor, and if
12 the cash investor wants to be protected they've got to have
13 an expressed agreement to provide that protection. When he
14 signed on that mortgage he knew the risk. My client could
15 have not paid his payments for a number of reasons, he
16 could have been injured in an accident and lost his job, he
17 could have been killed in an accident. Under all of those
18 circumstances he wouldn't have been able to make his
19 payment and so the risk of foreclosure was always there and
20 Mr. Ken Gainey knew that right from the outset and it's our
21 contention he should have taken steps to protect that in
22 the deal between these two. As the part we've heard about
23 evictions, there was no eviction. I mean, you will see a
24 notice that my client went down and put on the restaurant
25 door that says pay your rent or vacate the premises. And I

OPENING STATEMENTS

1 think all of you know if you want to actually evict someone
2 you've got to do some legal process. Our contention about
3 that is is what's wrong with a landlord asking for rent?
4 That's what the deal is. A landlord signs a lease that
5 says tenant is going to pay rent, the tenant didn't pay
6 rent and all my client did is say, "Hey, you're behind on
7 your rent, please pay up." And had they done so they would
8 have still been in the building. So any contention that my
9 client ran off the tenant and cut off the income stream is
10 just simply not true in our estimation. He simply asked
11 for the rent and the tenant left. I don't know why the
12 tenant left, maybe they couldn't pay the rent, maybe they
13 weren't making good enough money, I don't know. But
14 nonetheless, they did leave and it left my client in a
15 position to be unable to pay his mortgage and the building
16 did get foreclosed. My client lost his half interest in
17 that building as well, it wasn't just Mr. Kenneth Gainey
18 that lost. But the important issue to focus on during this
19 trial is was there an expressed agreement between these two
20 gentleman, not between Mr. Gainey and the bank because that
21 agreement exists, we'll stipulate to that, but was there an
22 agreement that when he couldn't make his payments for
23 whatever reason, not only would he lose his half, he would
24 have to pay back Mr. Gainey for his half. And at the end
25 of the day I think you will find that there was no such

OPENING STATEMENTS

1 agreement. Now, one final thing you may be asked to
2 consider is that in a situation like this when he knows the
3 building is in default and he knows it's into foreclosure
4 and he knows his half interest is in danger, the law will
5 put a burden on you that says you've got to try your best
6 to mitigate those damages, you've got to try to reduce the
7 damages that you might suffer. And so that means you might
8 try to sell the building, you might try to re-rent it, you
9 might try to make up the payments yourself, you might do
10 anything you can to stop that foreclosure to keep you from
11 losing your interest in the building. And if you don't
12 take any of those actions, well, then whatever you might be
13 entitled to recover gets reduced because you just sat there
14 and let it happen, you let the harm be suffered and you
15 took no effort to reduce that harm. So you may be asked to
16 consider that issue as well as I think the evidence will
17 show that no such efforts were made. Again, I thank you
18 for your service and I hope we won't be here more than
19 today. Thank you, again.

20 THE COURT: All right, ladies and gentlemen, we will
21 now start with the evidentiary portions of the trial with
22 the calling of witnesses. Mr. Wright, the plaintiff can
23 call their first witnesses.

24 MR. WRIGHT: Your Honor, the plaintiff calls the
25 defendant, Timothy Gainey.

TIMOTHY GAINNEY

1 The witness, TIMOTHY GAINNEY, was first sworn and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WRIGHT:

5 Q Mr. Gainey, will you tell us your name?

6 A Timothy M. Gainey, Mason Gainey.

7 Q Okay. You go by Tim; is that correct?

8 A I do.

9 Q Do you object to me calling you Tim as we ask these
10 questions?

11 A Not a bit.

12 Q Your brother goes by Ken.

13 A Right.

14 Q All right. Mr. Gainey, you'reⁿ brothers with Ken,
15 correct?

16 A Yes.

17 Q And what do you do for a living?

18 A I'm in sales.

19 Q Where?

20 A Matthews Building Supply.

21 Q That's in North Carolina?

22 A It is.

23 Q And how long have you been there?

24 A 23 years in May.

25 Q I'm sorry?

TIMOTHY GAINES

1 A 23 years in May.

2 Q If you could sit up a little closer to that mic, I'm
3 having a little trouble hearing you and I don't want to
4 wear those rabbit ears if I can help it. Did you and your
5 brother buy the old Hendrix Furniture Building down on
6 South 200?

7 A Yes.

8 Q And why did you buy it?

9 A As an investment.

10 Q Investment?

11 A Sure.

12 Q When you bought it what did you intend to do with it?

13 A Hold it to see if we could make some money.

14 Q Hold it. By holding it you mean?

15 A We used it for different things. He did what he
16 wanted to in it and I did what I wanted to.

17 Q I'm going to show you this document which has been
18 premarked as Exhibit 1, and ask you if you can identify
19 that document?

20 A I mean, it looks familiar. I can't say I have one
21 but it looks familiar.

22 Q Okay. Do you see this thing up here that says title
23 to real estate? You see it about as good as I do.

24 A Right. Yes.

25 Q And Mr. Hendrix, do you see his name on there?

TIMOTHY GAINES

- 1 A Yeah.
- 2 Q Is that who you bought it from?
- 3 A We did.
- 4 Q And do you see the purchase price of \$295,000?
- 5 A Right.
- 6 Q Is that what you paid for the building?
- 7 A I was thinking it was 300 but I guess if it was 295,
- 8 yeah.
- 9 MR. WRIGHT: Your Honor, we've agreed to enter this as
- 10 Plaintiff's Number 1.
- 11 THE COURT: Any objection?
- 12 MR. GRISSOM: No objection.
- 13 THE COURT: Plaintiff's Exhibit Number 1 admitted into
- 14 evidence without objection.
- 15 Q At the time you bought this building with your brother
- 16 were you working?
- 17 A Yes.
- 18 Q Was your brother working?
- 19 A I think he was doing some electrical work.
- 20 Q Electrical work?
- 21 A I know he worked for Duke Power.
- 22 Q Did your brother have some kind of injury or accident?
- 23 A He did.
- 24 Q Do you know when that was?
- 25 A Not year wise I don't.

TIMOTHY GAINES

1 Q Do you know whether it was before 2004 or after 2004?

2 A It may have been before, I'm not sure, I think it
3 was.

4 Q So before you bought the building he had had an
5 accident.

6 A Yeah.

7 Q And he had some cash, did he not, from that accident
8 settlement.

9 A I don't know where he had the cash from.

10 Q Did you know he had the cash to pay for his half of
11 the building?

12 A He told me he had cash to pay for the whole building.

13 Q For the whole building?

14 A Yes.

15 Q All right. But he paid cash for his half?

16 A Right.

17 Q And your half of the 295 would have been just short of
18 the \$150,000. Did you have that much cash to pay for the
19 building?

20 A No. I borrowed part of it from First Citizens,
21 134,000, and I took the rest out of my savings.

22 Q So you borrowed \$134,000 from First Citizens Bank.

23 A Right.

24 Q And did you talk with your brother about the fact that
25 you were having to borrow that money?

TIMOTHY GAINES

- 1 A Well, he knew that, yes.
- 2 Q Well, but what did the bank want as security for that
3 loan?
- 4 A The collateral was the building.
- 5 Q And he owned half of the building.
- 6 A Exactly.
- 7 Q So in order for the bank to have good security he had
8 to sign the mortgage, did he not?
- 9 A Yes.
- 10 Q Did you talk to him about that?
- 11 A Talked to as in what? We talked about it, yeah. We
12 were there at the bank, we signed the papers, yeah.
- 13 Q So you talked about it in that he understood you were
14 borrowing the money.
- 15 A Oh, sure.
- 16 Q And who was going to pay the money back?
- 17 A I made the loan, I was paying the payments.
- 18 Q Did you expect your brother to pay the payments back?
- 19 A No.
- 20 Q Did you agree with your brother that you would pay the
21 payments back?
- 22 A I didn't agree with him, I agreed with the bank. I
23 made the loan with the bank.
- 24 Q Okay. So you're saying that your brother put the
25 collateral up, signed the mortgage and didn't have any

TIMOTHY GAINES

- 1 agreement with you.
- 2 A I'm going to have to say no.
- 3 Q You're not saying that.
- 4 A I'm saying we didn't have an agreement between each
5 other other than he knew I borrowed the money from the
6 bank and I was paying the bank.
- 7 Q So you were going to pay the bank.
- 8 A Yeah.
- 9 Q That was your agreement with the bank.
- 10 A With the bank, yes.
- 11 Q And your brother was there when you made that
12 agreement.
- 13 A Sure.
- 14 Q And did you make the payments to the bank on that
15 \$134,000 mortgage?
- 16 A I did.
- 17 Q Did you use all of that \$134,000 to go toward the
18 purchase price?
- 19 A Every penny.
- 20 Q Now, in 2004 did you have a tenant in the building to
21 pay you rent?
- 22 A No, sir.
- 23 Q You said I think earlier both of you used the building
24 for your own purposes.
- 25 A Right.

TIMOTHY GAINES

1 Q What were your purposes in using the building? How
2 did you use the building?

3 A Well, I would say from -- we did a little storage for
4 just whatever our personal junk was. But his wife had a
5 business in it from 2005 to 2011 I think it was.

6 Q What kind of business did she have?

7 A Collectibles, antiques.

8 Q And what part of the building did she use?

9 A How much of it or what part?

10 Q What part of the building did she use?

11 A The end part, it was like three rooms deep.

12 Q As the building faces 200 to the left side, is there a
13 room of sorts?

14 A There is three rooms.

15 Q Did she use that part of the building?

16 A She did.

17 Q And to the right of that there's a bigger open space.

18 A Right.

19 Q And did you use that part of the building.

20 A Not all of that. From the I guess from doors to the
21 right I did, yes.

22 Q Now, you told me that you worked at Matthews Builders
23 Supply and that you're in sales.

24 A Right.

25 Q Did you store any materials in that building related

TIMOTHY GAINES

- 1 to your employment at Matthews Builders Supply?
- 2 A You mean for my job? No, sir.
- 3 Q Did you store door and window units in that building?
- 4 A I did. They were mine.
- 5 Q And can you give me an estimate of the number of door
- 6 and window units you stored?
- 7 A Three or 400.
- 8 Q Three or 400?
- 9 A Maybe more, I don't know.
- 10 Q Did you buy those units?
- 11 A I acquired them from Matthews Building Supply.
- 12 Q I'm sorry?
- 13 A I got them from Matthews Building Supply.
- 14 Q Did you buy them?
- 15 A No, sir.
- 16 Q They gave you --
- 17 A Yes, sir.
- 18 Q -- those units?
- 19 A Yes, sir.
- 20 Q And what did you do with those units?
- 21 A I sold some of them.
- 22 Q Okay. You ran a business called Construction Salvage?
- 23 A Contractor Salvage.
- 24 Q I'm sorry?
- 25 A Contractor Salvage.

TIMOTHY GAINES

1 Q And so you sold some of those units out of the
2 building.

3 A I did.

4 Q And did you receive any money in rent from your
5 employer for storing those windows and door units in your
6 building?

7 A Not a penny.

8 Q Not a penny. And were many of those there when the
9 restaurant later had got ready to open?

10 A True.

11 Q I'm jumping ahead a little bit. In 2009 the five year
12 balloon note became due and payable; is that right?

13 A Yes, it is.

14 Q Let me while I'm -- before I get too far ahead. This
15 is the \$134,000 mortgage to First Citizens. Does that look
16 right?

17 A Yes, sir.

18 MR. WRIGHT: Your Honor, we would offer that as
19 Plaintiff's Number 2.

20 THE COURT: Any objection?

21 MR. GRISSOM: No objection.

22 THE COURT: Plaintiff's Exhibit Number 2 admitted into
23 evidence without objection.

24 Q Now, when you entered into the 2009 transaction which
25 was a mortgage with the bank to payoff the mortgage on the

TIMOTHY GAINES

1 five year note --

2 A Right.

3 Q -- did you talk to your brother about that?

4 A He was there, yes.

5 Q He had to participate because he had to sign the
6 mortgage again.

7 A Right.

8 Q New loan, new mortgage.

9 A Yes, sir.

10 Q Okay. And you paid off the old mortgage as part of
11 that transaction, did you not?

12 A Yes.

13 Q I'm going to show you this. And this is the mortgage
14 satisfaction that shows on the record that, in fact, that
15 mortgage was satisfied.

16 A Right.

17 MR. WRIGHT: We would offer this as Plaintiff's 3,
18 Your Honor.

19 THE COURT: Any objection?

20 MR. GRISSOM: No objection.

21 THE COURT: Plaintiff's Exhibit 3 admitted into
22 evidence without objection.

23 Q Maybe it's just me, maybe it's just a lawyer's
24 curiosity, but I'm looking at the satisfaction, if you
25 would look at it. See that date right here. Can you read

TIMOTHY GAINES

1 that?

2 A Okay.

3 Q What is that date?

4 A 9/23/13.

5 Q 9/23/13. You refinanced the loan in 2009 and you paid
6 it off in 2009.

7 A Right.

8 Q But for some reason it didn't get satisfied until
9 2013. Do you have any reason why?

10 A I have no idea.

11 Q You don't know?

12 A No.

13 Q This is Exhibit Number 4, and I will show you that.

14 Can you tell me what that is, sir?

15 A This is for a loan --

16 MR. GRISSOM: Your Honor, may I interrupt for a
17 second? I guess officially it's an objection for
18 mischaracterization. I think the first page of his exhibit
19 is an acknowledgment of a lost mortgage. The actual
20 satisfaction on page two is recorded on October of 2009.

21 THE COURT: What are you talking about, the
22 Plaintiff's Exhibit 4 that he's got now?

23 MR. WRIGHT: That's three. That's three. They filed
24 a lost mortgage certificate for some reason four years
25 later.

TIMOTHY GAINES

1 THE COURT: So what is your objection?

2 MR. GRISSOM: I mean, I don't know where he was going
3 about asking why it was satisfied in 2013 when it appears
4 it was also satisfied in 2009.

5 THE COURT: Overruled. I'll allow you to address that
6 on cross examination.

7 Q Item number four that I'm handing you is the new
8 mortgage.

9 A Right.

10 Q For \$187,000.

11 A Yeah.

12 Q Do you see that amount on there, 187,000?

13 A That's correct.

14 MR. WRIGHT: We would offer that as Number 4, Your
15 Honor.

16 THE COURT: Any objection?

17 MR. GRISSOM: No objection.

18 THE COURT: Plaintiff's Number 4 admitted into
19 evidence without objection.

20 Q Now, you borrowed 134,000 in 2004 and you paid it down
21 for five years, and you didn't owe as much as 134 in 2009,
22 did you?

23 A No.

24 Q Why did you borrow 187?

25 A Well, my income dropped by about 60 percent and I

TIMOTHY GAINES

1 figured I would have more money to pay the bills until
2 things got better for one.

3 Q So you borrowed more money because your income had
4 gone down and you wanted to get more money against the
5 building to help you pay your personal expenses.

6 A That's not what I said, I said to pay the payments on
7 the building.

8 Q Pay the payments on the building.

9 A Right.

10 Q So are you saying that you took the difference between
11 what was owed on the old loan and the new loan and put that
12 in some kind of account and used that to pay the mortgage
13 payments?

14 A Well, for four years I did until about \$64,000. But
15 yes, that's exactly what I did. And I put a little in my
16 account to put back some of the money I had used of my
17 personal money.

18 Q You used your personal money to help pay the mortgage
19 payments?

20 A Always, yes.

21 Q Did you use any of that 187,000 to pay any of your
22 personal debts?

23 A Well, I didn't -- I probably did. Because I had --
24 when it was put in with my other money I'm sure I did.

25 Q You in fact co-mingled that money with your own

TIMOTHY GAINES

1 personal money as you needed to, did you not, sir?

2 A Well, considering I borrowed the money, yes, I did.

3 Q Okay. It was -- you considered it your money.

4 A Yeah.

5 Q And you did what you wanted to with it.

6 A I paid the bills with it, yes, sir.

7 Q But did you understand that now instead of \$134,000
8 original loan, you had \$187,000 loan against the building
9 so there was more risk involved.

10 A I do.

11 Q Okay. Now, on none of these transactions was your
12 brother signing the note, which was the document to the
13 bank that says, "I owe the bank the money", was he?

14 A Right.

15 Q You were the one promising to pay.

16 A Yeah.

17 Q You promised to pay on the second note.

18 A Uh-huh.

19 Q Just you, not your brother.

20 A Just the bank.

21 THE COURT: You need to answer yes or no.

22 A Yes, sir.

23 Q So you promised to pay the bank and you didn't have
24 any expectations that your brother would have to pay the
25 bank because you were going to pay the bank.

TIMOTHY GAINES

- 1 A I had always been paying the bank, yes.
- 2 Q You had been doing it for five years you kept right on
- 3 doing it for another four years or so. Okay.
- 4 A Uh-huh.
- 5 Q Now, 2011 comes along. And whose idea was leasing the
- 6 building?
- 7 A Kenny's.
- 8 Q And who did you want to lease it to?
- 9 A His brother-in-law.
- 10 Q Whose name is?
- 11 A JoJo Funderburke.
- 12 Q I think Joseph Funderburke, he goes by JoJo.
- 13 A JoJo, Joseph.
- 14 Q So if we hear JoJo, that's who that is?
- 15 A And his son, Joseph.
- 16 Q And JoJo is married to Lisa which was is Ken's wife.
- 17 A No, that's his sister.
- 18 Q I'm sorry?
- 19 A That is Joseph's sister.
- 20 Q Ken is married to Lisa.
- 21 A Right.
- 22 Q Okay. And that is JoJo's sister.
- 23 A Right.
- 24 Q So JoJo is his brother-in-law?
- 25 A Right.

TIMOTHY GAINES

1 Q And the business was going to be a restaurant.

2 A Right.

3 Q And at some point in time did you decide to form a
4 corporation to hold title to the building?

5 A Well, that's typically the way businesses do I
6 thought.

7 Q Did you deed the property to the corporation called
8 A-List Properties, LLC?

9 A We did, yes, sir.

10 Q The two of you?

11 A We did.

12 Q I'll show you this document which is marked
13 Plaintiff's 5. And I'll tell you that is the deed from you
14 and Ken to the corporation.

15 A Okay.

16 Q Okay.

17 MR. WRIGHT: We offer that as Number 5, Your Honor.

18 THE COURT: Any objection.

19 MR. GRISSOM: No objection.

20 THE COURT: All right. Plaintiff's Exhibit Number 5
21 admitted into evidence without objection.

22 Q But the fact that you deeded the property to the
23 corporation, the mortgage was still there at the bank.

24 A Yes.

25 Q You didn't do anything to the mortgage, did you?

TIMOTHY GAINES

1 A Not that I know of.

2 Q Did you go to the bank and say, "Well, we're going to
3 change this a little bit, we're going to let our
4 corporation own the property but we don't want to bother
5 the mortgage." You didn't do that.

6 A I think the lawyer may have -- he talked to the bank
7 about whatever they had to do whatever it was, Rick
8 Chandler.

9 Q Who negotiated the lease with the restaurant?

10 A I'm going to have to say Kenny.

11 Q But who hired the lawyer to draw up the lease?

12 A I did.

13 Q Is this Exhibit 6 the lease with the restaurant?

14 A Yes.

15 MR. WRIGHT: Your Honor, we would offer that as
16 Plaintiff's 6.

17 MR. GRISSOM: No objection.

18 THE COURT: Plaintiff's Exhibit 6 in evidence without
19 objection.

20 Q I believe the lawyer you selected to do that was Rick
21 Chandler.

22 A Right.

23 Q Whose office we can see out the window if we look hard
24 enough. And did you go over the lease before it was
25 signed?

TIMOTHY GAINES

- 1 A I'm sure we did, two or three times.
- 2 Q And were you satisfied with the lease?
- 3 A I guess as much as I could be, yes.
- 4 Q But you didn't want to rent the building, did you?
- 5 A I didn't want to lease it to a family member because
- 6 of typically you'll always hear people say don't lease to
- 7 family.
- 8 Q So why did you sign the lease?
- 9 A I guess enough of harassment, coercion I did, yes.
- 10 Q You were coerced into signing the lease?
- 11 A Yes.
- 12 Q Were you coerced in to taking rent?
- 13 A No, I was not.
- 14 Q How much was the rent on the building?
- 15 A 3,500 a month, I believe it was.
- 16 Q 3,500 a month. And your half of that would be 1,750.
- 17 A Right.
- 18 Q And did you get that amount?
- 19 A I did.
- 20 Q From the start of the lease.
- 21 A Right.
- 22 Q Right on through the time the tenant left.
- 23 A No, sir. I had to take the one page eviction notice
- 24 down there twice because they were three months behind one
- 25 time and --

TIMOTHY GAINES

1 Q I got that further down in my stack, I'm going to get
2 to that.

3 A Right.

4 Q So there was some time when you didn't get paid on
5 time and you took an eviction notice down to the tenant.

6 A Right.

7 Q And you did that, in fact, twice.

8 A Yes, sir.

9 Q The first time in December of 2011?

10 A Yes.

11 Q And after you took the eviction notice down, did you
12 get paid?

13 A I did.

14 Q And you did it again in July of 2012.

15 A Right.

16 Q And at that point in time the tenant vacated the
17 building.

18 A They appeared to be vacating the building when I took
19 it down there.

20 Q Okay. You think they were already moving out.

21 A I'm sure they were.

22 Q All right. Now, I'm going to show you this document
23 marked Plaintiff's 7. Is this the set of corporate

24 documents that setup the LLC called A-List Properties?

25 A Yes.

TIMOTHY GAINES

1 Q And who were the members of that LLC?

2 A Me and Ken.

3 Q Okay. Members of an LLC is roughly like a
4 stockholder; is that right?

5 A Never done one before, but if you say, yes.

6 Q Were you even owners of the building?

7 A Yes, right.

8 MR. WRIGHT: We would offer that as Number 8, Your
9 Honor?

10 MR. GRISSOM: No objection.

11 THE COURT: 8 or 7? I've got it as Plaintiff's 7.

12 MR. WRIGHT: I'm sorry, that is 7.

13 THE COURT: Plaintiff's Exhibit 7 admitted into
14 evidence without objection.

15 Q Now, have you ever run a corporation before?

16 A No.

17 Q Do you know anything about the running of a
18 corporation?

19 A No.

20 Q Did you go get any advice about how to run a
21 corporation before you started running this corporation?

22 A No.

23 Q Was it agreed between you and your brother that you
24 would handle the financial matters for the corporation?

25 A I didn't know there were any financial matters of the

TIMOTHY GAINNEY

1 corporation.

2 Q Okay. Corporation owned real estate.

3 A Right.

4 Q Rent was paid for the real estate.

5 A Right.

6 Q And the rent came to you and your brother.

7 A Right.

8 Q But it was divided into two payments.

9 A Yes, it was.

10 Q One went to you and one went to him.

11 A Yes.

12 Q Did you open a bank account at First Citizens Bank for
13 the corporation?

14 A I had to open an account at First Citizens to cash my
15 check to have an account to put my check in.

16 Q And I'll show you Exhibit 8 now. Is this the account
17 opening information at First Citizens?

18 A It is.

19 MR. WRIGHT: I offer that as Plaintiff's 8.

20 MR. GRISSOM: No objection.

21 THE COURT: Plaintiff's Exhibit 8 admitted into
22 evidence without objection.

23 Q Mr. Gainney, I'll ask you to look -- the first page is
24 a business card for Brenda Ledford who works at First
25 Citizens. You know Brenda?

55

TIMOTHY GAINNEY

1 A I do.

2 Q Okay. The second page is a business contract and

3 disclosure for a free business checking account, and it is

4 listed Timothy M. Gainney, dba, doing business as A-List

5 Properties LLC. Do you see that?

6 A I do.

7 Q Okay. Right underneath that, account ownership

8 designation. Can you read those two words for me?

9 A Sole proprietor.

10 Q Sole proprietor. Is that true?

11 A For my checking account, yes.

12 Q Are you the only owner of --

13 A Of that checking account, yes, sir.

14 Q No, sir. Are you the only owner of A-List Properties?

15 A No.

16 Q So there is another owner of A-List Properties, but

17 you were to be the only person to have ownership of the

18 corporate bank account.

19 A No, sir. That is an account to put my rent check in

20 which is the only way I could get it in the bank.

21 Q Okay. You didn't want your brother to know anything

22 about your financial affairs.

23 A Sir, if I would have done that I wouldn't have done

24 it at First Citizens because he knows everybody there and

25 they give out my information.

TIMOTHY GAINEY

- 1 Q But his name was nowhere on the account.
- 2 A I didn't want it on the account, that's my checking
- 3 account.
- 4 Q Okay. Did you find out some time later that he went
- 5 to the bank inquiring about the corporation?
- 6 A I did.
- 7 Q And do you understand that he got no information?
- 8 A I don't know if he did or didn't on that, but he did
- 9 on other things.
- 10 Q It wasn't on the account.
- 11 A Well, I know it wasn't on the account.
- 12 Q So did you authorize the bank to give him any
- 13 information?
- 14 A I did not.
- 15 Q Did you authorize First Citizens Bank to give your
- 16 brother information about that account?
- 17 A I did not.
- 18 Q Do you know if the restaurant when they paid the rent
- 19 paid you the same amount they paid your business partner,
- 20 Ken?
- 21 A To my understanding according to JoJo, Joseph, they
- 22 did.
- 23 Q That's what you think.
- 24 A Well, that's what he told me.
- 25 Q Okay. Well, I'm going to show you Plaintiff's Exhibit

TIMOTHY GAINES

1 9. What is that?

2 A A corrected copy of income, whatever forms it is.

3 Q How much did they pay you in 2011?

4 A According to this it was 19,762 which I think was
5 incorrect.

6 Q I'm sorry?

7 A It was 19,762.50 according to that but I think it was
8 incorrect.

9 Q Do you notice up at the top there is a box that says
10 corrected?

11 A I do.

12 Q They originally sent you one that was over 20, did
13 they not?

14 A I think it was.

15 Q But they corrected it to 19. So is this the right
16 one?

17 A I'm not sure if that's 100 percent correct or not.
18 My accountant has the info.

19 MR. WRIGHT: I will offer that as Number 9.

20 THE COURT: Any objection?

21 MR. GRISSOM: No objection.

22 THE COURT: Plaintiff's Exhibit 9 admitted into
23 evidence without objection.

24 Q I'm going to deviate from the plan a little bit^u
25 because one of my exhibits got stuck together. I'll show

TIMOTHY GAINNEY

1 you this document. This is a 1099 for 2011 from
2 Famdamily's to Kenny Gainney. How much did they pay him?

3 A 7,144.60.

4 Q \$7,000 versus \$19,000.

5 MR. WRIGHT: Your Honor, I would offer this as 9A
6 since we have the other premarked.

7 THE COURT: Any objection.

8 MR. GRISSOM: No objection.

9 THE COURT: All right. Plaintiff's Exhibit 9A
10 admitted into evidence without objection.

11 Q Do you have any idea why the landlord (sic) would pay
12 you \$19,000 and your business partner, who is a 50 percent
13 owner, only \$7,000?

14 A I have no idea. That must have been an agreement
15 they had.

16 Q Well, you didn't want to do this lease, did you? You
17 already told us that.

18 A I did.

19 Q You didn't want to have anything to do with Joe
20 Funderburke?

21 A I didn't have a problem with him. Why?

22 Q Well, did Jo Funderburke call you to come down there
23 and do work on the building?

24 A He did not.

25 Q Even at the very outset of the project with them going

TIMOTHY GAINES

1 in he didn't get in touch with you and say, "We need some
2 things done on the building?"

3 A He did not.

4 Q Didn't you have some obligation as a landlord to do
5 certain things to the building?

6 A There were certain things under the lease agreement
7 that we --

8 Q Roof, heating and air conditioning.

9 A Right.

10 Q You never got contacted about that?

11 A By him?

12 Q By him.

13 A No.

14 Q How about your brother?

15 A When I looked for the lease check he told me that
16 they had a problem. So I went down, he told me not to go
17 down there because I didn't need to stir it up, whatever
18 that meant.

19 Q Okay. Back up. Kenny told you that there was a
20 problem about the lease check. What was the problem that
21 Kenny told you about?

22 A He said they -- something about the heat or the heat
23 wasn't working.

24 Q They were going to deduct some money from the rent
25 check to pay for something that they thought was your

TIMOTHY GAINNEY

1 responsibility, weren't they?

2 A I never heard them deduct anything from my check.

3 Q But isn't that what Ken told you?

4 A No.

5 Q That's not what Ken told you.

6 A No.

7 Q What did he tell you?

8 A He told me that there was a problem. I said, "Why
9 did I not get a check?" And he said there was something
10 about the heat. So I said, "I'm going down to talk to
11 JoJo," or Joseph. And I asked him what the problem was
12 and he said, "The heat wasn't working." And I said,
13 "Well, you haven't called me," and he said he told Kenny.

14 Q And Kenny told you.

15 A No. Not until -- no, sir. That day he told me.

16 Q What, if anything, did you do about that issue, the
17 heat not working?

18 A I called my brother who runs Ricks Heating and Air
19 Conditioning and he sent guys down to take a look at it.

20 Q This brother?

21 A Rick Gainey.

22 Q Your other brother.

23 A Yes.

24 Q And did you pay anything for having that fixed?

25 A On that part I didn't have to, he took care of it.

TIMOTHY GAINES

- 1 Q He?
- 2 A My brother, Rick.
- 3 Q Your brother Rick took care of it.
- 4 A Right.
- 5 Q But you got your full rent check.
- 6 A I did.
- 7 Q Do you know how much rent your brother got that month?
- 8 A He told me over and over he never got a check so I
- 9 have no idea.
- 10 Q All right. So as time went on and the restaurant
- 11 occupied the building, did you ever go down there and fix
- 12 anything other than the time there was some damage to the
- 13 roof and you had an insurance claim?
- 14 A What would I go to fix? I don't understand you.
- 15 Q Did you ever go down to the building to check on your
- 16 obligations as a landlord to make sure things were
- 17 working --
- 18 A I gave JoJo my phone number and told him to call me
- 19 if there was a problem.
- 20 Q Did he call you?
- 21 A His girlfriend Debbie did and said the heat wasn't
- 22 working. And I sent Rick and them down to check it and
- 23 they had tripped a breaker on it, or cut the breaker off
- 24 and that's why it wasn't working.
- 25 Q Okay. Would it be fair to say that you did not have a

TIMOTHY GAINES

1 good relationship with Joe Funderburke?

2 A We didn't go out and eat together but I don't go out
3 and eat with you either. So, I mean, he pays the lease
4 and everything was fine.

5 Q Well, he didn't pay the lease apparently around
6 December because you went down and served him with a notice
7 to vacate the premises.

8 A I did.

9 Q I'll jump ahead. This is Plaintiff's 15. Is that a
10 notice you took him in December of 2011, the first year of
11 the lease?

12 A That looks --

13 Q Did you prepare this?

14 A I did.

15 Q By yourself?

16 A I had to pick the copy up at the magistrate's office.

17 Q You went to the magistrate's office and talked with
18 them about the eviction and got this form.

19 A Yes, sir.

20 MR. WRIGHT: We would offer this as Plaintiff's 15.

21 THE COURT: Any objection?

22 MR. GRISSOM: No, sir.

23 THE COURT: All right. Plaintiff's Exhibit 15
24 admitted into evidence without objection.

25 Q The exhibit says, "Five days to vacate premises." It

TIMOTHY GAINES

1 is dated 12/17/2011, it's to Famfamily Enterprises which is
2 the corporation that owns the restaurant. And it says,
3 "Your rent in the past has not been paid within five days
4 after being due. In accordance with the South Carolina
5 Landlord Tenant Act I hereby request for you to vacate the
6 property within five days." Is that an eviction notice?

7 A That's what you start with.

8 Q This is the starting of an eviction process.

9 A Uh-huh.

10 Q So you served them with that in December.

11 A I did.

12 Q And they paid you your rent.

13 A They did.

14 Q And you did not proceed with an eviction.

15 A I did not.

16 Q But in July you took another one of the same things
17 down there, didn't you?

18 A I did.

19 Q Plaintiff's 16. What is the date on that?

20 A 7/31/12.

21 Q End of July, 2012.

22 MR. WRIGHT: We would offer that as Plaintiff's 16,
23 Your Honor.

24 THE COURT: Any objection?

25 MR. GRISSOM: No objection.

TIMOTHY GAINES

1 THE COURT: Plaintiff's Exhibit 16 admitted into
2 evidence without objection.

3 Q And this is the point when the tenant left the
4 building.

5 A He was leaving the building, yes.

6 Q He was already in the process of leaving the building.

7 A Yes.

8 Q But you served him with a notice that he was going to
9 be evicted.

10 A Well, when I walked in with a notice he had the
11 tables and chairs pushed up to the front door.

12 Q Your brother, business partner, is a half owner of
13 that building and he's depending on you to make that lease
14 payment -- excuse me, the loan payment, and if I get your
15 testimony correctly you're depending on that lease money so
16 you can pay that mortgage payment.

17 A Yeah.

18 Q Right?

19 A Yes.

20 Q Why would you run the tenant off?

21 A Because I wasn't getting a check, the payment.

22 Q Did you try to negotiate with the tenant?

23 A I thought the contract that we signed was already the
24 negotiation.

25 Q Did you try to negotiate with the tenant? Yes or no.

TIMOTHY GAINES

- 1 A No.
- 2 Q Did you even tell your brother that you were doing
3 that?
- 4 A I don't think I did.
- 5 Q So unilaterally even though you're only half owner and
6 he had an interest, you took that notice down, gave it to
7 them and said you have got five days to get out.
- 8 A I did.
- 9 Q And they got out.
- 10 A They were already getting out, but --
- 11 Q And your income stream stopped.
- 12 A It had already stopped.
- 13 Q And the money that you got in 2009 and it co-mingled
14 from your personal uses had about played out at that point,
15 hadn't it?
- 16 A Yeah, it was getting there.
- 17 Q But your house was paid off.
- 18 A Yeah.
- 19 Q And your cars were paid off.
- 20 A Car, yes.
- 21 Q Car was paid off.
- 22 A Uh-huh.
- 23 Q Partly from that money.
- 24 A No. Well the house maybe part if it, yes, the car,
25 no.

TIMOTHY GAINES

1 Q So when the bank doesn't get paid the bank forecloses.

2 A Yes.

3 Q And the bank foreclosed.

4 A Uh-huh.

5 Q I'll show you Plaintiff's 10 and tell you that that is

6 the deed from the referee, which is the judge in a

7 foreclosure case, deeding your property back to First

8 Citizens Bank in foreclosure.

9 MR. WRIGHT: I offer that as Number 10, Your Honor.

10 THE COURT: Any objection?

11 MR. GRISSOM: No objection.

12 THE COURT: Plaintiff's Exhibit 10 admitted into

13 evidence without objection.

14 Q And Exhibit 10 on its face shows that the bank bid at

15 the foreclosure sale and paid \$150,000 for the property; is

16 that correct?

17 A I wasn't there but if you say so.

18 Q You didn't go to the sale?

19 A No, sir.

20 Q And as a result of the referee's deed the bank

21 released the lien on the real estate because they owned the

22 property then. That is Number 11 saying that that mortgage

23 lien is gone.

24 A Okay.

25 MR. WRIGHT: Plaintiff's 11, Your Honor, into

TIMOTHY GAINEY

1 evidence.

2 THE COURT: Any objection?

3 MR. GRISSOM: No objection.

4 THE COURT: Plaintiff's Exhibit 11 admitted into
5 evidence without objection.

6 Q Now, the bank when they foreclosed did not seek any
7 deficiency judgment against you, did they?

8 A As far as I know, no.

9 Q They didn't ask for a personal judgment for any amount
10 that was owed beyond what they paid for the property, did
11 they?

12 A As far as I know, no. I'm not familiar with all of
13 that paperwork.

14 Q So you had received the funds for the \$134,000 loan
15 and part of the funds for the \$187,000 loan less what it
16 took to pay the bank off, and now the building was gone.
17 What did you lose?

18 A All of the payments I had made on the building.

19 Q Which you borrowed from the bank.

20 A You still pay back a lot more than you borrow I
21 think, sir.

22 Q Well, you wrote that interest off, didn't you, on your
23 taxes?

24 A Most people do, yes, sir.

25 Q And you wrote the depreciation off on the building.

TIMOTHY GAINEY

1 A Most people do, yes, sir.

2 Q So you actually showed a loss on your taxes.

3 A Yes, sir.

4 Q I'm going to show you your 2011 tax return. That's
5 your 2011 tax return.

6 A Yes.

7 MR. WRIGHT: Offer this as Plaintiff's 12.

8 THE COURT: Any objection?

9 MR. GRISSOM: No objection.

10 THE COURT: Plaintiff's Exhibit 12 admitted into
11 evidence without objection.

12 Q I want you to look at that tax return, and I want you
13 to find for me the page where it shows how much rent you
14 got and how much depreciation you claimed and how much
15 interest you claimed, see if you see it in there. Take
16 your time.

17 A I mean, is it in here or am I just looking --

18 Q It's your tax returns. I'm just asking you if you
19 filed a depreciation schedule and an income and loss
20 statement on this business that you were co-running with
21 your brother. I will tell you I didn't find it.

22 A Business income loss.

23 Q I see the loss sheet.

24 A I'm sure there's a schedule they do on their
25 computer, I have no idea if it's in this.

TIMOTHY GAINES

1 Q But it's not on that, is it?

2 A Well, I don't see it but I'm sure it's on their
3 computer. I don't do these all day so --

4 Q Do you remember us taking your deposition in this
5 case?

6 A I remember some of it, yes.

7 Q And you remember you had a notebook at the deposition.

8 A Right.

9 Q I asked you about corporate records, you had a
10 notebook and you told me they're all right here in this
11 notebook, right? Didn't you tell me about the corporate
12 records?

13 A I don't know about corporate records. I don't
14 remember saying corporate records are right there.

15 Q Okay. But you had a notebook --

16 A You asked me did I file taxes for the business and I
17 said I did for my half, that's what I did.

18 Q Okay. And you gave me that document as what you
19 filed, correct?

20 A Sure.

21 Q Now, actually --

22 A Is that part of that what you were looking for there?

23 Q No. Actually in 2011 you did show that you made
24 \$1,422 profit in the business. Okay. That's on there.

25 But we have seen your 2011 1099 and it paid you \$19,000 in

TIMOTHY GAINES

1 2011. So somewhere you wrote off almost all of that rent,
2 right?

3 A If you say so. I mean, the depreciation, interest
4 payments, yes.

5 Q I'm sorry?

6 A I guess the depreciation, interest payments, I don't
7 know.

8 Q Is this your 2012 tax return?

9 A Appears to be so.

10 MR. WRIGHT: We would offer that as Plaintiff's 13.

11 THE COURT: Any objection?

12 MR. GRISSOM: No objection.

13 THE COURT: Plaintiff's Exhibit 13 admitted into
14 evidence without objection.

15 Q If you want to look at that document you certainly
16 can, but I'm going to tell you there's no depreciation
17 schedule in there, nothing, that tells how much you wrote
18 off. But it shows that year that you took a loss as that
19 business of \$2,116.

20 A Okay.

21 Q Okay. This is a copy of a document that you gave me
22 out of your notebook that was called restaurant records. I
23 don't know if it was done -- H and R Block was involved in
24 doing this, I assumed it had something to do with the
25 taxes. Do you recognize that document?

TIMOTHY GAINES

1 A That's taxes I'm assuming, H and R Block.

2 Q All right.

3 MR. WRIGHT: We offer that as Plaintiff's 14.

4 THE COURT: Any objection?

5 MR. GRISSOM: No objection.

6 THE COURT: Plaintiff's Exhibit 14 admitted into
7 evidence without objection.

8 Q And you attached to that a lot of the bills and stuff
9 you paid on the part of the business varies the same thing;
10 is that right?

11 A I'm sure whatever I paid was in there, yes.

12 Q So the building was sold, the bank bought it back for
13 \$150,000. When the Family's Restaurant moved out they
14 had built a rather large bar area in the building and they
15 left that there, didn't they?

16 A Yes.

17 Q Okay.

18 MR. GRISSOM: Your Honor, may we approach?

19 THE COURT: Yes.

20 Q Had they made other --

21 THE COURT: Hold on a second, we've got an objection.

22 (A bench conference was held.)

23 THE COURT: All right. Go ahead.

24 Q The tenant had built a kind of large bar in the
25 property, they left that there when they left, did they

TIMOTHY GAINES

1 not?

2 A I'm assuming. I was locked out, I couldn't get in.

3 Q All right. Let's talk about that. You claim that you
4 were locked out of the building, of the building that you
5 were a co-owner of.

6 A Yes.

7 Q How were you locked out of your own building?

8 A If you don't have a key to open the door you're
9 locked out.

10 Q But it is your building.

11 A Yes.

12 Q You own it with your business partner.

13 A Right.

14 Q Did you call your business partner up and say, "Do you
15 have a key?"

16 A I did.

17 Q What did he say?

18 A He said he was busy at that time, he couldn't bring
19 me one. This was on the side. I said, "I changed the
20 lock, I will bring you a key to it." And I carried him
21 the key straight down to his house.

22 Q So you had the locks changed.

23 A No, I had a lock changed.

24 Q You had a lock changed to get into the building.

25 A On the side where my belongings were at.

TIMOTHY GAINES

1 Q And when did you do that?

2 A I don't know the exact date, I would have to look
3 through some records, but it's late 2011 or early 2012.

4 Q The date of the foreclosure read on April 30th of
5 2014, the bank owned the building, you didn't own it
6 anymore.

7 A No. I mean, if that's what it says, yes, sir.

8 Q Okay. So did you have the locks changed before the
9 foreclosure sale?

10 A I had the lock changed in late 2011 or early 2012.

11 Q Well, in early 2012 the tenant was still in the
12 building.

13 A This was on the side where they had locked my
14 personal belongings up.

15 Q So the lock you changed was another lock, not the lock
16 to the restaurant part.

17 A Right. Correct.

18 Q Okay. Well, let's be sure the jury understands that.
19 When the restaurant leased the building they didn't lease
20 the entire building, did they?

21 A Right. Yes, sir.

22 Q You still had door and window units stored in part of
23 the building.

24 A That I couldn't get to, yes.

25 Q Okay. The wall where there used to be a door had been

TIMOTHY GAINES

1 closed up and you couldn't get in there to get the door and
2 window units out.

3 A Right.

4 Q Okay. And when was that wall closed up?

5 A Some time shortly after they moved into the
6 restaurant.

7 Q So they sealed off your property from their
8 restaurant.

9 A Well, that was fine, I knew they were going to do
10 that.

11 Q You knew they were going to do that. So knowing that,
12 how did you plan to get your doors --

13 A (That's not the door that I was talking about. There
14 was an opening that went in the front door of the side all
15 the way straight to the back, that's the wall that was
16 blocked.

17 Q Okay. So you changed that lock --

18 A Yes.

19 Q -- and could get to your property.

20 A For a couple of days and that was it.

21 Q And you moved the door and window units out.

22 A Not in those two days I did not, no.

23 Q Well, did you eventually move your door and window
24 units out before the bank took possession of the property?

25 A Yes. Or right about the same time.

TIMOTHY GAINES

1 Q And didn't Matthews Building Supply send trucks down
2 to get those units and move them for you?

3 A That was before the lease was done, yes.

4 Q I'm trying to understand. Between the time that the
5 tenant left around July or August of 2012 --

6 A Right.

7 Q -- and the foreclosure deed which wasn't done until
8 2014, are you saying that you didn't have access to the
9 building where the restaurant was?

10 A Exactly, yes.

11 Q Okay. Up until April of 2014 it was still your
12 building, you understand that.

13 A Right, uh-huh.

14 Q So if your building was locked, why didn't you just go
15 get a locksmith and change the lock and go in your
16 building?

17 A Well, I think we had asked you for a key to get in.

18 Q Why didn't you just -- if you couldn't get one from me
19 or Kenny, why didn't you just get a locksmith to go let you
20 in?

21 A Because I was trying to do the right thing by knowing
22 that my brother, your client, had me locked out by asking
23 you if I could get into it.

24 Q So you're saying your brother had you locked out of
25 the building.

TIMOTHY GAINES

- 1 A That's exactly what I'm saying.
- 2 Q And you're a half owner.
- 3 A That's right.
- 4 Q And you understand you had the right to enter that
- 5 building without anybody's permission. Do you understand
- 6 that?
- 7 A If you're telling me that, yes.
- 8 Q You didn't know that?
- 9 A Well, I didn't know that it wouldn't cause trouble,
- 10 so no, I didn't go in. That's why I asked you for a key.
- 11 Q So because you didn't want to cause trouble you just
- 12 didn't do anything.
- 13 A I didn't break into the building I owned, no, sir.
- 14 Q While the building was vacant it was vandalized, was
- 15 it not?
- 16 A In theory, yes.
- 17 Q In theory. Why do you say in theory?
- 18 A Because I think my brother went in and some stuff
- 19 disappeared.
- 20 Q Do you have any proof of that?
- 21 A I just said in theory, I don't know that.
- 22 Q Do you have any proof of that?
- 23 A No. I can tell you that the board that walled up the
- 24 section I couldn't get into was placed on the back of the
- 25 building where he removed the air conditioning unit.

TIMOTHY GAINES

1 Q Okay. What was the building worth when it was
2 foreclosed on?

3 A I don't know.

4 Q You don't have any idea?

5 A I didn't appraise it, no.

6 Q You have no opinion of value at all?

7 A Two or 300,000, 200,000, 250. I don't know.

8 Q All right. Do you think you owe your brother anything
9 because you didn't pay the mortgage, that was money you got
10 and used and spent and you didn't pay the bank and they
11 foreclosed and he lost all of his cash that he put into
12 that building, do you think you are responsible to him
13 because of that?

14 A Not at all.

15 Q Not at all. Owe him nothing.

16 A No, sir.

17 Q You understood that he wasn't supposed to pay the bank
18 back.

19 A I do.

20 Q You have said in a part of your answer that he needed
21 to mitigate his damages. Do you know what mitigate means?

22 A To lessen.

23 Q To lessen. So are you saying that your brother should
24 have gone in and paid the bank, paid your debt to the bank
25 so they wouldn't foreclose?

TIMOTHY GAINEY

1 A He could have tried to sell the building or put
2 another tenant in it. It is kind of hard to do when I'm
3 locked out and the only conversation we are having is
4 through lawyers.

5 Q And again, did you have any prospects to lease the
6 building?

7 A I couldn't get in the building, no, sir.

8 Q Did you have any prospects to buy the building?

9 A No, sir.

10 Q You had a lawyer. You knew you could go ask your
11 lawyer to help you do that, didn't you?

12 A To get in the building?

13 Q To help you get in the building.

14 A To get in the building?

15 Q Yeah.

16 A We did. I think he requested a key which you
17 refused.

18 Q I refused.

19 A Yes, sir.

20 Q Again, you're half owner of the building. Why
21 wouldn't you have the right to access the building
22 regardless of what I said? I'm just a lawyer.

23 A Usually when you do something like that you end up in
24 front of more lawyers.

25 Q Your house was and is paid for, correct?

TIMOTHY GAINES

- 1 A Yes.
- 2 Q You haven't borrowed any money on your house.
- 3 A Not in awhile, no, sir.
- 4 Q Why didn't you go to the bank when you got to the
- 5 point you couldn't pay the mortgage payments and say, "I'm
- 6 in trouble on my mortgage on my building, I want to
- 7 mortgage my house and borrow the money to pay the money
- 8 back on the building so the building won't go into
- 9 foreclosure, that way I will be taking the risk with my
- 10 collateral and my brother won't be taking the risk on the
- 11 building." Did you do that?
- 12 A Why didn't I borrow against my house? No, sir. I
- 13 didn't do that and I wouldn't have done that.
- 14 Q You wouldn't have done that?
- 15 A No, sir.
- 16 Q Why wouldn't you have done that?
- 17 A It just wouldn't be a smart thing to do business-wise
- 18 I don't think.
- 19 Q It wouldn't be a smart thing to do.
- 20 A Right.
- 21 Q To keep your brother from losing everything he had
- 22 invested in that building, you didn't care, it wasn't
- 23 costing you anything, was it?
- 24 A It cost me a lot.
- 25 Q The money you borrowed from the bank, when that

TIMOTHY GAINES

1 building went away you didn't lose anything, did you?

2 A I lost a good bit.

3 Q When this -- well, let me rephrase. At one point in
4 time you and your brother lived next door to one another.

5 A Right.

6 Q Do you live next door now?

7 A No, he moved.

8 Q He moved. Did he have any discussions with you about
9 moving?

10 A Not a bit.

11 Q Do you know why he moved?

12 A I don't have a clue.

13 Q But he doesn't live next to you anymore.

14 A No.

15 Q Y'all don't talk, do you?

16 A No, sir.

17 Q You don't call each other on the phone.

18 A No. We don't go to family reunions together, no.

19 Q Nothing?

20 A No.

21 Q Okay.

22 MR. WRIGHT: Thank you.

23 THE COURT: Let's take a short break. Ladies and
24 gentlemen, if you would retire to your jury room for a
25 morning recess, remember to not discuss the case.

TIMOTHY GAINNEY

1 (The jury left the courtroom and a break was taken.)

2 THE COURT: Welcome back. We are ready to resume the
3 trial of this case and the examination of this first
4 witness. All right, Mr. Grissom, cross examination.

5 MR. GRISSOM: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MR. GRISSOM:

8 Q Mr. Gainey, to start with when you were on direct with
9 Mr. Wright he asked you something about the refinance funds
10 in 2009 and he mentioned that you co-mingled those funds
11 with your personal funds. In 2009 did A-List Properties,
12 LLC exist?

13 A No, sir.

14 Q And at that time who were the owners of the building?

15 A Myself and my brother, Ken Gainey.

16 Q So the only account you had was your own account,
17 correct?

18 A Yes.

19 Q So there was no other account you could have put the
20 money in.

21 A Yes, sir.

22 Q Okay. I just wanted to clear that up. In 2012 when
23 you stopped making the payments to the bank, why did you do
24 that?

25 A Well, I made the payments as long as I could and we

TIMOTHY GAINES

1 had the tenant in, and when they quit paying that didn't
2 help any. But being locked out of the building surely
3 didn't help any, I couldn't get back into my own asset.

4 Q At the time that you stopped making those payments, do
5 you remember how much per month you were paying to the bank
6 and for the insurance on the building?

7 A I think it was about \$1,850 just for the payment and
8 the insurance.

9 Q And about how much were you bringing home in net
10 income at the time?

11 A Take home was 2,414 a month.

12 Q So you were left with roughly \$600 per month?

13 A Yes.

14 Q Did you feel like you had any other choice?

15 A I didn't have a choice.

16 Q And Mr. Wright asked you earlier that why didn't you
17 take out against your house to pay off the loan on the
18 building. If you couldn't pay off the loan on the
19 building, could you have paid a loan on your house?

20 A No, sir.

21 Q You would have just prolonged the inevitable, correct?

22 A Yes.

23 Q Now, your brother has also alleged and I think it has
24 been asserted that you evicted the tenant, in fact I think
25 he said unilaterally evicted the tenant. Did you ever do

TIMOTHY GAINES

1 anything besides delivering that notice to them?

2 A No, sir, that little one page thing, that was it.

3 Q And in December that actually worked, didn't it?

4 A Yes.

5 Q You got paid.

6 A Right.

7 Q And in July when you delivered it, how many months
8 were they behind?

9 A They were one behind then and before they left they
10 were two.

11 Q And you have clearly testified they were already
12 packing up.

13 A They already had the tables and chairs pushed up to
14 the front of the building and taken apart.

15 Q Did you feel like that was within your right to ask
16 for the rent that you were owed?

17 A I thought I had every right to ask for rent.

18 Q And I believe earlier Mr. Wright said that you owned
19 half of the building so you could have gone in the building
20 any time you wanted. If that's the logic, do you believe
21 you could ask the tenant for the rent any time you wanted?

22 A Exactly.

23 Q In your opinion, did you have anything to do with that
24 tenant leaving the building when they did?

25 A No, I didn't.

TIMOTHY GAINES

1 Q And had another tenant moved into that building and
2 began paying rent, would you have been able to make your
3 payments?

4 A Yes, sir.

5 Q If you could have still used the building or maybe
6 sold some of those doors and windows out of the building,
7 could you have possibly continued making payments?

8 A Possibly could have stayed in.

9 Q Did you want the tenant to stop paying rent?

10 A No.

11 Q Did you want them to leave the building?

12 A No, I did not.

13 Q And as long as they paid rent they were free to be
14 there, right?

15 A Yes, sir.

16 Q Did you want this building to go into foreclosure?

17 A No, sir.

18 Q When you originally took out your first loan in '04
19 when you purchased the building I believe you testified you
20 took some personal funds from your savings to go to that
21 closing, is that accurate?

22 A I did, yes, sir.

23 Q Okay. And you had saved up those funds for something,
24 correct?

25 A Just we had them in our savings, yeah.

TIMOTHY GAINES

1 Q And so when you refinanced and you got some cash out
2 of that loan, did part of those funds go back to replenish
3 that?

4 A They did, yes, sir.

5 Q And outside of that what did the vast majority of the
6 funds cashed out that you took go towards?

7 A I would say most of it over a period of time went to
8 pay the payments, insurance, some taxes.

9 Q So you didn't go out and buy yourself any brand new
10 asset or --

11 A No.

12 Q And Mr. Wright also asked you what did you lose in
13 this building. Well, you don't own the building anymore,
14 do you?

15 A No.

16 Q And you don't have any right to put a tenant in it and
17 get rent.

18 A No.

19 Q You don't have any right to sell it.

20 A No, I don't.

21 Q So is it fair to say you did lose something?

22 A I think I lost a lot.

23 Q To your knowledge after the building went into
24 foreclosure proceedings, did your brother make any effort
25 to stop those proceedings?

TIMOTHY GAINNEY

1 A Not to my knowledge.

2 Q Did he -- do you know if he tried to put a tenant in
3 it?

4 A Not to my knowledge.

5 Q Do you know if he tried to pay the bank anything?

6 A Not to my knowledge.

7 Q You got asked a lot of questions, I believe, about
8 your taxes and depreciation and business losses. You don't
9 personally prepare your tax returns, do you?

10 A No, sir, I sure don't.

11 Q And do you fully understand those tax returns?

12 A No, sir.

13 Q So is it fair to say there's nothing fraudulent and or
14 deceitful you did in those taxes --

15 A Definitely not.

16 Q -- you just turned over your records and had your
17 accountant do it.

18 A Right.

19 Q I want to get to the heart of I think what this case
20 is about. Your brother has alleged and Mr. Wright has
21 asked several questions regarding at the time you took
22 these loans out that there was some agreement between you
23 and Mr. Ken Gainey about you making him whole if you
24 couldn't make your bank payments. Did you and your brother
25 ever make that kind of agreement?

TIMOTHY GAINES

1 A No, sir, never would.

2 Q And he was at both of the closings and signed the
3 mortgage.

4 A He was.

5 Q As far as you understand he knew if you didn't make
6 the payments then the bank could foreclose.

7 A He did.

8 Q And you didn't promise anything further than that,
9 that if you can't make the payment you will deed the
10 property to him.

11 A No.

12 Q Or, "I will make you whole and pay for your half."

13 A Never.

14 Q Not oral or written.

15 A No, sir.

16 Q You spent the better part of the past 25 or 30 minutes
17 getting beat up about your taxes and depreciation and
18 tenant complaints and repairs on the building, et cetera.
19 Can you tell me what that has to do with whether or
20 not your brother had an agreement with you to paying him
21 back?

22 A I don't have a clue what that has to do with it.

23 Q And you're pretty clear that no agreement like that
24 was ever made.

25 A I'm 100 percent positive there was no agreement ever

TIMOTHY GAINES

1 made.

2 MR. GRISSOM: Nothing further, Your Honor.

3 THE COURT: All right. Redirect?

4 REDIRECT EXAMINATION

5 BY MR. WRIGHT:

6 Q You testified on cross examination by your attorney
7 that you had no money to pay the mortgage payments when the
8 tenant left, correct?

9 A It was dwindling down, yes.

10 Q And --

11 A And I was being sued so I had to hire a lawyer.

12 Q You closed the second loan in September of 2009, do
13 you remember that?

14 A I do.

15 Q And you paid off your house mortgage, I have a
16 satisfaction dated October 15th of 2009, the very next
17 month --

18 A All right.

19 Q -- a \$75,000 mortgage.

20 A Okay.

21 Q Didn't you use the money from that loan that you got
22 from the bank to pay off your house?

23 A That was probably part of that put in my original
24 account to this, so yes, sir.

25 MR. WRIGHT: Plaintiff's 17, Your Honor.

TIMOTHY GAINEY

1 THE COURT: Any objection?

2 MR. GRISSOM: No objection.

3 THE COURT: Plaintiff's Exhibit 17 admitted into
4 evidence without objection.

5 Q And you testified on cross examination that you didn't
6 have any money to pay the mortgage payments after the
7 tenant left in the summer of 2012, correct?

8 A I testified that they were dwindling down, yes, sir.

9 Q Well, did this help dwindle them down? This is a
10 satisfaction of your home equity loan, March 14th of 2013.

11 A Never borrowed that money.

12 Q Eight months after --

13 A It was never taken out.

14 Q It was never taken out?

15 A No, sir.

16 Q You had a mortgage for \$35,000 line of credit --

17 A Right, and I never borrowed the money.

18 Q You never took a dime of it.

19 A No, sir.

20 Q Didn't have to.

21 A I wasn't going to.

22 Q You had \$35,000 sitting there in a line of credit that
23 you could have used to pay the mortgage payments to protect
24 your brother and you didn't do it.

25 A No, sir.

TIMOTHY GAINES

1 MR. WRIGHT: Plaintiff 18.

2 THE COURT: Any objection?

3 MR. GRISSOM: No objection.

4 THE COURT: Plaintiff's Exhibit 18 admitted into
5 evidence without objection.

6 MR. WRIGHT: Thank you.

7 THE COURT: You may step down. Ladies and gentlemen,
8 it looks like now would be a good time for us to take our
9 lunch break. Let's plan on being back at 1:30, that's
10 1:30. Remember not to discuss the case, including each
11 other, while you are at lunch. Have a nice lunch.

12 (The jury left the courtroom.)

13 THE COURT: Anything from the plaintiff before we
14 break for lunch?

15 MR. WRIGHT: No, Your Honor.

16 THE COURT: From the defense?

17 MR. GRISSOM: No, Your Honor.

18 (A lunch break was taken.)

19 THE COURT: Anything from the plaintiff before we
20 bring the jury back in?

21 MR. WRIGHT: No, sir.

22 THE COURT: Defense?

23 MR. GRISSOM: No, Your Honor.

24 (The jury returned to the courtroom.)

25 THE COURT: All right. Welcome back, ladies and

KENNETH GAINEY

1 gentlemen.. I hope y'all had a nice lunch break. We are
2 are ready to resume the case. Mr. Wright, you may call
3 your first witness.

4 MR. WRIGHT: We call the plaintiff, Ken Gainey.

5 The witness, KENNETH GAINEY, was first sworn and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. WRIGHT:

9 Q Tell us your name.

10 A Kenneth Ray Gainey.

11 Q Mr. Gainey, where do you live now?

12 A 113 Patricia Street here in Lancaster.

13 Q Okay. Where did you used to live before you lived
14 there?

15 A It was Major Evans Road, 4086 Major Evans Road.

16 Q At that time when you lived on Major Evans Road, did
17 you live beside your brother?

18 A Yes, sir. Right in front of his property, his home.

19 Q When did you move to Patricia Drive?

20 A It has probably been close to two years, right at two
21 years now.

22 Q Okay. And why did you move to Patricia Drive?

23 A The biggest thing was just to get away from my
24 brother and the complaining and arguing that we had going
25 on at the time. Every time I would go in the yard it

KENNETH GAINES

1 would be fussing and a fighting or whatnot.

2 Q And who would instigate those discussions?

3 A He would usually meet me at the fence line or call me
4 there and start an argument with me everyday when he would
5 come home and he would see me.

6 Q Was it like that back in 2004 when you bought this
7 building?

8 A No, sir. We got along like brothers.

9 Q Okay. Are you working now?

10 A No, sir.

11 Q Do you draw disability now?

12 A Yes, sir, I do.

13 Q What is the basis of your disability?

14 A My back and neck.

15 Q What is the basis of your back and neck?

16 A I had broke my back and my neck in an auto accident
17 in 2002.

18 Q Okay. And was that an auto accident related to your
19 employment or is it related to just an auto accident?

20 A That was related to my employment at Duke Energy.

21 Q You worked for Duke Energy at the time.

22 A Yes, sir.

23 Q Have you worked since 2002?

24 A No, sir.

25 Q All right. Did you receive a settlement as a result

KENNETH GAINEY

1 of those injuries in 2002?

2 A Yes, sir, I did.

3 Q And did you talk with your brother about going into
4 business together to buy the Hendrix Furniture building?

5 A We'd spoke about it. I was looking to buy the
6 building up first and then he approached me about buying
7 half of the building after I had agreed on buying it for
8 sure.

9 Q So you were going to buy the building yourself
10 initially.

11 A Right, yes, sir.

12 Q And he approached you?

13 A Right.

14 Q And when he approached you, did he have the money, the
15 cash, to buy half of the building?

16 A Not that I was aware of.

17 Q Okay. Did you know where he was going to get the
18 money to buy the building?

19 A Most of it I did. I knew what the financial
20 institution he was going to.

21 Q Is that First Citizens?

22 A Yes, sir.

23 Q All right. And in order for him to get the loan to
24 buy his half interest, did the building have to be put up
25 as collateral?

KENNETH GAINEY

1 A Yes, sir, it did.

2 Q And did you have to sign the mortgage to let the bank
3 have clear mortgage on all of the property before they
4 would loan him the money?

5 A Yes, sir, I did.

6 Q And did you talk with your brother in the course of --
7 before you did that and while you were doing that about
8 that transaction?

9 A We did, we talked about that.

10 Q What was your understanding of the agreement between
11 you and your brother?

12 A Well, he was going to -- he was going to have a loan
13 against the building, or what we considered half of the
14 building, and that was totally his loan and he would pay
15 that loan back.

16 Q Would you have any responsibility to pay that loan
17 back?

18 A No, sir.

19 Q Did you have any problem trusting your brother at that
20 time to do what he said?

21 A No, sir, never had any problem.

22 Q Okay. Now, for the first five years of the mortgage,
23 first mortgage that had to be refinanced in 2009, you
24 didn't have a tenant in the building, did you?

25 A No, sir.

KENNETH GAINEY

1 Q You've heard his testimony that your wife used part of
2 it to run a shop.

3 A She did.

4 Q What kind of shop did she run?

5 A It was antiques and nick-nacks, just selling reused
6 things.

7 Q Speak up a little bit, I'm having -- they can probably
8 hear better than me. So it was antiques and nick-nacks.

9 A Yes, sir.

10 Q And did your brother use part of the building to store
11 door and window units?

12 A Most of the time he had used about three quarters of
13 the building to store doors, windows and building
14 supplies.

15 Q So the time came to renew the loan in 2009. Did your
16 brother know that was going to happen?

17 A He just come and asked me to sign the mortgage again
18 with him.

19 Q Okay. When you went to sign the mortgage, what did
20 you think he was doing?

21 A Just renewing that loan.

22 Q Did you have any idea that he was borrowing more than
23 the balance that was due on that loan?

24 A No, sir, I did not.

25 Q Were you privy to any of financial part of the

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1 transaction?

2 A No, sir.

3 Q All you did was sign the mortgage.

4 A Signed it and left.

5 Q I want to show you this document and ask you first,
6 when did you first see that document that's on the front?

7 A I would say the day it was signed, that was the only
8 day I saw it, September 23rd.

9 Q Did you sign that document, the front document?

10 A No, sir, I did not.

11 Q Okay.

12 MR. WRIGHT: Your Honor, I'm going to offer this
13 entire package as Plaintiff's 19.

14 THE COURT: Any objection?

15 MR. GRISSOM: No objection.

16 THE COURT: Plaintiff's Exhibit 19 admitted into
17 evidence without objection.

18 Q This is the closing statement from the second loan.

19 A Yes, sir.

20 Q Does your signature appear anywhere on that page?

21 A No, sir.

22 Q Does it appear anywhere on the second page?

23 A No, sir.

24 Q Are those the pages that have the financial terms on
25 it?

KENNETH GAINEY

1 A Yeah.

2 Q You did sign that day some documentation regarding
3 knowing there had to be insurance on the property.

4 A Correct.

5 Q And some documentation about keeping that insurance on
6 the property.

7 A Yes, sir.

8 Q But did anybody -- did you know when you left the
9 building that day that your brother got from the closing
10 \$69,840 in his pocket?

11 A No, sir, I did not.

12 Q Does that surprise you?

13 A Yes, sir.

14 Q Did he ever tell you that he was borrowing more than
15 just the payoff on the original mortgage?

16 A No, sir, he did not.

17 Q Do you now realize that after that closing in 2009
18 instead of the balance on the original 134 mortgage there
19 was \$187,000 loan against the building?

20 A I do now, I didn't know that.

21 Q At some point -- well, let me back up. What was the
22 agreement between you and your brother about the payment of
23 the insurance on the building?

24 A At the time when we signed them papers he was going
25 to keep the insurance on the building and I was to pay the

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1 taxes on the building.

2 Q The real estate taxes?

3 A Yes, sir.

4 Q So you would pay all of the real estate taxes.

5 A Yes, sir.

6 Q And he would pay all of the insurance. And did he
7 keep up his end of the bargain and pay all of the
8 insurance?

9 A Yes, sir, as far as I know.

10 Q And did you keep up your end of the bargain and pay
11 the taxes?

12 A Right, I did.

13 Q Tell me how you received your tax notice every year
14 about the building?

15 A If I wasn't in the yard to get it handed to me he
16 would come through our driveway and leave it on one of our
17 car windshields with the windshield wiper holding it down.

18 Q Put it on your windshield wiper.

19 A Yes, sir.

20 Q So the tax notice was not coming to you by mail.

21 A No, sir.

22 Q It was coming to him.

23 A Yes, sir.

24 Q And he would leave it under your windshield wiper.

25 And you went and paid it.

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1 A Yes, sir.

2 Q At some point did you want to have that building
3 produce some income?

4 A Yes, sir, I did.

5 Q And did you look for people to rent the building?

6 A We had several calls on it. We actually didn't even
7 have to look, there were people calling about it trying to
8 get in touch with who owned it somewhat all of the time.

9 Q When this process before the lease with Famdamily was
10 going on, was your brother involved in that part of the
11 process? In other words, was he talking with these people
12 that were calling about renting the building?

13 A I would give him the number to who had contacted me
14 by phone. Usually my number would be on the building and
15 I would give him their names and number, and if he
16 contacted them I wasn't aware yes or no, I'm not sure.

17 Q So you don't know whether he called them.

18 A No, sir.

19 Q But you didn't -- the tenant you had was Famdamily's
20 which was a restaurant which was run by Joe Funderburke,
21 that's your wife's brother.

22 A Yes, sir.

23 Q Now, how were your relations with Joe at that point in
24 time?

25 A Everybody was -- a good relationship.

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- 1 Q And did you have a short lease, a one page lease
2 prepared to use as a lease for the building?
- 3 A Yes, I did.
- 4 Q Did you talk to your brother about that?
- 5 A I did. I showed him that lease.
- 6 Q Did he like that lease?
- 7 A No, sir.
- 8 Q Did he hire a lawyer?
- 9 A He hired Rick Chandler.
- 10 Q Did he get a lease that he liked drawn up?
- 11 A Yes, sir, he did.
- 12 Q Did you participate in going to Mr. Chandler's office
13 and look at that lease and know what was going on about
14 that lease?
- 15 A I did not.
- 16 Q Did not?
- 17 A No, sir.
- 18 Q At what point did you find out about that lease?
- 19 A I was notified by Mr. Gainey to go by and sign
20 whatever paper Rick Chandler had for me to sign about the
21 lease.
- 22 Q Just go sign it.
- 23 A Right.
- 24 Q And had you ever read it?
- 25 A No, sir.

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1 Q When you went to Mr. Chandler's office, did you have a
2 chance to read it?

3 A I had a little bit of time to read it, not a good
4 deal time but I had time to look over it.

5 Q It's in evidence, it's pretty long.

6 A Yes, sir.

7 Q Did you understand that the tenant under the terms of
8 the lease was renting the building as is?

9 A Yes, sir.

10 Q Did you understand under the terms of the lease that
11 you had some responsibility?

12 A Some responsibility.

13 Q What was your responsibility as the landlord?

14 A We was to get the water plumbing in the order that it
15 was prior to when the building was shut down, and the air
16 conditioning and the heat that was in the building back up
17 and running.

18 Q Okay. And when you say back up and running, could you
19 fix what was there or did you have to replace the units?

20 A We fixed a couple of the units. It had four units on
21 it -- it had three units on it total and we replaced two
22 and used one of the older ones.

23 Q When you're having to spend money on the building to
24 get it ready for the tenant, did you talk to your brother
25 about that?

KENNETH GAINEY

1 A Yes, sir.

2 Q Did he contribute to that?

3 A No, sir. He said he didn't want to pay for none of
4 the upkeep or none of the repairs on the building.

5 Q What were his own words about that?

6 A He said he wasn't paying nothing, he wasn't going to
7 have nothing to do with no repairs.

8 Q Wasn't going to have anything to do with any repairs?

9 A No, sir.

10 Q And did you understand that under the lease both of
11 you since you were leasing the building were responsible?

12 A Yes, sir, I did.

13 Q Now, was it around this time that you formed the LLC?

14 A That's correct.

15 Q And why did you form the LLC?

16 A It was some part that the restaurant wanted to rent
17 from a LLC since they was a LLC. I'm not sure of the
18 paperwork on the trail to it, but it needed to be that.

19 Q The restaurant, the company that was renting from you
20 was a LLC.

21 A Right.

22 Q And they wanted to rent from a LLC.

23 A Yes, sir.

24 Q Do you know the advantages or disadvantages of putting
25 your property into the name of a LLC when you're going to

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1 be using it for those purposes?

2 A I do not.

3 Q Do you understand anything about the liability part of
4 that or how that works?

5 A No, sir, I don't.

6 Q Who did the LLC paperwork?

7 A I'm thinking Rick Chandler done that also.

8 Q Was that Tim's lawyer?

9 A Yes, sir.

10 Q And did you sign on the LLC paperwork to form the LLC?

11 A Yes, sir.

12 Q And were you a 50/50 member of the LLC?

13 A Yes, sir.

14 Q Did you ever agree to be anything else less than a
15 50/50 member of the LLC?

16 A No, sir.

17 Q What did that mean to you?

18 A As far as the LLC?

19 Q Being 50/50, what did that mean to you?

20 A We was just partners, you know, half partners on the
21 building.

22 Q What did it mean as relation to the sharing of costs
23 and expenses?

24 A I was figuring we was going to share costs, whatever
25 we needed half was going to pay for every repair.

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1 Q But when you needed to do things to the building,
2 would Tim help?

3 A No, sir.

4 Q Did the tenant want to up-fit the building, in other
5 words make improvements to the building so they could use
6 it as a restaurant?

7 A Yes, sir.

8 Q This used to be a furniture store.

9 A Furniture building.

10 Q And I don't think they cooked a lot of stuff in the
11 furniture store.

12 A No.

13 Q So what did they have to do to the kitchen part.

14 A The kitchen was just a warehouse room at the time.
15 It had to be re-floored, ventilation system put in,
16 rewired, pretty much -- all new gas lines put to it. It
17 was redone totally.

18 Q Mr. Funderburke is an electrician, is he not?

19 A Yes, sir.

20 Q What line of work were you in with Duke Energy?

21 A I was a lineman for years and then in the energy
22 protection after that.

23 Q Okay. Did the tenant want you to help up-fit the
24 building?

25 A He wanted us to do whatever we would do to help the

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1 up-fit.

2 Q But under the terms of the lease they were leasing the
3 building as is.

4 A That's correct.

5 Q So you didn't -- you weren't obligated to up-fit the
6 building, were you?

7 A No, sir.

8 Q Did you have some hope that in the future the tenant
9 would buy the building?

10 A I had a good hope that the Funderburkes was going to
11 buy the building.

12 Q Was that discussions between you and the tenant?

13 A Yes, sir.

14 Q Did you share that with your brother, Tim?

15 A I did.

16 Q So he knew that the possibility existed that they
17 might buy the building?

18 A Yes, sir.

19 Q What was his reaction to that?

20 A He was happy that they would buy the building. I
21 think he wanted it to go faster than what it was coming,
22 but he wanted it sold.

23 Q All right. So in order to keep the tenant happy, what
24 did you do?

25 A I nearly lived down there for about four months

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1 working day and night trying to accommodate them in any
2 fashion.

3 Q Did you help them up-fit the building?

4 A Yes, sir, I did.

5 Q Did you spend money helping them up-fit the building?

6 A Yes, sir, I did.

7 Q Do you feel like the money you spent to help keep the
8 value or the building up?

9 A I do.

10 Q Do you feel any good will between you and the tenant
11 to go toward the idea that maybe one day he would buy the
12 billing?

13 A I think it was a really good idea for that.

14 Q As in all things as they were in the building did
15 anything go wrong? Did they have problems?

16 A They had problems.

17 Q With the roof?

18 A Had a roof leak, yes, sir.

19 Q Plumbing?

20 A Plumbing wasn't as bad as the other things. Some
21 things had to redo with the plumbing.

22 Q Heating and air conditioning.

23 A Heating and air conditioning were a lot of our
24 problems.

25 Q Pretty hot in the furniture warehouse.

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1 A Yes, sir.

2 Q A lot hotter in a kitchen in a restaurant I would
3 think.

4 A Yes, sir.

5 Q Did they have to have added ventilation and other
6 things for that heat that they were producing?

7 A Yes, sir. They had to have a lot of vents.

8 Q Did you held with that?

9 A Yes, sir, I did.

10 Q Did Tim help with that?

11 A No, sir.

12 Q Would he even talk with you about it?

13 A No, sir.

14 Q Did you try to talk to him about it?

15 A On occasion I tried.

16 Q Did you text him, call him?

17 A Usually just -- I would call him and -- a few times
18 call him, but mostly we would just meet right there where
19 our yards joined.

20 Q But would he do anything?

21 A No, sir.

22 Q When the landlord (sic) started paying rent the
23 initial rent was \$3,500.

24 A Yes, sir.

25 Q Did they pay you in one check or in two checks?

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- 1 A They paid two checks.
- 2 Q And did they pay him 1,750?
- 3 A Yes, sir.
- 4 Q Did they pay you 1,750?
- 5 A No, sir.
- 6 Q Starting out did they pay you at all?
- 7 A About four or five months no payment to me.
- 8 Q And why didn't they pay you?
- 9 A I'm not 100 percent sure, but I think they just knew
- 10 they could get away with not paying me.
- 11 Q Okay. Were you -- were they submitting any bills to
- 12 you that they were incurring and fixing the building that
- 13 they wanted you to pay?
- 14 A No, sir, I don't think so.
- 15 Q Were they deducting anything from your rent that they
- 16 claimed that you ought to pay?
- 17 A No, sir.
- 18 Q You, in fact, right now are involved in litigation
- 19 with that tenant.
- 20 A Yes, sir.
- 21 Q There's a lawsuit pending over that matter about them
- 22 not paying you rent and not paying the expenses they should
- 23 pay.
- 24 A That's correct.
- 25 Q But that's a separate lawsuit.

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- 1 A Right.
- 2 Q Hadn't come to trial yet. So unfortunately you're in
3 court with your brother-in-law over his restaurant which is
4 no longer there.
- 5 A Yes, sir.
- 6 Q As problems arose in the restaurant, did you attempt
7 to answer and fulfill your responsibility as the landowner?
8 Did you try to do --
- 9 A Yes, I did. I tried to do everything I could
10 possibly do.
- 11 Q There was a storm I believe and some damage to the
12 roof that was covered by insurance, are you aware of that?
- 13 A Yes, sir.
- 14 Q And Tim was paying the insurance.
- 15 A That's correct.
- 16 Q And did Tim handle the insurance claim and deal with
17 all of that?
- 18 A He did, yes, sir.
- 19 Q Did you have anything to do with that or get involved
20 in that?
- 21 A No, sir. I talked with the insurance adjustor for a
22 brief moment and I think he was told not to call me after
23 that one time.
- 24 Q One conversation and that's over?
- 25 A Yes.

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- 1 Q The roof got fixed.
- 2 A Roof got fixed.
- 3 Q By insurance.
- 4 A Yes, sir.
- 5 Q Did there continue to be problems with the building
- 6 that needed to be addressed by the owners, you and Tim?
- 7 A Yes, sir, problems arose.
- 8 Q Did you continue to contact Tim about that?
- 9 A Yes, sir, I did.
- 10 Q Would he do anything?
- 11 A No, sir.
- 12 Q Did he go down to the restaurant on some occasions and
- 13 for the lack of a better term get into an altercations?
- 14 A Yes, sir. Almost every occasion he came there was
- 15 trouble.
- 16 Q Okay. Did you have to go down after that and smooth
- 17 things out?
- 18 A Usually I would, yes, sir.
- 19 Q So eventually -- well, did you know that Tim was going
- 20 to evict the tenant?
- 21 A No, sir, I was not aware of that.
- 22 Q Did he come to you and say, "These people were just
- 23 too much trouble, I don't want to mess with them, I want to
- 24 evict them?"
- 25 A No, sir.

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1 Q Did you find out, though, when you went down there
2 that, in fact, he had served them with the notice of
3 eviction?

4 A I did know the second time after the fact.

5 Q You didn't know about the December time at all?

6 A I didn't know about that.

7 Q But in July you knew.

8 A Yes, sir.

9 Q And did that surprise you?

10 A Very surprised.

11 Q Did you have resources, a line of credit that you
12 could use to assist in paying the costs associated with
13 owning the building and making these repairs?

14 A Yes, sir, I did.

15 Q And where is that line of credit?

16 A At First Citizens.

17 Q Same bank --

18 A Same bank.

19 Q -- that he was at. And did you have to invade that
20 line of credit to keep the tenant happy and keep the
21 building running?

22 A Yes, sir, I did.

23 Q To what extent did you have to do that?

24 A Nearly \$56,000.

25 Q \$56,000?

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1 A Yes, sir.

2 Q And you are still paying on that debt now?

3 A I'm still paying it down.

4 Q Did you realize that Tim was going to stop paying the
5 mortgage?

6 A No, sir, I was not.

7 MR. GRISSOM: Your Honor, may we approach?

8 THE COURT: All right.

9 (A bench conference was held.)

10 MR. GRISSOM: Your Honor, for the record I would
11 object to the use of line of credit for expenses on in the
12 building based on agreements prior to trial.

13 THE COURT: Okay.

14 MR. WRIGHT: I'm not sure I heard the motion.

15 MR. GRISSOM: I am moving to strike the testimony
16 regarding the use of the line of credit to pay the expenses
17 on the building. Do we need to take this up outside of the
18 presence of the jury?

19 MR. WRIGHT: We might.

20 THE COURT: All right. Ladies and gentlemen, I'm
21 going to excuse you back to the jury room for just a few
22 minutes while we address this matter of law. And I'll tell
23 you why we do it, it's not that we're trying to hide
24 anything from you. But as I told you at the start of the
25 trial you and you alone decide the facts of this case, I

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1 decide the law in the case. Well, an issue of what law to
2 be applied has come up at this time. When we discuss these
3 issues of law sometimes it requires me as the Judge and the
4 attorneys to reference factual matters, but what I say and
5 what the attorneys say is not evidence. So we do not want
6 you to be influenced by anything that I might say or
7 anything that the attorneys might say in your determination
8 of the facts of this case, and that's why we excuse you to
9 the jury room while we discuss these legal issues. So I
10 will excuse you back, it will give you a good opportunity
11 to stretch your legs, whatever the case may be. Please do
12 not discuss the case and we'll bring you back in in just a
13 minute.

14 (The jury left the courtroom.)

15 THE COURT: What is your objection?

16 MR. GRISSOM: Your Honor, this morning in chambers
17 when we met I believe it was agreed upon by all of us that
18 that the plaintiff was not seeking any expenses that he had
19 spent on the building related to the least and the time
20 that the tenant was in the building. I've et a lot of
21 testimony come in about that, but at this point he's asking
22 how much he had been went into the line of credit to pay
23 and he has testified to an amount, and my concern is that
24 the jury is going to hear that and put that into damages
25 when it was agreed upon all we're seeking is half the value

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1 of the building. So my motion is to strike that testimony
2 and have the jury disregard how much money of the line was
3 used to be spent on expenses of the building.

4 THE COURT: All right. Mr. Wright?

5 MR. WRIGHT: Your Honor, as I understand my burden is
6 to prove liability and damages, and they've allege failure
7 to mitigate. I'm trying through my client's testimony to
8 establish that he made every good faith effort he could to
9 keep this tenant in the building to the extent of extending
10 personal debt. I'm not asking for compensation for the
11 personal debt, I just simply want the jury to understand
12 that he came out of pocket to keep the tenant there to keep
13 the business going, to keep the money flow going and I
14 think it's part of my burden. I think it goes to the value
15 of the building. He invested fifty some odd thousand
16 dollars back into the building just during the couple of
17 years that the tenant was there. So I think on those
18 grounds it is relevant. It's not an accounting question,
19 it is simply a matter of his efforts to keep the tenant
20 there and to maintain the value of the building.

21 THE COURT: Okay. So you're not seeking to recoupment
22 of the 56 thousand back?

23 MR. WRIGHT: No, I am not.

24 THE COURT: I'm going to partially grant your
25 objection. I'm not going to order that it be stricken from

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1 the record, but I will give curative instructions to the
2 jury to the jury that says that the plaintiff is not
3 seeking reimbursement for these expenses of the \$56,000
4 from the defendant, but he is offering that testimony to
5 show mitigation of damages and the value of the building.

6 MR. GRISSOM: That works for me, Your Honor.

7 THE COURT: Anything further from the plaintiff before
8 we bring the jury back?

9 MR. WRIGHT: No, Your Honor.

10 THE COURT: Anything from the defense?

11 MR. GRISSOM: No, Your Honor.

12 (The jury returned to the courtroom.)

13 THE COURT: Ladies and gentlemen, welcome back. Now,
14 you've heard some testimony from this witness regarding
15 money that he has spent for repairs and other expenditures
16 for the building. However, the plaintiff acknowledges that
17 he is not seeking reimbursement from the defendant for
18 these expenditures. This testimony is only being offered
19 to show the value of the building as well as this witness's
20 mitigation of any damages that may have resulted in this
21 case and that is the purpose he is offering this testimony,
22 not because he is seeking reimbursement from the defendant
23 from the defendant for these expenditures, but to contest
24 the defendant's allegations that he failed to mitigate his
25 damages, and it also assists in the value of the building.

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1 All right.

2 MR. WRIGHT: Thank you.

3 BY MR. WRIGHT:

4 Q Mr. Gainey, you had a banking relationship with First
5 Citizens before this started.

6 A Yes, sir.

7 Q And your brother had a banking relationship with First
8 Citizens as a result of the mortgage.

9 A Right.

10 Q Did you go to First Citizens to seek information about
11 A-List Properties, the LLC that you are a 50 percent member
12 of?

13 A Yes, sir, I did.

14 Q Were you able to get any information?

15 A I got no information.

16 Q Okay. When you got no information, did that surprise
17 you?

18 A Yes, sir. It surprised me, yes, sir.

19 Q As a result of that what did you do?

20 A I came straight to your office to let you know what I
21 had done and needed your help.

22 Q Don't talk about what the people told you, especially
23 me, I'm your lawyer. But you came to my office.

24 A Yes, sir.

25 Q Which is right next door to First Citizens. And is

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- 1 that when this really started up?
- 2 A Yes, sir, it is..
- 3 Q All right. Long story short, tenant moved out.
- 4 A Yes, sir.
- 5 Q Got that eviction notice, moved out. And there's been
- 6 an allegation that you prevented your brother from having
- 7 access to the building. When the tenant moved out were
- 8 there locks on the building?
- 9 A Yes, sir, there were.
- 10 Q Whose locks were they?
- 11 A The front door lock was the lock -- that locked the
- 12 front door is the normal lock and on the side door was
- 13 just a padlock on the little side door that my wife had
- 14 run a little business out of prior.
- 15 Q So you could get into that little office.
- 16 A Yes, sir.
- 17 Q But did you have keys to the rest of the building?
- 18 A No, sir, I did not.
- 19 Q Who had those keys?
- 20 A JoJo and his son, I assume.
- 21 Q Did you ask for those keys back?
- 22 A Yes, sir.
- 23 Q Had the tenant, in fact, changed the locks when they
- 24 ran the business?
- 25 A I'm not sure if it was the same locks it was, I'm not

KENNETH GAINEY,

- 1 sure, I just didn't have a key for them.
- 2 Q You didn't have a key.
- 3 A No, sir.
- 4 Q You asked the tenant for a key.
- 5 A Yes, sir.
- 6 Q Did they eventually give you the key?
- 7 A We eventually got the key.
- 8 Q How did he get the key?
- 9 A It was left in our mailbox in the middle of the
- 10 night.
- 11 Q You went to get the paper and there was the key.
- 12 A Yes, sir.
- 13 Q Was your brother asking you for keys to the building?
- 14 A Yes, sir, he had.
- 15 Q When you got the key to the building did you tell him
- 16 you had it?
- 17 A Yes, sir.
- 18 Q Did you give it to him?
- 19 A I don't know if I give him a key or not then because
- 20 I believe the locks had been changed at that time.
- 21 Q Who changed the locks?
- 22 A I imagine he had that done.
- 23 Q You didn't have it done.
- 24 A No, sir.
- 25 Q Somebody changed the locks on the building.

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- 1 A Yes, sir.
- 2 Q Could you get in the building?
- 3 A I couldn't get in after that.
- 4 Q Did you in any way prevent your brother from having
- 5 access to the building after the tenant left so that he
- 6 could get it ready to rent or sell, or do anything he
- 7 wanted to do with it?
- 8 A No, sir, I did not.
- 9 Q Would he talk with you about any of those options?
- 10 A No, sir.
- 11 Q After the tenant moved out, what were you planning to
- 12 do with the building?
- 13 A We had tried to sell it, it was for sale. My sign
- 14 was on the front of the building probably two weeks after
- 15 it became vacant, I had a sign for sale, lease or rent on
- 16 the front of the building.
- 17 Q You had that sign put up?
- 18 A Yes, sir.
- 19 Q And did your brother know about that sign?
- 20 A Just by seeing it I assume.
- 21 Q Did you get any inquiries to rent or buy the building?
- 22 A Yes, sir.
- 23 Q Did you try to get in touch with your brother about
- 24 those?
- 25 A I did.

KENNETH GAINES

1 Q With what success?

2 A He didn't have any notice to tell me anything about
3 what to do.

4 Q Wouldn't talk to you.

5 A No, sir.

6 Q So had he talked to you could you have negotiated
7 something?

8 A Yes, sir, I could have.

9 Q Did you realize that that mortgage on that building
10 eventually wasn't going to get paid and it was going to get
11 foreclosed?

12 A Yes, sir, I did.

13 Q Was there anything you could do to stop that?

14 A No, sir.

15 Q Did you have the resources to pay the bank and pay the
16 mortgage -- I think the rate on the note is \$1,600 or
17 something a month, did you have any ability to do that?

18 A I did not.

19 Q Did your brother ever offer to deed the property to
20 you?

21 A No, sir, he did not.

22 Q So you were at a stalemate.

23 A Right.

24 Q And you eventually got served with foreclosure..

25 A Yes, sir, I did.

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1 Q Because you were on the mortgage. And did you lose
2 the property?

3 A We did.

4 Q In your opinion what was the building worth when it
5 was sold at foreclosure?

6 A Probably right at \$300,000.

7 Q Okay. You were paying --

8 MR. GRISSOM: I am going to object to the opinion
9 testimony from a lay witness.

10 THE COURT: All right. Overruled, go ahead.

11 Q You had paid 295 for the building.

12 A Yes, sir.

13 Q And had made improvements over the years.

14 A Several improvements.

15 Q When the restaurant left, did they leave the bar in
16 the building?

17 A They did.

18 Q Was it a big bar?

19 A It was really big.

20 Q Was it still there when the bank foreclosed?

21 A Yes, sir.

22 Q So you have lost your interest in the building.

23 A I have, yes, sir.

24 Q And that money that you used to buy the building was
25 intended to do what for you?

KENNETH GAINNEY

1 A That was just to make income for me and my family.

2 Q You don't have that anymore?

3 A No, sir.

4 Q Have you tried to work this out with your brother?

5 A It has been several months now. We've not spoken in
6 several months now.

7 Q Did you want to have to sue your brother in this case
8 to get to where we are today?

9 A No, sir, I did not.

10 Q Are you asking for the jury to give your verdict,
11 though?

12 A Yes, sir.

13 Q To let you recoup your half interest in the building?

14 A Yes, sir, I will.

15 MR. WRIGHT: All right. Answer any questions they
16 have. Thank you.

17 THE COURT: All right. Cross examination.

18 CROSS EXAMINATION

19 BY MR. GRISSOM:

20 Q Good afternoon, Mr. Gainey.

21 A Yes, sir.

22 Q When you originally purchased the building in 2004,
23 you did go along with my client to sign the mortgage
24 document to purchase the building, correct?

25 A Yes, sir, I think so.

KENNETH GAINEY

1 Q Do you remember about how much he borrowed on that
2 loan?

3 A Not to the exact dollar, I'm not sure. I can't say.

4 MR. GRISSOM: May I approach the bench, Your Honor?

5 THE COURT: All right.

6 Q I'll hand you up what was previously marked as
7 Plaintiff's Exhibit Number 2. And does that document
8 contain the amount that my client, Mr. Tim Gainey,
9 financed?

10 A Yes, sir, it does.

11 Q What is that amount?

12 A 134,000.

13 Q Okay. And do you understand -- you understood then
14 and you understood now that when a loan is secured by a
15 piece of property and that loan doesn't get paid for, the
16 bank has ability to foreclose to repay that loan, correct?

17 A Yes, sir.

18 Q And so you understood that there was some risk that if
19 your brother for whatever reason couldn't make a payment
20 that your building could be at risk for foreclosure.

21 A I never thought about him not being able to pay that.

22 Q But my question is did you understand if he did not
23 pay for it you are aware the bank had the right to
24 foreclose on it.

25 A Yes, sir, I did.

KENNETH GAINES

1 Q And then earlier I believe you testified that you had
2 no idea until you saw the closing statement that on the
3 refinance that he had any cash coming out of the loan; is
4 that correct?

5 A That is correct.

6 MR. GRISSOM: If I may approach again, Your Honor?

7 THE COURT: All right.

8 Q This is what was marked as Plaintiff's 19. And I
9 believe your attorney asked you a couple of questions about
10 it where you signed.

11 A Right.

12 Q I'm going to turn to this page, it's the agreement to
13 provide insurance. And are both of your signatures on that
14 document?

15 A Yes, sir, mine is.

16 Q And on the top left corner of that document does it
17 have a loan amount there?

18 A Yes, sir.

19 Q And what is it?

20 A 187.

21 Q So you signed this document --

22 A Yes, sir.

23 Q -- that had the loan amount on it. Same thing with
24 the mortgage which you signed. Did that also have the loan
25 amount?

KENNETH GAINES

1 A I didn't sign this one.

2 Q Are you testifying that that is not your signature on
3 that document?

4 A Yes, sir, that's my signature.

5 Q Okay. So then that loan amount was contained on that
6 document when you signed it too, correct?

7 A Yes, sir.

8 Q So then is it fair to say it was not true that you
9 were not aware how much that loan was for at the time your
10 brother took it out?

11 A I knew what the loan -- I guess I knew what the loan
12 was in the payment, I didn't know when he left the bank or
13 the -- I didn't go to the bank, I only went to the
14 lawyer's office, I didn't go to the bank. But I didn't
15 know what he left with, I didn't know his --

16 Q Well, you knew the original loan was 134,000, correct?

17 A I did.

18 Q And you had documents that you signed that said this
19 one was 187,000, correct?

20 A Yeah.

21 Q So you knew there was some difference in what he
22 borrowed the first time and what he borrowed the second
23 time.

24 A Right.

25 Q And did anything prevent you from asking what was

KENNETH GAINNEY

1 going on with that?

2 A No, it didn't.

3 Q Did you ask?

4 A I didn't ask, no, sir.

5 Q Is it your position that he had no right to borrow
6 against his half of the building?

7 A I didn't have any problem with him borrowing against
8 his half.

9 Q Right. In fact, you signed off on the mortgage that
10 allowed him to do so, right?

11 A Yes, sir.

12 Q Earlier you testified that the landlord was
13 responsible for certain things under the lease and they
14 were namely to make sure the HVAC was working and the
15 plumbing was repaired before the tenant moved in; is that
16 correct?

17 A Yes, sir.

18 Q After that who was responsible for the maintenance?

19 A Just for them -- the same things, the landlord just
20 for the primary three things; roof, air and plumbing.

21 Q Under Article 6 of the lease under subparagraph four,
22 if I can just have you read that out loud.

23 A "The lessee conveys warranty and agrees to accept the
24 lease property in as-is condition."

25 Q The subparagraph number four underneath there.

KENNETH GAINEY

1 A "Lessor conveys warranty, agrees that the HVAC system
2 and plumbing will be in operation and the roof will be
3 leak free prior to or 30 days of execution of the lease."

4 Q And what else? Could you continue, please?

5 A "Thereafter all repairs HVAC system, plumbing, roof
6 shall be sole responsibility of lessee."

7 Q And lessee would be the tenant, correct?

8 A Yes, sir.

9 Q So that's not correct that the landlord remained
10 responsible, it's just get them working for the tenant to
11 get in, correct?

12 A Right. Getting the primary stuff working, yes, sir.

13 Q And then in the paragraph down below that, does it
14 also say that the tenant would then thereafter be
15 responsible for all maintenance on the building during the
16 terms of the lease?

17 A Yes, sir, that's right.

18 Q So other than getting those items working before the
19 tenant moved in, the landlord had no responsibility for
20 repairs or maintenance; isn't that correct?

21 A That's what -- other than what we promised to do
22 under this lease, that's correct, yes, sir.

23 Q So any of those items that you testified earlier about
24 that you were repairing, you did that out of no obligation
25 under those documents, you just did that out of the

KENNETH GAINES

- 1 kindness of your heart, correct?
- 2 A That's correct.
- 3 Q So would you agree that my client didn't have any
- 4 obligation to make any of those repairs?
- 5 A Just the ones that we had promised to do, yes, sir.
- 6 Q Did he do those?
- 7 A Other than the roof, no, sir.
- 8 Q The HVAC wasn't working when the tenant moved in.
- 9 A No, sir.
- 10 Q Did it ultimately get to be working?
- 11 A It did after I repaired it and had it fixed.
- 12 Q And at that point he was no longer responsible,
- 13 correct?
- 14 A Who is he?
- 15 Q My client. According to the lease the tenant would
- 16 then become responsible.
- 17 A I guess that's right.
- 18 Q When you approached my client about leasing this, he
- 19 didn't want to lease this building, did he?
- 20 A He didn't act like he wanted to, no, sir.
- 21 Q And when he finally did agree to lease this building,
- 22 did he not make it very clear to you and the tenant that he
- 23 was not going to participate financially in any up-fit to
- 24 make it a restaurant?
- 25 A That's right.

KENNETH GAINEY

1 Q So he was clear about that.

2 A Other than the one we had promised to do, that's
3 correct.

4 Q So it wasn't any surprise to you later down the road
5 that he wasn't willing to contribute financially to make
6 any repairs to the restaurant, was it?

7 A Surprised me?

8 Q Right. He had been clear about that upfront, was he
9 not?

10 A Yeah, he was clear.

11 Q You alleged both in the complaint and testified here
12 today that my client evicted the tenant. Other than
13 posting that notice, do you have any knowledge of any
14 further action he took to evict the tenant?

15 A Other than those nothing. I think that's all it
16 took.

17 Q Is it your position here today that he didn't have the
18 the right to post that notice?

19 A I would say he didn't have the right to post that
20 note.

21 Q So as landlord if he is not receiving rent he doesn't
22 have the right to ask the tenant to pay rent?

23 A Pay rent, yes, sir.

24 Q Well, isn't that what that notice says?

25 A I think it said vacate five days.

KENNETH GAINEY.

1 Q Okay. Why weren't you asking for the rent if you

2 weren't receiving any rent?

3 A I was trying to get the building and keep somebody in

4 the building so it would eventually get sold and we

5 wouldn't lose the building into a vacant building or not

6 have nobody in it.

7 Q So you were willing to just have a tenant run a

8 restaurant in there without paying you to be there?

9 A Not forever, but until we got it up and everything

10 corrected I guess.

11 Q Well, the restaurant was open, right?

12 A It opened, yes, sir.

13 Q You testified earlier that you took out a line of

14 credit to make some of these repairs. What secures that

15 line of credit?

16 A My home that I live in, or lived in.

17 Q And you don't have any of that documentation with you

18 here today.

19 A The line of credit?

20 Q Uh-huh.

21 A No, sir.

22 Q Okay. And you said that you put a for sale or for

23 lease sign out in front of the building when the tenant

24 moved out.

25 A Yes, sir.

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KENNETH GAINEY

1 Q Did you list the building on any sort of listing
2 service or anything like that?

3 A No, sir.

4 Q Did you advertise it in any newspaper?

5 A Just the four by eight sign on the front of the
6 building.

7 Q And you said that you did have some inquiries on those
8 but you passed them onto my client and he didn't respond.

9 A Yes, sir.

10 Q Do you recall who any of those people are?

11 A I had several churches but I don't know the names of
12 them right now. The people who is in the building right
13 now called me about 20 times trying to get the building,
14 the ones who bought it eventually.

15 Q Who was that?

16 A Christian Services.

17 Q And out of all of the inquiries that's the only one
18 you remember who it was?

19 A That's just the last one because they bought it and I
20 remember and because they're in it now.

21 Q They bought it out of foreclosure, correct?

22 A Yes, sir.

23 Q So not from you guys?

24 A No, sir.

25 Q Other than your opinion, do you have anything that

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1 forms the basis of your testimony that the building is
2 worth \$300,000?

3 A In my opinion we paid that for it and it has been
4 almost totally remodeled since that time so I wouldn't
5 figured it would go down in value.

6 Q But you don't have an appraisal to that effect?

7 A No, sir.

8 Q And in general from your recollection, from 2004 to
9 2012, did property values go up or down?

10 A They go both up and down I'm sure.

11 Q But in general in the economic climate of 2010, '11
12 and '12 which direction were they generally moving at that
13 time?

14 A If they didn't stay the same -- up and down. I
15 wouldn't say they just went down, they went up and down.

16 Q And you don't know which direction this property went,
17 up or down?

18 A No. I would say it stayed -- held its own if nothing
19 else. I don't think it dropped in value.

20 Q What's the basis for that opinion?

21 A Just being nice commercial property and being in a
22 excellent location.

23 Q Well, you testified at length about all of these
24 issues you had to repair during the time the tenant was
25 there. Why do you call it a nice commercial building?

KENNETH GAINES

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1 A All of them things has been corrected now.

2 Q So your testimony is that when the tenant moved out
3 the building was in perfect condition?

4 A Not perfect but it was in way better condition than
5 when we bought it.

6 Q At either time in 2004 when you took out the original
7 loan or when you refied or when my client refied rather, in
8 2009 did you ever expressly sit down and talk to him about
9 what would happen if he couldn't make the payments?

10 A Not the second time. Me and him and his family have
11 sat down before and spoke about it, if something happened
12 to him that she knew what to do, and I was thinking that
13 would be insurance or she would know how to handle it if
14 something happened.

15 Q Did you and him come to any agreement that said if I
16 don't make the payments on the building and the bank steps
17 in what responsibilities he had to you?

18 A We didn't have -- other than that where he said she
19 would know what to do if something happened to him
20 health-wise.

21 Q And that's exclusively if something happens to him,
22 correct?

23 A No. I mean --

24 Q I'm asking did you talk about what happens if he
25 simply couldn't make the payment on the building?

KENNETH GAINEY

1 A No, sir. Because I never -- as well as he kept his
2 credit and worked everyday of his life I don't think he or
3 myself either one would have ever figured that he would
4 ever get in that situation.

5 Q So is the answer is no, you didn't come to any
6 agreement about that?

7 A Other than talking we didn't write nothing down.

8 Q And even in your talking it was nothing more than if
9 something happens to me, my wife will know what to do.

10 A I mean, just not worry about the building and him
11 borrowing half of the money on it ever, that was it.

12 MR. GRISSOM: I don't have anything further, Your
13 Honor.

14 THE COURT: All right. Redirect?

15 MR. WRIGHT: Nothing.

16 THE COURT: All right. You may step down. Plaintiff,
17 you can call your next witness.

18 MR. WRIGHT: Plaintiff rests.

19 THE COURT: Ladies and gentlemen, the plaintiff has
20 rested their case and now is the time in the trial where I
21 need to take up some matters of law with the attorneys.
22 And so as I explained earlier, when we discuss the law at
23 this point in time in the trial it does require us to
24 discuss some factual issue that we do not want our
25 discussions to influence you, so I will excuse you back to

1 the jury room for just a few minutes. Please do not
2 discuss the case even among yourselves at this point in
3 time, we will bring you back out in just a minute.

4 (The jury left the courtroom.)

5 THE COURT: All right. Any motions?

6 MR. GRISSOM: Yes, Your Honor. At this time the
7 defense would make a motion for a directed verdict as to
8 all three claims, on each of them individually. I don't
9 think there was any evidence put forward regarding a claim
10 of accounting or a receivership, I think both sides agree
11 that that claim is moot. Unless I hear different from the
12 other side I think the first claim can be just dispensed
13 with.

14 MR. WRIGHT: The first claim is moot, we will just
15 dissolve the corporation.

16 THE COURT: All right. Well, wait a minute. So are
17 you maintaining that cause of action for dissolution or are
18 you withdrawing that and y'all are going to -- your first
19 cause of action is for an accounting and dissolution of the
20 corporation. Are you still pursuing an accounting?

21 MR. WRIGHT: We are seeking an accounting.

22 THE COURT: Are you seeking dissolution of the
23 corporation?

24 MR. WRIGHT: We are seeking a dissolution which I
25 understand they agree to.

1 MR. GRISSOM: We don't object. If that's how we want
2 to do it, that's fine.

3 THE COURT: Now, how are we going to effectuate that?
4 In other words the accounting is voluntarily withdrawn or
5 voluntarily dismissed by the plaintiff. And then the
6 dissolution -- the parties agreed to dissolve the
7 corporation within what time frame?

8 MR. WRIGHT: We can file the necessary articles of
9 dissolution with the Secretary of State and --

10 THE COURT: Let's get a time period because these two
11 I don't think are going to agree on anything, so let's get
12 a definite time as to what each one has to sign.

13 MR. WRIGHT: Today is fine.

14 THE COURT: Well, let's say by tomorrow at 5:00.

15 MR. GRISSOM: That's fine, Your Honor.

16 THE COURT: Let's see, that will be 14th -- no
17 today --

18 MR. WRIGHT: 18th.

19 THE COURT: By March 18th at 5:00 p.m. All right.
20 You may go ahead.

21 MR. GRISSOM: I will next address the third claim of
22 relief which is breach of contract accompanied by a
23 fraudulent act. And I can hand up case law as Your Honor
24 needs a copy of it.

25 THE COURT: Well, let me hear from Mr. Wright on that

1 cause of action for breach of contract with fraudulent
2 intent.

3 MR. WRIGHT: Your Honor, my understanding of that
4 cause of action is that if the breaching party
5 intentionally and with malice, which is in affect what we
6 say happened in this case, creates the breach that creates
7 the loss then the cause of action stands. If you have to
8 have fraud and inducement to enter into the contract --
9 there's no fraud in the inducement, we haven't proved that,
10 we've simply proved that there was an agreement that the
11 brother would pay the loans that he got from the bank and
12 he didn't do it, that he didn't do it because he ran off
13 the tenant, we believe, and that was the fraudulent act,
14 that he voluntarily --

15 THE COURT: So what is your distinction between breach
16 of contract with fraudulent intent and then just a breach
17 of contract?

18 MR. WRIGHT: Breach of contract could be for many
19 reasons possibly; lack of financial ability to meet the
20 terms, failure to understand it. In this case the breach
21 was occasioned by the brother who would have nothing to do
22 with the tenant, in fact created problems with the tenant
23 based on the testimony of my client which led to him, the
24 defendant, unilaterally evicting the tenant and creating
25 the stoppage of the income stream that was paying the

1 mortgage which he knew he was obligated to pay, that he
2 knew he was creating his damage when he did, it was an
3 intentional breach. And that's my only explanation as to
4 how I understand it.

5 THE COURT: All right. Well, I will grant the motion
6 for a directed verdict. I think breach of contract with
7 fraudulent intent means that he induced the plaintiff into
8 entering a contract based upon a fraud in which he never
9 had an intention of fulfilling his obligating. I find that
10 there was no inducement in this case so I will grant the
11 motion for -- on the third cause of action for breach of
12 contract with fraudulent intent.

13 MR. GRISSOM: Thank you, Your Honor. And finally, I
14 would move to the breach of contract claim. There's
15 certainly been testimony by both parties that there is no
16 written contract to this affect, that somehow the defendant
17 would make the plaintiff whole in the event that he could
18 not make the payments to the mortgage. It's our position
19 that when you -- as two business partners, when you enter
20 into this arrangement and one partner is a cash investor
21 and one partner is a finance investor, the cash investor is
22 certainly aware that there's a risk out there that the
23 other investor may or may not be able to make the payments
24 on the loan. I would characterize that as a risk of doing
25 business under that arrangement, and that if you want an

1 agreement that goes beyond that to say if you do breach
2 that and don't make the payment, oh, by the way, you have
3 to make me whole on my half of the investment, I think you
4 have got to have a further agreement to that affect, you
5 have got to have a meeting of the minds that that is a
6 contract. And both sides have testified that there was no
7 writing to that affect, and really the only testimony at
8 all that they had any sort of agreement was some family
9 meeting that Mr. Kenneth Gainey testified to that sounded
10 more like succession planning than it was any sort of
11 agreement regarding if I default on the loan. So my first
12 position is that without any agreement in place to that
13 affect that there's simply no contract there. The two
14 parties never came to a meeting as to what would occur if
15 Mr. Gainey defaulted on the loan. The only promise Mr. Tim
16 Gainey made was to First Citizens Bank that he would make
17 the payments. And of course, their remedy if he didn't was
18 to foreclose, which is the ultimate remedy that they chose.
19 I would also point out that in paragraph 13 of the
20 complaint the allegation is that this was an expressed
21 agreement, it does not imply to facts, it was not an
22 equitable contract, it's pled as this was some expressed
23 agreement between the parties. It is not in writing and
24 there is really not testimony that says there was such an
25 agreement. But in the event that the Court is inclined to

1 find that there was an agreement, I would also follow that
2 argument with that this type of agreement should be in
3 writing pursuant to the South Carolina Statute of Frauds.
4 Because under Code of Laws 32-3-10, four and five I believe
5 are applicable. Agreements required to be in writing and
6 signed no action shall be brought whereby -- four is to
7 charge any person on any contract or sale of land,
8 tenements or rudiments in interest in or concerning them.
9 I think that this absolutely concerned a contract even with
10 land. And number five, to charge upon any person agreement
11 that is not to be performed into the space of the ones who
12 are making the agreement. Both of these loans were
13 certainly terms of longer than one year. So to the extent
14 there is some agreement between these parties that he would
15 hold him harmless, I think the statute of frauds requires
16 that agreement to be in writing to be valid and there is no
17 writing.

18 THE COURT: How about equitable indemnification? As I
19 understand the pleadings, his pleadings says that the
20 express agreement was that the defendant was going to make
21 the payments and that was the extent of the agreement was
22 that he was going to make the payments. So how does
23 that -- if he doesn't make the payments then how does that
24 not create an indemnification or an equitable
25 indemnification or something of that nature?

1 MR. GRISSOM: Well, my first position would be that
2 it's not pled that way, it's a breach of the expressed
3 agreement. And furthermore I would argue that if you're
4 going to argue that there is an equitable agreement to that
5 affect again it needs to be in writing because you're
6 still -- it's still an agreement concerning one of these
7 two elements under the statute of frauds, and so without a
8 writing then you don't have an agreement that could be
9 relied upon. There's also a case I believe it's out of the
10 South Carolina Supreme Court, it is Wilkinson -- it simply
11 says that the existence of a contract is ordinarily a
12 question of fact for the jury. Where undisputed facts do
13 not establish a contract however the question becomes one
14 of law. And it is our position that what has been
15 presented to the Court thus far, theres no dispute that
16 there was no meeting of the minds, there was no contract,
17 and because of that the question of whether the contract
18 existed is a matter for you to determine and not the jury.

19 THE COURT: All right. Mr. Wright?

20 MR. WRIGHT: Your Honor, there clearly was an
21 agreement between the parties, it was an oral agreement, it
22 was expressed in their intention when they took out both
23 loans that the defendant would pay the payments but my
24 client would not be required to make the payments. The
25 case is Vermeer versus Wood/Chuck Chipper Corporation, 336

1 South Carolina 53 decided in 1999, talks about a long line
2 of cases in which the Court relies on the theory of
3 equitable indemnification and that's what this is. It's an
4 equitable identification case because he breached the
5 agreement to pay the payments. The bank foreclosed, he
6 suffered a loss therefore he is entitled to be indemnified
7 by the brother for the loss and that is simply the case.
8 That is the law. We don't think that the statutes of fraud
9 applies. It wasn't plead, I think it's an affirmative
10 defense, it was not pled. In the answer I do find it
11 interesting that they called it latches, we couldn't bring
12 this cause of action until the foreclosure happened and so
13 none of those defenses apply. But this is I think when it
14 becomes my turn to move for a judgment on the pleadings on
15 the grounds that we clearly have established our right to
16 indemnification based on the testimony by the defendant who
17 admitted that as to both loans it was his obligation to
18 make the payments, he knew his brother relied on him to
19 make the payments and he did nothing to stop the
20 foreclosure from going forward even though he had the
21 economic ability to do so.

22 THE COURT: I think his argument is that you did not
23 pled equitable indemnification, that you only pled
24 expressed indemnification by contract. So what is your
25 argument on his motion for directed verdict in that it was

1 not pled?

2 MR. WRIGHT: Your Honor, I think this Court sitting as
3 the Court in the equity can. It is an implied
4 indemnification case, that is the net result of his
5 violation of his agreement in his contract to pay the
6 payments on the mortgage. So I do not see it as a case
7 where we need to plead indemnification. His damages for
8 the breach are the loss of the building.

9 THE COURT: Anything in reply?

10 THE JUROR: I would just respond to that, Your Honor,
11 that when you have a question as to whether there's a
12 breach, typically you plead breach of contract and you
13 plead contract implied fact or some equitable remedy. And
14 in this case the claim against my client is a breach of an
15 expressed contract, and there has been no evidence put
16 forth in court that there was an expressed contract, and
17 without that evidence the jury could not make that
18 decision.

19 THE COURT: I'm going to deny your motion. The
20 pleadings says that the express agreement was that the
21 defendant was responsible for the payments. To the extent
22 plaintiff needs an amendment to the pleadings I will
23 allow -- this is an equitable indemnification case and I
24 will allow amendment to the pleadings to that extent. As
25 to whether or not the defendant's breach of that express

1 agreement to make the payments creates an equitable remedy
2 to the plaintiff. So I will deny your motion for a
3 directed verdict in that record. All right. Anything
4 further? Are you going to recall anybody in defense.

5 MR. GRISSOM: Let me talk with him about it on the
6 break but most likely not.

7 THE COURT: Okay.

8 (A break was taken.)

9 THE COURT: Are you going to present any testimony?

10 MR. GRISSOM: Yes, Your Honor. I am going to call my
11 client for about two questions.

12 THE COURT: Okay. Do we want to -- well, let's just
13 see how long it takes. I think we might go ahead and break
14 and finish tomorrow but we will just see.

15 MR. GRISSOM: I think with any testimony and charge
16 conference I don't know that we'll get to it them by 4:00.

17 THE COURT: All right. That will be fine. All right.
18 Anything from the plaintiff before we bring the jury back
19 in?

20 MR. WRIGHT: No, Your Honor.

21 THE COURT: Anything from the defendant?

22 MR. GRISSOM: No, Your Honor.

23 THE COURT: All right. Let's bring the jury in.

24 (The jury returned to the courtroom.)

25 THE COURT: Ladies and gentlemen, welcome back. We

TIMOTHY GAINNEY

1 have reached the time of trial where the plaintiff has
2 closed their case and now is the time for the defense to
3 present their case should he choose to do so. Mr. Grissom,
4 call your first witness.

5 MR. GRISSOM: Your Honor, the defense would call the
6 defendant, Timothy Gainney.

7 The witness, TIMOTHY GAINNEY, remained under oath

8 And testified as follows:

9 DIRECT EXAMINATION

10 BY MR. GRISSOM:

11 Q Mr. Gainney, as a result of the foreclosure of the
12 building that was in question here, did First Citizens Bank
13 issue a 1099A form?

14 A They did.

15 Q And when you received that form did it list a fair
16 market value of this building?

17 A It did.

18 Q And what did it list?

19 A 180,000.

20 MR. GRISSOM: Nothing further, Your Honor.

21 THE COURT: All right. Cross examination.

22 MR. WRIGHT: Your Honor, I object and move to strike.
23 That testimony hasn't been introduced as far as I know in
24 any other document and it's hearsay.

25 THE COURT: All right. I sustain the objection, it's

TIMOTHY GAINES

1 hearsay. I will strike that response. Any other
2 questions?

3 MR. WRIGHT: No, Your Honor.

4 THE COURT: All right. Anything on cross examination?

5 MR. GRISSOM: No questions.

6 THE COURT: All right, sir. You may step down.

7 Defense can call their next witness?

8 MR. GRISSOM: Defense has no other witnesses, Your
9 Honor.

10 THE COURT: Ladies and gentlemen of the jury, the
11 defense has presented their case like at the close of the
12 plaintiff's case -- well, first let me see the attorneys
13 for a second.

14 (Bench conference was held.)

15 THE COURT: Ladies and gentlemen, the defense has
16 presented their case and now is the time of the trial where
17 we have to take up some matters of law, so just like we did
18 at the close of the plaintiff's case I would excuse you
19 back to the jury room. However, given the time of day we
20 do have some other matters that we need to tend to, so I
21 am going to go ahead and break for the remainder of the
22 day, we will finish this up tomorrow morning. I will ask
23 that you be back in the jury room -- I tell you what I'm
24 going to do -- yeah, let's be back in the jury room at 9:15
25 tomorrow morning, we will try to get started as soon after

1 9:15 as we can. I caution you again, do not discuss the
2 case even among yourselves, don't conduct any independent
3 investigation. I hope everybody has a good evening and
4 we'll see you back at 9:15 tomorrow morning. Thank you
5 very much.

6 (The jury left the courtroom.)

7 THE COURT: All right. Any motions?

8 MR. WRIGHT: Motion for a directed verdict on the part
9 of the plaintiff, Your Honor. I think we've established
10 clearly that there was a breach of the agreement to pay the
11 mortgage payments as to the first and second mortgage, he
12 paid the first but he did not pay the refinance mortgage.
13 As a result of that breach there was a foreclosure for sale
14 at a loss and my client is entitled to be indemnified by
15 his brother to the extent of his loss. The only testimony
16 as to value is my client's testimony of \$300,000 and we
17 would ask for a directed verdict of \$150,000.

18 THE COURT: All right.

19 MR. GRISSOM: Your Honor, I would just respond that I
20 believe that we put forth enough evidence to any sort of
21 agreement. Not paying the mortgage payments in and of
22 itself is not a breach of the agreement between these two
23 parties because that agreement was between the bank and Mr.
24 Gainey. So the jury is left to decide whether his failure
25 to make the mortgage payments entitles him to -- or

1 obligates him, rather, to pay Mr. Gainey for his half of
2 the building. There's also a jury question as to whether
3 or not failure to mitigate comes into questions so I don't
4 think that a directed verdict is appropriate at this time.

5 THE COURT: I'm going to deny the motion. Anything
6 further?

7 MR. WRIGHT: That's all.

8 THE COURT: All right.

9 (Court recessed for the evening and resumed at 9:30
10 A.m. on March 18, 2015.)

11 THE COURT: Gentleman, have you had an opportunity to
12 look over the proposed jury charges?

13 MR. WRIGHT: Yes, Your Honor.

14 THE COURT: Any additions or challenges from the
15 plaintiff?

16 MR. WRIGHT: No, Your Honor.

17 THE COURT: Any from the defense?

18 MR. GRISSOM: No, Your Honor.

19 THE COURT: All right. And as I told you, I will give
20 you another opportunity to raise any objections after I
21 charge the jury because sometimes it does sound differently
22 when you hear them read versus when you read it on paper so
23 I will give you another opportunity at that point in time.
24 Anything from the plaintiff before we bring the jury in?

25 MR. WRIGHT: No, Your Honor.

1 THE COURT: Anything from the defense?

2 MR. GRISSOM: No, Your Honor.

3 THE COURT: Before we go forward, let me -- a couple
4 of things. As I understand two things, number one, since
5 there is an agreement to dissolve the business we have
6 agreed to amend the caption as I understand it in this case
7 and any verdict in this case would just simply list Kenneth
8 R. Gainey as the plaintiff and Timothy M. Gainey as the
9 defendant; is that correct?

10 MR. WRIGHT: That's correct.

11 THE COURT: And we're deleting A-list Properties; is
12 that correct?

13 MR. WRIGHT: That's correct.

14 THE COURT: Also, I understand because of the other
15 pending action we want to address the agreement to dissolve
16 the corporation. What have we decided on that?

17 MR. WRIGHT: We will hold that -- we will dissolve the
18 corporation when the other litigation is completed, that
19 litigation is by the corporate defendant against the other
20 corporate defendant on the lease.

21 THE COURT: Okay. Is that your understanding?

22 MR. GRISSOM: That is.

23 THE COURT: All right. So on the first cause of
24 action for accounting dissolution the plaintiff voluntarily
25 dismisses the cause of action for accounting. And the

1 parties agree to dissolution but agree that that will not
2 transpire until the conclusion of the plaintiff's dispute
3 with the prior tenant; is that correct?

4 MR. WRIGHT: That's correct.

5 THE COURT: And that is the defendant's understanding?

6 MR. GRISSOM: That is correct.

7 THE COURT: All right. Anything else we need to put
8 on the record before we bring the jury in?

9 MR. GRISSOM: None from us.

10 MR. WRIGHT: No.

11 THE COURT: All right. Let's bring the jury in.
12 Thank you.

13 (The jury returned to the courtroom.)

14 THE COURT: All right ladies and gentlemen welcome
15 back. I hope everyone had a good evening. We are now
16 ready to resume the trial of the case. I apologize for
17 keeping you back in the jury room for so long but we did
18 have some matters that we needed to address. We have
19 reached the point in the trial where all of the evidence
20 has been presented to you, and now is the time of the trial
21 where the attorneys will make their closing arguments and
22 then I will charge you on the law to be applied in this
23 case. Now, just like their opening statements, these
24 closing arguments are not evidence in this case, it is
25 simply the attorneys' opinion as to what the evidence has

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1 shown to you, what the facts in this case are and the law
2 to be applied in this case. If at any time during these
3 closing arguments an attorney references a factual matter
4 that is different from the facts as you find them to be or
5 references the law that is different than the law as I will
6 charge you at the close of their arguments, then you are to
7 disregard that portion of their closing arguments because
8 these arguments are not law -- I mean, are not evidence.
9 It is just their contention as to what the facts are and
10 the law to be applied in this case. All right. Mr.
11 Wright, closing arguments.

12 MR. WRIGHT: Please the Court? Good morning. Well,
13 we've taken up three days of your lives to resolve this
14 controversy between these business partners and I
15 appreciate it and my client does and I'm sure the other
16 side does your being here to do that. A lot of people try
17 to avoid jury duty and they don't come. I think it's a
18 very interesting thing, I guess so because it's my job to
19 do these things, but we have to have jurors or we couldn't
20 resolve these cases. The judge told you when we started
21 this week that this is the only case to be tried. There
22 were a lot of cases on the docket but just because you and
23 your other juror members were here, people as they get
24 close to the hour of truth, they come to a meeting of the
25 minds and they settled cases. This case could not be

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1 settled. You heard the testimony in this case. The
2 brother, the defendant, business partner of my client
3 doesn't think he owes his brother a dollar. And my client
4 believes that he's entitled to indemnification or recovery
5 of what he's lost and that is his half interest in the
6 building. So we were very far apart, we could not bridge
7 that gap, so we had to try this case so 12 people from this
8 county had to make this decision. The jury system works
9 great in a free country, and thank God we live in a free
10 country. If you have ever been out of this country to a
11 country that's not free and you come back in this country
12 you will appreciate this country. Freedom is a wonderful
13 thing and the ability to solve your problems in this forum
14 instead of on the streets or in, you know, hand to hand,
15 this is the way to do it. So thank you for your service.
16 You're going to hear the judge charge you, the jury, in --
17 charge you the law in just a few minutes. He will tell you
18 what the law is as it relates to this case and tell you
19 some general things about verdicts and credibility and
20 other things and that's what he does. My job at this point
21 is simply to summarize my case to let you know what we
22 think we have proven. I appreciate your attentiveness. As
23 you're trying a case it's hard for me to see what you're
24 doing and whether you're paying attention and I don't think
25 anybody went to sleep because I thought it was an

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1 interesting case and I think you thought it was an
2 interesting case as you went through it because it was not
3 that long but it should have kept your attention. My
4 client had an injury in 2002, he had some money that he
5 wanted to invest that he wanted to try to make grow for the
6 future, he wanted to buy a building. His brother wanted to
7 get in on the deal but the brother didn't have any money,
8 so he said you're going to be my business partner. Then
9 fine, brother had to go to the bank and borrow the money.
10 But the deal was from my client's standpoint was, "You've
11 got to have my back. You're borrowing money, I'm putting
12 in cash. I'm taking the risk here that you're going to pay
13 this loan back and you've got to pay this loan back." And
14 he trusted him to do exactly that, and he did for the first
15 five years. They didn't even have a tenant for the first
16 five years from 2004 to 2009 and the mortgage got paid
17 every month and that's great, things were going along but
18 they weren't renting the building. Then in 2009 they had
19 to renew the loan. Well, my client thought that they were
20 just paying off the old mortgage which would have been paid
21 down by then. Unknown to him based on the closing
22 statements that you'll see, which was one of the last
23 exhibits we put in, the -- and any financial terms of the
24 second loan, which I remind you again, my client is not
25 privy to that information. My client is just signing on

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1 the mortgage saying that, "Yeah, you can use my half
2 interest on the property as collateral." This information
3 is between the bank and the defendant. And the defendant
4 knew that that day when he walked away from the closing the
5 very bottom of page one, there's a column that says cash to
6 borrower, he was walking out of there with a check for
7 \$70,000, a few hundred dollars short of \$70,000. There was
8 equity in the property which was part my client's and my
9 client didn't know he was mortgaging it because he didn't
10 know that, he just said, "You've got to sign another
11 mortgage because the mortgage is up." So he went and
12 signed another mortgage trusting his brother, still got his
13 back, but brother walked out with \$69,840.99, and within a
14 month paid off his house. So everything in this deal so
15 far for the business partner, the brother, is going great
16 because he's making out. He's got a debt paid off, he's
17 still got a half interest in the building, he's storing
18 these window units down there which he says were given to
19 him by his employer and which his employer came and picked
20 up when the thing was over. Now, I don't know whether he
21 was getting paid for that or not, he says he wasn't. But
22 boy, they sure had a lot of free storage for about six or
23 seven years down there. Then they got a tenant. And the
24 defendant testified "I don't want to have a tenant. I
25 don't want that tenant. It's your brother-in-law, I don't

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1 want to deal with it." But instead of just saying no,
2 we're not going to do it, he went to a lawyer and got a
3 lease done and signed it and agreed to have a tenant
4 because there was going to be money coming in that he was
5 going to get half of, and he got his half, he got his half
6 every month. My client didn't get his half every month
7 because he was trying to keep the tenant happy in hopes
8 that the tenant was going to buy the building, and if the
9 tenant bought the building the mortgage gets paid off and
10 this deal is over and my client extricates himself from it,
11 everything is fine. So my client is trying every way he
12 can to keep that tenant in that building, helping him and
13 doing things he didn't need to do down there. It doesn't
14 matter if it's his brother-in-law, he is the potential
15 buyer for the business, the building. And then the
16 brother, the business partner who is supposed to have his
17 back, gets mad at the tenant, he was mad at him the whole
18 term of the lease, wouldn't do anything for him, wouldn't
19 talk to him and when he went down there caused problems
20 that my client had to go down there and straighten out. He
21 goes down there and takes him an eviction notice and tells
22 them to get out and cuts off the income stream that by now
23 that's what he was using to pay the mortgage. He knew when
24 he did that what was going to happen, he was going to walk
25 away from this thing. It was not of any usefulness for him

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1 anymore to have this business, mess with a tenant, deal
2 with the mortgage payments, all of these things. Why worry
3 about it? Walk away from it, let the bank take it. What's
4 it going to hurt him? Nothing. His house is paid for, his
5 car is paid for, he ain't got any debt. He's just sitting
6 there clean as a bird. But his brother, whose back he's
7 supposed to have, is hanging in the wind just swinging.
8 What can be clearer? What can be clearer than this case?
9 This was a case where these people did business and when
10 you go into business you go into business in good faith
11 you're going to do your part, you're going to do what you
12 have to do and the deal was Tim is going to pay the
13 mortgage. Tim didn't do that. Tim couldn't do that
14 anymore because he cut off the income stream. My client
15 has spent a lot of money keeping up the building, taking
16 care of the building, trying to keep the building in shape
17 for his tenant. Tim didn't contribute to any of that. Tim
18 is just sitting back cashing the rent check every month and
19 if he doesn't get it he runs down there with an eviction
20 notice and runs off the tenant. And he won't even talk to
21 my client. Tim goes to the bank, sets up a bank account,
22 you're going to see the document, second page, A-List
23 Properties, LLC. Y'all know that there's two people in
24 that LLC, it's 50/50 but he puts down that he's sole
25 proprietor, sole proprietor, he doesn't even tell them that

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1 his brother is involved. So when his brother goes to the
2 bank and says, "Hey, my brother and I, we run this LLC and
3 I want to know about the LLC's business. Well sorry, we
4 can't talk to you. Well, why can't you talk to me? I'm a
5 half owner of the business. Well sorry, can't talk to you,
6 not going to tell you anything." Now, First Citizens Bank
7 is right beside my office, we walk to the bank to make our
8 deposits, he walked across the parking lot and -- I mean,
9 that's an upsetting moment when you find out that your
10 business that's completely controlled by the bank and the
11 mortgage they hold will not even talk to you about it,
12 you're having a heart attack. You're going crazy. This
13 was in 2012. This case has taken three days to try, this
14 case has been going on for three years, three years. He
15 and his wife have been living with this for three years. I
16 have to prove to you there was an agreement that the
17 brother would pay the mortgage. He admitted from the stand
18 that he didn't expect the brother to make the payments,
19 that's the agreement, I'm going to make the payments. We
20 have to prove to you that he broke the promise, he broke
21 the promise, he didn't pay the payments. He admitted he
22 stopped paying the payments, he said he couldn't pay the
23 payment. And the strange thing about that is, when I'm
24 looking at the records, the public records and I find a
25 \$35,000 line of credit that he had access to in April of

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1 2013 which was eight months after the tenant is gone and
2 about the time the bank is foreclosing, he's got a \$35,000
3 check he could write to satisfy the bank and hold them off,
4 give them a chance to sell the business. What does he do?
5 He goes down to Founders Federal Credit Union and says,
6 "You know, I don't need that money, I don't need that
7 money." Not, "I'm in foreclosure," not, "my brother is
8 getting ready to lose his shirt because of what I'm doing.
9 Close the account. Close the account." He argues that my
10 client should mitigate damages? My client put a sign up as
11 soon as that tenant moved out. He wanted to sell that
12 business or rent that business and get rid of that
13 business, pay off that mortgage because he knew the
14 foreclosure was coming. * Tim wouldn't even call him back.
15 He wouldn't talk to the tenants, he wouldn't talk to
16 anybody. He wouldn't talk to people who wanted to buy the
17 building, he just wouldn't talk to them. So nothing
18 happened and the banks can't sit there forever and the bank
19 foreclosed. So you're going to hear the judge charge you
20 about indemnity. Indemnity means making somebody whole for
21 something that hadn't been paid to a third party. No, I
22 don't want you to be confused by that. My client never had
23 to write a check to First Citizens, they just took his
24 land, that's what he paid First Citizens. His half
25 interest in the land went at the foreclosure sale. So

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1 that's his loss, that's what he paid First Citizens, they
2 took it away. Because his brother broke his promise and
3 didn't have his back and let him suffer this loss. Now, I
4 never know what you're thinking, I can't put myself in your
5 minds. My job is just to tell the story and that's what I
6 do, and I try tell it to you as plainly and as clearly
7 succinctly as I can. In this case there is no doubt that
8 my client trusted his brother. You might come from a --
9 your mindset might be, "Well, sorry, family is family, and
10 if it's family you just shake hands and say goodbye and
11 forget about it and go on." I'm sorry, this is business.
12 I told you at the beginning this is a business case, this
13 is a business case. And in business when you have a
14 business partner who does this to you you come back and you
15 get your money back. You've heard that Tim is sitting
16 there with a house having no mortgage on it, a car that was
17 paid for, there's a way for my client to recover maybe
18 hopefully. My client, not so lucky. Doesn't have the
19 interest in the building, lost all that money, lost all of
20 that time, lost all that effort and still involved in a
21 lawsuit with a tenant over accounting for all of that money
22 that he's still got to go through and pay for. Tim is
23 walking away from that, too. He's not in that. It's a
24 corporation which is now going to be -- Ken is going to
25 have to run it because Tim is just washing his hands of all

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1 of this and walked away clean if you let him. My point is,
2 please don't go back there and say, "Well, they were just
3 brothers, just forget about it. He just shouldn't have
4 trusted his brother, this is" -- I'm sorry, that's not the
5 law. This is a business, this is serious economic
6 business. How much is my client entitled to? The damages
7 is how much the building was worth. The only testimony --
8 I asked Tim what's the building worth and he said, "I don't
9 know, I don't have any idea, 200, 300, 250? I don't know."
10 My client said the building is worth \$300,000, we bought it
11 for 295, we had up-fitted it, we had done a lot of work on
12 it, maintained its value. The defense attorney tried to
13 run him down because of the economy here in Lancaster. But
14 still, good commercial property sitting right on 200, a lot
15 of road frontage just sitting there, the old Hendrix
16 Furniture building. \$300,000 was the value, my client was
17 a half owner, he lost \$150,000. So as I stand here in my
18 shoes knowing the facts and knowing the law and arguing to
19 you you should write a verdict for the pain for \$150,000
20 and this case is over, then I have to try to collect it.
21 It's not up to you to worry about that, it's up to me, it's
22 up to me. My job doesn't end today, my job continues.
23 This is just the trial, then comes hopefully the collecting
24 of a verdict. But this is the place, this is the only day
25 that Ken Gainey can seek justice in this case and you are

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1 the only people who can give it to him or not give it to
2 him, and we ask you today to do your duty and to give him
3 justice. We ask you to look through these documents
4 closely as you go through, but I think the numbers should
5 be pretty well ingrained in your mind by now. \$134,000
6 mortgage, \$187,000 mortgage, he walked away with almost
7 \$70,000 for which he used to pay off his debts and left my
8 guy hanging in the wind. Ran off the tenant. He won't
9 even admit that the thing he took down there was an
10 eviction notice, it says you have five days to vacate.
11 That's an eviction notice, that's "you've got to go." Ran
12 the tenant off, the money flow stopped, bank forecloses,
13 property is gone, my client had half of that property and
14 it's gone. So I've done everything I can do, it's now up
15 to you. You'll hear arguments from opposing counsel. I
16 may get back up if something else needs to come back up
17 that I need to talk about that he brings up, but if he
18 doesn't bring up anything new I probably won't talk to you
19 again. It's a been a pleasure trying the case, I hope you
20 understand the case, I hope I have been clear, I hope I
21 haven't confused you, but I think this was pretty clear.
22 So please, as hard as it might be to judge somebody -- and
23 it's not in our religion or our -- we just don't like to
24 judge people, but we do and we have to and in this case you
25 are the triers of the facts, the judge will tell you the

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1 law but you have to judge this. Thank you very, very much
2 for listening to me, listen to the other counsel and the
3 judge and I hope we get justice done today sometime soon.

4 THE COURT: Mr. Grissom?

5 MR. GRISSOM: Thank you, Your Honor. I would also
6 like to thank all of you for being here for the past three
7 days. We can't do this without you so you've served an
8 invaluable service to us. I want to start my closing by
9 making clear to all of you that there's one issue, one
10 decision that you all have to make when you go back there
11 today and it's the issue of the indemnification that Mr.
12 Wright just talked about. One issue. Does Tim Gainey have
13 to make Ken Gainey whole because of what happened in this
14 business deal? That is the only issue up for
15 consideration. Now, you have heard a litany of testimony
16 about the money that got pulled out and a house that got
17 paid off and repairs that were being made by one man and
18 not another man, depreciation and tax issues and the list
19 goes on and it goes on and it goes on. And what I'm here
20 to tell you is that none of that matters when you're making
21 a decision about what did these two agree, what these two
22 promised each other. None of that matters. I don't know
23 if you all know it, in the military fighters jets have heat
24 seeking missile and so when one of them fires a missile at
25 the target, the is heat coming out of the other plane and

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1 that's how it goes and it shoots it, and in defense of that
2 our fighters jets will send out these little tracers or
3 little heat balls and it makes the missile going flying off
4 in this direction or that direction and miss the plane.
5 And I think that's what all of those details are designed
6 to do is make you all go chasing off down the wrong path
7 and forget what the real issue is. I think a lot of it is
8 trying to make you think that Tim Gainey is a bad guy and
9 that's just not the case, and even if it were it's not
10 relevant to one issue you're here to decide and that is
11 what these two gentleman agreed with one another to do.
12 Every investment in the world comes with a risk, there's no
13 such thing as a guaranteed investment, if it was all of us
14 would have our money. The investment these guys made was
15 to buy a commercial building, one of them had his half to
16 pay in cash and the other one had to finance his half, and
17 so when you go into that investment as the cash investor
18 you understand there's a risk out there. My partner may
19 not be able to make his payments, and if he doesn't the
20 bank is going to exercise their right to foreclose, that's
21 the risk that I'm taking in this investment deal. That's
22 no different than if I put my money in a mutual fund and
23 the fund manager decides to move the money from a fund
24 that's doing okay to a fund that's certainly does bad, I
25 don't go sue the fund manager. He just made a bad

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1 investment decision that I had him make because I had put
2 my money in that fund, I lost my investment. Everybody has
3 lost money in investments, it is a fact of business. And I
4 submit to you that's all that's happened in this case is
5 that two men made an investment, the investment went south
6 and the bank had to step in and -- you know, they keep
7 making out that my client hadn't lost anything, well, he
8 lost his half interest in the building. And he's talking
9 about all of this money he walked away with but most of
10 that money went back to put back into his savings account
11 that he used to get the first loan, and most of the rest of
12 it went to pay the payments to make the mortgage stay
13 current. So he didn't walk away and get some windfall when
14 he made that second mortgage, he put it back into the
15 building. In effect what Ken Gainey is asking all of you
16 to do here is to make his investment a 100 percent
17 guarantee, to have no risk. He chose to go into business
18 with someone who had to finance the other half. He knew
19 the risk that if Tim for whatever reason ever, whether it
20 be disability, death, moved away, anything that caused him
21 not to make his payments, he knew the risk was the bank
22 would come in and start foreclosing. He didn't take any
23 extra steps to protect against that risk, he just trusted
24 his brother as Mr. Wright just said. And I think all of us
25 will initially say most of us would trust our siblings, but

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1 just like Mr. Wright said, this is business, and simply
2 trusting your partner is a bad business decision. You
3 should go further than that, you should take measures to
4 protect yourself above and beyond "I just trust he is going
5 to make the payments." The only promise Tim Gainey made
6 was to First Citizens Bank to make payments to the bank and
7 he did that for as long as he possibly could. Now, they
8 want to argue that he went down there and ran the tenant
9 off because he knew that would cutoff the income stream and
10 it would be foreclosed. He went down there and gave them
11 that eviction notice because he wasn't getting his rent, he
12 already wasn't getting paid. It worked once before when he
13 took it down there in December and he started getting
14 payments again, so he went down there again hoping if he
15 gave them this notice he will start getting paid again, but
16 they were already packing up and they were gone. He didn't
17 have anything to do with that tenant moving. His argument
18 is he should have just let them stay in there without
19 paying rent I guess, because that's what they were doing.
20 My client testified he couldn't make the payments on the
21 building because it was taking up almost 80 percent of his
22 monthly income, it was \$1,800 out of the \$2,400 that he was
23 bringing home every month. It was a building that wasn't
24 generating any income, he had no access to it, it was of no
25 benefit to him and it has taken up almost all of his

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1 disposable income. Now, Mr. Wright argued he had this line
2 of credit, why didn't he go take that out. So what he's
3 asking my client is to decide, "I'll save a business asset
4 and put my family home on the line when I can't pay for
5 either one, but rather than save any home where my wife and
6 my children come and visit me, I'll save the business asset
7 and I'll put my family out on the street." I mean, that's
8 the choice he's really saying my client had and I don't
9 think anybody in this room would have a hard time making
10 the decision when you're faced with that choice, business
11 asset versus your family home. Bottom line is my client
12 just couldn't make the payments. There was no wrongdoing.
13 And the judge will tell you the law in a little bit about
14 indemnification, it talks about a wrongdoing. All my
15 client did was stop making payments that he couldn't make,
16 it wasn't in the best interest of his personal economic
17 situation. And the unfortunate consequence of that was he
18 lost his investment and Mr. Gainey lost his investment.
19 And again, this is a business deal and it went bad and both
20 people lost their interest in this business deal. He's
21 talked a lit bit about some documents that you may look at
22 when you go back there. He makes a claim in his closing
23 that Mr. Gainey had no idea there was extra money coming
24 out of that loan, and again that's probably one of tracers
25 he wants you to chase down. As I asked Mr. Gainey on the

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1 stand and you see it in the second loan he signed two
2 documents that had the loan amount on it. Now, whether or
3 not he looked at it and paid attention to it, I don't know
4 what, but I can certainly tell you this, I know that's his
5 responsibility. If he's going to sign other mortgage it is
6 his duty to look into what's going on in this deal and if
7 he didn't like it he could say, "Wait, I'm not going to let
8 you take \$69,000 out on this loan, I'm not going to sign
9 the mortgage." But he didn't do that, he signed the
10 mortgage. Talked about not having access to the bank
11 account. But if you look at that bank account agreement,
12 it says the account holder is Timothy Gainey dba A-List
13 Properties, it was not a corporate bank account. You heard
14 Tim testify that the only reason he did that is because the
15 bank wouldn't let him cash checks made out to A-List
16 Properties unless he opened a bank account. The sole
17 reason he opened that account was so he could deposit the
18 rent checks in his account and use the rent. So when you
19 go back there based on the evidence you have been given I
20 think the right decision to make here is that he didn't do
21 anything wrong. For eight years he tried to make payments
22 and he made the payments, and when he got to a point where
23 he couldn't do it anymore he just couldn't do it and the
24 business deal went south, and now Ken Gainey wants him to
25 step in and pay him back. "I want a 100 percent guarantee

CLOSING ARGUMENTS

1 on my investment, I want all the risk taken out." Well,
2 everybody wants that deal but nobody gets that deal. But
3 if you're inclined to go back there and decide well, even
4 though Tim promised to make the payment, maybe he should
5 have got his brother's back, you still have to consider
6 that issue of mitigation of damages. Now, out of all of
7 those tracers and red herrings that flew out there, there
8 is one thing Mr. Gainey did to mitigate, he put up a sign,
9 one sign in front of the building. He didn't list it with
10 any service, he didn't advertise it with any paper. And
11 when I asked him who the people were that called that were
12 interested in the building, he had no recollection. He
13 named one person and that's the person that was in the
14 building now that probably every one of you in the
15 community could come up with because you know who is in
16 that building. So I call into question whether or not
17 there was any serious interest in the building, and I call
18 into question how seriously it was marketed at all. He
19 didn't try to work out anything with the bank. I didn't
20 hear any testimony that he even attended or did anything or
21 participated in the foreclosure proceeding. He just sat by
22 and let the bank proceed with foreclosure knowing if they
23 did do that his half of the building would be lost. And so
24 if you decide my client somehow has the obligation to him
25 for him simply not being able to make these bank payments

CLOSING ARGUMENTS

1 you then have to consider the fact that Ken Gainey just put
2 up a sign and crossed his fingers and hoped he wouldn't
3 lose his building, and that is not enough to get you to
4 your whole amount of damages. In fact, it may be enough to
5 take all of your damages away. And then we've got to talk
6 about the value of his building. Ken Gainey is not an
7 appraiser, he admitted that was just his opinion, \$300,000,
8 that's what we paid for it, I guess that's what it was
9 worth. I tried to ask him about what happened to property
10 values from '04 to 2012, I think everybody in the room
11 knows what was going on in the country during that time,
12 very few property values went up, a lot of them went down.
13 And to say that it's worth what we paid for it in 2004 is
14 just simply a number grabbed out of the sky. My client
15 said 2, 250, 300, he didn't know either. So if you guys
16 are inclined to award anything that's also your decision to
17 make as to decide that what is that building worth on the
18 time of the foreclosure, which was April of last year, not
19 now if it's been up-fitted but when it was a vacant
20 abandoned commercial building with some of it being a
21 kitchen and some of it being storage. But I hope you don't
22 reach that issue because I hope you'll understand that this
23 was just a business deal that didn't go good. Some go
24 great and everybody is happy, some go bad and people lose,
25 and that's what happened here. Both of these gentlemen

CLOSING ARGUMENTS

1 lost, and I don't think the right decision is to go and
2 punish one of them because he may -- he agreed to pay a
3 bank and then he didn't pay them. He knew that risk when
4 he made the deal and that's a risk that he agreed to take
5 and unfortunately it is a risk that came to be a reality
6 and cost him the building. So again, I thank you for being
7 here. I know you'll go back there and you will deliberate
8 on this carefully and then you will come to the right
9 decision. Thank you.

10 THE COURT: All right. Mr. Wright, anything in reply?

11 MR. WRIGHT: Yes, Your Honor. One item. And I
12 appreciate Mr. Grissom -- I can't get back up unless he
13 brought up something that I didn't talk to you about. But
14 he talked to you about the decision his client made about
15 canceling that credit line, using it to save the business
16 or using it to protect his family. He made a choice. The
17 choice was "to break my promise to my brother, to break my
18 promise to my business partner." And Mr. Grissom
19 crystalized it just as clearly as you can do it, he chose
20 his wife and children over the business promise that he had
21 made. That's why you're here. You're here to enforce the
22 law. The law is that you're bound by your promises. He
23 made a choice a lot of you would have made and maybe I
24 would have made, but it was the wrong choice. He needed to
25 do everything he could to protect him and he chose

JURY CHARGE

1 absolutely intentionally knowing not to do it. Give us a
2 verdict.

3 THE COURT: All right. Ladies and gentlemen, all of
4 the evidence has been presented in the case, the attorneys
5 have made their closing arguments and now is the time of
6 the trial for me to charge you the law to be applied in
7 this case. I remind you that during this trial you and I
8 have certain duties to perform. As the trial judge my
9 responsibility is to preside over the trial of this case.
10 I also have the duty to rule on the admissibility of
11 evidence offered during this trial. You are to consider
12 only the evidence before you. If any testimony was ordered
13 stricken from the record during this trial you must
14 disregard that testimony. You are to consider only the
15 testimony which has been presented from the witness stand,
16 any exhibits which have been made a part of the record in
17 this case, and any stipulations of counsel. I have the
18 additional duty to charge you the law applicable to this
19 case. Your duty as jurors is to accept and apply the law
20 as I now state it to you. If you have any idea as to what
21 the law is or what the law ought to be and your idea is
22 different from what I tell you the law is, you must
23 disregard what the law is or ought to be because you are
24 sworn to accept the law and apply the law exactly as I
25 state it to you. In every case tried in this Court before

JURY CHARGE

1 a jury, the jury is the sole and exclusive judge of the
2 facts. A trial judge cannot comment on or make any
3 statement about the facts in a case. Since you are the
4 sole judges of the facts, do not think by anything I have
5 said during the trial that I have an opinion about the
6 facts in this case, the law does not allow me to have an
7 opinion about the facts in this case. The burden of proof
8 in this case is by a preponderance of the evidence, and the
9 plaintiff bares the burden of proving his case by a
10 preponderance of the evidence. A preponderance of the
11 evidence simply means the greater weight of the evidence.
12 It is evidence which as a whole shows that the fact sought
13 to be proved is more likely true than not true. In other
14 words, if you find that the facts sought to be proved by
15 the plaintiff are more likely true than not true, then the
16 plaintiff has proved his case by a preponderance of the
17 evidence and is entitled to judgment against the defendant.
18 On the other hand, if you find that the facts sought to be
19 proven by the plaintiff are more likely not true than true,
20 or that the facts supporting the defense are more likely
21 true than not true, or are equally as true as the facts
22 sought to be proved by the plaintiff, then the plaintiff
23 has failed to meet his burden of proof and is not entitled
24 to judgment against the defendant. The preponderance of
25 evidence is not determined by the number of witnesses

JURY CHARGE

1 testifying on behalf of a party, or the number of exhibits
2 introduced into evidence by a party. Instead, a
3 preponderance of the evidence must be determined by the
4 greater weight of all of the evidence. Necessarily you
5 must determine the credibility of witnesses who have
6 testified in this case. Credibility simply means
7 believability. Your duty as jurors is to evaluate the
8 evidence and to determine which evidence convinces you of
9 its truth. In determining the believability of witnesses
10 who have testified in this case you may believe one witness
11 over several witnesses or several witnesses over one
12 witness. You may believe a part of the testimony of a
13 witness and reject the remaining part of the testimony of
14 that same witness. You may believe the testimony of a
15 witness in its entirety or reject the testimony of a
16 witness in its entirety. You may consider whether the
17 witness has an interest in the result of the trial, whether
18 the witness is prejudiced towards either the plaintiff or
19 the defendant, the opportunity for the witness to have seen
20 the matters and things about which the witness may testify,
21 and the way the witness acts on the witness stand. In this
22 case the plaintiff claims that he is entitled to
23 indemnification from the defendant. Indemnification is
24 defined as that form of compensation which a defendant is
25 liable to pay a plaintiff for loss or damage the plaintiff

JURY CHARGE

1 incurs to a third party. A right to indemnity may arise by
2 contract express or implied, or by operation of law as a
3 matter of equity between the two parties. A right to
4 indemnification arising as a matter of equity between two
5 parties is also referred to as equitable indemnification.
6 If one person is compelled to pay damages because of
7 another's wrongdoing, he may maintain an action for
8 indemnity against the person whose wrong has been imputed
9 to him. However, this right is subject to the provision
10 that the person seeking indemnification has not committed
11 any wrongdoing in causing his own injury. Finally, the
12 plaintiff must prove by a preponderance or greater weight
13 of the evidence that he suffered damages which were
14 proximately caused by the defendant's breach of contract.
15 This does not mean that the plaintiff must prove damages to
16 a mathematical certainty or produce evidence of the exact
17 amount of damages suffered. However, the amount of damages
18 cannot be left to guesswork or speculation. Instead, the
19 evidence presented by the plaintiff must be enough to allow
20 you to determine the amount of damages with reasonable
21 certainty and accuracy. If you find that the plaintiff has
22 proved his case by a preponderance or greater weight of the
23 evidence, you must then determine how much the plaintiff is
24 entitled to recover from the defendant. If the plaintiff
25 is entitled to a verdict, that verdict should be for all

JURY CHARGE

1 actual damages proximately caused by the defendant's
2 actions. In other words, damages which can be claimed
3 under equitable indemnity include the amount the plaintiff
4 was required to pay to a third party because of the
5 defendant's breach of contract. The plaintiff has a duty
6 to minimize the damages caused by the defendant's breach of
7 contract. The test is whether the party has done what an
8 ordinarily prudent person would have done under like
9 circumstances. If a party used reasonable care to reduce
10 its losses, the non-breaching party may recover the full
11 amount of its damages. If a party has not done what an
12 ordinarily prudent person would have done under similar
13 circumstances, then you would reduce the damages
14 accordingly. Now, there are two possible verdicts which
15 you may find in this case, no significance whatsoever is to
16 be given to the order in which I state these verdicts to
17 you, I simply have to state one first and one second. The
18 possible verdicts in this case are we, the jury, find in
19 favor of the plaintiff, Kenneth R. Gainey, and award the
20 plaintiff judgment against the defendant Timothy M. Gainey
21 in the amount of -- and then you determine the amount of
22 damages. Or we the jury find in favor of the defendant.
23 All 12 of you must agree on the verdict. The verdict
24 cannot be based on sympathy, passion, prejudice, emotion or
25 any other consideration not in evidence in this case. Mr.

JURY CHARGE

1 Tores, as foreperson when the jury agrees on the verdict,
2 you will check the appropriate verdict here on the verdict
3 form, fill in any necessary information and then sign your
4 name on the signature line as foreperson. Then you will
5 need to knock on the door and advise the bailiff that you
6 have reached a decision in this case and we'll bring you
7 back into the courtroom. I am going to send you back to
8 the jury room at this point in time, but do not begin your
9 deliberations at this point in time. I need to check with
10 the attorneys to see if they have any challenges or
11 additional instructions they think I need to give to you.
12 If they do and I deem the charge is appropriate I will
13 bring you back in and make any corrections or additional
14 charges to you. If there are none to be made, we'll send
15 the exhibits back to the jury room with the verdict form
16 and the bailiff will inform you to begin your deliberations
17 at that time. But please do not begin your deliberations
18 until the bailiff has instructed you to do so. I'll excuse
19 you back to the jury room and we'll be with you in just a
20 few minutes. Thank you very much.

21 (The jury left the courtroom.)

22 THE COURT: All right. Any exceptions or additional
23 charges from the plaintiff?

24 MR. WRIGHT: None, Your Honor.

25 THE COURT: Any from the defense?

JURY CHARGE

1 MR. GRISSOM: No, Your Honor.

2 THE COURT: All right. Let's make sure we have all of
3 the exhibits here.

4 (At this time the alternates were dismissed and the
5 Jury began deliberations.)

6 (The jury returned with a question.)

7 THE COURT: We've got a jury question from the jury.
8 "Can we consider cash back from the second refi or is that
9 separate from the indemnification?"

10 MR. WRIGHT: I don't understand.

11 THE COURT: I don't know whether to bring them in here
12 for clarification or whether to say the cash back from the
13 second refi is not damages sustained by the plaintiff but
14 it can be considered for whatever extent you think is
15 appropriate in determining the value of the property or the
16 value -- amount of damages -- I'm trying to think of a way.

17 MR. WRIGHT: That's just a weird question --

18 MR. GRISSOM: I guess we need to understand what they
19 mean by.

20 MR. WRIGHT: Could they make the question --

21 THE COURT: What I'll do is just bring them in and ask
22 them what did they mean, what is it that they wanted to
23 know, I don't really understand your question. But I think
24 we all agree that any cash that the defendant got in the
25 second refinance is not necessarily damages -- or is not

JURY CHARGE

1 damages sustained by the plaintiff.

2 MR. WRIGHT: If the question is can we identify and
3 put that 69-8 on top of it, no. But I don't know what --

4 THE COURT: If they're asking can we consider the
5 amount he got back, can we consider that when we come up
6 with a value of what this property was worth.

7 MR. WRIGHT: And I don't know if that has any
8 relevance on the issue of damages, maybe it does, but --

9 THE COURT: Well, you've got to believe that, you
10 know, if he borrowed more in the second refinance then the
11 property had appreciated to some extent, but how that plays
12 on the value at the time of foreclosure I'm not really
13 sure. What's your position?

14 MR. GRISSOM: I think Mr. Wright is probably right,
15 it's either one or the other, can we indemnify plus that or
16 can we say no indemnity and give him the 69. I don't know
17 what -- which way --

18 THE COURT: Do you want me to bring them in and just
19 say that the cash back from the second refinance is
20 separate from indemnification?

21 MR. WRIGHT: Could we just ask what they mean by the
22 question? I think we need to understand.

23 THE COURT: All right. Anything from the plaintiff
24 before we bring the jury in?

25 MR. WRIGHT: No, Your Honor.

JURY CHARGE

1 THE COURT: Anything from the defense?

2 MR. GRISSOM: No, Your Honor.

3 (The jury returned to the courtroom.)

4 THE COURT: All right, ladies and gentlemen, welcome
5 back. I understand that you do have a question, Mr. Tores.
6 I understand the jury's question is, "Can we consider cash
7 back from the second refinance or is that separate from
8 indemnification?" My question is is what do you mean by
9 considered a cash back? What do you mean can we consider
10 it?

11 THE JUROR: Can we consider --

12 THE COURT: Let's see if this answers your question.
13 The fact that the defendant got cash back from the second
14 refinance, whatever he got, would not necessarily be
15 damages or would not be damages sustained by the plaintiff.
16 However, the fact that he got cash back at the second
17 refinance might assist you in your determination of what
18 the value of the property was. The plaintiff -- if you
19 find that the plaintiff is entitled to damages, his damages
20 would be what he lost as a result of the defendant's
21 actions, not necessarily what the defendant got from the
22 second refinance. So when you say can we consider the cash
23 back, you can consider it if it helps you determine the
24 amount of damages that the plaintiff lost. But the fact
25 that the defendant may have gotten X amount of dollars when

JURY CHARGE

1 he refinanced it does not necessarily mean that the
2 plaintiff is entitled to that X amount because the
3 defendant got it and the plaintiff didn't. Does that
4 answer your question?

5 THE JUROR: Yes.

6 THE COURT: All right. I will send you out and let
7 you continue your deliberations. Thank you very much.

8 (The jury left the courtroom and resumed
9 Deliberations.)

10 THE COURT: All right. Any challenges to those
11 instructions from the plaintiff?

12 MR. WRIGHT: Your Honor, I think you answered the
13 question about as well as can be answered in its context.
14 So I think your answer is clear and gave them enough
15 guidance to finish their deliberations.

16 THE COURT: All right. Anything from the defense?

17 MR. GRISSOM: No, Your Honor.

18 (The jury returned with a verdict.)

19 THE COURT: All right. I understand that the jury has
20 reached a verdict. Anything from the plaintiff before we
21 bring the jury in.

22 MR. WRIGHT: No, Your Honor.

23 THE COURT: Anything from the defense?

24 MR. GRISSOM: No, Your Honor.

25 (The jury returned to the courtroom.)

JURY VERDICT

1 THE COURT: All right, ladies and gentlemen, welcome
2 back. Mr. Tores, I understand that the jury has reached a
3 verdict; is that correct?

4 THE JUROR: Yes, sir.

5 THE COURT: Have you completed a verdict form and
6 signed it?

7 THE JUROR: I have.

8 THE COURT: If you would please hand it to the clerk.
9 All right. I will ask the clerk if he would please publish
10 the verdict.

11 THE CLERK: Thank you, Your Honor. Case number
12 2012-CP-29-1187, Kenneth R. Gainey, plaintiff, versus
13 Timothy M. Gainey, defendant. We the jury find in favor of
14 the defendant, dated March 18, 2015. Signed Jeffrey Tores,
15 Foreperson. Ladies and gentlemen of the jury, if this be
16 your verdict so say you all by the raising of your right
17 hands. Let the record reflect all jurors raised their
18 right hands.

19 THE COURT: All right. Thank you very much.

20 (The jury was dismissed.)

21 THE COURT: I know the Rules of Civil Procedure give
22 you a timeline to make post-trial motions, but is there
23 anything that anybody wants to make at this time?

24 MR. WRIGHT: Your Honor, on behalf of the plaintiff we
25 would move for a judgment notwithstanding the verdict on

JURY VERDICT

1 the grounds that the clear evidence was that the defendant
2 breached a contract, and the only evidence of damages was
3 for \$300,000 for the value of the building. So we're
4 entitled to a verdict of \$150,000 and we move for the Court
5 to overturn the verdict of the jury as the 13 juror render
6 justice in this case.

7 THE COURT: All right.

8 MR. GRISSOM: Your Honor, we oppose that motion. I
9 think it was incumbent on the jury to decide whether or not
10 any equity, if there was anything flowing from the
11 defendant to the plaintiff, and the jury unanimously
12 decided that there was no such equitable remedy to be
13 awarded in this case and I think the jury verdict should
14 stand.

15 THE COURT: I'm going to deny the motion. It is up to
16 the plaintiff to prove the amount of damages, and while I
17 think that there is an equitable indemnity claim here, even
18 though the only thing in the record was the plaintiff's
19 testimony as to the value of the property, that doesn't
20 necessarily mean that the jury was persuaded that that was
21 the value of property. And so I think they could have very
22 well said that the plaintiff failed to prove the amount of
23 damages he sustained as an element so I will deny the
24 motion. All right. Anything further?

25 MR. WRIGHT: No, sir.

JURY VERDICT

1 MR. GRISSOM: No, sir.

2 (End of trial proceedings.)

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DEED DRAWN BY:
ROBERT K. FOLKS
ATTORNEY AT LAW

FILED, RECORDED, INDEXED
09/03/2004 11:40AM
Rec Fee: 10.00 St Fees: 767.00
Co Fee: 324.50 Pages: 2
Register of Deeds
LANCASTER COUNTY, SC

STATE OF SOUTH CAROLINA)

TITLE TO REAL ESTATE

COUNTY OF LANCASTER)

KNOW ALL MEN BY THESE PRESENTS, that, **Clarence H. Hendrix, a/k/a C.H. Hendrix**, ("Grantor"), in the State aforesaid, for and in consideration of the sum of Two Hundred Ninety-five Thousand and no/100ths (\$295,000.00) Dollars, to the Grantor in hand paid at and before the sealing and delivery of these Presents, by the Grantee (the receipt whereof is hereby acknowledged), has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto **Kenneth Ray Gainey and Timothy M. Gainey**, ("Grantee"), and Grantee's heirs, successors and assigns, the following described property, to wit:

All that certain piece, parcel or lot of land, together with the improvements thereon, lying, being and situate in Gills Creek Township, Lancaster County, South Carolina, located at the southeast intersection of S.C. Hwy. 200 South and Reece Road (County Rd. 677), fronting on the south side of S.C. Hwy. 200 South, containing 2.266 acres, being shown, described and designated on plat of survey entitled 'Plat of Property of Timothy M. Gainey or Kenneth R. Gainey' dated August 20, 2004 surveyed by J.C. Crumpler and recorded in the Register of Deeds Office for Lancaster County, South Carolina as Plat No. 2004-469, which plat is incorporated herein and by reference made a part hereof.

For derivation, see the following Deeds to the Grantor herein recorded in the Register of Deeds Office for Lancaster County, South Carolina: Deeds of T.M. Hughes, Jr. and D. Reece Williams, Trustees under the Last Will and Testament of T.Y. Williams, deceased, recorded in Deed Book N-4 Page 29, dated August 18, 1955, recorded September 27, 1955 and in Deed Book V-5 Page 169, dated February 8, 1967, recorded February 23, 1967; Deed of Nelson Williams recorded in Deed Book A-6 Page 449, dated April 6, 1970, recorded April 7, 1970.

The within described property is conveyed subject to existing easements and rights of way, whether of record or not, and to restrictions, if any, appearing in the chain of title which said restrictions, if any, are not intended to be reimposed hereby.

Tax Map No. 81J-A-1

RECORDED THIS 3rd DAYOF September, 2004

ASSESSOR'S OFFICE

Received 9-7-04

Grantee's Address:

IN BOOK 0 PAGE 6-01 Tax Map Code 81J-A-1.00

1227 Great Falls Hwy Cheryl H. Morgan
Lancaster SC 29720

Or Portion Of 000

Auditor, Lancaster County, S. C.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned, unto the said Grantee and Grantee's Heirs, Successors and Assigns forever.

AND the Grantor does hereby bind Grantor's Heirs, Successors, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and Grantee's Heirs, Successors and Assigns, against Grantor and whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS the Grantor's Hand and Seal this 1st day of September, 2004, and in the two hundred twenty-ninth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Ray K. John
De B. Russell

Clarence H. Hendrix (Seal)
Clarence H. Hendrix, a/k/a C.H. Hendrix

STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

ACKNOWLEDGMENT

I, the undersigned notary public, do hereby certify that the above named Grantor personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 1st day of September, 2004.

Ray K. John (Seal)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 6/21/11

STATE OF SOUTH CAROLINA

0005781 Bk: 01257 Pg: 00075

COUNTY OF LANCASTER

MORTGAGE OF REAL ESTATE

FILED, RECORDED, INDEXED
09/03/2004 11:43AM
Rec Fee: 11.00 St Fees: 0.00
Co Fee: 0.00 Pages: 5
Register of Deeds
LANCASTER COUNTY, SC

THIS MORTGAGE is dated SEPTEMBER 1, 2004THIS MORTGAGOR(S) as referred to in this Mortgage is (are) KENNETH RAY GAINY and TIMOTHY M GAINY

THE MORTGAGEE, First Citizens Bank and Trust Company, Inc., will be referred to herein as "Lender." Lender's address is

CENTRAL LOAN OPERATIONS, PO BOX 29, COLUMBIA, SC 29202-0029WHEREAS, Borrower(s) TIMOTHY M GAINY DBA KENT PROPERTIES isindebted to Lender in the principal amount of \$ 134,000.00 pursuant to the note, note agreement, loan agreementor revolving loan agreement (hereinafter referred to as the "Note") dated SEPTEMBER 1, 2004

The Note includes all documents renewing, extending, or modifying it and/or evidencing future advances. The Note has a final maturity of

SEPTEMBER 1, 2009

The amount of debt secured by this Mortgage, including the outstanding amount of the Note and all Future Advances under paragraph 13, shall

at no time be more than double the principal amount of the Note or \$ 134,000.00 whichever is greater, plus interest, reasonable attorney's fees and court costs incurred in collection of amounts due hereunder and expenditures by Lender under Paragraph 5 below. Interest under the Note will be deferred, accrued, or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

THIS MORTGAGE is given to secure the Lender the repayment of the following amounts, with interest: (A) the indebtedness evidenced by the Note; (B) any Future Advances made under paragraph 13 below; (C) expenditures by Lender under paragraph 5 below; and (D) attorney's fees, court costs and other amounts which may be due under the Note and the Mortgage. In consideration of the above indebtedness and for other valuable consideration which Mortgagor acknowledged receiving, Mortgagor does hereby mortgage, grant and convey to Lender, its successors and assigns the following described property (hereinafter sometimes referred to as the "Property").

Together with all singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto; all improvements, now or hereafter situated thereon; and all fixtures (including, but not limited to, appliances, additions, improvements, and all items and material attached to or used in connection with the described Property) now or hereafter attached thereto; all easements, rights-of-way, gores of land, streets, ways, alleys, passages, sewer rights, waters, watercourses, water rights, and powers, and all estates, rights, titles, interests, privileges, liberties, and tenements, whatsoever and in any way belonging, relating or appertaining to any of the property herein above described, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Mortgagor, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law as well as in equity, of Mortgagor of, in and to the same, including but not limited to all judgements, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property or to any rights, appurtenant thereto, and all proceeds of any sales or other dispositions of the property or any part thereof (collectively hereafter referred to as the "Property"; and all of the same being deemed part of the Property and included in the reference thereto).

TO HAVE AND TO HOLD all and singular the Property unto the Lender and the successors and assigns of Lender forever.

MORTGAGOR covenants that Mortgagor is lawfully seized of the Property in fee simple absolute, that Mortgagor has good right and is lawfully authorized to sell, convey or encumber the same, and that the Property is free and clear of all encumbrances except as expressly provided in paragraph 15 and otherwise herein. Mortgagor covenants to warrant and forever defend all and singular the Property unto Lender and the successors or assigns of Lender from and against Mortgagor and all persons whomsoever lawfully claiming the same or any part thereof.

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of Mortgagor and Lender, that if Mortgagor pays or causes to be paid to Lender the debt secured hereby, the estate hereby granted shall cease, determine and be utterly null and void; otherwise said estate shall remain in full force and effect.

IT IS AGREED that Mortgagor shall be entitled to hold and enjoy the Property until a Default as herein defined has occurred.

MORTGAGOR further covenants and agrees with Lender as follows:

1. Assignment of Rents and Profits. As further security for all sums secured by this Mortgage, Mortgagor assigns to Lender all rents and profits arising from the Property; provided, however, that so long as no Default as hereinafter defined has occurred, Mortgagor shall be entitled to collect and retain all such rents and profits as the sole property of Mortgagor without accounting to Lender therefor.

2. Care of Property. Mortgagor will maintain the Property in good condition and repair and will neither permit nor allow waste thereof. Mortgagor will promptly repair or restore any portion of the Property which is damaged or destroyed by any cause whatsoever and will promptly pay when due all costs and expenses of such repair or restoration. Mortgagor will not remove or demolish any improvement or fixture which is now or hereafter part of the Property and will cut no timber on the Property without the express written consent of Lender. Lender shall be entitled to specific performance of the provisions of this paragraph.

3. Insurance. (A) Mortgagor shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of the Mortgage, insurance policies in such amounts as Lender may require, in no event less than the full insurable value, insuring the Property against fire, extended coverage and such other insurable hazards, casualties and contingencies as Lender may require including flood damage, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof. The form of such policies, the companies issuing them and the coverages provided shall be acceptable to Lender and shall contain a noncontributory mortgage endorsement making losses payable to Lender. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Mortgagor shall deliver to Lender receipts evidencing the payment of all premiums of such insurance policies and renewals. In the event of loss, Mortgagor will give written notice to Lender, and Lender may make proof of loss if not made promptly by Mortgagor. In the event of foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all right, title and interest of Mortgagor in and to all insurance policies and renewals thereof then in force shall pass to the grantee. Upon the failure of Mortgagor to obtain and maintain insurance satisfactory to Lender, Lender may at its own discretion procure and substitute for any and all of the insurance so held as aforesaid, such other policy or policies of insurance, in such amount as Lender, acting in its sole discretion, may determine; all without prejudice to its right to foreclose hereunder should Mortgagor fail to refuse to keep said premises so insured.

(B) Mortgagor hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone, and not to Mortgagor and Lender jointly. After deducting such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender, acting in its sole discretion, may: apply the net proceeds (1) to the payment of any sum secured by this Mortgage in such order as Lender may determine; or (2) to the replacement, repair, or restoration of the portion of the Property damaged or destroyed in a manner determined by Lender; or may release said net proceeds to the Mortgagor upon such conditions as Lender shall determine; or may apply said net proceeds for any combination of the foregoing; all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. If Lender elects to restore the improvements, any balance of such monies after restoration shall either be applied toward the reduction of indebtedness and any other sums secured hereby or shall be paid to Mortgagor. Lender shall not be responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure.

(C) Mortgagor shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of this Mortgage, liability insurance policies relating to the Property, in such amounts, with such companies and in such form as may be reasonably required by Lender. Lender may require such policies to contain an endorsement, in form satisfactory to Lender, naming Lender as an additional insured thereunder. Mortgagor shall pay promptly, when due, any premiums on such insurance policies and renewals thereof.

4. Taxes and Assessments. Mortgagor will pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property which is superior to the lien of this Mortgage and will deliver to Lender proof of payment of the same not less than ten (10) days prior to the date the same becomes delinquent; provided, however, that Mortgagor shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collection of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings and Mortgagor deposits with the authority to which such tax, assessment or charge is payable or with Lender appropriate security for payment of the same together with any applicable interest and penalties, should the same be determined due and owing.

5. Expenditures by Lender. If Mortgagor fails to make payment for restoration or repair of the Property, for insurance premiums or for taxes, assessments or other charges as required in the Mortgage, Lender may, but shall not be obligated to, pay for the same, and any such payment by Lender will be secured by this Mortgage and have the same rank and priority as the principal debt secured hereby and bear interest from the date of payment at the rate payable from time to time on outstanding principal under the Note. Payments made for taxes by Lender shall be a first lien on the Property to the extent of the taxes so paid with interest from the date of payment, regardless of the rank and priority of this Mortgage. Mortgagor will pay to the Lender in cash on demand an amount equal to any payment made by Lender pursuant to this paragraph plus interest thereon as herein provided.

6. Condemnation. Lender shall be entitled to be made a party to and to participate in any proceeding, whether formal or informal, for condemnation or acquisition pursuant to power of eminent domain of any portion of the Property. Mortgagor hereby assigns to Lender the right to collect and receive any payment or award to which mortgagor would otherwise be entitled by reason of condemnation or acquisition pursuant to the power of eminent domain of any portion of the Property. Any such payment or award received by Lender may, at the option of Lender, (1) be applied by Lender to payment of any sums secured by this Mortgage in such order as Lender may determine or (2) be applied in a manner determined by Lender to the replacement of the portion of the Property taken and to the repair or restoration of the remaining portion of the Property or (3) be released to Mortgagor upon such conditions as Lender may determine or (4) be used for any combination of the foregoing purposes. No portion of an indemnity payment which is applied to replacement, repair or restoration of any portion of the Property or which is released to Mortgagor shall be deemed a payment against any sums secured by this Mortgage.

7. Due on sale or Transfer of Property. At the option of the Lender, the indebtedness secured by this Mortgage shall become due and payable if, without the written consent of the Lender, the Mortgagor shall convey away the mortgaged premises, or if the title shall become vested in any other person in any manner whatsoever (to include a Sales Contract) other than by death of the Mortgagor. It is understood and agreed that in consideration for the consent of the Lender to any transfer of title to the mortgaged premises, the Lender at its option may charge a loan transfer fee and/or require changes in the rate of interest, term of loan, monthly payments of principal and interest and other terms and conditions of this Mortgage and/or the Note secured hereby.

8. Default. The occurrence of any of the following events shall be deemed a Default under this Mortgage:

(A) any default by Mortgagor as described in the Note;

(B) failure of Mortgagor to pay any other sum secured by this Mortgage when due;

(C) failure of Mortgagor to observe or perform any covenant or agreement set forth in this Mortgage or in any loan agreement entered into between the Mortgagor and Lender with respect to the indebtedness hereby secured within ten (10) days following the giving of notice by Lender to Mortgagor to observe or perform the same.

State of South Carolina

County of _____

To

First Citizens Bank and Trust Company, Inc.

Mortgage of Real Estate

Filed at _____ o'clock _____ M.

this _____ day of _____

and recorded in Mortgage Book _____

Page _____

R.M.C. or Clerk of Court C.P. & G.S.

County, S.C.

18. Waiver by Mortgagor. 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 MORTGAGED PROPERTY.**

IN WITNESS WHEREOF, Mortgagor has executed this Mortgage the day and year first above written.

Signed, sealed and delivered

in the presence of:

Mortgagor

[Signature]
Marcia O. Ayers

Kenneth Ray Gainey
KENNETH RAY GAINES
Timothy M. Gainey
TIMOTHY M. GAINES

STATE OF SOUTH CAROLINA

Probate

County of LANCASTER

Before me, the undersigned Notary Public, personally appeared the undersigned witness who, being duly sworn, deposed and said that (s)he saw Kenneth Ray Gainey and Timothy M. Gainey sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness witnessed the execution thereof.

SWORN to and subscribed

before me this 1st day

of SEPTEMBER 12, 2004

Marcia O. Ayers (SEAL)
Notary Public for South Carolina

My commission expires: 10-10-06

[Signature]

9. **Remedies.** Upon the occurrence of a Default as hereinabove defined, Lender may, without notice to Mortgagor unless otherwise required by laws, declare all sums secured by this Mortgage immediately due and payable and may commence proceedings to collect such sums, foreclose this Mortgage and sell the Property. At the foreclosure Lender shall be entitled to bid and to purchase the Property and shall be entitled to apply the debt secured hereby, or any portion thereof, in payment for the Property. The remedies provided to Lender in this paragraph shall be in addition to and not in lieu of any other rights and remedies provided in this Mortgage or by law, all of which rights and remedies may be exercised by Lender simultaneously or consecutively in any order without being deemed to have waived any right or remedy previously or not yet exercised.

10. **Appointment of Receiver.** Upon the occurrence of a Default as hereinabove defined Lender shall be entitled to the appointment of a receiver to enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to, the execution, cancellation or modification of leases, the making of repairs to the Property and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. The receiver shall be entitled to receive a reasonable fee for so managing the Property. All rents collected pursuant to this paragraph shall be applied first to the costs of taking control of and managing the Property and collecting the rents, including, but not limited to attorney's fees, receiver's fees, premiums on receiver's bonds, costs of repairs to the Property, premiums on insurance policies, taxes, assessments and other charges on the Property, and the costs of discharging any obligation of liability of Mortgagor as lessor or landlord of the Property and then to the sums secured by this Mortgage. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received. Lender shall not be liable to Mortgagor, anyone claiming under or through Mortgagor, or anyone having an interest in the Property by reason of anything done or left undone by Mortgagor under this paragraph. If the rents of the Property are not sufficient to meet the cost of taking control and managing the Property and collecting the rents, Lender, at its sole option, may advance funds to meet the costs. Any funds expended by Lender for such purposes shall become indebtedness of Mortgagor to Lender secured by this Mortgage. Unless Lender and Mortgagor agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Mortgagor requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note. The entering upon and taking and maintaining of control of the Property by Lender or the receiver and the application of rents as provided herein shall not cure or waive any default hereunder or invalidate any other right or remedy of Lender hereunder.

11. **Waiver by Lender.** Lender may, in its sole discretion, from time to time waive or forbear from enforcing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Lender of any right or remedy provided herein or by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

12. **Costs of Appraisals.** Mortgagor shall pay any and all costs of providing to Lender, as it may request from time to time, a current appraisal of the market value of the property prepared by an appraiser acceptable to Lender, in its sole discretion. If Mortgagor fails to pay such costs, Lender may advance the cost on the Mortgagor's behalf and add the amount of such advance to the principal under the Note, which shall bear interest at the rate as provided in the Note, and shall be due and payable on demand. Mortgagor's failure to pay the cost of any such appraisal, plus all accrued interest, in full, within ten (10) days of the date of such demand shall constitute an event of default entitling the Lender to accelerate the maturity of all debts secured by the Mortgage, as allowed by law.

13. **Future Advances.** Lender, at its option, may make Future Advances to Mortgagor. Such Future Advances, with interest at the rate payable from time to time on the outstanding principal under the Note, shall be secured by this Mortgage when evidenced by the Note or by any other note stating that it is secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make but is not obligated to make such Future Advances (A) at the request of the Mortgagor, whether or not there is an obligation to make Future Advances; (B) pursuant to an advance of funds under Paragraph 10 above; or (C) to pay, with or without the consent or request of Mortgagor, any amounts which may be due under any other mortgage or lien affecting the Property.

14. **Notices.** Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid to the party to whom directed at the latest address of such party is known to the party sending the same. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

15. **Miscellaneous.**

- (A) The agreements herein shall bind and inure to the benefit of the Mortgagor, Lender and their respective heirs, successors and assigns.
- (B) Whenever in this Mortgage one of the parties hereto is named or referred to, the heirs, legal representatives, successors and assigns of such parties shall be included and all covenants and agreements contained in this Mortgage by or on behalf of the Mortgagor or by or on behalf of the Lender shall bind and inure to the benefit of their representatives, heirs, successors and assigns, whether so expressed or not.
- (C) The headings of the sections, paragraphs and subdivisions of this Mortgage are for the convenience of reference only, are not to be considered a part hereof and shall not limit or otherwise affect any of the terms hereof.
- (D) If any provision of this Mortgage conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage which can be given effect without the conflicting provision, and to this end the provisions of this Mortgage are declared to be severable.
- (E) Lender may make or cause to be made reasonable entries upon and inspections of the Property upon giving Mortgagor prior notice.
- (F) All covenants of Mortgage shall be joint and several.
- (G) This Mortgage shall be governed by, construed and enforced in accordance with the laws of South Carolina.
- (H) If this is not a first Mortgage, Mortgagor has provided Lender with an attorney's opinion letter (or title insurance) setting out in detail any and all prior Mortgages or liens including the date of the existing mortgage liens and the original amounts.
- (I) If the Mortgagor is not obligated on the debt which this Mortgage secures, then the Mortgagor acknowledges that Note was made in consideration for this transaction and the owner of the Property agrees to be bound by all terms and conditions of the Note and the Mortgage.

16. Mortgagor agrees to indemnify, defend and save Lender and its successors and assigns harmless from and against all claims, actions, administrative proceedings, fines, costs, liabilities, attorney's fees and costs or the like that arise directly or indirectly from the presence or release of hazardous materials, substances, waste or other environmentally regulated substances on the Property. The Mortgagor shall also indemnify and hold the Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgements and expenses (including attorneys, consultants or expert's fees and expenses) of any kind and nature suffered by or asserted against either Lender or Mortgagor as a direct or indirect result of any requirement under any law, regulation or ordinance, local, state or federal, which requires the elimination, removal, or transfer of any hazardous material, substances, waste or other environmentally regulated substances. The Mortgagor's obligations hereunder to the Lender shall not be limited to any extent by the term of the Note, and as to any act or occurrence prior to payment in full and satisfaction of the note which gives rise to the liability hereunder, shall continue to survive and remain in full force and effect not withstanding payment in full and satisfaction of the Note and Mortgage, or foreclosure under the Mortgage, or delivery of a deed in lieu of foreclosure. A default hereunder may, at the option of the Lender, be treated as a default under the documents evidencing and securing the loans. Hazardous materials, substances, waste or other environmentally regulated substances as those terms are used herein shall have the meanings specified in the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), as amended, the Resource Conservation Recovery Act, as amended, the Clean Air Act, the Clean Water Act, or any federal, state or local statute, law, ordinance, code, rule, regulation, order or decree as may now or at any time hereafter be in effect.

17. **Environmental Assessment Costs.** The Mortgagor shall pay the cost of providing to Lender, at Lender's request, a current environmental site assessment, audit, or survey ("Assessment") of the Property, which Assessment shall be prepared by a person or company acceptable to Lender, in Lender's sole discretion. If Mortgagor fails to pay the costs of the Assessment, Lender may pay such cost and the same shall constitute an advance under the Note and be secured by the Property, and shall be due and payable on demand. Mortgagor's failure to pay such amount with all accrued interests in full within ten (10) days of date of such demand shall constitute an event of default and entitle Lender to accelerate the maturity of any and all debts secured by the property, as allowed by law.

EXHIBIT "A"

All that certain piece, parcel or lot of land, together with the improvements thereon, lying, being and situate in Gills Creek Township, Lancaster County, South Carolina, located at the southeast intersection of S.C. Highway 200 South and Reece Road (County Rd. 677), fronting on the south side of S.C. Hwy. 200 South, containing 2.266 acres, being shown, described and designated on plat of survey entitled 'Plat of Property of Timothy M. Gainey or Kenneth R. Gainey' dated August 20, 2004 surveyed by J.C. Crumpler and recorded in the Register of Deeds Office for Lancaster County, South Carolina as Plat No. 2004-469, which plat is incorporated herein and by reference made a part hereof.

For derivation, see the following Deeds to the Grantor herein recorded in the Register of Deeds Office for Lancaster County, South Carolina: Deeds of T.M. Hughes, Jr. and D. Reece Williams, Trustees under the Last Will and Testament of T.Y. Williams, deceased, recorded in Deed Book N-4 Page 29, dated August 18, 1955, recorded September 27, 1955 and in Deed Book V-5 Page 169, dated February 8, 1967, recorded February 23, 1967; Deed of Nelson Williams recorded in Deed Book A-6 Page 449, dated April 6, 1970, recorded April 7, 1970.

The within described property is conveyed subject to existing easements and rights of way, whether of record or not, and to restrictions, if any, appearing in the chain of title which said restrictions, if any, are not intended to be reimposed hereby.

Tax Map No. 81-J-A-1

THS - KG

RECORDATION REQUESTED BY:
FIRST CITIZENS BANK AND TRUST COMPANY, INC
PO Box 29
Columbia SC 29202

WHEN RECORDED MAIL TO:
First Citizens
Loan Operations MC994033
PO Box 29
Columbia SC 29202

SEND TAX NOTICES TO:
TIMOTHY M GAINNEY
4078 MAJOR EVANS RD
LANCASTER SC 29720-7103

2009012502

MORTGAGE
RECORDING FEES

\$13.00

PRESENTED & RECORDED:

09-24-2009 12:14 PM

JOHN LANE

REGISTER OF DEEDS

LANCASTER COUNTY, SC

By: CANDICE KIRKLEY DEPUTY

BK:MORT 2163

PG:6-12

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

STATE OF SOUTH CAROLINA }

COUNTY OF LANCASTER }

MORTGAGE OF REAL ESTATE

THIS MORTGAGE is dated 09/23/2009

THE MORTGAGOR(S) as referred to in this Mortgage is (are) Timothy M. Gainey and Kenneth Ray Gainey

THE MORTGAGEE, First Citizens Bank and Trust Company, Inc. will be referred to herein as "Lender". Lender's address is PO Box 29, MC994033, Columbia, SC 29202.

WHEREAS, Borrower(s) TIMOTHY M GAINNEY

*KENT PROPERTIES

is (are) indebted to Lender in the principal amount of \$ 187,000.00 pursuant to the note, note agreement, loan agreement or revolving loan agreement (hereinafter referred to as the "Note") dated 09/23/2009. The Note includes all documents renewing, extending, or modifying it and/or evidencing future advances. The Note has a final maturity of 10/01/2014

The amount of debt secured by this Mortgage, including the outstanding amount of the Note and all Future Advances under paragraph 13, shall at no time be more than double the principal amount of the Note or \$ 187,000.00, whichever is greater, plus interest, reasonable attorney's fees and court costs incurred in collection of amounts due hereunder and expenditures by Lender under Paragraph 5 below. Interest under the Note will be deferred, accrued, or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

THIS MORTGAGE is given to secure the Lender the repayment of the following amounts, with interest: (A) the indebtedness evidenced by the Note; (B) any Future Advances made under Paragraph 13 below; (C) expenditures by Lender under Paragraph 5 below; and (D) attorney's fees, court costs and other amounts which may be due under the Note and the Mortgage. In consideration of the above indebtedness and for other valuable consideration

which Mortgagor acknowledges receiving. Mortgagor does hereby mortgage, grant and convey to Lender, its successors and assigns the following described property (hereinafter sometimes referred to as the "Property"):

The Real Property is located at:

1227 GREAT FALLS HIGHWAY, LANCASTER, SC 29720 (LANCASTER)

See Exhibit A

Together with all singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto; all improvements, now or hereafter situated thereon; and all fixtures (including, but not limited to, appliances, additions, improvements, and all items and material attached to or used in connection with the described Property) now or hereafter attached thereto; all easements, rights-of-way, gores of land, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights, and powers; and all estates, rights, titles, interests, privileges, liberties, and tenements, whatsoever and in any way belonging, relating or appertaining to any of the property herein above described, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Mortgagor; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law as well as in equity of Mortgagor of, in and to the same, including but not limited to all judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property or to any rights, appurtenant thereto; and all proceeds of any sales or other dispositions of the property or any part thereof (collectively hereafter referred to as the "Property"; and all of the same being deemed part of the Property and included in the reference thereto).

TO HAVE AND TO HOLD all and singular the Property unto Lender and the successors and assigns of Lender forever,

MORTGAGOR covenants that Mortgagor is lawfully seized of the Property in fee simple absolute, that Mortgagor has good right and is lawfully authorized to sell, convey or encumber the same, and that the Property is free and clear of all encumbrances except as expressly provided in Paragraph 15 and otherwise herein. Mortgagor covenants to warrant and forever defend all and singular the Property unto Lender and the successors or assigns of Lender from and against Mortgagor and all persons whomsoever lawfully claiming the same or any part thereof.

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of Mortgagor and Lender, that if Mortgagor pays or causes to be paid to Lender the debt secured hereby, the estate hereby granted shall cease, determine and be utterly null and void; otherwise said estate shall remain in full force and effect.

IT IS AGREED that Mortgagor shall be entitled to hold and enjoy the Property until a Default as herein defined has occurred.

MORTGAGOR further covenants and agrees with Lender as follows:

1. **Assignment of Rents and Profits.** As further security for all sums secured by this Mortgage, Mortgagor assigns to Lender all rents and profits arising from the Property; provided, however, that so long as no Default, as hereinafter defined, has occurred, Mortgagor shall be entitled to collect and retain all such rents and profits as the sole property of Mortgagor without accounting to Lender therefore.
2. **Care of Property.** Mortgagor will maintain the Property in good condition and repair and will neither permit nor allow waste thereof. Mortgagor will promptly repair or restore any portion of the Property which is damaged or destroyed by any cause whatsoever and will promptly pay when due all costs and expenses of such repair or restoration. Mortgagor will not remove or demolish any improvement or fixture which is now or hereafter part of the

Property and will cut no timber on the Property without the express written consent of Lender. Lender shall be entitled to specific performance of the provisions of this paragraph.

3. Insurance. (A) Mortgagor shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of the Mortgage, insurance policies in such amounts as Lender may require, in no event less than the full insurable value, insuring the Property against fire, extended coverage and such other insurable hazards, casualties and contingencies as Lender may require including flood damage, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof. The form of such policies, the companies issuing them and the coverages provided shall be acceptable to Lender and shall contain a noncontributory mortgage endorsement making losses payable to Lender. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Mortgagor shall deliver to Lender receipts evidencing the payment of all premiums of such insurance policies and renewals. In the event of loss, Mortgagor will give written notice to Lender, and Lender may make proof of loss if not made promptly by Mortgagor. In the event of foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all rights title and interest of Mortgagor in and to all insurance policies and renewals thereof then in force shall pass to the grantee. Upon the failure of Mortgagor to obtain and maintain insurance satisfactory to Lender, Lender may at its own discretion procure and substitute for any and all of the insurance so held as aforesaid, such other policy or policies in insurance, in such amount as Lender, acting in its sole discretion, may determine; all without prejudice to its right to foreclose hereunder should Mortgagor fail or refuse to keep said premises so insured.

(B) Mortgagor hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone and not to Mortgagor and Lender jointly. After deducting from such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender, acting in its sole discretion, may apply the net proceeds (1) to the payment of any sum secured by this Mortgage in such order as Lender may determine, or (2) to the replacement, repair, or restoration of the portion of the Property damaged or destroyed in a manner determined by Lender; or may release said net proceeds to the Mortgagor upon such conditions as Lender shall determine; or may apply said net proceeds for any combination of the foregoing; all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. If Lender elects to restore the improvements, any balance of such monies after restoration shall either be applied toward the reduction of indebtedness and any other sums secured hereby or shall be paid to Mortgagor. Lender shall not be responsible for any failure to collect any insurance proceeds due under the terms of any policy regardless of the cause of such failure.

(C) Mortgagor shall, at its sole expense, obtain for, deliver to, and maintain for the benefit of Lender, during the life of this Mortgage, liability insurance policies relating to the Property, in such amounts, with such companies and in such form as may be reasonably required by Lender. Lender may require such policies to contain an endorsement, in form satisfactory to Lender, naming Lender as an additional insured thereunder. Mortgagor shall pay promptly, when due, any premiums on such insurance policies and renewals thereof.

4. Taxes and Assessments. Mortgagor will pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property which is superior to the lien of this Mortgage and will deliver to Lender proof of payment of the same not less than ten (10) days prior to the date the same becomes delinquent; provided, however, that Mortgagor shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collection of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings and Mortgagor deposits with the authority to which such tax, assessment or charge is payable or with Lender appropriate security for payment of the same together with any applicable interest and penalties, should the same be determined due and owing.

5. Expenditures by Lender. If Mortgagor fails to make payment for restoration or repair of the Property (including any improvements to bring the Property in compliance with federal, state or local laws, ordinances or regulations), for insurance premiums or for taxes, assessments or other charges as required in the Mortgage, Lender may, but shall not be obligated to, pay for the same. Any such payment by Lender will be secured by this Mortgage and have the same rank and priority as the principal debt secured hereby and bear interest from the date of payment at the rate payable from time to time to outstanding principal under the Note. Payments made for taxes by Lender shall be a first lien on the Property to the extent of the taxes so paid with interest from the date of payment, regardless of the rank and priority of this Mortgage, Mortgagor will pay to Lender in cash on demand an amount equal to any payment made by Lender pursuant to this paragraph plus interest thereon as herein provided.

6. Condemnation. Lender shall be entitled to be made a party to and to participate in any proceeding, whether formal or informal, for condemnation or acquisition pursuant to power of eminent domain of any portion of the Property. Mortgagor hereby assigns to Lender the right to collect and receive any payment or award to which Mortgagor would otherwise be entitled by reason of condemnation or acquisition pursuant to the power of eminent domain of any portion of the Property. Any such payment or award received by Lender may, at the option of Lender, (1) be applied to payment of any sums secured by this Mortgage in such order as Lender may determine; or (2) be applied in a manner determined by Lender to the replacement of the portion of the Property taken and to the repair or restoration of the remaining portion of the Property; or (3) be released to Mortgagor upon such conditions as Lender may determine; or (4) be used for any combination of the foregoing purposes. No portion of an indemnity payment which is applied

to replacement, repair or restoration of any portion of the Property or which is released to Mortgagor shall be deemed a payment against any sums secured by this Mortgage.

7. Due on Sale or Transfer of Property. At the option of Lender, the indebtedness secured by this Mortgage shall become due and payable if, without the written consent of Lender, Mortgagor shall convey away the mortgaged premises, or if the title shall become vested in any other person in any manner whatsoever, (to include a Sales Contract) other than by death of Mortgagor. It is understood and agreed that in consideration for the consent of Lender to any transfer of title to the mortgaged premises, Lender, at its option, may charge a loan transfer fee and/or require changes in the rate of interest, term of loan, monthly payments of principal and interest and other terms and conditions of this Mortgage and/or the Note secured hereby.

8. Default. The occurrence of any of the following events shall be deemed a Default under this Mortgage:

- (A) any default by Mortgagor as described in the Note;
- (B) failure of Mortgagor to pay any other sum secured by this Mortgage when due;
- (C) failure of Mortgagor to observe or perform any covenant or agreement set forth in this Mortgage or any loan agreement entered into between Mortgagor and Lender with respect to the indebtedness hereby secured within ten (10) days following the giving of notice by Lender to Mortgagor to observe or perform the same.

9. Remedies. Upon the occurrence of a Default as hereinabove defined, Lender may, without notice to Mortgagor unless otherwise required by laws, declare all sums secured by this Mortgage immediately due and payable and may commence proceedings to collect such sums, foreclose this Mortgage and sell the Property. At the foreclosure, Lender shall be entitled to bid and to purchase the Property and shall be entitled to apply the debt secured hereby, or any portion thereof, in payment for the Property. The remedies provided to Lender in this paragraph shall be in addition to and not in lieu of any other rights and remedies provided in this Mortgage or by law, all of which rights and remedies may be exercised by Lender simultaneously or consecutively in any order without being deemed to have waived any right or remedy previously or not yet exercised.

10. Appointment of Receiver. Upon the occurrence of a Default as hereinabove defined Lender shall be entitled to the appointment of a receiver to enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to, the execution, cancellation or modification of leases; the making of repairs to the Property; and the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Mortgage. The receiver shall be entitled to receive a reasonable fee for so managing the Property. All rents collected pursuant to this paragraph shall be applied first to the costs of taking control of and managing the Property and collecting the rents, including, but not limited to attorney's fees, receiver's fees, premiums on receiver's bonds, costs or repairs to the Property, premiums on insurance policies, taxes, assessments and other charges on the Property, and the costs of discharging any obligation of liability of Mortgagor as lessor or landlord of the Property and then to the sums secured by this Mortgage. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received. Lender shall not be liable to Mortgagor, anyone claiming under or through Mortgagor, or anyone having an interest in the Property by reason of anything done or left undone by Mortgagor under this paragraph. If the rents of the Property are not sufficient to meet the cost of taking control and managing the Property and collecting the rents, Lender, at its sole option, may advance funds to meet the costs. Any funds expended by Lender for such purposes shall become indebtedness of Mortgagor to Lender secured by this Mortgage. Unless Lender and Mortgagor agree in writing to other terms of payment, such amounts shall be payable upon notice from Lender to Mortgagor requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note. The entering upon and taking and maintaining of control of the Property by Lender or the receiver and the application of rents as provided herein shall not cure or waive any default hereunder or invalidate any other right or remedy of Lender hereunder.

11. Waiver by Lender. Lender may, in its sole discretion, from time to time waive or forbear from endorsing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Lender of any right or remedy provided herein by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

12. Costs of Appraisals. Mortgagor shall pay any and all costs of providing to Lender, as it may request from time to time, a current appraisal of the market value of the Property prepared by an appraiser acceptable to Lender, in its sole discretion. If Mortgagor fails to pay such costs, Lender may advance the cost on the Mortgagor's behalf and add the amount of such advance to the principal under the Note, which shall bear interest at the rate as provided in the Note, and shall be due and payable on demand. Mortgagor's failure to pay the cost of any such appraisal, plus all accrued interest, in full, within ten (10) days of the date of such demand shall constitute an event of default entitling the Lender to accelerate the maturity of all debts secured by the Mortgage, as allowed by law.

13. Future Advances. Lender, at its option, may make Future Advances to Mortgagor. Such Future Advances, with interest at the rate payable from time to time on the outstanding principal under the Note, shall be secured by this Mortgage when evidenced by the Note or by any other note stating that it is secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make but is not obligated to make such Future Advances (A) at the request of Mortgagor, whether or not there is an obligation to make Future Advances; (B) pursuant to advance of funds provided for

herein; or (C) to pay, with or without the consent or request of Mortgagor, any amounts which may be due under any other mortgage or lien affecting the Property.

14. **Notices.** Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid to the party to who directed at the latest address of such party that is known to the party sending the same. This paragraph shall not be deemed to prohibit any other manner of delivering a notice of other document.

15. **Miscellaneous.**

- (A) The agreements herein shall bind and inure to the benefit of the Mortgagor, Lender and their respective heirs, successors and assigns.
- (B) Whenever in this Mortgage one of the parties hereto is named or referred to, the heirs, legal representatives, successors and assigns of such parties shall be included and all covenants and agreements contained in this Mortgage by or on behalf of Mortgagor or by or on behalf of Lender shall bind and inure to the benefit of their representatives, heirs, successors and assigns, whether so expressed or not.
- (C) The headings of the sections, paragraphs and subdivisions of this Mortgage are for the convenience of reference only, are not to be considered a part hereof and shall not limit or otherwise affect any of the terms hereof.
- (D) If any provision of this Mortgage conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage which can be given effect without the conflicting provision, and to this end the provisions of this Mortgage are declared to be severable.
- (E) Lender may make or cause to be made reasonable entries upon and inspections of the Property upon giving Mortgagor prior notice.
- (F) All covenants of Mortgage shall be joint and several.
- (G) This Mortgage shall be governed by, construed and enforced in accordance with the laws of South Carolina.
- (H) If this is not a first mortgage, Mortgagor has provided Lender with an attorney's opinion (or title insurance) setting out in detail any and all prior mortgages or liens including the date of the existing mortgage liens and the original amounts.
- (I) If the Mortgagor is not obligated on the debt which this Mortgage secures, then the Mortgagor acknowledges that Note was made in consideration for this transaction and the owner of the Property agrees to be bound by all terms and conditions of the Note and the Mortgage.
- (J) **Construction Mortgage.** If this is a construction loan, this Mortgage is a "construction mortgage" for the purposes of Sections 9-334 and 2A-309 of the Uniform Commercial Code, as those sections have been adopted by the State of South Carolina.

16. **Compliance with Environmental Laws.** Mortgagor agrees to indemnify, defend and save Lender and its successors and assigns harmless from and against all claims, actions, administrative proceedings, fines, costs, liabilities, attorney's fees and costs or the like that arise directly or indirectly from the presence or release of hazardous materials, substances, waste or other environmentally regulated substances on the Property. Mortgagor shall also indemnify and hold Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorney's, consultant's or expert's fees or expenses) of any kind and nature suffered by state or federal, which requires the elimination, removal, or transfer of any hazardous material, substances, waste or other environmentally regulated substances. Mortgagor's obligations hereunder to Lender shall not be limited to any extent by the term of the Note, as to any act or occurrence prior to payment in full and satisfaction of the Note which gives rise to the liability hereunder, shall continue to survive and remain in full force and effect notwithstanding payment in full and satisfaction of the Note and Mortgage, or foreclosure under the Mortgage, or delivery of a deed in lieu of foreclosure. A default hereunder may, at the option of the Lender, be treated as a default under the documents evidencing and securing the loans. Hazardous materials, substances, waste or other environmentally regulated substances, as those terms are used herein, shall have the meanings specified in the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), as amended, the Resource Conservation Recovery Act, as amended, the Clean Air Act, the Clean Water Act, or any federal, state or local statute, law, ordinance, code, rule, regulation, order or decree as may now or at any time hereafter be in effect.

17. **Environmental Assessments Costs.** The Mortgagor shall pay the cost of providing to Lender, at Lender's request, a current environmental site assessment, audit, or survey ("Assessment") of the Property, which Assessment shall be prepared by a person or company acceptable to Lender, in Lender's sole discretion. If Mortgagor fails to pay the costs of the Assessment, Lender may pay such cost and the same shall constitute an advance under the Note to be secured by the Property, and shall be due and payable on demand. Mortgagor's failure to pay such amount with all accrued interests in full within ten (10) days of date of such demand shall constitute an event of default and entitle Lender to accelerate the maturity of any and all debts secured by the Property, as allowed by law. The Mortgagor acknowledges that the Lender disclaims any duty or obligation to the Mortgagor or any third party in regard to these assessments and is acting solely in compliance with its lending practices. The Mortgagor is advised to seek technical and/or legal advice in regard to any environmental concerns associated with the Property.

18. Waiver by Mortgagor. 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 (30) days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. UNLESS PROHIBITED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

IN WITNESS WHEREOF, Mortgagor has executed this Mortgage the day and year first above written.

Signed, sealed and delivered in the presence of:

Sherry A. Roberts
Witness

[Signature]
Witness

Timothy M. Gainey
Mortgagor Timothy M. Gainey

Kenneth R. Gainey
Mortgagor Kenneth Ray Gainey

STATE OF SOUTH CAROLINA }

Probate

County of Lancaster }

Before me, the undersigned Notary Public, personally appeared the undersigned witness who, being duly sworn, depose and said that (s)he saw

Mortgagor
sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness witnessed the execution thereof.

SWORN to and subscribed

before me this 13 day

of Sept 2014

[Signature]
Notary Public for South Carolina

My commission expires: Sept 1 2014

Sherry A. Roberts
(Witness)

EXHIBIT 'A' ATTACHED HERETO AND MADE A PART HEREOF MORTGAGE FROM TIMOTHY M. GAINES AND KENNETH RAY GAINES TO FIRST CITIZENS BANK AND TRUST COMPANY, INC.

All that piece, parcel or lot of land, with improvements thereon, lying, being and situate on the South side of South Carolina State Highway # 200 just south of the corporate limits of the Town of Lancaster, Lancaster County, South Carolina, being more particularly shown and described as that 2.266 acre tract of land, more or less, on a plat thereof entitled 'PLAT OF PROPERTY OF TIMOTHY M. GAINES OR KENNETH R. GAINES' dated August 20, 2004 made by J.C. Crumpler, South Carolina Registration Number 6574, recorded in the Office of the Register of Deeds for Lancaster County in Plat Book 2004-469, reference to which plat is craved for a more particular description thereof.

Being property conveyed to Timothy M. Gaines and Kenneth Ray Gaines by Deed recorded September 3, 2004 in Deed Book 250 Page 235 in the Register of Deeds Office for Lancaster County, South Carolina.

XATB / KES

LANCASTER COUNTY ASSESSOR

Tax Map:

0081J 0A 001 00

2011005257

DEED	
RECORDING FEES	\$10.00
STATE TAX	\$0.00
COUNTY TAX	\$0.00

PRESENTED & RECORDED:

05-11-2011 11:23 AM

JOHN LANE

REGISTER OF DEEDS

LANCASTER COUNTY, SC

By: CANDICE KIRKLEY DEPUTY

BK: DEED 615

PG: 40-42

Title not Examined

Deed Drawn By:

RICK S. CHANDLER, JR.

ATTORNEY AT LAW

RECORDED THIS 13th DAY
OF MAY, 2011

IN BOOK 2011 PAGE G-1

Charles H. Morgan

Auditor, Lancaster County, SC

STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, that, **Timothy M. Gainey and Kenneth Ray Gainey** ("Grantor"), in the State aforesaid, for and in consideration of the sum of **Five no/100ths (\$5.00) Dollars**, to the Grantor in hand paid at and before the sealing and delivery of these Presents, by the Grantee (the receipt whereof is hereby acknowledged), has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto **A List Properties, LLC**, ("Grantee"), and Grantee's heirs, successors and assigns all our right, title and interest in and to the following described property, to wit:

All that piece, parcel or lot of land, with improvements thereon, lying, being and situate on the South side of South Carolina State Highway #200 just south of the corporate limits of the Town of Lancaster, Lancaster County, South Carolina, being more particularly shown and described as that 2.266 acre tract of land, more or less, on a plat thereof entitled 'PLAT OF PROPERTY OF TIMOTHY M. GAINEY OR KENNETH R. GAINEY' dated August 20, 2004 made by J.C. Crumpler, South Carolina Registration Number 6574, recorded in the Office of the Register of Deeds for Lancaster County in Plat Book 2004-469, reference to which plat is craved for a more particular description thereof.

Being property conveyed to Grantors herein by deed recorded September 3, 2004 in Deed Book 250, at Page 235 in the Register of Deeds Office for Lancaster County, South Carolina.

Grantee's Address: 4078 Major Evans Road, Lancaster, SC 29720

The within described property is conveyed subject to existing easements and rights of way, whether of record or not, and to restrictions, if any, appearing in the chain of title which said restrictions, if any, are not intended to be reimposed hereby.

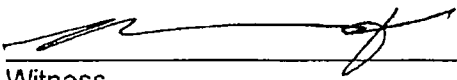
TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned, unto the said Grantee and Grantee's Heirs, Successors and Assigns forever.

AND the Grantor does hereby bind Grantor's Heirs, Successors, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and Grantee's Heirs, Successors and Assigns, against Grantor and whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS the Grantor's Hand and Seal this 29th day of April, 2011, and in the two hundred thirty fifth year of the Sovereignty and Independence of the United States of America.

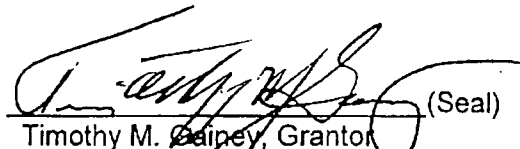
SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

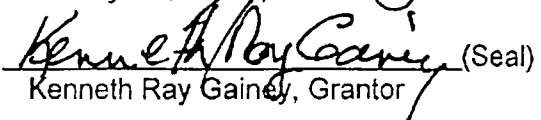


Witness



Witness

 (Seal)
Timothy M. Gainey, Grantor

 (Seal)
Kenneth Ray Gainey, Grantor

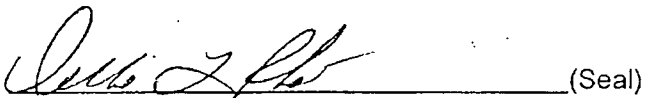
STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

ACKNOWLEDGMENT

I, the undersigned notary public, do hereby certify that the above named Grantor personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 29th day of April, 2011.

 (Seal)

NOTARY PUBLIC FOR SOUTH CAROLINA

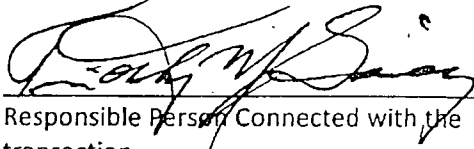
My Commission Expires: 4-3-2017

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

AFFIDAVIT FOR EXEMPT TRANSFERS

PERSONALLY appeared before the undersigned, who being duly sworn, deposes and says:

1. I have read the information on the back of this affidavit and I understand such information.
2. The Property being transferred is located at HIGHWAY #200
bearing LANCASTER County Tax Map Number 81J-A-1.00, was transferred
by TIMOTHY M. GAINY AND KENNETH RAY GAINY
to A LIST PROPERTIES on APRIL 29, 2011.
3. The deed is exempt from the deed recording fee because (See Information section of affidavit):
CONSIDERATION LESS THAN \$100
4. As required by Code Section 12-24-70, I state that I am a responsible person who was connected
with the transaction as: GRANTOR
5. I understand that a person required to furnish this affidavit who willfully furnishes a false or
fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more
than one thousand dollars or imprisoned not more than one year, or both.

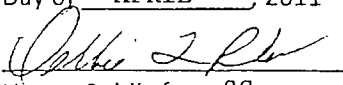

Responsible Person Connected with the
transaction

TIMOTHY M. GAINY

Print or type name here

SWORN to before me this 29th

Day of APRIL, 2011



Notary Public for SC

My Commission expires: 4/3/2017

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STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

LEASE AGREEMENT WITH
OPTION TO PURCHASE

ARTICLE I

PARTIES:

THIS LEASE AGREEMENT, made and entered into as of the last date of execution hereof, by and between A LIST PROPERTIES, LLC (hereinafter called '**Lessor**') and FAMDAMILY ENTERPRISES LLC, (hereinafter called '**Lessee**').

ARTICLE II

LEASED PROPERTY:

Lessor, in consideration of the rents to be paid and in further consideration of the covenants, conditions, agreements and stipulations of the Lessee hereinafter expressed, Lessor covenants and agrees to lease to Lessee, for the period and upon the terms hereinafter set out, subject to the affirmative agreements of the Lessee, the real property to wit, hereinafter called the 'Leased Property', and being more particularly shown and described on Exhibit 'A' and Exhibit 'B' attached hereto and made a part hereof.

It being further agreed that both Lessor and Lessee shall have full access of service road that surrounds the entire property.

ARTICLE III

TERM:

The term of this Lease shall be for a period of one (1) year commencing on April 1, 2011, and ending April 1, 2012.

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ARTICLE IV

USE AND CARE OF LEASED PROPERTY:

The Leased Property shall be used by the Lessee for its lawful purpose, and the Lessee shall not use or permit any other person to use the same for any other purpose without the prior written consent of Lessor.

Lessee shall not violate any laws, ordinances, orders or regulations of any lawful authority having jurisdiction over the Leased Property or the adjacent public streets. Lessee shall not permit any act to be preformed or any practice to be adopted or followed in or about the Leased Property which shall cause or be likely to cause injury or damage to any person or to the premises. Lessee at all times shall keep the Leased Property in a neat and orderly condition and shall keep the Leased property free of rodents, bugs and vermin.

Lessee agrees that Lessor and its agent or other representatives shall have the right to enter upon the Leased Property at all reasonable hours for the purpose of examining the Leased Property.

ARTICLE V

RENTAL:

The Lessee shall pay as rental for the Leased Property the sum of Three Thousand Five Hundred and no/100ths (\$3,500.00) dollars per month. Rental payments shall be due in advance on the first day of each calendar month. A late charge of five percent (5%) shall be added to any monthly rental payment not paid by the fifteenth (15th).

Notwithstanding the provisions of the first paragraph of Article XI, time is of the essence in the payment of the rental due under this agreement. In the event the rental is not paid by the time fixed for payment, this Lease Agreement may, at the option of Lessor, terminate immediately upon such failure to pay. In such event, the Lessor shall have the right of immediate possession and such other rights as described in the second and third paragraphs of Article XI.

ARTICLE VI

CONDITION OF PREMISES:

Lessee acknowledges and warrants that they have examined and inspected the Leased Property are familiar with the physical conditions thereto. Lessee further acknowledges and warrants that EXCEPT as provided in subparagraph (iv) below that;

- (i) That Lessor have not made and do not hereby make any representation regarding the physical condition of the Leased Property
- (ii) That there are no warranties either expressed or implied regarding the condition of the Leased Property and that any such warranties which may exist are hereby expressly released and waived.
- (iii) That Lessee covenants, warrants and agrees to accept the Leased Property in its 'AS IS' condition.
- (iv) Lessor covenants, warrants and agrees that the HVAC, System and Plumbing will be operational and that the Roof will be free of leaks prior to or within 30 days of the execution of this Lease. Thereafter all repairs to HVAC System, Plumbing and Roof shall be sole responsibility of Lessee.

ARTICLE VII

MAINTENANCE AND REPAIRS:

Lessee shall, at its own expense, keep and maintain in present order and repair the entire Leased Property. Lessee shall also, at its own expense repair any damage to the Leased Property occasioned or necessitated by the negligence or misconduct of Lessee, of its employees or customers. Lessee shall keep the exterior grounds of the Leased Property clean and free of trash and keep the grass cut in season. Lessee shall make no structural change or any alteration in and to the Leased Property without the written consent of Lessor, and shall not in any manner deface or injure the Leased Property or any part thereof and shall return the same peaceably and promptly to Lessor at the end of the term of this Lease, or any renewal thereof, or upon any earlier termination thereof, in as good condition as at the beginning of the term, ordinary wear and tear excepted.

ARTICLE VIII

ALTERATIONS:

Except as provided in subparagraph (A) below, the Lessee shall not, without the prior written consent of Lessor alter the architectural design of the Leased Property or make any structural or material changes to the Leased Property, without the prior written permission of the Lessor and any such alterations so made shall be made at the sole cost and expense of the Lessee. Upon the expiration or earlier termination of this Lease, all such improvements except as provided below, if any, shall remain on and in the Leased Property and becomes the sole property of the Lessor and Lessee will take any and all actions and sign any and all documents reasonably required by Lessor to effect or confirms Lessor's ownership of said improvements. Lessor however, upon written notice delivered at least Sixty (60) days prior to such date of expiration or earlier termination may elect to require Lessee to remove such improvements and restore the Leased Property, at Lessee sole expense to the same condition as existed at the commencement of the Lease, ordinary wear and tear alone excepted.

- (A.) The Lessee, PROVIDED that Lessee is not in default under the terms and conditions of this Lease and PROVIDED FURTHER that the same can be removed without injury to the Leased Property may at its sole expense remove the Hood Systems in kitchen, all T.V.s, Stereo Equipment, Pos System, and Alarm System (excluding the interior wiring of said systems) from the Leased Premises. If the Leased Premises shall be impaired by the removal of the aforesaid items and systems, Lessee shall at Lessee's sole expense repair the damages and place the Leased Premises in the same condition as existed at the commencement of the Lease and, if not so repaired by the expiration of the term of this Lease, Lessee shall be accountable to Lessor for rent (pro-rated daily at the last effective rent rate) until the damages are repaired to the condition of the Leased Premises at the commencement of this Lease.

ARTICLE IX

TAXES AND INSURANCE:

Lessor shall be responsible for the payment of Fire insurance on the Leased Property.

Lessor shall be responsible for the property taxes.

Lessee shall provide for all insurance on Lessees' own contents and personal property located in the Leased Property.

ARTICLE X

RIGHTS OF PAYMENT UPON DEFAULT:

Lessee shall pay as rental, in addition to the rental herein reserved, any and all sums which may become due by reason of the failure of Lessee to comply with all of the covenants of this Lease and each of them, and also any and all damages to the Leased Property caused by any act or neglect of the Lessee.

ARTICLE XI

DEFAULT:

The breach of any covenant of this Lease Agreement, except for the rental payment as provided in Article V, shall give the aggrieved party the right to terminate and cancel this Lease at any time after the expiration of thirty (30) days from the giving of written notice to the party in default, but only if the party in default has not remedied such default within the said thirty (30) days, or if the party in default has not commenced such act or acts as shall be necessary to remedy the default and shall complete such act or acts promptly.

Upon the termination of this Lease by Lessor, Lessor may immediately or at any time thereafter and without further notice of demand enter into and upon the Leased Property or any part thereof and take absolute possession of the same without such re-entry working a forfeiture of the rents to be paid and the covenants to be performed by the Lessee for the full term of this Lease and may at Lessor's election lease sublet the Leased Property or any part thereof on such terms and conditions and for such rents and for such time as Lessor may elect and after crediting the rent actually collected by Lessor from such reletting on the rentals stipulated to be paid under this Lease by the Lessee, collect from the Lessee any balance remaining due on the rent reserved under this Lease Agreement.

Lessor shall also have and may exercise all rights created by law for enforcement of claims for rent due and falling due hereunder through assertion of a lien against all property of the Lessee upon the Leased Property and through sale of such property under distraint.

ARTICLE XII

UTILITIES:

During the term of this Lease, Lessee shall provide and pay for all electricity, heat, air conditioning, water, sewer charges and other utilities upon the Leased Property as shown as Exhibit B.

ARTICLE XIII

DAMAGE OR DESTRUCTION BY FIRE OR OTHER CASUALTY:

In the event of damage to the building on the Leased Property by fire or other casualty or act of God, the Lessee shall give immediate notice thereof to the Lessor who shall, except as provided below, have the damage to the Leased Property repaired with reasonable speed at the Lessors' expense, due allowance being made for reasonable delay which may arise by reason of adjustment of loss under insurance policies on the part of the Lessor and/or the Lessee or any other cause beyond the Lessors' control, and to the extent that the Leased Property are rendered untenable, the rent shall proportionately abate; PROVIDED HOWEVER that in the event of any such damage, if the Lessor shall in its sole and absolute discretion decide not to repair or rebuild the Leased Property, this Lease, at the option of the Lessor, shall be terminated upon thirty (30) days written notice to the Lessee, and the rent, in such case, shall be paid to or adjusted as of the effective date of such termination, and in such case the Lessee shall thereupon vacate the Leased Property and surrender the same to the Lessor. In the event of any such damage to the building, all insurance proceeds payable in connection with such damages shall be the sole property of the Lessor.

ARTICLE XIV

INDEMNIFICATION AND LIABILITY INSURANCE:

The Lessor shall not be liable for any damage to property or person by reason of Lessee's use or occupancy of the said Leased Property and its appurtenances or by reason of any third party's use or occupancy of the Leased Property and its appurtenances (whether with or without the acquiescence of the Lessor or the Lessee), and the Lessee agree to save Lessor harmless from and against all claims, suits, demands, actions and the cost and expense thereof, including reasonable attorneys' fees, arising out of any property damage or personal injury (including death) whatsoever occurring in or on the said

Leased Property and its appurtenances. The Lessee further specifically agrees that it will procure and keep in force at their own expense liability insurance covering use and occupation of the Leased Property and its appurtenances in such amounts and with such companies as shall from time to time be acceptable to Lessor, which policy or policies of insurance shall show Lessor as an additional insured as Lessors' interest may appear. At the commencement of the Lease, such liability insurance shall be in amounts of \$500,000 with respect to bodily injury, disease, illness or death suffered by any one person, \$500,000 with respect to any one occurrence and \$500,000 with respect to damage to or destruction of property arising out of any one accident. Prior to its occupancy of the Leased Property and thereafter prior to each policy renewal date, Lessee shall cause a certificate of insurance to be furnished to Lessor evidencing such coverage, and said policy shall provide that said insurance may not be cancelled without written consent to Lessor s at least thirty (30) days prior to any cancellation.

ARTICLE XV

ASSIGNMENT AND SUBLETTING:

Lessee may not assign or transfer this Lease or any estate, interest or benefit thereof or sublet said Leased Property or any part or parts thereof without the prior written consent of Lessor. Consent by Lessor to any assignment or subletting shall not constitute a waiver or release of any rights of Lessor against Lessee hereunder, and Lessor shall remain primarily liable hereunder. Lessor shall have the absolute right to assign the Lease without receiving the consent of Lessee, and Lessee shall be obligated to any such assignee of Lessor under the terms and provisions of this Lease as if Lessee had initially entered into this Lease Agreement with such assignee.

ARTICLE XVI

SIGNS AND ADVERTISING:

- (1) That Lessor acknowledges that Lessee may at its sole expense erect and install a "Free Standing exterior sign" on the Leased Property and that said sign shall remain the sole property of the Lessee.
- (2) That Lessor further agrees that Lessee may paint Logo's on the Window panes.

- (3) That during the term of this Lease, Lessee may install such other signs of the Leased Property as may be reasonable and as shall not damage or impair the attractiveness of the Leased Property, or of any adjoining property of Lessor; Provided however, that no such signs shall be placed, impressed or attached to the Leased Property in such a manner as will injure the exterior of such building; PROVIDED FURTHER, that the care and maintenances of such signs shall be the duty of the Lessee; AND PROVIDED FURTHER, that any injury or damage to the Leased property by the removal of these signs by Lessee shall be repaired by Lessee at Lessee sole costs and expense.

ARTICLE XVII

OPTIONAL LEASE EXTENSION:

Lessor agrees that Lessee shall be and is hereby granted an Option to renew this Lease Agreement for additional two (2) additional one (1) year periods, as follows:

1. Lessee shall have the right and privilege as its first option to renew or extend the leasehold term for a further period of one (1) year, commencing on April 1, 2012 and terminating on March 31, 2013 with rental payments being the sum of Three Thousand Six Hundred Seventy-five and no/100 (\$3,675.00) Dollars per month for the term of this leasehold extension.
2. Lessee shall have the further right and privilege as their second option to renew or extend the leasehold term for a further period of one (1) year, commencing on April 1, 2013 and terminating on March 31, 2014, with rental payments being the sum of Three Thousand Eight Hundred Fifty-eight and 75/100 (\$3,858.75) Dollars per month for the term of this leasehold extension.

NOTWITHSTANDING anything to the contrary contained herein, all optional Lease extension shall be subject to the following terms and conditions:

- (a) No default is existing in the performance of any of the terms of the Lease or extension thereof by Lessee

- (b) That Lessee must give Lessor written notice of their desire to renew this Lease Agreement at least thirty (30) days prior to the termination of the original leasehold term or any extensions thereof.

ARTICLE XVIII

RIGHT OF FIRST REFUSAL OPTION:

Lessor hereby grants to Lessee, a Right of First Refusal, to purchase the Leased Property as shown on Exhibit A and Exhibit B, prior to Lessor selling the Leased Property to a third party. Prior to any sale of the Leased Property as shown on Exhibit A and Exhibit B during the term of this Lease and any subsequently renewal term, Lessor shall give Lessee written notice, including a copy of the executed offer to purchase received from said third party. Lessee may choose to exercise its First Refusal Option by giving Lessor written notice of its intention to purchase the Leased Property within thirty (30) days of receipt by Lessee of the executed offer to purchase property by a third party. Lessee's purchase of the Leased Property under its First Refusal Option shall be on the same terms and conditions as the written offer made by the third party. If Lessee does not exercise its First Refusal Option by giving notice as set forth above, then the First Refusal Option shall expire and Lessor may proceed to sell the Leased Property upon the terms set for in the written offer by the third party, provided that the sale shall be subject to the terms of this Lease.

ARTICLE XIX

LEASE BINDING ON HEIRS, ETC:

It is further hereby expressly agreed and understood that all covenants and agreements herein made shall extend to and be binding upon the parties hereto and its respective heirs, personal representatives, successors and permitted assigns, and that no modification of this Lease shall be binding unless evidenced by an agreement in writing signed by both the Lessor and the Lessee.

ARTICLE XX

NOTICES:

Whenever in this Lease Agreement it shall be required or permitted that notice or demand be given or served by either party hereto or on the other, such notice or demand shall be given or served and shall not be deemed to have been given or served unless in writing and forwarded by certified mail with signed receipt addressed as follows:

To the Lessor at _____

To the Lessee at 1599 Sailing Club Rd. Camden, SC 29020

Such address may be changed from time to time by either party by serving notice as above provided.

IN WITNESS WHEREOF, the parties have hereto caused this Lease Agreement to be executed as of the last date of execution appearing below.

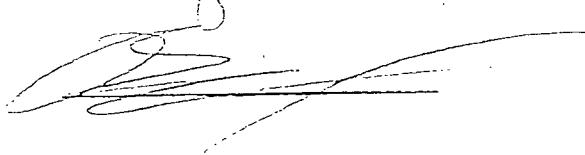
IN THE PRESENCE OF:

LESSOR: A List Properties, LLC

By: _____
Timothy M. Gainey

By: _____
Kenneth Ray Gainey

IN THE PRESENCE OF:

Sherry A Robertson


LESSEE: FAMDAMILY ENTERPRISES LLC

By: Joseph Edward Funderburk, Jr.
Joseph Edward Funderburk, Jr.

Joseph Willis Funderburk
Joseph Willis Funderburk

ARTICLE XX

NOTICES:

Whenever in this Lease Agreement it shall be required or permitted that notice or demand be given or served by either party hereto or on the other, such notice or demand shall be given or served and shall not be deemed to have been given or served unless in writing and forwarded by certified mail with signed receipt addressed as follows:

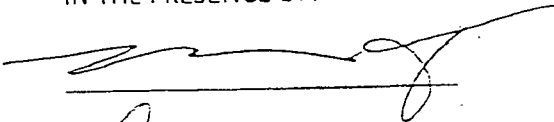
To the Lessor at _____

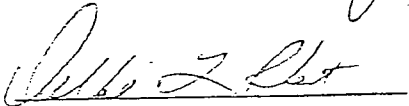
To the Lessee at _____

Such address may be changed from time to time by either party by serving notice as above provided.

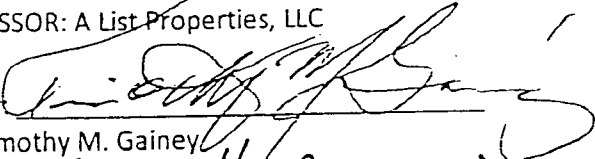
IN WITNESS WHEREOF, the parties have hereto caused this Lease Agreement to be executed as of the last date of execution appearing below.

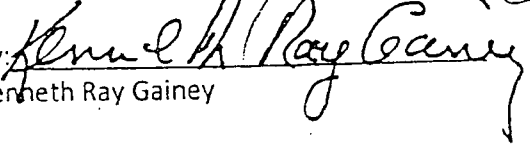
IN THE PRESENCE OF:





LESSOR: A List Properties, LLC

By: 
Timothy M. Gainey

By: 
Kenneth Ray Gainey

IN THE PRESENCE OF:

LESSEE: FAMDAMILY ENTERPRISES LLC

By: _____
Joseph Edward Funderburk, Jr.

Joseph Willis Funderburk

Exhibit "A"

A portion of a building and a portion of that certain parcel of land located at 1227 Great Falls Highway, Lancaster County, South Carolina and being more particularly shown on the attached drawing identified as Exhibit B.

SPECIFICALLY EXCLUDING from the terms of this Lease, is those three (3) portions of a building and upstairs shown on the attached Exhibit B identified as "Ken Gainey", "Tim Gainey", "Tim Gainey", "Tim Gainey upstairs".

ALSO SPECIFICALLY EXCLUDED from the terms of this Lease is those portions of the real property, necessary to service and provide access to those three (3) portions of the building reserved by Lessor.

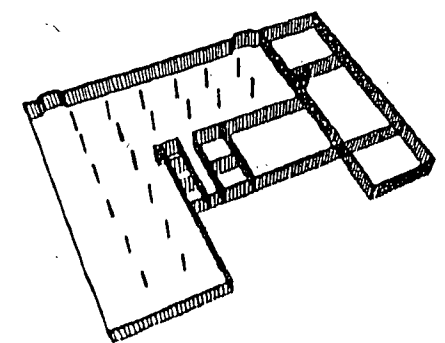
Main Floor Framing Plan
Scale: 1/8" = 1'-0"

Parking - Tim & Ken Galtrey

Upstairs - Tim Galtrey

Parking - Tim & Ken Galtrey

Parking - Tim & Ken Galtrey



A complete Javelin® framing plan requires the Project's Project Data from the Project's Project Data for Product Trademark Information.

LEASED
PROPERTY

12" Column - Typical

Office

Kitchen

Women's Bath

Bath

Bath

Bar Area

Covered Porch

EXCLUDED FROM LEASE

Ken Galtrey

EXCLUDED FROM LEASE

Tim Galtrey

EXCLUDED FROM LEASE

Tim Galtrey

The State of South Carolina



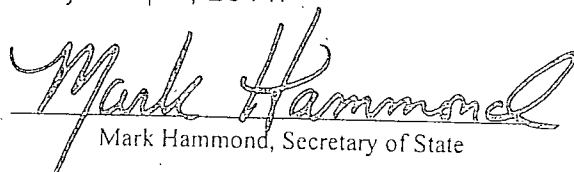
Office of Secretary of State Mark Hammond

Certificate of Existence

I, Mark Hammond, Secretary of State of South Carolina Hereby certify that:

A LIST PROPERTIES, LLC, A Limited Liability Company duly organized under the laws of the State of South Carolina on April 29th, 2011, with a duration that is at will, has as of this date filed all reports due this office, paid all fees, taxes and penalties owed to the Secretary of State, that the Secretary of State has not mailed notice to the company that it is subject to being dissolved by administrative action pursuant to section 33-44-809 of the South Carolina Code, and that the company has not filed articles of termination as of the date hereof.

Given under my Hand and the Great
Seal of the State of South Carolina this
29th day of April, 2011.


Mark Hammond, Secretary of State

APR 29 2011

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF ORGANIZATION
Limited Liability Company - Domestic
Filing Fee - \$110.00

TYPE OR PRINT CLEARLY IN BLACK INK

The undersigned delivers the following articles of organization to form a South Carolina limited liability company pursuant to S.C. Code of Laws §33-44-202 and §33-44-203.

1. The name of the limited liability company (Company ending must be included in name*)

A List Properties, LLC

***NOTE:** The name of the limited liability company must contain one of the following endings: "limited liability company" or "limited company" or the abbreviation "L.L.C.", "LLC", "L.C." or "LC". "Limited" may be abbreviated as "Ltd.", and "company" may be abbreviated as "Co."

2. The address of the initial designated office of the limited liability company in South Carolina is

4078 Major Evans Road

Street Address

Lancaster,

29720

City

Zip Code

3. The initial agent for service of process is

Timothy M. Gainey

Name

Signature of Agent

and the street address in South Carolina for this initial agent for service of process is

4078 Major Evans Road

Street Address

Lancaster

29720

City

Zip Code

4. List the name and address of each organizer. Only one organizer is required, but you may have more than one.

- (a) Timothy M. Gainey

Name

4078 Major Evans Road

Street Address

Lancaster

SC

29720

City

State

Zip Code

- (b) Kenneth Ray Gainey

Name

4086 Major Evans Road

Street Address

Lancaster

SC

29720

City

110429-0204

FILED: 04/29/2011

A LIST PROPERTIES, LLC

Filing Fee: \$110.00 ORIG

Mark Hammond

South Carolina Secretary of State

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5. ☐ Check this box only if the company is to be a term company. If the company is a term company, provide the term specified. _____
6. ☐ Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, include the name and address of each initial manager.

(a) _____
 Name _____

 Street Address _____

 City _____ State _____ Zip Code _____

(b) _____
 Name _____

 Street Address _____

 City _____ State _____ Zip Code _____

7. ☐ Check this box only if one or more of the members of the company are to be liable for its debts and obligations under §33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members. This provision is optional and does not have to be completed.

8. Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time.

9. Any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement may be included on a separate attachment. Please make reference to this section if you include a separate attachment.

10. Each organizer listed under number 4 must sign.

Frederick M. Gandy
 Signature of Organizer

April 14, 2011
 Date

Kenneth Ray Gandy
 Signature of Organizer

April 27, 2011
 Date

Filing Checklist

- Articles of Organization (filed in duplicate)
- \$110.00 made payable to the South Carolina Secretary of State
- **Self-addressed, stamped return envelope**
- Make sure the organizer has signed the form. Only one organizer is required, but you may have more than one. If you have more than one organizer, every organizer listed on the form must sign. The organizer is the individual who completes the documents and delivers them for filing to the Secretary of State. The organizer may be an owner of the entity, but he or she does not have to be. The organizer may simply be the individual who assists in the formation of the LLC without having any involvement with subsequent ownership or operational functions.
- Return all documents to:
 - South Carolina Secretary of State's Office
 - Attn: Corporate Filings
 - P.O. Box 11350
 - Columbia, SC 29211

SPECIAL NOTE

Registering your limited liability company name does not, in and of itself, provide an exclusive right to use this name on or in connection with any product or service. Use of a name as a trademark or service mark requires further clearance and registration and may be affected by prior use of the mark. For more information, contact the Trademarks Division of the Secretary of State's Office.



Brenda Ledford
Personal Banker

500 North Main Street
PO Box 580
Lancaster, SC 29721
803-283-6918 • fax 803-283-6925
brenda.ledford@firstcitizensonline.com

We're on it.



BUSINESS CONTRACT AND DISCLOSURE

Customer Copy

560176235301

Acct Type Free Business Checking

05-06-2011

Branch 325

Opened by BRENDA G LEDFORD

☒ New ☐ Amended ☐ Temp

TIMOTHY M GAINNEY
DBA A LIST PROPERTIES LLC

TIN: XXXXXXXXXX

Account Ownership Designation:

Sole Proprietor

DOCUMENTATION OBTAINED: ☐ Corp. Resolution ☐ Unincorp. Resolution ☐ Partnership Agreement ☐ Other

FIRST CITIZENS BANK AND TRUST COMPANY, INC.

[The relationship between the Bank and account holder(s) remain(s) the same regardless of (possible) conversions of this account.]

The undersigned:

- (1) acknowledge that at least one authorized signer has received at least one copy of each of the following documents: Business Deposit Accounts Fee Schedule/Interest Disclosures brochure; Rules and Regulations for Checking, Savings, MMDA Accounts/Funds Availability/Direct Deposit, Cardholder Agreement and Electronic Fund Transfer Disclosures brochure.
- (2) agree to the provisions set forth in the above documents.
- (3) certify that the "Account Ownership Designation" indicated above is correct.
- (4) certify that the purpose of this account is for business use and is not for consumer purposes.
- (5) CERTIFY, UNDER PENALTIES OF PERJURY, THAT: (A) THE TAXPAYER IDENTIFICATION NUMBER SHOWN ABOVE IS CORRECT; AND (B) THE ACCOUNT IS NOT SUBJECT TO BACKUP WITHHOLDING BECAUSE (1) THE ENTITY IS EXEMPT FROM BACKUP WITHHOLDING, OR (2) THE ENTITY HAS NOT BEEN NOTIFIED BY THE INTERNAL REVENUE SERVICE (IRS) THAT IT IS SUBJECT TO BACKUP WITHHOLDING AS A RESULT OF FAILURE TO REPORT ALL INTEREST OR DIVIDENDS, OR (3) THE IRS HAS NOTIFIED THE ENTITY THAT IT IS NO LONGER SUBJECT TO BACKUP WITHHOLDING. (NOTE: ITEM (B) MUST BE CROSSED OUT IF THE ENTITY HAS BEEN NOTIFIED BY THE IRS THAT IT IS CURRENTLY SUBJECT TO BACKUP WITHHOLDING BECAUSE OF UNDER-REPORTING INTEREST OR DIVIDENDS ON ITS TAX RETURN.); AND (C) THE ENTITY IS A U.S. ENTITY.

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE YOUR CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING AS CONTAINED IN ITEM (5).

Small Business Accounts

Business Relationship Checking

(Non-interest bearing, non-analyzed – \$100 minimum deposit to open. \$500 ATM Daily withdrawal limit)

Monthly Maintenance \$29.00
Fee posts on statement cycle date.

To avoid the monthly maintenance fee:

- Maintain \$10,000 average ledger balance in Business Relationship checking OR
 - Maintain \$20,000 minimum daily balance aggregated in Business Relationship checking, savings, CD, and Money Market accounts.
- Per item in excess of 1,000 items combined \$0.30 ea.
(debits/deposits/items deposited)

Free Business Checking

(Non-interest bearing, non-analyzed - \$50 minimum deposit to open)

Per item in excess of 150 items combined \$0.30 ea.
(debits/deposits/items deposited)

Money Market Accounts (MMAs)

Premium Market Rate Investor

(Interest bearing - \$10,000 minimum deposit to open)

Monthly Maintenance \$15.00
(will apply if the daily balance drops below \$10,000 or the average daily balance drops below \$25,000.)

Per item deposited \$0.065 ea.
(will apply to each item deposited in excess of 50 during the statement cycle)

Per debit item in excess of 3 \$10.00 ea.

Market Rate Investor

(Interest bearing - \$1,000 minimum deposit to open)

Monthly Maintenance \$10.00
(will apply if the daily balance drops below \$1,000)

Per item deposited \$0.065 ea.
(will apply to each item deposited in excess of 50 during the statement cycle)

Per debit item in excess of 3 \$10.00 ea.

Federal regulations limit the total of third party transfers (such as checks, automatic drafts and debit card purchases), pre-authorized transfers and online or telephone transfers to 6 per statement cycle. Withdrawals in person and transfers for purposes of repaying a First Citizens loan are unlimited. Repeated violation of the federally set limit will result in either closure of the account or conversion of the account to a checking account.

Miscellaneous Fees and Other Services

Checking Accounts MMAs, and Savings Accounts

Account Charge-off Fee \$8.00

ACH Reclamation Fee \$15.00

Cashier's Checks (issuance fee per check for customers only) \$6.00

Chargeback Fee (deposited or cashed item returned unpaid per item) \$10.00

Collection Items (processing fee per item) \$20.00 min

Counter Check \$0.50 ea

Dormant Charge \$10.00 per month
(will apply if the account has no external activity for 13 months and the account balance is less than \$1,000)

Early Closing Fee \$15.00
(account closed less than 90 days after opening)

First Citizens Business Online Banking*

Monthly service fee

For all small business checking accounts No Charge
(includes unlimited bill payments using the Bill Payment Service)

Insufficient Funds Fee

(Applies to items, such as checks, drafts, and withdrawals through electronic means, that are returned unpaid.)

First item \$25.00 ea.
Second through fourth item \$33.00 ea.
Fifth and subsequent items \$35.00 ea.
Fees are based on a rolling 12 months

Overdraft Item Fee

(Applies to items, such as checks, drafts, in-person withdrawals, ATM withdrawals, and withdrawals through other electronic means, that are paid and the account is overdrawn.)

First item \$25.00 ea.
Second through fourth item \$33.00 ea.
Fifth and subsequent items \$35.00 ea.
Fees are based on a rolling 12 months

Overdrawn Account Fee (acct's overdrawn \$10.00 or more) \$5.00 per day

Interim Statement \$7.50 ea.

Money Orders (issuance fee per money order) \$4.00

Night Depository Service (Checking Accounts Only)

Monthly Service Fee \$6.00 ea.
Cost per box of (100) disposable bags \$30.00
Cost per deposit if Non-FCB disposable bags are not used \$0.30 ea.

Coin/currency deposited (over \$10,000 per month) \$0.075 per \$100

Coin Issued \$0.09 per roll

Currency Issued \$0.075 per \$100

Photocopy of Item \$3.00 per item

Photocopy of Statement \$7.50

Printing of checks or deposit/withdrawal slips Fee depends on style and quantity ordered

Research (1 hour minimum) \$25.00 per hr.

Safe Deposit Boxes Available

Special Instructions \$20.00

Statement with cancelled Item(s) enclosed

For Business Relationship \$4.00

For all other checking accounts and MMAs \$4.00

Stop Payment \$35.00 ea.

Tax levy/garnishment \$100.00 ea

Duplicate Tax Form Request \$2.00

Undeliverable Statement fee \$5.00

Usage of Account Information Hotline (AIH)

First 8 call (per monthly cycle) No Charge

Each call over 8 (automated response) \$.50 ea.

(attendant response) 1.25 ea.

Verification of Deposit Processing Fee \$15.00

Wire Transfers (customers only)

All Incoming \$15.00 ea.

Domestic – Out \$20.00 ea.

International – Out \$50.00 ea.

Also refer to the bank's Rules and Regulations for Depository Accounts brochure for further details on the terms and conditions of deposit accounts.

*Business Online Banking Advantage is a cash management service and priced separately

Throughout this agreement, the terms "we," "us," "our," and "Bank" refer to First Citizens Bank and Trust Company, Inc. The terms "you" and "your" refer to the depositor, and if the context requires, anyone the depositor has authorized.

1. GENERAL PROVISIONS

You agree that:

- These Rules and Regulations apply to your depository accounts. A depository account is any account from which funds may be withdrawn by order of you and includes checking, savings, accounts with credit features, and Money Market Accounts (MMAs). By signing the signature card or using the account, you agree that your account is subject to applicable state and federal laws and regulations, these Rules and Regulations, the conditions of your signature card, the Fee Schedule and Interest Disclosures, and any other agreement between you and us.
- If your account causes the Bank to incur any legal expenses, you agree to indemnify and reimburse the Bank for these expenses. This includes legal action to collect amounts owed on your account.

2. OWNERSHIP

This account is **NON-TRANSFERABLE** except by operation of law or with our prior written consent.

3. DEPOSITS

All items accepted for deposit are credited subject to final payment to us, in cash or solvent credits, at our own office and we are not obligated to permit withdrawal of balances until final payment, except as noted on the "Ability to Withdraw Funds" section of this document. Any item not finally collected may be charged back to your account, whether the item was cashed or deposited and even if the chargeback creates an overdraft, for which we may deduct an overdrawn account fee from your account.

All items or deposits received and all business transacted at anytime on a non-business day, or after we close on a business day, may be treated as being received or transacted at the beginning of the next business day.

If you sign, stamp or affix an endorsement to a check for deposit which is outside of the area extending 1 1/2 inches from the trailing edge of a check or otherwise cause the bank endorsement to be obscured, and the return of the check is delayed because of the obscured bank endorsement, you agree to reimburse and hold us harmless against any loss, expense and cost we may incur because of your endorsement. The trailing edge is defined as the left side of the check looking at it from the front.

4. WITHDRAWALS

You may make withdrawals by written authorization, by use of electronic terminals or other electronic means approved by us or by such other means as we may agree. We may pay items drawn on your account in any order we determine, including paying certain categories of items (for example, electronic debits) prior to processing other items (for example, deposits), even if paying a particular item results in an insufficient balance in your account to pay one or more other items that otherwise could have been paid out of your account.

If there is not enough money in your account to cover a withdrawal from your account, depending on the type of transaction, we will either return the item unpaid or pay it and overdraw your account. If we return the item unpaid, you agree to pay an insufficient funds fee. If we pay the item and overdraw your account, you agree to pay an overdraft item fee and the daily overdrawn account fee. We do not authorize and pay overdrafts for ATM transactions or everyday debit card transactions unless you ask us to. If you do not ask us to authorize and pay overdrafts for these types of transactions, they will be declined. We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. You and any authorized signer, if the account is not a corporate account, agree to pay, promptly and without demand, any overdraft (loan) in connection with said account. Furthermore, you and any authorized signer agree to pay any cost of collection, including but not limited to attorneys' fees and cost of collection incurred to collect the amount of overdraft. If this is a multiple party account, all parties are jointly and severally liable for the amount of any outstanding overdraft.

Unless otherwise required by law, we shall not be responsible to you for any damages caused by payment of postdated items.

We shall not be bound by memoranda (e.g. wording such as "void after 90 days"; "payment in full"; etc.) placed upon or attached to a check or other withdrawal instrument by you.

We incur no liability to you on an account purporting to require two or more signatures on any items drawn on the account that have only one signature. The intent of having multiple signatures is for your internal audit and control purposes.

When permitted by law, to protect you and us in time of public excitement and danger, and otherwise required by Federal Regulation, we reserve the right to require 7 days prior written notice of intention to withdraw or transfer funds from any interest-bearing account.

If your account is a SAVINGS ACCOUNT or MONEY MARKET ACCOUNT (MMA), the following federally set transaction limit applies.

Savings Account. Federal regulations limit the total of third party transfers (such as checks, automatic drafts and debit card purchases), pre-authorized transfers and online or telephone transfers to 6 per statement cycle. Withdrawals in person or from an automated teller machine (ATM) and transfers for purposes of repaying a First Citizens loan are unlimited. Repeated violation of the federally set limit may result in closure of the account.

Money Market Account. Federal regulations limit the total of third party transfers (such as checks, automatic drafts and debit card purchases), pre-authorized transfers and online or telephone transfers to 6 per statement cycle. Withdrawals in person and transfers for purposes of repaying a First Citizens loan are unlimited. Repeated violation of the federally set limit will result in either closure of the account or conversion of the account to a checking account.

Savings and Money Market Account products are described in the Fee Schedule/Interest Disclosures brochure.

Savings or Money Market Accounts to use as overdraft protection. You may choose one Savings account or one Money Market account to be used to transfer funds to a related checking account in order to pay an item(s) to avoid an overdraft and overdraft fees. There will be a fee per transfer charged to your checking account for this transfer. The number of transfers from your Savings account or Money Market account, aggregated with other third party transfers, checks, automatic drafts and debit card purchases may not exceed a total of 6 during a monthly statement cycle as regulated by Federal Regulations. If your money market account is converted to a non interest bearing checking account, it will no longer be available to provide overdraft protection for your checking account. If you have an approved Overdraft Protection Line of Credit (LOC), this may be used in conjunction with a Savings or Money Market account in order to pay an item(s) to avoid an overdraft and overdraft fees on a related checking account. There will be no fee for transfers from your LOC. All Overdraft Protection Line of Credit terms and conditions remain in effect, as stated in your initial agreement.

5. ACCOUNT TERMINATION

We may at any time send notice of termination to your address of record on any account. Ten calendar days after the date of the notice, we will mail you a check (at your risk) for the balance of the account, if any. Any items presented to us after such termination may be returned unpaid. Accounts maintaining a zero balance are subject to closing.

6. PERIODIC STATEMENTS AND NOTICES

We will mail to you (at your address shown on our records), or otherwise make available to you, periodic statements reflecting all transactions on your account. Each statement shall, for all purposes, be deemed received by you or made available to you five (5) business days after its date, absent any proof of an earlier or later delivery date. Checking statements and MMA statements will normally be mailed on a monthly basis while savings statements will normally be mailed quarterly. Some savings statements may have a monthly statement cycle. (Statements on dormant accounts will be mailed annually.) You agree to notify us promptly when you have a change of address. We reserve the right to accept either written or verbal notice of your address change. We also reserve the right to change the address if we are notified by the United States Postal Service that you, or a joint owner on a joint account, have submitted a "change of address" form to the U. S. Postal Service.

If your correct mailing address is not known to us, we will hold your statement at one of our offices/departments and you agree that we have made your statement and cancelled items, if applicable, available to you when the statement is issued.

If you elect to have Check Safekeeping (meaning your cancelled checks/items are held by us instead of returned in your statement), you agree that we have made your cancelled items available to you when your statement is made available. We will provide copies of cancelled

items upon your request. We may charge a fee for providing such copies.

Upon receipt (or availability) of your statement and cancelled items, you agree that you will promptly examine your statement and items and will notify us if there are any incorrect or unauthorized signatures, transactions, or alterations. You also agree that 14 days(SC)/30 days(GA) after the statement and items are first available to you is a reasonable time for you to examine your statement and notify us of unauthorized signatures or alterations. If the item in question is an electronic fund transfer, refer to the ELECTRONIC FUND TRANSFER DISCLOSURES section in this document.

Any notice we send you will be considered effective when it is deposited in the U.S. Mail to your last address that we have in our records. Notice from you will be considered effective when we receive it at our designated address. If your account is a joint account, we can notify any one of you and the notice will be effective for all of the account holders. Similarly, any one of you can notify us and we will consider it to be notice from all of you.

7. MULTIPLE PARTY ACCOUNTS

All parties whose names appear on a joint account and who have signed the signature card are considered co-owners of this account, regardless of whose money is deposited or who makes the deposits. As long as all co-owners are living, each co-owner is permitted to make deposits and withdraw any or all funds from the account without the consent of the other(s). Each co-owner also hereby authorizes each other co-owner to (1) endorse for deposit to the joint account any items payable to any co-owner, (2) instruct us to stop payment on any items drawn on the account by any co-owner, (3) draw upon any overdraft or other line of credit which may be established in connection with the account, (4) pledge the account as security for any debts whether individual, joint or otherwise, and (5) close the account at any time.

In the event of the death of one of the parties on a joint account, unless we have previously agreed in writing with you, the balance in the account will belong to the survivor(s). If two or more of you survive, you will own the account as joint tenants with survivorship.

If two or more of you create a revocable trust or pay on death type of account, you own the account jointly with survivorship. Beneficiaries cannot withdraw unless: (1) all persons creating the account die, and (2) the beneficiary is still living. The person(s) creating either a revocable trust or pay on death account may (1) change beneficiaries (2) change account types, and (3) withdraw all or part of the account balance at any time.

8. RIGHT OF OFFSET

You each agree that we may, without prior notice, offset the funds in your account(s) against any due and payable debt you owe to us now or in the future, including debts owed to a financial institution which has been acquired by us or with which we have merged.

Your account(s) include account(s) owned by you individually and account(s) you own jointly with others. If you are a sole proprietor, we may use the funds in any of your personal or business accounts to offset debts owed by you or owed by the sole proprietorship. If the account is owned by two or more persons, you each agree that we may use the funds in the account to offset debts owed to us by you, as well as debts owed to us by another joint account owner. Further, you each agree that we may use the funds in any account(s) owned by you individually to satisfy any obligations you owe us arising out of any account(s) you own jointly with others, regardless of whether the obligations are directly incurred by you or are incurred by another joint account owner. You agree that our right of offset exists regardless of the source of the funds in the joint account(s).

If applicable law imposes conditions or limits our ability to offset funds in your account(s), you hereby waive these conditions or limits, to the fullest extent that you may do so by contract, and consent to our right of offset to satisfy the obligation. If the debt arises from a note, "any due and payable debt" includes the total amount to which we are entitled to demand payment under the terms of the note at the time we exercise our right of offset, including any balance due on the date of which we properly accelerate under the note.

This right of offset does not apply to this account if: (a) it is an Individual Retirement Account or other tax-deferred retirement account, or (b) the debt is created by a consumer credit transaction under a credit card plan, unless that debt has been reduced to a legal judgment in our favor, or (c) the debtor's right of withdrawal arises only in a representative capacity.

We will not be liable for the dishonor of any check when the dishonor occurs because we offset a debt against this account. You agree to hold us harmless from any claim arising as a result of our exercise of our right of offset.

9. RIGHT TO STOP PAYMENT - CHECKING & MMA

You may ask us to stop payment of a check or draft drawn on your account. You must give us reasonable notice (at least 24 hours), and you must tell us the exact amount of the check or draft, check number, date of the check, payee and the full account number on which it is drawn for us to be able to enter a stop payment. If the information you give us is not correct or if you do not give us other reasonable information requested about the check or draft, we will not be responsible if we are not able to effect the stop payment. You may verbally notify us to stop payment of a check or draft drawn on the account; however, the verbal order may

not be effective after 14 days from the date the verbal stop order was received unless you confirm it in writing within that time period. A written order is effective for 6 months only unless renewed in writing. There is a charge for stop payments.

10. DORMANCY

An account is considered dormant when no external item has been paid from or credited to the account for a period of one year. If you have not used your account or communicated with the bank in writing or otherwise indicated an interest in the account for a period of 5 years, your account and deposits are presumed to be abandoned. Dormant or abandoned accounts will be subject to service charges defined in the Fee Schedule/Interest Disclosures brochure. Accounts which are presumed to be abandoned will be subject to escheat (deposits remitted to the State in which your account is maintained) in accordance with applicable law.

11. SERVICE CHARGES

Your account shall be subject to service charges and other fees in effect or as adopted or changed by us in the future. These charges and/or fees, which may be deducted from the account, include but are not limited to the fees described in our Fee Schedule/Interest Disclosures brochure and charges assessed for handling legal process in connection with your account.

12. DEPOSIT ADJUSTMENTS

If any amount is deposited in this account in error, you authorize us to deduct the amount from this account or from any other deposit account you have with us, without prior notice. We may also use any other legal remedy to recover the amount of our liability even if that adjustment results in insufficient funds to cover checks you have written or other debits.

13. FIDUCIARY CAPACITY

If your account is set up as a trust account or custodial account, it's your sole responsibility to determine the legal effects of opening and maintaining an account of this nature.

If you wish to name another person to act as your attorney in fact or agent in connection with your account, we must approve the form of appointment, and we will not be liable for withdrawals signed by your agent or attorney in fact after the death of the depository(s) principal(s) unless we have received actual notice of such death.

The authorized signer(s) holding an account under a fiduciary capacity, agree(s) to indemnify and hold us harmless from any loss or damage arising from such authority or lack thereof. We have no responsibility or duty to assure or verify that authorized individual(s) have or are acting within the authority given them by the authorizing documentation or that such authorizing document is genuine or valid, even if we have seen or retained a copy of such document.

14. ADDING/DELETING SIGNER

Personal Accounts. If you request to have an authorized signer added to your account, all parties involved, i.e. current signer(s) and new signer, must sign a new signature card. IT IS OUR POLICY NOT TO ALLOW DELETION OF AN AUTHORIZED SIGNER. With the exception of death of one of the signers, if a signer is to be deleted, you must close your account and open a new one.

Non-Personal Accounts. (i.e. estate accounts, organization/association accounts, business accounts). The addition/deletion of an authorized signer is permissible provided you supply specific supporting documentation acceptable to (and by) us. A new signature card must be signed by all authorized signers.

15. CREDIT INQUIRIES

We are authorized to make credit inquiries on you with credit bureaus or any other person or entity. Also, any activity concerning your depository account (including overdrafts) may be reported to credit bureaus or any other person or entity, at our sole discretion.

16. AMENDMENT

We reserve the right to amend these Rules at anytime. We will provide you with any notice required by law of any amendments we make to these Rules. Your continued use of your account after the effective date of any amendment as stated in the notice, or after a reasonable time if no such date is stated, will constitute your acceptance of the terms of the amendment.

Consumer Accounts. We agree to give you at least thirty (30) calendar days advanced notice of any changes we make to fees required to be disclosed (Regulation DD) in our Fee Schedule/Interest Disclosures that will adversely affect your account.

17. REGULATORY REPORTING ON CHECKING ACCOUNTS

Your checking account is comprised of two sub-accounts: a checking sub-account and a sub-account that is not classified as a transaction account. We will maintain separate information on each sub-account; however, all information reported to you will be consolidated. The use of sub-accounts is for regulatory reporting purposes only. It is totally

transparent to you, that is, your monthly statement, as well as any balance information provided to you, will show your account as a single account, not as two sub-accounts.

The sub-accounts function as follows: At the beginning of each month, we will allocate the balance in your checking account between the two sub-accounts based on an allocation formula which we may change from time to time. All checks, withdrawals, debits, or other charges against your account will be presented against funds in the checking sub-account. If additional funds are needed to cover your transactions, we will automatically transfer funds from the other sub-account to the checking sub-account. Upon the sixth transfer from the other sub-account during a monthly statement period, the entire balance in the other sub-account will be transferred to the checking sub-account for the remainder of the statement period. At the beginning of the next statement period, the funds in your account will again be allocated between the two sub-accounts.

ABILITY TO WITHDRAW FUNDS

1. GENERAL POLICY

Our policy is to make funds from your deposits available to you on the first business day after the day we receive your deposit. Electronic direct deposits and funds from deposits of cash and wire transfers will be available on the day we receive the deposit. Also, we make up to \$1,000 (for consumer customers) or \$1,500 (for business customers that are not in our commercial analysis program) from a day's total check deposits available on the day of deposit, if the deposit is made to an account that has been open for more than 30 days and the deposit is made through one of our tellers. Once the funds are available, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

For determining the availability of your deposits, every day is a business day, except Saturdays, Sundays, and federal holidays. If you make a deposit to a teller in one of our branches on a business day before the close of business at that branch (generally 5:00 p.m.; 6:00 p.m. on Fridays at certain branches), we will consider that day to be the day of your deposit. If you make a deposit at one of our branches after the close of business at that branch or anytime on a non-business day, we will consider that the deposit was made on the next business day that we are open. Please note that because we balance ATMs anytime between the hours of 12:00 noon and 2:00 p.m., a deposit made through an ATM may be dated and credited one business day later than if you had made the deposit in the lobby or at a drive-in window. If you make a transfer deposit through Online Banking or Telephone Banking before 4:00 p.m. on a business day, we will consider that day to be the day of your deposit.

2. LONGER DELAYS MAY APPLY

In some cases, we will not make all the funds that you deposit by check available to you on the first business day after the day of your deposit and some funds availability that is initially provided on the day of deposit may be reversed or withdrawn. Depending on the type of check that you deposit, funds may not be available until the second business day after the day of your deposit. However, the first \$100 of your deposits may be available on the first business day after the day of your deposit.

If we are not going to make all of the funds from your deposit available on the first business day after the day of your deposit, we will notify you at the time you make your deposit. We will tell you when the funds will be available. If your deposit is not made directly to one of our employees, or if we decide to take this action after you have left the premises, we will mail you the notice by the business day after we receive your deposit. If you will need the funds from a deposit right away, you should ask us when the funds will be available.

In addition, funds you deposit by check may be delayed for a longer period under the following circumstances:

- We have reason to believe a check you deposit will not be paid.
- You re-deposit a check that has been returned unpaid.
- You deposit checks totaling more than \$5,000 on any one day.
- You have overdrawn your account repeatedly in the last six months.
- There is an emergency, such as failure of communications or computer equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. They will generally be available no later than the seventh business day after the day of your deposit.

3. SPECIAL RULES FOR NEW ACCOUNTS

If you are a new customer, the following special rules may apply during the first 30 days your account is open. Electronic direct deposits and funds from deposits of cash and wire transfers will be available on the day we receive the deposit. The first \$5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and federal, state, and local government checks will be available on the first business day after the day of your deposit, if the deposit meets certain conditions. For example, the checks must be payable to you. The excess over \$5,000 will be available on the ninth business day after the day of your deposit.

Funds from all other check deposits will generally be available no later than the seventh business day after the day of your deposit.

4. HOLDS ON OTHER FUNDS

- If we cash a check for you that is drawn on another bank, we may withhold the availability of a corresponding amount of funds that are already in your account. Those funds will be available at the time funds from the check we cashed would have been available if you had deposited it.
- Funds may be held in your account if we receive notice that a check you deposited or cashed is being returned unpaid. You will receive a notice indicating the amount of the hold and that the hold will be released when we receive the check and debit the funds from your account.

CHECK CLEARING FOR THE 21st CENTURY ACT (CHECK 21)

What you should know about substitute checks and your rights.

(This section applies to consumers only.)

1. WHAT IS A SUBSTITUTE CHECK?

To make check processing faster, federal law permits banks to replace original checks with "substitute checks." These checks are similar in size to original checks with a slightly reduced image of the front and back of the original check. The front of a substitute check states: "This is a legal copy of your check. You can use it the same way you would use the original check." You may use a substitute check as proof of payment just like the original check.

Some or all of the checks that you receive back from us may be substitute checks. This notice describes rights you have when you receive substitute checks from us. The rights in this notice do not apply to original checks or to electronic debits to your account. However, you have rights under other law with respect to those transactions.

2. WHAT ARE MY RIGHTS REGARDING SUBSTITUTE CHECKS?

In certain cases, federal law provides a special procedure that allows you to request a refund for losses you suffer if a substitute check is posted to your account (for example, if you think that we withdrew the wrong amount from your account or that we withdrew money from your account more than once for the same check). The losses you may attempt to recover under this procedure may include the amount that was withdrawn from your account and fees that were charged as a result of the withdrawal (for example, bounced check fees).

The amount of your refund under this procedure is limited to the amount of your loss or the amount of the substitute check, whichever is less. You also are entitled to interest on the amount of your refund if your account is an interest-bearing account. If your loss exceeds the amount of the substitute check, you may be able to recover additional amounts under other law.

If you use this procedure, you may receive up to \$2,500 of your refund (plus interest if your account earns interest) within 10 business days after we received your written claim and the remainder of your refund (plus interest if your account earns interest) not later than 45 calendar days after we received your written claim.

We may reverse the refund (including any interest on the refund) if we later are able to demonstrate that the substitute check was correctly posted to your account.

3. HOW DO I MAKE A CLAIM FOR A REFUND?

If you believe that you have suffered a loss relating to a substitute check that you received and that was posted to your account, please submit your claim in writing to:

First Citizens.
Customer Contact Center
Mail Code 994017
P.O. Box 29
Columbia, SC 29202

You must contact us within 40 calendar days of the date that we mailed (or otherwise delivered by a means to which you agreed) the substitute check in question or the account statement showing that the substitute check was posted to your account, whichever is later.

We will extend this time period if you were not able to make a timely claim because of extraordinary circumstances. If you contact us orally with a claim during the 40-calendar day period, you must supply a written claim within 10 business days of the date of the oral claim.

YOUR CLAIM MUST INCLUDE:

- A description of why you have suffered a loss (for example, you think the amount withdrawn was incorrect);
- An estimate of the amount of your loss;
- An explanation of why the substitute check you received is insufficient to confirm that you suffered a loss; and
- A copy of the substitute check or the following information to help us identify the substitute check: your account number, the check number, the check amount, the name of the person to whom you wrote the check; or, in the case of a returned check, the name of the person who wrote you the check.

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WIRE TRANSFERS

1. COVERAGE

A Wire Transfer is any interbank transfer of funds initiated or completed by any means other than check or similar paper instrument. Wire Transfers include "funds transfers" over Fedwire, ACH, and similar networks, including but not limited to "payment orders" as those terms are defined in Article 4A (Uniform Commercial Code - Funds Transfer, SC Code 36-4A-101 et seq., GA Code 11-4A-101 et seq.) Wire Transfer does not include any consumer electronic funds transfer governed by Regulation E, 12 C.F.R.205.

However, transactions initiated by consumers through a telephone response system or home banking system requiring an entry password are covered by Regulation E because issuance of a password does constitute the kind of prearranged agreement covered by Regulation E. Refer to section on ELECTRONIC FUNDS TRANSFER DISCLOSURES for details.

2. BANK AGREES

The Bank will use its best efforts to complete any Wire Transfer initiated by you or persons purporting to be your agent(s), and who possess or can access your established security devices. We, at our sole discretion, may refuse to complete any Wire Transfers for any reason or no reason, including a good faith belief that security has been compromised, the Wire Transfer does not comply with state or federal law, or network or other malfunctions or deficiencies may impede our ability to complete the Wire Transfer. We, at our discretion, may record any telephone conversation with you.

3. BANK'S LIABILITY IS LIMITED

The Bank is not liable for any losses resulting from its unintentional failure to complete a Wire Transfer or honor your request to stop payment, unless our action or failure to act was grossly negligent. We have no liability for any loss resulting from the failure of any communication media, or the action or inactions of anyone else, including but not limited to delays, actions or inactions of other parties participating in the processing of any wire transfers. We are not liable to you, any transferee, or other third party for any consequential, special, indirect or other damages beyond the amount of the Wire Transfer.

4. YOU (DEPOSITOR) AGREE(S)

You will promptly pay any fees associated with the Wire Transfer, whether imposed by us or any third party, and authorize us to deduct those fees from the funds transferred or from the account. You also agree to protect any security devices. You will provide us with accurate and complete information necessary to complete a Wire Transfer. You will notify us as soon as possible of any discrepancy in any statement or confirmation sent by us.

5. YOUR (DEPOSITOR) LIABILITY

You understand and agree that the Bank is not liable for any losses or damages that result from your failure to provide complete and accurate information, or any action, inaction, or circumstance beyond our control. You also agree to hold us harmless and indemnify us for any costs and expenses including attorneys fees incurred to prosecute or defend any claim related to a requested or completed Wire Transfer unless such claim is the result of our gross negligence or willful misconduct.

6. SECURITY DEVICES

"Security devices" refers to any keypad, card, secret code, password, encryption, or similar effort to keep unauthorized persons purporting to represent you from initiating a Wire Transfer. If you and the Bank agree on a security device, you expressly agree that any person possessing the security device may order us to initiate, cancel, redirect, modify or stop a Wire Transfer, whether or not we have been notified of that person's authority, and you accept sole responsibility for that order.

ELECTRONIC FUND TRANSFER DISCLOSURES

This section applies to Electronic Fund Transfers involving consumer accounts.

1. INTRODUCTION AND DEFINITIONS

Different parts in this section may apply depending on which service(s) you may be requesting or using. An electronic fund transfer is a transfer of funds initiated through an electronic terminal, telephonic voice response unit, computer, or magnetic tape for the purpose of authorizing the Bank to debit or credit an account. Electronic fund transfers include, but are not limited to, debit card and ATM transactions; pre-authorized deposits and payments; telephone transfers; transfers initiated through a personal computer; and, transfers initiated by using information obtained from a check (electronic check conversions). Electronic fund transfers do not include checks; paper drafts; pre-authorized transfers between your accounts within the Bank, such as an automatic transfer from savings to checking; or, transfers

initiated by a telephone conversation between a customer and an officer or employee of the Bank, not pursuant to a prearranged plan.

With regard to Bank Cardholder Transactions, throughout this disclosure, the term "ATM Card" means a card issued by the Bank which may be used at any participating automated teller machine (ATM) or Merchant POS Device to access an account. The term "Check Card" means a Card issued by the Bank which may be used as an "ATM Card" or as a "POS Card" at any merchant or company honoring the Visa Check Card. Where provisions in this disclosure apply to both cards, the terms "ATM Card" and "Check Card" are collectively referred to as the "Card" and apply to all "Cardholder" transactions.

If you have a non-bank card or other access device issued to you by a service-provider (such as a bill paying service or major oil company) which you may use to pay for goods or services (such as gasoline) by accessing your checking or other Bank asset account, the use of such card or access device is governed by the agreement(s) sent to you by the service provider with the card or access device.

You should contact the service provider, not the Bank, for any questions about transactions that you make using your non-bank card or access device. The service provider is also responsible for resolving any errors in transactions made with your non-bank card which appear on your bank statement.

2. DISCLOSURES OF TYPES OF AVAILABLE TRANSFERS

A. Preauthorized Transfers

The types of available transfers include preauthorized electronic deposits and payments to and from your eligible deposit accounts.

B. Cardholder Transactions

- You may use your Card and PIN at First Citizens automated teller machines to:
 - Obtain balance information on your eligible deposit accounts.
 - Make a deposit to your eligible deposit accounts.
 - Make a payment from either your eligible deposit accounts or by envelope to Overdraft Protection Account or Credit Card Account or Pay-Any-Day Loans or Installment Loan or Mortgage Loan through First Citizens Mortgage Corporation.
 - Withdraw cash from your eligible deposit accounts.
 - Make a transfer between your eligible deposit accounts.
- You may use your Card and PIN at automated teller machines owned by other financial institutions within the participating ATM network to:
 - Obtain balance information on your eligible deposit accounts.
 - Make a transfer between your eligible deposit accounts.
 - Withdraw cash from your eligible deposit accounts.A fee per transaction may apply to a, b and c above. Also, you may be charged a fee by the ATM operator or any network used to complete the transaction (and you may be charged a fee for a balance inquiry even if you do not complete a fund transfer).
- You may use your Card and PIN or Visa Check Card for purchases at participating merchant locations.

There are limitations on dollar amounts or transfers. You may make withdrawals and purchases up to your daily limit provided there are sufficient funds in your account. Daily limits are described in detail in section LIMITATIONS ON DOLLAR AMOUNTS OF TRANSFERS. For security reasons, there are other limits on withdrawals when you use our automated teller machines.

C. Electronic Telephone Transfers

For eligible accounts you may use your touch tone telephone and PIN to perform the following activities:

- Obtain balance and transaction detail information.
- Place stop payments on items.
- Make a transfer between depository accounts.
- Make payment to consumer loan, credit card or line of credit from depository account.

D. Electronic Check Conversion

You may authorize a merchant or other payee to make a one-time electronic payment from your checking account/MMA using information from your check to:

- Pay for purchases.
- Pay bills.

3. BANK'S LIABILITY FOR FAILURE TO MAKE TRANSFER ON TIME OR IN THE CORRECT AMOUNT

If we do not properly complete a transfer to or from your account on time or in the correct amount according to our agreement with you, we will be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance:

- if, through no fault of ours, your account does not have enough available money to make the transfer.

2. if the transfer would go over the credit limit of your Overdraft Protection account.
3. if the ATM or terminal where you are making a withdrawal does not have enough cash.
4. if the ATM or terminal was not working properly and you knew about the breakdown when you started the transfer.
5. if circumstances beyond our control (such as fire, flood) prevent the transfer.
6. if the funds are subject to legal process or other encumbrances restricting such transfer.
7. if the transfer would exceed a limitation described in section LIMITATIONS ON DOLLAR AMOUNTS OF TRANSFERS.

There may be other exceptions stated in our agreement with you.

4. YOUR RIGHT TO RECEIVE DOCUMENTATION OF TRANSFER

A. Preauthorized Transfer (Credits)

If you have arranged to have direct deposits made to your account at least once every 60 days from the same person or company, either the person or company making the deposit will tell you every time they send us the money or you can call us at your branch office telephone number shown on the front of your periodic statement to find out whether or not the deposit has been made.

B. Cardholder Transactions

For transactions through an automated teller machine, you will have the option to receive a receipt at the time you make any transfer to or from your account.

For Visa Check Card purchases made in person through a participating merchant, you will have the option to receive a sales receipt at the time of purchase or a credit voucher to represent a refund.

C. Periodic Statements

You will receive a monthly statement of transaction activity in your checking and savings account(s). If there is no activity in your account(s), you will get a statement at least quarterly. If your account(s) has been inactive for an extended period of time, you may receive statements less frequently.

5. BUSINESS DAYS OF FIRST CITIZENS BANK AND TRUST COMPANY, INC.

Our business days are Monday through Friday. Saturdays, Sundays and holidays are not included.

6. IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR ELECTRONIC TRANSFERS

Telephone us at 1-888-612-4444 or write us at:

First Citizens
Customer Contact Center
Mail Code 994017
P. O. Box 29
Columbia, SC 29202

as soon as you can, if you think your statement or receipt is wrong or you need more information about a transfer listed on a statement or receipt. We must hear from you no later than 60 days after we sent the FIRST statement on which the error appeared.

- (A) Tell us your name and account number.
- (B) Describe the error or transfer you are unsure about and explain as clearly as you can why you believe it is an error or why you need more information.
- (C) Tell us the dollar amount of the suspected error.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within ten (10) business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to forty five (45) days to investigate your complaint or question. If we decide to do this, we will credit your account within ten (10) business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within ten (10) business days, we may not credit your account.

For errors involving point-of-sale transactions, foreign-initiated transactions, or transactions on new accounts (i.e. transactions occurring within 30 days after the first deposit to the account was made), we may take up to ninety (90) days to investigate your complaint or question. For new accounts, we may take up to twenty (20) business days to credit your account for the amount you think is in error.

For errors involving unauthorized non-PIN based Visa Check Card point-of-sale transactions, we will provide provisional credit within five (5) business days after you notify us instead of within ten (10) or twenty (20) business days. We may withhold providing this accelerated provisional credit, to the extent allowed under applicable law, if the circumstances or account history warrants the delay.

We will tell you the results within three (3) business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

7. SPECIAL RULES FOR PREAUTHORIZED TRANSFERS

If you have told us in advance to make regular payments out of your account, you may stop any of these payments. Here's how: You may call your local First Citizens office — the phone number is on the front of your periodic statement. You may also call us at 1-888-612-4444 or write us at:

First Citizens
Customer Contact Center
Mail Code 994017
P.O. Box 29
Columbia, SC 29202

Please call or write us in time for us to receive your request 3 business days or more before the payment is scheduled to be made. If you call, we may also require you to put your request in writing and get it to us within 14 days after you call.

If these regular payments may vary in amount, the person you are going to pay will tell you 10 days before each payment, when it will be made and how much it will be. You may choose instead to get this notice only when the payment would differ by more than a certain amount from the previous payment, or the amount would fall outside certain limits that you set.

If you order us to stop one of these payments 3 business days before the transfer is scheduled, and we do not do so, we will be liable for your losses or damages. There is a charge for each stop payment order you give.

8. ACCOUNT INFORMATION TO THIRD PARTIES

We disclose information to third parties about your account or the transfers you make:

1. Where it is necessary for completing transfers, or
2. In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant, or
3. In order to comply with government agency or court orders, or
4. If you give us your written permission.

9. VALIDATION DISCLOSURE FOR CARDHOLDERS

You cannot use the card to transfer money into or out of your account until we have validated it by assigning you a Personal Identification Number(PIN). If you do not want to use the card, please destroy it by cutting it in half as soon as you receive it.

10. YOUR LIABILITY FOR UNAUTHORIZED TRANSFERS AND DISCLOSURE OF ADVISABILITY OF PROMPT REPORTING

Tell us AT ONCE if you believe your Card or PIN has been lost or stolen, or if you believe that an electronic fund transfer has been made without your permission using information from your check. Telephoning is the best way of keeping your possible losses down. You could lose all the money in your account (plus your maximum line of credit in your Overdraft Protection account, if applicable).

• If you tell us within two (2) business days after you learn of the loss or theft of your Card or PIN, you can lose no more than \$50 if someone used your Card or PIN without your permission. [For non-PIN based Visa Check Card point-of-sale transactions, your liability is reduced to zero unless you have been grossly negligent or have engaged in fraud. We may require you to provide a written statement regarding claims of unauthorized transactions.]

• If you do not tell us within two (2) business days after you learn of the loss or theft of your Card or PIN, and we can prove we could have stopped someone from using your Card or PIN without your permission if you had told us, you could lose as much as \$500. [For non-PIN based Visa Check Card point-of-sale transactions, your liability is reduced to zero unless you have been grossly negligent or have engaged in fraud. We may require you to provide a written statement regarding claims of unauthorized transactions.]

Also, if your statement shows transfers that you did not make, including those made by Card, PIN, or other means, tell us at once. If you do not tell us within sixty (60) days after the statement was mailed to you, you may not get back any money you lost after the sixty (60) days if we can prove that we could have stopped someone from taking the money if you had told us in time. If a good reason (such as a long trip or a hospital stay) kept you from telling us, we will extend the time periods.

11. TELEPHONE NUMBER AND ADDRESS TO BE NOTIFIED IN CASE OF UNAUTHORIZED TRANSFERS

If you believe your First Citizens issued Card or PIN has been lost or stolen or that someone has transferred or may transfer money from your account without your permission, call us at 1.888.612.4444 or write us at:

First Citizens
Customer Contact Center
Mail Code 994017
P. O. Box 29
Columbia, SC 29202

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You should also call the number or write to the address listed above if you believe a transfer has been made using the information from your check without your permission.

12. CHARGES FOR TRANSFERS OR RIGHT TO MAKE TRANSFERS

Charges for Electronic Fund Transfers and related services are itemized in the Fee Schedule/Interest Disclosures brochure given/sent to you previously, with this agreement or as amended from time to time. We reserve the right to change our schedule of service charges from time to time, but prior notice of any increase will be given to you.

13. CHANGE IN TERMS

Bank may amend, modify or terminate this Agreement and Disclosure at any time after notifying you in writing as required by law prior to the effective date of any modifications at the last address you furnished in writing.

14. LIMITATIONS ON DOLLAR AMOUNTS OF TRANSFERS

- A) ATM withdrawals may be made up to a total of \$500.00 per calendar day.
- B) Purchases may be made up to \$1,000 or the amount available in your account, per calendar day, when you use your PIN to complete purchase.
- C) Purchases not requiring a PIN, may be made up to your daily limit, which is \$2,500 or your available balance, whichever is less.

BUSINESS AND COMMERCIAL CUSTOMERS ONLY

In accordance with the requirements of the Unlawful Internet Gambling Enforcement Act of 2006 and Regulation GG, this notification is to inform you that restricted transactions are prohibited from being processed through your account or relationship with our institution. Restricted transactions are transactions in which a person accepts credit, funds, instruments or other proceeds from another person in connection with unlawful Internet gambling.

IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT

(USA Patriot Act)

To help the government fight the funding of terrorism and money laundering activities, Federal Law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means for you: When you open an account, we will ask for the following information, as appropriate - your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

BANK SECRECY ACT

Requirements of the Bank Secrecy Act (BSA) are designed to aid the federal government in detecting illegal activities, such as money laundering, tax evasion, and terrorist financing, through tracking certain cash-based transactions. In accordance with the BSA, we are required to report large currency transactions to the IRS by preparing and submitting a Currency Transaction Report (CTR) for each reportable transaction. Large currency transactions are defined as:

- a single transaction involving currency of more than \$10,000; or
- multiple transactions conducted by/for a customer during the same business day involving total currency of more than \$10,000.

Reportable transactions include deposits, withdrawals, exchanges of currency, check cashing, cash purchases of monetary instruments, and other financial services involving the physical transfer of over \$10,000 in cash between Bank personnel and a customer. It is a criminal violation of the BSA if, in order to evade a currency transaction reporting requirement, a person:

- cause(s) or attempt(s) to cause a domestic financial institution to fail to file a (CTR) report;
- cause(s) or attempt(s) to cause a domestic financial institution to file a report (CTR) that contains a material omission or misstatement of fact; or
- structure(s) or assist(s) in structuring, any transaction with one or more domestic financial institutions.

The BSA also requires us to maintain a record of: (1) sales of certain negotiable instruments, such as cashier's checks, money orders, traveler's checks and other similar instruments, when the amount of cash involved is \$3,000 to \$10,000 inclusive; and (2) certain funds transfers of \$3,000 or greater. These records are made available to the U.S. Treasury upon request.

You agree to assist us in gathering information to meet Bank Secrecy Act requirements.

First Citizens
We're on it.

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☒ CORRECTED (if checked)

PAYER'S name, street address, city, state, ZIP code, and telephone no. FAMDAMILY RESTAURANT & TAVERN 1599 SAILING CLUB ROAD CAMDEN, SC 29020		1 Rents \$ 19762.50	OMB No. 1545-0115 2011 Form 1099-MISC	Miscellaneous Income	
		2 Royalties \$			
		3 Other income \$	4 Federal income tax withheld \$		Copy B For Recipient
		5 Fishing boat proceeds \$	6 Medical and health care payments \$		
PAYER'S federal identification number 27-5175699	RECIPIENT'S identification number [REDACTED]	7 Nonemployee compensation \$	8 Substitute payments in lieu of dividends or interest \$	This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if this income is taxable and the IRS determines that it has not been reported.	
RECIPIENT'S name, address, and ZIP code TIM GAINEY DBA A LIST PROPERTIES, LLC 4078 MAJOR EVANS ROAD LANCASTER SC 29720		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale ☐	10 Crop insurance proceeds \$		
		11 [REDACTED]	12 [REDACTED]		
Account number (see instructions)		13 Excess golden parachute payments \$	14 Gross proceeds paid to an attorney \$		
15a Section 409A deferrals \$	15b Section 409A income \$	16 State tax withheld \$	17 State/Payer's state no. -----	18 State income \$	

Form 1099-MISC

(keep for your records)

38-2099803
Department of the Treasury - Internal Revenue Service

☒ CORRECTED (if checked)

PAYER'S name, street address, city, state, ZIP code, and telephone no. FAMDAMILY RESTAURANT & TAVERN 1599 SAILING CLUB ROAD CAMDEN, SC 29020		1 Rents \$ 7144.60	OMB No. 1545-0115 2011 Form 1099-MISC		Miscellaneous Income
		2 Royalties \$			
		3 Other income \$	4 Federal income tax withheld \$	Copy B For Recipient	
PAYER'S federal identification number 27-5175699	RECIPIENT'S identification number [REDACTED]	5 Fishing boat proceeds \$	6 Medical and health care payments \$		
RECIPIENT'S name, address, and ZIP code KENNY GAINEY 4086 MAJOR EVANS ROAD LANCASTER SC 29720		7 Nonemployee compensation \$	8 Substitute payments in lieu of dividends or interest \$		
		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale ☐	10 Crop insurance proceeds \$		
		11 [REDACTED]	12 [REDACTED]		
Account number (see instructions)		13 Excess golden parachute payments \$	14 Gross proceeds paid to an attorney \$		
15a Section 409A deferrals \$	15b Section 409A income \$	16 State tax withheld \$	17 State/Payer's state no. -----	18 State income \$	

Form 1099-MISC

(keep for your records)

38-2099803
Department of the Treasury - Internal Revenue Service

LANCASTER COUNTY ASSESSOR
Tax Map:
0081J 0A 001 00

Prepared By: Nelson Mullins Riley & Scarborough, LLP
Attn: B. Keith Poston, Esquire
P.O. Box 11070, Columbia, SC 29211

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER) FORECLOSURE

2014005506
DEED
RECORDING FEES
STATE TAX
COUNTY TAX
PRESENTED & RECORDED:
04-30-2014 11:09 AM
JOHN LANE
REGISTER OF DEEDS
LANCASTER COUNTY, SC
By: CANDICE PHILLIPS DEPUTY
BK: DEED 794
PG: 126-128

\$10.00
\$0.00
\$0.00

TO ALL WHOM THESE PRESENT SHALL CONCERN:

I, Clyde N. Davis, Jr. as Special Referee for Lancaster County, and the said State, send greetings:

WHEREAS, in action in the Court of Common Pleas in Lancaster County between First Citizens Bank and Trust Company, Inc. v. Timothy M. Gainey, et. al., (Case No.: 2013-CP-29-1247) by a Decree of Foreclosure filed January 16, 2014, it was decreed that the property hereinafter described should be sold by the Special Referee for Lancaster County on the terms and for the purposes mentioned in the Order(s) granted in the case (see **Judgment Roll No. 2013-CP-29-1247**) **A MORTGAGE FORECLOSURE ACTION-TRANSFERRING REALTY.**

NOW THEREFORE KNOW ALL MEN, That I, the undersigned, as Special Referee for Lancaster County, pursuant to the foregoing and in consideration of One Hundred Fifty Thousand and 00/100 (\$150,000.00) Dollars, as paid by the hereinafter named grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant and release the following property unto **First Citizens Bank and Trust Company, Inc. ("Grantee")**:

All that piece, parcel or lot of land, with improvements thereon, lying, being and situate on the South side of South Carolina State Highway #200 just south of the corporate limits of the Town of Lancaster, Lancaster County, South Carolina, being more particularly shown and described as that 2.266 acre tract of land, more or less, on a plat thereof entitled 'PLAT OF PROPERTY OF TIMOTHY M. GAINNEY OR KENNETH R. GAINNEY' dated August 20, 2004 made by J.C. Crumpler, South Carolina Registration Number 6574, recorded in the Office of the Register of Deeds for Lancaster County in Plat Book 2004-469, reference to which plat is craved for a more particular description thereof.

This being the same property conveyed to Kenneth Ray Gainey and Timothy M. Gainey by deed of Clarence H. Hendrix a/k/a C.H. Hendrix, recorded in the Office of the Register of Deeds for Lancaster County on September 3, 2004 in Book 250 at Page 235. Thereafter, Timothy M. Gainey and Kenneth Ray Gainey conveyed the property to A List Properties, LLC by deed recorded in the Office of the Register of Deeds for Lancaster County on May 11, 2011 in Book 615 at Page 40.

TMS No. 0081J-0A-001.00

Property Address: 1227 Great Falls Highway, Lancaster

Grantee: First Citizens Bank and Trust Company, Inc.

Grantee's Address: P.O. Box 29

Columbia, SC 29202

RECORDED THIS 2nd DAY
OF MAY, 2014
IN BOOK 2014 PAGE D-1

Cheryl A. Morgan
Auditor, Lancaster County, SC

Grantors: Clyde N. Davis, Jr., Special Referee for Lancaster County and
A List Properties, LLC

This property was sold subject to any past due or accruing property taxes, assessments, existing easements and restrictions of record and any other senior encumbrances.

TOGETHER with all and singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and all other person who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges and appurtenances, unto the said Grantee, its successors and assigns for their own use, benefit, and behoof, forever.

IN WITNESS WHEREOF, I, the undersigned, as Special Referee for Lancaster County, under and by virtue of the said Order(s), have hereunto set my hand and seal the 22nd day of April, the year of our Lord two-thousand fourteen (2014).

SIGNED, SEALED AND DELIVERED)
IN THE Presence of:)

[Signature]
Caroline Knight

By: [Signature]
Clyde N. Davis, Jr.
Special Referee, Lancaster County

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

Acknowledgment

I, Caroline Knight, so hereby certify that Clyde N. Davis, Jr., as Special Referee for Lancaster County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this 22 day of April, 2014.

Sworn To and Subscribed Before Me
This 22 day of April, 2014.

Caroline Knight (L.S.)
Notary Public of South Carolina

My commission expires: 09/05/2022

CAROLINE KNIGHT
Notary Public - State of South Carolina
My Commission Expires September 5, 2022

Affidavit

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at 1227 Great Falls Highway, Lancaster
bearing Lancaster County Tax Map Number 0081J-0A-001.00, was transferred
by Clyde N. Davis, Jr., Special Referee for Lancaster County
to First Citizens Bank and Trust Company, Inc. on April 22, 2014
3. Check one of the following: The deed is
(a) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c) ☒ exempt from the deed recording fee because (see information section of affidavit):
13 (Foreclosure) (If exempt, please skip items 4 - 7 and go to item 8 of this affidavit.)
4. Check one of the following if either item 3(a) or item 3(b) above has been checked (see information section of this affidavit):
(a) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
(b) _____ The fee is computed on the fair market value of the realty which is _____
(c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____
5. Check Yes _____ or No _____ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "yes" the amount of the outstanding balance of this lien or encumbrance is: _____
6. The deed recording fee is computed as follows:
(a) Place the amount listed in item 4 above here: _____
(b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here)
(c) Subtract line 6(b) from line 6(a) and place result here: _____
7. The deed recording fee due is based on the amount listed on line 6(c) above and the deed recording fee due is : _____
8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney for First Citizens Bank and Trust Company, Inc.
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

B. Kelly Bth
Responsible Person Connected with the Transaction

B. Keith Poston
Print or Type Name Here

SWORN to before me this 25th
day of April 2014
Catherine F. Dease
Notary Public for South Carolina
My Commission Expires: 9-17-2022

FIVE DAYS TO VACATE PREMISES

DATE 12/17/2011

TO: Famfamily Enterprises LLC
(Joseph Edward Funderburk, Jr. and
Joseph Willis Funderburk)

**YOUR RENT IN THE PAST HAS NOT BEEN PAID
WITHIN FIVE DAYS AFTER BEING DUE.**

**IN ACCORDANCE WITH SOUTH CAROLINA
LANDLORD AND TENANT ACT, I HEREBY REQUEST
FOR YOU TO VACATE THE PROPERTY WITHIN FIVE
DAYS.**

A List Properties, LLC
LANDLORD OR AGENT

Tracy Hance

FIVE DAYS TO VACATE PREMISES

DATE 07-31-12

TO: Famfamily Enterprises LLC
(Joseph Edward Funderburk Jr. and
Joseph Willis Funderburk)

**YOUR RENT IN THE PAST HAS NOT BEEN PAID
WITHIN FIVE DAYS AFTER BEING DUE.**

**IN ACCORDANCE WITH SOUTH CAROLINA
LANDLORD AND TENANT ACT, I HEREBY REQUEST
FOR YOU TO VACATE THE PROPERTY WITHIN FIVE
DAYS.**

A List Properties LLC
LANDLORD OR AGENT

Tim Gainey

State of South Carolina**COUNTY OF LANCASTER**

PAID IN FULL THIS 15th DAY OF Oct 2009 THE
 CLERK IS HEREBY AUTHORIZED AND
 DIRECTED TO CANCEL THIS SECURITY
 INSTRUMENT OF RECORD.

**REAL ESTATE FUTURE
 ADVANCE MORTGAGE**

SATISFIED

BK 1097 PG 30

10-29-09

REGISTER OF DEEDS
LANCASTER COUNTY, SC

FOUNDERS FEDERAL CREDIT UNION

BY: Pen TaylorTITLE: MortgageWITNESSES: [Signature]

FILED, RECORDED, INDEXED

07/16/2003 10:51AM

Rec Fee: 10.00 St Fees: 0.00

Co Fee: 0.00 Pages: 3

Register of Deeds

LANCASTER COUNTY, SC

WHEREAS, the said Tim M. Gainey and Vickie T. Gainey (mortgagor)

in and by that certain obligation bearing date the 11th day of July, 2003,
 stand firmly held and bound unto FOUNDERS FEDERAL CREDIT UNION (mortgagee), for such existing
 indebtedness in the principal amount of \$ 75,000.00, plus interest thereon, attorney's fees, court
 costs, and any payments by the mortgagee for insurance, taxes, or repairs, and pursuant to the terms of that
 aforesaid obligation; Maturity date not later than July 11, 2013.

NOW, KNOW ALL MEN, That the Mortgagor, in consideration of the aforesaid debt, and in order to secure
 the payment thereof, and of any other and further sums for which the Mortgagor may be indebted to the
 mortgagee at any time for advances made to or for his account by the Mortgagee, referring specifically to this
 mortgage transaction, has granted, bargained, sold and released and by these presents does grant, bargain, sell
 and release unto the Mortgagee, its successors and assigns:

All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina,
 County of Lancaster, located approximately 8 miles southwest of Lancaster, 1460' southeast of S.
 C. Highway 200, on northeast side of Major Evans Road (No. 216) in Cedar Creek Township,
 designated as Lot Number 3, containing 3.316 acres as shown on plat made by Jack Smith, RLS, on
 March 25, 1989, recorded in the Register of Deeds Office for Lancaster County, South Carolina as
 Plat Number 10085. For a more complete description reference to said plat is craved.

TOGETHER with that certain right of way for ingress and egress as shown that certain Right of Way
 and Easement Agreement dated January 22, 2003 and recorded in Deed Book 183 Page 132 in the
 Register of Deeds Office for Lancaster County, South Carolina.

Being the identical property conveyed to Tim M. Gainey and Vickie T. Gainey by Deed of Roy G.
 Roddey and Betty B. Roddey, a/k/a Betty S. Roddey dated March 3, 1989 and recorded April 11,
 1989 in Deed Book I-8 Page 130. See also Corrective Deed recorded May 26, 1989 in Deed Book
 K-8 Page 310.

2009014183

SATISFACTION MORTGAGE
RECORDING FEES

\$5.00

PRESENTED & RECORDED:

10-29-2009 01:18 PM

JOHN LANE

REGISTER OF DEEDS

LANCASTER COUNTY, SC

By: JENNIFER JOYNER DEPUTY

BK:MORT 2176

PG:36-36

Together with all singular rights, members, hereditaments, and appurtenances
 appertaining, and all of the rents, issues, and profits which may arise or
 plumbing, and lighting fixtures now or hereafter attached, connected, or litte-
 the parties hereto that all fixtures and equipment, other than the usual hous-
 estate.

TO HAVE AND TO HOLD, all and singular the said premises unto the Mortgagee, its heirs, successors and assigns, forever.

The Mortgagor covenants that it is lawfully seized of the premises hereinabove described in fee simple absolute, that it has
 good right and is lawfully authorized to sell, convey or encumber the same, and that the premises are free and clear of all
 liens and encumbrances except as provided herein. The Mortgagor further covenants to warrant and forever defend all and
 singular the said premises unto the Mortgagee forever, from and against the Mortgagor and all persons whomsoever lawfully
 claiming the same or any part thereof.

The Mortgagor further covenants and agrees as follows:

(1) That this mortgage shall secure the Mortgagee for such further sums as may be advanced hereafter, at the option of the
 Mortgagee, for the payment of taxes, insurance premiums, public assessments, repairs or other purposes pursuant to the
 covenants herein. This mortgage shall also secure the Mortgagee for any further advances, readvances or credits that
 may be made hereafter to the Mortgagor by the Mortgagee so long as the total indebtedness thus secured does not exceed
 the original amount shown on the face hereof. Provided, however, if the obligation of the Mortgagor has a variable interest
 rate provision then this mortgage shall also secure such interest as may be deferred.

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PAID IN FULL THIS 14th DAY OF March 2013 THE CLERK IS HEREBY AUTHORIZED AND DIRECTED TO CANCEL THIS SECURITY INSTRUMENT OF RECORD.

0000691 Bk: 01012 Pg: 00262

WHEN RECORDED, MAIL TO

FOUNDERS FEDERAL CREDIT UNION

BY: Tim M. Gainey
TITLE: Tim M. Gainey
WITNESSES: William Lane

FILED, RECORDED, INDEXED
01/27/2003 02:12PM
Rec Fee: 10.00 St Fees: 0.00
Co Fee: 0.00 Pages: 4
Register of Deeds
LANCASTER COUNTY, SC

SPACE ABOVE THIS LINE FOR RECORDER'S USE

REVOLVING CREDIT MORTGAGE

THIS MORTGAGE CONTAINS A DUE-ON-SALE PROVISION AND SECURES INDEBTEDNESS UNDER A CREDIT AGREEMENT WHICH PROVIDES FOR A REVOLVING LINE OF CREDIT AND MAY CONTAIN A VARIABLE RATE OF INTEREST.

THIS MORTGAGE ("Security Instrument") is made on January 22, 2003.

The Mortgagor is Tim M. Gainey and Vickie T. Gainey

("Borrower").

The Mortgagee is Founders Federal Credit Union

duly chartered and existing under the laws of The United States of America

whose address is 607 N. Main Street, Lancaster, SC 29720

("Lender").

WHEREAS, Borrower is indebted to Lender as described in this paragraph;
TO SECURE to Lender:

- (1) The repayment of all indebtedness due and to become due under the terms and conditions of the LOANLINER® Home Equity Plan Credit Agreement and Truth-in-Lending Disclosures made by Borrower and dated the same day as this Security Instrument, and all modifications, amendments, extensions and renewals thereof (herein "Credit Agreement"). Lender has agreed to make advances to Borrower under the terms of the Credit Agreement, which advances will be of a revolving nature and may be made, repaid, and remade from time to time. Borrower and Lender contemplate a series of advances to be secured by this Security Instrument. The total outstanding principal balance owing at any one time under the Credit Agreement (not including finance charges thereon at a rate which may vary from time to time, and any other charges and collection costs which may be owing from time to time under the Credit Agreement) shall not exceed Thirty Five Thousand & NO/100 (\$ 35,000.00). That sum is referred to herein as the Maximum Principal Balance and referred to in the Credit Agreement as the Credit Limit. On the Final Payment Date, 25 years from the date of this Security Instrument, the entire indebtedness under the Credit Agreement, if not paid earlier, is due and payable.
 - (2) The payment of all other sums advanced in accordance herewith to protect the security of this Security Instrument, with finance charges thereon at a rate which may vary as described in the Credit Agreement.
 - (3) The performance of Borrower's covenants and agreements under this Security Instrument and under the Credit Agreement.
- BORROWER does hereby mortgage, grant and convey to Lender the following described property located in the County of Lancaster, State of South Carolina:

"All that certain piece, parcel or tract of land, together with any and all improvements located thereon, situate, lying and being in the State of South Carolina, County of Lancaster, located about 8 miles southwest of Lancaster, north of Road No. 216 in Cedar Creek Township, designated as Tract No. 3 as shown on plat made by Jack Smith, RLS, on September 23, 1991, recorded in the Office of the Clerk of Court n/k/a Register of Deeds for Lancaster County, S. C., as Plat No. 11891. Reference to said plat is craved for a more minute description."

TOGETHER WITH that certain right of way for ingress and egress as shown that certain Right of Way and Easement Agreement dated January 22, 2003 and recorded in the Office of the Register of Deeds for Lancaster County in Deed Book 183, at Page 132.

Being the identical property conveyed to Mortgagors herein by deed dated March 3, 1989 and recorded April 11, 1989 in the Office of the Clerk of Court n/k/a Register of Deeds for Lancaster County in Deed Book I-8, at Page 130. See also corrected deed dated March 31, 1989, recorded May 26, 1989, in Deed Book K-8, at Page 310.

SATISFIED
MTG BK 182 PG 262
DATE 3-27-2013
REGISTER OF DEEDS
LANCASTER COUNTY, SC

2013004296

SATISFACTION MORTGAGE
RECORDING FEES

\$5.00

PRESERVED & RECORDED:
03-22-2013 11:23 AM

JOHN LANE
REGISTER OF DEEDS
LANCASTER COUNTY, SC
By: CANDICE PHILLIPS DEPUTY

BK:MORT 2635

PG:85-85

which has the address of 4078 Major Evans Road

(Street)

Lancaster

(City)

South Carolina

(State)

29720

(Zip Code)

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A. U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT SETTLEMENT STATEMENT	B. TYPE OF LOAN:				
	1. ☐ FHA	2. ☐ FmHA	3. ☒ CONV. UNINS.	4. ☐ VA	5. ☐ CONV. INS.
	6. FILE NUMBER: 5989		7. LOAN NUMBER:		
	8. MORTGAGE INS CASE NUMBER:				

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "[POC]" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME AND ADDRESS OF BORROWER: Timothy M. Gainey 4078 Major Evans Road Lancaster, SC 29720	E. NAME AND ADDRESS OF SELLER: Blackwell Trimnal Myers, LLC PLACE OF SETTLEMENT 201 Dunlap Street Lancaster, SC 29720	F. NAME AND ADDRESS OF LENDER: First Citizens Bank and Trust Company, Inc.
G. PROPERTY LOCATION: 1227 Great Falls Highway Lancaster, SC 29720	H. SETTLEMENT AGENT: 11-3681740 Blackwell Trimnal Myers, LLC	I. SETTLEMENT DATE: September 23, 2009

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract Sales Price		401. Contract Sales Price	
102. Personal Property		402. Personal Property	
103. Settlement Charges to Borrower (Line 1400)	2,636.00	403.	
104. Pay	114,523.01	404.	
105.		405.	
Adjustments For Items Paid By Seller in advance		Adjustments For Items Paid By Seller in advance	
106. City/Town Taxes to		406. City/Town Taxes to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	117,159.01	420. GROSS AMOUNT DUE TO SELLER	
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money		501. Excess Deposit (See Instructions)	
202. Principal Amount of New Loan(s)	187,000.00	502. Settlement Charges to Seller (Line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first Mortgage	
205.		505. Payoff of second Mortgage	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
Adjustments For Items Unpaid By Seller		Adjustments For Items Unpaid By Seller	
210. City/Town Taxes to		510. City/Town Taxes to	
211. County Taxes to		511. County Taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	187,000.00	520. TOTAL REDUCTION AMOUNT DUE SELLER	
300. CASH AT SETTLEMENT FROM/TO BORROWER:		600. CASH AT SETTLEMENT TO/FROM SELLER:	
301. Gross Amount Due From Borrower (Line 120)	117,159.01	601. Gross Amount Due To Seller (Line 420)	
302. Less Amount Paid By/For Borrower (Line 220)	(187,000.00)	602. Less Reductions Due Seller (Line 520)	
303. CASH (FROM) (X TO) BORROWER	69,840.99	603. CASH (TO) (FROM) SELLER	0.00

The undersigned hereby acknowledge receipt of a completed copy of pages 1&2 of this statement & any attachments referred to herein.

Borrower

Timothy M. Gainey

Seller

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L. SETTLEMENT CHARGES										PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL COMMISSION Based on Price \$ @ %											
Division of Commission (line 700) as Follows:											
701. \$ to											
702. \$ to											
703. Commission Paid at Settlement											
704. to											
800. ITEMS PAYABLE IN CONNECTION WITH LOAN											
801. Loan Origination Fee 0.3930 % to First Citizens Bank and Trust Company, Inc.										735.00	
802. Loan Discount % to											
803. Appraisal Fee to First Citizens Bank and Trust Company, Inc.										920.00	
804. Loan processing fee to First Citizens Bank and Trust Company, Inc.										200.00	
805. Lender's Inspection Fee to											
806. Mortgage Ins. App. Fee to											
807. Assumption Fee to											
808.											
809.											
810.											
811.											
812. Flood cert to First American Flood Data Services										8.00	
813.											
814.											
815.											
816.											
817.											
818.											
819.											
820.											
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE											
901. Interest From 09/23/09 to 10/01/09 @ \$ /day (8 days %)											
902. Mortgage Insurance Premium for months to											
903. Hazard Insurance Premium for 1.0 years to Auto Owners Insurance Company POCb											
904.											
905.											
1000. RESERVES DEPOSITED WITH LENDER											
1001. Hazard Insurance months @ \$ per month											
1002. Mortgage Insurance months @ \$ per month											
1003. City/Town Taxes months @ \$ per month											
1004. County Taxes months @ \$ per month											
1005. Assessments months @ \$ per month											
1006. months @ \$ per month											
1007. months @ \$ per month											
1008. months @ \$ per month											
1100. TITLE CHARGES											
1101. Settlement or Closing Fee to											
1102. Abstract or Title Search to Jackson Title Services, LLC										100.00	
1103. Title Examination to											
1104. Title Insurance Binder to Blackwell Trimnal Myers, LLC										100.00	
1105. Document Preparation to											
1106. Notary Fees to											
1107. Attorney's Fees to Blackwell Trimnal Myers, LLC										300.00	
(includes above item numbers:)											
1108. Title Insurance to Investors Title Insurance Company										260.00	
(includes above item numbers:)											
1109. Lender's Coverage \$ 187,000.00 260.00 reissue											
1110. Owner's Coverage \$											
1111.											
1112.											
1113.											
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES											
1201. Recording Fees: Deed \$ 13.00; Mortgage \$; Releases \$										13.00	
1202. City/County Tax/Stamps: Deed ; Mortgage											
1203. State Tax/Stamps: Revenue Stamps ; Mortgage											
1204.											
1205.											
1300. ADDITIONAL SETTLEMENT CHARGES											
1301. Survey to											
1302. Pest Inspection to											
1303. Interest to First Citizens Bank and Trust Company, Inc. POC:B730.00											
1304.											
1305.											
1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 103, Section J and 502, Section K)										2,636.00	

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 of this two page statement.

Brian Trimgal
Settlement Agent

Certified to be a true copy.

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STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

Kenneth R. Gainey,)

Plaintiff,)

vs.)

Timothy M. Gainey,)

Defendant.)

THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NUMBER: 2012-CP-29-1187

VERDICT

(Check one)

- ☐ WE, THE JURY, FIND IN FAVOR OF THE PLAINTIFF KENNETH R. GAINES AND AWARD THE PLAINTIFF JUDGMENT AGAINST THE DEFENDANT TIMOTHY M. GAINES IN THE AMOUNT OF:

\$ _____

- ☒ WE, THE JURY, FIND IN FAVOR OF THE DEFENDANT.

March, 18, 2015

Jeffrey S. Torres
Jeffrey S. Torres, Foreperson

FILED
OFFICE OF CLERK
OF COURT
2015 MAR 18 PM 2:04
CLERK OF COURT
LANCASTER, SC

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