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SC Court of Appeals

The State Of South Carolina
In The Court of Appeals

Appeal from Richland County Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Civil Action No. 2012 – CP 40 -07540
Appellate Case: 2015-000730

TD Bank, NA, successor by Merger
with Carolina First Bank, Respondent,
v.

David H. Jacobs, Appellant
v.

TD Bank, NA, successor by Merger
with Carolina First Bank, Respondent,
v.

David H. Jacobs and James McFarland, Defendants,
Of Whom David H. Jacobs is the Appellant

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TD Bank, NA, successor by merger with Carolina First Bank vs. David H. Jacobs
TD Bank, NA, successor by merger with Carolina First Bank vs. David H. Jacobs and James A. McFarland

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012- CP-40-6074/2012-CP-40-7540

TD Bank, NA successor by Merger with Carolina First Bank,	David H. Jacobs,
TD Bank, NA successor by Merger with Carolina First Bank, and	David H. Jacobs and James McFarland,
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Jody a. Bedenbaugh, Esquire	**Attorney for :** ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: The Defendant's Motion for Summary Judgment is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order: N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

~~Circuit Court Judge~~ Master

2097
Judge Code

3-21-14
Date

For Clerk of Court Office Use Only

This judgment was entered on the 24 day of March, 20 14 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Jody A. Bendenbaugh, Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gerald D. Jowers, Esquire

ATTORNEY(S) FOR THE DEFENDANT(S)

Rebecca W. Harrell
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-40-6074
2012-CP-40-7540

T. D. BANK,

Plaintiff,

vs.

DAVID A. JACOBS, ET AL.,

Defendant(s)

ORDER DENYING MOTIONS OF THE PLAINTIFF

RICHLAND COUNTY
FILED
2014 APR 23 AM 9:28
JEANETTE W. McBRIDE
C.C.P. & G.S.

T.D. BANK,

Plaintiff,

vs.

DAVID A. JACOBS AND JAMES MCFARLAND, JR.

Defendants

The matter before the Court is the Motion to Reconsider the Order Denying Plaintiff's Motions for Summary Judgment. Plaintiff's Motion for Summary Judgment against David Jacobs in case number 2012-CP-40-6074 and Plaintiff's Motion for Summary Judgment against David Jacobs and James McFarland in case number 2012-CP-40-7540 are denied.

It is so Ordered.

Joseph M. Strickland, as
Master in Equity for Richland County

Columbia, South Carolina

April 21, 2014.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank Plaintiff, vs. David H. Jacobs and James A. McFarland, Defendants.	)	Civil Action No. 2012-CP-40-7540

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David H. Jacobs, Defendant.	)	Civil Action No. 2012-CP-40-6074

The Parties appeared before the Court on August 12, 2014 for a date certain trial. Appearing before the Court was Jody Bedenbaugh and Paul Collins for Plaintiff TD Bank, N.A. ("TD Bank"), Gerald Jowers for Defendant David Jacobs, and Leonard Jordan for Defendant James McFarland. On August 7, 2014, TD Bank filed a motion in limine seeking to exclude certain testimony and evidence from trial pursuant to Rules 401-403 and 701-702 of the South Carolina Rules of Evidence, and Rule 37 of the South Carolina Rules of Civil Procedures.

These cases were originally on the jury roster for the July 7, 2014 term of court. On July 3, 2014, due to illness, Defendant Jacobs' counsel requested a continuance, which was granted by the Court. On July 11, 2014, the Court held a status conference at which time the Court consolidated the cases for trial, allowed Defendant Jacobs to amend his answer in both cases[1], and scheduled the consolidated cases for a date certain trial on August 12, 2014.

Prior to the call of the case for trial, the Court heard arguments on TD Bank's motion in limine. Based on the arguments and concessions made during arguments, the Court released the jury, and held that the Defendants would be provided the opportunity to proffer the testimony and evidence challenged by TD Bank, and the Court would then decide the motion based on the Court's file, the proffered evidence, the motion in limine with exhibits, and argument of counsel[2]. The Court further held, and the parties agreed, that any evidence challenged by TD Bank that Defendants did not proffer would be excluded.

Based on Court's file, TD Bank's motion in limine, the argument of counsel, and evidence and testimony proffered by the Defendants, as more fully discussed below, the Court grants TD Bank's motion in limine in part and denies TD Bank's motion in limine in part.

FACTUAL AND PROCEDURAL BACKGROUND

TD Bank v. David Jacobs (Newberry Atrium)

On September 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-6074 against Defendant David Jacobs to collect on a Guaranty ("Newberry Guaranty") given by Defendant

[1] TD Bank consented to the amendments subject to certain restrictions.
[2] The Court chose this procedure to ensure inadmissible evidence was not presented to the jury pursuant to Rule 103 of the South Carolina Rules of Evidence.

TD Bank v. David Jacobs and James McFarland (Atrium at Middle Sound Land)

On November 7, 2012, TD Bank filed Civil Action No. 2012-CP-40-7540 against Defendants David Jacobs and James McFarland to collect on Guaranties ("Atrium Guaranties") given by Defendants Jacobs and McFarland in consideration for a November 19, 2004 commercial note in the amount of $3,000,000.00 to Atrium at Middle Sound Land, LLC, and which was secured by a mortgage on commercial real estate owned by Atrium.

On April 8, 2013, Defendant Jacobs filed his answer admitting signing the note on behalf of Atrium at Middle Sound, admitting that he signed an unconditional guaranty, admitting that the maturity date on the note was April 4, 2012, and admitting that the balance due on the loan has not been paid. (Answer, ¶¶ 1-4). Defendant Jacobs also alleged in his answer that TD Bank breached the duty of good faith and fair dealing by suing him on solely on the guaranty and not the mortgage. (Answer, ¶¶ 17 & 20). Based on these allegations, Defendant Jacobs sought to void the guaranty (Answer, ¶ 24).

On May 30, 2013, Defendant McFarland filed his answer admitting signing the note on behalf of Atrium at Middle Sound, admitting that he signed an unconditional guaranty, admitting that the maturity date on the note was April 4, 2012, and admitting that the balance due on the loan has not been paid. (Answer, ¶¶ 1-5). Defendant Jacobs also alleged in his answer that TD Bank breached the duty of good faith and fair dealing by suing him on solely on the guaranty and not the mortgage. (Answer,¶¶ 14, 16, & 18). Based on these allegations, Defendant McFarland sought to have the Court suspend enforcement of the guaranty until TD Bank pursued its remedies against the collateral (Answer, ¶ 19).

On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that TD Bank has sold other notes

Jacobs in consideration for a February 20, 2007 commercial note in the amount of $7,141,000.00 to Newberry Atrium Professional Center, LLC ("Newberry Atrium"), which was secured by a mortgage on commercial real estate owned by Newberry Atrium.

On November 21, 2012, Defendant Jacobs filed his answer admitting signing the note on behalf of Newberry Atrium, admitting that he signed an unconditional guaranty, admitting that the maturity date on the note was August 8, 2012, and admitting that the balance due on the loan had not been paid. (Answer, ¶¶ 1-3). Defendant Jacobs also alleged in his answer that TD Bank breached the duty of good faith and fair dealing by failing to provide permanent financing and by suing him solely on the guaranty and not the mortgage. (Answer, ¶¶ 16, 18, 24-26). Based on these allegations, Defendant Jacobs sought to void the guaranty (Answer, ¶¶ 19 & 27). On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that TD Bank had sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with the officers of TD Bank will be released from liability. (Supp. Answer, ¶ 30).

Through discovery, Defendant Jacobs admitted signing the Newberry Atrium Guaranty individually as well as signing the Note and other loan documents on behalf of Newberry Atrium. In addition, Jacobs admitted the loan to Newberry had matured, that TD Bank demanded payment, that he and Newberry Atrium failed to pay the balance due, and that he and Newberry Atrium were indebted to TD Bank under the terms of the loan documents. (Affidavit of David Jacobs, ¶¶ 41 & 42, Exhibit C to TD Bank's Motion in Limine, and Deposition Transcript of David Jacobs, 82:1-3; 99:18-20; 107:5-9, Exhibit D to TD Bank's Motion in Limine).

and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with the officers of TD Bank, will be released from liability. (Supp. Answer, ¶ 27).

In response to TD Bank's written discovery, Defendant McFarland admitted signing the Atrium at Middle Sound Guaranty and admitted the loan to Atrium at Middle Sound was past due, that TD Bank demanded payment, that he failed to pay the balance due, and that he and Atrium at Middle Sound are indebted under the terms of the loan documents to TD Bank. (McFarland's Responses to TD Bank's Requests to Admit, Exhibit A to TD Bank's Motion in Limine, and Affidavit of James McFarland, Exhibit B to TD Bank's Motion in Limine). Defendant Jacobs admitted, by way of an affidavit and deposition testimony, signing the Atrium at Middle Sound Guaranty individually as well as signing the Note and other loan documents on behalf of Atrium at Middle Sound, that the loan to Atrium had matured, that TD Bank demanded payment, that he failed to pay the balance due, and that he is indebted to TD Bank under the terms of the loan documents. (Affidavit of David Jacobs, ¶¶ 41 & 42, Exhibit C to TD Bank's Motion in Limine, and Deposition Transcript of David Jacobs, 82:1-3; 99:18-20; 107:5-9, Exhibit D to TD Bank's Motion in Limine).

Although admitting the elements of TD Bank's case against them other than the exact amount of damages, Defendants allege that the Court should void the guaranty (Jacobs) or suspend enforcement of the guaranty (McFarland) because TD Bank refused to provide permanent financing when requested by Defendant Jacobs and because TD Bank is unfairly suing them on the Guaranties without first foreclosing on its collateral, which they contend are breaches of the duty of good faith and fair dealing owed to them by TD Bank.

On May 24, 2013, TD Bank filed a motion for summary judgment in both cases seeking summary judgment on the defenses raised by the Defendant. On August 15, 2013, Defendant Jacobs filed an affidavit in opposition to TD Bank's motion for summary judgment against him[3]. On August 16, 2013, Defendant Jacobs filed an affidavit in opposition to TD Bank's motions for summary judgment against him in both cases[4]. In his affidavit, Defendant McFarland again admitted owing the indebtedness to TD Bank, but asserted it was punitive and unconscionable for TD Bank to bring the lawsuit against him without foreclosing on the mortgage. (McFarland Affidavit, ¶ 14). In his affidavit, Defendant Jacobs admitted that when "he made the Newberry Atrium and Middle Sound loans, [he] fully understood that [he] was liable to the bank, if either project was unsuccessful for any loss that the bank incurred." (Jacobs' Affidavit, ¶ 41). On March 24, 2014, Judge Strickland entered a Form-4 order denying the motions for summary judgment. On April 3, 2014, TD Bank filed a motion to reconsider, which was denied by short form order filed on April 23, 2014.

TD BANK'S MOTION IN LIMINE

As referenced above, on August 7, 2014, TD Bank filed a motion in limine in both cases seeking to prevent the Defendants or their counsel from mentioning or referring in any way before the jury, whether in opening or closing or through direct or cross-examination or documents, the following irrelevant, prejudicial, and improper testimony and evidence:

> (1) any reference or evidence regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing or alleged breach of fiduciary duty because this evidence is irrelevant, would tend to confuse the jury, and is highly and unfairly prejudicial to TD Bank since there can be no breach of the implied duty of good faith and fair dealing for doing what a contract expressly allows or a of fiduciary duty to explain to an individual what he could learn from reading the parties' contract;

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[3] Defendant McFarland's August 15, 2013 Affidavit was attached as Exhibit B to TD Bank's Motion in Limine.

[4] Defendant Jacobs' Affidavit was attached as Exhibit C to TD Bank's Motion in Limine.

(2) any reference or evidence on the government's bail-out to the banking industry and the Troubled Asset Relief Program ("TARP") because such evidence is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bail-out;

(3) any reference or evidence regarding any unrelated note sales by TD Bank, including but not limited to the sale of a note from Heron Lakes I, LLC ("Heron Lakes I") to Sea Ducks, LLC (who subsequently assigned its right to purchase the note to Cypress Cove Properties, LLC ("Cypress Cove Properties")), because this evidence is irrelevant, would likely confuse the jury, and is highly and unfairly prejudicial to TD Bank; and

(4) any testimony or other evidence from Tom Wingard, Joe Hawk, John Hilton, and Andrew Syrett.

TD Bank was allowed to argue the merits of its motion, which grounds are set forth in its motion. Defendant Jacobs' counsel responded orally by focusing on the part of TD Bank's motion that sought to exclude testimony and evidence regarding the Defendants' defenses[5]. Defendant Jacobs argued the law should be changed to place a higher duty on banks to treat each customer equally and fairly regardless of the terms of the contract between the bank and customer. Since the Defendants would have needed to proffer all of the excluded testimony and evidence in order to preserve the issues for appeal, the Court determined the best course of action, to ensure inadmissible evidence was not presented to the jury, was to allow Defendants to proffer all testimony and evidence TD Bank challenged, so the Court could determine the issues based on the evidence rather than purely on TD Bank's motion in limine and the argument of counsel. Any challenged evidence not proffered would be excluded. None of the parties objected to proceeding in this manner.

DEFENDANTS' PROFER

Defendants proffered the following testimony and evidence: (1) the testimony of TD Bank witness Roper Jenkins; (2) the testimony of Tom Wingard; (3) testimony of Defendant David Jacobs; and (4) the testimony of defense witness David Hilburn. Defendants also proffered the following documents: (1) Articles of Merger dated September 30, 2010; (2) Document entitled "TD Bank Financial Group to Acquire The South Financial Group"; (3) July 9, 2012 letter from Defendant Jacobs to Roper Jenkins; (4) Loan Sale Agreement between TD Bank and Sea Ducks, LLC related to Heron Lakes I; (5) Loan Closing Statement related to Heron Lakes I; (6) Email from Roper Jenkins indicating payoff balance of the Heron Lakes I loan; and (7) Appraisal Report of Thomas Wingard dated April 29, 2013.

ANALYSIS

I. Evidence Related to Defenses of Breach of Implied Duty of Good Faith and Fair Dealing and Breach of Fiduciary Duty

Testimony and evidence regarding the above may be admitted and the issue may be revisited again on directed verdict.

II. Testimony Regarding TARP and the Government "Bailout"

Because Carolina First Bank received TARP funds prior to TD Bank's merger with Carolina First, Defendants intended to question witnesses at trial and admit evidence about the amount of TARP funds received by Carolina First Bank and the amount TD Bank paid to the US Treasury to repurchase the Treasury's preferred shares as part of the merger. It was clear to the Court based on the very limited proffered testimony and evidence on this issue that the receipt of any TARP money by Carolina First Bank is wholly irrelevant as to whether Defendants must pay on their guaranty obligations. The receipt of TARP money by a bank before TD Bank merged

with that bank is irrelevant to the claims in this case. This testimony, if allowed to be presented to the jury, would likely confuse the jury, and result in a verdict based on improper motives or bases rather than current law. The jury's decision should be based on the obligations between the parties pursuant to the terms of the at-issue guaranties. Therefore, any mention of Carolina First Bank's receipt of TARP money and government "bailouts" is excluded from all argument, testimony, and evidence at trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

This ruling does not bar Plaintiff from mentioning the economic downturn or recession.

III. The Heron Lakes I Note Sale

To support their legal position that TD Bank allegedly breached a duty to treat each of its customers with equality regardless of the terms of a contract between them, Defendants sought to introduce testimony and evidence regarding TD Bank's sale of a note from an unrelated borrower, Heron Lakes I, at a discount to Cypress Cove Properties in May of 2013. According to the Defendants, TD Bank agreed to this discounted note sale because of the close, personal relationship between TD Bank and the borrowers and guarantors of the note. In addition, Defendants allege that TD Bank agreed to the discounted note sale to ensure the borrowers and guarantors were released from personal liability. First, Defendants did not present the Court with any case law that supports their position that TD Bank, or any bank, has a duty to treat each of its customers exactly the same regardless of the contractual terms between them. Even if TD Bank decided to sell the Heron Lakes I note at a discount to ensure the borrower and guarantors were released from liability, it is wholly irrelevant to the issues in this case. Defendants have admitted signing the note and guaranties at issue in this case, have admitted the notes are in default, have admitted they have not paid TD Bank, and have admitted they are indebted to TD Bank under the

notes and guaranties. It is of no consequence that TD Bank may have sold another note for another borrower at a discount since that note is wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties at issue in this case, and wholly unrelated to any claim in this action.

Further, even if this Court were to determine the testimony and evidence regarding Heron Lakes I had some marginal relevance to this case, the proffered testimony does not support the allegations. Roper Jenkins, a TD Bank witness, was questioned at length by Defendants. Mr. Jenkins denied any relationship with the guarantor of the Heron Lakes I note other than a lender-borrower relationship. Mr. Jenkins explained the valid reasons why TD Bank chose to sell the Heron Lakes I note at a discount. Finally, Mr. Jenkins denied having any knowledge that the borrowers or guarantors would be released from personal liability since that determination would have been made by the note purchaser, Sea Ducks, LLC. In addition, Mr. Jenkins explained there were numerous differences between the Heron Lakes I loan and the loans that are at issue in this case, including differences in the type of the collateral for the loans, the degree of cooperation and financial disclosure by the guarantors of the loans, and the net worth of the guarantors. This testimony was uncontested.

Defendants also proffered the testimony of David Hilburn who acted as a broker for the ultimate purchaser of the Heron Lakes I note, Cypress Cove Properties. However, Mr. Hilburn testified that the negotiations of the note sale were between the original purchaser, Sea Ducks, LLC, and TD Bank before he got involved. Mr. Hilburn testified that he had no personal knowledge of the relationship between TD Bank and the Heron Lakes I borrowers and guarantors, the reasons TD Bank sold the Heron Lakes I note at a discount, or whether the borrowers and guarantors were released from liability at the behest of TD Bank or through

negotiations with the original purchaser, Sea Ducks, LLC. No other testimony was proffered on this issue.

Since the issues with the sale of the Heron Lakes I note, mortgage, and guaranty have no bearing on the issues to be decided by the jury in this case, the testimony and evidence is irrelevant, likely to confuse the jury on the issues to be decided, and unfairly prejudicial to TD Bank. This testimony would likely confuse the jury regarding TD Bank's obligations to the Defendants under the terms of the contract between them. Therefore, any mention, reference, testimony, or evidence related to the Heron Lakes I note sale by TD Bank to Cypress Cove Properties is excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

IV. **Testimony of Tom Wingard, John Hilton, Joe Hawk, and Andrew Syrett**

The matter involving only Defendant Jacobs is based on a construction loan made by Carolina First Bank to Newberry Atrium Professional Center, LLC. The loan financed the construction of a medical office building in Newberry, South Carolina. Defendant Jacobs executed a guaranty of this loan and that guaranty is the subject of this action. Defendant proffered a real estate appraiser Thomas Wingard who appraised the medical office building. The appraisal was made in April of 2013 in connection with the Chapter 11 Bankruptcy proceeding filed by Newberry Atrium Profession Center, LLC. The Plaintiff was a party to that action and received a copy of the appraisal when it was completed in 2013. Mr. Wingard was listed as a witness on July 29, 2014. Plaintiff did not take Mr. Wingard's deposition though it had time to do so. Mr. Wingard's testimony was proffered by Defendants only as evidence related to the defenses of Plaintiff's breach of implied duty of good faith and fair dealing. The value of the property is not an issue in this matter. Therefore, the Court finds Mr. Wingard's

testimony to be admissible, relevant to the defenses raised by Defendants, and is not unfairly prejudicial to Plaintiff.

On August 7, 2014, Defendant Jacobs identified for the first time, Joe Hawk, John Hilton, and S. Andrew Syrett as witnesses. (*See* Exhibit I to TD Bank's Motion in Limine). Defendants did not proffer the testimony of Joe Hawk and John Hilton. According to the hearing procedures agreed to by the parties, the testimony of Joe Hawk and John Hilton is excluded because it was not proffered. In addition, the testimony of Joe Hawk and John Hilton is excluded because these witnesses were not timely identified by Defendant Jacobs through discovery. Defendant Jacobs failed to identify these two witnesses until a mere four days before trial and over 14 months since he originally responded to TD Bank's written discovery. Pursuant to Rule 37(d), SCRCP, the Court excludes these witnesses from testifying at trial. Further, these witnesses were identified to provide testimony and documents regarding the Heron Lakes I note sale from TD Bank to the original purchaser, Sea Ducks, LLC, which has been excluded as discussed above. Consequently, any testimony from Joe Hawk and John Hilton related to the Heron Lakes I note sale is also excluded, even if they had been timely identified, because such testimony and evidence is irrelevant, likely to confuse the jury, and unfairly prejudicial to TD Bank pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

Mr. Syrett was identified as follows: "He has no knowledge of the facts of this case and his testimony will be limited to explain to the jury South Carolina mortgage foreclosure procedure, including deficiency judgments, upset bids, the appraisal statute, waiver of the appraisal statute, the impact of these on a suit on a guaranty, and giving his opinion about such matters." First, Defendant did not proffer Mr. Syrett's testimony so it is excluded. Second, all testimony from Mr. Syrett is excluded from trial because he was not timely identified by

Defendant Jacobs through discovery. Defendant Jacobs failed to identify this alleged expert witness until a mere four days before trial and over 14 months since he originally responded to TD Bank's written discovery. Defendant Jacobs also never properly supplemented his responses to TD Bank's written discovery to provide TD Bank with the type of information and documents requested related to expert witnesses. Pursuant to Rule 37(d), SCRCP, the Court excludes this witness from testifying at trial. Third, Mr. Syrett was identified as an alleged expert on the law, which is not allowed under clear South Carolina law since it is the Court's obligation to instruct the jury on the law. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)(where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court.). Finally, the proposed expert testimony of Mr. Syrett is excluded under Rules 401-403 of the South Carolina Rules of Evidence because it is irrelevant to any issues to be decided in the case, is irrelevant to any claim or defense in the case, and is likely to confuse the jury as to the issues to be decided.

The Court is mindful that not every witness not timely disclosed should be excluded. However, the Court is not excluding these witnesses solely because they were not timely identified by the Defendants. Based on all the factors, testimony, and evidence presented, the Court finds it to be within its discretion to exclude these witnesses from testifying at the trial of these cases.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that reference, testimony, or evidence related to the argument that TD Bank breached the implied duty of good faith and fair dealing or a fiduciary duty is admissible and not to be excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence;

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that any mention of Carolina First Bank's receipt of TARP money and the words "TARP" and "Government Bail-Out" are excluded from all argument, testimony, and evidence at trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence;

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that any mention, reference, testimony, or evidence related to the Heron Lakes I note sale is excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that defense witness Tom Wingard is to be allowed to testify at trial; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that defense witnesses Joe Hawk, John Hilton, and Andrew Syrett are excluded from testifying at trial.

IT IS SO ORDERED.

L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

Oct 3, 2014

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

TD Bank NA, Etal

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 12 -CP-40- 6074

David H. Jacobs

DEFENDANT(S)

FILED
2014 OCT 10 AM 11:09
JEANNETTE W. McBRIDE
R.C.C.P. & S.C.

CHECK ONE:

[ ] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED** (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other _____.

[ ] **ACTION STRICKEN** (*CHECK REASON*): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

IT IS ORDERED AND ADJUDGED: [ ] See attached order; [ ] Statement of Judgment by the Court:

Verdict for Plaintiff. Post trial motions to be filed within 10 days.

Dated at Columbia, South Carolina, this 7th day of October, 2014.

Al Clark Lee
PRESIDING JUDGE

This judgment was entered on the 10 day of October, 2014, and a copy mailed first class this 10 day of October, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Paul T. Collins
Jody A. Bedenbaugh

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gerald D. Jowers

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeannette W. McBride
CLERK OF COURT

SCRCP APP-24

SCRCP FORM 4 (Revised 5/00)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO. 12 -CP-40- 7540

TD Bank NA, Etal
PLAINTIFF(S)

David H. Jacobs, Etal
DEFENDANT(S)

FILED
2014 OCT 10 AM 11:16
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY

CHECK ONE:

[ ] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED** (*CHECK REASON*): [ ] Rule 12(b). SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other _____.

[ ] **ACTION STRICKEN** (*CHECK REASON*): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

IT IS ORDERED AND ADJUDGED: [ ] See attached order: [ ] Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this 7th day of October, 2014.

PRESIDING JUDGE

This judgment was entered on the 10 day of October, 2014, and a copy mailed first class this 10 day of October, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Paul T. Collins
Jody A. Bodenbaugh
ATTORNEY(S) FOR THE PLAINTIFF(S)

Leonard R. Jordan, Jr.
ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
CLERK OF COURT

SCRCP APP-24

SCRCP FORM 4 (Revised 5/00)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

TD Bank, NA, successor by merger with Carolina First Bank,

Plaintiff,

v.

David H. Jacobs,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No: 2012-CP-40-06074

VERDICT

FILED
2014 OCT 10 AM 11:09
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

WE, THE JURY, UNANIMOUSLY FIND FOR:

[✓] The **PLAINTIFF**

Two Million Eight Hundred Sixty Seven Thousand Two Hundred Seventy Seven & 14/100 ($2,867,277.14)
Actual damages

[ ] The **DEFENDANT.**

Foreperson

Date: 10/7/14

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, v. David H. Jacobs and James A. McFarland, Defendants.	Civil Action No: 2012-CP-40-07540 **VERDICT**

FILED
2014 OCT 10 AM 11:18
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

WE, THE JURY, UNANIMOUSLY FIND FOR:

[✓] The **PLAINTIFF**

One Million Five Hundred Fifty Seven Thousand Three Hundred Sixty Three & 29/100 ($1,557,363.29)
Actual damages

[ ] The **DEFENDANTS.**

Foreperson

Date: 10/7/14

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiffs, v. David H. Jacobs, Defendant.	Civil Action No.: 2012-CP-40-06074
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiffs, v. David H. Jacobs and James A. McFarland, Defendants.	Civil Action No.: 2012-CP-40-07540 **ORDER**

RICHLAND COUNTY FILED
2015 MAR -2 AM 10: 38
JEANETTE W. WALDROP C.C.P. & G.S.

This matter came before the Court upon Defendant Jacob's Motion for a New Trial. Case numbers 2012-CP-40-06074 and 2012-CP-40-07540 were consolidated and tried October 6 and 7, 2014. Plaintiff was represented at trial by Jody Bedenbaugh, Esquire, and Paul Collins, Esquire. Defendant Jacobs was represented at trial by Gerald Jowers, Esquire. Defendant McFarland was represented at trial by Leonard Jordan, Esquire. The jury returned a verdict in favor of the Plaintiff in the amount of $2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074 and in the amount of $1,557,363.29 against Defendants Jacobs and McFarland, jointly and severally, in case number 2012-CP-40-07540. On October 17, 2014, Defendant Jacobs filed a Motion for a New Trial. On October 28, 2014, Plaintiff filed a memorandum in opposition to the motion.

FACTUAL BACKGROUND

Case number 2012-CP-40-06074 arose as an action to collect on a guaranty of a commercial note given in connection with a loan to fund construction of a medical office building in Newberry, South Carolina. Plaintiff filed this action against the guarantor Jacobs

SCANNED

pursuant to the guaranty. Plaintiff sought at trial $2,867,277.14 in damages for the unpaid and unrecovered principal amount, interest, and late charges associate with collection on the loan.

Case number 2012-CP-40-07540 arose as an action to collect on guarantees of a commercial note given in connection with a real estate loan to be used for development of vacant commercial property. Plaintiff filed this action against the guarantors Jacobs and McFarland pursuant to the guarantees. Plaintiff sought $1,557,363.29 in damages for the unpaid principal amount, interest, and late charges associated with collection on the loan.

Defendant Jacobs alleged in his answer in both cases that Plaintiff breached the duty of good faith and fair dealing and was improperly suing him solely on the guaranty, not the mortgage. Based on these allegations, Defendant Jacobs sough to void the guaranty. On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that Plaintiff sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who allegedly had special or personal relationships with the Plaintiff, will be released from liability.

On May 24, 2013, Plaintiff filed a motion for summary judgment in both cases seeking summary judgment on the defenses raised by Defendant Jacobs. On March 24, 2014, Judge Strickland entered a Form 4 order denying the motions for summary judgment. On April 3, 2014, Plaintiff filed a motion to reconsider, which was denied by a Form 4 order filed on April 23, 2014.

On August 7, 2014, Plaintiff filed a motion in limine seeking to exclude certain testimony and evidence from trial. The parties appeared on August 12, 2014 for a date certain trial. Prior to the trial, the Honorable Casey Manning heard arguments on the motion in limine. Based on the arguments and concessions made during the arguments, Judge Manning released the jury and held that Defendants would be provided the opportunity to proffer the testimony and evidence challenged by Plaintiff, and the Court would then decide the motion. The Court further held that any evidence challenged by Plaintiff that Defendants did not proffer would be excluded.

On October 3, 2014, Judge Manning issued an order granting in part and denying in part Plaintiff's motion in limine. Judge Manning denied Plaintiff's motion regarding exclusion of Defendant Jacobs' breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses. Judge Manning granted Plaintiff's motion regarding exclusion of all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), government

bailouts, and the "Heron Lakes I note sale," a specific sale of a note at an allegedly discounted price. Finally, Judge Manning denied Plaintiff's motion to exclude Defendant Jacobs' appraiser, Tom Wingard, but granted Plaintiff's motion to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who was proffered to provide testimony on the Heron Lakes I note sale).

On October 6 and 7, 2014, the consolidated cases were tried before a jury. Following the close of Plaintiff's case in chief, Plaintiff moved for a directed verdict on its claims, seeking to have Defendant Jacobs' defenses dismissed as a matter of law. The Court denied Plaintiff's motion in part, but granted the motion on the issue of whether Plaintiff could sue on the guaranties without first foreclosing on the property securing the notes, which the Court determined Plaintiff could do under South Carolina law. Following the close of all evidence, Plaintiff again moved for a directed verdict on its claims, seeking to have the defenses dismissed as a matter of law. The Court again denied Plaintiff's motion and allowed the defenses to be submitted to the jury. The jury returned verdicts in Plaintiff's favor as follows: (1) $1,557,363.29 against Defendants Jacobs and McFarland in case number 2012-CP-40-07540; and (2) $2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074.

On October 17, 2014, Defendant Jacobs filed the Motion for New Trial presently before the Court. Defendant Jacobs seeks a new trial on the grounds that Judge Manning's exclusion of evidence related to TARP and government bailouts and evidence related to the Heron Lakes I note sale, including the testimony of David Hilburn, was improper and prejudicial to his ability to establish his defenses.

DISCUSSION

Defendant Jacobs asserts that a new trial should be granted based upon the pretrial rulings. "A new trial may be granted to all or any of the parties and on all or part of the issues...for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. Initially, Defendant Jacobs argues that Plaintiff's motion in limine was based on the same arguments that it made in previously filed motions for summary judgment and motions to reconsider that were denied by Judge Strickland on March 24, 2014 and April 3, 2014, respectively. Plaintiff moved for summary judgment on the grounds that the terms of the guaranty provide that it is an independent and absolute guaranty of payment, and Plaintiff is not required to first foreclose on the collateral. Plaintiff further

argued that there can be no breach of fiduciary duty or implied covenant where Plaintiff did what its contract expressly allowed it to do.

Even if Defendant Jacobs is correct that Plaintiff made the same arguments in the subsequent motion in limine as it did in the motions for summary judgment, Judge Manning denied Plaintiff's motion in limine as it related to the exclusion of the breach of fiduciary duty and breach of the implied duty of good faith and fair dealing defenses, and those defenses were submitted to the jury for consideration at trial. Therefore, even if they were argued multiple times, it is inconsequential. The issues Judge Manning granted in the motion in limine related to the exclusion of witnesses who were not previously identified when the motions for summary judgment were argued, and the exclusion of any reference to TARP, government bailout, and Heron Lakes I note sale, which were also not raised at summary judgment. Therefore, because Defendant Jacobs has not suffered any consequences or prejudice from the same arguments allegedly being made multiple times, the Court denies the motion for a new trial on this ground.

Next, Defendant Jacobs argues that it was improper to exclude any reference, evidence, and testimony about the bailout of the banking industry. Defendant Jacobs argues that the testimony was necessary to show the background regarding Plaintiff's actions to support Defendant's defense of bad faith and unfair dealing. Following the motion in limine, Judge Manning held that the testimony was irrelevant, and if allowed to be presented to the jury, would likely confuse the jury, and could result in a verdict based on improper motives. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Consequently, the motion for a new trial is denied on this ground.

Defendant Jacobs also moves for a new trial on the ground that it was improper to exclude the testimony of David Hilburn regarding the Heron Lakes I note sale and any reference to the note sale. Defendant Jacobs sought to introduce testimony and evidence regarding Plaintiff's sale of a note from Heron Lakes I at a discount to Sea Ducks, LLC in May of 2013 to support his position that Plaintiff was not treating Defendant Jacobs the same way as other borrowers, violating the covenant of good faith and fair dealing. At the hearing before Judge Manning to determine whether the testimony and evidence regarding the Heron Lakes I note sale was relevant and admissible, Defendant Jacobs proffered two witnesses. Judge Manning held

that Defendant Jacobs failed to present any evidence to establish that the Heron Lakes I note sale was relevant to the issues to be decided by the jury. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Defendant's motion for a new trial is denied on this basis.

ORDER

For the reasons stated above, Defendant Jacob's Motion for a New Trial is **DENIED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

February 27, 2015
Columbia, South Carolina

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Carpenter Appeals & Trial Support, LLC

An AV Appellate Practice Law Firm

Charles E. Carpenter, Jr.
Attorney at Law
charlie@carpenterappeals.com

4825 Portobello Road
Columbia, SC 29206
Tel 1-803-758-2886

www.carpenterappeals.com

April 3, 2015

RECEIVED
APR 03 2015
SC Court of Appeals

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: TD Bank, NA, successor by merger with Carolina First Bank vs. David H. Jacobs
Civil Action no. 2012: CP-40-06074

Dear Ms. Kitchings:

Enclosed for filing is the Notice of Appeal of the Defendant, David H. Jacobs, along with a copy of the Orders and Judgments appealed from and our Certificate of Service.

Also enclosed is our firm's check in the amount of $100.00 for the filing fee in this matter.

By copy of this letter, we are serving this Notice of Appeal on the Clerk of Court for Richland County and all counsel of record.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

Allison Estrada

Allison Estrada
Paralegal for Charles E. Carpenter, Jr.

Enclosures
cc: Leonard R. Jordan, Esquire (w/enc.)
Jody A. Bedenbaugh, Esquire (w/enc.)
Paul T. Collins, Esquire (w/enc.)
The Honorable Jeanette McBride (w/enc.)

The State Of South Carolina
In The Court of Appeals

Appeal from Richland County Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

TD Bank, NA, successor by Merger
with Carolina First Bank
Respondent,
v.
David H. Jacobs,
Appellant

Civil Action No. 2012 – CP 40 - 06074

TD Bank, NA, successor by merger
with Carolina First Bank,
Respondent
v.
David H. Jacobs and James A. McFarland,

Civil Action No. 2012- CP 40-07540

NOTICE OF APPEAL

Appellant David H. Jacobs appeals the Order of Judge Allison Renee Lee dated February 27, 2015, filed March 2, 2015. Appellant received written notice of entry of this order on March 6, 2015.

This the 2 day of April, 2015.

Charles E. Carpenter Jr.
4825 Portobello Rd.
Columbia, SC 29206
803-758-2886
Charlie@CarpenterAppeals.com

Gerald D. Jowers
1802 Sumter Street
Columbia, SC 29201
803-765-9620
Attorneys for Appellant David Jacobs

RECEIVED
APR 03 2015
SC Court of Appeals

Other Counsel of Record:
Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
1122 Lady Street
Columbia, South Carolina 29201
Attorney for James A. McFarland

Jody A. Bedenbaugh, Esquire
Paul T. Collins, Esquire
Nelson, Mullins Riley & Scarborough LLP
1320 Main Street 17th Floor
Columbia, SC 29201
(803) 799-2000
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, David H. Jacobs, do hereby certify that I have this date served the foregoing Notice of Appeal, dated April 2, 2015, with attached Orders, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

RECEIVED
APR 03 2015
SC Court of Appeals

The Honorable Jeanette McBride
Clerk of Court for Richland County
P.O. Box 2766
Columbia, SC 29202-2766

Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
1122 Lady Street
Columbia, South Carolina 29201
Attorney for James A. McFarland

Jody A. Bedenbaugh, Esquire
Paul T. Collins, Esquire
Nelson, Mullins Riley & Scarborough LLP
1320 Main Street 17th Floor
Columbia, SC 29201
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

B. Allison Estrada

B. Allison Estrada, Paralegal to Charles E. Carpenter, Jr.

Dated: April 3, 2015.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiffs, v. David H. Jacobs, Defendant.	Civil Action No.: 2012-CP-40-06074
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiffs, v. David H. Jacobs and James A. McFarland, Defendants.	Civil Action No.: 2012-CP-40-07540 **ORDER**

RECEIVED
APR 03 2015
SC Court of Appeals
2015 MAR 12 AM 10:38
RICHLAND COUNTY FILED

This matter came before the Court upon Defendant Jacob's Motion for a New Trial. Case numbers 2012-CP-40-06074 and 2012-CP-40-07540 were consolidated and tried October 6 and 7, 2014. Plaintiff was represented at trial by Jody Bedenbaugh, Esquire, and Paul Collins, Esquire. Defendant Jacobs was represented at trial by Gerald Jowers, Esquire. Defendant McFarland was represented at trial by Leonard Jordan, Esquire. The jury returned a verdict in favor of the Plaintiff in the amount of $2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074 and in the amount of $1,557,363.29 against Defendants Jacobs and McFarland, jointly and severally, in case number 2012-CP-40-07540. On October 17, 2014, Defendant Jacobs filed a Motion for a New Trial. On October 28, 2014, Plaintiff filed a memorandum in opposition to the motion.

FACTUAL BACKGROUND

Case number 2012-CP-40-06074 arose as an action to collect on a guaranty of a commercial note given in connection with a loan to fund construction of a medical office building in Newberry, South Carolina. Plaintiff filed this action against the guarantor Jacobs

SCANNED

pursuant to the guaranty. Plaintiff sought at trial $2,867,277.14 in damages for the unpaid and unrecovered principal amount, interest, and late charges associate with collection on the loan.

Case number 2012-CP-40-07540 arose as an action to collect on guarantees of a commercial note given in connection with a real estate loan to be used for development of vacant commercial property. Plaintiff filed this action against the guarantors Jacobs and McFarland pursuant to the guarantees. Plaintiff sought $1,557,363.29 in damages for the unpaid principal amount, interest, and late charges associated with collection on the loan.

Defendant Jacobs alleged in his answer in both cases that Plaintiff breached the duty of good faith and fair dealing and was improperly suing him solely on the guaranty, not the mortgage. Based on these allegations, Defendant Jacobs sough to void the guaranty. On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that Plaintiff sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who allegedly had special or personal relationships with the Plaintiff, will be released from liability.

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On October 3, 2014, Judge Manning issued an order granting in part and denying in part Plaintiff's motion in limine. Judge Manning denied Plaintiff's motion regarding exclusion of Defendant Jacobs' breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses. Judge Manning granted Plaintiff's motion regarding exclusion of all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), government

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bailouts, and the "Heron Lakes I note sale," a specific sale of a note at an allegedly discounted price. Finally, Judge Manning denied Plaintiff's motion to exclude Defendant Jacobs' appraiser, Tom Wingard, but granted Plaintiff's motion to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who was proffered to provide testimony on the Heron Lakes I note sale).

On October 6 and 7, 2014, the consolidated cases were tried before a jury. Following the close of Plaintiff's case in chief, Plaintiff moved for a directed verdict on its claims, seeking to have Defendant Jacobs' defenses dismissed as a matter of law. The Court denied Plaintiff's motion in part, but granted the motion on the issue of whether Plaintiff could sue on the guaranties without first foreclosing on the property securing the notes, which the Court determined Plaintiff could do under South Carolina law. Following the close of all evidence, Plaintiff again moved for a directed verdict on its claims, seeking to have the defenses dismissed as a matter of law. The Court again denied Plaintiff's motion and allowed the defenses to be submitted to the jury. The jury returned verdicts in Plaintiff's favor as follows: (1) $1,557,363.29 against Defendants Jacobs and McFarland in case number 2012-CP-40-07540; and (2) $2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074.

On October 17, 2014, Defendant Jacobs filed the Motion for New Trial presently before the Court. Defendant Jacobs seeks a new trial on the grounds that Judge Manning's exclusion of evidence related to TARP and government bailouts and evidence related to the Heron Lakes I note sale, including the testimony of David Hilburn, was improper and prejudicial to his ability to establish his defenses.

DISCUSSION

Defendant Jacobs asserts that a new trial should be granted based upon the pretrial rulings. "A new trial may be granted to all or any of the parties and on all or part of the issues...for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. Initially, Defendant Jacobs argues that Plaintiff's motion in limine was based on the same arguments that it made in previously filed motions for summary judgment and motions to reconsider that were denied by Judge Strickland on March 24, 2014 and April 3, 2014, respectively. Plaintiff moved for summary judgment on the grounds that the terms of the guaranty provide that it is an independent and absolute guaranty of payment, and Plaintiff is not required to first foreclose on the collateral. Plaintiff further

argued that there can be no breach of fiduciary duty or implied covenant where Plaintiff did what its contract expressly allowed it to do.

Even if Defendant Jacobs is correct that Plaintiff made the same arguments in the subsequent motion in limine as it did in the motions for summary judgment, Judge Manning denied Plaintiff's motion in limine as it related to the exclusion of the breach of fiduciary duty and breach of the implied duty of good faith and fair dealing defenses, and those defenses were submitted to the jury for consideration at trial. Therefore, even if they were argued multiple times, it is inconsequential. The issues Judge Manning granted in the motion in limine related to the exclusion of witnesses who were not previously identified when the motions for summary judgment were argued, and the exclusion of any reference to TARP, government bailout, and Heron Lakes I note sale, which were also not raised at summary judgment. Therefore, because Defendant Jacobs has not suffered any consequences or prejudice from the same arguments allegedly being made multiple times, the Court denies the motion for a new trial on this ground.

Next, Defendant Jacobs argues that it was improper to exclude any reference, evidence, and testimony about the bailout of the banking industry. Defendant Jacobs argues that the testimony was necessary to show the background regarding Plaintiff's actions to support Defendant's defense of bad faith and unfair dealing. Following the motion in limine, Judge Manning held that the testimony was irrelevant, and if allowed to be presented to the jury, would likely confuse the jury, and could result in a verdict based on improper motives. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Consequently, the motion for a new trial is denied on this ground.

Defendant Jacobs also moves for a new trial on the ground that it was improper to exclude the testimony of David Hilburn regarding the Heron Lakes I note sale and any reference to the note sale. Defendant Jacobs sought to introduce testimony and evidence regarding Plaintiff's sale of a note from Heron Lakes I at a discount to Sea Ducks, LLC in May of 2013 to support his position that Plaintiff was not treating Defendant Jacobs the same way as other borrowers, violating the covenant of good faith and fair dealing. At the hearing before Judge Manning to determine whether the testimony and evidence regarding the Heron Lakes I note sale was relevant and admissible, Defendant Jacobs proffered two witnesses. Judge Manning held

that Defendant Jacobs failed to present any evidence to establish that the Heron Lakes I note sale was relevant to the issues to be decided by the jury. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Defendant's motion for a new trial is denied on this basis.

ORDER

For the reasons stated above, Defendant Jacob's Motion for a New Trial is **DENIED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

February 27, 2015
Columbia, South Carolina

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4/2/15

S. C. Court of App. $100.00

Filing fee

TD BANK

vs.

JACOBS

2012-CP-40-06074

ENTER APPEALS & TRIAL SUPPORT LLC

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REORDER FORM #990LG1 (1 PART)

USE WITH COMPANION ENVELOPE #44-530

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Carpenter Appeals & Trial Support, LLC

An AV Appellate Practice Law Firm

Charles E. Carpenter, Jr.
Attorney at Law
charlie@carpenterappeals.com

4825 Portobello Road
Columbia, SC 29206
Tel 1-803-758-2886

www.carpenterappeals.com

April 3, 2015

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: TD Bank, NA, successor by merger with Carolina First Bank vs. David H. Jacobs and James A. McFarland
Civil Action no. 2012: CP-40-07540

Dear Ms. Kitchings:

Enclosed for filing is the Notice of Appeal of the Defendant, David H. Jacobs, along with a copy of the Orders and Judgments appealed from and our Certificate of Service.

Also enclosed is our firm's check in the amount of $100.00 for the filing fee in this matter.

By copy of this letter, we are serving this Notice of Appeal on the Clerk of Court for Richland County and all counsel of record.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

Allison Estrada

Allison Estrada
Paralegal for Charles E. Carpenter, Jr.

Enclosures
cc: Leonard R. Jordan, Esquire (w/enc.)
Jody A. Bedenbaugh, Esquire (w/enc.)
Paul T. Collins, Esquire (w/enc.)
The Honorable Jeanette McBride (w/enc.)

The State Of South Carolina
In The Court of Appeals

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SC Court of Appeals

Appeal from Richland County Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

TD Bank, NA, successor by Merger
with Carolina First Bank
Respondent,
v.
David H. Jacobs,
Appellant

Civil Action No. 2012 – CP 40 - 06074

TD Bank, NA, successor by merger
with Carolina First Bank,
Respondent
v.
David H. Jacobs and James A. McFarland,

Civil Action No. 2012- CP 40-07540

NOTICE OF APPEAL

Appellant David H. Jacobs appeals the Order of Judge Allison Renee Lee dated February 27, 2015, filed March 2, 2015. Appellant received written notice of entry of this order on March 6, 2015.

This the 2 day of April, 2015.

Charles E. Carpenter, Jr.
4825 Portobello Rd.
Columbia, SC 29206
803-758-2886
Charlie@CarpenterAppeals.com

Gerald D. Jowers
1802 Sumter Street
Columbia, SC 29201
803-765-9620
Attorneys for Appellant David Jacobs

Other Counsel of Record:
Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
1122 Lady Street
Columbia, South Carolina 29201
Attorney for James A. McFarland

Jody A. Bedenbaugh, Esquire
Paul T. Collins, Esquire
Nelson, Mullins Riley & Scarborough LLP
1320 Main Street 17th Floor
Columbia, SC 29201
(803) 799-2000
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

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APR 03 2015
SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, David H. Jacobs, do hereby certify that I have this date served the foregoing Notice of Appeal, dated April 2, 2015, with attached Orders, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

The Honorable Jeanette McBride
Clerk of Court for Richland County
P.O. Box 2766
Columbia, SC 29202-2766

Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
1122 Lady Street
Columbia, South Carolina 29201
Attorney for James A. McFarland

Jody A. Bedenbaugh, Esquire
Paul T. Collins, Esquire
Nelson, Mullins Riley & Scarborough LLP
1320 Main Street 17th Floor
Columbia, SC 29201
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

B. Allison Estrada

B. Allison Estrada, Paralegal to Charles E. Carpenter, Jr.

Dated: April 3, 2015.

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SC Court of Appeals

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiffs, v. David H. Jacobs, Defendant.	Civil Action No.: 2012-CP-40-06074
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiffs, v. David H. Jacobs and James A. McFarland, Defendants.	Civil Action No.: 2012-CP-40-07540 **ORDER**

2015 MAR -2 AM 10:38
RICHLAND C.C.P.

This matter came before the Court upon Defendant Jacob's Motion for a New Trial. Case numbers 2012-CP-40-06074 and 2012-CP-40-07540 were consolidated and tried October 6 and 7, 2014. Plaintiff was represented at trial by Jody Bedenbaugh, Esquire, and Paul Collins, Esquire. Defendant Jacobs was represented at trial by Gerald Jowers, Esquire. Defendant McFarland was represented at trial by Leonard Jordan, Esquire. The jury returned a verdict in favor of the Plaintiff in the amount of $2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074 and in the amount of $1,557,363.29 against Defendants Jacobs and McFarland, jointly and severally, in case number 2012-CP-40-07540. On October 17, 2014, Defendant Jacobs filed a Motion for a New Trial. On October 28, 2014, Plaintiff filed a memorandum in opposition to the motion.

FACTUAL BACKGROUND

Case number 2012-CP-40-06074 arose as an action to collect on a guaranty of a commercial note given in connection with a loan to fund construction of a medical office building in Newberry, South Carolina. Plaintiff filed this action against the guarantor Jacobs

pursuant to the guaranty. Plaintiff sought at trial $2,867,277.14 in damages for the unpaid and unrecovered principal amount, interest, and late charges associate with collection on the loan.

Case number 2012-CP-40-07540 arose as an action to collect on guarantees of a commercial note given in connection with a real estate loan to be used for development of vacant commercial property. Plaintiff filed this action against the guarantors Jacobs and McFarland pursuant to the guarantees. Plaintiff sought $1,557,363.29 in damages for the unpaid principal amount, interest, and late charges associated with collection on the loan.

Defendant Jacobs alleged in his answer in both cases that Plaintiff breached the duty of good faith and fair dealing and was improperly suing him solely on the guaranty, not the mortgage. Based on these allegations, Defendant Jacobs sough to void the guaranty. On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that Plaintiff sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who allegedly had special or personal relationships with the Plaintiff, will be released from liability.

On May 24, 2013, Plaintiff filed a motion for summary judgment in both cases seeking summary judgment on the defenses raised by Defendant Jacobs. On March 24, 2014, Judge Strickland entered a Form 4 order denying the motions for summary judgment. On April 3, 2014, Plaintiff filed a motion to reconsider, which was denied by a Form 4 order filed on April 23, 2014.

On August 7, 2014, Plaintiff filed a motion in limine seeking to exclude certain testimony and evidence from trial. The parties appeared on August 12, 2014 for a date certain trial. Prior to the trial, the Honorable Casey Manning heard arguments on the motion in limine. Based on the arguments and concessions made during the arguments, Judge Manning released the jury and held that Defendants would be provided the opportunity to proffer the testimony and evidence challenged by Plaintiff, and the Court would then decide the motion. The Court further held that any evidence challenged by Plaintiff that Defendants did not proffer would be excluded.

On October 3, 2014, Judge Manning issued an order granting in part and denying in part Plaintiff's motion in limine. Judge Manning denied Plaintiff's motion regarding exclusion of Defendant Jacobs' breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses. Judge Manning granted Plaintiff's motion regarding exclusion of all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), government

#2

bailouts, and the "Heron Lakes I note sale," a specific sale of a note at an allegedly discounted price. Finally, Judge Manning denied Plaintiff's motion to exclude Defendant Jacobs' appraiser, Tom Wingard, but granted Plaintiff's motion to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who was proffered to provide testimony on the Heron Lakes I note sale).

On October 6 and 7, 2014, the consolidated cases were tried before a jury. Following the close of Plaintiff's case in chief, Plaintiff moved for a directed verdict on its claims, seeking to have Defendant Jacobs' defenses dismissed as a matter of law. The Court denied Plaintiff's motion in part, but granted the motion on the issue of whether Plaintiff could sue on the guaranties without first foreclosing on the property securing the notes, which the Court determined Plaintiff could do under South Carolina law. Following the close of all evidence, Plaintiff again moved for a directed verdict on its claims, seeking to have the defenses dismissed as a matter of law. The Court again denied Plaintiff's motion and allowed the defenses to be submitted to the jury. The jury returned verdicts in Plaintiff's favor as follows: (1) $1,557,363.29 against Defendants Jacobs and McFarland in case number 2012-CP-40-07540; and (2) $2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074.

On October 17, 2014, Defendant Jacobs filed the Motion for New Trial presently before the Court. Defendant Jacobs seeks a new trial on the grounds that Judge Manning's exclusion of evidence related to TARP and government bailouts and evidence related to the Heron Lakes I note sale, including the testimony of David Hilburn, was improper and prejudicial to his ability to establish his defenses.

DISCUSSION

Defendant Jacobs asserts that a new trial should be granted based upon the pretrial rulings. "A new trial may be granted to all or any of the parties and on all or part of the issues...for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. Initially, Defendant Jacobs argues that Plaintiff's motion in limine was based on the same arguments that it made in previously filed motions for summary judgment and motions to reconsider that were denied by Judge Strickland on March 24, 2014 and April 3, 2014, respectively. Plaintiff moved for summary judgment on the grounds that the terms of the guaranty provide that it is an independent and absolute guaranty of payment, and Plaintiff is not required to first foreclose on the collateral. Plaintiff further

argued that there can be no breach of fiduciary duty or implied covenant where Plaintiff did what its contract expressly allowed it to do.

Even if Defendant Jacobs is correct that Plaintiff made the same arguments in the subsequent motion in limine as it did in the motions for summary judgment, Judge Manning denied Plaintiff's motion in limine as it related to the exclusion of the breach of fiduciary duty and breach of the implied duty of good faith and fair dealing defenses, and those defenses were submitted to the jury for consideration at trial. Therefore, even if they were argued multiple times, it is inconsequential. The issues Judge Manning granted in the motion in limine related to the exclusion of witnesses who were not previously identified when the motions for summary judgment were argued, and the exclusion of any reference to TARP, government bailout, and Heron Lakes I note sale, which were also not raised at summary judgment. Therefore, because Defendant Jacobs has not suffered any consequences or prejudice from the same arguments allegedly being made multiple times, the Court denies the motion for a new trial on this ground..

Next, Defendant Jacobs argues that it was improper to exclude any reference, evidence, and testimony about the bailout of the banking industry. Defendant Jacobs argues that the testimony was necessary to show the background regarding Plaintiff's actions to support Defendant's defense of bad faith and unfair dealing. Following the motion in limine, Judge Manning held that the testimony was irrelevant, and if allowed to be presented to the jury, would likely confuse the jury, and could result in a verdict based on improper motives. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Consequently, the motion for a new trial is denied on this ground.

Defendant Jacobs also moves for a new trial on the ground that it was improper to exclude the testimony of David Hilburn regarding the Heron Lakes I note sale and any reference to the note sale. Defendant Jacobs sought to introduce testimony and evidence regarding Plaintiff's sale of a note from Heron Lakes I at a discount to Sea Ducks, LLC in May of 2013 to support his position that Plaintiff was not treating Defendant Jacobs the same way as other borrowers, violating the covenant of good faith and fair dealing. At the hearing before Judge Manning to determine whether the testimony and evidence regarding the Heron Lakes I note sale was relevant and admissible, Defendant Jacobs proffered two witnesses. Judge Manning held

that Defendant Jacobs failed to present any evidence to establish that the Heron Lakes I note sale was relevant to the issues to be decided by the jury. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Defendant's motion for a new trial is denied on this basis.

ORDER

For the reasons stated above, Defendant Jacob's Motion for a New Trial is **DENIED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

February 27, 2015
Columbia, South Carolina

CARPENTER APPEALS & TRIAL SUPPORT LLC

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SC Court of Appeals

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REORDER FORM #990LG1 (1 PART)

USE WITH COMPANION ENVELOPE #44-530

4/21/15

S.C. Court of App. 100.00 Filing fee

TD BANK
vs.
JACOBS & MCFARland
2012-CP-40-07540

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
TD BANK, NA)
Plaintiff(s))
)
vs.)
)
DAVID H. JACOBS)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2012 -CP- 40 -00774

(Please Print)
Submitted By: JOHN T. MOORE
Address: NELSON MULLINS RILEY & SCARBOROUGH, LLP
P.O. BOX 11070
COLUMBIA, SC 29211

SC Bar #: 4056
Telephone #: 803-799-2000
Fax #: 803-256-7500
Other:
E-mail: john.moore@nelsonmullins.com

FILED
2012 DEC -7 PM 4:06
CLERK OF COURT
RICHLAND COUNTY

NOTE: The coversheet 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 coversheet 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 Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts	Torts - Professional Malpractice	Torts – Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☒ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20____-CP-____-_____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
_____	☐ Notice/ File Med Mal (230)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
	☐ Other (299)	☐ Other (399)	☐ Other (499)
	_____	_____	_____

Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
_____	☐ Forfeiture-Petition (840)	☐ Transcript of Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture-Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Worker's Comp (960)
	_____	☐ Confession of Judgment (770)	☐ Zoning Board (970)
			☐ Public Service Commission (990)

Special/Complex /Other			
☐ Environmental (600)	☐ Pharmaceuticals (630)	☐ Petition for Workers Compensation Settlement Approval (780)	☐ Employment Security Commission (991)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)	☐ Other (799)	☐ Other (999)
☐ Medical (620)	☐ Out-of State Depositions	_____	_____
☐ Other (699)	☐ Motion to Quash Subpoena in Out-of-County Action (660)		
_____			
☐ Sexual Predator (510)			

Submitting Party Signature: _____ **Date:** September 7, 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.

COPY

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

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 and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases 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. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. 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 has 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	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD BANK, NA, successor by merger with Carolina First Bank,	)	Civil Action No. 2012-CP-
Plaintiff,	)	
vs.	)	SUMMONS
DAVID H. JACOBS,	)	(Non-Jury)
Defendant.	)	

RICHLAND COUNTY
FILED
2012 SEP -7 PM 4:06
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1320 Main Street, Post Office Box 11070, Columbia, South Carolina 29211, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

John T. Moore
SC Bar No. 004056
E-Mail: john.moore@nelsonmullins.com
B. Keith Poston
E-Mail: keith.poston@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff TD Bank, NA

Columbia, South Carolina
Sept 7, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank	)	Civil Action No. 2012-CP-
Plaintiff,	)	
	)	COMPLAINT
vs.	)	
	)	(GUARANTY)
David H. Jacobs,	)	
Defendant.	)	

RICHLAND COUNTY FILED
2012 SEP -7 PM 4:06
JEANETTE W. WALKER C.C.P. & G.S.

The Plaintiff, complaining of the Defendant herein, would respectfully show unto this Court that:

1. Plaintiff is a banking corporation organized under the laws of the United States and maintains an office in the County and State above stated.

2. On information and belief, the Defendant is a citizen and resident of the above-named County, State of South Carolina.

3. On or about February 20, 2007, Newberry Atrium Professional Center, LLC, for consideration, executed in favor of Plaintiff a Promissory Note in the total amount of Seven Million One Hundred Forty One Thousand and No/100 ($7,141,000.00) Dollars, with interest as stated in said Note, and payable on February 28, 2009. A copy of said Note is attached hereto as **Exhibit A** and incorporated herein. The Note was modified and extended with the last Amendment to the Promissory Note dated May 23, 2012, which identifies a maturity date of the Note of

August 8, 2012. A copy of the Amendment to Promissory Note is attached hereto as **Exhibit B** and incorporated herein.

4. As further consideration for the Note, on or about February 20, 2007, the Defendant David H. Jacobs executed in favor of Plaintiff an Unconditional Guaranty of the Note. A copy of said Unconditional Guaranty is attached hereto as **Exhibit C** and incorporated herein.

5. As further consideration of said Note, the Defendant agreed to pay all costs of collection including reasonable attorney's fees.

6. The Defendant has failed to pay said Note when due and is therefore in default.

7. The Plaintiff has declared the entire balance due and payable and has demanded and does hereby demand payment of same, but the Defendant has refused to pay, and there is presently due and owing Plaintiff by Defendant the sum of Six Million Seventy One Thousand Nine Hundred Forty-Five and 26/100 ($6,071,945.26) Dollars, which amount represents principal, interest and late charges as of August 29, 2012, plus interest at the rate stated in said Note from August 29, 2012, together with all costs of collection and reasonable attorney's fees.

8. Plaintiff reserves all rights and claims as to any collateral securing the Note.

WHEREFORE, Plaintiff prays judgment against Defendant for the sum of Six Million Seventy One Thousand Nine Hundred Forty Five and 26/100 ($6,071,945.20) Dollars, plus accrued interest August 29, 2012, at the rate specified in

the note, plus reasonable attorney's fees, for the costs of this action, and such other and further relief as to the Court may appear just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

John T. Moore
SC Bar No. 004056
E-Mail: john.moore@nelsonmullins.com
B. Keith Poston
SC Bar No. 78397
E-Mail: keith.poston@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff TD Bank, NA

Columbia, South Carolina

_____, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

VERIFICATION

Personally appeared before me the undersigned, who, on oath says: That he is an employee/agent of Plaintiff in the within action; and that he has read the complaint, and the matters therein stated are true of his own knowledge, except those stated to be on information and belief, and as to those he believes them to be true.

T.D. BANK, N.A.

By: Benjamin R. Jenkins III
Name: Benjamin R. Jenkins III
Its: Vice President / Workout Officer

SWORN to and subscribed before me

this 30th day of Aug, 2012.

Tiffany Gibson (L.S.)
Notary Public for South Carolina

My Commission Expires: 11-22-2020

TIFFANY GIBSON NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 11-22-2020

FILED
CHARLESTON COUNTY
2012 SEP -7 PM 4:06
C.C.P. & G.S.

~#4837-5836-9808 v.1 - 04387/01815~

PROMISSORY NOTE

Greenville, South Carolina

February 20, 2007

FOR VALUE RECEIVED, NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC (the "Borrower"), promises to pay to the order of CAROLINA FIRST BANK (the "Lender") the principal sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND ($7,141,000.00) DOLLARS or so much thereof as may be advanced, with interest thereon computed at an annual rate equal to the Libor Base Rate (as hereinafter defined) plus one and ninety one hundredths percent (1.90%).

"LIBOR BASE RATE" means the 90-day LIBOR rate (rounded upward to the nearest 1/16th of 1%) as published in The Wall Street Journal on the 30th day of each month, or if said 30th day is not a Business Day, on the last Business Day of such month. If for any reason The Wall Street Journal, or any successor thereto, shall at any time no longer publish said LIBOR rate, Lender shall obtain such rate from another reliable publication which publishes the said LIBOR rate. If said LIBOR rate is no longer publicly published, Lender will substitute a comparable index rate, as determined by Lender in its reasonable discretion. "Business Day" means a day Lender is open for business with the general public.

Interest shall be payable monthly on the fifth day of each month until the Maturity Date as set forth below. At the option of Lender, it may collect interest due by deducting the amount of interest for the preceding month from any interest reserve established or credited and by adding the same to the outstanding principal balance.

Beginning March 5, 2007, and continuing on the fifth day of each month thereafter until the Maturity Date, Borrower shall continue to pay interest monthly as set forth above.

The entire outstanding principal balance of this Note and any outstanding accrued interest shall be due and payable in full on February 28, 2009 (the "Maturity Date").

All payments under this Note shall be applied first to late charges, if any, then to accrued interest and then to principal. All installments of principal and all interest are payable in lawful money of the United States of America and are to be made before 2:00 p.m. in South Carolina on the dates such payments are due. All payments received by Lender at 2:00 p.m. or thereafter in South Carolina shall be deemed made on the next banking day on which Lender is open for business in South Carolina. In the event of (a) failure to pay this Note in full on the Maturity Date, or (b) default in the payment of any other installment of interest or principal or any other sum payable pursuant to the terms of this Note not cured within five (5) days after written notice from Lender, or (c) an "Event of Default" as such term is defined in the Construction/Term Loan Agreement between Lender and Borrower of even date herewith (the "Loan Agreement"), then or at any time thereafter, at the option of Lender, the whole of the principal sum then remaining

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

Borrower's Initials: DK

EXHIBIT
tabbies
A

unpaid hereunder together with all interest accrued thereon, shall immediately become due and payable without further notice. From and after the maturity of this Note either according to its terms or as the result of a declaration of maturity, the entire principal remaining unpaid hereunder shall bear interest at a rate of three (3%) percent per annum above the rate otherwise in effect hereunder (the "Default Rate"), or the highest applicable lawful rate, whichever is the lesser.

If this Note is placed in the hands of an attorney for collection or is collected through any legal proceedings, Borrower promises to pay all expenses of collection and reasonable attorney's fees incurred by Lender.

In the event the interest provisions hereof or any exactions provided for herein or in the lien documents or any other instruments securing this Note shall result at any time during the life of the loan in an effective rate of interest which, for any period of time, transcends the limit of the usury or any other law applicable to the loan evidenced hereby, all sums in excess of those lawfully collectible as interest for the period in question, at the option of Lender, without further agreement or notice between or by any party hereto, shall be deemed applied to principal immediately upon receipt of such monies by Lender. Notwithstanding the foregoing, Lender may at any time and from time to time elect to reduce the collection of any interest to that permitted by law.

This Note is secured by that certain Mortgage and Security Agreement of even date herewith (the "Mortgage"). The Mortgage encumbers property generally described as approximately 1.70 acres of land located on Kinard Street, Newberry, South Carolina 29108, as more particularly described in the Mortgage.

Lender may collect a late charge of five (5%) percent of any installment of principal or interest which is not paid within twenty (20) days of the due date thereof to cover the extra time and expense involved in handling delinquent payments. Such late charge shall apply to late payments prior to maturity or acceleration. Upon maturity or acceleration, no further late charges shall be assessed, but Borrower shall pay the Default Rate of interest on all amounts due from the date of maturity or acceleration until the Note is paid in full. The collection of the late charge shall not be deemed a waiver by Lender of interest accruing after the due date of any installment or of any of Lender's other rights under this Note.

Borrower agrees that the late charge provided above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the Default Rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of the increased risks to Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Borrower and all endorsers, guarantors and all persons liable or to become liable on this Note waive presentment, protest and demand, notice of protest, demand and dishonor and nonpayment of this Note, and consent to any and all renewals and extensions of the time of payment hereof, and agree, further, that at any time and from time to time without notice, the terms of payment herein may be modified or the security described in any lien document

 Borrower's Initials: _____

securing the Note released in whole or in part, or increased, changed or exchanged by agreement between Lender and any owner of property affected by said lien document without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby.

Lender is not required to rely on the collateral for the payment of the Note in the event of default by the Borrower, but may proceed directly against the Borrower and Guarantor or endorsers in such manner as it deems desirable. None of the rights and remedies of Lender hereunder is to be waived or affected by failure or delay to exercise them. All remedies conferred on Lender by this Note or any other instrument or agreement shall be cumulative, and none is exclusive. Such remedies may be exercised concurrently or consecutively at Lender's option.

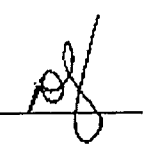
This Note may be prepaid in whole or in part at any time without penalty.

This Note shall be governed as to validity, interpretation, construction, effect, and in all other respects by the laws and decisions of the State of South Carolina.

Wherever possible each provision of this Note shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Note or portion thereof shall be prohibited by or be invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note.

This Note may be assigned by Lender with or without recourse.

ANY PROVISION HEREOF TO THE CONTRARY NOTWITHSTANDING, THIS DOCUMENT IS SUBJECT TO THE PROVISIONS OF THE LOAN AGREEMENT (OR IF THERE IS NO LOAN AGREEMENT, THE MORTGAGE) CONCERNING ARBITRATION OF DISPUTES. Subject to the foregoing, Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.

Borrower's Initials: 

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.

NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC

By: ATRIUM DEVELOPMENT ASSOCIATES, LLC
Its Manager

By: _____

Its: _____

(SEAL)

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AMENDMENT TO PROMISSORY NOTE

THIS AMENDMENT ("Amendment") IS MADE this **23**rd day of **May, 2012** to that certain Promissory Note dated **February 20, 2007** (as previously amended, modified or supplemented, the "Note") in the original sum of **Seven Million One Hundred Forty-One Thousand and Zero Cents ($7,141,000.00)** made by Newberry Atrium Professional Center, LLC (hereinafter referred to as the "Borrower") in favor of TD Bank, N.A. (hereinafter referred to as the "Bank").

WITNESSETH

WHEREAS, Borrower wishes to amend and modify the Note; and

WHEREAS, Bank is willing to permit the Note to be modified as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained and Borrower's promise to pay Bank all sums due under the terms of the Note as modified hereby, it is agreed that the term and repayment of the Note shall be amended and modified as follows:

1. The maturity date as referenced in the Note shall be extended to **August 8, 2012.**
2. The Borrower and Guarantors represent: It has no claims, defenses, counterclaims or rights of setoff or recoupment against the Bank under any of the loan documents or otherwise and each hereby waives any such claims, defenses, counterclaims or rights of setoff or recoupment.
   The Borrower and Guarantors releases and discharges lender and its agents, attorneys, employees and officers from any and all actions, causes of action, claims, demands or damages of any kind on account of or arising out of any event, action, omission or matter (whether known or unknown) occurring prior to the date of this agreement, including but not limited to the negotiation, execution, delivery or performance of the loan documents, the administration of the loan documents, the negotiation and actions taken with respect to the defaults existing or occurring under the loan documents and the loan transactions evidenced by the loan documents.
3. Principal Balance. The Borrower(s) acknowledge(s) and agree(s) that the current outstanding principal balance of the Note as of the date hereof is **$5,978,252.88.**

EXHIBIT
B

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EXCEPT AS MODIFIED HEREBY, this Amendment is contingent upon Borrower's compliance with all of those terms and conditions contained in the Note and loan documents executed in connection therewith which are incorporated herein by reference. Upon breach of any term or condition contained therein, Bank shall have the right to declare the Note in default and demand payment in full of the principal balance remaining unpaid, together with all interest which shall have accrued thereon.

ALL TERMS of the Note and any prior amendments, modifications and/or extension shall remain in full force, except as modified by this Amendment shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

Accepted and Legally Bound:

[WITNESS][Attest]:

BORROWER:

Newberry Atrium Professional Center, LLC

David H. Jacobs, Manager

Agreed to and Accepted:

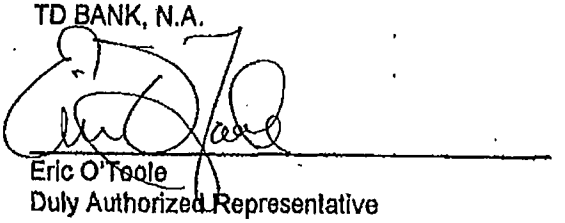
GUARANTOR:

David H. Jacobs, individually

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Agreed to and Accepted:

TD BANK, N.A.



Eric O'Toole
Duly Authorized Representative

Loan no.:
vb

UNCONDITIONAL GUARANTY

February 20, 2007

WHEREAS, NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC (the "Borrower"), has borrowed or shall borrow the sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND DOLLARS ($7,141,000.00) from CAROLINA FIRST BANK (the "Lender") pursuant to a promissory note from Borrower to Lender dated February 20, 2007 (the "Note"); and

WHEREAS, Lender is unwilling to make the loan to Borrower evidenced by the Note unless it receives an unconditional and continuing joint and several guaranty from DAVID H. JACOBS (hereinafter termed "Guarantor"), covering all "Obligations of Borrower" as hereinafter defined;

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and in order to induce Lender to lend money to Borrower as evidenced by the Note, Guarantor (jointly and severally, if more than one) hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due, whether by acceleration or otherwise, under the Note and all lien documents securing the Note, and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower").

This Guaranty is in addition to and is not intended to supersede any prior existing Guaranty of Guarantor.

Further, whether or not suit is brought by Lender to acquire possession of collateral or to enforce collection of any unpaid balance hereunder, Guarantor expressly hereby agrees to pay all legal expenses and the reasonable attorneys' fees (including those relative to appellate proceedings, if any) incurred by Lender with respect to this Guaranty.

In order to implement the foregoing and as additional inducements to Lender, Guarantor further covenants and agrees as follows:

1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or to require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor of Borrower or any other person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the generality of the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

Guarantor's Initials: DJ

EXHIBIT C

recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.

2. TIME IS OF THE ESSENCE HEREOF.

3. This Guaranty Agreement constitutes the entire agreement between the parties, and no waivers or modifications shall be valid unless they are reduced to writing, duly executed by the party to be charged thereby, and expressly approved in writing by an officer of Lender actually involved in the transactions being guaranteed hereby.

4. If any process is issued or ordered to be served upon Lender, Borrower or Guarantor, seeking to seize Borrower's and/or Guarantor's rights and/or interests in any bank account maintained with Lender, the balance in any such account shall immediately be deemed to have been and shall be set-off against any and all Obligations of Borrower and/or all obligations and liabilities of Guarantor hereunder, as of the time of the issuance of any such writ or process, whether or not Borrower, Guarantor and/or Lender shall then have been served therewith.

5. All moneys available to and/or received by Lender for application toward payment of (or reduction of) the Obligations of Borrower may be applied by Lender to such Obligations of Borrower in such manner, and apportioned in such amounts and at such times, as Lender, in its sole discretion, may deem suitable or desirable.

6. As security for any and all liabilities of Guarantor hereunder, now existing or hereafter arising, Guarantor hereby grants Lender the right to retain a security interest in any and all moneys or other property (i.e., goods and merchandise, as well as all documents relative thereto; also, funds, securities, choses in action and any and all other forms of property, whether real, personal or mixed and any right, title or interest of Guarantor therein or thereto) and/or the proceeds thereof, which have been or may hereafter be deposited or left with Lender (or with any agent or other third party acting on Lender's behalf) by or for the account or credit of Guarantor, including without limitation any property in which Guarantor may have any interest. Further, where any money is due Lender hereunder, Lender is herewith authorized to exercise its right of set-off or "bank lien" as to any moneys deposited in demand, checking, time, savings, or other accounts of any nature maintained in and with it by any of the undersigned, without advance notice. Said right of set-off shall also be applicable and exercised by Lender, in its sole discretion, where Lender is indebted to any Guarantor by reason of any certificate of deposit, bond, note or otherwise.

7. Guarantor agrees that Guarantor's liability hereunder shall not be diminished by any failure on the part of Lender to perfect (by filing, recording or otherwise) any security interest it may have in any property securing this Unconditional Guaranty Agreement and/or the Obligations of Borrower secured hereby and hereunder.

8. Guarantor further hereby consents and agrees that Lender may at any time, or from time to time, in its sole discretion: (i) extend or change the time of payment, and/or the manner, place or terms of payment of any or all of the Obligations of Borrower; (ii) exchange, release and/or surrender all or any of any collateral security, or any part thereof, by whomsoever

Guarantor's Initials: _____

deposited, which is or may hereafter be held by it in connection with all or any of the Obligations of Borrower and/or any liabilities or obligations of Guarantor hereunder; (iii) release any other guarantor, endorser or co-obligor of the Obligations of Borrower with or without consideration and without notice to and further consent from any Guarantor and such release shall not in any way affect the liability of the undersigned; (iv) sell or otherwise dispose of and/or purchase all or any of any such collateral at public or private sale, and after deducting all costs and expenses of every kind for collection, preparation for sale, sale or delivery, the net proceeds of any such sale or other disposition may be applied by Lender upon all or any of the Obligations of Borrower; (v) settle or compromise with Borrower, any insurance carrier and/or any other person liable thereon, any and all of the Obligations of Borrower (including, but not limited to any insurance applicable to the Obligations of Borrower), and/or subordinate the payment of all or any part of same, to the payment of any other debts or claims, which may at any time be due or owing to Lender and/or any other person; or (vi) alter, extend, change, modify, release, waive or cancel any covenant, agreement, condition, obligation or provision contained in any or all loan documents; all in such manner and upon such terms as Lender may deem proper and/or desirable, and without notice to or further assent from Guarantor, it being agreed that Guarantor shall be and remain bound upon this Unconditional Guaranty Agreement, irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, foreclosure, sale or other disposition, application, renewal or extension and notwithstanding also that the Obligations of Borrower may at any time exceed the aggregate principal sum of the Note. Further, this Guaranty shall not be construed to impose any obligation on Lender to extend or continue to extend credit or otherwise to deal with Borrower at any time.

9. In consideration of Lender's extension of credit to Borrower, Guarantor hereby agrees:

(a) To subordinate, and by this Agreement does subordinate, all debts now or hereafter owed by Borrower to Guarantor to any and all debts of Borrower to Lender now or hereafter existing while this Agreement is in effect.

(b) Guarantor further agrees that it will not assert any right to which it may be or become entitled, whether by subrogation, contribution or otherwise against Borrower or Guarantor or any of their respective properties, by reason of the performance of the undersigned of his obligations under this Guaranty, except after payment in full of all amounts (including costs and expenses) which may become payable in respect of or under the Obligations of Borrower.

(c) Guarantor hereby indemnifies and holds Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorneys', consultants' or experts' fees and expenses), of every kind and nature, suffered by or asserted against Lender under any law, regulation or ordinance, local, state or federal concerning any hazardous materials, substances, wastes or other environmentally regulated substances now or hereafter located on the property of Borrower or Guarantor.

Guarantor's Initials: 

10. This Unconditional Guaranty Agreement shall be binding upon Guarantor, and the heirs, executors, administrators, successors and assigns of Guarantor; and it shall inure to the benefit of, and be enforceable by, Lender and its successors, transferees and assigns. It further shall be deemed to have been made under and shall be governed by the Laws of the State of South Carolina in all respects, including matters of construction, validity and performance.

11. No waiver by Lender of any default by Guarantor or Borrower shall operate as a waiver of any other default or of the same default on a future occasion. If more than one person has signed this Guaranty Agreement, such parties are jointly and severally obligated hereunder. The term "Guarantor," as used herein, shall (if signed by more than one person) mean the "Guarantors and each of them." The liability of Guarantor hereunder shall also be joint and several with that of any person or entity executing a separate guaranty in favor of Lender. If any Guarantor shall be a partnership, the obligations, liabilities and agreements on the part of such Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals composing the partnership. Further, the term "Guarantor" shall include in such event any altered or successor partnerships, it being also understood that the predecessor partnership and its partners shall not thereby be released from any obligations or liabilities hereunder. Lender, or any other holder hereof, may correct patent errors in this Agreement.

12. Guarantor hereby waives: (i) notice of acceptance of this Guaranty; (ii) notice of extensions, continuations or modifications of the Note; (iii) notice of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Lender and Borrower; (iv) presentment and/or demand for payment of any of the Obligations of Borrower and/or for payment under this Guaranty; (v) protest or notice of dishonor or default to Guarantor or to any other person with respect to any of the Obligations of Borrower; (vi) the benefit of any homestead or other exemptions; and (vii) to the extent such waiver may be enforceable at the time of foreclosure, any right to have any mortgaged property securing the Obligations of Borrower appraised after foreclosure for the purpose of reducing a deficiency judgment against Borrower, Guarantor or any other guarantor or other party.

13. Anything contained herein to the contrary notwithstanding, if for any reason the effective rate of interest on any of the Obligations of Borrower should exceed the maximum lawful rate, the effective rate of such obligation shall be deemed reduced to and shall be such maximum lawful rate, and any sums of interest which have been collected in excess of such maximum lawful rate shall be applied as a credit against the unpaid principal balance due.

14. In the event any provision of this instrument should be left blank or incomplete, Guarantor hereby authorizes and empowers Lender to supply and complete the necessary information to complete or fill in the blank provision.

15. EVENTS OF DEFAULT. Guarantor shall be in default under this Guaranty Agreement upon the happening of any of the following events, circumstances or conditions, namely:

(a) Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default by Borrower in the payment of the Obligations of Borrower; or

Guarantor's Initials: 

(b) Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with this Guaranty Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or furnished; or

(c) Death (unless Lender, in its sole discretion, accepts a substitute guarantor), dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any State or Federal Bankruptcy or Insolvency Laws by or against any Guarantor; or

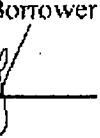
(d) Material adverse change in the financial position of Guarantor.

16. REMEDIES UPON DEFAULT. Upon the occurrence of any of the foregoing events, circumstances, or conditions of default, all of the obligations evidenced herein or guaranteed hereby shall immediately be due and payable without notice. Further, Lender shall then have all of the rights and remedies granted hereunder, and all of the rights and remedies of a secured party and/or holder-in-due-course under the South Carolina Uniform Commercial Code and/or under other Laws of South Carolina.

17. Any provision hereof to the contrary notwithstanding, to the extent Guarantor is determined to be an "insider" as such term is used in the United States Bankruptcy Code or cases thereunder, Guarantor waives any right (whether established by contract or statute or otherwise available at law or in equity) to reimbursement, indemnity, subrogation, contribution or other such claim against Lender, Borrower or any other guarantor or any other person primarily or secondarily liable for any Obligations of Borrower with respect to any disbursement or payment made by Guarantor under or in connection with this Guaranty or otherwise.

18. In the event any payment made by Guarantor to Lender is determined to be a preferential transfer under any bankruptcy or similar law and Lender is required to return such payment to a trustee in bankruptcy, to a receiver, to Guarantor, or to another person or entity, Guarantor's obligations under this Guaranty shall not be discharged with respect to such preferential payment notwithstanding any satisfaction of the Note guaranteed hereby or the return of this Guaranty. Furthermore, Guarantor shall be jointly and severally liable to Lender for the amount of any such preferential payment and any interest expenses or other expenses, including but not limited to attorneys' fees, incurred by Lender related in any way to such preferential payment, and Guarantor agrees to reinstate any collateral given to Lender as security for the obligations under this Guaranty notwithstanding the fact that such collateral may have been released or returned by Lender.

19. Guarantor acknowledges that Guarantor has previously submitted financial statements to Lender for the purpose of inducing Lender to extend credit to Borrower. Guarantor agrees to update such financial statements from time to time as requested by Lender. Guarantor further agrees to immediately notify Lender in writing of any material adverse change in the financial position of Guarantor. Guarantor covenants and warrants that such financial statements, as updated or supplemented from time to time by Guarantor, shall remain a true and accurate statement of Guarantor's financial position for so long as the Obligations of Borrower

Guarantor's Initials: 

remain outstanding, and Lender shall be entitled to continue to rely on the truth and accuracy of such statements. Guarantor agrees not to transfer assets for less than fair value or take any other action which could reasonably be expected to reduce the net worth of Guarantor or diminish Guarantor's ability to perform Guarantor's obligations hereunder.

20. Guarantor's liability hereunder shall not be diminished or reduced by (i) any payment of any of the Obligations of Borrower by any other guarantor, endorser, co-obligor or any other person liable or to become liable for the payment of the Obligations of Borrower, or (ii) any reduction of the Obligations of Borrower by realization of any collateral or security or by any other source.

21. Subject to the arbitration provisions set forth below, Guarantor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Guarantor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to Guarantor at Guarantor's address set forth below or any new address of which Lender has been notified by Guarantor in writing.

22. ARBITRATION. UPON DEMAND OF LENDER OR GUARANTOR, WHETHER MADE BEFORE OR AFTER INSTITUTION OF ANY JUDICIAL PROCEEDING, ANY DISPUTE, CLAIM OR CONTROVERSY ("DISPUTES") ARISING OUT OF, CONNECTED WITH OR RELATING TO THIS GUARANTY OR ANY OTHER LOAN DOCUMENTS SHALL BE RESOLVED BY BINDING ARBITRATION AS PROVIDED HEREIN. Institution of a judicial proceeding by a party does not waive the right of that party to demand arbitration hereunder. Disputes may include, without limitation, tort claims, counterclaims, disputes as to whether a matter is subject to arbitration, claims brought as class actions, claims arising from loan documents executed in the future, or claims arising out of or connected with the transaction reflected by this document.

Pursuant to the Federal Arbitration Act or, if it is deemed not to apply, the South Carolina Uniform Arbitration Act, arbitration shall be conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA"). All arbitration hearings shall be conducted in Columbia, South Carolina. All applicable statutes of limitation shall apply to a Dispute. A judgment upon the award may be entered in any court having jurisdiction.

Notwithstanding the preceding binding arbitration provisions, Lender and Guarantor preserve, without diminution, certain remedies that either party may employ or exercise freely, independently or in connection with an arbitration proceeding or after an arbitration action is brought. Lender and Guarantor shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable: (i) all rights to foreclose against any real or personal property or other security by exercising a power of sale granted under loan documents or under applicable law or by judicial foreclosure and sale, including a proceeding to confirm the sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-off, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary

Guarantor's Initials: _____

bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Preservation of these remedies does not limit the power of an arbitrator to grant similar remedies that may be requested by a party in a Dispute.

Guarantor and Lender shall not have a remedy of punitive or exemplary damages against the other in any Dispute and hereby waive any right or claim to punitive or exemplary damages they have now or which may arise in the future in connection with any Dispute whether the Dispute is resolved by arbitration or judicially.

23. 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.

WITNESS the Hand and Seal of the undersigned, this Unconditional Guaranty being executed and delivered on the date first above written. Each Guarantor has adopted as his seal the word "SEAL" appearing beside his signature.

_____ (SEAL)
DAVID H. JACOBS

Address: 115 Atrium Way #204
Columbia S.C. 29223

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF NEWBERRY)

On February 20 2007 before me personally came DAVID H. JACOBS to me known to be the person described in and who executed the foregoing Guaranty and acknowledged that (s)he/they executed the same.

_____
Notary Public for South Carolina
My Commission Expires: 2/1/2011

(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
TD BANK, NA)
Plaintiff(s))
)
vs.)
)
DAVID A. JACOBS AND JAMES A. MCFARLAND, JR.)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2012 -CP - 40 - 7540

(Please Print)
Submitted By: JOHN T. MOORE
Address: NELSON MULLINS RILEY & SCARBOROUGH, LLP
P.O. BOX 11070
COLUMBIA SC 29211

SC Bar #: 4056
Telephone #: 803-789-2000
Fax #: 803-256-7500
Other:
E-mail: john.moore@nelsonmullins.com

NOTE: The coversheet 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 coversheet must be served on the defendant(s) along with the Summons and Complaint.

RICHLAND COUNTY FILED
2012 NOV -7 PM 3:58
ANETTE C.C.P. & R. U.S.

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 Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
☐ Constructions (100)
■ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case # 20___-CP-___-_____
☐ Notice/ File Med Mal (230)
☐ Other (299)

Torts – Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ 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)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript of Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799)

Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Commission (991)
☐ Other (999)

Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (510)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Foreign Subpoenas (650)
☐ Motion to Quash Subpoena in Out-of-County Action (660)

Submitting Party Signature: _____ **Date:** November 7, 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.

SCCA / 234 (04/2012)

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

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 and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases 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. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. 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 has 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	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD BANK, NA, successor by merger with Carolina First Bank,	)	Civil Action No. 2012-CP-40-
Plaintiff,	)	
vs.	)	SUMMONS
DAVID A. JACOBS AND JAMES A. MCFARLAND, JR.,	)	(Non-Jury)
Defendants.	)	

RICHLAND COUNTY FILED
2012 NOV -7 PM 3:58
JEANETTE W. McBRIDE C.C.P. & G.S.

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1320 Main Street, Post Office Box 11070, Columbia, South Carolina 29211, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

John T. Moore
SC Bar No. 004056
E-Mail: john.moore@nelsonmullins.com
B. Keith Poston
E-Mail: keith.poston@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff TD Bank, NA

Columbia, South Carolina
November 7, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank	)	Civil Action No. 2012-CP-40-
Plaintiff,	)	
vs.	)	COMPLAINT
David A. Jacobs and James A. McFarland, Jr.,	)	(GUARANTY)
Defendants.	)	

RICHLAND COUNTY
FILED
2012 NOV -7 PM 3:58
JEANETTE W. WALKER
C.C.P. & G.S.

The Plaintiff, complaining of the Defendants herein, would respectfully show unto this Court that:

1. Plaintiff is a banking corporation organized under the laws of the United States and maintains an office in the County and State above stated.

2. On information and belief, the Defendant David A. Jacobs is a citizen and resident of the above-named County, State of South Carolina.

3. On information and belief, the Defendant James A. McFarland, Jr. is a citizen and resident of the State of North Carolina.

4. On or about April 4, 2011, Atrium at Middle Sound Land, LLC, for consideration, executed in favor of Plaintiff a Promissory Note in the total amount of One Million Three Hundred Ten Thousand Four Hundred Ninety-Five and 33/100 ($1,310,495.33) Dollars, with interest as stated in said Note, and payable on April 4, 2012. A copy of said Note is attached hereto as **Exhibit A** and incorporated herein.

5. As further consideration for the Note, on or about April 4, 2012, the Defendants David A. Jacobs and James A. McFarland, Jr., executed in favor of Plaintiff an Unconditional Guarantys of the Note. Copies of said Unconditional Guarantys are attached hereto as **Exhibit B** and incorporated herein.

6. As further consideration of said Note, the Defendants agreed to pay all costs of collection including reasonable attorney's fees.

7. Plaintiff reserves all rights and claims as to any collateral securing the Note.

8. The Defendants have failed to pay said Note when due and is therefore in default.

9. The Plaintiff has declared the entire balance due and payable and has demanded and does hereby demand payment of same, but the Defendants have refused to pay, and there is presently due and owing Plaintiff by Defendants the sum of One Million Three Hundred Twenty-One Thousand Nine Hundred Ninety-Two and 57/100 ($1,321,992.57) Dollars, which amount represents principal, interest and late charges as of October 22, 2012, plus interest at the rate stated in said Note from October 22, 2012, together with all costs of collection and reasonable attorney's fees.

WHEREFORE, Plaintiff prays judgment against Defendants for the sum of One Million Three Hundred Twenty-One Thousand Nine Hundred Ninety-Two and 57/100 ($1,321,992.57) Dollars, plus accrued interest October 22, 2012, at the rate specified in the note, plus reasonable attorney's fees, for the costs of this action, and such other and further relief as to the Court may appear just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

John T. Moore
SC Bar No. 004056
E-Mail: john.moore@nelsonmullins.com
B. Keith Poston
SC Bar No. 78397
E-Mail: keith.poston@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff TD Bank, NA

Columbia, South Carolina

_____, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

VERIFICATION

Personally appeared before me the undersigned, who, on oath says: That he is an employee/agent of Plaintiff in the within action; and that he has read the complaint, and the matters therein stated are true of his own knowledge, except those stated to be on information and belief, and as to those he believes them to be true.

T.D. BANK, N.A.

By: Benjamin R. Jenkins III
Name: Benjamin R. Jenkins III
Its: Vice President Workout Officer

SWORN to and subscribed before me

this 1st day of NOV, 2012.

Tiffany Gibson (L.S.)
Notary Public for South Carolina

My Commission Expires: 11-22-2020

TIFFANY GIBSON NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 11-22-2020

JEANETTE W. McBRIDE C.C.P. & G.S.

2012 NOV -7 PM 3:58

RICHLAND COUNTY FILED

~#4847-8306-9713 v.1~

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
[redacted]	ATRIUM AT MIDDLE SOUND LAND, LLC		04/04/11	
NOTE AMOUNT	**INDEX (w/Margin)**	**RATE**	**MATURITY DATE**	**LOAN PURPOSE**
$1,310,495.33	Not Applicable	5.000%	04/04/12	Commercial
		Creditor Use Only		

PROMISSORY NOTE

(Commercial - Single Advance)
RENEWAL NOTE

DATE AND PARTIES. The date of this Promissory Note (Note) is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
SUCCESSOR BY MERGER TO CAROLINA FIRST BANK
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

1. DEFINITIONS. As used in this Note, the terms have the following meanings:

A. Pronouns. The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.

B. Note. Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.

C. Loan. Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.

D. Loan Documents. Loan Documents refer to all the documents executed as a part of or in connection with the Loan.

E. Property. Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.

F. Percent. Rates and rate change limitations are expressed as annualized percentages.

2. RENEWAL. This Note is a renewal of the following described note:

Note Date	Note Number	Note Amount
December 11, 2009	[redacted]	$1,355,307.23

I have requested that the note listed in the table above be renewed. The remaining balance of the note listed in the table above is **$1,310,495.33.**

3. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of **$1,310,495.33 (Principal)** plus interest from April 4, 2011 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

4. INTEREST. Interest will accrue on the unpaid Principal balance of this Note at the rate of **5.000 percent (Interest Rate).**

A. Interest After Default. If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default, plus 4.000 percent, until paid in full.

B. Maximum Interest Amount. Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.

C. Statutory Authority. The amount assessed or collected on this Note is authorized by the South Carolina usury laws under S.C. Code Ann. §§ 37-3-605, 37-3-105 and 37-10-101 et. seq.

D. Accrual. Interest accrues using an Actual/360 days counting method.

5. ADDITIONAL CHARGES. As additional consideration, I agree to pay, or have paid, these additional fees and charges.

Wolters Kluwer Financial Services -1996, 2011 Bankers Systems*

EXHIBIT
tabbies
A

A. Nonrefundable Fees and Charges. The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

Renewal. A(n) Renewal fee of $6,522.00 payable from separate funds on or before today's date.

6. REMEDIAL CHARGES. In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. Late Charge. If a payment is more than 20 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or $25.00, whichever is greater. I will pay this late charge promptly but only once for each late payment.

B. Returned Check Charge. I agree to pay a fee not to exceed $25.00 for each check, negotiable order of withdrawal or draft I issue in connection with the Loan that is returned because it has been dishonored.

7. PAYMENT. I agree to pay this Note in 12 payments. This Note is amortized over 228 payments. I will make 11 payments of $8,968.20 beginning on May 4, 2011, and on the 4th day of each month thereafter. A single "balloon payment" of the entire unpaid balance of Principal and interest will be due April 4, 2012.

Payments will be rounded to the nearest $.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. PREPAYMENT. I may prepay this Loan in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. LOAN PURPOSE. The purpose of this Loan is FOR RENEWAL OF LOAN USED TO PURCHASE COMMERCIAL INVESTMENT PROPERTY.

10. SECURITY. The Loan is secured by previously executed, separate security instruments, including the following: REAL ESTATE DEED OF TRUST DATED NOVEMBER 19, 2004 IN THE ORIGINAL AMOUNT OF $3,000,000.00 COVERING PROPERTY KNOWN AS 9.2 ACRE TRACT (NOW 4.89 ACRE TRACT) OF R/E ON MARKET STREET AT MIDDLE SOUND LOOP RD., (AKA LOT 2 & 3 MARKET STREET) WILMINGTON, NC, SAID DEED RECORDED NOVEMBER 19, 2004 IN NEW HANOVER COUNTY, NC IN BOOK 4575 PAGE 606-615 INSTRUMENT #2004061710

ASSIGNMENT OF LEASES AND RENTS DATED NOVEMBER 19, 2004 RECORDED NOVEMBER 19, 2004 IN NEW HANOVER COUNTY, NC IN BOOK 4575 PAGE 616-625 INSTRUMENT #2004061711

11. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. Business Termination. I merge, dissolve, reorganize, end my business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. New Organizations. Without your written consent, I organize, merge into, or consolidate with an entity; acquire all or substantially all of the assets of another; materially change the legal structure, management, ownership or financial condition; or effect or enter into a domestication, conversion or interest exchange.

E. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Note.

F. Other Documents. A default occurs under the terms of any other Loan Document.

G. Other Agreements. I am in default on any other debt or agreement I have with you.

H. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

I. Judgment. I fail to satisfy or appeal any judgment against me.

J. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

K. Name Change. I change my name or assume an additional name without notifying you before making such a change.

L. Property Transfer. I transfer all or a substantial part of my money or property.

M. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

N. Material Change. Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.

O. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

12. DUE ON SALE OR ENCUMBRANCE. You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.

13. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers By Borrower. In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

(7) I agree that you may inform any party who guarantees this Loan of any Loan accommodations, renewals, extensions, modifications, substitutions or future advances.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

14. REMEDIES. After I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Note immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.

D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

16. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

17. WARRANTIES AND REPRESENTATIONS. I make to you the following warranties and representations which will continue as long as this Note is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Note and the obligation evidenced by this Note are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to you I have not changed my name or principal place of business within the last 10 years and have not used any other trade or fictitious name. Without your prior written consent, I do not and will not use any other name and will preserve my existing name, trade names and franchises.

18. APPLICABLE LAW. This Note is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

19. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

20. AMENDMENT, INTEGRATION AND SEVERABILITY. This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable. No present or future agreement securing any other debt I owe you will secure the payment of this Loan if, with respect to this loan, you fail to fulfill any necessary requirements or limitations of Sections 19(a), 32 or 35 of Regulation Z or if, as a result, this Loan would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

21. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Note.

22. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

23. CREDIT INFORMATION. I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

24. ERRORS AND OMISSIONS. I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

25. SIGNATURES. By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

ATRIUM AT MIDDLE SOUND LAND, LLC

By: _____ (Seal)
DAVID A. JACOBS, MEMBER

By: _____ (Seal)
JAMES A. MCFARLAND, JR., MEMBER

GUARANTY

(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
DAVID A. JACOBS
115 ATRIUM WAY, SUITE 204
COLUMBIA, SC 29223

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No.), dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you,

EXHIBIT
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pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control of a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:

_____ (Seal)
DAVID A. JACOBS
Individually

Wolters Kluwer Financial Services ©1998, 2011 Bankers Systems™

GUARANTY

(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
JAMES A. MCFARLAND JR.
103 FOREST HILLS DRIVE
WILMINGTON, NC 28403

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. , dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of those debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the Indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you,

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control of a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

JAMES A. MCFARLAND JR

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. ADDITIONAL TERMS.

21. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR: _____ (Seal)
JAMES A. MCFARLAND JR.
Individually

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT

TD BANK, NA successor by Merger with Carolina First Bank,	)	
	)	Case No. 2012-CP-40-6074
Plaintiff,	)	
vs.	)	ANSWER
	)	DEFENDANT DEMANDS TRIAL BY JURY
DAVID H. JACOBS	)	
	)	
Defendant,	)	

RICHLAND COUNTY
FILED
2012 NOV 21 PM 3:16
JEANETTE W. McBRIDE
C.C.P. & G.S.

David H. Jacobs hereby responds to the Complaint.

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 4 are admitted.

2. With respect to the allegations of paragraph 5, the instrument speaks for itself and the Court should interpret it accordingly.

3. With respect to the allegations of paragraphs 6, 7, and 8, this Defendant admits that the loan has not been paid in full, but denies the remaining allegations and demands strict proof thereof.

FOR A SECOND DEFENSE

4. The allegations of paragraphs 1 through 3 are re-alleged and incorporated herein by this reference.

5. The Defendant is a commercial real estate developer and in that capacity through various entities has developed numerous office buildings and child development centers throughout the country.

6. The Defendant and Carolina First Bank have had a fifteen-year successful business relationship. Throughout this time and by personal solicitation of Defendant by its

agents, Carolina First has sought lending opportunities from him and he has utilized the credit facilities of Carolina First for at least six large commercial projects. Carolina First has been repaid on all of these projects except for the one that is the subject of this action.

7. Defendant, through one of his companies, serves as the managing member of Newberry Atrium Professional Center, LLC (hereinafter " Newberry Atrium").

8. Carolina First Bank through its agents specifically requested the opportunity to finance for Newberry Atrium the construction of its proposed medical office building adjacent to the Newberry County Memorial Hospital in Newberry, South Carolina. Defendant as decision maker for Newberry Atrium selected Carolina First because of his long-term working relationship with that bank.

9. This long-term relationship between Defendant and Carolina First created a special fiduciary relationship of trust and confidence between them.

10. Plaintiff as successor to Carolina First Bank is liable for its acts and stands in the place of Carolina First Bank in relationship to this Defendant.

11. The loan made by Carolina First Bank to Newberry Atrium was made for the specific purpose providing the funds necessary to build a medical office building and this loan was secured by the real property on which the building was to be constructed and now the loan is secured by the land and the completed building.

12. Defendant executed the Guaranty (the "Guaranty") that is the subject of this action as part of this loan agreement between Plaintiff and Newberry Atrium and he would not have executed this Guaranty without the trust and confidence he placed in the fair dealing of Carolina First.

13. Defendant managed this project for Newberry Atrium and the medical office building was constructed in conformity with the loan agreement between Carolina First and Newberry Atrium.

14. The medical office building for Newberry Atrium was completed in 2008 in the midst of the economic recession that began in that year.

15. Because of uncertainties in the medical field and the economic recession, both of which were circumstances beyond the control of Newberry Atrium and this Defendant, Newberry Atrium has been unable to secure enough tenants to fully occupy its medical office building and for that reason it and Defendant have been unable to obtain permanent financing for Newberry Atrium with a third party lender.

16. Defendant has requested permanent financing from Carolina First Bank and Plaintiff and both have refused to do so. Plaintiff and its predecessor Carolina First could have agreed to modify the loan into long-term or permanent status without cost or detriment to them; such modification of the loan and would have been mutually beneficial to the Plaintiff and Newberry Atrium and this Defendant but Plaintiff has refused to do this without just cause or excuse.

17. An integral part of the loan agreement between Carolina First as lender and Atrium Professional as Borrower and Defendant has guarantor is an implied covenant of good faith and fair dealing.

18. By failing to provide such permanent financing, the Plaintiff has breached its covenant of good faith and fair dealing with the Defendant.

19. By breaching its covenant of good faith and fair dealing, the Defendant's Guaranty should be voided or in the alternative, Plaintiff should be permanently barred from pursuing this action on the Guaranty of Defendant.

21. By utilizing this punitive and abusive tactic, the Plaintiff is attempting to personally harm Defendant. Such harm to Defendant will damage Middle Sound as well because the Defendant is critical to the success of Middle Sound.

22. These punitive and unconscionable tactics of Plaintiff against this Defendant are not justified or warranted by the facts of this matter and are indicative of bad faith on the part of the Plaintiff; these tactics are a breach of the implied covenant of good faith and fair dealing that is an integral part of the loan agreement that Defendant's Guaranty is a part of.

23. The Plaintiff is utilizing this same punitive tactic in another legal matter pending against this Defendant and this is indicative of its intent to inflict harm on the Defendant rather than pursuing a legitimate legal objectives when it knows or should know that he does not have the financial sources to pay the entire amount due.

24. This breach of the implied covenant of good faith and fair dealing is of such degree that the Guaranty should be voided by this Court or in the alternative Plaintiff should be permanently barred from enforcing the Guaranty given by Defendant.

25. The Defendant demands trial by jury.

WHEREFORE, Defendant having answered the Complaint prays that it be dismissed, the Defendant's Guaranty be voided or in the alternative, the Plaintiff should be permanently barred from suing on the Guaranty and with costs and attorney fees assessed against Plaintiff and for such other and further relief as the Court deems just and proper.

Gerald D. Jowers
Attorney for Defendant
1802 Sumter Street
Columbia, South Carolina 29201
765-9620

January 18, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
TD BANK, NA successor by Merger with Carolina First Bank,	)	
	)	Case No. 2012-CP-40-7540
Plaintiff,	)	
vs.	)	ANSWER
	)	DEFENDANT DEMANDS TRIAL BY JURY
DAVID H. JACOBS and JAMES A. MCFARLAND, JR.	)	
Defendants,	)	

2013 APR -8 AM 10:19

David H. Jacobs hereby responds to the Complaint.

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 4 are admitted.

2. With respect to the allegations of paragraph 5 and 6, the instrument speaks for itself and the Court should interpret it accordingly.

3. With respect to the allegations of paragraphs 7, this Defendant denies these allegations and alleges that Plaintiff must elect its remedy.

4. With respect to paragraphs 8 and 9, this Defendant admits that the loan has not been paid in full, but denies the remaining allegations and demands strict proof thereof.

FOR A SECOND DEFENSE

5. The allegations of paragraphs 1 through 4 are re-alleged and incorporated herein by this reference.

6. This Defendant is a commercial real estate developer and in that capacity through various entities has developed numerous office buildings and child development centers throughout the country.

7. This Defendant and Carolina First Bank have had a fifteen-year successful business relationship. Throughout this time and by personal solicitation of this Defendant by its agents, Carolina First has sought lending opportunities from him and he has utilized the credit facilities of Carolina First for at least six large commercial projects. Carolina First has been repaid on all of these projects except for two, one of these is the subject of this action.

8. The Defendants are members of Atrium at Middle Sound, LLC (hereinafter " Middle Sound").

9. Carolina First Bank ("Carolina First") through its agents specifically requested the opportunity to finance Middle South for the acquisition of the real property and the development of the property into lots suitable for commercial buildings in Wilmington, North Carolina. Defendant as a decision maker for Middle Sound selected Carolina First because of his long-term working relationship with that bank.

10. This long-term relationship between this Defendant and Carolina First created a special fiduciary relationship of trust and confidence between them.

11. Plaintiff as successor to Carolina First Bank is liable for its acts and stands in the place of Carolina First Bank in relationship to this Defendant.

12. The loan made by Carolina First to Middle Sound was made for the specific purpose providing the funds necessary to acquire and develop the real property that is the collateral for the loan made by Carolina First Bank.

13. Defendant executed the Guaranty (the "Guaranty") that is the subject of this action as part of this loan agreement between Carolina First and Middle Sound and he would not have executed this Guaranty without the trust and confidence he placed in the fair dealing of Carolina First.

14. Middle Sound used the loan proceeds in conformity with the loan agreement between Carolina First and Newberry Atrium.

15. Because of the depressed commercial activities in the current economic recession that were especially severe in Wilmington, NC which were circumstances beyond the control of Middle Sound and this Defendant, Middle Sound has not be able sell the remaining developed property that it has and consequently has been unable to pay in full this loan.

16. An integral part of the loan agreement between Carolina First as lender and Middle Sound as Borrower and Defendant has guarantor is an implied covenant of good faith and fair dealing.

17. As of the date of the filing of this action, Plaintiff has not brought an action for the foreclosure of its mortgage on the remaining property of Middle Sound.

18. This Defendant is informed and believes that the value of Middle Sound's property that is the collateral for this loan far exceeds the amount owed to Plaintiff even in a recessionary real estate market.

19. The purpose of the loan and the only reason the loan was made was to acquire the property, develop and sell it in whole or in part and Carolina First was fully aware of this strategy.

20. The action of Plaintiff in bringing this action solely on the Guaranty and not the mortgage is punitive and unconscionable considering the prior relationship of Defendant and Plaintiff's predecessor. Further this action is indicative of bad faith and corrupt purpose on the part of the Plaintiff when the Plaintiff through its agents knows or should know that the Defendant does not have the present ability to pay to the judgment that the Plaintiff is seeking in this action.

21. By utilizing this punitive and abusive tactic, the Plaintiff is attempting to personally harm Defendant. Such harm to Defendant will damage Middle Sound as well because the Defendant is critical to the success of Middle Sound.

22. These punitive and unconscionable tactics of Plaintiff against this Defendant are not justified or warranted by the facts of this matter and are indicative of bad faith on the part of the Plaintiff; these tactics are a breach of the implied covenant of good faith and fair dealing that is an integral part of the loan agreement that Defendant's Guaranty is a part of.

23. The Plaintiff is utilizing this same punitive tactic in another legal matter pending against this Defendant and this is indicative of its intent to inflict harm on the Defendant rather than pursuing a legitimate legal objectives when it knows or should know that he does not have the financial sources to pay the entire amount due.

24. This breach of the implied covenant of good faith and fair dealing is of such degree that the Guaranty should be voided by this Court or in the alternative Plaintiff should be permanently barred from enforcing the Guaranty given by Defendant.

25. The Defendant demands trial by jury.

WHEREFORE, Defendant having answered the Complaint prays that it be dismissed, the Defendant's Guaranty be voided or in the alternative, the Plaintiff should be permanently barred from suing on the Guaranty and with costs and attorney fees assessed against Plaintiff and for such other and further relief as the Court deems just and proper.

Gerald D. Jowers
Attorney for Defendant
1802 Sumter Street
Columbia, South Carolina 29201
765-9620

January 18, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
TD BANK, NA successor by Merger with Carolina First Bank,	)	
	)	
Plaintiff,	)	Case No. 2012-CP-40-6074
vs.	)	
	)	SUPPLEMENTAL ANSWER
DAVID H. JACOBS	)	DEFENDANT DEMANDS TRIAL BY JURY
	)	
Defendant,	)	

RICHLAND COUNTY FILED
2014 JUL 11 AM 10:26
JEANNETTE W. McBRIDE C.C.P. & G.S.

David H. Jacobs hereby responds to the Complaint.

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 4 are admitted.

2. With respect to the allegations of paragraph 5, the instrument speaks for itself and the Court should interpret it accordingly.

3. With respect to the allegations of paragraphs 6, 7, and 8, this Defendant admits that the loan has not been paid in full, but denies the remaining allegations and demands strict proof thereof.

FOR A SECOND DEFENSE

4. The allegations of paragraphs 1 through 3 are re-alleged and incorporated herein by this reference.

5. The Defendant is a commercial real estate developer and in that capacity through various entities has developed numerous office buildings and child development centers throughout the country.

6. The Defendant and Carolina First Bank have had a fifteen-year successful business relationship. Throughout this time and by personal solicitation of Defendant by its

SCANNED

agents, Carolina First has sought lending opportunities from him and he has utilized the credit facilities of Carolina First for at least six large commercial projects. Carolina First has been repaid on all of these projects except for the one that is the subject of this action.

7. Defendant, through one of his companies, serves as the managing member of Newberry Atrium Professional Center, LLC (hereinafter " Newberry Atrium").

8. Carolina First Bank through its agents specifically requested the opportunity to finance for Newberry Atrium the construction of its proposed medical office building adjacent to the Newberry County Memorial Hospital in Newberry, South Carolina. Defendant as decision maker for Newberry Atrium selected Carolina First because of his long-term working relationship with that bank.

9. This long-term relationship between Defendant and Carolina First created a special fiduciary relationship of trust and confidence between them.

10. Plaintiff as successor to Carolina First Bank is liable for its acts and stands in the place of Carolina First Bank in relationship to this Defendant.

11. The loan made by Carolina First Bank to Newberry Atrium was made for the specific purpose providing the funds necessary to build a medical office building and this loan was secured by the real property on which the building was to be constructed and now the loan is secured by the land and the completed building.

12. Defendant executed the Guaranty (the "Guaranty") that is the subject of this action as part of this loan agreement between Plaintiff and Newberry Atrium and he would not have executed this Guaranty without the trust and confidence he placed in the fair dealing of Carolina First.

13. Defendant managed this project for Newberry Atrium and the medical office building was constructed in conformity with the loan agreement between Carolina First and Newberry Atrium.

14. The medical office building for Newberry Atrium was completed in 2008 in the midst of the economic recession that began in that year.

15. Because of uncertainties in the medical field and the economic recession, both of which were circumstances beyond the control of Newberry Atrium and this Defendant, Newberry Atrium has been unable to secure enough tenants to fully occupy its medical office building and for that reason it and Defendant have been unable to obtain permanent financing for Newberry Atrium with a third party lender.

16. Defendant has requested permanent financing from Carolina First Bank and Plaintiff and both have refused to do so. Plaintiff and its predecessor Carolina First could have agreed to modify the loan into long-term or permanent status without cost or detriment to them; such modification of the loan and would have been mutually beneficial to the Plaintiff and Newberry Atrium and this Defendant but Plaintiff has refused to do this without just cause or excuse.

17. An integral part of the loan agreement between Carolina First as lender and Atrium Professional as Borrower and Defendant has guarantor is an implied covenant of good faith and fair dealing.

18. By failing to provide such permanent financing, the Plaintiff has breached its covenant of good faith and fair dealing with the Defendant.

19. By breaching its covenant of good faith and fair dealing, the Defendant's Guaranty should be voided or in the alternative, Plaintiff should be permanently barred from pursuing this action on the Guaranty of Defendant.

FOR A THIRD DEFENSE

20. The allegation of paragraphs 1 through 19 are re-alleged and incorporated herein by this reference.

21. As of the date of the filing of this action, Plaintiff had not brought an action for the foreclosure of its mortgage on the medical office building of Newberry Atrium, however, such action was filed on or about September 10, 2013.

22. This Defendant is informed and believes that the value of this building is equal to or exceeds the amount owed to Plaintiff even in a recessionary real estate market.

23. The purpose of the loan and the only reason the loan was made was to construct a medical office building that would be rented to tenants and the building has been completed and tenants are in the building and paying monthly lease payments.

24. The action of Plaintiff in bringing this action solely on the Guaranty and not the mortgage is punitive and unconscionable considering the prior relationship of Defendant and Plaintiff's predecessor. Further this action is indicative of bad faith and corrupt purpose on the part of the Plaintiff when the Plaintiff through its agents knows or should know that the Defendant does not have the present ability to pay to the judgment that the Plaintiff is seeking in this action.

25. By utilizing this punitive and abusive tactic, the Plaintiff is attempting to personally harm Defendant. Such harm to Defendant will damage Newberry Atrium as well because the Defendant is critical to the success of Newberry Atrium and any possible refinancing of the mortgage with a third-party lender.

26. These punitive and unconscionable tactics of Plaintiff against this Defendant are not justified or warranted by the facts of this matter and are indicative of bad faith on the

part of the Plaintiff and are a breach of the implied covenant of good faith and fair dealing that is an integral part of the loan agreement that Defendant's Guaranty is a part of.

27. This breach of the implied covenant of good faith and fair dealing is of such degree that the Guaranty should be voided by this Court or in the alternative Plaintiff should be permanently barred from enforcing the Guaranty given by Defendant.

28. The Defendant demands trial by jury.

FOR A FOURTH DEFENSE

29. The allegations of Paragraphs 1 through 28 are realleged and incorporated herein by this reference.

30. Defendant is informed and believes Plaintiff has sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with officers of the Plaintiff, will be released from liability.

31. By doing this for others, the Plaintiff has not treated Defendant fairly and equally with those favored customers who have been given significant concessions and benefits.

32. By giving certain borrowers special treatment and favors without any justifiable business reason, Plaintiff is practicing favoritism and/or cronyism.

33. Such favoritism and cronyism by the Plaintiff and its officers is a breach of the covenant of good faith and fair dealing that is an implied covenant of the Guaranty agreement.

34. This breach of the implied covenant of good faith and fair dealing is of such degree that the Guaranty should be voided by this Court or in the alternative Plaintiff should be permanently barred from enforcing the Guaranty given by Defendant.

WHEREFORE, Defendant having answered the Complaint prays that it be dismissed, the Defendant's Guaranty be voided or in the alternative, the Plaintiff should be permanently barred from suing on the Guaranty and with costs and attorney fees assessed against Plaintiff and for such other and further relief as the Court deems just and proper.

Gerald D. Jowers
Attorney for Defendant
1802 Sumter Street
Columbia, South Carolina 29201
765-9620

July 10, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT

TD BANK, NA successor by Merger with Carolina First Bank,	)	
	)	Case No. 2012-CP-40-7540
Plaintiff,	)	
vs.	)	SUPPLEMENTAL ANSWER
	)	DEFENDANT DEMANDS TRIAL BY JURY
DAVID H. JACOBS and	)	
JAMES A. MCFARLAND, JR.	)	
Defendants,	)	

RICHLAND COUNTY
FILED
2014 JUL 11 AM 10: 28
JEANNETTE W. McBRIDE
C.C.P. & G.S.

David H. Jacobs hereby responds to the Complaint.

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 4 are admitted.

2. With respect to the allegations of paragraph 5 and 6, the instrument speaks for itself and the Court should interpret it accordingly.

3. With respect to the allegations of paragraphs 7, this Defendant denies these allegations and alleges that Plaintiff must elect its remedy.

4. With respect to paragraphs 8 and 9, this Defendant admits that the loan has not been paid in full, but denies the remaining allegations and demands strict proof thereof.

FOR A SECOND DEFENSE

5. The allegations of paragraphs 1 through 4 are re-alleged and incorporated herein by this reference.

6. This Defendant is a commercial real estate developer and in that capacity through various entities has developed numerous office buildings and child development centers throughout the country.

7. This Defendant and Carolina First Bank have had a fifteen-year successful business relationship. Throughout this time and by personal solicitation of this Defendant by its agents, Carolina First has sought lending opportunities from him and he has utilized the credit facilities of Carolina First for at least six large commercial projects. Carolina First has been repaid on all of these projects except for two, one of these is the subject of this action.

8. The Defendants are members of Atrium at Middle Sound, LLC (hereinafter " Middle Sound").

9. Carolina First Bank ("Carolina First") through its agents specifically requested the opportunity to finance Middle South for the acquisition of the real property and the development of the property into lots suitable for commercial buildings in Wilmington, North Carolina. Defendant as a decision maker for Middle Sound selected Carolina First because of his long-term working relationship with that bank.

10. This long-term relationship between this Defendant and Carolina First created a special fiduciary relationship of trust and confidence between them.

11. Plaintiff as successor to Carolina First Bank is liable for its acts and stands in the place of Carolina First Bank in relationship to this Defendant.

12. The loan made by Carolina First to Middle Sound was made for the specific purpose providing the funds necessary to acquire and develop the real property that is the collateral for the loan made by Carolina First Bank.

13. Defendant executed the Guaranty (the "Guaranty") that is the subject of this action as part of this loan agreement between Carolina First and Middle Sound and he would not have executed this Guaranty without the trust and confidence he placed in the fair dealing of Carolina First.

14. Middle Sound used the loan proceeds in conformity with the loan agreement between Carolina First and Newberry Atrium.

15. Because of the depressed commercial activities in the current economic recession that were especially severe in Wilmington, NC which were circumstances beyond the control of Middle Sound and this Defendant, Middle Sound has not be able sell the remaining developed property that it has and consequently has been unable to pay in full this loan.

16. An integral part of the loan agreement between Carolina First as lender and Middle Sound as Borrower and Defendant has guarantor is an implied covenant of good faith and fair dealing.

17. As of the date of the filing of this action, Plaintiff has not brought an action for the foreclosure of its mortgage on the remaining property of Middle Sound.

18. This Defendant is informed and believes that the value of Middle Sound's property that is the collateral for this loan far exceeds the amount owed to Plaintiff even in a recessionary real estate market.

19. The purpose of the loan and the only reason the loan was made was to acquire the property, develop and sell it in whole or in part and Carolina First was fully aware of this strategy.

20. The action of Plaintiff in bringing this action solely on the Guaranty and not the mortgage is punitive and unconscionable considering the prior relationship of Defendant and Plaintiff's predecessor. Further this action is indicative of bad faith and corrupt purpose on the part of the Plaintiff when the Plaintiff through its agents knows or should know that the Defendant does not have the present ability to pay to the judgment that the Plaintiff is seeking in this action.

21. By utilizing this punitive and abusive tactic, the Plaintiff is attempting to personally harm Defendant. Such harm to Defendant will damage Middle Sound as well because the Defendant is critical to the success of Middle Sound.

22. These punitive and unconscionable tactics of Plaintiff against this Defendant are not justified or warranted by the facts of this matter and are indicative of bad faith on the part of the Plaintiff; these tactics are a breach of the implied covenant of good faith and fair dealing that is an integral part of the loan agreement that Defendant's Guaranty is a part of.

23. The Plaintiff is utilizing this same punitive tactic in another legal matter pending against this Defendant and this is indicative of its intent to inflict harm on the Defendant rather than pursuing a legitimate legal objectives when it knows or should know that he does not have the financial sources to pay the entire amount due.

24. This breach of the implied covenant of good faith and fair dealing is of such degree that the Guaranty should be voided by this Court or in the alternative Plaintiff should be permanently barred from enforcing the Guaranty given by Defendant.

25. The Defendant demands trial by jury.

FOR A FOURTH DEFENSE

26. The allegations of Paragraphs 1 through 25 are realleged and incorporated herein by this reference.

27. Defendant is informed and believes Plaintiff has sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with officers of the Plaintiff, will be released from liability.

28. By doing this for others, the Plaintiff has not treated Defendant fairly and equally with those favored customers who have been given significant concessions and benefits.

29. By giving certain borrowers special treatment and favors without any justifiable business reason, Plaintiff is practicing favoritism and/or cronyism.

30. Such favoritism and cronyism by the Plaintiff and its officers is a breach of the covenant of good faith and fair dealing that is an implied covenant of the Guaranty agreement.

31. This breach of the implied covenant of good faith and fair dealing is of such degree that the Guaranty should be voided by this Court or in the alternative Plaintiff should be permanently barred from enforcing the Guaranty given by Defendant.

WHEREFORE, Defendant having answered the Complaint prays that it be dismissed, the Defendant's Guaranty be voided or in the alternative, the Plaintiff should be permanently barred from suing on the Guaranty and with costs and attorney fees assessed against Plaintiff and for such other and further relief as the Court deems just and proper.

Gerald D. Jowers
Attorney for Defendant
1802 Sumter Street
Columbia, South Carolina 29201
765-9620

July 10, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
TD BANK, NA successor by Merger with Carolina First Bank,	)	
	)	Case No. 2012-CP-40-6074
Plaintiff,	)	
vs.	)	
	)	
DAVID H. JACOBS	)	
	)	
Defendant,	)	

AFFIDAVIT

TD BANK, NA successor by Merger with Carolina First Bank,	)	Case No 2012-CP-40-7540
	)	
Plaintiff,	)	
vs.	)	
	)	
DAVID H. JACOBS and JAMES MCFARLAND	)	
	)	
Defendants,	)	

PERSONALLY APPEARED BEFORE ME, David H. Jacobs, who first being duly sworn, says and deposes:

1. I am the Defendant in these lawsuits and I am making this Affidavit in opposition to motions for summary judgment made by TD Bank in each case.

2. TD Bank owns the note and mortgage given by Newberry Atrium Professional Center, LLC ("Newberry Atrium") to Carolina First for a loan made on February 20, 2007 in the original amount of $7,141,000.00.

3. TD Bank also holds the renewal note and mortgage of a loan made by Carolina First Bank to Atrium at Middle Sound Land, LLC "(Middle Sound") on November 19, 2004 in the original amount of $3,000,000.00.

4. TD Bank is the successor to Carolina First Bank and collectively I may refer to them sometimes as the "Bank." During the recent banking crisis, Carolina First Bank was in financial distress and because of its shaky financial condition, government regulators forced the merger of Carolina First with TD Bank.

5. In the first suit described above, TD Bank is suing me on a Guaranty that I made for this loan of Newberry Atrium. TD Bank is not foreclosing the mortgage that it holds as security for this loan.

6. In the second suit described above, TD Bank is suing James McFarland and me on Guaranties of the Middle Sound loan. TD Bank is not foreclosing the mortgage that it holds as security for this loan.

7. Newberry Atrium is a limited liability company that originally consisted of Atrium Development Associates, Inc. a company in which I have an interest, and Newberry County Hospital or an affiliate of the hospital.

8. For most of my professional life, I have been a real estate developer and I have developed several medical office buildings during my career.

9. In 2005, the President of Newberry Hospital called me to discuss the possibility of developing an office building for doctors and medical professionals in the Newberry area. The officials of the hospital and physicians convinced me that such a building was needed by the community and especially the hospital to make it competitive in the rapidly changing health care environment. I began the lengthy process of designing the building to meet the needs of the hospital and securing prospective tenants for the building.

This process took almost two years before we were ready to obtain financing for the building in order to begin construction.

10. Atrium at Middle Sound Land, LLC is a limited liability company formed by James McFarland and me. This company was formed to purchase and develop a commercial parcel of land in Wilmington, North Carolina.

11. During my development career, I have used a number of banks and institutions for financing construction of projects and for permanent financing. For years prior to the financial crisis/recession that began in 2008, I was regularly visited and contacted by loan officers of various banks including Carolina First Bank who were soliciting loan business from me.

12. Beginning in 2001, Carolina First, its President Mack Whittle and its commercial loan officers and executives in the Columbia area regularly courted me for my business.

13. In response to this persistent solicitation, I began using Carolina First as a lender. Over the subsequent years and through several projects, I developed a close working relationship with the commercial loan officers and executives of Carolina First Bank including Larry Scott. Mr. Scott and the executives of the commercial loan department understood and appreciated my approach to development.

14. As Carolina First and I completed successful projects together, we developed a high degree of trust and respect for each other. The bank trusted me to do what I said I would do and I trusted the bank to assist me through the good and not so good aspects of long-term real estate developments.

15. Because of this degree of trust that developed between the officers of Carolina First and me and in response to their numerous requests and solicitations, I

continued to offer to Carolina First the opportunity to finance my projects and I made more loans with that Bank than any other lender. I considered Carolina First and its officers a valued partner in my developments and an integral part of my team. The Bank and its officers was ready to help when unforeseen circumstances affected any of these development projects and did so from time to time. The unexpected is a part of lengthy commercial developments projects and Carolina First understood this and was always flexible and willing to accommodate me when needed.

16. These are the projects financed for me by Carolina First Bank:

a. Loan for the Gateway Mallard project; $2,200,000.00 in 2002

b. Loan for the Gateway USC project; $3,5000,000.00 in 2003

c. Loan for the Irmo Medical Office building project; $7,400,000.00 in 2004

d. Loan for the Gateway Reames project; $3,000,000.00 in 2005

e. Loan for the Middle Sound project; $3,000,000.00 in 2004

f. Loan for Newberry Atrium project; $7,141,000.00 in 2007

In addition to these commercial projects, Carolina First loaned me over $500,000.00 in 2001 and 2002 in personal loans; all of this has been repaid.

17. All of these loans were paid in full and in accordance with the terms of the agreements except for the Middle Sound Project and Newberry Atrium. Over the years, my projects have repaid over $24,000,000.00 to Carolina First and earned the Bank over $5,000,000.00 in interest and hundreds of thousands of dollars in bank fees.

18. We have repaid the Bank $1,900,000.00 in principal on the Middle Sound loan and over $1,000,000.00 on the Newberry Atrium loan. Interest has been paid and was current on both of these loans until the Bank refused to renew these loans in 2012.

19. Each of these loans made by Carolina First for my projects was made on the strength of the project and my experience and not on my personal ability to repay these loans. I acted as a guarantor for each of this commercial loan and at the time of the making of these loans, I did not have the available cash or liquid assets to pay in full any of these loans. The loan officers of Carolina First always knew this and never relied on my personal ability to repay any commercial loan.

20. My personal net worth throughout my career has been in real estate or in business entities that own real estate and such assets, though valuable, are long-term investments that do not provide immediate or readily available cash liquidity.

21. Each of these loans, except for the Middle Sound loan, was made for the construction of a commercial building and by completing the buildings, I created the value and the collateral for the loans.

22. The Middle Sound loan financed the purchase of a commercial tract of land in Wilmington, North Carolina and the construction of expensive infrastructure that was necessary for commercial usage. The infrastructure was completed and several parcels have been sold to businesses that are operating there now. The remaining parcels have their development infrastructure in place such as water, sewer, and drainage, and are ready for commercial development. This remaining fully developed parcels are worth considerably more than is owed to the Bank.

23. All funds from each of these loans were used for the purposes stated in the loan agreements and project budgets that were approved by Carolina First. I have never been questioned by Carolina First about the use of loan proceeds.

24. The proceeds of the loan for the Newberry Atrium project were used for the construction of a 47,106 square foot, two story office building adjacent to the Newberry County Hospital.

25. This medical building was completed in July of 2008 according to the plans approved by Carolina First and has been occupied by tenants and some hospital staff since that time.

26. Because of the economic conditions of the recent recession, uncertainty of the future direction of the medical field and changes in management at the Newberry County Hospital, the Newberry Atrium medical office building has not been fully leased since it was completed.

27. The current occupancy rate this building is 58.14%-28,726 square feet is occupied. Current lending standards require an occupancy rate of 88% to qualify for a permanent loan so we have been unable to obtain such a loan that would payoff Carolina First/TD Bank.

28. Until the filing of this suit, the loan has been renewed and interest has been paid to Carolina First/TD Bank. At the present occupancy rate, the building is generating approximately $58,000.00 in gross income every month or over $696,000 per year.

29. At the time of the filing of this lawsuit, we have paid the interest on this loan totaling over $1,733,000.00.

30. Prior to construction, the Bank's appraiser estimated the value of the Newberry Atrium building at $8,900,000.00.

31. The value has remained fairly constant since that time. An appraisal made in April of 2013 by an appraiser who TD Bank had used for a previous appraisal found a value of $6,650,000.00 at its current occupancy rate; this amount exceeds the debt of TD Bank.

The appraiser further indicated the building would be valued at $7,842,000.00 if it reached the 88% occupancy.

32. At this time, most of my assets are minority interests in limited liability companies that own tracts of land in Mooresville, North Carolina. This was an investment I made beginning in 2006 and prior to the collapse of the real estate market. This venture was to develop these tracts of land into commercial and multi-family use. The recession wrecked these plans.

33. Due to the economic recession, I have been forced to invest all of my available cash into this project in North Carolina as well as in the Middle Sound and Atrium Newberry in order to save these projects from failure and foreclosure.

34. Before these lawsuits were filed, I had given the Bank financial statements that disclosed my financial condition at that time. The statement revealed that I had very little cash liquidity and certainly not nearly enough to pay either of these loans that are the subject of these suits. My financial statement further showed the Bank that my major assets are minority interests in real estate ventures that are heavily burdened with debt. The Bank knew or should have known for me to retain these assets, I must be able to act as a guarantor for renewals or refinancing of the short term debt on these assets. The action of the Bank in seeking judgments that I cannot possibly pay will result in the loss of most of my equity in these assets to other creditors without any benefit for the Bank.

35. For these reasons, I believe the Bank, by suing on these guaranties, is employing a purely punitive tactic that is designed to hurt and punish me for no good reason and not designed for any legitimate business purpose. With large judgments against me, I will be unable to continue any gainful activity and I will lose the equity that I have in my remaining investments.

36. Because of my close personal and business relationship with Carolina First Bank, I trusted that Bank to work with me when projects did not go as planned. I expected the Bank to treat me fairly and equitably as I had always treated the Bank fairly and equitably. TD Bank is not living up to its side of our agreements by its actions against me.

37. I am personally aware of instances in which TD Bank has discounted loans to borrowers or the Bank has sold notes and mortgages at a discounted price to third parties that ultimately benefit other customers of this Bank. By doing this for others, the Bank is not treating me fairly and equally with those customers who are given significant concessions and benefits. By giving certain borrowers special treatment and favors, this smacks of favoritism and/or cronyism and not any sound or justifiable business reason or practice. Such favoritism and cronyism by the Bank shows a complete lack of good faith and fair dealing with me in these matters.

38. Since the time the building was occupied, Newberry Atrium through my leadership has maintained the building to a high standard to preserve and protect this valuable asset that is Bank's security for the loan.

39. I have made tireless efforts to secure new tenants with little success and I have tried countless ways to obtain a permanent loan that would payoff TD Bank. To date, despite my best efforts, I have not been successful.

40. The tactic that TD Bank is now pursuing a judgment against me for the full amount of both of these loans while ignoring for now valuable collateral is unfair to me and inconsistent with my long and successful relationship with Carolina First. The current appraised value of the Newberry Atrium building is more than $6,650,000.00 and the value of the Middle Sound property is substantially higher than the debt.

41. When I made the Newberry Atrium and Middle Sound loans, I fully understood that I was liable to the Bank, if either project was unsuccessful for any loss that the Bank incurred.

42. I stand ready to pay when I am able any deficiency in the amount owed and the value of the building at Newberry or the land at Middle Sound as determined by a public sales through mortgage foreclosure.

(SEAL)
David H. Jacobs

Sworn to and acknowledged
before me on February 20, 2014
by David H. Jacobs.

Notary Public for South Carolina
My commission expires: 4/21/21

COPY

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank,	)	Civil Action No. 2012-CP-40-6074
Plaintiff,	)	
vs.	)	**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
David H. Jacobs,	)	
Defendant.	)	

2013 MAY 24 PM 3:58

NOTICE IS HEREBY GIVEN that ten (10) days from the date hereof or as soon thereafter as may be scheduled, the undersigned will move before the presiding judge of the Fifth Judicial Circuit for an Order granting the Plaintiff TD Bank, NA, successor by merger with Carolina First Bank (hereinafter "Plaintiff" or "TD Bank"), summary judgment on its claim against Defendant David H. Jacobs ("Jacobs"). The grounds for this Motion are that there is no genuine issue of material fact and, therefore, the Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure.

This Motion is based on the South Carolina Rules of Civil Procedure; the Affidavit of TD Bank, which is attached hereto as **Exhibit 1**; the deposition of David H. Jacobs, which is attached hereto as **Exhibit 2**; all other discovery in this action; the pleadings; the applicable statutory and case law; any memorandum or further affidavits filed in support of this Motion; and any other relevant authority.

ARGUMENT

This is an action to collect on a Guaranty (as defined in the Complaint) given by Defendant Jacobs in consideration for a commercial note to Newberry Atrium Professional Center, LLC ("Newberry Atrium"), which was secured by a mortgage on commercial real estate owned by Newberry Atrium. Jacobs admits signing the Guaranty individually as well as signing the Note and other loan documents on behalf of Newberry Atrium. (Deposition of David H. Jacobs ("Jacobs Dep.") 92:6-13 (Note), 93:1-9 (Guaranty), 93:23-94:3 (Mortgage), 95:7-97:18 (Modification Agreements), Ex. 2.). In addition, Jacobs admits the loan has matured, that TD Bank has demanded payment, that he and Newberry Atrium failed to pay the balance due, and that he and Newberry Atrium are indebted under the terms of the loan documents. (Jacobs Dep. 99:3-20, Ex. 2.) Rather, the only defenses offered by Jacobs are the affirmative defenses of breach of fiduciary duty and breach of implied covenants of good faith and fair dealing based upon TD Bank's decision to sue on the Guaranty without first foreclosing on its collateral and TD Bank's refusal to refinance the loan. As set forth below, each of these defenses is contrary to established law and fails as a matter of law.

A. The Terms of the Guaranty Provide it Is an Independent and Absolute Guaranty of Payment and TD Bank Is Not Required to First Resort to its Collateral.

A guaranty "is a contract and should be construed by the principles governing contracts," with the intentions of the parties as expressed in the guaranty guiding the Court. Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 973 (1989). The at-issue Guaranty provides as follows:

> 1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor or Borrower or any other Person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.

(Guaranty ¶ 1 (attached to TD Bank Aff. as Exhibit C).)

Thus, the at-issue Guaranty in this case unambiguously provides it is an absolute guaranty of payment (as opposed to a guaranty of collection) and that TD Bank is not required to first resort to its security. Under well-established South Carolina law, such guarantees of payment are independent contracts that give rise to obligations separate and distinct from a loan agreement. Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). Because they are separate obligations, creditors have the right to bring a separate action against a guarantor under a guaranty of payment immediately upon default and without suing the principal debtor or resorting to collateral. Citizens and Southern Nat'l Bank of South Carolina, 13 S.C. at 543, 443 S.E.2d at 551 (stating "no obligation was imposed upon [lender] . . . to pursue and/or exhaust the collateral"); Peoples Federal Sav. and Loan Ass'n, 300 S.C. at 281, 387 S.E.2d at 674; Tri-South Mortg. Investors v. Fountain, 266 S.C. 141, 145-46, 221 S.E.2d 861, 863 (1976) (holding based on unambiguous language of guaranty that lender was not required to foreclose on collateral before

pursuing remedy under guaranty).[1] Based on the unambiguous language of the Guaranty and South Carolina precedent enforcing a creditor's ability to sue independently on guarantees under provisions analogous to those in this case, Defendant Jacobs' defense fails as a matter of law. Consequently, summary judgment is appropriate.

B. There Can Be No Breach of Fiduciary Duty or Implied Covenant Where TD Bank Did What its Contract Expressly Allowed it To Do.

As set forth above, the terms of the Guaranty allow TD Bank to sue Defendant Jacobs without resorting to its security. Because the parties' contract expressly allows the action on which Defendant Jacobs bases his breach of fiduciary duty and breach of implied covenants of good faith and fair dealing defenses, those defenses fail as a matter of law. For instance, in First Fed'l Savings and Loan Ass'n of South Carolina v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992), the bank-plaintiff sued the defendants to collect on a guaranty and a defendant alleged the bank breached the implied covenants of good faith and fair dealing for not safeguarding collateral after learning of the potential loan default. The Court of Appeals reviewed the language of the guaranty and found the "guaranty gave First Federal the right to seek payment from the guarantors without pursuing collection against the [note obligor's] collateral" and

[1] Likewise, South Caroline law has recognized that a mortgagee is not required to foreclose on its mortgage prior to suing to collect on the underlying obligation. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 34, 647 S.E.2d 214, 216 (2007) (noting a "mortgagee who has a note and a mortgage has the option to either bring an action on the note or to pursue a foreclosure action" and mortgagee "may ignore the security and bring an action at law on the indebtedness") (citing Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978); Platt v. Carroll, 125 S.C. 493, 119 S.E. 180 (1923); Hatfield v. Kennedy, 1 Bay 501 (1973); Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990)).

thus the plaintiff was alleging a breach of an implied duty for the lender doing what the contract expressly permitted it to do. Id. at 266-67, 414 S.E.2d at 594. Therefore, the Court of Appeals affirmed the trial court's grant of summary judgment to the lender because "[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do." Id. at 267, 414 S.E.2d at 594; see also Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (same). Similarly, South Carolina courts recognize there is no fiduciary duty to explain to an individual what he could learn from reading the document. See Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. at 545, 443 S.E.2d at 551.[2] As the Guaranty in this case allows TD Bank to sue on the Guaranty without first resorting to security, summary judgment is appropriate as a matter of law.

C. TD Bank Does Not Have the Duty to Refinance the Loan.

Finally, Defendant Jacobs' defense based on TD Bank's failure to refinance the loan to Newberry Atrium, which is currently a debtor under Chapter 11 of the United States Bankruptcy Code, also fails as a matter of law. Defendant Jacobs admits there is no express provision in any document which requires TD Bank to refinance the loan. (Jacobs Dep. 88:21-89:1, Ex. 2.) Thus, any alleged duty or agreement to refinance conflicts with the lender statute of frauds, S.C. Code § 37-10-107(1)(c), which provides

[2] It is also the well settled rule in this State that the normal relationship between a bank and its customer generally does not create a fiduciary duty. See Regions Bank v. Scmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) (stating, "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature."); Steele v. Victory Savings Bank, 295 S.C. 290, 368 S.E.2d 91, (Ct. App. 1988) (discussing cases).

no person may maintain a defense for an alleged promise or agreement to renew a loan unless the party has a signed writing containing the material terms. S.C. Code § 37-10-107(1)(c) (2013). Moreover, Defendant Jacobs testified the alleged failure to refinance occurred in 2011. (Jacobs Dep. 88:15-20, Ex. 2.) Subsequently to this refusal, however, Defendant Jacobs signed modification agreements which released any such claims against TD Bank. (Modification Agreements (attached to TD Bank Aff. as Exhibit D).) As TD Bank does not have a duty to refinance the at-issue loan and Defendant Jacobs has released any claims relating to TD Bank's refusal to refinance, his defense fails as a matter of law and summary judgment should be granted.

CONCLUSION

WHEREFORE, TD Bank requests the Court to enter its Order granting TD Bank summary judgment on its claims against Defendant Jacobs and granting such other relief as this Court deems just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

Columbia, South Carolina

May 24, 2013.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for TD Bank, NA, successor by merger with Carolina First Bank, do hereby certify that I have served all counsel and/or parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

2013 MAY 24 PM 3:58
C.C.P. & G.S.

Pleadings:

Plaintiff's Motion for Summary Judgment
C/A No. 2012-CP-40-6074

Party Served:

Gerald D. Jowers, Esquire
1802 Sumter Street
Columbia, SC 29201

Catherine F. Sease
Administrative Assistant

May 24, 2013

~#4842-4654-4146 v.1 - 04387/01815~

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank,	)	Civil Action No. 2012-CP-40-6074
Plaintiff,	)	**AFFIDAVIT OF TD BANK, N.A. IN SUPPORT OF MOTION FOR SUAMMARY JUDGMENT**
vs.	)	
David H. Jacobs,	)	
Defendant.	)	

FILED
2013 MAY 24 PM 3:56
CLAIRE W. McCASLAND
C.P. & G.S.

PERSONALLY APPEARED BEFORE ME, Benjamin R. Jenkins, III, who first being duly sworn, deposes and says as follows:

1. He is an officer/agent of TD Bank, N.A., successor by merger with Carolina First Bank ("TD Bank"), and his job responsibilities with TD Bank include without limitation the oversight and review of accounts and promissory notes, including the loan documents at issue in the above-captioned action.

2. He is personally familiar with the status and payment history concerning the loan documents executed by the Defendants in favor of TD Bank. The matters stated herein are based on his own personal knowledge and/or his review of TD Bank's business records relating to the loan documents executed by the Defendants and the transactions described herein.

3. On February 20, 2007, Newberry Atrium Professional Center, LLC ("Newberry Atrium") executed a Promissory Note ("Note") in the principal amount of $7,141,000 in favor of TD Bank (through its predecessor, Carolina First). A true and correct copy of the Note is attached hereto as **Exhibit A**.



4. In consideration of the Note and in order to secure the payment thereof, Newberry Atrium also executed a Mortgage and Security Agreement ("Mortgage") on its real property, as more fully described therein, and rents in favor of TD Bank dated February 20, 2007 and recorded in the Office of the Register of Deeds for Newberry County on February 21, 2007, in Book 1236 at Page 1. A true and correct copy of the Mortgage is attached to hereto as **Exhibit B**.

5. As further consideration of the Note, David H. Jacobs ("Jacobs") executed and delivered to TD Bank an Unconditional Guaranty ("Guaranty") dated February 20, 2007 wherein and whereby he individually, jointly and severally, absolutely and unconditionally guaranteed the payment of the Note to TD Bank and all extensions and renewals thereof. A true and correct copy of the Guaranty is attached hereto as **Exhibit C**.

6. Following the execution of the original loan documents, at the request of the Debtor and Jacobs, TD Bank agreed to modify the Note and extended the maturity date in order to give the Debtor additional time to perform as agreed. As part of the consideration for such extension, TD Bank received a release from Newberry Atrium and Jacobs under the terms of the modifications. True and correct copies of the modifications are attached hereto as **Exhibit D**.

7. The Note matured and the Debtor and Jacobs defaulted in the payment of the Note and Guaranty by failing to pay TD Bank, on demand, the principal and interest due under said documents.

8. There is due and unpaid on the Note and Guaranty the sum of Six Million Two Hundred Forty Four Thousand Five Hundred Sixty Seven and 31/100

($6,244,567.31) Dollars, which amount represents principal, interest and late charges as of March 6, 2013, plus interest at the rate stated in the Note from March 6, 2013, reasonable attorney's fees and the costs and expenses of this action.

TD BANK, N.A.

By: Benjamin R. Jenkins, III
Its: Vice-President / Workout Officer

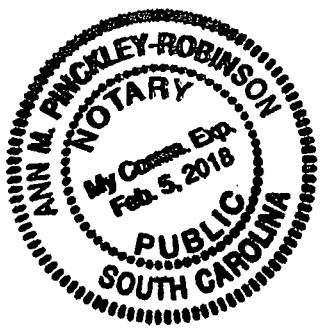
SWORN to and subscribed before me

this 23 day of May, 2013.

(L.S.)

Notary Public for South Carolina

My Commission Expires: Feb. 5, 2018



PROMISSORY NOTE

Greenville, South Carolina

February 20, 2007

FOR VALUE RECEIVED, NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC (the "Borrower"), promises to pay to the order of CAROLINA FIRST BANK (the "Lender") the principal sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND ($7,141,000.00) DOLLARS or so much thereof as may be advanced, with interest thereon computed at an annual rate equal to the Libor Base Rate (as hereinafter defined) plus one and ninety one hundredths percent (1.90%).

"LIBOR BASE RATE" means the 90-day LIBOR rate (rounded upward to the nearest 1/16th of 1%) as published in The Wall Street Journal on the 30th day of each month, or if said 30th day is not a Business Day, on the last Business Day of such month. If for any reason The Wall Street Journal, or any successor thereto, shall at any time no longer publish said LIBOR rate, Lender shall obtain such rate from another reliable publication which publishes the said LIBOR rate. If said LIBOR rate is no longer publicly published, Lender will substitute a comparable index rate, as determined by Lender in its reasonable discretion. "Business Day" means a day Lender is open for business with the general public.

Interest shall be payable monthly on the fifth day of each month until the Maturity Date as set forth below. At the option of Lender, it may collect interest due by deducting the amount of interest for the preceding month from any interest reserve established or credited and by adding the same to the outstanding principal balance.

Beginning March 5, 2007, and continuing on the fifth day of each month thereafter until the Maturity Date, Borrower shall continue to pay interest monthly as set forth above.

The entire outstanding principal balance of this Note and any outstanding accrued interest shall be due and payable in full on February 28, 2009 (the "Maturity Date").

All payments under this Note shall be applied first to late charges, if any, then to accrued interest and then to principal. All installments of principal and all interest are payable in lawful money of the United States of America and are to be made before 2:00 p.m. in South Carolina on the dates such payments are due. All payments received by Lender at 2:00 p.m. or thereafter in South Carolina shall be deemed made on the next banking day on which Lender is open for business in South Carolina. In the event of (a) failure to pay this Note in full on the Maturity Date, or (b) default in the payment of any other installment of interest or principal or any other sum payable pursuant to the terms of this Note not cured within five (5) days after written notice from Lender, or (c) an "Event of Default" as such term is defined in the Construction/Term Loan Agreement between Lender and Borrower of even date herewith (the "Loan Agreement"), then or at any time thereafter, at the option of Lender, the whole of the principal sum then remaining

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

Borrower's Initials: _____

PLAINTIFF'S EXHIBIT 4

unpaid hereunder together with all interest accrued thereon, shall immediately become due and payable without further notice. From and after the maturity of this Note either according to its terms or as the result of a declaration of maturity, the entire principal remaining unpaid hereunder shall bear interest at a rate of three (3%) percent per annum above the rate otherwise in effect hereunder (the "Default Rate"), or the highest applicable lawful rate, whichever is the lesser.

If this Note is placed in the hands of an attorney for collection or is collected through any legal proceedings, Borrower promises to pay all expenses of collection and reasonable attorney's fees incurred by Lender.

In the event the interest provisions hereof or any exactions provided for herein or in the lien documents or any other instruments securing this Note shall result at any time during the life of the loan in an effective rate of interest which, for any period of time, transcends the limit of the usury or any other law applicable to the loan evidenced hereby, all sums in excess of those lawfully collectible as interest for the period in question, at the option of Lender, without further agreement or notice between or by any party hereto, shall be deemed applied to principal immediately upon receipt of such monies by Lender. Notwithstanding the foregoing, Lender may at any time and from time to time elect to reduce the collection of any interest to that permitted by law.

This Note is secured by that certain Mortgage and Security Agreement of even date herewith (the "Mortgage"). The Mortgage encumbers property generally described as approximately 1.70 acres of land located on Kinard Street, Newberry, South Carolina 29108, as more particularly described in the Mortgage.

Lender may collect a late charge of five (5%) percent of any installment of principal or interest which is not paid within twenty (20) days of the due date thereof to cover the extra time and expense involved in handling delinquent payments. Such late charge shall apply to late payments prior to maturity or acceleration. Upon maturity or acceleration, no further late charges shall be assessed, but Borrower shall pay the Default Rate of interest on all amounts due from the date of maturity or acceleration until the Note is paid in full. The collection of the late charge shall not be deemed a waiver by Lender of interest accruing after the due date of any installment or of any of Lender's other rights under this Note.

Borrower agrees that the late charge provided above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the Default Rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of the increased risks to Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Borrower and all endorsers, guarantors and all persons liable or to become liable on this Note waive presentment, protest and demand, notice of protest, demand and dishonor and nonpayment of this Note, and consent to any and all renewals and extensions of the time of payment hereof, and agree, further, that at any time and from time to time without notice, the terms of payment herein may be modified or the security described in any lien document

Borrower's Initials: _____

securing the Note released in whole or in part, or increased, changed or exchanged by agreement between Lender and any owner of property affected by said lien document without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby.

Lender is not required to rely on the collateral for the payment of the Note in the event of default by the Borrower, but may proceed directly against the Borrower and Guarantor or endorsers in such manner as it deems desirable. None of the rights and remedies of Lender hereunder is to be waived or affected by failure or delay to exercise them. All remedies conferred on Lender by this Note or any other instrument or agreement shall be cumulative, and none is exclusive. Such remedies may be exercised concurrently or consecutively at Lender's option.

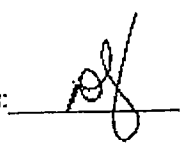
This Note may be prepaid in whole or in part at any time without penalty.

This Note shall be governed as to validity, interpretation, construction, effect, and in all other respects by the laws and decisions of the State of South Carolina.

Wherever possible each provision of this Note shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Note or portion thereof shall be prohibited by or be invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note.

This Note may be assigned by Lender with or without recourse.

ANY PROVISION HEREOF TO THE CONTRARY NOTWITHSTANDING, THIS DOCUMENT IS SUBJECT TO THE PROVISIONS OF THE LOAN AGREEMENT (OR IF THERE IS NO LOAN AGREEMENT, THE MORTGAGE) CONCERNING ARBITRATION OF DISPUTES. Subject to the foregoing, Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.

Borrower's Initials: 

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.

NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC

By: ATRIUM DEVELOPMENT ASSOCIATES, LLC
Its Manager

By: _____
Its: _____

(SEAL)

2583

ORIGINAL

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02/21/2007 02:04:20PM
Rec Fee: 25.00 St Fee: 0.00
Co Fee: 0.00 Pages: 19
Clerk of Court
Jackie S. Bowers

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

MORTGAGE AND SECURITY AGREEMENT

THIS MORTGAGE AND SECURITY AGREEMENT made this 20th day of February, 2007, by NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC ("Borrower"), whose address is 115 Atrium Way, Suite 204, Columbia, SC 29223, to CAROLINA FIRST BANK ("Lender"), whose address is 104 South Main Street, Greenville, South Carolina 29601, Attention: Commercial Real Estate Division;

WITNESSETH:

WHEREAS, Borrower is indebted to Lender in the principal sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND DOLLARS ($7,141,000.00) together with interest thereon, as evidenced by that certain promissory note of even date herewith, executed by Borrower and delivered to Lender, the final payment of which is due on or before of February 28, 2009, which by reference is made a part hereof to the same extent as though set out in full herein (the "Note");

NOW, THEREFORE, (a) to secure the performance and observance by Borrower of all covenants and conditions contained in the Note, in any renewal, extension or modification thereof, in this Mortgage and in all other instruments securing the Note; and (b) also to secure in accordance with Section 29-3-50, Code of Laws of South Carolina (1976) as amended, all future advances and re-advances that may subsequently be made to Borrower by Lender, evidenced by the aforesaid Note, or any other promissory notes, and all modifications, renewals and extensions thereof (provided, however, that nothing contained herein shall create an obligation on the part of Lender to make future advances or re-advances to Borrower), the maximum amount of all indebtedness outstanding at any one time secured hereby not to exceed twice the face amount of the Note, plus interest thereon, all charges and expenses of collection incurred by Lender, including court costs, and reasonable attorneys' fees; and (c) also in order to charge the properties, interests and rights hereinafter described with such payment, performance and observance; and (d) for and in consideration of the sum of One and No/100 ($1.00) Dollar paid by Lender to Borrower this date, and for other valuable consideration, the receipt of which is acknowledged, Borrower does hereby grant, bargain, sell, alien, remise, release, convey, assign, transfer, mortgage, hypothecate, pledge, deliver, set over, warrant and confirm unto Lender, its successors and assigns forever all right, title and interest of Borrower in and to:

TO THE EXTENT, IF ANY, PROVIDED IN THE NOTE, INTEREST OR DISCOUNT WILL BE DEFERRED, ACCRUED, OR CAPITALIZED.

THIS MORTGAGE AND SECURITY AGREEMENT COVERS FIXTURES AND CONSTITUTES A FIXTURE FINANCING STATEMENT. PROCEEDS OF THE NOTE SECURED HEREBY SHALL BE USED FOR LAND ACQUISITION OR REFINANCING AND CONSTRUCTION OF IMPROVEMENTS ON THE LAND.

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

PLAINTIFF'S EXHIBIT B

THE PROPERTY

(A) THE LAND. All the land (the "Land") described in Exhibit A attached hereto and made a part hereof.

(B) THE IMPROVEMENTS. TOGETHER WITH all buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land, and all fixtures, machinery, appliances, equipment, furniture, and personal property of every nature whatsoever now or hereafter owned by Borrower and located in or on, or attached to, or used or intended to be used in connection with or with the operation of, the Land, buildings, structures or other improvements (the "Improvements").

(C) EASEMENTS OR OTHER INTERESTS. TOGETHER WITH 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, tenements, hereditaments and appurtenances whatsoever, now or hereafter in any way belonging, relating or appertaining to any of the property hereinabove described.

(D) ASSIGNMENTS OF RENTS. TOGETHER WITH all rents, royalties, issues, profits, revenue, income and other benefits from the property described in paragraphs (A), (B) and (C) hereof to be applied against the indebtedness and other sums secured hereby, provided, however, that permission is hereby given to Borrower so long as no default has occurred hereunder, to collect, receive, take, use and enjoy such rents, royalties, issues, profits, revenue, income and other benefits as they become due and payable, but not in advance thereof. The foregoing assignment shall be fully operative without any further action on the part of either party and specifically Lender shall be entitled, at its option upon the occurrence of a default hereunder, to all rents, royalties, issues, profits, revenue, income and other benefits from the property described in paragraphs (A), (B) and (C) hereof whether or not Lender takes possession of the property described in paragraphs (A), (B) and (C) hereof. Upon any such default hereunder, the permission hereby given to Borrower to collect such rents, royalties, issues, profits, revenue, income and other benefits from the property described in paragraphs (A), (B) and (C) hereof shall terminate and such permission shall not be reinstated upon a cure of the default without Lender's specific consent. Neither the exercise of any rights under this paragraph by Lender nor the application of any such rents, royalties, issues, profits, revenue, income or other benefits to the indebtedness and other sums secured hereby, shall cure or waive any default or notice of default hereunder or invalidate any act done pursuant hereto or to any such notice, but shall be cumulative of all other rights and remedies.

(E) ASSIGNMENT OF LEASES. TOGETHER WITH all right, title and interest of Borrower in and to any and all leases now or hereafter on or affecting the property described in paragraphs (A), (B) and (C) hereof, together with all security therefor and all monies payable thereunder, subject, however, to the conditional permission hereinabove given to Borrower to collect the rentals under any such lease. The foregoing assignment of any lease shall not be deemed to impose upon Lender any of the obligations or duties of Borrower provided in any such lease, and Borrower agrees to fully perform all obligations of the lessor under all such leases. Upon Lender's request, Borrower agrees to send to Lender a list of all leases covered by

the foregoing assignment and as any such lease shall expire or terminate or as any new lease shall be made, Borrower shall so notify Lender in order that at all times Lender shall have a current list of all leases affecting the property described in paragraphs (A), (B) and (C) hereof. Lender shall have the right, at any time and from time to time, to notify any lessee of the rights of Lender as provided by this paragraph. From time to time, upon request of Lender, Borrower shall specifically assign to Lender as additional security hereunder, by an instrument in writing in such form as may be approved by Lender, all right, title and interest of Borrower in and to any and all leases now or hereafter on or affecting the Property, together with all security therefor and all monies payable thereunder, subject to the conditional permission hereinabove given to Borrower to collect the rentals under any such lease. Borrower shall also execute and deliver to Lender any notification, financing statement or other document reasonably required by Lender to perfect the foregoing assignment as to any such lease.

This instrument constitutes an absolute and present assignment of the rents, royalties, issues, profits, revenue, income and other benefits from the Property to Lender, subject to the right of Borrower to collect, receive, take, use and enjoy the same as provided hereinabove.

(F) FIXTURES AND PERSONAL PROPERTY. TOGETHER WITH a security interest in (i) all personal property and fixtures now or hereafter acquired and affixed to or located on the property described in paragraphs (A), (B) and (C) hereof which, to the fullest extent permitted by law shall be deemed fixtures and a part of the real property, (ii) all articles of personal property now or hereafter acquired and all materials delivered to the property described in paragraphs (A), (B) and (C) hereof (including such property for use in any construction being conducted thereon) and owned or leased by Borrower, including, but not limited to, all equipment, furniture, furnishings, inventory, apparatus, machinery, motors, elevators, fittings, radiators, ranges, refrigerators, awnings, shades, screens, blinds, carpeting, office equipment and other furnishings and all plumbing, heating, lighting, cooking, laundry, ventilating, refrigerating, incinerating, air conditioning and sprinkler equipment and fixtures and appurtenances thereto and all renewals or replacements thereof or articles in substitution thereof, whether or not the same are or shall be attached to said Land and Improvements in any manner, (iii) all existing and future choses in action and claims of every nature whatsoever related to the Land or the Improvements, including without limitation claims related to design or construction defects or otherwise concerning the condition of the Land or the Improvements, claims arising from damage to the Land or the Improvements caused by the acts of third parties, and claims for injury to the operation of the Land or the Improvements or diminution of the revenues derived therefrom arising from the acts of third parties, (iv) all building and engineering plans and specifications, construction contracts, architect's contracts and other plans, drawings and contracts and all licenses and permits related to the past or future improvement of the Land, (v) all leases of personal property, accounts, contract rights, instruments, chattel paper, cash, rights to withdraw cash, general intangibles, actions and rights in action now or hereafter acquired pertaining to the Property, including all rights to insurance proceeds, and (vi) all proceeds, products, replacements, additions, substitutions renewals and accessions of any of the foregoing. This Mortgage is a self-operative security agreement with respect to such property, but Borrower agrees to execute and deliver on demand such other security agreements, financing statements and other instruments as Lender may reasonably request in order to perfect its security interest or to impose the lien hereof more specifically upon any of such property. On demand, Borrower will promptly pay all costs and expenses of filing financing statements, continuation statements,

partial releases, and termination statements deemed necessary or appropriate by Lender to establish and maintain the validity and priority of the security interest of Lender, or any modification thereof, and all costs and expenses of any searches reasonably required by Lender. Lender may exercise any or all of the remedies of a secured party available to it under the Uniform Commercial Code (South Carolina) with respect to such property, and it is expressly agreed in accordance with the provisions of the Uniform Commercial Code (South Carolina), that ten (10) days' notice by Lender to Borrower shall be deemed to be reasonable notice under any provision of the Uniform Commercial Code (South Carolina) requiring such notice; provided, however, that Lender may at its option dispose of the collateral in accordance with Lender's rights and remedies in respect to the real property pursuant to the provisions of this Mortgage, in lieu of proceeding under the Uniform Commercial Code (South Carolina).

Some of the items of property described herein are goods that are or are to become fixtures related to the real estate described herein, and it is intended that, as to those goods, this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the Land is located. Information concerning the security interest created by this instrument may be obtained from Lender, as Secured Party, or Borrower, as Debtor, at the address first shown above.

Everything referred to in paragraphs (A), (B), (C), (D), (E), and (F) hereof and any additional property hereafter acquired by Borrower and subject to the lien of this Mortgage or intended to be so is herein referred to as the "Property."

TO HAVE AND TO HOLD the Property and all parts thereof unto Lender, its successors and assigns, to its own proper use and benefit forever, subject, however, to the terms and conditions herein:

PROVIDED, HOWEVER, that if Borrower shall promptly pay or cause to be paid to Lender the principal and interest payable under the Note, at the times and in the manner stipulated therein, herein, and in all other instruments securing the Note, all without any deduction or credit for taxes or other similar charges paid by Borrower, and shall keep, perform and observe all the covenants and promises in the Note, and any renewal, extension or modification thereof, and in this Mortgage and in all other instruments securing the Note, to be kept, performed or observed by Borrower, then this Mortgage, and all the properties, interest and rights hereby granted, conveyed and assigned shall cease and be void, but shall otherwise remain in full force and effect.

Borrower covenants and agrees with Lender as follows:

ARTICLE ONE

COVENANTS OF BORROWER

1.1. Performance of Loan Documents. Borrower shall perform, observe and comply with all provisions hereof, of the Note and of every other instrument securing the Note.

1.2. Performance of Loan Agreement. Borrower shall perform, observe and comply with all provisions of that certain construction/term loan agreement between Borrower and Lender of even date herewith (the "Loan Agreement"), the terms of which are incorporated herein by reference.

1.3. Warranty of Title. Borrower covenants and warrants that it is seized of an indefeasible estate in fee simple in the Land and real property hereby mortgaged, free and clear of all encumbrances except those matters disclosed in Schedule B of the final loan title insurance policy accepted by Lender.

1.4. Zoning and Environmental Laws.

(a) Borrower covenants and warrants that all applicable zoning laws, ordinances and regulations affecting the Land permit the use and occupancy of the Improvements and further covenants and warrants to comply with all such laws, ordinances and regulations, including, but not limited to, all environmental and ecological laws, ordinances and regulations affecting the Property or the use thereof. Without limiting the generality of the foregoing, Borrower warrants and represents to Lender after thorough investigation that: (a) the Property is now and at all times hereafter will continue to be in full compliance with all federal, state and local environmental laws and regulations, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), Public Law No. 96-510, 94 Stat. 2767, 42 USC 9601 et seq., and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, 100 Stat. 1613, and any amendments thereto, and (b)(i) as of the date hereof there are no hazardous materials, substances, wastes or other environmentally regulated substances (including without limitation, any materials containing asbestos) located on, in or under the Property or used in connection therewith, or (ii) Borrower has fully disclosed to Lender in writing the existence, extent and nature of any such hazardous materials, substances, wastes or other environmentally regulated substances, which Borrower is legally authorized and empowered to maintain on, in or under the Property or use in connection therewith, and Borrower has obtained and will maintain all licenses, permits and approvals required with respect thereto, and is in full compliance with all of the terms, conditions and requirements of such licenses, permits and approvals. Borrower further warrants and represents that it will promptly notify Lender of any change in the nature or extent of any hazardous materials, substances or wastes maintained on, in or under the Property or used in connection therewith, and will transmit to Lender copies of any citations, orders, notices or other material governmental or other communication received with respect to any other hazardous materials, substances, wastes or other environmentally regulated substances affecting the Property.

(b) Borrower shall indemnify and hold Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including clean-up costs),

judgments and expenses (including attorneys', consultants' or experts' fees and expenses) of every kind and nature suffered by or asserted against Lender as a direct or indirect result of any warranty or representation made by Borrower in the preceding paragraph being false or untrue in any material respect or any requirement under any law, regulation or ordinance, local, state or federal, which requires the elimination or removal of any hazardous materials, substances, wastes or other environmentally regulated substances by Lender, Borrower or any transferee of Borrower or Lender.

(c) Borrower's obligations hereunder shall not be limited to any extent by the term of the Note secured hereby, and, as to any act or occurrence prior to payment in full and satisfaction of said Note which gives rise to liability hereunder, shall continue, survive and remain in full force and effect notwithstanding payment in full and satisfaction of said Note and this Mortgage or foreclosure under this Mortgage, or delivery of a deed in lieu of foreclosure.

1.5. Taxes and Liens.

(a) Borrower shall pay or bond promptly, when and as due, and shall promptly exhibit to Lender receipts for the payment of all taxes, assessments, rates, dues, charges, fees, levies, fines, impositions, liabilities, obligations and encumbrances of every kind whatsoever now or hereafter imposed, levied or assessed upon or against the Property or any part thereof, or upon or against this Mortgage or the indebtedness or other sums secured hereby, or upon or against the interest of Lender in the Property, as well as all income taxes, assessments and other governmental charges levied and imposed by the United States of America or any state, county, municipality, borough or other taxing authority upon or against Borrower or in respect of the Property or any part thereof, and any charge which, if unpaid, would become a lien or charge upon the Property prior to or equal to the lien of this Mortgage before they become delinquent and before any interest attaches or any penalty is incurred.

(b) Borrower shall not permit or suffer more than fifteen (15) days any mechanics', laborers', materialmen's, statutory or other lien upon any of the Property.

(c) Lender may, in its sole discretion, require Borrower to deposit with Lender on the first day of each month, in addition to making any required payments of principal and interest, until the Note is fully paid, an amount equal to one-twelfth (1/12) of the yearly taxes and assessments as estimated by Lender to be sufficient to enable Lender to pay at least thirty (30) days before they become due all taxes, assessments and other similar charges against the Property or any part thereof. Such deposits shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Lender, and no interest shall be payable in respect thereof. Upon demand by Lender, Borrower shall deliver to Lender such additional monies as are required to make up any deficiencies in the amounts necessary to enable Lender to pay such taxes, assessments and similar charges. In the event of a default under any of the terms covenants and conditions of the Note, this Mortgage or any other instruments securing the Note to be kept, performed or observed by Borrower, Lender may apply to the reduction of the sums secured hereby, in such manner as Lender shall determine, any amount under this paragraph remaining to Borrower's credit.

(d) In the event of the enactment of any state or federal law (excepting only a change in income tax rates applicable to Lender generally) after the date of this Mortgage, deducting from the value of the Property for the purpose of taxation any lien thereon, or imposing any liability upon Lender in respect of the indebtedness secured hereby, or changing in any way the laws now in force for the taxation of mortgages, or debts secured by mortgages, or the manner of collection of any such taxes, Borrower shall pay any such obligation imposed on Lender thereby (unless payment of such by Borrower is prohibited by law).

1.6. Insurance.

(a) Borrower shall at its sole expense obtain for, deliver to and maintain for the benefit of Lender, during the life of this Mortgage, insurance policies with replacement cost endorsements, for 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, earthquake damage, and business interruption or loss of rental income protection, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof. The form of such policies, the coverages provided, and the companies issuing them, and the coverages provided shall be acceptable to Lender. All such policies and renewals thereof shall be held by Lender and shall contain a noncontributory mortgagee endorsement making losses payable to Lender. The coverage under such policies shall be limited to the improvements now or hereafter located on the Property. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Borrower shall deliver to Lender receipts evidencing the payment of all premiums on such insurance policies and renewals. Delivery of the insurance policies and renewals thereof shall constitute an assignment to Lender, as further security, of all unearned premiums. In the event of loss, Borrower will give immediate written notice to Lender and Lender may make proof of loss if not made promptly by Borrower. In the event of the 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 Borrower in and to all insurance policies and renewals thereof then in force shall pass to the purchaser or grantee. Lender may at any time 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 like amount, as it may determine without prejudice to its right to foreclose hereunder should Borrower fail or refuse to keep the Property so insured.

(b) Borrower 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 Borrower and Lender jointly. In the event the Property is entirely destroyed or is partially destroyed to the extent that restoration will in the opinion of Lender cost in excess of One Hundred Thousand ($100,000.00) Dollars, or in the event restoration costs will not exceed said amount but the conditions of the next sentence are not satisfied, all insurance proceeds shall, at the option of Lender, be applied to the Note (first to expenses, then interest, and then principal) and the Note and all other amounts secured hereby shall, at the option of Lender, become immediately due and payable. Notwithstanding any provisions of this Section to the contrary, (i) if the Property is only partially destroyed to the extent that in the opinion of Lender the Property can be restored for a cost not to

exceed One Hundred Thousand ($100,000.00) Dollars; (ii) if in the opinion of Lender the Property as restored will produce an operating income to debt service ratio and loan to value ratio substantially the same as that used in underwriting the loan evidenced by the Note; (iii) if rental insurance or business interruption insurance is available in amounts sufficient to pay all payments due on the Note during restoration, or if Borrower makes some other provision satisfactory to Lender for making all payments due on the Note during restoration; (iv) if all tenants agree in writing to remain on the Property under their leases and, if applicable, any purchasers of the Property or portions thereof agree in writing that their purchase contracts shall remain in effect; (v) if Lender receives evidence satisfactory to it and its counsel that the Property as restored will comply with all local zoning ordinances and building restrictions; and (vi) if Borrower covenants to make the necessary repairs and restoration and provides all additional funds necessary therefor, Lender will make the insurance proceeds (less expenses incurred in collecting the same) available to Borrower for the purpose of such repair and restoration, disbursement of proceeds to be in accordance with Lender's standard construction disbursement procedures. If Lender elects to restore the improvements, any balance of such monies after restoration shall, at the option of Lender, either be applied toward the reduction of indebtedness and other sums secured hereby or be paid to Borrower. 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) Borrower 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. Borrower shall pay promptly, when due, any premiums on such insurance policies and renewals thereof. Borrower shall deliver to Lender receipts evidencing the payment of all premiums on such insurance policies and renewals.

(d) Lender may, in its sole discretion, require Borrower to deposit with Lender on the first day of each month, in addition to making payments of regular installments of principal and interest, until the Note is fully paid, an amount equal to one-twelfth (1/12) of the yearly premiums for all insurance. Such deposits shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Lender, and no interest shall be payable in respect thereof. Upon demand by Lender, Borrower shall deliver to Lender such additional monies as are necessary to make up any deficiencies in the amounts necessary to enable Lender to pay such premiums when due. Upon an Event of Default, Lender may apply to the reduction of the sums secured hereby, in such manner as Lender shall determine, any amount under this paragraph remaining to Borrower's credit and any refund of premium received from cancellation of any insurance policy by Lender upon foreclosure of this Mortgage.

1.7. Condemnation. In the event there is taken or condemned the entire Property or any part thereof, under power of eminent domain exercised by any actual or quasi governmental authority or public utility, Borrower hereby assigns to Lender any and all awards that may be given, made or due Borrower in any proceedings in connection therewith, and the amounts of such awards shall be applied by Lender to the reduction of the indebtedness secured hereby. Borrower agrees to execute any and all such further instruments of assignment of any and all

such condemnation awards as may be required by Lender to carry out the purposes of this Section. Borrower shall give written notice of such condemnation proceeding within ten (10) days of receipt of any service or process in connection therewith. In any condemnation proceedings against the Property, Lender hereby reserves, and Borrower hereby acknowledges, Lender's right to institute or intervene in any such condemnation proceedings to assert said interest. In the event the entire Property is taken or so much thereof that restoration will in the opinion of Lender cost in excess of One Hundred Thousand ($100,000.00) Dollars, or in the event restoration costs will not exceed said amount but the conditions of the next sentence are not satisfied, all condemnation proceeds shall, at the option of Lender, be applied to the Note (first to expenses, then interest, and then principal) and the Note and all other amounts secured hereby shall, at the option of Lender, become immediately due and payable. Notwithstanding any provisions of this Section to the contrary, (i) if the entire Property is not taken and in the opinion of Lender the Property can be restored for a cost not to exceed One Hundred Thousand ($100,000.00) Dollars; (ii) if in the opinion of Lender the Property as restored will produce an operating income to debt service ratio and loan to value ratio substantially the same as that used in underwriting the loan evidenced by the Note; (iii) if provision satisfactory to Lender is made for making all payments due on the Note during restoration; (iv) if all tenants agree in writing to remain on the Property under their leases and, if applicable, any purchasers of the Property or portions thereof agree in writing that their purchase contracts shall remain in effect; (v) if Lender receives evidence satisfactory to it and its counsel that the Property as restored will comply with all local zoning ordinances and building restrictions; and (vi) if Borrower covenants to make the necessary repairs and restoration and provides all additional funds necessary therefor, Lender will make said award (less expenses incurred in collecting the same) available to Borrower for the purpose of such repair and restoration, disbursement of proceeds to be in accordance with Lender's standard construction disbursement procedures. Any excess of the proceeds of the award over the cost of repair and restoration shall be applied to reduce the principal amount of the Note and accrued interest thereon.

1.8. Care of Property.

(a) Borrower shall preserve and maintain the Property in good condition and repair. Borrower shall not remove, demolish, materially alter or materially change the use of any building, structure or other improvement presently or hereafter on the Land without the prior written consent of Lender, except as provided in the Loan Agreement. Borrower shall not permit, commit or suffer any waste, impairment or deterioration of the Property or of any part thereof, and will not take any action which will increase the risk of fire or other hazard to the Property or to any part thereof.

(b) Except as otherwise provided in this Mortgage or the Loan Agreement, no fixture, personal property or other part of the Property shall be removed, demolished or altered, without the prior written consent of Lender. Borrower may sell or otherwise dispose of, free from the lien of this Mortgage, furniture, furnishings, equipment, tools, appliances, machinery, fixtures or appurtenances which may become worn out, undesirable or obsolete only if they are replaced immediately with similar items of at least equal value which shall, without further action, become subject to the lien of this Mortgage, except as otherwise provided in this Mortgage.

(c) Lender may enter upon and inspect the Property at any reasonable time during the life of this Mortgage.

(d) Borrower will promptly comply with all present and future laws, ordinances, rules and regulations of any governmental authority affecting the Property or any part thereof.

(e) If all or any part of the Property shall be lost, damaged or destroyed by fire or any other cause, Borrower will give immediate written notice thereof to Lender and, unless Lender elects to apply available insurance proceeds to the Note instead of to restoration as permitted in this Mortgage, Borrower shall promptly restore the Property to the equivalent of its original condition regardless of whether or not there shall be sufficient insurance proceeds therefor. If a part of the Property shall be lost, physically damaged or destroyed through condemnation, unless Lender elects to apply condemnation proceeds to the Note instead of to restoration as permitted in this Mortgage, Borrower will promptly restore, repair or alter the remaining property in a manner satisfactory to Lender, regardless of whether condemnation proceeds are sufficient to pay for such restoration.

1.9. Transfer of Property. Borrower shall not sell, convey, transfer, mortgage, lease (except for leases in the ordinary course of business, subject to Lender's prior review and approval if such is required in the Loan Agreement) or further encumber any interest in or any part of the Property, without the prior written consent of Lender in its sole discretion. If any person should obtain any interest in all or any part of the Property pursuant to the execution or enforcement of any lien, security interest or other right, whether superior, equal or subordinate to this Mortgage or the lien hereof, such event shall be deemed to be a transfer by Borrower. Borrower further covenants that no shareholder, member or partner owning an interest in Borrower, as applicable, shall transfer any ownership interest in Borrower without the prior written consent of Lender in its sole discretion. This prohibition also applies to any transfer of interest by any shareholder, member or partner owning an interest in an entity that owns an interest in Borrower. Any such transfer shall be an Event of Default hereunder.

1.10. Further Assurances. Upon Lender's request Borrower shall execute and deliver to Lender and, where appropriate, shall cause to be recorded or filed and from time to time thereafter to be rerecorded or refiled at such time and in such offices and places as shall be deemed desirable by Lender all such further mortgages, instruments of further assurance, certificates and other documents as Lender may consider necessary or desirable in order to effectuate, complete, enlarge in accordance with the Loan Agreement or perfect, or to continue and preserve the obligations of Borrower under the Note and this Mortgage, and the lien of this Mortgage as a first and prior lien upon all of the Property, whether now owned or hereafter acquired by Borrower. Upon any failure by Borrower to do so, Lender may make, execute, record, file, re-record or refile any and all such mortgages, instruments, financing statements, certificates and documents for and in the name of Borrower, and Borrower hereby irrevocably appoints Lender the agent and attorney-in-fact of Borrower to do so.

1.11. After Acquired Property. The lien of this Mortgage will automatically attach, without further act, to all after acquired property located in or on, or attached to, or used or intended to be used in connection with or with the operation of, the Property or any part thereof.

1.12. Leases Affecting Property. Borrower shall comply with and observe its obligations as landlord under all leases affecting the Property or any part thereof, if any. Borrower, if required by Lender, shall furnish promptly to Lender executed copies of all such leases now existing or hereafter created, all of which shall be in form and substance subject to the approval of Lender. Borrower shall not, without the express written consent of Lender, modify, surrender, terminate or extend any such lease now existing or hereafter created, or permit or suffer an assignment or sublease. Borrower shall not accept payment of rent more than one (1) month in advance without the prior written consent of Lender.

1.13. Expenses. Borrower shall pay or reimburse Lender for all expenses, including reasonable attorney's fees, incurred by Lender in any action which is threatened, pending or completed or proceeding or in dispute in which Lender is or might be made a party or appears as a party plaintiff or party defendant and which affects or might affect the Note or the Property or any part thereof, or the interests of Borrower or Lender therein, including but not limited to the foreclosure of this Mortgage, condemnation involving all or part of the Property or any action to protect the security hereof. All expenses so incurred by Lender shall become due and payable immediately, whether or not there be notice, demand, attempt to collect or suit pending. The expenses so incurred or paid by Lender, together with interest thereon at the Default Rate as hereinafter defined from the date incurred until paid by Borrower, shall be added to the indebtedness and secured by the lien of this Mortgage.

1.14. Lender's Performance of Defaults. If Borrower defaults in the payment of any tax, assessment, encumbrance or other imposition, in its obligation to furnish insurance hereunder or in the performance or observance of any other covenant, condition or term in this Mortgage or in any other instrument securing the Note, Lender may at its option perform or observe the same, and all expenses incurred by Lender shall become due and payable immediately by Borrower. The expenses so incurred, together with interest thereon at the Default Rate as hereinafter defined from the date incurred until paid by Borrower, shall be added to the indebtedness and secured by the lien of this Mortgage. Nothing contained herein shall be construed as requiring Lender to advance or expend monies for any purposes mentioned in this paragraph, or for any other purpose. Lender is hereby empowered to enter and to authorize others to enter upon the Property or any part thereof for the purpose of performing or observing any such defaulted covenant, condition or terms, without thereby becoming liable to Borrower or any person in possession holding under Borrower.

1.15. Estoppel Affidavits. Borrower, within ten (10) days after written request from Lender, shall furnish a written statement, duly acknowledged, setting forth the unpaid principal of, and interest on, the Note, and any other unpaid sums secured hereby, and whether or not any offsets or defenses exist against such principal and interest or other sums.

1.16. Use of Property. The Property shall be used by Borrower only as a medical office building, which use shall not change without the prior written consent of Lender.

ARTICLE TWO

DEFAULTS

2.1. Event of Default. The term Event of Default, wherever used in this Mortgage, shall mean an "Event of Default" as such term is defined in the Loan Agreement.

2.2. Acceleration of Maturity. Upon an Event of Default, Lender may declare the outstanding principal amount of the Note and the interest accrued thereon, and all other sums secured hereby, to be due and payable immediately, and upon such declaration such principal and interest and other sums shall immediately become and be due and payable without demand or notice.

2.3. Lender's Power of Enforcement. Upon an Event of Default, Lender may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or by any other appropriate proceeding or remedy: (a) to enforce payment of the Note or the performance of any term hereof or any other right; (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Property, under the judgment or decree of a court or courts of competent jurisdiction; and (c) to pursue any other remedy available at law or in equity. Lender shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, or both, as Lender may determine.

2.4. Lender's Right to Enter and Take Possession, Operate and Apply Income.

(a) Upon an Event of Default, Borrower, upon demand of Lender, shall forthwith surrender to Lender the actual possession of the Property. If and to the extent permitted by law, Lender or such agents as it may appoint may enter and take possession of all the Property, and may exclude Borrower and its agents and employees wholly therefrom, and may have joint access with Borrower to the books, papers and accounts of Borrower.

(b) If Borrower shall for any reason fail to surrender or deliver the Property or any part thereof after Lender's demand, Lender may obtain a judgment or decree conferring on Lender the right to immediate possession or requiring Borrower to deliver immediate possession of all or part of the Property to Lender along with all books, papers and accounts of Borrower, to the entry of which judgment or decree Borrower hereby specifically consents.

(c) Upon every such entering upon or taking of possession, Lender may hold, store, use, operate, manage and control the Property and conduct the business thereof, and, from time to time:

(i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property;

(ii) insure or keep the Property insured;

(iii) manage and operate the Property and exercise all the rights and powers of Borrower in its name or otherwise, with respect to the same;

(iv) enter into agreements with others to exercise the powers herein granted Lender;

all as Lender in its reasonable judgment from time to time may determine; and Lender may collect and receive all the income, revenues, rents, issues and profits of the same, including those past due as well as those accruing thereafter; and shall apply the monies so received by Lender in such priority as Lender may determine to (1) the reasonable compensation, expenses and disbursements of the agents and attorneys; (2) the cost of insurance, taxes, assessments and other proper charges upon the Property or any part thereof; (3) the deposits for taxes and assessments and insurance premiums due; and (4) the payment of accrued interest and principal on the Note.

2.5. Leases. Lender, at its option, is authorized to foreclose this Mortgage subject to the rights of any tenants of the Property, and the failure to make any such tenants parties defendant to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted by Borrower to be, a defense to any proceedings instituted by Lender to collect the sums secured hereby or to collect any deficiency remaining unpaid after the foreclosure sale of the Property.

2.6. Purchase by Lender. Upon any foreclosure sale, Lender may bid for and purchase the Property and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in its own absolute right without further accountability.

2.7. Application of Indebtedness Toward Purchase Price. In the event Lender purchases any portion of the Property at any foreclosure sale, Lender may, to the extent permitted by law, apply toward payment of the foreclosure purchase price, in lieu of cash, any portion of or all sums due to Lender under the Note, this Mortgage or any other instrument securing the Note.

2.8. Waiver of Stay, Extension, Redemption Laws. Borrower agrees to the full extent and permitted by law that in case of a default on its part hereunder, neither Borrower nor anyone claiming through or under it shall or will set up, claim or seek to take advantage of any stay, extension or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Property or the final and absolute putting into possession thereof, immediately after such sale, of the purchasers thereat, and Borrower, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets comprising the Property marshalled upon any foreclosure of the lien hereof and agrees that Lender or any court having jurisdiction to foreclose such lien may sell the Property in part or as an entirety.

2.9. Receiver. Notwithstanding anything to the contrary in this Mortgage, the Loan Agreement or any other document or instrument securing or related to the Note, upon (a) the occurrence of an Event of Default, (b) a determination by Lender in its reasonable discretion that Borrower has distributed or is planning to distribute rent, profits, income or any other revenues

from the Property to any person or entity owning a direct or indirect interest in Borrower or to any other person or entity prior to first applying said rents, profits, income and revenues to payment of current scheduled payments of debt service on the Note, current ordinary and usual operating expenses for the Property, and, if previously directed by Lender pursuant to the terms of this Mortgage, current scheduled payments of escrows for taxes and insurance (e.g., if Borrower fails to first apply rent for the month to that month's scheduled payments of debt service (and taxes and insurance, if applicable) and to current operating expenses), or (c) the occurrence or happening of an event or circumstance or the existence of a fact or condition which (i) with the passage of time or the giving of notice, or both, would constitute an Event of Default, and (ii) if not immediately addressed or remedied could, in Lender's reasonable opinion, result in damage to, loss of or diminution or loss in value of, the Property or any portion thereof or any other security held by Lender for payment of the Note and performance by Borrower of its obligations, then Lender, to the extent permitted by law and without regard to the value of the Property or any other security and without regard to the occupancy of the Property, shall be entitled as a matter of right if it so elects to the appointment of a receiver to enter upon and take possession of the Property and to collect all rents, revenues, issues, income, products and profits thereof and apply the same as the court may direct. The receiver shall have all rights and powers permitted under the laws of the state where the Land is located and such other powers as the court making such appointment shall confer. The expenses, including receiver's fees, attorney's fees, costs and agent's compensation, incurred pursuant to the powers herein contained shall be secured by this Mortgage. The right to enter and take possession of and to manage and operate the Property, and to collect the rents, issues and profits thereof, whether by a receiver or otherwise, shall be cumulative to any other right or remedy hereunder or afforded by law, and may be exercised concurrently therewith or independently thereof. Lender shall be liable to account only for such rents, issues and profits actually received by Lender. Notwithstanding the appointment of any receiver or other custodian, Lender shall be entitled as secured party hereunder to the possession and control of any cash, deposits, or instruments at the time held by, or payable or deliverable under the terms of this Mortgage to, Lender.

2.10. Suits to Protect the Property. Lender shall have the power and authority to institute and maintain any suits and proceedings as Lender may deem advisable (a) to prevent any impairment of the Property by any acts which may be unlawful or any violation of this Mortgage, (b) to preserve or protect its interest in the Property, and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order might impair the security hereunder or be prejudicial to Lender's interest.

2.11. Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceedings affecting Borrower, any person, partnership or corporation guaranteeing or endorsing any of Borrower's obligations, its creditors or its property, Lender, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have its claims allowed in such proceedings for the entire amount due and payable by Borrower under the Note, this Mortgage and any other instrument securing the Note, at the date of the institution of such proceedings, and for any additional amounts which may become due and payable by Borrower after such date.

2.12. Judgment on the Note; Application of Monies by Lender.

(a) Upon an Event of Default, Lender shall be entitled to sue for and to recover judgment for the whole amount due under the Note, this Mortgage and any other loan document, together with costs and expenses including the reasonable compensation, expenses and disbursements of Lender's agents and attorneys incurred in connection with such suit and any appeal in connection therewith.

(b) In case of a foreclosure sale of all or any part of the Property and of the application of the proceeds of sale to the payment of the sums secured hereby, Lender shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid and to recover judgment for any portion thereof remaining unpaid, with interest.

(c) Borrower hereby agrees, to the extent permitted by law, that no recovery of any such judgment by Lender and no attachment or levy of any execution upon any of the Property or any other property shall in any way affect the lien of this Mortgage upon the Property or any part thereof or any lien, rights, powers or remedies of Lender hereunder, but such lien, rights, powers and remedies shall continue unimpaired as before.

2.13. Delay or Omission No Waiver. No delay or omission of Lender or of any holder of the Note to exercise any right, power or remedy accruing upon any Event of Default shall exhaust or impair any such right, power or remedy or shall be construed to waive any such Event of Default or to constitute acquiescence therein. Every right, power and remedy given to Lender may be exercised from time to time and as often as may be deemed expedient by Lender.

2.14. No Waiver of One Default to Affect Another. No waiver of any Event of Default hereunder shall extend to or affect any subsequent or any other Event of Default then existing, or impair any rights, powers or remedies consequent thereon. If Lender (a) grants forbearance or an extension of time for the payment of any sums secured hereby; (b) takes other or additional security for the payment thereof; (c) waives or does not exercise any right granted in the Note, this Mortgage or any other instrument securing the Note; (d) releases any part of the Property from the lien of this Mortgage or any other instrument securing the Note; (e) consents to the filing of any map, plat or replat of the Land; (f) consents to the granting of any easement on the Land; or (g) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Note, this Mortgage or otherwise of Borrower, or any subsequent purchaser of the Mortgaged property or any part thereof or any maker, cosigner, endorser, surety or guarantor. No such act or omission shall preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in case of any Event of Default then existing or of any subsequent Event of Default nor, except as otherwise expressly provided in an instrument or instruments executed by Lender, shall the lien of this Mortgage be altered thereby. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Property, Lender, without notice to any person, firm or corporation, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Property or the indebtedness secured hereby, or with reference to any of the terms or conditions hereof, as fully and to the same extent as it might deal with the original

parties hereto and without in any way releasing or discharging any of the liabilities or undertakings hereunder.

2.15. Discontinuance of Proceedings; Position of Parties Restored. If Lender shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Lender, then and in every such case Borrower and Lender shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Lender shall continue as if no such proceeding had occurred or had been taken.

2.16. Remedies Cumulative. No right, power or remedy conferred upon or reserved to Lender by the Note, this Mortgage or any other instrument securing the Note is exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or under the Note or any other instrument securing the Note, or now or hereafter available at law or in equity.

ARTICLE THREE

MISCELLANEOUS PROVISIONS

3.1. Future Advances. Lender shall make advances under the Note in accordance with the Loan Agreement. Lender may also, at its option, make additional future advances to Borrower, provided, however, that nothing contained herein shall constitute an obligation to do so. 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 instrument indicating that such advances are secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make such future advances (a) at the request of Borrower, whether or not there is any obligation to make future advances, or (b) to pay, with or without the consent or request of Borrower, any amounts which may be due under this Mortgage or under any other mortgage or lien affecting the Mortgaged property.

3.2. Default Rate. The Default Rate shall be the rate of interest after default as provided in the Note.

3.3. Addresses for Notices, Etc. Any notice, report, demand or other instrument authorized or required to be given or furnished under this Mortgage to Borrower or Lender shall be deemed given or furnished when mailed certified mail, return receipt requested, to that party at the address first shown above. Any party hereto may change the address for said notice by appropriately notifying the other parties in writing.

3.4. Headings. The headings of the articles, sections, paragraphs and subdivisions of this Mortgage are for convenience of reference only, are not to be considered a part hereof, and shall not limit or expand or otherwise affect any of the terms hereof.

3.5. Invalid Provisions to Affect No Others. In the event that any of the covenants, agreements, terms or provisions contained in the Note, this Mortgage or any other instrument securing the Note shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms or provisions contained herein and in the Note and any other instrument securing the Note shall be in no way affected, prejudiced or disturbed thereby.

3.6. Changes, etc. Neither this Mortgage nor any term hereof may be changed, waived, discharged or terminated orally, or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. Any agreement hereafter made by Borrower and Lender relating to this Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

3.7. Governing Law. This Mortgage is made by Borrower and accepted by Lender in the State of South Carolina, with reference to the laws of such State, and shall be construed, interpreted, enforced and governed by and in accordance with such laws, notwithstanding the fact that the choice of law or conflicts of law principles of South Carolina would otherwise apply the laws of another jurisdiction.

3.8. Arbitration; Jurisdiction. ANY PROVISION HEREOF TO THE CONTRARY NOTWITHSTANDING, THIS DOCUMENT IS SUBJECT TO THE PROVISIONS OF THE LOAN AGREEMENT CONCERNING ARBITRATION OF DISPUTES (AS SUCH TERM IS DEFINED IN THE LOAN AGREEMENT). Subject to the foregoing, Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to Borrower at Borrower's address set forth above or any new address of which Lender has been notified by Borrower in writing.

3.9. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE PROPERTY.

IN WITNESS WHEREOF, the undersigned have executed this instrument the day and year above first written.

Signed, sealed and delivered
in the presence of:

NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC

By: ATRIUM DEVELOPMENT ASSOCIATES, LLC
By: _____
Its: Manager / Member

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

The foregoing instrument was acknowledged before me this 20th day of February, 2007 by David Jacobs, a Manager of Atrium Development Associates, LLC, Manager of Newberry Atrium Professional Center, LLC, on behalf of said entity.

Notary Public for South Carolina
My Commission Expires: 6/1/2014

[SEAL]

Exhibit A
Real Property Description

ALL that certain piece, parcel, or lot of land, with the improvements thereon, situate, lying, and being in the County of Newberry, State of South Carolina, shown and designated as Trace A, containing 1.80 acres, on a Subdivision Survey for Atrium Development Newberry County Memorial Hospital, prepared by Pittman Professional Land Surveying, dated October 13, 2006, and recorded in the office of the Register of Deeds for Newberry County in Plat Book C167 at Page 8, and according to said latter plat being bounded as follows, to-wit: beginning at an iron on the Western side of Kinard Street and running N 58°14'04"W for a distance of 283.94 to an iron, then turning and running N 29°45'14"E for a distance of 271.95 to an iron, then turning and running S 60°14'46"E for a distance of 283.77 to an iron, then turning and running S 29°45'17"W for a distance of 281.92, to the point of beginning.

This being the same property conveyed to the Mortgagor by deed of Newberry Memorial Hospital Board of Trustees by deed dated February 15, 2007 to be recorded herewith.

UNCONDITIONAL GUARANTY

February 20, 2007

WHEREAS, NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC (the "Borrower"), has borrowed or shall borrow the sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND DOLLARS ($7,141,000.00) from CAROLINA FIRST BANK (the "Lender") pursuant to a promissory note from Borrower to Lender dated February 20, 2007 (the "Note"); and

WHEREAS, Lender is unwilling to make the loan to Borrower evidenced by the Note unless it receives an unconditional and continuing joint and several guaranty from DAVID H. JACOBS (hereinafter termed "Guarantor"), covering all "Obligations of Borrower" as hereinafter defined;

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and in order to induce Lender to lend money to Borrower as evidenced by the Note, Guarantor (jointly and severally, if more than one) hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due, whether by acceleration or otherwise, under the Note and all lien documents securing the Note, and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower").

This Guaranty is in addition to and is not intended to supersede any prior existing Guaranty of Guarantor.

Further, whether or not suit is brought by Lender to acquire possession of collateral or to enforce collection of any unpaid balance hereunder, Guarantor expressly hereby agrees to pay all legal expenses and the reasonable attorneys' fees (including those relative to appellate proceedings, if any) incurred by Lender with respect to this Guaranty.

In order to implement the foregoing and as additional inducements to Lender, Guarantor further covenants and agrees as follows:

1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or to require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor of Borrower or any other person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the generality of the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

Guarantor's Initials: DJ

PLAINTIFF'S EXHIBIT C

recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.

2. TIME IS OF THE ESSENCE HEREOF.

3. This Guaranty Agreement constitutes the entire agreement between the parties, and no waivers or modifications shall be valid unless they are reduced to writing, duly executed by the party to be charged thereby, and expressly approved in writing by an officer of Lender actually involved in the transactions being guaranteed hereby.

4. If any process is issued or ordered to be served upon Lender, Borrower or Guarantor, seeking to seize Borrower's and/or Guarantor's rights and/or interests in any bank account maintained with Lender, the balance in any such account shall immediately be deemed to have been and shall be set-off against any and all Obligations of Borrower and/or all obligations and liabilities of Guarantor hereunder, as of the time of the issuance of any such writ or process, whether or not Borrower, Guarantor and/or Lender shall then have been served therewith.

5. All moneys available to and/or received by Lender for application toward payment of (or reduction of) the Obligations of Borrower may be applied by Lender to such Obligations of Borrower in such manner, and apportioned in such amounts and at such times, as Lender, in its sole discretion, may deem suitable or desirable.

6. As security for any and all liabilities of Guarantor hereunder, now existing or hereafter arising, Guarantor hereby grants Lender the right to retain a security interest in any and all moneys or other property (i.e., goods and merchandise, as well as all documents relative thereto; also, funds, securities, choses in action and any and all other forms of property, whether real, personal or mixed and any right, title or interest of Guarantor therein or thereto) and/or the proceeds thereof, which have been or may hereafter be deposited or left with Lender (or with any agent or other third party acting on Lender's behalf) by or for the account or credit of Guarantor, including without limitation any property in which Guarantor may have any interest. Further, where any money is due Lender hereunder, Lender is herewith authorized to exercise its right of set-off or "bank lien" as to any moneys deposited in demand, checking, time, savings, or other accounts of any nature maintained in and with it by any of the undersigned, without advance notice. Said right of set-off shall also be applicable and exercised by Lender, in its sole discretion, where Lender is indebted to any Guarantor by reason of any certificate of deposit, bond, note or otherwise.

7. Guarantor agrees that Guarantor's liability hereunder shall not be diminished by any failure on the part of Lender to perfect (by filing, recording or otherwise) any security interest it may have in any property securing this Unconditional Guaranty Agreement and/or the Obligations of Borrower secured hereby and hereunder.

8. Guarantor further hereby consents and agrees that Lender may at any time, or from time to time, in its sole discretion: (i) extend or change the time of payment, and/or the manner, place or terms of payment of any or all of the Obligations of Borrower; (ii) exchange, release and/or surrender all or any of any collateral security, or any part thereof, by whomsoever

Guarantor's Initials: _____

deposited, which is or may hereafter be held by it in connection with all or any of the Obligations of Borrower and/or any liabilities or obligations of Guarantor hereunder; (iii) release any other guarantor, endorser or co-obligor of the Obligations of Borrower with or without consideration and without notice to and further consent from any Guarantor and such release shall not in any way affect the liability of the undersigned; (iv) sell or otherwise dispose of and/or purchase all or any of any such collateral at public or private sale, and after deducting all costs and expenses of every kind for collection, preparation for sale, sale or delivery, the net proceeds of any such sale or other disposition may be applied by Lender upon all or any of the Obligations of Borrower; (v) settle or compromise with Borrower, any insurance carrier and/or any other person liable thereon, any and all of the Obligations of Borrower (including, but not limited to any insurance applicable to the Obligations of Borrower), and/or subordinate the payment of all or any part of same, to the payment of any other debts or claims, which may at any time be due or owing to Lender and/or any other person; or (vi) alter, extend, change, modify, release, waive or cancel any covenant, agreement, condition, obligation or provision contained in any or all loan documents; all in such manner and upon such terms as Lender may deem proper and/or desirable, and without notice to or further assent from Guarantor, it being agreed that Guarantor shall be and remain bound upon this Unconditional Guaranty Agreement, irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, foreclosure, sale or other disposition, application, renewal or extension and notwithstanding also that the Obligations of Borrower may at any time exceed the aggregate principal sum of the Note. Further, this Guaranty shall not be construed to impose any obligation on Lender to extend or continue to extend credit or otherwise to deal with Borrower at any time.

9. In consideration of Lender's extension of credit to Borrower, Guarantor hereby agrees:

(a) To subordinate, and by this Agreement does subordinate, all debts now or hereafter owed by Borrower to Guarantor to any and all debts of Borrower to Lender now or hereafter existing while this Agreement is in effect.

(b) Guarantor further agrees that it will not assert any right to which it may be or become entitled, whether by subrogation, contribution or otherwise against Borrower or Guarantor or any of their respective properties, by reason of the performance of the undersigned of his obligations under this Guaranty, except after payment in full of all amounts (including costs and expenses) which may become payable in respect of or under the Obligations of Borrower.

(c) Guarantor hereby indemnifies and holds Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorneys', consultants' or experts' fees and expenses), of every kind and nature, suffered by or asserted against Lender under any law, regulation or ordinance, local, state or federal concerning any hazardous materials, substances, wastes or other environmentally regulated substances now or hereafter located on the property of Borrower or Guarantor.

Guarantor's Initials: _____

10. This Unconditional Guaranty Agreement shall be binding upon Guarantor, and the heirs, executors, administrators, successors and assigns of Guarantor; and it shall inure to the benefit of, and be enforceable by, Lender and its successors, transferees and assigns. It further shall be deemed to have been made under and shall be governed by the Laws of the State of South Carolina in all respects, including matters of construction, validity and performance.

11. No waiver by Lender of any default by Guarantor or Borrower shall operate as a waiver of any other default or of the same default on a future occasion. If more than one person has signed this Guaranty Agreement, such parties are jointly and severally obligated hereunder. The term "Guarantor," as used herein, shall (if signed by more than one person) mean the "Guarantors and each of them." The liability of Guarantor hereunder shall also be joint and several with that of any person or entity executing a separate guaranty in favor of Lender. If any Guarantor shall be a partnership, the obligations, liabilities and agreements on the part of such Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals composing the partnership. Further, the term "Guarantor" shall include in such event any altered or successor partnerships, it being also understood that the predecessor partnership and its partners shall not thereby be released from any obligations or liabilities hereunder. Lender, or any other holder hereof, may correct patent errors in this Agreement.

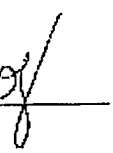
12. Guarantor hereby waives: (i) notice of acceptance of this Guaranty; (ii) notice of extensions, continuations or modifications of the Note; (iii) notice of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Lender and Borrower; (iv) presentment and/or demand for payment of any of the Obligations of Borrower and/or for payment under this Guaranty; (v) protest or notice of dishonor or default to Guarantor or to any other person with respect to any of the Obligations of Borrower; (vi) the benefit of any homestead or other exemptions; and (vii) to the extent such waiver may be enforceable at the time of foreclosure, any right to have any mortgaged property securing the Obligations of Borrower appraised after foreclosure for the purpose of reducing a deficiency judgment against Borrower, Guarantor or any other guarantor or other party.

13. Anything contained herein to the contrary notwithstanding, if for any reason the effective rate of interest on any of the Obligations of Borrower should exceed the maximum lawful rate, the effective rate of such obligation shall be deemed reduced to and shall be such maximum lawful rate, and any sums of interest which have been collected in excess of such maximum lawful rate shall be applied as a credit against the unpaid principal balance due.

14. In the event any provision of this instrument should be left blank or incomplete, Guarantor hereby authorizes and empowers Lender to supply and complete the necessary information to complete or fill in the blank provision.

15. EVENTS OF DEFAULT. Guarantor shall be in default under this Guaranty Agreement upon the happening of any of the following events, circumstances or conditions, namely:

(a) Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default by Borrower in the payment of the Obligations of Borrower; or

Guarantor's Initials: 

(b) Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with this Guaranty Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or furnished; or

(c) Death (unless Lender, in its sole discretion, accepts a substitute guarantor), dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any State or Federal Bankruptcy or Insolvency Laws by or against any Guarantor; or

(d) Material adverse change in the financial position of Guarantor.

16. REMEDIES UPON DEFAULT. Upon the occurrence of any of the foregoing events, circumstances, or conditions of default, all of the obligations evidenced herein or guaranteed hereby shall immediately be due and payable without notice. Further, Lender shall then have all of the rights and remedies granted hereunder, and all of the rights and remedies of a secured party and/or holder-in-due-course under the South Carolina Uniform Commercial Code and/or under other Laws of South Carolina.

17. Any provision hereof to the contrary notwithstanding, to the extent Guarantor is determined to be an "insider" as such term is used in the United States Bankruptcy Code or cases thereunder, Guarantor waives any right (whether established by contract or statute or otherwise available at law or in equity) to reimbursement, indemnity, subrogation, contribution or other such claim against Lender, Borrower or any other guarantor or any other person primarily or secondarily liable for any Obligations of Borrower with respect to any disbursement or payment made by Guarantor under or in connection with this Guaranty or otherwise.

18. In the event any payment made by Guarantor to Lender is determined to be a preferential transfer under any bankruptcy or similar law and Lender is required to return such payment to a trustee in bankruptcy, to a receiver, to Guarantor, or to another person or entity, Guarantor's obligations under this Guaranty shall not be discharged with respect to such preferential payment notwithstanding any satisfaction of the Note guaranteed hereby or the return of this Guaranty. Furthermore, Guarantor shall be jointly and severally liable to Lender for the amount of any such preferential payment and any interest expenses or other expenses, including but not limited to attorneys' fees, incurred by Lender related in any way to such preferential payment, and Guarantor agrees to reinstate any collateral given to Lender as security for the obligations under this Guaranty notwithstanding the fact that such collateral may have been released or returned by Lender.

19. Guarantor acknowledges that Guarantor has previously submitted financial statements to Lender for the purpose of inducing Lender to extend credit to Borrower. Guarantor agrees to update such financial statements from time to time as requested by Lender. Guarantor further agrees to immediately notify Lender in writing of any material adverse change in the financial position of Guarantor. Guarantor covenants and warrants that such financial statements, as updated or supplemented from time to time by Guarantor, shall remain a true and accurate statement of Guarantor's financial position for so long as the Obligations of Borrower

Guarantor's Initials: _____

remain outstanding, and Lender shall be entitled to continue to rely on the truth and accuracy of such statements. Guarantor agrees not to transfer assets for less than fair value or take any other action which could reasonably be expected to reduce the net worth of Guarantor or diminish Guarantor's ability to perform Guarantor's obligations hereunder.

20. Guarantor's liability hereunder shall not be diminished or reduced by (i) any payment of any of the Obligations of Borrower by any other guarantor, endorser, co-obligor or any other person liable or to become liable for the payment of the Obligations of Borrower, or (ii) any reduction of the Obligations of Borrower by realization of any collateral or security or by any other source.

21. Subject to the arbitration provisions set forth below, Guarantor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Guarantor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to Guarantor at Guarantor's address set forth below or any new address of which Lender has been notified by Guarantor in writing.

22. ARBITRATION. UPON DEMAND OF LENDER OR GUARANTOR, WHETHER MADE BEFORE OR AFTER INSTITUTION OF ANY JUDICIAL PROCEEDING, ANY DISPUTE, CLAIM OR CONTROVERSY ("DISPUTES") ARISING OUT OF, CONNECTED WITH OR RELATING TO THIS GUARANTY OR ANY OTHER LOAN DOCUMENTS SHALL BE RESOLVED BY BINDING ARBITRATION AS PROVIDED HEREIN. Institution of a judicial proceeding by a party does not waive the right of that party to demand arbitration hereunder. Disputes may include, without limitation, tort claims, counterclaims, disputes as to whether a matter is subject to arbitration, claims brought as class actions, claims arising from loan documents executed in the future, or claims arising out of or connected with the transaction reflected by this document.

Pursuant to the Federal Arbitration Act or, if it is deemed not to apply, the South Carolina Uniform Arbitration Act, arbitration shall be conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA"). All arbitration hearings shall be conducted in Columbia, South Carolina. All applicable statutes of limitation shall apply to a Dispute. A judgment upon the award may be entered in any court having jurisdiction.

Notwithstanding the preceding binding arbitration provisions, Lender and Guarantor preserve, without diminution, certain remedies that either party may employ or exercise freely, independently or in connection with an arbitration proceeding or after an arbitration action is brought. Lender and Guarantor shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable: (i) all rights to foreclose against any real or personal property or other security by exercising a power of sale granted under loan documents or under applicable law or by judicial foreclosure and sale, including a proceeding to confirm the sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-off, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary

Guarantor's Initials: _____

bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Preservation of these remedies does not limit the power of an arbitrator to grant similar remedies that may be requested by a party in a Dispute.

Guarantor and Lender shall not have a remedy of punitive or exemplary damages against the other in any Dispute and hereby waive any right or claim to punitive or exemplary damages they have now or which may arise in the future in connection with any Dispute whether the Dispute is resolved by arbitration or judicially.

23. 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.

WITNESS the Hand and Seal of the undersigned, this Unconditional Guaranty being executed and delivered on the date first above written. Each Guarantor has adopted as his seal the word "SEAL" appearing beside his signature.

_____ (SEAL)
DAVID H. JACOBS

Address: 115 Atrium Way #204
Columbia, S.C. 29223

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF NEWBERRY)

On February 20 2007 before me personally came DAVID H. JACOBS to me known to be the person described in, and who executed the foregoing Guaranty and acknowledged that (s)he/they executed the same.

_____
Notary Public for South Carolina
My Commission Expires: 2/1/2011

(SEAL)

CAROLINA FIRST

March 3, 2009
NEWBERRY ATRIUM PROFESSIONAL CENTER LLC
115 ATRIUM WAY SUITE 204
COLUMBIA SC 29223

Re: Loan #[redacted], dated February 20, 2007, in the original principal amount of $ 7,141,000.00 (the "Loan")

Dear Mr. Jacobs:

At your request, the Bank has agreed to modify the Loan as follows:

- The maturity date will be extended from February 28, 2009 to May 28, 2009
- Current rate of Libor + 190 Bps floating (3.34% currently) will be changed to a fixed rate of 5.50% during the extension period.

Borrower and any guarantors agree that the Loan is fully enforceable in accordance with its terms; agree that this letter does not constitute a novation, waiver or release; agree that the Bank is not releasing any collateral; and agree that the Bank is under no obligation to grant any additional or future modifications.

Borrower and any guarantors reaffirm their obligations under the Loan; represent that they have no claim, defense or setoff in connection with the Loan; and release the Bank from any claim or defense that they might have as of the date of this letter.

To induce us to continue or modify the loan, you release the bank and its employees, agents, attorneys and representatives, jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action for contribution and indemnity, whether arising at law or in equity (including without limitation, claims of fraud, duress, mistake, tortious interference, usury, or control), whether presently possessed or possessed in the future, for or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damage, breach of contract, fraud, violation of any statute or law, commission of any tort, or any other matter whatsoever or thing done, omitted or suffered to be done by the Bank, which has occurred in whole or in part, or was initiated at any time from the beginning of time up to and immediately preceding the moment of the execution of this Agreement.

PLAINTIFF'S EXHIBIT D

You acknowledge, consent and voluntarily agree that (i) in the event of proceedings by the Bank against you and/or the collateral, you have the right to file a petition in bankruptcy under the United States Bankruptcy Code; (ii) You hereby give up, surrender and waive the protection of the "automatic stay" provisions of the Bankruptcy Code with respect to the collateral securing the Loans and further agree not to take a contrary position in any future bankruptcy case or proceeding such that the Bank may proceed against the collateral and/or Obligated Parties without the necessity for lifting of the automatic stay under the Bankruptcy Code (or any equivalent protection), without regard to adequate protection, equity in the subject property, the necessity of the subject property for an effective reorganization or any other matter affecting your right or ability to obtain immediate relief from stay; and (iii) in the event of a bankruptcy filing by or against you, you hereby agree not to seek any extension or modification of the 120 day exclusive period in which you may only file a plan of reorganization as provided in the Bankruptcy Code. You acknowledge that the Bank would not forgo current remedies and forbear or extend as to your credit as set forth herein if this were not a part of this agreement.

Except as expressly amended by this letter, the Loan and all loan documents shall continue, unmodified and unchanged.

Sincerely,

Michael Phillips
Senior Vice President

Agreed to by Borrower:

David Jacobs



CAROLINA FIRST

June 16, 2009

NEWBERRY ATRIUM PROFESSIONAL CENTER LLC
115 ATRUIM WAY SUITE 204
COLUMBIA SC 29223

Re: Loan #[redacted], dated February 20, 2007, in the original principal amount of $7,141,000.00 (the "Loan")

Dear Mr. Jacobs:

At your request, the Bank has agreed to modify the Loan as follows:

- the maturity date shall be extended from May 28, 2009 to August 28, 2009

Borrower and any guarantors agree that the Loan is fully enforceable in accordance with its terms; agree that this letter does not constitute a novation, waiver or release; agree that the Bank is not releasing any collateral; and agree that the Bank is under no obligation to grant any additional or future modifications.

Borrower and any guarantors reaffirm their obligations under the Loan; represent that they have no claim, defense or setoff in connection with the Loan; and release the Bank from any claim or defense that they might have as of the date of this letter.

To induce us to continue or modify the loan, you release the bank and its employees, agents, attorneys and representatives, jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action for contribution and indemnity, whether arising at law or in equity (including without limitation, claims of fraud, duress, mistake, tortious interference, usury, or control), whether presently possessed or possessed in the future, for or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damage, breach of contract, fraud, violation of any statute or law, commission of any tort, or any other matter whatsoever or thing done, omitted or suffered to be done by the Bank, which has occurred in whole or in part, or was initiated at any time from the beginning of time up to and immediately preceding the moment of the execution of this Agreement.

You acknowledge, consent and voluntarily agree that (i) In the event of proceedings by the Bank against you and/or the collateral, you have the right to file a petition in bankruptcy under the United States Bankruptcy Code; (ii) You hereby give up, surrender and waive the protection of the "automatic stay" provisions of the Bankruptcy Code with respect to the collateral securing the Loans and further agree not to take a contrary position in any future bankruptcy case or proceeding such that the Bank may proceed against the collateral and/or Obligated Parties without the necessity for lifting of the automatic stay under the Bankruptcy Code (or any equivalent protection), without regard to adequate protection, equity in the subject property, the necessity of the subject property for an effective reorganization or any other matter affecting your right or ability to obtain immediate relief from stay; and (iii) In the event of a bankruptcy filing by or against you, you hereby agree not to seek any extension or modification of the 120 day exclusive period in which you may only file a plan of reorganization as provided in the Bankruptcy Code. You acknowledge that the Bank would not forgo current remedies and forbear or extend as to your credit as set forth herein if this were not a part of this agreement.

Except as expressly amended by this letter, the Loan and all loan documents shall continue, unmodified and unchanged.

Sincerely,

Michael Phillips
Senior Vice President

Agreed to by Borrower/Guarantor:

David Jacobs

CAROLINA FIRST

P.O. Box 12249, Columbia, SC 29211

September 14, 2009

NEWBERRY ATRIUM PROFESSIONAL CENTER LLC
115-ATRUIM WAY SUITE 204
COLUMBIA SC 29223

Re: Loan [redacted] dated February 20, 2007, in the original principal amount of $7,141,000.00 (the "Loan")

Dear Mr. Jacobs:

At your request, the Bank has agreed to modify the Loan as follows:

- the maturity date shall be extended from August 28, 2009 to November 28, 2009

Borrower and any guarantors agree that the Loan is fully enforceable in accordance with its terms; agree that this letter does not constitute a novation, waiver or release; agree that the Bank is not releasing any collateral; and agree that the Bank is under no obligation to grant any additional or future modifications.

Borrower and any guarantors reaffirm their obligations under the Loan; represent that they have no claim, defense or setoff in connection with the Loan; and release the Bank from any claim or defense that they might have as of the date of this letter.

To induce us to continue or modify the loan, you release the bank and its employees, agents, attorneys and representatives, jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action for contribution and indemnity, whether arising at law or in equity (including without limitation, claims of fraud, duress, mistake, tortious interference, usury, or control), whether presently possessed or possessed in the future, for or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damage, breach of contract, fraud, violation of any statute or law, commission of any tort, or any other matter whatsoever or thing done, omitted or suffered to be done by the Bank, which has occurred in whole or in part, or was initiated at any time from the beginning of time up to and immediately preceding the moment of the execution of this Agreement.

You acknowledge, consent and voluntarily agree that (i) in the event of proceedings by the Bank against you and/or the collateral, you have the right to file a petition in bankruptcy under the United States Bankruptcy Code; (ii) You hereby give up, surrender and waive the protection of the "automatic stay" provisions of the Bankruptcy Code with respect to the collateral securing the Loans and further agree not to take a contrary position in any future bankruptcy case or proceeding such that the Bank may proceed against the collateral and/or Obligated Parties without the necessity for lifting of the automatic stay under the Bankruptcy Code (or any equivalent protection), without regard to adequate protection, equity in the subject property, the necessity of the subject property for an effective reorganization or any other matter affecting your right or ability to obtain immediate relief from stay; and (iii) in the event of a bankruptcy filing by or against you, you hereby agree not to seek any extension or modification of the 120 day exclusive period in which you may only file a plan of reorganization as provided in the Bankruptcy Code. You acknowledge that the Bank would not forgo current remedies and forbear or extend as to your credit as set forth herein if this were not a part of this agreement.

Except as expressly amended by this letter, the Loan and all loan documents shall continue, unmodified and unchanged.

Sincerely,

Michael Phillips
Senior Vice President

Agreed to by Borrower/Guarantor:

David Jacobs



December 18, 2009

NEWBERRY ATRIUM PROFESSIONAL CENTER LLC
115 ATRUIM WAY SUITE 204
COLUMBIA SC 29223

Re: Loan [redacted] dated February 20, 2007, in the original principal amount of $7,141,000.00 (the "Loan")

Dear Mr. Jacobs:

At your request, the Bank has agreed to modify the Loan as follows:

- the maturity date shall be extended from November 28, 2009 until January 28, 2010

Borrower and any guarantors agree that the Loan is fully enforceable in accordance with its terms; agree that this letter does not constitute a novation, waiver or release; agree that the Bank is not releasing any collateral; and agree that the Bank is under no obligation to grant any additional or future modifications.

Borrower and any guarantors reaffirm their obligations under the Loan; represent that they have no claim, defense or setoff in connection with the Loan; and release the Bank from any claim or defense that they might have as of the date of this letter.

To induce us to continue or modify the loan, you release the bank and its employees, agents, attorneys and representatives, jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action for contribution and indemnity, whether arising at law or in equity (including without limitation, claims of fraud, duress, mistake, tortious interference, usury, or control), whether presently possessed or possessed in the future, for or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damage, breach of contract, fraud, violation of any statute or law, commission of any tort, or any other matter whatsoever or thing done, omitted or suffered to be done by the Bank, which has occurred in whole or in part, or was initiated at any time from the beginning of time up to and immediately preceding the moment of the execution of this Agreement.

You acknowledge, consent and voluntarily agree that (i) In the event of proceedings by the Bank against you and/or the collateral, you have the right to file a petition in bankruptcy under the United States Bankruptcy Code; (ii) You hereby give up, surrender and waive the protection of the "automatic stay" provisions of the Bankruptcy Code with respect to the collateral securing the Loans and further agree not to take a contrary position in any future bankruptcy case or proceeding such that the Bank may proceed against the collateral and/or Obligated Parties without the necessity for lifting of the automatic stay under the Bankruptcy Code (or any equivalent protection), without regard to adequate protection, equity in the subject property, the necessity of the subject property for an effective reorganization or any other matter affecting your right or ability to obtain immediate relief from stay; and (iii) In the event of a bankruptcy filing by or against you, you hereby agree not to seek any extension or modification of the 120 day exclusive period in which you may only file a plan of reorganization as provided in the Bankruptcy Code. You acknowledge that the Bank would not forgo current remedies and forbear or extend as to your credit as set forth herein if this were not a part of this agreement.

Except as expressly amended by this letter, the Loan and all loan documents shall continue, unmodified and unchanged.

Sincerely,

Michael Phillips
Senior Vice President

Agreed to by Borrower/Guarantor:

David Jacobs



CAROLINA FIRST

PO Box 12249 Columbia SC 29211

February 25, 2010

NEWBERRY ATRIUM PROFESSIONAL CENTER LLC
115 ATRUIM WAY SUITE 204
COLUMBIA SC 29223

Re: Loan #[redacted], dated February 20,2007, in the original principal amount of $7,141,000.00 (the "Loan")

Dear Mr Jacobs.

At your request, the Bank has agreed to modify the Loan as follows:

- The maturity date shall be extended from January 28, 2010 to April 28, 2010. All other terms will remain the same. Interest in the amount of $27,160 16 will be collected with this extension.

Borrower and any guarantors agree that the Loan is fully enforceable in accordance with its terms; agree that this letter does not constitute a novation, waiver or release, agree that the Bank is not releasing any collateral; and agree that the Bank is under no obligation to grant any additional or future modifications..

Borrower and any guarantors reaffirm their obligations under the Loan; represent that they have no claim, defense or setoff in connection with the Loan; and release the Bank from any claim or defense that they might have as of the date of this letter.

To induce us to continue or modify the loan, you release the bank and its employees, agents, attorneys and representatives, jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action for contribution and indemnity, whether arising at law or in equity (including without limitation, claims of fraud, duress, mistake, tortious interference, usury, or control), whether presently possessed or possessed in the future, for or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damage, breach of contract, fraud, violation of any statute or law, commission of any tort, or any other matter whatsoever or thing done, omitted or suffered to be done by the Bank, which

has occurred in whole or in part, or was initiated at any time from the beginning of time up to and immediately preceding the moment of the execution of this Agreement

You acknowledge, consent and voluntarily agree that (i) In the event of proceedings by the Bank against you and/or the collateral, you have the right to file a petition in bankruptcy under the United States Bankruptcy Code, (ii) You hereby give up, surrender and waive the protection of the "automatic stay" provisions of the Bankruptcy Code with respect to the collateral securing the Loans and further agree not to take a contrary position in any future bankruptcy case or proceeding such that the Bank may proceed against the collateral and/or Obligated Parties without the necessity for lifting of the automatic stay under the Bankruptcy Code (or any equivalent protection), without regard to adequate protection, equity in the subject property, the necessity of the subject property for an effective reorganization or any other matter affecting your right or ability to obtain immediate relief from stay; and (iii) in the event of a bankruptcy filing by or against you, you hereby agree not to seek any extension or modification of the 120 day exclusive period in which you may only file a plan of reorganization as provided in the Bankruptcy Code. You acknowledge that the Bank would not forgo current remedies and forbear or extend as to your credit as set forth herein if this were not a part of this agreement.

Except as expressly amended by this letter, the Loan and all loan documents shall continue, unmodified and unchanged. For purposes hereof, the term "Loan Documents" means any loan agreement, promissory note, amendment, modification or forbearance agreement, forbearance agreement, security agreement, mortgage, deed of trust and any other document or agreement evidencing or securing the Loan.

Sincerely,

Michael Phillips
Senior Vice President

Agreed to by Borrower/Guarantor

David Jacobs
Member

STATE OF SOUTH CAROLINA

LOAN MODIFICATION AGREEMENT

COUNTY OF RICHLAND

This Agreement, effective as of April 28, 2010 by and between **CAROLINA FIRST BANK**, 1501 Main Street, Columbia, South Carolina 29201 (the "Lender") and **NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC**, a South Carolina limited liability company ("the "Borrower").

WITNESSETH:

Whereas, Borrower executed its certain Promissory Note dated February 20, 2007 (the "Note"), whereby it promised to pay to the order of Lender the sum of Seven Million One Hundred Forty One Thousand and 00/100 ($7,141,000.00) Dollars (the "Loan") on or before February 28, 2009 with interest thereon as stated in the Note; and,

Whereas, the Note is secured by among other things, (i) a Mortgage and Security Agreement dated February 20, 2007 (the "Mortgage"), and recorded in Record Book 1236 at Page 1, in the Office of the Clerk of Court for Newberry County, South Carolina and (ii) an Unconditional Guaranty dated February 20, 2007 executed by David H. Jacobs (the "Guaranty") (the Mortgage and the Guaranty are sometimes collectively referred to as the "Security Documents")

Whereas, Lender is the owner and holder of the Note and the Security Documents and other documents evidencing and/or securing the Loan (collectively the "Loan Documents"); and

Whereas, Loan has been previously renewed and/or extended; and

Whereas, the parties have agreed to extend the maturity date, modify the interest rate, modify the repayment, add collateral and make certain other modifications to the Loan Documents;

NOW, THEREFORE, in consideration of the mutual covenants hereof, the receipt and sufficiency of which is hereby acknowledged, Lender and Borrower hereby agree as follows:

1. The maturity date of the Note is extended to April 28, 2011.

2. The interest rate on the Note is fixed at 5.5% per annum.

3. Payments under the Note shall be monthly payments of principal and interest based on a 25 year amortization to begin April 28, 2010.

4. Upon execution of this Agreement, Borrower shall deposit the amount of $150,000.00 into a Carolina First Bank money market account ("MM Account"). Borrower hereby assigns all of its rights, title and interest in the MM Account to the Lender to secure the payment of the principal, interest, and the satisfaction of all obligations under the Note. The MM Account shall hereinafter be included in the definition of Security Documents. Such assignment shall be absolute, and Borrower may not withdraw any funds from the MM Account unless approved by the Lender or otherwise provided for herein.

5. Funds in the MM Account are only to be used for tenant upfit for those leases approved in advance by Lender, or as otherwise provided for herein. Upon approval of a lease by Lender, Borrower shall submit requests for funds for the payment of the tenant upfit as such upfit is installed/constructed, which amounts shall be released from the MM Account.

6. In the event of a Default (as that term is defined in the Security Documents), Lender may apply the funds in the MM Account to any amounts due and owing under the Note.

7. Upon the maturity of the Note, any funds remaining in the MM Account shall be applied by Lender to any amounts due and owing under the Note.

8. Borrower shall obtain an EBIDA to debt service coverage ratio of 1.10 to 1 ("Coverage Ratio") on or before the maturity date of the Note.

9. The Security Documents shall continue to secure the repayment of the Note, as modified by this Agreement. It is intended that this Agreement will not disturb the existing priority of the Security Documents and other Loan Documents, which shall retain the same priority as originally recorded or filed. This Agreement shall not be construed as a novation of the Loan.

10. Except as modified by this Agreement, the terms of the Loan Documents and any and all other documents and instruments evidencing or securing the Loan shall remain in full force and effect.

11. Borrower acknowledges and agrees that Lender has performed all of its obligations to date in connection with the Loan and that there exists no defense, offset or counterclaim against enforcement of the Note or any other loan documents by Lender in accordance with their respective terms. To the extent there are defenses, offsets or counterclaims to the Note or any other loan documents, known or unknown, available to the Borrower or any person claiming through any of them, the Borrower, for herself, her heirs, successors

or assigns, hereby releases, acquits and forever discharges Lender, its officers, directors, agents, servants, employees, attorneys, representatives, shareholders, beneficiaries, successors and assigns, and any of them, from any and all claims, contingent claims, counterclaims, third party claims, liabilities, demands, losses, judgments, debts, actions, suits, causes of action, accountings, rights, damages, punitive damages, and interests, direct or derivative, known or unknown, choate or inchoate, that Borrower had, now have, may have at any time in the future, or claims to have had prior to the date of the execution of this Agreement as a result of, concerning, arising from, or with respect to any and all matters, dealings, occurrences, actions, failures to act, or events that are in any way related to the Note and the Loan Documents. This paragraph is intended to be a complete release of Lender from any claims by way of counterclaim or offset that the Borrower may have in relation to the Note and the loan documents and a waiver of any defense that the Borrower may have to the enforcement of the Note and the loan documents by the Lender.

12. This Agreement shall be binding on the parties hereto, their heirs, successors and assigns.

IN WITNESS WHEREOF, the undersigned have hereunto executed this Agreement effective on the day and year above written.

WITNESS:

Stephanie Woodie

Thom D. Stein

BORROWER:

NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC

By: Atrium Development Associates, LLC,
Its Manager

By: _____

Its: Mgr - Mbr

LENDER:

CAROLINA FIRST BANK

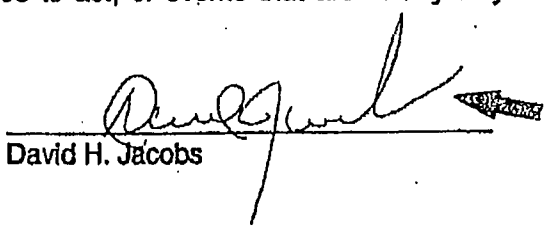
By: _____

Stacy Culbreath

Its: Senior Vice President

ACKNOWLEDGEMENT, RATIFICATION AND RELEASE BY THE GUARANTOR

The undersigned party has guaranteed the repayment of the Loan referenced above. By signing below he acknowledges and agrees to the terms of the above Loan Modification Agreement, ratify and reaffirm the debt evidenced thereby, and release, acquit and forever discharge Lender, its officers, directors, agents, servants, employees, attorneys, representatives, shareholders, beneficiaries, successors and assigns, and any of them, from any and all claims, contingent claims, counterclaims, third party claims, liabilities, demands, losses, judgments, debts, actions, suits, causes of action, accountings, rights, damages, punitive damages, and interests, direct or derivative, known or unknown, choate or inchoate, that they had, now have, may have, or claim to have had prior to the date of the execution of this Loan Modification Agreement as a result of, concerning, arising from, or with respect to any and all matters, dealings, occurrences, actions, failures to act, or events that are in any way related to the Note and the Loan Documents.



David H. Jacobs

STATE OF SOUTH CAROLINA

LOAN MODIFICATION AGREEMENT

COUNTY OF RICHLAND

This Agreement, effective as of May 10, 2011 by and between **TD Bank, N.A.**, 1501 Main Street, Columbia, South Carolina 29201 (the "Lender") and **NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC**, a South Carolina limited liability company ("the "Borrower").

WITNESSETH:

Whereas, Borrower executed its certain Promissory Note dated February 20, 2007 (the "Note"), whereby it promised to pay to the order of Lender the sum of Seven Million One Hundred Forty One Thousand and 00/100 ($7,141,000.00) Dollars (the "Loan") on or before February 28, 2009 with interest thereon as stated in the Note; and,

Whereas, the Note is secured by among other things, (i) a Mortgage and Security Agreement dated February 20, 2007 (the "Mortgage"), and recorded in Record Book 1236 at Page 1, in the Office of the Clerk of Court for Newberry County, South Carolina and (ii) an Unconditional Guaranty dated February 20, 2007 executed by David H. Jacobs (the "Guaranty") (the Mortgage and the Guaranty are sometimes collectively referred to as the "Security Documents")

Whereas, Lender is the owner and holder of the Note and the Security Documents and other documents evidencing and/or securing the Loan (collectively the "Loan Documents"); and

Whereas, Loan has been previously renewed and/or extended; and

Whereas, the parties have agreed to extend the maturity date, reduce the principal balance, modify the repayment, and make certain other modifications to the Loan Documents;

NOW, THEREFORE, in consideration of the mutual covenants hereof, the receipt and sufficiency of which is hereby acknowledged, Lender and Borrower hereby agree as follows:

1. Upon execution of this Agreement, the amount of $150,000 shall be released from TD Bank, N.A. money market account #7102555383 and applied to the Loan balance, resulting in a remaining principal balance of $6,099,914.40.

2. The maturity date of the Note is extended to May 10, 2012.

3. The interest rate on the Note shall remain fixed at 5.5% per annum.

4. Payments under the Note shall be monthly payments of principal and interest in the amount of $39,299.36 (payment amount is based on an amortization of 272 months) to begin June 10, 2011. The entire outstanding principal balance of the Note and any outstanding accrued interest shall be due and payable in full on May 10, 2012.

5. Borrower shall obtain a debt service coverage ratio of no less than 1:1 on the Newberry Atrium Professional Center ("Project") on or before May 10, 2012. Debt Service Coverage Ratio is defined as the Net Operating Income of the Project divided by the Debt Service (current maturities of long term debt plus interest expense) of the Project.

6. Borrower shall provide Lender copies of Borrower's annual tax return within fifteen (15) days of filing, and if filing is not made on or prior to the filing date for the then current tax year, then Borrower shall provide Lender with copies of any extensions filed for such tax year.

7. Borrower shall provide Lender the annual rent roll schedule for the Project within one-hundred twenty (120) days of the end of each fiscal year.

8. Guarantor shall provide Lender a copy of his individual tax return within fifteen (15) days of filing, and if filing is not made on or prior to the filing date for the then current tax year, then Guarantor shall provide Lender with copies of any extensions filed for such tax year.

9. Guarantor shall provide Lender within ninety (90) days of the end of each calendar year a personal financial statement which shall include a listing of all contingent liabilities (including amounts) of Guarantor.

10. Borrower and Guarantor shall provide additional financial information on the Project and/or the Guarantor, including interim updates, that may be requested from time to time by Lender.

11. The Security Documents shall continue to secure the repayment of the Note, as modified by this Agreement. It is intended that this Agreement will not disturb the existing priority of the Security Documents and other Loan Documents, which shall retain the same priority as originally recorded or filed. This Agreement shall not be construed as a novation of the Loan.

12. Except as modified by this Agreement, the terms of the Loan Documents and any and all other documents and instruments evidencing or securing the Loan shall remain in full force and effect.

13. Borrower acknowledges and agrees that Lender has performed all of its obligations to date in connection with the Loan and that there exists no defense, offset or counterclaim against enforcement of the Note or any other loan documents by Lender in accordance with their respective terms. To the extent there are defenses, offsets or counterclaims to the Note or any other loan documents, known or unknown, available to the Borrower or any person claiming through any of them, the Borrower, for herself, her heirs, successors or assigns, hereby releases, acquits and forever discharges Lender, its officers, directors, agents, servants, employees, attorneys, representatives, shareholders, beneficiaries, successors and assigns, and any of them, from any and all claims, contingent claims, counterclaims, third party claims, liabilities, demands, losses, judgments, debts, actions, suits, causes of action, accountings, rights, damages, punitive damages, and interests, direct or derivative, known or unknown, choate or inchoate, that Borrower had, now have, may have at any time in the future, or claims to have had prior to the date of the execution of this Agreement as a result of, concerning, arising from, or with respect to any and all matters, dealings, occurrences, actions, failures to act, or events that are in any way related to the Note and the Loan Documents. This paragraph is intended to be a complete release of Lender from any claims by way of counterclaim or offset that the Borrower may have in relation to the Note and the loan documents and a waiver of any defense that the Borrower may have to the enforcement of the Note and the loan documents by the Lender.

14. This Agreement shall be binding on the parties hereto, their heirs, successors and assigns.

(Signatures on the following page)

LENDER:

CAROLINA FIRST BANK

Stephanie Woodie

By: Robin Nichols

Its: Assistant Vice President

IN WITNESS WHEREOF, the undersigned have hereunto executed this Agreement effective on the day and year above written.

WITNESS:

Stephanie Woodlee

BORROWER:

NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC

By: Atrium Development Associates, LLC,
Its Manager

By: David Jenk

Its: MANAGER / MEMBER

ACKNOWLEDGEMENT, RATIFICATION AND RELEASE BY THE GUARANTOR

The undersigned party has guaranteed the repayment of the Loan referenced above. By signing below he acknowledges and agrees to the terms of the above Loan Modification Agreement, ratify and reaffirm the debt evidenced thereby, and release, acquit and forever discharge Lender, its officers, directors, agents, servants, employees, attorneys, representatives, shareholders, beneficiaries, successors and assigns, and any of them, from any and all claims, contingent claims, counterclaims, third party claims, liabilities, demands, losses, judgments, debts, actions, suits, causes of action, accountings, rights, damages, punitive damages, and interests, direct or derivative, known or unknown, choate or inchoate, that they had, now have, may have, or claim to have had prior to the date of the execution of this Loan Modification Agreement as a result of, concerning, arising from, or with respect to any and all matters, dealings, occurrences, actions, failures to act, or events that are in any way related to the Note and the Loan Documents.



David H. Jacobs

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AMENDMENT TO PROMISSORY NOTE

THIS AMENDMENT ("Amendment") IS MADE this **23**rd day of **May, 2012** to that certain Promissory Note dated **February 20, 2007** (as previously amended, modified or supplemented, the "Note") in the original sum of **Seven Million One Hundred Forty-One Thousand and Zero Cents ($7,141,000.00)** made by Newberry Atrium Professional Center, LLC (hereinafter referred to as the "Borrower") in favor of TD Bank, N.A. (hereinafter referred to as the "Bank").

WITNESSETH

WHEREAS, Borrower wishes to amend and modify the Note; and

WHEREAS, Bank is willing to permit the Note to be modified as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained and Borrower's promise to pay Bank all sums due under the terms of the Note as modified hereby, it is agreed that the term and repayment of the Note shall be amended and modified as follows:

1. The maturity date as referenced in the Note shall be extended to **August 8, 2012.**
2. The Borrower and Guarantors represent: it has no claims, defenses, counterclaims or rights of setoff or recoupment against the Bank under any of the loan documents or otherwise and each hereby waives any such claims, defenses, counterclaims or rights of setoff or recoupment.
   The Borrower and Guarantors releases and discharges lender and its agents, attorneys, employees and officers from any and all actions, causes of action, claims, demands or damages of any kind on account of or arising out of any event, action, omission or matter (whether known or unknown) occurring prior to the date of this agreement, including but not limited to the negotiation, execution, delivery or performance of the loan documents, the administration of the loan documents, the negotiation and actions taken with respect to the defaults existing or occurring under the loan documents and the loan transactions evidenced by the loan documents.
3. Principal Balance. The Borrower(s) acknowledge(s) and agree(s) that the current outstanding principal balance of the Note as of the date hereof is **$5,978,252.88.**

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EXCEPT AS MODIFIED HEREBY, this Amendment is contingent upon Borrower's compliance with all of those terms and conditions contained in the Note and loan documents executed in connection therewith which are incorporated herein by reference. Upon breach of any term or condition contained therein, Bank shall have the right to declare the Note in default and demand payment in full of the principal balance remaining unpaid, together with all interest which shall have accrued thereon.

ALL TERMS of the Note and any prior amendments, modifications and/or extension shall remain in full force, except as modified by this Amendment shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

Accepted and Legally Bound:

[WITNESS][Attest]:

BORROWER:

Newberry Atrium Professional Center, LLC

David H. Jacobs, Manager

Agreed to and Accepted:

GUARANTOR:

David H. Jacobs, individually

Note - The image is too larger for the printed page.

Agreed to and Accepted:

TD BANK, N.A.

Eric O'Toole
Duly Authorized Representative

Loan no. [redacted]
vb

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF RICHLAND CASE NO: 2012-CP-40-6074

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs,
Defendant.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF RICHLAND CASE NO: 2012-CP-40-7540

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs and James A. McFarland,
Defendants.

UNITED STATES BANKRUPTCY COURT
District of South Carolina
Case No. 13-01377-JW

In re:
Newberry Atrium Professional Center, LLC,
Debtor,

Newberry Atrium Professional Center, LLC,
Plaintiff,
vs.
TD Bank, NA,
Defendant.

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D E P O S I T I O N

WITNESS: David H. Jacobs

DATE: April 26, 2013

TIME: 9:30 a.m.

LOCATION: Columbia, South Carolina

TAKEN BY: Attorney for the Plaintiff
Jody A. Bedenbaugh, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

REPORTED BY: KATY MCCORMICK
Stenographic Court Reporter

APPEARANCES:

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803-779-2650
fjordan@bqslaw.com

(INDEX REAR OF TRANSCRIPT)

STIPULATION: It is stipulated in and between counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent reserves the right to read and sign the deposition transcript.

(The reading and signing of the deposition by the witness is waived.)

(Plaintiff's Exhibits 1-19 premarked for identification.)

DAVID H. JACOBS, being first duly sworn, testified as follows:

EXAMINATION

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, we have met before but for the record I am Jody Bedenbaugh here on behalf of TD Bank. Today we're here for your deposition in two of the State Court actions that TD filed against you as well as the adversary proceedings against the parties in the Newberry Atrium bankruptcy case.

The deposition shouldn't last all that long, I am going to try to get out of here shortly after lunch if we can.

PLAINTIFF'S EXHIBIT 2

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If you need a break at any time please let me know, don't hesitate. For her benefit and the benefit of the transcript you and I need to make sure we do not talk over each other and that all of your responses are verbal as opposed to nodding your head.

If you don't understand any of my questions or didn't hear my question or just want me to repeat it, please ask me to do so otherwise I'll assume you understood and heard the question; is that fair?

A. Yes.

Q. If your lawyer objects, most of the time it will be for my benefit and I may rephrase the question. If I don't rephrase the question you are to answer the question that I asked unless he instructs you not to because it's a privilege; do you understand?

A. Yes, sir.

Q. Are you under the influence of any drug or alcohol that would impair your ability to answer truthfully today?

A. No.

Q. Did you do anything to prepare for this deposition?

A. Reviewed my materials.

Q. And I don't want to know about any materials from your lawyer but other than that what did you review?

A. That's basically it.

Q. Did you discuss the case or this deposition with

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anyone other than your attorney or the attorney for your bankrupt entity?

A. No.

Q. What's your place and date of birth?

A. Tucson, Arizona, November 29, 1945.

Q. What's your business address now?

A. 115 Atrium Way, Columbia, SC.

Q. Are you at a particular suite there?

A. 204.

Q. What about your home address?

A. 6133 Lakeshore, Columbia.

Q. How long have you been at Lakeshore?

A. Twenty years.

Q. Are you married?

A. Yes.

Q. What's your wife's name?

A. Peggy.

Q. How long have you been married to Peggy?

A. About 40 years.

Q. Do you all have any children?

A. Yes.

Q. What are their names?

A. Kari and Kim.

Q. How do you spell Kari?

A. K A R I.

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Q. And is Kim just Kim not Kimberly?

A. She goes by both ways.

Q. Any other children?

A. No.

Q. Are they both adults?

A. Yes.

Q. Who is your current employer?

A. Atrium Development.

Q. What is your title there?

A. President.

Q. What are your duties at Atrium Development?

A. Manage property, develop property.

Q. Manage and develop property?

A. Yes.

Q. Are we talking about commercial real estate?

A. Yes.

Q. How long have you been doing that?

A. Over 25 years.

Q. Twenty-five years?

A. About.

Q. And that's been with Atrium Development the whole time?

A. The last 25 years.

Q. What did you do before that?

A. Worked for other developers.

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Q. How long did you work for developers before you went out on your own with Atrium Development?

A. Seven, eight years, 10 years.

Q. So for the past 35 years you've been in the real estate development business; is that correct?

A. Yes.

Q. Now, I am somewhat familiar with account background but I understand you have developed a number of office buildings under the Atrium name brand; is that correct?

A. Yes.

Q. Tell me about that.

A. The buildings are distinguished by an atrium in the interior to give it a unique feel and look.

Q. Are we talking about office buildings normally?

A. Primarily office, medical office, commercial office.

Q. How many of these Atrium-brand office buildings have you developed over the years?

A. Maybe 10 or 12.

Q. Are they located in South Carolina only or in other states as well?

A. South Carolina, North Carolina, Colorado.

Q. Okay. I understand you've also developed a number of daycare development center-type properties under the name Gateway; is that correct?

A. Yes.

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Q. How many Gateway Academy developments have you had over the years?
A. Twenty, somewhere between 20 to 22.
Q. Where are they located?
A. Colorado, North Carolina and South Carolina.
Q. Now, other than the Atrium brand office buildings and the Gateway child development centers do you have any other development projects currently?
A. I have developed some outparcel retails over my career.
Q. Okay. Where is that?
A. Tennessee.
Q. Anywhere else?
A. That's it.
Q. How are the projects typically financed?
A. Bank loans.
Q. And are you primarily the point person in connection with the bank financing of the developments or is someone else with Atrium a person primarily responsible for that?
A. Over the recent years I have been the point person.
Q. It's fair to say you've got a substantial amount of real estate financing experience in connection with your development line of work?
A. Yes.
Q. In terms of how the deals are structured do you

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typically place the properties in an entity of some type or do you hold them within your Atrium holding companies? How does that work?
A. Typically it's a single purpose entity.
Q. In connection with the financing are you generally asked to guarantee the debts of the single purpose entities?
A. The loans that I have obtained have all been collateralized loans and they have asked me -- commercial lenders, banks -- have asked me to sign a guarantee to back up that collateral.
Q. Okay. Now, we'll get to your Subpoena response that I just received yesterday in a little while and I have got copies of certain current guarantees, but in the past do you know how many guarantees you have executed for debts on these single purpose entities?
A. I would assume. Most every construction loan had a guaranty.
Q. So we talked about 20 to 22 Gateway projects and 10 to 12 Atrium projects in addition to some outparcel retail developments. Generally at the outset of financing you would have been asked to guarantee those loans; is that correct?
A. Yes.
Q. You've been handed Exhibit 1 to your deposition which is a statement of financial condition of David H. Jacobs dated June 30, 2012; do you see that?

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A. Yes.
Q. Does that appear to be a true and correct copy of your statement of financial condition as of that date?
A. Yes.
Q. According to the Statement of Assets on the first page it's got the cash balance in an amount of approximately $25,000; do you see that?
A. Yes.
Q. Do you know what your current cash balance is?
A. Probably in the same range. Day by day it goes up and down.
Q. I understand. Do you know if you have a financial statement that's been prepared that's more recent than this one?
A. No.
Q. You don't know or you don't have one?
A. No, I don't have one.
Q. Where are your checking accounts located?
A. I have one at Wells Fargo, one at Carolina First. I pretty much consolidated them to Wells Fargo.
Q. The net worth indicated here of a little over $20,000; have there been any material changes to that since the date of this financial statement?
A. I wouldn't call them material. It's all up and down and it's really based on appraisals prior to this date.
Q. So I guess I could characterize your answer as you

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don't know of any material changes except for the fluctuation of the underlying real estate prices; is that correct?
A. Yes. There have been times during the last couple of years that I have had to borrow money, I have paid it back, but I can't tell you today additional debts that are significantly different than this.
Q. Okay. Now this net worth and financial statement, was it accurate to the best of your knowledge as of June 30, 2012?
A. To the best of my knowledge, yes.
Q. Have you transferred any material assets since that time?
A. No, not since, '12.
Q. Have you incurred any material liabilities other than the ones identified in this statement?
A. No.
Q. If you'll look at page 2, the second page on Exhibit 1 it says Notes of Financial Statement at the top; do you see where I am?
A. Yes.
Q. It's got a Wells Fargo security account listed with an estimated current value of $471,000; do you see that?
A. Yes.
Q. It says this entire account is pledged to secure a loan?
A. Yes.

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Q. What loan was that?
A. I needed to borrow money to pay down the loan for Gateway financing.
Q. When was that loan taken out?
A. About a year ago. About a year ago.
Q. What is the balance of that loan?
A. Five million and some-odd.
Q. Is that loan also secured by real estate?
A. Yes.
Q. Is it one of the Gateway properties?
A. Yes.
Q. Is the current balance of that securities account approximately the same?
A. About that.
Q. This Pediatric Web.com, what is that?
A. It's an investment that I made with some doctors when I was working in Colorado for a website for pediatric information.
Q. Okay. And you've got a value of $50,000; is that valuation still the same today?
A. I would doubt that it is but that's what I paid for it.
Q. Okay. So that's your cost essentially?
A. Yes.
Q. Now, going down to paragraph 6 on this page you've got

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the various Note Receivables listed?
A. Yes.
Q. Do you have documentation for these notes payable to you?
A. I don't have in every case a signed, sealed note but I do have a record of the money being put into them.
Q. And I believe you indicated the notes to your financial statement that collectability of some of these are in doubt; is that correct?
A. Yes.
Q. Which of these do you doubt the collectability of?
A. I think 121 Market is very doubtful. We've had to abandon that project.
Q. Where is that project?
A. Wilmington.
Q. By abandon what do you mean?
A. I mean that we are not doing anything to move it forward and the land that was involved in it is not available to us.
Q. Has it been foreclosed upon?
A. No.
Q. Then what happened to the property?
A. It was never acquired.
Q. Does that entity own any assets?
A. No.

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Q. Did you guarantee any obligations in connection with that development project?
A. No.
Q. Okay. Any others that you believe are not collectable or collectability is in doubt?
A. That they are all certain circumstances -- I think they are all in doubt because of certain circumstances in the economy. And if they are collectable it will be years for the process to work out.
Q. Are any of these secured by any collateral?
A. Yes.
Q. Which ones?
A. Land Acquisition, that's an LLC that I invested in that Land Acquisition has a participation in some raw land.
Q. And you have security interest in that land?
A. No.
Q. Okay?
A. The LLC has it. My note is to the LLC.
Q. Okay. But did the LLC grant mortgage or anything back to you?
A. No.
Q. Do you know if any of these LLCs granted any collateral back to you directly?
A. They did not.
Q. The Land Acquisition has a note to buy it, which I

Page 16

understand indicates that the payment is dependent on the sale of improved land; is that correct?
A. Yes.
Q. What is the status of the salable efforts of that entity?
A. The property continues to be marketed. Funds are still trying to be raised to complete infrastructure. There are a number of potential sales over the years. Financing for infrastructure is still the major focus to get that done.
Q. Okay. Same question for Langtree Properties, LLC. What is the status of that entity and the efforts to sell the property?
A. It's the same situation. Those two LLCs are invested in a project called Langtree at the Lake in Charlotte.
Q. Has the infrastructure, is that currently being developed or are you still awaiting funding for that?
A. Parts of it have been acquired for small pieces of property.
Q. Parts of the infrastructure?
A. Yes.
Q. Has been completed?
A. Under construction.
Q. Okay. And is financing immanent for any other part of it?
A. It's been a process that's gone on for about seven or

Page 17

eight years, so I always believe it's immanent but it's not completed.

Q. Okay. Atrium at Middle Sound Land, what is the status of any efforts to sell that property?

A. It has been ongoing also for about I guess five or six years. We were successful in putting infrastructure in at a significant cost to the two partners. The infrastructure is in place for the majority of the property.

Q. And sales efforts are ongoing for that property?

A. Yes.

Q. Have you had any recent interest or any reason to believe that a sale may be likely to happen?

A. I am always optimistic but in today's environment where it is difficult to get funding for anything that's been the biggest problem that we faced. But there has been interest and we have had numerous inquiries. Ultimately it has come down to the lack of the ability for the buyer to obtain financing.

Q. We'll talk about Newberry Atrium in a little bit. What is Atrium Northeast Limited Partnership?

A. It's an office building.

Q. And is that loan collectable or not?

A. It really will depend on how the releasing goes on the property over the next year or two.

Q. Tell me what that means.

A. It means during the financial meltdown the building

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lost 40 percent of the building. People went out of business, went away, couldn't pay their rent.

Q. Are you involved in connection with efforts to release the remaining space?

A. Yes.

Q. Same thing with Atrium at Middle Sound. Do you have any involvement with efforts to sell that property?

A. I do not.

Q. Do you have any involvement with the ongoing efforts to complete the infrastructure for that property?

A. For which property?

Q. Atrium at Middle Sound.

A. I do not have a day-to-day involvement with the infrastructure.

Q. Okay. For the Langtree entities, do you have any day-to-day involvement with the development of those projects?

A. Not currently.

Q. The 121 Market, I don't see that. Is that entity operating at all?

A. No.

Q. Go to the next page, page 3. You've got two notes payable there. What is the status of those notes?

A. I am able to continue to make payments as agreed.

Q. Are both of those loans current?

A. Yes.

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Q. One more question on the notes receivables on the last page. Are you receiving any monthly payments on any of those?

A. No.

Q. The next page is page 4. This is titled Commercial Real Estate Owned; do you see where I am?

A. Yes.

Q. Pages 4 through 7 are the pages for this particular schedule. Is this an accurate listing of the commercial real estate related to the entities that you own?

A. Yes.

Q. You don't own any commercial real estate that's not listed on these documents; is that correct?

A. To the best of my knowledge.

Q. To the best of your knowledge no, you don't --

A. No, I don't own anything that I believe I have missed on this list.

Q. Okay. Let's look at these entities individually beginning with Atrium Northeast Limited Partnership. That's the building you were just talking about that has a 40 percent vacancy; is that correct?

A. Yes.

Q. And it's got an appraised value of 6.9 million?

A. Yes.

Q. Do you know the date of that appraisal?

A. It was probably during the time that it was financed

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which was seven, eight years ago.

Q. And when does that financing mature?

A. About 18 months.

Q. Eighteen months from now?

A. Yes.

Q. Who is that financing with?

A. Amalgamated Bank.

Q. Did you guarantee any portion of that financing?

A. No.

Q. The loan amount listed here, is it roughly still the same today?

A. Approximately.

Q. The appraised value, do you believe that has changed?

A. Yes.

Q. What would you ballpark that to be today?

A. My expectation is that it will be less because when the building was financed it was about 87 percent leased and it would be my expectation that was based on an income approach. I would say a new valuation today based on the current occupancy it would be a significant reduction, 30 percent, 40 percent.

Q. Do you still own 92.63 percent of that entity that owns that property?

A. Yes.

Q. Who owns the remaining part of that piece?

A. Partners in the building.

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Q. Are any of those partners related to you?
A. No.
Q. Do you have copies of the partnership agreement for that entity?
A. Yes.
Q. The next property listed is Gateway Properties, LLC indicating 14 Gateway Academy Child Development Centers located in South Carolina and North Carolina; do you see that?
A. Yes.
Q. Do you still own those, that entity?
A. Yes.
Q. Each of those has an appraised value indicated on this document. Do you believe the value to be roughly the same today or something different?
A. I would say it's different. And unfortunately these values too were done and financing when there were not the pressures on the economy for special purpose entities such as these.
Q. Do you know what these properties would be worth today or do you have an opinion as to what these properties would be worth today?
A. Again, just in keeping with the nature of the market today I would expect that they have declined in value 20, 30 percent.
Q. Are you a guarantor of any debt in connection with

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those properties?
A. Yes.
Q. Which ones?
A. The North Carolina locations.
Q. What is the amount of the debt for those locations?
A. I am guessing somewhere in the neighborhood of about five to $7,000,000.
Q. What is the status of that debt?
A. The status is it's paid currently and it's still owed.
Q. That debt is still current; is that what your testimony is?
A. Yes.
Q. When did it mature?
A. Everything matures in a year and a half, approximately a year and a half, 18, 20 months, something like that.
Q. Have you identified any financing for that debt upon maturity?
A. Not at this time.
Q. The South Carolina locations indicated -- your testimony indicated you are not the guarantor of any debt in connection with those; is that correct?
A. This a conduit loan which I have guaranteed and it's a non-recourse loan for carve-outs.
Q. Carve-outs; explain that to me.
A. That means that if we were to walk away from the

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properties, we can't pay them off, the lender takes them back. And unless I have done anything that is inappropriate, my understanding is that I would not be held personally liable for it.
Q. When does that debt mature?
A. Everything will mature in about 18 to 20 months. They are all tied together on due dates.
Q. And have you identified or has that entity identified any replacement financing yet for that debt?
A. No.
Q. Do you know yet whether you intend to try to refinance that or if you would allow that property to be recovered by the lender?
A. My objective would be to try and refinance it.
Q. Do you still own 25 percent of that entity?
A. Yes.
Q. Who owns the remaining 25 percent?
A. My partner.
Q. Who is your partner in that entity?
A. The Estate of Dave Burner.
Q. Can you spell that last name?
A. B U R N E R.
Q. How did he obtain that interest? His estate presumably obtained it upon his death but how did he obtain that interest?

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A. We were partners.
Q. Did he purchase any part of that interest from you or did he go in with you originally?
A. We went in originally.
Q. Was his original interest always 25 percent?
A. No.
Q. When did his interest change?
A. His interest continues to be approximately 50 percent.
Q. Has it been 50 percent throughout?
A. Yes.
Q. Who owns the other approximately 25 percent?
A. My family.
Q. Any particular member of your family?
A. My children and my wife.
Q. Do they own that interest through an entity of some sort or do they own it individually?
A. In trust.
Q. Is that one trust or multiple trusts?
A. Multiple.
Q. What are the names of those trusts?
A. Kari Jacobs Irrevocable Trust, Kimberly Jacobs Irrevocable Trust, Peggy Jacobs.
Q. Is Peggy Jacobs an irrevocable trust as well?
A. No, she just owns it.
Q. When did those trusts acquire that interest?

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A. Several years ago Dave and I did an estate planning because he and I both had some health issues and we decided it was time to make arrangements for our family.
Q. Do you recall the approximate date of those transfers?
A. My recollection is it was several years ago, two or three years ago, three and a half, something like that.
Q. So somewhere between two and three and a half years ago?
A. Something like that.
Q. Now, did the trust or your wife, Ms. Jacobs, transfer anything back to you in exchange for that interest or was it simply a transfer by you to her?
A. It was part of some estate planning that both Dave and I used.
Q. I understand your testimony is it was part of estate planning, but aside from the estate planning function of it did they transfer any assets or any money to you in exchange?
A. No.
Q. Do you have copies of the operating agreement for the Gateway entity?
A. Yes.
Q. Do you have copies of the documentation in connection with the transfer to the two trusts and your wife?
A. I believe I do. I don't have it but I assume that it is available to the attorneys that helped.

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Q. What attorney helped you on the estate planning side?
A. Tom Cothran (ph).
Q. How is the Gateway Properties, LLC managed?
A. I do it currently.
Q. Okay. Are you the managing member?
A. Yes.
Q. Does that entity produce any distributions?
A. It's veritable, but yes, it produces distributions.
Q. You say it varies. What is the typical variance on that?
A. Maintenance, replacements. These buildings are some 20 years old.
Q. So there's ongoing obligations that sometimes require the distributions to be lower; is that your testimony?
A. Yes, the distributions for repairs, maintenance, whatever the issues may be we have to deal with them.
Q. What is roughly the amount you receive and on what periodic basis do you receive it?
A. I would say depending on the month 10,000 a month maybe.
Q. That's from Gateway Properties, LLC?
A. From all the Gateways.
Q. So that would include Gateway Colorado, LLC as well?
A. Yes.
Q. Is that just your portion or the portion for all

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partners?
A. No, that would just be mine but that's again up and down. Everybody participates in the expenses of the properties.
Q. Now the financing that you have on the South Carolina locations, the non-resource financing, was that the original financing for that?
A. No.
Q. What was the original financing?
A. The original financing was with multiple banks including Carolina First who was very helpful and active in construction loans with these properties, among others, but they were a very active participant in this.
Q. When was that original financing?
A. Well, I can't tell you the exact date of each of the financings but we started developing these in 1995 and built these over a period of 10, 12 years, 13 years. Carolina First has been an active partner in the Gateway developments among other things that Carolina First did, and they were very interested in a lot of the development that I did including Gateway and some of the other office buildings. Carolina First has been very active in my development career for 12 or 15 years.
Q. And then this non-recourse loan that's the current debt on the property, when did you obtain that?
A. Early 2000's maybe.

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Q. Early of 2010 or?
A. No, no 2000s.
Q. And then when you did that refinancing did that generate any cash out of the property at the time?
A. It did. We paid off our loans and we had some cash out.
Q. How much was that approximately?
A. Several millions of dollars.
Q. And do you know approximately how much it was?
A. No, several million.
Q. More than five?
A. No.
Q. Somewhere between one and $5,000,000?
A. Yes.
Q. And your portion of that was half at that time?
A. Yeah, in the early 2000s, yeah.
Q. What did you do with your portion of the cash out from that refinancing?
A. I invested it in other real estate.
Q. Do you remember which particular investment?
A. It goes all over the place. I mean, I invested in more Gateways. I invested in developments of additional office buildings. I invested it in new opportunities at Langtree, at Middle Sound, at 121 Market. I invested it in all my holdings that grew as a result of that cash. I had some reserves that I

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used to feed my real estate investments.
Q. Did you gift or transfer a portion of the cash obtained from that financing to any relative or to any entity?
A. My family.
Q. And any particular member of your family?
A. All three.
Q. Do you know how much you gifted to them at that time?
A. Again a couple million.
Q. Did you gift that to them directly or did any portion of that go to a trust?
A. Combination.
Q. And the trusts, would that have been the two that we identified earlier or another trust?
A. Those two.
Q. The North Carolina locations, that debt that you indicated you had guaranteed in the neighborhood of five to $7,000,000, was that the original financing for those properties?
A. No, that was -- those were permanent loans that we took out to repay the construction loans.
Q. When you took out the construction loan was there any cash generated by that financing transaction?
A. No, had to put cash in.
Q. The next entity that you have -- before we get to that there's a note in parentheses that all ownership interests are

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collateralized by loan agreement; do you see that note?
A. Yes.
Q. What loan agreement are you referring to?
A. I borrowed money against some of these assets from time to time.
Q. From whom did you borrow that money?
A. A guy named Rick Howard, a long-term partner of mine in North Carolina.
Q. Do you currently owe Mr. Howard any money?
A. Yes.
Q. How much?
A. I think it's about a hundred thousand maybe.
Q. Okay. And what is the extent of your ability to borrow against these assets under your agreement with Mr. Howard?
A. It's really depending on his financial position at the time that I need any money. I have lent him money over the years, he's lent me money over the years. We work together to try to assist each other.
Q. Now, getting to the Gateway Colorado LLC, the appraised value for that, is your testimony the same that you believe that that has changed?
A. I would say so. I think the single purpose entities certainly have not done as well in this environment only because I think the environment for child care has been diminished

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during this meltdown, and I just think the general real estates for these type of entities are at a decline.
Q. Do you have an estimate of what these are worth today?
A. Again I would say -- and each one of course is a different location and a different place but my guesstimate would be somewhere in the 20 to 30 percent decline value.
Q. Is the loan amount about 7.3 million identified here on this schedule, is that still roughly the same?
A. Yes, these are 30 year amortizations so I would assume they haven't made a lot of progress in the last recent couple of years.
Q. Who is that loan facility with?
A. Which one?
Q. The Gateway Colorado, LLC?
A. Bank of America.
Q. Are you a guarantor of that loan?
A. Yes.
Q. When was that loan entered into?
A. About seven and a half, eight years ago. Since they are all coming due in the next 18 months that's about when it was done.
Q. Was Bank of America the original financing for these properties?
A. No.
Q. Are you a guarantor for the Bank of America loans?

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A. It's the same Bank of America loan that I mentioned above, it's the South Carolina entities.
Q. So it's non-recourse according to your testimony for the most part; is that correct?
A. If I don't pay it off, they won't renew it, they get the building.
Q. When you did that refinancing and got the cash out that we talked about earlier, that was the same transaction as these Colorado entities; is that correct?
A. Yes, that's correct.
Q. Do you still own 18.75 percent of that entity?
A. Yes.
Q. Who are the other owners of that entity?
A. The partners in Colorado and the Burner estate and my family.
Q. Okay. How much of that entity does your family own?
A. I would guess 18 percent maybe.
Q. So basically the same percentage as you own?
A. Yeah.
Q. Was that also transferred to the two trusts and to your wife individually as the other one we talked about?
A. Yes.
Q. And that was done somewhere between two and a half or three years ago as well?
A. Yes.

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Q. And also with that one, your family did not exchange anything to you in return for those interests?
A. No, they did not.
Q. Did they assume any debt connection with that transfer or the earlier one?
A. No.
Q. The note there on the bottom of this page about the interest being collateralized by a loan agreement, is that the same one with the gentleman in North Carolina Rick Howard?
A. Yes.
Q. The next page, page 5, Gateway Properties, LLC references new Gateway locations in Charlotte, North Carolina; do you see where I am?
A. Yes.
Q. Is your testimony the same that the appraised value would be different today?
A. I would think so. I think the value is consistent with the decline in the real estate valuation in the market today.
Q. These appraised values have a number right beside the word appraised value. What is that number?
A. That was the capitalization rate that they were using at that time.
Q. Is that taken off the appraisal of some other source?
A. My internal calculation.

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Q. Your calculation of what the capital rate is?
A. Was at that time the value of the appraisals were done.
Q. Is that the same cap rate that they used on the appraisal or did they use something else?
A. I think that's consistent with the appraisal at that time but I don't remember with the appraisal cap rates.
Q. For the Newberry Atrium development what would you consider to be an appropriate cap range for that at this time?
A. Looking at the appraisal that was done by Wingard and Associates during the depth of the recession several years back he used -- and this is an appraiser that the bank used, so I assume that I should have some confidence in his valuation approach. At that time he indicated approximately 8.75 cap rate on the property at that time, which provided and as is where is value of about 5.8 million. He further indicated that the stabilization of that property would be valued pushing $8,000,000, maybe 7.9 million dollars. That was back really in the depth of the recession in 2011.
As you may be aware I have ordered an appraisal using the former bank appraiser, and his indication to me is the valuation for medical office buildings on campus have increased in the recent years. He will be completing his appraisal in the next several days. And I asked him what the valuation might be and why it increased, and his indication was the valuations

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increased because of growing demand for upon-campus medical facilities, the long-term nature of the leases, the hospitals, and doctors have extended periods of time, some leases have excalating rates. He anticipates the valuation will come in more favorable possibly in the mid seven and a half cap range based on the research and sales that he's done, but I won't really have an authoritative answer until his appraisal is done in the next several days.
Q. Apart from his appraisal do you have a personal opinion of the appropriate current capitalization rate for the Newberry Atrium property?
A. As he educated me I would have agreed with his position, in the mid sevens.
Q. That's based on information from him and not on your own personal --
A. I learned from the experts and I think he's an expert. The bank obviously thought he was an expert so I agreed.
Q. I am not arguing with you on that, I am just saying if you excluded everything that he told you and I had to ask you what your personal opinion was, would you be able to tell me what your personal opinion is?
A. My personal opinion is based on what I have learned from the experts and I would believe that the valuation as-is where-is today would be somewhere in the low $6,000,000 range as-is where-is.

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I believe that stabilization I think it would be somewhere pushing eight plus million.
Q. All right. Back to the Charlotte, North Carolina Gateway properties. Is the loan amount still roughly the same for that one as well?
A. Yes.
Q. Who is the lender on that one?
A. Wells Fargo.
Q. Did you guarantee that loan?
A. Yes.
Q. What is the extent of your guaranty?
A. For the full debt.
Q. And does that loan also mature in the next 18 to 20 months?
A. Yes.
Q. Have you identified replacement financing for that loan?
A. Not at this time.
Q. Backing up to the Gateway Colorado, LLC, that one also had an 18 to 20 month maturity date. Have you identified replacement financing for that entity?
A. No, I haven't.
Q. Is your ownership still the same for Gateway Properties, LLC with the Charlotte, North Carolina properties?
A. Yes.

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Q. You still own 25 percent of that entity?
A. Yes.
Q. Who are the other partners for that entity?
A. The same people that owned the other, the estate of Dave Burner and my family.
Q. And your family's interest, that would also again be your wife and the two trusts belonging -- the two trusts in your daughters's names; is that correct?
A. Yes.
Q. And the circumstances around those transfers would have been the same?
A. Yes.
Q. Do you receive any distributions from the Gateway properties in Charlotte, North Carolina?
A. When I speak of the distributions earlier it's all encompassing.
Q. It's inclusive of that property as well?
A. Yes.
Q. And that loan agreement that you mentioned there is again the same one with Mr. Howard?
A. Yes.
Q. The next one, E Shoppes at Atrium, LLC?
A. Yes.
Q. That's a retail development apparently; is that correct?

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A. Yes.
Q. The appraised value and the loan amount, are those still roughly the same today?
A. Again, we have been going through a releasing on that property. I would say that is probably close to that, but I would say it's probably on the negative side in that we've lost several tenants and we're in search of refilling those spaces. So depending on when the property is valued it will be gaged on the occupancy and the market.
Q. Do you still own 50 percent of that entity?
A. Yes.
Q. Who owns the other 50 percent?
A. My partner.
Q. Who is your partner in that entity?
A. Joel Branwith (ph).
Q. Anybody else own an interest in that entity?
A. No.
Q. The next one, Atrium at Newberry, we'll talk about that later.
Atrium at Middle Sound is the next one. The appraised value that you have here from Atrium Middle Sound Land is 2.97 million dollars; is that correct?
A. Yes, again based on an appraisal.
Q. And do you believe that value to be the same or different today?

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A. I would think it's probably less. Again, it's raw land but it's got infrastructure. I think land in Wilmington has been affected with the rest of the real estate values in the country.
Q. Atrium Development Associates, LLC is the next one listed indicating an office condominium at 791 Greenlawn; is that correct?
A. Yes.
Q. And that one is worth $175,000?
A. Again, that was based on an older appraisal. I would say today in my personal experience it's worth maybe half of that maybe. Maybe a little bit more.
Q. And there is no debt on that property?
A. Correct.
Q. The next one you've got listed is Atrium Development, Inc.?
A. Yes.
Q. Would your testimony be the same for that one as well, the appraised value roughly the same or lower?
A. I would tell you significantly lower.
Q. Significantly lower for that one. Okay, and the loan amount on that one is approximately $190,000?
A. Yes.
Q. Do you still own 100 percent of that entity?
A. Yes.

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Q. Okay, the next one page 6 the first entity listed is Langtree Development LLC. You've got a member ownership interest of 2.63 percent. Explain your ownership interest and how that ontity is structured.
A. Langtree Development was the original development entity that acquired that land. Over the years because of the economic meltdown it has diminished in value. We were not able to carry the debt and it required improvements. We have sold large parts of that to other investor groups and that's what my current participation is.
Q. And do you own your interest through an entity or do you directly own the 2.63 percent?
A. Through an entity.
Q. And what is that entity?
A. Langtree Development Company, LLC.
Q. And so you personally own 2.63 percent or do you own an entity that owns an interest in it?
A. I own 2.63 percent through Atrium at the Lake I think it is.
Q. So you have an interest in Atrium at the Lake?
A. Atrium at the Lake has an interest in Langtree Development Company.
Q. Okay. And do you have any -- is there any pledges against your interest in that entity?
A. No.

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Q. Who are the other owners of Atrium at the Lake?
A. Just me -- I beg your pardon, that's not correct. Atrium at the Lake has multiple partners. I think there are four of us involved in that.
Q. Are any of them related to you?
A. No.
Q. And that entity in turn owns an interest in Langtree Development Company, LLC. How many other partners are there in Langtree Development, LLC?
A. Probably 15, 12, something like that.
Q. Are any of those partners related to you?
A. No.
Q. Have you received any distributions from Langtree Development Company, LLC in the past five years?
A. No, to the contrary.
Q. To the contrary you've made contributions to that company?
A. Correct.
Q. Would it be your testimony that the values indicated here are lower now?
A. I would say so only because these go back to appraisals that were done during the acquisition period which was in a very active market for the financial meltdown.
Q. Have you guaranteed any of the obligations with Langtree Development Company, LLC?

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A. Yes.
Q. What obligations have you guaranteed?
A. I think currently right how I am down to maybe $8,000,000 in guarantees, about 8,000,000.
Q. Is that to one lender or more than one lender?
A. That obligation is to one lender.
Q. What lender is that?
A. Yatkin Valley Bank.
Q. Is that debt current?
A. No.
Q. What is the status of that debt? Has it been accelerated?
A. No, we are in a work-out.
Q. Do you know when that debt matures?
A. It has matured.
Q. When did it mature?
A. Last year.
Q. Langtree Properties, LLC is the next entity listed. Explain briefly for me the ownership structure for that property.
A. Which item are you speaking about now?
Q. Item M.
A. Okay. That is the same scenario, it's just different holdings.
Q. So would Atrium at the Lake be --

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A. Yes.
Q. You own an interest in Atrium at the Lake which in turn owns an interest in Langtree Properties, LLC?
A. Correct.
Q. Would the values of the properties listed for that one M, I believe it's 13.125 million dollars, would the value be the same today?
A. I would say it's consistent with what we've been discussing. I think there's a decrease in value currently.
Q. Is the debt still roughly the same today?
A. Approximately. You could swing a few hundred thousand.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. That is part of that Yatkin Valley holdings. That's all together.
Q. Okay. The next one you have is Langtree Development Group, LLC. Is that the same type of ownership structure?
A. Yes, it is.
Q. And is your testimony the same for that one in terms of value?
A. Yes.
Q. The debt listed there, did you guarantee any portion of that?

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A. I think that has been reduced now because of our investors that thought the majority part of Langtree Properties basically have taken over that debt so I don't have any guaranty on that.
Q. Have you received any distributions or income from that entity or Langtree Properties, LLC?
A. No.
Q. Have you transferred that interest in that entity or Langtree Properties, LLC in the last five years?
A. Just to the investors that purchased the majority. This is what I am left with today.
Q. Langtree HUD Development Company, LLC, item O at the bottom?
A. Yes.
Q. Is the ownership structure the same for that one?
A. Yes.
Q. What about the appraised value? Do you feel that it has changed?
A. I think this is a recent valuation so it's -- I would say that's a recent valuation. I would say it's probably not changed.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. I was the manager of it so I was the guarantor of it.

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Q. So you guaranteed the full 40,000,000; is that correct?
A. Yes, but it is a HUD loan so it's non-resource once completed.
Q. Sorry, what's the last part of your answer?
A. I am guaranteeing the debt until it's completed and goes into a permanent loan.
Q. What is the status of the completion in permanent financing?
A. Six months away.
Q. Have you identified permanent financing for that property?
A. Yes.
Q. Did you have to guarantee any portion of the proposed permanent financing?
A. The normal carve-outs would be what my understanding is.
Q. What are the normal carve-outs?
A. Fraud, misrepresentation.
Q. The next page, page 7, LDC comma LLC. Do you see where I am?
A. Yes.
Q. What is your interest in that entity?
A. It again the 2.63 percent that is my remaining portion after we sold to the investors that took over those assets.

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Q. And would you believe the appraised value to be accurate on this one?
A. Again, I believe it's probably reduced, no infrastructure, no activity on this particular piece of land so just raw land.
Q. Have you guaranteed any portion of the debt?
A. Yes.
Q. How much of that have you guaranteed?
A. Joint and several.
Q. Is the current amount of that roughly the 2.75 million?
A. Yes.
Q. What is the status of this loan, the loan that is secured by that property?
A. It comes due this summer.
Q. Who is the lender for this?
A. First Bank.
Q. Have you identified replacement financing upon maturity for that property?
A. No.
Q. So my current understanding is you have an interest in, according to this document, six Atrium office buildings?
A. Six?
Q. That's what I counted.
A. I see Atrium Northeast and I see Atrium Newberry.

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Those are the two that I have interest in.
Q. Okay. Those are the two office buildings. The other commercial real estate under the Atrium brand, if you will, you've got four others. E Shoppes at Atrium, Atrium Middle Sound Land, LLC, Atrium Development Associates and Atrium Development Inc.; is that correct?
A. Yes.
Q. So that's six Atrium brand developments; is that correct?
A. Yes.
Q. And I counted 22 Gateway Child Development Centers at this time; is that correct?
A. Yes.
Q. I counted five different Langtree Development entities; is that correct?
A. I am not counting but what's identified here is what I have. I'll go back and count if you like.
Q. Well, if you disagree with me you're welcome to.
A. That's fine, no.
Q. And then on the next page I see three residential properties you own in a P&D Partnership; is that correct?
A. Correct.
Q. And do you still own the three residential properties?
A. Yes.
Q. Who's your partner in that?

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A. My wife Peggy.
Q. And is that just simply a partnership or is there some other entity for that?
A. That's it.
Q. And do you own any other assets in that partnership or just the three here?
A. Just that.
Q. Have you sold any commercial real estate interests that we haven't talked about in the past few years?
A. No, we've talked about everything I have sold.
Q. Those would be I believe the Langtree transactions which the investors took over that debt; is that correct?
A. Yes.
Q. And then the family transfers that we talked about; is that correct?
A. Yes.
Q. Other than that one cash-out refinancing that we talked about earlier have you had any other real estate development transactions in the last five years?
A. I think five years I was fortunate enough to sell a number of Atrium office buildings in '05 and '06 before everything melted down, and that was the scope of what I have sold.
Q. And did you obtain cash in excess of what the outstanding debt was on those transactions?

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A. Yes.
Q. How much did you receive roughly?
A. Again, I can't tell you an exact amount but it was several millions of dollars.
Q. Was it less than five?
A. I would say so.
Q. What was the disposition of the cash received from those transactions?
A. Again, I used that to invest in the future real estate that you see on this and feed the projects that did not fare well after 2008, '09 and '10 and '11.
Q. Did you transfer any portion of cash obtained from these transactions to any family members or any entity owned by a family member?
A. Not at that time.
Q. Do you have any portion of that cash still?
A. No. Unfortunately the economy has not been kind to me, I have enjoyed successes before the meltdown, didn't think it would end and invested in additional real estate knowing that I could continue making it work. Unfortunately '08, '09 pretty much put me on the ropes.
Q. Have you seen any improvement to this day?
A. I see some stabilization. I see some opportunities. There is interest to buy outparcels. There's interest to build. It has been very difficult for new investors, developers to

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obtain financing.
Q. Are you familiar with I guess the current market for financing commercial real estate transactions?
A. To an extent, yes.
Q. What are the terms available on the market?
A. I can speak to the Newberry one which I think is an important point of our discussion today. As a means to help solidify with TD Bank's cooperation that I enjoyed from Carolina First over 12, 15 year period, given the amount of time and working with the marker, the healthcare market, I think the opportunity to refinance that healthcare product in it's current location would be very possible. I have investigated refinancing on that property and what I see upon stabilization, I could obtain a four percent loan on a 30 year am with a 10 year call. So I would say that is very encouraging to me.
Q. You say you could obtain. What lender or lenders offered that to you?
A. I am working through a broker out of New York that I have worked with for many, many years and he's probably responsible for the majority of my permanent lending. He's identified several lenders that would be interested if I'm able to stabilize the building.
Q. What do you mean stabilize the building?
A. Increasing the income of the building over the next period of time to get it to a positive cash flow with the debt

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coverage of about 1.4.
Q. Do you have any documentation correspondence with the lenders about these offers?
A. Yes.
Q. Where do you keep that?
A. I keep it at the office and I provided it to both appraisers that were looking at this project valuation.
Q. Did you give them all of what you had or just certain documents?
A. Yes. No, what I had.
Q. The financing terms you mentioned that assumes the Newberry Atrium property has reached stabilization as your referred to it; is that correct?
A. Yes.
Q. By stabilization that means occupancy rate sufficient to give a positive cash flow coverage ratio and debt coverage ratio of at least 1.4?
A. Yes.
Q. Is that your testimony?
A. Yes.
Q. What occupancy level would Newberry Atrium have to reach to get to the 1.4 debt coverage ratio?
A. Again, it would be the function of the rent but it would be somewhere in the 10 to 12,000 square feet to be able to accomplish that kind of a loan.

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Q. Does Newberry Atrium currently have 10 to 12,000 square feet of finished space available?
A. No.
Q. So the space would need to be improved before it could be leased out or rented; is that correct?
A. Yes.
Q. Can you lease the space and have the tenant finish it or does the developer landlord finish it in every event?
A. Every one is a negotiation. There is no every event.
Q. How is it typically done?
A. Depending on the objective of each tenant some will rather have a lower rent rate and do the up-fit themselves, some want to have the finishes done and pay a high rate.
And a case in point, and again, let me make you aware as I've made your appraiser aware and the Wingard Associate people, the two guys the bank previously used. I am in discussions with Newberry Hospital on leasing some additional square footage in order to move it forward in the near future, not too distance future, to allow us the opportunity to potentially take advantage of the financing that I have found is available at a higher income than what we've gotten here.
Q. What is the status of those discussions with Newberry Hospital?
A. Ongoing.
Q. Have you got any documentation of a commitment or a

draft agreement with them for the additional space?
A. We've discussed terms and conditions.
Q. What would the terms be in terms of how much space how much rent?
A. The terms that we're discussing is leasing additional 10, 12,000 feet at a rate that would not include tenant up-fits. If they are to move forward with that approach I've agreed to give them my entire interest in the building. I have agreed to forgive the 300 some-odd thousand dollars that I have put into it, and that they would take the position in the building in order to look at the opportunities of potential refinance in the future or at least a confirmation of this to provide some hoped consideration to enter into the reorganization on the table with maybe some modifications.
Q. What is the expected time of a decision on that?
A. I wish I could give you a specific date but it's been ongoing for several months. The board is considering it, I am jumping through hoops in order to provide them additional information they're requesting.
Q. Do you think that's something that is going to happen within the context of the existing bankruptcy or later on down the line?
A. I would say if we're able to work anything out it would happen in the near future, in the next several months.
Q. Who were you communicating with at the hospital about

that?
A. Ron Vigas.
Q. How do you spell his last name?
A. V I G A S.
Q. What title does he have at the hospital?
A. CEO.
Q. You said the rate would not include tenant up-fit so that means the developer would be responsible for those?
A. No, that the tenant would be responsible.
Q. What needs to happen -- you said you were jumping through some hoops. What needs to happen for the hospital to be able to make a decision and enter into an agreement with you?
A. I really can't tell you what additional things they are going to be undertaking. I have provided them with the proposals, we have negotiated it. I've got nothing else to give. They continue to do their own research and they haven't shared with me what specific items that they are researching.
Q. So the ball is in their court so to speak?
A. Yes.
Q. These proposals and documentation related to the negotiations, have you given a copy of that to your lawyer?
A. Yes.
MR. BEDENBAUGH: Let's take a few minutes' break.
(Brief recess was held.)

BY MR. BEDENBAUGH:
Q. Mr. Jacobs, you've been handed Exhibit 2 to your deposition which is copies of financial statements from 2011, 2009 and 2006 all as one document. The first one there is dated January 31, 2011; do you see where I am?
A. Yes.
Q. Is that a true and correct copy of your financial statement as of that date?
A. I would say yes.
Q. And according to this document your total assets at this time was a little in excess of $32,000,000; is that correct?
A. Say that again..
Q. According to this document your total assets were a little bit more than $32,000,000 at this time?
A. Yes.
Q. Which is about $11,000,000 more than the financial statement dated January 31, 2012; is that correct?
A. Yes.
Q. Do you have any explanation generally as to the $11,000,000 drop?
A. I would say I invested a lot of it, fed a lot of it into valuations, and I guess without looking at it dramatically have changed over the last couple of years.
Q. The total net worth here is a little more than

$32,000,000; is that correct?
A. I am sorry, I didn't hear what you said.
Q. The net worth indicated on the January 31st, 2011 financial statement is slightly in excess of $32,000,000; is that correct?
A. No, I think it was 30,000,000.
Q. You're right, I was looking at the total liabilities. You're right, the total net worth is a little more than 30.4 million dollars, right?
A. Yes.
Q. Okay. The next page is Notes to Financial Statements dated January 31, 2011. You'll see the Wells Fargo account has a current estimated value at that time of a little more than 1.3 million dollars; do you see that?
A. Yes.
Q. That was $471,000 in the 2012 notes. Do you know why that dropped?
A. I was during '11 feeding a lot of real estate. I paid down about $2,000,000 on one of the notes at Carolina First. I paid down $1,000,000 on the Newberry. I paid down notes for refinancings of the Shoppes. I have paid down and fed funds to keep some of the properties going. I paid down personal debts owed to people on my financial statement, Ballington (ph), Peterson, basically using what liquidity I had at that time to keep everything afloat.

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Q. Okay. Now skipping down to paragraph 6 you've got 2011 Contracted Receivables Due; do you see where I am?
A. Yes.
Q. Did you receive this amount in 2011 of roughly $800,000 that you've got indicated here or results less than that?
A. They were less.
Q. Do you know how much you received?
A. No, I don't.
Q. Do you remember roughly if it was most of that or half of that?
A. It was part of it but I can't tell you three, two, two and a half years ago what I received.
Q. The Gateway Properties, LLC distribution of roughly $400,000, did you receive that?
A. Some part of that.
Q. Do you recall what part?
A. No.
Q. The next paragraph has 2012 contracted Receivables Due of total in excess of 1.2 million dollars; do you see that?
A. Yes.
Q. Do you know if you received that amount or something different?
A. It was different, a lot less. Two years out this was during some very difficult times and unfortunately many of the

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distributions from these properties did not materialize as anticipated there.
Q. Which of these performed as expected?
A. I could say none of them. Many of the Gateway incomes had to go to repair some issues. We had some infiltration of mold in a couple of the centers and construction requirements we had to do to keep the buildings operating, so the money was diverted to maintaining and fixing a number of the buildings.
Q. Okay. The next page has the Commercial Real Estate schedule beginning on this page, page 3; do you see where I am?
A. Yes.
Q. The Gateway Properties, LLC listed here starting with the letter B, your general partnership owner interest here was 50 percent; is that correct?
A. Yes.
Q. So this would have been January 31, 2012 prior to your transfer of 25 percent to various family members or entities?
A. If that's what it says but my recollection is that we did the estate planning somewhere toward the end of '10, so I can't tell you if this is my error, but my recollection is when Dave got sick in 2010 we decided that we needed to do some estate planning at that time.
Q. And do you know when those transactions actually were finalized and took place?
A. I can't tell you specifically but I do know that when

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he got sick that's when it all began and it was an ongoing process but I can't tell you the complete dates that all this was wrapped up.
Q. But the reduction from 50 percent to 25 percent would have been the cost of that transfer?
A. Yes.
Q. And similarly the next entity the Gateway Colorado, LLC?
A. Yes.
Q. It shows 37.5 percent and here the reduction to 18.75 percent in 2012 would have been attributable to the transfer to family members?
A. Yes.
Q. Likewise on D, E and F various Gateways in Charlotte, North Carolina are indicated to be 50 percent ownership interest with the reduction to 25 percent reflected in the 2012 statement would have been because of the transfers to the family members?
A. Yes.
Q. All right. And the next page, page 5 it's got L and M, two Langtree-related real estate investments apparently but the ownership structure is a little bit different than what we discussed in 2012?
A. Yes.
Q. Can you explain -- and you may have already done so earlier -- but can you explain how it got from 2011 to 2012?

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A. Sure. It was 2011 and 2010. In 2010 we were having trouble raising funds, we were having trouble meeting our obligations, we were in the process of negotiating with several investors. Towards mid '10 into '11 we were able to find somebody that could perform and purchase with a majority interest in the Langtree properties in order to keep us from basically not being in a position to meet our obligations, and that evolved over a period of time.
Q. In connection with those transactions did you receive any cash at all?
A. No.
Q. The next page is residential real estate owned as of January 31, 2011 page 6; do you see where I am?
A. Yes.
Q. This has 6133 Lakeshore which I believe you indicated was your residential address?
A. Right.
Q. That was not on 2012. What happened between 2011 and 2012 there?
A. During the same process Peggy has owned the properties, the Grand Pavilion and Lakeshore. During refinance they had been on the title but during the estate planning she has been on the title for years. I went through a refinance at that point, I was on it to help make the loan and then it was switched back.

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Q. So let me make sure I understand your testimony. Your testimony was that you and your wife both were on the title for years?

A. No, the majority of the time -- I went through three refinances during a period of 20 years, three or four refinances. During that time I would be required to sign on to the loan but it was always held in Peggy's name, and apparently I was not diligent enough to make the corrections on my financial statements.

Q. Okay. So you never owned an interest in either of those properties?

A. I did maybe 10 years ago. And I can't tell you approximately what the time was but every time we went through a refinance I'd have to sign on to it.

Q. But you last owned interest in these properties approximately 10 years ago?

A. Within the last five or 10 years, yes.

Q. And your interest you transferred to your wife?

A. Yes.

Q. What was the reason for that transfer?

A. The estate planning.

Q. Any other reasons?

A. No.

Q. Did she give you anything in return for that transfer?

A. No.

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Q. Okay. The next page is a rent roll for Atrium Northeast; do you see where I am?

A. Yes.

Q. I believe you testified earlier there's been some vacancies on that property?

A. Yes.

Q. So is the cash flow negative or positive now?

A. Negative.

Q. How much is the negative amount this month; do you know?

A. It varies from month to month to a break-even to a negative cash flow of about eight or $10,000, but during the negative times I was feeding it in order to meet the obligations and keep the building operating.

Q. Okay. The next one here is another Newberry Atrium rent roll of 2011. My understanding is that you have two lis pendens identified. Did either one of those happen?

A. No. I can give you a little background on that if that would be helpful.

Q. Sure.

A. During 2010 I was working with the original CEO of the hospital who initiated this project and asked me to participate. He had been there for 15 years and had been responsible in my opinion and in most people's opinion for taking the hospital to a different level, and requested that I assist them in

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developing this building.

During this time 2010 and '11 they had anticipated recruiting additional physicians that I was working with. At that time we were preparing proposals and doing the things that needed to do in order to get these tenants to relocate to Newberry. During that same time in 2011 the current, then current CEO left the hospital and a new CEO came in, had no connection with the community, he was there as I guess a temporary CEO. And during the former CEO's leaving the hospital and the community he would not focus on this building, apparently he had other focuses and the recruitments never occurred.

Q. What is the current variance on the cash flow at the Newberry Atrium property?

A. It is almost a break-even with the interest only. I have requested that BB&T consider some type of restructuring in order to out the building on a stable footing allowing me and the hospital and community times to recruit and work through the economic environment that we went through in 2011 -- previous to 2011 and into 2011. And this is recently.

When the Carolina First folks worked with me over the years, they were basically like joint venture partners. We did six, seven deals together and they were always there to help me, cooperate, give me some kind of flexibility that would allow me to work through the problems of any real estate transaction we

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were going through. They were almost like joint venture partners. They would solicit and got the benefit of some very high-profile projects that I was associated with. I was on a very good, warm friendly basis with the whole management team from Mac Whittle (ph) all the way through. And when the notes were coming due in 2012 everybody I knew at Carolina First had left, and I had nobody really to speak to.

When I met with one of the TD Bank executives who was out of Greenville, I believe, my opportunity to visit with him and give him background on the project was maybe a half hour meeting, and I explained what we were going through in '11. I guess it was '11 -- yeah, it was in '11 -- they really didn't have much interest or didn't discuss too much how they could be of assistance even though I had a plan and I proposed a plan to them, there was really no response.

And I may be bridging from '11 into '12 but this is pertinent to where we are in this transaction. I think that's something that should be acknowledged, at least.

When TD took over the portfolio from Carolina First it was my understanding that their position was they were taking over the same relationship that I enjoyed with the Carolina First people, which was a very good, flexible relationship over the years, 12 years plus or minus, had done $27,000,000 with Carolina First. And they really were very solicitous of the deals. I would be requested to work with them, many of the

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hospital medical deals. I had done a previous medical deal with Carolina First that was in '07, was successful in paying that off, a little longer than usual but '07 was a different time. By the time we sold it I was able to pay it back.

In fact, at the time that Carolina First got taken over -- I lost almost a joint venture partner. And that has been a very difficult process for me to work with that the TD representatives have no knowledge of my development history, one, no knowledge of the volume of business that I've done and the successes that I have enjoyed, and really the adversarial situation that they've created rather than understanding ways to solve the problems versus being almost punitive the way that they have come after me personally.

Q. We'll talk about the State Court cases in a little while, but is there any document that obligates TD Bank to refinance any of the loans that we're talking about today?

A. There's no document that obligates them to do anything other than what you would think the fiduciary responsibility of a bank would be.

Q. What document says there's a fiduciary responsibility for the bank to do anything?

A. When you enter into $27,000,000 of volume with a bank over six or seven deals and they solicit your business and you give them the business because you trust them because you believe they are reasonable and flexible people as they have

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proven over the last 12 years plus, you would expect that type of relationship to continue as long as you have been performing.

Q. Is there a document that says there's a fiduciary responsibility to you?

A. Don't have a document that says that but I would not have entered into these relationships with a group that would have been anything but reasonable and flexible that has proven likewise for over 12 years.

Q. Is there a document that says TD Bank has to do anything other than what its done in connection with these loans?

A. I don't have a document that says that they are going to be my savior, but they do know that if they have any insight into my history with Carolina First and my career they would know that I have worked everything out over good times and I am working things out in very difficult times.

Q. Your statement that TD has a fiduciary and acting in a punitive manner, is that based on any document that you have knowledge of today?

A. It's based on the actions that they have taken, the actions that they have taken on two of the transactions that I am involved in right now are the only transactions that they have left after I paid back 20 some-odd million dollars -- and unfortunately we all thought things would continue on as we had operated before, but it has not, and every bank that I have

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dealt with over my career, including Carolina First, has always been reasonable and flexible in order to salvage and enhance the value of the project they are associated with.

Q. So you can't identify any documents in response to my question?

A. I didn't have documents, I have actions from Carolina First.

Q. Those actions you spoke of two projects and those are Newberry Development and Middle Sound Land?

A. Yes.

Q. And the actions that you're speaking of are suing on the guaranty?

A. Yes.

Q. Any others?

A. Not understanding what the mechanics of solving the problems would be. As a party to a transaction they should be aware of how problems can be solved as opposed to how to damage and hurt the principals associated with the project, and ultimately damage the project and the asset itself.

Q. Anything else?

A. No.

Q. I want to look at the next document in Exhibit 2. It's the March 1, 2009 Statement of Financial Conditions; do you see that?

A. Okay.

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Q. Is that a true and correct copy of your statement of financial conditions as of March 1, 2009?

A. Yes.

Q. And again this document indicates assets in excess of $40,000,000; is that correct?

A. Yes.

Q. And it also indicates a net worth of close to $39,000,000; is that correct?

A. Yes.

Q. Is that your signature on this document?

A. Yes.

Q. If you'll look on the third page in of that document it's page 2 of the notes paragraph 7, Notes Receivables?

A. Yes.

Q. There's a note receivable in excess of 5.3 million dollars from Atrium at the Lake, LLC?

A. Yes.

Q. What happened to that receivable?

A. It's still on the books.

Q. Has any amount of that been paid?

A. No.

Q. All right. On the Commercial Real Estate Owned section which is the next page March 1, 2009, Gateway Properties, LLC, here it indicates from 2009, 16 Gateway Properties as opposed to the 14 in 2011 and 2012 and then at the

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bottom it has Kenton and Mallard sale/lease; do you see where I am?
A. Yes.
Q. Are those two the two that are missing from here?
A. Yes.
Q. What happened to those two properties?
A. We sold those properties to investors and we handled the lease transaction with the tenant.
Q. Did that transaction generate any cash?
A. Yes.
Q. How much?
A. I don't recall but it was enough to invest in some more Gateways and some more land acquisitions.
Q. Did you personally receive any cash from those transactions?
A. Yes.
Q. Do you recall how much?
A. No.
Q. Less than a million dollars or more?
A. I would say it was less.
Q. Did you transfer any portion of that cash to any family members?
A. No, I supported family members but I invested in additional Gateways and additional land.
Q. Did you transfer any portion of that cash or proceeds

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of that transaction to any entity or any family members?
A. No.
Q. On page 5 of the same document we have got paragraph K and L Residences at the Landings, building 27. What happened to those properties?
A. We had financing arranged, we had tenants signed up. Actually we had tenants signed up for the Residences at the Landings and had significant deposits on account. As the time went on during that year the financing evaporated and we were not able to move forward any further.
Q. What happened to those properties?
A. They didn't get built after we had financing and tenants in place.
Q. And the real estate, what happened to that?
A. It's still part of the Langtree holdings.
Q. And then you've got in paragraph N 131.14 acres indicating sale pending?
A. Yes.
Q. What happened to that property?
A. The same thing, people -- we had a hotel developer who was under contract owed us money up. He too couldn't get financing and that deal collapsed also.
Q. Two more pages in there's a Statement of Financial Condition dated December 1, 2006; do you see that?
A. Yes.

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Q. Is that a true and correct copy of your statement of financial condition as of that date?
A. Yes.
Q. Is that your signature on the document?
A. Yes.
Q. On the Notes to Financial Condition, the next page, down at the bottom under 2006 Contract Receivables Due paragraph 6 there's Atrium Memorial Partnership I and II, Atrium SRC, LLC, Southeast Pediatric Center, LLC, Irmo Medical Center, LLC; do you see where I am?
A. Yes I do.
Q. What happened to those entities?
A. Those were sold.
Q. Were these some of the entities that you talked about earlier as being sold of different sales?
A. I mentioned to you earlier that I had sold a number of the Atrium properties and this is part of those.
Q. Did you receive any proceeds from the sale?
A. I did.
Q. How much did you receive?
A. You know, combined, a couple million dollars.
Q. And was that sale in 2007 or later?
A. I think it was in 2007.
Q. You received in the neighborhood of $2,000,000?
A. Several million, I can't tell you exactly.

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Q. More than five or less than five?
A. Less than five.
Q. Do you know what you did with that?
A. I invested in Langtree, invested in more Gateways and more land.
Q. Did you transfer any portion of those sales proceedings to any family members or any entity owned by a family member?
A. Yes.
Q. What transfers did you do at that time?
A. Family members. My two daughters, my wife.
Q. And the transfers to your two daughters, was that to the trust or directly?
A. To the trust.
Q. And how much was each of those?
A. I don't recall but it was hundreds of thousands.
Q. For each?
A. Yes.
Q. When did that take place? Was that in 2007 when the sales closed?
A. Yeah, it would be around that time.
Q. Did they give you anything in exchange for those transfers?
A. No.
Q. The next page you've got a Note Receivable from Mini

School Learning Centers?
A. Write.
Q. What happened to that?
A. That was an amount that was still due on the sale of the Gateway operations.
Q. Has that been paid?
A. Yes.
Q. If you will look to Commercial Real Estate Owned schedule for 2006 this has paragraphs B through F which are the Atrium Memorial I and II, the Aetna SRC, Southeast Pediatric and Irmo Medical Center; do you see where I am?
A. Yes.
Q. Are those the entities that you sold in 2007 that we talked about earlier?
A. Yes.
Q. On page 6 of that document there's Vacant Land at 1921 Gunbarrel Road, Chattanooga, Tennessee?
A. Yes.
Q. What happened to that property?
A. Developed it.
Q. Who owns that property now?
A. Shoppes at Atrium.
Q. And that's reflected on your later financial statements?
A. Yes.

Q. The next page after that one on that same document is Residential Real Estate Owned as of December 1, 2006?
A. Yes.
Q. There are a number of properties here that weren't on the later financial statements beginning with 1522 S. Kilbourne, 3716 Palmetto, 3274 Davenport and 1367 Allendale?
A. Yes.
Q. And also 3509 Maybank. Do you see where I am?
A. Yes.
Q. What happened to those properties?
A. They were all sold.
Q. Were they sold in one transaction or separate?
A. Separate.
Q. Do you recall when they were sold?
A. No.
Q. Do you recall what proceeds you received from the sales?
A. No.
Q. Do you recall what you did with the proceeds of the sales?
A. I invested it in more real estate.
Q. Same question for the two properties on the next page, 716 Cedarfield and 1361 Weston Watch?
A. Same situation, sold them.
Q. You don't recall what you received from that or what

you did with those proceeds?
A. No.
Q. Mr. Jacobs, have you ever been charged with a criminal offense other than a traffic violation?
A. No.
Q. Have you ever been deposed before like we are doing today?
A. No.
Q. Have you filed a claim against anyone else in the last five years?
A. I have filed eviction notices.
Q. Other than that?
A. No.
Q. Has anyone other than TD Bank filed any claims against you in the last five years?
A. No.
Q. What about claims against entities in which you hold ownership interests?
A. No.
Q. Have you had any judgements entered against you in the last 10 years?
A. No.
Q. Have you searched for documents related to the TD Bank Carolina First loans?
A. Searched for documents? I am not sure I understand

what you mean.
Q. I sent requests to your lawyers for documents related to the loans. Have you looked for any documents related to the loans?
A. I have got several file drawers of loan documents on the various transactions that we have done over the last 12 years.
Q. Are those files at your house or at your office?
A. My office.
Q. Have you provided copies of those to your lawyer?
A. Not in recent time. They may have had them from previous transactions but they've all been paid off except these two.
Q. Do you have any documents on your computer related to the loans?
A. No.
Q. Any emails with TD Bank and Carolina First regarding the loans?
A. Not emails, I may have had an email or two about an appointment or a phone call but that's about the extent of it.
Q. I want to talk about the Newberry Atrium loan. Tell me about how that loan originated?
A. That originated in I guess '07 maybe. I was involved with Carolina First with Irmo Medical Center at that time. And during that time the people that I was dealing with like Larry

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Scotts and Michael Phillips and Justin Strickland, they were very kind and generous to me and they asked me if they would be able to look at the new transactions that were coming up. And because of the confidence that I had in working with these people from years before, I was very happy that they were interested in looking at the Newberry loans. They were familiar with the work that I had done and the performance that I had done, and they said that they would be very interested in putting a very good proposal on the table.

At that time I was required by the hospital to provide several proposals. Quite frankly, Carolina First won the proposal because I lobbied for them based on the longstanding relationship I have had with the management team and their interest, their willingness, the flexibility to work together through the previous six transactions that I have worked with them on. And as a result of my lobbying the hospital agreed to go with Carolina First.

Q. And then the funds were of course used to construct the medical office building known as Newberry Atrium Professional Center; is that correct?

A. Correct.

Q. And you were represented by separate counsel for that transaction I assume?

A. Separate than me?

Q. Separate from Carolina First -- another lawyer?

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A. Yes.

Q. Who was that?

A. Gerald Jowers.

Q. Now I believe in your bankruptcy filings the total rent per month is a little over $58,000 on a monthly basis; is that correct?

A. Again without looking at the details, I have got so many numbers in my head. If that's what it says I am sure that's what it was reported.

Q. It's leased up to about 62 percent at this time?

A. 63 percent occupied. I think we get revenue on 60 percent because the MRI is owned by the hospital.

Q. And is the current occupancy and the rental revenue sufficient to pay debt service and operating expenses?

A. No.

Q. How much is the shortfall per month?

A. Again depending on repairs and maintenance and depending on -- which currently before they called the loan I was feeding it $10,000 a month.

Q. Now, before Newberry Atrium filed for bankruptcy and the loan had matured the debtor was not making any payments to TD Bank; is that correct?

A. The debtor was making payments to the bank until they extended -- they gave me a 90-day extension to work something out and at that time I was contacted by a gentleman out of

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Greenville, who I mentioned to you, said we'd sit down and work something out. I had maybe an hour visit with him, he came to visit me.

I prepared a proposal that would show how that would work out, how I could get this on an even keel with a little flexibility from the bank and an extension. He indicated we would work on that. He left, I didn't hear from him for maybe three or four weeks. I tracked him down and said can you tell me what's going on. And he said well I have been unavailable and as a result of that I haven't made much progress on this. I said well what can I do to get this note renewed that's coming up. He says I have got to get my people to give me some direction. I said who are your people. And he said it's a committee. I said okay. What is it that you need and what are the issues? The proposal I gave you was a very realistic approach on how I could continue to maintain the property, meet all its obligations.

I didn't hear from him again for another couple of weeks and I tracked him down again. And I said I have got to know what we're going to do, we're already beyond the first 30 days. Are you going to work with me on extending this? He says I can't give you that answer.

Q. Who are you referring to?

A. No, I don't recall his name. He was out of Greenville. Todd maybe, Eric O'Toole (ph) or Eric Todd or

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something like that. I mean I had one visit with him and three phone calls. I just kept getting the runaround and I kept asking for what are we going to do. And he says well I might be able to get you an extension but you've got to pay it down significantly. What is significantly? A million dollars? I can't do that. I can't operate the building and pay it down at the same time.

Q. And at some point the debt matured; is that correct?

A. It matured and during that time I could not get an answer other than the runaround and no direction. He says I am leaving this position, you'll be contacted by another person. Another three weeks go by and I am contacted by another person. This gentleman is out of Charleston. I think he's the current gentleman that was at the hearing.

He then sets an appointment for a week later. He says I am going to come visit you and we'll work something out. I went through the same process I did with the first fellow from Greenville. And I gave him the proposal, updated it and he says well let me see what I can do on this. Said I've got to go back to my people. I've heard the people so I said who are your people. He says one is in Greenville, one is in Maine and someone else. It was him, a Maine guy and a Greenville person.

I gave him all the information that I had done before. He sent me a request for some additional information, I sent that to him. I didn't hear back from him. At some point, maybe

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several weeks later I get this lawsuit filed against me. And that was the end of it. I don't believe -- and I asked them if they had ever seen the property, if they had given any consideration to my proposal which would not jeopardize the bank, would maintain the facility and allow it to operate while we continued to -- and I gave them the history in very great detail of what's going on in the environment, the economy, the healthcare environment. And there was never any discussion. It was just the next thing I know I had a lawsuit.

Q. The loan did mature; did it not?

A. Yes. And during that time I had no communication with what anybody was going to do.

Q. After it matured did you make any payments to TD Bank?

A. No.

Q. And up until the time you filed bankruptcy you weren't making any payments?

A. No.

Q. So presumably the property had enough cash to pay its operating expenses during that time?

A. It did.

Q. Is the property currently listed for sale?

A. It's not listed. I have spoken to several brokers and I mean, there is interest out there but it's not interest at this moment that I could pursue considering where we are in this legal proceeding.

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Q. Are you and Newberry Atrium contesting liability in the TD Bank Note and Guaranty?

A. I wouldn't say I am contesting it. I think the guaranty and the punitive way that the bank has pursued this as opposed to looking into a collateralized loan, the loan has value -- I am sorry, the building has value. And the building itself has the ability at some point if were to believe the 2011 appraisal, five million eight as is where is, that provides a very good opportunity for the bank to recover the majority of the loan. Given the time and the approach that I proposed to work this thing out this loan could be paid in full in the near future, the next several years. Given the time to continue to operate the building, allow the Affordable Healthcare Act to provide the additional revenues to a real community like Newberry recruit additional physicians and services, which they probably are in a better position today than they have been in recent years to recruit additional services and physicians.

Q. You indicated you are not contesting the liability but you have some concern about what you call the punitive way in which TD Bank has done this. Are you referring to the suit solely on the guaranty; is that correct?

A. Yes.

Q. Are you referring to anything else?

A. The way that it has been handled, the failure to communicate with me to work with me in any reasonable way. The

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suit basically damages my ability to perform, not only on this asset and find new financing and working, but it could also jeopardize the other assets that I am involved in also, which may be a source of repayment given the time over the next several years to allow them and the economy to heal.

Q. In your complaints are they based on anything written in any of the loan documents between Newberry, yourself and TD Bank?

A. I can't tell you the minutia of the legalese in these documents. I can tell you that there is a standard of reasonableness when you enter into any kind of ongoing relationship. A $27,000,000 history of working together over 12 plus or minus years gave me that standard of performance. I performed, they performed, they were flexible. They gave me some breathing room when needed and I performed back and took care of the responsibilities I had.

Q. So your testimony is there isn't any term in the loan document that you're referring to?

A. I can't be specific because I haven't read the hundreds of pages of loan documents.

Q. Can you be general?

A. When you enter into a contract it's my understanding that there is a reasonableness to expect fair treatment, expect fair play, and nothing about this has been reasonable. It hasn't been fair, it hasn't been anything but abusive, damaging

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to me personally, to the assets that I can control. You basically are shooting me in the head for a reason that I can't understand. If I can preserve the value of this asset and grow it, the bank would not be harmed. You're just harming me which inhibits my ability to solve the problem.

Q. Again you're referring to the suit on the guaranty?

A. Yes.

Q. You keep mentioning the 27,000,000?

A. Yes.

Q. Those are obligations that were paid?

A. About 21,000,000 has been paid. I have reduced two obligations that are outstanding of about $3,000,000.

Q. So $24,000,000 has been paid?

A. I can't tell you. I guess I owe about six, $7,000,000.

Q. Seven million has been unpaid?

A. Yeah.

Q. So roughly 33 percent?

A. But they can be paid with a reasonable approach. And in today's world you have nothing else to work on other than solving problems rather than creating problems.

Q. All right. Let's look quickly at your Answer in the Guaranty Action. It's Exhibit 3.

In paragraph 9 of your answer it references a special fiduciary relationship between the Defendant and Carolina First;

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is that correct?
A. Yes.
Q. That's what you're alleging in this case?
A. Yes.
Q. When did that special fiduciary relationship develop?
A. When you enter into contracts with institutions or people you expect fair treatment, you expect the people will work together to deal and to solve problems rather than damaging the assets of the people associated with it that will undermine the solutions.
Q. When you are talking about damaging assets you're not saying that TD did anything to this property?
A. I am saying by being so unreasonable and aggressive they can cause the damage for a solution.
Q. And they didn't foreclose on this property; is that correct?
A. No, but now foreclosing on the property would be a course of action you could take to recover from part of your funds, but if I were given the time and didn't have the responsibility of fighting a lawsuit on a personal guaranty which could ultimately result in a judgement that completely damages the ability to solve the problems and it damages the properties and collateral that you have.
Q. So you're saying you'd be better off if TD foreclosed on the property?

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A. Rather than coming after me for a judgement because at this point my proposal would involve refinancing this in the not-too-distant future.
Q. Is there any document that says TD has to refinance this loan?
A. No document that says they are obligated to do anything other than act fairly and be reasonable to preserve an asset that they would undermine.
Q. What document says that?
A. I don't have a -- I've got that much legalese. I don't have anything that says what I am alleging, and if I do I haven't looked through the hundreds of pages of documents.
Q. So you don't know that there's a document that says what you just said?
A. I don't know all the minutia from the contracts.
Q. Do you know if there's a document that says what you just alleged?
A. I don't know.
Q. It's your claim that in paragraph 12 of this answer it says would not have executed a guaranty without the trust and confidence when dealing with Carolina First. Is that your allegation in this case?
A. Yes, it is. It's a fact and I had three other lenders that were interested in doing this. I chose and lobbied for Carolina First because of the flexible working relationship we

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had developed over the years.
Q. Those three other lenders, did they require any portion of the loan to be guaranteed?
A. I am sure they would.
Q. Do you know who those lenders were?
A. Yes.
Q. Who were they?
A. BB&T, Carolina First and I think Regions also was one.
Q. Now, Carolina First ultimately did agree to modify that construction financing; isn't that correct?
A. Yes.
Q. And they I think modified it seven or eight times, didn't they?
A. They modified it seven or eight times but kept squeezing me harder and harder which required me to continue to feed this.
Q. They wanted you to pay the loan?
A. Yeah.
Q. Imagine why they did that.
Now, do you know if BB&T or Regions, sitting here today, would have agreed to extend that maturity seven or eight different times?
A. Absolutely.
Q. How do you know that?
A. Because they had done it for me before.

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Q. Have they done it for you before in loans that didn't have a sustainable occupancy?
A. Yes.
Q. Which loans were that?
A. The first loan -- well, this goes back to Atrium Northeast. Atrium Northeast was troubled before and I had to get extensions over about a three-year period to release the building.
Q. Anything else?
A. I have had other banks that have because of good long-term relationships that have extended and turned them into permanent loans to make the properties able to stabilize as opposed to having to face this battle every four, five, six months.
Q. You later go on in your answer paragraphs 16 to 18, if you will look at that, indicating there was a refusal to provide permanent financing; is that correct?
A. Yes.
Q. When did that refusal occur?
A. In 2011 I guess it was.
Q. And I think we've talked about this earlier; there's no provision in either loan documents that required TD to provide financing, is there?
A. There is no requirement that I see other than working together in good faith and not trying to jeopardize and damage

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the asset and the operator, the developer, the guarantor.
Q. Did you seek permanent financing on this property from any other lenders?
A. Not during recent years, no.
Q. At any time?
A. No, not during the last two years.
Q. What about prior to the last two years?
A. No. We hadn't stabilized the building at that point.
Q. You wouldn't expect a lender to provide permanent financing when your building is not stabilized?
A. I would expect a lender that had worked with you over the years to be reasonable and flexible to find a solution to this.
Q. I'm not talking about TD Bank, I'm talking about other lenders. Would you expect other lenders to provide permanent financing?
A. Yes and they have.
Q. Why didn't you refinance this loan, Mr. Jacobs? Why didn't you do it for this loan?
A. Because the environment up until this point has been very dismal.
Q. Because you couldn't; you couldn't get it from any other source, could you?
A. Could not on this building.
Q. Your Third Defense in your Answer in paragraph 22 you

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allege that you believe the value of the building is equal to or exceeds the amount of the loan?
A. Yes.
Q. Do you believe that to be true?
A. Yes.
Q. And the basis of that is what?
A. The value of the building is based upon the facility income strength, the use of the building and the continued improvement in the economy, the continued working or the continued clarity in the healthcare environment that would allow additional improvements and additional reimbursements to the physicians in the hospital.
Q. Anything else?
A. No.
Q. Based on any valuation is what you have said?
A. Yes, I will have evidence of valuation of what it looks like now but at 5.8 two years ago in a much more difficult environment. I am believing that the valuation of this building will be in excess of 5.8. And its stabilization over the next several years will exceed the value of the loan amount.
Q. Your next allegation in paragraph 24 concerns not bringing action for foreclosure; is that correct?
A. Yes.
Q. And that's what you're alleging is punitive and unconscionable?

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A. It is. The bank knows that I don't have the ability to write a check for $6,000,000.
Q. I think the bank also knows that you have got a significant amount of other obligations that mature within the next 18 months?
A. I just shared that with you, yes.
Now, what good does the bank get by making it impossible for me to stabilize these assets by putting a judgement against me which would prevent any of these things from being worked out?
Q. In this Third Defense about not bringing an action on foreclosure are you referring to any other action or inaction of TD Bank?
A. That's what I am alleging.
Q. So that's what I want to know; are there any other facts aside from their decision to sue on the guaranty before they brought a foreclosure suit?
A. Not that I can tell you today. There may be others but my focus has been solving the problem, not looking at the legalese. You would hope a reasonable flexible group would understand there's solutions to be had as opposed to sabotaging the guarantor and the project.
Q. And by sabotaging you're just talking about suing on your guaranty?
A. Yes.

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Q. You're hot referring to anything else?
A. No.
Q. Mr. Jacobs, you've been handed Exhibit 4 to your deposition. Do you recognize that document?
A. It's a Promissory Note.
Q. Does this appear to be a promissory note between Newberry Atrium Development and Carolina First Bank?
A. Yes.
Q. Dated February 20, 2007?
A. Yes.
Q. On page 4 there's a signature block. Is that your signature?
A. Yes.
Q. Does it appear to be an accurate copy of the note?
A. I would expect nothing less.
Q. Page 3 of this document the first full paragraph indicates lender is not required to rely on the collateral for the payment on the note in the event of default by the borrower but may proceed directly against the borrower and guarantor or endorsers in such a manner as it deems desirable.
Did I read that correctly?
A. I am sure you did.
Q. That language gives the bank the right to sue directly on the note and on the guaranty; does it not?
A. That's what it says.

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Q. If you will look at Exhibit 5. Can you identify this document?
A. Yes.
Q. If you'll look at the last page, page 7 of the Guaranty. Is that your signature on this document?
A. Yes.
Q. Does it appear to be a true and correct copy of your Guaranty with the Newberry Atrium loan dated February 20, 2010?
A. I would expect it is.
Q. In paragraph 1 on page 1 continuing to page 2 states that guarantor hereby expressly waives any right to require londer to bring any action against the borrower or any other person; do you see where I am?
A. Yes.
Q. Did I read that correctly?
A. Yes.
Q. It also says the guarantor waives the right to require that resort be had to any security; do you see that?
A. Yes.
Q. That indicates what the bank can sue you directly; does it not?
A. That's what it says.
Q. If you'll look at Exhibit 6. Does this look to be a true and correct copy of the Newberry Atrium Mortgage and Security Agreement?

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A. Yes.
Q. Is that your signature on page 18 of the document?
A. Yes.
Q. Do you know of anything in this document that requires a suit or foreclosure on the mortgage before the bank exercises any other remedy?
A. I would assume that you would be telling me that it does not require that but it does require some requirement of good faith and cooperation in order to preserve the valuable asset and the ability to work it out.
Q. That's your opinion?
A. That's an opinion but my understanding is when parties and institutions enter into a contract there is that implied guaranty, there is a reasonableness and good faith in working together.
Q. Is there anything in that document that includes those terms you're speaking of?
A. I have not reviewed it so I cannot tell you that.
Q. In fact that document, if you will look at paragraph 2.16 on 16 that indicates that the remedies under the note and mortgage are cumulative; does it not?
A. It does say that.
Q. You've been handed Exhibit 7; do you recognize that?
A. Yes.
Q. Construction Loan Agreement between Newberry Atrium

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and Carolina First.
A. Yes.
Q. Is that a true and correct copy of the document?
A. I am sure it is.
Q. Is that your signature on the last page?
A. Yes.
Q. Exhibit 8, does this document contain a number of modification agreements. If you'll look through these the first one first page March 3rd, 2009; do you see where I am?
A. Okay.
Q. On the second page of that document is that your signature?
A. Yes.
Q. Does that appear to be an accurate copy of that modification agreement?
A. Yes.
Q. The next one, June 16, 2009?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that dated September 14, 2009; do you see where I am?
A. Yes.

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Q. Does that appear to be your signature on the second page of that document?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that, December 18, 2009, is that your signature?
A. Yes.
Q. Is that an accurate copy of the document?
A. Yes.
Q. February 25th, 2010?
A. Okay.
Q. Does that appear to be a true and correct copy of February 25th, 2010 modification agreement?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Turn one more page. Do you see the Loan Modification Agreement at the top?
A. Yes.
Q. It's dated April 28, 2010?
A. Yes.
Q. Does that appear to be a true and correct copy of the Loan Modification Agreement?
A. Yes.

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Q. Is that your signature on page 3?
A. Yes.
Q. There is an Acknowledgement Ratification and Release by Guarantor on the 5th page?
A. Okay.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. The very next page the Loan Modification Agreement dated May 10th, 2011; do you see where I am?
A. No, I don't have that.
Q. Let's skip that and go on to the next one which is the Loan Modification Agreement dated May 23rd, 2012.
A. Yes.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. That does that look to be a true and correct copy of the May 23rd, 2012 Loan Modification Agreement?
A. Yes.
THE WITNESS: I'd like to get some water.
MR. BEDENBAUGH: Sure.
MR. JOWERS: Jody, Exhibits 10 to 13 we'll stipulate so you won't have to go through them all.
MR. BEDENBAUGH: Okay.

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BY MR. BEDENBAUGH:
Q. The loan modifications that were just in front of you, the purpose of those was to extend the maturity date; is that correct?
A. Yes.
Q. Can Newberry Atrium benefit from the extension of the maturity date; is that correct?
A. It can.
Q. And you as guarantor would benefit from an extension of the maturity date; would you not?
A. Yes.
Q. Carolina First and TD did not have the obligation under the loan documentation to agree to an extension; did they not?
A. No, but they had the willingness and the interest to preserve and make the asset whole were they to get their funds repaid to them. By doing anything less would be of no benefit to the project, to me or to the bank. By being reasonable, by being flexible they would ultimately in the next several years per my plan get paid out a hundred percent. By being anything less they would gain nothing more because I don't have $6,000,000 or access to that.
But the building is a valuable asset and when allowed through a reasonable approach will realize and be able to pay back all its owed. And you would expect that from a long-term

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relationship in a very difficult environment to be able to work together to solve the problem.
Q. Do you dispute that the note matured on May 3rd, 2012?
A. No.
Q. Do you dispute that TD demanded the balance due from Newberry Atrium and from you?
A. No, I think they did.
Q. Do you dispute that you and Newberry Atrium have failed to pay the balance due on the Note and Guaranty?
A. Neither me nor the asset has that kind of cash available.
Q. So you don't dispute that you haven't paid the balance, do you?
A. I don't dispute it.
Q. Do you dispute that Newberry Atrium is indebted to TD Bank under the loan?
A. No.
Q. Do you dispute that you are personally indebted to TD Bank under the terms of the Guaranty?
A. No.
Q. Let's talk about Atrium at Middle Sound. Tell me about how that loan originated.
A. Again, my relationships at Carolina First. They had asked to look at everything that I was involved in. That property was acquired to develop a number of outparcels and

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there was interest to take that property -- the loan was $3,000,000 -- and allow us to develop the structure and allow us to sell outparcels, which we were very successful in doing. We took a $3,000,000 loan and reduced it through our successors in putting the infrastructure in at great cost, improving the property and selling three outparcels and had repaid almost $2,000,000 of that note, paying fees and interest all along the way. That I would say was very beneficial during a very difficult economic time, we continued to feed it and improve the property.
Q. And was it you that requested the loan from Carolina First for that particular project?
A. They asked if they could look at everything that I was doing.
Q. Did you go to them and request a loan?
A. I went to them and showed them -- you said you wanted to look at everything I was doing, and I have enjoyed the working relationship and if you are interested in this I would appreciate your terms.
Q. And that would have been with whom?
A. Larry Scott.
Q. He was the banker here in Columbia?
A. Yes.
Q. Now, I understand there's still some property that remains to be sold with them?

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A. Yes.
Q. And what is the status of that property?
A. There is activity on it.
Q. What activity is that?
A. My partner there indicates that there are interested parties that want to develop a hotel on that.
Q. What is the status of those discussions?
A. I believe negotiations are going on and the buyer is in the process of reviewing how they can raise the capital and obtaining a franchise for that development.
Q. What is the likelihood of that transaction occurring in your mind?
A. Again, my partner is fairly confident. We have had a number of inquiries over the years but again the environment has been such it's been difficult for purchasers to acquire funding, so that being said he believes that the Wilmington market is improving and the ability to raise the funds is improving and he is hopeful that this transaction could be consummated in the months ahead.
Q. Would the price of that transaction be enough to pay the loan in full or not?
A. I believe it would be.
Q. What's the current value of that property?
A. Again, I'm not sure what it would be but I am sure it would be enough to pay the loan which I think is about a million

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two. And the uniqueness of that property is that it's got the linited water taps, sewer taps and it's developed.
Q. I assume that property is listed for sale?
A. Yes.
Q. How long has it been listed for sale?
A. I can't tell you but it's been listed with various brokers in the last several years.
Q. Are the taxes current on this property?
A. Probably not.
Q. Were you represented by counsel for the closing of that loan transaction?
A. Yes.
Q. By Mr. Jowers?
A. Yes.
Q. Atrium at Middle Sound Landings, LLC, the owners of that are you and Mr. McFarland; is that correct?
A. Yes.
Q. Each owning 50 percent?
A. Yes.
Q. How did you and Mr. McFarland come to be involved in the project?
A. He has a long-time knowledge of the Wilmington market. I have known Jim for years before he moved to Wilmington. He has been successful in acquiring properties and finding development opportunities. And I might add he has proven

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himself to be adept that during the times before the financing debacle happened we were able to sell three pads and repay almost $20,000,000.
Q. Who manages Atrium at Middle Sound?
A. I guess we're both managers of it but he's on the ground.
Q. Who pays the bills?
A. I paid them, fed the property for years.
Q. And that's done out of your office in South Carolina?
A. He paid a lot of the development costs himself out of his own accounts. I paid some of the development costs, so it was kind of a combination of both of us.
Q. Who made payments on the property?
A. I did.
Q. How often do you discuss the developments with Mr. McFarland?
A. Monthly, every six weeks.
Q. Usually on the phone?
A. Yes.
Q. Now, the Middle Sound case, are you contesting liability to TD Bank under the loan and guaranty in that case?
A. Yes.
Q. Is that the same grounds of different grounds from what we talked about with Newberry Atriums?
A. Similar.

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Q. What's different?
A. The nature of the market has been very difficult for the last several years. It's coming back. We need time in order to try and consummate a sale and/or refinance, and the damage that TD will do will be difficult to find new financing for refinancing of the land or prospective tenant.
Q. And the damages, are you again referring to the suit on the loan and guaranty?
A. Yes.
Q. Now, you would agree with me that it would be more difficult to sell the property if the pending foreclosure was filed against it; would it not?
A. I think there would be difficulty in selling the land until the right person shows up foreclosure or not for the loan against the property, but the value is every bit -- I believe that the value of the property would repay the loan on the sale of the property.
Q. Other than TD's election to sue on the guaranty is there any other allegation or defense that you're raising in that case?
A. It's the same defense and the same thinking that having placed my trust in the people at Carolina First that had worked with me over the years that they would approach creating more harm than solutions the way they are approaching this.
Q. And that special relationship you're referring to in

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connection with Atrium at Middle Sound as well as Newberry Atrium that would have developed when Carolina First was the lender as opposed to TD?

A. It would be my expectation when somebody takes over the place of the lender that they would continue to honor that relationship that brought them that business.

Q. Thank you. I am asking when did the relationship begin?

A. Under Carolina First.

Q. And the people involved that you indicated created this special relationship, those were Carolina First employees?

A. They were.

Q. What were the names of those people?

A. My goodness, I have dealt with Larry Scott for many years. Rebecca Robuck (ph), Justin Strickland. But Larry and Rebecca were the primary on-the-ground people, but absolutely sought after by the other people that I have dealt with.

Q. Same question as with the Newberry Atrium the special relationship, that's not based on any particular thing in the loan document, is it?

A. It's based on the history and actions that we have worked over the last 12 years.

Q. And not on anything in the loan document?

A. If it's there I am sure you would have found it for me.

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Q. Again in your Answer in that case you allege you would not have executed the Guaranty without the special relationship?

A. That's correct based on the knowledge that they had been flexible and reasonable to work through problems.

Q. And just like Newberry Atrium the guaranty wasn't a condition of the loan commitment; was it not?

A. It was.

Q. And any other lender would have required a guaranty; would they not?

A. I would think so.

Q. Again your defense about the election to sue on the guaranty and not bringing an action of foreclosure that's based solely on the decision to file suit on the Guaranty; is that correct?

A. Yes. I think that the value, if we had time to sell the report and create the opportunity to turn the land into cash or to develop it on behalf of a user would certainly protect TD's position.

Q. Is there anything else that we haven't talked about that is the basis of your defenses in the Middle Sound case?

A. I think certainly the value that I have enjoyed in working with Carolina First has created a lot of income for Carolina First, has certainly allowed me to create income to invest in other real estate, which unfortunately has not gone as well as everybody had anticipated during the meltdown, but

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nobody has gotten hurt. I can, absolutely if given the time, can solve these problems.

Q. All right. Exhibit 11 through 15. I believe your lawyer indicated that you would stipulate that 11 through 15 are accurate copies of these loan documents containing your signature. Can you look through those and let me know if you agree with that?

A. Yes.

Q. Those are true and correct copies?

A. Yes.

Q. You signed those documents?

A. Yes.

Q. Do you dispute that the Atrium at Middle Sound note matured under its terms?

A. No.

Q. Do you dispute that TD Bank has demanded the balance due from you and the entity?

A. Yes.

Q. You do dispute that?

A. No, I don't.

Q. Do you dispute that Atrium at Middle Sound and you and Mr. McFarland have failed to pay the balance due under the terms of the Note and Guaranty?

A. We would pay it if we had the liquidity, we do not have the liquidity, we're looking to the collateral that we

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pledged to this to repay the notes.

Q. Do you dispute that Atrium at Middle Sound is indebted to TD Bank for the note?

A. I don't dispute it.

Q. Do you dispute you're personally indebted to TD in return of the guaranty?

A. I don't dispute it but I do request a little more time and a reasonable flexibility to turn these assets into repayment sources.

Q. All right. You've been handed Exhibit 16. This is a Subpoena that I sent to you in connection with the bankruptcy adversary proceeding. Have you seen that before?

A. Yes.

Q. Also we'll give you Exhibit 19 which is your responses to the Subpoena which I received yesterday. Do you have 19?

A. Yes.

Q. The first thing I had asked for was time records and other documents showing the amount of time you spent with Newberry Atrium and your response indicates that you do not keep any time records for that; is that correct?

A. Yes.

Q. Do you have an estimate of how much time you spent on Newberry Atrium versus the other matters?

A. Depending on the month and the process it could be full-time to part-time.

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Q. Do you know if you spent 20 hours a week on it or more than that or how does it break down?
A. Depending on the week and the month and the situation it could be 40 to 60 hours a week, it could be nine to 10 to 20 hours a week.
Q. The next thing I subpoenaed was related to the TD Bank N.A. non-privileged documents related to TD Bank N.A.'s State Court actions against you; do you see that?
A. Yes.
Q. I believe you testified earlier that you do have files relating to these loans?
A. I have the documents that you showed to me in my files.
Q. And you have other documents in your files or do you know?
A. I have the leases which I have turned over to the bank. I have the basic plans, I have the designs, I have information that pertains to the asset, yes.
Q. And I believe you testified earlier that you have not produced those to your lawyer; is that right?
A. They produced it to me.
Q. Have you gone through those documents and given them to your lawyer?
A. I have gone through the documents and I have given it to my lawyer.

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Q. Okay. Your response indicates all documents between David Jacobs and his counsel are privileged but you testified earlier that you have documents related to these loans. All I want are copies of those documents, so that's what I'm trying to figure out.
A. I have given him documents that were requested which were leases, appraisals, plans and the bank has all that.
Q. You can't just respond in the litigation context -- in my mind you can't just respond and say the bank already has everything?
A. I've given it twice or three times.
Q. Well nothing was produced in response to my Subpoena so that's what I am trying to figure out.
A. Because I've delivered it previously.
MR. JOWERS: Let me make this statement for the record. The Subpoena says all documents relating to the State Court action. The documents he has in his files has nothing to do with the lawsuit. Those were just pre-construction or construction documents and bank documents that the bank prepared. There's nothing else that are relevant to this lawsuit that he has other than what we've produced.
MR. BEDENBAUGH: Without seeing them I don't know what they are.

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MR. JOWERS: That's not the question. The question was relating to that so the Subpoena called for an opinion on our part and that is our opinion. If you want to be more specific with subpoenas then you need to be more specific.
BY MR. BEDENBAUGH:
Q. The next question asks for documents related to the reorganization efforts of the Newberry Atrium. Your response says all documents concerning the reorganization are with the legal counsel and are privileged.
Now, you testified earlier you had in fact had some documents of Newberry Hospital related to a refinancing, with the possibility of leasing additional space?
A. Yes, and I have provided that to your appraiser.
Q. Are there other documents that I haven't gotten that relates to the reorganization?
A. No, just the correspondence that I have had with the appraiser which I sent on to him, the leases, the documents they requested. I have sent everything they requested to them so it's been delivered to them.
Q. Looking back at 19 the next document is a response to another subpoena; do you see that?
A. Yes.
Q. Have you seen that before, the Responses to the Subpoena?

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A. I am looking at it now. What is it you want me to answer?
Q. Have you seen the document before?
A. I don't believe I have but we have discussed these questions. I don't know that I've seen all this stuff that I provided, all that stuff that's attached to it.
Q. In paragraph 1 it indicates you do not have any documents that would show your ability to fund a plan of reorganization filed March 22nd, 2013 for Newberry Atrium Professional Center, LLC; is that correct?
A. That is correct. I have no documents. I have a business associate that has lent me money before and I have lent him money before. He has indicated he has interest in assisting me with funding the land.
Q. How much is he willing to lend to you?
A. My plan requires that I come up with that $450,000 over the next three years.
Q. Is that the gentleman in North Carolina?
A. Yes.
Q. What's his name, Howard?
A. Yes.
Q. What's his first name?
A. Rick.
Q. You don't have any documentation for that?
A. No.

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Q. Next sentence says he does not have any commitments of definitive source of funds for the plan of reorganization filed on March 22, 2013 for Newberry Atrium Professional center, LLC; is that correct?

A. I don't have anything in writing at this point but the fact that I have found a hundred and some-odd thousand dollars to keep the doors open for the last several years indicates that I have the ability to raise funds. And I do believe that the opportunity to continue working with the hospital provides another alternative solution.

Q. The third paragraph has documents showing the contributions to the debtor?

A. Yes.

Q. Do you recall what those contributions were used for?

A. To pay taxes, operating expenses.

Q. How much are the property taxes a year?

A. They were about 220 some-odd thousand dollars. I appealed it and it was reduced it to about $107,000.

Q. Why did Newberry Atrium file bankruptcy?

A. In an attempt to protect me as a guarantor to allow for the time to work through the reorganization which I anticipate will take three to five years, to continue to release, recruit the tenants and allow the property to be financed out and protect the interests of the tenants, the hospital, the community and allow me to refinance it out, and/or

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sell it.

Q. When you filed bankruptcy I believe the debtor had approximately $50,000 in his checking account; is that correct?

A. Yes.

Q. And the total trade claims as I calculate under your schedules to your maintenance service and various service providers were about $9,500; does that sound right?

A. No, it's probably closer to 20.

Q. But in any event you had the ability to pay those claims at the time you filed your bankruptcy; did you not?

A. I was trying to maintain a reserve and I was cautions about using those funds.

Q. But you certainly could pay it in the ordinary course, couldn't you?

A. I could other than the other courses that were going on.

Q. Well, at the time you weren't making payments to TD Bank, right?

A. For several months I was not because I knew the note was not -- they called the loan.

Q. What I am trying to figure out is you say certain other things going on but what prevented you from just paying those creditors?

A. I was applying it towards taxes and other important utilities such as electricity, sewer and water, and maintain

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that cash collateral which I was advised to do.

Q. What do you do on behalf of the debtor? What do you do for the debtor?

A. I am the manager, deal with the property managers, pay the bills, deal with the opportunity to design spaces, interface with the potential tenants that the hospitals direct me to, deal with the tenant issues, deal with the hospital and the ongoing operations and maintenance of the property.

Q. And the actual leasing efforts, that's led by the hospital itself?

A. It's been a combination of both. I have brought tenants to the table that have had offers and to participate and for various reasons the hospital declined. I have advised the other hospitals, Self Memorial Hospital on designs for their expansions. I have worked with them on operating the building, their space and dealing with their medical staff.

Q. And the debtor also utilizes brokers in connection with the leasing efforts; is that correct?

A. Yes.

Q. The hospital has the right to repurchase the debtor's property at some point; is that right?

A. It has a right of purchase.

Q. You have alleged that the State Court suit impaired Newberry Atrium's ability to reorganization; is that correct?

A. Yes.

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Q. What is the basis of that allegation?

A. Without the ability to refinance it with a judgement against it prevents the building from being financed out to repay TD.

Q. The impairment is in your opinion that the judgement would impeded the ability to get refinanced?

A. Yes.

Q. Is there anything else?

A. The funds that I anticipate raising to pay the loan would not be available to carry it for the next several years while we go through the releasing of the property.

Q. And why would the judgement have that impact, that latter impact that you just mentioned?

A. I wouldn't have the ability to raise the money if I had a judgement against me.

Q. You could raise the money from Mr. Howard?

A. Yes.

Q. Did Mr. Howard indicate that he would lend you the money if you get a judgement against you?

A. He's pretty much indicated that he wants his money safe.

Q. Has he indicated he would not loan you the money --

A. He hasn't been specific but I understand what he's telling me.

Q. Do you know if a judgement in the State Court suit

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will be entered in the next two or three months?
A. I really don't know what that process would involve but I know it would be immanent.
Q. If the judgement is entered against you do you have any idea of when you would be forced to make some sort of payment or that TD would collect on that judgement?
A. I don't know.
Q. Do you have an asset, available asset that you believe TD would be able to reach as a result of that judgement?
A. No, I don't know what TD's capabilities are.
Q. You can't name an asset that would be unavailable to you because of a judgement?
A. No, but any assets that I have that I was able to turn into cash would be impaired to repay anybody's debts back.
Q. Have you made any post petition advances to the debtor?
A. No.
Q. What is the balance of the cash collateral account?
A. I am not sure. We file reports regularly but I can't tell you the exact amount.
Q. The approximate $450,000 that you're proposing to fund the plan of reorganization would that come exclusively from Mr. Howard or some other source?
A. At this time that's where I anticipate it would be coming from. Over the next several years I do anticipate some

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of these assess that I have minority positions in should be able to be turned into cash and that will help me meet these obligations.
Q. Have you attempted to locate post confirmation funding from a traditional lender?
A. No.
Q. Has the debtor made that attempt?
A. No.
Q. What's the reason for the proposed planned injunction against TD Bank?
A. Well, it protects me as a guarantor allowing me to operate to raise money to refinance the property. There would a personal guaranty required under any refinancing and that will be my responsibility.
Q. If TD had a judgement against you the judgement would be paid down from the refinancing as well; would it not?
A. That would be my hope, but it certainly doesn't bode well for getting a new loan for a property coming out of bankruptcy.
Q. Have you previously made advances to the debtor without the benefit of an injunction?
A. No, but I was anticipating getting it back as the property continued to stabilize and we were able to refinance it back out again.
Q. So you did previously make advances without an

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injunction?
A. Without an injunction but we weren't facing the loan calling and the threat to get a judgement against me.
Q. Is it possible if TD got a judgement against you that you would continue to fund the short call and keep the debtor alive?
A. Anything is possible.
Q. If TD got a judgement against you would you just allow Newberry Atrium to fail?
A. I don't know.
Q. It would be in your interest in that case to continue to try to refinance or sell the property; would it not?
A. I am not sure how I would respond if I have no ability to raise money or have the ability to refinance.
Q. Now, the scope of the injunction in the plan in connection with prohibiting TD from suing you, does that apply only to the Newberry Atrium loan or to other loans with TD?
A. A judgement is detrimental anywhere it comes from.
Q. I just didn't understand the plan. Is it the debtors intent to extend --
A. My main focus is on preserving the Newberry Atrium because of the many moving parts that require refinancing. If you are asking me about the Middle Sound property we may have an opportunity to do a build suit for a tenant which would require us being able to get a loan and that remaining property could be

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a very good parcel for a couple of users that my partner is working with.
Q. Now, the injunction and plan, would that apply to TD only or to other lenders?
A. The other lenders I am currently working with have all been reasonable and flexible and I have a fair assurance, nothing in writing, that they do not want the projects to fail and would jeopardize my chances to continue releasing and selling the assets that I have.
Q. So no, it would not apply to those loans?
A. I haven't gotten to that point at this moment. I haven't gotten to the point where people are threatening to call the loan and put a judgement against me, if they have proven over the years to be flexible and reasonable.
Q. The terms you proposed in the plan at five and a half percent interest rate with a five year am and five year maturity, what's the basis of those terms?
A. The contract rate that is currently in place.
Q. For maturity?
A. Yes.
Q. Was that based on the market at all?
A. It was based on the contract rate that the loans had been was at maturity.
Q. Of course the market was different when that loan was made, was it not?

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A. The whole world was different, that's correct.
Q. Have you -- other than what you talked about earlier with the broker in New York if this transaction with the hospital goes down, have you done anything else to identify a post-confirmation lender?
A. I have inquired but have not had anyone that's willing to lend in a condition today as it stands today until this bankruptcy is flushed out. And the condition for the refinance would be that this bankruptcy be dropped, be dismissed.
Q. Now, I believe the debtor's plan assumes that there would be some additional leasing in years three through five; is that correct?
A. Yes.
Q. Why does the debtor believe that those years will be different from the past five or six years?
A. One is that the new CEO, interim CEO has now refocused and dealt with the settling in in the community. He's been there a year and a half, two years so the demand for health care in Newberry will continue to grow because of the expansion of reimbursement for Newberry County would allow them to recruit additional physicians because the Affordable Healthcare Act that will increase the demand to bring in all the Medicare and Medicaid patients that are underserved in the area, and as a result of that the recruitment will accelerate come '14 and '15.
Q. So it's your opinion that reimbursements will go up

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under the Affordable Healthcare Act?
A. Yes, and the demand will increase. Newberry is a very poor rural community and much of the population is underserved. The Affordable Healthcare Act will increase the coverage, increase the demand and increase the ability to recruit new physicians.
Q. Now, of course you're aware that South Carolina thus far has rejected the Medicaid expansion that's part of the Affordable Healthcare Act; are you not?
A. I don't know if it's been finalized. I think the politics right now are driving that. I can't tell you I know how the politicians will resolve this but the indications I am getting from the healthcare community is that there will be some acceptance, it's more affordable for the state to participate in the national program.
Q. By increased reimbursement does that assume that South Carolina --
A. Not South Carolina, Newberry County. I can't speak to the State of South Carolina. I can speak to Newberry County which has been acknowledged to get a higher reimbursement than many of the other rural counties in the state.
Q. Why is that?
A. I can't speak to the reasons, I am just aware that that has been the indications from the hospitals.
Q. From Newberry Hospital?

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A. Well, from other folks. There's been articles in the paper that speak to that, but the hospital, Newberry Hospital is anticipating an increase reimbursement. Self Memorial, that is also a participant in this building acknowledges that the Newberry County area will get a higher reimbursement than Greenwood which gives them more incentive to continue to expand their operations in Newberry.
Q. Look at Exhibit 17. Are those the projections for your plan?
A. Yes.
Q. Now, you've got the rent increasing it looks like in June of 2014?
A. Yes.
Q. Is that just an escalator clause in the lease?
A. Yes.
Q. Then you've got some up-fitting costs, February of 2014 to April 2014; do you see that $13,333?
A. Yes.
Q. Now, would that only occur if a new tenant is identified or would that be done for anyone?
A. If a new tenant is identified.
Q. So that assumes a new tenant would be coming on line?
A. Yes.
Q. Now, you've got expense increases in here of assuming a one and a half percent increase in your two and three. What

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was the basis for that assumption?
A. The rate of inflation.
Q. Now, the expenses identified on here, are any of those passed through to the tenant?
A. They are.
Q. Is that included in the rent received so that it nets out or how does that work?
A. There is an operating expense stop at 525. Anything that exceeds that is passed on the tenant.
Q. Explain that to me again in layman's terms.
A. The lease includes $5.25 of operating expenses. If it exceeds that, which it has, the tenants are billed pro-rata on their occupancy and are obligated to pay that additional money with additional rent.
Q. That would be included in the rent line item income section?
A. Yes.
Q. And so have you done that in this calculation or does that assume that it's below the rent?
A. If you'll look at the legend below it explains specifically what we're doing there.
Q. So a number -- I guess I am trying to figure out the rent figure stays constant throughout, it just assumes a constant amount?
A. There are rent escalations in addition to rent

passthroughs and they occur every three years.
Q. One percent a year?
A. Every third year.
Q. But the passthrough expenses, what I am trying to figure out is is that included in the rent figure that's shown for example August 13, $58,093?
A. It says in the notes here passthrough expense income included in the rental income is what it says.
Q. So you assumed for this that those expenses --
A. Are added to the rental income.
Q. The amount of your contribution is shown then on the post-petition loan line item?
A. Yes.
Q. So roughly?
A. A quarter of a million dollars.
Q. $198,000 in the first year cumulative to get a quarter of a million and then $172,000 and $114,000 in the third year?
A. Yes.
Q. Certainly it's possible your contribution could be less than that?
A. I would hope that it would be more; that means more up-fits, more tenants. This is a realistic approach.

MR. BEDENBAUGH: I have nothing further.

MR. MARKHAM: No questions.
MR. JORDAN: No questions.
MR. JOWERS: No questions.

(Thereupon the proceedings were concluded at 1:30 p.m.)

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CERTIFICATE OF REPORTER

I, Mary K. McCormick, Court Reporter and Notary Public for the State of South Carolina, do hereby certify:

That the foregoing proceeding was taken before me at the date and time and location as stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing proceeding as typed is a true, accurate and complete record of the testimony of the deponent and all of the objections made at the time of the proceeding to the best of my ability.

I further certify that I am not of counsel or kin to any of the parties to this cause pending or interested in the events thereof.

Witness my hand, I have hereunto af[illegible] official seal this 29th day of April, 2013, [illegible] Aiken County, South Carolina.

Mary K. McCormick (Katy McCormick)
Notary Public
State of South Carolina at Large
My Commission Expires:
June 30, 2015

COPY

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank	)	Civil Action No. 2012-CP-40-7540
Plaintiff,	)	**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT JACOBS**
vs.	)	
David H. Jacobs and James A. McFarland,	)	
Defendants.	)	

FILED
2012 MAY 24 PM 3:59

NOTICE IS HEREBY GIVEN that ten (10) days from the date hereof or as soon thereafter as may be scheduled, the undersigned will move before the presiding judge of the Fifth Judicial Circuit for an Order granting the Plaintiff TD Bank, NA, successor by merger with Carolina First Bank (hereinafter "Plaintiff" or "TD Bank"), summary judgment on its claim against Defendant David H. Jacobs ("Jacobs"). The grounds for this Motion are that there is no genuine issue of material fact and, therefore, the Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure.

This Motion is based on the South Carolina Rules of Civil Procedure; the Affidavit of TD Bank, which is attached hereto as **Exhibit 1**; the deposition of David H. Jacobs, which is attached hereto as **Exhibit 2**; all other discovery in this action; the pleadings; the applicable statutory and case law; any memorandum or further affidavits filed in support of this Motion; and any other relevant authority.

ARGUMENT

This is an action to collect on a Guaranty (as defined in the Complaint) given by Defendant Jacobs in consideration for a commercial note to Atrium at Middle Sound Land, LLC ("Atrium"), which was secured by a mortgage on commercial real estate owned by Atrium. Jacobs admits signing the Guaranty individually as well as signing the Note and other loan documents on behalf of Atrium. (Deposition of David H. Jacobs ("Jacobs Dep.") 107:3-12, Ex. 2.). In addition, Jacobs admits the loan has matured, that TD Bank has demanded payment, that he and Atrium failed to pay the balance due, and that he and Atrium are indebted under the terms of the loan documents. (Jacobs Dep. 107:13-108:9, Ex. 2.) Rather, the only defenses offered by Jacobs are the affirmative defenses of breach of fiduciary duty and breach of implied covenants of good faith and fair dealing based upon TD Bank's decision to sue on the Guaranty without first foreclosing on its collateral. As set forth below, these defenses are contrary to established law and fails as a matter of law.

A. *The Terms of the Guaranty Provide it Is an Independent and Absolute Guaranty of Payment and TD Bank Is Not Required to First Resort to its Collateral.*

A guaranty "is a contract and should be construed by the principles governing contracts," with the intentions of the parties as expressed in the guaranty guiding the Court. Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 973 (1989). The at-issue Guaranty provides in the first Paragraph that it is a guaranty of payment of the subject debt and further states in Paragraph 4 as follows:

> 4. **Unconditional Liability.** I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debtor or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. . . .

(Guaranty ¶ 4 (attached to TD Bank Aff. as Exhibit B).)

Thus, the at-issue Guaranty in this case unambiguously provides it is an absolute guaranty of payment (as opposed to a guaranty of collection) and that TD Bank is not required to first resort to its security. Under well-established South Carolina law, such guarantees of payment are independent contracts that give rise to obligations separate and distinct from a loan agreement. Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). Because they are separate obligations, creditors have the right to bring a separate action against a guarantor under a guaranty of payment immediately upon default and without suing the principal debtor or resorting to collateral. Citizens and Southern Nat'l Bank of South Carolina, 13 S.C. at 543, 443 S.E.2d at 551 (stating "no obligation was imposed upon [lender] . . . to pursue and/or exhaust the collateral"); Peoples Federal Sav. and Loan Ass'n, 300 S.C. at 281, 387 S.E.2d at 674; Tri-South Mortg. Investors v. Fountain, 266 S.C. 141, 145-46, 221 S.E.2d 861, 863 (1976) (holding based on unambiguous language of guaranty that lender was not required to foreclose on collateral before

pursuing remedy under guaranty).[1] Based on the unambiguous language of the Guaranty and South Carolina precedent enforcing a creditor's ability to sue independently on guarantees under provisions analogous to those in this case, Defendant Jacobs' defense fails as a matter of law. Consequently, summary judgment is appropriate.

B. There Can Be No Breach of Fiduciary Duty or Implied Covenant Where TD Bank Did What its Contract Expressly Allowed it To Do.

As set forth above, the terms of the Guaranty allow TD Bank to sue Defendant Jacobs without resorting to its security. Because the parties' contract expressly allows the action on which Defendant Jacobs bases his breach of fiduciary duty and breach of implied covenants of good faith and fair dealing defenses, those defenses fail as a matter of law. For instance, in First Fed'l Savings and Loan Ass'n of South Carolina v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992), the bank-plaintiff sued the defendants to collect on a guaranty and a defendant alleged the bank breached the implied covenants of good faith and fair dealing for not safeguarding collateral after learning of the potential loan default. The Court of Appeals reviewed the language of the guaranty and found the "guaranty gave First Federal the right to seek payment from the guarantors without pursuing collection against the [note obligor's] collateral" and

[1] Likewise, South Caroline law has recognized that a mortgagee is not required to foreclose on its mortgage prior to suing to collect on the underlying obligation. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 34, 647 S.E.2d 214, 216 (2007) (noting a "mortgagee who has a note and a mortgage has the option to either bring an action on the note or to pursue a foreclosure action" and mortgagee "may ignore the security and bring an action at law on the indebtedness") (citing Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978); Platt v. Carroll, 125 S.C. 493, 119 S.E. 180 (1923); Hatfield v. Kennedy, 1 Bay 501 (1973); Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990)).

thus the plaintiff was alleging a breach of an implied duty for the lender doing what the contract expressly permitted it to do. Id. at 266-67, 414 S.E.2d at 594. Therefore, the Court of Appeals affirmed the trial court's grant of summary judgment to the lender because "[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do." Id. at 267, 414 S.E.2d at 594; see also Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (same). Similarly, South Carolina courts recognize there is no fiduciary duty to explain to an individual what he could learn from reading the document. See Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. at 545, 443 S.E.2d at 551.[2] As the Guaranty in this case allows TD Bank to sue on the Guaranty without first resorting to security, summary judgment is appropriate as a matter of law.

CONCLUSION

WHEREFORE, TD Bank requests the Court to enter its Order granting TD Bank summary judgment on its claims against Defendant Jacobs and granting such other relief as this Court deems just and proper.

[SIGNATURE PAGE FOLLOWS]

[2] It is also the well settled rule in this State that the normal relationship between a bank and its customer generally does not create a fiduciary duty. See Regions Bank v. Scmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) (stating, "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature."); Steele v. Victory Savings Bank, 295 S.C. 290, 368 S.E.2d 91, (Ct. App. 1988) (discussing cases).

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

Columbia, South Carolina

May 24, 2013.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for TD Bank, NA, successor by merger with Carolina First Bank, do hereby certify that I have served all counsel and/or parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid,, to the following address(es):

FILED
2013 MAY 24 PM 3:59
CLERK OF COURT
C.C.P. & G.S.

Pleadings:

Plaintiff's Motion for Summary Judgment
C/A No. 2012-CP-40-7540

Party Served:

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Catherine F. Sease
Administrative Assistant

May 24, 2013

~#4822-5012-0978 v.1 - 04387/01818~

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT

TD Bank, NA, successor by merger with Carolina First Bank	)	Civil Action No. 2012-CP-40-7540
Plaintiff,	)	**AFFIDAVIT OF TD BANK, N.A. IN SUPPORT OF MOTION FOR SUAMMARY JUDGMENT AS TO DEFENDANT JACOBS**
vs.	)	
David H. Jacobs and James A. McFarland,	)	
Defendants.	)	

2013 MAY 24 PM 3:59

PERSONALLY APPEARED BEFORE ME, Benjamin R. Jenkins, III, who, first being duly sworn, deposes and says as follows:

1. He is an officer/agent of TD Bank, N.A., successor by merger with Carolina First Bank ("TD Bank"), and his job responsibilities with TD Bank include without limitation the oversight and review of accounts and promissory notes, including the loan documents at issue in the above-captioned action.

2. He is personally familiar with the status and payment history concerning the loan documents executed by the Defendants in favor of TD Bank. The matters stated herein are based on his own personal knowledge and/or his review of TD Bank's business records relating to the loan documents executed by the Defendants and the transactions described herein.

3. On April 4, 2011, Atrium at Middle Sound Land, LLC ("Atrium"), for consideration, executed in favor of TD Bank a Promissory Note ("Note") in the total amount of One Million Three Hundred Ten Thousand Four Hundred Ninety-Five and

PLAINTIFF'S EXHIBIT

33/100 ($1,310,495.33) Dollars, with interest as stated in said Note, and payable in full on April 4, 2012. The Note was a renewal of prior notes. A true and correct copy of the Note is attached hereto as **Exhibit A**.

4. As further consideration for the Note, on April 4, 2012, David A. Jacobs ("Jacobs") and James A. McFarland, Jr. ("McFarland") each executed in favor of Carolina First an Unconditional Guaranty (collectively, the "Guarantees") of the Note. True and correct copies of the Jacobs Guaranty and the McFarland Guaranty are attached hereto as **Exhibits B** and **C**, respectively.

5. To further secure the Original Note and all renewals and replacements of same, Atrium executed and delivered to Carolina First a Deed of Trust as to certain real property described therein which was dated November 19, 2004 and recorded in the Office of the Register of Deeds for New Hanover County, North Carolina on November 19, 2004 in Book 4575, Page 606 and executed an Assignment of Leases and Rents as to the real property which was dated November 19, 2004 and recorded in the Office of the Register of Deeds for New Hanover County, North Carolina on November 19, 2004 in Book 4575, Page 616. True and correct copies of the Deed of Trust and Assignment of Leases and Rents are attached hereto as **Exhibit D**.

6. Subsequently, Atrium, Jacobs, and McFarland failed to make the payments when due and defaulted under the terms of the Note and Guarantees. Therefore, TD Bank declared the entire balance due and payable and has demanded and does hereby demand payment of the same, but Atrium, Jacobs, and McFarland have refused to pay, and therefore are in default under the terms of the Note and Guarantees.

7. There is due and unpaid on the Note and Guarantees the sum of One Million Three Hundred Twenty-One Thousand Nine Hundred Ninety-Two and 57/100 ($1,321,992.57) Dollars, which amount represents principal, interest and late charges as of October 22, 2012, plus interest at the rate stated in the Note from October 22, 2012, reasonable attorney's fees and the costs and expenses of this action.

TD BANK, N.A.

By: Benjamin R. Jenkins, III
Its: Vice-President / Workout Officer

SWORN to and subscribed before me

this 22nd day of May, 2013.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: Feb. 5, 2018

ANN M. PINCKLEY-ROBINSON NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. Feb. 5, 2018

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
[redacted]	ATRIUM AT MIDDLE SOUND LAND, LLC		04/04/11	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
$1,310,495.33	Not Applicable	5.000%	04/04/12	Commercial
		Creditor Use Only		

PROMISSORY NOTE

(Commercial - Single Advance)
RENEWAL NOTE

DATE AND PARTIES. The date of this Promissory Note (Note) is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
SUCCESSOR BY MERGER TO CAROLINA FIRST BANK
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

1. DEFINITIONS. As used in this Note, the terms have the following meanings:

A. Pronouns. The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.

B. Note. Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.

C. Loan. Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.

D. Loan Documents. Loan Documents refer to all the documents executed as a part of or in connection with the Loan.

E. Property. Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.

F. Percent. Rates and rate change limitations are expressed as annualized percentages.

2. RENEWAL. This Note is a renewal of the following described note:

Note Date	Note Number	Note Amount
December 11, 2009	[redacted]	$1,355,307.23

I have requested that the note listed in the table above be renewed. The remaining balance of the note listed in the table above is $1,310,495.33.

3. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of **$1,310,495.33 (Principal)** plus interest from April 4, 2011 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

4. INTEREST. Interest will accrue on the unpaid Principal balance of this Note at the rate of 5.000 percent (Interest Rate).

A. Interest After Default. If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, Interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default, plus 4.000 percent, until paid in full.

B. Maximum Interest Amount. Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.

C. Statutory Authority. The amount assessed or collected on this Note is authorized by the South Carolina usury laws under S.C. Code Ann. §§ 37-3-605, 37-3-105 and 37-10-101 et. seq.

D. Accrual. Interest accrues using an Actual/360 days counting method.

5. ADDITIONAL CHARGES. As additional consideration, I agree to pay, or have paid, these additional fees and charges.

PLAINTIFF'S EXHIBIT A

A. Nonrefundable Fees and Charges. The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

Renewal. A(n) Renewal fee of $6,522.00 payable from separate funds on or before today's date.

6. REMEDIAL CHARGES. In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. Late Charge. If a payment is more than 20 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or $25.00, whichever is greater. I will pay this late charge promptly but only once for each late payment.

B. Returned Check Charge. I agree to pay a fee not to exceed $25.00 for each check, negotiable order of withdrawal or draft I issue in connection with the Loan that is returned because it has been dishonored.

7. PAYMENT. I agree to pay this Note in 12 payments. This Note is amortized over 228 payments. I will make 11 payments of $8,968.20 beginning on May 4, 2011, and on the 4th day of each month thereafter. A single "balloon payment" of the entire unpaid balance of Principal and interest will be due April 4, 2012.

Payments will be rounded to the nearest $.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. PREPAYMENT. I may prepay this Loan in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. LOAN PURPOSE. The purpose of this Loan is FOR RENEWAL OF LOAN USED TO PURCHASE COMMERCIAL INVESTMENT PROPERTY.

10. SECURITY. The Loan is secured by previously executed, separate security instruments, including the following: REAL ESTATE DEED OF TRUST DATED NOVEMBER 19, 2004 IN THE ORIGINAL AMOUNT OF $3,000,000.00 COVERING PROPERTY KNOWN AS 9.2 ACRE TRACT (NOW 4.89 ACRE TRACT) OF R/E ON MARKET STREET AT MIDDLE SOUND LOOP RD., (AKA LOT 2 & 3 MARKET STREET) WILMINGTON, NC, SAID DEED RECORDED NOVEMBER 19, 2004 IN NEW HANOVER COUNTY, NC IN BOOK 4575 PAGE 606-615 INSTRUMENT #2004061710

ASSIGNMENT OF LEASES AND RENTS DATED NOVEMBER 19, 2004 RECORDED NOVEMBER 19, 2004 IN NEW HANOVER COUNTY, NC IN BOOK 4575 PAGE 616-625 INSTRUMENT #2004061711

11. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. Business Termination. I merge, dissolve, reorganize, end my business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. New Organizations. Without your written consent, I organize, merge into, or consolidate with an entity; acquire all or substantially all of the assets of another; materially change the legal structure, management, ownership or financial condition; or effect or enter into a domestication, conversion or interest exchange.

E. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Note.

F. Other Documents. A default occurs under the terms of any other Loan Document.

G. Other Agreements. I am in default on any other debt or agreement I have with you.

H. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

I. Judgment. I fail to satisfy or appeal any judgment against me.

J. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

K. Name Change. I change my name or assume an additional name without notifying you before making such a change.

L. Property Transfer. I transfer all or a substantial part of my money or property.

M. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

N. Material Change. Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.

O. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

12. DUE ON SALE OR ENCUMBRANCE. You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.

13. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers By Borrower. In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

(7) I agree that you may inform any party who guarantees this Loan of any Loan accommodations, renewals, extensions, modifications, substitutions or future advances.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

14. REMEDIES. After I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Note immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.

D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

16. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

17. WARRANTIES AND REPRESENTATIONS. I make to you the following warranties and representations which will continue as long as this Note is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Note and the obligation evidenced by this Note are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to you I have not changed my name or principal place of business within the last 10 years and have not used any other trade or fictitious name. Without your prior written consent, I do not and will not use any other name and will preserve my existing name, trade names and franchises.

18. APPLICABLE LAW. This Note is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

19. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

20. AMENDMENT, INTEGRATION AND SEVERABILITY. This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable. No present or future agreement securing any other debt I owe you will secure the payment of this Loan if, with respect to this loan, you fail to fulfill any necessary requirements or limitations of Sections 19(a), 32 or 35 of Regulation Z or if, as a result, this Loan would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

21. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Note.

22. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

23. CREDIT INFORMATION. I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

24. ERRORS AND OMISSIONS. I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

25. SIGNATURES. By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

ATRIUM AT MIDDLE SOUND LAND, LLC

By _____ (Seal)
DAVID A. JACOBS, MEMBER

By _____ (Seal)
JAMES A. MCFARLAND, JR., MEMBER

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
DAVID A. JACOBS
115 ATRIUM WAY, SUITE 204
COLUMBIA, SC 29223

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [redacted], dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you.

PLAINTIFF'S EXHIBIT B

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:

_____ (Seal)
DAVID A. JACOBS
Individually

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
JAMES A. MCFARLAND JR.
103 FOREST HILLS DRIVE
WILMINGTON, NC 28403

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [redacted] dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of those debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you,

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PLAINTIFF'S EXHIBIT C

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on those actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. ADDITIONAL TERMS.

21. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR: _____ (Seal)
JAMES A. MCFARLAND JR.
Individually

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2004061710

FOR REGISTRATION REGISTER OF DEEDS
REBECCA T CHRISTIAN
NEW HANOVER COUNTY, NC
2004 NOV 19 04 49 45 PM
BK-4575 PG 606-615 FEE.$38 00

INSTRUMENT # 2004061710

DEED OF TRUST

Return to: Saffo Law Firm, P.C. (With Future Advance Clause)

This document was prepared by: REMBRANDT SERVICES - MIDLANDS, CAROLINA FIRST BANK, 575 COLUMBIA AVENUE, LEXINGTON, South Carolina 29072
Please return after recording to: LOAN OPERATIONS, CAROLINA FIRST BANK - Loan Doc. Dept., PO BOX 1029, GREENVILLE, South Carolina 29602

DATE AND PARTIES. The date of this Deed Of Trust (Security Instrument) is NOVEMBER 19, 2004. The parties and their addresses are.

GRANTOR:
ATRIUM AT MIDDLE SOUND LAND LLC
A North Carolina Limited Liability Company
115 ATRIUM WAY SUITE 204
COLUMBIA, South Carolina 29223

TRUSTEE:
MTNBK LTD
a North Carolina Company
201 WREN DRIVE
HENDERSONVILLE, North Carolina 28792

ORIGINAL

LENDER:
CAROLINA FIRST BANK
Organized and existing under the laws of South Carolina
575 Columbia Avenue
Lexington, South Carolina 29072
TIN: 57-0833566

1. CONVEYANCE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Grantor's performance under this Security Instrument, Grantor irrevocably grants, conveys and sells to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

9.2 ACRE TRACT OF R/E ON MARKET STREET AT MIDDLE SOUND LOOP RD, WILMINGTON, NC, AS FURTHER DESCRIBED IN ATTACHED EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in NEW HANOVER County at 9.2 ACRE TRACT OF R/E ON MARKET STREET AT MIDDLE SOUND LOOP RD, WILMINGTON, North Carolina .

Initials _____

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PLAINTIFF'S EXHIBIT D

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described (all referred to as Property). This Security Instrument will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

2. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Security Instrument at any one time will not exceed $3,000,000.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

3. SECURED DEBTS. This Security Instrument will secure the following Secured Debts:

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, dated November 19, 2004, from Grantor to Lender, with a loan amount of $3,000,000.00, and maturing on June 5, 2006. One or more of the debts secured by this Security Instrument contains a future advance provision.

B. All Debts. All present debts and future debts executed within fifteen years after the date of this Security Instrument from Grantor to Lender, even if this Security Instrument is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Security Instrument, each agrees that it will secure debts incurred either individually or with others who may not sign this Security Instrument. Nothing in this Security Instrument constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in the Grantor's principal dwelling that is created by this Security Instrument. This Security Instrument will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Security Instrument will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

4. PAYMENTS. Grantor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Security Instrument.

5. WARRANTY OF TITLE. Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, convey and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.

6. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees.

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Grantor receives from the holder.

C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.

7. CLAIMS AGAINST TITLE. Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.

8. DUE ON SALE. Lender may, at its option, declare the entire balance of the Secured Debts to be immediately due and payable upon the creation of, or contract for the creation of, a transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law governing the preemption of state due-on-sale laws, as applicable.

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9. TRANSFER OF AN INTEREST IN THE GRANTOR. If Grantor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:

A. A beneficial interest in Grantor is sold or transferred.

B. There is a change in either the identity or number of members of a partnership or similar entity.

C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.

10. WARRANTIES AND REPRESENTATIONS. Grantor makes to Lender the following warranties and representations which will continue as long as this Security Instrument is in effect:

A. Power. Grantor is duly organized, and validly existing and in good standing in all jurisdictions in which Grantor operates. Grantor has the power and authority to enter into this transaction and to carry on Grantor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Grantor operates.

B. Authority. The execution, delivery and performance of this Security Instrument and the obligation evidenced by this Security Instrument are within Grantor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which Grantor is a party or to which Grantor is or any of Grantor's property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to Lender, Grantor has not changed Grantor's name or principal place of business within the last 10 years and has not used any other trade or fictitious name. Without Lender's prior written consent, Grantor does not and will not use any other name and will preserve Grantor's existing name, trade names and franchises.

11. PROPERTY CONDITION, ALTERATIONS AND INSPECTION. Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor will not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Grantor will not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender will give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property will be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

12. AUTHORITY TO PERFORM. If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor will not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

13. DEFAULT. Grantor will be in default if any of the following occur:

A. Payments. Grantor fails to make a payment in full when due.

B. Insolvency or Bankruptcy. Any legal entity obligated on the Secured Debts makes an assignment for the benefit of creditors or become insolvent, either because its liabilities exceed its assets or it is unable to pay its debts as they become due; or it petitions for protection under federal, state or local bankruptcy, insolvency or

debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 60 days.

C. Business Termination. Grantor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. Grantor fails to perform any condition or to keep any promise or covenant of this Security Instrument.

E. Other Documents. A default occurs under the terms of any other transaction document.

F. Other Agreements. Grantor is in default on any other debt or agreement Grantor has with Lender.

G. Misrepresentation. Grantor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. Grantor fails to satisfy or appeal any judgment against Grantor.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority

J. Name Change. Grantor changes Grantor's name or assumes an additional name without notifying Lender before making such a change.

K. Property Transfer. Grantor transfers all or a substantial part of Grantor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

L. Property Value. The value of the Property declines or is impaired.

M. Material Change. Without first notifying Lender, there is a material change in Grantor's business, including ownership, management, and financial conditions.

N. Insecurity. Lender reasonably believes that Lender is insecure.

14. REMEDIES. Lender may use any and all remedies Lender has under state or federal law or in any instrument evidencing or pertaining to the Secured Debts, including, without limitation, the power to sell the Property. Any amounts advanced on Grantor's behalf will be immediately due and may be added to the balance owing under the Secured Debts. Lender may make a claim for any and all insurance benefits or refunds that may be available on Grantor's default.

Subject to any right to cure, required time schedules or any other notice rights Grantor may have under federal and state law, Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due and foreclose this Security Instrument in a manner provided by law upon the occurrence of a default or anytime thereafter.

If there is a default, Trustee will, in addition to any other permitted remedy, at the request of the Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash, after having first given such notice of hearing as to commencement of foreclosure proceedings and obtained such findings or leave of court as may be then required by law, and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee will give notice of sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.

Upon sale of the property and to the extent not prohibited by law, Trustee will pay all fees, charges and costs, including the Trustee's commission, will pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debts, and paying any surplus as required by law. The Trustee's commission will be 5 percent of the gross proceeds of the sale for a completed foreclosure. Lender or its designee may purchase the Property.

Upon any sale of the Property, Trustee will make and deliver a special or limited warranty deed that conveys the property sold to the purchaser or purchasers. Under this special or limited warranty deed, Trustee will covenant that Trustee has not caused or allowed a lien or an encumbrance to burden the Property and that Trustee will specially warrant and defend the Property's title of the purchaser or purchasers at the sale against all lawful claims and demand of all persons claiming by, through or under Trustee. The recitals in any deed of conveyance will be prima facie evidence of the facts set forth therein.

All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated or after foreclosure proceedings are filed will not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising

any remedy, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Grantor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Instrument. Grantor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, reasonable attorneys' fees not exceeding 15 percent of the outstanding balance on the Secured Debts. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. To the extent permitted by the United States Bankruptcy Code, Grantor agrees to pay the reasonable attorneys' fees Lender incurs to collect the Secured Debts as awarded by any court exercising jurisdiction under the Bankruptcy Code.

16. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Grantor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property, or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit

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to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Grantor's obligations under this section at Grantor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Grantor will provide Lender with collateral of at least equal value to the Property secured by this Security Instrument without prejudice to any of Lender's rights under this Security Instrument.

L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

17. CONDEMNATION. Grantor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds will be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

18. INSURANCE. Grantor agrees to keep the Property insured against the risks reasonably associated with the Property. Grantor will maintain this insurance in the amounts Lender requires. This insurance will last until the Property is released from this Security Instrument. What Lender requires pursuant to the preceding two sentences can change during the term of the Secured Debts. Grantor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

All insurance policies and renewals will include a standard "mortgage clause" and, where applicable, "loss payee clause." If required by Lender, Grantor agrees to maintain comprehensive general liability insurance and rental loss or business interruption insurance in amounts and under policies acceptable to Lender. The comprehensive general liability insurance must name Lender as an additional insured. The rental loss or business interruption insurance must be in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing.)

Grantor will give Lender and the insurance company immediate notice of any loss. All insurance proceeds will be applied to restoration or repair of the Property or to the Secured Debts, at Lender's option. If Lender acquires the Property in damaged condition, Grantor's rights to any insurance policies and proceeds will pass to Lender to the extent of the Secured Debts.

Grantor will immediately notify Lender of cancellation or termination of insurance. If Grantor fails to keep the Property insured Lender may obtain insurance to protect Lender's interest in the Property. This insurance may include coverages not originally required of Grantor, may be written by a company other than one Grantor would choose, and may be written at a higher rate than Grantor could obtain if Grantor purchased the insurance.

19. ESCROW FOR TAXES AND INSURANCE. Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.

20. CO-SIGNERS. If Grantor signs this Security Instrument but does not sign the Secured Debts, Grantor does so only to convey Grantor's interest in the Property to secure payment of the Secured Debts and Grantor does not agree to be personally liable on the Secured Debts. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

21. SUCCESSOR TRUSTEE. Lender, at Lender's option, may from time to time remove Trustee and appoint a successor without any other formality than the designation in writing. The successor trustee, without conveyance of the Property, will succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law.

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22. CONSTRUCTION LOAN. This Security Instrument secures an obligation incurred for the construction of an improvement on the Property.

23. OTHER TERMS. The following are applicable to this Security Instrument:

A. Additional Terms. Notwithstanding the foregoing maximum obligation limit of $3,000,000.00 specified in paragraph 2 above, this Deed of Trust shall secure payment of all future advances and/or extensions of credit that may subsequently be made to Grantor by Trustee, when evidenced by promissory notes specifically referring to this Deed of Trust and all extensions and renewals thereof, the maximum principal amount of all existing indebtedness, future advances, extensions of credit and all other indebtedness outstanding at any one time and to be secured by this Deed of Trust not to exceed FOUR MILLION FIVE HUNDRED THOUSAND AND NO/100 dollars ($4,500,000.00), plus interest thereon, attorneys' fees and court costs, and any advances necessary for the protection of the security or title thereto, including, but not limited to, advances for taxes and insurance premiums and all other payments or liabilities otherwise provided for in this Deed of Trust. This Deed of Trust may secure interest which is deferred, accrued or capitalized as provided in the aforesaid statute.

24. APPLICABLE LAW. This Security Instrument is governed by the laws of South Carolina, except to the extent otherwise required by the laws of the jurisdiction where the Property is located, and the United States of America.

25. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Grantor's obligations under this Security Instrument are independent of the obligations of any other Grantor. Lender may sue each Grantor individually or together with any other Grantor. Lender may release any part of the Property and Grantor will still be obligated under this Security Instrument for the remaining Property. The duties and benefits of this Security Instrument will bind and benefit the successors and assigns of Lender and Grantor.

26. AMENDMENT, INTEGRATION AND SEVERABILITY. This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this Security Instrument is effective unless made in writing and executed by Grantor and Lender. This Security Instrument is the complete and final expression of the agreement. If any provision of this Security Instrument is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

27. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Security Instrument.

28. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one party will be deemed to be notice to all parties. Grantor will inform Lender in writing of any change in Grantor's name, address or other application information. Grantor will provide Lender any financial statements or information Lender requests. All financial statements and information Grantor gives Lender will be correct and complete. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and to confirm Lender's lien status on any Property. Time is of the essence.

SIGNATURES. By signing under seal, Grantor agrees to the terms and covenants contained in this Security Instrument. Grantor also acknowledges receipt of a copy of this Security Instrument.

GRANTOR:

ATRIUM AT MIDDLE SOUND LAND, LLC

By _____ (Seal)
DAVID H. JACOBS, MEMBER

ACKNOWLEDGMENT.

(Business or Entity)

State OF South Carolina County OF Richland ss.

I Gerald D. Jowers a Notary Public, certify that David H. Jacobs, member of Grantor personally came before me this day and acknowledged that he/she is an authorized member of ATRIUM AT MIDDLE SOUND LAND LLC a Limited Liability Company, and that by authority duly given and as the act of the Limited Liability Company, the foregoing instrument was signed in its name by its MEMBER, and attested by himself/herself as its member.

Witness my hand and official seal, this the 18th day of November, 2004

My commission expires: 6/1/2011

Notary Public

GERALD D. JOWERS NOTARY PUBLIC SOUTH CAROLINA

The Foregoing Certificates of _____

is/are certified to be correct. This instrument and this certificate are duly registered at the date and time in the Book and Page shown on page one.

_____ REGISTER OF DEEDS FOR _____ COUNTY

By _____ Deputy/Assistant-Register of Deeds

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Exhibit "A"

BEING ALL of TRACT 1 and TRACT 2 as shown on that map entitled "Survey for HALL FAMILY TRUST" recorded in Map Book 40 at Page 43 of the New Hanover County Registry, reference to which is hereby made for a more particular description.

Exhibit "A"

BEING ALL of TRACT 1 and TRACT 2 as shown on that map entitled "Survey for HALL FAMILY TRUST" recorded in Map Book 40 at Page 43 of the New Hanover County Registry, reference to which is hereby made for a more particular description

[redacted]

2004061711

FOR REGISTRATION REGISTER OF DEEDS
REBECCA T CHRISTIAN
NEW HANOVER COUNTY NC
2004 NOV 19 04 49 45 PM
BK 4575 PG:616-625 FEE $38 00
NS $25 00
INSTRUMENT # 2004061711

Return to: Saffo Law Firm, P.C.

ASSIGNMENT OF LEASES AND RENTS

This document was prepared by: REMBRANDT SERVICES - MIDLANDS, CAROLINA FIRST BANK, 575 COLUMBIA AVENUE, LEXINGTON, South Carolina 29072
Please return after recording to: LOAN OPERATIONS, CAROLINA FIRST BANK - Loan Doc. Dept , PO BOX 1029, GREENVILLE, South Carolina 29602

DATE AND PARTIES. The date of this Assignment of Leases and Rents (Assignment) is NOVEMBER 19, 2004. The parties and their addresses are:

ASSIGNOR:
ATRIUM AT MIDDLE SOUND LAND LLC
A North Carolina Limited Liability Company
115 ATRIUM WAY SUITE 204
COLUMBIA, South Carolina 29223

ORIGINAL

LENDER:
CAROLINA FIRST BANK
Organized and existing under the laws of South Carolina
575 Columbia Avenue
Lexington, South Carolina 29072
TIN. 57-0833566

1. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Assignment at any one time will not exceed $3,000,000.00 This limitation of amount does not include interest and other fees and charges validly made pursuant to this Assignment. Also, this limitation does not apply to advances made under the terms of this Assignment to protect Lender's security and to perform any of the covenants contained in this Assignment.

2. SECURED DEBTS. This Assignment will secure the following Secured Debts:

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, dated November 19, 2004, from Assignor to Lender, with a loan amount of $3,000,000.00, and maturing on June 5, 2006. One or more of the debts secured by this Assignment contains a future advance provision.

B. All Debts. All present debts and future debts executed within fifteen years after the date of this Assignment from Assignor to Lender, even if this Assignment is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Assignment, each agrees that it will secure debts incurred either individually or with others who may not sign this Assignment. Nothing in this Assignment constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in the Assignor's principal dwelling that is created by this Assignment. This Assignment will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are

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defined by federal law governing unfair and deceptive credit practices. This Assignment will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Assignment.

3. ASSIGNMENT OF LEASES AND RENTS. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Assignor's performance under this Assignment, Assignor assigns, grants and conveys to Lender as additional security all the right, title and interest in the following (all referred to as Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases).

B. Rents, issues and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have regarding the Property

C. The term Property as used in this Assignment shall include the following described real property

9.2 ACRE TRACT OF R/E ON MARKET STREET AT MIDDLE SOUND LOOP RD, WILMINGTON, NC, AS FURTHER DESCRIBED IN ATTACHED EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in NEW HANOVER County at 9.2 ACRE TRACT OF R/E ON MARKET STREET AT MIDDLE SOUND LOOP RD, WILMINGTON, North Carolina .

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

4. PAYMENTS. Assignor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Assignment.

5. COLLECTION OF RENTS. Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. Assignor will not collect in advance any Rents due in future lease periods, unless Assignor first obtains Lender's written consent.

Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds. When Lender so directs, Assignor will endorse and deliver any payments of Rents from the Property to Lender Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses.

Assignor agrees that this Assignment is immediately effective between Assignor and Lender and effective as to third parties on the recording of this Assignment.

6. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Assignor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Assignment. Assignor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Assignment. Expenses include, but are not limited to, reasonable attorneys' fees not exceeding 15 percent of the outstanding balance on the Secured Debts These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts To the extent permitted by the United States Bankruptcy Code, Assignor agrees to pay the reasonable attorneys' fees Lender incurs to collect the Secured Debts as awarded by any court exercising jurisdiction under the Bankruptcy Code.

7. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or

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contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Assignor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Assignor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Assignor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Assignor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Assignor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Assignor or any tenant of any Environmental Law. Assignor will immediately notify Lender in writing as soon as Assignor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Assignor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Assignor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Assignor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Assignor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Assignor agrees, at Assignor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Assignor's obligations under this section at Assignor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Assignor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Assignment and in return Assignor will provide Lender with collateral of at least equal value to the Property secured by this Assignment without prejudice to any of Lender's rights under this Assignment.

L. Notwithstanding any of the language contained in this Assignment to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Assignment regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

8. CONDEMNATION. Assignor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Assignor authorizes Lender to intervene in Assignor's name in any of the above described actions or

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claims. Assignor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property Such proceeds will be considered payments and will be applied as provided in this Assignment. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

9. APPOINTMENT OF A RECEIVER. On or after an Assignor's default, Assignor agrees to Lender making an application to the court for an appointment of a receiver for the benefit of Lender to take possession of the Property and the Leases, with the power to receive, collect and apply the Rents. Any Rents collected will be applied as the court authorizes to pay taxes, to provide insurance, to make repairs and to pay costs or any other expenses relating to the Property, the Leases and Rents, and any remaining sums shall be applied to the Secured Debts. Assignor agrees that this appointment of a receiver may be without giving bond, without reference to the then-existing value of the Property, and without regard to the insolvency of any person liable for any of the Secured Debts.

10. DUE ON SALE. Lender may, at its option, declare the entire balance of the Secured Debts to be immediately due and payable upon the creation of, or contract for the creation of, a transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law governing the preemption of state due-on-sale laws, as applicable.

11. TRANSFER OF AN INTEREST IN THE ASSIGNOR. If Assignor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:

A. A beneficial interest in Assignor is sold or transferred.

B. There is a change in either the identity or number of members of a partnership or similar entity.

C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Assignment.

12. WARRANTIES AND REPRESENTATIONS. Assignor makes to Lender the following warranties and representations which will continue as long as this Assignment is in effect:

A. Power. Assignor is duly organized, and validly existing and in good standing in all jurisdictions in which Assignor operates. Assignor has the power and authority to enter into this transaction and to carry on Assignor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Assignor operates.

B. Authority. The execution, delivery and performance of this Assignment and the obligation evidenced by this Assignment are within Assignor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which Assignor is a party or to which Assignor is or any of Assignor's property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to Lender, Assignor has not changed Assignor's name or principal place of business within the last 10 years and has not used any other trade or fictitious name. Without Lender's prior written consent, Assignor does not and will not use any other name and will preserve Assignor's existing name, trade names and franchises.

D. Title. Assignor has good title to the Leases, Rents and Property and the right to assign, grant and convey to Lender as additional security the Leases and Rents, and no other person has any right in the Leases and Rents

E. Recordation. Assignor has recorded the Leases as required by law or as otherwise prudent for the type and use of the Property.

F. Default. No default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Assignor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Assignor or any party to the Lease defaults or fails to observe any applicable law, Assignor will promptly notify Lender.

G. Lease Modification. Assignor has not sublet, modified, extended, canceled, or otherwise altered the Leases, or accepted the surrender of the Property covered by the Leases (unless the Leases so require)

H. Encumbrance. Assignor has not assigned, compromised, subordinated or encumbered the Leases and Rents.

13. COVENANTS. Assignor agrees to the following covenants:

Initials

A. Rent Abatement and Insurance. When any Lease provides for an abatement of Rents due to fire, flood or other casualty, Assignor will insure against this risk of loss with a policy satisfactory to Lender. Assignor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

B. Copies of Leases. Assignor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.

C. Right To Rents. After default and Lender taking the appropriate affirmative action, Assignor will notify all current and future tenants and others obligated under the Leases of Lender's right to the Leases and Rents.

D. Accounting. When Lender requests, Assignor will provide to Lender an accounting of Rents, prepared in a form acceptable to Lender, subject to generally accepted accounting principles and certified by Assignor or Assignor's accountant to be current, accurate and complete as of the date requested by Lender.

E. Lease Modification. Assignor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's written consent.

F. Encumbrance. Assignor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent.

G. Future Leases. Assignor will not enter into any future Leases without prior written consent from Lender. Assignor will execute and deliver such further assurances and assignments as to these future Leases as Lender requires from time to time.

H. Personal Property. Assignor will not sell or remove any personal property on the Property, unless Assignor replaces this personal property with like kind for the same or better value.

I. Prosecution and Defense of Claims. Assignor will appear in and prosecute its claims or defend its title to the Leases and Rents against any claims that would impair Assignor's interest under this Assignment and, on Lender's request, Assignor will also appear in any action or proceeding on behalf of Lender. Assignor agrees to assign to Lender, as requested by Lender, any right, claims or defenses which Assignor may have against parties who supply labor or materials to improve or maintain the leaseholds subject to the Leases and/or the Property.

J. Liability and Indemnification. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses or damages due to Lender's gross negligence or intentional torts. Otherwise, Assignor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

K. Leasehold Estate. Assignor will not cause or permit the leasehold estate under the Leases to merge with Assignor's reversionary interest, and agrees that the Leases shall remain in full force and effect regardless of any merger of the Assignor's interests and of any merger of the interests of Assignor and any party obligated under the Leases.

L. Insolvency. Lender will be the creditor of each tenant and of anyone else obligated under the Leases who is subject to an assignment for the benefit of creditors, an insolvency, a dissolution or a receivership proceeding, or a bankruptcy.

14. DEFAULT. Assignor will be in default if any of the following occur:

A. Payments. Assignor fails to make a payment in full when due.

B. Insolvency or Bankruptcy. Any legal entity obligated on the Secured Debts makes an assignment for the benefit of creditors or become insolvent, either because its liabilities exceed its assets or it is unable to pay its debts as they become due; or it petitions for protection under federal, state or local bankruptcy, insolvency or debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 60 days.

C. Business Termination. Assignor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. Assignor fails to perform any condition or to keep any promise or covenant of this Assignment.

E. Other Documents. A default occurs under the terms of any other transaction document.

F. Other Agreements. Assignor is in default on any other debt or agreement Assignor has with Lender.

Initials _____

G. Misrepresentation. Assignor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided

H. Judgment. Assignor fails to satisfy or appeal any judgment against Assignor.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. Assignor changes Assignor's name or assumes an additional name without notifying Lender before making such a change.

K. Property Transfer. Assignor transfers all or a substantial part of Assignor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

L. Property Value. The value of the Property declines or is impaired.

M. Material Change. Without first notifying Lender, there is a material change in Assignor's business, including ownership, management, and financial conditions.

N. Insecurity. Lender reasonably believes that Lender is insecure.

15. REMEDIES. After Assignor defaults, and after Lender gives any legally required notice and opportunity to cure the default, Lender may at Lender's option do any one or more of the following.

A. Acceleration. Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due.

B. Additional Security. Lender may demand additional security or additional parties to be obligated to pay the Secured Debts.

C. Sources. Lender may use any and all remedies Lender has under North Carolina or federal law or in any instrument evidencing or pertaining to the Secured Debts.

D. Insurance Benefits. Lender may make a claim for any and all insurance benefits or refunds that may be available on Assignor's default.

E. Payments Made On Assignor's Behalf. Amounts advanced on Assignor's behalf will be immediately due and may be added to the Secured Debts

F. Rents. Lender may terminate Assignor's right to collect Rents and directly collect and retain Rents in Lender's name without taking possession of the Property and to demand, collect, receive, and sue for the Rents, giving proper receipts and releases. In addition, after deducting all reasonable expenses of collection from any collected and retained Rents, Lender may apply the balance as provided for by the Secured Debts.

G. Entry. Lender may enter, take possession, manage and operate all or any part of the Property, make, modify, enforce or cancel or accept the surrender of any Leases; obtain or evict any tenants or licensees, increase or reduce Rents; decorate, clean and make repairs or do any other act or incur any other cost Lender deems proper to protect the Property as fully as Assignor could do. Any funds collected from the operation of the Property may be applied in such order as Lender may deem proper, including, but not limited to, payment of the following: operating expenses, management, brokerage, attorneys' and accountants' fees, the Secured Debts, and toward the maintenance of reserves for repair or replacement. Lender may take such action without regard to the adequacy of the security, with or without any action or proceeding, through any person or agent, or receiver to be appointed by a court, and irrespective of Assignor's possession.

The collection and application of the Rents or the entry upon and taking possession of the Property as set out in this section shall not cure or waive any notice of default under the Secured Debts, this Assignment, or invalidate any act pursuant to such notice. The enforcement of such remedy by Lender, once exercised, shall continue for so long as Lender shall elect, notwithstanding that such collection and application of Rents may have cured the original default.

H. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

16. TERM. This Assignment will remain in full force and effect until the Secured Debts are paid or otherwise discharged and Lender is no longer obligated to advance funds under any loan or credit agreement which is a part of the Secured Debts. If any or all payments of the Secured Debts are subsequently invalidated, declared void or voidable, or set aside and are required to be repaid to a trustee, custodian, receiver or any other party under any

Initials _____

bankruptcy act or other state or federal law, then the Secured Debts will be revived and will continue in full force and effect as if this payment had not been made.

17. CO-SIGNERS. If Assignor signs this Assignment but does not sign the Secured Debts, Assignor does so only to assign Assignor's interest in the Property to secure payment of the Secured Debts and Assignor does not agree to be personally liable on the Secured Debts. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

18. CONSTRUCTION LOAN. This Assignment secures an obligation incurred for the construction of an improvement on the Property.

19. OTHER TERMS. The following are applicable to this Assignment:

A. Additional Terms. This Agreement (along with all deposit accounts, mortgages, security agreements, pledge agreements and any and all other security instruments and items of collateral that I have at any time in the past given to you or that I may at any time in the future give to you) shall secure any and all of the obligations that I currently owe you or that I may at any time in the future owe you.

20. APPLICABLE LAW. This Assignment is governed by the laws of South Carolina, except to the extent otherwise required by the laws of the jurisdiction where the Property is located, and the United States of America.

21. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Assignor's obligations under this Assignment are independent of the obligations of any other Assignor. Lender may sue each Assignor individually or together with any other Assignor. Lender may release any part of the Property and Assignor will still be obligated under this Assignment for the remaining Property. The duties and benefits of this Assignment will bind and benefit the successors and assigns of Lender and Assignor.

22. AMENDMENT, INTEGRATION AND SEVERABILITY. This Assignment may not be amended or modified by oral agreement. No amendment or modification of this Assignment is effective unless made in writing and executed by Assignor and Lender. This Assignment is the complete and final expression of the agreement. If any provision of this Assignment is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

23. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Assignment.

24. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one party will be deemed to be notice to all parties. Assignor will inform Lender in writing of any change in Assignor's name, address or other application information. Assignor will provide Lender any financial statements or information Lender requests. All financial statements and information Assignor gives Lender will be correct and complete. Assignor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Assignor's obligations under this Assignment and to confirm Lender's lien status on any Property. Time is of the essence.

SIGNATURES. By signing under seal, Assignor agrees to the terms and covenants contained in this Assignment. Assignor also acknowledges receipt of a copy of this Assignment.

ASSIGNOR:

ATRIUM AT MIDDLE SOUND LAND LLC

By _____ (Seal)

DAVID H. JACOBS, MEMBER

ACKNOWLEDGMENT.

(Business or Entity)

State OF South Carolina, County OF Richland ss.

I Gerald D. Jowers a Notary Public, certify that David H. Jacobs personally came before me this day and acknowledged that he/she is a member of ATRIUM AT MIDDLE SOUND LAND LLC a Limited Liability Company, and that by authority duly given and as the act of the Limited Liability Company, the foregoing instrument was signed in its name by its MEMBER, and attested by himself/herself as its Member

Witness my hand and official seal, this the 18 day of November, 2004.

My commission expires: 6/1/2011

(Notary Public) for SC

GERALD D. JOWERS NOTARY PUBLIC SOUTH CAROLINA

The Foregoing Certificates of _____

is/are certified to be correct. This instrument and this certificate are duly registered at the date and time in the Book and Page shown on page one.

_____ REGISTER OF DEEDS FOR _____ COUNTY

By _____ Deputy/Assistant-Register of Deeds

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REBECCA T. CHRISTIAN
REGISTER OF DEEDS, NEW HANOVER
216 NORTH SECOND STREET

WILMINGTON, NC 28401

****

Filed For Registration:	**11/19/2004 04:49:45 PM**
Book:	**RE 4575 Page: 616-625**
Document No.:	**2004061711**
	ASGMT 10 PGS $38.00
NS:	**$25.00**
Recorder:	**LIESEL WARD**

****

State of North Carolina, County of New Hanover

The foregoing certificate of GERALD D JOWERS Notary is certified to be correct. This 19TH of November 2004

REBECCA T. CHRISTIAN , REGISTER OF DEEDS

By: Liesel Ward
Deputy/~~Assistant~~ Register of Deeds

****

YELLOW PROBATE SHEET IS A VITAL PART OF YOUR RECORDED DOCUMENT.
PLEASE RETAIN WITH ORIGINAL DOCUMENT AND SUBMIT FOR RE-RECORDING.

2004061711

2004061711

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS
COUNTY OF RICHLAND — CASE NO: 2012-CP-40-6074

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs,
Defendant.

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS
COUNTY OF RICHLAND — CASE NO: 2012-CP-40-7540

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs and James A. McFarland,
Defendants.

UNITED STATES BANKRUPTCY COURT
District of South Carolina
Case No. 13-01377-JW

In re:
Newberry Atrium Professional Center, LLC,
Debtor,

Newberry Atrium Professional Center, LLC,
Plaintiff,
vs.
TD Bank, NA,
Defendant.

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D E P O S I T I O N

WITNESS: David H. Jacobs

DATE: April 26, 2013

TIME: 9:30 a.m.

LOCATION: Columbia, South Carolina

TAKEN BY: Attorney for the Plaintiff
Jody A. Bedenbaugh, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

REPORTED BY: KATY MCCORMICK
Stenographic Court Reporter

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803-779-2650
fjordan@bqslaw.com

(INDEX REAR OF TRANSCRIPT)

STIPULATION: It is stipulated in and between counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent reserves the right to read and sign the deposition transcript.

(The reading and signing of the deposition by the witness is waived.)

(Plaintiff's Exhibits 1-19 premarked for identification.)

DAVID H. JACOBS, being first duly sworn, testified as follows:

EXAMINATION

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, we have met before but for the record I am Jody Bedenbaugh here on behalf of TD Bank. Today we're here for your deposition in two of the State Court actions that TD filed against you as well as the adversary proceedings against the parties in the Newberry Atrium bankruptcy case.

The deposition shouldn't last all that long, I am going to try to get out of here shortly after lunch if we can.

PLAINTIFF'S EXHIBIT 2

If you need a break at any time please let me know, don't hesitate. For her benefit and the benefit of the transcript you and I need to make sure we do not talk over each other and that all of your responses are verbal as opposed to nodding your head.

If you don't understand any of my questions or didn't hear my question or just want me to repeat it, please ask me to do so otherwise I'll assume you understood and heard the question; is that fair?

A. Yes.

Q. If your lawyer objects, most of the time it will be for my benefit and I may rephrase the question. If I don't rephrase the question you are to answer the question that I asked unless he instructs you not to because it's a privilege; do you understand?

A. Yes, sir.

Q. Are you under the influence of any drug or alcohol that would impair your ability to answer truthfully today?

A. No.

Q. Did you do anything to prepare for this deposition?

A. Reviewed my materials.

Q. And I don't want to know about any materials from your lawyer but other than that what did you review?

A. That's basically it.

Q. Did you discuss the case or this deposition with

anyone other than your attorney or the attorney for your bankrupt entity?

A. No.

Q. What's your place and date of birth?

A. Tucson, Arizona, November 29, 1945.

Q. What's your business address now?

A. 115 Atrium Way, Columbia, SC.

Q. Are you at a particular suite there?

A. 204.

Q. What about your home address?

A. 6133 Lakeshore, Columbia.

Q. How long have you been at Lakeshore?

A. Twenty years.

Q. Are you married?

A. Yes.

Q. What's your wife's name?

A. Peggy.

Q. How long have you been married to Peggy?

A. About 40 years.

Q. Do you all have any children?

A. Yes.

Q. What are their names?

A. Kari and Kim.

Q. How do you spell Kari?

A. K A R I.

Q. And is Kim just Kim not Kimberly?

A. She goes by both ways.

Q. Any other children?

A. No.

Q. Are they both adults?

A. Yes.

Q. Who is your current employer?

A. Atrium Development.

Q. What is your title there?

A. President.

Q. What are your duties at Atrium Development?

A. Manage property, develop property.

Q. Manage and develop property?

A. Yes.

Q. Are we talking about commercial real estate?

A. Yes.

Q. How long have you been doing that?

A. Over 25 years.

Q. Twenty-five years?

A. About.

Q. And that's been with Atrium Development the whole time?

A. The last 25 years.

Q. What did you do before that?

A. Worked for other developers.

Q. How long did you work for developers before you want out on your own with Atrium Development?

A. Seven, eight years, 10 years.

Q. So for the past 35 years you've been in the real estate development business; is that correct?

A. Yes.

Q. Now, I am somewhat familiar with account background but I understand you have developed a number of office buildings under the Atrium name brand; is that correct?

A. Yes.

Q. Tell me about that.

A. The buildings are distinguished by an atrium in the interior to give it a unique feel and look.

Q. Are we talking about office buildings normally?

A. Primarily office, medical office, commercial office.

Q. How many of these Atrium-brand office buildings have you developed over the years?

A. Maybe 10 or 12.

Q. Are they located in South Carolina only or in other states as well?

A. South Carolina, North Carolina, Colorado.

Q. Okay. I understand you've also developed a number of daycare development center-type properties under the name Gateway; is that correct?

A. Yes.

Q. How many Gateway Academy developments have you had over the years?
A. Twenty, somewhere between 20 to 22.
Q. Where are they located?
A. Colorado, North Carolina and South Carolina.
Q. Now, other than the Atrium brand office buildings and the Gateway child development centers do you have any other development projects currently?
A. I have developed some outparcel retails over my career.
Q. Okay. Where is that?
A. Tennessee.
Q. Anywhere else?
A. That's it.
Q. How are the projects typically financed?
A. Bank loans.
Q. And are you primarily the point person in connection with the bank financing of the developments or is someone else with Atrium a person primarily responsible for that?
A. Over the recent years I have been the point person.
Q. It's fair to say you've got a substantial amount of real estate financing experience in connection with your development line of work?
A. Yes.
Q. In terms of how the deals are structured do you

typically place the properties in an entity of some type or do you hold them within your Atrium holding companies? How does that work?
A. Typically it's a single purpose entity.
Q. In connection with the financing are you generally asked to guarantee the debts of the single purpose entities?
A. The loans that I have obtained have all been collateralized loans and they have asked me -- commercial lenders, banks -- have asked me to sign a guarantee to back up that collateral.
Q. Okay. Now, we'll get to your Subpoena response that I just received yesterday in a little while and I have got copies of certain current guarantees, but in the past do you know how many guarantees you have executed for debts on these single purpose entities?
A. I would assume. Most every construction loan had a guaranty.
Q. So we talked about 20 to 22 Gateway projects and 10 to 12 Atrium projects in addition to some outparcel retail developments. Generally at the outset of financing you would have been asked to guarantee those loans; is that correct?
A. Yes.
Q. You've been handed Exhibit 1 to your deposition which is a statement of financial condition of David H. Jacobs dated June 30, 2012; do you see that?

A. Yes.
Q. Does that appear to be a true and correct copy of your statement of financial condition as of that date?
A. Yes.
Q. According to the Statement of Assets on the first page it's got the cash balance in an amount of approximately $25,000; do you see that?
A. Yes.
Q. Do you know what your current cash balance is?
A. Probably in the same range. Day by day it goes up and down.
Q. I understand. Do you know if you have a financial statement that's been prepared that's more recent than this one?
A. No.
Q. You don't know or you don't have one?
A. No, I don't have one.
Q. Where are your checking accounts located?
A. I have one at Wells Fargo, one at Carolina First. I pretty much consolidated them to Wells Fargo.
Q. The net worth indicated here of a little over $20,000; have there been any material changes to that since the date of this financial statement?
A. I wouldn't call them material. It's all up and down and it's really based on appraisals prior to this date.
Q. So I guess I could characterize your answer as you

don't know of any material changes except for the fluctuation of the underlying real estate prices; is that correct?
A. Yes. There have been times during the last couple of years that I have had to borrow money, I have paid it back, but I can't tell you today additional debts that are significantly different than this.
Q. Okay. Now this net worth and financial statement, was it accurate to the best of your knowledge as of June 30, 2012?
A. To the best of my knowledge, yes.
Q. Have you transferred any material assets since that time?
A. No, not since, '12.
Q. Have you incurred any material liabilities other than the ones identified in this statement?
A. No.
Q. If you'll look at page 2, the second page on Exhibit 1 it says Notes of Financial Statement at the top; do you see where I am?
A. Yes.
Q. It's got a Wells Fargo security account listed with an estimated current value of $471,000; do you see that?
A. Yes.
Q. It says this entire account is pledged to secure a loan?
A. Yes.

Q. What loan was that?
A. I needed to borrow money to pay down the loan for Gateway financing.
Q. When was that loan taken out?
A. About a year ago. About a year ago.
Q. What is the balance of that loan?
A. Five million and some-odd.
Q. Is that loan also secured by real estate?
A. Yes.
Q. Is it one of the Gateway properties?
A. Yes.
Q. Is the current balance of that securities account approximately the same?
A. About that.
Q. This Pediatric Web.com, what is that?
A. It's an investment that I made with some doctors when I was working in Colorado for a website for pediatric information.
Q. Okay. And you've got a value of $50,000; is that valuation still the same today?
A. I would doubt that it is but that's what I paid for it.
Q. Okay. So that's your cost essentially?
A. Yes.
Q. Now, going down to paragraph 6 on this page you've got

the various Note Receivables listed?
A. Yes.
Q. Do you have documentation for these notes payable to you?
A. I don't have in every case a signed, sealed note but I do have a record of the money being put into them.
Q. And I believe you indicated the notes to your financial statement that collectability of some of these are in doubt; is that correct?
A. Yes.
Q. Which of these do you doubt the collectability of?
A. I think 121 Market is very doubtful. We've had to abandon that project.
Q. Where is that project?
A. Wilmington.
Q. By abandon what do you mean?
A. I mean that we are not doing anything to move it forward and the land that was involved in it is not available to us.
Q. Has it been foreclosed upon?
A. No.
Q. Then what happened to the property?
A. It was never acquired.
Q. Does that entity own any assets?
A. No.

Q. Did you guarantee any obligations in connection with that development project?
A. No.
Q. Okay. Any others that you believe are not collectable or collectability is in doubt?
A. That they are all certain circumstances -- I think they are all in doubt because of certain circumstances in the economy. And if they are collectable it will be years for the process to work out.
Q. Are any of these secured by any collateral?
A. Yes.
Q. Which ones?
A. Land Acquisition, that's an LLC that I invested in that Land Acquisition has a participation in some raw land.
Q. And you have security interest in that land?
A. No.
Q. Okay?
A. The LLC has it. My note is to the LLC.
Q. Okay. But did the LLC grant mortgage or anything back to you?
A. No.
Q. Do you know if any of these LLCs granted any collateral back to you directly?
A. They did not.
Q. The Land Acquisition has a note to buy it, which I

understand indicates that the payment is dependent on the sale of improved land; is that correct?
A. Yes.
Q. What is the status of the salable efforts of that entity?
A. The property continues to be marketed. Funds are still trying to be raised to complete infrastructure. There are a number of potential sales over the years. Financing for infrastructure is still the major focus to get that done.
Q. Okay. Same question for Langtree Properties, LLC. What is the status of that entity and the efforts to sell the property?
A. It's the same situation. Those two LLCs are invested in a project called Langtree at the Lake in Charlotte.
Q. Has the infrastructure, is that currently being developed or are you still awaiting funding for that?
A. Parts of it have been acquired for small pieces of property.
Q. Parts of the infrastructure?
A. Yes.
Q. Has been completed?
A. Under construction.
Q. Okay. And is financing immanent for any other part of it?
A. It's been a process that's gone on for about seven or

eight years, so I always believe it's immanent but it's not completed.

Q. Okay. Atrium at Middle Sound Land, what is the status of any efforts to sell that property?

A. It has been ongoing also for about I guess five or six years. We were successful in putting infrastructure in at a significant cost to the two partners. The infrastructure is in place for the majority of the property.

Q. And sales efforts are ongoing for that property?

A. Yes.

Q. Have you had any recent interest or any reason to believe that a sale may be likely to happen?

A. I am always optimistic but in today's environment where it is difficult to get funding for anything that's been the biggest problem that we faced. But there has been interest and we have had numerous inquiries. Ultimately it has come down to the lack of the ability for the buyer to obtain financing.

Q. We'll talk about Newberry Atrium in a little bit. What is Atrium Northeast Limited Partnership?

A. It's an office building.

Q. And is that loan collectable or not?

A. It really will depend on how the releasing goes on the property over the next year or two.

Q. Tell me what that means.

A. It means during the financial meltdown the building

lost 40 percent of the building. People went out of business, went away, couldn't pay their rent.

Q. Are you involved in connection with efforts to release the remaining space?

A. Yes.

Q. Same thing with Atrium at Middle Sound. Do you have any involvement with efforts to sell that property?

A. I do not.

Q. Do you have any involvement with the ongoing efforts to complete the infrastructure for that property?

A. For which property?

Q. Atrium at Middle Sound.

A. I do not have a day-to-day involvement with the infrastructure.

Q. Okay. For the Langtree entities, do you have any day-to-day involvement with the development of those projects?

A. Not currently.

Q. The 121 Market, I don't see that. Is that entity operating at all?

A. No.

Q. Go to the next page, page 3. You've got two notes payable there. What is the status of those notes?

A. I am able to continue to make payments as agreed.

Q. Are both of those loans current?

A. Yes.

Q. One more question on the notes receivables on the last page. Are you receiving any monthly payments on any of those?

A. No.

Q. The next page is page 4. This is titled Commercial Real Estate Owned; do you see where I am?

A. Yes.

Q. Pages 4 through 7 are the pages for this particular schedule. Is this an accurate listing of the commercial real estate related to the entities that you own?

A. Yes.

Q. You don't own any commercial real estate that's not listed on these documents; is that correct?

A. To the best of my knowledge.

Q. To the best of your knowledge no, you don't --

A. No, I don't own anything that I believe I have missed on this list.

Q. Okay. Let's look at these entities individually beginning with Atrium Northeast Limited Partnership. That's the building you were just talking about that has a 40 percent vacancy; is that correct?

A. Yes.

Q. And it's got an appraised value of 6.9 million?

A. Yes.

Q. Do you know the date of that appraisal?

A. It was probably during the time that it was financed

which was seven, eight years ago.

Q. And when does that financing mature?

A. About 18 months.

Q. Eighteen months from now?

A. Yes.

Q. Who is that financing with?

A. Amalgamated Bank.

Q. Did you guarantee any portion of that financing?

A. No.

Q. The loan amount listed here, is it roughly still the same today?

A. Approximately.

Q. The appraised value, do you believe that has changed?

A. Yes.

Q. What would you ballpark that to be today?

A. My expectation is that it will be less because when the building was financed it was about 87 percent leased and it would be my expectation that was based on an income approach. I would say a new valuation today based on the current occupancy it would be a significant reduction, 30 percent, 40 percent.

Q. Do you still own 92.63 percent of that entity that owns that property?

A. Yes.

Q. Who owns the remaining part of that piece?

A. Partners in the building.

Q. Are any of those partners related to you?
A. No.
Q. Do you have copies of the partnership agreement for that entity?
A. Yes.
Q. The next property listed is Gateway Properties, LLC indicating 14 Gateway Academy Child Development Centers located in South Carolina and North Carolina; do you see that?
A. Yes.
Q. Do you still own those, that entity?
A. Yes.
Q. Each of those has an appraised value indicated on this document. Do you believe the value to be roughly the same today or something different?
A. I would say it's different. And unfortunately these values too were done and financing when there were not the pressures on the economy for special purpose entities such as these.
Q. Do you know what these properties would be worth today or do you have an opinion as to what these properties would be worth today?
A. Again, just in keeping with the nature of the market today I would expect that they have declined in value 20, 30 percent.
Q. Are you a guarantor of any debt in connection with

those properties?
A. Yes.
Q. Which ones?
A. The North Carolina locations.
Q. What is the amount of the debt for those locations?
A. I am guessing somewhere in the neighborhood of about five to $7,000,000.
Q. What is the status of that debt?
A. The status is it's paid currently and it's still owed.
Q. That debt is still current; is that what your testimony is?
A. Yes.
Q. When did it mature?
A. Everything matures in a year and a half, approximately a year and a half, 18, 20 months, something like that.
Q. Have you identified any financing for that debt upon maturity?
A. Not at this time.
Q. The South Carolina locations indicated -- your testimony indicated you are not the guarantor of any debt in connection with those; is that correct?
A. This a conduit loan which I have guaranteed and it's a non-recourse loan for carve-outs.
Q. Carve-outs; explain that to me.
A. That means that if we were to walk away from the

properties, we can't pay them off, the lender takes them back. And unless I have done anything that is inappropriate, my understanding is that I would not be held personally liable for it.
Q. When does that debt mature?
A. Everything will mature in about 18 to 20 months. They are all tied together on due dates.
Q. And have you identified or has that entity identified any replacement financing yet for that debt?
A. No.
Q. Do you know yet whether you intend to try to refinance that or if you would allow that property to be recovered by the lender?
A. My objective would be to try and refinance it.
Q. Do you still own 25 percent of that entity?
A. Yes.
Q. Who owns the remaining 25 percent?
A. My partner.
Q. Who is your partner in that entity?
A. The Estate of Dave Burner.
Q. Can you spell that last name?
A. B U R N E R.
Q. How did he obtain that interest? His estate presumably obtained it upon his death but how did he obtain that interest?

A. We were partners.
Q. Did he purchase any part of that interest from you or did he go in with you originally?
A. We went in originally.
Q. Was his original interest always 25 percent?
A. No.
Q. When did his interest change?
A. His interest continues to be approximately 50 percent.
Q. Has it been 50 percent throughout?
A. Yes.
Q. Who owns the other approximately 25 percent?
A. My family.
Q. Any particular member of your family?
A. My children and my wife.
Q. Do they own that interest through an entity of some sort or do they own it individually?
A. In trust.
Q. Is that one trust or multiple trusts?
A. Multiple.
Q. What are the names of those trusts?
A. Kari Jacobs Irrevocable Trust, Kimberly Jacobs Irrevocable Trust, Peggy Jacobs.
Q. Is Peggy Jacobs an irrevocable trust as well?
A. No, she just owns it.
Q. When did those trusts acquire that interest?

A. Several years ago Dave and I did an estate planning because he and I both had some health issues and we decided it was time to make arrangements for our family.

Q. Do you recall the approximate date of those transfers?

A. My recollection is it was several years ago, two or three years ago, three and a half, something like that.

Q. So somewhere between two and three and a half years ago?

A. Something like that.

Q. Now, did the trust or your wife, Ms. Jacobs, transfer anything back to you in exchange for that interest or was it simply a transfer by you to her?

A. It was part of some estate planning that both Dave and I used.

Q. I understand your testimony is it was part of estate planning, but aside from the estate planning function of it did they transfer any assets or any money to you in exchange?

A. No.

Q. Do you have copies of the operating agreement for the Gateway entity?

A. Yes.

Q. Do you have copies of the documentation in connection with the transfer to the two trusts and your wife?

A. I believe I do. I don't have it but I assume that it is available to the attorneys that helped.

Q. What attorney helped you on the estate planning side?

A. Tom Cothran (ph).

Q. How is the Gateway Properties, LLC managed?

A. I do it currently.

Q. Okay. Are you the managing member?

A. Yes.

Q. Does that entity produce any distributions?

A. It's veritable, but yes, it produces distributions.

Q. You say it varies. What is the typical variance on that?

A. Maintenance, replacements. These buildings are some 20 years old.

Q. So there's ongoing obligations that sometimes require the distributions to be lower; is that your testimony?

A. Yes, the distributions for repairs, maintenance, whatever the issues may be we have to deal with them.

Q. What is roughly the amount you receive and on what periodic basis do you receive it?

A. I would say depending on the month 10,000 a month maybe.

Q. That's from Gateway Properties, LLC?

A. From all the Gateways.

Q. So that would include Gateway Colorado, LLC as well?

A. Yes.

Q. Is that just your portion or the portion for all

partners?

A. No, that would just be mine but that's again up and down. Everybody participates in the expenses of the properties.

Q. Now the financing that you have on the South Carolina locations, the non-resource financing, was that the original financing for that?

A. No.

Q. What was the original financing?

A. The original financing was with multiple banks including Carolina First who was very helpful and active in construction loans with these properties, among others, but they were a very active participant in this.

Q. When was that original financing?

A. Well, I can't tell you the exact date of each of the financings but we started developing these in 1995 and built these over a period of 10, 12 years, 13 years. Carolina First has been an active partner in the Gateway developments among other things that Carolina First did, and they were very interested in a lot of the development that I did including Gateway and some of the other office buildings. Carolina First has been very active in my development career for 12 or 15 years.

Q. And then this non-recourse loan that's the current debt on the property, when did you obtain that?

A. Early 2000's maybe.

Q. Early of 2010 or?

A. No, no 2000s.

Q. And then when you did that rafinancing did that generate any cash out of the property at the time?

A. It did. We paid off our loans and we had some cash out.

Q. How much was that approximately?

A. Several millions of dollars.

Q. And do you know approximately how much it was?

A. No, several million.

Q. More than five?

A. No.

Q. Somewhere between one and $5,000,000?

A. Yes.

Q. And your portion of that was half at that time?

A. Yeah, in the early 2000s, yeah.

Q. What did you do with your portion of the cash out from that refinancing?

A. I invested it in other real estate.

Q. Do you remember which particular investment?

A. It goes all over the place. I mean, I invested in more Gateways. I invested in developments of additional office buildings. I invested it in new opportunities at Langtree, at Middle Sound, at 121 Market. I invested it in all my holdings that grew as a result of that cash. I had some reserves that I

used to feed my real estate investments.
Q. Did you gift or transfer a portion of the cash obtained from that financing to any relative or to any entity?
A. My family.
Q. And any particular member of your family?
A. All three.
Q. Do you know how much you gifted to them at that time?
A. Again a couple million.
Q. Did you gift that to them directly or did any portion of that go to a trust?
A. Combination.
Q. And the trusts, would that have been the two that we identified earlier or another trust?
A. Those two.
Q. The North Carolina locations, that debt that you indicated you had guaranteed in the neighborhood of five to $7,000,000, was that the original financing for those properties?
A. No, that was -- those were permanent loans that we took out to repay the construction loans.
Q. When you took out the construction loan was there any cash generated by that financing transaction?
A. No, had to put cash in.
Q. The next entity that you have -- before we get to that there's a note in parentheses that all ownership interests are

collateralized by loan agreement; do you see that note?
A. Yes.
Q. What loan agreement are you referring to?
A. I borrowed money against some of these assets from time to time.
Q. From whom did you borrow that money?
A. A guy named Rick Howard, a long-term partner of mine in North Carolina.
Q. Do you currently owe Mr. Howard any money?
A. Yes.
Q. How much?
A. I think it's about a hundred thousand maybe.
Q. Okay. And what is the extent of your ability to borrow against these assets under your agreement with Mr. Howard?
A. It's really depending on his financial position at the time that I need any money. I have lent him money over the years, he's lent me money over the years. We work together to try to assist each other.
Q. Now, getting to the Gateway Colorado LLC, the appraised value for that, is your testimony the same that you believe that that has changed?
A. I would say so. I think the single purpose entities certainly have not done as well in this environment only because I think the environment for child care has been diminished

during this meltdown, and I just think the general real estates for these type of entities are at a decline.
Q. Do you have an estimate of what these are worth today?
A. Again I would say -- and each one of course is a different location and a different place but my guesstimate would be somewhere in the 20 to 30 percent decline value.
Q. Is the loan amount about 7.3 million identified here on this schedule, is that still roughly the same?
A. Yes, these are 30 year amortizations so I would assume they haven't made a lot of progress in the last recent couple of years.
Q. Who is that loan facility with?
A. Which one?
Q. The Gateway Colorado, LLC?
A. Bank of America.
Q. Are you a guarantor of that loan?
A. Yes.
Q. When was that loan entered into?
A. About seven and a half, eight years ago. Since they are all coming due in the next 18 months that's about when it was done.
Q. Was Bank of America the original financing for these properties?
A. No.
Q. Are you a guarantor for the Bank of America loans?

A. It's the same Bank of America loan that I mentioned above, it's the South Carolina entities.
Q. So it's non-recourse according to your testimony for the most part; is that correct?
A. If I don't pay it off, they won't renew it, they get the building.
Q. When you did that refinancing and got the cash out that we talked about earlier, that was the same transaction as these Colorado entities; is that correct?
A. Yes, that's correct.
Q. Do you still own 18.75 percent of that entity?
A. Yes.
Q. Who are the other owners of that entity?
A. The partners in Colorado and the Burner estate and my family.
Q. Okay. How much of that entity does your family own?
A. I would guess 18 percent maybe.
Q. So basically the same percentage as you own?
A. Yeah.
Q. Was that also transferred to the two trusts and to your wife individually as the other one we talked about?
A. Yes.
Q. And that was done somewhere between two and a half or three years ago as well?
A. Yes.

Q. And also with that one, your family did not exchange anything to you in return for those interests?
A. No, they did not.
Q. Did they assume any debt connection with that transfer or the earlier one?
A. No.
Q. The note there on the bottom of this page about the interest being collateralized by a loan agreement, is that the same one with the gentleman in North Carolina Rick Howard?
A. Yes.
Q. The next page, page 5, Gateway Properties, LLC references new Gateway locations in Charlotte, North Carolina; do you see where I am?
A. Yes.
Q. Is your testimony the same that the appraised value would be different today?
A. I would think so. I think the value is consistent with the decline in the real estate valuation in the market today.
Q. These appraised values have a number right beside the word appraised value. What is that number?
A. That was the capitalization rate that they were using at that time.
Q. Is that taken off the appraisal of some other source?
A. My internal calculation.

Q. Your calculation of what the capital rate is?
A. Was at that time the value of the appraisals were done.
Q. Is that the same cap rate that they used on the appraisal or did they use something else?
A. I think that's consistent with the appraisal at that time but I don't remember with the appraisal cap rates.
Q. For the Newberry Atrium development what would you consider to be an appropriate cap range for that at this time?
A. Looking at the appraisal that was done by Wingard and Associates during the depth of the recession several years back he used -- and this is an appraiser that the bank used, so I assume that I should have some confidence in his valuation approach. At that time he indicated approximately 8.75 cap rate on the property at that time, which provided and as is where is value of about 5.8 million. He further indicated that the stabilization of that property would be valued pushing $8,000,000, maybe 7.9 million dollars. That was back really in the depth of the recession in 2011.
As you may be aware I have ordered an appraisal using the former bank appraiser, and his indication to me is the valuation for medical office buildings on campus have increased in the recent years. He will be completing his appraisal in the next several days. And I asked him what the valuation might be and why it increased, and his indication was the valuations

increased because of growing demand for upon-campus medical facilities, the long-term nature of the leases, the hospitals, and doctors have extended periods of time, some leases have excalating rates. He anticipates the valuation will come in more favorable possibly in the mid seven and a half cap range based on the research and sales that he's done, but I won't really have an authoritative answer until his appraisal is done in the next several days.
Q. Apart from his appraisal do you have a personal opinion of the appropriate current capitalization rate for the Newborry Atrium property?
A. As he educated me I would have agreed with his position, in the mid sevens.
Q. That's based on information from him and not on your own personal --
A. I learned from the experts and I think he's an expert. The bank obviously thought he was an expert so I agreed.
Q. I am not arguing with you on that, I am just saying if you excluded everything that he told you and I had to ask you what your personal opinion was, would you be able to tell me what your personal opinion is?
A. My personal opinion is based on what I have learned from the experts and I would believe that the valuation as-is where-is today would be somewhere in the low $6,000,000 range as-is where-is.

I believe that stabilization I think it would be somewhere pushing eight plus million.
Q. All right. Back to the Charlotte, North Carolina Gateway properties. Is the loan amount still roughly the same for that one as well?
A. Yes.
Q. Who is the lender on that one?
A. Wells Fargo.
Q. Did you guarantee that loan?
A. Yes.
Q. What is the extent of your guaranty?
A. For the full debt.
Q. And does that loan also mature in the next 18 to 20 months?
A. Yes.
Q. Have you identified replacement financing for that loan?
A. Not at this time.
Q. Backing up to the Gateway Colorado, LLC, that one also had an 18 to 20 month maturity date. Have you identified replacement financing for that entity?
A. No, I haven't.
Q. Is your ownership still the same for Gateway Properties, LLC with the Charlotte, North Carolina properties?
A. Yes.

Q. You still own 25 percent of that entity?
A. Yes.
Q. Who are the other partners for that entity?
A. The same people that owned the other, the estate of Dave Burner and my family.
Q. And your family's interest, that would also again be your wife and the two trusts belonging -- the two trusts in your daughters's names; is that correct?
A. Yes.
Q. And the circumstances around those transfers would have been the same?
A. Yes.
Q. Do you receive any distributions from the Gateway properties in Charlotte, North Carolina?
A. When I speak of the distributions earlier it's all encompassing.
Q. It's inclusive of that property as well?
A. Yes.
Q. And that loan agreement that you mentioned there is again the same one with Mr. Howard?
A. Yes.
Q. The next one, E Shoppes at Atrium, LLC?
A. Yes.
Q. That's a retail development apparently; is that correct?

A. Yes.
Q. The appraised value and the loan amount, are those still roughly the same today?
A. Again, we have been going through a releasing on that property. I would say that is probably close to that, but I would say it's probably on the negative side in that we've lost several tenants and we're in search of refilling those spaces. So depending on when the property is valued it will be gaged on the occupancy and the market.
Q. Do you still own 50 percent of that entity?
A. Yes.
Q. Who owns the other 50 percent?
A. My partner.
Q. Who is your partner in that entity?
A. Joel Branwith (ph).
Q. Anybody else own an interest in that entity?
A. No.
Q. The next one, Atrium at Newberry, we'll talk about that later.
Atrium at Middle Sound is the next one. The appraised value that you have here from Atrium Middle Sound Land is 2.97 million dollars; is that correct?
A. Yes, again based on an appraisal.
Q. And do you believe that value to be the same or different today?

A. I would think it's probably less. Again, it's raw land but it's got infrastructure. I think land in Wilmington has been affected with the rest of the real estate values in the country.
Q. Atrium Development Associates, LLC is the next one listed indicating an office condominium at 791 Greenlawn; is that correct?
A. Yes.
Q. And that one is worth $175,000?
A. Again, that was based on an older appraisal. I would say today in my personal experience it's worth maybe half of that maybe. Maybe a little bit more.
Q. And there is no debt on that property?
A. Correct.
Q. The next one you've got listed is Atrium Development, Inc.?
A. Yes.
Q. Would your testimony be the same for that one as well, the appraised value roughly the same or lower?
A. I would tell you significantly lower.
Q. Significantly lower for that one. Okay, and the loan amount on that one is approximately $190,000?
A. Yes.
Q. Do you still own 100 percent of that entity?
A. Yes.

Q. Okay, the next one page 6 the first entity listed is Langtree Development LLC. You've got a member ownership interest of 2.63 percent. Explain your ownership interest and how that entity is structured.
A. Langtree Development was the original development entity that acquired that land. Over the years because of the economic meltdown it has diminished in value. We were not able to carry the debt and it required improvements. We have sold large parts of that to other investor groups and that's what my current participation is.
Q. And do you own your interest through an entity or do you directly own the 2.63 percent?
A. Through an entity.
Q. And what is that entity?
A. Langtree Development Company, LLC.
Q. And so you personally own 2.63 percent or do you own an entity that owns an interest in it?
A. I own 2.63 percent through Atrium at the Lake I think it is.
Q. So you have an interest in Atrium at the Lake?
A. Atrium at the Lake has an interest in Langtree Development Company.
Q. Okay. And do you have any -- is there any pledges against your interest in that entity?
A. No.

Q. Who are the other owners of Atrium at the Lake?
A. Just me -- I beg your pardon, that's not correct. Atrium at the Lake has multiple partners. I think there are four of us involved in that.
Q. Are any of them related to you?
A. No.
Q. And that entity in turn owns an interest in Langtree Development Company, LLC. How many other partners are there in Langtree Development, LLC?
A. Probably 15, 12, something like that.
Q. Are any of those partners related to you?
A. No.
Q. Have you received any distributions from Langtree Development Company, LLC in the past five years?
A. No, to the contrary.
Q. To the contrary you've made contributions to that company?
A. Correct.
Q. Would it be your testimony that the values indicated here are lower now?
A. I would say so only because these go back to appraisals that were done during the acquisition period which was in a very active market for the financial meltdown.
Q. Have you guaranteed any of the obligations with Langtree Development Company, LLC?

A. Yes.
Q. What obligations have you guaranteed?
A. I think currently right how I am down to maybe $8,000,000 in guarantees, about 8,000,000.
Q. Is that to one lender or more than one lender?
A. That obligation is to one lender.
Q. What lender is that?
A. Yatkin Valley Bank.
Q. Is that debt current?
A. No.
Q. What is the status of that debt? Has it been accelerated?
A. No, we are in a work-out.
Q. Do you know when that debt matures?
A. It has matured.
Q. When did it mature?
A. Last year.
Q. Langtree Properties, LLC is the next entity listed. Explain briefly for me the ownership structure for that property.
A. Which item are you speaking about now?
Q. Item M.
A. Okay. That is the same scenario, it's just different holdings.
Q. So would Atrium at the Lake be --

A. Yes.
Q. You own an interest in Atrium at the Lake which in turn owns an interest in Langtree Properties, LLC?
A. Correct.
Q. Would the values of the properties listed for that one M, I believe it's 13.125 million dollars, would the value be the same today?
A. I would say it's consistent with what we've been discussing. I think there's a decrease in value currently.
Q. Is the debt still roughly the same today?
A. Approximately. You could swing a few hundred thousand.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. That is part of that Yatkin Valley holdings. That's all together.
Q. Okay. The next one you have is Langtree Development Group, LLC. Is that the same type of ownership structure?
A. Yes, it is.
Q. And is your testimony the same for that one in terms of value?
A. Yes.
Q. The debt listed there, did you guarantee any portion of that?

A. I think that has been reduced now because of our investors that thought the majority part of Langtree Properties basically have taken over that debt so I don't have any guaranty on that.
Q. Have you received any distributions or income from that entity or Langtree Properties, LLC?
A. No.
Q. Have you transferred that interest in that entity or Langtree Properties, LLC in the last five years?
A. Just to the investors that purchased the majority. This is what I am left with today.
Q. Langtree HUD Development Company, LLC, item O at the bottom?
A. Yes.
Q. Is the ownership structure the same for that one?
A. Yes.
Q. What about the appraised value? Do you feel that it has changed?
A. I think this is a recent valuation so it's -- I would say that's a recent valuation. I would say it's probably not changed.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. I was the manager of it so I was the guarantor of it.

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Q. So you guaranteed the full 40,000,000; is that correct?
A. Yes, but it is a HUD loan so it's non-resource once completed.
Q. Sorry, what's the last part of your answer?
A. I am guaranteeing the debt until it's completed and goes into a permanent loan.
Q. What is the status of the completion in permanent financing?
A. Six months away.
Q. Have you identified permanent financing for that property?
A. Yes.
Q. Did you have to guarantee any portion of the proposed permanent financing?
A. The normal carve-outs would be what my understanding is.
Q. What are the normal carve-outs?
A. Fraud, misrepresentation.
Q. The next page, page 7, LDC comma LLC. Do you see where I am?
A. Yes.
Q. What is your interest in that entity?
A. It again the 2.63 percent that is my remaining portion after we sold to the investors that took over these assets.

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Q. And would you believe the appraised value to be accurate on this one?
A. Again, I believe it's probably reduced, no infrastructure, no activity on this particular piece of land so just raw land.
Q. Have you guaranteed any portion of the debt?
A. Yes.
Q. How much of that have you guaranteed?
A. Joint and several.
Q. Is the current amount of that roughly the 2.75 million?
A. Yes.
Q. What is the status of this loan, the loan that is secured by that property?
A. It comes due this summer.
Q. Who is the lender for this?
A. First Bank.
Q. Have you identified replacement financing upon maturity for that property?
A. No.
Q. So my current understanding is you have an interest in, according to this document, six Atrium office buildings?
A. Six?
Q. That's what I counted.
A. I see Atrium Northeast and I see Atrium Newberry.

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Those are the two that I have interest in.
Q. Okay. Those are the two office buildings. The other commercial real estate under the Atrium brand, if you will, you've got four others. E Shoppes at Atrium, Atrium Middle Sound Land, LLC, Atrium Development Associates and Atrium Development Inc.; is that correct?
A. Yes.
Q. So that's six Atrium brand developments; is that correct?
A. Yes.
Q. And I counted 22 Gateway Child Development Centers at this time; is that correct?
A. Yes.
Q. I counted five different Langtree Development entities; is that correct?
A. I am not counting but what's identified here is what I have. I'll go back and count if you like.
Q. Well, if you disagree with me you're welcome to.
A. That's fine, no.
Q. And then on the next page I see three residential properties you own in a P&D Partnership; is that correct?
A. Correct.
Q. And do you still own the three residential properties?
A. Yes.
Q. Who's your partner in that?

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A. My wife Peggy.
Q. And is that just simply a partnership or is there some other entity for that?
A. That's it.
Q. And do you own any other assets in that partnership or just the three here?
A. Just that.
Q. Have you sold any commercial real estate interests that we haven't talked about in the past few years?
A. No, we've talked about everything I have sold.
Q. Those would be I believe the Langtree transactions which the investors took over that debt; is that correct?
A. Yes.
Q. And then the family transfers that we talked about; is that correct?
A. Yes.
Q. Other than that one cash-out refinancing that we talked about earlier have you had any other real estate development transactions in the last five years?
A. I think five years I was fortunate enough to sell a number of Atrium office buildings in '05 and '06 before everything melted down, and that was the scope of what I have sold.
Q. And did you obtain cash in excess of what the outstanding debt was on those transactions?

A. Yes.
Q. How much did you receive roughly?
A. Again, I can't tell you an exact amount but it was several millions of dollars.
Q. Was it less than five?
A. I would say so.
Q. What was the disposition of the cash received from those transactions?
A. Again, I used that to invest in the future real estate that you see on this and feed the projects that did not fare well after 2008, '09 and '10 and '11.
Q. Did you transfer any portion of cash obtained from these transactions to any family members or any entity owned by a family member?
A. Not at that time.
Q. Do you have any portion of that cash still?
A. No. Unfortunately the economy has not been kind to me, I have enjoyed successes before the meltdown, didn't think it would end and invested in additional real estate knowing that I could continue making it work. Unfortunately '08, '09 pretty much put me on the ropes.
Q. Have you seen any improvement to this day?
A. I see some stabilization. I see some opportunities. There is interest to buy outparcels. There's interest to build. It has been very difficult for new investors, developers to

obtain financing.
Q. Are you familiar with I guess the current market for financing commercial real estate transactions?
A. To an extent, yes.
Q. What are the terms available on the market?
A. I can speak to the Newberry one which I think is an important point of our discussion today. As a means to help solidify with TD Bank's cooperation that I enjoyed from Carolina First over 12, 15 year period, given the amount of time and working with the marker, the healthcare market, I think the opportunity to refinance that healthcare product in it's current location would be very possible. I have investigated refinancing on that property and what I see upon stabilization, I could obtain a four percent loan on a 30 year am with a 10 year call. So I would say that is very encouraging to me.
Q. You say you could obtain. What lender or lenders offered that to you?
A. I am working through a broker out of New York that I have worked with for many, many years and he's probably responsible for the majority of my permanent lending. He's identified several lenders that would be interested if I'm able to stabilize the building.
Q. What do you mean stabilize the building?
A. Increasing the income of the building over the next period of time to get it to a positive cash flow with the debt

coverage of about 1.4.
Q. Do you have any documentation correspondence with the lenders about these offers?
A. Yes.
Q. Where do you keep that?
A. I keep it at the office and I provided it to both appraisers that were looking at this project valuation.
Q. Did you give them all of what you had or just certain documents?
A. Yes. No, what I had.
Q. The financing terms you mentioned that assumes the Newberry Atrium property has reached stabilization as your referred to it, is that correct?
A. Yes.
Q. By stabilization that means occupancy rate sufficient to give a positive cash flow coverage ratio and debt coverage ratio of at least 1.4?
A. Yes.
Q. Is that your testimony?
A. Yes.
Q. What occupancy level would Newberry Atrium have to reach to get to the 1.4 debt coverage ratio?
A. Again, it would be the function of the rent but it would be somewhere in the 10 to 12,000 square feet to be able to accomplish that kind of a loan.

Q. Does Newberry Atrium currently have 10 to 12,000 square feet of finished space available?
A. No.
Q. So the space would need to be improved before it could be leased out or rented, is that correct?
A. Yes.
Q. Can you lease the space and have the tenant finish it or does the developer landlord finish it in every event?
A. Every one is a negotiation. There is no every event.
Q. How is it typically done?
A. Depending on the objective of each tenant some will rather have a lower rent rate and do the up-fit themselves, some want to have the finishes done and pay a high rate.
And a case in point, and again, let me make you aware as I've made your appraiser aware and the Wingard Associate people, the two guys the bank previously used. I am in discussions with Newberry Hospital on leasing some additional square footage in order to move it forward in the near future, not too distance future, to allow us the opportunity to potentially take advantage of the financing that I have found is available at a higher income than what we've gotten here.
Q. What is the status of those discussions with Newberry Hospital?
A. Ongoing.
Q. Have you got any documentation of a commitment or a

draft agreement with them for the additional space?

A. We've discussed terms and conditions.

Q. What would the terms be in terms of how much space how much rent?

A. The terms that we're discussing is leasing additional 10, 12,000 feet at a rate that would not include tenant up-fits. If they are to move forward with that approach I've agreed to give them my entire interest in the building. I have agreed to forgive the 300 some-odd thousand dollars that I have put into it, and that they would take the position in the building in order to look at the opportunities of potential refinance in the future or at least a confirmation of this to provide some hoped consideration to enter into the reorganization on the table with maybe some modifications.

Q. What is the expected time of a decision on that?

A. I wish I could give you a specific date but it's been ongoing for several months. The board is considering it, I am jumping through hoops in order to provide them additional information they're requesting.

Q. Do you think that's something that is going to happen within the context of the existing bankruptcy or later on down the line?

A. I would say if we're able to work anything out it would happen in the near future, in the next several months.

Q. Who were you communicating with at the hospital about

that?

A. Ron Vigas.

Q. How do you spell his last name?

A. V I G A S.

Q. What title does he have at the hospital?

A. CEO.

Q. You said the rate would not include tenant up-fit so that means the developer would be responsible for those?

A. No, that the tenant would be responsible.

Q. What needs to happen -- you said you were jumping through some hoops. What needs to happen for the hospital to be able to make a decision and enter into an agreement with you?

A. I really can't tell you what additional things they are going to be undertaking. I have provided them with the proposals, we have negotiated it. I've got nothing else to give. They continue to do their own research and they haven't shared with me what specific items that they are researching.

Q. So the ball is in their court so to speak?

A. Yes.

Q. These proposals and documentation related to the negotiations, have you given a copy of that to your lawyer?

A. Yes.

MR. BEDENBAUGH: Let's take a few minutes' break.

(Brief recess was held.)

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, you've been handed Exhibit 2 to your deposition which is copies of financial statements from 2011, 2009 and 2006 all as one document. The first one there is dated January 31, 2011; do you see where I am?

A. Yes.

Q. Is that a true and correct copy of your financial statement as of that date?

A. I would say yes.

Q. And according to this document your total assets at this time was a little in excess of $32,000,000; is that correct?

A. Say that again.

Q. According to this document your total assets were a little bit more than $32,000,000 at this time?

A. Yes.

Q. Which is about $11,000,000 more than the financial statement dated January 31, 2012; is that correct?

A. Yes.

Q. Do you have any explanation generally as to the $11,000,000 drop?

A. I would say I invested a lot of it, fed a lot of it into valuations, and I guess without looking at it dramatically have changed over the last couple of years.

Q. The total net worth here is a little more than

$32,000,000; is that correct?

A. I am sorry, I didn't hear what you said.

Q. The net worth indicated on the January 31st, 2011 financial statement is slightly in excess of $32,000,000; is that correct?

A. No, I think it was 30,000,000.

Q. You're right, I was looking at the total liabilities. You're right, the total net worth is a little more than 30.4 million dollars, right?

A. Yes.

Q. Okay. The next page is Notes to Financial Statements dated January 31, 2011. You'll see the Wells Fargo account has a current estimated value at that time of a little more than 1.3 million dollars; do you see that?

A. Yes.

Q. That was $471,000 in the 2012 notes. Do you know why that dropped?

A. I was during '11 feeding a lot of real estate. I paid down about $2,000,000 on one of the notes at Carolina First. I paid down $1,000,000 on the Newberry. I paid down notes for refinancings of the Shoppes. I have paid down and fed funds to keep some of the properties going. I paid down personal debts owed to people on my financial statement, Ballington (ph), Peterson, basically using what liquidity I had at that time to keep everything afloat.

Q. Okay. Now skipping down to paragraph 6 you've got 2011 Contracted Receivables Due; do you see where I am?
A. Yes.
Q. Did you receive this amount in 2011 of roughly $800,000 that you've got indicated here or results less than that?
A. They were less.
Q. Do you know how much you received?
A. No, I don't.
Q. Do you remember roughly if it was most of that or half of that?
A. It was part of it but I can't tell you three, two, two and a half years ago what I received.
Q. The Gateway Properties, LLC distribution of roughly $400,000, did you receive that?
A. Some part of that.
Q. Do you recall what part?
A. No.
Q. The next paragraph has 2012 contracted Receivables Due of total in excess of 1.2 million dollars; do you see that?
A. Yes.
Q. Do you know if you received that amount or something different?
A. It was different, a lot less. Two years out this was during some very difficult times and unfortunately many of the

distributions from these properties did not materialize as anticipated there.
Q. Which of these performed as expected?
A. I could say none of them. Many of the Gateway incomes had to go to repair some issues. We had some infiltration of mold in a couple of the centers and construction requirements we had to do to keep the buildings operating, so the money was diverted to maintaining and fixing a number of the buildings.
Q. Okay. The next page has the Commercial Real Estate schedule beginning on this page, page 3; do you see where I am?
A. Yes.
Q. The Gateway Properties, LLC listed here starting with the letter B, your general partnership owner interest here was 50 percent; is that correct?
A. Yes.
Q. So this would have been January 31, 2012 prior to your transfer of 25 percent to various family members or entities?
A. If that's what it says but my recollection is that we did the estate planning somewhere toward the end of '10, so I can't tell you if this is my error, but my recollection is when Dave got sick in 2010 we decided that we needed to do some estate planning at that time.
Q. And do you know when those transactions actually were finalized and took place?
A. I can't tell you specifically but I do know that when

he got sick that's when it all began and it was an ongoing process but I can't tell you the complete dates that all this was wrapped up.
Q. But the reduction from 50 percent to 25 percent would have been the cost of that transfer?
A. Yes.
Q. And similarly the next entity the Gateway Colorado, LLC?
A. Yes.
Q. It shows 37.5 percent and here the reduction to 18.75 percent in 2012 would have been attributable to the transfer to family members?
A. Yes.
Q. Likewise on D, E and F various Gateways in Charlotte, North Carolina are indicated to be 50 percent ownership interest with the reduction to 25 percent reflected in the 2012 statement would have been because of the transfers to the family members?
A. Yes.
Q. All right. And the next page, page 5 it's got L and M, two Langtree-related real estate investments apparently but the ownership structure is a little bit different than what we discussed in 2012?
A. Yes.
Q. Can you explain -- and you may have already done so earlier -- but can you explain how it got from 2011 to 2012?

A. Sure. It was 2011 and 2010. In 2010 we were having trouble raising funds, we were having trouble meeting our obligations, we were in the process of negotiating with several investors. Towards mid '10 into '11 we were able to find somebody that could perform and purchase with a majority interest in the Langtree properties in order to keep us from basically not being in a position to meet our obligations, and that evolved over a period of time.
Q. In connection with those transactions did you receive any cash at all?
A. No.
Q. The next page is residential real estate owned as of January 31, 2011 page 6; do you see where I am?
A. Yes.
Q. This has 6133 Lakeshore which I believe you indicated was your residential address?
A. Right.
Q. That was not on 2012. What happened between 2011 and 2012 there?
A. During the same process Peggy has owned the properties, the Grand Pavilion and Lakeshore. During refinance they had been on the title but during the estate planning she has been on the title for years. I went through a refinance at that point, I was on it to help make the loan and then it was switched back.

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Q. So let me make sure I understand your testimony. Your testimony was that you and your wife both were on the title for years?

A. No, the majority of the time -- I went through three refinances during a period of 20 years, three or four refinances. During that time I would be required to sign on to the loan but it was always held in Peggy's name, and apparently I was not diligent enough to make the corrections on my financial statements.

Q. Okay. So you never owned an interest in either of those properties?

A. I did maybe 10 years ago. And I can't tell you approximately what the time was but every time we went through a refinance I'd have to sign on to it.

Q. But you last owned interest in these properties approximately 10 years ago?

A. Within the last five or 10 years, yes.

Q. And your interest you transferred to your wife?

A. Yes.

Q. What was the reason for that transfer?

A. The estate planning.

Q. Any other reasons?

A. No.

Q. Did she give you anything in return for that transfer?

A. No.

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Q. Okay. The next page is a rent roll for Atrium Northeast; do you see where I am?

A. Yes.

Q. I believe you testified earlier there's been some vacancies on that property?

A. Yes.

Q. So is the cash flow negative or positive now?

A. Negative.

Q. How much is the negative amount this month; do you know?

A. It varies from month to month to a break-even to a negative cash flow of about eight or $10,000, but during the negative times I was feeding it in order to meet the obligations and keep the building operating.

Q. Okay. The next one here is another Newberry Atrium rent roll of 2011. My understanding is that you have two lis pendens identified. Did either one of those happen?

A. No. I can give you a little background on that if that would be helpful.

Q. Sure.

A. During 2010 I was working with the original CEO of the hospital who initiated this project and asked me to participate. He had been there for 15 years and had been responsible in my opinion and in most people's opinion for taking the hospital to a different level, and requested that I assist them in

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developing this building.

During this time 2010 and '11 they had anticipated recruiting additional physicians that I was working with. At that time we were preparing proposals and doing the things that needed to do in order to get these tenants to relocate to Newberry. During that same time in 2011 the current, then current CEO left the hospital and a new CEO came in, had no connection with the community, he was there as I guess a temporary CEO. And during the former CEO's leaving the hospital and the community he would not focus on this building, apparently he had other focuses and the recruitments never occurred.

Q. What is the current variance on the cash flow at the Newberry Atrium property?

A. It is almost a break-even with the interest only. I have requested that BB&T consider some type of restructuring in order to out the building on a stable footing allowing me and the hospital and community times to recruit and work through the economic environment that we went through in 2011 -- previous to 2011 and into 2011. And this is recently.

When the Carolina First folks worked with me over the years, they were basically like joint venture partners. We did six, seven deals together and they were always there to help me, cooperate, give me some kind of flexibility that would allow me to work through the problems of any real estate transaction we

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were going through. They were almost like joint venture partners. They would solicit and got the benefit of some very high-profile projects that I was associated with. I was on a very good, warm friendly basis with the whole management team from Mac Whittle (ph) all the way through. And when the notes were coming due in 2012 everybody I knew at Carolina First had left, and I had nobody really to speak to.

When I met with one of the TD Bank executives who was out of Greenville, I believe, my opportunity to visit with him and give him background on the project was maybe a half hour meeting, and I explained what we were going through in '11. I guess it was '11 -- yeah, it was in '11 -- they really didn't have much interest or didn't discuss too much how they could be of assistance even though I had a plan and I proposed a plan to them, there was really no response.

And I may be bridging from '11 into '12 but this is pertinent to where we are in this transaction. I think that's something that should be acknowledged, at least.

When TD took over the portfolio from Carolina First it was my understanding that their position was they were taking over the same relationship that I enjoyed with the Carolina First people, which was a very good, flexible relationship over the years, 12 years plus or minus, had done $27,000,000 with Carolina First. And they really were very solicitous of the deals. I would be requested to work with them, many of the

hospital medical deals. I had done a previous medical deal with Carolina First that was in '07, was successful in paying that off, a little longer than usual but '07 was a different time. By the time we sold it I was able to pay it back.

In fact, at the time that Carolina First got taken over -- I lost almost a joint venture partner. And that has been a very difficult process for me to work with that the TD representatives have no knowledge of my development history, one, no knowledge of the volume of business that I've done and the successes that I have enjoyed, and really the adversarial situation that they've created rather than understanding ways to solve the problems versus being almost punitive the way that they have come after me personally.

Q. We'll talk about the State Court cases in a little while, but is there any document that obligates TD Bank to refinance any of the loans that we're talking about today?

A. There's no document that obligates them to do anything other than what you would think the fiduciary responsibility of a bank would be.

Q. What document says there's a fiduciary responsibility for the bank to do anything?

A. When you enter into $27,000,000 of volume with a bank over six or seven deals and they solicit your business and you give them the business because you trust them because you believe they are reasonable and flexible people as they have

proven over the last 12 years plus, you would expect that type of relationship to continue as long as you have been performing.

Q. Is there a document that says there's a fiduciary responsibility to you?

A. Don't have a document that says that but I would not have entered into these relationships with a group that would have been anything but reasonable and flexible that has proven likewise for over 12 years.

Q. Is there a document that says TD Bank has to do anything other than what its done in connection with these loans?

A. I don't have a document that says that they are going to be my savior, but they do know that if they have any insight into my history with Carolina First and my career they would know that I have worked everything out over good times and I am working things out in very difficult times.

Q. Your statement that TD has a fiduciary and acting in a punitive manner, is that based on any document that you have knowledge of today?

A. It's based on the actions that they have taken, the actions that they have taken on two of the transactions that I am involved in right now are the only transactions that they have left after I paid back 20 some-odd million dollars -- and unfortunately we all thought things would continue on as we had operated before, but it has not, and every bank that I have

dealt with over my career, including Carolina First, has always been reasonable and flexible in order to salvage and enhance the value of the project they are associated with.

Q. So you can't identify any documents in response to my question?

A. I didn't have documents, I have actions from Carolina First.

Q. Those actions you spoke of two projects and those are Newberry Development and Middle Sound Land?

A. Yes.

Q. And the actions that you're speaking of are suing on the guaranty?

A. Yes.

Q. Any others?

A. Not understanding what the mechanics of solving the problems would be. As a party to a transaction they should be aware of how problems can be solved as opposed to how to damage and hurt the principals associated with the project, and ultimately damage the project and the asset itself.

Q. Anything else?

A. No.

Q. I want to look at the next document in Exhibit 2. It's the March 1, 2009 Statement of Financial Conditions; do you see that?

A. Okay.

Q. Is that a true and correct copy of your statement of financial conditions as of March 1, 2009?

A. Yes.

Q. And again this document indicates assets in excess of $40,000,000; is that correct?

A. Yes.

Q. And it also indicates a net worth of close to $39,000,000; is that correct?

A. Yes.

Q. Is that your signature on this document?

A. Yes.

Q. If you'll look on the third page in of that document it's page 2 of the notes paragraph 7, Notes Receivables?

A. Yes.

Q. There's a note receivable in excess of 5.3 million dollars from Atrium at the Lake, LLC?

A. Yes.

Q. What happened to that receivable?

A. It's still on the books.

Q. Has any amount of that been paid?

A. No.

Q. All right. On the Commercial Real Estate Owned section which is the next page March 1, 2009, Gateway Properties, LLC, here it indicates from 2009, 16 Gateway Properties as opposed to the 14 in 2011 and 2012 and then at the

bottom it has Kenton and Mallard sale/lease; do you see where I am?

A. Yes.

Q. Are those two the two that are missing from here?

A. Yes.

Q. What happened to those two properties?

A. We sold those properties to investors and we handled the lease transaction with the tenant.

Q. Did that transaction generate any cash?

A. Yes.

Q. How much?

A. I don't recall but it was enough to invest in some more Gateways and some more land acquisitions.

Q. Did you personally receive any cash from those transactions?

A. Yes.

Q. Do you recall how much?

A. No.

Q. Less than a million dollars or more?

A. I would say it was less.

Q. Did you transfer any portion of that cash to any family members?

A. No, I supported family members but I invested in additional Gateways and additional land.

Q. Did you transfer any portion of that cash or proceeds

of that transaction to any entity or any family members?

A. No.

Q. On page 5 of the same document we have got paragraph K and L Residences at the Landings, building 27. What happened to those properties?

A. We had financing arranged, we had tenants signed up. Actually we had tenants signed up for the Residences at the Landings and had significant deposits on account. As the time went on during that year the financing evaporated and we were not able to move forward any further.

Q. What happened to those properties?

A. They didn't get built after we had financing and tenants in place.

Q. And the real estate, what happened to that?

A. It's still part of the Langtree holdings.

Q. And then you've got in paragraph N 131.14 acres indicating sale pending?

A. Yes.

Q. What happened to that property?

A. The same thing, people -- we had a hotel developer who was under contract owed us money up. He too couldn't get financing and that deal collapsed also.

Q. Two more pages in there's a Statement of Financial Condition dated December 1, 2006; do you see that?

A. Yes.

Q. Is that a true and correct copy of your statement of financial condition as of that date?

A. Yes.

Q. Is that your signature on the document?

A. Yes.

Q. On the Notes to Financial Condition, the next page, down at the bottom under 2006 Contract Receivables Due paragraph 6 there's Atrium Memorial Partnership I and II, Atrium SRC, LLC, Southeast Pediatric Center, LLC, Irmo Medical Center, LLC; do you see where I am?

A. Yes I do.

Q. What happened to those entities?

A. Those were sold.

Q. Were these some of the entities that you talked about earlier as being sold of different sales?

A. I mentioned to you earlier that I had sold a number of the Atrium properties and this is part of those.

Q. Did you receive any proceeds from the sale?

A. I did.

Q. How much did you receive?

A. You know, combined, a couple million dollars.

Q. And was that sale in 2007 or later?

A. I think it was in 2007.

Q. You received in the neighborhood of $2,000,000?

A. Several million, I can't tell you exactly.

Q. More than five or less than five?

A. Less than five.

Q. Do you know what you did with that?

A. I invested in Langtree, invested in more Gateways and more land.

Q. Did you transfer any portion of those sales proceedings to any family members or any entity owned by a family member?

A. Yes.

Q. What transfers did you do at that time?

A. Family members. My two daughters, my wife.

Q. And the transfers to your two daughters, was that to the trust or directly?

A. To the trust.

Q. And how much was each of those?

A. I don't recall but it was hundreds of thousands.

Q. For each?

A. Yes.

Q. When did that take place? Was that in 2007 when the sales closed?

A. Yeah, it would be around that time.

Q. Did they give you anything in exchange for those transfers?

A. No.

Q. The next page you've got a Note Receivable from Mini

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School Learning Centers?
A. Write.
Q. What happened to that?
A. That was an amount that was still due on the sale of the Gateway operations.
Q. Has that been paid?
A. Yes.
Q. If you will look to Commercial Real Estate Owned schedule for 2006 this has paragraphs B through F which are the Atrium Memorial I and II, the Aetna SRC, Southeast Pediatric and Irmo Medical Center; do you see where I am?
A. Yes.
Q. Are those the entities that you sold in 2007 that we talked about earlier?
A. Yes.
Q. On page 6 of that document there's Vacant Land at 1921 Gunbarrel Road, Chattanooga, Tennessee?
A. Yes.
Q. What happened to that property?
A. Developed it.
Q. Who owns that property now?
A. Shoppes at Atrium.
Q. And that's reflected on your later financial statements?
A. Yes.

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Q. The next page after that one on that same document is Residential Real Estate Owned as of December 1, 2006?
A. Yes.
Q. There are a number of properties here that weren't on the later financial statements beginning with 1522 S. Kilbourne, 3716 Palmetto, 3274 Davenport and 1367 Allendale?
A. Yes.
Q. And also 3509 Maybank. Do you see where I am?
A. Yes.
Q. What happened to those properties?
A. They were all sold.
Q. Were they sold in one transaction or separate?
A. Separate.
Q. Do you recall when they were sold?
A. No.
Q. Do you recall what proceeds you received from the sales?
A. No.
Q. Do you recall what you did with the proceeds of the sales?
A. I invested it in more real estate.
Q. Same question for the two properties on the next page, 716 Cedarfield and 1361 Weston Watch?
A. Same situation, sold them.
Q. You don't recall what you received from that or what you did with those proceeds?
A. No.
Q. Mr. Jacobs, have you ever been charged with a criminal offense other than a traffic violation?
A. No.
Q. Have you ever been deposed before like we are doing today?
A. No.
Q. Have you filed a claim against anyone else in the last five years?
A. I have filed eviction notices.
Q. Other than that?
A. No.
Q. Has anyone other than TD Bank filed any claims against you in the last five years?
A. No.
Q. What about claims against entities in which you hold ownership interests?
A. No.
Q. Have you had any judgements entered against you in the last 10 years?
A. No.
Q. Have you searched for documents related to the TD Bank Carolina First loans?
A. Searched for documents? I am not sure I understand what you mean.
Q. I sent requests to your lawyers for documents related to the loans. Have you looked for any documents related to the loans?
A. I have got several file drawers of loan documents on the various transactions that we have done over the last 12 years.
Q. Are those files at your house or at your office?
A. My office.
Q. Have you provided copies of those to your lawyer?
A. Not in recent time. They may have had them from previous transactions but they've all been paid off except these two.
Q. Do you have any documents on your computer related to the loans?
A. No.
Q. Any emails with TD Bank and Carolina First regarding the loans?
A. Not emails, I may have had an email or two about an appointment or a phone call but that's about the extent of it.
Q. I want to talk about the Newberry Atrium loan. Tell me about how that loan originated?
A. That originated in I guess '07 maybe. I was involved with Carolina First with Irmo Medical Center at that time. And during that time the people that I was dealing with like Larry

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Scotts and Michael Phillips and Justin Strickland, they were very kind and generous to me and they asked me if they would be able to look at the new transactions that were coming up. And because of the confidence that I had in working with these people from years before, I was very happy that they were interested in looking at the Newberry loans. They were familiar with the work that I had done and the performance that I had done, and they said that they would be very interested in putting a very good proposal on the table.

At that time I was required by the hospital to provide several proposals. Quite frankly, Carolina First won the proposal because I lobbied for them based on the longstanding relationship I have had with the management team and their interest, their willingness, the flexibility to work together through the previous six transactions that I have worked with them on. And as a result of my lobbying the hospital agreed to go with Carolina First.

Q. And then the funds were of course used to construct the medical office building known as Newberry Atrium Professional Center; is that correct?

A. Correct.

Q. And you were represented by separate counsel for that transaction I assume?

A. Separate than me?

Q. Separate from Carolina First -- another lawyer?

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A. Yes.

Q. Who was that?

A. Gerald Jowers.

Q. Now I believe in your bankruptcy filings the total rent per month is a little over $58,000 on a monthly basis; is that correct?

A. Again without looking at the details, I have got so many numbers in my head. If that's what it says I am sure that's what it was reported.

Q. It's leased up to about 62 percent at this time?

A. 63 percent occupied. I think we get revenue on 60 percent because the MRI is owned by the hospital.

Q. And is the current occupancy and the rental revenue sufficient to pay debt service and operating expenses?

A. No.

Q. How much is the shortfall per month?

A. Again depending on repairs and maintenance and depending on -- which currently before they called the loan I was feeding it $10,000 a month.

Q. Now, before Newberry Atrium filed for bankruptcy and the loan had matured the debtor was not making any payments to TD Bank; is that correct?

A. The debtor was making payments to the bank until they extended -- they gave me a 90-day extension to work something out and at that time I was contacted by a gentleman out of

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Greenville, who I mentioned to you, said we'd sit down and work something out. I had maybe an hour visit with him, he came to visit me.

I prepared a proposal that would show how that would work out, how I could get this on an even keel with a little flexibility from the bank and an extension. He indicated we would work on that. He left, I didn't hear from him for maybe three or four weeks. I tracked him down and said can you tell me what's going on. And he said well I have been unavailable and as a result of that I haven't made much progress on this. I said well what can I do to get this note renewed that's coming up. He says I have got to get my people to give me some direction. I said who are your people. And he said it's a committee. I said okay. What is it that you need and what are the issues? The proposal I gave you was a very realistic approach on how I could continue to maintain the property, meet all its obligations.

I didn't hear from him again for another couple of weeks and I tracked him down again. And I said I have got to know what we're going to do, we're already beyond the first 30 days. Are you going to work with me on extending this? He says I can't give you that answer.

Q. Who are you referring to?

A. No, I don't recall his name. He was out of Greenville. Todd maybe, Eric O'Toole (ph) or Eric Todd or

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something like that. I mean I had one visit with him and three phone calls. I just kept getting the runaround and I kept asking for what are we going to do. And he says well I might be able to get you an extension but you've got to pay it down significantly. What is significantly? A million dollars? I can't do that. I can't operate the building and pay it down at the same time.

Q. And at some point the debt matured; is that correct?

A. It matured and during that time I could not get an answer other than the runaround and no direction. He says I am leaving this position, you'll be contacted by another person. Another three weeks go by and I am contacted by another person. This gentleman is out of Charleston. I think he's the current gentleman that was at the hearing.

He then sets an appointment for a week later. He says I am going to come visit you and we'll work something out. I went through the same process I did with the first fellow from Greenville. And I gave him the proposal, updated it and he says well let me see what I can do on this. Said I've got to go back to my people. I've heard the people so I said who are your people. He says one is in Greenville, one is in Maine and someone else. It was him, a Maine guy and a Greenville person.

I gave him all the information that I had done before. He sent me a request for some additional information, I sent that to him. I didn't hear back from him. At some point, maybe

several weeks later I get this lawsuit filed against me. And that was the end of it. I don't believe -- and I asked them if they had ever seen the property, if they had given any consideration to my proposal which would not jeopardize the bank, would maintain the facility and allow it to operate while we continued to -- and I gave them the history in very great detail of what's going on in the environment, the economy, the healthcare environment. And there was never any discussion. It was just the next thing I know I had a lawsuit.

Q. The loan did mature; did it not?

A. Yes. And during that time I had no communication with what anybody was going to do.

Q. After it matured did you make any payments to TD Bank?

A. No.

Q. And up until the time you filed bankruptcy you weren't making any payments?

A. No.

Q. So presumably the property had enough cash to pay its operating expenses during that time?

A. It did.

Q. Is the property currently listed for sale?

A. It's not listed. I have spoken to several brokers and I mean, there is interest out there but it's not interest at this moment that I could pursue considering where we are in this legal proceeding.

Q. Are you and Newberry Atrium contesting liability in the TD Bank Note and Guaranty?

A. I wouldn't say I am contesting it. I think the guaranty and the punitive way that the bank has pursued this as opposed to looking into a collateralized loan, the loan has value -- I am sorry, the building has value. And the building itself has the ability at some point if were to believe the 2011 appraisal, five million eight as is where is, that provides a very good opportunity for the bank to recover the majority of the loan. Given the time and the approach that I proposed to work this thing out this loan could be paid in full in the near future, the next several years. Given the time to continue to operate the building, allow the Affordable Healthcare Act to provide the additional revenues to a real community like Newberry recruit additional physicians and services, which they probably are in a better position today than they have been in recent years to recruit additional services and physicians.

Q. You indicated you are not contesting the liability but you have some concern about what you call the punitive way in which TD Bank has done this. Are you referring to the suit solely on the guaranty; is that correct?

A. Yes.

Q. Are you referring to anything else?

A. The way that it has been handled, the failure to communicate with me to work with me in any reasonable way. The

suit basically damages my ability to perform, not only on this asset and find new financing and working, but it could also jeopardize the other assets that I am involved in also, which may be a source of repayment given the time over the next several years to allow them and the economy to heal.

Q. In your complaints are they based on anything written in any of the loan documents between Newberry, yourself and TD Bank?

A. I can't tell you the minutia of the legalese in these documents. I can tell you that there is a standard of reasonableness when you enter into any kind of ongoing relationship. A $27,000,000 history of working together over 12 plus or minus years gave me that standard of performance. I performed, they performed, they were flexible. They gave me some breathing room when needed and I performed back and took care of the responsibilities I had.

Q. So your testimony is there isn't any term in the loan document that you're referring to?

A. I can't be specific because I haven't read the hundreds of pages of loan documents.

Q. Can you be general?

A. When you enter into a contract it's my understanding that there is a reasonableness to expect fair treatment, expect fair play, and nothing about this has been reasonable. It hasn't been fair, it hasn't been anything but abusive, damaging

to me personally, to the assets that I can control. You basically are shooting me in the head for a reason that I can't understand. If I can preserve the value of this asset and grow it, the bank would not be harmed. You're just harming me which inhibits my ability to solve the problem.

Q. Again you're referring to the suit on the guaranty?

A. Yes.

Q. You keep mentioning the 27,000,000?

A. Yes.

Q. Those are obligations that were paid?

A. About 21,000,000 has been paid. I have reduced two obligations that are outstanding of about $3,000,000.

Q. So $24,000,000 has been paid?

A. I can't tell you. I guess I owe about six, $7,000,000.

Q. Seven million has been unpaid?

A. Yeah.

Q. So roughly 33 percent?

A. But they can be paid with a reasonable approach. And in today's world you have nothing else to work on other than solving problems rather than creating problems.

Q. All right. Let's look quickly at your Answer in the Guaranty Action. It's Exhibit 3.

In paragraph 9 of your answer it references a special fiduciary relationship between the Defendant and Carolina First;

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is that correct?
A. Yes.
Q. That's what you're alleging in this case?
A. Yes.
Q. When did that special fiduciary relationship develop?
A. When you enter into contracts with institutions or people you expect fair treatment, you expect the people will work together to deal and to solve problems rather than damaging the assets of the people associated with it that will undermine the solutions.
Q. When you are talking about damaging assets you're not saying that TD did anything to this property?
A. I am saying by being so unreasonable and aggressive they can cause the damage for a solution.
Q. And they didn't foreclose on this property; is that correct?
A. No, but now foreclosing on the property would be a course of action you could take to recover from part of your funds, but if I were given the time and didn't have the responsibility of fighting a lawsuit on a personal guaranty which could ultimately result in a judgement that completely damages the ability to solve the problems and it damages the properties and collateral that you have.
Q. So you're saying you'd be better off if TD foreclosed on the property?

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A. Rather than coming after me for a judgement because at this point my proposal would involve refinancing this in the not-too-distant future.
Q. Is there any document that says TD has to refinance this loan?
A. No document that says they are obligated to do anything other than act fairly and be reasonable to preserve an asset that they would undermine.
Q. What document says that?
A. I don't have a -- I've got that much legalese. I don't have anything that says what I am alleging, and if I do I haven't looked through the hundreds of pages of documents.
Q. So you don't know that there's a document that says what you just said?
A. I don't know all the minutia from the contracts.
Q. Do you know if there's a document that says what you just alleged?
A. I don't know.
Q. It's your claim that in paragraph 12 of this answer it says would not have executed a guaranty without the trust and confidence when dealing with Carolina First. Is that your allegation in this case?
A. Yes, it is. It's a fact and I had three other lenders that were interested in doing this. I chose and lobbied for Carolina First because of the flexible working relationship we

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had developed over the years.
Q. Those three other lenders, did they require any portion of the loan to be guaranteed?
A. I am sure they would.
Q. Do you know who those lenders were?
A. Yes.
Q. Who were they?
A. BB&T, Carolina First and I think Regions also was one.
Q. Now, Carolina First ultimately did agree to modify that construction financing; isn't that correct?
A. Yes.
Q. And they I think modified it seven or eight times, didn't they?
A. They modified it seven or eight times but kept squeezing me harder and harder which required me to continue to feed this.
Q. They wanted you to pay the loan?
A. Yeah.
Q. Imagine why they did that.
Now, do you know if BB&T or Regions, sitting here today, would have agreed to extend that maturity seven or eight different times?
A. Absolutely.
Q. How do you know that?
A. Because they had done it for me before.

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Q. Have they done it for you before in loans that didn't have a sustainable occupancy?
A. Yes.
Q. Which loans were that?
A. The first loan -- well, this goes back to Atrium Northeast. Atrium Northeast was troubled before and I had to get extensions over about a three-year period to release the building.
Q. Anything else?
A. I have had other banks that have because of good long-term relationships that have extended and turned them into permanent loans to make the properties able to stabilize as opposed to having to face this battle every four, five, six months.
Q. You later go on in your answer paragraphs 16 to 18, if you will look at that, indicating there was a refusal to provide permanent financing; is that correct?
A. Yes.
Q. When did that refusal occur?
A. In 2011 I guess it was.
Q. And I think we've talked about this earlier; there's no provision in either loan documents that required TD to provide financing, is there?
A. There is no requirement that I see other than working together in good faith and not trying to jeopardize and damage

the asset and the operator, the developer, the guarantor.

Q. Did you seek permanent financing on this property from any other lenders?

A. Not during recent years, no.

Q. At any time?

A. No, not during the last two years.

Q. What about prior to the last two years?

A. No. We hadn't stabilized the building at that point.

Q. You wouldn't expect a lender to provide permanent financing when your building is not stabilized?

A. I would expect a lender that had worked with you over the years to be reasonable and flexible to find a solution to this.

Q. I'm not talking about TD Bank, I'm talking about other lenders. Would you expect other lenders to provide permanent financing?

A. Yes and they have.

Q. Why didn't you refinance this loan, Mr. Jacobs? Why didn't you do it for this loan?

A. Because the environment up until this point has been very dismal.

Q. Because you couldn't; you couldn't get it from any other source, could you?

A. Could not on this building.

Q. Your Third Defense in your Answer in paragraph 22 you

allege that you believe the value of the building is equal to or exceeds the amount of the loan?

A. Yes.

Q. Do you believe that to be true?

A. Yes.

Q. And the basis of that is what?

A. The value of the building is based upon the facility income strength, the use of the building and the continued improvement in the economy, the continued working or the continued clarity in the healthcare environment that would allow additional improvements and additional reimbursements to the physicians in the hospital.

Q. Anything else?

A. No.

Q. Based on any valuation is what you have said?

A. Yes, I will have evidence of valuation of what it looks like now but at 5.8 two years ago in a much more difficult environment. I am believing that the valuation of this building will be in excess of 5.8. And its stabilization over the next several years will exceed the value of the loan amount.

Q. Your next allegation in paragraph 24 concerns not bringing action for foreclosure; is that correct?

A. Yes.

Q. And that's what you're alleging is punitive and unconscionable?

A. It is. The bank knows that I don't have the ability to write a check for $6,000,000.

Q. I think the bank also knows that you have got a significant amount of other obligations that mature within the next 18 months?

A. I just shared that with you, yes.

Now, what good does the bank get by making it impossible for me to stabilize these assets by putting a judgement against me which would prevent any of these things from being worked out?

Q. In this Third Defense about not bringing an action on foreclosure are you referring to any other action or inaction of TD Bank?

A. That's what I am alleging.

Q. So that's what I want to know; are there any other facts aside from their decision to sue on the guaranty before they brought a foreclosure suit?

A. Not that I can tell you today. There may be others but my focus has been solving the problem, not looking at the legalese. You would hope a reasonable flexible group would understand there's solutions to be had as opposed to sabotaging the guarantor and the project.

Q. And by sabotaging you're just talking about suing on your guaranty?

A. Yes.

Q. You're hot referring to anything else?

A. No.

Q. Mr. Jacobs, you've been handed Exhibit 4 to your deposition. Do you recognize that document?

A. It's a Promissory Note.

Q. Does this appear to be a promissory note between Newberry Atrium Development and Carolina First Bank?

A. Yes.

Q. Dated February 20, 2007?

A. Yes.

Q. On page 4 there's a signature block. Is that your signature?

A. Yes.

Q. Does it appear to be an accurate copy of the note?

A. I would expect nothing less.

Q. Page 3 of this document the first full paragraph indicates lender is not required to rely on the collateral for the payment on the note in the event of default by the borrower but may proceed directly against the borrower and guarantor or endorsers in such a manner as it deems desirable.

Did I read that correctly?

A. I am sure you did.

Q. That language gives the bank the right to sue directly on the note and on the guaranty; does it not?

A. That's what it says.

Q. If you will look at Exhibit 5. Can you identify this document?
A. Yes.
Q. If you'll look at the last page, page 7 of the Guaranty. Is that your signature on this document?
A. Yes.
Q. Does it appear to be a true and correct copy of your Guaranty with the Newberry Atrium loan dated February 20, 2010?
A. I would expect it is.
Q. In paragraph 1 on page 1 continuing to page 2 states that guarantor hereby expressly waives any right to require lender to bring any action against the borrower or any other person; do you see where I am?
A. Yes.
Q. Did I read that correctly?
A. Yes.
Q. It also says the guarantor waives the right to require that resort be had to any security; do you see that?
A. Yes.
Q. That indicates what the bank can sue you directly; does it not?
A. That's what it says.
Q. If you'll look at Exhibit 6. Does this look to be a true and correct copy of the Newberry Atrium Mortgage and Security Agreement?

A. Yes.
Q. Is that your signature on page 18 of the document?
A. Yes.
Q. Do you know of anything in this document that requires a suit or foreclosure on the mortgage before the bank exercises any other remedy?
A. I would assume that you would be telling me that it does not require that but it does require some requirement of good faith and cooperation in order to preserve the valuable asset and the ability to work it out.
Q. That's your opinion?
A. That's an opinion but my understanding is when parties and institutions enter into a contract there is that implied guaranty, there is a reasonableness and good faith in working together.
Q. Is there anything in that document that includes those terms you're speaking of?
A. I have not reviewed it so I cannot tell you that.
Q. In fact that document, if you will look at paragraph 2.16 on 16 that indicates that the remedies under the note and mortgage are cumulative; does it not?
A. It does say that.
Q. You've been handed Exhibit 7; do you recognize that?
A. Yes.
Q. Construction Loan Agreement between Newberry Atrium

and Carolina First.
A. Yes.
Q. Is that a true and correct copy of the document?
A. I am sure it is.
Q. Is that your signature on the last page?
A. Yes.
Q. Exhibit 8, does this document contain a number of modification agreements. If you'll look through these the first one first page March 3rd, 2009; do you see where I am?
A. Okay.
Q. On the second page of that document is that your signature?
A. Yes.
Q. Does that appear to be an accurate copy of that modification agreement?
A. Yes.
Q. The next one, June 16, 2009?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that dated September 14, 2009; do you see where I am?
A. Yes.

Q. Does that appear to be your signature on the second page of that document?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that, December 18, 2009, is that your signature?
A. Yes.
Q. Is that an accurate copy of the document?
A. Yes.
Q. February 25th, 2010?
A. Okay.
Q. Does that appear to be a true and correct copy of February 25th, 2010 modification agreement?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Turn one more page. Do you see the Loan Modificatio Agreement at the top?
A. Yes.
Q. It's dated April 28, 2010?
A. Yes.
Q. Does that appear to be a true and correct copy of th Loan Modification Agreement?
A. Yes.

Q. Is that your signature on page 3?
A. Yes.
Q. There is an Acknowledgement Ratification and Release by Guarantor on the 5th page?
A. Okay.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. The very next page the Loan Modification Agreement dated May 10th, 2011; do you see where I am?
A. No, I don't have that.
Q. Let's skip that and go on to the next one which is the Loan Modification Agreement dated May 23rd, 2012.
A. Yes.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. That does that look to be a true and correct copy of the May 23rd, 2012 Loan Modification Agreement?
A. Yes.
THE WITNESS: I'd like to get some water.
MR. BEDENBAUGH: Sure.
MR. JOWERS: Jody, Exhibits 10 to 13 we'll stipulate so you won't have to go through them all.
MR. BEDENBAUGH: Okay.

BY MR. BEDENBAUGH:
Q. The loan modifications that were just in front of you, the purpose of those was to extend the maturity date; is that correct?
A. Yes.
Q. Can Newberry Atrium benefit from the extension of the maturity date; is that correct?
A. It can.
Q. And you as guarantor would benefit from an extension of the maturity date; would you not?
A. Yes.
Q. Carolina First and TD did not have the obligation under the loan documentation to agree to an extension; did they not?
A. No, but they had the willingness and the interest to preserve and make the asset whole were they to get their funds repaid to them. By doing anything less would be of no benefit to the project, to me or to the bank. By being reasonable, by being flexible they would ultimately in the next several years per my plan get paid out a hundred percent. By being anything less they would gain nothing more because I don't have $6,000,000 or access to that.
But the building is a valuable asset and when allowed through a reasonable approach will realize and be able to pay back all its owed. And you would expect that from a long-term

relationship in a very difficult environment to be able to work together to solve the problem.
Q. Do you dispute that the note matured on May 3rd, 2012?
A. No.
Q. Do you dispute that TD demanded the balance due from Newberry Atrium and from you?
A. No, I think they did.
Q. Do you dispute that you and Newberry Atrium have failed to pay the balance due on the Note and Guaranty?
A. Neither me nor the asset has that kind of cash available.
Q. So you don't dispute that you haven't paid the balance, do you?
A. I don't dispute it.
Q. Do you dispute that Newberry Atrium is indebted to TD Bank under the loan?
A. No.
Q. Do you dispute that you are personally indebted to TD Bank under the terms of the Guaranty?
A. No.
Q. Let's talk about Atrium at Middle Sound. Tell me about how that loan originated.
A. Again, my relationships at Carolina First. They had asked to look at everything that I was involved in. That property was acquired to develop a number of outparcels and

there was interest to take that property -- the loan was $3,000,000 -- and allow us to develop the structure and allow us to sell outparcels, which we were very successful in doing. We took a $3,000,000 loan and reduced it through our successors in putting the infrastructure in at great cost, improving the property and selling three outparcels and had repaid almost $2,000,000 of that note, paying fees and interest all along the way. That I would say was very beneficial during a very difficult economic time, we continued to feed it and improve the property.
Q. And was it you that requested the loan from Carolina First for that particular project?
A. They asked if they could look at everything that I was doing.
Q. Did you go to them and request a loan?
A. I went to them and showed them -- you said you wanted to look at evorything I was doing, and I have enjoyed the working relationship and if you are interested in this I would appreciate your terms.
Q. And that would have been with whom?
A. Larry Scott.
Q. He was the banker here in Columbia?
A. Yes.
Q. Now, I understand there's still some property that remains to be sold with them?

A. Yes.
Q. And what is the status of that property?
A. There is activity on it.
Q. What activity is that?
A. My partner there indicates that there are interested parties that want to develop a hotel on that.
Q. What is the status of those discussions?
A. I believe negotiations are going on and the buyer is in the process of reviewing how they can raise the capital and obtaining a franchise for that development.
Q. What is the likelihood of that transaction occurring in your mind?
A. Again, my partner is fairly confident. We have had a number of inquiries over the years but again the environment has been such it's been difficult for purchasers to acquire funding, so that being said he believes that the Wilmington market is improving and the ability to raise the funds is improving and he is hopeful that this transaction could be consummated in the months ahead.
Q. Would the price of that transaction be enough to pay the loan in full or not?
A. I believe it would be.
Q. What's the current value of that property?
A. Again, I'm not sure what it would be but I am sure it would be enough to pay the loan which I think is about a million

two. And the uniqueness of that property is that it's got the limited water taps, sewer taps and it's developed.
Q. I assume that property is listed for sale?
A. Yes.
Q. How long has it been listed for sale?
A. I can't tell you but it's been listed with various brokers in the last several years.
Q. Are the taxes current on this property?
A. Probably not.
Q. Were you represented by counsel for the closing of that loan transaction?
A. Yes.
Q. By Mr. Jowers?
A. Yes.
Q. Atrium at Middle Sound Landings, LLC, the owners of that are you and Mr. McFarland; is that correct?
A. Yes.
Q. Each owning 50 percent?
A. Yes.
Q. How did you and Mr. McFarland come to be involved in the project?
A. He has a long-time knowledge of the Wilmington market. I have known Jim for years before he moved to Wilmington. He has been successful in acquiring properties and finding development opportunities. And I might add he has proven

himself to be adept that during the times before the financing debacle happened we were able to sell three pads and repay almost $20,000,000.
Q. Who manages Atrium at Middle Sound?
A. I guess we're both managers of it but he's on the ground.
Q. Who pays the bills?
A. I paid them, fed the property for years.
Q. And that's done out of your office in South Carolina?
A. He paid a lot of the development costs himself out of his own accounts. I paid some of the development costs, so it was kind of a combination of both of us.
Q. Who made payments on the property?
A. I did.
Q. How often do you discuss the developments with Mr. McFarland?
A. Monthly, every six weeks.
Q. Usually on the phone?
A. Yes.
Q. Now, the Middle Sound case, are you contesting liability to TD Bank under the loan and guaranty in that case?
A. Yes.
Q. Is that the same grounds of different grounds from what we talked about with Newberry Atriums?
A. Similar.

Q. What's different?
A. The nature of the market has been very difficult for the last several years. It's coming back. We need time in order to try and consummate a sale and/or refinance, and the damage that TD will do will be difficult to find new financing for refinancing of the land or prospective tenant.
Q. And the damages, are you again referring to the suit on the loan and guaranty?
A. Yes.
Q. Now, you would agree with me that it would be more difficult to sell the property if the pending foreclosure was filed against it; would it not?
A. I think there would be difficulty in selling the land until the right person shows up foreclosure or not for the loan against the property, but the value is every bit -- I believe that the value of the property would repay the loan on the sale of the property.
Q. Other than TD's election to sue on the guaranty is there any other allegation or defense that you're raising in that case?
A. It's the same defense and the same thinking that having placed my trust in the people at Carolina First that had worked with me over the years that they would approach creating more harm than solutions the way they are approaching this.
Q. And that special relationship you're referring to in

connection with Atrium at Middle Sound as well as Newberry Atrium that would have developed when Carolina First was the lender as opposed to TD?

A. It would be my expectation when somebody takes over the place of the lender that they would continue to honor that relationship that brought them that business.

Q. Thank you. I am asking when did the relationship begin?

A. Under Carolina First.

Q. And the people involved that you indicated created this special relationship, those were Carolina First employees?

A. They were.

Q. What were the names of those people?

A. My goodness, I have dealt with Larry Scott for many years. Rebecca Robuck (ph), Justin Strickland. But Larry and Rebecca were the primary on-the-ground people, but absolutely sought after by the other people that I have dealt with.

Q. Same question as with the Newberry Atrium the special relationship, that's not based on any particular thing in the loan document, is it?

A. It's based on the history and actions that we have worked over the last 12 years.

Q. And not on anything in the loan document?

A. If it's there I am sure you would have found it for me.

Q. Again in your Answer in that case you allege you would not have executed the Guaranty without the special relationship?

A. That's correct based on the knowledge that they had been flexible and reasonable to work through problems.

Q. And just like Newberry Atrium the guaranty wasn't a condition of the loan commitment; was it not?

A. It was.

Q. And any other lender would have required a guaranty; would they not?

A. I would think so.

Q. Again your defense about the election to sue on the guaranty and not bringing an action of foreclosure that's based solely on the decision to file suit on the Guaranty; is that correct?

A. Yes. I think that the value, if we had time to sell the report and create the opportunity to turn the land into cash or to develop it on behalf of a user would certainly protect TD's position.

Q. Is there anything else that we haven't talked about that is the basis of your defenses in the Middle Sound case?

A. I think certainly the value that I have enjoyed in working with Carolina First has created a lot of income for Carolina First, has certainly allowed me to create income to invest in other real estate, which unfortunately has not gone as well as everybody had anticipated during the meltdown, but

nobody has gotten hurt. I can, absolutely if given the time, can solve these problems.

Q. All right. Exhibit 11 through 15. I believe your lawyer indicated that you would stipulate that 11 through 15 are accurate copies of these loan documents containing your signature. Can you look through those and let me know if you agree with that?

A. Yes.

Q. Those are true and correct copies?

A. Yes.

Q. You signed those documents?

A. Yes.

Q. Do you dispute that the Atrium at Middle Sound note matured under its terms?

A. No.

Q. Do you dispute that TD Bank has demanded the balance due from you and the entity?

A. Yes.

Q. You do dispute that?

A. No, I don't.

Q. Do you dispute that Atrium at Middle Sound and you and Mr. McFarland have failed to pay the balance due under the terms of the Note and Guaranty?

A. We would pay it if we had the liquidity, we do not have the liquidity, we're looking to the collateral that we

pledged to this to repay the notes.

Q. Do you dispute that Atrium at Middle Sound is indebted to TD Bank for the note?

A. I don't dispute it.

Q. Do you dispute you're personally indebted to TD in return of the guaranty?

A. I don't dispute it but I do request a little more time and a reasonable flexibility to turn these assets into repayment sources.

Q. All right. You've been handed Exhibit 16. This is a Subpoena that I sent to you in connection with the bankruptcy adversary proceeding. Have you seen that before?

A. Yes.

Q. Also we'll give you Exhibit 19 which is your responses to the Subpoena which I received yesterday. Do you have 19?

A. Yes.

Q. The first thing I had asked for was time records and other documents showing the amount of time you spent with Newberry Atrium and your response indicates that you do not keep any time records for that; is that correct?

A. Yes.

Q. Do you have an estimate of how much time you spent on Newberry Atrium versus the other matters?

A. Depending on the month and the process it could be full-time to part-time.

Q. Do you know if you spent 20 hours a week on it or more than that or how does it break down?

A. Depending on the week and the month and the situation it could be 40 to 60 hours a week, it could be nine to 10 to 20 hours a week.

Q. The next thing I subpoenaed was related to the TD Bank N.A. non-privileged documents related to TD Bank N.A.'s State Court actions against you; do you see that?

A. Yes.

Q. I believe you testified earlier that you do have files relating to these loans?

A. I have the documents that you showed to me in my files.

Q. And you have other documents in your files or do you know?

A. I have the leases which I have turned over to the bank. I have the basic plans, I have the designs, I have information that pertains to the asset, yes.

Q. And I believe you testified earlier that you have not produced those to your lawyer; is that right?

A. They produced it to me.

Q. Have you gone through those documents and given them to your lawyer?

A. I have gone through the documents and I have given it to my lawyer.

Q. Okay. Your response indicates all documents between David Jacobs and his counsel are privileged but you testified earlier that you have documents related to these loans. All I want are copies of those documents, so that's what I'm trying to figure out.

A. I have given him documents that were requested which ware leases, appraisals, plans and the bank has all that.

Q. You can't just respond in the litigation context -- in my mind you can't just respond and say the bank already has everything?

A. I've given it twice or three times.

Q. Well nothing was produced in response to my Subpoena so that's what I am trying to figure out.

A. Because I've delivered it previously.

MR. JOWERS: Let me make this statement for the record. The Subpoena says all documents relating to the State Court action. The documents he has in his files has nothing to do with the lawsuit. Those were just pre-construction or construction documents and bank documents that the bank prepared. There's nothing else that are relevant to this lawsuit that he has other than what we've produced.

MR. BEDENBAUGH: Without seeing them I don't know what they are.

MR. JOWERS: That's not the question. The question was relating to that so the Subpoena called for an opinion on our part and that is our opinion. If you want to be more specific with subpoenas then you need to be more specific.

BY MR. BEDENBAUGH:

Q. The next question asks for documents related to the reorganization efforts of the Newberry Atrium. Your response says all documents concerning the reorganization are with the legal counsel and are privileged.

Now, you testified earlier you had in fact had some documents of Newberry Hospital related to a refinancing, with the possibility of leasing additional space?

A. Yes, and I have provided that to your appraiser.

Q. Are there other documents that I haven't gotten that relates to the reorganization?

A. No, just the correspondence that I have had with the appraiser which I sent on to him, the leases, the documents they requested. I have sent everything they requested to them so it's been delivered to them.

Q. Looking back at 19 the next document is a response to another subpoena; do you see that?

A. Yes.

Q. Have you seen that before, the Responses to the Subpoena?

A. I am looking at it now. What is it you want me to answer?

Q. Have you seen the document before?

A. I don't believe I have but we have discussed these questions. I don't know that I've seen all this stuff that I provided, all that stuff that's attached to it.

Q. In paragraph 1 it indicates you do not have any documents that would show your ability to fund a plan of reorganization filed March 22nd, 2013 for Newberry Atrium Professional Center, LLC; is that correct?

A. That is correct. I have no documents. I have a business associate that has lent me money before and I have lent him money before. He has indicated he has interest in assisting me with funding the land.

Q. How much is he willing to lend to you?

A. My plan requires that I come up with that $450,000 over the next three years.

Q. Is that the gentleman in North Carolina?

A. Yes.

Q. What's his name, Howard?

A. Yes.

Q. What's his first name?

A. Rick.

Q. You don't have any documentation for that?

A. No.

Q. Next sentence says he does not have any commitments of definitive source of funds for the plan of reorganization filed on March 22, 2013 for Newberry Atrium Professional center, LLC; is that correct?

A. I don't have anything in writing at this point but the fact that I have found a hundred and some-odd thousand dollars to keep the doors open for the last several years indicates that I have the ability to raise funds. And I do believe that the opportunity to continue working with the hospital provides another alternative solution.

Q. The third paragraph has documents showing the contributions to the debtor?

A. Yes.

Q. Do you recall what those contributions were used for?

A. To pay taxes, operating expenses.

Q. How much are the property taxes a year?

A. They were about 220 some-odd thousand dollars. I appealed it and it was reduced it to about $107,000.

Q. Why did Newberry Atrium file bankruptcy?

A. In an attempt to protect me as a guarantor to allow for the time to work through the reorganization which I anticipate will take three to five years, to continue to release, recruit the tenants and allow the property to be financed out and protect the interests of the tenants, the hospital, the community and allow me to refinance it out, and/or

sell it.

Q. When you filed bankruptcy I believe the debtor had approximately $50,000 in his checking account; is that correct?

A. Yes.

Q. And the total trade claims as I calculate under your schedules to your maintenance service and various service providers were about $9,500; does that sound right?

A. No, it's probably closer to 20.

Q. But in any event you had the ability to pay those claims at the time you filed your bankruptcy; did you not?

A. I was trying to maintain a reserve and I was cautions about using those funds.

Q. But you certainly could pay it in the ordinary course, couldn't you?

A. I could other than the other courses that were going on.

Q. Well, at the time you weren't making payments to TD Bank, right?

A. For several months I was not because I knew the note was not -- they called the loan.

Q. What I am trying to figure out is you say certain other things going on but what prevented you from just paying those creditors?

A. I was applying it towards taxes and other important utilities such as electricity, sewer and water, and maintain

that cash collateral which I was advised to do.

Q. What do you do on behalf of the debtor? What do you do for the debtor?

A. I am the manager, deal with the property managers, pay the bills, deal with the opportunity to design spaces, interface with the potential tenants that the hospitals direct me to, deal with the tenant issues, deal with the hospital and the ongoing operations and maintenance of the property.

Q. And the actual leasing efforts, that's led by the hospital itself?

A. It's been a combination of both. I have brought tenants to the table that have had offers and to participate and for various reasons the hospital declined. I have advised the other hospitals, Self Memorial Hospital on designs for their expansions. I have worked with them on operating the building, their space and dealing with their medical staff.

Q. And the debtor also utilizes brokers in connection with the leasing efforts; is that correct?

A. Yes.

Q. The hospital has the right to repurchase the debtor's property at some point; is that right?

A. It has a right of purchase.

Q. You have alleged that the State Court suit impaired Newberry Atrium's ability to reorganization; is that correct?

A. Yes.

Q. What is the basis of that allegation?

A. Without the ability to refinance it with a judgement against it prevents the building from being financed out to repay TD.

Q. The impairment is in your opinion that the judgement would impeded the ability to get refinanced?

A. Yes.

Q. Is there anything else?

A. The funds that I anticipate raising to pay the loan would not be available to carry it for the next several years while we go through the releasing of the property.

Q. And why would the judgement have that impact, that latter impact that you just mentioned?

A. I wouldn't have the ability to raise the money if I had a judgement against me.

Q. You could raise the money from Mr. Howard?

A. Yes.

Q. Did Mr. Howard indicate that he would lend you the money if you get a judgement against you?

A. He's pretty much indicated that he wants his money safe.

Q. Has he indicated he would not loan you the money --

A. He hasn't been specific but I understand what he's telling me.

Q. Do you know if a judgement in the State Court suit

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will be entered in the next two or three months?
A. I really don't know what that process would involve but I know it would be immanent.
Q. If the judgement is entered against you do you have any idea of when you would be forced to make some sort of payment or that TD would collect on that judgement?
A. I don't know.
Q. Do you have an asset, available asset that you believe TD would be able to reach as a result of that judgement?
A. No, I don't know what TD's capabilities are.
Q. You can't name an asset that would be unavailable to you because of a judgement?
A. No, but any assets that I have that I was able to turn into cash would be impaired to repay anybody's debts back.
Q. Have you made any post petition advances to the debtor?
A. No.
Q. What is the balance of the cash collateral account?
A. I am not sure. We file reports regularly but I can't tell you the exact amount.
Q. The approximate $450,000 that you're proposing to fund the plan of reorganization would that come exclusively from Mr. Howard or some other source?
A. At this time that's where I anticipate it would be coming from. Over the next several years I do anticipate some

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of these assess that I have minority positions in should be able to be turned into cash and that will help me meet these obligations.
Q. Have you attempted to locate post confirmation funding from a traditional lender?
A. No.
Q. Has the debtor made that attempt?
A. No.
Q. What's the reason for the proposed planned injunction against TD Bank?
A. Well, it protects me as a guarantor allowing me to operate to raise money to refinance the property. There would a personal guaranty required under any refinancing and that will be my responsibility.
Q. If TD had a judgement against you the judgement would be paid down from the refinancing as well; would it not?
A. That would be my hope, but it certainly doesn't bode well for getting a new loan for a property coming out of bankruptcy.
Q. Have you previously made advances to the debtor without the benefit of an injunction?
A. No, but I was anticipating getting it back as the property continued to stabilize and we were able to refinance it back out again.
Q. So you did previously make advances without an

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injunction?
A. Without an injunction but we weren't facing the loan calling and the threat to get a judgement against me.
Q. Is it possible if TD got a judgement against you that you would continue to fund the short call and keep the debtor alive?
A. Anything is possible.
Q. If TD got a judgement against you would you just allow Newberry Atrium to fail?
A. I don't know.
Q. It would be in your interest in that case to continue to try to refinance or sell the property; would it not?
A. I am not sure how I would respond if I have no ability to raise money or have the ability to refinance.
Q. Now, the scope of the injunction in the plan in connection with prohibiting TD from suing you, does that apply only to the Newberry Atrium loan or to other loans with TD?
A. A judgement is detrimental anywhere it comes from.
Q. I just didn't understand the plan. Is it the debtors intent to extend --
A. My main focus is on preserving the Newberry Atrium because of the many moving parts that require refinancing. If you are asking me about the Middle Sound property we may have an opportunity to do a build suit for a tenant which would require us being able to get a loan and that remaining property could be

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a very good parcel for a couple of users that my partner is working with.
Q. Now, the injunction and plan, would that apply to TD only or to other lenders?
A. The other lenders I am currently working with have all been reasonable and flexible and I have a fair assurance, nothing in writing, that they do not want the projects to fail and would jeopardize my chances to continue releasing and selling the assets that I have.
Q. So no, it would not apply to those loans?
A. I haven't gotten to that point at this moment. I haven't gotten to the point where people are threatening to call the loan and put a judgement against me, if they have proven over the years to be flexible and reasonable.
Q. The terms you proposed in the plan at five and a half percent interest rate with a five year am and five year maturity, what's the basis of those terms?
A. The contract rate that is currently in place.
Q. For maturity?
A. Yes.
Q. Was that based on the market at all?
A. It was based on the contract rate that the loans had been was at maturity.
Q. Of course the market was different when that loan was made, was it not?

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A. The whole world was different, that's correct.
Q. Have you -- other than what you talked about earlier with the broker in New York if this transaction with the hospital goes down, have you done anything else to identify a post-confirmation lender?
A. I have inquired but have not had anyone that's willing to lend in a condition today as it stands today until this bankruptcy is flushed out. And the condition for the refinance would be that this bankruptcy be dropped, be dismissed.
Q. Now, I believe the debtor's plan assumes that there would be some additional leasing in years three through five; is that correct?
A. Yes.
Q. Why does the debtor believe that those years will be different from the past five or six years?
A. One is that the new CEO, interim CEO has now refocused and dealt with the settling in in the community. He's been there a year and a half, two years so the demand for health care in Newberry will continue to grow because of the expansion of reimbursement for Newberry County would allow them to recruit additional physicians because the Affordable Healthcare Act that will increase the demand to bring in all the Medicare and Medicaid patients that are underserved in the area, and as a result of that the recruitment will accelerate come '14 and '15.
Q. So it's your opinion that reimbursements will go up

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under the Affordable Healthcare Act?
A. Yes, and the demand will increase. Newberry is a very poor rural community and much of the population is underserved. The Affordable Healthcare Act will increase the coverage, increase the demand and increase the ability to recruit new physicians.
Q. Now, of course you're aware that South Carolina thus far has rejected the Medicaid expansion that's part of the Affordable Healthcare Act; are you not?
A. I don't know if it's been finalized. I think the politics right now are driving that. I can't tell you I know how the politicians will resolve this but the indications I am getting from the healthcare community is that there will be some acceptance, it's more affordable for the state to participate in the national program.
Q. By increased reimbursement does that assume that South Carolina --
A. Not South Carolina, Newberry County. I can't speak to the State of South Carolina. I can speak to Newberry County which has been acknowledged to get a higher reimbursement than many of the other rural counties in the state.
Q. Why is that?
A. I can't speak to the reasons, I am just aware that that has been the indications from the hospitals.
Q. From Newberry Hospital?

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A. Well, from other folks. There's been articles in the paper that speak to that, but the hospital, Newberry Hospital is anticipating an increase reimbursement. Self Memorial, that is also a participant in this building acknowledges that the Newberry County area will get a higher reimbursement than Greenwood which gives them more incentive to continue to expand their operations in Newberry.
Q. Look at Exhibit 17. Are those the projections for your plan?
A. Yes.
Q. Now, you've got the rent increasing it looks like in June of 2014?
A. Yes.
Q. Is that just an escalator clause in the lease?
A. Yes.
Q. Then you've got some up-fitting costs, February of 2014 to April 2014; do you see that $13,333?
A. Yes.
Q. Now, would that only occur if a new tenant is identified or would that be done for anyone?
A. If a new tenant is identified.
Q. So that assumes a new tenant would be coming on line?
A. Yes.
Q. Now, you've got expense increases in here of assuming a one and a half percent increase in your two and three. What

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was the basis for that assumption?
A. The rate of inflation.
Q. Now, the expenses identified on here, are any of those passed through to the tenant?
A. They are.
Q. Is that included in the rent received so that it nets out or how does that work?
A. There is an operating expense stop at 525. Anything that exceeds that is passed on the tenant.
Q. Explain that to me again in layman's terms.
A. The lease includes $5.25 of operating expenses. If it exceeds that, which it has, the tenants are billed pro-rata on their occupancy and are obligated to pay that additional money with additional rent.
Q. That would be included in the rent line item income section?
A. Yes.
Q. And so have you done that in this calculation or does that assume that it's below the rent?
A. If you'll look at the legend below it explains specifically what we're doing there.
Q. So a number -- I guess I am trying to figure out the rent figure stays constant throughout, it just assumes a constant amount?
A. There are rent escalations in addition to rent

passthroughs and they occur every three years.
Q. One percent a year?
A. Every third year.
Q. But the passthrough expenses, what I am trying to figure out is is that included in the rent figure that's shown for example August 13, $58,093?
A. It says in the notes here passthrough expense income included in the rental income is what it says.
Q. So you assumed for this that those expenses --
A. Are added to the rental income.
Q. The amount of your contribution is shown then on the post-petition loan line item?
A. Yes.
Q. So roughly?
A. A quarter of a million dollars.
Q. $198,000 in the first year cumulative to get a quarter of a million and then $172,000 and $114,000 in the third year?
A. Yes.
Q. Certainly it's possible your contribution could be less than that?
A. I would hope that it would be more; that means more up-fits, more tenants. This is a realistic approach.

MR. BEDENBAUGH: I have nothing further.

MR. MARKHAM: No questions.
MR. JORDAN: No questions.
MR. JOWERS: No questions.

(Thereupon the proceedings were concluded at 1:30 p.m.)

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CERTIFICATE OF REPORTER

I, Mary K. McCormick, Court Reporter and Notary Public for the State of South Carolina, do hereby certify:

That the foregoing proceeding was taken before me at the date and time and location as stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing proceeding as typed is a true, accurate and complete record of the testimony of the deponent and all of the objections made at the time of the proceeding to the best of my ability.

I further certify that I am not of counsel or kin to any of the parties to this cause pending or interested in the events thereof.

Witness my hand, I have hereunto af[illegible] official seal this 29th day of April, 2013, [illegible] Aiken County, South Carolina.

Mary K. McCormick (Katy McCormick)
Notary Public
State of South Carolina at Large
My Commission Expires:
June 30, 2015

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	**REPLY TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION TO DEFENDANT JAMES A. MCFARLAND**

TO: JODY A. BEDENBAUGH, ESQUIRE, ATTORNEY FOR PLAINTIFF:

James A. McFarland, Jr. ("Defendant") replies to Plaintiffs' First Request for Admission to Defendant James A. McFarland, dated January 3, 2013, as follows:

1. Admit the note attached as Exhibit A to the Complaint is a true and correct copy of the note dated April 4, 2011, between Bank and Atrium at Middle Sound Land, LLC. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

2. Admit that the note attached as Exhibit A to the Complaint was signed by David H. Jacobs and James A. McFarland (sic) as members of Atrium at Middle Sound Land, LLC. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

3. Admit the Unconditional Guaranty attached as Exhibit C (sic) to the



Complaint is a true and correct copy of the guaranty dated April 4, 2011 ("Guaranty") between Bank and James A. McFarland (sic). If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

4. Admit the Guaranty attached as Exhibit C (sic) to the Complaint was signed by James A. McFarland (sic). If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

5. Admit that Atrium at Middle Sound Land, LLC has not made the payments as required under the terms of the Note and is past due. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

6. Admit that Plaintiff has declared the entire balance of Note due and payable and has demanded payment for such. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

7. Admit that James A. McFarland (sic) has failed to pay the balance due on the Note and Guaranty. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

8. Admit that, under the terms of the Note and Guaranty, James A. McFarland (sic) is required to pay all costs of collection, including attorney's fees and court costs, in the event of default. If you deny any or all of this paragraph, please stipulate in what respect and set forth in

detail the reasons for that denial.

RESPONSE: Admitted.

Leonard R. Jordan, Jr.
BERRY, QUACKENBUSH & STUART, P.A.
1122 Lady Street, 5th Floor
Post Office Box 394
Columbia, South Carolina 29202-0394
Phone: (803) 779-2650

Columbia, South Carolina
May 28, 2013

Attorneys for Defendant James A. McFarland, Jr.

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Reply to First Requests for Admissions.wpd

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	)	**AFFIDAVIT OF MAILING**

I, Stephanie Arnold, of Berry, Quackenbush & Stuart, P.A., attorneys for the Plaintiff, hereby certify that I have this 29th day of May, 2013, served a copy of the Reply to Plaintiff's First Request for Admissions to Defendant James A. McFarland upon the Plaintiff herein by mailing a copy thereof to Jody A. Bedenbaugh, Esquire, attorney for the Plaintiff herein, by mailing a copy thereof to him, postage prepaid, at the address indicated below:

Jody A. Bedenbaugh, Esquire
Attorney at Law
P.O. Box 11070
Columbia, South Carolina 29211-1070

Stephanie Arnold

SWORN to and subscribed before me
this 29th day of May, 2013

Adtina Johnson (L.S.)
Notary Public for South Carolina
My Commission Expires: 3-26-17

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Reply to First Requests for Admissions.wpd

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

TD Bank, NA, successor by merger with Carolina First Bank) Civil Action No. 2012-CP-40-7540
)
Plaintiff,)
)
vs.)
)
David H. Jacobs and James A. McFarland,)
)
Defendants.)

FILED
2014 APR -3 PM 12:30
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

TD Bank, NA, successor by merger with Carolina First Bank,) Civil Action No. 2012-CP-40-6074
)
Plaintiff,)
)
vs.)
)
David H. Jacobs,)
)
Defendant.)

TD BANK'S MOTION TO RECONSIDER, ALTER, OR AMEND MARCH 24, 2014 ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AGAINST DEFENDANTS JACOBS AND McFARLAND

YOU WILL PLEASE TAKE NOTICE that Plaintiff, TD Bank, NA, successor by merger with Carolina First Bank ("TD Bank"), through undersigned counsel, will move before the Honorable Joseph M. Strickland, Master in Equity for Richland County, ten days hereafter, or as soon as the matter may be heard, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, seeking reconsideration of the

Order Denying Plaintiff's Motions for Summary Judgment ('Order"), signed on March 21, 2014, filed on March 24, 2014, and received by the undersigned on March 27, 2014, on the following grounds:

1. TD Bank filed Civil Action No. 2012-CP-40-7540 against Defendants Jacobs and McFarland to collect on Guaranties (Atrium Guaranties) given by Defendants Jacobs and McFarland in consideration for a commercial notes to Atrium at Middle Sound Land, LLC, and which was secured by a mortgage on commercial real estate owned by Atrium.

2. TD Bank filed Civil Action No. 2012-CP-40-6074) against only Defendant Jacobs to collect on a Guaranty (Newberry Guaranty) given by Defendant Jacobs in consideration for a commercial note to Newberry Atrium Professional Center, LLC ("Newberry Atrium"), which was secured by a mortgage on commercial real estate owned by Newberry Atrium.

3. Defendant McFarland admits signing the Atrium Guaranty and admits the loan to Atrium is past due, that TD Bank has demanded payment, that he failed to pay the balance due, and that he and Atrium are indebted under the terms of the loan documents.

4. Defendant Jacobs admits signing the Atrium Guaranty individually as well as signing the Note and other loan documents on behalf of Atrium. In addition, Jacobs admits the loan to Atrium has matured, that TD Bank has demanded payment, that he and Atrium failed to pay the balance due, and that he and Atrium are indebted under the terms of the loan documents.

5. Jacobs also admits signing the Newberry Guaranty individually as well as signing the Note and other loan documents on behalf of Newberry Atrium. In addition, Jacobs admits the loan to Newberry has matured, that TD Bank has demanded payment, that he and Newberry Atrium failed to pay the balance due, and that he and Newberry Atrium are indebted under the terms of the loan documents.

6. The only defense offered by Defendants Jacobs and McFarland in these two cases is that TD Bank is unfairly suing them on the Guaranties without first foreclosing on its collateral, which they contend is a breach the duty of good faith and fair dealing and a breach of fiduciary duty owed to them by TD Bank.

7. As set forth in the previously filed Motions for Summary Judgment against Defendants Jacobs and McFarland[1], the defense raised by the Defendants fails as a matter of law because the terms of the at-issue Guaranties provide that it is an absolute guaranty of payment and that TD Bank is not required to resort to its collateral before suing on the guaranty.

8. The at-issue Guaranties provide that they are for the unconditional payment of the subject debt, and Jacobs and McFarland agreed they were liable for the debt regardless of whether TD Bank pursued any other remedies against them, and other entity, or against the mortgaged property. Thus, the at-issue Guaranties in this case unambiguously provides they are absolute guaranties of payment (as opposed to a guaranty of collection) and that TD Bank was/is not required to first resort to its security. A guaranty "is a contract and should be construed by the principles governing

[1] TD Bank incorporates by reference the Motions for Summary Judgment and all exhibits previously filed against Defendants Jacobs and McFarland as if set forth verbatim herein.

contracts," with the intentions of the parties as expressed in the guaranty guiding the Court. Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 973 (1989).

9. Under well-established, controlling South Carolina law, such guaranties of payment are independent contracts that give rise to obligations separate and distinct from a loan agreement. Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). Because they are separate obligations, creditors have the right to bring a separate action against a guarantor under a guaranty of payment immediately upon default and without suing the principal debtor or resorting to collateral. Citizens and Southern Nat'l Bank of South Carolina, 13 S.C. at 543, 443 S.E.2d at 551 (stating "no obligation was imposed upon [lender] . . . to pursue and/or exhaust the collateral"); Peoples Federal Sav. and Loan Ass'n, 300 S.C. at 281, 387 S.E.2d at 674; Tri-South Mortg. Investors v. Fountain, 266 S.C. 141, 145-46, 221 S.E.2d 861, 863 (1976) (holding based on unambiguous language of guaranty that lender was not required to foreclose on collateral before pursuing remedy under guaranty).

10. Since the terms of the Guaranties expressly allow TD Bank to sue Defendants Jacobs and McFarland without resorting to its security, Defendants' breach of fiduciary duty and breach of implied covenants of good faith and fair dealing defenses fail as a matter of law. See First Fed'l Savings and Loan Ass'n of South Carolina v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992)("[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do."); see also Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (same).

11. South Carolina courts recognize there is no fiduciary duty to explain to an individual what he could learn from reading the document. See Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. at 545, 443 S.E.2d at 551.

12. South Caroline law also recognizes that a mortgagee is not required to foreclose on its mortgage prior to suing to collect on the underlying obligation. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 34, 647 S.E.2d 214, 216 (2007) (noting a "mortgagee who has a note and a mortgage has the option to either bring an action on the note or to pursue a foreclosure action" and mortgagee "may ignore the security and bring an action at law on the indebtedness") (citing Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978); Platt v. Carroll, 125 S.C. 493, 119 S.E. 180 (1923); Hatfield v. Kennedy, 1 Bay 501 (1973); Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990)).

13. Based on the unambiguous language of the Guaranties and controlling South Carolina case law enforcing a creditor's ability to sue independently on guaranties under provisions analogous to those in this case, Defendants' defenses fail as a matter of law.

14. Based on the facts and law set forth above, on May 24, 2013, TD Bank filed motions for summary against Defendants David H. Jacobs and James A. McFarland in the matters of TD Bank, NA, successor by merger with Carolina First Bank v. David H. Jacobs bearing case number 2012-CP-40-6074 and TD Bank, NA, successor by merger with Carolina First Bank v. David H. Jacobs and James A. McFarland bearing case number 2012-CP-40-7540.

15. On March 28, 2014, TD Bank received a short, Form 4 Order Denying the Motions for Summary Judgment with no explanation of the legal claims or defenses raised in the pleadings, no analysis of the facts the Court determined created a genuine and material issue of fact sufficient to defeat TD Bank's Motions for Summary Judgment, or why the Court did not apply the controlling South Carolina case law in denying TD Bank's Motions for Summary Judgment.

WHEREFORE, Plaintiff TD Bank respectfully requests that the Court review the previously filed Motions for Summary Judgment and exhibits attached thereto, reconsider its previously filed denial of TD Bank's Motion for Summary Judgment, and grant TD Bank's Motions for Summary Judgment against Defendant Jacobs in both cases and Defendant McFarland in one case, or in the alternative, to reconsider its previously filed order denying TD Bank's Motions for Summary Judgment and issue an order with a Statement of Facts and Conclusions of Law so that the issues may be narrowed and clarified for trial.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Jody A. Bedenbaugh
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Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

Columbia, South Carolina
April 3, 2014

CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for the Plaintiff, TD Bank, N.A., do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified via the service specified below, to the following address(es):

FILED
2014 APR -9 PM 12:39
JEANNETTE W. McBRIDE
CLERK OF COURT
G.S.

PLEADINGS: MOTION TO RECONSIDER ORDER DENYING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AS TO DEFENDANTS JACOBS AND MCFARLAND

PARTIES SERVED:

Gerald D. Jowers, Esquire
Attorney for David H. Jacobs
1802 Sumter Street
Columbia, SC 29201

Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
Attorney for James A. McFarland
1122 Lady Street
Columbia, South Carolina 29201

Paul T. Collins, Esquire

April 3, 2014

Nelson Mullins

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Paul T. Collins
Tel: 803.255.9747
Fax: 803.255.9128
paul.collins@nelsonmullins.com

August 7, 2014

Hand Delivered
The Honorable Jeanette W. McBride
Clerk of Court
Richland County Judicial Center
1701 Main Street (29201)
Post Office Box 2766
Columbia, SC 29202-2766

RE: TD Bank v. David A. Jacobs and James A. McFarland, Jr.
C/A No. 2012-CP-40-07540

TD Bank v. David H. Jacobs
C/A No. 2012-CP-40-06074

Dear Ms. McBride:

The above-referenced matters are on the trial roster for Tuesday, August 12, 2014. In that regard, I enclose for filing the original and one copy of T.D. Bank, N.A.'s Motion in Limine. We have also enclosed a Motion and Order Information Cover Sheet for each matter, together with a filing fee for each referenced action. I would appreciate if you would file the original Motions in each file and return a clocked copy of each Motion to my runner.

By copy of this letter, I am serving counsel for the Defendants with this Motion. We will also provide a copy of this Motion to the Honorable Casey Manning.

With kind regards, I am

Sincerely,

Paul T. Collins

cc: Gerald D. Jowers, Esquire
Leonard R. Jordan, Jr., Esquire

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND TD Bank, NA ☒ Plaintiff v. David H. Jacobs, ☐ Defendant.	))))))))))	IN THE COURT OF COMMON PLEAS CASE NO. 2012-CP-40-06074 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Paul T. Collins Bar No. 70336 Address: 1320 Main Street, Columbia, SC 29201 phone:803-255-9747 e-mail: paul.collins@nelsonmullins.com other:	Leonard R. Jordan, Jr. Bar No. Address: P. O. Box 394 Columbia, SC 29202 phone: _____ fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information
Nature of Motion: **Motion in Limine**
Estimated Time Needed: 20 min. **Court Reporter Needed:** ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type
☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Paul T. Collins — August 7, 2014
Signature of Attorney for ☒ **Plaintiff** / ☐ **Defendant** **Date submitted**

SECTION III: Motion Fee
☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status
☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act
☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication
☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, **reduced to writing from motion made in open court per judge's instructions**
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION
Collected by: _____ Date Filed:
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

~#4827-2020-9683 v.1 - 04387/01818~

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank	)	Civil Action No. 2012-CP-40-7540
Plaintiff,	)	
vs.	)	
David H. Jacobs and James A. McFarland,	)	
Defendants.	)	

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank,	)	Civil Action No. 2012-CP-40-6074
Plaintiff,	)	
vs.	)	
David H. Jacobs,	)	
Defendant.	)	

TD BANK, N.A.'S MOTION IN LIMINE

TD Bank, N.A., through its under signed counsel, will respectfully move the Court, on August 12, 2014, or as soon as the Court may direct, for an order, pursuant to Rules 401-403 and 701-02 of the South Carolina Rules of Evidence, preventing the Defendants or their counsel from mentioning or referring in any way before the jury, whether in opening or closing or through direct or cross examination, the following irrelevant, prejudicial, and improper testimony and evidence:

(1) any reference, evidence, or testimony regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing because this testimony is irrelevant, would tend to confuse the jury, and is highly and unfairly prejudicial to TD Bank since there can be no breach of the implied duty of good faith and fair dealing for doing what a contract expressly allows;

(2) any reference, evidence, or testimony on the government's bail-out to the banking industry because the testimony is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bail-out;

(3) any reference, evidence, or testimony regarding any unrelated note sales by TD Bank, including but not limited to the Heron Lakes I, LLC, note sale to Sea Ducks, LLC, because the testimony is irrelevant, would likely confuse the jury, and is highly and unfairly prejudicial to TD Bank; and

(4) any testimony from any lay or expert witness that has not been properly or timely disclosed.

I. Nature of the Case:

a. TD Bank, N.A. v. David Jacobs and James McFarland

TD Bank filed Civil Action No. 2012-CP-40-7540 against Defendants Jacobs and McFarland to collect on Guaranties ("Atrium Guaranties") given by Defendants Jacobs and McFarland in consideration for a commercial notes to Atrium at Middle Sound Land, LLC, and which was secured by a mortgage on commercial real estate owned by Atrium. In response to TD Bank's written discovery, Defendant McFarland admits signing the Atrium Guaranty and admits the loan to Atrium is past due, that TD Bank

has demanded payment, that he failed to pay the balance due, and that he and Atrium are indebted under the terms of the loan documents. (*See* McFarland's Responses to TD Bank's Requests to Admit, attached hereto as Exhibit A, and Affidavit of James McFarland, attached hereto as Exhibit B). Through his affidavit and at his deposition, Defendant Jacobs admits signing the Atrium Guaranty individually as well as signing the Note and other loan documents on behalf of Atrium, that the loan to Atrium has matured, that TD Bank has demanded payment, that he failed to pay the balance due, and that he is indebted to TD Bank under the terms of the loan documents. (*See* Affidavit of David Jacobs, ¶¶ 41 & 42, attached hereto as Exhibit C, and Deposition Transcript of David Jacobs, 82:1-3; 99:18-20; 107:5-9, attached hereto as Exhibit D).

b. TD Bank, N.A. v. David Jacobs

TD Bank filed Civil Action No. 2012-CP-40-6074) against only Defendant Jacobs to collect on a Guaranty ("Newberry Guaranty") given by Defendant Jacobs in consideration for a commercial note to Newberry Atrium Professional Center, LLC ("Newberry Atrium"), which was secured by a mortgage on commercial real estate owned by Newberry Atrium. Jacobs also admits signing the Newberry Guaranty individually as well as signing the Note and other loan documents on behalf of Newberry Atrium. In addition, Jacobs admits the loan to Newberry has matured, that TD Bank has demanded payment, that he and Newberry Atrium failed to pay the balance due, and that he and Newberry Atrium are indebted under the terms of the loan documents. (*See* Affidavit of David Jacobs, ¶¶ 41 & 42, attached hereto as Exhibit C, and Deposition Transcript of David Jacobs, 82:1-3; 99:18-20; 107:5-9, attached hereto as Exhibit D).

II. The Court Should Exclude Testimony Regarding Defendants' Alleged Breach of the Implied Duty of Good Faith and Fair Dealing Defense Because the Testimony is Irrelevant, Likely to Confuse the Jury from the Issues in the Case, and Unfairly Prejudicial to TD Bank:

The only defense offered by Defendants Jacobs and McFarland in these two cases is that TD Bank is unfairly suing them on the Guaranties without first foreclosing on its collateral, which they contend is a breach the duty of good faith and fair dealing and a breach of fiduciary duty owed to them by TD Bank although the terms of the at-issue Guaranties provide that it is an absolute guaranty of payment and that TD Bank is not required to resort to its collateral before suing on the guaranty.

The Guaranties at issue in these cases provide that they are for the unconditional payment of the subject debt, and Jacobs and McFarland agreed they were liable for the debt regardless of whether TD Bank pursued any other remedies against them, and other entity, or against the mortgaged property. (*See* Guaranty of James McFarland on Middle Sound Atrium, attached hereto as Exhibit E; Guaranty of David Jacobs on Atrium at Middle Sound, attached hereto as Exhibit F; and Guaranty of David Jacobs on Newberry Atrium, attached hereto as Exhibit G). Thus, the at-issue Guaranties in this case unambiguously provides they are absolute guaranties of payment (as opposed to a guaranty of collection) and that TD Bank was/is not required to first resort to its security. A guaranty "is a contract and should be construed by the principles governing contracts," with the intentions of the parties as expressed in the guaranty guiding the Court. Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 973 (1989).

Under well-established, controlling South Carolina law, such guaranties of payment are independent contracts that give rise to obligations separate and distinct from a loan agreement. Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). Because they are separate obligations, creditors have the right to bring a separate action against a guarantor under a guaranty of payment immediately upon default and without suing the principal debtor or resorting to collateral. Citizens and Southern Nat'l Bank of South Carolina, 13 S.C. at 543, 443 S.E.2d at 551 (stating "no obligation was imposed upon [lender] . . . to pursue and/or exhaust the collateral"); Peoples Federal Sav. and Loan Ass'n, 300 S.C. at 281, 387 S.E.2d at 674; Tri-South Mortg. Investors v. Fountain, 266 S.C. 141, 145-46, 221 S.E.2d 861, 863 (1976) (holding based on unambiguous language of guaranty that lender was not required to foreclose on collateral before pursuing remedy under guaranty).

Since the terms of the Guaranties expressly allow TD Bank to sue Defendants Jacobs and McFarland without resorting to its security, Defendants' breach of fiduciary duty and breach of implied covenants of good faith and fair dealing defenses should be excluded from trial. See First Fed'l Savings and Loan Ass'n of South Carolina v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992)("[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do."); see also Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (same). South Carolina courts recognize there is no fiduciary duty to explain to an individual what he could learn from reading the document. See Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. at 545, 443 S.E.2d at 551.

South Caroline law also recognizes that a mortgagee is not required to foreclose on its mortgage prior to suing to collect on the underlying obligation. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 34, 647 S.E.2d 214, 216 (2007) (noting a "mortgagee who has a note and a mortgage has the option to either bring an action on the note or to pursue a foreclosure action" and mortgagee "may ignore the security and bring an action at law on the indebtedness") (citing Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978); Platt v. Carroll, 125 S.C. 493, 119 S.E. 180 (1923); Hatfield v. Kennedy, 1 Bay 501 (1973); Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990)).

For these reasons, any reference, testimony, or evidence related to the argument that TD Bank breached the implied duty of good faith and fair dealing by suing on the guaranties rather than foreclosing on the collateral should be excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence

III. The Court Should Exclude Testimony Regarding the Troubled Asset Relief Program (TARP) because the Testimony is Irrelevant, Likely to Confuse and Enflame the Jury, and Unfairly Prejudicial to TD Bank:

Because Carolina First Bank received TARP funds prior to TD Bank's merger with Carolina First, Defendants may attempt to raise this fact during trial to influence the jury's decision as to whether Defendants should be excused from their obligations under the guaranties. But, the receipt of any TARP money is irrelevant as to whether Defendants must pay on their guaranty obligations. The federal district court in the Northern District of Georgia in *Wachovia Bank, N.A. v. Lone Pine, Inc.*, held that a bank's receipt of funds under TARP is irrelevant to claims raised by borrowers against the bank. The receipt of TARP money by a bank before TD Bank merged with that bank

is irrelevant to the claims in this case. It should therefore be excluded from all argument, testimony, and evidence.

Even if the Court were to deem this type of evidence as marginally relevant, it should be excluded because its low probative value would be outweighed by the risk that it would unduly prejudice the jury or tend to confuse or mislead the jury. Defendants would be attempting to use the public's perceived bias against a "taxpayer bailout" to unduly influence the jury's decision. The jury's decision should be based on the obligations between the parties and the terms of the at-issue guaranties, not some bias against "taxpayer bailouts" received by a bank that TD Bank later acquired by a merger. Therefore, any mention of Carolina First Bank's receipt of TARP money should be excluded from all argument, testimony, and evidence at trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

IV. The Court Should Exclude Testimony Regarding the Heron Lakes I Note Sale Because the Testimony is Irrelevant, Likely to Confuse the Jury, and is Unfairly Prejudicial to TD Bank:

On June 29, 2014, Defendant Jacobs for the first time listed David Hilburn to testify regarding the "terms and circumstances surrounding the purchase by Cypress Cove Properties, LLC from TD Bank of the note, mortgage, and guarantees of the loan made by Carolina First Bank to Heron Lakes I, LLC and the results of that transaction." (*See* July 29, 2014 (sic) Letter from Mr. Gerald Jowers to Mr. John Moore, attached hereto as Exhibit H). On August 1, 2014, Mr. Hilburn was deposed. On August 7, 2014, Defendant Jacobs listed Joe Hawk and John Hilton as witnesses for the first time to presumably also testify about the Heron Lakes I note sale. *(See* August 7, 2014 Email from Gerald Jowers to Paul Collins, attached hereto as Exhibit I). Defendant

Jacobs apparently intends to elicit testimony from Mr. Hilburn, Mr. Hawk, and Mr. Hilton, and introduce evidence, regarding a note sale wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties at issue in this case, and wholly unrelated to any claim in this action. Since the issues with the sale of the Heron Lakes I note, mortgage, and guaranty have no bearing on the issues to be decided by the jury in this case, the testimony and evidence is irrelevant, likely to confuse the jury on the issues to be decided, and unfairly prejudicial to TD Bank. The Defendants are attempting to confuse the jury to avoid their obligations under the guaranties. Therefore, any mention, reference, testimony, or evidence related to the Heron Lakes I note sale by TD Bank to Cypress Cove Properties should be excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

V. The Court Should Exclude all Testimony from any Lay or Expert Witness that was not Properly or Timely Disclosed Trough Discovery

On May 13, 2013, Defendant Jacobs responded to TD Bank's First Set of Interrogatories in both cases listing only David Jacobs and Larry Scott as witnesses. In addition, Defendant Jacobs did not identify any expert witnesses or produce any materials or reports created by any retained expert. On June 29, 2014, Defendant Jacobs identified Tom Wingard as a witness to testify "about the appraisal he made on April 29, 2013." (*See* July 29, 2014 Letter from Mr. Gerald Jowers to Mr. John Moore, attached hereto as Exhibit H). First, Defendant Jacob presumably had this April 29, 2013 report prior to responding to TD Bank's interrogatories and requests for production on May 13, 2013. Second, Defendant Jacobs never supplemented his responses to TD Bank's written discovery to provide TD Bank with the type of

information and documents requested through discovery related to expert witnesses. Since a lay person cannot testify as to issues that require special knowledge, skill, experience, or training, like the value of someone else's property, Mr. Wingard would have to be qualified as an expert under Rule 702, SCRE, to testify about the value of the Newberry Atrium property. Accordingly, pursuant to Rule 37(d), SCRCP, any expert testimony of Mr. Wingard should be struck and excluded from trial based on Defendant Jacob's failure to properly identify Mr. Wingard as an expert. It would be highly and unfairly prejudicial to TD Bank to allow an undisclosed expert to testify at trial. In addition, Mr. Wingard's testimony regarding the value of the property is irrelevant, as it has no bearing on TD Bank's contractual rights under the terms of the Guaranties, and should be excluded pursuant to Rule 401-403 of the South Carolina Rules of Evidence.

On August 7, 2014, Defendant Jacobs identified for the first time, Joe Hawk, John Hilton, and S. Andrew Syrett as witnesses. (*See* Exhibit I). The testimony of Joe Hawk and John Hilton should be excluded because these witnesses were not timely identified by Defendant Jacobs through discovery. Defendant Jacobs failed to identify these two witnesses until a mere 4 days before trial and over 14 months since he originally responded to TD Bank's written discovery. Pursuant to Rule 37(d), SCRCP, the Court should exclude these witnesses from testify at trial. In addition, these witnesses are being identified to provided testimony and documents regarding the Heron Lakes I note sale from TD Bank to Cypress Cove Properties, which is wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties at issue in this case, and wholly unrelated to any claim in this action. Since the issues with the Heron Lakes I note, mortgage, and guaranty sale have no bearing on the issues to be

decided by the jury in this case, the testimony and evidence is irrelevant, likely to confuse the jury on the issues to be decided, and unfairly prejudicial to TD Bank. Therefore, Joe Hawk and John Hilton should also be excluded from providing any testimony or evidence related to the Heron Lakes I note sale by TD Bank to Cypress Cove Properties because such testimony and evidence is irrelevant, likely to confuse the jury, and unfairly prejudicial to TD Bank pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

Mr. Syrett was identified as follows: "He has no knowledge of the facts of this case and his testimony will be limited to explain to the jury South Carolina mortgage foreclosure procedure, including deficiency judgments, upset bids, the appraisal statute, waiver of the appraisal statute, the impact of these on a suit on a guaranty, and giving his opinion about such matters." First, all testimony from Mr. Syrett should be excluded from trial because he was not timely identified by Defendant Jacobs through discovery. Defendant Jacobs failed to identify this alleged expert witness until a mere 4 days before trial and over 14 months since he originally responded to TD Bank's written discovery. Defendant Jacobs also never properly supplemented his responses to TD Bank's written discovery to provide TD Bank with the type of information and documents requested related to expert witnesses. Pursuant to Rule 37(d), SCRCP, the Court should exclude this witness from testifying at trial. Second, Mr. Syrett is identified as an alleged expert on the law, which is not allowed under clear South Carolina law since it is the Court's obligation to instruct the jury on the law. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)(where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly

excluded the testimony because that was within the exclusive province of the trial court.). Finally, the proposed expert testimony of Mr. Syrett would be excluded under Rules 401-403 of the South Carolina Rules of Evidence because it is irrelevant to any issues to be decided in the case, is irrelevant to any claim or defense in the case, and is likely to confuse the jury as to the issues to be decided.

For the reasons set forth above, TD Bank respectfully requests an order of this Court excluding the testimony and evidence outlined above as irrelevant, likely to confuse the jury, and unfairly prejudicial to TD Bank.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Jody A. Bedenbaugh
SC Bar No. 71176
E-Mail: jody.bedenbaugh@nelsonmullins.com
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Post Office Box 11070 (29211-1070)
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(803) 799-2000
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

Columbia, South Carolina
August 7, 2014

CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for the Plaintiff, TD Bank, N.A., do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified via the service specified below, to the following address(es):

PLEADINGS: **PLAINTIFF'S MOTION IN LIMINE**

PARTIES SERVED:

Gerald D. Jowers, Esquire
Attorney for David H. Jacobs
1802 Sumter Street
Columbia, SC 29201

Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
Attorney for James A. McFarland
1122 Lady Street
Columbia, South Carolina 29201

METHID OF SERVICE: US Mail and Electronic Mail

Paul T. Collins, Esquire

August 7, 2014

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	**REPLY TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION TO DEFENDANT JAMES A. MCFARLAND**

TO: JODY A. BEDENBAUGH, ESQUIRE, ATTORNEY FOR PLAINTIFF:

James A. McFarland, Jr. ("Defendant") replies to Plaintiffs' First Request for Admission to Defendant James A. McFarland, dated January 3, 2013, as follows:

1. Admit the note attached as Exhibit A to the Complaint is a true and correct copy of the note dated April 4, 2011, between Bank and Atrium at Middle Sound Land, LLC. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

2. Admit that the note attached as Exhibit A to the Complaint was signed by David H. Jacobs and James A. McFarland (sic) as members of Atrium at Middle Sound Land, LLC. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

3. Admit the Unconditional Guaranty attached as Exhibit C (sic) to the

EXHIBIT
A

Complaint is a true and correct copy of the guaranty dated April 4, 2011 ("Guaranty") between Bank and James A. McFarland (sic). If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

4. Admit the Guaranty attached as Exhibit C (sic) to the Complaint was signed by James A. McFarland (sic). If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

5. Admit that Atrium at Middle Sound Land, LLC has not made the payments as required under the terms of the Note and is past due. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

6. Admit that Plaintiff has declared the entire balance of Note due and payable and has demanded payment for such. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

7. Admit that James A. McFarland (sic) has failed to pay the balance due on the Note and Guaranty. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

8. Admit that, under the terms of the Note and Guaranty, James A. McFarland (sic) is required to pay all costs of collection, including attorney's fees and court costs, in the event of default. If you deny any or all of this paragraph, please stipulate in what respect and set forth in

detail the reasons for that denial.

RESPONSE: Admitted.

Leonard R. Jordan, Jr.
BERRY, QUACKENBUSH & STUART, P.A.
1122 Lady Street, 5th Floor
Post Office Box 394
Columbia, South Carolina 29202-0394
Phone: (803) 779-2650

Attorneys for Defendant James A. McFarland, Jr.

Columbia, South Carolina
May 28, 2013

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Reply to First Requests for Admissions.wpd

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	**AFFIDAVIT OF MAILING**

I, Stephanie Arnold, of Berry, Quackenbush & Stuart, P.A., attorneys for the Plaintiff, hereby certify that I have this 29th day of May, 2013, served a copy of the Reply to Plaintiff's First Request for Admissions to Defendant James A. McFarland upon the Plaintiff herein by mailing a copy thereof to Jody A. Bedenbaugh, Esquire, attorney for the Plaintiff herein, by mailing a copy thereof to him, postage prepaid, at the address indicated below:

Jody A. Bedenbaugh, Esquire
Attorney at Law
P.O. Box 11070
Columbia, South Carolina 29211-1070

Stephanie Arnold

SWORN to and subscribed before me
this 29th day of May, 2013

Notary Public for South Carolina (L.S.)
My Commission Expires: 3-26-17

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Reply to First Requests for Admissions.wpd

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	)	**AFFIDAVIT OF JAMES A. MCFARLAND, JR. IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, James A. McFarland, Jr., reserving my right to assert that this court lacks jurisdiction over me, and being first duly sworn, state and affirm as follows:

1. I am a Defendant herein.

2. On or about April 4, 2011, I executed a Guaranty in favor of Carolina First Bank, the Plaintiff's predecessor, which Guaranty is the subject of this suit.

3. This Guaranty was intended to serve as additional collateral for the mortgage loan made to Atrium at Middle Sound Land, LLC for the purpose of acquiring and developing certain real property in Wilmington, North Carolina.

4. A mortgage on said real property served as the primary collateral for the loan.

5. The value of the mortgaged real property far exceeds the amount due to the Plaintiff.

6. It defies understanding why the Plaintiff has elected not to foreclose its mortgage.

7. It may be as simple as such suit would have had to be filed in New Hanover County, North Carolina, where I reside.

8. I still maintain that I am not subject to the jurisdiction of the State of South Carolina, and I intend hereby to reserve any and all rights I have with regard to this issue, as set forth in my Answer.

9. The defendants, like most developers of real property, were harshly affected by the downturn in

EXHIBIT

B

the economy in 2008-2009, when banks stopped making loans.

10. Because of the depressed commercial activities in the economic recession, which were especially severe in Wilmington, NC and which were circumstances beyond the control of the defendants, the borrower has been unable to sell the remaining potion of the developed real property, which is mortgaged to the Plaintiff, and consequently, and for that reason alone, the borrower has been unable to pay the loan in full.

11. This developed property is being marketed for sale, and the Plaintiff's loan indebtedness will be paid from 100% of the seller's net sale proceeds.

12. Carolina First Bank was selected to make the mortgage loan because of the defendant's long-term working relationship with that bank.

13. This action by the successor to Carolina First Bank is indicative of bad faith on the part of such successor, especially when it is aware that the defendants do not have the present ability to pay the mortgage loan indebtedness and that a foreclosure of its mortgage would unquestionably result in full payment of such indebtedness.

14. While I acknowledge that I owe the indebtedness, it is punitive and unconscionable for the Plaintiff to bring this suit without simultaneously foreclosing its mortgage.

15. The Plaintiff's tactics constitute a breach of the implied covenant of good faith and fair dealing, which is an integral part of the loan agreement of which my Guaranty is a part.

James A. McFarland, Jr.

SUBSCRIBED AND SWORN to before me
this 25 day of July, 2013

Notary Public for North Carolina
My Commission Expires: July 2, 2014

U:\StephanieJordan Misc\McFarland 8418.0001\Affidavit in Opposition.wpd

CHRISTINA SIAKI-RANDOLPH NOTARY PUBLIC BRUNSWICK COUNTY, NC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	CASE NO.: 2012-CP-40-7540

TD Bank, NA, successor by merger with Carolina First Bank,

Plaintiff,

vs.

David A. Jacobs and James A. McFarland, Jr.,

Defendants.

CERTIFICATE OF MAILING

I, Leonard R. Jordan, Jr., of Berry, Quackenbush & Stuart, P.A., attorneys for the Defendant, James A. McFarland, Jr., hereby certify that I have this 14th day of August, 2013, served a copy of the Affidavit of James A. McFarland, Jr. In Opposition to Plaintiff's Motion for Summary Judgment upon the Plaintiff herein by mailing a copy thereof to its attorney, Jody A. Bedenbaugh, Esquire, postage prepaid, at the address indicated below:

Jody A. Bedenbaugh, Esquire
Attorney at Law
P.O. Box 11070
Columbia, South Carolina 29211-1070

Leonard R. Jordan, Jr.

SWORN to and subscribed before me
this 14th day of August, 2013

(L.S.)
Notary Public for South Carolina
My Commission Expires: 08/01/2016

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Certificate of Mailing Affidavit.McFarland.wpd

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT

TD BANK, NA successor by Merger with Carolina First Bank,	)	Case No. 2012-CP-40-6074
Plaintiff,	)	
vs.	)	
DAVID H. JACOBS	)	
Defendant,	)	

AFFIDAVIT

TD BANK, NA successor by Merger with Carolina First Bank,	)	Case No 2012-CP-40-7540
Plaintiff,	)	
vs.	)	
DAVID H. JACOBS and JAMES MCFARLAND	)	
Defendants,	)	

PERSONALLY APPEARED BEFORE ME, David H. Jacobs, who first being duly sworn, says and deposes:

1. I am the Defendant in these lawsuits and I am making this Affidavit in opposition to motions for summary judgment made by TD Bank in each case.

2. TD Bank owns the note and mortgage given by Newberry Atrium Professional Center, LLC ("Newberry Atrium") to Carolina First for a loan made on February 20, 2007 in the original amount of $7,141,000.00.

EXHIBIT
C

3. TD Bank also holds the renewal note and mortgage of a loan made by Carolina First Bank to Atrium at Middle Sound Land, LLC "(Middle Sound") on November 19, 2004 in the original amount of $3,000,000.00.

4. TD Bank is the successor to Carolina First Bank and collectively I may refer to them sometimes as the "Bank." During the recent banking crisis, Carolina First Bank was in financial distress and because of its shaky financial condition, government regulators forced the merger of Carolina First with TD Bank.

5. In the first suit described above, TD Bank is suing me on a Guaranty that I made for this loan of Newberry Atrium. TD Bank is not foreclosing the mortgage that it holds as security for this loan.

6. In the second suit described above, TD Bank is suing James McFarland and me on Guaranties of the Middle Sound loan. TD Bank is not foreclosing the mortgage that it holds as security for this loan.

7. Newberry Atrium is a limited liability company that originally consisted of Atrium Development Associates, Inc. a company in which I have an interest, and Newberry County Hospital or an affiliate of the hospital.

8. For most of my professional life, I have been a real estate developer and I have developed several medical office buildings during my career.

9. In 2005, the President of Newberry Hospital called me to discuss the possibility of developing an office building for doctors and medical professionals in the Newberry area. The officials of the hospital and physicians convinced me that such a building was needed by the community and especially the hospital to make it competitive in the rapidly changing health care environment. I began the lengthy process of designing the building to meet the needs of the hospital and securing prospective tenants for the building.

This process took almost two years before we were ready to obtain financing for the building in order to begin construction.

10. Atrium at Middle Sound Land, LLC is a limited liability company formed by James McFarland and me. This company was formed to purchase and develop a commercial parcel of land in Wilmington, North Carolina.

11. During my development career, I have used a number of banks and institutions for financing construction of projects and for permanent financing. For years prior to the financial crisis/recession that began in 2008, I was regularly visited and contacted by loan officers of various banks including Carolina First Bank who were soliciting loan business from me.

12. Beginning in 2001, Carolina First, its President Mack Whittle and its commercial loan officers and executives in the Columbia area regularly courted me for my business.

13. In response to this persistent solicitation, I began using Carolina First as a lender. Over the subsequent years and through several projects, I developed a close working relationship with the commercial loan officers and executives of Carolina First Bank including Larry Scott. Mr. Scott and the executives of the commercial loan department understood and appreciated my approach to development.

14. As Carolina First and I completed successful projects together, we developed a high degree of trust and respect for each other. The bank trusted me to do what I said I would do and I trusted the bank to assist me through the good and not so good aspects of long-term real estate developments.

15. Because of this degree of trust that developed between the officers of Carolina First and me and in response to their numerous requests and solicitations, I

continued to offer to Carolina First the opportunity to finance my projects and I made more loans with that Bank than any other lender. I considered Carolina First and its officers a valued partner in my developments and an integral part of my team. The Bank and its officers was ready to help when unforeseen circumstances affected any of these development projects and did so from time to time. The unexpected is a part of lengthy commercial developments projects and Carolina First understood this and was always flexible and willing to accommodate me when needed.

16. These are the projects financed for me by Carolina First Bank:

a. Loan for the Gateway Mallard project; $2,200,000.00 in 2002

b. Loan for the Gateway USC project; $3,5000,000.00 in 2003

c. Loan for the Irmo Medical Office building project; $7,400,000.00 in 2004

d. Loan for the Gateway Reames project; $3,000,000.00 in 2005

e. Loan for the Middle Sound project; $3,000,000.00 in 2004

f. Loan for Newberry Atrium project; $7,141,000.00 in 2007

In addition to these commercial projects, Carolina First loaned me over $500,000.00 in 2001 and 2002 in personal loans; all of this has been repaid.

17. All of these loans were paid in full and in accordance with the terms of the agreements except for the Middle Sound Project and Newberry Atrium. Over the years, my projects have repaid over $24,000,000.00 to Carolina First and earned the Bank over $5,000,000.00 in interest and hundreds of thousands of dollars in bank fees.

18. We have repaid the Bank $1,900,000.00 in principal on the Middle Sound loan and over $1,000,000.00 on the Newberry Atrium loan. Interest has been paid and was current on both of these loans until the Bank refused to renew these loans in 2012.

19. Each of these loans made by Carolina First for my projects was made on the strength of the project and my experience and not on my personal ability to repay these loans. I acted as a guarantor for each of this commercial loan and at the time of the making of these loans, I did not have the available cash or liquid assets to pay in full any of these loans. The loan officers of Carolina First always knew this and never relied on my personal ability to repay any commercial loan.

20. My personal net worth throughout my career has been in real estate or in business entities that own real estate and such assets, though valuable, are long-term investments that do not provide immediate or readily available cash liquidity.

21. Each of these loans, except for the Middle Sound loan, was made for the construction of a commercial building and by completing the buildings, I created the value and the collateral for the loans.

22. The Middle Sound loan financed the purchase of a commercial tract of land in Wilmington, North Carolina and the construction of expensive infrastructure that was necessary for commercial usage. The infrastructure was completed and several parcels have been sold to businesses that are operating there now. The remaining parcels have their development infrastructure in place such as water, sewer, and drainage, and are ready for commercial development. This remaining fully developed parcels are worth considerably more than is owed to the Bank.

23. All funds from each of these loans were used for the purposes stated in the loan agreements and project budgets that were approved by Carolina First. I have never been questioned by Carolina First about the use of loan proceeds.

24. The proceeds of the loan for the Newberry Atrium project were used for the construction of a 47,106 square foot, two story office building adjacent to the Newberry County Hospital.

25. This medical building was completed in July of 2008 according to the plans approved by Carolina First and has been occupied by tenants and some hospital staff since that time.

26. Because of the economic conditions of the recent recession, uncertainty of the future direction of the medical field and changes in management at the Newberry County Hospital, the Newberry Atrium medical office building has not been fully leased since it was completed.

27. The current occupancy rate this building is 58.14%-28,726 square feet is occupied. Current lending standards require an occupancy rate of 88% to qualify for a permanent loan so we have been unable to obtain such a loan that would payoff Carolina First/TD Bank.

28. Until the filing of this suit, the loan has been renewed and interest has been paid to Carolina First/TD Bank. At the present occupancy rate, the building is generating approximately $58,000.00 in gross income every month or over $696,000 per year.

29. At the time of the filing of this lawsuit, we have paid the interest on this loan totaling over $1,733,000.00.

30. Prior to construction, the Bank's appraiser estimated the value of the Newberry Atrium building at $8,900,000.00.

31. The value has remained fairly constant since that time. An appraisal made in April of 2013 by an appraiser who TD Bank had used for a previous appraisal found a value of $6,650,000.00 at its current occupancy rate; this amount exceeds the debt of TD Bank.

The appraiser further indicated the building would be valued at $7,842,000.00 if it reached the 88% occupancy.

32. At this time, most of my assets are minority interests in limited liability companies that own tracts of land in Mooresville, North Carolina. This was an investment I made beginning in 2006 and prior to the collapse of the real estate market. This venture was to develop these tracts of land into commercial and multi-family use. The recession wrecked these plans.

33. Due to the economic recession, I have been forced to invest all of my available cash into this project in North Carolina as well as in the Middle Sound and Atrium Newberry in order to save these projects from failure and foreclosure.

34. Before these lawsuits were filed, I had given the Bank financial statements that disclosed my financial condition at that time. The statement revealed that I had very little cash liquidity and certainly not nearly enough to pay either of these loans that are the subject of these suits. My financial statement further showed the Bank that my major assets are minority interests in real estate ventures that are heavily burdened with debt. The Bank knew or should have known for me to retain these assets, I must be able to act as a guarantor for renewals or refinancing of the short term debt on these assets. The action of the Bank in seeking judgments that I cannot possibly pay will result in the loss of most of my equity in these assets to other creditors without any benefit for the Bank.

35. For these reasons, I believe the Bank, by suing on these guaranties, is employing a purely punitive tactic that is designed to hurt and punish me for no good reason and not designed for any legitimate business purpose. With large judgments against me, I will be unable to continue any gainful activity and I will lose the equity that I have in my remaining investments.

36. Because of my close personal and business relationship with Carolina First Bank, I trusted that Bank to work with me when projects did not go as planned. I expected the Bank to treat me fairly and equitably as I had always treated the Bank fairly and equitably. TD Bank is not living up to its side of our agreements by its actions against me.

37. I am personally aware of instances in which TD Bank has discounted loans to borrowers or the Bank has sold notes and mortgages at a discounted price to third parties that ultimately benefit other customers of this Bank. By doing this for others, the Bank is not treating me fairly and equally with those customers who are given significant concessions and benefits. By giving certain borrowers special treatment and favors, this smacks of favoritism and/or cronyism and not any sound or justifiable business reason or practice. Such favoritism and cronyism by the Bank shows a complete lack of good faith and fair dealing with me in these matters.

38. Since the time the building was occupied, Newberry Atrium through my leadership has maintained the building to a high standard to preserve and protect this valuable asset that is Bank's security for the loan.

39. I have made tireless efforts to secure new tenants with little success and I have tried countless ways to obtain a permanent loan that would payoff TD Bank. To date, despite my best efforts, I have not been successful.

40. The tactic that TD Bank is now pursuing a judgment against me for the full amount of both of these loans while ignoring for now valuable collateral is unfair to me and inconsistent with my long and successful relationship with Carolina First. The current appraised value of the Newberry Atrium building is more than $450,000.00 and the value of the Middle Sound property is substantially higher than the debt.

41. When I made the Newberry Atrium and Middle Sound loans, I fully understood that I was liable to the Bank, if either project was unsuccessful for any loss that the Bank incurred.

42. I stand ready to pay when I am able any deficiency in the amount owed and the value of the building at Newberry or the land at Middle Sound as determined by a public sales through mortgage foreclosure.

(SEAL)
David H. Jacobs

Sworn to and acknowledged
before me on August 14, 2013
by David H. Jacobs

Notary Public for South Carolina
My commission expires: 4/21/21

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS
CASE NO: 2012-CP-40-6074

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs,
Defendant.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS
CASE NO: 2012-CP-40-7540

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs and James A. McFarland,
Defendants.

UNITED STATES BANKRUPTCY COURT
District of South Carolina
Case No. 13-01377-JW

In re:
Newberry Atrium Professional Center, LLC,
Debtor,

Newberry Atrium Professional Center, LLC,
Plaintiff,
vs.
TD Bank, NA,
Defendant.

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D E P O S I T I O N

WITNESS: David H. Jacobs

DATE: April 26, 2013

TIME: 9:30 a.m.

LOCATION: Columbia, South Carolina

TAKEN BY: Attorney for the Plaintiff
Jody A. Bedenbaugh, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

REPORTED BY: KATY MCCORMICK
Stenographic Court Reporter

APPEARANCES:

ATTORNEYS FOR THE PLAINTIFF:

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Columbia, South Carolina 29202
803-779-2650
fjordan@bqslaw.com

(INDEX REAR OF TRANSCRIPT)

STIPULATION: It is stipulated in and between counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent reserves the right to read and sign the deposition transcript.

(The reading and signing of the deposition by the witness is waived.)

(Plaintiff's Exhibits 1-19 premarked for identification.)

DAVID H. JACOBS, being first duly sworn, testified as follows:

EXAMINATION

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, we have met before but for the record I am Jody Bedenbaugh here on behalf of TD Bank. Today we're here for your deposition in two of the State Court actions that TD filed against you as well as the adversary proceedings against the parties in the Newberry Atrium bankruptcy case.

The deposition shouldn't last all that long, I am going to try to get out of here shortly after lunch if we can.

EXHIBIT
D

If you need a break at any time please let me know, don't hesitate. For her benefit and the benefit of the transcript you and I need to make sure we do not talk over each other and that all of your responses are verbal as opposed to nodding your head.

If you don't understand any of my questions or didn't hear my question or just want me to repeat it, please ask me to do so otherwise I'll assume you understood and heard the question; is that fair?

A. Yes.

Q. If your lawyer objects, most of the time it will be for my benefit and I may rephrase the question. If I don't rephrase the question you are to answer the question that I asked unless he instructs you not to because it's a privilege; do you understand?

A. Yes, sir.

Q. Are you under the influence of any drug or alcohol that would impair your ability to answer truthfully today?

A. No.

Q. Did you do anything to prepare for this deposition?

A. Reviewed my materials.

Q. And I don't want to know about any materials from your lawyer but other than that what did you review?

A. That's basically it.

Q. Did you discuss the case or this deposition with

anyone other than your attorney or the attorney for your bankrupt entity?

A. No.

Q. What's your place and date of birth?

A. Tucson, Arizona, November 29, 1945.

Q. What's your business address now?

A. 115 Atrium Way, Columbia, SC.

Q. Are you at a particular suite there?

A. 204.

Q. What about your home address?

A. 6133 Lakeshore, Columbia.

Q. How long have you been at Lakeshore?

A. Twenty years.

Q. Are you married?

A. Yes.

Q. What's your wife's name?

A. Peggy.

Q. How long have you been married to Peggy?

A. About 40 years.

Q. Do you all have any children?

A. Yes.

Q. What are their names?

A. Kari and Kim.

Q. How do you spell Kari?

A. K A R I.

Q. And is Kim just Kim not Kimberly?

A. She goes by both ways.

Q. Any other children?

A. No.

Q. Are they both adults?

A. Yes.

Q. Who is your current employer?

A. Atrium Development.

Q. What is your title there?

A. President.

Q. What are your duties at Atrium Development?

A. Manage property, develop property.

Q. Manage and develop property?

A. Yes.

Q. Are we talking about commercial real estate?

A. Yes.

Q. How long have you been doing that?

A. Over 25 years.

Q. Twenty-five years?

A. About.

Q. And that's been with Atrium Development the whole time?

A. The last 25 years.

Q. What did you do before that?

A. Worked for other developers.

Q. How long did you work for developers before you went out on your own with Atrium Development?

A. Seven, eight years, 10 years.

Q. So for the past 35 years you've been in the real estate development business; is that correct?

A. Yes.

Q. Now, I am somewhat familiar with account background but I understand you have developed a number of office buildings under the Atrium name brand; is that correct?

A. Yes.

Q. Tell me about that.

A. The buildings are distinguished by an atrium in the interior to give it a unique feel and look.

Q. Are we talking about office buildings normally?

A. Primarily office, medical office, commercial office.

Q. How many of these Atrium-brand office buildings have you developed over the years?

A. Maybe 10 or 12.

Q. Are they located in South Carolina only or in other states as well?

A. South Carolina, North Carolina, Colorado.

Q. Okay. I understand you've also developed a number of daycare development center-type properties under the name Gateway; is that correct?

A. Yes.

Q. How many Gateway Academy developments have you had over the years?
A. Twenty, somewhere between 20 to 22.
Q. Where are they located?
A. Colorado, North Carolina and South Carolina.
Q. Now, other than the Atrium brand office buildings and the Gateway child development centers do you have any other development projects currently?
A. I have developed some outparcel retails over my career.
Q. Okay. Where is that?
A. Tennessee.
Q. Anywhere else?
A. That's it.
Q. How are the projects typically financed?
A. Bank loans.
Q. And are you primarily the point person in connection with the bank financing of the developments or is someone else with Atrium a person primarily responsible for that?
A. Over the recent years I have been the point person.
Q. It's fair to say you've got a substantial amount of real estate financing experience in connection with your development line of work?
A. Yes.
Q. In terms of how the deals are structured do you

typically place the properties in an entity of some type or do you hold them within your Atrium holding companies? How does that work?
A. Typically it's a single purpose entity.
Q. In connection with the financing are you generally asked to guarantee the debts of the single purpose entities?
A. The loans that I have obtained have all been collateralized loans and they have asked me -- commercial lenders, banks -- have asked me to sign a guarantee to back up that collateral.
Q. Okay. Now, we'll get to your Subpoena response that I just received yesterday in a little while and I have got copies of certain current guarantees, but in the past do you know how many guarantees you have executed for debts on these single purpose entities?
A. I would assume. Most every construction loan had a guaranty.
Q. So we talked about 20 to 22 Gateway projects and 10 to 12 Atrium projects in addition to some outparcel retail developments. Generally at the outset of financing you would have been asked to guarantee those loans; is that correct?
A. Yes.
Q. You've been handed Exhibit 1 to your deposition which is a statement of financial condition of David H. Jacobs dated June 30, 2012; do you see that?

A. Yes.
Q. Does that appear to be a true and correct copy of your statement of financial condition as of that date?
A. Yes.
Q. According to the Statement of Assets on the first page it's got the cash balance in an amount of approximately $25,000; do you see that?
A. Yes.
Q. Do you know what your current cash balance is?
A. Probably in the same range. Day by day it goes up and down.
Q. I understand. Do you know if you have a financial statement that's been prepared that's more recent than this one?
A. No.
Q. You don't know or you don't have one?
A. No, I don't have one.
Q. Where are your checking accounts located?
A. I have one at Wells Fargo, one at Carolina First. I pretty much consolidated them to Wells Fargo.
Q. The net worth indicated here of a little over $20,000; have there been any material changes to that since the date of this financial statement?
A. I wouldn't call them material. It's all up and down and it's really based on appraisals prior to this date.
Q. So I guess I could characterize your answer as you

don't know of any material changes except for the fluctuation of the underlying real estate prices; is that correct?
A. Yes. There have been times during the last couple of years that I have had to borrow money, I have paid it back, but I can't tell you today additional debts that are significantly different than this.
Q. Okay. Now this net worth and financial statement, was it accurate to the best of your knowledge as of June 30, 2012?
A. To the best of my knowledge, yes.
Q. Have you transferred any material assets since that time?
A. No, not since, '12.
Q. Have you incurred any material liabilities other than the ones identified in this statement?
A. No.
Q. If you'll look at page 2, the second page on Exhibit 1 it says Notes of Financial Statement at the top; do you see where I am?
A. Yes.
Q. It's got a Wells Fargo security account listed with an estimated current value of $471,000; do you see that?
A. Yes.
Q. It says this entire account is pledged to secure a loan?
A. Yes.

Q. What loan was that?
A. I needed to borrow money to pay down the loan for Gateway financing.
Q. When was that loan taken out?
A. About a year ago. About a year ago.
Q. What is the balance of that loan?
A. Five million and some-odd.
Q. Is that loan also secured by real estate?
A. Yes.
Q. Is it one of the Gateway properties?
A. Yes.
Q. Is the current balance of that securities account approximately the same?
A. About that.
Q. This Pediatric Web.com, what is that?
A. It's an investment that I made with some doctors when I was working in Colorado for a website for pediatric information.
Q. Okay. And you've got a value of $50,000; is that valuation still the same today?
A. I would doubt that it is but that's what I paid for it.
Q. Okay. So that's your cost essentially?
A. Yes.
Q. Now, going down to paragraph 6 on this page you've got

the various Note Receivables listed?
A. Yes.
Q. Do you have documentation for these notes payable to you?
A. I don't have in every case a signed, sealed note but I do have a record of the money being put into them.
Q. And I believe you indicated the notes to your financial statement that collectability of some of these are in doubt; is that correct?
A. Yes.
Q. Which of these do you doubt the collectability of?
A. I think 121 Market is very doubtful. We've had to abandon that project.
Q. Where is that project?
A. Wilmington.
Q. By abandon what do you mean?
A. I mean that we are not doing anything to move it forward and the land that was involved in it is not available to us.
Q. Has it been foreclosed upon?
A. No.
Q. Then what happened to the property?
A. It was never acquired.
Q. Does that entity own any assets?
A. No.

Q. Did you guarantee any obligations in connection with that development project?
A. No.
Q. Okay. Any others that you believe are not collectable or collectability is in doubt?
A. That they are all certain circumstances -- I think they are all in doubt because of certain circumstances in the econony. And if they are collectable it will be years for the process to work out.
Q. Are any of these secured by any collateral?
A. Yes.
Q. Which ones?
A. Land Acquisition, that's an LLC that I invested in that Land Acquisition has a participation in some raw land.
Q. And you have security interest in that land?
A. No.
Q. Okay?
A. The LLC has it. My note is to the LLC.
Q. Okay. But did the LLC grant mortgage or anything back to you?
A. No.
Q. Do you know if any of these LLCs granted any collateral back to you directly?
A. They did not.
Q. The Land Acquisition has a note to buy it, which I

understand indicates that the payment is dependent on the sale of improved land; is that correct?
A. Yes.
Q. What is the status of the salable efforts of that entity?
A. The property continues to be marketed. Funds are still trying to be raised to complete infrastructure. There are a number of potential sales over the years. Financing for infrastructure is still the major focus to get that done.
Q. Okay. Same question for Langtree Properties, LLC. What is the status of that entity and the efforts to sell the property?
A. It's the same situation. Those two LLCs are invested in a project called Langtree at the Lake in Charlotte.
Q. Has the infrastructure, is that currently being developed or are you still awaiting funding for that?
A. Parts of it have been acquired for small pieces of property.
Q. Parts of the infrastructure?
A. Yes.
Q. Has been completed?
A. Under construction.
Q. Okay. And is financing immanent for any other part of it?
A. It's been a process that's gone on for about seven or

eight years, so I always believe it's imminent but it's not completed.

Q. Okay. Atrium at Middle Sound Land, what is the status of any efforts to sell that property?

A. It has been ongoing also for about I guess five or six years. We were successful in putting infrastructure in at a significant cost to the two partners. The infrastructure is in place for the majority of the property.

Q. And sales efforts are ongoing for that property?

A. Yes.

Q. Have you had any recent interest or any reason to believe that a sale may be likely to happen?

A. I am always optimistic but in today's environment where it is difficult to get funding for anything that's been the biggest problem that we faced. But there has been interest and we have had numerous inquiries. Ultimately it has come down to the lack of the ability for the buyer to obtain financing.

Q. We'll talk about Newberry Atrium in a little bit. What is Atrium Northeast Limited Partnership?

A. It's an office building.

Q. And is that loan collectable or not?

A. It really will depend on how the releasing goes on the property over the next year or two.

Q. Tell me what that means.

A. It means during the financial meltdown the building

lost 40 percent of the building. People went out of business, went away, couldn't pay their rent.

Q. Are you involved in connection with efforts to release the remaining space?

A. Yes.

Q. Same thing with Atrium at Middle Sound. Do you have any involvement with efforts to sell that property?

A. I do not.

Q. Do you have any involvement with the ongoing efforts to complete the infrastructure for that property?

A. For which property?

Q. Atrium at Middle Sound.

A. I do not have a day-to-day involvement with the infrastructure.

Q. Okay. For the Langtree entities, do you have any day-to-day involvement with the development of those projects?

A. Not currently.

Q. The 121 Market, I don't see that. Is that entity operating at all?

A. No.

Q. Go to the next page, page 3. You've got two notes payable there. What is the status of those notes?

A. I am able to continue to make payments as agreed.

Q. Are both of those loans current?

A. Yes.

Q. One more question on the notes receivables on the last page. Are you receiving any monthly payments on any of those?

A. No.

Q. The next page is page 4. This is titled Commercial Real Estate Owned; do you see where I am?

A. Yes.

Q. Pages 4 through 7 are the pages for this particular schedule. Is this an accurate listing of the commercial real estate related to the entities that you own?

A. Yes.

Q. You don't own any commercial real estate that's not listed on these documents; is that correct?

A. To the best of my knowledge.

Q. To the best of your knowledge no, you don't --

A. No, I don't own anything that I believe I have missed on this list.

Q. Okay. Let's look at these entities individually beginning with Atrium Northeast Limited Partnership. That's the building you were just talking about that has a 40 percent vacancy; is that correct?

A. Yes.

Q. And it's got an appraised value of 6.9 million?

A. Yes.

Q. Do you know the date of that appraisal?

A. It was probably during the time that it was financed

which was seven, eight years ago.

Q. And when does that financing mature?

A. About 18 months.

Q. Eighteen months from now?

A. Yes.

Q. Who is that financing with?

A. Amalgamated Bank.

Q. Did you guarantee any portion of that financing?

A. No.

Q. The loan amount listed here, is it roughly still the same today?

A. Approximately.

Q. The appraised value, do you believe that has changed?

A. Yes.

Q. What would you ballpark that to be today?

A. My expectation is that it will be less because when the building was financed it was about 87 percent leased and it would be my expectation that was based on an income approach. I would say a new valuation today based on the current occupancy it would be a significant reduction, 30 percent, 40 percent.

Q. Do you still own 92.63 percent of that entity that owns that property?

A. Yes.

Q. Who owns the remaining part of that piece?

A. Partners in the building.

Q. Are any of those partners related to you?
A. No.
Q. Do you have copies of the partnership agreement for that entity?
A. Yes.
Q. The next property listed is Gateway Properties, LLC indicating 14 Gateway Academy Child Development Centers located in South Carolina and North Carolina; do you see that?
A. Yes.
Q. Do you still own those, that entity?
A. Yes.
Q. Each of those has an appraised value indicated on this document. Do you believe the value to be roughly the same today or something different?
A. I would say it's different. And unfortunately these values too were done and financing when there were not the pressures on the economy for special purpose entities such as these.
Q. Do you know what these properties would be worth today or do you have an opinion as to what these properties would be worth today?
A. Again, just in keeping with the nature of the market today I would expect that they have declined in value 20, 30 percent.
Q. Are you a guarantor of any debt in connection with

those properties?
A. Yes.
Q. Which ones?
A. The North Carolina locations.
Q. What is the amount of the debt for those locations?
A. I am guessing somewhere in the neighborhood of about five to $7,000,000.
Q. What is the status of that debt?
A. The status is it's paid currently and it's still owed.
Q. That debt is still current; is that what your testimony is?
A. Yes.
Q. When did it mature?
A. Everything matures in a year and a half, approximately a year and a half, 18, 20 months, something like that.
Q. Have you identified any financing for that debt upon maturity?
A. Not at this time.
Q. The South Carolina locations indicated -- your testimony indicated you are not the guarantor of any debt in connection with those; is that correct?
A. This a conduit loan which I have guaranteed and it's a non-recourse loan for carve-outs.
Q. Carve-outs; explain that to me.
A. That means that if we were to walk away from the

properties, we can't pay them off, the lender takes them back. And unless I have done anything that is inappropriate, my understanding is that I would not be held personally liable for it.
Q. When does that debt mature?
A. Everything will mature in about 18 to 20 months. They are all tied together on due dates.
Q. And have you identified or has that entity identified any replacement financing yet for that debt?
A. No.
Q. Do you know yet whether you intend to try to refinance that or if you would allow that property to be recovered by the lender?
A. My objective would be to try and refinance it.
Q. Do you still own 25 percent of that entity?
A. Yes.
Q. Who owns the remaining 25 percent?
A. My partner.
Q. Who is your partner in that entity?
A. The Estate of Dave Burner.
Q. Can you spell that last name?
A. B U R N E R.
Q. How did he obtain that interest? His estate presumably obtained it upon his death but how did he obtain that interest?

A. We were partners.
Q. Did he purchase any part of that interest from you or did he go in with you originally?
A. We went in originally.
Q. Was his original interest always 25 percent?
A. No.
Q. When did his interest change?
A. His interest continues to be approximately 50 percent.
Q. Has it been 50 percent throughout?
A. Yes.
Q. Who owns the other approximately 25 percent?
A. My family.
Q. Any particular member of your family?
A. My children and my wife.
Q. Do they own that interest through an entity of some sort or do they own it individually?
A. In trust.
Q. Is that one trust or multiple trusts?
A. Multiple.
Q. What are the names of those trusts?
A. Kari Jacobs Irrevocable Trust, Kimberly Jacobs Irrevocable Trust, Peggy Jacobs.
Q. Is Peggy Jacobs an irrevocable trust as well?
A. No, she just owns it.
Q. When did those trusts acquire that interest?

A. Several years ago Dave and I did an estate planning because he and I both had some health issues and we decided it was time to make arrangements for our family.

Q. Do you recall the approximate date of those transfers?

A. My recollection is it was several years ago, two or three years ago, three and a half, something like that.

Q. So somewhere between two and three and a half years ago?

A. Something like that.

Q. Now, did the trust or your wife, Ms. Jacobs, transfer anything back to you in exchange for that interest or was it simply a transfer by you to her?

A. It was part of some estate planning that both Dave and I used.

Q. I understand your testimony is it was part of estate planning, but aside from the estate planning function of it did they transfer any assets or any money to you in exchange?

A. No.

Q. Do you have copies of the operating agreement for the Gateway entity?

A. Yes.

Q. Do you have copies of the documentation in connection with the transfer to the two trusts and your wife?

A. I believe I do. I don't have it but I assume that it is available to the attorneys that helped.

Q. What attorney helped you on the estate planning side?

A. Tom Cothran (ph).

Q. How is the Gateway Properties, LLC managed?

A. I do it currently.

Q. Okay. Are you the managing member?

A. Yes.

Q. Does that entity produce any distributions?

A. It's veritable, but yes, it produces distributions.

Q. You say it varies. What is the typical variance on that?

A. Maintenance, replacements. These buildings are some 20 years old.

Q. So there's ongoing obligations that sometimes require the distributions to be lower; is that your testimony?

A. Yes, the distributions for repairs, maintenance, whatever the issues may be we have to deal with them.

Q. What is roughly the amount you receive and on what periodic basis do you receive it?

A. I would say depending on the month 10,000 a month maybe.

Q. That's from Gateway Properties, LLC?

A. From all the Gateways.

Q. So that would include Gateway Colorado, LLC as well?

A. Yes.

Q. Is that just your portion or the portion for all

partners?

A. No, that would just be mine but that's again up and down. Everybody participates in the expenses of the properties.

Q. Now the financing that you have on the South Carolina locations, the non-resource financing, was that the original financing for that?

A. No.

Q. What was the original financing?

A. The original financing was with multiple banks including Carolina First who was very helpful and active in construction loans with these properties, among others, but they were a very active participant in this.

Q. When was that original financing?

A. Well, I can't tell you the exact date of each of the financings but we started developing these in 1995 and built these over a period of 10, 12 years, 13 years. Carolina First has been an active partner in the Gateway developments among other things that Carolina First did, and they were very interested in a lot of the development that I did including Gateway and some of the other office buildings.. Carolina First has been very active in my development career for 12 or 15 years.

Q. And then this non-recourse loan that's the current debt on the property, when did you obtain that?

A. Early 2000's maybe.

Q. Early of 2010 or?

A. No, no 2000s.

Q. And then when you did that refinancing did that generate any cash out of the property at the time?

A. It did. We paid off our loans and we had some cash out.

Q. How much was that approximately?

A. Several millions of dollars.

Q. And do you know approximately how much it was?

A. No, several million.

Q. More than five?

A. No.

Q. Somewhere between one and $5,000,000?

A. Yes.

Q. And your portion of that was half at that time?

A. Yeah, in the early 2000s, yeah.

Q. What did you do with your portion of the cash out from that refinancing?

A. I invested it in other real estate.

Q. Do you remember which particular investment?

A. It goes all over the place. I mean, I invested in more Gateways. I invested in developments of additional office buildings. I invested it in new opportunities at Langtree, at Middle Sound, at 121 Market. I invested it in all my holdings that grew as a result of that cash. I had some reserves that I

used to feed my real estate investments.
Q. Did you gift or transfer a portion of the cash obtained from that financing to any relative or to any entity?
A. My family.
Q. And any particular member of your family?
A. All three.
Q. Do you know how much you gifted to them at that time?
A. Again a couple million.
Q. Did you gift that to them directly or did any portion of that go to a trust?
A. Combination.
Q. And the trusts, would that have been the two that we identified earlier or another trust?
A. Those two.
Q. The North Carolina locations, that debt that you indicated you had guaranteed in the neighborhood of five to $7,000,000, was that the original financing for those properties?
A. No, that was -- those were permanent loans that we took out to repay the construction loans.
Q. When you took out the construction loan was there any cash generated by that financing transaction?
A. No, had to put cash in.
Q. The next entity that you have -- before we get to that there's a note in parentheses that all ownership interests are

collateralized by loan agreement; do you see that note?
A. Yes.
Q. What loan agreement are you referring to?
A. I borrowed money against some of these assets from time to time.
Q. From whom did you borrow that money?
A. A guy named Rick Howard, a long-term partner of mine in North Carolina.
Q. Do you currently owe Mr. Howard any money?
A. Yes.
Q. How much?
A. I think it's about a hundred thousand maybe.
Q. Okay. And what is the extent of your ability to borrow against these assets under your agreement with Mr. Howard?
A. It's really depending on his financial position at the time that I need any money. I have lent him money over the years, he's lent me money over the years. We work together to try to assist each other.
Q. Now, getting to the Gateway Colorado LLC, the appraised value for that, is your testimony the same that you believe that that has changed?
A. I would say so. I think the single purpose entities certainly have not done as well in this environment only because I think the environment for child care has been diminished

during this meltdown, and I just think the general real estates for these type of entities are at a decline.
Q. Do you have an estimate of what these are worth today?
A. Again I would say -- and each one of course is a different location and a different place but my guesstimate would be somewhere in the 20 to 30 percent decline value.
Q. Is the loan amount about 7.3 million identified here on this schedule, is that still roughly the same?
A. Yes, these are 30 year amortizations so I would assume they haven't made a lot of progress in the last recent couple of years.
Q. Who is that loan facility with?
A. Which one?
Q. The Gateway Colorado, LLC?
A. Bank of America.
Q. Are you a guarantor of that loan?
A. Yes.
Q. When was that loan entered into?
A. About seven and a half, eight years ago. Since they are all coming due in the next 18 months that's about when it was done.
Q. Was Bank of America the original financing for these properties?
A. No.
Q. Are you a guarantor for the Bank of America loans?

A. It's the same Bank of America loan that I mentioned above, it's the South Carolina entities.
Q. So it's non-recourse according to your testimony for the most part; is that correct?
A. If I don't pay it off, they won't renew it, they get the building.
Q. When you did that refinancing and got the cash out that we talked about earlier, that was the same transaction as these Colorado entities; is that correct?
A. Yes, that's correct.
Q. Do you still own 18.75 percent of that entity?
A. Yes.
Q. Who are the other owners of that entity?
A. The partners in Colorado and the Burner estate and my family.
Q. Okay. How much of that entity does your family own?
A. I would guess 18 percent maybe.
Q. So basically the same percentage as you own?
A. Yeah.
Q. Was that also transferred to the two trusts and to your wife individually as the other one we talked about?
A. Yes.
Q. And that was done somewhere between two and a half or three years ago as well?
A. Yes.

Q. And also with that one, your family did not exchange anything to you in return for those interests?
A. No, they did not.
Q. Did they assume any debt connection with that transfer or the earlier one?
A. No.
Q. The note there on the bottom of this page about the interest being collateralized by a loan agreement, is that the same one with the gentleman in North Carolina Rick Howard?
A. Yes.
Q. The next page, page 5, Gateway Properties, LLC references new Gateway locations in Charlotte, North Carolina; do you see where I am?
A. Yes.
Q. Is your testimony the same that the appraised value would be different today?
A. I would think so. I think the value is consistent with the decline in the real estate valuation in the market today.
Q. These appraised values have a number right beside the word appraised value. What is that number?
A. That was the capitalization rate that they were using at that time.
Q. Is that taken off the appraisal of some other source?
A. My internal calculation.

Q. Your calculation of what the capital rate is?
A. Was at that time the value of the appraisals were done.
Q. Is that the same cap rate that they used on the appraisal or did they use something else?
A. I think that's consistent with the appraisal at that time but I don't remember with the appraisal cap rates.
Q. For the Newberry Atrium development what would you consider to be an appropriate cap range for that at this time?
A. Looking at the appraisal that was done by Wingard and Associates during the depth of the recession several years back he used -- and this is an appraiser that the bank used, so I assume that I should have some confidence in his valuation approach. At that time he indicated approximately 8.75 cap rate on the property at that time, which provided and as is where is value of about 5.8 million. He further indicated that the stabilization of that property would be valued pushing $8,000,000, maybe 7.9 million dollars. That was back really in the depth of the recession in 2011.
As you may be aware I have ordered an appraisal using the former bank appraiser, and his indication to me is the valuation for medical office buildings on campus have increased in the recent years. He will be completing his appraisal in the next several days. And I asked him what the valuation might be and why it increased, and his indication was the valuations

increased because of growing demand for upon-campus medical facilities, the long-term nature of the leases, the hospitals, and doctors have extended periods of time, some leases have excalating rates. He anticipates the valuation will come in more favorable possibly in the mid seven and a half cap range based on the research and sales that he's done, but I won't really have an authoritative answer until his appraisal is done in the next several days.
Q. Apart from his appraisal do you have a personal opinion of the appropriate current capitalization rate for the Newberry Atrium property?
A. As he educated me I would have agreed with his position, in the mid sevens.
Q. That's based on information from him and not on your own personal --
A. I learned from the experts and I think he's an expert. The bank obviously thought he was an expert so I agreed.
Q. I am not arguing with you on that, I am just saying if you excluded everything that he told you and I had to ask you what your personal opinion was, would you be able to tell me what your personal opinion is?
A. My personal opinion is based on what I have learned from the experts and I would believe that the valuation as-is where-is today would be somewhere in the low $6,000,000 range as-is where-is.

I believe that stabilization I think it would be somewhere pushing eight plus million.
Q. All right. Back to the Charlotte, North Carolina Gateway properties. Is the loan amount still roughly the same for that one as well?
A. Yes.
Q. Who is the lender on that one?
A. Wells Fargo.
Q. Did you guarantee that loan?
A. Yes.
Q. What is the extent of your guaranty?
A. For the full debt.
Q. And does that loan also mature in the next 18 to 20 months?
A. Yes.
Q. Have you identified replacement financing for that loan?
A. Not at this time.
Q. Backing up to the Gateway Colorado, LLC, that one also had an 18 to 20 month maturity date. Have you identified replacement financing for that entity?
A. No, I haven't.
Q. Is your ownership still the same for Gateway Properties, LLC with the Charlotte, North Carolina properties?
A. Yes.

Q. You still own 25 percent of that entity?
A. Yes.
Q. Who are the other partners for that entity?
A. The same people that owned the other, the estate of Dave Burner and my family.
Q. And your family's interest, that would also again be your wife and the two trusts belonging -- the two trusts in your daughters's names; is that correct?
A. Yes.
Q. And the circumstances around those transfers would have been the same?
A. Yes.
Q. Do you receive any distributions from the Gateway properties in Charlotte, North Carolina?
A. When I speak of the distributions earlier it's all encompassing.
Q. It's inclusive of that property as well?
A. Yes.
Q. And that loan agreement that you mentioned there is again the same one with Mr. Howard?
A. Yes.
Q. The next one, E Shoppes at Atrium, LLC?
A. Yes.
Q. That's a retail development apparently; is that correct?

A. Yes.
Q. The appraised value and the loan amount, are those still roughly the sane today?
A. Again, we have been going through a releasing on that property. I would say that is probably close to that, but I would say it's probably on the negative side in that we've lost several tenants and we're in search of refilling those spaces. So depending on when the property is valued it will be gaged on the occupancy and the market.
Q. Do you still own 50 percent of that entity?
A. Yes.
Q. Who owns the other 50 percent?
A. My partner.
Q. Who is your partner in that entity?
A. Joel Branwith (ph).
Q. Anybody else own an interest in that entity?
A. No.
Q. The next one, Atrium at Newberry, we'll talk about that later.
Atrium at Middle Sound is the next one. The appraised value that you have here from Atrium Middle Sound Land is 2.97 million dollars; is that correct?
A. Yes, again based on an appraisal.
Q. And do you believe that value to be the same or different today?

A. I would think it's probably less. Again, it's raw land but it's got infrastructure. I think land in Wilmington has been affected with the rest of the real estate values in the country.
Q. Atrium Development Associates, LLC is the next one listed indicating an office condominium at 791 Greenlawn; is that correct?
A. Yes.
Q. And that one is worth $175,000?
A. Again, that was based on an older appraisal. I would say today in my personal experience it's worth maybe half of that maybe. Maybe a little bit more.
Q. And there is no debt on that property?
A. Correct.
Q. The next one you've got listed is Atrium Development, Inc.?
A. Yes.
Q. Would your testinony be the same for that one as well, the appraised value roughly the same or lower?
A. I would tell you significantly lower.
Q. Significantly lower for that one. Okay, and the loan amount on that one is approxinately $190,000?
A. Yes.
Q. Do you still own 100 percent of that entity?
A. Yes.

Q. Okay, the next one page 6 the first entity listed is Langtree Development LLC. You've got a member ownership interest of 2.63 percent. Explain your ownership interest and how that entity is structured.
A. Langtree Development was the original development entity that acquired that land. Over the years because of the economic meltdown it has diminished in value. We were not able to carry the debt and it required improvements. We have sold large parts of that to other investor groups and that's what my current participation is.
Q. And do you own your interest through an entity or do you directly own the 2.63 percent?
A. Through an entity.
Q. And what is that entity?
A. Langtree Development Company, LLC.
Q. And so you personally own 2.63 percent or do you own an entity that owns an interest in it?
A. I own 2.63 percent through Atrium at the Lake I think it is.
Q. So you have an interest in Atrium at the Lake?
A. Atrium at the Lake has an interest in Langtree Development Company.
Q. Okay. And do you have any -- is there any pledges against your interest in that entity?
A. No.

Q. Who are the other owners of Atrium at the Lake?
A. Just me -- I beg your pardon, that's not correct. Atrium at the Lake has multiple partners. I think there are four of us involved in that.
Q. Are any of them related to you?
A. No.
Q. And that entity in turn owns an interest in Langtree Development Company, LLC. How many other partners are there in Langtree Development, LLC?
A. Probably 15, 12, something like that.
Q. Are any of those partners related to you?
A. No.
Q. Have you received any distributions from Langtree Development Company, LLC in the past five years?
A. No, to the contrary.
Q. To the contrary you've made contributions to that company?
A. Correct.
Q. Would it be your testimony that the values indicated here are lower now?
A. I would say so only because these go back to appraisals that were done during the acquisition period which was in a very active market for the financial meltdown.
Q. Have you guaranteed any of the obligations with Langtree Development Company, LLC?

A. Yes.
Q. What obligations have you guaranteed?
A. I think currently right how I am down to maybe $8,000,000 in guarantees, about 8,000,000.
Q. Is that to one lender or more than one lender?
A. That obligation is to one lender.
Q. What lender is that?
A. Yatkin Valley Bank.
Q. Is that debt current?
A. No.
Q. What is the status of that debt? Has it been accelerated?
A. No, we are in a work-out.
Q. Do you know when that debt matures?
A. It has matured.
Q. When did it mature?
A. Last year.
Q. Langtree Properties, LLC is the next entity listed. Explain briefly for me the ownership structure for that property.
A. Which item are you speaking about now?
Q. Item M.
A. Okay. That is the same scenario, it's just different holdings.
Q. So would Atrium at the Lake be --

A. Yes.
Q. You own an interest in Atrium at the Lake which in turn owns an interest in Langtree Properties, LLC?
A. Correct.
Q. Would the values of the properties listed for that one M, I believe it's 13.125 million dollars, would the value be the same today?
A. I would say it's consistent with what we've been discussing. I think there's a decrease in value currently.
Q. Is the debt still roughly the same today?
A. Approximately. You could swing a few hundred thousand.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. That is part of that Yatkin Valley holdings. That's all together.
Q. Okay. The next one you have is Langtree Development Group, LLC. Is that the same type of ownership structure?
A. Yes, it is.
Q. And is your testimony the same for that one in terms of value?
A. Yes.
Q. The debt listed there, did you guarantee any portion of that?

A. I think that has been reduced now because of our investors that thought the majority part of Langtree Properties basically have taken over that debt so I don't have any guaranty on that.
Q. Have you received any distributions or income from that entity or Langtree Properties, LLC?
A. No.
Q. Have you transferred that interest in that entity or Langtree Properties, LLC in the last five years?
A. Just to the investors that purchased the majority. This is what I am left with today.
Q. Langtree HUD Development Company, LLC, item O at the bottom?
A. Yes.
Q. Is the ownership structure the same for that one?
A. Yes.
Q. What about the appraised value? Do you feel that it has changed?
A. I think this is a recent valuation so it's -- I would say that's a recent valuation. I would say it's probably not changed.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. I was the manager of it so I was the guarantor of it.

Q. So you guaranteed the full 40,000,000; is that correct?
A. Yes, but it is a HUD loan so it's non-resource once completed.
Q. Sorry, what's the last part of your answer?
A. I am guaranteeing the debt until it's completed and goes into a permanent loan.
Q. What is the status of the completion in permanent financing?
A. Six months away.
Q. Have you identified permanent financing for that property?
A. Yes.
Q. Did you have to guarantee any portion of the proposed permanent financing?
A. The normal carve-outs would be what my understanding is.
Q. What are the normal carve-outs?
A. Fraud, misrepresentation.
Q. The next page, page 7, LDC comma LLC. Do you see where I am?
A. Yes.
Q. What is your interest in that entity?
A. It again the 2.63 percent that is my remaining portion after we sold to the investors that took over these assets.

Q. And would you believe the appraised value to be accurate on this one?
A. Again, I believe it's probably reduced, no infrastructure, no activity on this particular piece of land so just raw land.
Q. Have you guaranteed any portion of the debt?
A. Yes.
Q. How much of that have you guaranteed?
A. Joint and several.
Q. Is the current amount of that roughly the 2.75 million?
A. Yes.
Q. What is the status of this loan, the loan that is secured by that property?
A. It comes due this summer.
Q. Who is the lender for this?
A. First Bank.
Q. Have you identified replacement financing upon maturity for that property?
A. No.
Q. So my current understanding is you have an interest in, according to this document, six Atrium office buildings?
A. Six?
Q. That's what I counted.
A. I see Atrium Northeast and I see Atrium Newberry.

Those are the two that I have interest in.
Q. Okay. Those are the two office buildings. The other commercial real estate under the Atrium brand, if you will, you've got four others. E Shoppes at Atrium, Atrium Middle Sound Land, LLC, Atrium Development Associates and Atrium Development Inc.; is that correct?
A. Yes.
Q. So that's six Atrium brand developments; is that correct?
A. Yes.
Q. And I counted 22 Gateway Child Development Centers at this time; is that correct?
A. Yes.
Q. I counted five different Langtree Development entities; is that correct?
A. I am not counting but what's identified here is what I have. I'll go back and count if you like.
Q. Well, if you disagree with me you're welcome to.
A. That's fine, no.
Q. And then on the next page I see three residential properties you own in a P&D Partnership; is that correct?
A. Correct.
Q. And do you still own the three residential properties?
A. Yes.
Q. Who's your partner in that?

A. My wife Peggy.
Q. And is that just simply a partnership or is there some other entity for that?
A. That's it.
Q. And do you own any other assets in that partnership or just the three here?
A. Just that.
Q. Have you sold any commercial real estate interests that we haven't talked about in the past few years?
A. No, we've talked about everything I have sold.
Q. Those would be I believe the Langtree transactions which the investors took over that debt; is that correct?
A. Yes.
Q. And then the family transfers that we talked about; is that correct?
A. Yes.
Q. Other than that one cash-out refinancing that we talked about earlier have you had any other real estate development transactions in the last five years?
A. I think five years I was fortunate enough to sell a number of Atrium office buildings in '05 and '06 before everything melted down, and that was the scope of what I have sold.
Q. And did you obtain cash in excess of what the outstanding debt was on those transactions?

A. Yes.
Q. How much did you receive roughly?
A. Again, I can't tell you an exact anount but it was several millions of dollars.
Q. Was it less than five?
A. I would say so.
Q. What was the disposition of the cash received from those transactions?
A. Again, I used that to invest in the future real estate that you see on this and feed the projects that did not fare well after 2008, '09 and '10 and '11.
Q. Did you transfer any portion of cash obtained from these transactions to any family members or any entity owned by a family member?
A. Not at that time.
Q. Do you have any portion of that cash still?
A. No. Unfortunately the economy has not been kind to me, I have enjoyed successes before the meltdown, didn't think it would end and invested in additional real estate knowing that I could continue making it work. Unfortunately '08, '09 pretty much put me on the ropes.
Q. Have you seen any improvement to this day?
A. I see some stabilization. I see some opportunities. There is interest to buy outparcels. There's interest to build. It has been very difficult for new investors, developers to

obtain financing.
Q. Are you familiar with I guess the current market for financing commercial real estate transactions?
A. To an extent, yes.
Q. What are the terms available on the market?
A. I can speak to the Newberry one which I think is an important point of our discussion today. As a means to help solidify with 7D Bank's cooperation that I enjoyed from Carolina First over 12, 15 year period, given the amount of tine and working with the marker, the healthcare market, I think the opportunity to refinance that healthcare product in it's current location would be very possible. I have investigated refinancing on that property and what I see upon stabilization, I could obtain a four percent loan on a 30 year an with a 10 year call. So I would say that is very encouraging to me.
Q. You say you could obtain. What lender or lenders offered that to you?
A. I am working through a broker out of New York that I have worked with for many, many years and he's probably responsible for the majority of my permanent lending. He's identified several lenders that would be interested if I'm able to stabilize the building.
Q. What do you mean stabilize the building?
A. Increasing the income of the building over the next period of time to get it to a positive cash flow with the debt

coverage of about 1.4.
Q. Do you have any documentation correspondence with the lenders about these offers?
A. Yes.
Q. Where do you keep that?
A. I keep it at the office and I provided it to both appraisers that were looking at this project valuation.
Q. Did you give them all of what you had or just certain documents?
A. Yes. No, what I had.
Q. The financing terms you mentioned that assumes the Newberry Atrium property has reached stabilization as your referred to it; is that correct?
A. Yes.
Q. By stabilization that means occupancy rate sufficient to give a positive cash flow coverage ratio and debt coverage ratio of at least 1.4?
A. Yes.
Q. Is that your testimony?
A. Yes.
Q. What occupancy level would Newberry Atrium have to reach to get to the 1.4 debt coverage ratio?
A. Again, it would be the function of the rent but it would be somewhere in the 10 to 12,000 square feet to be able to accomplish that kind of a loan.

Q. Does Newberry Atrium currently have 10 to 12,000 square feet of finished space available?
A. No.
Q. So the space would need to be improved before it could be leased out or rented; is that correct?
A. Yes.
Q. Can you lease the space and have the tenant finish it or does the developer landlord finish it in every event?
A. Every one is a negotiation. There is no every event.
Q. How is it typically done?
A. Depending on the objective of each tenant some will rather have a lower rent rate and do the up-fit themselves, some want to have the finishes done and pay a high rate.
And a case in point, and again, let me make you aware as I've made your appraiser aware and the Wingard Associate people, the two guys the bank previously used. I am in discussions with Newberry Hospital on leasing some additional square footage in order to move it forward in the near future, not too distance future, to allow us the opportunity to potentially take advantage of the financing that I have found is available at a higher income than what we've gotten here.
Q. What is the status of those discussions with Newberry Hospital?
A. Ongoing.
Q. Have you got any documentation of a commitment or a

draft agreement with them for the additional space?

A. We've discussed terms and conditions.

Q. What would the terms be in terms of how much space how much rent?

A. The terms that we're discussing is leasing additional 10, 12,000 feet at a rate that would not include tenant up-fits. If they are to move forward with that approach I've agreed to give them my entire interest in the building. I have agreed to forgive the 300 some-odd thousand dollars that I have put into it, and that they would take the position in the building in order to look at the opportunities of potential refinance in the future or at least a confirmation of this to provide some hoped consideration to enter into the reorganization on the table with maybe some modifications.

Q. What is the expected time of a decision on that?

A. I wish I could give you a specific date but it's been ongoing for several months. The board is considering it, I am jumping through hoops in order to provide them additional information they're requesting.

Q. Do you think that's something that is going to happen within the context of the existing bankruptcy or later on down the line?

A. I would say if we're able to work anything out it would happen in the near future, in the next several months.

Q. Who were you communicating with at the hospital about

that?

A. Ron Vigas.

Q. How do you spell his last name?

A. V I G A S.

Q. What title does he have at the hospital?

A. CEO.

Q. You said the rate would not include tenant up-fit so that means the developer would be responsible for those?

A. No, that the tenant would be responsible.

Q. What needs to happen -- you said you were jumping through some hoops. What needs to happen for the hospital to be able to make a decision and enter into an agreement with you?

A. I really can't tell you what additional things they are going to be undertaking. I have provided them with the proposals, we have negotiated it. I've got nothing else to give. They continue to do their own research and they haven't shared with me what specific items that they are researching.

Q. So the ball is in their court so to speak?

A. Yes.

Q. These proposals and documentation related to the negotiations, have you given a copy of that to your lawyer?

A. Yes.

MR. BEDENBAUGH: Let's take a few minutes' break.

(Brief recess was held.)

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, you've been handed Exhibit 2 to your deposition which is copies of financial statements from 2011, 2009 and 2006 all as one document. The first one there is dated January 31, 2011; do you see where I am?

A. Yes.

Q. Is that a true and correct copy of your financial statement as of that date?

A. I would say yes.

Q. And according to this document your total assets at this time was a little in excess of $32,000,000; is that correct?

A. Say that again.

Q. According to this document your total assets were a little bit more than $32,000,000 at this time?

A. Yes.

Q. Which is about $11,000,000 more than the financial statement dated January 31, 2012; is that correct?

A. Yes.

Q. Do you have any explanation generally as to the $11,000,000 drop?

A. I would say I invested a lot of it, fed a lot of it into valuations, and I guess without looking at it dramatically have changed over the last couple of years.

Q. The total net worth here is a little more than

$32,000,000; is that correct?

A. I am sorry, I didn't hear what you said.

Q. The net worth indicated on the January 31st, 2011 financial statement is slightly in excess of $32,000,000; is that correct?

A. No, I think it was 30,000,000.

Q. You're right, I was looking at the total liabilities. You're right, the total net worth is a little more than 30.4 million dollars, right?

A. Yes.

Q. Okay. The next page is Notes to Financial Statements dated January 31, 2011. You'll see the Wells Fargo account has a current estimated value at that time of a little more than 1.3 million dollars; do you see that?

A. Yes.

Q. That was $471,000 in the 2012 notes. Do you know why that dropped?

A. I was during '11 feeding a lot of real estate. I paid down about $2,000,000 on one of the notes at Carolina First. I paid down $1,000,000 on the Newberry. I paid down notes for refinancings of the Shoppes. I have paid down and fed funds to keep some of the properties going. I paid down personal debts owed to people on my financial statement, Ballington (ph), Peterson, basically using what liquidity I had at that time to keep everything afloat.

Q. Okay. Now skipping down to paragraph 6 you've got 2011 Contracted Receivables Due; do you see where I am?
A. Yes.
Q. Did you receive this amount in 2011 of roughly $800,000 that you've got indicated here or results less than that?
A. They were less.
Q. Do you know how much you received?
A. No, I don't.
Q. Do you remember roughly if it was most of that or half of that?
A. It was part of it but I can't tell you three, two, two and a half years ago what I received.
Q. The Gateway Properties, LLC distribution of roughly $400,000, did you receive that?
A. Some part of that.
Q. Do you recall what part?
A. No.
Q. The next paragraph has 2012 contracted Receivables Due of total in excess of 1.2 million dollars; do you see that?
A. Yes.
Q. Do you know if you received that amount or something different?
A. It was different, a lot less. Two years out this was during some very difficult times and unfortunately many of the

distributions from these properties did not materialize as anticipated there.
Q. Which of these performed as expected?
A. I could say none of them. Many of the Gateway incomes had to go to repair some issues. We had some infiltration of mold in a couple of the centers and construction requirements we had to do to keep the buildings operating, so the money was diverted to maintaining and fixing a number of the buildings.
Q. Okay. The next page has the Commercial Real Estate schedule beginning on this page, page 3; do you see where I am?
A. Yes.
Q. The Gateway Properties, LLC listed here starting with the letter B, your general partnership owner interest here was 50 percent; is that correct?
A. Yes.
Q. So this would have been January 31, 2012 prior to your transfer of 25 percent to various family members or entities?
A. If that's what it says but my recollection is that we did the estate planning somewhere toward the end of '10, so I can't tell you if this is my error, but my recollection is when Dave got sick in 2010 we decided that we needed to do some estate planning at that time.
Q. And do you know when those transactions actually were finalized and took place?
A. I can't tell you specifically but I do know that when

he got sick that's when it all began and it was an ongoing process but I can't tell you the complete dates that all this was wrapped up.
Q. But the reduction from 50 percent to 25 percent would have been the cost of that transfer?
A. Yes.
Q. And similarly the next entity the Gateway Colorado, LLC?
A. Yes.
Q. It shows 37.5 percent and here the reduction to 18.75 percent in 2012 would have been attributable to the transfer to family members?
A. Yes.
Q. Likewise on D, E and F various Gateways in Charlotte, North Carolina are indicated to be 50 percent ownership interest with the reduction to 25 percent reflected in the 2012 statement would have been because of the transfers to the family members?
A. Yes.
Q. All right. And the next page, page 5 it's got L and M, two Langtree-related real estate investments apparently but the ownership structure is a little bit different than what we discussed in 2012?
A. Yes.
Q. Can you explain -- and you may have already done so earlier -- but can you explain how it got from 2011 to 2012?

A. Sure. It was 2011 and 2010. In 2010 we were having trouble raising funds, we were having trouble meeting our obligations, we were in the process of negotiating with several investors. Towards mid '10 into '11 we were able to find somebody that could perform and purchase with a majority interest in the Langtree properties in order to keep us from basically not being in a position to meet our obligations, and that evolved over a period of time.
Q. In connection with those transactions did you receive any cash at all?
A. No.
Q. The next page is residential real estate owned as of January 31, 2011 page 6; do you see where I am?
A. Yes.
Q. This has 6133 Lakeshore which I believe you indicated was your residential address?
A. Right.
Q. That was not on 2012. What happened between 2011 and 2012 there?
A. During the same process Peggy has owned the properties, the Grand Pavilion and Lakeshore. During refinance they had been on the title but during the estate planning she has been on the title for years. I went through a refinance at that point, I was on it to help make the loan and then it was switched back.

Q. So let me make sure I understand your testimony. Your testimony was that you and your wife both were on the title for years?

A. No, the majority of the time -- I went through three refinances during a period of 20 years, three or four refinances. During that time I would be required to sign on to the loan but it was always held in Peggy's name, and apparently I was not diligent enough to make the corrections on my financial statements.

Q. Okay. So you never owned an interest in either of those properties?

A. I did maybe 10 years ago. And I can't tell you approximately what the time was but every time we went through a refinance I'd have to sign on to it.

Q. But you last owned interest in these properties approximately 10 years ago?

A. Within the last five or 10 years, yes.

Q. And your interest you transferred to your wife?

A. Yes.

Q. What was the reason for that transfer?

A. The estate planning.

Q. Any other reasons?

A. No.

Q. Did she give you anything in return for that transfer?

A. No.

Q. Okay. The next page is a rent roll for Atrium Northeast; do you see where I am?

A. Yes.

Q. I believe you testified earlier there's been some vacancies on that property?

A. Yes.

Q. So is the cash flow negative or positive now?

A. Negative.

Q. How much is the negative amount this month; do you know?

A. It varies from month to month to a break-even to a negative cash flow of about eight or $10,000, but during the negative times I was feeding it in order to meet the obligations and keep the building operating.

Q. Okay. The next one here is another Newberry Atrium rent roll of 2011. My understanding is that you have two lis pendens identified. Did either one of those happen?

A. No. I can give you a little background on that if that would be helpful.

Q. Sure.

A. During 2010 I was working with the original CEO of the hospital who initiated this project and asked me to participate. He had been there for 15 years and had been responsible in my opinion and in most people's opinion for taking the hospital to a different level, and requested that I assist them in

developing this building.

During this time 2010 and '11 they had anticipated recruiting additional physicians that I was working with. At that time we were preparing proposals and doing the things that needed to do in order to get these tenants to relocate to Newberry. During that same time in 2011 the current, then current CEO left the hospital and a new CEO came in, had no connection with the community, he was there as I guess a temporary CEO. And during the former CEO's leaving the hospital and the community he would not focus on this building, apparently he had other focuses and the recruitments never occurred.

Q. What is the current variance on the cash flow at the Newberry Atrium property?

A. It is almost a break-even with the interest only. I have requested that BB&T consider some type of restructuring in order to out the building on a stable footing allowing me and the hospital and community times to recruit and work through the economic environment that we went through in 2011 -- previous to 2011 and into 2011. And this is recently.

When the Carolina First folks worked with me over the years, they were basically like joint venture partners. We did six, seven deals together and they were always there to help me, cooperate, give me some kind of flexibility that would allow me to work through the problems of any real estate transaction we

were going through. They were almost like joint venture partners. They would solicit and got the benefit of some very high-profile projects that I was associated with. I was on a very good, warm friendly basis with the whole management team from Mac Whittle (ph) all the way through. And when the notes were coming due in 2012 everybody I knew at Carolina First had left, and I had nobody really to speak to.

When I met with one of the TD Bank executives who was out of Greenville, I believe, my opportunity to visit with him and give him background on the project was maybe a half hour meeting, and I explained what we were going through in '11. I guess it was '11 -- yeah, it was in '11 -- they really didn't have much interest or didn't discuss too much how they could be of assistance even though I had a plan and I proposed a plan to them, there was really no response.

And I may be bridging from '11 into '12 but this is pertinent to where we are in this transaction. I think that's something that should be acknowledged, at least.

When TD took over the portfolio from Carolina First it was my understanding that their position was they were taking over the same relationship that I enjoyed with the Carolina First people, which was a very good, flexible relationship over the years, 12 years plus or minus, had done $27,000,000 with Carolina First. And they really were very solicitous of the deals. I would be requested to work with them, many of the

hospital medical deals. I had done a previous medical deal with Carolina First that was in '07, was successful in paying that off, a little longer than usual but '07 was a different time. By the time we sold it I was able to pay it back.

In fact, at the time that Carolina First got taken over -- I lost almost a joint venture partner. And that has been a very difficult process for me to work with that the TD representatives have no knowledge of my development history, one, no knowledge of the volume of business that I've done and the successes that I have enjoyed, and really the adversarial situation that they've created rather than understanding ways to solve the problems versus being almost punitive the way that they have come after me personally.

Q. We'll talk about the State Court cases in a little while, but is there any document that obligates TD Bank to refinance any of the loans that we're talking about today?

A. There's no document that obligates them to do anything other than what you would think the fiduciary responsibility of a bank would be.

Q. What document says there's a fiduciary responsibility for the bank to do anything?

A. When you enter into $27,000,000 of volume with a bank over six or seven deals and they solicit your business and you give them the business because you trust them because you believe they are reasonable and flexible people as they have

proven over the last 12 years plus, you would expect that type of relationship to continue as long as you have been performing.

Q. Is there a document that says there's a fiduciary responsibility to you?

A. Don't have a document that says that but I would not have entered into these relationships with a group that would have been anything but reasonable and flexible that has proven likewise for over 12 years.

Q. Is there a document that says TD Bank has to do anything other than what its done in connection with these loans?

A. I don't have a document that says that they are going to be my savior, but they do know that if they have any insight into my history with Carolina First and my career they would know that I have worked everything out over good times and I am working things out in very difficult times.

Q. Your statement that TD has a fiduciary and acting in a punitive manner, is that based on any document that you have knowledge of today?

A. It's based on the actions that they have taken, the actions that they have taken on two of the transactions that I am involved in right now are the only transactions that they have left after I paid back 20 some-odd million dollars -- and unfortunately we all thought things would continue on as we had operated before, but it has not, and every bank that I have

dealt with over my career, including Carolina First, has always been reasonable and flexible in order to salvage and enhance the value of the project they are associated with.

Q. So you can't identify any documents in response to my question?

A. I didn't have documents, I have actions from Carolina First.

Q. Those actions you spoke of two projects and those are Newberry Development and Middle Sound Land?

A. Yes.

Q. And the actions that you're speaking of are suing on the guaranty?

A. Yes.

Q. Any others?

A. Not understanding what the mechanics of solving the problems would be. As a party to a transaction they should be aware of how problems can be solved as opposed to how to damage and hurt the principals associated with the project, and ultimately damage the project and the asset itself.

Q. Anything else?

A. No.

Q. I want to look at the next document in Exhibit 2. It's the March 1, 2009 Statement of Financial Conditions; do you see that?

A. Okay.

Q. Is that a true and correct copy of your statement of financial conditions as of March 1, 2009?

A. Yes.

Q. And again this document indicates assets in excess of $40,000,000; is that correct?

A. Yes.

Q. And it also indicates a net worth of close to $39,000,000; is that correct?

A. Yes.

Q. Is that your signature on this document?

A. Yes.

Q. If you'll look on the third page in of that document it's page 2 of the notes paragraph 7, Notes Receivables?

A. Yes.

Q. There's a note receivable in excess of 5.3 million dollars from Atrium at the Lake, LLC?

A. Yes.

Q. What happened to that receivable?

A. It's still on the books.

Q. Has any amount of that been paid?

A. No.

Q. All right. On the Commercial Real Estate Owned section which is the next page March 1, 2009, Gateway Properties, LLC, here it indicates from 2009, 16 Gateway Properties as opposed to the 14 in 2011 and 2012 and then at the

bottom it has Kenton and Mallard sale/lease; do you see where I am?

A. Yes.

Q. Are those two the two that are missing from here?

A. Yes.

Q. What happened to those two properties?

A. We sold those properties to investors and we handled the lease transaction with the tenant.

Q. Did that transaction generate any cash?

A. Yes.

Q. How much?

A. I don't recall but it was enough to invest in some more Gateways and some more land acquisitions.

Q. Did you personally receive any cash from those transactions?

A. Yes.

Q. Do you recall how much?

A. No.

Q. Less than a million dollars or more?

A. I would say it was less.

Q. Did you transfer any portion of that cash to any family members?

A. No, I supported family members but I invested in additional Gateways and additional land.

Q. Did you transfer any portion of that cash or proceeds

of that transaction to any entity or any family members?

A. No.

Q. On page 5 of the same document we have got paragraph K and L Residences at the Landings, building 27. What happened to those properties?

A. We had financing arranged, we had tenants signed up. Actually we had tenants signed up for the Residences at the Landings and had significant deposits on account. As the time went on during that year the financing evaporated and we were not able to move forward any further.

Q. What happened to those properties?

A. They didn't get built after we had financing and tenants in place.

Q. And the real estate, what happened to that?

A. It's still part of the Langtree holdings.

Q. And then you've got in paragraph N 131.14 acres indicating sale pending?

A. Yes.

Q. What happened to that property?

A. The same thing, people -- we had a hotel developer who was under contract owed us money up. He too couldn't get financing and that deal collapsed also.

Q. Two more pages in there's a Statement of Financial Condition dated December 1, 2006; do you see that?

A. Yes.

Q. Is that a true and correct copy of your statement of financial condition as of that date?

A. Yes.

Q. Is that your signature on the document?

A. Yes.

Q. On the Notes to Financial Condition, the next page, down at the bottom under 2006 Contract Receivables Due paragraph 6 there's Atrium Memorial Partnership I and II, Atrium SRC, LLC, Southeast Pediatric Center, LLC, Irmo Medical Center, LLC; do you see where I am?

A. Yes I do.

Q. What happened to those entities?

A. Those were sold.

Q. Were these some of the entities that you talked about earlier as being sold of different sales?

A. I mentioned to you earlier that I had sold a number of the Atrium properties and this is part of those.

Q. Did you receive any proceeds from the sale?

A. I did.

Q. How much did you receive?

A. You know, combined, a couple million dollars.

Q. And was that sale in 2007 or later?

A. I think it was in 2007.

Q. You received in the neighborhood of $2,000,000?

A. Several million, I can't tell you exactly.

Q. More than five or less than five?

A. Less than five.

Q. Do you know what you did with that?

A. I invested in Langtree, invested in more Gateways and more land.

Q. Did you transfer any portion of those sales proceedings to any family members or any entity owned by a family member?

A. Yes.

Q. What transfers did you do at that time?

A. Family members. My two daughters, my wife.

Q. And the transfers to your two daughters, was that to the trust or directly?

A. To the trust.

Q. And how much was each of those?

A. I don't recall but it was hundreds of thousands.

Q. For each?

A. Yes.

Q. When did that take place? Was that in 2007 when the sales closed?

A. Yeah, it would be around that time.

Q. Did they give you anything in exchange for those transfers?

A. No.

Q. The next page you've got a Note Receivable from Mini

School Learning Centers?
A. Write.
Q. What happened to that?
A. That was an amount that was still due on the sale of the Gateway operations.
Q. Has that been paid?
A. Yes.
Q. If you will look to Commercial Real Estate Owned schedule for 2006 this has paragraphs B through F which are the Atrium Memorial I and II, the Aetna SRC, Southeast Pediatric and Irmo Medical Center; do you see where I am?
A. Yes.
Q. Are those the entities that you sold in 2007 that we talked about earlier?
A. Yes.
Q. On page 6 of that document there's Vacant Land at 1921 Gunbarrel Road, Chattanooga, Tennessee?
A. Yes.
Q. What happened to that property?
A. Developed it.
Q. Who owns that property now?
A. Shoppes at Atrium.
Q. And that's reflected on your later financial statements?
A. Yes.

Q. The next page after that one on that same document is Residential Real Estate Owned as of December 1, 2006?
A. Yes.
Q. There are a number of properties here that weren't on the later financial statements beginning with 1522 S. Kilbourne, 3716 Palmetto, 3274 Davenport and 1367 Allendale?
A. Yes.
Q. And also 3509 Maybank. Do you see where I am?
A. Yes.
Q. What happened to those properties?
A. They were all sold.
Q. Were they sold in one transaction or separate?
A. Separate.
Q. Do you recall when they were sold?
A. No.
Q. Do you recall what proceeds you received from the sales?
A. No.
Q. Do you recall what you did with the proceeds of the sales?
A. I invested it in more real estate.
Q. Same question for the two properties on the next page, 716 Cedarfield and 1361 Weston Watch?
A. Same situation, sold them.
Q. You don't recall what you received from that or what you did with those proceeds?

A. No.
Q. Mr. Jacobs, have you ever been charged with a criminal offense other than a traffic violation?
A. No.
Q. Have you ever been deposed before like we are doing today?
A. No.
Q. Have you filed a claim against anyone else in the last five years?
A. I have filed eviction notices.
Q. Other than that?
A. No.
Q. Has anyone other than TD Bank filed any claims against you in the last five years?
A. No.
Q. What about claims against entities in which you hold ownership interests?
A. No.
Q. Have you had any judgements entered against you in the last 10 years?
A. No.
Q. Have you searched for documents related to the TD Bank Carolina First loans?
A. Searched for documents? I am not sure I understand what you mean.

Q. I sent requests to your lawyers for documents related to the loans. Have you looked for any documents related to the loans?
A. I have got several file drawers of loan documents on the various transactions that we have done over the last 12 years.
Q. Are those files at your house or at your office?
A. My office.
Q. Have you provided copies of those to your lawyer?
A. Not in recent time. They may have had them from previous transactions but they've all been paid off except these two.
Q. Do you have any documents on your computer related to the loans?
A. No.
Q. Any emails with TD Bank and Carolina First regarding the loans?
A. Not emails, I may have had an email or two about an appointment or a phone call but that's about the extent of it.
Q. I want to talk about the Newberry Atrium loan. Tell me about how that loan originated?
A. That originated in I guess '07 maybe. I was involved with Carolina First with Irmo Medical Center at that time. And during that time the people that I was dealing with like Larry

Scotts and Michael Phillips and Justin Strickland, they were very kind and generous to me and they asked me if they would be able to look at the new transactions that were coming up. And because of the confidence that I had in working with these people from years before, I was very happy that they were interested in looking at the Newberry loans. They were familiar with the work that I had done and the performance that I had done, and they said that they would be very interested in putting a very good proposal on the table.

At that time I was required by the hospital to provide several proposals. Quite frankly, Carolina First won the proposal because I lobbied for them based on the longstanding relationship I have had with the management team and their interest, their willingness, the flexibility to work together through the previous six transactions that I have worked with them on. And as a result of my lobbying the hospital agreed to go with Carolina First.

Q. And then the funds were of course used to construct the medical office building known as Newberry Atrium Professional Center; is that correct?

A. Correct.

Q. And you were represented by separate counsel for that transaction I assume?

A. Separate than me?

Q. Separate from Carolina First -- another lawyer?

A. Yes.

Q. Who was that?

A. Gerald Jowers.

Q. Now I believe in your bankruptcy filings the total rent per month is a little over $58,000 on a monthly basis; is that correct?

A. Again without looking at the details, I have got so many numbers in my head. If that's what it says I am sure that's what it was reported.

Q. It's leased up to about 62 percent at this time?

A. 63 percent occupied. I think we get revenue on 60 percent because the MRI is owned by the hospital.

Q. And is the current occupancy and the rental revenue sufficient to pay debt service and operating expenses?

A. No.

Q. How much is the shortfall per month?

A. Again depending on repairs and maintenance and depending on -- which currently before they called the loan I was feeding it $10,000 a month.

Q. Now, before Newberry Atrium filed for bankruptcy and the loan had matured the debtor was not making any payments to TD Bank; is that correct?

A. The debtor was making payments to the bank until they extended -- they gave me a 90-day extension to work something out and at that time I was contacted by a gentleman out of

Greenville, who I mentioned to you, said we'd sit down and work something out. I had maybe an hour visit with him, he came to visit me.

I prepared a proposal that would show how that would work out, how I could get this on an even keel with a little flexibility from the bank and an extension. He indicated we would work on that. He left, I didn't hear from him for maybe three or four weeks. I tracked him down and said can you tell me what's going on. And he said well I have been unavailable and as a result of that I haven't made much progress on this. I said well what can I do to get this note renewed that's coming up. He says I have got to get my people to give me some direction. I said who are your people. And he said it's a committee. I said okay. What is it that you need and what are the issues? The proposal I gave you was a very realistic approach on how I could continue to maintain the property, meet all its obligations.

I didn't hear from him again for another couple of weeks and I tracked him down again. And I said I have got to know what we're going to do, we're already beyond the first 30 days. Are you going to work with me on extending this? He says I can't give you that answer.

Q. Who are you referring to?

A. No, I don't recall his name. He was out of Greenville. Todd maybe, Eric O'Toole (ph) or Eric Todd or

something like that. I mean I had one visit with him and three phone calls. I just kept getting the runaround and I kept asking for what are we going to do. And he says well I might be able to get you an extension but you've got to pay it down significantly. What is significantly? A million dollars? I can't do that. I can't operate the building and pay it down at the same time.

Q. And at some point the debt matured; is that correct?

A. It matured and during that time I could not get an answer other than the runaround and no direction. He says I am leaving this position, you'll be contacted by another person. Another three weeks go by and I am contacted by another person. This gentleman is out of Charleston. I think he's the current gentleman that was at the hearing.

He then sets an appointment for a week later. He says I am going to come visit you and we'll work something out. I went through the same process I did with the first fellow from Greenville. And I gave him the proposal, updated it and he says well let me see what I can do on this. Said I've got to go back to my people. I've heard the people so I said who are your people. He says one is in Greenville, one is in Maine and someone else. It was him, a Maine guy and a Greenville person.

I gave him all the information that I had done before. He sent me a request for some additional information, I sent that to him. I didn't hear back from him. At some point, maybe

several weeks later I get this lawsuit filed against me. And that was the end of it. I don't believe -- and I asked them if they had ever seen the property, if they had given any consideration to my proposal which would not jeopardize the bank, would maintain the facility and allow it to operate while we continued to -- and I gave them the history in very great detail of what's going on in the environment, the economy, the healthcare environment. And there was never any discussion. It was just the next thing I know I had a lawsuit.

Q. The loan did mature; did it not?

A. Yes. And during that time I had no communication with what anybody was going to do.

Q. After it matured did you make any payments to TD Bank?

A. No.

Q. And up until the time you filed bankruptcy you weren't making any payments?

A. No.

Q. So presumably the property had enough cash to pay its operating expenses during that time?

A. It did.

Q. Is the property currently listed for sale?

A. It's not listed. I have spoken to several brokers and I mean, there is interest out there but it's not interest at this moment that I could pursue considering where we are in this legal proceeding.

Q. Are you and Newberry Atrium contesting liability in the TD Bank Note and Guaranty?

A. I wouldn't say I am contesting it. I think the guaranty and the punitive way that the bank has pursued this as opposed to looking into a collateralized loan, the loan has value -- I am sorry, the building has value. And the building itself has the ability at some point if were to believe the 2011 appraisal, five million eight as is where is, that provides a very good opportunity for the bank to recover the majority of the loan. Given the time and the approach that I proposed to work this thing out this loan could be paid in full in the near future, the next several years. Given the time to continue to operate the building, allow the Affordable Healthcare Act to provide the additional revenues to a real community like Newberry recruit additional physicians and services, which they probably are in a better position today than they have been in recent years to recruit additional services and physicians.

Q. You indicated you are not contesting the liability but you have some concern about what you call the punitive way in which TD Bank has done this. Are you referring to the suit solely on the guaranty; is that correct?

A. Yes.

Q. Are you referring to anything else?

A. The way that it has been handled, the failure to communicate with me to work with me in any reasonable way. The

suit basically damages my ability to perform, not only on this asset and find new financing and working, but it could also jeopardize the other assets that I am involved in also, which may be a source of repayment given the time over the next several years to allow them and the economy to heal.

Q. In your complaints are they based on anything written in any of the loan documents between Newberry, yourself and TD Bank?

A. I can't tell you the minutia of the legalese in these documents. I can tell you that there is a standard of reasonableness when you enter into any kind of ongoing relationship. A $27,000,000 history of working together over 12 plus or minus years gave me that standard of performance. I performed, they performed, they were flexible. They gave me some breathing room when needed and I performed back and took care of the responsibilities I had.

Q. So your testimony is there isn't any term in the loan document that you're referring to?

A. I can't be specific because I haven't read the hundreds of pages of loan documents.

Q. Can you be general?

A. When you enter into a contract it's my understanding that there is a reasonableness to expect fair treatment, expect fair play, and nothing about this has been reasonable. It hasn't been fair, it hasn't been anything but abusive, damaging

to me personally, to the assets that I can control. You basically are shooting me in the head for a reason that I can't understand. If I can preserve the value of this asset and grow it, the bank would not be harmed. You're just harming me which inhibits my ability to solve the problem.

Q. Again you're referring to the suit on the guaranty?

A. Yes.

Q. You keep mentioning the 27,000,000?

A. Yes.

Q. Those are obligations that were paid?

A. About 21,000,000 has been paid. I have reduced two obligations that are outstanding of about $3,000,000.

Q. So $24,000,000 has been paid?

A. I can't tell you. I guess I owe about six, $7,000,000.

Q. Seven million has been unpaid?

A. Yeah.

Q. So roughly 33 percent?

A. But they can be paid with a reasonable approach. And in today's world you have nothing else to work on other than solving problems rather than creating problems.

Q. All right. Let's look quickly at your Answer in the Guaranty Action. It's Exhibit 3.

In paragraph 9 of your answer it references a special fiduciary relationship between the Defendant and Carolina First;

is that correct?
A. Yes.
Q. That's what you're alleging in this case?
A. Yes.
Q. When did that special fiduciary relationship develop?
A. When you enter into contracts with institutions or people you expect fair treatment, you expect the people will work together to deal and to solve problems rather than damaging the assets of the people associated with it that will undermine the solutions.
Q. When you are talking about damaging assets you're not saying that TD did anything to this property?
A. I am saying by being so unreasonable and aggressive they can cause the damage for a solution.
Q. And they didn't foreclose on this property; is that correct?
A. No, but now foreclosing on the property would be a course of action you could take to recover from part of your funds, but if I were given the time and didn't have the responsibility of fighting a lawsuit on a personal guaranty which could ultimately result in a judgement that completely damages the ability to solve the problems and it damages the properties and collateral that you have.
Q. So you're saying you'd be better off if TD foreclosed on the property?

A. Rather than coming after me for a judgement because at this point my proposal would involve refinancing this in the not-too-distant future.
Q. Is there any document that says TD has to refinance this loan?
A. No docunent that says they are obligated to do anything other than act fairly and be reasonable to preserve an asset that they would undermine.
Q. What document says that?
A. I don't have a -- I've got that much legalese. I don't have anything that says what I am alleging, and if I do I haven't looked through the hundreds of pages of documents.
Q. So you don't know that there's a document that says what you just said?
A. I don't know all the minutia from the contracts.
Q. Do you know if there's a document that says what you just alleged?
A. I don't know.
Q. It's your claim that in paragraph 12 of this answer it says would not have executed a guaranty without the trust and confidence when dealing with Carolina First. Is that your allegation in this case?
A. Yes, it is. It's a fact and I had three other lenders that were interested in doing this. I chose and lobbied for Carolina First because of the flexible working relationship we

had developed over the years.
Q. Those three other lenders, did they require any portion of the loan to be guaranteed?
A. I am sure they would.
Q. Do you know who those lenders were?
A. Yes.
Q. Who were they?
A. BB&T, Carolina First and I think Regions also was one.
Q. Now, Carolina First ultimately did agree to modify that construction financing; isn't that correct?
A. Yes.
Q. And they I think modified it seven or eight times, didn't they?
A. They modified it seven or eight times but kept squeezing me harder and harder which required me to continue to feed this.
Q. They wanted you to pay the loan?
A. Yeah.
Q. Imagine why they did that.
Now, do you know if BB&T or Regions, sitting here today, would have agreed to extend that maturity seven or eight different times?
A. Absolutely.
Q. How do you know that?
A. Because they had done it for me before.

Q. Have they done it for you before in loans that didn't have a sustainable occupancy?
A. Yes.
Q. Which loans were that?
A. The first loan -- Well, this goes back to Atrium Northeast. Atrium Northeast was troubled before and I had to get extensions over about a three-year period to release the building.
Q. Anything else?
A. I have had other banks that have because of good long-term relationships that have extended and turned them into permanent loans to make the properties able to stabilize as opposed to having to face this battle every four, five, six months.
Q. You later go on in your answer paragraphs 16 to 18, if you will look at that, indicating there was a refusal to provide permanent financing; is that correct?
A. Yes.
Q. When did that refusal occur?
A. In 2011 I guess it was.
Q. And I think we've talked about this earlier; there's no provision in either loan documents that required TD to provide financing, is there?
A. There is no requirement that I see other than working together in good faith and not trying to jeopardize and damage

the asset and the operator, the developer, the guarantor.

Q. Did you seek permanent financing on this property from any other lenders?

A. Not during recent years, no.

Q. At any time?

A. No, not during the last two years.

Q. What about prior to the last two years?

A. No. We hadn't stabilized the building at that point.

Q. You wouldn't expect a lender to provide permanent financing when your building is not stabilized?

A. I would expect a lender that had worked with you over the years to be reasonable and flexible to find a solution to this.

Q. I'm not talking about TD Bank, I'm talking about other lenders. Would you expect other lenders to provide permanent financing?

A. Yes and they have.

Q. Why didn't you refinance this loan, Mr. Jacobs? Why didn't you do it for this loan?

A. Because the environment up until this point has been very dismal.

Q. Because you couldn't; you couldn't get it from any other source, could you?

A. Could not on this building.

Q. Your Third Defense in your Answer in paragraph 22 you

allege that you believe the value of the building is equal to or exceeds the amount of the loan?

A. Yes.

Q. Do you believe that to be true?

A. Yes.

Q. And the basis of that is what?

A. The value of the building is based upon the facility income strength, the use of the building and the continued improvement in the economy, the continued working of the continued clarity in the healthcare environment that would allow additional improvements and additional reimbursements to the physicians in the hospital.

Q. Anything else?

A. No.

Q. Based on any valuation is what you have said?

A. Yes, I will have evidence of valuation of what it looks like now but at 5.8 two years ago in a much more difficult environment. I am believing that the valuation of this building will be in excess of 5.8. And its stabilization over the next several years will exceed the value of the loan amount.

Q. Your next allegation in paragraph 24 concerns not bringing action for foreclosure; is that correct?

A. Yes.

Q. And that's what you're alleging is punitive and unconscionable?

A. It is. The bank knows that I don't have the ability to write a check for $6,000,000.

Q. I think the bank also knows that you have got a significant amount of other obligations that mature within the next 18 months?

A. I just shared that with you, yes.

Now, what good does the bank get by making it impossible for me to stabilize these assets by putting a judgement against me which would prevent any of these things from being worked out?

Q. In this Third Defense about not bringing an action on foreclosure are you referring to any other action or inaction of TD Bank?

A. That's what I am alleging.

Q. So that's what I want to know; are there any other facts aside from their decision to sue on the guaranty before they brought a foreclosure suit?

A. Not that I can tell you today. There may be others but my focus has been solving the problem, not looking at the legalese. You would hope a reasonable flexible group would understand there's solutions to be had as opposed to sabotaging the guarantor and the project.

Q. And by sabotaging you're just talking about suing on your guaranty?

A. Yes.

Q. You're hot referring to anything else?

A. No.

Q. Mr. Jacobs, you've been handed Exhibit 4 to your deposition. Do you recognize that document?

A. It's a Promissory Note.

Q. Does this appear to be a promissory note between Newberry Atrium Development and Carolina First Bank?

A. Yes.

Q. Dated February 20, 2007?

A. Yes.

Q. On page 4 there's a signature block. Is that your signature?

A. Yes.

Q. Does it appear to be an accurate copy of the note?

A. I would expect nothing less.

Q. Page 3 of this document the first full paragraph indicates lender is not required to rely on the collateral for the payment on the note in the event of default by the borrower but may proceed directly against the borrower and guarantor or endorsers in such a manner as it deems desirable.

Did I read that correctly?

A. I am sure you did.

Q. That language gives the bank the right to sue directly on the note and on the guaranty; does it not?

A. That's what it says.

Q. If you will look at Exhibit 5. Can you identify this document?
A. Yes.
Q. If you'll look at the last page, page 7 of the Guaranty. Is that your signature on this document?
A. Yes.
Q. Does it appear to be a true and correct copy of your Guaranty with the Newberry Atrium loan dated February 20, 2010?
A. I would expect it is.
Q. In paragraph 1 on page 1 continuing to page 2 states that guarantor hereby expressly waives any right to require lender to bring any action against the borrower or any other person; do you see where I am?
A. Yes.
Q. Did I read that correctly?
A. Yes.
Q. It also says the guarantor waives the right to require that resort be had to any security; do you see that?
A. Yes.
Q. That indicates what the bank can sue you directly; does it not?
A. That's what it says.
Q. If you'll look at Exhibit 6. Does this look to be a true and correct copy of the Newberry Atrium Mortgage and Security Agreement?

A. Yes.
Q. Is that your signature on page 18 of the document?
A. Yes.
Q. Do you know of anything in this document that requires a suit or foreclosure on the mortgage before the bank exercises any other remedy?
A. I would assume that you would be telling me that it does not require that but it does require some requirement of good faith and cooperation in order to preserve the valuable asset and the ability to work it out.
Q. That's your opinion?
A. That's an opinion but my understanding is when parties and institutions enter into a contract there is that implied guaranty, there is a reasonableness and good faith in working together.
Q. Is there anything in that document that includes those terms you're speaking of?
A. I have not reviewed it so I cannot tell you that.
Q. In fact that document, if you will look at paragraph 2.16 on 16 that indicates that the remedies under the note and mortgage are cumulative; does it not?
A. It does say that.
Q. You've been handed Exhibit 7; do you recognize that?
A. Yes.
Q. Construction Loan Agreement between Newberry Atrium and Carolina First.

A. Yes.
Q. Is that a true and correct copy of the document?
A. I am sure it is.
Q. Is that your signature on the last page?
A. Yes.
Q. Exhibit 8, does this document contain a number of modification agreements. If you'll look through these the first one first page March 3rd, 2009; do you see where I am?
A. Okay.
Q. On the second page of that document is that your signature?
A. Yes.
Q. Does that appear to be an accurate copy of that modification agreement?
A. Yes.
Q. The next one, June 16, 2009?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that dated September 14, 2009; do you see where I am?
A. Yes.

Q. Does that appear to be your signature on the second page of that document?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that, December 18, 2009, is that your signature?
A. Yes.
Q. Is that an accurate copy of the document?
A. Yes.
Q. February 25th, 2010?
A. Okay.
Q. Does that appear to be a true and correct copy of February 25th, 2010 modification agreement?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Turn one more page. Do you see the Loan Modification Agreement at the top?
A. Yes.
Q. It's dated April 28, 2010?
A. Yes.
Q. Does that appear to be a true and correct copy of the Loan Modification Agreement?
A. Yes.

Q. Is that your signature on page 3?
A. Yes.
Q. There is an Acknowledgement Ratification and Release by Guarantor on the 5th page?
A. Okay.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. The very next page the Loan Modification Agreement dated May 10th, 2011; do you see where I am?
A. No, I don't have that.
Q. Let's skip that and go on to the next one which is the Loan Modification Agreement dated May 23rd, 2012.
A. Yes.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. That does that look to be a true and correct copy of the May 23rd, 2012 Loan Modification Agreement?
A. Yes.
THE WITNESS: I'd like to get some water.
MR. BEDENBAUGH: Sure.
MR. JOWERS: Jody, Exhibits 10 to 13 we'll stipulate so you won't have to go through them all.
MR. BEDENBAUGH: Okay.

BY MR. BEDENBAUGH:
Q. The loan modifications that were just in front of you, the purpose of those was to extend the maturity date; is that correct?
A. Yes.
Q. Can Newberry Atrium benefit from the extension of the maturity date; is that correct?
A. It can.
Q. And you as guarantor would benefit from an extension of the maturity date; would you not?
A. Yes.
Q. Carolina First and TD did not have the obligation under the loan documentation to agree to an extension; did they not?
A. No, but they had the willingness and the interest to preserve and make the asset whole were they to get their funds repaid to them. By doing anything less would be of no benefit to the project, to me or to the bank. By being reasonable, by being flexible they would ultimately in the next several years per my plan get paid out a hundred percent. By being anything less they would gain nothing more because I don't have $6,000,000 or access to that.
But the building is a valuable asset and when allowed through a reasonable approach will realize and be able to pay back all its owed. And you would expect that from a long-term

relationship in a very difficult environment to be able to work together to solve the problem.
Q. Do you dispute that the note matured on May 3rd, 2012?
A. No.
Q. Do you dispute that TD demanded the balance due from Newberry Atrium and from you?
A. No, I think they did.
Q. Do you dispute that you and Newberry Atrium have failed to pay the balance due on the Note and Guaranty?
A. Neither me nor the asset has that kind of cash available.
Q. So you don't dispute that you haven't paid the balance, do you?
A. I don't dispute it.
Q. Do you dispute that Newberry Atrium is indebted to TD Bank under the loan?
A. No.
Q. Do you dispute that you are personally indebted to TD Bank under the terms of the Guaranty?
A. No.
Q. Let's talk about Atrium at Middle Sound. Tell me about how that loan originated.
A. Again, my relationships at Carolina First. They had asked to look at everything that I was involved in. That property was acquired to develop a number of outparcels and

there was interest to take that property -- the loan was $3,000,000 -- and allow us to develop the structure and allow us to sell outpaicels, which we were very successful in doing. We took a $3,000,000 loan and reduced it through our successors in putting the infrastructure in at great cost, improving the property and selling three outparcels and had repaid almost $2,000,000 of that note, paying fees and interest all along the way. That I would say was very beneficial during a very difficult economic time, we continued to feed it and improve the property.
Q. And was it you that requested the loan from Carolina First for that particular project?
A. They asked if they could look at everything that I was doing.
Q. Did you go to them and request a loan?
A. I went to them and showed them -- you said you wanted to look at everything I was doing, and I have enjoyed the working relationship and if you are interested in this I would appreciate your terms.
Q. And that would have been with whom?
A. Larry Scott.
Q. He was the banker here in Columbia?
A. Yes.
Q. Now, I understand there's still some property that remains to be sold with them?

A. Yes.
Q. And what is the status of that property?
A. There is activity on it.
Q. What activity is that?
A. My partner there indicates that there are interested parties that want to develop a hotel on that.
Q. What is the status of those discussions?
A. I believe negotiations are going on and the buyer is in the process of reviewing how they can raise the capital and obtaining a franchise for that development.
Q. What is the likelihood of that transaction occurring in your mind?
A. Again, my partner is fairly confident. We have had a number of inquiries over the years but again the environment has been such it's been difficult for purchasers to acquire funding, so that being said he believes that the Wilmington market is improving and the ability to raise the funds is improving and he is hopeful that this transaction could be consummated in the months ahead.
Q. Would the price of that transaction be enough to pay the loan in full or not?
A. I believe it would be.
Q. What's the current value of that property?
A. Again, I'm not sure what it would be but I am sure it would be enough to pay the loan which I think is about a million

two. And the uniqueness of that property is that it's got the limited water taps, sewer taps and it's developed.
Q. I assume that property is listed for sale?
A. Yes.
Q. How long has it been listed for sale?
A. I can't tell you but it's been listed with various brokers in the last several years.
Q. Are the taxes current on this property?
A. Probably not.
Q. Were you represented by counsel for the closing of that loan transaction?
A. Yes.
Q. By Mr. Jowers?
A. Yes.
Q. Atrium at Middle Sound Landings, LLC, the owners of that are you and Mr. McFarland; is that correct?
A. Yes.
Q. Each owning 50 percent?
A. Yes.
Q. How did you and Mr. McFarland come to be involved in the project?
A. He has a long-time knowledge of the Wilmington market. I have known Jim for years before he moved to Wilmington. He has been successful in acquiring properties and finding development opportunities. And I might add he has proven

himself to be adept that during the times before the financing debacle happened we were able to sell three pads and repay almost $20,000,000.
Q. Who manages Atrium at Middle Sound?
A. I guess we're both managers of it but he's on the ground.
Q. Who pays the bills?
A. I paid them, fed the property for years.
Q. And that's done out of your office in South Carolina?
A. He paid a lot of the development costs himself out of his own accounts. I paid some of the development costs, so it was kind of a combination of both of us.
Q. Who made payments on the property?
A. I did.
Q. How often do you discuss the developments with Mr. McFarland?
A. Monthly, every six weeks.
Q. Usually on the phone?
A. Yes.
Q. Now, the Middle Sound case, are you contesting liability to TD Bank under the loan and guaranty in that case?
A. Yes.
Q. Is that the same grounds of different grounds from what we talked about with Newberry Atriums?
A. Similar.

Q. What's different?
A. The nature of the market has been very difficult for the last several years. It's coming back. We need time in order to try and consummate a sale and/or refinance, and the damage that TD will do will be difficult to find new financing for refinancing of the land or prospective tenant.
Q. And the damages, are you again referring to the suit on the loan and guaranty?
A. Yes.
Q. Now, you would agree with me that it would be more difficult to sell the property if the pending foreclosure was filed against it; would it not?
A. I think there would be difficulty in selling the land until the right person shows up foreclosure or not for the loan against the property, but the value is every bit -- I believe that the value of the property would repay the loan on the sale of the property.
Q. Other than TD's election to sue on the guaranty is there any other allegation or defense that you're raising in that case?
A. It's the same defense and the same thinking that having placed my trust in the people at Carolina First that had worked with me over the years that they would approach creating more harm than solutions the way they are approaching this.
Q. And that special relationship you're referring to in

connection with Atrium at Middle Sound as well as Newberry Atrium that would have developed when Carolina First was the lender as opposed to TD?

A. It would be my expectation when somebody takes over the place of the lender that they would continue to honor that relationship that brought them that business.

Q. Thank you. I am asking when did the relationship begin?

A. Under Carolina First.

Q. And the people involved that you indicated created this special relationship, those were Carolina First employees?

A. They were.

Q. What were the names of those people?

A. My goodness, I have dealt with Larry Scott for many years. Rebecca Robuck (ph), Justin Strickland. But Larry and Rebecca were the primary on-the-ground people, but absolutely sought after by the other people that I have dealt with.

Q. Same question as with the Newberry Atrium the special relationship, that's not based on any particular thing in the loan document, is it?

A. It's based on the history and actions that we have worked over the last 12 years.

Q. And not on anything in the loan document?

A. If it's there I am sure you would have found it for me.

Q. Again in your Answer in that case you allege you would not have executed the Guaranty without the special relationship?

A. That's correct based on the knowledge that they had been flexible and reasonable to work through problems.

Q. And just like Newberry Atrium the guaranty wasn't a condition of the loan commitment; was it not?

A. It was.

Q. And any other lender would have required a guaranty; would they not?

A. I would think so.

Q. Again your defense about the election to sue on the guaranty and not bringing an action of foreclosure that's based solely on the decision to file suit on the Guaranty; is that correct?

A. Yes. I think that the value, if we had time to sell the report and create the opportunity to turn the land into cash or to develop it on behalf of a user would certainly protect TD's position.

Q. Is there anything else that we haven't talked about that is the basis of your defenses in the Middle Sound case?

A. I think certainly the value that I have enjoyed in working with Carolina First has created a lot of income for Carolina First, has certainly allowed me to create income to invest in other real estate, which unfortunately has not gone as well as everybody had anticipated during the meltdown, but

nobody has gotten hurt. I can, absolutely if given the time, can solve these problems.

Q. All right. Exhibit 11 through 15. I believe your lawyer indicated that you would stipulate that 11 through 15 are accurate copies of these loan documents containing your signature. Can you look through those and let me know if you agree with that?

A. Yes.

Q. Those are true and correct copies?

A. Yes.

Q. You signed those documents?

A. Yes.

Q. Do you dispute that the Atrium at Middle Sound note matured under its terms?

A. No.

Q. Do you dispute that TD Bank has demanded the balance due from you and the entity?

A. Yes.

Q. You do dispute that?

A. No, I don't.

Q. Do you dispute that Atrium at Middle Sound and you and Mr. McFarland have failed to pay the balance due under the terms of the Note and Guaranty?

A. We would pay it if we had the liquidity, we do not have the liquidity, we're looking to the collateral that we

pledged to this to repay the notes.

Q. Do you dispute that Atrium at Middle Sound is indebted to TD Bank for the note?

A. I don't dispute it.

Q. Do you dispute you're personally indebted to TD in return of the guaranty?

A. I don't dispute it but I do request a little more time and a reasonable flexibility to turn these assets into repayment sources.

Q. All right. You've been handed Exhibit 16. This is a Subpoena that I sent to you in connection with the bankruptcy adversary proceeding. Have you seen that before?

A. Yes.

Q. Also we'll give you Exhibit 19 which is your responses to the Subpoena which I received yesterday. Do you have 19?

A. Yes.

Q. The first thing I had asked for was time records and other documents showing the amount of time you spent with Newberry Atrium and your response indicates that you do not keep any time records for that; is that correct?

A. Yes.

Q. Do you have an estimate of how much time you spent on Newberry Atrium versus the other matters?

A. Depending on the month and the process it could be full-time to part-time.

Q. Do you know if you spent 20 hours a week on it or more than that or how does it break down?

A. Depending on the week and the month and the situation it could be 40 to 60 hours a week, it could be nine to 10 to 20 hours a week.

Q. The next thing I subpoenaed was related to the TD Bank N.A. non-privileged documents related to TD Bank N.A.'s State Court actions against you; do you see that?

A. Yes.

Q. I believe you testified earlier that you do have files relating to these loans?

A. I have the documents that you showed to me in my files.

Q. And you have other documents in your files or do you know?

A. I have the leases which I have turned over to the bank. I have the basic plans, I have the designs, I have information that pertains to the asset, yes.

Q. And I believe you testified earlier that you have not produced those to your lawyer; is that right?

A. They produced it to me.

Q. Have you gone through those documents and given them to your lawyer?

A. I have gone through the documents and I have given it to my lawyer.

Q. Okay. Your response indicates all documents between David Jacobs and his counsel are privileged but you testified earlier that you have documents related to these loans. All I want are copies of those documents, so that's what I'm trying to figure out.

A. I have given him documents that were requested which were leases, appraisals, plans and the bank has all that.

Q. You can't just respond in the litigation context -- in my mind you can't just respond and say the bank already has everything?

A. I've given it twice or three times.

Q. Well nothing was produced in response to my Subpoena so that's what I am trying to figure out.

A. Because I've delivered it previously.

MR. JOWERS: Let me make this statement for the record. The Subpoena says all documents relating to the State Court action. The documents he has in his files has nothing to do with the lawsuit. Those were just pre-construction or construction documents and bank documents that the bank prepared. There's nothing else that are relevant to this lawsuit that he has other than what we've produced.

MR. BEDENBAUGH: Without seeing them I don't know what they are.

MR. JOWERS: That's not the question. The question was relating to that so the Subpoena called for an opinion on our part and that is our opinion. If you want to be more specific with subpoenas then you need to be more specific.

BY MR. BEDENBAUGH:

Q. The next question asks for documents related to the reorganization efforts of the Newberry Atrium. Your response says all documents concerning the reorganization are with the legal counsel and are privileged.

Now, you testified earlier you had in fact had some documents of Newberry Hospital related to a refinancing, with the possibility of leasing additional space?

A. Yes, and I have provided that to your appraiser.

Q. Are there other documents that I haven't gotten that relates to the reorganization?

A. No, just the correspondence that I have had with the appraiser which I sent on to him, the leases, the documents they requested. I have sent everything they requested to them so it's been delivered to them.

Q. Looking back at 19 the next document is a response to another subpoena; do you see that?

A. Yes.

Q. Have you seen that before, the Responses to the Subpoena?

A. I am looking at it now. What is it you want me to answer?

Q. Have you seen the document before?

A. I don't believe I have but we have discussed these questions. I don't know that I've seen all this stuff that I provided, all that stuff that's attached to it.

Q. In paragraph 1 it indicates you do not have any documents that would show your ability to fund a plan of reorganization filed March 22nd, 2013 for Newberry Atrium Professional Center, LLC; is that correct?

A. That is correct. I have no documents. I have a business associate that has lent me money before and I have lent him money before. He has indicated he has interest in assisting me with funding the land.

Q. How much is he willing to lend to you?

A. My plan requires that I come up with that $450,000 over the next three years.

Q. Is that the gentleman in North Carolina?

A. Yes.

Q. What's his name, Howard?

A. Yes.

Q. What's his first name?

A. Rick.

Q. You don't have any documentation for that?

A. No.

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Q. Next sentence says he does not have any commitments of definitive source of funds for the plan of reorganization filed on March 22, 2013 for Newberry Atrium Professional center, LLC; is that correct?

A. I don't have anything in writing at this point but the fact that I have found a hundred and some-odd thousand dollars to keep the doors open for the last several years indicates that I have the ability to raise funds. And I do believe that the opportunity to continue working with the hospital provides another alternative solution.

Q. The third paragraph has documents showing the contributions to the debtor?

A. Yes.

Q. Do you recall what those contributions were used for?

A. To pay taxes, operating expenses.

Q. How much are the property taxes a year?

A. They were about 220 some-odd thousand dollars. I appealed it and it was reduced it to about $107,000.

Q. Why did Newberry Atrium file bankruptcy?

A. In an attempt to protect me as a guarantor to allow for the time to work through the reorganization which I anticipate will take three to five years, to continue to release, recruit the tenants and allow the property to be financed out and protect the interests of the tenants, the hospital, the community and allow me to refinance it out, and/or

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sell it.

Q. When you filed bankruptcy I believe the debtor had approximately $50,000 in his checking account; is that correct?

A. Yes.

Q. And the total trade claims as I calculate under your schedules to your maintenance service and various service providers were about $9,500; does that sound right?

A. No, it's probably closer to 20.

Q. But in any event you had the ability to pay those claims at the time you filed your bankruptcy; did you not?

A. I was trying to maintain a reserve and I was cautions about using those funds.

Q. But you certainly could pay it in the ordinary course, couldn't you?

A. I could other than the other courses that were going on.

Q. Well, at the time you weren't making payments to TD Bank, right?

A. For several months I was not because I knew the note was not -- they called the loan.

Q. What I an trying to figure out is you say certain other things going on but what prevented you from just paying those creditors?

A. I was applying it towards taxes and other important utilities such as electricity, sewer and water, and maintain

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that cash collateral which I was advised to do.

Q. What do you do on behalf of the debtor? What do you do for the debtor?

A. I am the manager, deal with the property managers, pay the bills, deal with the opportunity to design spaces, interface with the potential tenants that the hospitals direct me to, deal with the tenant issues, deal with the hospital and the ongoing operations and maintenance of the property.

Q. And the actual leasing efforts, that's led by the hospital itself?

A. It's been a combination of both. I have brought tenants to the table that have had offers and to participate and for various reasons the hospital declined. I have advised the other hospitals, Self Memorial Hospital on designs for their expansions. I have worked with them on operating the building, their space and dealing with their medical staff.

Q. And the debtor also utilizes brokers in connection with the leasing efforts; is that correct?

A. Yes.

Q. The hospital has the right to repurchase the debtor's property at some point; is that right?

A. It has a right of purchase.

Q. You have alleged that the State Court suit impaired Newberry Atrium's ability to reorganization; is that correct?

A. Yes.

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Q. What is the basis of that allegation?

A. Without the ability to refinance it with a judgement against it prevents the building from being financed out to repay TD.

Q. The impairment is in your opinion that the judgement would impeded the ability to get refinanced?

A. Yes.

Q. Is there anything else?

A. The funds that I anticipate raising to pay the loan would not be available to carry it for the next several years while we go through the releasing of the property.

Q. And why would the judgement have that impact, that latter impact that you just mentioned?

A. I wouldn't have the ability to raise the money if I had a judgement against me.

Q. You could raise the money from Mr. Howard?

A. Yes.

Q. Did Mr. Howard indicate that he would lend you the money if you get a judgement against you?

A. He's pretty much indicated that he wants his money safe.

Q. Has he indicated he would not loan you the money --

A. He hasn't been specific but I understand what he's telling me.

Q. Do you know if a judgement in the State Court suit

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will be entered in the next two or three months?
A. I really don't know what that process would involve but I know it would be immanent.
Q. If the judgement is entered against you do you have any idea of when you would be forced to make some sort of payment or that TD would collect on that judgement?
A. I don't know.
Q. Do you have an asset, available asset that you believe TD would be able to reach as a result of that judgement?
A. No, I don't know what TD's capabilities are.
Q. You can't name an asset that would be unavailable to you because of a judgement?
A. No, but any assets that I have that I was able to turn into cash would be impaired to repay anybody's debts back.
Q. Have you made any post petition advances to the debtor?
A. No.
Q. What is the balance of the cash collateral account?
A. I am not sure. We file reports regularly but I can't tell you the exact amount.
Q. The approximate $450,000 that you're proposing to fund the plan of reorganization would that come exclusively from Mr. Howard or some other source?
A. At this time that's where I anticipate it would be coming from. Over the next several years I do anticipate some

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of these assess that I have minority positions in should be able to be turned into cash and that will help me meet these obligations.
Q. Have you attempted to locate post confirmation funding from a traditional lender?
A. No.
Q. Has the debtor made that attempt?
A. No.
Q. What's the reason for the proposed planned injunction against TD Bank?
A. Well, it protects me as a guarantor allowing me to operate to raise money to refinance the property. There would a personal guaranty required under any refinancing and that will be my responsibility.
Q. If TD had a judgement against you the judgement would be paid down from the refinancing as well; would it not?
A. That would be my hope, but it certainly doesn't bode well for getting a new loan for a property coming out of bankruptcy.
Q. Have you previously made advances to the debtor without the benefit of an injunction?
A. No, but I was anticipating getting it back as the property continued to stabilize and we were able to refinance it back out again.
Q. So you did previously make advances without an

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injunction?
A. Without an injunction but we weren't facing the loan calling and the threat to get a judgement against me.
Q. Is it possible if TD got a judgement against you that you would continue to fund the short call and keep the debtor alive?
A. Anything is possible.
Q. If TD got a judgement against you would you just allow Newberry Atrium to fail?
A. I don't know.
Q. It would be in your interest in that case to continue to try to refinance or sell the property; would it not?
A. I am not sure how I would respond if I have no ability to raise money or have the ability to refinance.
Q. Now, the scope of the injunction in the plan in connection with prohibiting TD fron suing you, does that apply only to the Newberry Atrium loan or to other loans with TD?
A. A judgement is detrimental anywhere it comes from.
Q. I just didn't understand the plan. Is it the debtors intent to extend --
A. My main focus is on preserving the Newberry Atrium because of the many moving parts that require refinancing. If you are asking me about the Middle Sound property we may have an opportunity to do a build suit for a tenant which would require us being able to get a loan and that remaining property could be

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a very good parcel for a couple of users that my partner is working with.
Q. Now, the injunction and plan, would that apply to TD only or to other lenders?
A. The other lenders I am currently working with have all been reasonable and flexible and I have a fair assurance, nothing in writing, that they do not want the projects to fail and would jeopardize my chances to continue releasing and selling the assets that I have.
Q. So no, it would not apply to those loans?
A. I haven't gotten to that point at this moment. I haven't gotten to the point where people are threatening to call the loan and put a judgement against me, if they have proven over the years to be flexible and reasonable.
Q. The terms you proposed in the plan at five and a half percent interest rate with a five year am and five year maturity, what's the basis of those terms?
A. The contract rate that is currently in place.
Q. For maturity?
A. Yes.
Q. Was that based on the market at all?
A. It was based on the contract rate that the loans had been was at maturity.
Q. Of course the market was different when that loan was made, was it not?

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A. The whole world was different, that's correct.
Q. Have you -- other than what you talked about earlier with the broker in New York if this transaction with the hospital goes down, have you done anything else to identify a post-confirmation lender?
A. I have inquired but have not had anyone that's willing to lend in a condition today as it stands today until this bankruptcy is flushed out. And the condition for the refinance would be that this bankruptcy be dropped, be dismissed.
Q. Now, I believe the debtor's plan assumes that there would be some additional leasing in years three through five; is that correct?
A. Yes.
Q. Why does the debtor believe that those years will be different from the past five or six years?
A. One is that the new CEO, interim CEO has now refocused and dealt with the settling in in the community. He's been there a year and a half, two years so the demand for health care in Newberry will continue to grow because of the expansion of reimbursement for Newberry County would allow them to recruit additional physicians because the Affordable Healthcare Act that will increase the demand to bring in all the Medicare and Medicaid patients that are underserved in the area, and as a result of that the recruitment will accelerate come '14 and '15.
Q. So it's your opinion that reimbursements will go up

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under the Affordable Healthcare Act?
A. Yes, and the demand will increase. Newberry is a very poor rural community and much of the population is underserved. The Affordable Healthcare Act will increase the coverage, increase the demand and increase the ability to recruit new physicians.
Q. Now, of course you're aware that South Carolina thus far has rejected the Medicaid expansion that's part of the Affordable Healthcare Act; are you not?
A. I don't know if it's been finalized. I think the politics right now are driving that. I can't tell you I know how the politicians will resolve this but the indications I am getting from the healthcare community is that there will be some acceptance, it's more affordable for the state to participate in the national program.
Q. By increased reimbursement does that assume that South Carolina --
A. Not South Carolina, Newberry County. I can't speak to the State of South Carolina. I can speak to Newberry County which has been acknowledged to get a higher reimbursement than many of the other rural counties in the state.
Q. Why is that?
A. I can't speak to the reasons, I am just aware that that has been the indications from the hospitals.
Q. From Newberry Hospital?

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A. Well, from other folks. There's been articles in the paper that speak to that, but the hospital, Newberry Hospital is anticipating an increase reimbursement. Self Memorial, that is also a participant in this building acknowledges that the Newberry County area will get a higher reimbursement than Greenwood which gives them more incentive to continue to expand their operations in Newberry.
Q. Look at Exhibit 17. Are those the projections for your plan?
A. Yes.
Q. Now, you've got the rent increasing it looks like in June of 2014?
A. Yes.
Q. Is that just an escalator clause in the lease?
A. Yes.
Q. Then you've got some up-fitting costs, February of 2014 to April 2014; do you see that $13,333?
A. Yes.
Q. Now, would that only occur if a new tenant is identified or would that be done for anyone?
A. If a new tenant is identified.
Q. So that assumes a new tenant would be coming on line?
A. Yes.
Q. Now, you've got expense increases in here of assuming a one and a half percent increase in your two and three. What

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was the basis for that assumption?
A. The rate of inflation.
Q. Now, the expenses identified on here, are any of those passed through to the tenant?
A. They are.
Q. Is that included in the rent received so that it nets out or how does that work?
A. There is an operating expense stop at 525. Anything that exceeds that is passed on the tenant.
Q. Explain that to me again in layman's terms.
A. The lease includes $5.25 of operating expenses. If it exceeds that, which it has, the tenants are billed pro-rata on their occupancy and are obligated to pay that additional money with additional rent.
Q. That would be included in the rent line item income section?
A. Yes.
Q. And so have you done that in this calculation or does that assume that it's below the rent?
A. If you'll look at the legend below it explains specifically what we're doing there.
Q. So a number -- I guess I am trying to figure out the rent figure stays constant throughout, it just assumes a constant amount?
A. There are rent escalations in addition to rent

passthroughs and they occur every three years.
Q. One percent a year?
A. Every third year.
Q. But the passthrough expenses, what I am trying to figure out is is that included in the rent figure that's shown for example August 13, $58,093?
A. It says in the notes here passthrough expense income included in the rental income is what it says.
Q. So you assumed for this that those expenses --
A. Are added to the rental income.
Q. The amount of your contribution is shown then on the post-petition loan line item?
A. Yes.
Q. So roughly?
A. A quarter of a million dollars.
Q. $198,000 in the first year cumulative to get a quarter of a million and then $172,000 and $114,000 in the third year?
A. Yes.
Q. Certainly it's possible your contribution could be less than that?
A. I would hope that it would be more; that means more up-fits, more tenants. This is a realistic approach.

MR. BEDENBAUGH: I have nothing further.

MR. MARKHAM: No questions.
MR. JORDAN: No questions.
MR. JOWERS: No questions.

(Thereupon the proceedings were concluded at 1:30 p.m.)

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CERTIFICATE OF REPORTER

I, Mary K. McCormick, Court Reporter and Notary Public for the State of South Carolina, do hereby certify:

That the foregoing proceeding was taken before me at the date and time and location as stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing proceeding as typed is a true, accurate and complete record of the testimony of the deponent and all of the objections made at the time of the proceeding to the best of my ability.

I further certify that I am not of counsel or kin to any of the parties to this cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 29th day of April, 2013, at Aiken County, South Carolina.

Mary K. McCormick (Katy McCormick)
Notary Public
State of South Carolina at Large
My Commission Expires:
June 30, 2015

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
JAMES A. MCFARLAND JR.
103 FOREST HILLS DRIVE
WILMINGTON, NC 28403

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [redacted] dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of those debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you,

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

JAMES A. MCFARLAND JR.
South Carolina Guaranty
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other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. ADDITIONAL TERMS.

21. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR: _____ (Seal)
JAMES A. MCFARLAND JR.
Individually

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
DAVID A. JACOBS
115 ATRIUM WAY, SUITE 204
COLUMBIA, SC 29223

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [redacted], dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you.

EXHIBIT
F

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of those other persons.) Any Guarantor who is not an insider makes those waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:

_____ (Seal)
DAVID A. JACOBS
Individually

Wolters Kluwer Financial Services ©1998, 2011 Bankers Systems™

UNCONDITIONAL GUARANTY

February 20, 2007

WHEREAS, NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC (the "Borrower"), has borrowed or shall borrow the sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND DOLLARS ($7,141,000.00) from CAROLINA FIRST BANK (the "Lender") pursuant to a promissory note from Borrower to Lender dated February 20, 2007 (the "Note"); and

WHEREAS, Lender is unwilling to make the loan to Borrower evidenced by the Note unless it receives an unconditional and continuing joint and several guaranty from DAVID H. JACOBS (hereinafter termed "Guarantor"), covering all "Obligations of Borrower" as hereinafter defined;

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and in order to induce Lender to lend money to Borrower as evidenced by the Note, Guarantor (jointly and severally, if more than one) hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due, whether by acceleration or otherwise, under the Note and all lien documents securing the Note, and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower").

This Guaranty is in addition to and is not intended to supersede any prior existing Guaranty of Guarantor.

Further, whether or not suit is brought by Lender to acquire possession of collateral or to enforce collection of any unpaid balance hereunder, Guarantor expressly hereby agrees to pay all legal expenses and the reasonable attorneys' fees (including those relative to appellate proceedings, if any) incurred by Lender with respect to this Guaranty.

In order to implement the foregoing and as additional inducements to Lender, Guarantor further covenants and agrees as follows:

1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or to require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor of Borrower or any other person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the generality of the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

Guarantor's Initials: DJ

EXHIBIT

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recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.

2. TIME IS OF THE ESSENCE HEREOF.

3. This Guaranty Agreement constitutes the entire agreement between the parties, and no waivers or modifications shall be valid unless they are reduced to writing, duly executed by the party to be charged thereby, and expressly approved in writing by an officer of Lender actually involved in the transactions being guaranteed hereby.

4. If any process is issued or ordered to be served upon Lender, Borrower or Guarantor, seeking to seize Borrower's and/or Guarantor's rights and/or interests in any bank account maintained with Lender, the balance in any such account shall immediately be deemed to have been and shall be set-off against any and all Obligations of Borrower and/or all obligations and liabilities of Guarantor hereunder, as of the time of the issuance of any such writ or process, whether or not Borrower, Guarantor and/or Lender shall then have been served therewith.

5. All moneys available to and/or received by Lender for application toward payment of (or reduction of) the Obligations of Borrower may be applied by Lender to such Obligations of Borrower in such manner, and apportioned in such amounts and at such times, as Lender, in its sole discretion, may deem suitable or desirable.

6. As security for any and all liabilities of Guarantor hereunder, now existing or hereafter arising, Guarantor hereby grants Lender the right to retain a security interest in any and all moneys or other property (i.e., goods and merchandise, as well as all documents relative thereto; also, funds, securities, choses in action and any and all other forms of property, whether real, personal or mixed and any right, title or interest of Guarantor therein or thereto) and/or the proceeds thereof, which have been or may hereafter be deposited or left with Lender (or with any agent or other third party acting on Lender's behalf) by or for the account or credit of Guarantor, including without limitation any property in which Guarantor may have any interest. Further, where any money is due Lender hereunder, Lender is herewith authorized to exercise its right of set-off or "bank lien" as to any moneys deposited in demand, checking, time, savings, or other accounts of any nature maintained in and with it by any of the undersigned, without advance notice. Said right of set-off shall also be applicable and exercised by Lender, in its sole discretion, where Lender is indebted to any Guarantor by reason of any certificate of deposit, bond, note or otherwise.

7. Guarantor agrees that Guarantor's liability hereunder shall not be diminished by any failure on the part of Lender to perfect (by filing, recording or otherwise) any security interest it may have in any property securing this Unconditional Guaranty Agreement and/or the Obligations of Borrower secured hereby and hereunder.

8. Guarantor further hereby consents and agrees that Lender may at any time, or from time to time, in its sole discretion: (i) extend or change the time of payment, and/or the manner, place or terms of payment of any or all of the Obligations of Borrower; (ii) exchange, release and/or surrender all or any of any collateral security, or any part thereof, by whomsoever

Guarantor's Initials: _____

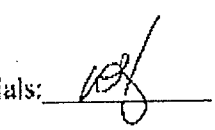
deposited, which is or may hereafter be held by it in connection with all or any of the Obligations of Borrower and/or any liabilities or obligations of Guarantor hereunder; (iii) release any other guarantor, endorser or co-obligor of the Obligations of Borrower with or without consideration and without notice to and further consent from any Guarantor and such release shall not in any way affect the liability of the undersigned; (iv) sell or otherwise dispose of and/or purchase all or any of any such collateral at public or private sale, and after deducting all costs and expenses of every kind for collection, preparation for sale, sale or delivery, the net proceeds of any such sale or other disposition may be applied by Lender upon all or any of the Obligations of Borrower; (v) settle or compromise with Borrower, any insurance carrier and/or any other person liable thereon, any and all of the Obligations of Borrower (including, but not limited to any insurance applicable to the Obligations of Borrower), and/or subordinate the payment of all or any part of same, to the payment of any other debts or claims, which may at any time be due or owing to Lender and/or any other person; or (vi) alter, extend, change, modify, release, waive or cancel any covenant, agreement, condition, obligation or provision contained in any or all loan documents; all in such manner and upon such terms as Lender may deem proper and/or desirable, and without notice to or further assent from Guarantor, it being agreed that Guarantor shall be and remain bound upon this Unconditional Guaranty Agreement, irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, foreclosure, sale or other disposition, application, renewal or extension and notwithstanding also that the Obligations of Borrower may at any time exceed the aggregate principal sum of the Note. Further, this Guaranty shall not be construed to impose any obligation on Lender to extend or continue to extend credit or otherwise to deal with Borrower at any time.

9. In consideration of Lender's extension of credit to Borrower, Guarantor hereby agrees:

(a) To subordinate, and by this Agreement does subordinate, all debts now or hereafter owed by Borrower to Guarantor to any and all debts of Borrower to Lender now or hereafter existing while this Agreement is in effect.

(b) Guarantor further agrees that it will not assert any right to which it may be or become entitled, whether by subrogation, contribution or otherwise against Borrower or Guarantor or any of their respective properties, by reason of the performance of the undersigned of his obligations under this Guaranty, except after payment in full of all amounts (including costs and expenses) which may become payable in respect of or under the Obligations of Borrower.

(c) Guarantor hereby indemnifies and holds Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorneys', consultants' or experts' fees and expenses), of every kind and nature, suffered by or asserted against Lender under any law, regulation or ordinance, local, state or federal concerning any hazardous materials, substances, wastes or other environmentally regulated substances now or hereafter located on the property of Borrower or Guarantor.

Guarantor's Initials: 

10. This Unconditional Guaranty Agreement shall be binding upon Guarantor, and the heirs, executors, administrators, successors and assigns of Guarantor; and it shall inure to the benefit of, and be enforceable by, Lender and its successors, transferees and assigns. It further shall be deemed to have been made under and shall be governed by the Laws of the State of South Carolina in all respects, including matters of construction, validity and performance.

11. No waiver by Lender of any default by Guarantor or Borrower shall operate as a waiver of any other default or of the same default on a future occasion. If more than one person has signed this Guaranty Agreement, such parties are jointly and severally obligated hereunder. The term "Guarantor," as used herein, shall (if signed by more than one person) mean the "Guarantors and each of them." The liability of Guarantor hereunder shall also be joint and several with that of any person or entity executing a separate guaranty in favor of Lender. If any Guarantor shall be a partnership, the obligations, liabilities and agreements on the part of such Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals composing the partnership. Further, the term "Guarantor" shall include in such event any altered or successor partnerships, it being also understood that the predecessor partnership and its partners shall not thereby be released from any obligations or liabilities hereunder. Lender, or any other holder hereof, may correct patent errors in this Agreement.

12. Guarantor hereby waives: (i) notice of acceptance of this Guaranty; (ii) notice of extensions, continuations or modifications of the Note; (iii) notice of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Lender and Borrower; (iv) presentment and/or demand for payment of any of the Obligations of Borrower and/or for payment under this Guaranty; (v) protest or notice of dishonor or default to Guarantor or to any other person with respect to any of the Obligations of Borrower; (vi) the benefit of any homestead or other exemptions; and (vii) to the extent such waiver may be enforceable at the time of foreclosure, any right to have any mortgaged property securing the Obligations of Borrower appraised after foreclosure for the purpose of reducing a deficiency judgment against Borrower, Guarantor or any other guarantor or other party.

13. Anything contained herein to the contrary notwithstanding, if for any reason the effective rate of interest on any of the Obligations of Borrower should exceed the maximum lawful rate, the effective rate of such obligation shall be deemed reduced to and shall be such maximum lawful rate, and any sums of interest which have been collected in excess of such maximum lawful rate shall be applied as a credit against the unpaid principal balance due.

14. In the event any provision of this instrument should be left blank or incomplete, Guarantor hereby authorizes and empowers Lender to supply and complete the necessary information to complete or fill in the blank provision.

15. EVENTS OF DEFAULT. Guarantor shall be in default under this Guaranty Agreement upon the happening of any of the following events, circumstances or conditions, namely:

(a) Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default by Borrower in the payment of the Obligations of Borrower; or

Guarantor's Initials: _____

(b) Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with this Guaranty Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or furnished; or

(c) Death (unless Lender, in its sole discretion, accepts a substitute guarantor), dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any State or Federal Bankruptcy or Insolvency Laws by or against any Guarantor; or

(d) Material adverse change in the financial position of Guarantor.

16. REMEDIES UPON DEFAULT. Upon the occurrence of any of the foregoing events, circumstances, or conditions of default, all of the obligations evidenced herein or guaranteed hereby shall immediately be due and payable without notice. Further, Lender shall then have all of the rights and remedies granted hereunder, and all of the rights and remedies of a secured party and/or holder-in-due-course under the South Carolina Uniform Commercial Code and/or under other Laws of South Carolina.

17. Any provision hereof to the contrary notwithstanding, to the extent Guarantor is determined to be an "insider" as such term is used in the United States Bankruptcy Code or cases thereunder, Guarantor waives any right (whether established by contract or statute or otherwise available at law or in equity) to reimbursement, indemnity, subrogation, contribution or other such claim against Lender, Borrower or any other guarantor or any other person primarily or secondarily liable for any Obligations of Borrower with respect to any disbursement or payment made by Guarantor under or in connection with this Guaranty or otherwise.

18. In the event any payment made by Guarantor to Lender is determined to be a preferential transfer under any bankruptcy or similar law and Lender is required to return such payment to a trustee in bankruptcy, to a receiver, to Guarantor, or to another person or entity, Guarantor's obligations under this Guaranty shall not be discharged with respect to such preferential payment notwithstanding any satisfaction of the Note guaranteed hereby or the return of this Guaranty. Furthermore, Guarantor shall be jointly and severally liable to Lender for the amount of any such preferential payment and any interest expenses or other expenses, including but not limited to attorneys' fees, incurred by Lender related in any way to such preferential payment, and Guarantor agrees to reinstate any collateral given to Lender as security for the obligations under this Guaranty notwithstanding the fact that such collateral may have been released or returned by Lender.

19. Guarantor acknowledges that Guarantor has previously submitted financial statements to Lender for the purpose of inducing Lender to extend credit to Borrower. Guarantor agrees to update such financial statements from time to time as requested by Lender. Guarantor further agrees to immediately notify Lender in writing of any material adverse change in the financial position of Guarantor. Guarantor covenants and warrants that such financial statements, as updated or supplemented from time to time by Guarantor, shall remain a true and accurate statement of Guarantor's financial position for so long as the Obligations of Borrower

Guarantor's Initials: _____

remain outstanding, and Lender shall be entitled to continue to rely on the truth and accuracy of such statements. Guarantor agrees not to transfer assets for less than fair value or take any other action which could reasonably be expected to reduce the net worth of Guarantor or diminish Guarantor's ability to perform Guarantor's obligations hereunder.

20. Guarantor's liability hereunder shall not be diminished or reduced by (i) any payment of any of the Obligations of Borrower by any other guarantor, endorser, co-obligor or any other person liable or to become liable for the payment of the Obligations of Borrower, or (ii) any reduction of the Obligations of Borrower by realization of any collateral or security or by any other source.

21. Subject to the arbitration provisions set forth below, Guarantor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Guarantor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to Guarantor at Guarantor's address set forth below or any new address of which Lender has been notified by Guarantor in writing.

22. ARBITRATION. UPON DEMAND OF LENDER OR GUARANTOR, WHETHER MADE BEFORE OR AFTER INSTITUTION OF ANY JUDICIAL PROCEEDING, ANY DISPUTE, CLAIM OR CONTROVERSY ("DISPUTES") ARISING OUT OF, CONNECTED WITH OR RELATING TO THIS GUARANTY OR ANY OTHER LOAN DOCUMENTS SHALL BE RESOLVED BY BINDING ARBITRATION AS PROVIDED HEREIN. Institution of a judicial proceeding by a party does not waive the right of that party to demand arbitration hereunder. Disputes may include, without limitation, tort claims, counterclaims, disputes as to whether a matter is subject to arbitration, claims brought as class actions, claims arising from loan documents executed in the future, or claims arising out of or connected with the transaction reflected by this document.

Pursuant to the Federal Arbitration Act or, if it is deemed not to apply, the South Carolina Uniform Arbitration Act, arbitration shall be conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA"). All arbitration hearings shall be conducted in Columbia, South Carolina. All applicable statutes of limitation shall apply to a Dispute. A judgment upon the award may be entered in any court having jurisdiction.

Notwithstanding the preceding binding arbitration provisions, Lender and Guarantor preserve, without diminution, certain remedies that either party may employ or exercise freely, independently or in connection with an arbitration proceeding or after an arbitration action is brought. Lender and Guarantor shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable: (i) all rights to foreclose against any real or personal property or other security by exercising a power of sale granted under loan documents or under applicable law or by judicial foreclosure and sale, including a proceeding to confirm the sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-off, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary

Guarantor's Initials: _____

bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Preservation of these remedies does not limit the power of an arbitrator to grant similar remedies that may be requested by a party in a Dispute.

Guarantor and Lender shall not have a remedy of punitive or exemplary damages against the other in any Dispute and hereby waive any right or claim to punitive or exemplary damages they have now or which may arise in the future in connection with any Dispute whether the Dispute is resolved by arbitration or judicially.

23. 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.

WITNESS the Hand and Seal of the undersigned, this Unconditional Guaranty being executed and delivered on the date first above written. Each Guarantor has adopted as his seal the word "SEAL" appearing beside his signature.

_____(SEAL)
DAVID H. JACOBS

Address: 115 Atrium Way #204
Columbia S.C. 29223

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF NEWBERRY)

On February 20 2007 before me personally came DAVID H. JACOBS to me known to be the person described in and who executed the foregoing Guaranty and acknowledged that (s)he/they executed the same.

_____
Notary Public for South Carolina
My Commission Expires: 2/1/2011

(SEAL)

GERALD D. JOWERS
Attorney at Law
1802 Sumter Street
Columbia, South Carolina 29201
Telephone (803) 765-9620
Facsimile (803) 765-0085

July 29, 2013

VIA ELECTRONIC MAIL AND US MAIL

John T. Moore, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

Re: TD Bank, NA v. David H. Jacobs

Dear John:

Please consider the following individuals as possible witnesses and the following documents may be introduced. This is to supplement to our answers to Interrogatories:

David W. Hilburn, PO Box 1605, Columbia, SC 29202. Mr. Hilburn will testify about the terms and circumstances surrounding the purchase by Cypress Cove Properties, LLC from TD Bank of the note, mortgage, and guarantees of the loan made by Carolina First Bank to Heron Lake I, LLC and the results of that transaction.

Tom Wingard, 2711 Middleburg Drive, Columbia, SC. Mr. Wingard is an appraiser with Wingard & Associates, Inc. and will testify about the appraisal he made on April 29, 2013. Your firm and the bank have a copy of this appraisal.

We also may introduce photographs of the Atrium Professional Building in Newberry, SC.

We may also introduce the letters from Mr. Jacobs to Eric O'Toole dated 3/21/2012 and 3/29, 2012. Copies attached

We may also introduce the letter from Mr. Jacobs to Roper Jenkins dated July 9, 2012. A copy is attached.

Sincerely yours,

Gerald D. Jowers

GDJ/lnr

cc: Jody Bedenbaugh, Esq.

EXHIBIT
H

Paul Collins

From: Gerald Jowers <gjowers@jowerslaw.com>
Sent: Thursday, August 07, 2014 10:57 AM
To: Paul Collins
Subject: TD v Jacobs
Attachments: SCAN6989_000.pdf

Paul:

Based on information given by Mr. Hilburn at his deposition, we may use the following as witnesses:

Joe Hawk
1224 Pickens Street
Columbia, SC

John Hilton
1325 Park Street
Columbia, SC

Home addresses unknown.

Their testimony is unknown because they apparently signed confidentiality agreements but it is apparent they negotiated the Heron Lakes I asset sale with Roper Jenkins and William Barnwell.

We have served a subpoena on Mr. Hawk, a copy is attached.

Because the bank cancelled the foreclosure sale scheduled for August 5, I have decided we need a witness to assist the jury in understanding the complexities of foreclosure practice.

We may use S. Andrew Syrett, attorney, as an expert witness. He has no knowledge of the facts of this case and his testimony will be limited to explain to the jury South Carolina mortgage foreclosure procedure, including deficiency judgments, upset bids, the appraisal statute, waiver of the appraisal statute, the impact of these on a suit on a guaranty, and giving his opinion about such matters.

Mr. Syrett's office address is 712 Richland Street, Suite E, Columbia, SC. Home address unknown.

At trial we will introduce a copy of the foreclosure order in this matter from Newberry County that John Moore obtained for TD Bank. Mr. Syrett may be questioned about this.

Gerald D. Jowers
Attorney at Law
1802 Sumter Street
Columbia, SC 29201
Telephone (803) 765-9620
Facsimile (803)765-0085
gjowers@jowerslaw.com

EXHIBIT
I

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF RICHLAND

TD Bank, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

David H. Jacobs, Defendant

Case Number: 2012 CP 40 6074

Pending in Richland County

TO: Joe Hawk, individually and as agent for Sea Ducks, LLC and Hilton, Hawk & Company, LLC

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

All emails, letters and documents concerning the Heron Lakes I, LLC property in Richland County, SC , including any communications with William Barnwell, Roper Jenkins, and TD Bank.

PLACE 1802 Sumter Street, Columbia, SC	DATE AND TIME Friday, August 8, 2014 , 10 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature — Date: 8/5/14 — Print Name: Gerald D. Jowers

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

Attorney for Plaintiff

1802 Sumter Street, Columbia, SC 29201 803 765-9620

Clerk of Court/Issuing Officer's Signature — Date — Print Name

Pro Se Litigant's Name, Address and Telephone Number:

SCCA 254 (11/2013)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties In Responding to Subpoena.

(1)(A)A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
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Tel: 803.255.9747
Fax: 803.255.9128
paul.collins@nelsonmullins.com

August 7, 2014

Hand Delivered
The Honorable Jeanette W. McBride
Clerk of Court
Richland County Judicial Center
1701 Main Street (29201)
Post Office Box 2766
Columbia, SC 29202-2766

RE: TD Bank v. David A. Jacobs and James A. McFarland, Jr.
C/A No. 2012-CP-40-07540

TD Bank v. David H. Jacobs
C/A No. 2012-CP-40-06074

Dear Ms. McBride:

The above-referenced matters are on the trial roster for Tuesday, August 12, 2014. In that regard, I enclose for filing the original and one copy of T.D. Bank, N.A.'s Motion in Limine. We have also enclosed a Motion and Order Information Cover Sheet for each matter, together with a filing fee for each referenced action. I would appreciate if you would file the original Motions in each file and return a clocked copy of each Motion to my runner.

By copy of this letter, I am serving counsel for the Defendants with this Motion. We will also provide a copy of this Motion to the Honorable Casey Manning.

With kind regards, I am

Sincerely,

Paul T. Collins

cc: Gerald D. Jowers, Esquire
Leonard R. Jordan, Jr., Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

TD Bank, NA
☒ Plaintiff

v.

David H. Jacobs and James A. McFarland, Jr.
☐ Defendant.

CASE NO.
2012-CP-40-07540

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Paul T. Collins Bar No. 70336 Address: 1320 Main Street, Columbia, SC 29201 phone:803-255-9747 e-mail: paul.collins@nelsonmullins.com other:	Leonard R. Jordan, Jr. Bar No. Address: P. O. Box 394 Columbia, SC 29202 phone: _____ fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information
Nature of Motion: **Motion in Limine**
Estimated Time Needed: 20 min. **Court Reporter Needed: ☒ YES / ☐ NO**

SECTION II: Motion/Order Type
☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Paul T. Collins August 7, 2014
Signature of Attorney for ☒ Plaintiff / ☐ Defendant **Date submitted**

SECTION III: Motion Fee
☒ PAID – AMOUNT: 25.00
☐ EXEMPT:
(check reason)
☐ Indigent Status
☐ Sexually Violent Predator Act
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication
☐ Proposed order submitted at request of the court; or, **reduced to writing from motion made in open court per judge's instructions**
Name of Court Reporter:
☐ Other:
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ State Agency v. Indigent Party
☐ Post-Conviction Relief
☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION
☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE
CODE: _____ Date: _____

CLERK'S VERIFICATION
Collected by: _____ Date Filed:
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

~#4827-2020-9683 v.1 - 04387/01818~

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank	)	Civil Action No. 2012-CP-40-7540
Plaintiff,	)	
vs.	)	
David H. Jacobs and James A. McFarland,	)	
Defendants.	)	

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
TD Bank, NA, successor by merger with Carolina First Bank,	)	Civil Action No. 2012-CP-40-6074
Plaintiff,	)	
vs.	)	
David H. Jacobs,	)	
Defendant.	)	

TD BANK, N.A.'S MOTION IN LIMINE

TD Bank, N.A., through its under signed counsel, will respectfully move the Court, on August 12, 2014, or as soon as the Court may direct, for an order, pursuant to Rules 401-403 and 701-02 of the South Carolina Rules of Evidence, preventing the Defendants or their counsel from mentioning or referring in any way before the jury, whether in opening or closing or through direct or cross examination, the following irrelevant, prejudicial, and improper testimony and evidence:

(1) any reference, evidence, or testimony regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing because this testimony is irrelevant, would tend to confuse the jury, and is highly and unfairly prejudicial to TD Bank since there can be no breach of the implied duty of good faith and fair dealing for doing what a contract expressly allows;

(2) any reference, evidence, or testimony on the government's bail-out to the banking industry because the testimony is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bail-out;

(3) any reference, evidence, or testimony regarding any unrelated note sales by TD Bank, including but not limited to the Heron Lakes I, LLC, note sale to Sea Ducks, LLC, because the testimony is irrelevant, would likely confuse the jury, and is highly and unfairly prejudicial to TD Bank; and

(4) any testimony from any lay or expert witness that has not been properly or timely disclosed.

I. Nature of the Case:

a. TD Bank, N.A. v. David Jacobs and James McFarland

TD Bank filed Civil Action No. 2012-CP-40-7540 against Defendants Jacobs and McFarland to collect on Guaranties ("Atrium Guaranties") given by Defendants Jacobs and McFarland in consideration for a commercial notes to Atrium at Middle Sound Land, LLC, and which was secured by a mortgage on commercial real estate owned by Atrium. In response to TD Bank's written discovery, Defendant McFarland admits signing the Atrium Guaranty and admits the loan to Atrium is past due, that TD Bank

has demanded payment, that he failed to pay the balance due, and that he and Atrium are indebted under the terms of the loan documents. (*See* McFarland's Responses to TD Bank's Requests to Admit, attached hereto as Exhibit A, and Affidavit of James McFarland, attached hereto as Exhibit B). Through his affidavit and at his deposition, Defendant Jacobs admits signing the Atrium Guaranty individually as well as signing the Note and other loan documents on behalf of Atrium, that the loan to Atrium has matured, that TD Bank has demanded payment, that he failed to pay the balance due, and that he is indebted to TD Bank under the terms of the loan documents. (*See* Affidavit of David Jacobs, ¶¶ 41 & 42, attached hereto as Exhibit C, and Deposition Transcript of David Jacobs, 82:1-3; 99:18-20; 107:5-9, attached hereto as Exhibit D).

b. TD Bank, N.A. v. David Jacobs

TD Bank filed Civil Action No. 2012-CP-40-6074) against only Defendant Jacobs to collect on a Guaranty ("Newberry Guaranty") given by Defendant Jacobs in consideration for a commercial note to Newberry Atrium Professional Center, LLC ("Newberry Atrium"), which was secured by a mortgage on commercial real estate owned by Newberry Atrium. Jacobs also admits signing the Newberry Guaranty individually as well as signing the Note and other loan documents on behalf of Newberry Atrium. In addition, Jacobs admits the loan to Newberry has matured, that TD Bank has demanded payment, that he and Newberry Atrium failed to pay the balance due, and that he and Newberry Atrium are indebted under the terms of the loan documents. (*See* Affidavit of David Jacobs, ¶¶ 41 & 42, attached hereto as Exhibit C, and Deposition Transcript of David Jacobs, 82:1-3; 99:18-20; 107:5-9, attached hereto as Exhibit D).

II. The Court Should Exclude Testimony Regarding Defendants' Alleged Breach of the Implied Duty of Good Faith and Fair Dealing Defense Because the Testimony is Irrelevant, Likely to Confuse the Jury from the Issues in the Case, and Unfairly Prejudicial to TD Bank:

The only defense offered by Defendants Jacobs and McFarland in these two cases is that TD Bank is unfairly suing them on the Guaranties without first foreclosing on its collateral, which they contend is a breach the duty of good faith and fair dealing and a breach of fiduciary duty owed to them by TD Bank although the terms of the at-issue Guaranties provide that it is an absolute guaranty of payment and that TD Bank is not required to resort to its collateral before suing on the guaranty.

The Guaranties at issue in these cases provide that they are for the unconditional payment of the subject debt, and Jacobs and McFarland agreed they were liable for the debt regardless of whether TD Bank pursued any other remedies against them, and other entity, or against the mortgaged property. (*See* Guaranty of James McFarland on Middle Sound Atrium, attached hereto as Exhibit E; Guaranty of David Jacobs on Atrium at Middle Sound, attached hereto as Exhibit F; and Guaranty of David Jacobs on Newberry Atrium, attached hereto as Exhibit G). Thus, the at-issue Guaranties in this case unambiguously provides they are absolute guaranties of payment (as opposed to a guaranty of collection) and that TD Bank was/is not required to first resort to its security. A guaranty "is a contract and should be construed by the principles governing contracts," with the intentions of the parties as expressed in the guaranty guiding the Court. Peoples Federal Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 973 (1989).

Under well-established, controlling South Carolina law, such guaranties of payment are independent contracts that give rise to obligations separate and distinct from a loan agreement. Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). Because they are separate obligations, creditors have the right to bring a separate action against a guarantor under a guaranty of payment immediately upon default and without suing the principal debtor or resorting to collateral. Citizens and Southern Nat'l Bank of South Carolina, 13 S.C. at 543, 443 S.E.2d at 551 (stating "no obligation was imposed upon [lender] . . . to pursue and/or exhaust the collateral"); Peoples Federal Sav. and Loan Ass'n, 300 S.C. at 281, 387 S.E.2d at 674; Tri-South Mortg. Investors v. Fountain, 266 S.C. 141, 145-46, 221 S.E.2d 861, 863 (1976) (holding based on unambiguous language of guaranty that lender was not required to foreclose on collateral before pursuing remedy under guaranty).

Since the terms of the Guaranties expressly allow TD Bank to sue Defendants Jacobs and McFarland without resorting to its security, Defendants' breach of fiduciary duty and breach of implied covenants of good faith and fair dealing defenses should be excluded from trial. See First Fed'l Savings and Loan Ass'n of South Carolina v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992)("[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do."); see also Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (same). South Carolina courts recognize there is no fiduciary duty to explain to an individual what he could learn from reading the document. See Citizens and Southern Nat'l Bank of South Carolina v. Lanford, 313 S.C. at 545, 443 S.E.2d at 551.

South Caroline law also recognizes that a mortgagee is not required to foreclose on its mortgage prior to suing to collect on the underlying obligation. See Lever v. Lighting Galleries, Inc., 374 S.C. 30, 34, 647 S.E.2d 214, 216 (2007) (noting a "mortgagee who has a note and a mortgage has the option to either bring an action on the note or to pursue a foreclosure action" and mortgagee "may ignore the security and bring an action at law on the indebtedness") (citing Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978); Platt v. Carroll, 125 S.C. 493, 119 S.E. 180 (1923); Hatfield v. Kennedy, 1 Bay 501 (1973); Blackmon v. Patel, 302 S.C. 361, 363, 396 S.E.2d 128, 130 (Ct. App. 1990)).

For these reasons, any reference, testimony, or evidence related to the argument that TD Bank breached the implied duty of good faith and fair dealing by suing on the guaranties rather than foreclosing on the collateral should be excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence

III. The Court Should Exclude Testimony Regarding the Troubled Asset Relief Program (TARP) because the Testimony is Irrelevant, Likely to Confuse and Enflame the Jury, and Unfairly Prejudicial to TD Bank:

Because Carolina First Bank received TARP funds prior to TD Bank's merger with Carolina First, Defendants may attempt to raise this fact during trial to influence the jury's decision as to whether Defendants should be excused from their obligations under the guaranties. But, the receipt of any TARP money is irrelevant as to whether Defendants must pay on their guaranty obligations. The federal district court in the Northern District of Georgia in *Wachovia Bank, N.A. v. Lone Pine, Inc.*, held that a bank's receipt of funds under TARP is irrelevant to claims raised by borrowers against the bank. The receipt of TARP money by a bank before TD Bank merged with that bank

is irrelevant to the claims in this case. It should therefore be excluded from all argument, testimony, and evidence.

Even if the Court were to deem this type of evidence as marginally relevant, it should be excluded because its low probative value would be outweighed by the risk that it would unduly prejudice the jury or tend to confuse or mislead the jury. Defendants would be attempting to use the public's perceived bias against a "taxpayer bailout" to unduly influence the jury's decision. The jury's decision should be based on the obligations between the parties and the terms of the at-issue guaranties, not some bias against "taxpayer bailouts" received by a bank that TD Bank later acquired by a merger. Therefore, any mention of Carolina First Bank's receipt of TARP money should be excluded from all argument, testimony, and evidence at trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

IV. The Court Should Exclude Testimony Regarding the Heron Lakes I Note Sale Because the Testimony is Irrelevant, Likely to Confuse the Jury, and is Unfairly Prejudicial to TD Bank:

On June 29, 2014, Defendant Jacobs for the first time listed David Hilburn to testify regarding the "terms and circumstances surrounding the purchase by Cypress Cove Properties, LLC from TD Bank of the note, mortgage, and guarantees of the loan made by Carolina First Bank to Heron Lakes I, LLC and the results of that transaction." (*See* July 29, 2014 (sic) Letter from Mr. Gerald Jowers to Mr. John Moore, attached hereto as Exhibit H). On August 1, 2014, Mr. Hilburn was deposed. On August 7, 2014, Defendant Jacobs listed Joe Hawk and John Hilton as witnesses for the first time to presumably also testify about the Heron Lakes I note sale. (*See* August 7, 2014 Email from Gerald Jowers to Paul Collins, attached hereto as Exhibit I). Defendant

Jacobs apparently intends to elicit testimony from Mr. Hilburn, Mr. Hawk, and Mr. Hilton, and introduce evidence, regarding a note sale wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties at issue in this case, and wholly unrelated to any claim in this action. Since the issues with the sale of the Heron Lakes I note, mortgage, and guaranty have no bearing on the issues to be decided by the jury in this case, the testimony and evidence is irrelevant, likely to confuse the jury on the issues to be decided, and unfairly prejudicial to TD Bank. The Defendants are attempting to confuse the jury to avoid their obligations under the guaranties. Therefore, any mention, reference, testimony, or evidence related to the Heron Lakes I note sale by TD Bank to Cypress Cove Properties should be excluded from trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

V. The Court Should Exclude all Testimony from any Lay or Expert Witness that was not Properly or Timely Disclosed Trough Discovery

On May 13, 2013, Defendant Jacobs responded to TD Bank's First Set of Interrogatories in both cases listing only David Jacobs and Larry Scott as witnesses. In addition, Defendant Jacobs did not identify any expert witnesses or produce any materials or reports created by any retained expert. On June 29, 2014, Defendant Jacobs identified Tom Wingard as a witness to testify "about the appraisal he made on April 29, 2013." (*See* July 29, 2014 Letter from Mr. Gerald Jowers to Mr. John Moore, attached hereto as Exhibit H). First, Defendant Jacob presumably had this April 29, 2013 report prior to responding to TD Bank's interrogatories and requests for production on May 13, 2013. Second, Defendant Jacobs never supplemented his responses to TD Bank's written discovery to provide TD Bank with the type of

information and documents requested through discovery related to expert witnesses. Since a lay person cannot testify as to issues that require special knowledge, skill, experience, or training, like the value of someone else's property, Mr. Wingard would have to be qualified as an expert under Rule 702, SCRE, to testify about the value of the Newberry Atrium property. Accordingly, pursuant to Rule 37(d), SCRCP, any expert testimony of Mr. Wingard should be struck and excluded from trial based on Defendant Jacob's failure to properly identify Mr. Wingard as an expert. It would be highly and unfairly prejudicial to TD Bank to allow an undisclosed expert to testify at trial. In addition, Mr. Wingard's testimony regarding the value of the property is irrelevant, as it has no bearing on TD Bank's contractual rights under the terms of the Guaranties, and should be excluded pursuant to Rule 401-403 of the South Carolina Rules of Evidence.

On August 7, 2014, Defendant Jacobs identified for the first time, Joe Hawk, John Hilton, and S. Andrew Syrett as witnesses. (*See* Exhibit I). The testimony of Joe Hawk and John Hilton should be excluded because these witnesses were not timely identified by Defendant Jacobs through discovery. Defendant Jacobs failed to identify these two witnesses until a mere 4 days before trial and over 14 months since he originally responded to TD Bank's written discovery. Pursuant to Rule 37(d), SCRCP, the Court should exclude these witnesses from testify at trial. In addition, these witnesses are being identified to provided testimony and documents regarding the Heron Lakes I note sale from TD Bank to Cypress Cove Properties, which is wholly unrelated to the parties in this action, wholly unrelated to the note, mortgage, and guaranties at issue in this case, and wholly unrelated to any claim in this action. Since the issues with the Heron Lakes I note, mortgage, and guaranty sale have no bearing on the issues to be

decided by the jury in this case, the testimony and evidence is irrelevant, likely to confuse the jury on the issues to be decided, and unfairly prejudicial to TD Bank. Therefore, Joe Hawk and John Hilton should also be excluded from providing any testimony or evidence related to the Heron Lakes I note sale by TD Bank to Cypress Cove Properties because such testimony and evidence is irrelevant, likely to confuse the jury, and unfairly prejudicial to TD Bank pursuant to Rules 401-403 of the South Carolina Rules of Evidence.

Mr. Syrett was identified as follows: "He has no knowledge of the facts of this case and his testimony will be limited to explain to the jury South Carolina mortgage foreclosure procedure, including deficiency judgments, upset bids, the appraisal statute, waiver of the appraisal statute, the impact of these on a suit on a guaranty, and giving his opinion about such matters." First, all testimony from Mr. Syrett should be excluded from trial because he was not timely identified by Defendant Jacobs through discovery. Defendant Jacobs failed to identify this alleged expert witness until a mere 4 days before trial and over 14 months since he originally responded to TD Bank's written discovery. Defendant Jacobs also never properly supplemented his responses to TD Bank's written discovery to provide TD Bank with the type of information and documents requested related to expert witnesses. Pursuant to Rule 37(d), SCRCP, the Court should exclude this witness from testifying at trial. Second, Mr. Syrett is identified as an alleged expert on the law, which is not allowed under clear South Carolina law since it is the Court's obligation to instruct the jury on the law. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)(where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly

excluded the testimony because that was within the exclusive province of the trial court.). Finally, the proposed expert testimony of Mr. Syrett would be excluded under Rules 401-403 of the South Carolina Rules of Evidence because it is irrelevant to any issues to be decided in the case, is irrelevant to any claim or defense in the case, and is likely to confuse the jury as to the issues to be decided.

For the reasons set forth above, TD Bank respectfully requests an order of this Court excluding the testimony and evidence outlined above as irrelevant, likely to confuse the jury, and unfairly prejudicial to TD Bank.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Paul T. Collins

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Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000
Attorneys for TD Bank, N.A., successor by merger with Carolina First Bank

Columbia, South Carolina
August 7, 2014

CERTIFICATE OF SERVICE

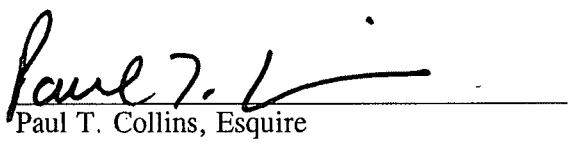
I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for the Plaintiff, TD Bank, N.A., do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified via the service specified below, to the following address(es):

PLEADINGS: **PLAINTIFF'S MOTION IN LIMINE**

PARTIES SERVED: Gerald D. Jowers, Esquire
Attorney for David H. Jacobs
1802 Sumter Street
Columbia, SC 29201

Leonard R. Jordan, Jr., Esquire
Berry, Quackenbush & Stuart, P.A.
Attorney for James A. McFarland
1122 Lady Street
Columbia, South Carolina 29201

METHID OF SERVICE: US Mail and Electronic Mail



Paul T. Collins, Esquire

August 7, 2014

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	**REPLY TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION TO DEFENDANT JAMES A. MCFARLAND**

TO: JODY A. BEDENBAUGH, ESQUIRE, ATTORNEY FOR PLAINTIFF:

James A. McFarland, Jr. ("Defendant") replies to Plaintiffs' First Request for Admission to Defendant James A. McFarland, dated January 3, 2013, as follows:

1. Admit the note attached as Exhibit A to the Complaint is a true and correct copy of the note dated April 4, 2011, between Bank and Atrium at Middle Sound Land, LLC. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

2. Admit that the note attached as Exhibit A to the Complaint was signed by David H. Jacobs and James A. McFarland (sic) as members of Atrium at Middle Sound Land, LLC. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

3. Admit the Unconditional Guaranty attached as Exhibit C (sic) to the



Complaint is a true and correct copy of the guaranty dated April 4, 2011 ("Guaranty") between Bank and James A. McFarland (sic). If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

4. Admit the Guaranty attached as Exhibit C (sic) to the Complaint was signed by James A. McFarland (sic). If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

5. Admit that Atrium at Middle Sound Land, LLC has not made the payments as required under the terms of the Note and is past due. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

6. Admit that Plaintiff has declared the entire balance of Note due and payable and has demanded payment for such. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

7. Admit that James A. McFarland (sic) has failed to pay the balance due on the Note and Guaranty. If you deny any or all of this paragraph, please stipulate in what respect and set forth in detail the reasons for that denial.

RESPONSE: Admitted.

8. Admit that, under the terms of the Note and Guaranty, James A. McFarland (sic) is required to pay all costs of collection, including attorney's fees and court costs, in the event of default. If you deny any or all of this paragraph, please stipulate in what respect and set forth in

detail the reasons for that denial.

RESPONSE: Admitted.

Leonard R. Jordan, Jr.
BERRY, QUACKENBUSH & STUART, P.A.
1122 Lady Street, 5th Floor
Post Office Box 394
Columbia, South Carolina 29202-0394
Phone: (803) 779-2650

Columbia, South Carolina
May 28, 2013

Attorneys for Defendant James A. McFarland, Jr.

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Reply to First Requests for Admissions.wpd

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	)	**AFFIDAVIT OF MAILING**

I, Stephanie Arnold, of Berry, Quackenbush & Stuart, P.A., attorneys for the Plaintiff, hereby certify that I have this 29th day of May, 2013, served a copy of the Reply to Plaintiff's First Request for Admissions to Defendant James A. McFarland upon the Plaintiff herein by mailing a copy thereof to Jody A. Bedenbaugh, Esquire, attorney for the Plaintiff herein, by mailing a copy thereof to him, postage prepaid, at the address indicated below:

Jody A. Bedenbaugh, Esquire
Attorney at Law
P.O. Box 11070
Columbia, South Carolina 29211-1070

Stephanie Arnold

SWORN to and subscribed before me
this 29th day of May, 2013

Adrina Johnson (L.S.)
Notary Public for South Carolina
My Commission Expires: 3-26-17

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Reply to First Requests for Admissions.wpd

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-40-7540
TD Bank, NA, successor by merger with Carolina First Bank, Plaintiff, vs. David A. Jacobs and James A. McFarland, Jr., Defendants.	)	**AFFIDAVIT OF JAMES A. MCFARLAND, JR. IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, James A. McFarland, Jr., reserving my right to assert that this court lacks jurisdiction over me, and being first duly sworn, state and affirm as follows:

1. I am a Defendant herein.

2. On or about April 4, 2011, I executed a Guaranty in favor of Carolina First Bank, the Plaintiff's predecessor, which Guaranty is the subject of this suit.

3. This Guaranty was intended to serve as additional collateral for the mortgage loan made to Atrium at Middle Sound Land, LLC for the purpose of acquiring and developing certain real property in Wilmington, North Carolina.

4. A mortgage on said real property served as the primary collateral for the loan.

5. The value of the mortgaged real property far exceeds the amount due to the Plaintiff.

6. It defies understanding why the Plaintiff has elected not to foreclose its mortgage.

7. It may be as simple as such suit would have had to be filed in New Hanover County, North Carolina, where I reside.

8. I still maintain that I am not subject to the jurisdiction of the State of South Carolina, and I intend hereby to reserve any and all rights I have with regard to this issue, as set forth in my Answer.

9. The defendants, like most developers of real property, were harshly affected by the downturn in

EXHIBIT
B

the economy in 2008-2009, when banks stopped making loans.

10. Because of the depressed commercial activities in the economic recession, which were especially severe in Wilmington, NC and which were circumstances beyond the control of the defendants, the borrower has been unable to sell the remaining potion of the developed real property, which is mortgaged to the Plaintiff, and consequently, and for that reason alone, the borrower has been unable to pay the loan in full.

11. This developed property is being marketed for sale, and the Plaintiff's loan indebtedness will be paid from 100% of the seller's net sale proceeds.

12. Carolina First Bank was selected to make the mortgage loan because of the defendant's long-term working relationship with that bank.

13. This action by the successor to Carolina First Bank is indicative of bad faith on the part of such successor, especially when it is aware that the defendants do not have the present ability to pay the mortgage loan indebtedness and that a foreclosure of its mortgage would unquestionably result in full payment of such indebtedness.

14. While I acknowledge that I owe the indebtedness, it is punitive and unconscionable for the Plaintiff to bring this suit without simultaneously foreclosing its mortgage.

15. The Plaintiff's tactics constitute a breach of the implied covenant of good faith and fair dealing, which is an integral part of the loan agreement of which my Guaranty is a part.

James A. McFarland, Jr.

SUBSCRIBED AND SWORN to before me
this 25 day of July, 2013

Notary Public for North Carolina
My Commission Expires: July 2, 2016

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Affidavit in Opposition.wpd

CHRISTINA SIAKI-RANDOLPH NOTARY PUBLIC BRUNSWICK COUNTY, NC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	CASE NO.: 2012-CP-40-7540

TD Bank, NA, successor by merger with Carolina First Bank,

Plaintiff,

vs.

David A. Jacobs and James A. McFarland, Jr.,

Defendants.

CERTIFICATE OF MAILING

I, Leonard R. Jordan, Jr., of Berry, Quackenbush & Stuart, P.A., attorneys for the Defendant, James A. McFarland, Jr., hereby certify that I have this 14th day of August, 2013, served a copy of the Affidavit of James A. McFarland, Jr. In Opposition to Plaintiff's Motion for Summary Judgment upon the Plaintiff herein by mailing a copy thereof to its attorney, Jody A. Bedenbaugh, Esquire, postage prepaid, at the address indicated below:

Jody A. Bedenbaugh, Esquire
Attorney at Law
P.O. Box 11070
Columbia, South Carolina 29211-1070

Leonard R. Jordan, Jr.

SWORN to and subscribed before me
this 14th day of August, 2013

(L.S.)
Notary Public for South Carolina
My Commission Expires: 08/01/2016

U:\Stephanie\Jordan Misc\McFarland 8418.0001\Certificate of Mailing Affidavit.McFarland.wpd

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
TD BANK, NA successor by Merger with Carolina First Bank, Plaintiff, vs. DAVID H. JACOBS Defendant,	))))))))	Case No. 2012-CP-40-6074

AFFIDAVIT

TD BANK, NA successor by Merger with Carolina First Bank, Plaintiff, vs. DAVID H. JACOBS and JAMES MCFARLAND Defendants,	))))))))	Case No 2012-CP-40-7540

PERSONALLY APPEARED BEFORE ME, David H. Jacobs, who first being duly sworn, says and deposes:

1. I am the Defendant in these lawsuits and I am making this Affidavit in opposition to motions for summary judgment made by TD Bank in each case.

2. TD Bank owns the note and mortgage given by Newberry Atrium Professional Center, LLC ("Newberry Atrium") to Carolina First for a loan made on February 20, 2007 in the original amount of $7,141,000.00.

EXHIBIT
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3. TD Bank also holds the renewal note and mortgage of a loan made by Carolina First Bank to Atrium at Middle Sound Land, LLC "(Middle Sound") on November 19, 2004 in the original amount of $3,000,000.00.

4. TD Bank is the successor to Carolina First Bank and collectively I may refer to them sometimes as the "Bank." During the recent banking crisis, Carolina First Bank was in financial distress and because of its shaky financial condition, government regulators forced the merger of Carolina First with TD Bank.

5. In the first suit described above, TD Bank is suing me on a Guaranty that I made for this loan of Newberry Atrium. TD Bank is not foreclosing the mortgage that it holds as security for this loan.

6. In the second suit described above, TD Bank is suing James McFarland and me on Guaranties of the Middle Sound loan. TD Bank is not foreclosing the mortgage that it holds as security for this loan.

7. Newberry Atrium is a limited liability company that originally consisted of Atrium Development Associates, Inc. a company in which I have an interest, and Newberry County Hospital or an affiliate of the hospital.

8. For most of my professional life, I have been a real estate developer and I have developed several medical office buildings during my career.

9. In 2005, the President of Newberry Hospital called me to discuss the possibility of developing an office building for doctors and medical professionals in the Newberry area. The officials of the hospital and physicians convinced me that such a building was needed by the community and especially the hospital to make it competitive in the rapidly changing health care environment. I began the lengthy process of designing the building to meet the needs of the hospital and securing prospective tenants for the building.

This process took almost two years before we were ready to obtain financing for the building in order to begin construction.

10. Atrium at Middle Sound Land, LLC is a limited liability company formed by James McFarland and me. This company was formed to purchase and develop a commercial parcel of land in Wilmington, North Carolina.

11. During my development career, I have used a number of banks and institutions for financing construction of projects and for permanent financing. For years prior to the financial crisis/recession that began in 2008, I was regularly visited and contacted by loan officers of various banks including Carolina First Bank who were soliciting loan business from me.

12. Beginning in 2001, Carolina First, its President Mack Whittle and its commercial loan officers and executives in the Columbia area regularly courted me for my business.

13. In response to this persistent solicitation, I began using Carolina First as a lender. Over the subsequent years and through several projects, I developed a close working relationship with the commercial loan officers and executives of Carolina First Bank including Larry Scott. Mr. Scott and the executives of the commercial loan department understood and appreciated my approach to development.

14. As Carolina First and I completed successful projects together, we developed a high degree of trust and respect for each other. The bank trusted me to do what I said I would do and I trusted the bank to assist me through the good and not so good aspects of long-term real estate developments.

15. Because of this degree of trust that developed between the officers of Carolina First and me and in response to their numerous requests and solicitations, I

continued to offer to Carolina First the opportunity to finance my projects and I made more loans with that Bank than any other lender. I considered Carolina First and its officers a valued partner in my developments and an integral part of my team. The Bank and its officers was ready to help when unforeseen circumstances affected any of these development projects and did so from time to time. The unexpected is a part of lengthy commercial developments projects and Carolina First understood this and was always flexible and willing to accommodate me when needed.

16. These are the projects financed for me by Carolina First Bank:

a. Loan for the Gateway Mallard project; $2,200,000.00 in 2002

b. Loan for the Gateway USC project; $3,5000,000.00 in 2003

c. Loan for the Irmo Medical Office building project; $7,400,000.00 in 2004

d. Loan for the Gateway Reames project; $3,000,000.00 in 2005

e. Loan for the Middle Sound project; $3,000,000.00 in 2004

f. Loan for Newberry Atrium project; $7,141,000.00 in 2007

In addition to these commercial projects, Carolina First loaned me over $500,000.00 in 2001 and 2002 in personal loans; all of this has been repaid.

17. All of these loans were paid in full and in accordance with the terms of the agreements except for the Middle Sound Project and Newberry Atrium. Over the years, my projects have repaid over $24,000,000.00 to Carolina First and earned the Bank over $5,000,000.00 in interest and hundreds of thousands of dollars in bank fees.

18. We have repaid the Bank $1,900,000.00 in principal on the Middle Sound loan and over $1,000,000.00 on the Newberry Atrium loan. Interest has been paid and was current on both of these loans until the Bank refused to renew these loans in 2012.

19. Each of these loans made by Carolina First for my projects was made on the strength of the project and my experience and not on my personal ability to repay these loans. I acted as a guarantor for each of this commercial loan and at the time of the making of these loans, I did not have the available cash or liquid assets to pay in full any of these loans. The loan officers of Carolina First always knew this and never relied on my personal ability to repay any commercial loan.

20. My personal net worth throughout my career has been in real estate or in business entities that own real estate and such assets, though valuable, are long-term investments that do not provide immediate or readily available cash liquidity.

21. Each of these loans, except for the Middle Sound loan, was made for the construction of a commercial building and by completing the buildings, I created the value and the collateral for the loans.

22. The Middle Sound loan financed the purchase of a commercial tract of land in Wilmington, North Carolina and the construction of expensive infrastructure that was necessary for commercial usage. The infrastructure was completed and several parcels have been sold to businesses that are operating there now. The remaining parcels have their development infrastructure in place such as water, sewer, and drainage, and are ready for commercial development. This remaining fully developed parcels are worth considerably more than is owed to the Bank.

23. All funds from each of these loans were used for the purposes stated in the loan agreements and project budgets that were approved by Carolina First. I have never been questioned by Carolina First about the use of loan proceeds.

24. The proceeds of the loan for the Newberry Atrium project were used for the construction of a 47,106 square foot, two story office building adjacent to the Newberry County Hospital.

25. This medical building was completed in July of 2008 according to the plans approved by Carolina First and has been occupied by tenants and some hospital staff since that time.

26. Because of the economic conditions of the recent recession, uncertainty of the future direction of the medical field and changes in management at the Newberry County Hospital, the Newberry Atrium medical office building has not been fully leased since it was completed.

27. The current occupancy rate this building is 58.14%-28,726 square feet is occupied. Current lending standards require an occupancy rate of 88% to qualify for a permanent loan so we have been unable to obtain such a loan that would payoff Carolina First/TD Bank.

28. Until the filing of this suit, the loan has been renewed and interest has been paid to Carolina First/TD Bank. At the present occupancy rate, the building is generating approximately $58,000.00 in gross income every month or over $696,000 per year.

29. At the time of the filing of this lawsuit, we have paid the interest on this loan totaling over $1,733,000.00.

30. Prior to construction, the Bank's appraiser estimated the value of the Newberry Atrium building at $8,900,000.00.

31. The value has remained fairly constant since that time. An appraisal made in April of 2013 by an appraiser who TD Bank had used for a previous appraisal found a value of $6,650,000.00 at its current occupancy rate; this amount exceeds the debt of TD Bank.

The appraiser further indicated the building would be valued at $7,842,000.00 if it reached the 88% occupancy.

32. At this time, most of my assets are minority interests in limited liability companies that own tracts of land in Mooresville, North Carolina. This was an investment I made beginning in 2006 and prior to the collapse of the real estate market. This venture was to develop these tracts of land into commercial and multi-family use. The recession wrecked these plans.

33. Due to the economic recession, I have been forced to invest all of my available cash into this project in North Carolina as well as in the Middle Sound and Atrium Newberry in order to save these projects from failure and foreclosure.

34. Before these lawsuits were filed, I had given the Bank financial statements that disclosed my financial condition at that time. The statement revealed that I had very little cash liquidity and certainly not nearly enough to pay either of these loans that are the subject of these suits. My financial statement further showed the Bank that my major assets are minority interests in real estate ventures that are heavily burdened with debt. The Bank knew or should have known for me to retain these assets, I must be able to act as a guarantor for renewals or refinancing of the short term debt on these assets. The action of the Bank in seeking judgments that I cannot possibly pay will result in the loss of most of my equity in these assets to other creditors without any benefit for the Bank.

35. For these reasons, I believe the Bank, by suing on these guaranties, is employing a purely punitive tactic that is designed to hurt and punish me for no good reason and not designed for any legitimate business purpose. With large judgments against me, I will be unable to continue any gainful activity and I will lose the equity that I have in my remaining investments.

36. Because of my close personal and business relationship with Carolina First Bank, I trusted that Bank to work with me when projects did not go as planned. I expected the Bank to treat me fairly and equitably as I had always treated the Bank fairly and equitably. TD Bank is not living up to its side of our agreements by its actions against me.

37. I am personally aware of instances in which TD Bank has discounted loans to borrowers or the Bank has sold notes and mortgages at a discounted price to third parties that ultimately benefit other customers of this Bank. By doing this for others, the Bank is not treating me fairly and equally with those customers who are given significant concessions and benefits. By giving certain borrowers special treatment and favors, this smacks of favoritism and/or cronyism and not any sound or justifiable business reason or practice. Such favoritism and cronyism by the Bank shows a complete lack of good faith and fair dealing with me in these matters.

38. Since the time the building was occupied, Newberry Atrium through my leadership has maintained the building to a high standard to preserve and protect this valuable asset that is Bank's security for the loan.

39. I have made tireless efforts to secure new tenants with little success and I have tried countless ways to obtain a permanent loan that would payoff TD Bank. To date, despite my best efforts, I have not been successful.

40. The tactic that TD Bank is now pursuing a judgment against me for the full amount of both of these loans while ignoring for now valuable collateral is unfair to me and inconsistent with my long and successful relationship with Carolina First. The current appraised value of the Newberry Atrium building is more than $450,000.00 and the value of the Middle Sound property is substantially higher than the debt.

41. When I made the Newberry Atrium and Middle Sound loans, I fully understood that I was liable to the Bank, if either project was unsuccessful for any loss that the Bank incurred.

42. I stand ready to pay when I am able any deficiency in the amount owed and the value of the building at Newberry or the land at Middle Sound as determined by a public sales through mortgage foreclosure.

(SEAL)
David H. Jacobs

Sworn to and acknowledged
before me on August 14, 2013
by David H. Jacobs.

Notary Public for South Carolina
My commission expires: 4/21/21

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
COURT OF COMMON PLEAS
CASE NO: 2012-CP-40-6074

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs,
Defendant.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
COURT OF COMMON PLEAS
CASE NO: 2012-CP-40-7540

TD Bank, NA, successor by merger with Carolina First Bank
Plaintiff,
vs.
David H. Jacobs and James A. McFarland,
Defendants.

UNITED STATES BANKRUPTCY COURT
District of South Carolina
Case No. 13-01377-JW

In re:
Newberry Atrium Professional Center, LLC,
Debtor,

Newberry Atrium Professional Center, LLC,
Plaintiff,
vs.
TD Bank, NA,
Defendant.

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D E P O S I T I O N

WITNESS: David H. Jacobs

DATE: April 26, 2013

TIME: 9:30 a.m.

LOCATION: Columbia, South Carolina

TAKEN BY: Attorney for the Plaintiff
Jody A. Bedenbaugh, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

REPORTED BY: KATY MCCORMICK
Stenographic Court Reporter

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(INDEX REAR OF TRANSCRIPT)

STIPULATION: It is stipulated in and between counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent reserves the right to read and sign the deposition transcript.

(The reading and signing of the deposition by the witness is waived.)

(Plaintiff's Exhibits 1-19 premarked for identification.)

DAVID H. JACOBS, being first duly sworn, testified as follows:

EXAMINATION

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, we have met before but for the record I am Jody Bedenbaugh here on behalf of TD Bank. Today we're here for your deposition in two of the State Court actions that TD filed against you as well as the adversary proceedings against the parties in the Newberry Atrium bankruptcy case.

The deposition shouldn't last all that long, I am going to try to get out of here shortly after lunch if we can.

EXHIBIT
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If you need a break at any time please let me know, don't hesitate. For her benefit and the benefit of the transcript you and I need to make sure we do not talk over each other and that all of your responses are verbal as opposed to nodding your head.

If you don't understand any of my questions or didn't hear my question or just want me to repeat it, please ask me to do so otherwise I'll assume you understood and heard the question; is that fair?

A. Yes.

Q. If your lawyer objects, most of the time it will be for my benefit and I may rephrase the question. If I don't rephrase the question you are to answer the question that I asked unless he instructs you not to because it's a privilege; do you understand?

A. Yes, sir.

Q. Are you under the influence of any drug or alcohol that would impair your ability to answer truthfully today?

A. No.

Q. Did you do anything to prepare for this deposition?

A. Reviewed my materials.

Q. And I don't want to know about any materials from your lawyer but other than that what did you review?

A. That's basically it.

Q. Did you discuss the case or this deposition with

anyone other than your attorney or the attorney for your bankrupt entity?

A. No.

Q. What's your place and date of birth?

A. Tucson, Arizona, November 29, 1945.

Q. What's your business address now?

A. 115 Atrium Way, Columbia, SC.

Q. Are you at a particular suite there?

A. 204.

Q. What about your home address?

A. 6133 Lakeshore, Columbia.

Q. How long have you been at Lakeshore?

A. Twenty years.

Q. Are you married?

A. Yes.

Q. What's your wife's name?

A. Peggy.

Q. How long have you been married to Peggy?

A. About 40 years.

Q. Do you all have any children?

A. Yes.

Q. What are their names?

A. Kari and Kim.

Q. How do you spell Kari?

A. K A R I.

Q. And is Kim just Kim not Kimberly?

A. She goes by both ways.

Q. Any other children?

A. No.

Q. Are they both adults?

A. Yes.

Q. Who is your current employer?

A. Atrium Development.

Q. What is your title there?

A. President.

Q. What are your duties at Atrium Development?

A. Manage property, develop property.

Q. Manage and develop property?

A. Yes.

Q. Are we talking about commercial real estate?

A. Yes.

Q. How long have you been doing that?

A. Over 25 years.

Q. Twenty-five years?

A. About.

Q. And that's been with Atrium Development the whole time?

A. The last 25 years.

Q. What did you do before that?

A. Worked for other developers.

Q. How long did you work for developers before you went out on your own with Atrium Development?

A. Seven, eight years, 10 years.

Q. So for the past 35 years you've been in the real estate development business; is that correct?

A. Yes.

Q. Now, I am somewhat familiar with account background but I understand you have developed a number of office buildings under the Atrium name brand; is that correct?

A. Yes.

Q. Tell me about that.

A. The buildings are distinguished by an atrium in the interior to give it a unique feel and look.

Q. Are we talking about office buildings normally?

A. Primarily office, medical office, commercial office.

Q. How many of these Atrium-brand office buildings have you developed over the years?

A. Maybe 10 or 12.

Q. Are they located in South Carolina only or in other states as well?

A. South Carolina, North Carolina, Colorado.

Q. Okay. I understand you've also developed a number of daycare development center-type properties under the name Gateway; is that correct?

A. Yes.

Q. How many Gateway Academy developments have you had over the years?
A. Twenty, somewhere between 20 to 22.
Q. Where are they located?
A. Colorado, North Carolina and South Carolina.
Q. Now, other than the Atrium brand office buildings and the Gateway child development centers do you have any other development projects currently?
A. I have developed some outparcel retails over my career.
Q. Okay. Where is that?
A. Tennessee.
Q. Anywhere else?
A. That's it.
Q. How are the projects typically financed?
A. Bank loans.
Q. And are you primarily the point person in connection with the bank financing of the developments or is someone else with Atrium a person primarily responsible for that?
A. Over the recent years I have been the point person.
Q. It's fair to say you've got a substantial amount of real estate financing experience in connection with your development line of work?
A. Yes.
Q. In terms of how the deals are structured do you

typically place the properties in an entity of some type or do you hold them within your Atrium holding companies? How does that work?
A. Typically it's a single purpose entity.
Q. In connection with the financing are you generally asked to guarantee the debts of the single purpose entities?
A. The loans that I have obtained have all been collateralized loans and they have asked me -- commercial lenders, banks -- have asked me to sign a guarantee to back up that collateral.
Q. Okay. Now, we'll get to your Subpoena response that I just received yesterday in a little while and I have got copies of certain current guarantees, but in the past do you know how many guarantees you have executed for debts on these single purpose entities?
A. I would assume. Most every construction loan had a guaranty.
Q. So we talked about 20 to 22 Gateway projects and 10 to 12 Atrium projects in addition to some outparcel retail developments. Generally at the outset of financing you would have been asked to guarantee those loans; is that correct?
A. Yes.
Q. You've been handed Exhibit 1 to your deposition which is a statement of financial condition of David H. Jacobs dated June 30, 2012; do you see that?

A. Yes.
Q. Does that appear to be a true and correct copy of your statement of financial condition as of that date?
A. Yes.
Q. According to the Statement of Assets on the first page it's got the cash balance in an amount of approximately $25,000; do you see that?
A. Yes.
Q. Do you know what your current cash balance is?
A. Probably in the same range. Day by day it goes up and down.
Q. I understand. Do you know if you have a financial statement that's been prepared that's more recent than this one?
A. No.
Q. You don't know or you don't have one?
A. No, I don't have one.
Q. Where are your checking accounts located?
A. I have one at Wells Fargo, one at Carolina First. I pretty much consolidated them to Wells Fargo.
Q. The net worth indicated here of a little over $20,000; have there been any material changes to that since the date of this financial statement?
A. I wouldn't call them material. It's all up and down and it's really based on appraisals prior to this date.
Q. So I guess I could characterize your answer as you

don't know of any material changes except for the fluctuation of the underlying real estate prices; is that correct?
A. Yes. There have been times during the last couple of years that I have had to borrow money, I have paid it back, but I can't tell you today additional debts that are significantly different than this.
Q. Okay. Now this net worth and financial statement, was it accurate to the best of your knowledge as of June 30, 2012?
A. To the best of my knowledge, yes.
Q. Have you transferred any material assets since that time?
A. No, not since, '12.
Q. Have you incurred any material liabilities other than the ones identified in this statement?
A. No.
Q. If you'll look at page 2, the second page on Exhibit 1 it says Notes of Financial Statement at the top; do you see where I am?
A. Yes.
Q. It's got a Wells Fargo security account listed with an estimated current value of $471,000; do you see that?
A. Yes.
Q. It says this entire account is pledged to secure a loan?
A. Yes.

Q. What loan was that?
A. I needed to borrow money to pay down the loan for Gateway financing.
Q. When was that loan taken out?
A. About a year ago. About a year ago.
Q. What is the balance of that loan?
A. Five million and some-odd.
Q. Is that loan also secured by real estate?
A. Yes.
Q. Is it one of the Gateway properties?
A. Yes.
Q. Is the current balance of that securities account approximately the same?
A. About that.
Q. This Pediatric Web.com, what is that?
A. It's an investment that I made with some doctors when I was working in Colorado for a website for pediatric information.
Q. Okay. And you've got a value of $50,000; is that valuation still the same today?
A. I would doubt that it is but that's what I paid for it.
Q. Okay. So that's your cost essentially?
A. Yes.
Q. Now, going down to paragraph 6 on this page you've got

the various Note Receivables listed?
A. Yes.
Q. Do you have documentation for these notes payable to you?
A. I don't have in every case a signed, sealed note but I do have a record of the money being put into them.
Q. And I believe you indicated the notes to your financial statement that collectability of some of these are in doubt; is that correct?
A. Yes.
Q. Which of these do you doubt the collectability of?
A. I think 121 Market is very doubtful. We've had to abandon that project.
Q. Where is that project?
A. Wilmington.
Q. By abandon what do you mean?
A. I mean that we are not doing anything to move it forward and the land that was involved in it is not available to us.
Q. Has it been foreclosed upon?
A. No.
Q. Then what happened to the property?
A. It was never acquired.
Q. Does that entity own any assets?
A. No.

Q. Did you guarantee any obligations in connection with that development project?
A. No.
Q. Okay. Any others that you believe are not collectable or collectability is in doubt?
A. That they are all certain circumstances -- I think they are all in doubt because of certain circumstances in the econony. And if they are collectable it will be years for the process to work out.
Q. Are any of these secured by any collateral?
A. Yes.
Q. Which ones?
A. Land Acquisition, that's an LLC that I invested in that Land Acquisition has a participation in some raw land.
Q. And you have security interest in that land?
A. No.
Q. Okay?
A. The LLC has it. My note is to the LLC.
Q. Okay. But did the LLC grant mortgage or anything back to you?
A. No.
Q. Do you know if any of these LLCs granted any collateral back to you directly?
A. They did not.
Q. The Land Acquisition has a note to buy it, which I

understand indicates that the payment is dependent on the sale of improved land; is that correct?
A. Yes.
Q. What is the status of the salable efforts of that entity?
A. The property continues to be marketed. Funds are still trying to be raised to complete infrastructure. There are a number of potential sales over the years. Financing for infrastructure is still the major focus to get that done.
Q. Okay. Same question for Langtree Properties, LLC. What is the status of that entity and the efforts to sell the property?
A. It's the same situation. Those two LLCs are invested in a project called Langtree at the Lake in Charlotte.
Q. Has the infrastructure, is that currently being developed or are you still awaiting funding for that?
A. Parts of it have been acquired for small pieces of property.
Q. Parts of the infrastructure?
A. Yes.
Q. Has been completed?
A. Under construction.
Q. Okay. And is financing immanent for any other part of it?
A. It's been a process that's gone on for about seven or

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eight years, so I always believe it's immanent but it's not completed.

Q. Okay. Atrium at Middle Sound Land, what is the status of any efforts to sell that property?

A. It has been ongoing also for about I guess five or six years. We were successful in putting infrastructure in at a significant cost to the two partners. The infrastructure is in place for the majority of the property.

Q. And sales efforts are ongoing for that property?

A. Yes.

Q. Have you had any recent interest or any reason to believe that a sale may be likely to happen?

A. I am always optimistic but in today's environment where it is difficult to get funding for anything that's been the biggest problem that we faced. But there has been interest and we have had numerous inquiries. Ultimately it has come down to the lack of the ability for the buyer to obtain financing.

Q. We'll talk about Newberry Atrium in a little bit. What is Atrium Northeast Limited Partnership?

A. It's an office building.

Q. And is that loan collectable or not?

A. It really will depend on how the releasing goes on the property over the next year or two.

Q. Tell me what that means.

A. It means during the financial meltdown the building

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lost 40 percent of the building. People went out of business, went away, couldn't pay their rent.

Q. Are you involved in connection with efforts to release the remaining space?

A. Yes.

Q. Same thing with Atrium at Middle Sound. Do you have any involvement with efforts to sell that property?

A. I do not.

Q. Do you have any involvement with the ongoing efforts to complete the infrastructure for that property?

A. For which property?

Q. Atrium at Middle Sound.

A. I do not have a day-to-day involvement with the infrastructure.

Q. Okay. For the Langtree entities, do you have any day-to-day involvement with the development of those projects?

A. Not currently.

Q. The 121 Market, I don't see that. Is that entity operating at all?

A. No.

Q. Go to the next page, page 3. You've got two notes payable there. What is the status of those notes?

A. I am able to continue to make payments as agreed.

Q. Are both of those loans current?

A. Yes.

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Q. One more question on the notes receivables on the last page. Are you receiving any monthly payments on any of those?

A. No.

Q. The next page is page 4. This is titled Commercial Real Estate Owned; do you see where I am?

A. Yes.

Q. Pages 4 through 7 are the pages for this particular schedule. Is this an accurate listing of the commercial real estate related to the entities that you own?

A. Yes.

Q. You don't own any commercial real estate that's not listed on these documents; is that correct?

A. To the best of my knowledge.

Q. To the best of your knowledge no, you don't --

A. No, I don't own anything that I believe I have missed on this list.

Q. Okay. Let's look at these entities individually beginning with Atrium Northeast Limited Partnership. That's the building you were just talking about that has a 40 percent vacancy; is that correct?

A. Yes.

Q. And it's got an appraised value of 6.9 million?

A. Yes.

Q. Do you know the date of that appraisal?

A. It was probably during the time that it was financed

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which was seven, eight years ago.

Q. And when does that financing mature?

A. About 18 months.

Q. Eighteen months from now?

A. Yes.

Q. Who is that financing with?

A. Amalgamated Bank.

Q. Did you guarantee any portion of that financing?

A. No.

Q. The loan amount listed here, is it roughly still the same today?

A. Approximately.

Q. The appraised value, do you believe that has changed?

A. Yes.

Q. What would you ballpark that to be today?

A. My expectation is that it will be less because when the building was financed it was about 87 percent leased and it would be my expectation that was based on an income approach. I would say a new valuation today based on the current occupancy it would be a significant reduction, 30 percent, 40 percent.

Q. Do you still own 92.63 percent of that entity that owns that property?

A. Yes.

Q. Who owns the remaining part of that piece?

A. Partners in the building.

Q. Are any of those partners related to you?
A. No.
Q. Do you have copies of the partnership agreement for that entity?
A. Yes.
Q. The next property listed is Gateway Properties, LLC indicating 14 Gateway Academy Child Development Centers located in South Carolina and North Carolina; do you see that?
A. Yes.
Q. Do you still own those, that entity?
A. Yes.
Q. Each of those has an appraised value indicated on this document. Do you believe the value to be roughly the same today or something different?
A. I would say it's different. And unfortunately these values too were done and financing when there were not the pressures on the economy for special purpose entities such as these.
Q. Do you know what these properties would be worth today or do you have an opinion as to what these properties would be worth today?
A. Again, just in keeping with the nature of the market today I would expect that they have declined in value 20, 30 percent.
Q. Are you a guarantor of any debt in connection with

those properties?
A. Yes.
Q. Which ones?
A. The North Carolina locations.
Q. What is the amount of the debt for those locations?
A. I am guessing somewhere in the neighborhood of about five to $7,000,000.
Q. What is the status of that debt?
A. The status is it's paid currently and it's still owed.
Q. That debt is still current; is that what your testimony is?
A. Yes.
Q. When did it mature?
A. Everything matures in a year and a half, approximately a year and a half, 18, 20 months, something like that.
Q. Have you identified any financing for that debt upon maturity?
A. Not at this time.
Q. The South Carolina locations indicated -- your testimony indicated you are not the guarantor of any debt in connection with those; is that correct?
A. This a conduit loan which I have guaranteed and it's a non-recourse loan for carve-outs.
Q. Carve-outs; explain that to me.
A. That means that if we were to walk away from the

properties, we can't pay them off, the lender takes them back. And unless I have done anything that is inappropriate, my understanding is that I would not be held personally liable for it.
Q. When does that debt mature?
A. Everything will mature in about 18 to 20 months. They are all tied together on due dates.
Q. And have you identified or has that entity identified any replacement financing yet for that debt?
A. No.
Q. Do you know yet whether you intend to try to refinance that or if you would allow that property to be recovered by the lender?
A. My objective would be to try and refinance it.
Q. Do you still own 25 percent of that entity?
A. Yes.
Q. Who owns the remaining 25 percent?
A. My partner.
Q. Who is your partner in that entity?
A. The Estate of Dave Burner.
Q. Can you spell that last name?
A. B U R N E R.
Q. How did he obtain that interest? His estate presumably obtained it upon his death but how did he obtain that interest?

A. We were partners.
Q. Did he purchase any part of that interest from you or did he go in with you originally?
A. We went in originally.
Q. Was his original interest always 25 percent?
A. No.
Q. When did his interest change?
A. His interest continues to be approximately 50 percent.
Q. Has it been 50 percent throughout?
A. Yes.
Q. Who owns the other approximately 25 percent?
A. My family.
Q. Any particular member of your family?
A. My children and my wife.
Q. Do they own that interest through an entity of some sort or do they own it individually?
A. In trust.
Q. Is that one trust or multiple trusts?
A. Multiple.
Q. What are the names of those trusts?
A. Kari Jacobs Irrevocable Trust, Kimberly Jacobs Irrevocable Trust, Peggy Jacobs.
Q. Is Peggy Jacobs an irrevocable trust as well?
A. No, she just owns it.
Q. When did those trusts acquire that interest?

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A. Several years ago Dave and I did an estate planning because he and I both had some health issues and we decided it was time to make arrangements for our family.
Q. Do you recall the approximate date of those transfers?
A. My recollection is it was several years ago, two or three years ago, three and a half, something like that.
Q. So somewhere between two and three and a half years ago?
A. Something like that.
Q. Now, did the trust or your wife, Ms. Jacobs, transfer anything back to you in exchange for that interest or was it simply a transfer by you to her?
A. It was part of some estate planning that both Dave and I used.
Q. I understand your testimony is it was part of estate planning, but aside from the estate planning function of it did they transfer any assets or any money to you in exchange?
A. No.
Q. Do you have copies of the operating agreement for the Gateway entity?
A. Yes.
Q. Do you have copies of the documentation in connection with the transfer to the two trusts and your wife?
A. I believe I do. I don't have it but I assume that it is available to the attorneys that helped.

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Q. What attorney helped you on the estate planning side?
A. Tom Cothran (ph).
Q. How is the Gateway Properties, LLC managed?
A. I do it currently.
Q. Okay. Are you the managing member?
A. Yes.
Q. Does that entity produce any distributions?
A. It's veritable, but yes, it produces distributions.
Q. You say it varies. What is the typical variance on that?
A. Maintenance, replacements. These buildings are some 20 years old.
Q. So there's ongoing obligations that sometimes require the distributions to be lower; is that your testimony?
A. Yes, the distributions for repairs, maintenance, whatever the issues may be we have to deal with them.
Q. What is roughly the amount you receive and on what periodic basis do you receive it?
A. I would say depending on the month 10,000 a month maybe.
Q. That's from Gateway Properties, LLC?
A. From all the Gateways.
Q. So that would include Gateway Colorado, LLC as well?
A. Yes.
Q. Is that just your portion or the portion for all

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partners?
A. No, that would just be mine but that's again up and down. Everybody participates in the expenses of the properties.
Q. Now the financing that you have on the South Carolina locations, the non-resource financing, was that the original financing for that?
A. No.
Q. What was the original financing?
A. The original financing was with multiple banks including Carolina First who was very helpful and active in construction loans with these properties, among others, but they were a very active participant in this.
Q. When was that original financing?
A. Well, I can't tell you the exact date of each of the financings but we started developing these in 1995 and built these over a period of 10, 12 years, 13 years. Carolina First has been an active partner in the Gateway developments among other things that Carolina First did, and they were very interested in a lot of the development that I did including Gateway and some of the other office buildings. Carolina First has been very active in my development career for 12 or 15 years.
Q. And then this non-recourse loan that's the current debt on the property, when did you obtain that?
A. Early 2000's maybe.

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Q. Early of 2010 or?
A. No, no 2000s.
Q. And then when you did that refinancing did that generate any cash out of the property at the time?
A. It did. We paid off our loans and we had some cash out.
Q. How much was that approximately?
A. Several millions of dollars.
Q. And do you know approximately how much it was?
A. No, several million.
Q. More than five?
A. No.
Q. Somewhere between one and $5,000,000?
A. Yes.
Q. And your portion of that was half at that time?
A. Yeah, in the early 2000s, yeah.
Q. What did you do with your portion of the cash out from that refinancing?
A. I invested it in other real estate.
Q. Do you remember which particular investment?
A. It goes all over the place. I mean, I invested in more Gateways. I invested in developments of additional office buildings. I invested it in new opportunities at Langtree, at Middle Sound, at 121 Market. I invested it in all my holdings that grew as a result of that cash. I had some reserves that I

used to feed my real estate investments.
Q. Did you gift or transfer a portion of the cash obtained from that financing to any relative or to any entity?
A. My family.
Q. And any particular member of your family?
A. All three.
Q. Do you know how much you gifted to them at that time?
A. Again a couple million.
Q. Did you gift that to them directly or did any portion of that go to a trust?
A. Combination.
Q. And the trusts, would that have been the two that we identified earlier or another trust?
A. Those two.
Q. The North Carolina locations, that debt that you indicated you had guaranteed in the neighborhood of five to $7,000,000, was that the original financing for those properties?
A. No, that was -- those were permanent loans that we took out to repay the construction loans.
Q. When you took out the construction loan was there any cash generated by that financing transaction?
A. No, had to put cash in.
Q. The next entity that you have -- before we get to that there's a note in parentheses that all ownership interests are

collateralized by loan agreement; do you see that note?
A. Yes.
Q. What loan agreement are you referring to?
A. I borrowed money against some of these assets from time to time.
Q. From whom did you borrow that money?
A. A guy named Rick Howard, a long-term partner of mine in North Carolina.
Q. Do you currently owe Mr. Howard any money?
A. Yes.
Q. How much?
A. I think it's about a hundred thousand maybe.
Q. Okay. And what is the extent of your ability to borrow against these assets under your agreement with Mr. Howard?
A. It's really depending on his financial position at the time that I need any money. I have lent him money over the years, he's lent me money over the years. We work together to try to assist each other.
Q. Now, getting to the Gateway Colorado LLC, the appraised value for that, is your testimony the same that you believe that that has changed?
A. I would say so. I think the single purpose entities certainly have not done as well in this environment only because I think the environment for child care has been diminished

during this meltdown, and I just think the general real estates for those type of entities are at a decline.
Q. Do you have an estimate of what these are worth today?
A. Again I would say -- and each one of course is a different location and a different place but my guesstimate would be somewhere in the 20 to 30 percent decline value.
Q. Is the loan amount about 7.3 million identified here on this schedule, is that still roughly the same?
A. Yes, these are 30 year amortizations so I would assume they haven't made a lot of progress in the last recent couple of years.
Q. Who is that loan facility with?
A. Which one?
Q. The Gateway Colorado, LLC?
A. Bank of America.
Q. Are you a guarantor of that loan?
A. Yes.
Q. When was that loan entered into?
A. About seven and a half, eight years ago. Since they are all coming due in the next 18 months that's about when it was done.
Q. Was Bank of America the original financing for these properties?
A. No.
Q. Are you a guarantor for the Bank of America loans?

A. It's the same Bank of America loan that I mentioned above, it's the South Carolina entities.
Q. So it's non-recourse according to your testimony for the most part; is that correct?
A. If I don't pay it off, they won't renew it, they get the building.
Q. When you did that refinancing and got the cash out that we talked about earlier, that was the same transaction as these Colorado entities; is that correct?
A. Yes, that's correct.
Q. Do you still own 18.75 percent of that entity?
A. Yes.
Q. Who are the other owners of that entity?
A. The partners in Colorado and the Burner estate and my family.
Q. Okay. How much of that entity does your family own?
A. I would guess 18 percent maybe.
Q. So basically the same percentage as you own?
A. Yeah.
Q. Was that also transferred to the two trusts and to your wife individually as the other one we talked about?
A. Yes.
Q. And that was done somewhere between two and a half or three years ago as well?
A. Yes.

Q. And also with that one, your family did not exchange anything to you in return for those interests?
A. No, they did not.
Q. Did they assume any debt connection with that transfer or the earlier one?
A. No.
Q. The note there on the bottom of this page about the interest being collateralized by a loan agreement, is that the same one with the gentleman in North Carolina Rick Howard?
A. Yes.
Q. The next page, page 5, Gateway Properties, LLC references new Gateway locations in Charlotte, North Carolina; do you see where I am?
A. Yes.
Q. Is your testimony the same that the appraised value would be different today?
A. I would think so. I think the value is consistent with the decline in the real estate valuation in the market today.
Q. These appraised values have a number right beside the word appraised value. What is that number?
A. That was the capitalization rate that they were using at that time.
Q. Is that taken off the appraisal of some other source?
A. My internal calculation.

Q. Your calculation of what the capital rate is?
A. Was at that time the value of the appraisals were done.
Q. Is that the same cap rate that they used on the appraisal or did they use something else?
A. I think that's consistent with the appraisal at that time but I don't remember with the appraisal cap rates.
Q. For the Newberry Atrium development what would you consider to be an appropriate cap range for that at this time?
A. Looking at the appraisal that was done by Wingard and Associates during the depth of the recession several years back he used -- and this is an appraiser that the bank used, so I assume that I should have some confidence in his valuation approach. At that time he indicated approximately 9.75 cap rate on the property at that time, which provided and as is where is value of about 5.8 million. He further indicated that the stabilization of that property would be valued pushing $8,000,000, maybe 7.9 million dollars. That was back really in the depth of the recession in 2011.
As you may be aware I have ordered an appraisal using the former bank appraiser, and his indication to me is the valuation for medical office buildings on campus have increased in the recent years. He will be completing his appraisal in the next several days. And I asked him what the valuation might be and why it increased, and his indication was the valuations

increased because of growing demand for upon-campus medical facilities, the long-term nature of the leases, the hospitals, and doctors have extended periods of time, some leases have excalating rates. He anticipates the valuation will come in more favorable possibly in the mid seven and a half cap range based on the research and sales that he's done, but I won't really have an authoritative answer until his appraisal is done in the next several days.
Q. Apart from his appraisal do you have a personal opinion of the appropriate current capitalization rate for the Newberry Atrium property?
A. As he educated me I would have agreed with his position, in the mid sevens.
Q. That's based on information from him and not on your own personal --
A. I learned from the experts and I think he's an expert. The bank obviously thought he was an expert so I agreed.
Q. I am not arguing with you on that, I am just saying if you excluded everything that he told you and I had to ask you what your personal opinion was, would you be able to tell me what your personal opinion is?
A. My personal opinion is based on what I have learned from the experts and I would believe that the valuation as-is where-is today would be somewhere in the low $6,000,000 range as-is where-is.

I believe that stabilization I think it would be somewhere pushing eight plus million.
Q. All right. Back to the Charlotte, North Carolina Gateway properties. Is the loan amount still roughly the same for that one as well?
A. Yes.
Q. Who is the lender on that one?
A. Wells Fargo.
Q. Did you guarantee that loan?
A. Yes.
Q. What is the extent of your guaranty?
A. For the full debt.
Q. And does that loan also mature in the next 18 to 20 months?
A. Yes.
Q. Have you identified replacement financing for that loan?
A. Not at this time.
Q. Backing up to the Gateway Colorado, LLC, that one also had an 18 to 20 month maturity date. Have you identified replacement financing for that entity?
A. No, I haven't.
Q. Is your ownership still the same for Gateway Properties, LLC with the Charlotte, North Carolina properties?
A. Yes.

Q. You still own 25 percent of that entity?
A. Yes.
Q. Who are the other partners for that entity?
A. The same people that owned the other, the estate of Dave Burner and my family.
Q. And your family's interest, that would also again be your wife and the two trusts belonging -- the two trusts in your daughters's names; is that correct?
A. Yes.
Q. And the circumstances around those transfers would have been the same?
A. Yes.
Q. Do you receive any distributions from the Gateway properties in Charlotte, North Carolina?
A. When I speak of the distributions earlier it's all encompassing.
Q. It's inclusive of that property as well?
A. Yes.
Q. And that loan agreement that you mentioned there is again the same one with Mr. Howard?
A. Yes.
Q. The next one, E Shoppes at Atrium, LLC?
A. Yes.
Q. That's a retail development apparently; is that correct?

A. Yes.
Q. The appraised value and the loan amount, are those still roughly the sans today?
A. Again, we have been going through a releasing on that property. I would say that is probably close to that, but I would say it's probably on the negative side in that we've lost several tenants and we're in search of refilling those spaces. So depending on when the property is valued it will be gaged on the occupancy and the market.
Q. Do you still own 50 percent of that entity?
A. Yes.
Q. Who owns the other 50 percent?
A. My partner.
Q. Who is your partner in that entity?
A. Joel Branwith (ph).
Q. Anybody else own an interest in that entity?
A. No.
Q. The next one, Atrium at Newberry, we'll talk about that later.
Atrium at Middle Sound is the next one. The appraised value that you have here from Atrium Middle Sound Land is 2.97 million dollars; is that correct?
A. Yes, again based on an appraisal.
Q. And do you believe that value to be the same or different today?

A. I would think it's probably less. Again, it's raw land but it's got infrastructure. I think land in Wilmington has been affected with the rest of the real estate values in the country.
Q. Atrium Development Associates, LLC is the next one listed indicating an office condominium at 791 Greenlawn; is that correct?
A. Yes.
Q. And that one is worth $175,000?
A. Again, that was based on an older appraisal. I would say today in my personal experience it's worth maybe half of that maybe. Maybe a little bit more.
Q. And there is no debt on that property?
A. Correct.
Q. The next one you've got listed is Atrium Development, Inc.?
A. Yes.
Q. Would your testimony be the same for that one as well, the appraised value roughly the same or lower?
A. I would tell you significantly lower.
Q. Significantly lower for that one. Okay, and the loan amount on that one is approximately $190,000?
A. Yes.
Q. Do you still own 100 percent of that entity?
A. Yes.

Q. Okay, the next one page 6 the first entity listed is Langtree Development LLC. You've got a member ownership interest of 2.63 percent. Explain your ownership interest and how that entity is structured.
A. Langtree Development was the original development entity that acquired that land. Over the years because of the economic meltdown it has diminished in value. We were not able to carry the debt and it required improvements. We have sold large parts of that to other investor groups and that's what my current participation is.
Q. And do you own your interest through an entity or do you directly own the 2.63 percent?
A. Through an entity.
Q. And what is that entity?
A. Langtree Development Company, LLC.
Q. And so you personally own 2.63 percent or do you own an entity that owns an interest in it?
A. I own 2.63 percent through Atrium at the Lake I think it is.
Q. So you have an interest in Atrium at the Lake?
A. Atrium at the Lake has an interest in Langtree Development Company.
Q. Okay. And do you have any -- is there any pledges against your interest in that entity?
A. No.

Q. Who are the other owners of Atrium at the Lake?
A. Just me -- I beg your pardon, that's not correct. Atrium at the Lake has multiple partners. I think there are four of us involved in that.
Q. Are any of them related to you?
A. No.
Q. And that entity in turn owns an interest in Langtree Development Company, LLC. How many other partners are there in Langtree Development, LLC?
A. Probably 15, 12, something like that.
Q. Are any of those partners related to you?
A. No.
Q. Have you received any distributions from Langtree Development Company, LLC in the past five years?
A. No, to the contrary.
Q. To the contrary you've made contributions to that company?
A. Correct.
Q. Would it be your testimony that the values indicated here are lower now?
A. I would say so only because these go back to appraisals that were done during the acquisition period which was in a very active market for the financial meltdown.
Q. Have you guaranteed any of the obligations with Langtree Development Company, LLC?

A. Yes.
Q. What obligations have you guaranteed?
A. I think currently right how I am down to maybe $8,000,000 in guarantees, about 8,000,000.
Q. Is that to one lender or more than one lender?
A. That obligation is to one lender.
Q. What lender is that?
A. Yatkin Valley Bank.
Q. Is that debt current?
A. No.
Q. What is the status of that debt? Has it been accelerated?
A. No, we are in a work-out.
Q. Do you know when that debt matures?
A. It has matured.
Q. When did it mature?
A. Last year.
Q. Langtree Properties, LLC is the next entity listed. Explain briefly for me the ownership structure for that property.
A. Which item are you speaking about now?
Q. Item M.
A. Okay. That is the same scenario, it's just different holdings.
Q. So would Atrium at the Lake be --

A. Yes.
Q. You own an interest in Atrium at the Lake which in turn owns an interest in Langtree Properties, LLC?
A. Correct.
Q. Would the values of the properties listed for that one M, I believe it's 13.125 million dollars, would the value be the same today?
A. I would say it's consistent with what we've been discussing. I think there's a decrease in value currently.
Q. Is the debt still roughly the same today?
A. Approximately. You could swing a few hundred thousand.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. That is part of that Yatkin Valley holdings. That's all together.
Q. Okay. The next one you have is Langtree Development Group, LLC. Is that the same type of ownership structure?
A. Yes, it is.
Q. And is your testimony the same for that one in terms of value?
A. Yes.
Q. The debt listed there, did you guarantee any portion of that?

A. I think that has been reduced now because of our investors that thought the majority part of Langtree Properties basically have taken over that debt so I don't have any guaranty on that.
Q. Have you received any distributions or income from that entity or Langtree Properties, LLC?
A. No.
Q. Have you transferred that interest in that entity or Langtree Properties, LLC in the last five years?
A. Just to the investors that purchased the majority. This is what I am left with today.
Q. Langtree HUD Development Company, LLC, item O at the bottom?
A. Yes.
Q. Is the ownership structure the same for that one?
A. Yes.
Q. What about the appraised value? Do you feel that it has changed?
A. I think this is a recent valuation so it's -- I would say that's a recent valuation. I would say it's probably not changed.
Q. Have you guaranteed any portion of that debt?
A. Yes.
Q. How much of that have you guaranteed?
A. I was the manager of it so I was the guarantor of it.

Q. So you guaranteed the full 40,000,000; is that correct?
A. Yes, but it is a HUD loan so it's non-resource once completed.
Q. Sorry, what's the last part of your answer?
A. I am guaranteeing the debt until it's completed and goes into a permanent loan.
Q. What is the status of the completion in permanent financing?
A. Six months away.
Q. Have you identified permanent financing for that property?
A. Yes.
Q. Did you have to guarantee any portion of the proposed permanent financing?
A. The normal carve-outs would be what my understanding is.
Q. What are the normal carve-outs?
A. Fraud, misrepresentation.
Q. The next page, page 7, LDC comma LLC. Do you see where I am?
A. Yes.
Q. What is your interest in that entity?
A. It again the 2.63 percent that is my remaining portion after we sold to the investors that took over these assets.

Q. And would you believe the appraised value to be accurate on this one?
A. Again, I believe it's probably reduced, no infrastructure, no activity on this particular piece of land so just raw land.
Q. Have you guaranteed any portion of the debt?
A. Yes.
Q. How much of that have you guaranteed?
A. Joint and several.
Q. Is the current amount of that roughly the 2.75 million?
A. Yes.
Q. What is the status of this loan, the loan that is secured by that property?
A. It comes due this summer.
Q. Who is the lender for this?
A. First Bank.
Q. Have you identified replacement financing upon maturity for that property?
A. No.
Q. So my current understanding is you have an interest in, according to this document, six Atrium office buildings?
A. Six?
Q. That's what I counted.
A. I see Atrium Northeast and I see Atrium Newberry.

Those are the two that I have interest in.
Q. Okay. Those are the two office buildings. The other commercial real estate under the Atrium brand, if you will, you've got four others. E Shoppes at Atrium, Atrium Middle Sound Land, LLC, Atrium Development Associates and Atrium Development Inc.; is that correct?
A. Yes.
Q. So that's six Atrium brand developments; is that correct?
A. Yes.
Q. And I counted 22 Gateway Child Development Centers at this time; is that correct?
A. Yes.
Q. I counted five different Langtree Development entities; is that correct?
A. I am not counting but what's identified here is what I have. I'll go back and count if you like.
Q. Well, if you disagree with me you're welcome to.
A. That's fine, no.
Q. And then on the next page I see three residential properties you own in a P&D Partnership; is that correct?
A. Correct.
Q. And do you still own the three residential properties?
A. Yes.
Q. Who's your partner in that?

A. My wife Peggy.
Q. And is that just simply a partnership or is there some other entity for that?
A. That's it.
Q. And do you own any other assets in that partnership or just the three here?
A. Just that.
Q. Have you sold any commercial real estate interests that we haven't talked about in the past few years?
A. No, we've talked about everything I have sold.
Q. Those would be I believe the Langtree transactions which the investors took over that debt; is that correct?
A. Yes.
Q. And then the family transfers that we talked about; is that correct?
A. Yes.
Q. Other than that one cash-out refinancing that we talked about earlier have you had any other real estate development transactions in the last five years?
A. I think five years I was fortunate enough to sell a number of Atrium office buildings in '05 and '06 before everything melted down, and that was the scope of what I have sold.
Q. And did you obtain cash in excess of what the outstanding debt was on those transactions?

A. Yes.
Q. How much did you receive roughly?
A. Again, I can't tell you an exact amount but it was several millions of dollars.
Q. Was it less than five?
A. I would say so.
Q. What was the disposition of the cash received from those transactions?
A. Again, I used that to invest in the future real estate that you see on this and feed the projects that did not fare well after 2008, '09 and '10 and '11.
Q. Did you transfer any portion of cash obtained from these transactions to any family members or any entity owned by a family member?
A. Not at that time.
Q. Do you have any portion of that cash still?
A. No. Unfortunately the economy has not been kind to me, I have enjoyed successes before the meltdown, didn't think it would end and invested in additional real estate knowing that I could continue making it work. Unfortunately '08, '09 pretty much put me on the ropes.
Q. Have you seen any improvement to this day?
A. I see some stabilization. I see some opportunities. There is interest to buy outparcels. There's interest to build. It has been very difficult for new investors, developers to

obtain financing.
Q. Are you familiar with I guess the current market for financing commercial real estate transactions?
A. To an extent, yes.
Q. What are the terms available on the market?
A. I can speak to the Newberry one which I think is an important point of our discussion today. As a means to help solidify with TD Bank's cooperation that I enjoyed from Carolina First over 12, 15 year period, given the amount of time and working with the marker, the healthcare market, I think the opportunity to refinance that healthcare product in it's current location would be very possible. I have investigated refinancing on that property and what I see upon stabilization, I could obtain a four percent loan on a 30 year an with a 10 year call. So I would say that is very encouraging to me.
Q. You say you could obtain. What lender or lenders offered that to you?
A. I am working through a broker out of New York that I have worked with for many, many years and he's probably responsible for the majority of my permanent lending. He's identified several lenders that would be interested if I'n able to stabilize the building.
Q. What do you mean stabilize the building?
A. Increasing the income of the building over the next period of time to get it to a positive cash flow with the debt

coverage of about 1.4.
Q. Do you have any documentation correspondence with the lenders about these offers?
A. Yes.
Q. Where do you keep that?
A. I keep it at the office and I provided it to both appraisers that were looking at this project valuation.
Q. Did you give them all of what you had or just certain documents?
A. Yes. No, what I had.
Q. The financing terms you mentioned that assumes the Newberry Atrium property has reached stabilization as your referred to it; is that correct?
A. Yes.
Q. By stabilization that means occupancy rate sufficient to give a positive cash flow coverage ratio and debt coverage ratio of at least 1.4?
A. Yes.
Q. Is that your testimony?
A. Yes.
Q. What occupancy level would Newberry Atrium have to reach to get to the 1.4 debt coverage ratio?
A. Again, it would be the function of the rent but it would be somewhere in the 10 to 12,000 square feet to be able to accomplish that kind of a loan.

Q. Does Newberry Atrium currently have 10 to 12,000 square feet of finished space available?
A. No.
Q. So the space would need to be improved before it could be leased out or rented; is that correct?
A. Yes.
Q. Can you lease the space and have the tenant finish it or does the developer landlord finish it in every event?
A. Every one is a negotiation. There is no every event.
Q. How is it typically done?
A. Depending on the objective of each tenant some will rather have a lower rent rate and do the up-fit themselves, some want to have the finishes done and pay a high rate.
And a case in point, and again, let me make you aware as I've made your appraiser aware and the Wingard Associate people, the two guys the bank previously used. I am in discussions with Newberry Hospital on leasing some additional square footage in order to move it forward in the near future, not too distance future, to allow us the opportunity to potentially take advantage of the financing that I have found is available at a higher income than what we've gotten here.
Q. What is the status of those discussions with Newberry Hospital?
A. Ongoing.
Q. Have you got any documentation of a commitment or a

draft agreement with them for the additional space?

A. We've discussed terms and conditions.

Q. What would the terms be in terms of how much space how much rent?

A. The terms that we're discussing is leasing additional 10, 12,000 feet at a rate that would not include tenant up-fits. If they are to move forward with that approach I've agreed to give them my entire interest in the building. I have agreed to forgive the 300 some-odd thousand dollars that I have put into it, and that they would take the position in the building in order to look at the opportunities of potential refinance in the future or at least a confirmation of this to provide some hoped consideration to enter into the reorganization on the table with maybe some modifications.

Q. What is the expected time of a decision on that?

A. I wish I could give you a specific date but it's been ongoing for several months. The board is considering it, I am jumping through hoops in order to provide them additional information they're requesting.

Q. Do you think that's something that is going to happen within the context of the existing bankruptcy or later on down the line?

A. I would say if we're able to work anything out it would happen in the near future, in the next several months.

Q. Who were you communicating with at the hospital about

that?

A. Ron Vigas.

Q. How do you spell his last name?

A. V I G A S.

Q. What title does he have at the hospital?

A. CEO.

Q. You said the rate would not include tenant up-fit so that means the developer would be responsible for those?

A. No, that the tenant would be responsible.

Q. What needs to happen -- you said you were jumping through some hoops. What needs to happen for the hospital to be able to make a decision and enter into an agreement with you?

A. I really can't tell you what additional things they are going to be undertaking. I have provided them with the proposals, we have negotiated it. I've got nothing else to give. They continue to do their own research and they haven't shared with me what specific items that they are researching.

Q. So the ball is in their court so to speak?

A. Yes.

Q. These proposals and documentation related to the negotiations, have you given a copy of that to your lawyer?

A. Yes.

MR. BEDENBAUGH: Let's take a few minutes' break.

(Brief recess was held.)

BY MR. BEDENBAUGH:

Q. Mr. Jacobs, you've been handed Exhibit 2 to your deposition which is copies of financial statements from 2011, 2009 and 2006 all as one document. The first one there is dated January 31, 2011; do you see where I am?

A. Yes.

Q. Is that a true and correct copy of your financial statement as of that date?

A. I would say yes.

Q. And according to this document your total assets at this time was a little in excess of $32,000,000; is that correct?

A. Say that again.

Q. According to this document your total assets were a little bit more than $32,000,000 at this time?

A. Yes.

Q. Which is about $11,000,000 more than the financial statement dated January 31, 2012; is that correct?

A. Yes.

Q. Do you have any explanation generally as to the $11,000,000 drop?

A. I would say I invested a lot of it, fed a lot of it into valuations, and I guess without looking at it dramatically have changed over the last couple of years.

Q. The total net worth here is a little more than

$32,000,000; is that correct?

A. I am sorry, I didn't hear what you said.

Q. The net worth indicated on the January 31st, 2011 financial statement is slightly in excess of $32,000,000; is that correct?

A. No, I think it was 30,000,000.

Q. You're right, I was looking at the total liabilities. You're right, the total net worth is a little more than 30.4 million dollars, right?

A. Yes.

Q. Okay. The next page is Notes to Financial Statements dated January 31, 2011. You'll see the Wells Fargo account has a current estimated value at that time of a little more than 1.3 million dollars; do you see that?

A. Yes.

Q. That was $471,000 in the 2012 notes. Do you know why that dropped?

A. I was during '11 feeding a lot of real estate. I paid down about $2,000,000 on one of the notes at Carolina First. I paid down $1,000,000 on the Newberry. I paid down notes for refinancings of the Shoppes. I have paid down and fed funds to keep some of the properties going. I paid down personal debts owed to people on my financial statement, Ballington (ph), Peterson, basically using what liquidity I had at that time to keep everything afloat.

Q. Okay. Now skipping down to paragraph 6 you've got 2011 Contracted Receivables Due; do you see where I am?
A. Yes.
Q. Did you receive this amount in 2011 of roughly $800,000 that you've got indicated here or results less than that?
A. They were less.
Q. Do you know how much you received?
A. No, I don't.
Q. Do you remember roughly if it was most of that or half of that?
A. It was part of it but I can't tell you three, two, two and a half years ago what I received.
Q. The Gateway Properties, LLC distribution of roughly $400,000, did you receive that?
A. Some part of that.
Q. Do you recall what part?
A. No.
Q. The next paragraph has 2012 contracted Receivables Due of total in excess of 1.2 million dollars; do you see that?
A. Yes.
Q. Do you know if you received that amount or something different?
A. It was different, a lot less. Two years out this was during some very difficult times and unfortunately many of the

distributions from these properties did not materialize as anticipated there.
Q. Which of these performed as expected?
A. I could say none of them. Many of the Gateway incomes had to go to repair some issues. We had some infiltration of mold in a couple of the centers and construction requirements we had to do to keep the buildings operating, so the money was diverted to maintaining and fixing a number of the buildings.
Q. Okay. The next page has the Commercial Real Estate schedule beginning on this page, page 3; do you see where I am?
A. Yes.
Q. The Gateway Properties, LLC listed here starting with the letter B, your general partnership owner interest here was 50 percent; is that correct?
A. Yes.
Q. So this would have been January 31, 2012 prior to your transfer of 25 percent to various family members or entities?
A. If that's what it says but my recollection is that we did the estate planning somewhere toward the end of '10, so I can't tell you if this is my error, but my recollection is when Dave got sick in 2010 we decided that we needed to do some estate planning at that time.
Q. And do you know when those transactions actually were finalized and took place?
A. I can't tell you specifically but I do know that when

he got sick that's when it all began and it was an ongoing process but I can't tell you the complete dates that all this was wrapped up.
Q. But the reduction from 50 percent to 25 percent would have been the cost of that transfer?
A. Yes.
Q. And similarly the next entity the Gateway Colorado, LLC?
A. Yes.
Q. It shows 37.5 percent and here the reduction to 18.75 percent in 2012 would have been attributable to the transfer to family members?
A. Yes.
Q. Likewise on D, E and F various Gateways in Charlotte, North Carolina are indicated to be 50 percent ownership interest with the reduction to 25 percent reflected in the 2012 statement would have been because of the transfers to the family members?
A. Yes.
Q. All right. And the next page, page 5 it's got L and M, two Langtree-related real estate investments apparently but the ownership structure is a little bit different than what we discussed in 2012?
A. Yes.
Q. Can you explain -- and you may have already done so earlier -- but can you explain how it got from 2011 to 2012?

A. Sure. It was 2011 and 2010. In 2010 we were having trouble raising funds, we were having trouble meeting our obligations, we were in the process of negotiating with several investors. Towards mid '10 into '11 we were able to find somebody that could perform and purchase with a majority interest in the Langtree properties in order to keep us from basically not being in a position to meet our obligations, and that evolved over a period of time.
Q. In connection with those transactions did you receive any cash at all?
A. No.
Q. The next page is residential real estate owned as of January 31, 2011 page 6; do you see where I am?
A. Yes.
Q. This has 6133 Lakeshore which I believe you indicated was your residential address?
A. Right.
Q. That was not on 2012. What happened between 2011 and 2012 there?
A. During the same process Peggy has owned the properties, the Grand Pavilion and Lakeshore. During refinance they had been on the title but during the estate planning she has been on the title for years. I went through a refinance at that point, I was on it to help make the loan and then it was switched back.

Q. So let me make sure I understand your testimony. Your testimony was that you and your wife both were on the title for years?

A. No, the majority of the time -- I went through three refinances during a period of 20 years, three or four refinances. During that time I would be required to sign on to the loan but it was always held in Peggy's name, and apparently I was not diligent enough to make the corrections on my financial statements.

Q. Okay. So you never owned an interest in either of those properties?

A. I did maybe 10 years ago. And I can't tell you approximately what the time was but every time we went through a refinance I'd have to sign on to it.

Q. But you last owned interest in these properties approximately 10 years ago?

A. Within the last five or 10 years, yes.

Q. And your interest you transferred to your wife?

A. Yes.

Q. What was the reason for that transfer?

A. The estate planning.

Q. Any other reasons?

A. No.

Q. Did she give you anything in return for that transfer?

A. No.

Q. Okay. The next page is a rent roll for Atrium Northeast; do you see where I am?

A. Yes.

Q. I believe you testified earlier there's been some vacancies on that property?

A. Yes.

Q. So is the cash flow negative or positive now?

A. Negative.

Q. How much is the negative amount this month; do you know?

A. It varies from month to month to a break-even to a negative cash flow of about eight or $10,000, but during the negative times I was feeding it in order to meet the obligations and keep the building operating.

Q. Okay. The next one here is another Newberry Atrium rent roll of 2011. My understanding is that you have two lis pendens identified. Did either one of those happen?

A. No. I can give you a little background on that if that would be helpful.

Q. Sure.

A. During 2010 I was working with the original CEO of the hospital who initiated this project and asked me to participate. He had been there for 15 years and had been responsible in my opinion and in most people's opinion for taking the hospital to a different level, and requested that I assist them in

developing this building.

During this time 2010 and '11 they had anticipated recruiting additional physicians that I was working with. At that time we were preparing proposals and doing the things that needed to do in order to get these tenants to relocate to Newberry. During that same time in 2011 the current, then current CEO left the hospital and a new CEO came in, had no connection with the community, he was there as I guess a temporary CEO. And during the former CEO's leaving the hospital and the community he would not focus on this building, apparently he had other focuses and the recruitments never occurred.

Q. What is the current variance on the cash flow at the Newberry Atrium property?

A. It is almost a break-even with the interest only. I have requested that BB&T consider some type of restructuring in order to out the building on a stable footing allowing me and the hospital and community times to recruit and work through the economic environment that we went through in 2011 -- previous to 2011 and into 2011. And this is recently.

When the Carolina First folks worked with me over the years, they were basically like joint venture partners. We did six, seven deals together and they were always there to help me, cooperate, give me some kind of flexibility that would allow me to work through the problems of any real estate transaction we

were going through. They were almost like joint venture partners. They would solicit and got the benefit of some very high-profile projects that I was associated with. I was on a very good, warm friendly basis with the whole management team from Mac Whittle (ph) all the way through. And when the notes were coming due in 2012 everybody I knew at Carolina First had left, and I had nobody really to speak to.

When I met with one of the TD Bank executives who was out of Greenville, I believe, my opportunity to visit with him and give him background on the project was maybe a half hour meeting, and I explained what we were going through in '11. I guess it was '11 -- yeah, it was in '11 -- they really didn't have much interest or didn't discuss too much how they could be of assistance even though I had a plan and I proposed a plan to them, there was really no response.

And I may be bridging from '11 into '12 but this is pertinent to where we are in this transaction. I think that's something that should be acknowledged, at least.

When TD took over the portfolio from Carolina First it was my understanding that their position was they were taking over the same relationship that I enjoyed with the Carolina First people, which was a very good, flexible relationship over the years, 12 years plus or minus, had done $27,000,000 with Carolina First. And they really were very solicitous of the deals. I would be requested to work with them, many of the

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hospital medical deals. I had done a previous medical deal with Carolina First that was in '07, was successful in paying that off, a little longer than usual but '07 was a different time. By the time we sold it I was able to pay it back.

In fact, at the time that Carolina First got taken over -- I lost almost a joint venture partner. And that has been a very difficult process for me to work with that the TD representatives have no knowledge of my development history, one, no knowledge of the volume of business that I've done and the successes that I have enjoyed, and really the adversarial situation that they've created rather than understanding ways to solve the problems versus being almost punitive the way that they have come after me personally.

Q. We'll talk about the State Court cases in a little while, but is there any document that obligates TD Bank to refinance any of the loans that we're talking about today?

A. There's no document that obligates them to do anything other than what you would think the fiduciary responsibility of a bank would be.

Q. What document says there's a fiduciary responsibility for the bank to do anything?

A. When you enter into $27,000,000 of volume with a bank over six or seven deals and they solicit your business and you give them the business because you trust them because you believe they are reasonable and flexible people as they have

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proven over the last 12 years plus, you would expect that type of relationship to continue as long as you have been performing.

Q. Is there a document that says there's a fiduciary responsibility to you?

A. Don't have a document that says that but I would not have entered into these relationships with a group that would have been anything but reasonable and flexible that has proven likewise for over 12 years.

Q. Is there a document that says TD Bank has to do anything other than what its done in connection with these loans?

A. I don't have a document that says that they are going to be my savior, but they do know that if they have any insight into my history with Carolina First and my career they would know that I have worked everything out over good times and I am working things out in very difficult times.

Q. Your statement that TD has a fiduciary and acting in a punitive manner, is that based on any document that you have knowledge of today?

A. It's based on the actions that they have taken, the actions that they have taken on two of the transactions that I am involved in right now are the only transactions that they have left after I paid back 20 some-odd million dollars -- and unfortunately we all thought things would continue on as we had operated before, but it has not, and every bank that I have

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dealt with over my career, including Carolina First, has always been reasonable and flexible in order to salvage and enhance the value of the project they are associated with.

Q. So you can't identify any documents in response to my question?

A. I didn't have documents, I have actions from Carolina First.

Q. Those actions you spoke of two projects and those are Newberry Development and Middle Sound Land?

A. Yes.

Q. And the actions that you're speaking of are suing on the guaranty?

A. Yes.

Q. Any others?

A. Not understanding what the mechanics of solving the problems would be. As a party to a transaction they should be aware of how problems can be solved as opposed to how to damage and hurt the principals associated with the project, and ultimately damage the project and the asset itself.

Q. Anything else?

A. No.

Q. I want to look at the next document in Exhibit 2. It's the March 1, 2009 Statement of Financial Conditions; do you see that?

A. Okay.

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Q. Is that a true and correct copy of your statement of financial conditions as of March 1, 2009?

A. Yes.

Q. And again this document indicates assets in excess of $40,000,000; is that correct?

A. Yes.

Q. And it also indicates a net worth of close to $39,000,000; is that correct?

A. Yes.

Q. Is that your signature on this document?

A. Yes.

Q. If you'll look on the third page in of that document it's page 2 of the notes paragraph 7, Notes Receivables?

A. Yes.

Q. There's a note receivable in excess of 5.3 million dollars from Atrium at the Lake, LLC?

A. Yes.

Q. What happened to that receivable?

A. It's still on the books.

Q. Has any amount of that been paid?

A. No.

Q. All right. On the Commercial Real Estate Owned section which is the next page March 1, 2009, Gateway Properties, LLC, here it indicates from 2009, 16 Gateway Properties as opposed to the 14 in 2011 and 2012 and then at the

bottom it has Kenton and Mallard sale/lease; do you see where I am?

A. Yes.

Q. Are those two the two that are missing from here?

A. Yes.

Q. What happened to those two properties?

A. We sold those properties to investors and we handled the lease transaction with the tenant.

Q. Did that transaction generate any cash?

A. Yes.

Q. How much?

A. I don't recall but it was enough to invest in some more Gateways and some more land acquisitions.

Q. Did you personally receive any cash from those transactions?

A. Yes.

Q. Do you recall how much?

A. No.

Q. Less than a million dollars or more?

A. I would say it was less.

Q. Did you transfer any portion of that cash to any family members?

A. No, I supported family members but I invested in additional Gateways and additional land.

Q. Did you transfer any portion of that cash or proceeds

of that transaction to any entity or any family members?

A. No.

Q. On page 5 of the same document we have got paragraph K and L Residences at the Landings, building 27. What happened to those properties?

A. We had financing arranged, we had tenants signed up. Actually we had tenants signed up for the Residences at the Landings and had significant deposits on account. As the time went on during that year the financing evaporated and we were not able to move forward any further.

Q. What happened to those properties?

A. They didn't get built after we had financing and tenants in place.

Q. And the real estate, what happened to that?

A. It's still part of the Langtree holdings.

Q. And then you've got in paragraph N 131.14 acres indicating sale pending?

A. Yes.

Q. What happened to that property?

A. The same thing, people -- we had a hotel developer who was under contract owed us money up. He too couldn't get financing and that deal collapsed also.

Q. Two more pages in there's a Statement of Financial Condition dated December 1, 2006; do you see that?

A. Yes.

Q. Is that a true and correct copy of your statement of financial condition as of that date?

A. Yes.

Q. Is that your signature on the document?

A. Yes.

Q. On the Notes to Financial Condition, the next page, down at the bottom under 2006 Contract Receivables Due paragraph 6 there's Atrium Memorial Partnership I and II, Atrium SRC, LLC, Southeast Pediatric Center, LLC, Irmo Medical Center, LLC; do you see where I am?

A. Yes I do.

Q. What happened to those entities?

A. Those were sold.

Q. Were these some of the entities that you talked about earlier as being sold of different sales?

A. I mentioned to you earlier that I had sold a number of the Atrium properties and this is part of those.

Q. Did you receive any proceeds from the sale?

A. I did.

Q. How much did you receive?

A. You know, combined, a couple million dollars.

Q. And was that sale in 2007 or later?

A. I think it was in 2007.

Q. You received in the neighborhood of $2,000,000?

A. Several million, I can't tell you exactly.

Q. More than five or less than five?

A. Less than five.

Q. Do you know what you did with that?

A. I invested in Langtree, invested in more Gateways and more land.

Q. Did you transfer any portion of those sales proceedings to any family members or any entity owned by a family member?

A. Yes.

Q. What transfers did you do at that time?

A. Family members. My two daughters, my wife.

Q. And the transfers to your two daughters, was that to the trust or directly?

A. To the trust.

Q. And how much was each of those?

A. I don't recall but it was hundreds of thousands.

Q. For each?

A. Yes.

Q. When did that take place? Was that in 2007 when the sales closed?

A. Yeah, it would be around that time.

Q. Did they give you anything in exchange for those transfers?

A. No.

Q. The next page you've got a Note Receivable from Mini

School Learning Centers?
A. Write.
Q. What happened to that?
A. That was an amount that was still due on the sale of the Gateway operations.
Q. Has that been paid?
A. Yes.
Q. If you will look to Commercial Real Estate Owned schedule for 2006 this has paragraphs B through F which are the Atrium Memorial I and II, the Aetna SRC, Southeast Pediatric and Irmo Medical Center; do you see where I am?
A. Yes.
Q. Are those the entities that you sold in 2007 that we talked about earlier?
A. Yes.
Q. On page 6 of that document there's Vacant Land at 1921 Gunbarrel Road, Chattanooga, Tennessee?
A. Yes.
Q. What happened to that property?
A. Developed it.
Q. Who owns that property now?
A. Shoppes at Atrium.
Q. And that's reflected on your later financial statements?
A. Yes.

Q. The next page after that one on that same document is Residential Real Estate Owned as of December 1, 2006?
A. Yes.
Q. There are a number of properties here that weren't on the later financial statements beginning with 1522 S. Kilbourne, 3716 Palmetto, 3274 Davenport and 1367 Allendale?
A. Yes.
Q. And also 3509 Maybank. Do you see where I am?
A. Yes.
Q. What happened to those properties?
A. They were all sold.
Q. Were they sold in one transaction or separate?
A. Separate.
Q. Do you recall when they were sold?
A. No.
Q. Do you recall what proceeds you received from the sales?
A. No.
Q. Do you recall what you did with the proceeds of the sales?
A. I invested it in more real estate.
Q. Same question for the two properties on the next page, 716 Cedarfield and 1361 Weston Watch?
A. Same situation, sold them.
Q. You don't recall what you received from that or what

you did with those proceeds?
A. No.
Q. Mr. Jacobs, have you ever been charged with a criminal offense other than a traffic violation?
A. No.
Q. Have you ever been deposed before like we are doing today?
A. No.
Q. Have you filed a claim against anyone else in the last five years?
A. I have filed eviction notices.
Q. Other than that?
A. No.
Q. Has anyone other than TD Bank filed any claims against you in the last five years?
A. No.
Q. What about claims against entities in which you hold ownership interests?
A. No.
Q. Have you had any judgements entered against you in the last 10 years?
A. No.
Q. Have you searched for documents related to the TD Bank Carolina First loans?
A. Searched for documents? I am not sure I understand

what you mean.
Q. I sent requests to your lawyers for documents related to the loans. Have you looked for any documents related to the loans?
A. I have got several file drawers of loan documents on the various transactions that we have done over the last 12 years.
Q. Are those files at your house or at your office?
A. My office.
Q. Have you provided copies of those to your lawyer?
A. Not in recent time. They may have had them from previous transactions but they've all been paid off except these two.
Q. Do you have any documents on your computer related to the loans?
A. No.
Q. Any emails with TD Bank and Carolina First regarding the loans?
A. Not emails, I may have had an email or two about an appointment or a phone call but that's about the extent of it.
Q. I want to talk about the Newberry Atrium loan. Tell me about how that loan originated?
A. That originated in I guess '07 maybe. I was involved with Carolina First with Irmo Medical Center at that time. And during that time the people that I was dealing with like Larry

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Scotts and Michael Phillips and Justin Strickland, they were very kind and generous to me and they asked me if they would be able to look at the new transactions that were coming up. And because of the confidence that I had in working with these people from years before, I was very happy that they were interested in looking at the Newberry loans. They were familiar with the work that I had done and the performance that I had done, and they said that they would be very interested in putting a very good proposal on the table.

At that time I was required by the hospital to provide several proposals. Quite frankly, Carolina First won the proposal because I lobbied for them based on the longstanding relationship I have had with the management team and their interest, their willingness, the flexibility to work together through the previous six transactions that I have worked with them on. And as a result of my lobbying the hospital agreed to go with Carolina First.

Q. And then the funds were of course used to construct the medical office building known as Newberry Atrium Professional Center; is that correct?

A. Correct.

Q. And you were represented by separate counsel for that transaction I assume?

A. Separate than me?

Q. Separate from Carolina First -- another lawyer?

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A. Yes.

Q. Who was that?

A. Gerald Jowers.

Q. Now I believe in your bankruptcy filings the total rent per month is a little over $58,000 on a monthly basis; is that correct?

A. Again without looking at the details, I have got so many numbers in my head. If that's what it says I am sure that's what it was reported.

Q. It's leased up to about 62 percent at this time?

A. 63 percent occupied. I think we get revenue on 60 percent because the MRI is owned by the hospital.

Q. And is the current occupancy and the rental revenue sufficient to pay debt service and operating expenses?

A. No.

Q. How much is the shortfall per month?

A. Again depending on repairs and maintenance and depending on -- which currently before they called the loan I was feeding it $10,000 a month.

Q. Now, before Newberry Atrium filed for bankruptcy and the loan had matured the debtor was not making any payments to TD Bank; is that correct?

A. The debtor was making payments to the bank until they extended -- they gave me a 90-day extension to work something out and at that time I was contacted by a gentleman out of

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Greenville, who I mentioned to you, said we'd sit down and work something out. I had maybe an hour visit with him, he came to visit me.

I prepared a proposal that would show how that would work out, how I could get this on an even keel with a little flexibility from the bank and an extension. He indicated we would work on that. He left, I didn't hear from him for maybe three or four weeks. I tracked him down and said can you tell me what's going on. And he said well I have been unavailable and as a result of that I haven't made much progress on this. I said well what can I do to get this note renewed that's coming up. He says I have got to get my people to give me some direction. I said who are your people. And he said it's a committee. I said okay. What is it that you need and what are the issues? The proposal I gave you was a very realistic approach on how I could continue to maintain the property, meet all its obligations.

I didn't hear from him again for another couple of weeks and I tracked him down again. And I said I have got to know what we're going to do, we're already beyond the first 30 days. Are you going to work with me on extending this? He says I can't give you that answer.

Q. Who are you referring to?

A. No, I don't recall his name. He was out of Greenville. Todd maybe, Eric O'Toole (ph) or Eric Todd or

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something like that. I mean I had one visit with him and three phone calls. I just kept getting the runaround and I kept asking for what are we going to do. And he says well I might be able to get you an extension but you've got to pay it down significantly. What is significantly? A million dollars? I can't do that. I can't operate the building and pay it down at the same time.

Q. And at some point the debt matured; is that correct?

A. It matured and during that time I could not get an answer other than the runaround and no direction. He says I am leaving this position, you'll be contacted by another person. Another three weeks go by and I am contacted by another person. This gentleman is out of Charleston. I think he's the current gentlemen that was at the hearing.

He then sets an appointment for a week later. He says I am going to come visit you and we'll work something out. I went through the same process I did with the first fellow from Greenville. And I gave him the proposal, updated it and he says well let me see what I can do on this. Said I've got to go back to my people. I've heard the people so I said who are your people. He says one is in Greenville, one is in Maine and someone else. It was him, a Maine guy and a Greenville person.

I gave him all the information that I had done before. He sent me a request for some additional information, I sent that to him. I didn't hear back from him. At some point, maybe

several weeks later I get this lawsuit filed against me. And that was the end of it. I don't believe -- and I asked them if they had ever seen the property, if they had given any consideration to my proposal which would not jeopardize the bank, would maintain the facility and allow it to operate while we continued to -- and I gave them the history in very great detail of what's going on in the environment, the economy, the healthcare environment. And there was never any discussion. It was just the next thing I know I had a lawsuit.

Q. The loan did mature; did it not?

A. Yes. And during that time I had no communication with what anybody was going to do.

Q. After it matured did you make any payments to TD Bank?

A. No.

Q. And up until the time you filed bankruptcy you weren't making any payments?

A. No.

Q. So presumably the property had enough cash to pay its operating expenses during that time?

A. It did.

Q. Is the property currently listed for sale?

A. It's not listed. I have spoken to several brokers and I mean, there is interest out there but it's not interest at this moment that I could pursue considering where we are in this legal proceeding.

Q. Are you and Newberry Atrium contesting liability in the TD Bank Note and Guaranty?

A. I wouldn't say I am contesting it. I think the guaranty and the punitive way that the bank has pursued this as opposed to looking into a collateralized loan, the loan has value -- I am sorry, the building has value. And the building itself has the ability at some point if were to believe the 2011 appraisal, five million eight as is where is, that provides a very good opportunity for the bank to recover the majority of the loan. Given the time and the approach that I proposed to work this thing out this loan could be paid in full in the near future, the next several years. Given the time to continue to operate the building, allow the Affordable Healthcare Act to provide the additional revenues to a real community like Newberry recruit additional physicians and services, which they probably are in a better position today than they have been in recent years to recruit additional services and physicians.

Q. You indicated you are not contesting the liability but you have some concern about what you call the punitive way in which TD Bank has done this. Are you referring to the suit solely on the guaranty; is that correct?

A. Yes.

Q. Are you referring to anything else?

A. The way that it has been handled, the failure to communicate with me to work with me in any reasonable way. The

suit basically damages my ability to perform, not only on this asset and find new financing and working, but it could also jeopardize the other assets that I am involved in also, which may be a source of repayment given the time over the next several years to allow them and the economy to heal.

Q. In your complaints are they based on anything written in any of the loan documents between Newberry, yourself and TD Bank?

A. I can't tell you the minutia of the legalese in these documents. I can tell you that there is a standard of reasonableness when you enter into any kind of ongoing relationship. A $27,000,000 history of working together over 12 plus or minus years gave me that standard of performance. I performed, they performed, they were flexible. They gave me some breathing room when needed and I performed back and took care of the responsibilities I had.

Q. So your testimony is there isn't any term in the loan document that you're referring to?

A. I can't be specific because I haven't read the hundreds of pages of loan documents.

Q. Can you be general?

A. When you enter into a contract it's my understanding that there is a reasonableness to expect fair treatment, expect fair play, and nothing about this has been reasonable. It hasn't been fair, it hasn't been anything but abusive, damaging

to me personally, to the assets that I can control. You basically are shooting me in the head for a reason that I can't understand. If I can preserve the value of this asset and grow it, the bank would not be harmed. You're just harming me which inhibits my ability to solve the problem.

Q. Again you're referring to the suit on the guaranty?

A. Yes.

Q. You keep mentioning the 27,000,000?

A. Yes.

Q. Those are obligations that were paid?

A. About 21,000,000 has been paid. I have reduced two obligations that are outstanding of about $3,000,000.

Q. So $24,000,000 has been paid?

A. I can't tell you. I guess I owe about six, $7,000,000.

Q. Seven million has been unpaid?

A. Yeah.

Q. So roughly 33 percent?

A. But they can be paid with a reasonable approach. And in today's world you have nothing else to work on other than solving problems rather than creating problems.

Q. All right. Let's look quickly at your Answer in the Guaranty Action. It's Exhibit 3.

In paragraph 9 of your answer it references a special fiduciary relationship between the Defendant and Carolina First;

is that correct?
A. Yes.
Q. That's what you're alleging in this case?
A. Yes.
Q. When did that special fiduciary relationship develop?
A. When you enter into contracts with institutions or people you expect fair treatment, you expect the people will work together to deal and to solve problems rather than damaging the assets of the people associated with it that will undermine the solutions.
Q. When you are talking about damaging assets you're not saying that TD did anything to this property?
A. I am saying by being so unreasonable and aggressive they can cause the damage for a solution.
Q. And they didn't foreclose on this property; is that correct?
A. No, but now foreclosing on the property would be a course of action you could take to recover from part of your funds, but if I were given the time and didn't have the responsibility of fighting a lawsuit on a personal guaranty which could ultimately result in a judgement that completely damages the ability to solve the problems and it damages the properties and collateral that you have.
Q. So you're saying you'd be better off if TD foreclosed on the property?

A. Rather than coming after me for a judgement because at this point my proposal would involve refinancing this in the not-too-distant future.
Q. Is there any document that says TD has to refinance this loan?
A. No document that says they are obligated to do anything other than act fairly and be reasonable to preserve an asset that they would undermine.
Q. What document says that?
A. I don't have a -- I've got that much legalese. I don't have anything that says what I am alleging, and if I do I haven't looked through the hundreds of pages of documents.
Q. So you don't know that there's a document that says what you just said?
A. I don't know all the minutia from the contracts.
Q. Do you know if there's a document that says what you just alleged?
A. I don't know.
Q. It's your claim that in paragraph 12 of this answer it says would not have executed a guaranty without the trust and confidence when dealing with Carolina First. Is that your allegation in this case?
A. Yes, it is. It's a fact and I had three other lenders that were interested in doing this. I chose and lobbied for Carolina First because of the flexible working relationship we

had developed over the years.
Q. Those three other lenders, did they require any portion of the loan to be guaranteed?
A. I am sure they would.
Q. Do you know who those lenders were?
A. Yes.
Q. Who were they?
A. BB&T, Carolina First and I think Regions also was one.
Q. Now, Carolina First ultimately did agree to modify that construction financing; isn't that correct?
A. Yes.
Q. And they I think modified it seven or eight times, didn't they?
A. They modified it seven or eight times but kept squeezing me harder and harder which required me to continue to feed this.
Q. They wanted you to pay the loan?
A. Yeah.
Q. Imagine why they did that.
Now, do you know if BB&T or Regions, sitting here today, would have agreed to extend that maturity seven or eight different times?
A. Absolutely.
Q. How do you know that?
A. Because they had done it for me before.

Q. Have they done it for you before in loans that didn't have a sustainable occupancy?
A. Yes.
Q. Which loans were that?
A. The first loan -- well, this goes back to Atrium Northeast. Atrium Northeast was troubled before and I had to get extensions over about a three-year period to release the building.
Q. Anything else?
A. I have had other banks that have because of good long-term relationships that have extended and turned them into permanent loans to make the properties able to stabilize as opposed to having to face this battle every four, five, six months.
Q. You later go on in your answer paragraphs 16 to 18, if you will look at that, indicating there was a refusal to provide permanent financing; is that correct?
A. Yes.
Q. When did that refusal occur?
A. In 2011 I guess it was.
Q. And I think we've talked about this earlier; there's no provision in either loan documents that required TD to provide financing, is there?
A. There is no requirement that I see other than working together in good faith and not trying to jeopardize and damage

the asset and the operator, the developer, the guarantor.

Q. Did you seek permanent financing on this property from any other lenders?

A. Not during recent years, no.

Q. At any time?

A. No, not during the last two years.

Q. What about prior to the last two years?

A. No. We hadn't stabilized the building at that point.

Q. You wouldn't expect a lender to provide permanent financing when your building is not stabilized?

A. I would expect a lender that had worked with you over the years to be reasonable and flexible to find a solution to this.

Q. I'm not talking about TD Bank, I'm talking about other lenders. Would you expect other lenders to provide permanent financing?

A. Yes and they have.

Q. Why didn't you refinance this loan, Mr. Jacobs? Why didn't you do it for this loan?

A. Because the environment up until this point has been very dismal.

Q. Because you couldn't; you couldn't get it from any other source, could you?

A. Could not on this building.

Q. Your Third Defense in your Answer in paragraph 22 you

allege that you believe the value of the building is equal to or exceeds the amount of the loan?

A. Yes.

Q. Do you believe that to be true?

A. Yes.

Q. And the basis of that is what?

A. The value of the building is based upon the facility income strength, the use of the building and the continued improvement in the economy, the continued working or the continued clarity in the healthcare environment that would allow additional improvements and additional reimbursements to the physicians in the hospital.

Q. Anything else?

A. No.

Q. Based on any valuation is what you have said?

A. Yes, I will have evidence of valuation of what it looks like now but at 5.8 two years ago in a much more difficult environment. I am believing that the valuation of this building will be in excess of 5.8. And its stabilization over the next several years will exceed the value of the loan amount.

Q. Your next allegation in paragraph 24 concerns not bringing action for foreclosure; is that correct?

A. Yes.

Q. And that's what you're alleging is punitive and unconscionable?

A. It is. The bank knows that I don't have the ability to write a check for $6,000,000.

Q. I think the bank also knows that you have got a significant amount of other obligations that mature within the next 18 months?

A. I just shared that with you, yes.

Now, what good does the bank get by making it impossible for me to stabilize these assets by putting a judgement against me which would prevent any of these things from being worked out?

Q. In this Third Defense about not bringing an action on foreclosure are you referring to any other action or inaction of TD Bank?

A. That's what I am alleging.

Q. So that's what I want to know; are there any other facts aside from their decision to sue on the guaranty before they brought a foreclosure suit?

A. Not that I can tell you today. There may be others but my focus has been solving the problem, not looking at the legalese. You would hope a reasonable flexible group would understand there's solutions to be had as opposed to sabotaging the guarantor and the project.

Q. And by sabotaging you're just talking about suing on your guaranty?

A. Yes.

Q. You're not referring to anything else?

A. No.

Q. Mr. Jacobs, you've been handed Exhibit 4 to your deposition. Do you recognize that document?

A. It's a Promissory Note.

Q. Does this appear to be a promissory note between Newberry Atrium Development and Carolina First Bank?

A. Yes.

Q. Dated February 20, 2007?

A. Yes.

Q. On page 4 there's a signature block. Is that your signature?

A. Yes.

Q. Does it appear to be an accurate copy of the note?

A. I would expect nothing less.

Q. Page 3 of this document the first full paragraph indicates lender is not required to rely on the collateral for the payment on the note in the event of default by the borrower but may proceed directly against the borrower and guarantor or endorsers in such a manner as it deems desirable.

Did I read that correctly?

A. I am sure you did.

Q. That language gives the bank the right to sue directly on the note and on the guaranty; does it not?

A. That's what it says.

Q. If you will look at Exhibit 5. Can you identify this document?
A. Yes.
Q. If you'll look at the last page, page 7 of the Guaranty. Is that your signature on this document?
A. Yes.
Q. Does it appear to be a true and correct copy of your Guaranty with the Newberry Atrium loan dated February 20, 2010?
A. I would expect it is.
Q. In paragraph 1 on page 1 continuing to page 2 states that guarantor hereby expressly waives any right to require lender to bring any action against the borrower or any other person; do you see where I am?
A. Yes.
Q. Did I read that correctly?
A. Yes.
Q. It also says the guarantor waives the right to require that resort be had to any security; do you see that?
A. Yes.
Q. That indicates what the bank can sue you directly; does it not?
A. That's what it says.
Q. If you'll look at Exhibit 6. Does this look to be a true and correct copy of the Newberry Atrium Mortgage and Security Agreement?

A. Yes.
Q. Is that your signature on page 18 of the document?
A. Yes.
Q. Do you know of anything in this document that requires a suit or foreclosure on the mortgage before the bank exercises any other remedy?
A. I would assume that you would be telling me that it does not require that but it does require some requirement of good faith and cooperation in order to preserve the valuable asset and the ability to work it out.
Q. That's your opinion?
A. That's an opinion but my understanding is when parties and institutions enter into a contract there is that implied guaranty, there is a reasonableness and good faith in working together.
Q. Is there anything in that document that includes those terms you're speaking of?
A. I have not reviewed it so I cannot tell you that.
Q. In fact that document, if you will look at paragraph 2.16 on 16 that indicates that the remedies under the note and mortgage are cumulative; does it not?
A. It does say that.
Q. You've been handed Exhibit 7; do you recognize that?
A. Yes.
Q. Construction Loan Agreement between Newberry Atrium

and Carolina First.
A. Yes.
Q. Is that a true and correct copy of the document?
A. I am sure it is.
Q. Is that your signature on the last page?
A. Yes.
Q. Exhibit 8, does this document contain a number of modification agreements. If you'll look through these the first one first page March 3rd, 2009; do you see where I am?
A. Okay.
Q. On the second page of that document is that your signature?
A. Yes.
Q. Does that appear to be an accurate copy of that modification agreement?
A. Yes.
Q. The next one, June 16, 2009?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that dated September 14, 2009; do you see where I am?
A. Yes.

Q. Does that appear to be your signature on the second page of that document?
A. Yes.
Q. Does that appear to be a true and correct copy?
A. Yes.
Q. The next one after that, December 18, 2009, is that your signature?
A. Yes.
Q. Is that an accurate copy of the document?
A. Yes.
Q. February 25th, 2010?
A. Okay.
Q. Does that appear to be a true and correct copy of February 25th, 2010 modification agreement?
A. Yes.
Q. Is that your signature on the second page?
A. Yes.
Q. Turn one more page. Do you see the Loan Modification Agreement at the top?
A. Yes.
Q. It's dated April 28, 2010?
A. Yes.
Q. Does that appear to be a true and correct copy of the Loan Modification Agreement?
A. Yes.

Q. Is that your signature on page 3?
A. Yes.
Q. There is an Acknowledgement Ratification and Release by Guarantor on the 5th page?
A. Okay.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. The very next page the Loan Modification Agreement dated May 10th, 2011; do you see where I am?
A. No, I don't have that.
Q. Let's skip that and go on to the next one which is the Loan Modification Agreement dated May 23rd, 2012.
A. Yes.
Q. Is that your signature on it; do you see where I am?
A. Yes.
Q. That does that look to be a true and correct copy of the May 23rd, 2012 Loan Modification Agreement?
A. Yes.
THE WITNESS: I'd like to get some water.
MR. BEDENBAUGH: Sure.
MR. JOWERS: Jody, Exhibits 10 to 13 we'll stipulate so you won't have to go through them all.
MR. BEDENBAUGH: Okay.

BY MR. BEDENBAUGH:
Q. The loan modifications that were just in front of you, the purpose of those was to extend the maturity date; is that correct?
A. Yes.
Q. Can Newberry Atrium benefit from the extension of the maturity date; is that correct?
A. It can.
Q. And you as guarantor would benefit from an extension of the maturity date; would you not?
A. Yes.
Q. Carolina First and TD did not have the obligation under the loan documentation to agree to an extension; did they not?
A. No, but they had the willingness and the interest to preserve and make the asset whole were they to get their funds repaid to them. By doing anything less would be of no benefit to the project, to me or to the bank. By being reasonable, by being flexible they would ultimately in the next several years per my plan get paid out a hundred percent. By being anything less they would gain nothing more because I don't have $6,000,000 or access to that.
But the building is a valuable asset and when allowed through a reasonable approach will realize and be able to pay back all its owed. And you would expect that from a long-term

relationship in a very difficult environment to be able to work together to solve the problem.
Q. Do you dispute that the note matured on May 3rd, 2012?
A. No.
Q. Do you dispute that TD demanded the balance due from Newberry Atrium and from you?
A. No, I think they did.
Q. Do you dispute that you and Newberry Atrium have failed to pay the balance due on the Note and Guaranty?
A. Neither me nor the asset has that kind of cash available.
Q. So you don't dispute that you haven't paid the balance, do you?
A. I don't dispute it.
Q. Do you dispute that Newberry Atrium is indebted to TD Bank under the loan?
A. No.
Q. Do you dispute that you are personally indebted to TD Bank under the terms of the Guaranty?
A. No.
Q. Let's talk about Atrium at Middle Sound. Tell me about how that loan originated.
A. Again, my relationships at Carolina First. They had asked to look at everything that I was involved in. That property was acquired to develop a number of outparcels and

there was interest to take that property -- the loan was $3,000,000 -- and allow us to develop the structure and allow us to sell outparcels, which we were very successful in doing. We took a $3,000,000 loan and reduced it through our successors in putting the infrastructure in at great cost, improving the property and selling three outparcels and had repaid almost $2,000,000 of that note, paying fees and interest all along the way. That I would say was very beneficial during a very difficult economic time, we continued to feed it and improve the property.
Q. And was it you that requested the loan from Carolina First for that particular project?
A. They asked if they could look at everything that I was doing.
Q. Did you go to them and request a loan?
A. I went to them and showed them -- you said you wanted to look at everything I was doing, and I have enjoyed the working relationship and if you are interested in this I would appreciate your terms.
Q. And that would have been with whom?
A. Larry Scott.
Q. He was the banker here in Columbia?
A. Yes.
Q. Now, I understand there's still some property that remains to be sold with them?

A. Yes.
Q. And what is the status of that property?
A. There is activity on it.
Q. What activity is that?
A. My partner there indicates that there are interested parties that want to develop a hotel on that.
Q. What is the status of those discussions?
A. I believe negotiations are going on and the buyer is in the process of reviewing how they can raise the capital and obtaining a franchise for that development.
Q. What is the likelihood of that transaction occurring in your mind?
A. Again, my partner is fairly confident. We have had a number of inquiries over the years but again the environment has been such it's been difficult for purchasers to acquire funding, so that being said he believes that the Wilmington market is improving and the ability to raise the funds is improving and he is hopeful that this transaction could be consummated in the months ahead.
Q. Would the price of that transaction be enough to pay the loan in full or not?
A. I believe it would be.
Q. What's the current value of that property?
A. Again, I'm not sure what it would be but I am sure it would be enough to pay the loan which I think is about a million

two. And the uniqueness of that property is that it's got the limited water taps, sewer taps and it's developed.
Q. I assume that property is listed for sale?
A. Yes.
Q. How long has it been listed for sale?
A. I can't tell you but it's been listed with various brokers in the last several years.
Q. Are the taxes current on this property?
A. Probably not.
Q. Were you represented by counsel for the closing of that loan transaction?
A. Yes.
Q. By Mr. Jowers?
A. Yes.
Q. Atrium at Middle Sound Landings, LLC, the owners of that are you and Mr. McFarland; is that correct?
A. Yes.
Q. Each owning 50 percent?
A. Yes.
Q. How did you and Mr. McFarland come to be involved in the project?
A. He has a long-time knowledge of the Wilmington market. I have known Jim for years before he moved to Wilmington. He has been successful in acquiring properties and finding development opportunities. And I might add he has proven

himself to be adept that during the times before the financing debacle happened we were able to sell three pads and repay almost $20,000,000.
Q. Who manages Atrium at Middle Sound?
A. I guess we're both managers of it but he's on the ground.
Q. Who pays the bills?
A. I paid them, fed the property for years.
Q. And that's done out of your office in South Carolina?
A. He paid a lot of the development costs himself out of his own accounts. I paid some of the development costs, so it was kind of a combination of both of us.
Q. Who made payments on the property?
A. I did.
Q. How often do you discuss the developments with Mr. McFarland?
A. Monthly, every six weeks.
Q. Usually on the phone?
A. Yes.
Q. Now, the Middle Sound case, are you contesting liability to TD Bank under the loan and guaranty in that case?
A. Yes.
Q. Is that the same grounds of different grounds from what we talked about with Newberry Atriums?
A. Similar.

Q. What's different?
A. The nature of the market has been very difficult for the last several years. It's coming back. We need time in order to try and consummate a sale and/or refinance, and the damage that TD will do will be difficult to find new financing for refinancing of the land or prospective tenant.
Q. And the damages, are you again referring to the suit on the loan and guaranty?
A. Yes.
Q. Now, you would agree with me that it would be more difficult to sell the property if the pending foreclosure was filed against it; would it not?
A. I think there would be difficulty in selling the land until the right person shows up foreclosure or not for the loan against the property, but the value is every bit -- I believe that the value of the property would repay the loan on the sale of the property.
Q. Other than TD's election to sue on the guaranty is there any other allegation or defense that you're raising in that case?
A. It's the same defense and the same thinking that having placed my trust in the people at Carolina First that had worked with me over the years that they would approach creating more harm than solutions the way they are approaching this.
Q. And that special relationship you're referring to in

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connection with Atrium at Middle Sound as well as Newberry Atrium that would have developed when Carolina First was the lender as opposed to TD?

A. It would be my expectation when somebody takes over the place of the lender that they would continue to honor that relationship that brought them that business.

Q. Thank you. I am asking when did the relationship begin?

A. Under Carolina First.

Q. And the people involved that you indicated created this special relationship, those were Carolina First employees?

A. They were.

Q. What were the names of those people?

A. My goodness, I have dealt with Larry Scott for many years. Rebecca Robuck (ph), Justin Strickland. But Larry and Rebecca were the primary on-the-ground people, but absolutely sought after by the other people that I have dealt with.

Q. Same question as with the Newberry Atrium the special relationship, that's not based on any particular thing in the loan document, is it?

A. It's based on the history and actions that we have worked over the last 12 years.

Q. And not on anything in the loan document?

A. If it's there I am sure you would have found it for me.

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Q. Again in your Answer in that case you allege you would not have executed the Guaranty without the special relationship?

A. That's correct based on the knowledge that they had been flexible and reasonable to work through problems.

Q. And just like Newberry Atrium the guaranty wasn't a condition of the loan commitment; was it not?

A. It was.

Q. And any other lender would have required a guaranty; would they not?

A. I would think so.

Q. Again your defense about the election to sue on the guaranty and not bringing an action of foreclosure that's based solely on the decision to file suit on the Guaranty; is that correct?

A. Yes. I think that the value, if we had time to sell the report and create the opportunity to turn the land into cash or to develop it on behalf of a user would certainly protect TD's position.

Q. Is there anything else that we haven't talked about that is the basis of your defenses in the Middle Sound case?

A. I think certainly the value that I have enjoyed in working with Carolina First has created a lot of income for Carolina First, has certainly allowed me to create income to invest in other real estate, which unfortunately has not gone as well as everybody had anticipated during the meltdown, but

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nobody has gotten hurt. I can, absolutely if given the time, can solve these problems.

Q. All right. Exhibit 11 through 15. I believe your lawyer indicated that you would stipulate that 11 through 15 are accurate copies of these loan documents containing your signature. Can you look through those and let me know if you agree with that?

A. Yes.

Q. Those are true and correct copies?

A. Yes.

Q. You signed those documents?

A. Yes.

Q. Do you dispute that the Atrium at Middle Sound note matured under its terms?

A. No.

Q. Do you dispute that TD Bank has demanded the balance due from you and the entity?

A. Yes.

Q. You do dispute that?

A. No, I don't.

Q. Do you dispute that Atrium at Middle Sound and you and Mr. McFarland have failed to pay the balance due under the terms of the Note and Guaranty?

A. We would pay it if we had the liquidity, we do not have the liquidity, we're looking to the collateral that we

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pledged to this to repay the notes.

Q. Do you dispute that Atrium at Middle Sound is indebted to TD Bank for the note?

A. I don't dispute it.

Q. Do you dispute you're personally indebted to TD in return of the guaranty?

A. I don't dispute it but I do request a little more time and a reasonable flexibility to turn these assets into repayment sources.

Q. All right. You've been handed Exhibit 16. This is a Subpoena that I sent to you in connection with the bankruptcy adversary proceeding. Have you seen that before?

A. Yes.

Q. Also we'll give you Exhibit 19 which is your responses to the Subpoena which I received yesterday. Do you have 19?

A. Yes.

Q. The first thing I had asked for was time records and other documents showing the amount of time you spent with Newberry Atrium and your response indicates that you do not keep any time records for that; is that correct?

A. Yes.

Q. Do you have an estimate of how much time you spent on Newberry Atrium versus the other matters?

A. Depending on the month and the process it could be full-time to part-time.

Q. Do you know if you spent 20 hours a week on it or more than that or how does it break down?

A. Depending on the week and the month and the situation it could be 40 to 60 hours a week, it could be nine to 10 to 20 hours a week.

Q. The next thing I subpoenaed was related to the TD Bank N.A. non-privileged documents related to TD Bank N.A.'s State Court actions against you; do you see that?

A. Yes.

Q. I believe you testified earlier that you do have files relating to these loans?

A. I have the documents that you showed to me in my files.

Q. And you have other documents in your files or do you know?

A. I have the leases which I have turned over to the bank. I have the basic plans, I have the designs, I have information that pertains to the asset, yes.

Q. And I believe you testified earlier that you have not produced those to your lawyer; is that right?

A. They produced it to me.

Q. Have you gone through those documents and given them to your lawyer?

A. I have gone through the documents and I have given it to my lawyer.

Q. Okay. Your response indicates all documents between David Jacobs and his counsel are privileged but you testified earlier that you have documents related to these loans. All I want are copies of those documents, so that's what I'm trying to figure out.

A. I have given him documents that were requested which were leases, appraisals, plans and the bank has all that.

Q. You can't just respond in the litigation context -- in my mind you can't just respond and say the bank already has everything?

A. I've given it twice or three times.

Q. Well nothing was produced in response to my Subpoena so that's what I am trying to figure out.

A. Because I've delivered it previously.

MR. JOWERS: Let me make this statement for the record. The Subpoena says all documents relating to the State Court action. The documents he has in his files has nothing to do with the lawsuit. Those were just pre-construction or construction documents and bank documents that the bank prepared. There's nothing else that are relevant to this lawsuit that he has other than what we've produced.

MR. BEDENBAUGH: Without seeing them I don't know what they are.

MR. JOWERS: That's not the question. The question was relating to that so the Subpoena called for an opinion on our part and that is our opinion. If you want to be more specific with subpoenas then you need to be more specific.

BY MR. BEDENBAUGH:

Q. The next question asks for documents related to the reorganization efforts of the Newberry Atrium. Your response says all documents concerning the reorganization are with the legal counsel and are privileged.

Now, you testified earlier you had in fact had some documents of Newberry Hospital related to a refinancing, with the possibility of leasing additional space?

A. Yes, and I have provided that to your appraiser.

Q. Are there other documents that I haven't gotten that relates to the reorganization?

A. No, just the correspondence that I have had with the appraiser which I sent on to him, the leases, the documents they requested. I have sent everything they requested to them so it's been delivered to them.

Q. Looking back at 19 the next document is a response to another subpoena; do you see that?

A. Yes.

Q. Have you seen that before, the Responses to the Subpoena?

A. I am looking at it now. What is it you want me to answer?

Q. Have you seen the document before?

A. I don't believe I have but we have discussed these questions. I don't know that I've seen all this stuff that I provided, all that stuff that's attached to it.

Q. In paragraph 1 it indicates you do not have any documents that would show your ability to fund a plan of reorganization filed March 22nd, 2013 for Newberry Atrium Professional Center, LLC; is that correct?

A. That is correct. I have no documents. I have a business associate that has lent me money before and I have lent him money before. He has indicated he has interest in assisting me with funding the land.

Q. How much is he willing to lend to you?

A. My plan requires that I come up with that $450,000 over the next three years.

Q. Is that the gentleman in North Carolina?

A. Yes.

Q. What's his name, Howard?

A. Yes.

Q. What's his first name?

A. Rick.

Q. You don't have any documentation for that?

A. No.

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Q. Next sentence says he does not have any commitments of definitive source of funds for the plan of reorganization filed on March 22, 2013 for Newberry Atrium Professional center, LLC; is that correct?

A. I don't have anything in writing at this point but the fact that I have found a hundred and some-odd thousand dollars to keep the doors open for the last several years indicates that I have the ability to raise funds. And I do believe that the opportunity to continue working with the hospital provides another alternative solution.

Q. The third paragraph has documents showing the contributions to the debtor?

A. Yes.

Q. Do you recall what those contributions were used for?

A. To pay taxes, operating expenses.

Q. How much are the property taxes a year?

A. They were about 220 some-odd thousand dollars. I appealed it and it was reduced it to about $107,000.

Q. Why did Newberry Atrium file bankruptcy?

A. In an attempt to protect me as a guarantor to allow for the time to work through the reorganization which I anticipate will take three to five years, to continue to release, recruit the tenants and allow the property to be financed out and protect the interests of the tenants, the hospital, the community and allow me to refinance it out, and/or

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sell it.

Q. When you filed bankruptcy I believe the debtor had approximately $50,000 in his checking account; is that correct?

A. Yes.

Q. And the total trade claims as I calculate under your schedules to your maintenance service and various service providers were about $9,500; does that sound right?

A. No, it's probably closer to 20.

Q. But in any event you had the ability to pay those claims at the time you filed your bankruptcy; did you not?

A. I was trying to maintain a reserve and I was cautions about using those funds.

Q. But you certainly could pay it in the ordinary course, couldn't you?

A. I could other than the other courses that were going on.

Q. Well, at the time you weren't making payments to TD Bank, right?

A. For several months I was not because I knew the note was not -- they called the loan.

Q. What I am trying to figure out is you say certain other things going on but what prevented you from just paying those creditors?

A. I was applying it towards taxes and other important utilities such as electricity, sewer and water, and maintain

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that cash collateral which I was advised to do.

Q. What do you do on behalf of the debtor? What do you do for the debtor?

A. I am the manager, deal with the property managers, pay the bills, deal with the opportunity to design spaces, interface with the potential tenants that the hospitals direct me to, deal with the tenant issues, deal with the hospital and the ongoing operations and maintenance of the property.

Q. And the actual leasing efforts, that's led by the hospital itself?

A. It's been a combination of both. I have brought tenants to the table that have had offers and to participate and for various reasons the hospital declined. I have advised the other hospitals, Self Memorial Hospital on designs for their expansions. I have worked with them on operating the building, their space and dealing with their medical staff.

Q. And the debtor also utilizes brokers in connection with the leasing efforts; is that correct?

A. Yes.

Q. The hospital has the right to repurchase the debtor's property at some point; is that right?

A. It has a right of purchase.

Q. You have alleged that the State Court suit impaired Newberry Atrium's ability to reorganization; is that correct?

A. Yes.

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Q. What is the basis of that allegation?

A. Without the ability to refinance it with a judgement against it prevents the building from being financed out to repay TD.

Q. The impairment is in your opinion that the judgement would impeded the ability to get refinanced?

A. Yes.

Q. Is there anything else?

A. The funds that I anticipate raising to pay the loan would not be available to carry it for the next several years while we go through the releasing of the property.

Q. And why would the judgement have that impact, that latter impact that you just mentioned?

A. I wouldn't have the ability to raise the money if I had a judgement against me.

Q. You could raise the money from Mr. Howard?

A. Yes.

Q. Did Mr. Howard indicate that he would lend you the money if you get a judgement against you?

A. He's pretty much indicated that he wants his money safe.

Q. Has he indicated he would not loan you the money --

A. He hasn't been specific but I understand what he's telling me.

Q. Do you know if a judgement in the State Court suit

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will be entered in the next two or three months?
A. I really don't know what that process would involve but I know it would be immanent.
Q. If the judgement is entered against you do you have any idea of when you would be forced to make some sort of payment or that TD would collect on that judgement?
A. I don't know.
Q. Do you have an asset, available asset that you believe TD would be able to reach as a result of that judgement?
A. No, I don't know what TD's capabilities are.
Q. You can't name an asset that would be unavailable to you because of a judgement?
A. No, but any assets that I have that I was able to turn into cash would be impaired to repay anybody's debts back.
Q. Have you made any post petition advances to the debtor?
A. No.
Q. What is the balance of the cash collateral account?
A. I am not sure. We file reports regularly but I can't tell you the exact amount.
Q. The approximate $450,000 that you're proposing to fund the plan of reorganization would that come exclusively from Mr. Howard or some other source?
A. At this time that's where I anticipate it would be coming from. Over the next several years I do anticipate some

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of these assess that I have minority positions in should be able to be turned into cash and that will help me meet these obligations.
Q. Have you attempted to locate post confirmation funding from a traditional lender?
A. No.
Q. Has the debtor made that attempt?
A. No.
Q. What's the reason for the proposed planned injunction against TD Bank?
A. Well, it protects me as a guarantor allowing me to operate to raise money to refinance the property. There would a personal guaranty required under any refinancing and that will be my responsibility.
Q. If TD had a judgement against you the judgement would be paid down from the refinancing as well; would it not?
A. That would be my hope, but it certainly doesn't bode well for getting a new loan for a property coming out of bankruptcy.
Q. Have you previously made advances to the debtor without the benefit of an injunction?
A. No, but I was anticipating getting it back as the property continued to stabilize and we were able to refinance it back out again.
Q. So you did previously make advances without an

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injunction?
A. Without an injunction but we weren't facing the loan calling and the threat to get a judgement against me.
Q. Is it possible if TD got a judgement against you that you would continue to fund the short call and keep the debtor alive?
A. Anything is possible.
Q. If TD got a judgement against you would you just allow Newberry Atrium to fail?
A. I don't know.
Q. It would be in your interest in that case to continue to try to refinance or sell the property; would it not?
A. I am not sure how I would respond if I have no ability to raise money or have the ability to refinance.
Q. Now, the scope of the injunction in the plan in connection with prohibiting TD from suing you, does that apply only to the Newberry Atrium loan or to other loans with TD?
A. A judgement is detrimental anywhere it comes from.
Q. I just didn't understand the plan. Is it the debtors intent to extend --
A. My main focus is on preserving the Newberry Atrium because of the many moving parts that require refinancing. If you are asking me about the Middle Sound property we may have an opportunity to do a build suit for a tenant which would require us being able to get a loan and that remaining property could be

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a very good parcel for a couple of users that my partner is working with.
Q. Now, the injunction and plan, would that apply to TD only or to other lenders?
A. The other lenders I am currently working with have all been reasonable and flexible and I have a fair assurance, nothing in writing, that they do not want the projects to fail and would jeopardize my chances to continue releasing and selling the assets that I have.
Q. So no, it would not apply to those loans?
A. I haven't gotten to that point at this moment. I haven't gotten to the point where people are threatening to call the loan and put a judgement against me, if they have proven over the years to be flexible and reasonable.
Q. The terms you proposed in the plan at five and a half percent interest rate with a five year am and five year maturity, what's the basis of those terms?
A. The contract rate that is currently in place.
Q. For maturity?
A. Yes.
Q. Was that based on the market at all?
A. It was based on the contract rate that the loans had been was at maturity.
Q. Of course the market was different when that loan was made, was it not?

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A. The whole world was different, that's correct.
Q. Have you -- other than what you talked about earlier with the broker in New York if this transaction with the hospital goes down, have you done anything else to identify a post-confirmation lender?
A. I have inquired but have not had anyone that's willing to lend in a condition today as it stands today until this bankruptcy is flushed out. And the condition for the refinance would be that this bankruptcy be dropped, be dismissed.
Q. Now, I believe the debtor's plan assumes that there would be some additional leasing in years three through five; is that correct?
A. Yes.
Q. Why does the debtor believe that those years will be different from the past five or six years?
A. One is that the new CEO, interim CEO has now refocused and dealt with the settling in in the community. He's been there a year and a half, two years so the demand for health care in Newberry will continue to grow because of the expansion of reimbursement for Newberry County would allow them to recruit additional physicians because the Affordable Healthcare Act that will increase the demand to bring in all the Medicare and Medicaid patients that are underserved in the area, and as a result of that the recruitment will accelerate come '14 and '15.
Q. So it's your opinion that reimbursements will go up

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under the Affordable Healthcare Act?
A. Yes, and the demand will increase. Newberry is a very poor rural community and much of the population is underserved. The Affordable Healthcare Act will increase the coverage, increase the demand and increase the ability to recruit new physicians.
Q. Now, of course you're aware that South Carolina thus far has rejected the Medicaid expansion that's part of the Affordable Healthcare Act; are you not?
A. I don't know if it's been finalized. I think the politics right now are driving that. I can't tell you I know how the politicians will resolve this but the indications I am getting from the healthcare community is that there will be some acceptance, it's more affordable for the state to participate in the national program.
Q. By increased reimbursement does that assume that South Carolina --
A. Not South Carolina, Newberry County. I can't speak to the State of South Carolina. I can speak to Newberry County which has been acknowledged to get a higher reimbursement than many of the other rural counties in the state.
Q. Why is that?
A. I can't speak to the reasons, I am just aware that that has been the indications from the hospitals.
Q. From Newberry Hospital?

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A. Well, from other folks. There's been articles in the paper that speak to that, but the hospital, Newberry Hospital is anticipating an increase reimbursement. Self Memorial, that is also a participant in this building acknowledges that the Newberry County area will get a higher reimbursement than Greenwood which gives them more incentive to continue to expand their operations in Newberry.
Q. Look at Exhibit 17. Are those the projections for your plan?
A. Yes.
Q. Now, you've got the rent increasing it looks like in June of 2014?
A. Yes.
Q. Is that just an escalator clause in the lease?
A. Yes.
Q. Then you've got some up-fitting costs, February of 2014 to April 2014; do you see that $13,333?
A. Yes.
Q. Now, would that only occur if a new tenant is identified or would that be done for anyone?
A. If a new tenant is identified.
Q. So that assumes a new tenant would be coming on line?
A. Yes.
Q. Now, you've got expense increases in here of assuming a one and a half percent increase in your two and three. What

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was the basis for that assumption?
A. The rate of inflation.
Q. Now, the expenses identified on here, are any of those passed through to the tenant?
A. They are.
Q. Is that included in the rent received so that it nets out or how does that work?
A. There is an operating expense stop at 525. Anything that exceeds that is passed on the tenant.
Q. Explain that to me again in layman's terms.
A. The lease includes $5.25 of operating expenses. If it exceeds that, which it has, the tenants are billed pro-rata on their occupancy and are obligated to pay that additional money with additional rent.
Q. That would be included in the rent line item income section?
A. Yes.
Q. And so have you done that in this calculation or does that assume that it's below the rent?
A. If you'll look at the legend below it explains specifically what we're doing there.
Q. So a number -- I guess I am trying to figure out the rent figure stays constant throughout, it just assumes a constant amount?
A. There are rent escalations in addition to rent

passthroughs and they occur every three years.
Q. One percent a year?
A. Every third year.
Q. But the passthrough expenses, what I am trying to figure out is is that included in the rent figure that's shown for example August 13, $58,093?
A. It says in the notes here passthrough expense income included in the rental income is what it says.
Q. So you assumed for this that those expenses --
A. Are added to the rental income.
Q. The amount of your contribution is shown then on the post-petition loan line item?
A. Yes.
Q. So roughly?
A. A quarter of a million dollars.
Q. $198,000 in the first year cumulative to get a quarter of a million and then $172,000 and $114,000 in the third year?
A. Yes.
Q. Certainly it's possible your contribution could be less than that?
A. I would hope that it would be more; that means more up-fits, more tenants. This is a realistic approach.

MR. BEDENBAUGH: I have nothing further.

MR. MARKHAM: No questions.
MR. JORDAN: No questions.
MR. JOWERS: No questions.

(Thereupon the proceedings were concluded at 1:30 p.m.)

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CERTIFICATE OF REPORTER

I, Mary K. McCormick, Court Reporter and Notary Public for the State of South Carolina, do hereby certify:

That the foregoing proceeding was taken before me at the date and time and location as stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing proceeding as typed is a true, accurate and complete record of the testimony of the deponent and all of the objections made at the time of the proceeding to the best of my ability.

I further certify that I am not of counsel or kin to any of the parties to this cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 29th day of April, 2013, in Aiken County, South Carolina.

Mary K. McCormick (Katy McCormick)
Notary Public
State of South Carolina at Large
My Commission Expires:
June 30, 2015

GUARANTY

(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
JAMES A. MCFARLAND JR.
103 FOREST HILLS DRIVE
WILMINGTON, NC 28403

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [redacted] dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of those debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you,

JAMES A. MCFARLAND JR.
South Carolina Guaranty
SC/4/or/13792/0018440000745/012040411Y

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EXHIBIT E

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on those actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. ADDITIONAL TERMS.

21. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR: _____ (Seal)
JAMES A. MCFARLAND JR.
Individually

GUARANTY

(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is April 4, 2011. The parties and their addresses are:

LENDER:
TD BANK, N.A.
104 South Main Street
Greenville, SC 29601
Telephone: (800) 476-6400

BORROWER:
ATRIUM AT MIDDLE SOUND LAND, LLC
a North Carolina Limited Liability Company
115 ATRIUM WAY
COLUMBIA, SC 29223

GUARANTOR:
DAVID A. JACOBS
115 ATRIUM WAY, SUITE 204
COLUMBIA, SC 29223

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. [redacted], dated April 4, 2011, from ATRIUM AT MIDDLE SOUND LAND, LLC (Borrower) to you, in the amount of $1,310,495.33.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you.

EXHIBIT
F

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

8. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on those actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of those other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

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In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

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14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:

_____ (Seal)

DAVID A. JACOBS

Individually

Wolters Kluwer Financial Services ©1996, 2011 Bankers Systems™

UNCONDITIONAL GUARANTY

February 20, 2007

WHEREAS, NEWBERRY ATRIUM PROFESSIONAL CENTER, LLC (the "Borrower"), has borrowed or shall borrow the sum of SEVEN MILLION ONE HUNDRED FORTY-ONE THOUSAND DOLLARS ($7,141,000.00) from CAROLINA FIRST BANK (the "Lender") pursuant to a promissory note from Borrower to Lender dated February 20, 2007 (the "Note"); and

WHEREAS, Lender is unwilling to make the loan to Borrower evidenced by the Note unless it receives an unconditional and continuing joint and several guaranty from DAVID H. JACOBS (hereinafter termed "Guarantor"), covering all "Obligations of Borrower" as hereinafter defined;

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and in order to induce Lender to lend money to Borrower as evidenced by the Note, Guarantor (jointly and severally, if more than one) hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due, whether by acceleration or otherwise, under the Note and all lien documents securing the Note, and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower").

This Guaranty is in addition to and is not intended to supersede any prior existing Guaranty of Guarantor.

Further, whether or not suit is brought by Lender to acquire possession of collateral or to enforce collection of any unpaid balance hereunder, Guarantor expressly hereby agrees to pay all legal expenses and the reasonable attorneys' fees (including those relative to appellate proceedings, if any) incurred by Lender with respect to this Guaranty.

In order to implement the foregoing and as additional inducements to Lender, Guarantor further covenants and agrees as follows:

1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or to require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor of Borrower or any other person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the generality of the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT (SOUTH CAROLINA)

Guarantor's Initials: DJ

EXHIBIT

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recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.

2. TIME IS OF THE ESSENCE HEREOF.

3. This Guaranty Agreement constitutes the entire agreement between the parties, and no waivers or modifications shall be valid unless they are reduced to writing, duly executed by the party to be charged thereby, and expressly approved in writing by an officer of Lender actually involved in the transactions being guaranteed hereby.

4. If any process is issued or ordered to be served upon Lender, Borrower or Guarantor, seeking to seize Borrower's and/or Guarantor's rights and/or interests in any bank account maintained with Lender, the balance in any such account shall immediately be deemed to have been and shall be set-off against any and all Obligations of Borrower and/or all obligations and liabilities of Guarantor hereunder, as of the time of the issuance of any such writ or process, whether or not Borrower, Guarantor and/or Lender shall then have been served therewith.

5. All moneys available to and/or received by Lender for application toward payment of (or reduction of) the Obligations of Borrower may be applied by Lender to such Obligations of Borrower in such manner, and apportioned in such amounts and at such times, as Lender, in its sole discretion, may deem suitable or desirable.

6. As security for any and all liabilities of Guarantor hereunder, now existing or hereafter arising, Guarantor hereby grants Lender the right to retain a security interest in any and all moneys or other property (i.e., goods and merchandise, as well as all documents relative thereto; also, funds, securities, choses in action and any and all other forms of property, whether real, personal or mixed and any right, title or interest of Guarantor therein or thereto) and/or the proceeds thereof, which have been or may hereafter be deposited or left with Lender (or with any agent or other third party acting on Lender's behalf) by or for the account or credit of Guarantor, including without limitation any property in which Guarantor may have any interest. Further, where any money is due Lender hereunder, Lender is herewith authorized to exercise its right of set-off or "bank lien" as to any moneys deposited in demand, checking, time, savings, or other accounts of any nature maintained in and with it by any of the undersigned, without advance notice. Said right of set-off shall also be applicable and exercised by Lender, in its sole discretion, where Lender is indebted to any Guarantor by reason of any certificate of deposit, bond, note or otherwise.

7. Guarantor agrees that Guarantor's liability hereunder shall not be diminished by any failure on the part of Lender to perfect (by filing, recording or otherwise) any security interest it may have in any property securing this Unconditional Guaranty Agreement and/or the Obligations of Borrower secured hereby and hereunder.

8. Guarantor further hereby consents and agrees that Lender may at any time, or from time to time, in its sole discretion: (i) extend or change the time of payment, and/or the manner, place or terms of payment of any or all of the Obligations of Borrower; (ii) exchange, release and/or surrender all or any of any collateral security, or any part thereof, by whomsoever

Guarantor's Initials: _____

deposited, which is or may hereafter be held by it in connection with all or any of the Obligations of Borrower and/or any liabilities or obligations of Guarantor hereunder; (iii) release any other guarantor, endorser or co-obligor of the Obligations of Borrower with or without consideration and without notice to and further consent from any Guarantor and such release shall not in any way affect the liability of the undersigned; (iv) sell or otherwise dispose of and/or purchase all or any of any such collateral at public or private sale, and after deducting all costs and expenses of every kind for collection, preparation for sale, sale or delivery, the net proceeds of any such sale or other disposition may be applied by Lender upon all or any of the Obligations of Borrower; (v) settle or compromise with Borrower, any insurance carrier and/or any other person liable thereon, any and all of the Obligations of Borrower (including, but not limited to any insurance applicable to the Obligations of Borrower), and/or subordinate the payment of all or any part of same, to the payment of any other debts or claims, which may at any time be due or owing to Lender and/or any other person; or (vi) alter, extend, change, modify, release, waive or cancel any covenant, agreement, condition, obligation or provision contained in any or all loan documents; all in such manner and upon such terms as Lender may deem proper and/or desirable, and without notice to or further assent from Guarantor, it being agreed that Guarantor shall be and remain bound upon this Unconditional Guaranty Agreement, irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, foreclosure, sale or other disposition, application, renewal or extension and notwithstanding also that the Obligations of Borrower may at any time exceed the aggregate principal sum of the Note. Further, this Guaranty shall not be construed to impose any obligation on Lender to extend or continue to extend credit or otherwise to deal with Borrower at any time.

9. In consideration of Lender's extension of credit to Borrower, Guarantor hereby agrees:

(a) To subordinate, and by this Agreement does subordinate, all debts now or hereafter owed by Borrower to Guarantor to any and all debts of Borrower to Lender now or hereafter existing while this Agreement is in effect.

(b) Guarantor further agrees that it will not assert any right to which it may be or become entitled, whether by subrogation, contribution or otherwise against Borrower or Guarantor or any of their respective properties, by reason of the performance of the undersigned of his obligations under this Guaranty, except after payment in full of all amounts (including costs and expenses) which may become payable in respect of or under the Obligations of Borrower.

(c) Guarantor hereby indemnifies and holds Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorneys', consultants' or experts' fees and expenses), of every kind and nature, suffered by or asserted against Lender under any law, regulation or ordinance, local, state or federal concerning any hazardous materials, substances, wastes or other environmentally regulated substances now or hereafter located on the property of Borrower or Guarantor.

Guarantor's Initials: 

10. This Unconditional Guaranty Agreement shall be binding upon Guarantor, and the heirs, executors, administrators, successors and assigns of Guarantor; and it shall inure to the benefit of, and be enforceable by, Lender and its successors, transferees and assigns. It further shall be deemed to have been made under and shall be governed by the Laws of the State of South Carolina in all respects, including matters of construction, validity and performance.

11. No waiver by Lender of any default by Guarantor or Borrower shall operate as a waiver of any other default or of the same default on a future occasion. If more than one person has signed this Guaranty Agreement, such parties are jointly and severally obligated hereunder. The term "Guarantor," as used herein, shall (if signed by more than one person) mean the "Guarantors and each of them." The liability of Guarantor hereunder shall also be joint and several with that of any person or entity executing a separate guaranty in favor of Lender. If any Guarantor shall be a partnership, the obligations, liabilities and agreements on the part of such Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals composing the partnership. Further, the term "Guarantor" shall include in such event any altered or successor partnerships, it being also understood that the predecessor partnership and its partners shall not thereby be released from any obligations or liabilities hereunder. Lender, or any other holder hereof, may correct patent errors in this Agreement.

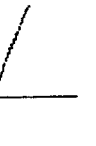
12. Guarantor hereby waives: (i) notice of acceptance of this Guaranty; (ii) notice of extensions, continuations or modifications of the Note; (iii) notice of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Lender and Borrower; (iv) presentment and/or demand for payment of any of the Obligations of Borrower and/or for payment under this Guaranty; (v) protest or notice of dishonor or default to Guarantor or to any other person with respect to any of the Obligations of Borrower; (vi) the benefit of any homestead or other exemptions; and (vii) to the extent such waiver may be enforceable at the time of foreclosure, any right to have any mortgaged property securing the Obligations of Borrower appraised after foreclosure for the purpose of reducing a deficiency judgment against Borrower, Guarantor or any other guarantor or other party.

13. Anything contained herein to the contrary notwithstanding, if for any reason the effective rate of interest on any of the Obligations of Borrower should exceed the maximum lawful rate, the effective rate of such obligation shall be deemed reduced to and shall be such maximum lawful rate, and any sums of interest which have been collected in excess of such maximum lawful rate shall be applied as a credit against the unpaid principal balance due.

14. In the event any provision of this instrument should be left blank or incomplete, Guarantor hereby authorizes and empowers Lender to supply and complete the necessary information to complete or fill in the blank provision.

15. EVENTS OF DEFAULT. Guarantor shall be in default under this Guaranty Agreement upon the happening of any of the following events, circumstances or conditions, namely:

(a) Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default by Borrower in the payment of the Obligations of Borrower; or

Guarantor's Initials: 

(b) Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with this Guaranty Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or furnished; or

(c) Death (unless Lender, in its sole discretion, accepts a substitute guarantor), dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any State or Federal Bankruptcy or Insolvency Laws by or against any Guarantor; or

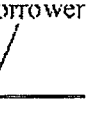
(d) Material adverse change in the financial position of Guarantor.

16. REMEDIES UPON DEFAULT. Upon the occurrence of any of the foregoing events, circumstances, or conditions of default, all of the obligations evidenced herein or guaranteed hereby shall immediately be due and payable without notice. Further, Lender shall then have all of the rights and remedies granted hereunder, and all of the rights and remedies of a secured party and/or holder-in-due-course under the South Carolina Uniform Commercial Code and/or under other Laws of South Carolina.

17. Any provision hereof to the contrary notwithstanding, to the extent Guarantor is determined to be an "insider" as such term is used in the United States Bankruptcy Code or cases thereunder, Guarantor waives any right (whether established by contract or statute or otherwise available at law or in equity) to reimbursement, indemnity, subrogation, contribution or other such claim against Lender, Borrower or any other guarantor or any other person primarily or secondarily liable for any Obligations of Borrower with respect to any disbursement or payment made by Guarantor under or in connection with this Guaranty or otherwise.

18. In the event any payment made by Guarantor to Lender is determined to be a preferential transfer under any bankruptcy or similar law and Lender is required to return such payment to a trustee in bankruptcy, to a receiver, to Guarantor, or to another person or entity, Guarantor's obligations under this Guaranty shall not be discharged with respect to such preferential payment notwithstanding any satisfaction of the Note guaranteed hereby or the return of this Guaranty. Furthermore, Guarantor shall be jointly and severally liable to Lender for the amount of any such preferential payment and any interest expenses or other expenses, including but not limited to attorneys' fees, incurred by Lender related in any way to such preferential payment, and Guarantor agrees to reinstate any collateral given to Lender as security for the obligations under this Guaranty notwithstanding the fact that such collateral may have been released or returned by Lender.

19. Guarantor acknowledges that Guarantor has previously submitted financial statements to Lender for the purpose of inducing Lender to extend credit to Borrower. Guarantor agrees to update such financial statements from time to time as requested by Lender. Guarantor further agrees to immediately notify Lender in writing of any material adverse change in the financial position of Guarantor. Guarantor covenants and warrants that such financial statements, as updated or supplemented from time to time by Guarantor, shall remain a true and accurate statement of Guarantor's financial position for so long as the Obligations of Borrower

Guarantor's Initials: 

remain outstanding, and Lender shall be entitled to continue to rely on the truth and accuracy of such statements. Guarantor agrees not to transfer assets for less than fair value or take any other action which could reasonably be expected to reduce the net worth of Guarantor or diminish Guarantor's ability to perform Guarantor's obligations hereunder.

20. Guarantor's liability hereunder shall not be diminished or reduced by (i) any payment of any of the Obligations of Borrower by any other guarantor, endorser, co-obligor or any other person liable or to become liable for the payment of the Obligations of Borrower, or (ii) any reduction of the Obligations of Borrower by realization of any collateral or security or by any other source.

21. Subject to the arbitration provisions set forth below, Guarantor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Guarantor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested, to Guarantor at Guarantor's address set forth below or any new address of which Lender has been notified by Guarantor in writing.

22. ARBITRATION. UPON DEMAND OF LENDER OR GUARANTOR, WHETHER MADE BEFORE OR AFTER INSTITUTION OF ANY JUDICIAL PROCEEDING, ANY DISPUTE, CLAIM OR CONTROVERSY ("DISPUTES") ARISING OUT OF, CONNECTED WITH OR RELATING TO THIS GUARANTY OR ANY OTHER LOAN DOCUMENTS SHALL BE RESOLVED BY BINDING ARBITRATION AS PROVIDED HEREIN. Institution of a judicial proceeding by a party does not waive the right of that party to demand arbitration hereunder. Disputes may include, without limitation, tort claims, counterclaims, disputes as to whether a matter is subject to arbitration, claims brought as class actions, claims arising from loan documents executed in the future, or claims arising out of or connected with the transaction reflected by this document.

Pursuant to the Federal Arbitration Act or, if it is deemed not to apply, the South Carolina Uniform Arbitration Act, arbitration shall be conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA"). All arbitration hearings shall be conducted in Columbia, South Carolina. All applicable statutes of limitation shall apply to a Dispute. A judgment upon the award may be entered in any court having jurisdiction.

Notwithstanding the preceding binding arbitration provisions, Lender and Guarantor preserve, without diminution, certain remedies that either party may employ or exercise freely, independently or in connection with an arbitration proceeding or after an arbitration action is brought. Lender and Guarantor shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable: (i) all rights to foreclose against any real or personal property or other security by exercising a power of sale granted under loan documents or under applicable law or by judicial foreclosure and sale, including a proceeding to confirm the sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-off, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary

Guarantor's Initials: _____

bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Preservation of these remedies does not limit the power of an arbitrator to grant similar remedies that may be requested by a party in a Dispute.

Guarantor and Lender shall not have a remedy of punitive or exemplary damages against the other in any Dispute and hereby waive any right or claim to punitive or exemplary damages they have now or which may arise in the future in connection with any Dispute whether the Dispute is resolved by arbitration or judicially.

23. 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.

WITNESS the Hand and Seal of the undersigned, this Unconditional Guaranty being executed and delivered on the date first above written. Each Guarantor has adopted as his seal the word "SEAL" appearing beside his signature.

_____(SEAL)
DAVID H. JACOBS

Address: 115 Atrium Way #204
Columbia S.C. 29223

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGEMENT
COUNTY OF NEWBERRY)

On February 20 2007 before me personally came DAVID H. JACOBS to me known to be the person described in and who executed the foregoing Guaranty and acknowledged that (s)he/they executed the same.

_____
Notary Public for South Carolina
My Commission Expires: 2/1/2011

(SEAL)

GERALD D. JOWERS
Attorney at Law
1802 Sumter Street
Columbia, South Carolina 29201
Telephone (803) 765-9620
Facsimile (803) 765-0085

July 29, 2013

VIA ELECTRONIC MAIL AND US MAIL

John T. Moore, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

Re: TD Bank, NA v. David H. Jacobs

Dear John:

Please consider the following individuals as possible witnesses and the following documents may be introduced. This is to supplement to our answers to Interrogatories:

David W. Hilburn, PO Box 1605, Columbia, SC 29202. Mr. Hilburn will testify about the terms and circumstances surrounding the purchase by Cypress Cove Properties, LLC from TD Bank of the note, mortgage, and guarantees of the loan made by Carolina First Bank to Heron Lake I, LLC and the results of that transaction.

Tom Wingard, 2711 Middleburg Drive, Columbia, SC. Mr. Wingard is an appraiser with Wingard & Associates, Inc. and will testify about the appraisal he made on April 29, 2013.Your firm and the bank have a copy of this appraisal.

We also may introduce photographs of the Atrium Professional Building in Newberry, SC.

We may also introduce the letters from Mr. Jacobs to Eric O'Toole dated 3/21/2012 and 3/29, 2012. Copies attached

We may also introduce the letter from Mr. Jacobs to Roper Jenkins dated July 9, 2012. A copy is attached.

Sincerely yours,

Gerald D. Jowers

GDJ/lnr

cc: Jody Bedenbaugh, Esq.

EXHIBIT
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Paul Collins

From: Gerald Jowers <gjowers@jowerslaw.com>
Sent: Thursday, August 07, 2014 10:57 AM
To: Paul Collins
Subject: TD v Jacobs
Attachments: SCAN6989_000.pdf

Paul:

Based on information given by Mr. Hilburn at his deposition, we may use the following as witnesses:

Joe Hawk
1224 Pickens Street
Columbia, SC

John Hilton
1325 Park Street
Columbia, SC

Home addresses unknown.

Their testimony is unknown because they apparently signed confidentiality agreements but it is apparent they negotiated the Heron Lakes I asset sale with Roper Jenkins and William Barnwell.

We have served a subpoena on Mr. Hawk, a copy is attached.

Because the bank cancelled the foreclosure sale scheduled for August 5, I have decided we need a witness to assist the jury in understanding the complexities of foreclosure practice.

We may use S. Andrew Syrett, attorney, as an expert witness. He has no knowledge of the facts of this case and his testimony will be limited to explain to the jury South Carolina mortgage foreclosure procedure, including deficiency judgments, upset bids, the appraisal statute, waiver of the appraisal statute, the impact of these on a suit on a guaranty, and giving his opinion about such matters.

Mr. Syrett's office address is 712 Richland Street, Suite E, Columbia, SC. Home address unknown.

At trial we will introduce a copy of the foreclosure order in this matter from Newberry County that John Moore obtained for TD Bank. Mr. Syrett may be questioned about this.

Gerald D. Jowers
Attorney at Law
1802 Sumter Street
Columbia, SC 29201
Telephone (803) 765-9620
Facsimile (803)765-0085
gjowers@jowerslaw.com

EXHIBIT
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STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF RICHLAND

TD Bank, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

David H. Jacobs, Defendant

Case Number: 2012 CP 40 6074

Pending in Richland County

TO: Joe Hawk, individually and as agent for Sea Ducks, LLC and Hilton, Hawk & Company, LLC

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

All emails, letters and documents concerning the Heron Lakes I, LLC property in Richland County, SC , including any communications with William Barnwell, Roper Jenkins, and TD Bank.

PLACE 1802 Sumter Street, Columbia, SC	DATE AND TIME Friday, August 8, 2014 , 10 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature	8/5/14 Date	Gerald D. Jowers Print Name

Indicate if Attorney for Plaintiff or Defendant
Attorney's Address and Telephone Number :
Attorney for Plaintiff

1802 Sumter Street, Columbia, SC 29201 803 765-9620

Clerk of Court/Issuing Officer's Signature	Date	Print Name

Pro Se Litigant's Name, Address and Telephone Number :

SCCA 254 (11/2013)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐ NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties In Responding to Subpoena.

(1)(A)A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
TD BANK, NA successor by Merger with Carolina First Bank,)) Plaintiff,) vs.)) DAVID H. JACOBS)) Defendant,)	Case No. 2012-CP-40-6074
STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	
TD BANK, NA successor by Merger with Carolina First Bank,)) Plaintiff,) vs.)) DAVID H. JACOBS and JAMES MCFARLAND)) Defendants,)	Case No. 2012-CP-40-_7540 MOTION FOR A NEW TRIAL

RICHLAND COUNTY, SC
FILED
2014 OCT 17 PM 4:10
JEANNETTE W. ROBERTS
C.C.P. & G.S.

Defendant David H. Jacobs, by and through his undersigned counsel, hereby moves for a New Trial in the above-captioned matters.

These two actions were consolidated for trial by agreement.

Prior to the call of this case for trial, the Plaintiff TD BANK, NA successor by merger with Carolina First Bank made a Motion in Limine to exclude from the trial of the case the following:

"(1) any reference, evidence, or testimony regarding an alleged breach by TD Bank of the implied duty of good faith and fair dealing because this testimony is irrelevant, would tend to confuse the jury, and is highly and unfairly prejudicial to TD Bank since there can be no breach of the implied duty of good faith and fair dealing for doing what a contract expressly allows;

(2) any reference, evidence, or testimony on the government's bail-out to the banking industry because the testimony is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bail-out;

(3) any reference, evidence, or testimony regarding any unrelated note sales by TD Bank, including but not limited to the Heron Lakes I, LLC, note sale to Sea Ducks, LLC, because the testimony is irrelevant, would likely confuse the jury, and is highly and unfairly prejudicial to TD Bank; and

(4) any testimony from any lay or expert witness that has not been properly or timely disclosed."

Before ruling on this motion, the Honorable L. Casey Manning allowed testimony to be given without impaneling a jury as a proffer. This was done on August 12, 2014. Plaintiff presented its witness and Defendant was allowed to offer the Defendant David Jacobs, Thomas Wingard, a real estate appraiser, and David W. Hilburn, a fact witness.

DEFENDANTS' PROFER

Defendants proffered the following testimony and evidence:

(1) the testimony of TD Bank witness Roper Jenkins;
(2) the testimony of Tom Wingard;
(3) testimony of Defendant David Jacobs; and
(4) the testimony of defense witness David Hilburn.

Defendants also proffered the following documents:
(5) Articles of Merger dated September 30, 2010;
(6) Document entitled "TD Bank Financial Group to Acquire The South Financial Group";
(7) July 9, 2012 letter from Defendant Jacobs to Roper Jenkins;
(8) Loan Sale Agreement between TD Bank and Sea Ducks, LLC related to Heron Lakes I;
(9) Loan Closing Statement related to Heron Llkes I;
(10) Email from Roper Jenkins indicating payoff balance of the Heron Lakes I loan; and
(11) Appraisal Report of Thomas Wingard dated April 29, 2013.

His Honor Judge Manning took the matter under advisement and asked for proposed orders from the parties. These were submitted on August 22, 2014.

These cases were set for a day certain trial on Monday, October 6, 2014 before the Honorable Alison Lee.

His Honor Judge Manning issued a ruling on the Motion in Limine late in the afternoon of Friday, October 3, 2014; the parties were sent this Order by electronic mail.

Judge Manning ruled:

1. any mention of Carolina First Bank's receipt of TARP money and the words "TARP" and "Government Bail-Out" are excluded from all argument, testimony, and evidence at trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence;

2. any mention, reference, testimony, or evidence related to the Heron Lakes I note sale is excluded from trial; and

3. defense witnesses Joe Hawk, John Hilton, and Andrew Syrett are excluded from testifying at trial.

These evidentiary items were relevant and critical to the Defendant's ability to establish the defenses that the plaintiff breached its contractual duty of good faith and fair dealings and the defense of breach of the fiduciary duty arising from the special relationship between the parties.

In establishing these defenses of David Jacobs, these evidentiary items would also necessarily simultaneously establish that the plaintiff was not acting based on a business judgment rule in its actions that breached its duty of good fair dealings and/or its fiduciary duty which arose out of the special relationship between the parties.

It was reversible error to exclude the Defendant David Jacobs from being allowed to introduce into evidence

1. any mention of Carolina First Bank's receipt of TARP money and the words "TARP" and "Government Bail-Out" are excluded from all argument, testimony, and evidence

at trial pursuant to Rules 401-403 of the South Carolina Rules of Evidence;

2. any mention, reference, testimony, or evidence related to the Heron Lakes I note sale is excluded from trial; and

3. defense witnesses Joe Hawk, John Hilton, and Andrew Syrett are excluded from testifying at trial.

This motion for a new trial is based on the following:

1. The Answers filed by Defendant Jacobs in these cases contained the following allegations:

> "This long-term relationship between Defendant and Carolina First created a special fiduciary relationship of trust and confidence between them." and
>
> "An integral part of the loan agreement between Carolina First as lender and Atrium Professional as Borrower and Defendant has guarantor is an implied covenant of good faith and fair dealing."

2. The Answers further alleged specific acts that Plaintiff did or did not do that violated this fiduciary relationship and the covenant of good faith and fair dealing that Defendant Jacobs claimed.

3. These allegations were the only defenses raised by Defendant Jacobs.

4. On or about May 24, 2013, Plaintiff moved for a Summary Judgment. In this Motion, Plaintiff argued that "The terms of the Guaranty provide it is an independent and absolute guaranty of payment and TD Bank is not required to first resort to its collateral" Plaintiff further argued that "There can be no breach of fiduciary duty or implied covenant where TD Bank did what its contract expressly allowed it to do." Plaintiff cited a number of case to support its position

5. Defendant filed an affidavit and made the following statements:

"Because of my close personal and business relationship with Carolina First Bank, I trusted that Bank to work with me when projects did not go as planned. I expected the Bank to treat me fairly and equitably as I had always treated the Bank fairly and equitably. TD Bank is not living up to its side of our agreements by its actions against me." and

"I am personally aware of instances in which TD Bank has discounted loans to borrowers or the Bank has sold notes and mortgages at a discounted price to third parties that ultimately benefit other customers of this Bank. By doing this for others, the Bank is not treating me fairly and equally with those customers who are given significant concessions and benefits. By giving certain borrowers special treatment and favors, this smacks of favoritism and/or cronyism and not any sound or justifiable business reason or practice. Such favoritism and cronyism by the Bank shows a complete lack of good faith and fair dealing with me in these matters."

6. Plaintiff's Motion was heard by The Honorable Joseph Strickland who was acting as a Special Circuit Judge. Counsel for Defendant Jacobs argued this position in a brief that was filed in opposition to the Motion for Summary Judgment and at the hearing on this Motion.

7. After due consideration of Plaintiff's Motion for Summary Judgment, Judge Strickland denied the Motion in a Form 4 Order.

8. Thereafter, Plaintiff made a Motion to Judge Strickland under Rule 59 (e) SCRCP to Reconsider, Alter or Amend his previous decision.

9. This 59 (e) Motion of Plaintiff made essentially the same arguments as the Plaintiff made in the Motion for Summary Judgment. Plaintiff cited twelve (12) South Carolina cases in this 59(e) Motion and these were the same twelve (12) cases cited in its Motion for Summary Judgment.

10. Plaintiff's Motion in Limine was based on the same arguments that it made in the Motion for Summary Judgment and Motion to Reconsider, Alter or Amend. The same cases are cited in the Motion in Limine as in the two other motions made by Plaintiff.

11. Rule 43 (l) of the SCRCP provides

> If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action

12. Judge Strickland ruled twice on the same set of facts and law as the Plaintiff presented in its Motion in Limine. The Motion in Limine bars testimony about the only defense raised by the Defendant. Thus Plaintiff is seeking the same result it sought in its Motion for Summary Judgment. That result was denied when the Motion for Summary Judgment was denied and Rule 43(l) bars this Motion at this time because the issue has already been heard. Plaintiff will have the right to make a Motion for Directed Verdict at the conclusion of testimony at the trial of this case.

13. In Item 2 of the Motion in Limine, Plaintiff seeks to bar any reference, evidence or testimony about the government's bailout of the banking industry. The proffered testimony and evidence revealed that the United States Treasury did waive over $200,000.00 in debt owed by Carolina First Bank to entice TD Bank to complete this merger. The testimony further indicated that shareholders of Carolina First Bank lost a considerable sum of money in the merger and that TD Bank paid the shareholders of Carolina First only $.28 per share.

14. This evidence about the terms of the merger of Carolina First and TD Bank is not prejudicial as it is common knowledge that Banks have been assisted by the federal government in the recent economic recession and bank crisis.

15. This testimony was necessary element to show the environment in which Plaintiff was acting in order to support Defendant's claim of bad faith and unfair dealing by TD Bank with him in this matter. Any alleged prejudice can be cured by an appropriate charge to the jury that Plaintiff may request.

16. In item 3 of the Motion in Limine the Plaintiff seeks to bar any reference, evidence or testimony concerning the sale by TD Bank of the Heron Lakes I note and loan documents.

17. On July 10, 2014, with the consent of Plaintiff, Defendant Jacobs filed a Supplemental Answer in which he alleged the following:

> Defendant is informed and believes Plaintiff has sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who have special or personal relationships with officers of the Plaintiff, will be released from liability.

18. This allegation was similar to the statement made by Defendant Jacobs in his affidavit in opposition to the Motion for Summary Judgment. Thereafter on July 29, 2014, Defendant named David Hilburn as an additional witness to testify about the purchase by Cypress Cove Properties, LLC from TD Bank of a note and mortgage and other loan documents called the Heron Lakes I transaction.

19. The Plaintiff has taken the deposition of Mr. Hilburn.

20. Defendant proffered the testimony of Mr. Hilburn. Mr. Hilburn testified that he represented a company that bought the Heron Lakes I note from TD Bank. The Bank was represented by Roper Jenkins, one of its Vice-Presidents, in that transaction. Mr. Hilburn testified that he valued the asset at more than twice the amount the bank was selling it for and that a precondition of the sale was that the guarantors of the loan would not be sued. Mr. Hilburn testified that this was an unusual stipulation. He said he learned from Mr. Jenkins that Mr. Jenkins was a friend of the guarantor.

21. The testimony of Mr. Hilburn contradicts the testimony of Plaintiff's only witness Roper Jenkins.

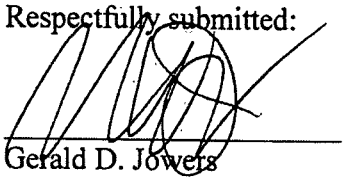
22. His testimony supports the defense of Defendant Jacobs as setforth in his Supplemental Answer and concerns matters involving an officer of Plaintiff and its principal witness.

23. This testimony was essential to prove that Plaintiff was not treating this Defendant in the same favorable way as other borrowers in violation of the covenant of good faith and fair dealing.

24. The testimony was an integral part of Defendant Jacobs' defense and is relevant and deprived him of his day in court.

25. The Order excluding any reference to the bank bailouts, TARP, or to the alleged favorable treatment of a friend of the bank's sole witness unfairly tied the hands of this Defendant in proving the alleged breach by Plaintiff of the covenant of good faith and fair dealing with this Defendant.

Respectfully submitted:



Gerald D. Jowers
Attorney for Defendant David Jacobs
1802 Sumter Street
Columbia, SC 29201

Charles E. Carpenter, Jr.
Carpenter Appeals and Trial
Support, LLC
Attorney for Defendant David Jacobs
4825 Portobello Road
Columbia, SC 29206

October 17, 2014

2012-7540 (cm)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 5TH JUDICIAL CIRCUIT
)
) CASE NO.: 2012-CP-40-6074 and 7540
TD BANK)
Plaintiff,) **MOTION AND ORDER INFORMATION**
vs.) **FORM AND COVERSHEET**
)
DAVID JACOBS)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Jody Bedenbaugh, Bar No. 71176 Address: 1329 Main Street, Columbia, SC Phone: 803 7992000Fax ____ E-mail: jody.bedenbaugh@nelsonmullins.comOther: ____	Gerald D. Jowers, Bar No. 3236 Address: 1802 Sumter Street, Columbia, SC Phone: 803-765-9620 Fax____ E-mail: gjowers@jowerslaw.comOther: ____

2014 OCT 17 PM 4:09

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for New Trial
Estimated Time Needed: 1hour Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒Written motion attached
☐Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — 10/17/ 2014 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $ ____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____
- ☐ Other: ____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: ____

JUDGE CODE ____
Date: ____

CLERK'S VERIFICATION

Collected by: mtl Date Filed: 10/17/14
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCANNED

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
TD BANK, NA successor by Merger with Carolina First Bank,)) Plaintiff,) vs.)) DAVID H. JACOBS)) Defendant,)	Case No. 2012-CP-40-6074

2014 OCT 17 PM 4:09

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	
TD BANK, NA successor by Merger with Carolina First Bank,)) Plaintiff,) vs.)) DAVID H. JACOBS and JAMES MCFARLAND)) Defendants,)	Case No. 2012-CP-40-_7540 MOTION FOR A NEW TRIAL

Defendant David H. Jacobs, by and through his undersigned counsel, hereby moves for a New Trial in the above-captioned matters.

These two actions were consolidated for trial by agreement.

Prior to the call of this case for trial, the Plaintiff TD BANK, NA successor by merger with Carolina First Bank made a Motion in Limine to exclude from the trial of the case the following:

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(2) any reference, evidence, or testimony on the government's bail-out to the banking industry because the testimony is irrelevant, would likely confuse the jury, and would be highly and unfairly prejudicial to TD Bank, especially since TD Bank did not receive a bail-out;

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Before ruling on this motion, the Honorable L. Casey Manning allowed testimony to be given without impaneling a jury as a proffer. This was done on August 12, 2014. Plaintiff presented its witness and Defendant was allowed to offer the Defendant David Jacobs, Thomas Wingard, a real estate appraiser, and David W. Hilburn, a fact witness.

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