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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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SC Court of Appeals

Record on Appeal Volume II of III (p.477-943)

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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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22. His testimony supports the defense of Defendant Jacobs as set forth 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:



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October 17, 2014

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2012-CP-40-7540
	)	2012-CP-40-6074
	)	
TD BANK, NA, successor by	)	
merger with Carolina First	)	
Bank,	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
DAVID H. JACOBS AND JAMES A.	)	
MCFARLAND,	)	
DEFENDANTS.	)	Transcript of Record
	)	
TD BANK, NA, successor by	)	
merger with Carolina First	)	
Bank,	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
DAVID H. JACOBS,	)	
DEFENDANT.	)	
	)	

August 12, 2014
Columbia, South Carolina

B E F O R E:

THE HONORABLE L. CASEY MANNING, JUDGE.

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

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I N D E X

(PW) - Denotes Plaintiff's Witness
 (DW) - Denotes Defense Witness

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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THE COURT: Gentlemen, are you ready?

Mr. Bedenbaugh, I guess it's your motion.

MR. COLLINS: It's, actually, going to be, Your Honor.
May it please the Court. Paul Collins here for TD Bank. We
filed a motion in limine on these consolidated cases. We
admitted on four grounds. One, we'd like to exclude any
reference to the Defendant's defense that there is a breach
of the duty --

THE COURT: Good faith, fair dealings or something like
that?

MR. COLLINS: Yes, Your Honor. We believe it's in our
prayer under South Carolina and I'll get into that in more
detail. We'd also like --

THE COURT: (Unintelligible).

MR. COLLINS: I think that may be the argument, Your
Honor. But I think third, there's also our understanding
the Defendants are going to try to bring in evidence and
witnesses related to an unrelated note sale with -- it's
called the Heron Lakes One note sale.

THE COURT: Is it connected to these Defendants in any
way?

MR. COLLINS: Not at all, Your Honor. The only
connection is it was done by TD Bank and Mr. Jowers
represented the investor, none of the Defendants in this

1 case. And last, we'd like to exclude any testimony from lay
2 witnesses or any expert witnesses that were not identified
3 timely through the discovery process.

4 THE COURT: Somebody suggested the other day that some
5 witnesses were named like Friday or something?

6 MR. BEDENBAUGH: Yes, Your Honor. It was actually
7 August 7th. I think I may have misspoke. It was Thursday,
8 I believe.

9 So, briefly, just want to explain the cases here.
10 They're consolidated. One is TD Bank vs. David Jacobs and
11 James McFarland. That relates to a note on the Atrium at
12 Middle Sound Land --

13 THE COURT: And that was secured by a mortgage, was it
14 not?

15 MR. COLLINS: Yes, Your Honor, it was. And the note in
16 that case was about 1.3 million dollars. That was issued in
17 2004. And through the discovery process, the Defendants
18 have admitted they signed the note, they signed the
19 guarantee, that they didn't pay it and that they owe the
20 money, other than this defense they've raised.

21 THE COURT: Yes, sir.

22 MR. COLLINS: We believe the issues are fairly clear in
23 that particular case.

24 Also, we have another case that's been consolidated, TD
25 Bank versus just Mr. Jacobs. That relates to a note for

1 Newberry Atrium, and that's a medical office building in
2 Newberry. That one was for about seven million dollars and
3 that was in 2007. Again, Mr. Jacobs admits he signed the
4 note, the guarantee, that it allows TD Bank to sue him on
5 the guarantee, admits that he's indebted to the bank, other
6 than thinking they treated him unfairly by suing him on a
7 guarantee rather than to foreclose. And so that kind of
8 gets us into the only defense the Defendants have raised is
9 that by the bank suing him personally on the guarantee
10 rather than foreclosing, somehow that breaches the implied
11 duty of good faith and fair dealing.

12 It's uncontested that the guarantees they signed have a
13 provision that says we can sue you independent of any
14 foreclosure, any remedy, anything else we want to do.
15 That's uncontested. And we believe under South Carolina
16 law, it's pretty clear you can't violate the duty, the
17 implied duty of good faith and fair dealing through doing
18 what a contract allows you to do.

19 You know, implied duty of good faith and fair dealing
20 is really to fill gaps in a contract. If there's a term
21 missing, both parties should act to enforce the contract.
22 Here, we have an expressed contract term that says TD Bank
23 can sue on the guarantee independent of the foreclosure. We
24 also believe there's a bunch of cases in South Carolina that
25 says a bank can sue on a guarantee. It's an independent

1 contractural right. They don't have to foreclose. They
2 don't have to do anything else. And that's exactly what's
3 been done here.

4 We also think under South Carolina law the guarantee is
5 to be interpreted like any other contract. And since the
6 contract -- both guarantees admittedly have this provision
7 that TD Bank has an absolute right to sue on the guarantee
8 and that defense is really just irrelevant and we believe
9 will confuse the jury, when at the end of the day, as a
10 matter of law, it's an invalid defense. If they wanted to
11 contest the fraud in the inducement, we don't cure that.
12 They've admitted they signed the note. They admitted they
13 got the money. They admitted the bank asked them for the
14 money and they admitted they didn't pay. The only issue is
15 they say TD Bank should have foreclosed first. And that's
16 just contrary to the law, so we would ask --

17 THE COURT: It reminds me of the David and Daniel movie
18 somehow, an old movie.

19 MR. COLLINS: I have not seen that movie. I'll put it
20 on the list, though, Your Honor.

21 So what we're asking for is the Court to exclude any
22 reference to an implied duty that TD Bank had related to
23 these notes. I mean, obviously, if they want to counter
24 with the amount of damages, they have a right to do that,
25 but we don't believe they should be able to present evidence

1 or argument on a defense that should be stricken as a matter
2 of law.

3 THE COURT: All right.

4 MR. COLLINS: And that kind of gets into the second
5 issue. It is our understanding that the Defendants want to
6 raise TARP. They want to mention that Carolina First
7 received TARP money from the treasury. TD Bank merged with
8 Carolina First in 2010, so not only do we think the
9 reference of TARP is irrelevant and prejudicial, but it
10 wasn't TD Bank that received TARP, so it's kind of two
11 layers of relevancy that they're missing here. And we
12 believe that should be excluded. We think it will confuse
13 the jury. We surely believe it will inflame the jury
14 because there's a lot of bad bias against banks and their
15 bail-outs. We see it in the news. TD Bank did not receive
16 a bail-out. Even if it did, we still think it's irrelevant
17 and should be excluded from any reference at trial.

18 I think the third issue we have is this unrelated Heron
19 Lakes One note. And just to explain it a little bit for the
20 Court, TD Bank, I believe it was in 2013, had another note
21 with another group of individuals that developed Heron Lakes
22 One. The guarantors in that case were Billy Barnwell and
23 Neil Baker, completely unrelated to anybody here. That note
24 was sold at a discount to Cypress Grove Properties. And I
25 believe the Defendants are going to try to raise well, TD

1 Bank at one other point discounted a note and somehow, I
2 guess, argue that they're treated unfairly in this case.

3 But nonetheless, it's irrelevant what TD Bank did on
4 another note unrelated property, unrelated parties. Really,
5 the parties wouldn't even know if Mr. Jowers had not
6 represented the investor in that case. It's irrelevant.
7 There is no tie to anything in this case. You know, the
8 issues in this case, really, is there a guarantee, has it
9 been breached, are there damages? Whether TD Bank
10 discounted another note or done anything to any other
11 consumer, it's irrelevant to the issues before the jury.

12 And, again, we believe it's being interjected simply to
13 confuse the jury and try to make an argument that's really
14 invalid, that even if TD Bank discounted a note for another
15 consumer for whatever reasons were in that particular case
16 somehow affects what they did to Mr. Jacobs or Mr.
17 McFarland. So we're asking no reference to the Heron Lakes
18 One note sale, any testimony to be excluded.

19 THE COURT: Mr. Jordan or Mr. Jowers? You want to
20 respond?

21 MR. COLLINS: I have one more, Your Honor.

22 THE COURT: Okay.

23 MR. COLLINS: And think this may be probably the most
24 important or, at least, as important as that there's been
25 some untimely disclosed witnesses. Discovery in this case

1 by Mr. Jacobs was responded to May 13th of 2013. There were
2 only two witnesses, Mr. Jacobs and a gentleman named Larry
3 Scott, that were identified.

4 THE COURT: Who did you say?

5 MR. COLLINS: Larry Scott.

6 THE COURT: Oh, Scott. Go ahead.

7 MR. COLLINS: And as you know, Your Honor, we were on
8 the trial roster in June. And then following that trial
9 roster, on June 29th, Mr. Jacobs identified a gentleman
10 named Tom Wingard, and he was identified to testify to some
11 appraisal that was done in April of 2013.

12 One, we believe Mr. Wingard was not properly
13 identified or, at least, timely identified as an expert.
14 And I think he'd have to be an expert to testify to an
15 appraisal report. It's not his property. We believe it
16 takes specialized skill and knowledge. He was not
17 identified as an expert. We weren't provided any documents
18 or any evidence of what he relied on, which we asked for in
19 discovery. So we would ask that Mr. Wingard be excluded to
20 testify as an expert in this case.

21 On August 7th, Thursday of last week, the Defendant
22 identified some additional witnesses, Joe Hawk, John Hilton
23 and Andrew Sheret, who's an attorney --

24 THE COURT: Andrew Sheret?

25 MR. COLLINS: Yes, sir. And it's our understanding,

1 Joe Hawk and John Hilton who were identified to testify
2 about Heron Lakes One note sale. They haven't been
3 identified timely. Mr. Jowers was involved in that note
4 sale, so he's known about it this entire lawsuit, so to the
5 extent he thought they were needed as witnesses, they should
6 have been identified well before four days before trial. So
7 we would ask that they be excluded.

8 Now, if we get to Andy Sheret, he's been identified --
9 I just want to read in the record how he's been identified.
10 It says he has no knowledge of the facts of this case and
11 his testimony will be limited --

12 THE COURT: I'll just give you a description of Andy
13 Sheret, balding and glasses --

14 MR. COLLINS: I believe that is him, Your Honor.

15 He's, basically, been identified not to testify to any
16 facts of this case, but to explain to the jury the South
17 Carolina process of foreclosure.

18 THE COURT: So he's being identified as an expert or a
19 lay witness? Is he offering opinion or a fact?

20 MR. COLLINS: Opinion, Your Honor. It begins with he
21 will be giving his opinion about subject matters. So first,
22 we believe Mr. Sheret has not been timely identified as an
23 expert. It was four days before trial. Also, South
24 Carolina does not allow experts on legal issues. I think
25 that's the judge's role to instruct the jury on what the law

1 is, not have an expert get up there and tell the jury what
2 the law is. I think if the Defendants want to submit a jury
3 charge to the judge on that particular issue and it's
4 relevant, then it can be charged to the jury, but I don't
5 think we need an expert to come in here and tell them what
6 the law is. So we believe that's the Court's role.

7 Third, it's not relevant. This isn't a foreclosure
8 case. This is a breach of guarantee case. So the fact that
9 they want to put an expert up there to talk about something
10 that's wholly irrelevant to this case, the foreclosure
11 process, we believe, again, it should be excluded under
12 rules 401 and 403.

13 So, I guess, in summary, we believe that any evidence
14 or testimony related to the defense of implied duty of good
15 faith and fair dealing should be excluded. We believe any
16 untimely witnesses should be excluded, and that would be Tom
17 Wingard, Joe Hawk, John Hilton and Andy Sheret. We also
18 believe any reference or testimony related to the Heron
19 Lakes One note sale should be excluded as irrelevant and any
20 reference to TARP or the government's bail-out should be
21 excluded as to relevance. Thank you, Your Honor, and I can
22 answer questions if you have them.

23 THE COURT: I don't think I have any right now.

24 Mr. Jowers.

25 MR. JOWERS: May it please the Court, Your Honor.

1 THE COURT: Yes, sir.

2 MR. JOWERS: I call the Court's attention to rule
3 43(L). That rule says if any motion be made to a new judge
4 and be denied, in full or in part, subsequent motion from
5 the same set of facts should be made to any other judge.

6 THE COURT: Do I need to reference that Judge Lee
7 hasn't made a decision in regards to the summary judgment --

8 MR. JOWERS: It was a summary judgment matter --

9 THE COURT: Do you have an order?

10 MR. JOWERS: I can get that for you, Your Honor.

11 THE COURT: Go ahead.

12 MR. JOWERS: The Plaintiff in this case made a motion
13 for summary judgment on the same facts they're trying to
14 exclude evidence of breach of good faith and fair dealing.
15 In that particular motion, an affidavit was filed and in
16 that affidavit from Mr. Jacobs, which was uncontested, in
17 paragraph 37, Mr. Jacobs noted that there were incidents
18 where the bank has treated other customers differently than
19 him.

20 Our answer in this case alleged a fiduciary
21 relationship between Mr. Jacobs and Carolina First. The
22 answer recites a 15-year relationship of lending between the
23 two and borrowing. But that relationship was more than just
24 lending and borrowing. Carolina First was one of those
25 banks that wanted to be involved in their customers'

1 business. They provided more than just money. They
2 provided assistance. They provided advice. They helped
3 with preparing leases for these commercial properties that
4 Mr. Jacobs did.

5 Mr. Jacobs is a one-man shop. He had to assemble a
6 team of architects, engineers, contractors and a bank.
7 Carolina First solicited the business. The president of the
8 bank, Mack Whittle, came to Columbia, visited with Mr.
9 Jacobs. This was over 15 years ago. Asked for the
10 business, got the business and then, as they say, earned the
11 business by providing more than just money. They provided
12 assistance. They became literally and figuratively part of
13 his development team. That created a very special
14 relationship, which there are cases that say if there is
15 more to it than just -- they were involved. They wanted to
16 be involved. It was one of those kinds of banks that wanted
17 to be hands on. These guys did that. They provided more
18 than just money. And under the cases, that creates or can
19 create a fiduciary relationship.

20 In addition to the standard provision in the law, the
21 implied covenant of good faith and fair dealing, that
22 allegation has been made from the beginning of this case.
23 That's what was heard on summary judgment and that was
24 denied.

25 THE COURT: Did you find the Order?

1 MR. JOWERS: That motion was made to reconsider. I
2 think Mr. Collins here signed that, he made the same
3 arguments that I'm hearing now.

4 THE COURT: Hold on just a minute.

5 So Judge Strickland reconsidered Judge Lee's order, so
6 Judge Strickland issued an order, also?

7 MR. JOWERS: Yes, heard a motion for summary judgment.

8 THE COURT: Go ahead.

9 MR. JOWERS: So from the beginning, that has been our
10 case, is that the special circumstances of this case
11 distinguish it from other cases, other reported cases.
12 There was more to it than just a bank and borrower
13 relationship. And that is recognized by the courts and we
14 should be allowed to present that evidence. In the merger
15 between Carolina First and TD Bank, TD Bank agreed to assume
16 all the obligations of Carolina First. That's why we
17 believe the arrangements made between Carolina First and Mr.
18 Jacobs are the responsibility of TD Bank and its new.

19 The facts distinguish this case from the other and
20 that's what Judge Strickland heard because we had made the
21 same arguments, that the relationship and the fact that
22 special deals were made for special people. Their only
23 witness today, I assume, is this gentleman right here, Roper
24 Jenkins.

25 THE COURT: Well, doesn't a bank have a right to make a

1 deal with whoever they want to?

2 MR. JOWERS: Yes.

3 THE COURT: I mean, they can make a deal with A, B or
4 D.

5 MR. JOWERS: In a vacuum, but not necessarily. They
6 ought to be held to a higher standard and that's why it's
7 time --

8 THE COURT: So they should treat everybody exactly the
9 same or --

10 MR. JOWERS: In the same circumstances. Yes, why not?

11 THE COURT: I'm just asking.

12 MR. JOWERS: Why shouldn't that be the law? The
13 covenant of good faith and fair dealing and there's a
14 fiduciary relationship. Why shouldn't there be fair
15 treatment, equal treatment?

16 The Heron Lakes transaction that we want to bring up,
17 the problem with that was that the guarantor, we believe,
18 was a friend of this gentleman right here. And it was a
19 buddy deal. It was a crony deal. They discounted that note
20 a million and a half dollars. The people that bought it
21 have almost made that much already, what they paid for it.
22 It was a buddy deal. It's indicative of what's going on
23 here and the bank should not be able to get away with it.

24 They hide behind confidentiality agreements, which
25 prevent people from talking. And that's why this

1 information has not been disclosed, that's why we can't find
2 other transactions. In our discovery, they sent us 10,000
3 pages of stuff that were so redacted, it was impossible to
4 decipher. A jury should hear this. I mean, if the
5 government protects the banks, they're too big to fail, then
6 why shouldn't they be held to a higher standard? They're
7 held to a higher standard in some aspects, so why shouldn't
8 --

9 THE COURT: The problem is your client signed the note
10 admitting they owed the money.

11 MR. JOWERS: Yes, but --

12 THE COURT: What do you hope to accomplish? You signed
13 the note, you admit you owe the money and you're saying they
14 didn't treat you the way they did some other people.

15 MR. JOWERS: Because that is a breach of the covenant
16 that they ought to be treated fairly. All we asked for in
17 this case was to recast the loan so that every penny could
18 be paid back, that is with small alterations in the interest
19 rate and the length of time and they would have been paid
20 back the main loan, the Newberry loan. It's an office
21 building on the campus of the Newberry County Hospital.
22 It's 60 percent rented. It was paying payments up until the
23 time the loan -- or the guarantees called, the loan was
24 current, both loans that are subject of this action. They
25 just arbitrarily, without any credit for the 15-year

1 relationship, pulled the plugs, no negotiations.

2 THE COURT: Sounds like they got divorced or something
3 maybe?

4 MR. JOWERS: The payments were current. The payments
5 were current. It was this TD Bank, which stands for Toronto
6 Dominion --

7 THE COURT: Let me stop you. I don't know if it'll get
8 to a jury or not. Technically, a motion in limine is only
9 good at the time the evidence is offered, but I'm willing to
10 do a split the baby a little bit. Can I see y'all in
11 chambers?

12 (WHEREUPON, a short break was taken.)

13 THE COURT: Whether I grant the motion or not, the
14 Defendants still have a right to proffer the evidence they'd
15 like to come in. The best way for me to make a decision is
16 have a record upon which to make the decision, not just
17 arguments of the lawyers. So what I've concluded to do is
18 this, forget the jury trial for a minute, we're going to use
19 however long it takes for you to proffer the information he
20 wants to exclude. That way, I can make specific findings
21 based on the record and not just arguments from the lawyers.
22 This might be somewhat inconvenient to everybody involved,
23 especially the bank, I would imagine, but at the same time,
24 it gives the Court a specific hands-on way to make a
25 decision that's not going to hurt anybody, but we'll all

1 know before we resume for a jury trial exactly what where
2 you stand. If we pull the jury, you've got a right to
3 proffer anyway, who knows how long it will take, couple
4 hours, three hours, and I want to get these issues out of
5 the way succinctly and clearly before we go forth with a
6 jury trial one way or the other and you'll both know where
7 you stand.

8 I'm going to give you a while to explain it to your
9 clients. I would like to resume this matter once again at
10 two o'clock where you can make your proffer. You can do the
11 direct, they can do the cross. We'll have a full record one
12 way or the other. And whatever decision I make, it could be
13 affirmed, it could be reversed, but, at least, we'll have
14 specific evidence in the record that I can make the decision
15 on and so can the appellate court can make a decision on.
16 That's the way I've concluded to do it for my own sake.
17 It's probably not going to hurt anybody technically, but it
18 gives everybody a full pitch of both positions.

19 Anything else? Two o'clock is good enough to resume,
20 gentlemen?

21 MR. COLLINS: Yes, Your Honor.

22 MR. JOWERS: Yes, Your Honor.

23 THE COURT: I'll see y'all at two o'clock. This is the
24 way I've decided to do it. It makes a full and complete
25 record for me to make a specific ruling so everybody is on

1 the same page once I make that decision. I'll see you back
2 at two o'clock.

3 (WHEREUPON, a short break was taken.)

4 THE COURT: Thank you. Please take your seats.

5 MR. COLLINS: Your Honor, may I ask one question?

6 THE COURT: Yes, sir.

7 MR. COLLINS: I understand clearly the Court's ruling
8 and what we're doing other than it's my understanding we've
9 made a motion to exclude certain witnesses and certain
10 issues and the Defendant being provided an opportunity to
11 proffer today for the Court to consider. We will be trying
12 this one way or another in the future. It's my
13 understanding that anything that's not proffered today,
14 would that be excluded from trial?

15 THE COURT: This is the chance for them proffer
16 anything in response to your motion in limine. And it's my
17 understanding they're going to call Andy Sheret. I don't go
18 looking for these things, they just fall in my lap.

19 MR. JOWERS: It's amazing how it works.

20 THE COURT: It is.

21 MR. COLLINS: All we're just trying to avoid if we're
22 hearing --

23 THE COURT: No, no, this is going to include everything
24 that they want to proffer in response to your motion in
25 limine and I'll make a decision on the record instead of

1 arguments. And that way one way or the other, we'll have a
2 complete record that goes up one way or the other.

3 MR. JOWERS: Following up to what his question was, it
4 does not limit our ability at trial of the case if we get
5 that far to introduce other witnesses that are necessary --

6 THE COURT: Look, this is how I'm looking at it from
7 this point forward, if I decide that these witnesses you
8 listed like last Thursday or Friday should be excluded in a
9 trial, I'm not going to let them come up later on. This is
10 going to cover all of that. Now, I don't know whether I
11 answered your question or not, but that's the range of my
12 decision.

13 In other words, in the cases I try next week or the
14 following week, you can't go out and find some third party
15 witness or something else and say oh, I just found this guy
16 last night. My decision today, whatever my decision is it's
17 going to be this is all out or all in and this is how we're
18 going to proceed at trial. These are the issues remaining.
19 If I grant this motion, those witnesses are out. If I grant
20 this motion about collateral matters and third party
21 situations, all that is out.

22 And I'm doing this for this reason, I don't want a jury
23 sitting around when I don't know if it's going to take an
24 hour or two hours or whatever, but it puts everybody exactly
25 on the same page with a specific ruling and your record is

1 made for both sides for purposes of appeal. That's about
2 the best I can do. Now, if you think of anything else, I'll
3 be happy to entertain it. Last minute witnesses or other
4 deals or ventures that maybe they were treated differently,
5 I'm going to wrap all that up in a little ball and make a
6 decision on all those matters. You can go down the list one
7 by one if you've raised four or five issues, whatever they
8 are, let's clear it all up today and from this day forward,
9 we'll be ready to go to trial based on my ruling about what
10 I'm going to let in and what I'm going to rule out.

11 MR. JOWERS: Once your ruling is made, we'll have a
12 full trial on the merits --

13 THE COURT: Oh, yeah, yeah, yeah. This is just to let
14 everybody know exactly where you are before you get a jury
15 here.

16 MR. JOWERS: Will there be cross-examination by --

17 THE COURT: Of course. And I think you raised some
18 issues in chambers about something you want to get in, I
19 said call whoever it is as an adverse.

20 MR. JORDAN: Your Honor, I do have one housekeeping
21 matter.

22 THE COURT: Go ahead.

23 MR. JORDAN: Earlier in this case, we moved to dismiss
24 Mr. McFarland, my client, on the basis that the Court lacks
25 jurisdiction over him. That was denied, but I want to make

1 sure that I am not in any way --

2 THE COURT: Your position is preserved for appeal.

3 MR. JORDON: Okay. That's exactly what I want.

4 THE COURT: After the trial is over. I can't go back
5 and undo what some other judge did. Is this Judge
6 Strickland or Judge Lee?

7 MR. JORDON It's Cooper, I believe.

8 THE COURT: All right.

9 Call your witness.

10 MR. JOWERS: May it please the Court, we'd call Roper
11 Jenkins.

12 THE COURT: Mr. Jenkins, come around, sir.

13 BENJAMIN R. JENKINS, III,

14 After having been duly sworn, testified as follows:

15 THE COURT: Please take a seat sir. Tell me your full
16 name and spell your last name for the record.

17 THE WITNESS: My full name is Benjamin Roper Jenkins,
18 III. Jenkins is spelled J-E-N-K-I-N-S.

19 MR. JOWERS: May it please the Court?

20 THE COURT: Yes, sir.

21 DIRECT EXAMINATION

22 BY MR. JOWERS:

23 Q Mr. Jenkins, you are employed by TD Bank?

24 A Yes, sir, that is correct.

25 Q What is your position there?

1 A I'm a commercial workout officer.

2 Q What does a commercial workout officer do?

3 A Commercial workout officer is responsible for
4 handling loans that have difficulties, identified
5 weaknesses or weaknesses which require more closely
6 management and monitoring of the progress.

7 Q Do you actually work out anything or do you simply
8 collect debts?

9 A Well, there's actually two different things. A
10 workout strategy can have a collection piece of it, but I
11 do both. I mean, I work out loans and do the collection
12 of it.

13 MR. JOWERS: Your Honor, I'd like to introduce this
14 evidence.

15 THE COURT: What is it? Show it to the other side.

16 MR. JOWERS: Articles of merger.

17 MR. BEDENBAUGH: No objection.

18 THE COURT: And what is it again, I'm sorry?

19 MR. JOWERS: Articles of merger.

20 THE COURT: Articles of merger, all right.

21 MR. JOWERS: Between Carolina First Bank and TD Bank.

22 (WHEREUPON, Defendant's Exhibit No. 1 was admitted
23 into evidence.)

24 THE COURT: Do you have a document for me to look at?

25 MR. JOWERS: Yes, sir, I do.

1 BY MR. JOWERS:

2 Q Mr. Jenkins, are you familiar with this particular
3 document?

4 A Yes, sir, I've seen the document before.

5 Q And that is a document that was filed with the South
6 Carolina Secretary of State?

7 A Yes, sir, that's correct.

8 Q I'm afraid I'm going to have to look at this for just
9 a second.

10 A Sure.

11 Q Mr. Jenkins, on the agreement and plan of merger,
12 which is attached to this and incorporated by reference, I
13 would like for you to read the section called -- it's
14 section 7A, then two I's.

15 A Seven A, then two I's. Section 7, subparagraph A
16 states, On consummation of the merger and in addition to
17 the effects under applicable law, including without
18 limitation to 12 USC the symbol 215, lower case A comma.

19 Q Keep going, I believe there's more.

20 THE COURT: He wants you to read subsection 2I.

21 THE WITNESS: Yes, sir. The surviving bank shall be
22 liable for all liabilities of the bank, fixed or
23 contingent, including all deposits, accounts, debts,
24 obligations and contracts thereof, matured or unmatured,
25 whether accrued, absolute, contingent or otherwise and

1 whether or not reflected or reserved on balance sheets,
2 books of accounts or records thereof and all rights of
3 creditors or obligees and all liens on property of the
4 bank shall be preserved unimpaired.

5 BY MR. JOWERS:

6 Q Thank you.

7 MR. JOWERS: Let me show you this.

8 MR. BEDENBAUGH: No objection, Your Honor.

9 THE COURT: What is this?

10 MR. JOWERS: This is a description of the merger that
11 was published by TD Bank on its website and is still on
12 the website. It is a brief description, but instructive
13 as to what transpired.

14 (WHEREUPON, Defendant's Exhibit No. 2 was admitted
15 into evidence.)

16 BY MR. JOWERS:

17 Q Mr. Jenkins, I ask that you read this first
18 paragraph, beginning with TD Bank Financial Group.

19 A Yes, sir. First paragraph states, TD Bank Financial
20 Group, Inc., and it gives the stock symbols, today
21 announced that it has signed a definitive agreement with
22 the South Financial Group for TD to acquire 100 percent of
23 the outstanding common shares of South Financial for
24 approximately 61 million in cash or TD common stock.
25 Common shareholders of South Financial will have the right

1 to elect to receive either 28 cents in cash or point 004
2 shares of TD common stock for each outstanding South
3 Financial common share. In addition, immediately prior to
4 completion of the transaction, the United States
5 Department of Treasury will sell to TD its 347 million of
6 South Financial preferred stock and the associated warrant
7 acquired under the Treasury's capital purchase program and
8 discharge all accrued but unpaid dividends on that stock
9 for a total cash consideration of approximately 130
10 million, 600 thousand.

11 Q So a quick summary of that, Mr. Jenkins, is 28 cents
12 a share for shareholders and government gave a, what, \$280
13 discount on the stock that it sold?

14 A Yes, sir, that is correct.

15 Q You were a shareholder in Carolina First, were you
16 not?

17 A Yes, sir, I was.

18 Q How much did you lose on that transaction?

19 A It was -- I mean, personally, it was four or \$5000, I
20 believe, if memory serves me.

21 Q How long had you been with Carolina First before the
22 merger?

23 A I started working with Carolina in February of 2007.

24 Q The property in Newberry, which is the subject of the
25 loan that TD holds, is that correct?

1 THE COURT: Is this a picture of the property?

2 MR. JOWERS: Yes, sir.

3 THE COURT: Why don't you let him look at it up
4 close. It's kind of fancy for Newberry County.

5 Go ahead.

6 THE WITNESS: Yes, sir, that's the building and
7 property that secures the loan known as Newberry Atrium
8 Professional Center.

9 BY MR. JENKINS:

10 Q The bank filed this action for a judgment on the
11 guarantee instead of foreclosing the mortgage, at least,
12 initially, is that correct?

13 A Yes, that's correct.

14 Q Whose strategy was that?

15 A That's a strategy that was put together based off the
16 financial information we received from the guarantor and
17 we looked at the project and it's a culmination of
18 information. And when it was reviewed, it was discussed
19 internally and that was the decision, to file a suit
20 against the guarantee.

21 Q Was it your recommendation that that procedure be
22 followed?

23 A Yes, that was the recommendation.

24 Q Foreclosure has since been filed, is that correct?

25 A Yes, sir, that's correct.

1 Q Let me show you this letter, Mr. Jenkins.

2 MR. BEDENBAUGH: No objection.

3 (WHEREUPON, Defendant's Exhibit No. 3 was admitted
4 into evidence.)

5 BY MR. JOWERS:

6 Q Let me show you this, Mr. Jenkins.

7 A Okay.

8 Q That letter is a proposal from Mr. Jacobs to you for
9 a workout of the loan, is that correct?

10 A Yes, this is a request for a modification of the
11 existing terms of the loan.

12 Q What was wrong with that proposal?

13 A Let's see. The first issue was that the property
14 taxes for Newberry County in the amount of \$123,898.40 was
15 past due and the property was -- if the taxes hadn't been
16 paid would go to tax sale. It was a request to reduce the
17 interest rate from 5.5 percent to 3.5 percent, and
18 amortizing the balance for 272 months, which is well
19 beyond an amortization schedule of any loan that I've ever
20 dealt with and request to -- let's see, six monthly
21 payments to pay the taxes.

22 Q The entity that owns the building filed for a
23 reorganization, did it not?

24 A Yes, that's correct.

25 Q Did the bank oppose the reorganization?

1 A No, sir. The plan as it was presented was confirmed
2 because at that point, we were actually given the ability
3 to collect some payment because up to that point, we had
4 not collected any payment for some time.

5 Q But was a plan accepted by the bank --

6 A Yes.

7 Q -- as a part of the reorganization?

8 A Yes. Because it -- yes, there was the plan that
9 included the payments to the bank and -- yes, yes.

10 Q So you're saying that the reorganization plan was
11 approved in the bankruptcy court?

12 A Yes.

13 Q The bank is now foreclosing, is that correct?

14 A Yes, sir, that's correct.

15 Q The bank is asking for a deficiency, is that correct?

16 A That is correct.

17 Q What does the bank plan to bid on the property when
18 it is sold at foreclosure?

19 A I don't have that figure. What I'm required to do is
20 obtain a current appraisal and then the bank's bid,
21 strategy, as it's called, is formulated off of the current
22 appraisal.

23 Q Well, the property was supposed to be sold a week ago
24 and you did not have the appraisal, is that correct?

25 A No, I have an appraisal, but when the sale date was

1 moved forward, I did not process the request for approval
2 for the bid amount.

3 Q So what was the appraisal that you got?

4 A I don't have the exact dollar figure in front of me
5 and I don't have it committed to memory, but I believe it
6 was \$5,100,000, but I'd have to check that.

7 Q So what are you going to recommend as the bid?

8 A It's -- the bank has a standard template bid amount
9 that it's based off the appraisal and then there's some
10 other factors to include in there, if there are any
11 environmental issues, which the environmental report is to
12 be back, I think, this week or maybe next. And then if
13 there are repairs, whether they're taken into account in
14 the appraisal with respect to the sidewalk and there's
15 some issues with that. So I don't know what the dollar
16 amount will be.

17 Q Well, what is this template that the bank uses to
18 determine a bid?

19 A Well, it's a percentage. The standard --

20 Q What percentage?

21 A The standard percentage, if there are no issues and
22 it's based strictly off the appraisal and there's nothing
23 else to consider, the bid amount for all loans at
24 foreclosure with TD Bank is 70 percent.

25 Q Who did this appraisal for you?

1 A I can't recall. I don't know off the top of my head.

2 Q Did you order the appraisal?

3 A I ordered the appraisal through an appraisal
4 department. We are not to have any contact with
5 appraisers other than to provide them contact information
6 if we have to, but we send it to a centralized appraisal
7 order department here in Columbia. They solicit the bids.
8 They take whomever they assign it to and then the report
9 comes back to me when it's done.

10 Q You're, of course, familiar with the foreclosure
11 process, is that correct?

12 A Yes, sir.

13 Q Was the appraisal statute waived in the loan
14 documents for this particular loan?

15 A As I sit here, I can't recall. There's a lot of
16 information and I don't have a chance to look at it
17 everyday.

18 Q Are you aware that the bank gets only one bid at
19 foreclosure?

20 A Yes, sir. When there is a deficiency, the bank bids
21 at the first sale and it's its only bid, final bid, and
22 then it stays open for 30 days.

23 Q The bank is asking for a deficiency judgment for the
24 difference between the loan amount -- the amount that's
25 owed and the bid, is that correct?

1 A That is correct.

2 Q And someone can bid a dollar more than your bid and
3 get the property, is that your understanding?

4 A As I understand it, yes, the bank can be outbid by
5 any dollar amount.

6 Q And assuming that the appraisal statute is waived in
7 the loan documents, what, if any, is the recourse of the
8 land owner/borrower?

9 A If the appraisal rights are waived, then, really, the
10 only thing that a landowner or property owner could
11 potentially do -- because it's happened before, is they
12 can actually bid it at the foreclosure sale. If they
13 don't have the means to do that, then it either goes to
14 the bank or goes to whomever the third party buyer is.

15 Q And the terms at a foreclosure sale are the balance
16 due in 20 days, is it not?

17 A I understand that there's a deposit amount that has
18 to be paid and they have so many days in which to provide
19 the full payment for whatever the bid is.

20 Q Mr. Jenkins, you were the workout officer for the
21 Heron Lakes One loan?

22 A Yes, sir, I was.

23 Q Who were the guarantors of that particular loan?

24 A The guarantors were originally William Barnwell,
25 Billy Barnwell, as he's known, and Neil Baker. Neil Baker

1 has since passed away.

2 Q Were you acquainted with these people?

3 A I knew them from a lender/borrower perspective. I
4 was not the original loan officer that closed the loans
5 that they had with Carolina First Bank at the time, but I
6 managed the loans going forward due to the nature of the
7 collateral and the type of business they were in.

8 Q In any of your banking experience, did you ever make
9 -- originate loans for William Barnwell or Neal Baker?

10 A I did not originate them, no, sir.

11 Q None?

12 A I, personally, no, sir.

13 Q How long have you known Billy Barnwell?

14 A I was introduced to Mr. Barnwell when I started at
15 Carolina First in 2007.

16 Q Have you ever been on his fishing boat?

17 A No, sir, I have not. And as a matter of fact, the U.
18 S. Marshall's seized his fishing boat several years ago
19 and it was taken back by another lender in Charleston.

20 Q You ever been fishing with Mr. Barnwell on any boat?

21 A Never, no, sir.

22 Q On any pier?

23 A No, sir, never. I have never spent time with him
24 socially. I only know where he lives geographically. His
25 relationship with Carolina First, now TD Bank, was

1 strictly the lender/borrower relationship.

2 MR. BEDENBAUGH: No objection, Your Honor.

3 MR. JOWERS: We'd like to put this into evidence.

4 This is a loan sale agreement between TD Bank and Sea
5 Ducks, LLC.

6 THE COURT: TD Bank and who?

7 MR. JENKINS: Sea Ducks.

8 THE COURT: Okay.

9 (WHEREUPON, Defendant's Exhibit No. 4 was admitted
10 into evidence.)

11 BY MR. JENKINS:

12 Q Mr. Jenkins, would you review that?

13 A Okay.

14 Q Did you negotiate that transaction or did Mr.
15 Barnwell negotiate that transaction?

16 A I received a phone call from the gentleman associated
17 with Sea Ducks, LLC, and they had stated they were
18 interested in purchasing the bank's note as it relates to
19 the Heron Lakes partially finished subdivision in
20 Columbia.

21 Q Who negotiated the price?

22 A The price was -- there was an offer from the third
23 party buyer presented to the bank and then it subsequently
24 changed due to some issues that they found that was going
25 to cost them some more money, so they wanted to lower

1 their offer price. But the dollar amount is taken into
2 account along with the financial condition of the
3 guarantors and the buyability of the product itself. So
4 what we did was we looked at it globally to see whether
5 this note sale was something that made sense to the bank.

6 Q How much was the -- what was the sales price on that
7 contract?

8 A The sales price was -- it shows a million four, but
9 it was, actually, less than that. It's a million 300
10 something. I can't remember the exact dollar amount. I
11 mean, I could find it. I think it's in here.

12 MR. BEDENBAUGH: Judge, we may need a little bit of
13 time to locate the document. He has produced them to us,
14 we'll just have to try to locate it.

15 THE COURT: Take your time, we don't have a jury.
16 We might just take a short break here.

17 (WHEREUPON, Defendant's Exhibit No. 5 was admitted
18 into evidence.)

19 (WHEREUPON, a short break was taken.)

20 THE COURT: No. 5 was what?

21 COURT REPORTER: Loan sale closing statement.

22 THE COURT: Loan sale closing?

23 COURT REPORTER: Closing statement.

24 BY MR. JOWERS:

25 Q Can you identify that, Mr. Jenkins?

1 A Yes, sir. It is a loan sale closing statement dated
2 May 7, 2013.

3 Q And it shows the price as what?

4 A The money paid to TD -- which price, I'm sorry?

5 THE COURT: Speak up just a little bit, sir.

6 THE WITNESS: Okay. I'm sorry.

7 What, the total receipts or --

8 BY MR. JOWERS:

9 Q What was the amount paid to TD Bank for the Heron
10 Lakes documents?

11 A One million three hundred twenty-five thousand
12 dollars.

13 Q Okay. Was there any discussion about the release of
14 the guarantors in connection with that assumption and
15 transfer?

16 A No, sir. We don't ever put stipulations on loan
17 sales and note sales. What we simply do is we have a
18 third party buyer that purchases the note and loan
19 documents. And at that point after they purchase it,
20 they're free to with the loan documents what they wish.
21 We don't stipulate or request anything because we have
22 sold that and they're free to do with that loan what they
23 want.

24 Q Was there not an understanding that Mr. Barnwell and
25 the Baker Estate were to be released?

1 A No, sir.

2 Q You were not aware of that?

3 A No, sir. Whatever takes --

4 Q No one ever discussed that with you?

5 A No, sir. Whatever takes place between the purchaser
6 and the guarantor, which was the last guarantor remaining,
7 what they work out is what they work out amongst
8 themselves.

9 Q What was the total debt owed to TD Bank on that Heron
10 Lakes One asset?

11 A I don't have the total figure in front of me. I
12 don't know.

13 MR. JOWERS: Your Honor, we offer this. It's an
14 e-mail from Mr. Jenkins.

15 THE COURT: This is a payoff, you said?

16 MR. JOWERS: Yes, sir.

17 MR. BEDENBAUGH: No objection.

18 THE COURT: Without objection.

19 (WHEREUPON, Defendant's Exhibit No. 6 was admitted
20 into evidence.)

21 BY MR. JOWERS:

22 Q Mr. Jenkins, that is a statement as to the balance
23 that was owed TD Bank on the obligation of Heron Lakes
24 One, LLC, is that correct?

25 A Yes, sir, this is an e-mail that I sent to you,

1 that's correct.

2 Q The amount is what?

3 A The total net payoff is \$2,538,310.37.

4 Q That is the asset that you sold for a million three,
5 is that correct?

6 A Yes, sir, that is correct.

7 Q Is it the practice of the bank to have
8 confidentiality agreements signed with anyone who is
9 attempting to purchase an asset from the bank?

10 A Yes, sir.

11 Q What do those confidentiality agreements provide?

12 A It provides for the bank to have the third party
13 buyer understand that they're not to discuss the terms,
14 they're not to do anything that would jeopardize the
15 existing relationship and there's a host of other things
16 in there. I just don't have it in front of me.

17 Q One point of clarification, on that proposal that was
18 made to you earlier by Mr. Jacobs that's been admitted as
19 Exhibit No. 3, isn't it a fact, Mr. Jenkins, that the
20 amortization was a number of months, but the term was
21 actually subject to recall in three years? Paragraph D on
22 page two, Mr. Jenkins.

23 A Yes, yes. The last sentence says, Accordingly, I am
24 requesting a three-year renewal.

25 Q That's not unusual, is it, Mr. Jenkins?

1 A No, sir. A three-year renewal is not unusual. What
2 was unusual was the number of months for the amortization
3 period.

4 Q But the renewal period was within your guidelines
5 that you operate under?

6 A It falls within what we do in the regular course of
7 business, yes, sir.

8 Q And this proposal from Mr. Jacobs was not asking for
9 a discount, it was a forbearance agreement?

10 A Well, the request is for a discount of the current
11 interest rate.

12 Q But not of the principle?

13 A No, sir, not of the principle, that's correct.

14 Q Forbearance agreements are fairly commonplace these
15 days, are they not?

16 A Yes, sir.

17 Q And, again, this was rejected?

18 A That is correct.

19 Q Did you, actually, write a letter or just no
20 response?

21 A My initial response was to Mr. Jacobs requesting some
22 additional financial information to better understand his
23 personal financial statement, which is fairly complex.

24 It's very lengthy. So my initial response was to request
25 more information to understand. Because when you have a

1 -- you know, it's an interesting situation when you have
2 someone with a 20 million dollar net worth where they come
3 in and ask for concessions from the bank. Because
4 concessions for loans don't come from individuals that are
5 considered, you know, high net worth. They're more so
6 from the folks like the Heron Lake folks that, you know,
7 one was deceased and they're estate was negative 14
8 million dollars and the other gentleman that was remaining
9 had to borrow money from his mother to live. And they
10 demonstrated that they didn't have the ability to pay, so
11 that's really the difference in the two. It's a big
12 difference.

13 THE COURT: So let me understand this, the Defendants
14 have a net worth of 20 million dollars at this point?

15 THE WITNESS: At the time this request was made, yes,
16 sir, there was a personal financial statement that was
17 over 20 million dollars.

18 THE COURT: Thank you, sir.

19 THE WITNESS: Yes, sir.

20 BY MR. JOWERS:

21 Q What was the date of that last personal financial
22 statement you're referring to, Mr. Jenkins?

23 A I believe it's June, June 2012.

24 Q Was the financial statement liquid at that time or
25 was it real estate holdings?

1 A There was some liquidity on there. I don't know. I
2 don't have the exact dollar amount, but that led to the
3 request for more information to understand because of the
4 complexity with ownership in companies and real estate and
5 lots of other things that were included in it.

6 Q So you knew Mr. Barnwell had to borrow money from his
7 mother?

8 A Yes, sir. Because in that situation where he didn't
9 have the ability to provide payment, he, actually,
10 provided the bank with an affidavit of financial condition
11 that attached it to his inability to pay and he couldn't
12 pay and his deceased partner, he couldn't pay either.

13 Q Did you have an appraisal made of the Heron Lakes
14 property?

15 A I'm sure we had one at some point in time. I don't
16 have the exact date of the appraisal, but we would have
17 had one, yes, sir.

18 Q Did you get an appraisal to determine that value that
19 you sold it for?

20 A The appraisal would have been one of the things
21 utilized to determine whether the loan sale, the note sale
22 was something that was to the bank's benefit because if
23 you have a piece of property that's worth 10 million
24 dollars and they only owe two million dollars, well,
25 naturally, you would foreclose that because you can

1 protect your interest. But the appraised value was in a
2 position to where it lends to the bank moving to the note
3 sale coupled with the financial information from the
4 guarantors. The borrower was a single purpose entity that
5 had nothing and it was a failed single-family subdivision
6 that the only way it was going to get repaid was with the
7 sale of lots and lots weren't selling. They weren't able
8 to get any contracts to sell it.

9 Q So I ask again, what was the land worth?

10 A I don't know. I don't have the dollar amount in
11 front of me. It had value, I just can't tell you today
12 specifically what it was.

13 Q Did you ever speak to John Hilton about the Heron
14 Lakes One project?

15 A I never spoke to John Hilton. There were some e-mail
16 exchanges that went back and forth and I had spoken to a
17 gentleman by the name of Joe Hawk, who actually called me
18 about purchasing the note. And then I had maybe one or
19 two subsequent conversations with him with respect to when
20 was the closing going to take place because it was taking
21 a little longer than they had first indicated.

22 Q Were you aware that Mr. Hawk and Mr. Hilton were
23 negotiating with Mr. Barnwell?

24 A No, sir.

25 Q Were you aware that Mr. Barnwell was quoting a price

1 of 1.4 million dollars?

2 A Quoting a price of?

3 Q One point four million dollars for that asset?

4 A No, sir.

5 Q You were not aware of that?

6 A No, sir. I'm not personally aware of any
7 conversation that he may have had with the third party
8 buyer.

9 Q And you're saying again under oath that you did not
10 have any personal relationship with Billy Barnwell?

11 THE COURT: I think he said he never went fishing
12 with him on his boat or something. I'm sorry, go ahead.

13 MR. BEDENBAUGH: I think he already answered that
14 question and said he didn't go fishing with him.

15 MR. JOWERS: May I proceed, Your Honor?

16 THE COURT: Yes, sir.

17 BY MR. JOWERS:

18 Q You're saying under oath you have not had any
19 personal relationship, not had any social contact with Mr.
20 Barnwell prior to that note sale or after?

21 A No, sir. Well, now, I have spoken to him afterwards
22 because you have to understand that Mr. Barnwell is of
23 character of person that he started out -- he and his
24 partner started out owing the bank about 10 million
25 dollars in related loans. And he was the one guy who said

1 I will get you repaid, I will make sure these sales occur.
2 And they were very difficult assets to sell because it was
3 raw land, partially developed land for residential home
4 builders, but he was able to work through all that.

5 The Heron Lakes loan was the last one that he had had
6 with us, except for this one small loan. And it was a
7 relationship of lender and borrower. And he is the only
8 person that has done everything he said he was going to
9 do, including a \$40,000 loan that he currently has with
10 the bank. He came in about six weeks ago, maybe two
11 months ago, and brought a check for \$10,000 and said I'm
12 going to get you the \$30,000, I just don't have the
13 ability to.

14 So I did speak with him quite a bit throughout the
15 past few years to get updates to where things were and how
16 things were progressing in the sales and that sort of
17 thing, but it was never more than that. I've never had
18 lunch with the man. I've never been to his house. I
19 simply know him as a borrower of the bank, but he is an
20 upstanding person.

21 Q What sort of discounts did Mr. Barnwell get on these
22 other loans?

23 A In total, including -- not the small loan that he has
24 left to pay, but in total of the five loans, the repayment
25 was over 90 percent of what was owed. And when I say 90

1 percent, that's not just the principle, that includes
2 accrued interest. And he also -- the bank didn't incur
3 any legal fees because he didn't file suit against the
4 bank or, you know, move any of his entities into
5 bankruptcy or anything like that. So he delivered on what
6 he said he would.

7 Q Would you be surprised to learn that over 30 lots
8 have sold in that Heron Lakes Subdivision in the little
9 over a year since this sale took place?

10 A I mean, I don't know if that's good, bad or
11 indifferent if they've closed. I mean, I'm sure some of
12 it sold, but once we were out of it as lender, then it's
13 really immaterial going forward.

14 MR. JOWERS: No further questions. Thank you.

15 THE COURT: Mr. Jordan.

16 CROSS-EXAMINATION

17 BY MR. JORDAN:

18 Q Mr. Jenkins, I'm Leonard Jordan. I represent Mr.
19 McFarland.

20 A Yes, sir.

21 Q So my questions for you this afternoon will be
22 dealing with the North Carolina property, the Atrium at
23 Middle Sound Land, LLC.

24 A Okay.

25 THE COURT: I'm sorry, I need to ask both of you to

1 speak up a little bit. I have trouble hearing.

2 MR. JORDAN: All right. I'll try, Your Honor.

3 THE COURT: Thank you.

4 BY MR. JORDAN:

5 Q The loan itself was for the purpose of acquisition
6 and development of a Wilmington, North Carolina property,
7 is that correct?

8 A Yes, sir, that's correct.

9 Q And that property is, for the most part, still owned
10 by the borrower, is that correct?

11 A Yes, sir, that's correct.

12 Q To your knowledge, were the loan proceeds used at all
13 times for that property?

14 A Let me make sure I understand the question. The
15 original loan proceeds, are you talking about when the
16 loan was originally closed --

17 Q When the three million dollar original loan was made,
18 it was used for that property?

19 A As I understand it, yes, sir.

20 Q Now, this loan was renewed a total of five times,
21 isn't that correct?

22 A I believe it was eight, but I know it was multiple
23 times.

24 Q Okay. I've got copies of five renewal notes and also
25 an extension agreement.

1 A Okay.

2 Q Now, you indicated earlier that you started work with
3 Carolina First Bank in 2007?

4 A February 12th, as a matter of fact.

5 Q At what point in time were you first acquainted with
6 this particular loan?

7 A That would have been April, May of 2012, maybe
8 February, March. At some point in 2012.

9 Q So you're saying that you were not involved in this
10 loan when it was with Carolina First?

11 A That's correct.

12 Q So your first involvement at all with Atrium at
13 Middle Sound Land, LLC was after you had joined TD Bank or
14 right after y'all became TD Bank?

15 A Yes, sir. I knew it by name because I had heard it
16 before because I was with Carolina First Bank, but as far
17 as the details of it, I did not have knowledge of those,
18 no, sir.

19 Q Did you know David Jacobs at that point?

20 A Yes. Both loans were transferred to me to be managed
21 going forward because they shared a common guarantor, Mr.
22 Jacobs, that's correct.

23 Q And Mr. Jacobs was your point of contact on this
24 particular loan, isn't that correct?

25 A Yes, sir.

1 Q And Mr. McFarland, you had no dealings with
2 whatsoever?

3 A I don't believe so. I can't remember that far back.

4 Q Okay. After all of these renewals, and you say there
5 were eight after the loan was originated in 2004, how far
6 down have the principle balance of this loan been paid?

7 A I don't have the exact dollar amount, but I do know a
8 portion of the property at some point in time was sold and
9 something was built on it. I don't know what it is. But
10 the principle reduction came through the sale of a portion
11 of the property.

12 Q And it also came through the monthly payments or
13 servicing of the loan by the borrower, isn't that correct?

14 A The loan for some period of time was interest-only
15 payments. And, obviously, as you well know, that just
16 pays the interest. But I don't know if ever there was a
17 principle and interest schedule.

18 Q TD Bank elected not to renew this loan again. Why
19 did it decide to call the loan or insist on full payment?

20 A At that point in time, much like the Newberry Atrium
21 property, the property taxes were past due and we were
22 trying to obtain updated financial information so we could
23 understand the situation with respect to the finances of
24 the guarantors. And much like Newberry Atrium -- and you
25 have to understand, when you have a loan that shares

1 common guarantors, you look at the guarantor for each of
2 the loans as well. And we were -- you know, when we
3 decided that this loan was not something that would have
4 been extended, while they're two separate loans, they
5 share a common guarantor, so you do look at them somewhat
6 together.

7 And, there again, when you have issues like,
8 basically, the loan being in default for the property
9 taxes not being paid and you have information in the file
10 that shows that you have guarantors with, you know, a high
11 net worth, then you have to wonder why you're being asked
12 to extend a loan and, you know, modify it and do all these
13 sorts of things when, clearly, on paper what you have to
14 go by demonstrates that they do have the capacity while on
15 paper, but maybe not necessarily the willingness, so that
16 goes into making that decision.

17 Q Well, weren't the payments on this loan being
18 serviced? Wasn't it actually paid on a monthly
19 installment basis up to the point it matured?

20 A I'd have to look back at the payment history, but I
21 don't know that. I don't have an answer for that.

22 Q Okay. At that point when you were evaluating this
23 decision not to renew again, was an evaluation of the
24 value of the collateral made? Did you have an appraisal
25 or some other means of determining the value?

1 A With it being, basically, two years ago, I don't know
2 if we had an appraisal at that point or we had ordered one
3 and it had come in later.

4 Q Well, do you know whether the reason to not renew was
5 due to the value of the property or some other reason?

6 A That could have been a reason, but I can't tell you
7 it was the reason.

8 Q Okay. Do you have any idea what the reason might
9 have been?

10 A It's a collective -- the appraisal, the property
11 taxes not being paid and the -- you know, either lack of
12 financial information or not current financial information
13 from borrower and guarantors.

14 Q Are you aware of the fact that the 2013 taxes have
15 been paid by the debtor in this case, the borrower in this
16 case, even though the bank's are suing on their
17 guarantees?

18 A I have not seen the receipt, but I do know that the
19 bank previously has provided payment for the taxes.

20 Q Now, was the financial statements of the guarantors
21 the reason, primary reason for them not being able to get
22 a renewal on this note again?

23 A Well, much like my previous answer, it's a
24 combination. It's not just one thing. It's a combination
25 of the -- globally, when you look at the situation. You

1 know, there's an assemblage of information that lends to
2 why a loan should or should not be extended. It's not
3 just one thing.

4 Q Well, did the bank consider this to be a loan in
5 jeopardy or a problem loan of some type?

6 A Based on the information, yes, sir.

7 Q But it was a loan that was being serviced
8 payment-wise?

9 A As interest-only payments go for a loan that's been
10 extended eight times and it originally closed in 2004,
11 current payments does not necessarily equate a performing
12 loan. That just means that the payments were made timely.

13 Q Okay. Why did the bank elect to sue on the
14 guarantees as opposed to foreclosing of the mortgage, or
15 in North Carolina, selling the property, basically? It
16 didn't really involve a foreclosure, it involved an
17 advertising for sale?

18 A The bank looks at each case and understands the
19 dynamics behind it. You know, what folks need to
20 understand is bank's aren't in the business of owning real
21 estate or taking it back. And, basically, when you have
22 information in which to make a decision that shows that
23 what you have in front of you states that you have
24 individuals with a high net worth, then you question why
25 is someone with maybe the capacity, but unwillingness to

1 pay asking the bank to give a concession when there's no
2 concession on their part, you know, it's just a request
3 for the bank to assume the problem of the borrower.

4 Q Well, at some point during this whole process, the
5 bank, certainly, must have an idea as to what the value of
6 the property is?

7 A Yes, sir.

8 Q Or estimated value?

9 A Yes.

10 Q What is that value as far as the bank's concerned?

11 A A two-year-old appraisal -- and I can't tell you what
12 the exact dollar amount was and I'm not sure that I have
13 one that's updated. It's probably been ordered and maybe
14 I do have it in the file, but I think it was something in
15 the 400 to \$450,000 range as is, as the property sits.
16 But please don't quote me on the exact dollar amount
17 because I'd have to look that up.

18 Q So if you actually went to sale on this property and
19 let's just use -- because it's easier to work with in my
20 head, \$400,000 as the value, okay. You're going to bid 70
21 percent based on your template of that value. So you're
22 going to bid \$280,000 for that property, would that be a
23 correct estimate?

24 A No, sir.

25 Q Okay.

1 A We would order -- we have to have appraisals within
2 60 days of a foreclosure, so whatever the value is with
3 that percentage is what it would be, but I can't say it
4 would be that value because that appraisal and that amount
5 is two years old, at least.

6 Q Well, let's say the number is 600,000. You would bid
7 70 percent of \$600,000 if that were your appraised value?

8 A Whatever the number is, 70 percent, that's correct.

9 Q If there were other issues involved, like
10 environmental issues, it would result in a reduction in
11 what you're bidding, not any kind of increase?

12 A Yes, that's correct. Any identified issue with the
13 property, that would affect the value, it would be taken
14 into account, yes.

15 Q So at the end of the day, if this property is worth
16 \$600,000 in the bank's opinion and it only bids \$420,000
17 and takes \$420,000 from the proceeds of the sale and
18 applies that against the debt, the guarantors and the
19 borrower, they're only getting about \$420,000 credit
20 against their debt, is that a correct analysis?

21 A No, sir. It's close. What the bank does is it bids
22 70 percent at the sale because, like I said before, the
23 bank is not really interested in owning real estate and
24 equipment, so, actually, in all actuality, the borrower
25 gets credit for 80 percent when it's moved into being bank

1 owned. And that's a policy standard across the board.

2 Q So if the bank bids \$420,000 on this initial bid and
3 nobody outbids it and it takes title to the property for a
4 bid of \$420,000, it's going to give additional five
5 percent or additional credit to the borrower and grantor
6 for an amount above that 420,000, that's what you're
7 saying?

8 A The bid amount is 70 percent and credit given is 80
9 of whatever the dollar amount is.

10 Q Okay. And that would apply equally as well if the
11 bank bid 420,000 and a third party bid in at 420,000 and
12 one dollar?

13 A No.

14 Q That only applies if the bank bids it?

15 A If the bank bids and is the high bidder and takes the
16 property to bank owned, yes.

17 Q Okay. So if the bids an artificially low price and
18 somebody actually comes in and gets a steal, the borrower
19 and grantor get no benefit from the extra bump up in
20 credit that you're giving in a situation where the bank
21 buys the property?

22 A It's not artificially low. It's the -- the
23 percentage is based on a current appraisal and that's a
24 standard. That's how every single loan is handled that
25 goes into foreclosure. There are no exceptions.

1 Q But you will admit that the 70 percent is completely
2 arbitrary? I mean, it's the bank's decision? If it
3 wanted to bid 110 percent of value, it could do that just
4 as well as bid 70 percent of value, couldn't it?

5 A No. The bank stays consistent with that 70 percent
6 bid unless the property is worth five times the debt, then
7 we just bid it in at the debt.

8 Q Okay. But my point is is the bank itself controls
9 its bidding procedures?

10 A Yes, sir, we have a bidding policy, that's correct.

11 Q So if it decides not to bid 100 percent of the value
12 of the property, then it determines to be a value, okay?
13 If its value is \$600,000 and the banks knows -- that's the
14 best knowledge it has that's the value and it elects to
15 bid something less than \$600,000, it's actually screwing
16 over the borrower and the guarantor for the difference,
17 would you admit that?

18 A No, sir, that's why the bid percentage is 70 percent
19 because everyone is treated fairly and equally in a case
20 where the value is much less than the debt owed. 70
21 percent is a standard. It's not a screwing over of anyone
22 because everyone is treated fairly and equally. It's a
23 bank policy to bid 70 percent unless the value far exceeds
24 the debt, then we bid the debt amount. And that's across
25 the board.

1 Q But it's some kind of standard set by whom?

2 A It's bank policy.

3 Q TD Bank standard?

4 A That's correct.

5 Q So if everybody gets screwed the same, nobody gets
6 screwed, is that fair?

7 A Everyone is treated equally and fairly under the
8 processes that we have in place for bid strategy.

9 Q All right. Are you aware that Mr. McFarland has been
10 trying to market this property for sale, this property
11 being North Carolina property?

12 A Yes, sir.

13 Q And you're aware that he has gotten a contract offer
14 for one million 40 thousand dollars?

15 A I heard you mention it outside before, yes, sir.

16 Q And are you -- does the bank have a willingness to
17 allow the sale of the property based on that particular
18 sale price?

19 A The bank will consider the sale of the property at
20 that amount, however, we also have to understand what is
21 the guarantor's willingness to accept responsibility for
22 the deficiency because in a transaction where guarantors
23 are going to make a lot of money, they make a lot of
24 money. They don't include the bank in the -- when they
25 make money, we're not brought in and said hey, we want to

1 share this profit with you because you're a great bank,
2 but we're asking to share in the loss. And the bank is
3 just not -- you know, we want to understand how a
4 guarantor or guarantors are going to handle their
5 responsibility in repayment of the debt. And thus far,
6 they're not willing to do that.

7 Q Would you agree, though, that such an evaluation is
8 not really important if you think the value of the
9 property is 600,000?

10 A I'm sorry, I don't understand.

11 Q If you think this property is valued at 600,000 or
12 400,000 and we have an offer to sell the property for over
13 a million, what the heck does it matter that it's -- you
14 know, when the property is selling for effectively twice
15 as much as you think it's worth?

16 A I never said I thought it was worth \$600,000.

17 Q Well, that's right. You think it's worth somewhere
18 like 400 or 450,000?

19 A No, sir. That was what I said the two-year-old
20 appraisal states.

21 Q Well, let me ask you the question straight out. What
22 do you think the property is worth?

23 A I am not an appraiser nor an expert and I don't have
24 an answer for you because that's not my area of expertise.

25 Q You don't have any idea?

1 A I do not know the market of Wilmington, North
2 Carolina, no, sir.

3 Q Okay. Now, going back to the sale of this property
4 versus suing on the guarantee.

5 A Okay.

6 Q Okay. And I'm, certainly, not going to argue with
7 you and, frankly, I would stipulate to you that the bank
8 has the right to foreclose the mortgage if it wants to do
9 that first or if it wants to sue on the guarantee first,
10 totally its business. I'm not arguing about that. But
11 the consequence -- and I'm asking you from the perspective
12 of the bank, the consequence of not foreclosing is,
13 actually, to run up the debt, isn't that correct?

14 A No, sir.

15 Q Okay.

16 A It's not to run up the debt.

17 Q Well, it might not be the intention of the bank, but
18 that is a consequence because you're not paying down the
19 principle, isn't that correct?

20 A We're not receiving any payment, no, sir?

21 Q Exactly. But if you had sold the property and the
22 principle gets reduced by the value of the property, by
23 whatever it bid in at the sale, it would reduce the
24 principle, at least, some portion?

25 A Yes.

1 Q At least, some portion? I mean, it might be applied
2 to pay off the interest first and then principle because
3 at some point, it would reach the principle, correct?

4 A Yes. I mean, if there was a sale --

5 Q And it would pay down the principle balance that
6 interest is being accrued on everyday?

7 A Yes.

8 Q So it is a consequence of that not happening that the
9 debt is actually allowed to run up faster than would
10 ordinarily be the case?

11 A Well, same to be said for the guarantors not
12 providing the bank with their plan on how to accept
13 responsibility for the deficiency because the deficiency
14 is not being paid either, regardless of what it sells for.
15 So yes, you could say that -- yeah, I would agree with
16 that. Yes, as the interest accrues and it increased, but
17 it's two-fold. It's not -- there again, it's just the
18 bank being asked to do something when the guarantors
19 aren't willing to do -- in step with the bank to say okay,
20 if you do this, then here's how we're going to fix the
21 deficiency. So it's two-fold there.

22 Q Well, but the bank could have just sold this property
23 in North Carolina, right, without bringing a lawsuit?

24 A Well, that sale just materialized here recently, not
25 back when this started two years ago.

1 Q I'm not talking about the private sale, I'm talking
2 about at a public sale of the property pursuant to the due
3 trust that's given to the bank, they could have just
4 advertise this property for sale and sold it and it would
5 be over?

6 A Had you had guarantors that didn't show on paper that
7 they were high net worth individuals with assets exceeding
8 20 million dollars, yeah.

9 Q So your idea -- or the bank's idea was to simply go
10 against the guarantors because of their financial status?

11 A Whenever you have information that shows on paper
12 that there's the capacity, but maybe not the willingness
13 to provide payment, then why should the bank do otherwise?
14 Because borrowers and guarantors borrow money. They're
15 obligated to pay it back. And when they don't and can't
16 show the bank that they can't pay it back, that's where
17 the issue is.

18 Q But wasn't the bank told, at least, by Mr. Jacobs
19 long ago that if you just took the property and sold it
20 that he would make sure the balance would be paid?

21 A No, sir.

22 Q You don't recall that?

23 A No, sir.

24 Q All right.

25 A A discount on that, yes, but not the full amount.

1 Q And you do acknowledge that these two years that its
2 taken this loan to get to this point, the interest rate of
3 nine percent has been clicking away steadily and running
4 up this debt?

5 A Yes, sir. The accrued interest, it accrues everyday,
6 yes, that's correct.

7 Q And, again, you'd admit, I'm sure, that nine percent
8 is well above market rate for any kind of loan in this
9 time frame?

10 A I can't say for certain, but that's probably the
11 default rate --

12 Q It is the default --

13 A -- not the original rate.

14 Q It is default, but you are collecting nine percent,
15 is that correct, or you're adding that to your debt?

16 A Yeah, we're not collecting anything, but it is
17 accrued because the loan documents allow for us to charge
18 the default rate and for it to accrue, that's correct.

19 Q The ultimate debt that you obtain on behalf of the
20 bank would include interest at nine percent accrued for
21 this two-year period, the last two years?

22 A Absolutely.

23 Q And that would be a great deal higher debt than would
24 be the case if the property in North Carolina had been
25 allowed to go to sale, public sale?

1 A If there was a sale, obviously, whatever the sale
2 amount would have been would have reduced the principle
3 balance, which, in essence, would have reduced the per
4 diem of accrued interest.

5 Q And does the bank have complete control over whether
6 or not it goes to sale on the deed of trust?

7 A The bank has the ability to file for that to take
8 place, yes, sir.

9 Q All right, sir.

10 MR. JORDAN: That's all I have. Thank you.

11 THE COURT: Gentlemen, you have any questions?

12 MR. BEDENBAUGH: Your Honor, may I approach?

13 (WHEREUPON, Plaintiff's Exhibit Nos. 1 through 16
14 were marked for identification.)

15 CROSS-EXAMINATION

16 BY MR. BEDENBAUGH:

17 Q Mr. Jenkins, in response to Mr. Jordan, I believe you
18 testified that the Atrium at Middle Sound loan was
19 originally made in 2004, is that correct?

20 A Yes, sir, that's correct.

21 Q And I believe your testimony was that the bank had
22 agreed to extend that loan eight different times?

23 A Yes, that's correct.

24 Q Can you tell me when the Newberry Atrium loan was
25 originally made?

1 A 2007, I believe, yes.

2 Q And how long was that loan originally, what was the
3 term of that loan originally?

4 A It was a two-year loan for the construction of the
5 property and the building of the project.

6 Q Okay. And did the bank grant an extension of the
7 two-year term?

8 A Yes, that loan, in fact, was extended eight times as
9 well.

10 Q So that loan was extended eight different times as
11 well?

12 A That's correct.

13 Q Why did the bank give the Defendants eight different
14 extensions?

15 A Well, more time was needed because as was talked
16 about earlier today, the building is 60 percent occupied,
17 so part of a construction loan in order to move to
18 permanent financing, you have an occupancy rate that you
19 want to see so the property is stabilized. And what
20 stabilized means is, basically, the property can carry
21 itself, pay its bills and pay its debt service, loan
22 payments out of a certain number of tenants in the
23 building. And I don't know what that is for this
24 particular one.

25 Q And, eventually, I believe your testimony was loans

1 came due in 2012, is that correct?

2 A Yes. The loans matured -- the maturity date on a
3 loan is, indeed, when the loan is due and payment in full.

4 Q And in 2012, that's when you got the letter that Mr.
5 Jowers admitted as evidence as Exhibit 3, is that correct?

6 A Yes, sir, that's correct.

7 Q And your testimony was that the terms of that
8 proposal were not acceptable to the bank?

9 A Correct.

10 Q Did the bank consider that recasting of the loan, as
11 Mr. Jowers called it, did the bank consider that just like
12 it does every other borrower?

13 A It was -- it, basically, when a proposal or request
14 is submitted, they're all considered because it's what we
15 do in the normal course of business. So it's not a
16 recasting, it's more of an extension. And this, actually,
17 would have been a modification of the existing terms.

18 Q And when the bank made the decision not to renew this
19 loan, was that based on the same decision-making process
20 that the bank uses for other borrowers?

21 A Yes.

22 Q And was it intended to punish the Defendants in any
23 way?

24 A There is no punish elements, that's not the bank
25 intent. The bank's intent is simply when it lends money

1 to borrowers to get repaid and we have to look at each
2 loan request as well as extension request to see if its
3 something that makes sense to the bank, is it a sound
4 business decision. And it is a business decision.

5 Q And I believe your testimony was that part of the
6 business decision process was financial statements
7 submitted by the Defendants and their apparent net worth,
8 is that correct?

9 A That is correct.

10 Q If you would, please, look at the exhibit notebook
11 and turn to Exhibit 10, please. Can you identify that
12 document?

13 A Yes, sir, it is a statement of financial condition
14 for James A. McFarland, Jr., dated May 1st, 2008.

15 Q And is that a true and correct copy of the financial
16 statement from Mr. McFarland that was submitted to the
17 bank?

18 A Yes, it is.

19 MR. BEDENBAUGH: Your Honor, we would move to admit
20 into evidence Exhibit 10, please, Mr. McFarland's
21 financial statement dated May 1, 2008.

22 MR. JORDAN: No objection.

23 MR. JOWERS: No objection.

24 THE COURT: Without objection.

25 (WHEREUPON, Plaintiff's Exhibit No. 10 was admitted

1 into evidence.)

2 BY MR. BEDENBAUGH:

3 Q And what was Mr. McFarland's net worth at that time
4 according to his financial statement?

5 A According to the statement, the net worth at this
6 time was \$20,931,967.

7 Q If you would look at Exhibit 11 for me, please?

8 A Yes, sir.

9 Q Can you identify that document?

10 A It's a personal financial statement as of December
11 1st, 2010.

12 Q And as of that date, is this a true and correct copy
13 of the financial statement that was submitted to the bank
14 dated that date?

15 A Yes, it is.

16 MR. BEDENBAUGH: Your Honor, we would move to admit
17 into evidence Exhibit No. 11, financial statement of Mr.
18 McFarland dated December 1, 2010.

19 MR. JORDAN: No objection.

20 MR. JOWERS: No objection.

21 THE COURT: Without objection.

22 (WHEREUPON, Plaintiff's Exhibit No. 11 was admitted
23 into evidence.)

24 BY MR. BEDENBAUGH:

25 Q And what did Mr. McFarland indicate his net worth was

1 at that time?

2 A At this time, the net worth is listed \$22,356,171.

3 Q What did he say his income was at this time?

4 A Total cash income is listed as \$2,180,729.

5 Q So in 2010, his net worth had gone up according to
6 his financial statement, after the recession, is that
7 correct?

8 A That's correct.

9 Q And he had over two million dollars in income in 2010
10 after the recession, is that correct?

11 A That is correct.

12 Q I want to look at Mr. Jacobs' financial statement.
13 Can you look at Exhibit 12 for me, please?

14 A Yes, sir.

15 Q Can you identify that document?

16 A It's a statement of financial condition for David H.
17 Jacobs, dated June 1, 2004.

18 Q Is that a true and correct copy of the financial
19 statement as it was submitted by Mr. Jacobs?

20 A Yes, it is.

21 MR. BEDENBAUGH: Your Honor, we would move to admit
22 Exhibit No. 12, financial statement of David Jacobs, dated
23 June 1, 2004.

24 MR. JOWERS: No objection.

25 THE COURT: Without objection.

1 (WHEREUPON, Plaintiff's Exhibit No. 12 was admitted
2 into evidence.)

3 BY MR. BEDENBAUGH:

4 Q What was Mr. Jacobs' net worth in 2004, which I
5 believe is the time -- at the time the Middle Sound loan
6 was made?

7 A It shows a net worth of \$36,614,348.55.

8 Q Okay. Would you look at the next exhibit for me,
9 please? Can you identify that document?

10 A That's Exhibit 13.

11 Q Yeah, Exhibit 13.

12 A It's a statement of financial condition for David H.
13 Jacobs, dated July 1, 2008.

14 Q Is that a true and correct copy of the financial
15 statement submitted to the bank?

16 A Yes, it is.

17 MR. BEDENBAUGH: Your Honor, we would move to admit
18 Exhibit 13, the financial statement of Mr. Jacobs dated
19 July 1, 2008.

20 MR. JOWERS: No objection.

21 (WHEREUPON, Plaintiff's Exhibit No. 13 was admitted
22 into evidence.)

23 BY MR. BEDENBAUGH:

24 Q What was Mr. Jacobs net worth according to his
25 financial statement?

1 A According to this financial statement dated July 1,
2 2008, the net worth is listed a \$42,064,792.35.

3 Q Can you look at Exhibit 14, please?

4 A Yes, sir.

5 Q Can you identify that document?

6 A Yes, it's a statement of financial condition for
7 David H. Jacobs dated March 1, 2009.

8 Q And is that a true and correct copy of the financial
9 statement submitted at that time to the bank?

10 A Yes, sir, it is.

11 MR. BEDENBAUGH: Your Honor, we would move to admit
12 Exhibit 14, financial statement dated March 1, 2009, of
13 Mr. Jacobs.

14 MR. JOWERS: No objection.

15 THE COURT: Without objection.

16 (WHEREUPON, Plaintiff's Exhibit No. 14 was admitted
17 into evidence.)

18 BY MR. BEDENBAUGH:

19 Q And what was Mr. Jacobs' net worth according to the
20 financial statement in 2009?

21 A Net worth is listed as \$38,854,430.91.

22 Q Thank you. Can you turn to the next exhibit, please,
23 Exhibit 15?

24 A Okay.

25 Q Can you identify that document?

1 A Yes, sir, it's a statement of financial condition for
2 David H. Jacobs dated January 31, 2011.

3 Q And is that a true and correct copy of the financial
4 statement submitted to the bank in 2011?

5 A Yes, it is.

6 MR. BEDENBAUGH: Your Honor, we would move to admit
7 Exhibit 15 into evidence, financial statement, dated
8 January 31, 2011.

9 THE COURT: All right, sir.

10 (WHEREUPON, Plaintiff's Exhibit No. 15 was admitted
11 into evidence.)

12 BY MR. BEDENBAUGH:

13 Q And what was Mr. Jacobs' net worth according to his
14 financial statement by 2011?

15 A The net worth is listed as \$30,470,701.95.

16 Q I'd like you to look at one more, Exhibit No. 16,
17 please.

18 A Okay.

19 Q Can you identify that document?

20 A Yes, it's a statement of financial condition for
21 David H. Jacobs dated June 30th, 2012.

22 Q And is that a true and correct copy of the financial
23 statement submitted by Mr. Jacobs to the bank at that
24 time?

25 A Yes, it is.

1 MR. BEDENBAUGH: Your Honor, we would move to admit
2 Exhibit 16 into evidence, financial statement of Mr.
3 Jacobs dated June 30th, 2012.

4 MR. JOWERS: No objection.

5 THE COURT: All right.

6 (WHEREUPON, Plaintiff's Exhibit No. 16 was admitted
7 into evidence.)

8 BY MR. BEDENBAUGH:

9 Q What was Mr. Jacobs' net worth in June of 2012
10 according to his financial statement?

11 A It's listed as \$20,199,172.89.

12 Q And is this the last financial statement that the
13 bank received in connection with the maturity of the loan
14 in 2012 and discussions about whether to extend it?

15 A Yes, it is.

16 Q Now, according to these financial statements, Mr.
17 Jacobs' financial situation dropped from a 42 million
18 dollar net worth in 2008 to, roughly, half that in 2012.
19 Did that concern the bank at all?

20 A Yes.

21 Q And did the bank attempt to ask followup questions to
22 Mr. Jacobs about his financial condition at that time?

23 A Yes, there was a request to provide a detailed
24 explanation as of the contents of the statement of
25 financial condition because it has multiple pages, it list

1 certain notes receivable, it has other assets and
2 ownership in businesses. And we needed to have a better
3 understanding of what exactly it meant because you could
4 see the numbers and you understand what they were related
5 to, but then you have to go farther than that to
6 understand the full global picture of something that has a
7 complicated financial statement.

8 Q And did he ever provide any of the information that
9 the bank asked for?

10 A No, sir.

11 Q Did that have any bearing on the bank's decision not
12 to accept his proposal in Exhibit 3 or further extend
13 these loans?

14 A Yes, because when the bank asked for clarification
15 and it's not provided, then the bank has to wonder if the
16 guarantor is hiding something or doesn't want to explain
17 all of the information contained in the financial
18 statement.

19 Q And did the bank subsequently find out that Mr.
20 Jacobs had transferred any assets or put any assets
21 outside of his own name from the time in 2008 when he was
22 worth 42 million until 2012 when the loans came due?

23 A Yes, we did.

24 Q And what did the bank find out?

25 A The bank found out that through transfer of assets,

1 to include cash, that assets were transferred in the
2 millions of dollars.

3 Q And who did he transfer them to?

4 A We understand it is the -- to his wife and a trust
5 for his daughter, I believe.

6 Q Do you believe that supports the bank's decision to
7 sue Mr..Jacobs on his guarantees instead of first
8 foreclosing on the property?

9 A Yes.

10 Q Why is that?

11 A Because what we want to do is we want to move as
12 quickly as we can with the legal rights we have to ensure
13 that no more assets were transferred or transfers take
14 place.

15 Q Now, ultimately, the bank did make the decision to
16 sue on the guarantee without first foreclosing on the
17 collateral, is that correct?

18 A Yes, sir, that's correct.

19 Q And why did the bank decide to do that?

20 A Well, to sue its own guarantees, you know, when you
21 have individuals that show that they have a high net worth
22 and have the ability, you know, on paper to provide
23 payment and can't demonstrate that they do not have the
24 ability to provide payment, you know, it's incumbent of a
25 borrower to fix their problems because it's, indeed, their

1 problem and not the bank's. And, you know, in order to
2 move forward, the suits on the guarantees were based on
3 the information we were provided.

4 Q And in making the decision to sue on the guarantee,
5 if another borrower had a 20 million dollar net worth
6 according to the financial statements, would the bank have
7 also sued them on their guarantee or would they have done
8 something different?

9 A Given the same set of circumstances, just with a
10 different borrower and guarantor, we would have done the
11 same thing.

12 Q How many guarantors have you dealt with that have a
13 20 million dollar net worth?

14 A There's only been one because most of the folks that
15 I deal with who truly can't pay demonstrate it.

16 Q Now, I want to talk briefly about the foreclosure
17 process that Mr. Jowers and Mr. Jordan asked you about.
18 Once the bank forecloses on these properties, will
19 borrowers give a credit for the result of the foreclosure
20 sale?

21 A Yes, they will.

22 Q Is that how the bank treats every other borrower?

23 A Every borrower is treated the same, yes.

24 Q Now, you worked at other banks before you worked at
25 Carolina First or TD Bank, is that correct?

1 A That is correct.

2 Q And did those other banks give borrowers credit for
3 the result of foreclosure sale?

4 A Yes, they did.

5 Q Exactly like TD Bank is doing in this case?

6 A The percentages may have been different, but the
7 premise is the same. You give credit at a certain
8 percentage, whatever policy of the particular institution
9 it is, but the process is exactly the same.

10 Q Now, the bank -- when you sign to sue on guarantees,
11 does that allow the Defendants to continue to try to sell
12 this property themselves?

13 A Absolutely.

14 Q And does the bank generally consider that to be a
15 good thing for borrowers to be able to sell it themselves
16 rather than the bank foreclosing it?

17 A Yes. When property becomes bank owned, there is a
18 stigma attached to it that it's bank owned and the bank
19 wants to get rid of it because they don't want to pay the
20 taxes and have insurance on it and maintain the property
21 and so that is -- I mean, that is why, particularly, what
22 the bank bids at a foreclosure sale.

23 Q Now, in fact, Mr. McFarland has continued to market
24 the Middle Sound property, has he not?

25 A That is correct.

1 Q And according to Mr. Jordan's questions to you today,
2 he has obtained an offer in excess of a million dollars
3 for the property, is that correct?

4 A That's correct.

5 Q And would the bank release its mortgage or deed of
6 trust on a property in exchange for the proceeds of that
7 sale with everybody observing their rights on the
8 deficiency?

9 A Yes.

10 Q And would the Defendants agree to that?

11 A No.

12 Q And why not?

13 A Mr. Jacobs, in particular, would not --

14 MR. JOWERS: I object, Your Honor. How does he know
15 what Mr. Jacobs --

16 THE COURT: Well, he dealt with him. Let him answer
17 the question and we'll see.

18 Answer the question.

19 THE WITNESS: His requirement was that if the
20 property be sold for the dollar amount, whatever that
21 dollar is, is that he would agree to it only if he could,
22 basically, walk away from the remaining balance --

23 THE COURT: Now, what was your objection? Nothing.
24 Not even a valid objection.

25 Go ahead.

1 MR. BEDENBAUGH: Thank you, Your Honor.

2 BY MR. BEDENBAUGH:

3 Q Now, I believe you testified under cross with Mr.
4 Jordan that two years ago, the bank got an appraisal and
5 it was in the range of 400 to \$450,000, is that correct?

6 A Yes, sir, that's correct.

7 Q Now, if the bank had done what the Defendants want
8 them to do and foreclose on the property at that time,
9 would the bank's foreclosure bid have been based on 400 to
10 \$450,000 of value?

11 A Yes, it would have.

12 Q And by not foreclosing at that time, the Defendants
13 have now gotten the opportunity to get a million dollar
14 offer on the property, have they not?

15 A Yes, correct.

16 Q And so do you believe waiting to foreclose actually
17 benefitted the Defendants?

18 A In this case, yes, it did.

19 MR. BEDENBAUGH: Your Honor, no further questions.

20 THE COURT: Anything on redirect?

21 MR. JOWERS: Yes, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. JOWERS:

24 Q Mr. Jenkins, you talked about the renewals that were
25 made on the notes?

1 A The extensions, yes, sir.

2 Q Isn't it a fact that all the renewals were made under
3 the auspices of Carolina First and not TD Bank?

4 A I would have to look at them. One of the loans had a
5 TD Bank extension, but I can't speak to that unless you
6 want me to take a look at it.

7 Q Do you have the material with you?

8 MR. BEDENBAUGH: Your Honor, all of the extensions
9 are part of our exhibits. So I, certainly, wouldn't mind
10 if Mr. Jowers wanted to refer to our exhibits --

11 THE COURT: That's fine.

12 MR. BEDENBAUGH: The Newberry Atrium modifications
13 are all Exhibit 3 and the other loan, Middle Sound, are
14 Exhibit 8.

15 BY MR. JOWERS:

16 Q Take a look at them, Mr. Jenkins.

17 A Certainly. Under tab three, the amendment to
18 promissory note is -- as it says in the first paragraph in
19 favor of TD Bank and it references TD Bank. And on the
20 Middle Sound, also, the last extension agreement was in
21 favor of TD Bank.

22 Q With respect to the alleged transfers of assets, when
23 did you learn about that?

24 A After -- through bank's counsel, there was a
25 deposition, I believe, where that was made known.

1 Q And that was long after the lawsuit was filed, wasn't
2 it?

3 A I don't know the exact date of the deposition. I
4 don't have it committed to memory.

5 Q But a deposition is taken as part of a lawsuit that's
6 already filed, is it not?

7 A Sure, yes, sir.

8 Q So you filed suit before any knowledge of any alleged
9 transfers, isn't that correct?

10 A Yes, sir.

11 Q You gave the opposite -- or I got the opposite
12 impression from your testimony earlier. Did you intend to
13 give that impression?

14 A No, sir. In two years time, I can't say what took
15 place when. I work at a bank, I am not a legal
16 professional.

17 Q And your magnanimous statement that the bank gives
18 the borrower credit for the property that is -- for the
19 proceeds of foreclosure sales, isn't that the law anyway?

20 A Yes, sir.

21 Q So you're not really doing anything for anybody at
22 that point. You're only doing what the law requires, is
23 that not correct, Mr. Jenkins?

24 A I don't think the law stipulates the percentage given
25 and it varies by institution, but, yes, we do what we have

1 to do, yes.

2 Q Are you the gatekeeper for this loan, that is do you
3 make all of the decisions or how does this work in this
4 bank? I'm trying to understand.

5 A With respect to what?

6 Q The loans that you manage, particularly, these two
7 loans?

8 A That's hard to answer because it depends on if you're
9 asking me if I have the authority to waive anything or if
10 you're asking me if someone comes in with a settlement
11 offer, you know. Basically, in general, I report to -- I
12 have a manager I report to who reports to the head of
13 workout for TD Bank. Any requests that comes in or
14 anything at all is put together in a format and submitted
15 for consideration. And depending on the level of approval
16 that it has to go through, it goes to those people. And
17 that's for everything.

18 Q Mr. Jordan mentioned to you the contract, the offer
19 for the Middle Sound property is still open. Are you
20 going to send that up your chain of command?

21 A It depends on if the guarantors are going to accept
22 responsibility for any deficiency because if they're not,
23 then it's hard for me to submit that because it's been
24 submitted before, the lower offers, the previous lower
25 offers.

1 Q Isn't it true that the financial statements of Mr.
2 Jacobs were primarily in real estate holdings in which he
3 had a minority interest?

4 A There are real estate holdings with minority interest
5 included in there, yes, sir.

6 Q The amount of cash was not particularly significant,
7 was it, compared to the --

8 A Well, compared to the 2004, no, it's not nearly what
9 it was then.

10 Q So at the time you filed suit on the guarantee, there
11 was -- he did not have the liquidity to pay that debt, did
12 he?

13 A Well, there is a difference in -- no, he did not have
14 the liquidity, to answer your question, in an account.
15 However, without the details of understanding, we don't
16 know if liquidity can be generated from the other 20
17 million dollars in assets.

18 Q There were notes in his financial report, you did see
19 those, did you not?

20 A There are notes in there, yes, sir.

21 Q And they did explain the contingent nature of most of
22 the assets, did they not?

23 A It's been two years since I've looked at that
24 statement. Yes, there are notes in there that contain
25 information about the assets, that is correct, but I can't

1 speak to the exact nature of them and what they explain.

2 Q So the net worth figure that you quoted earlier is
3 not necessarily that rosy, is it?

4 A Yeah, but when you look at his assets -- and everyone
5 would agree that assets have value because if they didn't
6 have any value, they wouldn't be listed. So while they
7 might not be technically liquid, that doesn't necessarily
8 mean they don't have any value or that they can't be
9 turned into liquidity.

10 Q Marketability has an affect on that, doesn't it?

11 A It does, but 20 million dollars in assets has some
12 value. Now, what that is, I can't speak to because I
13 don't know.

14 MR. JOWERS: Nothing further, Your Honor.

15 THE COURT: Anything gentlemen in response?

16 MR. BEDENBAUGH: No, Your Honor.

17 MR. JORDAN: No, Your Honor.

18 THE COURT: You may step down, sir.

19 Who do you have next? Whoever it is, we're going to
20 take a break.

21 (WHEREUPON, a short break was taken.)

22 THE COURT: Everybody ready?

23 MR. JOWERS: Your Honor, we would call Thomas Wingard
24 to the stand.

25 THOMAS WINGARD,

1 after having been duly sworn, testified as follows:

2 THE COURT: Please have a seat and state your full name
3 and spell your last name for the record.

4 THE WITNESS: Thomas F. Wingard, W-I-N-G-A-R-D.

5 VOIR DIRE EXAMINATION

6 BY MR. JOWERS:

7 Q Mr. Wingard, you are a real estate appraiser?

8 A Yes, sir.

9 Q If you would, give the Court your qualifications,
10 please?

11 A I've been in the real estate appraisal business since
12 1974. I hold the MIA designation from the Appraisal
13 Institute. And over the last 15 to 20 years, my practice
14 has been primarily commercial properties, conservation
15 easements. I do a lot of work with hospitals relative to
16 helping them generate ground leases for medical office
17 business development and, of course, I've done numerous
18 medical office buildings throughout the southeast and
19 southwestern United States.

20 MR. JOWERS: Your Honor, I would move he be
21 considered an expert.

22 THE COURT: This is one of the witnesses you object
23 to as being named too late, last Thursday or something?

24 MR. BEDENBAUGH: That's correct, Your Honor.
25 Certainly, we still have those objections, but we have no

1 objections to his qualifications.

2 THE COURT: Have you been offered as an expert before
3 in State or Federal courts?

4 THE WITNESS: Yes, sir.

5 THE COURT: How many times?

6 THE WITNESS: Probably 10 or 15 times.

7 THE COURT: I qualify him as an expert in real estate
8 appraisal. Like I said, you have a right to proffer this.
9 This is the best way to make a record.

10 MR. JOWERS: I would offer this into evidence.

11 THE COURT: All right.

12 (WHEREUPON, Defendant's Exhibit No. 7 was admitted
13 into evidence.)

14 THE COURT: Obviously, everything that's submitted
15 today is proffer evidence.

16 Yes, sir, continue.

17 DIRECT EXAMINATION

18 BY MR. JOWERS:

19 Q Mr. Wingard, did you have the opportunity to appraise
20 the Newberry Atrium Professional Center in Newberry, South
21 Carolina, in April of 2013?

22 A That's correct.

23 Q That was at the request of the owner of the property,
24 is that correct?

25 A Yes, sir.

1 Q What was your determination of value at that time?

2 A I had two values. I had a value as is and then a
3 stabilized market value, which would have a different
4 effective date of valuation. The market value as is,
5 which would be the value as of April 16, 2013 was
6 \$6,650,000. And then the stabilized market value, which
7 would be as of November the 1st, 2017, was \$7,842,000.

8 Q And what does stabilized mean in your chart?

9 A Stabilized market value is a value that is indigenous
10 to property where it's not heavily influenced by
11 depressions or booms in real property so that you kind of
12 remove those influences so you have what would be more or
13 less a typical value associated with the property.

14 THE COURT: That was 780,000, you said?

15 THE WITNESS: 7,842,000. Now, that's with a
16 different effective date, that's a prospective market
17 value as of that stabilized date.

18 BY MR. JOWERS:

19 Q April 16, 2013, as is value?

20 A Six million six fifty, yes, sir.

21 Q Yes. That included tenant structure at that time and
22 market conditions at that time?

23 A That's correct.

24 Q Any opinion on current market value or as is as of
25 this date, any opinion, sir?

1 A I don't have an opinion about this property
2 specifically because I haven't looked at it, but the
3 overall market for medical office buildings has really
4 improved over the last several years for several reasons.
5 First of all, during the recession, these property owners
6 didn't sell properties. They held onto the properties.
7 And as a result, when the market conditions started to
8 improve and there was a demand for this particular real
9 property type, specifically, those office medical
10 buildings that are identified as on-campus facilities,
11 such as the subject property. A lot of medical office
12 buildings increased in value without really rents
13 increasing. What happened was there was a compression of
14 capitalization rates that occurred because of the demand
15 for these type buildings and that elevated the property
16 values.

17 MR. JOWERS: No further questions, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. BEDENBAUGH:

20 Q Mr. Wingard, my name is Chip Bedenbaugh. How are you
21 being compensated for your appraisal and your testimony
22 today?

23 A I'm not sure. I haven't asked anyone.

24 Q Do you have any personal relationship with Mr. Jacobs
25 or Mr. Jowers or any of the lawyers in this case?

1 A No, sir.

2 Q Do you have any opinion on whether a bank or a lender
3 can sue on a guarantee without foreclosing on collateral?

4 A No, sir.

5 Q On the stabilized nature of the property, I believe
6 in your appraisal, you indicated that means the property
7 -- for this property would be 88 percent occupied, is that
8 correct?

9 A As of on November 2017.

10 Q And is it your understanding that this property has
11 never been above 60 percent occupied?

12 A I'm not aware of that, no, sir.

13 Q Okay. And if the property is never above 60 percent
14 occupancy, would that change your opinion of value?

15 A No, sir.

16 Q Now, are you aware that TD Bank has commenced
17 foreclosure proceedings on this property?

18 A I am by sitting in this courtroom today, I'm aware of
19 that.

20 Q You would agree with me that a pending foreclosure
21 can have a negative impact on value, can it not?

22 A It may.

23 Q Now, if a bank recovers the property at the
24 foreclosure sale, you would agree with me that bank-owned
25 properties generally are worth less in the marketplace

1 than if they're not bank-owned, wouldn't you?

2 A I wouldn't agree that they are worth less, I would
3 suggest that they may sell or be disposed for less.

4 Q Okay. And if a bank owns it, it may sell less,
5 likely would sell less than if Mr. Jacobs sold it himself,
6 it that your testimony?

7 A Potentially, yes.

8 Q And your appraisal that Mr. Jowers asked you about,
9 that doesn't take into account whether the bank forecloses
10 on the property, does it?

11 A It does not.

12 Q And, in fact, the liquidation value of the property
13 would be much less than the market value, is that true?

14 A What kind of liquidation would you suggest?

15 Q What type of liquidation analysis do you normally do
16 for a bank or other client when they ask you to give a
17 liquidation value?

18 A Well, a liquidation value could be as a result of a
19 longer than typical disposition timeframe associated with
20 the property or what they call a quick sale, meaning a
21 three-month sale. At that time, then you would discount
22 that value because it would not be within the typical
23 disposition timeframe associated with that real property
24 type.

25 Q And most banks, you would agree with me, tend to want

1 to sell the property as quickly as they can, is that
2 correct?

3 A Yes, they're not in the business to own and sell and
4 dispose of real estate, absolutely.

5 Q In that scenario, do you have any opinion as to what
6 the liquidation value of this property is?

7 A I do not.

8 Q And I believe your testimony was that your opinion is
9 as of April 2013, is that correct?

10 A Yes, sir.

11 Q And you've not visited it or updated your appraisal
12 since then?

13 A I have not.

14 Q And I believe your testimony is you couldn't testify
15 as to what the property is worth today?

16 A That's correct.

17 MR. BEDENBAUGH: Thank you. No further questions.

18 THE COURT: Anything further?

19 MR. JOWERS: No, sir.

20 THE COURT: You may step down, sir.

21 MR. JOWERS: Your Honor, how long did you indicate
22 you wanted to go today?

23 THE COURT: I said 5:00 or 5:30. If we don't finish
24 today, we'll come back in the morning. I'm here to help
25 you, just tell me what you want.

1 MR. BEDENBAUGH: Your Honor, we do have a proposed
2 order on one of the loans. We are very close, but it is
3 going to take some calls on our end that I don't think we
4 can do this afternoon. So our preference would be if it
5 suits everybody else to go ahead and get everybody in and
6 get the record made.

7 THE COURT: We'll just see how it works out. I'm
8 prepared to make it go away as soon as possible and I'll
9 give you the opportunity to continue your discussions.

10 Call your next witness.

11 MR. JOWERS: Your Honor, we call David Jacobs.

12 DAVID JACOBS,

13 after having been duly sworn, testified as follows:

14 THE CLERK: Please have a seat here and please state
15 your full name when you get seated there.

16 THE WITNESS: David Jacobs, J-A-C-O-B-S.

17 DIRECT EXAMINATION

18 BY MR. JOWERS:

19 Q Mr. Jacobs, what is your occupation?

20 A I'm a real estate developer.

21 Q And what does that entail?

22 A Putting the pieces together to commence a
23 transaction, putting the land together, putting the design
24 team together, putting the legal team, the lending source,
25 putting all the pieces together to work out all the

1 details to build a development.

2 Q Mr. Jacobs, what type of organization do you have
3 that you work with?

4 A I'm a one-man show. I have really no staff and I
5 have one lady that helps me with keeping the books and
6 helping with the documentation.

7 Q So how do you do these developments then?

8 A Over the years, I've been doing this for about 30
9 years. And what I have learned is you've got to build a
10 team approach. And over the years, I have worked with a
11 whole array of professionals in the Columbia market. The
12 general contractor, I typically have a go-to person, such
13 as National Construction, an architectural team, which is
14 JHS or Strad Architectural. There really has been a whole
15 array of local subcontractors or professionals or team
16 members is what I call them.

17 Q What about banking sources?

18 A Banking. Over the years, I've used a lot of
19 different banks over the last 30 years. I've used,
20 basically, all the big banks, small banks until over the
21 last 15 years when I got involved with Carolina First.

22 Q How did that relationship begin?

23 A Well, it started with solicitations from the
24 executive team. The Mack Whittles, the Justin
25 Stricklands, Larry Scotts, a lot of different folks at

1 Carolina First is who I dealt with and who, basically,
2 solicited me over several years. I first got involved
3 with them in 2002.

4 Q What did they offer you?

5 A Carolina First really -- the first loan I did with
6 them, I did a personal loan with them, but because of
7 their solicitation, because of their hands-on approach
8 that they described to me -- I mean, over the first
9 project, the second project, they described we want to be
10 part of your team. We would like to be involved in what
11 you do. We like the approach you take for the development
12 with the pre-leasing, the designs. We like the team that
13 you've assembled and we'd like to be a part of this. And
14 you approach transactions in a very conservative manner
15 with pre-leases. You work on the financial structures,
16 the documentations in a very conservative manner and we'd
17 like to be part of your team.

18 And it's interesting, over the years, many banks will
19 say, you know, we want to be a part of your team, we want
20 to work together with you. And for the most part, my
21 experience is most of the banks, it's really a bunch of
22 words. But my experience with Carolina First from,
23 really, 2002, 2003, 2004 through the time that I have
24 worked with them and in 2012 -- or '10, I guess it was,
25 when they got -- basically, got acquired, their words

1 demonstrated that they would do what they said, advise me.
2 They guided me on a lot of the details of a project.

3 Q What do you mean by details?

4 A They would look at everything that was going on in
5 the project, from the initial part, they would go with me
6 to take a look at a site. They'd discuss the site, siting
7 of the project. They would get involved in looking at the
8 tenant or the sponsor that was involved in the project,
9 either the tenant or who was sponsoring them. They'd
10 understand who they were. They'd ask me questions.
11 They'd ask me different ways that I could structure a
12 loan. They'd suggest different ways. They really were
13 hands on. I mean, they were a matter of we want to be a
14 part of your team, we said it, and here's the
15 demonstration. They would guide me through all of the
16 various aspects of developing a piece of property.

17 And being a one-man show, it really was value added
18 to me. It really was something that I needed help on to
19 keep going in the right conservative direction. And so I
20 relied on them. I relied on them for the advice, for the
21 direction, for the comments. They would look at
22 documentation and make comments. And, obviously, when
23 they would make comments, I would follow their advice. It
24 was just ongoing hands-on working together. And I relied
25 on their expertise, obviously, but I also relied on the

1 guidance they were giving me was making the deal better.
2 And it was really all about making the transaction more
3 conservative, more appropriate for the situation.

4 Q And this was different than other institutions?

5 A It was significantly different. Over the years,
6 prior to getting involved with Carolina First, I really
7 was, basically, here's the money, you show me what you're
8 going to do, but it wasn't a negotiation, it wasn't a
9 hands-on, look under the covers type of approach.
10 Carolina First team really wanted to make the project very
11 viable, work and they guided me. And I relied on their
12 advice to be able to make a transaction better and more
13 productive for all concerned.

14 Q How many projects did you work with Carolina First on
15 in the 15-year period?

16 A I worked on six different transactions with them.
17 Since I'm a one-man show, I really am very slow in doing
18 transactions. It takes me -- for instance, the Newberry
19 transaction, it took me two years before I was even in a
20 position to move forward. And during that two years, I
21 consulted with the Carolina First team. They gave me
22 guidance. And throughout the relationship, it was always
23 about how can we make this better, what can we do to
24 protect everybody's interest much better.

25 Q What other projects did you do with Carolina First?

1 A Another project I did with them was a University of
2 South Carolina Child Development and Research Center. The
3 sponsor was the University of South Carolina. And it was
4 a project where the University was looking to create a
5 child development center on the campus and they wanted a
6 child research center on the top floor.

7 Q Other projects that you worked on with them?

8 A Oh, it goes -- I mean, the two projects most
9 recently, unfortunately, have occurred during a very
10 difficult time in the economy in many aspects, but we'll
11 discuss that in a moment. We did a couple different child
12 development centers, Gateway Academy, both in Charlotte.
13 My feeling was early in the relationship that they just
14 wanted to focus on South Carolina, but the more that we
15 did together, they said you're a client we would like to
16 follow. We like the way you do it. We trust you. And I
17 trusted them, I really found their guidance and direction
18 to be very helpful.

19 Q Let's see, how did you find your way to Newberry,
20 South Carolina?

21 A I was involved, again, with Carolina First on the
22 Irmo Medical Center. It was a large two-level medical
23 office building located across from the Lexington Medical
24 Center in Irmo. And during that process, they help guide
25 me, they helped structure the loan. They looked at all

1 the different documentation pieces and guided me. And
2 through that, I really got confidence in how we worked
3 together.

4 And that is how I found Newberry -- actually,
5 Newberry found me. Many of the physicians that lived in
6 Newberry and the executive team, they'd come down to look
7 at Newberry. They looked at it, they were aware of it as
8 it was being developed. They were aware of it after it
9 was finished. And they saw and understood the different
10 structures that we were able to offer a hospital and
11 physician team. And Carolina First, again, was helpful in
12 strategizing that type of structure.

13 Q The projects you did with Carolina First were
14 successful, correct?

15 A They were all successful until the recent recession.
16 And being in the healthcare area, the process that has
17 been going on for the last several years with the
18 affordable care act, that really has put a lot of
19 healthcare projects on a deep shelf. And I can explain
20 that in more detail if that would be of interest.

21 Q Go ahead.

22 A Okay. Well, of course, during the recession, the
23 capital environment just, basically, froze up. That was
24 starting, of course, in the last part of 2008. And that's
25 when we completed the Newberry office building. We had

1 pre-leased the building, 60 percent approximately, of
2 Newberry. But as a result of the affordable care act and
3 the indecision in the marketplace -- not indecision, but
4 the question marks that existed in the marketplace, it put
5 everything on hold in healthcare. Nobody, hospitals,
6 doctors really didn't understand how they were going to
7 get reimbursed or if they were going to get reimbursed.
8 And that chill has just started to wear off in the last
9 year or so as the affordable care act became law. Prior
10 to that, it was a mystery. Nobody really knew.

11 Of course, the recession put a chill on everything
12 and, basically, sucked many of the quote, investors out of
13 the marketplace, permanent lenders. It was a very
14 difficult time, which as it affected everybody on Main
15 Street, it really significantly affected me. It affected
16 the projects that I was working with.

17 Q On those projects, how did Carolina First react to
18 problems?

19 A Well, again, the attitude and the hands-on approach
20 of the team that I worked with at Carolina First, they
21 were very informed and very aware of the issues that we
22 were facing. For instance, when the building got -- the
23 Newberry building completed in 2008, that was just the
24 beginning of the recession and within six months of that,
25 the affordable act became -- which it wasn't called that

1 at that time, but it really started to put a tail on the
2 healthcare environment.

3 And during that time, unfortunately, within seven,
4 eight months, 12 months of the building being completed
5 and tenants moving in, the executive team at Newberry
6 Hospital picked up and left, from the CEO all the way
7 through the full management team.

8 Q The hospital did have an ownership interest in this
9 building?

10 A Yes. One of the structures that Newberry executive
11 physicians were very interested, which we did at the Irmo
12 Medical Center, which the executive team at Carolina First
13 helped me put together was providing an incentive for the
14 sponsors, i.e., the physicians, the tenants, the hospital
15 to participate in ownership. So in this case at Newberry,
16 the hospital and physicians owned 48 percent of the
17 property. I owned 52 percent. And that was a unique
18 feature that really appealed to them that they learned
19 about at the Irmo Medical Center.

20 Q The overall plan was for the hospital to buy the
21 building from you?

22 A Yes. Before we even started construction, as we were
23 going through the -- putting the pieces together on this
24 transaction, which took two years, we had pre-agreed for
25 the hospital to buy the building or the right of first

1 refusal to buy the building at any time of their choosing.
2 The hospital, when they recruited me to Newberry to
3 replicate what we had completed at the Irmo Medical
4 Center, they liked all aspects of it, but what they didn't
5 want to do is have the building, which is sitting at the
6 entrance to the hospital campus, they didn't want to have
7 that owned by a separate party.

8 Unfortunately, because of the economy, because of the
9 healthcare act putting a, basically, chill on the whole
10 healthcare environment for many years and it still -- it's
11 just starting to come out of it to an extent, the bank,
12 Carolina First, the team, they recognize these problems
13 that I was going through and as a result of that, they
14 were very accommodating to many of the requests. They
15 understood the requests --

16 Q What kind of requests? Share that.

17 A One of the requests -- I mean, there were several
18 requests that we worked through. I mean, when you get
19 involved in a two-year, three-year project, nothing ever
20 goes smoothly, and we all anticipated that there would be
21 -- as in any project that spans over two years plus, there
22 are already time lines, the environment changes,
23 everything changes.

24 So what Carolina First did, after the building was
25 completed, the hospital had a request to put an MRI in the

1 building. And the only way they could do that was to own
2 it outright. Rather than a tenant, they needed to own
3 that facility outright in order to meet the requirements
4 of their financing.

5 Carolina First, again, stepped up, understood the
6 situation, they guided me on how to accomplish the
7 structure that would allow the hospital to own the
8 premises they were in for the MRI. So as a result of
9 that, we restructured the ownership from the previous
10 ownership to allow the hospital to own and occupy the MRI
11 suite to facilitate their financing.

12 Q Is that unusual for a lender to make such a drastic
13 change?

14 A I've never had that kind of flexibility in working
15 with a previous lender. And I know I'm not supposed to
16 get into the discussions, but since it is something that
17 is important to this, I had worked with many lenders over
18 the years and I found nobody that was as hands on and that
19 guided me and was interested in moving forward, but to
20 improve the property.

21 Q During the time since the building was completed, was
22 the building generating enough income to service the loan?

23 A It was during the construction loan. When we renewed
24 one of the loans, and we renewed it fairly often, as
25 indicated from the exhibits. We renewed it many times

1 because of the environment. But it went from a
2 construction loan, we put into an amortizing loan where we
3 started paying down the principle. That gave them the
4 comfort to move forward and continue to extend it and
5 protect the property. Their goal was always to protect
6 the property and to allow us the time to get it to
7 stabilization, add a few more tenants so we could take the
8 loan out.

9 Q Were payments being made at the time the note was
10 called?

11 A Payments had been made up until they called the loan.
12 And during this process, there was a change in routines.
13 When Carolina First got acquired, everybody I knew left.
14 Everybody that had worked with me, everybody that had
15 envisioned this, had worked with me on the details of the
16 transactions, guided me on how to do this, they were all
17 gone. And I think that was, basically -- I can't remember
18 exactly when, but when everybody left the bank, I think it
19 was 2011, possibly when everybody left and the merger was
20 completed. It could have been the end of '10. Whereas I
21 used to have regular ongoing meetings with the team, the
22 Carolina First team, where they would guide me on this is
23 the problem, how do we deal with it? They would guide me
24 on how best to suit a certain matter. But when the team
25 left, I was left with nobody that I knew at Carolina

1 First.

2 Q How would you characterize the treatment that you
3 received from Carolina First as opposed to TD Bank?

4 A Well, I can only represent that it was 180 degrees
5 different. I mean, before, we used to have direct
6 conversation. We would discuss the issues, talk about
7 solutions, but it was always solution oriented. It was
8 never -- as what I face now, it was never as -- it was
9 difficult to deal with. I mean, the difficulty in dealing
10 with the new regime at TD is completely different. I
11 mean, there's no discussion about solving problems. It
12 is, basically, a threat-oriented situation.

13 Q Let's talk a moment, Mr. Jacobs, about the Middle
14 Sound project.

15 A Yes.

16 Q That is in Wilmington, North Carolina?

17 A Yes.

18 Q What exactly was that project?

19 A That was a nine-acre tract of land that was to be
20 developed into multiple tracts to be sold. We found the
21 opportunity to presale, actually, a couple of tracts
22 before we even started. Again, one of the opportunities
23 to work with Carolina First is they looked at what the
24 project was once we got going. And as a result of that,
25 we had the ability to presale and we acquired the nine

1 acres immediately afterwards. We were able to sell -- not
2 immediately, we were able to sell off a number of parcels.

3 Unfortunately, we found some more problems. Some of
4 the problems that we incurred with the Middle Sound
5 project is getting water to the property. During the
6 early years of this property, the Town of Wilmington had
7 contaminated water. That, basically, prevented us from
8 getting water and moving forward with these sales.

9 Q How did Carolina First react to that?

10 A Well, frustrated, but they recognized that you can't
11 sell property unless you have water to it. So we
12 continued to develop the property, less the water. We
13 brought sewer. We couldn't bring water. We put the
14 infrastructure in, but we couldn't hook up the water,
15 which delayed some of the sale closings.

16 Q How long did it take to get the water to this site?

17 A I can't tell exactly, but it was in excess of a year.
18 I mean, it was an ongoing issue.

19 Q What did Carolina First -- were the loans at Middle
20 Sound due at some point?

21 A Yes, oh, yes. It was initially a construction loan.
22 And yes, they became due, but recognizing the issues that
23 we were facing, we all worked together to solve the
24 problem.

25 Q Who do you mean we all?

1 A We, we being the Larry Scotts, the Mike Phillips, the
2 people --

3 Q You're talking about at Carolina First?

4 A Yeah, Carolina First people that I dealt with.

5 Q You were sued on a guarantee by TD Bank, is that
6 correct, Mr. Jacobs?

7 A Yes.

8 Q And that's what we're here about today, is that
9 correct?

10 A Yes, that's correct.

11 Q What was your reaction to that suit?

12 A Well, I mean, I was just -- I was one, bewildered. I
13 had a solution on how to work through this. And in the
14 normal course of business, I had always enjoyed that type
15 of ongoing support to work toward solutions rather than
16 pulling the rug out from under the borrower or the client.

17 Q After TD took over Carolina First, what type of
18 conjunction did you have with that group?

19 A Basically, it was nonexistent. When TD took over, I
20 was working, all the people I knew had left. One of the
21 loan officers that filled in really didn't have quote, the
22 authority or -- this is after TD took over. So I really
23 had no ability to communicate with a local loan officer.
24 But shortly after Carolina First was acquired, it was,
25 basically, a year before I really had any meaningful

1 contact with anybody. And as a result of me reaching out
2 to the local Carolina First loan officer who said they
3 really can't help me, that they need to assign me to the
4 workout department. And it was about a year after
5 Carolina First got acquired before I had the ability to
6 have a conversation with anybody.

7 My first conversation was with a workout officer out
8 of Greenville and seemed like in a position to talk about
9 the issues, to work together to solve the problems. I
10 didn't hear back from that loan officer in the workout
11 department. I guess it was probably six or seven months,
12 he said -- when I tried to reach out to him when the loans
13 were coming due, said I need to work with you on this,
14 says I've been reassigned to another department, but I'll
15 get somebody else in the workout department to contact
16 you. I guess it was probably six or seven months before I
17 heard from another person.

18 Q And you were continuing to make the payments on both
19 loans?

20 A I made payments up until the day they called the loan
21 on both loans. And the payments really came from the cash
22 flow from the property at Newberry. And for Jim and I at
23 Newberry -- I'm sorry, at Middle Sound, I personally put
24 in over a million dollars just to try and save this during
25 the recession.

1 Q And when you say Jim, that's Jim McFarland?

2 A Jim McFarland, yes.

3 Q So how did -- you were sued on the guarantee rather
4 than a foreclosure, is that correct?

5 A That's correct.

6 Q And was it an initial shock that was their initial
7 action taken?

8 A That was the initial shock. When I found that the
9 loan had been called and, basically, I had run out of
10 capital, run out of cash. During this recession, I,
11 basically, fed these properties until I ran out of cash.
12 When they called the loan -- and there was no discussion,
13 no contact with any of the workout people and they called
14 the loan, shortly after that, I got a letter that they
15 were suing me on the guarantee. We had no discussions.

16 When that happened, I didn't have the cash to buy it
17 during the recession. My very attractive financial
18 statements back then, nobody reflected what my current
19 financial situation is, which is -- as a result of this
20 recession, I've lost a lot of money, a lot of interest
21 working through all the solutions.

22 Q How did it make you feel that they took the action of
23 suing on the guarantee without any reference to the
24 collateral, Mr. Jacobs?

25 A Well, I just felt betrayed. I mean, there was just

1 no reason. This building, had been given the time, as you
2 noted in your notebook of exhibits, the Carolina First
3 team gave me time to solve problems and it never cost them
4 anything, it never cost them anything. My goal -- and
5 when I finally reached the two different workout officers,
6 I had a proposal, which was referenced earlier today. But
7 at the end of the day, there was no discussion. It was
8 just we are going to call the loan and, you know, we'll
9 come after you, as followed up by I get sued on the
10 guarantee.

11 In order to protect that position and protect the
12 building, I had to call reorganization to try and get some
13 reasonable attention to this, something that if we could
14 have worked together, we would have spent the last two
15 years solving the problem rather than fighting the
16 situation we are right now.

17 Q This reorganization was a Chapter 11 bankruptcy?

18 A Yes, it was.

19 Q What position did TD Bank take in that?

20 A They were opposed to everything that we put on the
21 table. They would not withdraw the suit on the guarantee.
22 They were coming after me, which, basically, blocked me
23 from doing anything to raise money. I couldn't raise
24 money, I couldn't borrow money with that hanging over my
25 head. It was just an approach to, basically, embarrass

1 me.

2 Q Given your long term relationship with Carolina
3 First, how did that strike you?

4 A Well, I felt betrayed. I just felt like with the
5 15-year relationship and successful transactions we had
6 done together and the guidance they had provided me, to
7 leave me -- when the old team left and TD took over with
8 such an aggressive, uncompromising solution opportunity,
9 they wouldn't even talk to me. It was all by attorney.
10 It turned out to be 180 degrees different. It was just --
11 it was abusive. It really was. It was abusive power, the
12 way -- they can do what they do, I understand that, but it
13 was just abusive power. They knew they could do it and
14 they did it.

15 If I might add, during the same period of time, I had
16 significant investments in many other real estate
17 projects, not with Carolina First, but with three
18 different banks. And during the same time, bankers that I
19 had no long-term relationship, just transactional bankers,
20 I was able to work out solutions for every one of those
21 loans that were issues. And today, all those have been
22 resolved. Over the last two and a half, three years, I
23 have resolved all the problems because everybody
24 understood it was better to work together to solve the
25 problem and salvage the value of the asset. My workout

1 plans would have given us that opportunity and that was
2 two years ago. And today, we could have been in a
3 position where the full value of the loan could be repaid.

4 Q How would you characterize your relationship with
5 Carolina First over the years, but prior to this merger
6 with TD Bank?

7 A Being a one-man show, they really added value to what
8 I was involved with. I felt like it was a cooperative
9 team member, that we worked through issues. I'm sure the
10 Carolina First team didn't want to continue renewing these
11 loans, but they did. They renewed it because we worked
12 together to find a strategy to work it out.

13 So how do I feel because of the TD acquisition, I
14 just feel like I've been betrayed by people that was to,
15 basically, stand in the shoes of Carolina First, allow me
16 the opportunity to work with them to solve the problems,
17 but there was never any discussion. It was just man to
18 man to man, we don't want to hear about anything. We just
19 want -- we're coming after you as evidenced by calling the
20 note with no discussion, as evidenced by suing me on the
21 guarantee loan without any consideration of the value of
22 the asset that had been created.

23 Q The money that you borrowed from Carolina First for
24 the Newberry project, did every penny of that go into the
25 building?

1 A Every penny of it did and every penny I had went into
2 both of these projects.

3 Q Has there ever been any claim of misappropriation?

4 A No.

5 MR. JOWERS: No further questions. Thank you, Mr.
6 Jacobs.

7 MR. COLLINS: May it please the Court?

8 THE COURT: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. COLLINS:

11 Q Good afternoon, Mr. Jacobs.

12 A Afternoon.

13 Q Let me start with a few things that I think are
14 important. You don't dispute that you signed guarantees,
15 correct?

16 A I didn't dispute that I signed the guarantee, but
17 when I signed the guarantee with Carolina First, I was
18 working with a team that had assured me and demonstrated
19 the ability to work through problems that arise in
20 multi-year projects.

21 Q Now, this team with Carolina First you speak of, they
22 required you to sign a personal guarantee to secure the
23 note, correct?

24 A I signed the personal guarantee, I do not dispute
25 that, but I knew the people I was working with. Let me

1 give you a reference point. During the Newberry project,
2 hospital, which was a significant tenant and significant
3 owner, they required, demanded that I get three bids from
4 different lending institutions, three different bids. The
5 hospital put up two of their lending sources they had
6 worked with favorably, I put up Carolina First. At the
7 end of the day, they were both all competitive bids. The
8 difference was I was able to lobby and prevail on the
9 hospital to allow me to work with Carolina First for the
10 reasons that I had a long term relationship with them. I
11 had a relationship of working through problems and them
12 being hands-on involved, whereas the other banks, I had no
13 relationship. I had no opportunity to work -- I take that
14 back. I had worked with a couple of bankers or the
15 lenders that were recommended by the hospital, but I never
16 had the same relationship that I did with Carolina First.

17 Q So you don't dispute you signed the guarantee,
18 correct?

19 A I signed the guarantee with the understanding that I
20 was working with a team that I had confidence in because
21 they demonstrated the flexibility and looking to solve
22 problems, to solve issues and retain value.

23 Q And so you don't dispute that the guarantees are
24 involved as you sit here today, correct?

25 A Correct.

1 Q Okay. And you don't dispute that you're indebted to
2 TD Bank on these guarantees, correct?

3 A I don't dispute it, but I had a solution to work
4 through it if given the opportunity.

5 Q Right. And there's nothing in the guarantees or
6 notes or loan documents that require TD Bank to do
7 anything other than its doing today, correct?

8 A Nothing in the paperwork, but having the actual
9 demonstration of what the Carolina First team would do on
10 my behalf and on behalf of the project was the spirit in
11 which I signed this. I had never been in the situation
12 that the recession put upon all of us. It wasn't even a
13 vision back in '07 that something like this could happen,
14 but I knew if there were problems, as Carolina First had
15 always demonstrated, they would have worked together and
16 help me solve them.

17 Q So it's your testimony that Carolina First would have
18 just continued to extended these notes in perpetuity until
19 you somehow made payment on them?

20 A I'm not saying what they would do, I will tell you
21 what they did do.

22 Q And TD Bank has also made extensions on these notes,
23 correct?

24 A One only and it was a 90-day extension for them to
25 figure things out. And once that 90 days came, they

1 called the note.

2 Q That's right. And then your proposal to the bank was
3 for the bank to reduce the interest rate, correct?

4 A The interest rate at that time had been -- we're at
5 the depths of recession now. Interest rates and the
6 market had declined and I was asking them to adjust the
7 interest rates and give me a couple more years. And, you
8 know, everything in this world is negotiable, but I never
9 even had the opportunity. It was just -- it wasn't even a
10 conversation. It was a letter, the loan's over with and
11 we're going to sue you on the guarantee. It all happened
12 within, really, a couple of months of each other.

13 Q So your proposal to TD Bank in 2012 was first to
14 reduce the interest rate, correct?

15 A To bring it into market rates.

16 Q Okay.

17 A To bring it into market rates, so maybe a couple of
18 years. Now, if there was any opportunity to discuss it
19 and let's talk about how we can solve this thing and
20 something that will work for us, that's the way we always
21 worked together at the Carolina First team. But to have
22 no conversation, no discussion, what can we do to help
23 solve these problems, I mean, it's just unconscionable.

24 Q Well, you also told TD Bank in this proposal that the
25 taxes of \$123,898.40 had not been paid for 2011, correct?

1 A That is correct, but I had a solution. Give me an
2 extension, I can raise the money.

3 Q And you also told TD Bank that the Newberry property
4 was not generating enough cash to keep up with the
5 mortgage and pay the taxes, correct?

6 A Because the amortization had been increased.

7 Q That's a yes, you did tell the bank that?

8 A I was funding this thing out of pocket to keep the
9 bills paid. It was a cash flowing, except the taxes
10 escalated because I did not have the cash at that moment
11 to pay the taxes off it.

12 Q So the Newberry Atrium note was signed in 2004,
13 correct?

14 A Yes.

15 Q So after --

16 A Wait, wait, wait, no, no, no. Say that again.

17 THE COURT: 2007?

18 THE WITNESS: Yes, sir, 2007.

19 BY MR. COLLINS:

20 Q 2007, I apologize. So in 2012 and after multiple
21 extensions, you contacted TD Bank and, basically, give
22 them a proposal that the bank will need to pay the taxes
23 --

24 A No, I didn't say the bank had to pay the taxes. My
25 request was in my discussion, brief as it was, if we can

1 get an extension, I believe I can raise the money, but
2 you've got to give me something to work with. A 90-day
3 extension does not give me the ability to raise money.

4 Q If the bank did not pay the taxes, was the property
5 going to go into a tax sale? Isn't that what you stated
6 in this letter?

7 A It absolutely would.

8 Q So the bank would have had to fund the taxes,
9 correct?

10 A If we couldn't have worked things out. And at the
11 end of the day, I'd raise the money.

12 Q And if we look at your financial statements --

13 A Yes.

14 Q And you heard the testimony today, in 2008, is it
15 accurate to say that your net worth was, roughly, 42
16 million dollars?

17 A It was in 2008, that was before the recession hit
18 hard and everything cratered. I had transactions on the
19 table that if were funded would have made that realistic.
20 And we had loan commitments in 2008 for that, but
21 everybody disappeared on me in 2008. I had financing
22 lined up for multiple projects that would have allowed me
23 to have that kind of net worth, but at the end of 2008 and
24 2009, basically, everything stopped and I was left out
25 there blowing in the wind.

1 Q Well, your net worth in 2009 was, roughly, 38
2 million, right?

3 A If that's what it says, yes.

4 Q You don't dispute that, correct?

5 A It was all in real estate limited partnerships, LLCs
6 where I was the minority owner in basically everything.

7 Q But by submitting this financial statement to banks,
8 that was part of you getting these loans, correct?

9 A And I think my track record previous to that was part
10 of it, too.

11 Q So you don't dispute you were worth 38 million
12 dollars in 2009, correct?

13 A Real estate isn't liquid. Real estate is really a
14 situation where if you're a minority owner, you don't have
15 the ability to raise cash as proposed earlier. The
16 liquidity had basically disappeared, and disappeared
17 because I continued to fund the obligations that I had
18 until it was all gone.

19 Q And so, ultimately, in 2012, the last financial
20 statement you sent to the bank, you were worth roughly 20
21 million dollars net worth, correct?

22 A All real estate -- minority ownership in real estate
23 transactions. I had no quote, real estate that I had the
24 fee simple on. I was an owner, a minority owner, I might
25 add, in real estate transactions that, basically, had

1 chilled through -- and even until today.

2 Q So since 2008 to 2012, you had lost roughly 20
3 million dollars in net worth, correct?

4 A Yes, yes, and it continues down. You know, one of
5 the conditions that was requested for you to consider the
6 Middle Sound sale is provide updated financials, which I
7 did. And yet, nobody has given any reflection on that. I
8 mean, today is a lot different than 2012.

9 Q And during this time period, 2004 to 2012, you were
10 also transferring personal assets of yours to your family
11 members, correct?

12 A I wasn't transferring anything. I was paying them
13 for their interest in the ownership.

14 Q Did you not --

15 A At the end of the day, I mean, any borrower that has
16 the ability to transfer assets for estate planning
17 shouldn't be the purview of a bank. I mean, I wasn't
18 doing it to avoid obligations, but there were -- it was
19 estate planning. I had a partner in one of my
20 transactions to die and my life had turned upside down.

21 It woke me up to the fact that I needed to do some estate
22 planning myself. And that was the process I was going in.

23 Q So over this time period, you transferred millions of
24 dollars to your wife and two children, correct?

25 A No, no, never. I never had millions of dollars to

1 transfer. The reduction in my net worth is a result of
2 the real estate market and the recession.

3 Q Do you remember being deposed by Mr. Bedenbaugh?

4 A I do.

5 Q Do you remember being asked whether you transferred
6 assets to your wife and children?

7 A Yes.

8 Q Do you remember responding that you transferred
9 millions of dollars to your wife and daughter with the
10 sale of a piece of property?

11 A I don't recall the millions of dollars, no, but they
12 were part owners in some of the real estate I was involved
13 in. So yes, when it was disposed of, they got their
14 share.

15 MR. COLLINS: I'm going to have to pull it out --

16 THE COURT: Take your time. We've been here this
17 long.

18 MR. COLLINS: Judge, because of the procedure, I do
19 have an original that I would like to hold until the trial
20 of this case unless you'd like me to open it and hand it
21 to the Court.

22 THE COURT: I think I have a copy of it attached to
23 your motion.

24 MR. COLLINS: I think you may. It's going to be page
25 28.

1 MR. JOWERS: What page?

2 THE COURT: 28, I think he said.

3 THE COURT: Page 28, line what?

4 MR. COLLINS: If you would look at line three.

5 BY MR. COLLINS:

6 Q Mr. Jacobs, page 28, line three.

7 A Okay.

8 Q And if you'll read down through page 29, line 14.

9 A Twenty-nine --

10 Q I just want to see if that refreshes your
11 recollection.

12 A Okay.

13 Q Does that refresh your recollection as to the
14 transfer of several million dollars to your wife and two
15 children?

16 A I transferred the funds that came out of a real
17 estate refinancing to them because they were owners in
18 these properties.

19 Q Okay. And that's not what you stated in your
20 deposition, is it?

21 A Well, I don't think it's -- I transferred it because
22 it was theirs to do and I was in the process of estate
23 planning. At that point, it did not matter. I mean, I
24 was -- this was prior to this lawsuit being instituted, so
25 I wasn't under the control of anybody. I could do the

1 estate planning that had been advised to me when you get a
2 wake up call when a partner dies.

3 Q Isn't it true that you transferred interest in
4 certain properties to your wife and two children with no
5 cost to them?

6 A They had interest in some of the real estate
7 holdings, yes.

8 THE COURT: I'll take that as a yes, that's his
9 estimation, but, obviously, looking at the deposition and
10 recalling the testimony. I mean, this is nonjury, okay?

11 Go ahead.

12 MR. COLLINS: Judge, can we take five minutes?

13 THE COURT: Yes.

14 (WHEREUPON, a short break was taken.)

15 THE COURT: All right, gentlemen, everybody ready?

16 MR. COLLINS: Yes, sir.

17 BY MR. COLLINS:

18 Q Mr. Jacobs, is your only complaint against TD Bank
19 that they sued you on the guarantee rather than foreclosed
20 on the property?

21 A Well, my complaint is I didn't have the same hands-on
22 participation in working problems out. And that was a
23 standard I came to expect with the Carolina team. I mean,
24 they gave me that type of assistance and I expected that
25 type of cooperation and problem-solving going forward.

1 Just because a new owner takes ownership of the stock
2 doesn't mean the relationship has to change, but it was
3 changed.

4 Q Any other complaints?

5 A Just how aggressive and -- they've been an
6 obstructionist. They, basically, hold all the cards and
7 they're doing everything they can to, basically, bury me.

8 Q And that's because they sued you on the guarantee
9 rather than --

10 A Yes.

11 Q -- giving you an extension?

12 A Well, there would have been a solution if we had had
13 an extension.

14 Q And so is that the predicate for your claims, that
15 they didn't give you that extension, they being TD Bank?

16 A Well, not just because of the extension. We should
17 have had some kind of discussion, something other than
18 just call a loan, we'll sue you on the guarantee, thank
19 you very much and we'll see you in court. And that's
20 where I've spent my last two years.

21 MR. COLLINS: I don't have any further questions.
22 Thank you.

23 THE COURT: Any further witnesses?

24 MR. JOWERS: Your Honor, one last question. If I can
25 ask him to read his answer because that was, obviously,

1 not the basis of his argument today.

2 THE COURT: I think he's asked the question about
3 four or five times. A relationship had been established.
4 I know where we're at.

5 MR. JOWERS: Can I ask him --

6 THE COURT: Go ahead. Go ahead.

7 REDIRECT EXAMINATION

8 BY MR. JOWERS:

9 Q Mr. Jacobs, what other problems -- why do you think
10 the bank has done -- acted inappropriately to the extent
11 that this guarantee can be voided?

12 A Well, by not giving me the same consideration they
13 would give to other clients to allow them to get discounts
14 on notes --

15 THE COURT: Now, are you testifying to this from your
16 own personal knowledge of other clients or are you
17 testifying as a result of what you've received during this
18 lawsuit?

19 THE WITNESS: I'm sorry, I didn't understand.

20 THE COURT: You said based on how they treated other
21 clients. Is this of your own personal knowledge of
22 treatment of other clients other than yourself or this is
23 based on information that's been developed through this
24 lawsuit?

25 THE WITNESS: Yes --

1 MR. JOWERS: I just wanted to make sure they were not
2 boxing --

3 THE WITNESS: No, no, it's all about -- I mean, if
4 I've invested 15 years in a relationship and the bank has
5 done the same, you would expect some fair treatment that
6 would be commensurate with other clients that had similar
7 problems. Whatever those problems were, I, at least,
8 deserved the right to have a fair negotiation and work
9 together and solve the problems. If you'll do it for one
10 borrower, you need to do it for another, particularly,
11 with the guidance and the references that -- the ability
12 to work together with the Carolina First team over the
13 15-year period.

14 MR. JOWERS: That's all.

15 THE COURT: Anything further?

16 MR. COLLINS: No, Your Honor.

17 THE COURT: You may step down, Mr. Jacobs.

18 MR. JOWERS: One more witness. I would call David
19 Hilburn. He is outside.

20 THE COURT: All right.

21 DAVID HILBURN,

22 after having been duly sworn, testified as follows:

23 THE COURT: Please have a seat, sir, tell us your full
24 name and spell your last name for the record.

25 THE WITNESS: David Wade Hilburn, H-I-L-B-U-R-N.

DIRECT EXAMINATION

BY MR. JOWERS:

Q Mr. Hilburn, what type of business are you in?

A Most people in Columbia would call me a developer, but for 30 years, I've also been a banker.

Q As a developer, what do you do?

A I purchase raw land, design subdivisions and build subdivisions, sell to builders as well as sort of broker off notes and mortgages and lands that banks currently have for sale.

Q What do you mean by brokering?

A Well, I've been doing this -- that is doing construction lending and been in the banking business for 30 years and I know a number of bankers. When the economy collapsed, a number of bankers that I knew who were taking back properties contacted me about helping them get rid of assets that they acquired through either foreclosure or just bad assets.

Q Do you do this for yourself or for others or what do you do?

A I don't currently buy any for myself. The economy has taken care of that. I find investors that are interested in properties and kind of connect them with whoever the bank is who wants to sell.

Q Any particular banks you work with?

1 A There's probably not many I haven't worked with.

2 Q How many transactions like that have you been
3 involved in?

4 A In the last eight years, more than 50, less than 100.

5 Q Mr. Hilburn, you're familiar with the Heron Lakes One
6 property?

7 A I am.

8 Q What is that property?

9 A Well, Heron One is a company that owned property, so
10 Heron One is a company that was formed, I guess, by -- at
11 least, my understanding by, at least, two gentlemen. And
12 that property acquired some property, I believe, from the
13 State of South Carolina, which was around a lake and they
14 designed and developed a neighborhood for Beazer Homes.

15 Q And where is this property located?

16 A It's located, basically, between Farrow Road,
17 Longtown Road and North Brickyard in the northeast
18 Columbia quadrant.

19 Q And you got involved with a purchase of something to
20 do with that, is that correct?

21 THE COURT: You need to speak up. The court reporter
22 can't hear you.

23 MR. JOWERS: I'm sorry.

24 THE COURT: That's all right. Repeat the question.

25 BY MR. JOWERS:

1 Q Mr. Hilburn, how did you first become involved with
2 that property known as Heron Lake?

3 A A gentleman named Joe Hawk or John Hilton, one of the
4 two contacted me about the possibility of buying the note.
5 They knew that I did that.

6 Q Okay. What -- describe that property that is subject
7 to the note and mortgage.

8 A And that's sort of my forte, the land portion. It
9 was 80 plus single-family residential lots and then raw
10 land that had been designed into approximately 120 plus
11 lots. It would be single-family detached lots to be sold
12 to builders in the future.

13 Q After you heard from Mr. Hawk, what was your next
14 step involved in that project?

15 A Well, they had -- that is Joe Hawk and John Hilton
16 came to -- I said, Well, come by the office and let's see
17 what you have. I was familiar with that project because I
18 had developed around it. There was a subdivision called
19 Plantation Pointe that was next to it, so I kind of knew
20 about the subdivision. I didn't lend money to Beazer
21 Homes or large national companies, so I wasn't familiar
22 with the details of the property. I didn't know the lot
23 size or anything like that. And I told them I would need
24 to go out there and look at it and study it and see what
25 the value of the property was before I would consider

1 bringing them to any of my clients.

2 Q What did you decide the value was?

3 A Quick math was we believed the market was, at least,
4 north of three million dollars.

5 Q North of three million dollars. What does that mean?

6 A Well, you know, it depends on what you're buying and
7 what you're paying how quickly you can turn a piece of
8 property. We figured that the lots on the ground were
9 probably worth \$30,000 a piece and that's what currently
10 the seller is selling them for, and that the raw land with
11 the fact that they had been designed for a subdivision
12 and, basically, entitled. And what entitled means is you
13 could build what they designed.

14 Q But is it improved by the county?

15 A Yes, sir.

16 Q And the subdivision plan had passed regulatory
17 inspection?

18 A Yes.

19 Q After that, what was your next step in this project?

20 A My next step was to contact John Hilton, that's who I
21 started doing most of my communications with and I spoke
22 to him about, you know, what would the bank be willing to
23 take for the note and could I have access to the
24 guarantors.

25 Q Did you see the contract that Mr. Hilton had with the

1 bank?

2 A I did eventually, yes.

3 Q And that contract was in what name?

4 A I believe the company that they had was called Sea
5 Ducks, LLC.

6 Q Do you recall the price?

7 A I believe the price was 1.4 million dollars.

8 Q Did you speak with the bank officer about that?

9 A I did, yes.

10 Q And what was that gentleman's name?

11 A Mr. Jenkins.

12 Q Roper Jenkins?

13 A Roper Jenkins.

14 THE COURT: Mr. Who?

15 MR. JOWERS: Roper Jenkins.

16 BY MR. JOWERS:

17 Q You spoke to the guarantor, also?

18 A Yes. I got the phone number -- I believe I got the
19 phone number to Mr. Barnwell from Mr. Jenkins.

20 Q What was the point of calling Mr. Barnwell?

21 A Well, it's always good to get the guarantor on board,
22 meaning that if I communicate with them and they were
23 willing to assist us in any manner, then it would make
24 transaction easier. They may have information that would
25 help us.

1 Q What were your conversations with Mr. Roper Jenkins
2 of TD Bank about?

3 A A couple things, you know, how much was the value of
4 the note, and I'm thinking in the first conversation, that
5 was revealed to me. And then, who was involved. And at
6 that time, I learned there was a partner who had died or
7 was killed.

8 Q Was there any question or issue raised about the
9 guarantees involved?

10 A I'm not sure in the first conversation with Mr.
11 Jenkins or the second that it was my impression from
12 leaving that conversation that the guarantors were not
13 being pursued.

14 Q And why was that?

15 A I don't know. And it's not important to me, so I
16 didn't pursue that.

17 Q Did Mr. Jenkins appear to have a personal
18 relationship with Mr. Barnwell, the guarantor?

19 A Well, I believe Mr. Jenkins told me they were
20 friends, yes.

21 Q Any other comments about their relationship?

22 A Well, Mr. Barnwell had mentioned that they had fished
23 together and that they were friends and maybe even hunted,
24 I'm not sure.

25 Q Did Mr. Barnwell mention to you anything about the

1 guarantee?

2 A Yes, numerous times. He had told me that he had
3 cleared it with Mr. Jenkins and that that note was not
4 going to be under any terms sold to us until he was
5 assured that everybody knew that the guarantors were not
6 to be pursued.

7 Q Was that in writing?

8 A It was not in writing to me, no.

9 Q That was the understanding, though?

10 A Yes, sir.

11 Q Was there any -- did you get any indication of why
12 this was implied?

13 A Well, I mean, looking back, it appears that they were
14 friends and maybe this was a good way to get the note off
15 the books and everybody could go away.

16 Q So the price that was eventually negotiated was what?

17 A Well, we did some due diligence work and within a
18 couple of weeks before the closing, I had a conversation
19 with Billy Barnwell and his attorney, which happened to be
20 Brian Boger. And Brian told me he would talk to Roper
21 Jenkins about getting the price reduced.

22 Q So a price reduction was negotiated?

23 A It was.

24 Q How much?

25 A Seventy-five thousand dollars.

1 Q Was it unusual in your experience dealing with banks
2 and notes for the parties to the note or guarantors to be
3 dealing with a note sale?

4 A We, typically, do not do that.

5 Q So the transaction was completed?

6 A Yes, sir.

7 Q Who purchased the note and mortgage?

8 A Cypress Cove Properties, LLC.

9 Q And, ultimately, Mr. Barnwell deeded the property to
10 another entity?

11 A Yes. Prior to the closing, I had to orchestrate
12 making sure that all happened because it was clear to my
13 investor that they would not be able to pursue the
14 guarantor, but my customers, typically, do not pursue the
15 guarantor anyway.

16 Q So the entity that purchased the asset -- strike
17 that. The entity that obtained title to the property has
18 since been selling lots?

19 A Yes. Cypress Cove Properties purchased the note and
20 Billy Barnwell and, I guess, in this case would be the
21 estate of the other gentleman, deeded that property over
22 to a company called Lakeshore Visions, LLC.

23 Q And Lakeshore Visions, LLC has been marketing the
24 property?

25 A Yes, sir.

1 Q How many lots have been sold since then?

2 A I believe 29 or 30.

3 Q And at what price?

4 A Thirty thousand dollars.

5 Q Thirty thousand per lot?

6 A Yes, sir.

7 Q So that's what, \$900,000?

8 A Quick math, yes.

9 Q And that's in a little over a year?

10 A I believe this note was purchased in March a year
11 ago.

12 Q And it was purchased for 1.3 million dollars?

13 A Yes, sir, one million 325, I believe, to be correct.

14 Q And 900 has been, essentially, recouped?

15 A Well, that's closing costs and -- I'm sure they have
16 expenses.

17 MR. JOWERS: Nothing further. Thank you, Mr.
18 Hilburn.

19 MR. BEDENBAUGH: May it please the Court, Your Honor.
20 I'll try to be very brief.

21 CROSS-EXAMINATION

22 BY MR. BEDENBAUGH:

23 Q Mr. Hilburn, good to see you again. How you doing?

24 A I've been good. Thank you.

25 Q Just for the Court's benefit and to go back a little

1 bit further, I know we discussed Cypress Cove Properties,
2 but it's actually a company called Sea Ducks, LLC, that
3 initially contacted TD Bank about buying the Heron Lakes
4 One note, correct?

5 A Yes, sir.

6 Q And the negotiations regarding the terms and the
7 price of the Heron Lakes One note was done by Sea Ducks,
8 LLC, correct?

9 A I would say most of it was, yes.

10 Q So by the time you got involved, those negotiations
11 had been completed, correct?

12 A Just about, yes.

13 Q And do you, as you sit here today, know what the Sea
14 Ducks, LLC members negotiated with Billy Barnwell to get
15 his cooperation?

16 A I do not know that.

17 Q But Billy Barnwell was cooperative with you, was he
18 not?

19 A Not at first, but yes, he became very cooperative,
20 yes.

21 Q And he was helpful to you, correct?

22 A Yes, sir.

23 Q Actually, it surprised you a little bit that he was
24 so cooperative?

25 A Yes, sir.

1 Q And you don't have any personal knowledge whether the
2 members of Sea Ducks, LCC had a personal relationship with
3 Billy Barnwell?

4 A No one has mentioned that to me, no.

5 Q You don't know whether the folks at Sea Ducks, LLC
6 had a prior relationship with Billy Barnwell?

7 A I do not know that.

8 Q You don't know anything about TD Bank's
9 decision-making process related to the Heron Lakes One
10 note sale?

11 A Not at all.

12 Q Okay. And to the extent there was an agreement that
13 the guarantors would be released as part of the note sale,
14 you don't know where that agreement came from at all, do
15 you?

16 A No, sir.

17 MR. BEDENBAUGH: I have no further questions. Thank
18 you, Judge.

19 THE COURT: Anything further?

20 MR. JOWERS: That's all we have, Your Honor.

21 THE COURT: You may step down, sir.

22 I'll make my decision in the morning. If y'all want
23 to submit -- I'll put it this way, I'll make my decision
24 in the morning. I'll give you a chance one more time to
25 submit proposals strictly on the applied grounds in your

1 motions in limine. Is that fair enough?

2 MR. BEDENBAUGH: Yes, Your Honor.

3 MR. JOWERS: When do you need this proposal?

4 THE COURT: As soon as possible. I'm here to help
5 you out. I can make my decision tomorrow morning, but
6 I'll be willing to wait and give everybody an opportunity
7 to do the best they can for their clients. So y'all
8 decide, you want five days, 10 days, two days.

9 (WHEREUPON, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, PENNY M. JOHNSON, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 12th day of August, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 7, 2014

Penny M. Johnson Court Reporter

My Commission Expires: 06/16/2018

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 COUNTY OF RICHLAND) TRANSCRIPT OF RECORD

TD Bank, NA, Successor by
 Merger with Carolina First
 Bank,

Plaintiff,

vs.

David H. Jacobs,

Defendant.

2012-CP-40-06074

TD Bank, NA, Successor by
 Merger with Carolina First
 Bank,

Plaintiff,

vs.

David H. Jacobs and James A.
 McFarland,

Defendant.

2012-CP-40-07540

October 6-7, 2014
 Columbia, South Carolina

B E F O R E:

THE HONORABLE ALISON RENEE LEE, JUDGE.

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OCTOBER 6, 2014

THE COURT: Good afternoon, everyone. Be seated, please.

This is Docket Number 2012-CP-40-06074, TD Bank, NA, versus David Jacobs, as well as Docket Number 2012-CP-40-07540, TD Bank, NA, versus David Jacobs and James McFarland.

The Plaintiffs are represented by Paul Collins and Jody Bedenbaugh; is that correct?

MR. COLLINS: Yes, Your Honor.

MR. BEDENBAUGH: Yes, Your Honor.

THE COURT: The Defendant, David Jacobs, is represented by Gerald Jowers?

MR. JOWERS: Yes, Your Honor.

THE COURT: And the Defendant, James McFarland, is represented by Leonard Jordan?

MR. JORDAN: That's correct.

THE COURT: We are here for a jury trial on these cases. They have been consolidated for trial.

I have had the opportunity to briefly review the files. I have read the order that was signed by Judge Manning on Friday related to some motions in limine. I have also had the opportunity to review a brief of the Defendant, David Jacobs, in

1 reference to I guess one of the motions, and I
2 guess the motion for summary judgment that was
3 filed a while ago. And I skimmed through the
4 summary judgment motions, and I briefly skimmed
5 through some of the exhibits that were part of the
6 record.

7 I believe that they have a strike list that is
8 ready. Are there any issues that we need to take
9 up before we bring the jury up?

10 MR. JOWERS: No, Your Honor.

11 MR. COLLINS: No, Your Honor. Thank you.

12 THE COURT: And I have received requested voir
13 dire from both the Plaintiff and the Defendant.

14 And so if there is nothing further, we will
15 call for the panel.

16 THE CLERK: Yes, Your Honor.

17 THE COURT: Counsel, I have four witnesses
18 listed. I have Roper Jenkins, James McFarland,
19 David Jacobs, and Tom Wingard. Are there any
20 additional witnesses?

21 MR. COLLINS: No, Your Honor.

22 MR. JOWERS: No, Your Honor.

23 THE COURT: I wanted to make sure I had them
24 all.

25

1 (WHEREUPON, the jury came into open
2 court at 12:08 p.m.)

3 THE BAILIFF: The jurors are all present, Your
4 Honor.

5 THE COURT: Thank you.

6 Good morning, ladies and gentlemen -- or good
7 afternoon.

8 THE JURY: Good afternoon.

9 THE COURT: My name is Alison Lee. I am your
10 Circuit Court judge here this week for Common
11 Pleas, or Civil Court.

12 We are about to begin the trial of the case of
13 TD Bank, NA, Successor by Merger with Carolina
14 First Bank, versus David Jacobs. And it is
15 consolidated with another case, TD Bank, NA,
16 Successor by Merger with Carolina First Bank,
17 versus David Jacobs and James McFarland.

18 Ladies and gentlemen, both of these lawsuits
19 arise out of the personal guarantees that were
20 signed by the Defendant to certain loans that were
21 executed for businesses. And we are here today on
22 the bank trying to collect on those particular
23 guarantees.

24 Is there any member of the jury panel that has
25 any knowledge of any of the facts or any of the

1 issues that are to be tried in this case? If so,
2 please stand.

3 (WHEREUPON, there was no response.)

4 THE COURT: The Plaintiff in this case is TD
5 Bank, who is a Successor by Merger with Carolina
6 First Bank.

7 Is there any member of the jury panel who has
8 ever been an officer, shareholder, director, or an
9 employee of TD Bank or Carolina First Bank? If so,
10 please stand.

11 (WHEREUPON, there was no response.)

12 THE COURT: Is there any member of the jury
13 panel that currently holds any account with TD Bank
14 or previously with Carolina First Bank? If so,
15 please stand.

16 Yes, ma'am, your name, please?

17 THE JUROR: Stuart James.

18 THE COURT: The first name again?

19 THE JUROR: Stuart, S-T-U-A-R-T.

20 THE COURT: And, Ms. James, do you currently
21 hold an account with TD Bank?

22 THE JUROR: A checking account.

23 THE COURT: And the fact that you hold an
24 account with that bank, would that prevent you from
25 being able to listen to the evidence to be

1 presented in this particular case?

2 THE JUROR: No.

3 THE COURT: Would you be able to make a
4 decision that would be based strictly upon the
5 evidence to be presented here?

6 THE JUROR: Yes.

7 THE COURT: Would you be able to give both the
8 Plaintiff, as well as the two Defendants, a fair
9 and impartial trial in this matter?

10 THE JUROR: Yes.

11 THE COURT: Thank you, ma'am. You may have a
12 seat.

13 (Juror seated.)

14 THE COURT: The bank is represented by Paul
15 Collins. If you would stand and face the panel,
16 please.

17 (Mr. Collins stands.)

18 THE COURT: And Jody Bedenbaugh.

19 (Mr. Bedenbaugh stands.)

20 THE COURT: Both of the law firm of Nelson
21 Mullins Riley and Scarborough.

22 Is there any member of the jury panel who is
23 related by blood or marriage or a close personal
24 friend of either of these two gentleman, or
25 lawyers, or have you ever been represented by them

1 or by members of their law firm? If so, please
2 stand.

3 (WHEREUPON, there was no response.)

4 THE COURT: Thank you.

5 (Mr. Collins and Mr. Bedenbaugh are seated.)

6 THE COURT: The Defendants in this case are
7 David Jacobs and James McFarland.

8 Is there any member of the jury panel who is
9 related by blood or marriage or a close personal
10 friend of David Jacobs or James McFarland? If so,
11 please stand.

12 (WHEREUPON, there was no response.)

13 THE COURT: Is there any member of the jury
14 panel who has ever had any business dealings with
15 either David Jacobs or James McFarland? If so,
16 please stand.

17 (WHEREUPON, there was no response.)

18 THE COURT: Mr. Jacobs is represented by
19 Gerald Jowers, of the Jowers Law Firm, and
20 Mr. McFarland is represented by Leonard Jordan, of
21 the Jordan Law Firm.

22 (Mr. Jowers and Mr. McFarland stand.)

23 THE COURT: Is there any member of the jury
24 panel who is related by blood or marriage or a
25 close personal friend of either of these two

1 attorneys, or have you ever been represented by
2 them or by their law firm? If so, please stand.

3 (WHEREUPON, there was no response.)

4 THE COURT: Thank you, gentleman.

5 (Mr. Jowers and Mr. McFarland are seated.)

6 THE COURT: Ladies and gentlemen, in addition
7 to the parties in this case, there may be
8 additional witnesses who may be called to testify.

9 Is there any member -- and if any of the
10 witnesses are present, when I call your names, if
11 you will please stand.

12 Is there any member of the jury panel who is
13 related by blood or marriage or a close personal
14 friend of Roper Jenkins?

15 (Mr. Jenkins stands.)

16 THE COURT: Mr. Jenkins is here in the
17 courtroom.

18 If so, please stand.

19 (WHEREUPON, there was no response.)

20 THE COURT: Thank you, sir.

21 (Mr. Jenkins is seated.)

22 THE COURT: Is there any member of the jury
23 panel that is related by blood or marriage or a
24 close personal friend of Tom Wingard? If so,
25 please stand. And he is a real estate appraiser.

1 (WHEREUPON, there was no response.)

2 THE COURT: Is there any member of the jury
3 panel or a member of your immediate family who has
4 ever been involved in a dispute with a bank
5 relating to financial transactions, which would
6 include any mortgages or notes? If so, please
7 stand.

8 (Juror stands.)

9 THE COURT: Your name, please, sir?

10 THE JUROR: Milliken.

11 THE COURT: Milliken is your last name?

12 THE JUROR: Yes, ma'am.

13 THE COURT: And, Mr. Milliken, I presume
14 that -- it obviously does not involve this
15 particular bank; is that correct?

16 THE JUROR: Yes, ma'am. But, I mean, it is
17 over with. Everything has all been cleared up. It
18 was.

19 THE COURT: So it involved TD Bank?

20 THE JUROR: A judgment against me.

21 THE COURT: Involving TD Bank?

22 THE JUROR: Yes, ma'am.

23 THE COURT: Okay. And the fact that that
24 occurred, would that prevent you from being able to
25 listen to the evidence in this case?

1 THE JUROR: I don't think so. No, ma'am.

2 THE COURT: Would you be able to make a
3 decision that would be based strictly upon the
4 evidence to be presented here?

5 THE JUROR: Yes, ma'am.

6 THE COURT: And would you be able to give both
7 the Plaintiff, as well as the Defendants, a fair
8 and impartial trial?

9 THE JUROR: Yes, ma'am.

10 THE COURT: And you said there was a judgment
11 involved, but it has all been taken care of?

12 THE JUROR: Yes, ma'am, it has.

13 THE COURT: How many years ago was that?

14 THE JUROR: A year ago.

15 THE COURT: Thank you, sir.

16 THE JUROR: Yes, ma'am.

17 (Juror seated.)

18 THE COURT: Is there any member of the jury
19 panel or a member of your immediate family that has
20 ever worked as a real estate developer or a real
21 estate appraiser? If so, please stand.

22 (Juror stands.)

23 THE JUROR: My wife is a land appraiser.

24 THE COURT: Tell me your name, please, sir.

25 THE JUROR: Drew Woodham.

1 THE COURT: The last name?

2 THE JUROR: Woodham.

3 THE COURT: And the fact that she is in that
4 profession, would that prevent you from being able
5 to listen to the evidence in this case?

6 THE JUROR: No, ma'am.

7 THE COURT: Would you be able to make a
8 decision that would be based strictly upon the
9 evidence to be presented here?

10 THE JUROR: Yes, ma'am.

11 THE COURT: And would you be able to give both
12 the Plaintiff, as well as the Defendants, a fair
13 and impartial trial?

14 THE JUROR: Yes, ma'am.

15 THE COURT: Thank you. You may have a seat.
16 (Juror seated.)

17 THE COURT: Ladies and gentlemen, this
18 lawsuit, as I indicated, involves a guarantee on
19 some loans that were made by TD Bank. They also
20 involve entities that I would like to ask you
21 about.

22 Is there any member of the jury panel that has
23 any personal or financial relationship with any of
24 the following entities, or if you have ever been an
25 employee or a shareholder or a director or an

1 officer of these companies:

2 Newberry Atrium Professional Center, LLC. If
3 so, please stand.

4 (WHEREUPON, there was no response.)

5 THE COURT: Atrium at Middle Sound Land, LLC.
6 If so, please stand.

7 (WHEREUPON, there was no response.)

8 THE COURT: Atrium Northeast Limited
9 Partnership.

10 (WHEREUPON, there was no response.)

11 THE COURT: Atrium Development Association,
12 LLC.

13 (WHEREUPON, there was no response.)

14 THE COURT: Atrium Development, Incorporated.
15 If any of those apply to you, if you would
16 please stand.

17 (WHEREUPON, there was no response.)

18 THE COURT: Is there any member of the jury
19 panel that has any knowledge of any of the facts --
20 I have already asked you that question.

21 Is there any member of the jury panel aware of
22 any bias or prejudice towards either the Plaintiff
23 or the Defendants in this case? If so, please
24 stand.

25 (WHEREUPON, there was no response.)

1 THE COURT: Is there any member of the jury
2 panel who has formed or expressed an opinion about
3 any of the issues that are to be tried in this
4 particular case? If so, please stand.

5 (WHEREUPON, there was no response.)

6 THE COURT: Is there any member of the jury
7 panel that is aware of any bias or prejudice
8 towards either the Plaintiff or either the
9 Defendants in this case? If so, please stand.

10 (WHEREUPON, there was no response.)

11 THE COURT: And is there any member of the
12 jury panel that knows of any reason why you would
13 not be able to serve as a fair and impartial juror
14 in the trial of this particular case? If so,
15 please stand.

16 (WHEREUPON, there was no response.)

17 THE COURT: Is there anything further from the
18 Plaintiff?

19 MR. COLLINS: No, Your Honor. Thank you.

20 THE COURT: Anything further from the
21 Defendants?

22 MR. JOWERS: No, Your Honor.

23 MR. JORDAN: No, ma'am.

24 THE COURT: Counsel, if you will look at your
25 strike list, using the numbers on the left-hand

1 side of the column, Numbers 1 through 20. There
2 are four strikes for the Plaintiff and four strikes
3 collectively for the Defendant.

4 And, then, do the parties wish to have an
5 alternate?

6 MR. COLLINS: I don't think it is necessary,
7 Your Honor.

8 MR. JOWERS: No, Your Honor.

9 THE COURT: Would you be willing to go to 11
10 or 10?

11 MR. COLLINS: Yes, Your Honor.

12 MR. JOWERS: Yes, Your Honor.

13 THE COURT: Okay. Then we'll begin with the
14 Plaintiff.

15 MR. COLLINS: Your Honor, I would like to
16 strike Juror Number 8.

17 THE CLERK: The Plaintiff strikes Number 8.

18 MR. JOWERS: 12, Your Honor.

19 THE CLERK: The Defendant strikes Number 12.

20 MR. COLLINS: The Plaintiff would strike
21 Number 14, Your Honor.

22 THE CLERK: The Plaintiff strikes Number 14.

23 MR. JOWERS: The Defendant strikes Number 11.

24 THE CLERK: The Defendant strikes Number 11.

25 MR. COLLINS: The Plaintiff would like to

1 strike Number 23.

2 THE COURT: 1 through 20.

3 MR. COLLINS: Oh, I'm sorry, Your Honor.

4 The Plaintiff would strike Number -- Juror 20,
5 Your Honor.

6 THE CLERK: The Plaintiff strikes Number 20.

7 MR. JOWERS: The Defendant strikes 14.

8 THE CLERK: That has already been struck.

9 MR. JOWERS: Oh, I'm sorry. The Defendant
10 strikes 137, Your Honor.

11 THE COURT: Numbers 1 through 20.

12 MR. JOWERS: Number 16.

13 THE CLERK: The Defendant strikes Number 16.

14 MR. COLLINS: Juror Number 17, Your Honor.

15 THE CLERK: The Plaintiff strikes Number 17.

16 MR. JOWERS: The Defendant strikes Number 9.

17 THE CLERK: The Defendant strikes Number 9.

18 Counsel, please allow me to review your
19 strikes with you.

20 For the Plaintiff, the numbers are: 8, 14,
21 20, and 17. Is this correct?

22 MR. COLLINS: Yes, ma'am.

23 THE COURT: And for the Defendant, the numbers
24 are: 12, 11, 16, and 9. Is this correct?

25 MR. JOWERS: Yes.

1 THE COURT: Are there any motions with respect
2 to the selection of the jury?

3 MR. COLLINS: None from the Plaintiff, Your
4 Honor.

5 MR. JOWERS: None from the Defense.

6 THE COURT: Ladies and gentlemen, as your
7 names are called, please bring all your belongings
8 and have a seat in the jury box.

9 THE CLERK: Number 211, Deonna Richardson.
10 Number 16, Alfredia Boyd.
11 Number 151, Shannon Lewis.
12 Number 300, Shimika Young.
13 Number 292, Tyrone Wilson.
14 Number 146, Jeffrey Lauffer.
15 Number 306, Rachel Hartness.
16 Number 91, April Gibson.
17 Number 119, Matthew Jacobs.
18 Number 28, Thomas Burt.
19 Number 87, Jerome Fulton.
20 Number 52, Karla Crawford.

21 THE COURT: Ladies and gentlemen, if you would
22 stand and raise your right hand, please, for the
23 administration of the oath.

24 (Jury stands.)

25 THE CLERK: After this oath, please

1 acknowledge by answering, I do.

2 Do you swear or affirm that you shall well and
3 truly try the issues joined in this case and a true
4 verdict give, according to the law and the
5 evidence, so help you God?

6 THE JURY: I do.

7 THE CLERK: Thank you. You may be seated.

8 (Jury seated.)

9 THE COURT: Remaining members of the panel, I
10 would like to thank you very much for your
11 willingness to serve as jurors in this matter.

12 I ask that you return downstairs to the jury
13 assembly room for further instructions.

14 Thank you.

15 (WHEREUPON, the remaining panel was
16 excused at 12:27 p.m.)

17 THE COURT: Good afternoon again, ladies and
18 gentlemen.

19 What I would like to do is to briefly give you
20 some instructions I am going to ask that you follow
21 throughout the course of this trial. And then I'll
22 go ahead and excuse you for a lunch break. Then
23 when you come back, I'll briefly describe how the
24 trial will proceed. And then we will actually get
25 started this afternoon.

1 Now, ladies and gentlemen, you have now been
2 sworn as jurors in this case. And, as jurors, your
3 role is to determine the facts of this case based
4 upon the evidence that will be presented to you
5 throughout the course of this trial. So in
6 connection with that, I ask that you follow these
7 instructions.

8 First of all, I ask that you not begin to
9 discuss this matter among yourselves until it is
10 time for you all to begin your deliberations.

11 The evidence does not always come in in a
12 chronological order, but until you have heard all
13 the evidence that has to be presented you are not
14 in a position to be able to determine the facts of
15 this case. So I ask that you not discuss it until
16 you are instructed to begin your deliberations.

17 Secondly, ladies and gentlemen, I ask that you
18 not allow anyone to approach you for someone to
19 discuss the matter with you. If someone comes up
20 to you and wants to talk to you about this case,
21 please tell them that you are a juror and that you
22 cannot discuss it. And I ask that you report it as
23 soon as possible. We'd like to have the
24 opportunity to make sure that no one is attempting
25 to influence you in any way, and the only way we

1 can do that is if you report it to us.

2 You can report it to the bailiff or to the
3 clerk's office or to me, but certainly if that
4 occurs, we ask that you do report it as soon as
5 possible. And please tell them that you cannot
6 discuss the matter with them.

7 Also, ladies and gentlemen, as you come and go
8 from the courthouse, I ask that you not listen to
9 conversations that you may overhear in the
10 hallways. Oftentimes the attorneys may be
11 discussing things with each other or with their
12 clients and with witnesses. And the decisions that
13 you have to make about this case must be based upon
14 the evidence that will be presented here in this
15 courtroom. It should not be based upon
16 conversations that you may overhear as you come and
17 go. So I ask that you simply not listen to any of
18 those discussions.

19 Finally, ladies and gentlemen, I ask that you
20 not keep any reading materials with you. If you
21 have the opportunity during the lunch break to take
22 those reading materials and leave them with your
23 car or if you have a chance to go home, I ask that
24 you not keep those with you. I don't screen your
25 reading materials. I never know when there is

1 something that you are reading that could have an
2 impact upon some particular fact or issue that is
3 to be determined in this case, and just out of an
4 abundance of caution we ask that you not keep that
5 reading material with you in the jury room.

6 I will also tell you that when we return from
7 lunch they will collect your telephones from you.
8 If you need to be connected to your home or office
9 for some reason and you do not wish to turn your
10 telephone off, if you turn it on vibrate or silent,
11 we can take a break for you to address any
12 emergencies. But they will collect your phones
13 from you so that you will not be able to keep those
14 with you while you are in the jury room and while
15 you are here in court. They will be secured and
16 they will be locked up, so you won't have to worry
17 about anything happening to them.

18 Ladies and gentlemen, what I'm going to do,
19 after you return from your lunch break, I am going
20 to ask that you select a foreperson. The
21 foreperson's responsibility is to communicate with
22 me in the event that there is anything that you all
23 need throughout the course of this trial.

24 For example, if there is anyone that has any
25 health issues I need to be aware of, either for

1 purposes of taking a break or lunch hour, the
2 foreperson should write me a note about that. Or
3 in the event that we have to go past 5:00 p.m., if
4 you have any appointments after work, daycare,
5 childcare issues, or other appointments that you
6 need to make, the foreperson should write me a note
7 about that as well.

8 But, more importantly, when this case is
9 submitted to you all to begin your deliberations,
10 it will be the foreperson's responsibility to make
11 sure that everyone has the opportunity to express
12 his or her views about the evidence and what it
13 shows, and then to coordinate those discussions.

14 And then ultimately when you all have reached
15 a verdict, it will be the foreperson's
16 responsibility to report the verdict on the
17 appropriate form. It should be someone that you
18 select among the 12 of you who you think would be
19 best suited to serve in that particular capacity.

20 I just ask that after lunch when you have
21 selected that foreperson that you write the
22 person's name on a sheet of paper and give it to
23 the bailiff. And then when you come into the
24 courtroom, the foreperson should take the very
25 first seat in the first row where this young lady

1 is with the black sweater. The rest of you are
2 free to sit wherever you would like to sit within
3 the first three rows. The only assigned seat is
4 for the foreperson.

5 Ladies and gentlemen, at this time I am going
6 to ask you to follow the bailiff out. They will
7 show you a room where you should report after
8 lunch. I am going to ask that you report back at
9 2:00 o'clock. And when you have reported back at
10 that particular time, then we will be ready to
11 continue on with the trial of this case, and I'll
12 start by giving you an overview of how we'll
13 progress.

14 I hope that you have a good lunch. And we'll
15 see you back here at 2:00 o'clock.

16 Thank you.

17 (WHEREUPON, the jury is excused for
18 lunch at 12:32 p.m.)

19 THE COURT: Is there anything that we need to
20 take up before we take a lunch break?

21 MR. COLLINS: Not from the Plaintiffs, Your
22 Honor.

23 MR. JOWERS: No.

24 MR. JORDAN: Your Honor, on behalf of
25 Mr. McFarland, I would like to raise again, there

1 is an objection regarding the Court's jurisdiction.
2 This has already been ruled on. I am just doing
3 this for the purposes of an appeal. And we have
4 argued this at length, of course, so that is not an
5 issue that the Court needs to take up, but I just
6 want it on record reserving that particular issue.

7 THE COURT: And when you say the Court's
8 jurisdiction, to what are you referring?

9 MR. JORDAN: He is a resident of Wilmington,
10 North Carolina, so personal jurisdiction over him.

11 THE COURT: I'll note it for the record,
12 unless you want to make any further argument about
13 it.

14 MR. JORDAN: I don't think any other argument
15 at this stage would be appropriate since it has
16 already been ruled on.

17 THE COURT: Thank you. It is preserved for
18 the record, then. And I presume that the Court
19 ruled on it because of his contact in making -- in
20 entering into the contract; is that correct?

21 MR. JORDAN: I suspect it was because TD Bank
22 happens to be a local bank, a South Carolina bank.
23 They are not only in South Carolina, they are in
24 North Carolina as well, but I think the gist of the
25 Court's ruling was that -- the basis for

1 jurisdiction is TD Bank's being here. Of course,
2 the contract was negotiated by Mr. Jacobs and not
3 by Mr. McFarland. And Mr. Jacobs is here.

4 THE COURT: All right, then. Then we will see
5 you all back at 2:00 o'clock.

6 The courtroom is locked up, so if you wish to
7 leave any documents, you certainly may, but it will
8 be locked up over the break.

9 We will see you all back at 2:00.

10 (WHEREUPON, a lunch break was taken.)

11 THE COURT: The foreman is Deonna Richardson,
12 Number 211.

13 Is there anything we need to take up before we
14 bring the jury in?

15 MR. BEDENBAUGH: Not from the Plaintiff, Your
16 Honor.

17 MR. JOWERS: Not from the Defendants, Your
18 Honor.

19 MR. JORDAN: No.

20 THE COURT: You may ask the jury to come in,
21 please.

22 THE BAILIFF: Be glad to.

23 (WHEREUPON, the jury came into open
24 court at 2:09 p.m.)

25 THE BAILIFF: The jury is all present.

1 THE COURT: Ms. Richardson, you have been
2 selected as our foreperson?

3 THE FOREPERSON: Yes, ma'am.

4 THE COURT: You sat in the magic seat. I
5 would like to thank you for serving in that
6 capacity.

7 Ladies and gentlemen, at this time what I
8 would like to do is explain to you the process that
9 we will follow for the trial, and then we will
10 actually get started.

11 Now, the first thing you will hear will be the
12 opening statements of the attorneys. Their opening
13 statements are not evidence, but what they will do
14 is they will tell you a little bit more about what
15 this case is about and what you can expect to hear
16 in the form of testimony that will be presented
17 throughout the course of this trial. So I ask that
18 you listen very carefully to those opening
19 statements.

20 Once they have made those opening statements,
21 then you will hear the evidence. Now, the evidence
22 may take many forms. It may be in the form of a
23 witness's testimony from the witness stand or may
24 be in the form of photographs or documents or other
25 physical pieces of evidence that you will be able

1 to take with you into the jury room when it is time
2 for you all to begin your deliberations.

3 Now, in any profession, there are certain
4 rules that govern. For jury trials, they are what
5 we call Rules of Evidence. Those rules are
6 designed to make sure that what you hear and what
7 you can consider will help you in being able to
8 determine the facts. Again, that is your role here
9 is to determine the facts.

10 So from time to time you may hear the
11 attorneys objecting about certain evidence that is
12 being presented. If I sustain the objection, then
13 that means that the evidence will not be allowed
14 in. I ask that you not speculate as to what the
15 evidence might have been or the reasons for the
16 objection. I assure you that we're not trying to
17 hide or keep anything from you. Again, we're just
18 trying to make sure that the evidence will be able
19 to assist you in determining the facts.

20 On the other hand, if I overrule the
21 objection, then the evidence will be allowed in and
22 you will be able to hear it.

23 On other occasions, ladies and gentlemen, we
24 may need to take up some legal matters outside of
25 your presence. To the extent that we can do that

1 quickly here in court, the attorneys may come up
2 and we'll talk about it at the bench. On other
3 occasions I may need to ask that you retire to the
4 jury room. I will tell you not to speculate,
5 again, as to what we're discussing or the reasons
6 for our conversation. Again, we're just trying to
7 make sure that everyone's legal rights are
8 protected. And we have to have that conversation
9 about those legal issues, but we have to do that
10 outside of your presence.

11 Now, once you have heard all of the evidence
12 that has to be presented, then you will hear again
13 from the attorneys in the form of a closing
14 argument.

15 Again, their arguments are not evidence, but
16 what they will do is pick out portions of the
17 evidence that you have heard in an effort to try to
18 sway you to find the facts in accordance with their
19 view of what happened. So I ask that you listen
20 carefully to those closing arguments.

21 Then, once they have done that, then I will
22 instruct you on the law that is to be applied and
23 you may begin your deliberations at that particular
24 point.

25 Now, ladies and gentlemen, I don't think that

1 we will complete this trial today. I'm sure we
2 will -- hopefully, we will get through a couple of
3 witnesses and some of the evidence. But I ask that
4 you listen very carefully to the attorneys and to
5 the witnesses and the evidence as it is being
6 presented.

7 I ask that you not take notes. I find
8 oftentimes that when people are taking notes, they
9 are busy writing information and they may miss
10 something that is being presented. But, having
11 said that, I do understand that sometimes people
12 need to take notes to help them remember
13 information, and if you need to take notes to help
14 you remember what is going on, please let me know
15 so I can accommodate you. I'm hoping that it will
16 be relatively straightforward and you'll be able to
17 keep up with the information, but if you need to
18 takes notes, please let me know so that I can
19 accommodate you.

20 At this time, ladies and gentlemen, I believe
21 that we're ready to begin with the opening
22 statements.

23 Mr. Bedenbaugh?

24 MR. BEDENBAUGH: Yes, ma'am. May it please
25 the Court?

1 THE COURT: Yes, sir.

2 OPENING STATEMENT

3 MR. BEDENBAUGH: Ladies and gentlemen, this is
4 a case about TD Bank to collect millions of dollars
5 of loans from two wealthy developers, who
6 personally guaranteed the loans, but now refuse to
7 repay them. Mr. David Jacobs, who guaranteed two
8 of the loans, and Mr. James McFarland, who
9 guaranteed one of the loans.

10 My name is Jerry Bedenbaugh. Along with
11 Mr. Paul Collins, we represent TD Bank. With us
12 today is Mr. Roper Jenkins from TD Bank.

13 I would submit to you that it is a
14 straightforward case. It is a simple case. It is
15 essentially about two things. Agreements and
16 actions.

17 The agreements in this case are loan documents
18 and personal guarantees that the Defendants admit
19 signing. They admit entering into those
20 agreements. Nobody in this case disputes what the
21 agreements are or what the agreements say.

22 The first set of agreements relate to a loan
23 to a company called Newberry Atrium Professional
24 Center, LLC. That is a company that Mr. Jacobs
25 owns, and he formed it to acquire and develop a

1 medical office building beside Newberry Memorial
2 Hospital in Newberry.

3 In 2007, TD Bank's predecessor, Carolina
4 First, made a loan to Newberry Atrium in the amount
5 of \$7,141,000.

6 Mr. Jacobs admits entering into the loan. He
7 admits he got the money, he used the money to
8 construct the office building in accordance with
9 his specifications.

10 Importantly, he also admits that in order to
11 get the loan the bank required that he sign a
12 personal guarantee that the loan would be repaid.

13 Unfortunately -- frankly, the reason we're all
14 here today -- that project wasn't successful.
15 Unfortunately Mr. Jacobs was unable to find enough
16 tenants to occupy the office building.

17 After a number of extensions of the due date
18 for the loan, the loan came due. It came due on
19 August 8th, 2012.

20 Mr. Jacobs doesn't dispute that the loan came
21 due. He admits that at that time TD Bank made a
22 formal demand for repayment of the loan.

23 He also admits that neither he nor his
24 company, Newberry Atrium, paid the loan off at that
25 time.

1 He further admits that he is personally
2 indebted for the Newberry Atrium loan under the
3 terms of the guarantee.

4 TD Bank will show that as of today the amount
5 due under Mr. Jacobs's guarantee of the Newberry
6 Atrium loan is in excess of \$2.8 million.

7 The second set of agreements relate to a loan
8 to a company called Atrium at Middle Sound Land,
9 LLC. Middle Sound is the company, again, owned and
10 formed by Mr. Jacobs, this time with partner,
11 Mr. McFarland. They formed that company to acquire
12 and develop commercial real estate in Wilmington,
13 North Carolina.

14 In 2004, TD Bank's predecessor, Carolina
15 First, made a loan to Middle Sound in the amount of
16 \$3 million. They admit they got the money, they
17 used it to develop the property in accordance with
18 their specifications. They also admit that in
19 order to get the loan the bank required and they
20 signed personal guarantees that it would be repaid.

21 But, again, unfortunately that project wasn't
22 successful. Again, after a number of extensions,
23 the loan came due on July 4th, 2012. They admit it
24 came due. They admit TD Bank made a formal demand
25 for repayment. And they admit that neither they

1 nor the company paid the balance due at that time.

2 They further admit that under the terms of
3 their guarantees they are personally indebted the
4 amount of the Middle Sound loan.

5 At this point you may be asking yourself, with
6 all of these admissions -- they admit getting the
7 money, they admit they didn't pay it back, they
8 admit they personally guaranteed it -- why are we
9 here? Why are we here?

10 We are here because the Defendants allege TD
11 Bank treated them unfairly by asking them to repay
12 this loan without first foreclosing on the
13 unsuccessful real estate project that secured the
14 loan.

15 In response to that, what I would ask you to
16 do is ask yourself: What did the agreement say?
17 What did the agreement say about whether TD Bank is
18 required to foreclose or do anything else before
19 asking these two gentleman to repay the loan?

20 TD Bank will admit those agreements in
21 evidence. You will get a chance to read them
22 yourself. We believe that this evidence is crystal
23 clear that TD Bank doesn't have to foreclose. TD
24 Bank has done nothing that these two Defendants
25 didn't agree they had the right to do.

1 Because of that, because that evidence is so
2 clear, because those agreements are so clear, I
3 don't think you'll hear the Defendants talk about
4 their agreement very much. Instead, they may
5 allege that TD Bank treated them unfairly, TD
6 Bank's actions were unfair in filing this action
7 without first foreclosing the collateral, TD Bank
8 treated them unfairly by not working with them one
9 more time on these loans.

10 If they do that, what I would ask you to do is
11 listen to the actual evidence in this case. Ask
12 yourself as they testify, who are they trying to
13 protect? Whose interest are they trying to
14 protect? Whose actions are they trying to excuse
15 in this case?

16 TD Bank believes the evidence in this case is
17 crystal clear that they did precisely what the
18 Defendants agreed they can do.

19 Not only that, Mr. Jenkins will explain to you
20 there were a number of business reasons why TD Bank
21 sought repayment from these two gentlemen before
22 foreclosing on the unsuccessful real estate
23 development.

24 Chief among those is, these were high net
25 worth individuals. These two gentlemen submitted

1 financial statements to the bank showing, not
2 millions of dollars, but tens of millions of
3 dollars in net worth.

4 In addition, Mr. Jenkins will explain to you
5 these projects were losing money. They were
6 unsuccessful real estate developments. That is why
7 we're here. That is why the bank wanted to seek
8 repayment from these high net worth individuals
9 before recovering the properties that were losing
10 money.

11 Mr. Jenkins will also explain to you that
12 these Defendants got the benefit of a number of
13 extensions. The bank didn't just call these loans
14 the day after they came due. Time and time again
15 the Defendants came to the bank and asked for an
16 extension of the due date. And time and again the
17 bank agreed to do it. This happened not once or
18 twice, but eight times on each loan the Defendants
19 got the benefit of an extension.

20 What were they doing? What were they doing
21 during this time when they got eight different
22 extensions of the due date? We know they weren't
23 able to sell the property. They weren't able to
24 sell the property themselves to pay off the loan.
25 The very thing they are asking the bank to do,

1 these two successful real estate, wealthy
2 developers, couldn't do themselves. We also know
3 they were coming to the bank asking for more time
4 because they couldn't perform. They didn't have
5 the money to repay the loans.

6 The evidence will show that their net worth
7 did decrease dramatically from the time when the
8 loans originally came due in 2006, 2008, until 2012
9 when the bank finally called the loan.

10 I'd like for you to look closely at
11 Mr. Jacobs' net worth during this time. Mr. Jacobs
12 was the point person on both of these loans.
13 Mr. Jacobs was the one coming to the bank asking
14 for more time: I just need a little bit more time
15 on these loans.

16 Mr. Jacobs, no one can dispute, is a
17 successful real estate developer. He has had so
18 much success that by 2007, 2008, when these loans
19 were originally coming due, his net worth was in
20 excess of \$40 million. By 2012, when the loans
21 finally came due, his net worth had dropped to
22 \$20 million. He lost \$20 million from the time he
23 got those extensions until the time the loans came
24 due.

25 The evidence will show that during this time

1 when he was getting the benefit of these extensions
2 he was transferring millions of dollars out of his
3 own name and into the name of his wife and into the
4 name of a trust.

5 Those are the actions that will be proven in
6 this case. The question for you is: Did those
7 actions excuse the Defendants from their agreement,
8 the agreement they admittedly signed, the agreement
9 they admittedly got the benefit of?

10 As I said at the beginning, this is a simple
11 case, we think. But it is an important case. It
12 is an important case to TD Bank, not just because
13 there are millions of dollars at stake, but because
14 the validity, the integrity of the documents that
15 TD Bank relies on in making loans to folks every
16 day, is at stake in this case.

17 Y'all's role in this regard cannot be
18 overstated. Y'all are the trier of fact. Y'all
19 are the body that parties go to, not just banks,
20 but all the parties go to to enforce their
21 agreements.

22 That is what we're asking you to do today:
23 Enter judgment in favor of TD Bank and against the
24 Defendants on the amount due on their personal
25 guarantees, because that is what they agreed to do.

1 Thank you.

2 THE COURT: Mr. Jowers?

3 MR. JOWERS: If it please the Court?

4 THE COURT: Yes, sir.

5 OPENING STATEMENT

6 MR. JOWERS: Good afternoon, ladies and
7 gentlemen. My name is Gerald Jowers. And of
8 course I'm an attorney here in Columbia. I
9 represent David Jacobs, the gentleman sitting there
10 sitting on my left. The gentleman on the end is
11 James McFarland, Jim McFarland. And Leonard Jordan
12 is his attorney, sitting there with the gray hair.

13 Let me tell you the story of this case. You
14 heard from Mr. Bedenbaugh, but he left out a few
15 aspects of the story that I think are quite
16 important, because the case is really about
17 fairness.

18 Under the law, when you make an agreement with
19 someone, you expect, and you have a right to
20 expect, that they will treat you fairly and that
21 you will treat them fairly. It is all about a
22 mutuality of respect and fairness.

23 When you make an agreement with a bank, with
24 an insurance company, with a telephone company, you
25 expect them to treat you fairly, and you will do

1 your part of the agreement. That is an inherent
2 part of every contract is that the expectation of
3 fairness.

4 Determining fairness, you have to look at the
5 whole situation, the relationship of the parties,
6 how they got together, what is the circumstances
7 under which the agreement was made.

8 Now, let's look at what -- let me tell you the
9 story as I see it.

10 David Jacobs builds buildings. Yes, he is a
11 developer. He develops small office buildings. He
12 has developed a number of daycare centers. And
13 he's been doing this for a number of years.

14 About 12 to 15 years ago, he started working
15 with Carolina First Bank. And you folks will
16 perhaps remember that little bank. It started here
17 in South Carolina. It developed to have become the
18 largest bank in the state. That was headquartered
19 here.

20 That particular bank got that way because it
21 cared about its customers. It truly believed in
22 earning the business of its customers.

23 Carolina First came to David, asked for his
24 business. And then they went about earning that by
25 providing him services and help. Four buildings

1 were built, four loans were being built -- four
2 loans were entered into, because they wanted his
3 business and they got it.

4 David is a one-man operation. He doesn't have
5 any employees except a lady that helps him with his
6 bookkeeping. So he has to get a team of people
7 together to build these buildings.

8 And part of that team is, of course, builders,
9 accountants, architects, and banks. The bank
10 provides financing. But what Carolina First did
11 was provide more. They actually looked at these
12 proposals, gave him advice, really got involved in
13 this business, because that is how they wanted to
14 earn his business, and they did. They built four
15 successful buildings. They were daycare centers
16 and a building in Irmo, Irmo Professional Center.
17 You may have noticed it. It is right there in
18 beautiful downtown Irmo. It is a two-story medical
19 office building.

20 They participated in that with him and they
21 were all very successful projects. These last two
22 buildings that we're here about -- or last two
23 projects that we're here today about is this one in
24 Newberry. That project is a project that David
25 worked with the Newberry County Hospital to

1 develop. Actually, the hospital owns a part of his
2 company.

3 The hospital came to David saying, We need a
4 building like you did in Irmo on our campus, that
5 is, it sits in the front yard of the Newberry
6 County Hospital.

7 That hospital was trying to maintain its
8 viability in troubled times in medical care, and so
9 they needed a place for their physicians to
10 practice right there at the hospital. That is why
11 David went to Newberry to do this. He saw it as a
12 viable project, something good for the community,
13 to give back, because he had been doing developing
14 a long time.

15 The bank was involved, stayed involved in this
16 project, helped throughout the project. And David
17 will tell you about some of the things they did to
18 make this project work. But it is a beautiful
19 project, and that is actually the building there on
20 the easel.

21 The other project was in Wilmington, North
22 Carolina. David built this with Jim McFarland.
23 That was not an unsuccessful project. I disagree
24 with Jody on that. It was a large piece of land, a
25 track of land on a major thoroughfare. A number of

1 parcels were sold out, one to an auto parts store,
2 a daycare center, and some other business, which I
3 don't recall. David will tell you that.

4 But what happened in 2008? 2008. The
5 building was finished in the summer of 2008. What
6 happened in September? The Great Recession. The
7 Great Recession. Lehman Brothers failed. Banks
8 became in precarious positions. The whole world
9 changed overnight. I dare say, most of us have
10 been damaged in one way or the other from the Great
11 Recession because it has taken years to claw out of
12 this thing. And it is still happening to a lot of
13 people. A lot of people are still suffering from
14 this.

15 And that is what happened in Newberry. The
16 building was 60 percent occupied at the time it
17 opened. Then the recession happened. And in
18 Wilmington, they had one track of land, five acres.
19 But, because of the recession, banks stopped
20 lending money on commercial property. People that
21 wanted the properties couldn't buy it because they
22 could not get financing. The recession created
23 problems for everybody.

24 Carolina First was working with David. They
25 did make extensions. They did extend the loan

1 eight times. And all throughout this period of
2 extensions, monthly payments were being made on the
3 project. Payments made to Wilmington were being
4 paid. Payments were current on this loan, both
5 loans, up until the time TD Bank called the loan.

6 So what happened to Carolina First? Well, you
7 perhaps remember, they were a victim of the
8 recession also, just like lots of other people.
9 They were a victim. They were forced to merge with
10 a larger institution.

11 A Canadian bank called Toronto-Dominion came
12 along, saw a bargain and took it. Thus, we have
13 what they now call TD Bank. That is what TD means,
14 Toronto-Dominion. It is one of largest banks in
15 Canada -- second largest.

16 They took over. They have forgotten about all
17 the personal relationships. All the people that
18 David worked with for 15 years left that bank. We
19 have a group of people now in TD Bank that doesn't
20 care about the relationship, the personal
21 relationship that had been worked on for 15 years
22 that was mutually beneficial.

23 They now embarked on a strategy, what I call a
24 scorched earth strategy. Rather than extending the
25 loan, making modifications, like lots of other

1 banks were doing, they said: Pay up. Pay up now.
2 Even though you are making payments, we're tired of
3 you. Pay up now.

4 Now, there were two strategies banks can
5 follow when they decide it is time to foreclosure
6 or to end the relationship. They can foreclosure
7 the mortgage, take over the property, and get a
8 judgment for anything that the sale does not bring
9 against the debtor.

10 But what this bank did was, rather than
11 ignoring the valuable collateral that it had, it
12 started suing on the guarantee. They knew from the
13 financial statements -- now, the net worth is one
14 thing, cash money is another -- they knew that Mr.
15 Jacobs -- David -- and Jim did not have the money
16 to pay them off. They did that as a punitive
17 measure, trying to extract, what, I don't know,
18 because you can't get blood out of a turnip.

19 But they sat and took this strategy, ignored
20 the modification request. They even made a
21 proposal -- he'll tell you about it -- that would
22 have brought the loan current, kept it current, we
23 wouldn't be here today. And as the healthcare
24 market and the economy, more tenants would get into
25 the Newberry building and new financing could have

1 been obtained if they had just worked with them.

2 And that is all we have ever asked, is work
3 with us. We don't want something for nothing.
4 That was never that. We want you to work with us
5 because of the economy, the recession. It is
6 nobody's fault. Why punish these people, that
7 worked with that bank for many years? But they
8 wanted vengeance, for some reason. I cannot figure
9 it out. I have never to this day understood their
10 strategy because it is such a punitive strategy.
11 And it is further evidence of what this bank is
12 doing and has done.

13 They finally, about 9, 12 months after they
14 started the suit on the guarantee, they did bring
15 an action for foreclosure of the Newberry property.

16 It finally sold last week. You will hear from
17 the appraiser today that that building is worth "as
18 is" six and a half million dollars. All right?

19 What the bank did is bid three and a half
20 million dollars and change for that building at
21 foreclosure. Because that is such a large sum of
22 money and the terms in a foreclosure sale are so
23 difficult, that is, you have to pay your bid in a
24 foreclosure sale within 20 days, you don't have
25 time to get a loan, you don't have time to check

1 the building out. Twenty days. That is it. That
2 is the way foreclosures work in the state.

3 Nobody bid on it. So the bank gets the
4 property. They have to give -- they give, under
5 the law, they only have to give David credit for
6 three and a half million dollars. They get a
7 judgment for the rest. Or that is what they are
8 asking you folks to give them today on this
9 guarantee.

10 But the real terrible point is this. They now
11 own the building. They can sell that building for
12 anything they want, including six million dollars.
13 And they are still asking for a judgment against
14 Mr. Jacobs. So what does that mean? They are
15 going to double-dip, or they have that possibility.

16 That is why I say their actions are punitive,
17 corrupt, and show no element of fairness. And that
18 is what we're looking for today, is fundamental
19 fairness with you folks today.

20 Listen to the evidence. See what is fair.
21 You know what is fair. I mean, every one of us has
22 had to deal with this recession. That is why we're
23 here, is because of the recession. Projects were
24 successful, they will be successful. They could
25 have been successful with a little bit of

1 compromise from this bank, who apparently had no
2 concern about the community, because now the
3 hospital has no interest in this building in its
4 front yard.

5 What will happen to the building in Newberry
6 no one knows now, but they are punishing customers
7 for no good reason.

8 Thank you, ladies and gentlemen.

9 THE COURT: Mr. Jordan?

10 MR. JORDAN: May it please the Court?

11 THE COURT: Yes, sir.

12 OPENING STATEMENT

13 MR. JORDAN: Ladies and gentlemen, this is my
14 client, Mr. McFarland. He traveled here from
15 Wilmington, North Carolina. He is a real estate
16 developer in North Carolina. And, as Mr. Jowers
17 and Mr. Bedenbaugh indicated, he is a partner with
18 Mr. Jacobs.

19 There are two suits involved in the trial
20 today. One involves Mr. Jacobs by himself. And
21 the other involves a suit against Mr. Jacobs and
22 Mr. McFarland together. I am only involved in the
23 one. Okay? It involves property in Wilmington,
24 North Carolina. It does not involve property here
25 in South Carolina at all. The purpose of the loan

1 from its inception was to allow the acquisition and
2 development of real property, commercial real
3 property, in Wilmington. And at no point in time
4 was any of the money ever used in the State of
5 South Carolina.

6 And even though it is not something you are
7 going to decide today, because it is an issue that
8 has come up and has already been resolved, so
9 Mr. McFarland's complaint is that the Court has no
10 personal jurisdiction over him because he is not a
11 resident of South Carolina. And there will be some
12 testimony solicited today to basically cover those
13 points as to why he feels like the court has no
14 jurisdiction to enter a judgment against him.

15 And the purpose for raising that, since the
16 matter, for purposes of trial, has already been
17 resolved, but we do have the possibility of appeal
18 afterwards, and we have to make our record for
19 appeal. So that is something that will be
20 discussed today.

21 And the point I want to make is that, when you
22 listen to the evidence, please try to segregate the
23 two cases. We have them tried together just
24 because it is easier to do it that way, but there
25 are two loans, completely separate loans, two

1 properties secured these loans. And, again,
2 Mr. McFarland is only involved in the one.

3 Now, I'm certainly not going to take all the
4 time that Mr. Jowers did to talk about the fairness
5 situation, but that is basically the pinch. The
6 Defendants, and certainly Mr. McFarland and
7 Mr. Jacobs are looking at this thing in an
8 identical fashion. The bank has been unfair to
9 them. The bank has breached its implied duty,
10 covenant of good faith and fair dealing. The bank
11 has some motives that are really unexplainable. I
12 mean, it is really illogical to me that a bank
13 would not foreclose and take the property when they
14 have security.

15 When this loan was made -- and I'm talking
16 about just the North Carolina loan -- it was a
17 \$3 million loan back in 2004. Okay? The principal
18 balance on this loan right now is \$1.3 million.

19 And, you know, both of these gentleman, when
20 the loans were made, were well-to-do, had really
21 strong financial statements. And that is not the
22 case today, because the way the economy has been.
23 But, you know, at the end of the day, these
24 properties secured the loan.

25 Now, it is the position of the Defendants or

1 the bank, by avoiding the foreclosure of the
2 properties, have in fact put the interest accrual
3 on these loans in overdrive. The interest on the
4 North Carolina loan, for instance, is a 5 percent
5 loan. That is the contract rate for interest.
6 When the loan is declared to be in default because
7 the maturity date has passed, the interest jumped
8 from 5 percent to 9 percent, almost doubling the
9 interest rate. So the bank is the beneficiary of
10 this particular line item in the promissory note.
11 I mean, that is -- you know, that is a significant
12 amount of extra interest.

13 Now, the way foreclosures work is you sell
14 your security interest, you apply it against the
15 debt, which of course reduces the principal balance
16 of the loan, and therefore the amount of the
17 balance that the interest applies to is much less.

18 But the bank didn't want to do that. They
19 wanted to run this interest at super speed. And
20 according to the records that we have been given,
21 the numbers -- I think we had \$19 a day in interest
22 is accruing on this note.

23 Again, it is the Defendant's position that the
24 bank has basically treated this loan, the North
25 Carolina loan -- you know, and certainly the

1 Newberry loan too -- as just a way to punish the
2 Defendants. They are not only punishing the
3 Defendants, they are crushing them. They are
4 making it impossible for them to basically remain
5 in the business that they are in.

6 And, you know, you are going to hear a lot of
7 testimony today regarding all of that, so there is
8 no reason to bring it up at this point in time.
9 But just I'd ask that you remain open-minded,
10 listen to the testimony, and make the appropriate
11 decision.

12 Thank you so much for your attention.

13 THE COURT: You may call your first witness.

14 MR. BEDENBAUGH: The Plaintiff calls Roper
15 Jenkins, Your Honor.

16 (Witness approaches.)

17 THE BAILIFF: Place your left hand on the
18 Bible, and raise your right hand, please.

19 (Witness complies.)

20 THE CLERK: Do you swear or affirm the
21 testimony you shall give in this case will be the
22 truth, the whole truth, and nothing but the truth,
23 so help you God?

24 THE WITNESS: Yes, I do.

25 THE CLERK: Please be seated.

1 (Witness complies.)

2 THE CLERK: And state your full name for the
3 record.

4 THE WITNESS: My name is Benjamin Roper
5 Jenkins, III.

6 BENJAMIN ROPER JENKINS, III,
7 after being duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. BEDENBAUGH:

10 Q Mr. Jenkins, where do you work?

11 A I am employed by TD Bank.

12 Q And what is your position at TD Bank?

13 A I'm a commercial workout officer. I deal with
14 loans that are in trouble or have potential to be
15 in trouble or need close monitoring.

16 Q And how long have you been with TD Bank?

17 A I was with Carolina First before the merger, so
18 since the merger, in all total I have been with the
19 organization as it is now since 2007, but I guess
20 2010 was when the merger took place.

21 Q Okay. What did you do before Carolina First Bank?

22 A I was a commercial loan officer. I did business
23 loans to -- whatever.

24 Q And you have been in banking for about how long?

25 A I have been in banking 17 years.

1 Q And before you went into banking, did you get a
2 college degree?

3 A Yes, I did. I attended the University of South
4 Carolina here in Columbia.

5 Q Okay. Did you get a bachelor's degree?

6 A Yes, sir, I did.

7 Q Are you familiar with the loan files and the loans
8 that are the subject of this action?

9 A Yes, I am.

10 Q Briefly explain to the jury what TD Bank's claims
11 are in this action.

12 A There are two suits on guarantees with the two
13 prospective loans that they talked about. There is
14 the suit on guarantee of Mr. Jacobs on the Newberry
15 Atrium loan, and then the suit on Mr. James
16 McFarland on the North Carolina property.

17 Q And these are commercial real estate loans, is that
18 your testimony?

19 A Yes, they are. They are commercial real estate
20 loans. They were originally closed to help fund
21 the projects in the construction of the one
22 building.

23 Q Were the loans originally made by TD Bank?

24 A No, sir, they were not. They were originated by TD
25 Bank -- excuse me, they were originated by Carolina

1 First Bank.

2 Q And did TD acquire these loans when it merged with
3 Carolina First in 2010?

4 A Yes.

5 Q Is TD Bank now the owner and the holder of the loan
6 that it is seeking to enforce in this action?

7 A Yes.

8 Q Briefly describe the Newberry Atrium loan for me.

9 A The Newberry Atrium loan was a loan to fund the
10 construction of the two-story medical office
11 building, like they explained, in Newberry.

12 And the second loan was for the purchase of
13 vacant, raw real estate to be developed at some
14 point in the future.

15 Q Okay. So the first loan, the Newberry Atrium loan,
16 was a construction loan for the property in
17 Newberry; is that correct?

18 A That's correct.

19 Q And the second loan, that related to commercial
20 property in Wilmington, North Carolina, is that
21 your testimony?

22 A That's correct.

23 Q Now, you said the Newberry Atrium loan was a
24 construction loan. What is that?

25 A Yes. A construction loan is closed, and it is

1 called a construction loan while the building is
2 being built. And when the building is completed
3 and there are enough tenants that are leasing the
4 space in the building, then it goes from a
5 construction loan to a permanent loan with normal
6 monthly principal and interest payments.

7 Q And how long typically do construction loans last
8 for typical construction loan terms?

9 A They can run anywhere from 12 to 18 months.

10 Q Did Carolina First in fact loan the money so that
11 the Newberry Atrium property could be built?

12 A Yes.

13 Q And the loan was originally made in 2007, is that
14 your testimony?

15 A That's correct.

16 MR. BEDENBAUGH: Your Honor, may I approach?

17 THE COURT: Yes, sir.

18 (Complies.)

19 BY MR. BEDENBAUGH:

20 Q If you will turn to Tab 1. On the table?

21 A I apologize. I can't see without my glasses.

22 (Pause.)

23 A Thank you.

24 Q Are you at Exhibit 1?

25 A Yes, sir, I am.

1 Q Can you identify that document?

2 A Yes, sir. This is a promissory note dated
3 February 20th, 2007, for the Newberry Atrium
4 Professional Center construction loan.

5 Q Is that a true and correct copy of the promissory
6 note dated February 20, 2007, in the amount of
7 \$7,141,000?

8 A Yes.

9 MR. BEDENBAUGH: Your Honor, the Plaintiff
10 would move to admit in evidence Exhibit 1, the
11 promissory note dated February 20th, 2007.

12 THE COURT: Any objection?

13 MR. JOWERS: Where is the original?

14 MR. BEDENBAUGH: Your Honor, the original is
15 in my file right here. I don't think there is any
16 requirement that the original be admitted into
17 evidence, but I certainly have it in my file.

18 I would also note that the Defendant admitted
19 to the genuineness of the document in their request
20 for admissions.

21 THE COURT: So your only objection is to the
22 original?

23 MR. JOWERS: That's correct.

24 THE COURT: Do you dispute that the copy that
25 is represented in the file is the same copy as the

1 original? You compared them?

2 MR. JOWERS: I have not compared them this
3 morning -- this afternoon, Your Honor. I assume
4 they are. I trust Mr. Bedenbaugh, but I have
5 not -- I think it is appropriate to introduce the
6 original then substitute a copy.

7 THE COURT: You can compare the two at this
8 time.

9 MR. BEDENBAUGH: Thank you, Your Honor.

10 (Pause.)

11 MR. JOWERS: This is the original of the note,
12 Your Honor.

13 THE COURT: And the same as Exhibit Number 1?

14 MR. JOWERS: It appears to be so. Thank you.

15 THE COURT: Then it is admitted.

16 MR. JOWERS: We withdraw the objection.

17 (WHEREUPON, Plaintiff's Exhibit No. 1
18 was marked for identification and
19 received into evidence.)

20 BY MR. BEDENBAUGH:

21 Q Mr. Jenkins, who is the borrower on the note that
22 has been admitted as Exhibit 1?

23 A The borrower is listed as Newberry Atrium
24 Professional Center, LLC.

25 Q And that entity -- is that an entity that is owned

1 by Mr. Jacobs?

2 A Yes.

3 Q If you'll look at the first page, fifth paragraph.

4 Does that indicate the maturity date for the

5 Newberry Atrium loan?

6 A It does.

7 Q What is the maturity date?

8 A The maturity date was originally February 28, 2009.

9 Q Can you explain for the jury what is meant by the
10 maturity date?

11 A Yes. Maturity date is, when the loan matures, the
12 loan amount becomes due and payable in full at the
13 time of the maturity.

14 Q So this originally was a two-year loan, is that
15 your testimony?

16 A That -- yes, about a week over two years, yes.

17 Q Now, does the note say anything about whether the
18 bank is required to sue the borrower, Newberry
19 Atrium, first or required to foreclose on the
20 collateral first?

21 A Let's see here. Yes. On the third page, the first
22 full paragraph, it starts out: Lender is not
23 required to rely on the collateral for the payment
24 of the note in the event of default by the
25 borrower, but may proceed directly against the

1 borrower and guarantor or endorser in such a manner
2 it deems desirable.

3 Q Thank you. If you can turn to Exhibit 2 in your
4 notebook for me.

5 A Okay.

6 Q Can you identify that document?

7 A Yes. This is an unconditional guarantee, is what
8 it is labeled. It is an unconditional guarantee of
9 payment.

10 Q And is that a true and correct copy of the
11 unconditional guarantee of David Jacobs, dated
12 February 20th, 2007?

13 A Yes, it is.

14 MR. BEDENBAUGH: Your Honor, we would move to
15 admit into evidence Exhibit 2, the unconditional
16 guarantee of David Jacobs.

17 THE COURT: Any objection?

18 MR. JOWERS: No objection, Your Honor.

19 THE COURT: It is admitted.

20 (WHEREUPON, Plaintiff's Exhibit No. 2
21 was marked for identification and
22 received into evidence.)

23 BY MR. BEDENBAUGH:

24 Q Mr. Jenkins, is it common for the bank to obtain a
25 personal guarantee business loan like this?

1 A Yes, it is.

2 Q Why is that?

3 A When you have a company that is set up to build a
4 building and develop the real estate -- the company
5 is such that the real estate and building in this
6 case is all that they own or all they have. So the
7 personal guarantees are required because if
8 something happened with the project and we had no
9 guarantee and the project failed, then we would go
10 after the project, and if it was failed, maybe we'd
11 get paid, maybe we don't get repaid. But in order
12 to exist as a bank, the personal guarantees are
13 required so that the principal or borrower or
14 developer doesn't walk away from a project because
15 they have a personal guarantee attached to it.

16 Q Okay. So your testimony is the personal guarantee
17 is in part required to prevent the guarantor,
18 developer, from walking away from the project and
19 leaving the bank with only the collateral? Is that
20 your testimony?

21 A That's correct.

22 Q Now, does that guarantee require the bank to sue
23 the borrower, Newberry Atrium, first or recover the
24 collateral before the guarantor, Mr. Jacobs, is
25 asked to repay the loan?

1 A No, it doesn't.

2 Q If you'll look at Page 1, Paragraph 1 on Exhibit 2.

3 Do you see where I am?

4 A Yes.

5 Q Of the guarantee. Does that paragraph say anything
6 about whether the bank is required to first
7 foreclose the collateral before suing on the
8 guarantee?

9 A It says: Further, whether -- let's see. Excuse me
10 one second.

11 (Pause.)

12 Q The first numbered paragraph.

13 A Okay. Yes. The first numbered paragraph is:

14 "This guarantee is and shall remain an
15 unconditional and continuing guarantee
16 of payment and not of collection.
17 Guarantor hereby expressly waives any
18 right to require lender to bring any
19 action against borrower or any other
20 person or to require that resort be had
21 to any security or to any balance of any
22 deposit or other account or debt or
23 credits on the books of the lender in
24 favor of the borrower or any other
25 person."

1 Q Thank you. And then the paragraph beginning,
2 "Without limiting the foregoing..." It is one
3 sentence over from where you stopped. Can you read
4 that for the record?

5 A "Without limiting the generality of the
6 foregoing, guarantor expressly waives
7 any rights guarantor otherwise might
8 have under provisions of South Carolina
9 or other applicable law to require a
10 lender to attempt to recover against
11 borrower and/or to realize upon any
12 security or collateral security which
13 lender holds for the obligation
14 evidenced or secured hereby."

15 Q Thank you. Now, you testified earlier that the
16 Newberry Atrium loan was originally set to mature
17 on February 28th, 2009; is that correct?

18 A Correct.

19 Q Did the bank agree to give Newberry Atrium and
20 Mr. Jacobs an extension of that due date?

21 A Yes. There was an extension at that particular
22 time. And then after that there were seven
23 subsequent extensions.

24 Q Okay. So on eight different times there was a
25 renewal or an extension of the due date for this

1 loan; is that correct?

2 A Yes, that is correct.

3 Q Why did the bank give Mr. Jacobs more time? Why
4 did he give him eight extensions?

5 A The extensions are such that the -- when the
6 building was built, there was -- it wasn't
7 100 percent occupied, so the extension requests in
8 part were because that was the time that was needed
9 to bring more tenants into the building so it could
10 be full, at capacity.

11 Q The bank wanted to give him every opportunity to
12 find enough tenants to occupy that office building;
13 is that correct?

14 A That's correct.

15 Q Would you turn to Exhibit 3 in your notebook for
16 me?

17 A Okay.

18 Q Can you identify this document?

19 A Yes. This is an extension document extending the
20 loan with a new maturity date.

21 Q Okay. And, in fact, were those all the copies of
22 the extensions for the Newberry Atrium loan? If
23 you will look through those.

24 (Complies.)

25 A Yes, they are.

1 Q Okay. Are those true and correct copies of the
2 extensions and modifications that the bank entered
3 into in favor of Newberry Atrium and Mr. Jacobs?

4 A Yes.

5 MR. BEDENBAUGH: Your Honor, we would move to
6 admit into evidence Exhibit 3, copies of the
7 modification agreement on the Newberry Atrium loan.

8 THE COURT: Any objection?

9 MR. JOWERS: No objection, Your Honor.

10 THE COURT: It is admitted.

11 (WHEREUPON, Plaintiff's Exhibit No. 3
12 was marked for identification and
13 received into evidence.)

14 BY MR. BEDENBAUGH:

15 Q Now, when the bank agreed to extend the due date on
16 eight different occasions, did Newberry Atrium and
17 Mr. Jacobs have the opportunity to complain about
18 anything the bank was doing at that time?

19 A Yes. They would have -- if there was a question or
20 a concern at the time of the extensions, it could
21 have been made known to the bank or it could have
22 been brought to someone's attention.

23 Q And each of these times, all normal course line,
24 eight extensions, did Mr. Jacobs ever raise a
25 complaint or defense about the underlying loan or

1 the guarantee?

2 A No, he did not.

3 Q Did he in fact place the modification agreements
4 that he had in the claim?

5 A Yes.

6 Q Where does say it say that, for example, in the
7 March 3rd, 2009, modification agreement, in Exhibit
8 3?

9 A The next to the last paragraph reads:

10 "Borrower and any guarantor reaffirm
11 their obligation under the loan
12 represent that they have no claim,
13 defense, or setoff in connection with
14 the loan and release the bank from any
15 claim or defense that they might have as
16 of the date of this letter."

17 Q Thank you. Now, what about in 2012 when the loan
18 was last extended and TD Bank granted the
19 modification, after they merged with Carolina
20 First? Did they again have the opportunity to
21 raise any questions or claims?

22 A Yes.

23 Q And, again, did they raise any complaints, claims,
24 or questions about the loan at that time?

25 A No, they did not.

1 Q If you will look at the amendment to the promissory
2 note in the document in Exhibit 3. And tell me
3 when you get there.

4 A I've got it.

5 Q Did that document say anything about whether the
6 borrower or guarantor had any claims or defenses
7 against TD Bank?

8 A Yes. It is -- the first -- on the first page,
9 Paragraph Number 2:

10 "The borrower and guarantor represent it
11 has no claims, defenses, counterclaims,
12 or right to setoff or recoupment against
13 the bank under any of the loan
14 documents, or otherwise, and each hereby
15 waives any such claim, defenses,
16 counterclaims, or right to setoff or
17 recoupment."

18 Q Thank you. Is that agreement signed by Mr. Jacobs
19 as well as Newberry Atrium?

20 A Yes, it is.

21 Q How long did the bank eventually extend the
22 maturity to?

23 A The maturity date I see was extended to August 8th,
24 2012.

25 Q And did the loan in fact mature on August 8th,

1 2012?

2 A Yes, it did.

3 Q At that time did the bank have any communication
4 with Mr. Jacobs about the status of the loan or any
5 maturity?

6 A Yes. I had a meeting with Mr. Jacobs on June the
7 17th, and he was going to request an additional
8 extension, and he did after that.

9 Q And what did Mr. Jacobs propose to the bank at that
10 time?

11 A His request was for the interest rate to be
12 lowered, the term of the loan to be put on a very
13 long term for -- as far as repayment to calculate
14 the payments, and as well as he had indicated that
15 he could not pay the property taxes and asked that
16 the bank pay those.

17 Q Now, the property taxes, were they past due at that
18 point?

19 A Yes, they were.

20 Q And had the property gone to tax sale by that time?

21 A Yes, it had.

22 Q What did the bank decide to do? What was your
23 response to Mr. Jacobs' proposal in July of 2012?

24 A Whenever anyone asks for an extension of an
25 existing loan, we require that they provide us with

1 current updated personal financial information, tax
2 returns, financial statements, and that sort of
3 thing, those types of documents.

4 And then we take those documents, along with
5 the request, and take a look at it and say, Okay,
6 is this request, is it reasonable based on all of
7 the information that we have?

8 Q And was Mr. Jacobs' request reasonable?

9 A No, it was not.

10 Q And why is that?

11 A The payments -- the request was to lower the
12 interest rate, which lowers the payments, and to
13 put it on a payment schedule that is far greater
14 than any payment schedule that we have ever done at
15 the bank based on the number of years, as well as
16 the request for us to pay the property taxes.

17 Q Now, in reviewing the financial statement that you
18 mentioned, did you have follow-up questions for
19 Mr. Jacobs in connection with the financial
20 statements he had submitted to the bank?

21 A Yes, I did. Based on the financial statements that
22 I had received that show a \$20 million net worth,
23 typically when we have a net worth that is that
24 high, you don't have someone asking you to pay
25 taxes for you and you don't have someone asking for

1 you to change the payments and the terms of the
2 loan.

3 So subsequently I requested additional
4 information to better understand the financial
5 statement, because it is multiple pages and it
6 contained a lot of information, and I needed to --
7 for it to be explained, you know, why a \$20 million
8 net worth person is asking the bank to change the
9 payments and pay the taxes.

10 Q And did he ever give you the explanation or the
11 documents you requested?

12 A No, sir, he did not.

13 Q And so based on the failure to provide the
14 additional financial information, default on the
15 property taxes, with the property going to tax
16 sale, and the terms that Mr. Jacobs requested, did
17 the bank decide to enter into the extension, or did
18 the loan mature?

19 A The loan matured.

20 Q And did it mature on August 8, 2012?

21 A Yes.

22 Q Upon maturity, did Newberry Atrium or Mr. Jacobs
23 pay the balance due?

24 A No, they did not.

25 Q What is the current status of the Newberry Atrium

- 1 loan and guarantee?
- 2 A The loan is in default, as it is over two years
- 3 past the maturity.
- 4 Q If you will look at Exhibit 4 for me, please.
- 5 (Pause.)
- 6 Q Are you there? Can you identify that document?
- 7 A Yes. This is the Newberry Atrium Professional
- 8 Center. It is a payoff screen. It is the
- 9 information that shows what the balances are due on
- 10 the loan.
- 11 Q Is it the regular practice of TD Bank to produce
- 12 this payoff screen?
- 13 A Yes, it is.
- 14 Q Is the payoff screen kept in the ordinary course of
- 15 regularly-conducted business activity?
- 16 A Yes, it is.
- 17 Q Is the information on the payoff screen, is that
- 18 transmitted by a person with knowledge of the
- 19 underlying transactions that the screen reflects?
- 20 A Yes, it is.
- 21 Q Is the payoff screen produced at or near the time
- 22 of the transactions on the document?
- 23 A Yes, it is.
- 24 Q And is this a true and correct copy of the payoff
- 25 screen for the Newberry Atrium loan?

1 A Yes, it is.

2 MR. BEDENBAUGH: Your Honor, we would move to
3 admit the payoff screen for the Newberry Atrium
4 loan into evidence as Exhibit 4.

5 MR. JOWERS: Your Honor, I object to this
6 because it is inaccurate. It is incomplete because
7 it does not reflect results of the foreclosure
8 sale. And it contains certain fees that have not
9 been awarded. And it is generally misleading.

10 MR. BEDENBAUGH: Your Honor, if Mr. Jowers
11 will give me a second I will get the credit into
12 evidence as well as an explanation as to the fees.
13 We are not seeking any of the fees that are set
14 forth in this document through Mr. Jenkins'
15 testimony. The foreclosure sale was just completed
16 last Wednesday. This document was printed before
17 then, but Mr. Jenkins is prepared today to explain
18 the amount of the bid and the credit given, which
19 will of course be deducted from the amount of the
20 payoff.

21 THE COURT: And the question was whether it
22 was a true and correct copy of the information
23 available at the time -- the date?

24 MR. BEDENBAUGH: Your Honor, this was printed
25 on October 1st. The foreclosure sale was final on

1 October 2nd. And it will take some time for that
2 process to be reflected because we had to submit
3 everything to the Master-in-Equity and all of that.

4 THE COURT: If it is true and correct as of
5 the date of October 1st of 2014, I'll admit it.

6 MR. BEDENBAUGH: Thank you, Your Honor.

7 (WHEREUPON, Plaintiff's Exhibit No. 4
8 was marked for identification and
9 received into evidence.)

10 BY MR. BEDENBAUGH:

11 Q Mr. Jenkins, what is the amount shown due as of
12 October 6th on this payoff screen?

13 THE COURT: October 1st or October 6th?

14 MR. BEDENBAUGH: Well, this is dated as of
15 October 6th, giving him credit for the interest as
16 of up to today, Your Honor, and then we will back
17 out the results of the foreclosure sale.

18 THE COURT: Yes, sir.

19 BY MR. BEDENBAUGH:

20 Q You can testify.

21 A Since the sale just concluded last Tuesday, I
22 believe it was, the calculation isn't reflected in
23 there because we haven't received the money. And I
24 have on my notes -- that I failed to bring with me
25 up here -- the actual amount after the calculation.

1 But I can, if you want me, I can hand-calculate it.

2 Q Well, if you will just read into the record what,
3 as of October 1, when this printed out, the
4 principal, interest, late charges, and then the
5 total, and then you can refer to your notes with a
6 calculator.

7 A Okay. As of October the 1st, the principal balance
8 was \$5,949,788.88. The accrued but unpaid interest
9 amount is \$488,766.31, with late charges of
10 \$2,357.96.

11 Q And the gross total payoff as of the date that was
12 printed on October 1st?

13 A \$6,440,913.15.

14 MR. BEDENBAUGH: Your Honor, may I approach?

15 THE COURT: Yes, sir.

16 (Complies.)

17 BY MR. BEDENBAUGH:

18 Q Now, you testified that the foreclosure sale had
19 occurred last week?

20 A Yes.

21 Q So the bank -- and we'll talk in detail about the
22 foreclosure sale in a minute, but the bank has now
23 completed the foreclose sale, is that your
24 testimony?

25 A Yes, the sale had concluded last Tuesday.

- 1 Q And what was the result of the foreclosure sale?
- 2 A The result was that the bank provided the winning
- 3 bid at the foreclosure sale. And now the bank will
- 4 move to have the property to be bank owned.
- 5 Q What was the amount of the successful bid at the
- 6 foreclosure sale?
- 7 A The bank provided a bid of \$3,570,000.
- 8 Q And have you calculated the net payoff as of today
- 9 by taking out the bid at the foreclosure sale?
- 10 A Yes.
- 11 Q What is that amount?
- 12 A The amount is \$2,867,277.14.
- 13 Q So that is the amount owed today, is that your
- 14 testimony?
- 15 A There is -- there will be six days of accrued
- 16 interest that is not included in there -- and I can
- 17 certainly do that -- but, in essence, yes.
- 18 Q Okay. Now, there is a line for fees on the payoff
- 19 screen.
- 20 A Correct.
- 21 Q Can you tell me what that is?
- 22 A Those are a portion of the legal fees that the bank
- 23 has paid.
- 24 Q And are you seeking to include those fees in the
- 25 payoff you just gave the Court?

1 A No, the bank's counsel will provide an affidavit as
2 to the fees.

3 Q Okay. I want to talk about the Middle Sound loan
4 for a second. Briefly describe that loan again for
5 the jury.

6 A The Atrium at Middle Sound Land loan was a loan to
7 fund the purchase of some vacant commercial
8 property to be developed at some point in the
9 future.

10 Q And when was that loan made?

11 A That loan, I believe, was originated 2004.

12 Q And did Carolina First Bank in fact loan money to
13 Middle Sound to acquire that property and develop
14 it?

15 A Yes.

16 Q Can you look at Exhibit 5 for me, please?

17 A Okay, I've got it.

18 Q Can you identify that document?

19 A Yes. This is a promissory note, a commercial
20 promissory note, dated April 4th, 2011.

21 Q And is that a true and correct copy of the
22 promissory note by Carolina First?

23 A Yes.

24 MR. BEDENBAUGH: Your Honor, we would move to
25 admit Exhibit Number 5, a promissory note dated

1 April 4, 2011, on the Middle Sound loan.

2 THE COURT: Any objection?

3 MR. JORDAN: Can Mr. Bedenbaugh indicate that
4 he has the original available of this document?

5 MR. BEDENBAUGH: Yes, we have the originals,
6 Your Honor.

7 MR. JORDAN: If he has it, no objection.

8 MR. BEDENBAUGH: Thank you.

9 THE COURT: Without objection, it is admitted.
10 (WHEREUPON, Plaintiff's Exhibit No. 5
11 was marked for identification and
12 received into evidence.)

13 BY MR. BEDENBAUGH:

14 Q Now, this note dated April 4, 2011, was this the
15 note from when the loan was originally made?

16 A No, it was actually one of the renewal of the
17 original loan.

18 Q Okay. And who is the borrower on this loan?

19 A The borrower is Atrium at Middle Sound Land, LLC.

20 Q And that entity is owned by Mr. Jacobs and
21 Mr. McFarland; is that correct?

22 A That is correct.

23 Q All right. If you'll look at Exhibit 6 for me,
24 please.

25 A Okay.

1 Q Can you identify that document?

2 A Yes. This a guarantee, a personal guarantee of
3 payment.

4 Q And is that a true and correct copy of the personal
5 guarantee of David Jacobs for the Middle Sound loan
6 dated April 4th, 2011?

7 A Yes, it is.

8 MR. BEDENBAUGH: Your Honor, we would move to
9 admit into evidence Exhibit 6, the personal
10 guarantee of David Jacobs, dated April 4, 2011?

11 THE COURT: Any objection?

12 MR. JOWERS: No objection, Your Honor.

13 THE COURT: It is admitted.

14 (WHEREUPON, Plaintiff's Exhibit No. 6
15 was marked for identification and
16 received into evidence.)

17 BY MR. BEDENBAUGH:

18 Q Does this guarantee require the bank to foreclosure
19 on any collateral or do anything else before suing
20 on the guarantee?

21 A No, it does not. In Paragraph 4 it states that:

22 "The person that signs it states that
23 they are unconditionally liable under
24 the guarantee, regardless of whether or
25 not you pursue any of your remedies

1 against the borrower, against any other
2 maker, surety, guarantor, or endorser of
3 the debt, or against any property. You
4 may sue me alone or anyone else who is
5 obligated on this guarantee, or any
6 number of us together, to collect the
7 debt."

8 Q Thank you. If you will look at Exhibit 7, please.
9 Can you identify that document?

10 A Yes. This is a guarantee, a personal guarantee,
11 for the Atrium at Middle Sound Land, LLC loan,
12 signed by James McFarland.

13 Q And is that a true and correct of Mr. McFarland's
14 guarantee of the Middle Sound loan, dated April 4,
15 2011?

16 A Yes, it is.

17 MR. BEDENBAUGH: Your Honor, we would move to
18 admit into evidence Exhibit Number 7, the guarantee
19 of Mr. McFarland, dated April 4, 2011.

20 MR. JORDAN: No objection.

21 THE COURT: It is admitted.

22 (WHEREUPON, Plaintiff's Exhibit No. 7
23 was marked for identification and
24 received into evidence.)

25 BY MR. BEDENBAUGH:

1 Q Now, did this guarantee require the bank to
2 foreclose on the collateral or sue the borrower
3 before suing on the guarantee?

4 A It is the exact same language in Paragraph 4 as the
5 previous. And I can read it again, but it states
6 the same exact thing.

7 Q Thank you.

8 A Uh-huh.

9 Q Now, you testified earlier that this loan was
10 originally made in 2004; is that correct?

11 A Yes, that is correct.

12 Q When did the original note mature?

13 A The original note matured June 5th, 2006.

14 Q Okay. And when that original note matured, did the
15 bank agree to give Mr. Jacobs and Mr. McFarland an
16 extension of the due date?

17 A Yes. As a matter of fact, there were a total of
18 eight extensions for this loan.

19 Q So there are eight extensions on this loan just
20 like the Newberry Atrium loan, is that your
21 testimony?

22 A That is correct.

23 Q Why did the bank grant extensions, eight different
24 extensions, on this loan?

25 A This was a vacant commercial land to be developed.

1 And the extensions were provided in order to allow
2 the borrower and guarantors more time to sell the
3 property.

4 Q Can you look at Exhibit 8 for me, please?

5 A Okay. Got it.

6 Q Can you look at those documents and identify them?

7 A Yes. This is the Atrium at Middle Sound Land
8 original promissory note, and then the subsequent
9 renewals.

10 Q And is that a true and correct copy of the original
11 note and the subsequent renewals and modifications
12 that were entered into for the Middle Sound loan?

13 A Yes, they are.

14 MR. BEDENBAUGH: Your Honor, we would move to
15 admit into evidence Exhibit Number 8, the note and
16 renewal and modification agreements for the Middle
17 Sound loan.

18 THE COURT: Any objection?

19 MR. JOWERS: No, Your Honor.

20 THE COURT: It is admitted.

21 (WHEREUPON, Plaintiff's Exhibit No. 8
22 was marked for identification and
23 received into evidence.)

24 BY MR. BEDENBAUGH:

25 Q Now, like with Newberry Atrium, when these

1 modifications, extensions, renewals were entered
2 into, did the bank give Mr. McFarland and Mr.
3 Jacobs the opportunity to raise any claim or
4 defenses about these loans?

5 A Yes, they did.

6 Q Did they ever raise any claims or any defenses when
7 they were getting an extension of the due date?

8 A They did not.

9 Q All right. Look at the modification that is the
10 January 18, 2011, modification near the end.

11 A Okay, I've got it.

12 Q Does that document, like the modifications with
13 Newberry Atrium, say anything about whether the
14 Defendants raised a claim or defenses to these
15 loans?

16 A Yes. It states:

17 "If the borrower and any guarantor
18 reaffirm their obligations under the
19 loan, represent that they have no claim,
20 defense, or setoff in connection with
21 the loan and release the bank from any
22 claim or defense that they might have as
23 of the date of this letter."

24 Q Thank you. Now, I want you to look at the
25 paragraph above that. Can you read that one into

1 the record as well?

2 A Yes.

3 "Borrower and any guarantors agree that
4 the loan is fully enforceable in
5 accordance with its term, agree that
6 this letter does not constitute a
7 novation, waiver, or release, agree that
8 the bank is not releasing any
9 collateral, and agree that the bank is
10 under no obligation to grant any
11 additional or further modifications."

12 Q Thank you. And was this document entered into with
13 Carolina First, or had their merger already
14 occurred at that point?

15 A By the heading on the letter it states Carolina
16 First, and then Carolina First Bank is a tradename
17 of TD Bank, NA, so this was after the merger had
18 formally taken place.

19 Q And then in the first sentence below their names,
20 does it say that TD Bank has agreed to modify the
21 loan?

22 A Yes.

23 Q Now, did this loan eventually mature?

24 A Yes, it did.

25 Q When did this loan mature?

1 A This loan matured April 4th, 2012. No, I'm sorry,
2 that was one of the renewal -- or extension dates.
3 Let's see here. Maturity date, July 4th, 2012.

4 Q Okay. Now, upon the maturity of this loan, did the
5 bank have communications with Mr. Jacobs and
6 Mr. McFarland about this loan like he did with
7 Newberry Atrium?

8 A Yes.

9 Q Did Mr. Jacobs again request the bank give him
10 another extension?

11 A Yes.

12 Q What was the bank's response to that request?

13 A It was the same response with the other. We
14 already had the other information, or the
15 information that was requested with the other loan
16 extension, and asked for clarification of the
17 documentation, and were never provided that
18 information.

19 Q So without full financial information of
20 Mr. Jacobs, the bank declined to extend the
21 maturity, is that your testimony?

22 A That's correct.

23 Q Did the bank -- did the loan ultimately mature?

24 A Yes, it did.

25 Q Did Atrium at Middle Sound, Mr. McFarland, or Mr.

1 Jacobs pay the balance due at maturity?

2 A They did not.

3 Q What is the current status of the Middle Sound
4 loan?

5 A It is past the maturity date and is in default for
6 non-payment.

7 Q If you would look at Exhibit 9 for me, please.

8 A Okay.

9 Q Can you identify that document?

10 A Yes. This is a payoff screen shot of the payoff
11 balances for the Atrium at Middle Sound Land, LLC,
12 loan as of October 1st, 2014.

13 Q Is it the regular practice of TD Bank to release
14 that document?

15 A Yes, it is.

16 Q Is the payoff screen kept in its ordinary course of
17 a regularly-conducted business activity?

18 A Yes.

19 Q Is the payoff screen created from information that
20 was transmitted by a person with knowledge of the
21 underlying transaction?

22 A Yes.

23 Q Is the payoff screen produced at or near the time
24 of the transaction reflected on the document?

25 A Yes.

1 Q Is that a true and correct copy of the Middle Sound
2 payoff screen?

3 A Yes, it is.

4 MR. BEDENBAUGH: Your Honor, we would move to
5 admit Exhibit Number 9 into evidence, the payoff
6 screen for the Middle Sound loan.

7 THE COURT: Any objection?

8 MR. JORDAN: Mr. Bedenbaugh, is it still your
9 position that the fees are going to be handled at a
10 separate time?

11 MR. BEDENBAUGH: That's correct.

12 MR. JORDAN: No objection.

13 THE COURT: It is admitted.

14 (WHEREUPON, Plaintiff's Exhibit No. 9
15 was marked for identification and
16 received into evidence.)

17 BY MR. BEDENBAUGH:

18 Q What is the amount due as of October 6 under the
19 payoff screen for the Middle Sound loan?

20 A The amount due is comprised of the principal
21 balance, which is \$1,279,681.61. Accrued but
22 unpaid interest, \$277,233.27. Late charges,
23 \$448.41. For a total of \$1,557,363.29.

24 Q And does that give the Defendants credit for all
25 payments they have made to date?

- 1 A Yes, it does.
- 2 Q And, again, this one includes a fee line; is that
3 correct?
- 4 A That's correct.
- 5 Q And you didn't include those fees in your testimony
6 in the amount due?
- 7 A I did not.
- 8 Q Thank you. Now, I believe you testified both of
9 these loans were secured by real estate when they
10 were made?
- 11 A Yes.
- 12 Q Are they still secured by real estate?
- 13 A They -- they are -- yes, they are secured by real
14 estate. And I hesitate because of the foreclosure
15 sale that is moving through the process.
- 16 Q Sure. We will talk about the foreclosure sale.
17 Now, let's step back to when TD Bank filed this
18 action, both of these actions. Did TD Bank make a
19 decision to sue the two Defendants on their
20 guarantees without first foreclosing?
- 21 A Yes.
- 22 Q Were you involved in that decision?
- 23 A Yes.
- 24 Q Explain for the jury why the bank elected to first
25 sue on the guarantees?

1 A When we have a situation that comes up where you
2 have -- in this case there are two separate loans,
3 so you've got a medical office building, and then
4 you have vacant land that was purchased for future
5 development.

6 When you look at the situation, the medical
7 office building has confidential information,
8 patient records, doctors' offices, et cetera.

9 The Middle Sound Land loan was one that was a
10 commercial real estate project that didn't -- it
11 didn't work out. It wasn't a viable project. So
12 when you look at those, coupled along with the
13 financial information that the guarantors provide
14 you that shows that they are high net worth
15 individuals that have net worths in the millions of
16 dollars, you make the decision -- because what you
17 see is, you see information on paper that shows you
18 that there is an ability, just an unwillingness to
19 pay.

20 And so that is why you make that decision,
21 coupled along with one of them being a medical
22 office building, which is difficult by nature of
23 what it is, and then a real estate project that
24 didn't work out.

25 Q Now, did the bank believe that allowing these

1 borrowers to attempt to sell this property
2 themselves, both of these properties themselves,
3 giving them more time to do so, did the bank
4 believe that was of benefit to the guarantors?

5 A Absolutely. I mean, this process has been going on
6 for two years. And at any point in time while this
7 process goes on and there is an offer for
8 someone -- someone has interest in buying it,
9 either one, at any point in time that can be
10 brought to the bank's attention to see if it is
11 something that is viable. So, yes. In our
12 experience, the owner of a piece of property is a
13 much better person to sell it than a bank.

14 Q Do borrowers -- do most borrowers generally ask for
15 more time to sell the property themselves when they
16 think they can sell it?

17 A Yes, they do.

18 Q Now, did the fact that Newberry Atrium could not
19 generate enough cash to pay its property taxes, did
20 that cause any concerns with foreclosing on that
21 property?

22 A Yes, it did. The other component of it, is if you
23 have a building that is leased with tenants and it
24 is not generating enough money every month to pay
25 its own bills, then if the bank were to take it

1 over in that condition, then the bank has to start
2 paying out of its pocket for the bills that the
3 lease income that is generated by the tenants -- if
4 it has to be supplemented, then the bank has to pay
5 it.

6 Q And you also said the fact that the Newberry Atrium
7 property is a medical office building, that also
8 gave the bank some concern about owning that
9 project; is that correct?

10 A Yes, it does. With the types of businesses that
11 are there, patient records, confidential
12 information, all the laws surrounding medical
13 records, that is one factor of the decision as
14 well.

15 Q In addition to that, did the Newberry Atrium entity
16 do anything to prevent the bank from filing a
17 foreclosure action?

18 A Yes. They had filed bankruptcy in order to --
19 which halted the bank from being able to do
20 anything because they filed that. And it actually
21 helped because in that bankruptcy filing we noticed
22 that there was enough money to where the bank could
23 have received payments going forward, but the bank
24 hadn't received any money, so what that did was it
25 gave us an accounting of how much money was there

1 to make payments, and even though it might not have
2 been enough to make the payments, the regular
3 payments, there was income there that the bank was
4 not getting.

5 Q And what ultimately happened with the Newberry
6 Atrium's bankruptcy?

7 A In that bankruptcy, what Mr. Jacobs had requested,
8 that the bankruptcy court allow him the protection
9 of the bankruptcy because the business filed
10 bankruptcy, but he wanted it to cover him as well
11 because of the suit that we had. And so when that
12 was denied, then the bankruptcy -- they stopped the
13 bankruptcy.

14 Q Okay. So after the bankruptcy court denied
15 Mr. Jacobs' request to enjoin this action against
16 him personally, the bankruptcy case was dismissed,
17 is that your testimony?

18 A Yes.

19 Q Now, are you aware that the Defendants are alleging
20 that TD Bank is treating them unfairly by asking
21 them to repay these loans without foreclosing
22 first?

23 A Yes, I am.

24 Q What is your response to that?

25 A It is not about fairness, it is about agreeing to

1 loan someone money and asking for it to be paid
2 back. It is nothing personal. It is strictly
3 business. And when we loan money, we expect that
4 it gets repaid. I mean, that is how banks -- that
5 is how they operate. And if we can't get repaid on
6 loans, then, you know, you can't make a loan to the
7 bakery and you can't make a new loan to the
8 landscaper because, you know, people think that
9 they don't have to pay their obligations back. And
10 it just doesn't work like that.

11 Q Is the decision -- or was the decision to seek
12 repayment from Mr. Jacobs and Mr. McFarland, was
13 that based on any personal animosity or ill-will
14 towards them at all?

15 A Absolutely not. It had nothing to do with it. It
16 is just -- it is business.

17 Q Does TD Bank typically look to the collateral, the
18 real estate, or whatever the collateral is that
19 secures the loan as a primary source of repayment?

20 A No, we don't. You know, a lot of people think that
21 banks want to take things back. The banks aren't
22 in the real estate business. We don't want to own
23 real estate. That is not what we do. It is just
24 not how we operate. We don't look to take
25 collateral back.

1 Q What about Carolina First? Carolina First, do they
2 look to collateral first for repayment of the loan?

3 A No.

4 Q What about all the other banks you worked for? Did
5 any of them make a loan to recover collateral?

6 A When you have a situation where you have guarantors
7 that have provided you with financial information
8 that says they have net worth in the millions of
9 dollars, you know, it shows that, Well, we're not
10 going to take this property back because we just
11 have a case of people who have, you know, the
12 ability, just not the willingness to repay the
13 money that they borrowed that they said that they
14 owed that they would pay back.

15 Q Now, you mentioned the bank did eventually decide
16 to proceed with the Newberry Atrium foreclosure; is
17 that correct?

18 A That's correct.

19 Q Explain why the bank elected to go ahead and
20 foreclose on that property?

21 A The bank moved to foreclose the property because it
22 had been going on for so long and we had received
23 no payments to date. This was delayed with -- why
24 we're here today -- with the bankruptcy filings,
25 but in the bankruptcy filing, when we saw that

1 there was -- there was money available that was
2 being paid to the owner and management fees, then
3 we looked at that and said, Okay, well, we have to
4 foreclose now because that is the only way that we
5 can get a property manager into the property to pay
6 the property taxes so the bank didn't have to and
7 collect the monies that were otherwise going
8 somewhere else.

9 Q Thank you. Now, surely Mr. Jacobs and Newberry
10 Atrium cooperated with the foreclosure since that
11 is what they apparently wanted the bank to do; is
12 that correct?

13 A No, sir. They have not been cooperative in any
14 aspect of this since it began.

15 Q Did they, in fact, contest the foreclosure?

16 A Yes.

17 Q Now, despite their efforts, was the bank able to
18 complete the foreclosure last week?

19 A Yes, it was.

20 Q And your testimony was that the foreclosure sale
21 was final on October 2nd?

22 A That's correct.

23 Q And the successful bid for the property, I believe
24 your testimony was, was \$3,570,000; is that
25 correct?

- 1 A That's correct.
- 2 Q Did the bank, in making its bid, base it on the
3 fair market value of the property today?
- 4 A Yes.
- 5 Q Now, the winning bid, that was after a public sale?
- 6 A That is correct.
- 7 Q That was after it was advertised for weeks in the
8 paper?
- 9 A Three weeks advertisement, and then the public sale
10 in Newberry County.
- 11 Q How many people bid in addition to the bank?
- 12 A None.
- 13 Q Thank you. Now, the Atrium at Middle Sound, you
14 stated that that property remains with the
15 borrower; is that correct?
- 16 A That's correct.
- 17 Q Is that property for sale?
- 18 A Yes, I believe it is.
- 19 Q Have there been any recent sales efforts on that
20 property?
- 21 A There was an offer that was brought to the bank's
22 attention a few weeks ago, and the bank was asked
23 to consider the offer. There actually has been
24 multiple -- let me back up. There has been
25 multiple offers, but the most significant one

1 happened six weeks ago, eight weeks ago, something
2 like that.

3 Q Do you remember the approximate amount of the offer
4 that was brought to the bank?

5 A A million dollars, I believe it was. \$1,100,000.

6 Q And what was the bank's response?

7 A The bank was very much in favor of the sale of the
8 property. But the issue was that the guarantors in
9 the situation wouldn't agree to how they were going
10 to repay the balance that was owed from what the
11 sales price would have been and the bank received.
12 There was a difference there. And so that was the
13 latest difficulty was dealing with the balance owed
14 after the property was sold.

15 Q And did the bank in fact say: Willing to release
16 its deed of trust on the North Carolina property in
17 exchange for the net proceeds of these sales and
18 just reserve all rights under the deficiency?

19 A Yes.

20 Q And the Defendants wouldn't agree to that?

21 A They would not.

22 Q They wouldn't allow the sale to go forward?

23 A No, sir.

24 Q Now, I want to step back to 2012. If the bank had
25 elected to foreclose on the Middle Sound property

1 in 2012, like the Defendants apparently wanted it
2 to do, tell me about what the bank's bidding
3 strategy would have been at that time.

4 A At that particular time -- and I don't have the
5 exact dollar amounts, but the property's value was
6 \$420,000 maybe. So if we would have elected to
7 foreclose at that time and we would have bid an
8 amount less than that, then the deficiency would
9 have been a huge number because the value is what
10 the bank bases its bid strategy on when it bids on
11 a property at a foreclosure sale.

12 Q And so had the bank foreclosed in 2012, its bid
13 would have been based on an appraisal at that time
14 of around 400 and something thousand dollars?

15 A Uh-huh.

16 Q Is that correct?

17 A That is correct.

18 Q And so by waiting until 2014, the Defendants got
19 two years to try to sell the property themselves;
20 is that correct?

21 A That's correct.

22 Q And they had in fact gotten an offer in the range
23 of a million dollars; is that correct?

24 A That is correct.

25 Q Do you think they benefited by that time period?

1 A Absolutely. You know, if the sale would have gone
2 through now, the deficiency would have been
3 minimal. If it happened two years ago, it would
4 have been a very large dollar amount.

5 Q Thank you.

6 THE COURT: Before you go on, this would be a
7 good time to take an afternoon break.

8 Ladies and gentlemen, I am going to remind you
9 of the instructions I have given to you; that is,
10 not to begin to discuss this matter among
11 yourselves as you have not heard all the evidence.

12 Let's take a brief break, and then we will
13 come back and continue on.

14 (WHEREUPON, the jury retires to the jury
15 room at 3:34 p.m.)

16 THE COURT: Mr. Jenkins, you may step down.
17 I'll instruct you that you should not discuss your
18 testimony with anyone during this break because you
19 have not completed it, so it would be inappropriate
20 for you to discuss it.

21 THE WITNESS: Yes, ma'am.

22 THE COURT: You may step down.

23 (Witness steps down.)

24 THE COURT: Is there anything we need to take
25 up before we take a break?

1 MR. JORDAN: Your Honor, one thing. Mr.
2 McFarland is here from Wilmington, and he has got
3 to go home tonight, okay? So what we would like is
4 to have him on the stand today. It doesn't
5 necessarily have to be, you know, ahead of the
6 conclusion of Mr. Jenkins' testimony, but at some
7 point in time today I would certainly like to have
8 him on the witness stand. However that works is
9 fine.

10 MR. BEDENBAUGH: Your Honor, I probably have
11 about 30 more minutes with Mr. Jenkins based on the
12 proffer hearing. Mr. Jowers may have up to an hour
13 or so on the note. But we certainly have no
14 objection to Mr. McFarland --

15 THE COURT: You all can discuss -- I'm not
16 going to say for sure that I'm going to require
17 that he be placed on the witness stand today. He
18 is a part of this case. He can come back tomorrow
19 or some other time. Nobody said that there were
20 any concerns about when the people would be here.
21 So you all can talk about it, and if you are able
22 to work it out, that is fine. I can't guarantee
23 that he will be able to conclude his testimony
24 before the end of the day in the first place. So
25 you all can discuss it. If you come to an

1 agreement, that is fine. And we will see what time
2 that might be and whether or not that is something
3 we can accommodate.

4 (WHEREUPON, a break was taken.)

5 THE COURT: You may return to the witness
6 stand, please.

7 (Witness returns to witness stand.)

8 THE COURT: Is there anything we need to take
9 up before we continue on?

10 MR. BEDENBAUGH: Your Honor, TD Bank has one
11 issue, if we may, that we would like to discuss
12 when the jury gets in.

13 As Your Honor knows, Judge Manning's order
14 ruled that any reference to TARP or the government
15 bailout is excluded.

16 Mr. Jowers intends to admit an exhibit which
17 was the website's announcement of the merger
18 between Carolina First and TD Bank. That exhibit
19 itself is not problematic, but in the text of it,
20 it refers to TD Bank's repayment to the government
21 for those shares.

22 So it may be that we don't have an issue with
23 how Mr. Jowers intends to use that document, but we
24 certainly would object to him using that as a way
25 to refer to the government bailout or any of the

1 excluded testimony that Judge Manning already ruled
2 on.

3 THE COURT: Yes, sir?

4 MR. JOWERS: Your Honor, the document is a TD
5 Bank announcement. So it is something they put out
6 in the public domain. And it does not say TARP and
7 it does not say bailout, which were the words that
8 Judge Manning said not to use.

9 THE COURT: Well, I don't think it is only
10 that. Let's talk about why it is even relevant.
11 Is there an issue as to whether or not TD Bank is
12 the appropriate party to be able to go forward in
13 this claim?

14 MR. JOWERS: Well, some of the documents we
15 want to establish in the mind of the jury that TD
16 Bank stands in the shoes of Carolina First, that it
17 was not a buyout of a bank, it was a merger, where
18 they are one in the same.

19 THE COURT: Well, that is not an issue, is it?

20 MR. JOWERS: Yes, it is, because our whole
21 claim is because of a relationship with Carolina
22 First. TD Bank should follow into that
23 relationship. And so because they are two
24 different names now, we want --

25 THE COURT: But they are not denying that

1 there was a merger.

2 MR. JOWERS: Right. But a merger could be
3 confusing to the jury as to what does it actually
4 mean. Is it a buyout? Is it a new bank? We want
5 there to be no doubt that they are one in the same.
6 That is why those documents are relevant.

7 THE COURT: I'll be happy to take a look at
8 the document, and then, if necessary, the document
9 can be redacted. We can look at that now or look
10 at it at the time that --

11 MR. JOWERS: We can do it now.

12 MR. BEDENBAUGH: I think it most efficient to
13 look at it now, Your Honor. TD Bank certainly
14 stipulates that the merger occurred and it acquired
15 the assets of Carolina First Bank. That was part
16 of our case through Mr. Jenkins' testimony.

17 Mr. Jowers also intends to admit the merger
18 document, which formally states that TD Bank merged
19 with Carolina First and assumed all the liability,
20 which, if that is all he wants to use it for, that
21 document does that. He doesn't need the website
22 printout that does not use the word TARP, but it
23 does refer to the government loan to Carolina First
24 Bank that was repaid by TD and the amounts that TD
25 Bank paid, which was less than the amount that was

1 loaned on Carolina First.

2 THE COURT: Let me ask, is that document part
3 of what Judge Manning considered in the exhibits
4 that were part of the motions that were presented?

5 MR. BEDENBAUGH: That was proffered at the
6 last hearing, Your Honor.

7 THE COURT: And which exhibit was it?

8 MR. BEDENBAUGH: I think it is Exhibit 3, Your
9 Honor.

10 THE COURT: To?

11 MR. BEDENBAUGH: Actually it is Defendant's
12 Exhibit 2, and then the Articles of Merger is
13 Defendant's Exhibit 1.

14 THE COURT: I will be happy to take a look at
15 it.

16 MR. JOWERS: All right, Your Honor. That is
17 the Articles of Merger that apparently
18 Mr. Bedenbaugh does not object to. The first
19 paragraph, or full paragraph of that document, is
20 the one in question.

21 THE COURT: And, so, Mr. Jowers, how did this
22 exhibit, Defendant's Exhibit 2, assist you in
23 making the argument that it is a merger in which TD
24 Bank stepped into the shoes of Carolina First?

25 MR. JOWERS: It goes to the mechanics of the

1 merger, Your Honor, and how it is relevant.

2 THE COURT: And how is it relevant?

3 MR. JOWERS: Is there an objection to the
4 Articles of Merger?

5 THE COURT: I'm sorry?

6 MR. JOWERS: I was asking Plaintiff's counsel
7 if they object to the Articles of Merger.

8 MR. BEDENBAUGH: Your Honor, we don't object
9 to the articles. We will stipulate the Articles of
10 Merger are what they are, and we are fine with
11 those being admitted. It is Exhibit 3 that we
12 objected to.

13 MR. JOWERS: We will withdraw --

14 MR. BEDENBAUGH: Exhibit 2 is what we objected
15 to.

16 MR. JOWERS: We'll withdraw that one, Your
17 Honor. As long as the Articles of Merger remain
18 in, we will withdraw the other one.

19 THE COURT: That's fine.

20 MR. BEDENBAUGH: Thank you, Your Honor.

21 THE COURT: Anything else we need to take up?

22 MR. BEDENBAUGH: Nothing from TD Bank, Your
23 Honor.

24 (WHEREUPON, Defendant's Exhibit 2 withdrawn.)

25 THE COURT: You can ask the jury to come in,

1 please.

2 (WHEREUPON, the jury came into open
3 court at 4:05 p.m.)

4 THE BAILIFF: The jurors are all present, Your
5 Honor.

6 THE COURT: You may continue.

7 DIRECT EXAMINATION CONTINUES

8 BY MR. BEDENBAUGH:

9 Q Mr. Jenkins, you testified earlier that one of the
10 reasons the bank elected to sue first on the
11 guarantee as opposed to foreclosing first on the
12 collateral was the net worth of the two Defendants,
13 Mr. Jacobs and Mr. McFarland; is that correct?

14 A Yes.

15 Q What did the bank base that on? Any documents
16 or -- how did the bank determine the net worth of
17 these two Defendants?

18 A The personal financial statements provided by the
19 guarantors shows the net worth. It shows what they
20 own and what they owe and then the net worth
21 calculated. And it shows, you know, basically that
22 number.

23 Q Is it important to the bank to receive personal
24 financial statements for loans like this?

25 A Yes. It is a requirement.

1 Q And why does the bank require financial statements?

2 A Because when you have a loan that is \$7 million,
3 you want to look to the guarantors of that loan to
4 see, Hey, if this project doesn't work out or if
5 there is a problem, you have to make sure that the
6 guarantors have the ability to repay that debt,
7 because projects do fail.

8 Q And does the bank in fact make decisions based on
9 the financial statements submitted by its borrowers
10 and guarantors?

11 A Absolutely. We rely on the financial information
12 provided by borrowers and guarantors to make
13 decisions.

14 Q Does the bank retain copies of the financial
15 statements submitted by the borrowers, and
16 particularly the Defendants in this case?

17 A Yes, we do.

18 Q All right. I'm going to look at Mr. McFarland's
19 financial statements. Can you look at Exhibits 10
20 and 11, please.

21 A Okay.

22 Q Have you had a chance to look at those documents?

23 A Yes.

24 Q Can you identify those two documents?

25 A These two documents are personal financial

1 statements of James A. McFarland, Jr.

2 Q And are these true and correct copies of financial
3 statements submitted to the bank by Mr. McFarland,
4 dated May 1st, 2008, and December 1, 2010?

5 A Yes.

6 MR. BEDENBAUGH: Your Honor, we would move to
7 admit Exhibits 10 and 11. Exhibit 10 is a
8 financial statement of James A. McFarland, dated
9 May 1st, 2008. Exhibit 11 is Mr. McFarland's
10 financial statement dated December 1, 2010.

11 THE COURT: Any objection?

12 MR. JORDAN: No objection, Your Honor.

13 THE COURT: They are admitted.

14 MR. BEDENBAUGH: Thank you, Your Honor.

15 (WHEREUPON, Plaintiff's Exhibit No. 10
16 was marked for identification and
17 received into evidence.)

18 (WHEREUPON, Plaintiff's Exhibit No. 11
19 was marked for identification and
20 received into evidence.)

21 BY MR. BEDENBAUGH:

22 Q If you will look at Exhibit 10 for me, please.
23 What was Mr. McFarland's net worth according to his
24 financial statement dated May 1st, 2008, at that
25 time?

1 A It states the net worth is \$20,931,967.

2 Q Thank you. How about Exhibit 11, financial
3 statement dated December 1, 2010?

4 A His net worth is listed as \$22,356,171.

5 Q According to Mr. McFarland, in 2010, after the
6 recession of 2009, his net worth actually went up a
7 couple of million dollars?

8 A Yes.

9 Q What was his income, according to the financial
10 statement he submitted to the bank in 2010?

11 A Total cash income was \$2,180,729.

12 Q Thank you. Did the bank also receive financial
13 statements from Mr. Jacobs?

14 A Yes, we did.

15 Q If you will look at Exhibits 12 through 16.

16 A Okay.

17 Q Can you identify those documents?

18 A Yes. These are personal financial statements -- or
19 they are labeled Statement of Financial Condition
20 for David H. Jacobs.

21 Q And are they true and correct copies of financial
22 statements submitted by Mr. Jacobs?

23 A Yes, they are.

24 Q Thank you.

25 MR. BEDENBAUGH: Your Honor, we would move to

1 admit into evidence Exhibits 12, 13, 14, 15, and
2 16.

3 Exhibit 12 is a financial statement dated
4 June 1st, 2004.

5 Exhibit 13 is Mr. Jacobs' financial statement
6 dated July 1, 2008.

7 Exhibit 14 is a financial statement dated
8 March 1, 2009.

9 Exhibit 15 is Mr. Jacobs' financial statement
10 dated January 31, 2011.

11 And Exhibit 16, finally, is Mr. Jacobs'
12 financial statement dated June 30, 2012.

13 THE COURT: Any objection?

14 MR. JOWERS: Your Honor, no objection.

15 THE COURT: They are admitted.

16 MR. BEDENBAUGH: Thank you, Your Honor.

17 (WHEREUPON, Plaintiff's Exhibit No. 12
18 was marked for identification and
19 received into evidence.)

20 (WHEREUPON, Plaintiff's Exhibit No. 13
21 was marked for identification and
22 received into evidence.)

23 (WHEREUPON, Plaintiff's Exhibit No. 14
24 was marked for identification and
25 received into evidence.)

1 (WHEREUPON, Plaintiff's Exhibit No. 15
2 was marked for identification and
3 received into evidence.)

4 (WHEREUPON, Plaintiff's Exhibit No. 16
5 was marked for identification and
6 received into evidence.)

7 BY MR. BEDENBAUGH:

8 Q Let's start with the financial statements from
9 before the time these loans were made and when they
10 were originally made up to the time of maturity.

11 Look at Exhibit 12. It is a financial
12 statement dated June 1, 2004.

13 A Okay.

14 Q What did Mr. Jacobs say his financial condition was
15 at that time?

16 A It lists a net worth of \$36,614,348.55.

17 Q Okay. Let's look at Exhibit 13, July 1st, 2008,
18 financial statement.

19 What did Mr. Jacobs say his net worth was on
20 July 1st, 2008?

21 A It is listed as net worth of \$42,064,792.35.

22 Q All right. How about the next year, Exhibit 14,
23 March 1st, 2009. What did Mr. Jacobs tell the bank
24 his net worth was at that time?

25 A \$38,854,430.91.

1 Q So in 2009 after the recession, he is still showing
2 approximately \$38 million in net worth, is that
3 your testimony?

4 A Yes, it is.

5 Q Let's look at 2011, Exhibit 15. What did Mr.
6 Jacobs say his net worth was on January 31st, 2011?

7 A \$30,470,701.95.

8 Q Thank you. And Exhibit 16, June 30th, 2012. What
9 did Mr. Jacobs say his net worth was in 2012?

10 A The net worth listed as \$20,199,172.89.

11 Q So according to the financial statement submitted
12 by Mr. Jacobs, his net worth had peaked at around
13 \$42 million in 2008 and had decreased \$20 million
14 by 2012?

15 A That's correct.

16 Q Now, you previously testified that one of the
17 reasons the bank elected to sue Mr. Jacobs on his
18 guarantee was the financial statements. Can you
19 explain that for the jury?

20 A Certainly. Whenever you have a decrease in
21 someone's net worth, it does happen, when things
22 get, you know, sold or things become worth less,
23 then the net worth can decrease. But over a span
24 of time when a net worth decreases by \$20 million,
25 you know, that is a lot of money in a relatively

1 short period of time, so that is cause for concern.

2 Q And based on that concern, did the bank attempt to
3 request additional information from Mr. Jacobs
4 about his financial condition?

5 A Yes, we did.

6 Q Did he voluntarily provide that information?

7 A No, sir, he did not.

8 Q Was the refusal to provide additional information
9 about his finances, was that one of the reasons the
10 bank elected to sue him on his guarantee?

11 A Yes, because whenever someone won't provide you
12 information, they are either not telling you the
13 whole story or hiding something, because if it can
14 be easily explained, most people say, Here is what
15 happened. So you make the decision based on, you
16 know, the lack of information as part of it.

17 Q And did you later learn information about
18 Mr. Jacobs' net worth and some of the reasons for
19 the decrease in his net worth?

20 A Yes. Part of the reason for that is there were
21 transfers to family members in the millions of
22 dollars.

23 Q And so you learned that there were millions of
24 dollars in transfers to family members, is that
25 your testimony?

- 1 A That is correct.
- 2 Q Let's look at Exhibit 15, the 2011 financial
3 statement, and talk about some of these transfers.
4 If you will look at Page 3 to the financial
5 statement.
- 6 A Okay.
- 7 Q There is a Paragraph B, referring to Gateway
8 Properties, LLC, 14 Gateway Academy Child
9 Development Center locations in South Carolina and
10 North Carolina. Do you see where I am?
- 11 A Yes.
- 12 Q What was Mr. Jacobs' interest in those 14 child
13 development centers in 2011?
- 14 A It says that the ownership interest was 50 percent.
- 15 Q What was Mr. Jacobs' value with interest at that
16 time?
- 17 A His 50 percent ownership interest in these 14
18 Gateway Child -- excuse me, Gateway Academy Child
19 Development Centers -- was valued at \$5,450,918.66.
- 20 Q Well, let's look at the corresponding part of the
21 2012 financial statement, Page 4, the June 30,
22 2012, financial statement.
- 23 A Okay.
- 24 Q Do you see the 14 Gateway Academies on that?
- 25 A I do.

1 Q What was Mr. Jacobs' interest in 2004 -- or, excuse
2 me, in 2012?

3 A The interest had decreased from 50 percent to
4 25 percent. And the 25 percent was valued at
5 \$2,615,153.99.

6 Q And what is your understanding of what happened to
7 the other 25 percent?

8 A The interest -- the 25 percent was transferred to a
9 family member.

10 Q And his interest, according to his financial
11 statements, decreased from \$5.4 million to \$2.6
12 million; is that correct?

13 A From year to year, that's correct.

14 Q That is about a \$1.8 million difference?

15 A Yes, it is.

16 Q All right. Let's look back at Exhibit 15,
17 Paragraph C. There are five Gateway Academy Child
18 Development Centers in Gateway, Colorado, LLC,
19 locations in Colorado. Do you see where I am?

20 A I do.

21 Q What was Mr. Jacobs' interest in that entity in
22 2011?

23 A His ownership was 37 and a half percent.

24 Q How did Mr. Jacobs value his interest?

25 A It was valued at \$1,173,763.02.

1 Q What about in 2012? If you would look at the
2 corresponding part of Exhibit 16.

3 A The next year in June it was the ownership interest
4 had decreased to 18.75 percent and the value was
5 listed at \$613,731.79.

6 Q So his interest went in half between 2011 and 2012;
7 is that correct?

8 A That's correct.

9 Q And what is your understanding of what happened to
10 that interest?

11 A Again, it was transferred to a family member.

12 Q And, in specifics, is it your understanding it was
13 to his wife and to a trust that you said he set up
14 for his daughters?

15 A That's correct.

16 Q And the value of that interest had decreased from
17 \$1.1 million to around \$600,000; is that correct?

18 A Yes.

19 Q So that is roughly \$500,000 for that entity?

20 A That is correct.

21 Q All right. Let's look back at 2011. Exhibit 15.
22 He has got three more Gateway locations in
23 Charlotte, North Carolina, Paragraphs D through F.
24 Do you see where I am?

25 A I do.

1 Q What was Mr. Jacobs' interest in each of those?

2 A 50 percent.

3 Q And what did he value each of those locations?

4 A One of them is \$819,000 in round figures. One of
5 them is \$781,000 in round figures. And the other
6 is \$787,000 in round figures.

7 Q So roughly three more locations of Gateway Academy
8 Child Development Centers around \$800,000 each for
9 \$2.4 million; is that correct?

10 A That's correct.

11 Q What about in 2012, as shown on Exhibit 16? It is
12 on Page 5.

13 A Paragraph D?

14 Q Paragraph D.

15 A That interest had decreased from 50 percent to
16 25 percent. And the 25 percent value is valued
17 here at \$795,379.17.

18 Q So for those three locations his interest had
19 dropped 50 percent as well?

20 A That is correct.

21 Q And the value of that drop was from around \$2.4
22 million to \$800,000, so a difference roughly of
23 \$1.6 million; is that correct?

24 A That is correct.

25 Q So just these three transfers, the \$2.8 million,

1 the \$600,000, and the \$1.6 million, that totals
2 more than \$5 million; is that correct?

3 A That's correct, it does.

4 Q Is that more than enough to pay off these loans?

5 A It is more than enough, yes.

6 Q Is this an important case for TD Bank?

7 A It is extremely important.

8 Q Why is that?

9 A Because -- I stated earlier that it is important
10 that when people borrow money they repay the loan.
11 They borrow the money. We give them the money.
12 They agree to pay it back. And, you know, that is
13 how we operate.

14 You know, when you have -- when you are
15 looking at information that shows that someone has
16 the ability, just not the willingness to pay back,
17 that makes it very difficult because we can't lend
18 to other businesses if we can't collect from the
19 people that we made the loans to beforehand.

20 Q Just offhand, how many borrowers or guarantors does
21 the bank have that you work with, with net worths
22 in excess of \$20 million?

23 A None. There may have been one at one time, but it
24 is only one, if there was.

25 Q And how many of them ask for extensions and payment

1 reductions and not paying their property taxes?

2 A None.

3 Q What is TD Bank asking the jury to award?

4 A We're being asked to award -- we're asking that we
5 be awarded -- excuse me -- judgment in this case
6 because the money was borrowed and, you know, the
7 bank expects to get paid.

8 Q And you are asking specifically for judgment
9 against Mr. Jacobs on his Newberry Atrium guarantee
10 and against Mr. Jacobs and Mr. McFarland on their
11 guarantees of the Middle Sound loan?

12 A That's correct.

13 Q Thank you.

14 MR. BEDENBAUGH: No further questions, Your
15 Honor.

16 THE COURT: Mr. Jowers? Cross?

17 MR. JOWERS: One moment, Your Honor.

18 (Pause.)

19 MR. JOWERS: May I approach, Your Honor?

20 THE COURT: Yes, sir.

21 MR. JOWERS: This is the Articles of Merger
22 document. We'll be offering this.

23 MR. BEDENBAUGH: No objection, Your Honor.

24 MR. JOWERS: Your Honor, we offer this into
25 evidence, the merger.

1 THE COURT: Are you going to show the witness?

2 MR. JOWERS: Yes.

3 THE COURT: I have no problem. That will be
4 Exhibit Number 1.

5 (WHEREUPON, Defendant's Exhibit No. 1
6 was marked for identification and
7 received into evidence.)

8 CROSS-EXAMINATION

9 BY MR. JOWERS:

10 Q Mr. Jenkins, I refer you to these Articles of
11 Merger.

12 A Yes, sir.

13 Q And, let's see, we have got Section 7(ii). If you
14 would read that for the jury.

15 A 7, titled, Effects of the Merger?

16 Q 7(ii). Two i's.

17 A Oh, two i's, not 2(i). Okay, gotcha. Let's see
18 here.

19 "The surviving bank shall be liable for
20 all liabilities of the bank, fixed or
21 contingent, including all deposits,
22 accounts, debts, obligations, and
23 contracts thereof, matured or unmatured,
24 whether accrued, absolute, contingent,
25 or otherwise, and whether or not

1 reflected or reserved against on the
2 balance sheet and books of accounts or
3 records thereof and all rights of
4 creditors or obligees and all liens on
5 property of the bank shall be preserved
6 unimpaired."

7 Q And that is the Articles of Merger between Carolina
8 First Bank and TD, or Toronto-Dominion, whatever it
9 is called; is that correct?

10 A Yes, sir. It is TD. That is correct.

11 Q So you will agree that what is now called TD Bank
12 is liable for the acts of Carolina First and that
13 they are essentially one in the same as of this
14 point in time?

15 MR. BEDENBAUGH: Your Honor, we object. It
16 calls for a legal conclusion from the witness.

17 THE COURT: Let him finish the question. Were
18 you finished with the question?

19 MR. JOWERS: Not quite..

20 BY MR. JOWERS:

21 Q So at this time do you believe that Carolina First
22 and TD Bank are one in the same?

23 A Carolina First was merged with TD Bank, so TD Bank
24 is the owner of the loan and the notes and
25 everything of record that was Carolina First is now

1 TD Bank.

2 Q And all the obligations of TD Bank are now the
3 obligations of -- excuse me -- all the obligations
4 of Carolina First are now the obligations of TD
5 Bank?

6 MR. BEDENBAUGH: Same objection, Your Honor,
7 to that question.

8 THE COURT: To the extent that he has
9 knowledge, personal knowledge, he can answer the
10 question.

11 A I can't answer that question because it is not what
12 I do. I'm not that part of the bank that has those
13 decisions to make. And I just -- I can't give an
14 answer on that.

15 Q But you do -- your position has been all day is
16 that what is now called TD Bank is the owner of the
17 note and the guarantee that are the subject of this
18 action; is that correct?

19 A Yes, sir, that is correct.

20 Q Okay. And so any agreements that were part of
21 those documents are owned now by TD Bank?

22 A If you are speaking of any agreement specific to
23 documentation, then, yes, that is correct.

24 Q In your testimony you were referring to the
25 extension agreements that were made between -- or

1 for the Atrium Newberry project and the Wilmington
2 project; is that correct? You referred to, I think
3 it is eight?

4 A Eight for each, correct.

5 Q How many were made before the merger?

6 A I would have to look back. I mean, I can't
7 specifically say.

8 Q Something like seven? Seven of the eight?

9 A Could be.

10 Q Do you have those exhibits in front of you?

11 A Yes, sir, I do, right here.

12 Q Why don't you check them for us?

13 A Are we finished with this?

14 Q Yes, uh-huh.

15 A For the -- I'm sorry, let me back up. Are you
16 speaking specifically about the Newberry Atrium
17 loan?

18 Q That would be Number 1.

19 A Okay. Let me get to the right page here.

20 (Pause.)

21 A It would have been two of the modifications.

22 Q Two -- what's that?

23 A Two of the extensions, modifications. The first
24 one was -- it is dated here May 11 -- or, excuse
25 me, May 10th, 2011, between TD Bank, NA, Newberry

1 and Professional Center. And then the one dated
2 May of 2012 lists or references TD Bank as well.

3 Q So that is two of the eight?

4 A That's correct, yes, sir.

5 Q What about Atrium Middle Sound?

6 A I believe it is two as well, but let me go ahead
7 here and take a look.

8 (Pause.)

9 A Yes, it is two as well. Yes, sir.

10 Q Let me introduce this exhibit. Can you identify
11 this, Mr. Jenkins?

12 A Yes, sir. It is a letter that Mr. Jacobs sent me
13 after we met in 2012.

14 MR. JOWERS: Your Honor, we would like to
15 admit this into evidence.

16 THE COURT: And the Exhibit Number is?

17 MR. JOWERS: Three.

18 THE COURT: Is there any objection?

19 MR. BEDENBAUGH: No objection, Your Honor.

20 THE COURT: Without objection it is admitted,
21 as well as Exhibit Number 1.

22 (WHEREUPON, Defendant's Exhibit No. 3
23 was marked for identification and
24 received into evidence.)

25 BY MR. JOWERS:

1 Q Mr. Jenkins, this letter contains a proposal from
2 Mr. Jacobs. And it is the proposal that you
3 referenced in your earlier testimony, I believe?

4 A Yes, sir.

5 Q All right. Let's read the proposal to make sure we
6 understand what the actual proposal was. And I
7 believe it begins at the bottom of that first page.

8 A Yes, sir. It is:

9 "I propose the following forbearance
10 agreement: The interest rate on the
11 loan should be reduced from 5.5 percent
12 to 3.5 percent per annum, or annually.
13 Adjust the monthly payment based on this
14 new interest rate to \$31,926.67. This
15 is based on amortizing the balance for
16 the 272 months. For six months the
17 monthly payments will be paid to your
18 bank for the 2011 taxes and the 2012
19 taxes. The interest for these six
20 months will be capitalized. The
21 hospital anticipates it may take two to
22 three years to add enough new tenants to
23 stabilize the property. Accordingly, I
24 am requesting a three year renewal."

25 Q So that proposal was for a three year renewal?

- 1 A That was the request, yes.
- 2 Q Okay. Not for some long-term renewal that you
- 3 seemed to indicate earlier; is that correct?
- 4 A I was referring to the payments. The monthly
- 5 payments were calculated on 272 months.
- 6 Q Right.
- 7 A Okay. Which is well beyond what is done in the
- 8 normal course.
- 9 Q Okay. And the payment of the taxes was to be
- 10 capitalized. What do you mean -- what does that
- 11 mean to you?
- 12 A This reads that the request was that the bank pay
- 13 the taxes and then payment comes back from
- 14 Mr. Jacobs over the six months to pay back what the
- 15 bank paid on his behalf, and then the interest for
- 16 these six months will be capitalized, which means
- 17 it is added back to the loan.
- 18 Q Right.
- 19 A You can't capitalize interest on a loan. We don't
- 20 do that. That is a regulatory issue.
- 21 Q But the effect would have been, the bank would have
- 22 gotten its money back; correct?
- 23 A What money?
- 24 Q The money that is advanced for the project?
- 25 A For the taxes.

1 Q Yes. And the whole project if that payout -- if
2 that arrangement had been accepted?

3 A No, sir, not necessarily, and I'll tell you why.
4 Because the hospital is anticipating two or three
5 years to add enough new tenants to stabilize the
6 property. No one here knows if that would or
7 wouldn't happen. Maybe it does or maybe it
8 doesn't.

9 Q Wouldn't you concede that the recession was an
10 unusual occurrence?

11 A Absolutely.

12 Q It hurt Carolina First, didn't it?

13 A I'd say so, yes, sir.

14 Q Carolina First was forced to merge, was it not?

15 A We weren't forced to merge. There was a merger.
16 It was actually TD Bank bought Carolina First. And
17 the merger is actually -- to be clear, the merger
18 is actually when the two companies come together.
19 But it was TD Bank that purchased Carolina First.
20 It wasn't forced by the government. It was -- the
21 merger is simply the day that it happens, that the
22 two become one company.

23 Q Okay. Can you tell me what were the terms of this
24 purchase, then?

25 A TD Bank and Carolina First?

1 Q Yes. You brought the subject up, so -- that you
2 are saying it is not a merger.

3 A Well, the merger is when the two companies come
4 together, like you merge and you put the new
5 signage out. What I'm saying is that it was
6 actually a -- the purchase was what took place.

7 Now, if you are asking me for the details of
8 that, that is way beyond my skill set or pay grade,
9 and I couldn't even begin to tell you because that
10 happens with people a lot more important than
11 myself.

12 Q You were a stockholder in Carolina First, were you
13 not?

14 A Yes, sir, I was.

15 Q Was your stock purchased?

16 A It was.

17 Q Or did you take stock in TD Bank?

18 A Yes, I do have stock in TD Bank, that's correct.

19 Q But was your Carolina First stock purchased by TD
20 Bank, or did you exchange it?

21 A I got so many shares for -- you know, if you have
22 this many shares of Carolina First, you get this
23 many shares of TD Bank.

24 Q Did you lose money on that transaction?

25 A Absolutely.

1 Q So is your testimony that Carolina First was not in
2 any kind of financial difficulties at the time of
3 this, quote, merger?

4 A I'm sure it was, but the details they -- I am not
5 provided with that kind of information. I don't
6 know what it was.

7 Q But this recession was unusual, you will agree with
8 that?

9 A Absolutely, yes, sir.

10 Q And it hurt a lot of people?

11 A Sure.

12 Q And you were a workout officer working with people
13 who were hurt by the recession; is that correct,
14 sir?

15 A I work with all types of people. You know, the two
16 types of people that I work with are folks that
17 can't pay and folks that don't want to pay. So,
18 yes, I deal with all kinds.

19 Q Okay. These two loans were performing at the time
20 you called them, were they not? That is, the
21 monthly payments in the modification agreements
22 were being made on a regular timely basis?

23 A I'd have to look back at the loan history. I can't
24 say whether the payments were current at the time
25 they matured or not.

1 Q You don't deny that they were current, then, you
2 just don't remember?

3 A No, sir. I can't say that they were current
4 without looking at the information. They may or
5 may not have been. I don't know.

6 Q But, again, because of this recession, did your
7 bank work out creative solutions for borrowers who
8 needed assistance?

9 A If the situation warranted -- if it was warranted
10 that a request comes in and then somebody says,
11 Here is what I'm asking the bank to do, we evaluate
12 each scenario with each one that comes in, because
13 they are all unique and different.

14 In some scenarios, yes, you would look at it
15 and say, Okay, this plan makes sense and here is
16 why. And there is others, you look at it and say,
17 This doesn't make any sense, and here is why.

18 Q In your position, did you ever make creative
19 modifications for customers?

20 MR. BEDENBAUGH: Your Honor, we're going to
21 object at this point. May we approach?

22 THE COURT: Yes, sir.

23 (WHEREUPON, a bench conference was held
24 in the presence of the jury but out of
25 the hearing of the jury.)

1 MR. JOWERS: I'm not sure I recall the last
2 question. What was that, Madam Court Reporter?

3 A Creative something or another.

4 Q Did you personally work out any creative solutions
5 for borrowers who were in trouble?

6 A Creative is up to interpretation from one person to
7 another, so I can't say what is creative. We have
8 a set of guidelines in which we have to work
9 within, and whether it falls into creative or not,
10 I just don't -- I don't -- creative is such a
11 broad -- I don't know how to answer that.

12 Q Did you ever lower interest rates for people?

13 A No, sir.

14 Q Never?

15 A I have not personally, no, sir.

16 Q What was the prime interest rate at the time?

17 A I have no idea. I'd have to look it up. I mean,
18 it changes all the time. It hasn't changed
19 recently. But I don't know what it is -- was then,
20 rather.

21 Q What other techniques do you use for working out
22 problem loans?

23 A Let's see here. You have short sales. You have
24 note sales. You have this kind of odd thing for
25 large loans where you -- it hasn't been done

1 lately, but you make - you take one loan and make
2 it two loans. And it is really complicated. I
3 have never done one, but people have. But it is
4 pretty limited because the regulators, since they
5 tell us what to do, there is only so many things we
6 can do.

7 Q You have made numerous comments about the financial
8 statements that you have for Mr. Jacobs.

9 A Yes, sir.

10 Q And for Mr. McFarland. Isn't it a fact that most
11 of the value on those financial statements are real
12 estate holdings?

13 A When you review the statements, it shows the
14 ownership and the different entities. Now, whether
15 that is in an operating business and just the real
16 estate -- I mean, it could be. I can't say that
17 that is all that it is, because it doesn't break it
18 out.

19 Q But those interests do not translate into cash very
20 easily, do they?

21 A I don't know. I don't know if there is a market
22 for it. Because when we look at information on the
23 personal financial statements and someone puts a
24 value out next to it, well, it has value. Because
25 if it didn't have any value, they wouldn't list it

1 on there.

2 Q Those are estimates of value, are they not?

3 A I don't know. I didn't prepare them. I would have
4 to rely on whoever did.

5 Q And you've been in banking 16 years as a commercial
6 loan officer?

7 A Seventeen, yes, sir.

8 Q Seventeen. And you understand real estate, I
9 assume, do you not? Do you understand real estate
10 values?

11 A I do. Yes, I do.

12 Q And you understand that, especially during the
13 period of the recession, was it not difficult to
14 sell real estate?

15 A I can't say, because I didn't have real estate for
16 sale. I mean, everything can be sold, it just
17 depends on, you know, the person selling it and
18 what they are willing to do.

19 Q What about minority interest in real estate
20 holdings or partnerships? Is that easily -- is
21 that a commodity easily converted into cash?

22 A It depends on the situation. I can't answer
23 whether it is or isn't because there is a
24 possibility that it can be easily converted or not.
25 I don't know.

1 Q All right. With respect to the foreclosure that
2 you finally started on the Newberry property --

3 A Yes, sir.

4 Q -- you indicated that Mr. Jacobs hindered that
5 foreclosure.

6 A Yes, sir.

7 Q Exactly how was that hindered?

8 A Well, the bankruptcy, for one thing, it delayed it
9 for a while. It cost the bank a tremendous amount
10 of money to work through that process. And then
11 when it didn't work out, then it was dropped.

12 Q What else did the bank do? How else was the bank
13 hindered in the foreclosure?

14 A I can't recall off the top of my head.

15 Q Isn't it true that now the bank owns the Newberry
16 property?

17 A We are -- yes. Yes. We were the only bidder at
18 the foreclosure sale, that is correct.

19 Q Doesn't the bank have in its files agreements with
20 tenants to honor the leases?

21 A I have not read the leases. I don't know --
22 basically the process in a normal circumstance
23 where you have an office building with tenants in
24 it, you know, all those details are worked out
25 because, you know, the bank is not going to take

1 the building and just kick everybody out. I mean,
2 especially when you have got sensitive information
3 and patient records, and that sort of stuff.

4 Q So I still don't understand why you think the fact
5 that there were tenants in the building delayed
6 your foreclosure action. You testified earlier
7 that that had caused the bank to either hesitate,
8 pause, or delay a foreclosure action. How did that
9 do that?

10 A Well, like I stated before, when you look at the
11 collateral type, and it is collateral for the loan,
12 and the type is a medical office building, because
13 you have sensitive information, you have X-ray
14 machines; you have patient files, you have all of
15 these different aspects in this building. It is
16 not as easy as, say, an office building that has,
17 you know, attorneys in it or, you know, insurance
18 agents or -- I mean, it is a lot different than
19 just a regular office building.

20 Q I thought you just said that the bank would honor
21 the leases, it is not going to kick people out
22 because they are paying the rent?

23 A I don't understand -- I guess I don't understand
24 what you are talking about. You are talking about
25 tenants and leases and why the bank did what they

1 did. I mean, I don't under -- I don't follow.

2 Q What I'm getting at is, you have been saying that
3 you didn't foreclose because it was a medical
4 office building, but on the other hand you stated a
5 few moments ago that you are not going to kick out
6 the tenants. So what -- why was there a delay?

7 A The delay in the foreclosure?

8 Q Uh-huh?

9 A Because when you have someone that provides you
10 with financials that shows they have a net worth of
11 \$20 million and they are asking you to pay their
12 bills and modify their loan, they are asking the
13 bank to take care of their problem. And that is
14 why the foreclosure was delayed, because you have
15 on paper someone that shows the ability, but they
16 just don't have the willingness.

17 Q All right. The bank now owns the building?

18 A In the process of it, yes, sir.

19 Q And it can sell the building for anything it wants;
20 is that not true?

21 A Certainly.

22 Q And if it sells the building for what it is worth,
23 which is probably in the range of \$6 million --

24 MR. BEDENBAUGH: Objection, Your Honor. That
25 is not into evidence.

1 THE COURT: Rephrase the question.

2 BY MR. JOWERS:

3 Q You are familiar with the appraisal that was made
4 by Mr. Wingard, were you not -- or are you not?

5 A I've been told about the appraisal, yes, sir.

6 Q You have seen it, have you not -- haven't you?

7 A I have probably glanced at it, but I haven't read
8 it, you know, cover-to-cover. I have my own
9 appraisal that I ordered which I based my
10 foreclosure bid strategy on. I'm more familiar
11 with that one.

12 Q All right. But the bank can now sell the building
13 for more than it paid and no credit will be given
14 to David Jacobs or anyone else? That would be the
15 bank's money; right?

16 A Well, what you have to keep in mind is what -- your
17 statement is true, that's correct. However, it can
18 also sell it at a loss and cannot expect to get any
19 more money back from Mr. Jacobs either.

20 Q The building is generating income every month; is
21 it not?

22 A Yes, sir, that is correct.

23 Q How much is it generating?

24 A I don't have the numbers in front of me. I get a
25 report, but I can't tell you what they are exactly.

1 I know it was enough for them to pay the property
2 taxes this past year.

3 Q But, again -- I'm trying to get at this -- you are
4 asking today for a judgment for the difference
5 between what you bid at foreclosure and the debt
6 that has been running on this loan; correct?

7 A Absolutely. That's correct.

8 Q And if you sell the building for more than what you
9 bid on it, Mr. Jacobs will not get any credit for
10 that, will he?

11 A But what the bank sells it for is irrelevant.

12 Q Answer the question, please, sir.

13 A If it is a dollar more, yes, that is correct.

14 Q When you were giving numbers to the Court about how
15 much is owed, have you applied all the rent that
16 the bank has been receiving during the pendency of
17 this action?

18 A We have received one payment, that is correct.

19 Q How much was that?

20 A It was either \$240 or \$245,000, that's correct.

21 Q That is reflected on your calculation?

22 A Absolutely.

23 Q Do you know if the receiver has any other funds on
24 hand?

25 A I'm sure that he has some funds in his operating

1 account because there are some repairs that had to
2 be made, and that sort of thing, and he has to pay
3 certain expenses. So I'm sure he does have some
4 money, I just don't know the amount.

5 And to add to that, that was the first payment
6 that we received since the bankruptcy last year.

7 Q But up until the filing of the foreclosure,
8 payments were being made?

9 A Again, I'd have to look. I can't answer that
10 because I just -- I'm not sure.

11 MR. JOWERS: Your Honor, if I may have a
12 moment, please?

13 THE COURT: Yes, sir.

14 (Pause.)

15 MR. JOWERS: Nothing further of this witness,
16 Your Honor.

17 THE COURT: Any cross, Mr. Jordan?

18 MR. JORDAN: May it please the Court?

19 CROSS-EXAMINATION

20 BY MR. JORDAN:

21 Q Mr. Jenkins, this line of questioning will be
22 limited to the Atrium at Middle Sound Land, LLC.

23 A Yes, sir.

24 Q That is what I am interested in, the location. If
25 you would look at Plaintiff's Exhibit Number 5,

- 1 which is a promissory note.
- 2 A Yes, sir.
- 3 Q Okay. Would you characterize this form as a
- 4 uniform document?
- 5 A It is a, what we call, a template document that is
- 6 a standard loan document, yes, sir.
- 7 Q But it is prepared for -- either by or for the
- 8 bank; is that correct?
- 9 A The bank uses this form.
- 10 Q It is the bank's form?
- 11 A Yes, exactly. Yes, sir, that is correct.
- 12 Q Would you also look at Plaintiff's Exhibit Number
- 13 7, the guarantee that Mr. McFarland signed?
- 14 A Yes, sir.
- 15 Q Okay. Also a uniform or standard template?
- 16 A Yes, sir, that's correct.
- 17 Q The bank's form?
- 18 A Yes, sir.
- 19 Q Is there any indication on either one of those
- 20 forms that the document will change or the form --
- 21 wording of the document?
- 22 A Excuse me for a second. I'll have to look through
- 23 it.
- 24 (Pause.)
- 25 A No, sir, it doesn't appear that anything has been

1 changed -- on these copies, that is.

2 Q Wouldn't it be the expectation of the bank that
3 these loan documents would be signed as presented?

4 A What do you mean, signed as presented?

5 Q In other words, they are not negotiated documents,
6 are they?

7 A No, the negotiation takes place before the
8 documents are signed, if there is negotiation, yes,
9 sir.

10 Q So all of the fine print in that document you say
11 was negotiated sometime previously?

12 A Well, you have to come -- when there is a loan, you
13 have to come to an agreement on what the interest
14 rate is and the payments and, you know, all the
15 details of the loan, because you don't go generate
16 these and then change them and then go back again.
17 I mean, that is all worked out ahead of time, or
18 should be.

19 Q You would admit, I'm sure, that there is lot of
20 boilerplate type language in there?

21 A I don't understand. What do you mean?

22 Q Well, boilerplate, for instance, you've got a
23 provision in there of applicable law, you've got a
24 provision in there of waiver of jury trial on some
25 of the documents. Those things are not negotiated

- 1 in advance, are they?
- 2 A They are included in the documents and they are
- 3 signed.
- 4 Q Well, they are included in the documents that the
- 5 bank prepared for the benefit of the bank; isn't
- 6 that correct?
- 7 A Well, a borrower has time to review the documents
- 8 and read through them, and if there is an issue,
- 9 then it is brought up before they are signed.
- 10 Q Okay. But, again, those documents contain a lot of
- 11 wording, a lot of fine print that are not
- 12 negotiated terms, that are negotiated in advance of
- 13 the loan closing; isn't that correct?
- 14 A They can be negotiated.
- 15 Q Well, they can be, but in most cases they are not?
- 16 They are just standard, kind of boilerplate
- 17 legalese, is what I would call it?
- 18 A I mean, yes, there are definitions and words and
- 19 statements in here that are included in a lot of
- 20 the documents, correct.
- 21 Q Okay. Well, on the North Carolina loan, the
- 22 original amount was \$3 million; correct?
- 23 A I'd have to look.
- 24 Q 2004 promissory note?
- 25 A I believe that -- yes, that is correct.

1 Q Exhibit Number 5?

2 A Yes, sir.

3 Q Okay. Now, the purpose of that loan was to acquire
4 and develop the land in Wilmington, North Carolina;
5 correct?

6 A Yes sir, that is correct.

7 Q Do you have any idea that the loan proceeds were
8 used for any other purpose than that one?

9 A To my knowledge, no, sir.

10 Q Okay. No purpose having to do with the State of
11 South Carolina or property in South Carolina, or
12 anything of that nature?

13 A Not to my knowledge.

14 Q Okay. And the loan balance over the period of 2004
15 to 2012 was reduced -- the principal balance was
16 reduced from \$3 million to something just over
17 \$1.3 million; is that correct?

18 A Yes, sir, that is correct.

19 Q All right. And you knew -- the bank knew that the
20 borrower was having difficulty selling property --
21 selling this property; correct?

22 A I mean, I don't know if the borrower was trying to
23 sell the property at the time. They could have
24 been. I mean, I don't know if they were having
25 difficulty because I don't know if they were

1 working to sell it or not.

2 Q But they were struggling to make payments, you were
3 aware of that?

4 A Yes. I was informed of that, yes.

5 Q But they also were servicing the loan to the best
6 of your knowledge, weren't they?

7 A I can't say that the payments were current at the
8 time it matured.

9 Q Okay. But as they obtained renewal of the loan
10 from time to time, the principal balances were not
11 increasing, they were actually decreasing in most
12 of the renewals; isn't that correct?

13 A I would have to look at each individual one to tell
14 you if it decreases or not.

15 Q Okay. But you are not aware of any increase in
16 principal balance? In other words --

17 A No, sir.

18 Q -- there was no inclusion of accrued interest when
19 it got renewed, or anything like that?

20 A No, sir.

21 Q So in most of these renewals it represents a -- in
22 the meantime, there had been some reduction?

23 A There had been through -- as I understand it, the
24 bulk of the payments was through the sale of
25 portions of the property, or development of it.

1 Q Now, the bank is in the business of making loans to
2 make a profit, isn't it?

3 A Yes, sir.

4 Q Okay. And it actually makes loans that are to be
5 paid back in installments, typically monthly
6 installments?

7 A That's correct.

8 Q And interest is added on the loan so when you
9 collect payments a part of the payment is interest
10 and part of it is principal typically?

11 A Typically, yes.

12 Q Okay. All right. When the bank -- when the
13 borrower was encountering difficulty in making
14 payments, why -- well, certainly -- why wasn't the
15 bank willing to let them continue to make payments
16 on an installment basis when it was completely
17 unable to, that they could not make payments on a
18 lump sum payoff basis? Why would it be in the best
19 interest of the bank to say, No, pay us everything
20 or pay us nothing?

21 A When people provide you with information and they
22 tell you one thing that, We can't make payments and
23 we don't have money and we can't do this and we
24 can't do that, but then you look at the financial
25 information, it really is equated to someone

1 wanting the bank to fix their problems because of
2 the conflicting information. I mean, it is -- I
3 don't have any money, but I show all this on paper
4 and here is what I want you to do because I can't
5 do it, but I can't prove to you that I can't pay
6 it. I mean, it is not up to the bank to assume
7 someone else's problem just because they don't want
8 to pay as it shows on paper, the information we're
9 provided with, and that is what we have to rely on.

10 Q So the bank really had no concern whatsoever about
11 the ability to pay; is that a correct statement?

12 A With the information we were provided, it
13 demonstrated that there was the ability.

14 Q Okay. Well, why then wouldn't you allow the
15 borrowers to pay you as they had been paying you
16 historically for, you know, eight years?

17 A Part of the reason is -- you understand how
18 construction loans work and development loans.
19 Okay. But if not, I'll explain it.

20 What you've got is a mortgage on a house is a
21 principal and interest payment, and mortgages can
22 be from 15 to 30 years, because that is how they
23 are set up. That is where they are supposed to be.
24 Car loans, boat loans, five years.

25 For a development loan, the plan is you

1 purchase the property, you develop it or sell
2 pieces of it off.

3 Well, if from the inception of this loan in
4 2004, 10 years later you've got a loan that, you
5 know, by all accounts by now should have been,
6 either the land sold and the debt repaid, or the
7 land sold and if they couldn't repay all the debt,
8 there are some replacement terms, but a loan like
9 this is not one that goes on forever. It is not
10 supposed to. It can't. It goes back to the
11 regulators. If you have a loan classified as this
12 and it is a development loan, it is not supposed to
13 be for 10 or 12 or 15 years. It is not supposed to
14 be.

15 Q Now, are you expecting us to believe that the bank
16 could not renew the loan? Could not roll it over
17 once again?

18 A We could not.

19 Q That is your testimony, the bank could not roll
20 this thing over again? In other words, the
21 regulators say eight is enough?

22 A And the reason we could not is because the people
23 that were asking us to do that could not
24 demonstrate that they couldn't pay. Because they
25 were asked, and we never received the information.

1 All we were told was, We can't, We can't.

2 Q Well, I want you to answer my question about the
3 regulators. Are you telling me that eight is
4 enough and that is the way it works, you just can't
5 do it another time after eight?

6 A I can tell you that eight is more than any other
7 loan that I have ever dealt with as far as numbers
8 of extensions. I have never done eight on any
9 loan.

10 Q Well, obviously Carolina First made six renewals --
11 maybe seven, I can't recall, but six or seven
12 renewals by Carolina First. You were involved and
13 working for Carolina First?

14 A Yes, sir.

15 Q You know, and, again, when TD Bank comes in, they
16 make one renewal for a real short term and think
17 they have done it, they have done the job?

18 A Well, there were two extensions.

19 Q Well, I can only find -- under Exhibit 8 I can only
20 find one.

21 A There were two. Because when that much time passes
22 and nothing has happened, you have got to look at
23 the situation, and then it is a business decision.

24 What is to say that if you gave eight more
25 past the eight you already gave that you would

1 still be in the same spot? And when you have loans
2 like that, it is a loss every day that they sit
3 there, like these have for, you know, two more
4 years. Now it is ten years on this particular one.

5 Q But isn't it the real purpose here of the bank to
6 collect money and to make a profit on their loans?
7 Isn't that the whole purpose of lending money?

8 A That is how banks operate, yes, sir.

9 Q Okay. And after this loan went into default, the
10 interest rate on this loan went from 5 percent to
11 9 percent?

12 A Correct.

13 Q And you are collecting 9 percent on this loan
14 today?

15 A Well, as of today we're not collecting anything.

16 Q Well, you are seeking a judgment which includes
17 interest for the entire period of post-maturity at
18 the rate of 9 percent per annum?

19 A That's correct, because it is in the documents that
20 when you don't pay, or repay, then the default rate
21 is how we try to offset the loss.

22 Q And that particular provision is not in the other
23 loan, is that your testimony too?

24 A I thought we were just talking about this one.

25 Q No, I'm just asking right now. That provision is

1 not something you have discussed in connection with
2 the Newberry loan?

3 A I have not -- that has not been brought up, no,
4 sir.

5 Q Okay. So would you agree with me that there is no
6 bump in the interest rate on the Newberry loan? In
7 other words, the interest rate is 5 and a half
8 percent, and that is what it is?

9 A As we stand, that is the rate, that's correct. And
10 why it is like that, I don't know.

11 Q In the Middle Sound case, the Wilmington, North
12 Carolina case, the interest rate went from
13 5 percent to 9 percent?

14 A Correct, yes, sir.

15 Q And you are accruing interest at 9 percent for a
16 total of \$320 every day on this account?

17 A Yes, sir, that's correct. And every day we're not
18 collecting any payment either.

19 Q But you are suing people that you are convinced
20 have the ability to pay; is that correct?

21 A We're suing people who could not demonstrate that
22 they couldn't pay.

23 Q Okay. But at the end of this game of litigation,
24 you know, if a judgment is entered, do you have any
25 doubt you are going to collect money?

1 A Well, I mean, judgments are, you know, they are
2 good for ten years. And who is to say that someone
3 can't pay in the future? Because they still owe
4 the money.

5 Q But, again, it is going to continue to accrue
6 interest at 9 percent per annum?

7 A Yes, sir.

8 Q Correct? Okay. And in order to continue the
9 churning of this interest, the security for this
10 loan has not been sold?

11 A No, it has not been sold; that is correct.

12 Q So, in other words, the entire principal balance,
13 which could have been reduced by the sale of this
14 property, is remaining as high as it can possibly
15 remain?

16 A Well, see, the -- my explanation to that is, it
17 could have been sold had the guarantors agreed to
18 accept their portion of the repayment and not ask
19 the bank initially, you know, to let them walk
20 away. That was a difficulty, as you well know.
21 Yes, it could have been sold, but it wasn't. It is
22 not that the bank wasn't willing, it was the
23 guarantors weren't willing to address the balance
24 left over after the sale.

25 Q Okay. You also testified that you could have gone

1 through the foreclosure process back in 2012 in
2 North Carolina?

3 A Yes, sir, that's correct.

4 Q And the approximate bid would have been based on a
5 \$420,000 appraisal, plus or minus?

6 A Yes, sir.

7 Q Okay. How much would the bank have bid based on
8 that appraisal?

9 A I'd have to do it on a calculator. It is a little
10 late for me --

11 Q 70 percent of that number? I believe you told me
12 that before?

13 A Yes, sir, it would have been 70 percent of that
14 number, that is correct.

15 Q So approximately \$290,000? Does that sound right?

16 A That sounds about right, yes, sir.

17 Q On a piece of property that is today worth a
18 million dollars? Will you agree to that?

19 A I can't say what it is worth. I can't say that --
20 I'm not an appraiser. I can't say what the value
21 is.

22 Q Do you think that procedure of bidding a property
23 in at \$290,000 would be a fair thing to do to your
24 borrower?

25 A We're talking about two years ago.

1 Q Correct.

2 A I mean, at that time that was the value of the
3 appraisal that an independent third party appraiser
4 provided the bank with. So if we would have done
5 that at that time, that is the -- what we had --
6 would have had to have gone on at that particular
7 point in time. We don't have a choice.

8 Q Why did the bank elect to sue Mr. McFarland here in
9 South Carolina rather than in North Carolina?

10 A I'm not a legal professional. I'd have to refer to
11 my counsel for that. I can't tell you legally. I
12 don't have an answer for that.

13 Q Does TD Bank have branch offices in Wilmington,
14 North Carolina?

15 A Yes, we do.

16 Q Okay. So it would not have been an inconvenience
17 to the bank to bring it in North Carolina had it
18 elected to do so? Is that correct?

19 A Having a branch location doesn't mean it is
20 convenient or inconvenient. I don't -- again, I
21 don't really have an answer for your question about
22 convenience.

23 Q Okay. Wouldn't it have been your expectation that
24 the venue for enforcement of this loan would have
25 been Wilmington, North Carolina?

1 A Again, I don't pick and choose where things happen
2 logistically, legally. I just work at the bank.

3 Q Let's look again at the promissory note, Exhibit 5,
4 Paragraph 18. That has to be the applicable law.
5 And I point out to you that the guarantee, which
6 was Exhibit 7, has the same provision in it at
7 Paragraph 14 in the guarantee.

8 Would you read that provision, please?

9 A It states:

10 "This note is governed by the laws of
11 South Carolina, the United States of
12 America, and to the extent required by
13 the laws of the jurisdiction where the
14 property is located, except to the
15 extent such state laws are preempted by
16 federal law."

17 Q Okay. You would admit that that is not what you
18 would consider a negotiated term, would you?

19 A Yes, sir, that is correct.

20 Q Okay. That is just inserted in there for the
21 benefit of the bank?

22 A Well, yes.

23 Q Okay. All right. And it provides what laws would
24 be applied, okay? Correct? It says South Carolina
25 law will apply. Unless it happens in North

1 Carolina, that law might apply?

2 A It just references South Carolina.

3 Q Okay. But where, if anywhere, in that document
4 does it speak to venue as to where you would bring
5 the suit?

6 A I mean, I -- if you want me to read all the way
7 through it, I will be more than happy to, but I
8 can't tell you --

9 Q Well, let's assume for the sake of brevity here
10 that there is nothing in there about venue, okay?

11 Now, if the bank had the opportunity to
12 prepare these documents and they were smart enough
13 to come up with the applicable law provision,
14 why -- just why not stick it in if they are going
15 to sue in South Carolina versus North Carolina
16 where the property is located?

17 A Are you asking me a question?

18 Q Why not?

19 A I mean, I don't -- I don't get into the formation
20 of documents --

21 Q Okay.

22 A -- with respect to legalese.

23 Q The bank would have the opportunity, had it thought
24 to do so, to put that provision in it?

25 A I can't say what the bank would have done if it had

1 thought about it. I mean, I'm not the bank.

2 Q You certainly know that they had the opportunity if
3 they wanted to since they prepared the documents,
4 wouldn't you?

5 A I can't answer that. I mean, you are asking me to
6 answer something that I'm certainly not an expert
7 in.

8 Q All right. Let me ask you about the guarantee.
9 Does the guarantee have anything to do with real
10 property?

11 A No, sir, it is a personal guarantee of payment from
12 an individual.

13 Q This time flip to the guarantee, Paragraph 14. And
14 I want you to read that same provision again.

15 A That is Exhibit 6?

16 Q That would be Paragraph 14, I believe, applicable
17 law.

18 A No, it is Exhibit 6.

19 Q Oh, Exhibit 7, excuse me.

20 A 7. Okay.

21 (Pause.)

22 A You are correct. It reads exactly like the
23 previous one I read. And I can read it again, but
24 it does say the same thing.

25 Q Okay. Well, why would it provide that the laws of

1 North Carolina may apply, the laws of where some
2 property may, you know, may be, it refers to some
3 property somewhere, why is that in there on a
4 guarantee?

5 A I don't put these documents together. I'm not a
6 legal expert. I can't answer that.

7 Q Your attorney indicated that this is a simple case.
8 Would you agree?

9 A Absolutely.

10 Q Okay. And we are here two years later on a simple
11 case. What has been the holdup?

12 A The holdup for?

13 Q For getting from Point A to where we are today?

14 A With respect to this particular loan?

15 Q This particular litigation?

16 A Well, when they were joined together for the matter
17 of having both actions dealt with at the same time,
18 this is the third time that we have been -- we
19 finally got to trial, because it took two
20 reschedulings and, you know, it took these hearings
21 and court dates. And, I mean, there is a host of
22 reasons that it has taken forever.

23 Q But the bank really didn't care whether it moved
24 along fast or not, did it?

25 A Did the what now?

- 1 Q The bank didn't care? It is getting 9 percent --
- 2 A Oh, we care.
- 3 Q -- per annum on every loan?
- 4 A Because it costs us a lot of money.
- 5 Q Well, why didn't you just proceed non-jury?
- 6 A I can't answer that because I'm -- I don't mean to
- 7 keep repeating myself, but I'm not a lawyer or a
- 8 law professional.
- 9 Q Well, let's look at Exhibit 8, the last document on
- 10 Exhibit 8, which is the only extension agreement I
- 11 see in my notebook here that is signed by TD Bank.
- 12 A If you look at the -- just for clarification. If
- 13 you look at the one before that --
- 14 Q Okay.
- 15 A -- if you look under the Carolina First, it says:
- 16 Carolina First Bank is a trade name of TD Bank.
- 17 And if you go down to the, "At your request TD
- 18 Bank..."
- 19 Q I see it. Okay. Well, on the second one, which is
- 20 the May 2012, I want you to acknowledge for me that
- 21 it does, on Paragraph 2.14, contain a jury waiver?
- 22 A It does.
- 23 Q Okay.
- 24 A But I think that we talked about it the other day
- 25 and no one would agree to it.

1 Q My question to you is, Why are we here on a jury
2 trial basis two years later?

3 A I would have to refer to the legal professionals
4 and the legal system. I don't know. There are
5 several things that I can think of, but all of
6 them, you know, obviously I can't.

7 Q Okay. On the payoff statements -- and I refer
8 specifically to Exhibit Number 9 that has to do
9 with the Middle Sound loan.

10 A Okay.

11 Q There is a line item for miscellaneous fees,
12 \$38,455.72?

13 A It is identified as just fees, yes, sir.

14 Q Okay. At the bottom part of it it has got
15 miscellaneous fees.

16 A In the totals is where it is, yes, sir.

17 Q Do you have any idea what makes up those fees?

18 A I do. I can tell you what I know that is in there,
19 but I can't tell you that it is the only things in
20 there. There are some legal fees in there. And
21 the reason I say some is because they are not
22 inclusive. It is probably pretty close, but I
23 can't say that it is -- that 100 percent of the
24 legal fees are there. I can tell you that there
25 are some appraisal fees, because we have had to get

1 updated appraisals to see what the value of the
2 property is, and that sort of thing. I don't --

3 Q How much did the appraisal fee amount to?

4 A I have no earthly idea. I cannot remember.

5 Q What is the authority for the collection of
6 appraisal fees that the bank claims?

7 A Authority? I don't -- I'm not following you.

8 Q Well, we're dealing with a contract; right?

9 A Uh-huh.

10 Q Okay. It would be in the contract somewhere if you
11 had any authority. What part of the contract
12 refers to appraisal -- the cost of appraisals?

13 A I can't tell you the language, but I can -- if you
14 give me about ten minutes, I can find it. It is
15 located in there. It is like real estate taxes.
16 We can advance for real estate taxes. Appraisal
17 fees. It is for the -- in order to protect the
18 bank's interest and understand the values, you
19 know, that is what the bank does. I mean, we have
20 to -- by regulation, we have to have current
21 appraisals in the file for loans that don't pay and
22 aren't paying to see, you know, where the values
23 are.

24 Q Well, there are a lot of things regulation requires
25 that are not in contracts, not a requirement that

1 the borrower pay for those things, is it? Would
2 you agree with that?

3 A No, they are obligated to pay it, because it is in
4 there.

5 Q I am going to ask your attorneys if they are
6 looking for it to point out anything that they can
7 in the documents that have anything to do with
8 collecting appraisal fees.

9 MR. BEDENBAUGH: Your Honor, I'm not
10 testifying today, unfortunately. I'll be glad to
11 follow up on redirect.

12 MR. JORDAN: Okay. I can't wait to hear that
13 answer then.

14 BY MR. JORDAN:

15 Q Okay. Let me ask you this question too, then. On
16 the principal balance, on Exhibit Number 9 again,
17 you have a principal balance of \$1,279,681.61; is
18 that correct?

19 A Yes, sir, that is correct.

20 Q Okay. Let's look at what is my understanding is
21 the last document, which is the extension, May 7,
22 2012, the last document in Exhibit 8. Okay? Would
23 you agree that is the last document?

24 A The last extension document?

25 Q Yes. Is that the last contract in connection with

1 this loan that was signed by both the bank and the
2 borrower?

3 A I believe so, yes, sir.

4 Q Okay. All right. Would you notice down there what
5 the principal balance is at Paragraph 1.4?

6 A I do.

7 Q Okay. What is that number?

8 A \$1,272,070.50.

9 Q Okay. How -- my question is, how did the principal
10 balance on this loan increase?

11 A The only way a principal balance -- the only thing
12 that I know of that we do and process that
13 increases a principal balance is the advance for
14 payment of real estate taxes.

15 Q Okay. Did that happen in this instance?

16 A I can't say sitting here. I would have to look it
17 up. I don't know. But I'm sure it did.

18 Q Would you think that the advancement of real estate
19 taxes would be limited to the sum of -- it looks
20 like \$7,000?

21 A I have no idea. I can look it up, but I just can't
22 tell you today.

23 Q Okay. But going back to these fees, you do have a
24 breakdown between cost advance and attorney's fees;
25 is that a correct statement?

1 A I don't have it in front of me. I mean, I don't
2 have it.

3 Q Okay. But you know the bank -- the bank has paid
4 some fees; correct?

5 A Yes.

6 Q And whatever they paid included cost advance by
7 your counsel as well as their attorney's fees?

8 A I mean, I'd have to -- I would literally have to
9 sit down and calculate and get all the information
10 to say --

11 Q You know for a fact that the bank paid, in this
12 particular -- on this particular loan, something in
13 excess of \$38,000 for fees and costs to your
14 counsel?

15 A At least. Well, I can't say that is all counsel.
16 I'm sure the majority of it is, but there are some
17 other items in there. But I can't tell you what
18 the total is and I can't tell you that that is all
19 that that fee category is.

20 Q Okay. So you are saying that those miscellaneous
21 fees include something -- potentially includes
22 something other than attorney's fees and cost
23 advance in connection with this litigation?

24 A It could.

25 Q All right. But is it your testimony that if it is

1 shown on this statement that the bank has
2 definitely written a check for it and paid it?

3 A Yes.

4 Q This is not some kind of accrual or something of
5 that nature?

6 A No, sir, it is categorized as fees because it is a
7 fee in some form or fashion.

8 Q Okay. Now, would you have been the person to
9 approve any bills submitted or received from your
10 counsel?

11 A Yes.

12 Q Or would somebody else be doing that?

13 A No, the bills come directly to me and then I have
14 an approval authority on legal bills, and if it is
15 a large dollar amount, then it goes through a chain
16 of people that review it and --

17 Q Now, these billings for attorney's fees, I'm sure
18 the costs are itemized, as they should be -- the
19 billings for attorney's fees, are they itemized on
20 a -- like a -- you know, a per services, you know,
21 like a draft complaint?

22 A It is a date and the person's name who did the work
23 and what they worked on and then each thing is line
24 itemed. It is all broken up.

25 Q Okay. Are you aware what the hourly rate is that

1 your attorneys charge?

2 A Individually? No, I don't.

3 Q The approximate range of the rates that they are
4 charging?

5 A I mean, I can find out, but I don't have that
6 information in front of me, because I deal with a
7 lot of different attorneys.

8 Q All right.

9 MR. JORDAN: That is all the questions I have
10 of this witness.

11 THE COURT: Any redirect?

12 MR. BEDENBAUGH: Very briefly, Your Honor.

13 (Pause.)

14 MR. BEDENBAUGH: Your Honor, may I approach
15 the witness?

16 THE COURT: Yes, sir.

17 (Complies.)

18 REDIRECT EXAMINATION

19 BY MR. BEDENBAUGH:

20 Q Mr. Jenkins, can you take a look at that document
21 for me?

22 A Yes, sir, this is the answer of James A. McFarland,
23 Jr.

24 Q And on the first page of that answer, does it
25 request a jury trial? It should be near the very

- 1 top.
- 2 A Oh, I'm sorry. Yes. Jury trial demanded.
- 3 Q Okay. Who signed that answer, by the way?
- 4 A Leonard R. Jordan, Jr.
- 5 Q How about Mr. Jenkins? Did his attorney request a
- 6 jury trial?
- 7 A Yes.
- 8 Q Now, Mr. Jordan asked you about the bank's interest
- 9 in the these proceedings and wanting to delay. Did
- 10 the bank want to delay getting repaid on these two
- 11 loans from these two gentleman?
- 12 A Absolutely not.
- 13 Q Had the bank instructed its attorneys to move these
- 14 cases along as frequently or quickly as possible?
- 15 A On many occasions, yes, sir.
- 16 Q Did the bank make the decision to put Newberry
- 17 Atrium in bankruptcy?
- 18 A No.
- 19 Q That was pretty costly for the bank, was it not?
- 20 A Very.
- 21 Q Did the bank make the decision to ask the
- 22 bankruptcy judge to prevent itself from suing
- 23 Mr. Jacobs on these guarantees?
- 24 A No, sir.
- 25 Q But the bank won that decision when the bankruptcy

1 judge decided, didn't they?

2 A Yes, we did.

3 Q Now, Mr. Jordan asked you about accruing interest
4 on the loan at 9 and a half percent.

5 Would the bank prefer to accrue interest or
6 get paid yesterday or a year ago?

7 A Accruing interest means nothing more than the
8 interest accumulates. It is not getting -- you are
9 not getting paid. We would rather have been paid a
10 long time before now. Accruing interest doesn't do
11 anything, but the number gets larger and if it
12 doesn't get paid it doesn't really matter.

13 Q The bank would choose payment over accruing
14 interest every time, would it not?

15 A Absolutely.

16 Q Now, Mr. Jowers asked you about the ability of
17 making the payments before the loan was secure.
18 Were these loans actually in default prior to
19 maturity because they failed to pay their property
20 taxes?

21 A Yes, the -- loans have many events of default. One
22 of them is death of a borrower, a grantor, and one
23 of them is payment of property taxes. So non-
24 payment of property taxes is an event of default
25 and the loan is in default at that time.

1 MR. BEDENBAUGH: Your Honor, may I approach?

2 THE COURT: Yes, sir.

3 (Complies.)

4 BY MR. BEDENBAUGH:

5 Q Do you have that exhibit? The letter? You don't
6 have any exhibits?

7 A I don't.

8 THE COURT: What is the number of the exhibit
9 you are looking for?

10 MR. BEDENBAUGH: Your Honor, the letter
11 from -- we didn't get a copy, Your Honor -- the
12 letter from Mr. Jacobs addressed to Mr. Jenkins.

13 A Oh, I'm sorry.

14 MR. JOWERS: Exhibit 3.

15 A It is right here. I'm sorry.

16 BY MR. BEDENBAUGH:

17 Q Thank you. Now, you received the letter -- you
18 received this letter from Mr. Jacobs; is that
19 correct.

20 A Yes, that is correct.

21 Q Now, this letter is dated July 9, 2012; is that
22 correct?

23 A Yes, sir.

24 Q Now, in this letter Mr. Jacobs requests a three
25 year extension; is that correct?

1 A Correct.

2 Q Now, it has been over two years since this letter
3 was written. Has Mr. Jacobs personally made any
4 payments on these loans since then?

5 A No. No, sir.

6 Q Now, Mr. Jacobs, during this two year period when,
7 according to this letter and Mr. Jowers, the bank's
8 problems would have been solved if they would have
9 granted just one more extension.

10 Was Mr. Jacobs able to market this property
11 for sale during the whole two year period?

12 A Yes. The property could have been marketed at any
13 time up until the recent foreclosure sale.

14 Q And, to your knowledge, did he ever receive any
15 offers for the property during that time?

16 A If he did, they were never presented to the bank
17 for the bank to consider.

18 Q And the foreclosure sale of Newberry Atrium, that
19 was a public sale after advertisement; is that
20 correct?

21 A That is correct.

22 Q If somebody wanted to pay more than the bank, they
23 could have shown up and bid at that time, could
24 they not?

25 A Yes, they could have.

1 Q Mr. McFarland's counsel asked you about the bank
2 bidding \$290,000 based on the \$400,000 appraisal
3 that was in the file in 2012. That never happened,
4 did it?

5 A No, it did not.

6 Q In fact, the bank chose not to foreclose at that
7 time, did they not?

8 A That's correct.

9 Q And, because of that, the Defendant got a
10 million-dollar offer on the property, didn't they?

11 A Yes, they did.

12 Q And they wouldn't let that go through unless they
13 walked, would they?

14 A That's correct.

15 Q The financial statements that Mr. Jowers asked you
16 about, minority interest, was it the bank that
17 drafted those financial statements or did they come
18 from Mr. Jacobs and Mr. McFarland?

19 A They were presented to the bank from the guarantor.
20 We do not draft or help with people's personal
21 financial information.

22 Q Mr. Jowers asked you about the value of minority
23 interest, but who put the value on those documents?

24 A Whomever prepared the documents. Presumably the
25 guarantors.

1 Q Now, minority real estate interest, somebody's
2 interest -- Mr. Jacobs owned 50 percent at one
3 time, did he not?

4 A Correct.

5 Q And it is only because he transferred 25 percent,
6 some share of his interest to his wife and his
7 trust. That is why he was a minority shareholder,
8 is it not?

9 A That's correct.

10 Q When somebody says they are worth \$42 million, what
11 does the bank think they are worth?

12 A \$42 million.

13 MR. BEDENBAUGH: Thank you, Your Honor. No
14 further questions.

15 THE COURT: You may step down.

16 THE WITNESS: Oh, thank you.

17 THE COURT: Please leave any exhibits there on
18 the desk.

19 THE WITNESS: The notebook and the --

20 THE COURT: Yes, sir.

21 THE WITNESS: Okay. Thank you.

22 (Witness steps down.)

23 THE COURT: Ladies and gentlemen, this time
24 would be a good time to break for the evening.

25 I am going to remind you of the instructions I

1 have given to you; that is, not to begin to discuss
2 this matter among yourselves as you still haven't
3 heard all the evidence that has to be presented.

4 Please remember as you come and go from the
5 courthouse not to listen to conversation that you
6 may hear in the hallway, again, for the reasons
7 that you have to make your decisions based upon the
8 evidence that you hear in this courtroom and should
9 not be based upon conversation that you may
10 overhear as you come and go.

11 Please remember also not to allow anyone to
12 approach you to discuss this matter. If someone
13 attempts to discuss this case with you, please tell
14 them that you are a juror and that you cannot
15 discuss it. And I ask that you report it as soon
16 as possible.

17 Additionally, ladies and gentlemen, I will ask
18 that you follow some additional instructions.
19 First of all, I'll ask that you not engage in any
20 independent research or investigation about any of
21 the matters that you have heard discussed
22 throughout the course of this trial. That is not
23 evidence in this case.

24 And to the extent that you may have access to
25 either computers or persons, individuals, or books,

1 or other sources of information in order for you to
2 answer whatever questions you may have, I ask that
3 you not engage in that conduct. It is
4 inappropriate. It is not evidence that you may
5 consider in reaching your verdict in this
6 particular case. And you should just not engage in
7 that conduct at all.

8 Additionally, ladies and gentlemen, I know
9 that your family and friends will want to know what
10 you are doing on jury duty this week since you have
11 been called. Certainly you can tell them that you
12 are a juror in the case and it involves a
13 collection on a debt, but I ask that you not
14 discuss what you have seen any further.

15 The reason I say that is because even though
16 they are family and friends, they may ask some
17 questions, they may make comments to you. All that
18 has the potential to affect how you view the
19 evidence. And while they are not a stranger that
20 comes up to you and talks to you about this case,
21 it has the same effect, that they inject into your
22 mind and into your consideration information or
23 questions that are not proper for you to consider
24 outside the discussion that you have with your
25 fellow jurors and outside of the information that

1 is presented to you in this courtroom.

2 So please tell them that I have asked you not
3 to discuss it with them. Certainly when you have
4 reached a verdict in this case you will be free at
5 that time to discuss with them whatever you have
6 heard or seen during this trial. And please tell
7 them that I asked that you not do that.

8 Ladies and gentlemen, I'm going to ask that
9 you report to the same jury room where you reported
10 after lunch, up here on the third floor. You will
11 report at 9:30 tomorrow morning.

12 When you have all assembled at 9:30, then we
13 will be ready to continue on with the trial of this
14 matter.

15 You will have to go through downstairs and
16 have them scan your badges, but please do not stay
17 downstairs on the first floor, come upstairs to the
18 third floor and come down the hallway and be
19 assembled in that jury room.

20 And I hope that you have a pleasant evening
21 this evening. And we will see you tomorrow morning
22 at 9:30.

23 Thank you.

24 (WHEREUPON, the jury is excused at 5:33
25 p.m.)

1 THE COURT: Is there anything we need to take
2 up before we adjourn for the evening?

3 MR. BEDENBAUGH: Nothing from the Plaintiff,
4 Your Honor.

5 MR. JOWERS: Nothing from the Defendants.

6 THE COURT: I will ask to the extent that you
7 have any requests to charge that you produce those
8 to me tomorrow morning before we begin so that I'll
9 have a chance to review them throughout the course
10 of the day before we get to that particular point
11 where we will have the charge conference.

12 And if there is nothing further, then I will
13 see you all tomorrow morning at 9:30.

14 Thank you.

15 MR. BEDENBAUGH: Thank you, Your Honor.

16 MR. JOWERS: Thank you, Your Honor.

17 MR. JORDAN: Thank you.

18 (WHEREUPON, court adjourned for the
19 evening at 5:34 p.m.)

20 OCTOBER 7, 2014

21 THE COURT: Good morning, everyone. Be
22 seated, please. Is there anything we need to take
23 up before we bring the jury in?

24 MR. COLLINS: Your Honor, if it may please the
25 Court? I have one question. The jury charges were

1 submitted just a few minutes ago, and I noticed the
2 Defendant McFarland's counsel has submitted charges
3 basically going to attorney's fees. And it appears
4 that his position may be attorney's fees should
5 come in in the case in chief rather than by
6 affidavit and a hearing in front of the Court to
7 the extent TD Bank prevails. And I have never had
8 a case where attorney's fees were submitted to the
9 jury. That has generally been done after the fact
10 where an attorney can get put under oath if
11 necessary and take the testimony if the attorney's
12 fees are challenged.

13 I don't know if the Court has a position on
14 that at this point, but we would, if possible,
15 would like a ruling on that before we end up
16 getting, you know, our case in chief finished.

17 I don't know how the Court normally does that.
18 We have fee affidavits prepared. To the extent the
19 jury found for TD Bank, we would expect a hearing
20 from the Court after the fact on attorney's fees,
21 or they can be challenged by the Defendants,
22 obviously, and the attorneys get put on the stand
23 if necessary.

24 THE COURT: I have generally not had them -- I
25 am trying to think if I ever had a case where the

1 attorney's fees portion went to the jury. I can't
2 think of one.

3 MR. JORDAN: Your Honor, let me respond to
4 that, if you would. The attorney's fees are
5 clearly not liquidated damages. They are damages
6 that are a result of the evidence that is
7 presented. And here we are in court. And the
8 trier of the facts is the jury. The Court is not
9 the trier of the facts with regard to anything.

10 And the matter of attorney's fees and the
11 amount of attorney's fees is not an issue of the
12 law, it is factual based, and it is based on the
13 evidence presented by the parties that are
14 requesting attorney's fees.

15 In this case, you know, whatever the
16 attorney's fees are requested by the Plaintiffs,
17 they are subject to testimony and proof as to what
18 is an appropriate attorney's fee based on all the
19 six factors in the Marietta case that is required
20 to be considered as part of the decision in the
21 case.

22 And, you know, I don't think it would be
23 appropriate for the Court to accept an affidavit
24 after the fact of attorney's fees that, you know,
25 are not subject to, you know, a possibility of

1 cross-examination before the jury.

2 MR. COLLINS: Could I briefly respond, Your
3 Honor?

4 THE COURT: Yes, sir.

5 MR. COLLINS: I just think under our equitable
6 rules and the South Carolina law, attorneys are
7 only entitled to reasonable attorney's fees anyway.
8 And I think the only thing we have to prove in our
9 case in chief, which has already been testified to,
10 is that under the contracts TD Bank is entitled to
11 a reasonable attorney fee. And I think it is up to
12 the Court to determine what a reasonable attorney
13 fee is. At least that is the way I have done it in
14 every state and federal court I have been in. I
15 have never had that submitted to the jury. I think
16 it would require an attorney to take the stand to
17 testify to the reasonableness of his fee, or her
18 fee. And I don't think that is appropriate.

19 MR. JORDAN: Your Honor, reasonableness is
20 certainly in the area of the decision that the jury
21 makes. The jury makes the decision on what is
22 reasonable, not the Court.

23 And in this particular case, if there is a
24 testimony of what the reasonableness is, it would
25 not be the attorneys that are submitting their

1 affidavit or submitting testimony with regard to
2 their bills. They can't testify as to
3 reasonableness. It would take an expert witness,
4 actually. And of course the precipice of this case
5 would require an outside attorney to actually
6 testify as to what the reasonable rate of an hourly
7 rate is in establishing a fair and reasonable
8 attorney's fee.

9 And if they are prepared to do that, then I'm
10 certainly prepared to listen to and cross-examine
11 that testimony. But, again, reasonableness is a
12 concept that, you know, applies to the facts of the
13 case and certainly in the purview of the jury to
14 make that decision after listening to the evidence.

15 THE COURT: I'll consider the matter and I'll
16 get back with you.

17 Anything else?

18 MR. COLLINS: No, Your Honor. Thank you.

19 MR. JOWERS: No, Your Honor.

20 MR. JORDAN: Thank you.

21 THE COURT: You can ask the jury to come in,
22 please.

23 (WHEREUPON, the jury came into open
24 court at 9:44 a.m.)

25 THE BAILIFF: Your Honor, the jury is present.

1 THE COURT: Good morning, ladies and
2 gentlemen.

3 THE JURY: Good morning.

4 THE COURT: We are ready to continue on.
5 You may call your next witness.

6 MR. COLLINS: Thank you, Your Honor.

7 TD Bank would like to call David Jacobs to the
8 stand.

9 (Witness approaches.)

10 THE BAILIFF: Place your left hand on the
11 Bible, and raise your right hand, please.

12 (Witness complies.)

13 THE CLERK: Do you swear or affirm the
14 testimony you shall give in this case will be the
15 truth, the whole truth, and nothing but the truth,
16 so help you God?

17 THE WITNESS: I do.

18 THE CLERK: Thank you. Please have a seat in
19 the witness stand.

20 (Witness complies.)

21 THE CLERK: And state your full name for the
22 record.

23 THE WITNESS: Thank you. I'm David Jacobs.

24 DAVID JACOBS,
25 after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

Q Good morning, Mr. Jacobs. How are you doing this morning?

You are currently the president of Atrium Development?

A Yes, I am.

Q Okay. You have been the president for about 25 years?

A Yes.

Q And have you been in commercial real estate development about 35 years?

A About that, yes.

Q Okay. And under the Atrium Development Company, you have developed 10 to 12 office buildings?

A Yes.

Q And you have also developed about 20 to 22 daycare facilities under the Gateway name?

A Yes.

Q And for all of those developments you have gotten construction loans from banks?

A Yes, I have.

Q And all of those construction loans required you to sign a personal guarantee?

A Not all of them in the early days, but, yes, in the

1 later days, that's correct.

2 Q So you are well aware of the obligations under a
3 personal guarantee; correct?

4 A Yes, I am. And it really is a matter of -- when
5 you sign a personal guarantee -- previously I would
6 sign personal guarantees with partners that were
7 invested in it. This is the first guarantee that I
8 was ever required to sign on this Newberry Atrium
9 building.

10 And the reason I did that, even because -- the
11 hospital and the doctors owned about half of the
12 building -- the reason I did that, because of the
13 years of experience that I have had with Carolina
14 First and the team that I had worked with for 12,
15 14 years. So I knew who I was dealing with. I
16 knew the team. I knew the way that they approached
17 business. And I knew that they were reasonable
18 people, flexible people. And they had been part of
19 my team for, you know, 12 years, working together,
20 guiding me, helping me understand the positive, the
21 negatives about each transaction.

22 And I know, more importantly, that they had
23 been dealing with me fairly. They had done things
24 that most banks never have done. They have been
25 advising me, counseling me, getting involved in

1 projects early on. So they really understand the
2 dynamics of every project that I was involved in.

3 So I felt confident that signing the guarantee
4 with the team that I was involved with was a
5 reasonable approach, because over the years they
6 had worked with me and advised me on how to protect
7 the bank, the project, and everybody involved. So
8 I expected fair treatment from them. And they have
9 demonstrated that over the years, so --

10 Q You are not suggesting that you signed this
11 personal guarantee thinking Carolina First would
12 never sue you if you didn't repay the loan, are
13 you?

14 A No. But I knew that working with the Carolina
15 First team, that had become part of my team for the
16 last -- the previous 12 years, that they would work
17 with me, be flexible to the point that when we had
18 problems, which you usually do in a construction
19 project that would span multiple years, that were
20 reasonable and understood the objective of the game
21 was to make a project successful and get paid back.

22 Q And you got eight extensions on these loans before
23 anybody sued you to get paid; correct?

24 A And that, again, demonstrated the flexibility, the
25 opportunity to work with a team that understood the

1 project, had done work on this, even before they
2 were given the opportunity to fund this thing.
3 This was a process that wasn't a one-shot deal.
4 This was over 12 years where we had worked
5 together. And they had demonstrated to me that
6 when there is a opportunity to make things better,
7 we would work together to do that. And that is why
8 I signed a guarantee with these people.

9 This is the first time that I have ever signed
10 a personal guarantee on my own. And I would not
11 have done it with another bank. I mean, and never
12 have previously.

13 So my confidence in the flexibility, my
14 confidence in their reasonableness, and my
15 confidence in them giving me an opportunity to work
16 to improve buildings and the project was the sole
17 reason that I did this.

18 Q And you testified at a deposition that Carolina
19 First was squeezing you harder and harder to do
20 these extensions, didn't you?

21 A They weren't squeezing me harder. What they were
22 doing was asking for a way in which we could extend
23 loans, make payments, reduce the principal amount,
24 which we negotiated and agreed to time and time
25 again.

1 Over the term of the loan we agreed, mutually
2 agreed, what was possible and what was not
3 possible.

4 And, accordingly, over the term of the loan, I
5 was able through a reasonable negotiation to raise
6 a million and a half dollars to reduce the
7 principal of this loan in order for the right to
8 continue to go forward.

9 They were just as interested in this project
10 being a success, and demonstrated that by working
11 together to make it a reasonable approach to solve
12 the problems. And we had many problems, which I'd
13 be happy to share with you at the appropriate time
14 if you are ready. But they recognized every
15 problem that we were facing in this transition.

16 Q And my question was, Did you testify that Carolina
17 First modified these loans seven or eight times and
18 they kept squeezing you harder and harder to get
19 paid? Isn't that what you testified to?

20 A Squeezing I guess is an acronym of really what we
21 were going through. They were squeezing one way, I
22 was working the other way, and we ultimately agreed
23 that these were reasonable approaches in which to
24 get the loans modified, to get loans extended in
25 order to ensure the success of the project.

1 Q But as you sit here today, you are not testifying
2 that you expected never to be sued if you didn't
3 pay these loans, are you?

4 A I expected the continued flexibility and the
5 assistance of the team that I had worked with for
6 15 years.

7 Q Okay. Because you got eight extensions; correct?

8 A And that demonstrates their flexibility.

9 Q And you are angry because you didn't get a ninth
10 extension; correct?

11 A No, that is not at all what I'm angry about. I'm
12 angry about when TD Bank took over Carolina First,
13 they basically didn't take the time or the interest
14 to understand anything about the loan, the history,
15 the issues, the problems we were facing.

16 I had the opportunity to meet -- when Carolina
17 First sold, I had maybe three or four months, I
18 can't recall, before all the team that I had worked
19 with -- and they were part of my team -- I had
20 worked with them for many years, and they were very
21 sensitive to the issues going on. And we were
22 in -- we finished this building -- we started in
23 '07. We finished this building in '08, mid '08.
24 And within -- we opened the building with
25 60 percent occupants. It was a very, very great

1 accomplishment that we had completed this building
2 and moved approximately 60 percent of the building
3 tenants in, which were hospitals and doctors, who
4 owned a part of this building. This was part of
5 what the hospital had requested of me is to
6 structure a way in which the doctors and the
7 hospital would be able to own a part in this
8 building.

9 And working with Carolina First, the team,
10 over two years, we structured a deal that the
11 hospital, the physicians, and the bank was happy to
12 accommodate the tenants and the hospital.

13 And we moved forward on that basis of
14 cooperation, of understanding, and the opportunity
15 to work with people that understand the players and
16 understood the dynamics of each individual project.

17 MR. COLLINS: Your Honor, may I approach? I
18 will ask a question about our exhibits.

19 THE COURT: Yes, sir.

20 (Complies.)

21 BY MR. COLLINS:

22 Q Let's talk about your financial condition when TD
23 Bank merged with Carolina First. If I can get you
24 to look at Exhibit 13. Excuse me, if you could
25 look at Exhibit 12. I think that is your financial

- 1 statement from 2004.
- 2 A Okay.
- 3 Q When you first took out the Newberry -- or, excuse
4 me -- Atrium at Middle Sound loan in 2004, you had
5 submitted a financial statement to Carolina First
6 showing your net worth to be \$36 million; correct?
- 7 A Correct.
- 8 Q Okay. Turn to Exhibit 13. That is a financial
9 statement from July 1st, 2008?
- 10 A Yes.
- 11 Q You submitted this financial statement to Carolina
12 First showing a net worth of \$42 million; correct?
- 13 A Yes.
- 14 Q Okay. Now, March -- if you will look at Exhibit
15 14.
- 16 A Okay.
- 17 Q Now, this financial statement was submitted to
18 Carolina First to get an extension on these loans;
19 correct?
- 20 A Yes.
- 21 Q And it showed a net worth of \$38 million; correct?
- 22 A Yes.
- 23 Q Okay. Now, if we look at Exhibit 15, a financial
24 statement, January 31st, 2011; correct?
- 25 A Yes.

1 Q Okay. And this is when TD Bank took over the
2 loans; correct?

3 A Actually, the bank, I think, was sold in '10, and I
4 continued to deal with the small team in '11. That
5 is how I originally worked with the Carolina First
6 team.

7 Q The first extension from TD Bank was in 2011;
8 correct?

9 A The extension was Carolina First/TD Bank, so it was
10 Carolina First still operating as Carolina First
11 and it was owned by TD Bank. Not until we got into
12 '12 did I really have any contact with any TD Bank
13 personnel. After the fail in '10, I really was
14 left without any contact but for one episode. When
15 we got into '12, that is when all the people that I
16 had worked with as a team member for all these
17 years basically had left the bank, and I was left
18 really rudderless knowing who to communicate in the
19 TD Bank management team.

20 Q Let me ask if you will turn to Exhibit 3. That
21 will be the second to the last document in that
22 pack. And it is going to be a loan modification
23 agreement. And it is dated May 10, 2011. Tell me
24 when you get there.

25 A Okay.

1 Q Now, this document is a year extension from TD Bank
2 to Newberry Atrium; correct?

3 A Yes.

4 Q That is 2011; correct?

5 A Yes.

6 Q If I can also get you to turn to Exhibit 8. Excuse
7 me, simply go to Exhibit 5.

8 A Okay.

9 Q That is also a renewal notice of 2011 from TD Bank;
10 correct?

11 A Yes.

12 Q Okay. So back to my question again. In 2011, it
13 was TD Bank that gave you an extension on both
14 loans; correct?

15 A That is what it says, yes.

16 Q Okay. Now, if we go back to your financial
17 statement in 2011, which is Exhibit 15. Now, this
18 financial statement was submitted to TD Bank as
19 part of the request for an extension; correct?

20 A Yes.

21 Q And it showed you a net worth of \$30 million
22 roughly?

23 A Yes.

24 Q Okay. And that was -- in 2011 you had lost
25 basically \$12 million in net worth from 2008;

1 correct?

2 A Yes.

3 Q Okay. And roughly \$8 million in 2009; correct?

4 A Yes.

5 Q Okay. Now, if we turn to Page 6 on this financial
6 statement. Tell me when you get there.

7 A Okay.

8 Q You have two pieces of property -- or more than two
9 pieces, but there is two I want to ask you about.

10 The first one is a piece of property that looks
11 like 6133 Lakeshore Drive. Do you see that?

12 A Yes.

13 Q Okay. And that is your residence?

14 A Yes.

15 Q Okay. And it shows a market value of \$1.4 million?

16 A That is what it says, yes.

17 Q Okay. And it showed a mortgage of roughly
18 \$400,000?

19 A Yes.

20 Q So you basically had a million dollars in equity in
21 the home as of 2011; correct?

22 A Yes, but --

23 Q Okay.

24 A Yes. Okay.

25 Q Just look at the next piece of property at 129

1 Grand Pavilion, Isle of Palms. Do you see that?

2 A Yes.

3 Q And that is your beach house; correct?

4 A Yes.

5 Q And that showed a market value of \$1.5 million;
6 correct?

7 A Yes.

8 Q And a mortgage of roughly \$400,000?

9 A Yes.

10 Q So, again, that is about \$1.1 million in equity
11 that showed on your 2011 financial statement;
12 correct?

13 A Yes.

14 Q Okay. Now, if we look at your 2012 financial
15 statement, that was also submitted to TD Bank as
16 part of another extension request; correct?

17 A Yes.

18 Q Okay. I think that is Exhibit 16. And it shows a
19 net worth of roughly \$20 million; correct?

20 A Yes, but there are also other footnotes here that
21 have to be noted. I mean, there are -- I mean, you
22 just can't look at the \$20 million and say, He has
23 got \$20 million in cash in order to pay any
24 obligation. When you --

25 Q Financial statements don't show cash, do they?

1 A Yes, they do.

2 Q I mean, financial statements are submitted to show
3 what your net worth is so the bank can rely on them
4 in giving an extension or loan; correct?

5 A Banks look at financial statements from a liquidity
6 point, how much cash do you have, how much assets
7 do you have. I mean, it is not just one figure. I
8 mean, every banker -- Mr. Jenkins knows this, he's
9 been in banking for 17 years -- I mean, they just
10 don't look at the net worth. They want to
11 understand what makes up the net worth. And
12 liquidity -- cash -- is a very important part of
13 this. But you also want to look at the other
14 aspects of what makes up a net worth.

15 And when you look at -- and the bankers that
16 are in the industry, they don't just look at one
17 number, they analyze each and every number they had
18 done over the years and ask me questions about
19 every aspect of it.

20 Now, during this time, from 2009, '10, '11, I
21 had been using every dollar that I had in order to
22 carry the Newberry building, to carry Middle Sound.

23 And you will look at the notes receivable how
24 much money I put into these. I mean, it wasn't a
25 matter of willingness. I willingly paid every

1 dollar of cash I had to support and pay to keep
2 everything current during a very difficult time
3 that started, really, in -- at the end of 2008,
4 '09, '10. And it just kept declining. Every one
5 of the real estate projects that I was involved
6 with was hemorrhaging. There was no market for
7 real estate. Banks were not lending on acquisition
8 of real estate or you couldn't sell anything. You
9 couldn't borrow against them.

10 But I was able to work through the remaining
11 assets that I had and use all cash. I raised more
12 cash, sold, liquidated, did what I had to do to
13 keep the bank paid and current, which I did all the
14 way through until they came to basically the end
15 when TD Bank took over.

16 But let me point out something. Most of this
17 net worth is really -- if you look at the
18 footnotes. Let's just look at some of the things
19 that a banker will look at.

20 I mean, you look at the notes receivable. I
21 mean, that certainly is an asset. But when you
22 look at -- I put money into multiple projects to
23 keep the bank current, to keep them paid, to keep
24 everything operating, all with the optimistic view
25 that I was going to be able to work it out as I had

1 over the last 30 years. I worked problems out,
2 working with the bank in a flexible manner.

3 Q And the banks are also going to look at assets that
4 are missing off the later financial statements that
5 were on an earlier financial statement; correct?

6 A And I used those assets in order to raise cash.

7 Q Well, let me ask you. We just talked about two
8 homes, a beach home and a lake home that were on
9 the 2011 financial statement.

10 A Right.

11 Q They are not on the 2012 financial statement, are
12 they?

13 A No. They were financed out because my wife had the
14 ability to get financing, which I did not. This is
15 what -- this action has basically damaged me,
16 damaged the project.

17 Q Mr. Jacobs?

18 A Yes?

19 Q This action wasn't filed in 2012 when you
20 transferred those homes to your wife, was it?

21 A It was in pendency. I knew I had to raise cash in
22 order to keep the building going. I knew that the
23 tenants during this recession were not forthcoming.
24 It was a very difficult time. I had no recourse
25 but to try and raise cash in order to keep the

1 buildings afloat.

2 Q Let me ask you. In 2011 you have two homes that
3 are listed at roughly \$2.1 million in equity?

4 A Uh-huh.

5 Q And you did not do anything to try to get that
6 equity out to pay those loans, did you?

7 A Oh, I did that. I did. That is exactly what I
8 did.

9 Q By transferring the homes to your wife?

10 A She was the only one that could sign on a note. I
11 could not.

12 Q And so you -- it is your testimony that you paid
13 \$2.1 million to TD Bank on these notes in 2012?

14 A No. It is my testimony that if you look at all the
15 funds that I put -- look at Note 6 -- and look at
16 that I put in \$8,900,000 of cash into various real
17 estate projects. I did everything I could to raise
18 cash. And that was part of it. I mean, that
19 was -- those homes had nothing to do with the
20 \$8,900,000 that I put into save -- to keep these
21 projects afloat.

22 Q You don't think that was going to concern TD Bank
23 when you are asking for a ninth extension and two
24 homes that had over \$2 million in equity are all of
25 a sudden off a 2012 financial statement?

1 A My concern was more that they were looking to keep
2 the payments current, had to do upfit for the
3 tenants. I mean, those are the things that would
4 jeopardize the project. They were looking at what
5 real estate is here or there. I mean, as
6 Mr. Jenkins has failed to note when he was looking
7 at these financials, what makes up the net worth,
8 and when you have \$8,900,000 of notes due that you
9 put in -- I mean, I basically leveraged everything
10 I had up. I sold everything that I could in order
11 to get the cash to keep everything moving forward.

12 Q In 35 years of experience, you understand legally
13 your financial statement submitted to a bank has to
14 be accurate; correct?

15 A Yes, I do.

16 Q Okay. So when you submitted this in 2012 and said
17 that your net worth was \$20 million, it was
18 \$20 million; correct?

19 A Yes. But when you look at the elements that make
20 up that net worth and when you have basically
21 \$9 million in cash that you put in the projects to
22 keep the bank happy and to pay the bills, that has
23 something to do with it.

24 When you look at the different assets that I
25 own, which are real estate, basically they were all

1 owned in partnerships. And in order to raise cash
2 in all these, I had to sell to other partners that
3 would be interested in buying it, because as a
4 minority owner in the real estate, I have no option
5 to sell this. They had no market for it. There
6 was no way that I could get cash. So I did
7 everything I could to honor my commitment.

8 And when Mr. Jenkins says, you know, These
9 gentlemen, they were wealthy. We were wealthy. We
10 had worked hard for 30 years and made some good
11 money. We did a lot of good things with this
12 money. But during the interim and during the
13 recession, things changed. It was a life-changing
14 experience for all of us, the banks included, but
15 personally us mainstream folks.

16 Q Well, and you were also transferring assets to your
17 wife and two daughters; correct?

18 A No. I sold -- not sold, but I transferred the
19 real -- the two homes to my wife in order so we
20 could raise cash to get out from under some of the
21 obligations I had to the bank.

22 Q And you also transferred millions of dollars to
23 your wife and children; correct?

24 A No. What I had to do is get new funds for the
25 Gateway project. I had multiple Gateway projects

1 that had loans coming up. They required my wife to
2 sign on the documents.

3 MR. COLLINS: May I approach, Your Honor?

4 THE COURT: Yes, sir.

5 (Complies.)

6 BY MR. COLLINS:

7 Q Can I get you to turn to Page 29?

8 MR. JOWERS: Do you have one for us?

9 MR. COLLINS: Yes. I apologize.

10 (Pause.)

11 BY MR. COLLINS:

12 Q If I can get you to turn to Line 2 on Page 29?

13 A Yes.

14 Q And Mr. Bedenbaugh asked you a question at your
15 deposition when you were under oath. And the
16 question was:

17 Did you gift or transfer a portion of the cash
18 obtained from the financing to any relative or
19 entity?

20 What was your question -- or answer, excuse
21 me?

22 A Did you gift or transfer a portion of the cash
23 obtained from the financing to any relative or
24 entity?

25 And I said: My family.

1 And here is what is going on.

2 Q Let me ask you. The next question was: Do you
3 know how much you gifted?

4 And what was your answer on Line 8?

5 A A couple of million dollars.

6 Q And so my question earlier was, You transferred
7 millions of dollars to your wife and daughters?

8 You did, in fact, do that, didn't you?

9 A Well, there are circumstances of why you do that.
10 I was in a partnership with a partner in Gateway
11 and several other partnerships. My Gateway partner
12 had become very, very sick. Life-threatening sick.
13 I too had been very sick during that time.

14 My wife had been my partner for 40 years. And
15 in the environment that we were living, she had no
16 support, no backup. She needed some type of
17 ability to survive in case something happened to
18 me.

19 I had -- and my partner had just come through
20 a very -- not come through, he passed away
21 unfortunately -- and I too was very sick during
22 that time.

23 And she deserved an opportunity to have a
24 fallback in case something happened to me
25 physically and business-wise. But it didn't

1 diminish the ability for me to pay and meet my
2 obligations as they came due.

3 Q Okay. And another occasion you also transferred
4 hundreds of thousands of dollars to your wife and
5 two daughters; correct?

6 A I transferred money to her from her portion of the
7 ownership of the entities that she had to sign on
8 to get a loan.

9 Q And if you look at your 2011 financial statement,
10 Exhibit 15, again, Page 3, the first time you asked
11 for an extension from TD Bank -- if I can get you
12 to look at the general partnership, ownership under
13 the Section B, Gateway Properties. You owned
14 50 percent in 2011 with a value of roughly \$5.4
15 million; correct?

16 A Yes.

17 Q Okay. And then right under that, the Gateway
18 Colorado -- that is 2011 when you first approached
19 TD Bank -- you had a 37.5 percent interest, valued
20 at \$1.1 million; correct?

21 A Yes.

22 Q Now, the second time you approached TD Bank back in
23 2012, your ownership in the Gateway Properties had
24 dropped to 25 percent; correct?

25 A Yes, but understand --

1 Q Yes or no?

2 A Understand the circumstances in which we are going
3 on. I had loans coming due. I could not sign on
4 the renewals -- I'm sorry, on the new financing. I
5 had to get new financing. I could not sign on it.
6 The only person that could sign on it was my wife.
7 I had -- basically had difficult times during this
8 real estate recession, and I could not continue to
9 meet my obligation. And so we had to raise money
10 to refinance. And that is what we did. And my
11 wife Peggy had to take the obligation.

12 Q So my question is, in 2012, 25 percent of your
13 ownership in Gateway Properties had been
14 transferred to your wife and kids again; correct?

15 A In order to -- to my wife -- in order to be able to
16 get funding that would raise cash to meet my
17 obligations for all these other projects that I was
18 involved in, to the tune of about \$8.9 million that
19 I put in to keep these facilities going.

20 Q And your general partnership or ownership in the
21 Gateway Colorado was also split in half, you gave
22 that to your wife and children as well; correct?

23 A Again, as part of the transaction in order to be
24 able to raise cash.

25 Q And it was based on all of this information. TD

1 Bank then denied your request in 2012 for a further
2 extension; correct?

3 A I still do not know to this day why they denied it,
4 but I will tell you my assumption.

5 Over the years that I have been working with
6 Carolina First, we had always worked together.
7 They understood where my resources were. They had
8 guided me on how to structure the deals, how to
9 fight the deal. They were a part of the team.
10 They got involved in my development activities even
11 before there was a deal, even before they had the
12 chance to look at a financing proposal. They
13 wanted to look at every deal that I had had the
14 opportunity to be part of. And they wanted to look
15 early. And during -- Newberry, in particular. But
16 USC -- I mean, I was involved in developing a Child
17 Development Center for the University of South
18 Carolina. And Carolina First wanted to be part of
19 that. And they spent a year and a half working
20 with me, looking at the site, understanding the
21 dynamics of the tenancy, they looked at what the
22 design was going to be, who the players were, and
23 they guided me and advised me during this process.
24 And, ultimately, when the financing opportunity
25 came and the university said, We'd like to go

1 forward with this, certainly Carolina First and my
2 partners on that team were ready and interested
3 because they had guided me to make this deal, as a
4 very satisfactory deal for all parties.

5 Q Mr. Jacobs, when Carolina First began their
6 renewal, you weren't transferring millions of
7 dollars of assets to your family, were you?

8 A But during --

9 Q That occurred in 2011 when TD Bank got involved;
10 right?

11 A This is in the midst of the recession. I was --

12 Q Is that a yes?

13 A What I'm telling you is, there are circumstances
14 that required I had to raise cash. It wasn't a
15 matter of unwillingness to pay everybody's
16 obligation, I just had to have the ability. And I
17 was losing my cash in order to try and support all
18 these various projects that I was involved in.
19 There was a reason for it. And that was the
20 reason.

21 Q And I am going to have to work backwards now. If
22 you could look at Exhibit 1 and just tell me if
23 that is the promissory note between Carolina First
24 and Newberry Atrium?

25 A Yes.

1 Q Okay. Is that your signature on Page 4?

2 A Actually, if we're looking at Exhibit -- I'm sorry.

3 Yes, it is.

4 Q Okay. And you initialed Pages 1 through 3 of this
5 document?

6 A Yes, I did.

7 Q And if you look at Exhibit 2, is that the
8 unconditional guarantee you signed?

9 A Yes, it is.

10 Q To secure the note?

11 A But, again, understand the circumstances in which I
12 was signing this. I knew the time that I was
13 working with. I knew their hands-on approach to
14 dealing with these projects. We had done multiple
15 projects together. And they always, always were a
16 group of people that wanted to be part of the team
17 and they wanted to be ensuring a success on these
18 projects. And that is what I -- I was working with
19 people. Yes, these are documents that say I owe
20 the money. And I intend to pay the money. And I
21 made a proposal to the bank over and over again.
22 And over and over again we worked together to get
23 it done.

24 Once the recession hit and all the various
25 problems with Atrium Newberry became evident, this

1 was part of our discussion. This was part of
2 understanding what we were trying to do and the
3 intent of all parties. The bank, the owners, the
4 hospital were intent on making it possible to
5 continue to make this as successful as it could be
6 in a very difficult time.

7 And when I say difficult time, I'm not just
8 speaking about the recession. Yes, that froze up
9 the home market. But during the same time, this
10 was a healthcare facility. And a healthcare
11 facility is really contingent on being able to
12 deliver services to the public. And Newberry
13 Hospital had approached me several years earlier to
14 build a project like this in '05. And in '05 I had
15 just completed with Carolina First Irmo Medical
16 Center, which was located in the Irmo area.
17 Carolina First was involved in that project. And
18 it was a very successful project. And it was again
19 because of what Carolina First did to assist me and
20 advise me through the whole process. We had
21 problems. We had problems with every one of these
22 projects. It was -- there has never been smooth
23 sailing in real estate. And the bank, Carolina
24 First team, was always there to assist to get us
25 into a position that would work for all parties.

1 That was the MO that we had worked with for all
2 these years. And that is why I continued to go
3 back to Carolina First, because they were team
4 members. They were partners in this. They were
5 going to ensure and negotiate and find flexibility
6 in how to preserve and make a project successful.

7 Q I know you keep saying that, but, again, Carolina
8 First -- it wasn't until 2011 when TD Bank got
9 involved that you started million-dollar transfers
10 to your wife and kids. Carolina First didn't have
11 to deal with that, did it?

12 A Carolina First was -- in 2011. I was still dealing
13 with a few of the Carolina First team.

14 Q Okay. The extensions were from TD Bank in 2011.
15 We established that earlier, did we not?

16 A But I was dealing with people that I knew and
17 trusted at that point, so it -- yes, the name had
18 changed, but the attitude had not. And that is the
19 difference.

20 When TD got involved and I reached out to the
21 TD people now that all the Carolina First people
22 were gone, I didn't even know where to go. From
23 2000 -- I guess it was for about a year and a half,
24 I really didn't have much contact with any of the
25 new TD regime because everybody had gone at that

1 time.

2 When the extension came up, I reached out. I
3 tried to find who I could deal with at TD Bank in
4 order to put in a plan for the next needed
5 extension.

6 We were in a point where healthcare was
7 basically in a deep freeze. The economy was in a
8 deep freeze. We were facing multiple problems at
9 that time. The CEO of Newberry Hospital, after 15
10 years, who had spearheaded this project, had come
11 to me and said, We want a building similar to what
12 has been done in Irmo.

13 I basically worked with the bank, worked with
14 Carolina First over about two years to make sure
15 that we had a transaction that everybody was
16 comfortable with.

17 So the team that I had dealt with, the team
18 that had given me the respect, the consideration of
19 being a long-term and a profitable client, had
20 basically left. And I was left with one
21 representative from TD Bank, which I found was a
22 gentleman in Greenville. And I communicated with
23 him. I gave him the history on the project. It
24 was tough to give a history on a project that was
25 run through all the years that this project has run

1 and not have a sense of what had caused these
2 issues between the recession and the healthcare
3 freeze-up. The executive team at the hospital who
4 was responsible, including doctors and including
5 the surgical team. All that. And those years
6 basically started to unwind, from '09, '10, '11,
7 things were very, very difficult in the healthcare
8 field, and particularly in the world of
9 construction and finance.

10 Q But that doesn't answer the question. The money
11 that could have been used to pay TD Bank down on
12 these notes you were transferring to your family.
13 And you are not acknowledging that TD Bank based
14 its decision in part on that fact. Carolina First
15 didn't have to deal with that, did it?

16 A Carolina First did deal with that. We dealt with
17 it. I reduced the loan by a million and a half
18 dollars by doing the things that I indicated. I
19 was --

20 Q But it did not reduce the loan with TD Bank is my
21 point?

22 A Oh, but it did. It did. It was a \$7,100,000 loan.
23 It was less than -- it was about \$5,800,000 when
24 all this stuff happened. I had reduced it over a
25 million and a half.

1 But in addition to that, we had obligations on
2 the Middle Sound Land. We had borrowed \$3 million
3 over the course of the years, again because of
4 recession, because of the lack of financing. We
5 had to continue to pay that loan. And we did. We
6 paid all these loans timely and up to the time that
7 they -- TD Bank called the loan in and denied.

8 Q Newberry Atrium had been sold at a tax sale in
9 2012; correct?

10 A And I had a proposal in which to work that out. At
11 the end of the day I raised the money and paid the
12 taxes off. I paid out both 2011 and 2012 taxes. I
13 paid it. And I have receipts to show that I paid
14 it. The bank didn't pay it, I paid it. I paid the
15 obligations up until the loan was called. And I
16 got a letter in August 29th of '09 that, We're
17 coming after you, Mr. Jacobs, and we're basically
18 going to destroy you.

19 It basically says, We're suing you on your
20 personal guarantee. And by suing me on my personal
21 guarantee, that left me basically no place to turn.
22 I had no cash. And the bank -- if the loan
23 officer, or the workout officer, Mr. Jenkins, had
24 taken time and looked at these financial
25 statements, he would have seen clearly that my cash

1 had been put into these buildings.

2 Q And transferred to family members; correct?

3 A In order to get new financing in order to raise
4 cash, that is what I had to do.

5 Q If I could get you -- maybe without looking at the
6 documents. You admit you signed both notes for
7 Newberry Atrium and Atrium Middle Sound?

8 A I did. And I did under the understanding that I
9 was working with a team that understood the project
10 was flexible and would do what it took to preserve
11 and make the project a success.

12 Q And you also admitted you signed the note and
13 guarantee, or, excuse me, the guarantees on both
14 Newberry Atrium and Atrium at Middle Sound?

15 A I did, under the same circumstances.

16 Q And you admit that under the notes and guarantees,
17 TD Bank can sue you personally on the guarantees?

18 A That's what I have been told, and it is wrong.

19 Q Okay.

20 A Because it is -- it is just wrong. I mean, the
21 objective of the game is to make a project a
22 success. And in order to sue somebody on the
23 guarantee, it basically closes the doors for you
24 having any ability to work the project out and
25 finance it out.

1 Q Can I get you to look at Exhibit 2? Just for the
2 sake of the jury, could you read Paragraph 1 on
3 Page 1?

4 A Paragraph 2?

5 Q Exhibit 2, Paragraph 1.

6 A Okay. "Whereas, Newberry Professional Center...

7 Q No, I'm sorry. Paragraph 1. It is marked as
8 Paragraph 1.

9 A Okay.

10 This guarantee is and shall remain
11 unconditional and continuing guarantee
12 of payment and not of collection.
13 Guarantor hereby expressly waives all
14 right to require lender to bring any
15 action against the borrower or any other
16 person, requires that if you have any
17 security or balances to be paid with any
18 deposit other than the account debit or
19 credit on the books of the lender in
20 favor of the borrower or any other
21 person. Guarantor acknowledges that the
22 guaranteed liability and obligations
23 hereunder are primary rather than
24 secondary. Without limit...:

25 Q You can stop there. So under the documents you

1 signed, the bank, Carolina First and TD Bank, has
2 the right to sue you under the guarantee if you
3 don't pay the loans; correct?

4 A They --

5 Q Yes or no?

6 A They have a right, but in the business sense, there
7 is no business reason for suing on this.

8 If you look at the financial statement and you
9 said, This guy basically has paid all he could pay
10 to keep these projects moving.

11 And you look at it and you see I have, you
12 know, several thousand dollars left in cash and I
13 have real estate interests that are basically
14 minority interests in many different interests in
15 many different real estates.

16 How was I going to pay \$6 million, \$5.8
17 million in cash when I was struggling to pay the
18 taxes? But I was doing it when I was struggling to
19 pay all the loan payments on a timely basis, which
20 I was doing. When this loan was called, everything
21 had been paid timely.

22 Now, I did raise the money in order to pay the
23 taxes, which basically, I had basically been wiped
24 out of cash during this process and was asking for
25 some assistance to preserve this, modest adjustment

1 to the renewal.

2 But there was no negotiation. No discussion.
3 It was basically, We're going to cut you off, cut
4 you at the knees, and we are going to come get you
5 and just bury you so you can't do anything in this
6 marketplace.

7 Q After eight extensions? After extensions; correct?

8 A After eight extensions. And I had basically -- I
9 mean, during the eight extensions we had gone
10 through reducing the loan by a million and a half
11 dollars. We had improved the operations and saved
12 money. We had paid down almost \$3 million on the
13 Newberry Middle Sound. I had saved the assets, the
14 other real estate property to the tune of
15 \$8.9 million in cash so I could continue to
16 operate.

17 And during this whole time I had to work with
18 other banks throughout this whole process, banks
19 that I had very little dealings. No -- no
20 experience with. But every one of the banks
21 through this recession had worked with me
22 successfully. I didn't have the relationship. I
23 didn't have the team members like I had in Carolina
24 First. But Carolina First always worked with me
25 and gave me the extensions and understood how we

1 were going to work this out.

2 When TD Bank got involved, there was no
3 discussion. I had three letters between
4 Mr. Jenkins and myself. Nine days later, without
5 even a discussion, a phone call, a drop-dead
6 how-are-you, the attorneys send me a letter, We're
7 suing you, and it is over with.

8 Q Mr. Jacobs, I don't want to bore the jury or the
9 Court going back over that TD Bank gave you an
10 extension in 2011 -- you seem to want to forget
11 that -- and only get to 2012. But they gave you an
12 extension in 2011; correct?

13 A It was a 90-day extension, I believe. I mean, the
14 the last extension was a 90-day extension. The
15 last extension.

16 Now, the one previously when I was dealing
17 with the Carolina First gave me time in order to
18 try and stabilize the building and continue to make
19 the payments.

20 The last extension was for 90 days. And the
21 discussion was the original TD banker out of
22 Greenville, a guy named Eric. He said, We're going
23 to work through this. You just -- you sign this
24 note. Give us 90 days to work through this. And
25 we will absolutely find a way to help you get

1 through this thing.

2 Within a month and a half, Eric was gone. I
3 was now dealing with Mr. Jenkins, who wouldn't give
4 me the time of day.

5 Q Can I ask you to go back to Exhibit 3, second to
6 last document. It is called loan modification
7 agreement.

8 A Okay.

9 Q Isn't that a loan modification agreement dated May
10 10, 2011?

11 A It is.

12 Q TD Bank and Newberry Atrium?

13 A Yes.

14 Q Okay. TD Bank gave you an extension in 2011;
15 correct?

16 A Yes.

17 Q Okay. You were seeking a second extension from TD
18 Bank in 2012?

19 A Yes. Now, this extension was made with the
20 remainder -- the last person that I knew at
21 Carolina First, who was a part of the team that had
22 originated.

23 Now, after he was gone, everybody basically
24 had left Carolina First, I wasn't dealing with
25 anybody that knew me, knew the history, knew the

1 project, and basically knew the successes that I
2 had achieved for the projects and on behalf of the
3 bank.

4 Q I don't know that I ever got an answer to my
5 question when we went over the language of the
6 unconditional guarantee. You will at least agree
7 with me, according to the document you signed, TD
8 Bank can sue you personally on the guarantee
9 without taking any other action; correct? Yes or
10 no?

11 A For what business reason would they do that? And,
12 yes, they can. But what business reason did that
13 serve? They knew I didn't have any cash. They
14 knew I had been successful in working through these
15 problems through the years. And, yes -- what help
16 did that give the bank, other than basically
17 damaging the project, basically ending my real
18 estate career? What benefit did that serve?

19 Q Well, there had been a lot of transfer of assets
20 between 2011, the first extension, and 2012, the
21 request for the second extension; correct?

22 A There was a lot of cash -- a lot of cash that had
23 to be raised to keep everybody paid and paid
24 timely.

25 Q Is that a yes?

1 A Yes. I had to raise a lot of cash, which you see
2 on my financial statement.

3 MR. COLLINS: I don't have any further
4 questions, Judge. Thank you.

5 THE COURT: Any questions at this time?

6 MR. JOWERS: Can I reserve my questions until
7 our direct examination, Your Honor?

8 THE COURT: Yes, sir.

9 MR. JOWERS: I'll do that.

10 THE COURT: You may step down.

11 (Witness steps down.)

12 THE COURT: Call your next witness.

13 MR. COLLINS: Yes, Your Honor. James
14 McFarland.

15 (Witness approaches.)

16 THE BAILIFF: Place your left hand on the
17 Bible, and raise your right hand, please.

18 (Witness complies.)

19 THE CLERK: Do you swear or affirm the
20 testimony you shall give in this case will be the
21 truth, the whole truth, and nothing but the truth,
22 so help you God?

23 THE WITNESS: I do.

24 THE CLERK: Thank you. Have a seat in the
25 witness stand.

1 (Witness complies.)

2 THE CLERK: State your full name for the
3 record, and please spell your last name.

4 THE WITNESS: Okay. James Arthur McFarland,
5 Jr. And M-C-F-A-R-L-A-N-D is the spelling.

6 JAMES A. MCFARLAND, JR.,
7 after being duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. COLLINS:

10 Q Good morning, Mr. McFarland. Could you please tell
11 the jury your current occupation?

12 A Well, I guess I'm still a developer. I'm not sure.

13 Q How long have you been a commercial developer?

14 A Well, I've been in the commercial real estate
15 business for 28 years. I have been a developer for
16 probably 18 years, I guess.

17 Q And since 2007, you have had various ownership
18 interest in developmental properties?

19 A Sure. Yes.

20 Q And in 2008 you had a net worth of roughly
21 \$20 million?

22 A Yes.

23 Q An that was submitted to the bank in support of --

24 A Uh-huh.

25 Q -- getting these loans?

- 1 A Yes. As the bank instructed me to do, yes.
- 2 Q Okay. And in 2010 when you were getting extensions
3 you had a net worth of roughly \$21 million?
- 4 A Yes. All in real estate. Yes.
- 5 Q And it was based on that net worth is the reason
6 you would be able to get these loans and develop
7 properties; correct?
- 8 A Well, that and the value of the projects we were
9 doing.
- 10 Q And you had to sign personal guarantees on these
11 developmental --
- 12 A Yes, sir.
- 13 Q -- or construction loans?
- 14 A Yes, sir.
- 15 Q Okay. That wasn't uncommon for you, was it?
- 16 A No. I didn't have to do it on all of them, but
17 most.
- 18 Q Okay. Now, on the Atrium at Middle Sound loan, you
19 were a 50 percent owner of that?
- 20 A Yes.
- 21 Q And the other 50 percent was owned by Mr. Jacobs?
- 22 A Yes.
- 23 Q Okay. And if we -- the Atrium at Middle Sound
24 loan, I guess it was in 2004; is that right?
- 25 A Roughly, yes. Yes, April of 2004, right.

1 Q And the note I guess originally became due in 2006?

2 A If you say so. I don't know that off the top of my
3 head. But, yes, I guess.

4 Q Now, that note was extended multiple times by the
5 bank?

6 A Yes.

7 Q Was it eight times it was extended?

8 A I don't know. You have said that a number of times
9 and we have agreed with it. I'm not sure.

10 Q Okay. And the last renewal note by TD Bank was in
11 2011; correct?

12 A Right, yes.

13 Q And you then sought an additional extension in
14 2012; correct?

15 A Yes.

16 Q And TD Bank denied that extension; correct?

17 A Yes.

18 Q Now, if you will look at Exhibit 5.

19 A This one?

20 Q Yes, sir. Is that the renewal promissory note for
21 the Atrium at Middle Sound loan?

22 A Yes, I believe it is.

23 Q Okay. And that is your signature on Page 4?

24 A Yes, sir.

25 Q Okay. And if you look at Exhibit 7, is that the

1 personal guarantee securing this note?

2 A Yes, sir, it looks like it. Yes, sir.

3 Q And you don't dispute today that the note has
4 matured and is due and owing; correct?

5 A No, huh-uh, I don't dispute it.

6 Q And you don't dispute that you are indebted to TD
7 Bank on the personal guarantee, do you?

8 A No, but I always assumed it was in combination with
9 the other property, which goes to the foreclosure
10 issue.

11 Q And if we look at the document, you would agree
12 with me that TD Bank didn't have any obligation to
13 foreclose before suing you on the personal
14 guarantee; correct?

15 A Oh, I believe they do, but the documents don't say
16 that, right.

17 Q The documents give TD Bank the right to do what
18 they are doing; correct?

19 A Yes, uh-huh.

20 MR. COLLINS: I don't have any further
21 questions, Judge. Thank you.

22 MR. JORDAN: Your Honor, I would like to
23 reserve this witness until the Defendant's case is
24 called.

25 THE COURT: You may step down.

1 (Witness steps down.)

2 THE COURT: You may call your next witness.

3 MR. COLLINS: We don't have any further
4 witnesses, we don't think. There may be a matter
5 we need to take up with the Court outside the
6 presence of the jury before we rest.

7 THE COURT: At this time, ladies and
8 gentlemen, let's take a break.

9 I'll ask that you remember not to discuss this
10 matter among yourselves because you still haven't
11 heard all the evidence.

12 Let's take a break, and then we will come back
13 and continue on.

14 (WHEREUPON, the jury retires to the jury
15 room at 10:37 a.m.)

16 THE COURT: Is there anything we need to take
17 up before we take a break?

18 MR. COLLINS: The only issue we have, Judge --
19 I mean, we can take a break and take it up
20 before -- is the attorney fees. Before we rest we
21 need to know whether we need to put up a witness on
22 the attorney fees.

23 THE COURT: There is case law that addresses
24 the issue, so I am about to go and read that. So
25 let's take a break, and then we will come back.

1 MR. COLLINS: Thank you, Judge.

2 (WHEREUPON, a break was taken.)

3 THE COURT: Regarding the issue of attorney
4 fees, I have found several cases. One is Read
5 Phosphate Company versus Jenkins, 120 S.C. 337, 113
6 S.E. 317. It is a 1922 case from the Supreme
7 Court. It is an action upon a note.

8 The note contained a provision for reasonable
9 attorney's fees not to exceed 10 percent. The
10 complaint alleged that the fee was reasonable. The
11 Defense stated that it was unreasonable. And the
12 Court -- the Trial Court granted the attorney's
13 fees in the amount of 10 percent. And the
14 Defendant appealed.

15 In the appeal the Defendant said the answer
16 raised an issue of fact as to what would be a
17 reasonable attorney's fee which should have been
18 submitted to a jury.

19 The Court stated that whether the provision
20 for attorney's fees is for a definite percentage or
21 expressed in indefinite terms as in the case at bar
22 for reasonable attorney's fees, the Court has the
23 power to determine what that amount should be.

24 There is also another 1922 case, Bank of
25 Enoree v. Yarborough, 120 S.C. 385, 113 S.E. 313.

1 An action by the bank against various Defendants to
2 recover on a note.

3 The Supreme Court basically said that:

4 "There may arise cases where the right
5 to recover attorney's fees at all may
6 depend upon certain issues of fact which
7 involve that right. In law cases, such
8 issues should be submitted to the jury,
9 but in all cases, law and equity, in
10 which there is no dispute as to the
11 facts as to whether or not the
12 attorney's fees should be required and
13 the only issue is as to the reasonable
14 amount of the fee, that becomes a
15 question of law to be determined by the
16 Court, either with or without expert
17 testimony, and with or without the
18 assistance of the jury, as the Court may
19 desire, controlled of course by appeal
20 to the Court."

21 Both of these cases were cited in Federal
22 Deposit Insurance Corporation versus Aroneck. It
23 is A-R-O-N-E-C-K. 643 F.2d 164(1981). It is a
24 United States Fourth Circuit case involving a South
25 Carolina case.

1 The promissory note provided for reasonable
2 attorney's fees and all other costs and expenses
3 incurred in the collection of the note should be
4 added to the amount due and collected. And that is
5 a provision for the promissory note provided.

6 The District Court awards a fee representing
7 10 percent of the principal. The FDIC complained
8 and appealed because it thought that the award was
9 arbitrary given the fact that there was an
10 affidavit which talked about the complexity of the
11 case. And I guess -- I presume that the amount of
12 attorney's fees was much higher. They were. The
13 legal fees incurred were \$12,000. And the fee the
14 District Court awarded was \$3,000 and some change.

15 The Fourth Circuit started looking to the law
16 of South Carolina. We find that the award of
17 reasonable attorney's fees is considered to present
18 questions of law to be determined by the Court, not
19 a factual dispute to be submitted to a jury.

20 And it cites the Bank of Enoree and Read
21 Phosphate cases.

22 And then in Seabrook Property Owners'
23 Association versus Berger, 365 S.C. 234, it is
24 a 2005 Court of Appeals case where the Trial Court
25 awarded attorney's fees based upon an affidavit

1 that was submitted without live testimony.

2 Relating to those attorney fees, the Court
3 says: I think the restrictive covenants authorize
4 the payment of attorney fees. And the Court of
5 Appeals said: Where there is a contract, the award
6 of attorney's fees is left to the discretion of the
7 trial judge and will not be disturbed unless there
8 is an abuse of discretion shown.

9 And it went on to indicate that there was no
10 requirement that an attorney testify or that there
11 be any testimony relating to the attorney fees.
12 And that it was appropriate for the Court to make
13 an award based upon affidavits that were presented.

14 So based upon the case law, it appears that
15 the reasonableness of the fee is not submitted to
16 the jury, but it is a question of law to be decided
17 by the Court. And it can be done without testimony
18 presented by live witnesses, expert or otherwise.

19 Any other questions?

20 Any other motions at this point?

21 MR. BEDENBAUGH: None from the Plaintiff, Your
22 Honor. We would rest at this time and preserve our
23 rights to put forth affidavit or other evidence as
24 to the attorney's fees issue if the jury finds that
25 the bank is entitled to enforce the agreement.

1 MR. COLLINS: Judge, we would also like to
2 argue a directed verdict motion.

3 THE COURT: Yes, sir?

4 MR. COLLINS: May it please the Court, Your
5 Honor? I will try to be very brief. I understand
6 the Plaintiff, TD Bank, just rested. The Defendant
7 has reserved their right to put on a case. But we
8 believe under these facts, no matter what the
9 Defendants say, no reasonable jury can find for the
10 Defendants in this case.

11 I don't want to belabor the point. These are
12 breach of guarantee cases. And I understand Your
13 Honor has heard the testimony. Guarantees are
14 contracts just like any other contract to be
15 construed by what the parties' intent was.

16 I think the testimony very clearly from TD
17 Bank, from Mr. McFarland, and Mr. Jacobs, it is
18 uncontested that the contracts allow TD Bank to do
19 exactly what it is doing today. It can sue on the
20 personal guarantees regardless of pursuing any
21 other remedy.

22 We think that is well supported under South
23 Carolina law. There are cases very clearly that
24 say as long as the guarantees allow for it, a bank
25 or any other creditor can sue on the personal

1 guarantees regardless of any other collateral.

2 So the only thing the Defendants have done is
3 they have come in and said, Well, there is a breach
4 of the duty of good faith and fair dealing.

5 Again, under South Carolina law, there can be
6 no breach of the duty of good faith and fair
7 dealing if you are doing exactly what the contract
8 says you can do.

9 And it is uncontested that TD Bank today is
10 doing exactly what the contract -- they have
11 allowed us to do. The Defendants don't like it. I
12 think the Defendants testified they would like
13 another extension. They think it is unfair. But
14 at the end of the day it is uncontested that the
15 guarantee that they admittedly signed allow TD Bank
16 to do exactly what it is doing.

17 We think under South Carolina law as well,
18 when you talk about a breach of fiduciary duty, two
19 issues there. One, you don't have any duty to tell
20 a person what a contract says if they have ability
21 to read it themselves. I think it is very clear
22 that both of these contracts allow TD Bank to sue
23 on the guarantees. And, again, that is
24 uncontested. And there has been no testimony that
25 for some reason they couldn't read it or they

1 weren't told that.

2 And so if we look at the evidence that we
3 have, both Mr. McFarland and Mr. Jacobs have
4 admitted signing the guarantees, that the
5 principals did not pay the debt, that the debt is
6 owed.

7 The only issue is that they believe they have
8 been treated unfairly. The testimony is they were
9 given eight extensions on both loans. And really
10 the gist of it is they wanted a ninth.

11 The testimony again is uncontested, TD Bank
12 comes in in 2011 and gives them a year extension.
13 So they come in and give the eighth extension, but
14 between the eighth extension and the request for a
15 ninth extension, you have transfers of assets, a
16 substantial loss of net worth. And we believe as a
17 matter of the law it is unquestionably reasonable
18 at that point not to extend any further.

19 Mr. Jenkins testified this is the longest he
20 has ever seen a loan extended. I mean, this is a
21 construction loan that is supposed to last for two
22 years. Then you are supposed to get permitted and
23 financing. That it is how this works. It was
24 extended eight times.

25 And we believe under the uncontested evidence,

1 no matter what the Defendants want to say, that
2 they both testified in TD Bank's case in chief,
3 they submitted the documents, they laid out what
4 their belief is on the unfairness, and we believe
5 as a matter of law, under South Carolina law, the
6 jury, or no reasonable jury, could find that TD
7 Bank did anything other than act reasonably under
8 the circumstances. It had a right to do what it
9 did. And it is entitled to judgment for the unpaid
10 balance on both notes.

11 And we would ask for a directed verdict on
12 that basis, Your Honor.

13 THE COURT: Any response? Mr. Jowers?

14 MR. JORDAN: Your Honor, on the motion for
15 summary judgment, the Defendants haven't even put
16 up their case and they are seeking judgment against
17 the Defendants already. I mean, they have had a
18 motion in front of the judge, but that was denied.
19 It is certainly not appropriate at this stage to
20 raise that again. The Defendants should be allowed
21 to present their case. And that is what we here to
22 do today.

23 THE COURT: Well -- yes, sir?

24 MR. JOWERS: Your Honor, I agree with
25 Mr. Jordan. We have not had our opportunity to be

1 fully heard. There was a motion for summary
2 judgment in these cases. That was heard. And it
3 was ruled on. There was a motion to reconsider.
4 And that was ruled on. So we're at least entitled
5 to have our day in court with an opportunity to be
6 heard and present our case. They can renew their
7 motion at a later time, but I think it is patently
8 unfair to make this motion at this point because,
9 as he said, it is simply a motion for summary
10 judgment.

11 There are -- and we will flesh this out in our
12 direct testimony -- that there are exceptions to
13 the rules that Mr. Collins has stated about
14 enforcing documents.

15 If there is a special relationship between the
16 parties, between a bank and its depositor, there
17 are cases to that effect. And those were cited in
18 the previous brief submitted to the Court in the
19 motion for summary judgment when the argument
20 began.

21 But, again, we believe we are entitled to be
22 heard. And the motion in limine that was made was
23 essentially trying to tear the defenses out of this
24 case. And that was denied.

25 THE COURT: Are you saying that both of the

1 Defendants are depositors with TD Bank?

2 MR. JOWERS: They were customers.

3 THE COURT: That is not the same as being
4 depositors. And the law is very clear on that.

5 MR. JOWERS: I believe Mr. Jacobs -- I know
6 had an account. They both were depositors.

7 THE COURT: And because of those -- and it has
8 to be because of those deposits that -- the action
9 has to arise out of those deposits in order to
10 create any type of fiduciary relationship.

11 I think the case law clearly says, you know,
12 one of debtor/creditor is not a fiduciary
13 relationship.

14 MR. JOWERS: I understand that, Your Honor.
15 But the fact that the number of extensions that
16 were made by Carolina First indicates a special
17 relationship, as Mr. Jenkins testified. He had
18 never seen that before. Because it was a special
19 relationship that had been going on for 12 years
20 between Mr. Jacobs and Carolina First. So it was
21 more than simply a bank creditor/debtor
22 relationship. And that -- and I think we're
23 entitled to offer the evidence to flesh that out
24 for the Court and the jury.

25 So I think that we will establish that there

1 was a breach of the covenant of good faith and fair
2 dealing in the action of the bank taken as a whole,
3 given the unusual circumstances of the world in the
4 last several years. You know, the cases have not
5 had -- the cases that have been decided on these
6 various issues were not in the context of a
7 cataclysmic recession. The changing in banking
8 that has occurred over the last 20 years, all of
9 these facts need to be looked at before we can use
10 black letter law and say no relationship, you know,
11 they can enforce.

12 I think the whole totality of the
13 circumstances have to be looked at, and that is why
14 I believe we should be entitled at least to get our
15 case on the record and let the Court and jury hear
16 it, and Your Honor can decide on this motion for
17 directed verdict.

18 MR. COLLINS: Your Honor, can I briefly
19 respond?

20 THE COURT: Yes, sir.

21 MR. COLLINS: The only thing I would point to
22 is -- he is right, there was a motion in limine
23 argued. There was a full proffer on the issues.
24 And Judge Manning denied that and said it should be
25 taken up at directed verdict. So it is not that

1 they haven't had their day in court or had their
2 opportunity to develop a full record. And at some
3 point cases simply have to end. And we believe
4 under South Carolina law there was no fiduciary
5 relationship in this particular instance between a
6 bank and its customer, no matter how they want to
7 frame it in their testimony. And we think it is
8 very clear under South Carolina there is no
9 fiduciary relationship there.

10 And even if there was, there were eight
11 extensions given to try to help these two debtors
12 get out of this debt. And we don't believe any
13 reasonable jury could hear these facts and
14 determine that there could have been a breach of
15 the fiduciary duty. Even if there is one, which we
16 believe there is not under South Carolina law. But
17 even if there was, the facts, as a matter of law
18 the bank did everything it could, so there was
19 simply no breach of fiduciary duty.

20 When it comes to the implied duty of good
21 faith and fair dealing, we do believe that is maybe
22 a little more crystal clear. There is plenty of
23 case law that says you can't have a breach of that
24 duty if you are doing what the contract says.

25 So we would ask for a directed verdict on that

1 particular defense. And we -- I don't want to
2 belabor the point, but we do believe it is well
3 within this Court's discretion to grant a directed
4 verdict on the breach of fiduciary duty as well,
5 for the reasons argued previously.

6 THE COURT: As to the motion for directed
7 verdict as to whether or not the bank was required
8 to foreclose on the property, I think the law on
9 that is absolutely clear that the documents, both
10 the guarantee as well as the note, specifically
11 provide that the bank can choose to foreclose or
12 bring suit on the guarantee.

13 In the sense they are exercising the rights
14 which the documents give to them, I'll grant the
15 directed verdict as to that particular, I guess,
16 defense raised by the Defendants.

17 As it relates to the -- and I believe that
18 the only other claim I saw is the breach of good
19 faith and fair dealing. It is set out in two
20 different manners in which they can raise that
21 issue, from what I saw in looking at the answer.

22 As I read the claim of the Newberry Atrium was
23 relating to whether the bank was required to give
24 current funding, and then the other was for a claim
25 that the conduct was punitive or unconscionable and

1 breached the covenant of good faith and fair
2 dealing.

3 And then the fourth one was the one that was
4 ruled upon by Judge Manning.

5 I will not grant it at this particular time
6 subject to any additional testimony that I may
7 hear.

8 I do have some severe concerns based upon what
9 I have heard so far, but I acknowledge that I have
10 not heard all the information that may be presented
11 by the Defense. So I'll deny it at this particular
12 point.

13 MR. COLLINS: Thank you, Your Honor.

14 THE COURT: Anything else we need to take up
15 before we bring the jury in?

16 MR. JORDAN: Your Honor, I'd like a
17 clarification on the ruling with regard to
18 attorney's fees. What --

19 THE COURT: It is a question of law for the
20 Court.

21 MR. JORDAN: Well, I certainly accept the
22 Court's ruling. My question is as to the procedure
23 that the Plaintiff's attorneys will be submitting
24 an affidavit, I'm sure, and we have an opportunity
25 as Defendants to basically object.

1 THE COURT: Yes, sir.

2 MR. JORDAN: Or to quash that affidavit.

3 THE COURT: Yes, sir. And I haven't read all
4 the documents specifically, but I don't know
5 specifically what it says about attorney's fees,
6 whether reasonable attorney's fees include the cost
7 of collection, and I will assume that any
8 attorney's fees -- the cost of collection would
9 include this particular lawsuit. And so at this
10 particular point the attorney's fees have not fully
11 matured and it depends on what the jury decides to
12 do.

13 Anything else we need to take up?

14 MR. COLLINS: Nothing from the Plaintiff, Your
15 Honor. Thank you.

16 THE COURT: You may ask the jury to come in.

17 MR. JOWERS: Your Honor, what is our schedule
18 this morning? Have you decided the schedule for
19 breaking for lunch?

20 THE COURT: Usually I don't break for lunch
21 until 1:00 or after.

22 You can bring the jury in, please.

23 THE BAILIFF: Yes, Your Honor.

24 (WHEREUPON, the jury came into open
25 court at 11:21 a.m.)

1 THE COURT: You can sit wherever you would
2 like to sit in the jury box.

3 THE BAILIFF: The jury is present, Your Honor.

4 THE COURT: At this time, ladies and
5 gentlemen, we are ready to hear from -- does the
6 Plaintiff wish to rest on the record? I think he
7 already did.

8 MR. COLLINS: Yes, we rested, Your Honor.
9 Thank you.

10 THE COURT: At this time we are ready to hear
11 the Defense in this case, ladies and gentlemen.

12 You may call your first witness, Mr. Jowers.

13 MR. JOWERS: May it please the Court, Your
14 Honor? We call Thomas Wingard.

15 (Witness approaches.)

16 THE BAILIFF: Place your left hand on the
17 Bible, and raise your right hand, please.

18 (Witness complies.)

19 THE CLERK: Do you swear or affirm the
20 testimony you shall give in this case will be the
21 truth, the whole truth, and nothing but the truth,
22 so help you God?

23 THE WITNESS: I do.

24 THE CLERK: Thank you. Please have a seat in
25 the witness stand.

1 (Witness complies.)

2 THE CLERK: And please spell your last name.

3 THE WITNESS: Thomas F. Wingard,

4 W-I-N-G-A-R-D.

5 THE COURT: Yes, sir.

6 THOMAS F. WINGARD,

7 after being duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. JOWERS:

10 Q You are a real estate appraiser?

11 A Yes, sir.

12 Q State your qualifications in that profession.

13 A I have been in the real estate appraisal business
14 for 39 years and in private practice for about 36
15 of those 39 years.

16 I hold the MAI designation from the Appraisal
17 Institute and specialize in commercial real estate
18 valuation.

19 MR. JOWERS: Your Honor, I would move that he
20 be qualified as an expert.

21 THE COURT: Any voir dire?

22 MR. BEDENBAUGH: No, Your Honor. We heard
23 Mr. Wingard's qualifications at the proffer
24 hearing. We do not object to the qualifications.
25 We do want to preserve our prior objection at our

1 motion in limine that Judge Manning heard for the
2 record.

3 THE COURT: And your objection is noted for
4 the record. And I find him qualified as a real
5 estate appraiser in commercial real estate
6 valuation.

7 BY MR. JOWERS:

8 Q Mr. Wingard you have performed appraisals for TD
9 Bank; is that correct?

10 A Yes, sir.

11 Q You also appraised the property known as the
12 Newberry Atrium Professional Center; is that
13 correct?

14 A Yes, sir.

15 Q How many times did you appraise that property?

16 A Two times.

17 Q The first time was when?

18 A 2011.

19 Q At whose request was that appraisal made?

20 A TD Bank.

21 Q The second time you appraised it, when was that?

22 A 2013.

23 Q Okay. And that request was made by whom?

24 A Mr. Jacobs.

25 Q Do you recall the value that you determined for

1 that property in 2011, that first appraisal?

2 A Well, there is -- in a property like this subject
3 property, there is two values. The property was
4 built in 2008. And at that time we were
5 experiencing the worst recession that we have ever
6 experienced in my lifetime, and probably
7 everybody's lifetime here in this courtroom. So
8 the occupancy was only -- was a little bit less
9 than 60 percent. So when you have something like
10 that, there is an expectation that it is reasonable
11 to suggest that market conditions will improve
12 after the recession and that occupancy will
13 increase. So you have a value "as is" and a
14 prospective value at what they call stabilization
15 where the occupancy is stabilized. So there is two
16 values.

17 Q Stabilization would mean what now?

18 A Be the value at an occupancy that is more realistic
19 than what the occupancy is at the present time.
20 Market conditions would improve and over a period
21 of time than the occupancy would occur.

22 Just like when a building -- a retail building
23 is constructed and there is three or four retail
24 spaces, at first they are vacant. And then tenants
25 are secured and the building leases up.

1 Well, it doesn't always lease up on the time
2 the building is complete. It may take, you know,
3 months and maybe a year or two before tenants are
4 secured in order for there to be a stabilized
5 occupancy in the building.

6 Q In that 2011 appraisal, do you recall the numbers
7 that you determined --

8 A I think there was a -- the "as is" value was like
9 \$5.8 million. I can't remember what the stabilized
10 value was. But it was a value that would occur in
11 the future. And I think it was like four or five
12 years after that, 2011. 2015 I think was that --
13 was the date of the stabilized value.

14 MR. JOWERS: May I approach, Your Honor?

15 THE COURT: Yes.

16 (Complies.)

17 BY MR. JOWERS:

18 Q All right, Mr. Wingard, can you identify that?

19 A This is the 2013 appraisal that was done.

20 Q Hold it for just a second, please, sir. Hold it
21 just a second, please.

22 MR. JORDAN: I think it is already marked as
23 Defendant's 4. I would offer this in evidence,
24 Your Honor.

25 THE COURT: Any objection?

1 MR. BEDENBAUGH: No objection other than that
2 was raised in our motion in limine previously
3 heard, Your Honor.

4 THE COURT: It is admitted, Defendant's
5 Exhibit 4.

6 (WHEREUPON, Defendant's Exhibit No. 4
7 was marked for identification and
8 received into evidence.)

9 BY MR. JOWERS:

10 Q Mr. Wingard, what are the values that you found for
11 the property at that point?

12 A The value "as is" was as of April 16th, 2013, and
13 it was \$6,650,000.

14 Q All right. At stabilization, what was the value?

15 A That was as of November 1st, 2017. And that value
16 is \$7,842,000.

17 Q What was the condition of the building when you
18 appraised it in 2013?

19 A It was in very good condition. It is a Class A
20 medical office building, the only one in Newberry,
21 in the City of Newberry, the only one in Newberry
22 County. It is on the campus of Newberry Hospital,
23 so it is --

24 Q Is that rendering on the easel, is that the
25 building?

1 A That's correct.

2 Q You perhaps heard the testimony I believe yesterday
3 about the foreclosure of this building?

4 A I did.

5 Q You heard what it sold for?

6 A Yes, sir.

7 Q Slightly over three and a half million dollars?

8 A Yes, sir.

9 Q In your experience, do foreclosure sales bring a
10 reasonable price for a building?

11 A Well, a reasonable price, I don't know what that
12 would suggest, but in foreclosure, there is a lot
13 of circumstances in foreclosure that would suggest
14 that it would be a value less than market value.
15 You know, the timing of the sale, I think it said
16 three weeks. A typical marketing time for a
17 building like the subject property under normal
18 market conditions is probably eight months, eight
19 to ten months, in order for prospective purchasers
20 to look at the property, look at the rent roll,
21 look at the quality of the tenants, look at the
22 relationship of the medical building with the
23 hospital, since it is on the campus of Newberry
24 Hospital. So there is a lot of circumstances that
25 are involved during the normal marketing time.

1 Marketing times for medical office buildings,
2 Class A medical office buildings like the subject
3 property, will vacillate with market conditions.
4 When market conditions are poor, it takes longer
5 for the building to be absorbed. When market
6 conditions are very good and there is a lot of
7 transactions, then the marketing time becomes less.

8 So a typical marketing time for a Class A
9 on-campus building like this is probably eight
10 months.

11 Q Also, the terms of payment of a foreclosure are
12 strenuous, are they not?

13 A Yes. It is very quick payment. You know, that is
14 atypical for normal transactions.

15 Q Do you use foreclosure sales as a comparable in
16 your business as for purposes of determining values
17 of properties?

18 A Typically not. Only on a rare instance if I
19 determine that the foreclosure value, what was bid
20 at foreclosure, would be equivalent to my
21 determination of market value would I use that.

22 Q Do you have an opinion as to the value that this
23 building sold for at foreclosure?

24 A Yes. And I think it is less than the market value.
25 Absolutely.

1 Q Is it anywhere close to market value?

2 A No, I don't think so.

3 Q The value you determined in 2013 was \$6 million --
4 what did you say, \$6 million and how much?

5 A \$6,650,000.

6 Q Do you have an opinion as to its value today?

7 A Well, no. But what it sold for at foreclosure was
8 \$3,570,000, if I remember hearing that in the
9 courtroom. That equates to \$78 a square foot for
10 this building. A typical Class A on-campus medical
11 office building this age should sell for between
12 \$125 and \$140 a square foot. So that lets me know
13 there is a good chance it is going to be well below
14 the market value.

15 MR. JOWERS: No further questions. Thank you.

16 THE COURT: Anything further?

17 MR. JORDAN: No questions, Your Honor.

18 THE COURT: Any cross?

19 MR. BEDENBAUGH: Yes, ma'am.

20 CROSS-EXAMINATION

21 BY MR. BEDENBAUGH:

22 Q Mr. Wingard, you are of course aware that the bank
23 completed the foreclosure of the property -- you
24 just testified about that -- is that correct?

25 A Yes, sir.

- 1 Q And you would agree with me that the bank owned
2 properties are generally -- they generally sell for
3 less than an individual or a company does for
4 selling the property in the market place; is that
5 correct?
- 6 A Typically, yes.
- 7 Q Banks are not in the business of owning and selling
8 real estate, are they?
- 9 A They are not.
- 10 Q And typically when a bank owns a property, they
11 want to sell it pretty quick, do they not?
- 12 A I would -- yes, sir, they do.
- 13 Q And in that scenario, a liquidation scenario,
14 normally you would discount the value in that
15 market value, would you not?
- 16 A It would.
- 17 Q And your appraisal doesn't take in account the
18 liquidation value, does it?
- 19 A No, sir.
- 20 Q Now, you performed your appraisal in 2013; is that
21 correct?
- 22 A Yes, sir.
- 23 Q When you do a sales comparison approach -- as you
24 did, did you not?
- 25 A Yes, sir.

1 Q -- you start with the assumption that the building
2 is stabilized; is that correct?

3 A Not in "as is" value. Well, you assume it is
4 stabilized, and then you make a deduction for the
5 lease up cost for it to become stable.

6 Q You assume it is stabilized, and then you deduct
7 what it costs to lease it up?

8 A Yes, sir.

9 Q And you never lease it out, you don't ever incur
10 the cost --

11 A No, sir.

12 Q -- to lease it up?

13 A No.

14 Q Were you aware this property has never been
15 60 percent occupied?

16 A Well, whenever I valued it in 2013 I was aware of
17 that, yes.

18 Q Okay.

19 A But it was on the market during the time when
20 market conditions were poor, there were changes in
21 the leadership at the hospital. Since that time, I
22 think Self Memorial Hospital has become involved
23 with Newberry Hospital and the building, so there
24 is more chances for the building to gain some
25 additional occupancy. And market conditions are

- 1 improving.
- 2 Q But you have no knowledge that they have gained any
- 3 additional tenants since you looked at the
- 4 building, do you?
- 5 A I have no knowledge, no.
- 6 Q And stabilization, that is 88 percent occupied, is
- 7 it not?
- 8 A Yes, but that is as of 2017, not right now.
- 9 Q We are not in 2017, are we?
- 10 A Absolutely not.
- 11 Q Now, your appraisal in 2013, you used a sales
- 12 comparison approach; is that correct?
- 13 A Correct.
- 14 Q And sitting here today, you haven't updated the
- 15 sales comparisons from that?
- 16 A I have not, no.
- 17 Q Okay. You also did a yield capitalization
- 18 calculation at that time, did you not?
- 19 A I did.
- 20 Q That one relied on the same sales data, didn't it?
- 21 A That doesn't involve sales data.
- 22 Q You don't extract data from sales comparison in
- 23 connection with a yield calculation?
- 24 A Well, you extract overall capitalization rates if
- 25 data is available. But discount rates are -- you

1 really don't know what a discount rate is until you
2 buy a property, hold it, and then subsequently
3 dispose of it, so --

4 Q Have you updated your research on the yield
5 calculation you did as you sit here today?

6 A Not for this valuation, no.

7 Q Have you updated the discount rate you just
8 mentioned, have you updated that as you sit here
9 today?

10 A Have I updated it relative to what?

11 Q To this property?

12 A No, sir.

13 Q You can't testify to what the property is worth
14 today, can you?

15 A No, sir.

16 MR. BEDENBAUGH: No further questions.

17 THE COURT: Any redirect?

18 MR. JOWERS: No, Your Honor. Thank you.

19 THE COURT: You may step down. Thank you.

20 (Witness steps down.)

21 MR. JOWERS: Your Honor, I ask that

22 Mr. Wingard be excused.

23 THE COURT: Any objection?

24 MR. BEDENBAUGH: No objection, Your Honor.

25 THE COURT: You may be excused. Thank you.

1 (Witness excused.)

2 THE COURT: You may call your next witness.

3 MR. JORDAN: We call James McFarland.

4 THE COURT: Mr. McFarland, I will remind you
5 that you are still under oath to tell the truth in
6 this matter.

7 THE WITNESS: Yes, ma'am.

8 JAMES A. MCFARLAND, JR.,
9 after being previously sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. JORDAN:

12 Q Mr. McFarland, you are a developer of commercial
13 real estate in North Carolina; correct?

14 A Yes, sir.

15 Q And you live in Wilmington, North Carolina?

16 A Yes, I do.

17 Q How long have you lived there?

18 A Twenty-four years now. I moved there in 1989.

19 Q All right. Where did you live before that?

20 A Columbia. Here.

21 Q Okay. Were you born in Columbia?

22 A No, was born in D.C., raised in Rutherfordton,
23 North Carolina, and moved here in the tenth grade,
24 and went to Spring Valley High School, and then to
25 USC.

1 Q Okay. And you graduated from college here?

2 A Actually, no. I transferred to Presbyterian
3 College and graduated from there.

4 Q Okay.

5 A Up the street -- up the road.

6 Q All right. But 24 years ago you moved to
7 Wilmington, North Carolina?

8 A Correct.

9 Q Okay. And since then you have not lived in South
10 Carolina?

11 A No.

12 Q Okay. The property in question is located in
13 Wilmington, North Carolina?

14 A Yes, it is.

15 Q Okay. And it is property that is owned by Atrium
16 at Middle Sound Land, LLC?

17 A Correct.

18 Q Is that a North Carolina limited liability company?

19 A Yes, sir.

20 Q Okay. Does it have anything to do with the State
21 of South Carolina?

22 A No.

23 Q Does it have any other property ownerships anywhere
24 other than the property in question?

25 A Do I own properties --

- 1 Q No, does that company --
- 2 A No.
- 3 Q Okay. And your partner in that company is David
- 4 Jacobs?
- 5 A Yes, sir.
- 6 Q And you are 50/50 owners in that company?
- 7 A Correct.
- 8 Q Now, Mr. Jacobs was the manager; is that correct?
- 9 A That's correct.
- 10 Q And he dealt directly with the banks?
- 11 A Correct.
- 12 Q And your involvement did not include dealing with
- 13 the banks, did it?
- 14 A Not at all. I had a few conversations with him
- 15 early on, and -- but, no, not typically.
- 16 Q Okay. As far as negotiating this loan, David
- 17 Jacobs was the point man?
- 18 A That's correct.
- 19 Q Okay. Now, the purpose of the loan was to acquire
- 20 and develop this land in Wilmington, North
- 21 Carolina?
- 22 A That's correct.
- 23 Q And this property actually was secured -- secured
- 24 the loan as a deed of trust?
- 25 A Right, yes, sir. Initially it was roughly nine and

1 a half acres and a \$3 million loan. And we
2 developed three -- four parcels, sold three
3 parcels, and brought the loan to \$1.25 million,
4 roughly, which it sits at today. That is the
5 principal amount.

6 Q Did any other property that you are aware of secure
7 this particular loan?

8 A No, huh-uh.

9 Q That was the only property securing the loan?

10 A That's right.

11 Q Okay. And the loan that we discussed any number of
12 times was renewed eight times?

13 A Correct.

14 Q And the initial renewals were negotiated when it
15 was Carolina First?

16 A That's --

17 Q Okay.

18 A I think the last one was when it was TD Bank.
19 Right, yes.

20 Q I ask if you would look at the binder there with
21 the exhibits in it, and turn to Exhibit Number 8.

22 A I got it.

23 Q Of course, Exhibit 8 has the promissory note, the
24 2004 promissory note, along with various renewals
25 or extensions. So I'll ask you to pass over the

1 promissory note. And let's look at the extension
2 that was dated June 13, 2006.

3 A Okay. Yes, I'm there.

4 Q Okay. That was a brand new promissory note, a
5 renewal of the previous note; correct?

6 A Right, yes.

7 Q And this was done by Carolina First, and of course
8 signed by the limited liability company that we
9 refer to?

10 A That's correct, right.

11 Q At that point in time, what was the principal
12 balance of the loan?

13 A Is that the 2.522 number?

14 Q Yes.

15 A \$2.522 million, roughly.

16 Q So it is down from \$3 million that you originally
17 borrowed?

18 A Right.

19 Q Okay. And the maturity date on the first renewal
20 promissory note was July 5, 2007?

21 A That is the maturity date. Is that what you said?

22 Q The new maturity date?

23 A Right.

24 Q Okay. So that was an extension from the previous
25 maturity date. Let's go back to the promissory

1 note.

2 A Well, it is a renewal. We had sold one of the lots
3 that we had developed, and so the numbers had
4 changed and our renewal was done. But, yes,
5 correct.

6 Q And your original promissory note had a maturity
7 date of June 5, 2006, okay?

8 A Correct.

9 Q And the new loan gave you basically a 13-month
10 extension?

11 A Correct, uh-huh.

12 Q Okay. And let's look to the next extension. This
13 was dated August 8, 2007?

14 A Correct.

15 Q And extended the maturity date till August 8, 2008?

16 A Correct.

17 Q That was a 12-month extension; correct?

18 A Yes, it was.

19 Q All right. Let's look over to the next one, which
20 was September 19, 2008.

21 A Right.

22 Q Also Carolina First?

23 A Yep.

24 Q Now, this extension was for what period of time?

25 A Hmm, this one is written differently.

1 Q Look on Page 1 of that --

2 A To November of 2008, so six -- three months, excuse
3 me. Three months. I'm sorry.

4 Q All right. Now, what was happening at that point
5 in time that this was such a short-term loan
6 renewal?

7 A Well, you know, I really don't know, to be honest.
8 We had done a lot of work to the property. I
9 don't -- I don't know specifically what was going
10 on.

11 Q All right. Well, let's flip then to the next
12 renewal note, which is dated November 4, 2008. And
13 I would ask you to look at the principal balance on
14 that particular renewal note.

15 A Right. It is down to \$1.755 million, roughly.

16 Q Okay. And the previous renewal September 19, 2008,
17 how much money was owed on the loan at that stage?

18 A The previous one?

19 Q Previous one?

20 A \$2.522, I believe it was. Yes, roughly.

21 Q Okay. All right. Now, so what was happening at
22 that time frame? I mean, you paid down the debt.

23 A Right. We had sold another lot. We had also paid
24 down a little of the debt ourselves. And, again,
25 we spent more money developing the infrastructure

- 1 for the property.
- 2 Q Okay. So the \$3 million loan down to \$1.755?
- 3 A That's right.
- 4 Q In November 2008?
- 5 A Right.
- 6 Q Okay. And maturity date on that renewal was what
- 7 date?
- 8 A November 4th, '09.
- 9 Q Okay. So another extension for 12 months?
- 10 A For a year. Right.
- 11 Q All right. Let's flip over to the next renewal,
- 12 which was dated December 11, 2009.
- 13 A Right.
- 14 Q The principal balance was how much at that point?
- 15 A \$1.355, roughly, just over that.
- 16 Q Down right at \$400,000 from the previous renewal?
- 17 A Correct.
- 18 Q And the maturity date is what date?
- 19 A December 11th of 2010.
- 20 Q Okay. So another 12-month renewal?
- 21 A Correct. We had sold another lot.
- 22 Q Next we will go to the September -- excuse me --
- 23 January 18, 2011, renewal. And this one was made
- 24 by TD Bank?
- 25 A I'm sorry, the next one I have is Carolina -- what

1 date did you say?

2 Q September -- excuse me, January 18th, 2011. It has
3 got Carolina First at the top.

4 A That is still Carolina First, right.

5 Q But if you will look right under that it says --

6 A I'm sorry, it does say TD Bank right under that.

7 Q TD Bank?

8 A Right.

9 Q Okay. And the loan at that point in time was
10 extended to March 11, 2011?

11 A Yes, it was. Yes.

12 Q Effectively less than a two-month extension?

13 A Correct.

14 Q All right. And flip over to the final extension
15 agreement, also by TD Bank. This was dated May 7,
16 2012. And the principal balance figure is now
17 \$1,272,000?

18 A Correct.

19 Q Okay. And the maturity date in Paragraph 1.3 is
20 what date?

21 A July 4th, 2012.

22 Q Okay. So from May 7, 2012, effectively a two-month
23 extension?

24 A Correct.

25 Q Okay. So, in summary, then, the Carolina First

1 extensions were effectively for 12 months every
2 time they did it?

3 A Correct.

4 Q And the extensions by TD Bank were effectively
5 about two months?

6 A Right.

7 Q All right. Now, what is your belief as to why the
8 bank declined to extend this loan again for the
9 ninth time?

10 A I don't really know. Things had gone pretty well.
11 Of course, the whole business of commercial real
12 estate development was in an uproar. The whole
13 real estate -- the country was in a recession. I
14 believe TD Bank came in and bought Carolina First,
15 and when they bought them they were forgiving a lot
16 of loans by the government. They then took the
17 hard line with the people they were dealing with
18 and decided to cut us off.

19 Q Okay. And previously you had testified regarding
20 your financial statements, which are Exhibits 10
21 and 11?

22 A Right.

23 Q Did you work up a financial statement previously
24 this year?

25 A Yes, I did. And I shared it with TD Bank. They

1 asked for it. It was significantly less than these
2 two. I had lost --

3 Q Okay. Well, approximately what do you recall your
4 net worth to be at this point in time, based on
5 that more recent financial statement?

6 A Roughly negative two and a half million, roughly.

7 Q And what do you attribute the great fall in your
8 net worth to -- what caused it?

9 A Well, the business came to a screeching halt
10 because all the banks stopped loaning money. The
11 values of the real estate cratered, commercial real
12 estate worse, much more so than residential real
13 estate.

14 I was then forced over the last four or five
15 years to sell everything I had to satisfy loans and
16 satisfy other things that I had to do.

17 Q And how much money actually did you put -- of your
18 own pocket into this project at Middle Sound?

19 A Roughly \$1.4 million.

20 Q Okay. Now, once a default was declared on this
21 loan, did you anticipate that you would be sued in
22 South Carolina, or did you expect to be sued in
23 North Carolina?

24 A No, I was under the belief it had to come in North
25 Carolina where the asset resided.

1 Q Okay. You expected them to foreclose, or whatever
2 you do, in North Carolina?

3 A I expected them to foreclose first, and then fight
4 about the rest of it.

5 Q Okay. All right. Has it been an inconvenience to
6 you to have to defend this case in South Carolina?

7 A Oh, yes, uh-huh. I drove --

8 Q Are you a full-time resident of North Carolina?

9 A Yes, I am, uh-huh.

10 Q Do you have any offices in South Carolina
11 whatsoever?

12 A No, huh-uh.

13 Q Do you own or lease any property in South Carolina?

14 A I own one piece of property, yes.

15 Q And have you personally transacted any business in
16 South Carolina?

17 A Just buying that property. I bought it in a
18 package of properties that a gentleman owned. And
19 it was the one that was in South Carolina. Yes,
20 sir.

21 Q Okay. Now, you didn't come to South Carolina to
22 apply for this particular loan, did you?

23 A No, huh-uh.

24 Q Did you ever come to South Carolina to execute any
25 of the loan documents, original loan documents or

- 1 extensions or renewals?
- 2 A No, huh-uh.
- 3 Q Okay. Everything you signed was signed in
- 4 Wilmington, North Carolina? It was sent to you and
- 5 you signed it and sent it back?
- 6 A That's correct.
- 7 Q Okay. All right. Do you have any bank accounts in
- 8 South Carolina?
- 9 A No, sir.
- 10 Q Okay. Do you file tax returns in South Carolina?
- 11 A No, sir.
- 12 Q Do you owe any taxes to the State of South
- 13 Carolina?
- 14 A No, not -- huh-uh.
- 15 Q Atrium, as a North Carolina limited liability
- 16 company, has it filed North Carolina tax returns?
- 17 A Yes.
- 18 Q Okay. And has it ever filed tax returns in any
- 19 other state?
- 20 A No, I don't believe so.
- 21 Q Okay. Now, you admit that the loan is accurate,
- 22 don't you?
- 23 A Yes, I do.
- 24 Q You haven't denied that. You signed the note. You
- 25 admit that?

1 A Right:

2 Q Same thing for the guarantee. You admit the
3 accuracy and also you admit that you signed it?

4 A Right. Yes, I did.

5 Q You admit that Atrium at Middle Sound had not paid
6 the loan off?

7 A Correct. Not completely.

8 Q All that is admitted. I mean, they have gotten you
9 to sign, you know, basically respond to requests
10 for admissions and you have been forthcoming in
11 that respect?

12 A Yes, sir, uh-huh.

13 Q But your defense is based upon bad faith and based
14 on lack of fair dealing by the bank?

15 A Yes.

16 Q Okay. What is it that you think the bank should be
17 doing in this particular situation?

18 A Well, a number of things. First of all, I think
19 they should give us more time. It has been an
20 incredible recession. As you all know, I think it
21 has affected everybody. It is ongoing. I think
22 the proof of the sale of the Newberry property is
23 the most stark proof we have here in the room.
24 They paid half of what the property was worth. It
25 is proof that we're still in a deep recession, at

1 least in the commercial real estate business.

2 They were a little disingenuous about my -- or
3 very disingenuous about my net worth. I had sent
4 them my financial statements, and they chose to
5 talk about ones that are five, six years old.

6 They did not foreclose property. In my
7 understanding of being in the business the 18 to 26
8 years I have been in the business, even though I
9 did sign the document that said they could come
10 after me without foreclosing, I never -- it never
11 occurred to me that they would do it that way.

12 I have -- the main fault I have with them is
13 that over the last year or two I have brought them
14 four or five offers. And, in essence, I have never
15 really gotten an answer. I got half answers at
16 times. And never could really get a true answer.

17 The last offer I brought them would have given
18 them 90 percent of the principal balance of the
19 loan. And they didn't take that either. And I
20 don't really know why. They have done plenty of
21 short sales with other people, and they should have
22 done one with us.

23 Q Well, if a bank today gave you an opportunity, once
24 again, to resume payments on the loan, another loan
25 renewal or extension, would that be what you would

1 be looking for?

2 A That is what I prefer, because I still believe the
3 value is there. Commercial real estate is a little
4 different, and I fought appraisers -- appraisal
5 values, not appraisers -- but commercial real
6 estate acts a little differently. It generally
7 just stops and there is no action for a period of
8 time. This has been a terrible recession, much
9 longer than usual. But, generally speaking, the
10 values are say, roughly, the same. And they will
11 fall a little bit, but they don't generally fall
12 90 percent like they have now. And when the action
13 starts again, we typically can recover and deal
14 with the values that we were under when we were
15 dealing with the bank previously.

16 So I would like to continue to work on it.
17 The fact that I brought them a sale for
18 \$1.1 million means that we're pretty close in terms
19 of being able to do something. And I am working
20 with a lot of people that potentially would be part
21 of a development or a sale to -- an outright sale.
22 So, yes, I would like to have another shot at it.

23 Q Well, Mr. McFarland, you have heard a portion of
24 Mr. Jacobs' comments regarding, you know, the way
25 this thing has worked historically and the fact

1 that the bank has worked with him and your company
2 as well as far as refinancing this loan. And do
3 you join in the sentiments that Mr. Jacobs has
4 expressed already?

5 A Yes, I do. And, in fact, initially David and I had
6 a conversation about where the loan would be taken
7 out. And he persuaded me that he was close enough
8 to Carolina First that they would be very helpful
9 in developing the property. And that is why we
10 ultimately chose to do that with Carolina First.

11 Q And do you feel that TD Bank has acted in a fashion
12 that was completely contradictory to the experience
13 you had with Carolina First?

14 A Absolutely. I believe they, for lack of a better
15 term, have been a shark in this situation. They
16 bought out Carolina First. At least the newspapers
17 reported that all of their bad loans were forgiven,
18 so they didn't have to go through that. And from
19 then on, they gave us, as you said, one extension
20 that effectively was two months, which is nothing
21 in this business. You can't get anything done in
22 two months.

23 And we feel that they very much shut us out
24 and stopped dealing with us in the way we had been
25 dealing with them prior to that.

1 Q Thank you, Mr. McFarland. Please answer any
2 questions other counsel has.

3 A Thank you.

4 THE COURT: Any questions, Mr. Jowers?

5 MR. JOWERS: No, ma'am.

6 THE COURT: Mr. Collins?

7 MR. COLLINS: Yes, Your Honor. Thank you.

8 CROSS-EXAMINATION

9 BY MR. COLLINS:

10 Q Mr. McFarland, I believe you just testified that TD
11 Bank only gave you a 90-day extension that wasn't
12 very useful. Did you not just say that?

13 A Yes.

14 Q Would you please turn to Paragraph 5 -- or, excuse
15 me, Exhibit 5?

16 A I'm there.

17 Q And isn't this a renewal note from TD Bank for one
18 year?

19 A Yes, it is. I thought this one was from Carolina
20 First.

21 Q And you were incorrect earlier when you said the
22 only extension from TD Bank --

23 A I'm sorry, yes. I believed -- I thought the only
24 one we got from TD Bank was the last one.

25 Q Now, a few minutes ago I think you testified that

1 one of the complaints you had is that you wanted
2 more time?

3 A Right.

4 Q Did I understand? You have had how many, three
5 years, where you have been able to sell this
6 property and have been unable to; correct?

7 A For the entire amount that you wanted, yes. I
8 brought quite a few offers for the property, and we
9 could have sold it.

10 Q And you'll sell it only if TD Bank is willing to
11 let you and Mr. Jacobs walk away without paying
12 what is owed on the notes; correct?

13 A Correct.

14 Q Okay. And I believe under OSHA in this case, you
15 testified that although you owe the money, the
16 complaint you have is that TD Bank did not
17 foreclose first on the property; is that correct?

18 A I'm just saying that is the normal course of
19 events. And, yes, that is a complaint.

20 Q So as you sit here today under oath, you don't
21 dispute that you owe TD Bank under the guarantee;
22 correct?

23 A No, I do not.

24 Q Okay.

25 MR. COLLINS: I have no further questions,

1 Your Honor. Thank you.

2 THE COURT: You may step down.

3 (Witness steps down.)

4 THE COURT: You may call your next witness.

5 MR. JOWERS: Your Honor, we call David Jacobs.

6 THE COURT: Mr. Jacobs, I'll remind you that
7 you are still under oath to tell the truth in this
8 matter.

9 THE WITNESS: Yes, ma'am.

10 MR. JOWERS: May it please the Court, Your
11 Honor?

12 DAVID JACOBS,
13 after being previously sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. JOWERS:

16 Q Mr. Jacobs, you are a resident of Columbia?

17 A Yes, I am.

18 Q How long have you been in Columbia?

19 A I have lived in Columbia about 30 some-odd years.
20 Thirty-seven years.

21 Q You are married?

22 A Yes, I am.

23 Q Your business is as a real estate developer; is
24 that correct?

25 A That's correct.

1 Q What type of development have you been involved in
2 throughout your career?

3 A Over about the last 30 years, I've developed
4 office -- several commercial office buildings,
5 medical office buildings, and some child
6 development centers.

7 Q The office buildings that you build are generally
8 small to medium size?

9 A Yes.

10 Q What type of organization do you have involved in
11 this process of buildings?

12 A I'm a one-man show. I have done everything on my
13 own. I have one lady that helps me keep up with
14 the records. So I do very small, very slow
15 development. So it is a very slow process for me.

16 Q How do you go about doing these types of
17 developments with the sort of help you have, would
18 you say?

19 A Over the years I have had the good fortune to
20 develop a good team that would work with me. This
21 team typically would consist of architects,
22 attorneys, engineers, civil engineers. And over
23 the recent years, the last 12 or 15 years, Carolina
24 First has become one of my primary go-to team
25 members. Because they wanted to be. They were

1 absolutely soliciting me over the last 12 years.
2 They called on me from the executive staff. The
3 loan officers that I worked with, we were always
4 working together and exploring opportunities
5 together.

6 Q How many projects did you actually -- did Carolina
7 First finance for you?

8 A Six. But, remember, I have moved very slowly and
9 very cautiously. And it is a very long process.

10 Q Those six projects were over a 12-year period?

11 A Yes.

12 Q Now, you talk about Carolina First being part of
13 your team.

14 A Right.

15 Q What do you mean by that?

16 A Carolina First, during the time that they asked to
17 look at every project that I was doing, had respect
18 for the type of work that I did. I did it very
19 slowly. I did it very cautiously. And they
20 appreciate that approach.

21 They asked. They wanted to be the team. They
22 wanted to take the first look at anything that I
23 had on the horizon. And on the horizon means
24 anything that I was discussing, I was exploring.
25 And they asked if they could take a look at it and

1 give me some feedback on what their thoughts were,
2 to the point that they were involved even before we
3 were even to a financing situation.

4 They would come and look at the sites. They
5 would look at multiple sites that were under
6 consideration. They would suggest different ways
7 to site the property. They would --

8 Q What do you mean by site the property?

9 A Site the property. If you have multiple locations,
10 they would like to see what the options were, who
11 the tenants were, who the users were going to be.

12 And they spent months, in many cases years, of
13 working with me on a project, looking at it,
14 considering, investigating, advising. I really
15 relied on their expertise, their direction. And
16 they became really a very critical team member in
17 my development process. Slow and very cautiously.

18 Q So you are saying they did this before you actually
19 signed a loan with the bank?

20 A Oh, yes. I mean, we would spend in many cases two
21 years, two years looking at an option and
22 discussing all the aspects of it. Considering the
23 budget. Considering the various construction
24 structures. All the different things that you
25 would appreciate some financial team member to give

1 you guidance on.

2 Q Was there involvement above and beyond the typical
3 lender?

4 A Oh, there was no question. I mean, the team at
5 Carolina First, they really became my partner. And
6 that is what they asked for. They wanted to be my
7 partner. They wanted to work with me. They wanted
8 to understand each and every project, have some
9 input on it. And many times this is way before we
10 even got to loan proposal. This was a process
11 where they would suggest different ways to
12 structure, different ways to do a partnership
13 agreement.

14 I can give you a couple of examples of some of
15 the assistance that they provided me.

16 One of the projects that I got involved with
17 took about two years to process through. The
18 University of South Carolina asked me to develop a
19 project for the campus, a Child Development and
20 Research Center, which we had three different sites
21 that were involved in that.

22 And for about a year and a half, we went
23 through, looked at the various sites, analyzed the
24 different things. They met with a tenant, the
25 University of South Carolina Early Childhood

1 Education Facility, which is the dean of the
2 college.

3 I mean, we went through and discussed what the
4 objectives were and how to help the university
5 develop the center. But this was really the
6 advanced guidance that I would see for years before
7 we finally did the transaction with the university.

8 During the transaction, as the process
9 evolved, the university came back to me and said,
10 You know, this is going to be a very important
11 facility for Early Childhood Education on the
12 campus, and we would like to add some additional
13 facilities to it, some additional improvement.

14 And I consulted back with the Carolina First
15 team and said, Here is what we're trying to
16 accomplish. How can you help us?

17 And what they suggested is, Let's adjust the
18 university's lease, let's accommodate what the
19 tenant, the university was trying to accomplish,
20 and we'll work it out in the future financing as
21 you go forward.

22 That, unfortunately, required additional time,
23 additional money, but they were helpful enough to
24 allow the tenant to be accommodated, and we worked
25 together to meet the goal of insuring a very

1 successful project.

2 Q This Newberry project, this is a photograph of it
3 or a drawing of this, is it not?

4 A Yes, sir. Yes.

5 Q How did you first become involved in it?

6 A My involvement with the Newberry Hospital Group was
7 as a result of having developed another medical
8 building in Irmo. And I developed that again in
9 conjunction with Carolina First. They were early
10 on. They were evaluating the Irmo project, giving
11 me guidance, again, on the siting. And when I say
12 "siting," they looked at the various options.

13 On the Irmo project, for instance, one of the
14 site issues that we finally selected, we had to
15 cross a railroad track. And the folks at Carolina
16 First questioned, What -- this doesn't appear to be
17 a very good access to this medical building. What
18 are you going to do about that?

19 And I said, We're going to figure out how to
20 get across that.

21 And they were kind enough to introduce me to
22 some of the local legislators that helped guide us
23 through getting access across those tracks.

24 That was just an example of how they assisted
25 and were a team member on this.

1 Another instance at the Irmo Professional
2 Center. Same situation. The University of South
3 Carolina requested -- we had a tenant that wanted
4 to come in and have diagnostic equipment in there.
5 And it was a similar situation. It was a client
6 that said, We will come to the building and we will
7 occupy space, but you need to find a way to help
8 us.

9 And we did, in a similar approach that we had
10 done at USC giving the prospective tenant the
11 opportunity to raise some more money for the upfit
12 and build-out of their space and working -- they
13 guided me into advising how we construct the lease
14 to accommodate the situation.

15 So it was a process that I appreciated, I
16 counted on, I relied on the team members of
17 Carolina First, not because of their banking, but
18 because of their advice and their guidance. And it
19 wasn't because they had a loan transaction on the
20 table, but it was a matter of they wanted to give
21 some input, advice that would make it better, and
22 not for the loan, but better for the project, and
23 ultimately better for me.

24 Now, you had asked a question about how I --

25 Q At Newberry.

1 A -- how I got involved --

2 Q Yes.

3 A -- at Newberry. Well, that was the catalyst. Irmo
4 was developed, again, with Carolina First. We
5 had -- I mean, it was a known building, well
6 located in the Irmo area.

7 And the hospital and physicians at Newberry
8 had been keeping an eye on this over the years.
9 And after the building was complete, they
10 approached me after having looked at it,
11 understanding some of the things that we were able
12 to do to accommodate the physicians at the Irmo
13 building.

14 And some of the accommodations, for instance,
15 was: Physicians want to be part of a building.
16 And we had to create a structure where the doctors
17 could participate in the ownership of the building.
18 And, ultimately, the doctors own over 50 percent of
19 the building at Irmo.

20 And that was a very unique structure. And,
21 again, Carolina First, through their advice and
22 guidance, helped me structure such a structure,
23 which really was a benefit to the project, benefit
24 to the doctors and the tenants, that they weren't
25 just renting, they were owning a part of their

1 medical office.

2 And that was very, very important. And that
3 was the catalyst that the Newberry Hospital CEO,
4 the doctors, they all knew that. And they liked
5 the design, they liked the building. And that was
6 the advent of the doctors and the hospital staff
7 approaching saying, We'd like to explore with you
8 the opportunity for a similar project, similar
9 features up in the Newberry area.

10 Q What ultimately was the ownership arrangement in
11 the Newberry project?

12 A Sure. Newberry was very similar to what we did at
13 Irmo. The hospital needed/wanted, physicians
14 needed and wanted an updated modern facility. Many
15 of the doctors in the hospital were operating out
16 of old houses, buildings that were very dated,
17 nothing new and nothing was located on the campus
18 of the hospital.

19 So after, again, about two years, we went
20 through the siting issues, we went through the
21 design issues, and to the point that Carolina First
22 had advanced many, many good thoughts and
23 directions to both me and ultimately to the doctors
24 that allowed us to move forward.

25 What is unique here is, when the hospital --

1 when we got to that point -- and we have invested
2 about two years to this, in designing and working
3 with the doctors and the hospital -- what is unique
4 is the hospital comes to me and says, at the tenth
5 hour, We'd like to get three bids, competing bids,
6 from financial institutions on who is going to
7 finance this property. It was a very significant
8 property for Newberry.

9 And as you heard from the appraiser, it was a
10 Class A facility right on the entrance of a
11 hospital. And the hospital wanted their banks to
12 take a look at this.

13 So all of a sudden -- which I had been working
14 with and consulting with the Carolina First team --
15 the hospital comes to me and says, We're going to
16 get three bids here.

17 Well, we went out and we got three different
18 bids. And Carolina First was competitive. The
19 hospital wanted to use one of their relationship
20 banks. But, as I explained to the hospital, this
21 is a process that is going to take several years.
22 And I have had such good experience in working with
23 the Carolina First team that there really is a
24 great benefit to having a Carolina First team that
25 has spent the last two years looking at this,

1 understanding it, going through the CON issues,
2 dealing with the economics, dealing with the
3 siting, dealing with everything.

4 I told the hospital CEO that we definitely
5 need to use Carolina First for all of the reasons I
6 explained. When you are in a project that goes for
7 multiple years, you need a lender, a team member
8 that I worked with that had a great experience,
9 because I knew they were available and flexible to
10 do the things it took to make the project a
11 success.

12 Q So you ultimately did go with Carolina First?

13 A We ultimately went with Carolina First.

14 Q All right. The building was completed what year?

15 A Mid '08.

16 Q What happened after '08?

17 A '08. Okay. Well '08 was a very traumatic year for
18 everybody, for the economy, for healthcare, for
19 personnel, for doctors. Everything happened in mid
20 '08.

21 And then let's go through the consequences of
22 all these. The recession had hit. This was
23 several months. I mean, it had been kind of
24 building in '08, but in '08, September, October,
25 the bottom fell out. Everything froze up. I mean,

1 the lending froze up, health practices froze up.
2 Nobody knew where to turn next. This was in '08.

3 '09 -- I mean, we're now at the end of '08.
4 The economy is just frozen. Nobody is able to do
5 anything. Construction is complete. We occupied
6 approximately 60 percent of the hospital and
7 physicians on site. But during this time,
8 healthcare, which had become a very important part
9 of the discussion at the national level, the
10 Affordable Care Act was introduced, talked about.
11 And what that did was change the whole perception
12 of what healthcare was going to be about. It was
13 going to give access to many more patients. It was
14 going to change the way doctors and hospitals were
15 paid. Unfortunately, in '09 it just froze up the
16 healthcare industry. I mean, nothing could get
17 done. The economy was in a deep freeze.
18 Healthcare was in a deep freeze. And so we were
19 facing some very, very significant problems.

20 To cap that off, the CEO that brought me to
21 the table in Newberry, Mr. Bishop, he had been
22 there for 15 years. He basically had built this
23 hospital. His executive team and I have worked
24 together hand-in-hand for almost four years.

25 Mid '09 he leaves. This is mid '09. The

1 hospital is without leadership, as Mr. Wingard
2 mentioned. So we have got a hospital that has no
3 leadership. Not only did the CEO leave, but the
4 whole management team. The hospital was definitely
5 having problems. And this continued through '10,
6 and into '11.

7 And they finally -- I mean, so the hospital
8 had no basis to run the hospital efficiently. All
9 the relationships at the hospital had changed now
10 that the management team and the CEO was gone.

11 And so everything was just in a stall:
12 Healthcare, reimbursement, financial were in --
13 just basically frozen. And now the hospital is
14 without leadership. No way to recruit. They were
15 not focusing on recruiting. They finally brought
16 an interim CEO in that was really just trying to
17 figure out how to keep the hospital operating.

18 So we're going through this basically in '10
19 and '11.

20 Q How did all of that affect the building, though?

21 A Well, the building continued to operate. The
22 building continued to operate. Unfortunately,
23 because the taxes had been increased, and during
24 the subsequent negotiations with Carolina First
25 team from '09, '10, '11, they understood the

1 problems, I mean, these were life-changing
2 problems, not only for the country, but for
3 healthcare. And so they were very, very informed
4 and aware of the consequences this was having on
5 the medical field and the community.

6 Newberry was in a difficult situation too
7 during this recession. And it still is, quite
8 frankly. The hospital is just now getting its legs
9 back under them. They have got a new CEO. This is
10 '13 where all of a sudden it regains leadership.
11 Healthcare is starting now really in '12 and into
12 '13, it is starting to get some definition. So now
13 physicians and hospitals really understand how to
14 get paid. The environment is changing slowly, but
15 the economics have been extremely difficult.

16 Q So from the standpoint of occupancy of the
17 building, what does all this mean?

18 A Well, it means that it has been very, very
19 difficult to get additional new tenants, but it is
20 starting to come now. Self Memorial Hospital came
21 and brought a number of physician practices, and
22 now they are part of this.

23 I think there was a misunderstanding here a
24 little earlier, but there have been expansions.
25 Self Memorial Hospital has expanded. They have

1 doctors and they expanded. We had to pay for the
2 upfit costs of this expansion. And that was
3 handled.

4 Because of the tax increase, I was slow in
5 paying that, but ultimately, contrary to what was
6 recorded from the TD officer, I paid all the taxes.
7 I paid the delinquent taxes that were delinquent in
8 '11, and I paid them for '12. And I paid them
9 because it was the right thing to do.

10 Q Now, the hospital and the doctors own 52 percent of
11 the building, is that --

12 A 48 percent.

13 Q They own 48 percent. Have they assisted at all in
14 trying to resolve the problem?

15 A They haven't really been able to. They are like
16 deers in the headlights. It really has been -- I
17 mean, they would like to add some new physicians
18 and some new services, but without any knowledge of
19 what the status of this building is, it just
20 basically has continued to freeze.

21 Q Throughout this period of time up until the time
22 the loan was called, were the payments being made?

23 A Yes. Payments have been made up until the time
24 that I received a letter from TD's attorney saying,
25 It is over with. We're suing you on your

1 guarantee.

2 And this is coincidentally like nine days
3 later after I had tried to communicate with
4 Mr. Jenkins. Here is the workout. We were going
5 to be able to work together to pull this out.

6 To not give us the time in one of the most
7 tumultuous times in our economic and healthcare
8 history was just -- it was unconscionable.

9 Q Let me show you these. This is an exhibit that is
10 already admitted. Can you identify those first two
11 letters, please?

12 A One is a letter from me to Mr. Jenkins on July 9th
13 of '12.

14 Q The other letters?

15 A The other letter is a follow-up letter of August --
16 I'm sorry, March 20th -- to Mr. Jenkins.

17 And then the first two letters are letters to
18 Mr. Jenkins' predecessor that I had to seek out
19 with a new TD regime, a Mr. O'Toole in Greenville.

20 And then finally I've got a letter here
21 basically nine days after Mr. Jenkins had received
22 a letter from me indicating, Here are the issues
23 that I'm facing. And this is a follow-up letter.
24 And this is something I have one chance to meet
25 Mr. Jenkins and basically I was able to get two

1 letters off to him. And that was the extent of
2 Mr. Jenkins' involvement in this transaction.

3 Well, on the 9th -- I'm sorry, on
4 August 20th -- I again reached out to Mr. Jenkins
5 and said, Can you be of help to us? It is my
6 desire to make everybody whole. I would ask for
7 some consideration in extending the loan. And I
8 will pay everything off.

9 I just needed some time, three years to adjust
10 the payments nominally -- nominally -- at that time
11 and work through this with the hospital. Things
12 were getting better. This is on August 9th.

13 On August 29th I get a letter from
14 Mr. Jenkins' law firm saying -- no response from
15 Mr. Jenkins during any of this time -- I get a
16 letter from the attorney representing TD Bank
17 saying, We're suing you on your guarantee. Pay up.

18 And that was just -- to me it was
19 unconscionable. I had spent 12 plus years working
20 with a team at Carolina First that understood the
21 dynamics of a developer. And then during the worst
22 environment we have ever seen, the recession and
23 healthcare freeze-up, not to allow me to keep the
24 payments current. I have never missed a date. I
25 would be making payments either for Newberry or for

1 Middle Sound. Everything was being kept current.

2 Q Hold on a second.

3 MR. JOWERS: Your Honor, we would like to
4 introduce these others.

5 THE COURT: You need to get them marked first.
6 (Complies.)

7 THE COURT: They are marked as Defendant's
8 Exhibit Number 5. Any objection?

9 MR. COLLINS: May I approach, Your Honor? I
10 don't think I have an objection, I just want to
11 make sure we have the same document that is being
12 admitted.

13 (Complies.)

14 MR. COLLINS: No objection.

15 THE COURT: Without objection, they are
16 admitted.

17 (WHEREUPON, Defendant's Exhibit No. 5
18 was marked for identification and
19 received into evidence.)

20 BY MR. JOWERS:

21 Q Before you made those requests to TD Bank, Carolina
22 First had issued a number of extensions, I believe?

23 A Yes. Carolina First, over the years, granted a
24 long time, but this was a very serious problem we
25 were facing because of the recession, because of

1 the healthcare environment, because of lack of
2 leadership. I mean, these were serious problems.
3 But I was funding Middle Sound, I was funding the
4 Atrium Newberry project, and I was doing it by
5 liquidating assets and refinancing what I could
6 through my wife. And basically I put in every last
7 dollar that I had available to keep all these
8 afloat and live up to my obligation. I was paying
9 taxes, paying the interest and principal on time.
10 And through this. Through the renewal. Every time
11 we renewed, we agreed on what kind of principal
12 reduction.

13 And as I have mentioned, I paid down this loan
14 by about a million and a half dollars. And yet I
15 kept paying it current. I also, as we
16 negotiated -- the benefit of working with Carolina
17 First team, we talked about things. How can we
18 make things work? How can you and the bank agree
19 on things that would allow the project to continue
20 to go forward? And we did that. And we did that
21 by agreeing to make principal reductions or
22 amortization.

23 In other words, the bank agreed to give me
24 many permanent loans, so I could pay, continue to
25 pay the loan down through the monthly payments.

1 But during that, we were still short. I had to
2 raise money to keep paying and keep everybody
3 happy.

4 Q The Middle Sound project was also financed by
5 Carolina First?

6 A Yes.

7 Q That is what we call the Wilmington --

8 A Yes.

9 Q -- project?

10 A Yes.

11 Q I believe Mr. McFarland testified that it was your
12 idea to use Carolina First for that project?

13 A Yes. Again, because of the relationship and the
14 confidence I had in having this team working with
15 me hands-on and being flexible, we used Carolina
16 First at my request. Again, he had another
17 relationship with a bank. But, again, I requested
18 that -- Carolina First had been a real asset to my
19 team, and I wanted to continue to work with them
20 because I knew I was working with people that
21 understood what we were dealing and I trusted they
22 would work together with me to do the right thing
23 to ensure a successful project.

24 Q Carolina First granted a number of extensions on
25 both loans. Would you say that was typical of a

1 lender?

2 A No. No. Again, I speak to the point of the
3 special relationship I had with Carolina First and
4 this team. I'm not aware of any other lender, bank
5 that would, one, do the accommodation that Carolina
6 First did. They were special people and they
7 worked in special ways to ensure the success of the
8 project.

9 So the answer is no. These extensions were
10 done in a positive, flexible, negotiated manner.
11 And it worked for everybody. The ultimate goal of
12 all the parties that I say over and over again is
13 the lender is to honor the commitment to pay
14 everything back, but I needed time for all the
15 reasons and the problems that we have discussed
16 here today.

17 Q You heard Mr. Jenkins' testimony yesterday about
18 the foreclosure and the price they paid, or at
19 least -- they really didn't pay a price, they
20 credited that against the loan; is that correct?
21 Is that your understanding?

22 A That is my understanding. My understanding is that
23 TD Bank basically had no interest in working with
24 any of these projects. They chose to work with
25 clients or friends of the specific officers in

1 giving them special consideration.

2 Unfortunately, I didn't know any of the TD
3 people that had taken over for the Carolina First
4 people. They all had left. So I was kind of
5 adrift in an area that I have a long-term 12-year
6 history of very good cooperation and assistance.
7 And here I am at the end of this cycle in a very
8 different environment and I'm dealing with TD Bank,
9 who I understand acquired Carolina First, they
10 merged with them. They bought them at a huge
11 discount. I mean, the papers that I read they
12 basically got a \$200 million --

13 MR. COLLINS: Your Honor, we object, for
14 reasons stated already on the record. If I could
15 approach?

16 THE COURT: Yes, sir.

17 (WHEREUPON, a bench conference was held
18 in the presence of the jury but out of
19 the hearing of the jury.)

20 BY MR. JOWERS:

21 Q Now, you heard about the foreclosure sale?

22 A Yes, sir.

23 Q And now Carolina First -- or, excuse me, TD Bank --
24 owns the property in Newberry. And you also heard
25 that they can sell it for anything they want at

1 this point and you get no credit for it. Is that
2 correct?

3 A Yes. That is pretty unconscionable also, I mean,
4 to acquire the building for pennies on the dollar,
5 one. Two, to basically cut me off after a history
6 of success in working with Carolina First. Now
7 they basically have -- and, basically, because of
8 this legal action, I'm basically without the
9 ability to borrow money and raise the funds.

10 Q That was my next question: How does this suit on
11 guarantee affect you and your ability to work and
12 to save these two projects?

13 A It basically killed it. I mean, there is no
14 ability for me to move forward in this environment
15 with the judgment and what the TD Bank has done to
16 me and Mr. McFarland.

17 Unfortunately, what I have learned, and I am
18 impersonally aware of, TD Bank has given other
19 clients --

20 MR. COLLINS: Object, Your Honor. May I
21 approach?

22 MR. JOWERS: We'll strike that, Your Honor.
23 We withdraw that line of discussion.

24 BY MR. JOWERS:

25 Q Mr. Jacobs, why do you think these guarantees on

1 these two loans should not be enforced against you?

2 A I'm coming from a relationship, a long-term
3 relationship with Carolina First. And it was a
4 relationship of trust, of fair dealing. We worked
5 together to solve problems. And it was based on a
6 cooperative, working-together relationship, as
7 evidenced by the number of extensions and the
8 number of years that we have had to continue to
9 work through this through a very difficult
10 environment.

11 Inside of several months working with TD Bank,
12 basically with no discussion, no negotiations, no
13 anything, they basically say, We're coming after
14 you on your personal guarantee -- which basically
15 ends my career -- and that was the end of it.

16 Bankers that I am used to working with at
17 Carolina First, it was a process that we worked
18 together on. So to have a hardcore lender filling
19 in the shoes of a cooperative team member is just
20 unconscionable.

21 And one more thing that I think is important
22 for everybody to understand, in an effort to try
23 and protect this building, I put it into a
24 reorganization believing that there was a way for
25 the legal system to protect it.

1 Unfortunately during this whole reorganization
2 trying to protect the building -- and I continue to
3 make payments during the reorganization, I continue
4 to pay -- but during this reorganization, the fact
5 that they, TD, was suing me on my guarantee and
6 would not relent on that, it -- and the
7 reorganization was the opportunity for me to buy
8 some time, raise some additional monies to put into
9 the leasing and the carrying costs. But with a
10 personal guarantee that they basically are going to
11 sue me on, it would prohibit me from refinancing
12 the building in a year, six months, whatever it
13 would be. I could solve the problem, but I
14 couldn't finance it out, and that was the
15 objective, is to find a financing ability to
16 finance this out and pay TD off and let the
17 building succeed. But they blocked that.

18 Q In his testimony, Mr. Jenkins tried to paint you as
19 one of those people who won't pay --

20 A Yes, sir.

21 Q -- their debt.

22 A Yes.

23 Q What is your reaction to that?

24 A Well, I think it flies in the facts of reality. I
25 mean, I have liquidated all the assets borrowed

1 against all the assets that I could to keep
2 everybody paid and take care of my obligations. It
3 is not a matter of can't or -- I mean, I can't.
4 They basically have tied me up so much. I
5 exhausted all my cash. The assets that I have left
6 are partial ownerships in real estate organizations
7 that basically have no market in them. I am
8 basically down to items that, as I discussed in my
9 financial statement, all I have left are debts. I
10 have equity in real estate, which I'm a minority
11 owner, but no ability to sell and raise money. I
12 basically squeezed every dollar out of my worth in
13 order to meet my obligation.

14 MR. JOWERS: No further questions at this
15 time.

16 THE COURT: Anything?

17 MR. JORDAN: I have no questions.

18 THE COURT: You may cross.

19 MR. COLLINS: Your Honor, would it be possible
20 to break for lunch? I don't know that I have
21 questions, or, if I do, there will only be a very
22 few, but a few minutes to prepare would be helpful.

23 THE COURT: Go ahead and get started.

24 (Pause.)

25 CROSS-EXAMINATION

1 BY MR. COLLINS:

2 Q Mr. Jacobs, when TD Bank first brought suit against
3 you in this case, you raised the defense that TD
4 Bank should have foreclosed on the property rather
5 than sue you on the guarantee; correct? A simple
6 yes or no would be good.

7 A But it is not the answer. The answer is, there
8 should have been a consistent action from TD Bank
9 similar to what Carolina First had offered me: The
10 opportunity to work together to solve the problem.

11 MR. COLLINS: Can I approach, Your Honor?

12 THE COURT: Yes, sir.

13 (Complies.)

14 BY MR. COLLINS:

15 Q Will you take a look at that and please tell me, is
16 that an affidavit you submitted in this case under
17 oath?

18 A It appears to be.

19 Q And if you turn to Paragraph 42, would you please
20 read that paragraph into the record?

21 A 42?

22 Q Yes, sir.

23 A I have been ready to pay, when I'm able, any
24 deficiency in the amount owed and the value of the
25 building of Newberry and the land as determined by

1 public sales through the mortgage foreclosure.

2 Q Okay. So at least as of August 14, 2013, you had
3 stated under oath that you were ready to pay the
4 deficiency between the value of what is owed at
5 Newberry Atrium and what it was sold at public
6 sale; correct?

7 A I was willing to. Unable to.

8 Q That is a yes?

9 A I was not able to, but I was willing to.

10 Q At this point, Newberry Atrium has been sold at
11 public sale; correct?

12 A That is my understanding, yes.

13 Q Based on this sworn statement, you are willing to
14 pay the difference between what is owed and what it
15 sold at public sale; correct?

16 A It is unfortunate, but, yes. But, unfortunately,
17 the bank was not -- again, TD was not fair in
18 dealing with this transaction. You heard that the
19 value of the building is \$6,000,006. They
20 basically came in and bid half of the value of it.

21 Q Mr. Jenkins, you asked for a public sale; correct?
22 That is your words, public sale; correct?

23 A Yes, but I also --

24 Q Yes.

25 A -- am aware that the bank had been approached by a

1 number of investment groups to buy this building
2 for far more than what the bank ultimately
3 purchased it for. And they were rebuffed.

4 Q Mr. Jenkins --

5 A But they were rebuffed every approach that I'm
6 aware of.

7 Q In your sworn statement you asked the bank to sell
8 Newberry Atrium at a public sale; correct?

9 A Yes.

10 Q Yes?

11 A Provided that they would treat --

12 Q And it was sold at a public sale; correct?

13 A -- in a fair manner, which, unfortunately, has not
14 been the case.

15 Q Is there anything that would have prevented any
16 third party from coming in and bidding one more
17 dollar than the bank at this public sale?

18 A As a result of the foreclosure process, it was very
19 difficult for anybody to do that.

20 Q Okay. Anybody could have came in and bid one more
21 dollar and took the property from the bank;
22 correct?

23 A The legal -- it is legally allowed. Is it morally
24 allowed? I can't answer that. I can answer that,
25 but I'm sure you are going to cut me off.

1 Q It is a public sale; correct?

2 A Yes.

3 Q Okay.

4 MR. COLLINS: I have no further questions,
5 Your Honor.

6 THE COURT: Anything further?

7 MR. JORDAN: No, Your Honor.

8 MR. JOWERS: No, Your Honor.

9 THE COURT: You may step down. Thank you.

10 (Witness steps down.)

11 THE COURT: Anything further from the Defense?

12 MR. JORDAN: No, Your Honor.

13 MR. JOWERS: Nothing further, Your Honor.

14 THE COURT: The Defense rests?

15 MR. JOWERS: Yes.

16 MR. JORDAN: Yes.

17 THE COURT: Any rebuttal testimony at this
18 time?

19 MR. BEDENBAUGH: Nothing further, Your Honor.

20 THE COURT: Ladies and gentlemen, at this time
21 it would be a good time for you to take a lunch
22 break.

23 I am going to remind you of the instructions I
24 have given to you, that is, that you should not
25 begin to discuss this matter among yourselves.

1 Even though you have heard all of the evidence, you
2 are still not in a position to be able to determine
3 the facts until you have heard my instructions to
4 you as to the law. And so I ask that you not begin
5 to engage in any discussions about this matter.

6 As you come and go from the courthouse, please
7 remember not to listen to conversations that you
8 may hear in the hallway, again, for the reasons
9 that you have to make decisions based upon what you
10 have heard here in this courtroom, it should not be
11 based upon other conversations that you may
12 overhear.

13 Please also remember not to allow anyone to
14 approach you to discuss this matter with you.
15 Again, if someone attempts to do that, please tell
16 them that you are a juror and you cannot discuss
17 it. And we ask that you report it as soon as
18 possible.

19 Ladies and gentlemen, we have reached the
20 point in the trial where we have some legal issues
21 to take up. And I am hopeful when you come back
22 from lunch at that time we will be ready to hear
23 the closing arguments of the attorneys, and then
24 after those closing arguments I will instruct you
25 on the law, and you may begin deliberations at that

1 particular point.

2 Because of these legal issues, we may need to
3 take a little extra time in order for us to address
4 these issues. And so I am going to give you a
5 little bit longer lunch break for us to do that.

6 I am going to ask that you come back at 2:30.
7 And come back at 2:30 to the same jury room, and
8 we'll be ready at that time to be able to go
9 forward and continue on with this particular
10 matter.

11 I hope that you have a pleasant lunch. And
12 we'll see you back at 2:30.

13 (WHEREUPON, the jury is excused for
14 lunch at 12:43 p.m.)

15 THE COURT: Are there any motions at this
16 time?

17 MR. COLLINS: Yes, Your Honor. We would renew
18 our motion for directed verdict. It is going to be
19 for the same grounds, Your Honor. If you would
20 like me to go over those again I will. I don't
21 want to belabor before the Court, but it will be
22 based on the same grounds we argued after the
23 Plaintiff first closed.

24 THE COURT: And now that we have heard all the
25 evidence as it relates to -- obviously the only

1 thing that is remaining is whatever allegations
2 there are about good faith and fair dealing?

3 MR. COLLINS: Yes, Your Honor. I guess it
4 goes to what the Defendants are trying to allege is
5 breached. I think the only thing the Defendants
6 put up in their case was testimony that they had
7 some type of relationship with Carolina First. And
8 even taking that evidence at its face value, which
9 I think the Court has to do, there is no end to
10 that. There is no "what is the breach." Is the
11 breach that TD Bank wouldn't give them a ninth
12 extension? I'm not -- I don't know that there was
13 any testimony at all other than they believed they
14 had been treated unfairly.

15 I mean, if any debtor can come into the court
16 and simply say, You can't sue me because I think it
17 is unfair, I'm not certain we would ever have any
18 breach of contract claims. I think generally the
19 Defendant, especially in a case like this where
20 there is millions of dollars at stake, the
21 Defendants probably do feel like they have been
22 treated unfairly when the bank comes to get their
23 money if they haven't been able to pay.

24 And I don't see any testimony at all. The one
25 I challenge whether under these facts there could

1 even be a fiduciary duty. I believe it is a
2 lender/borrower relationship. I think under South
3 Carolina law that is, by its nature, somewhat --
4 I'm not going to use the word adversarial, but
5 surely not one where there is a breach of
6 fiduciary -- or a fiduciary duty between one, but
7 even if there was, if the Court looks at it and
8 says, I think maybe -- we have heard a lot of
9 testimony about the relationship, there has been
10 absolutely no evidence that a jury could determine
11 there was a breach of that fiduciary duty.

12 TD Bank came in and gave a year extension.
13 And based on the financials that were submitted,
14 did not give a ninth extension. I don't believe
15 under South Carolina law that can be a breach of
16 fiduciary duty.

17 And so, based on that, Your Honor, we believe
18 under the facts and the law that we should be
19 granted a directed verdict.

20 THE COURT: Mr. Jowers?

21 MR. JOWERS: May it please the Court, Your
22 Honor? Thank you.

23 We believe we have shown that this was an
24 unusual case. The relationship between Mr. Jacobs
25 and Carolina First was a long one. It was unusual

1 to the extent that Carolina First got involved in
2 the business and stayed involved in his business,
3 giving him advice, counsel, assistance, above and
4 beyond anything a normal lender would do.

5 We believe that those facts and those actions
6 ripen into a special relationship that TD Bank, by
7 merging with Carolina First, had to honor.

8 There are ways to do things, right ways and
9 wrong ways. If TD Bank truly wanted to end the
10 relationship, they could have proceeded on
11 reasonably. What they did was unreasonable.

12 Yes, they had the right to sue on a guarantee.
13 I understand the law. But given the facts of the
14 case and the unusual circumstances in the world at
15 that time, of the recession, and the fact that
16 Carolina First had been working closely trying to
17 resolve a mutual problem resulting from the
18 recession, then TD should have continued on with
19 that, or at least started foreclosure, include the
20 guarantee in that, and be done with it.

21 Suing on the guarantee alone smacks of being
22 punitive, because there is really no legitimate
23 basis for that in actuality. It is one of those,
24 Yes, you can do it, but is it fair under the
25 circumstances? I don't think so. And I don't

1 believe they should be -- they should have done
2 that.

3 They did not analyze the financial statements.
4 They claim the financial statements were the basis
5 for their decisions to move forward. Clearly,
6 looking at the financial statements, there is
7 nothing there because the values -- there was real
8 estate values that were a minority interest that
9 could not be turned into liquidity to satisfy the
10 debt. By suing on the guarantee, that precluded
11 Mr. Jacobs of doing anything -- refinance or do any
12 other financing -- to save either property.

13 And then the final, I think, blow to prove
14 that they have acted unconscionably in this case is
15 the bid at foreclosure. They didn't produce an
16 appraisal here today showing what it appraised for,
17 because I don't think they had one. The existing
18 appraiser, who they have used in the past, who
19 appraised it only a year ago, showed that the -- or
20 came up with a value of six and a half million
21 dollars.

22 They bid almost less -- almost half of that,
23 because they, continuing in their fairly punitive
24 way of proceeding against the guarantors -- and
25 they still will own the property, and with a

1 modicum of marketing, will probably reap the
2 benefits, because this is an income-producing
3 asset. It has a substantial rental income from
4 60 percent occupancy. And as Mr. Jacobs testified,
5 payments were made throughout the term until they
6 called the loan.

7 So what I'm saying, Your Honor, is that the
8 total circumstances -- and you cannot look at one
9 little thing here. We have to look at the whole
10 circumstances: The long-term relationship, the
11 economy, the healthcare, the fact that the bank
12 continued to -- Carolina First continued to work
13 and probably would have continued to work with
14 Mr. Jacobs to save this property, which was an
15 asset to the community of Newberry, owned in part
16 by the hospital, but, no, they wanted to take
17 drastic punitive steps against him, which served no
18 business purpose.

19 We believe, yes, there is a covenant of good
20 faith and fair dealing in every contract, and a
21 guarantee is just that.

22 We believe there are actions in the context --
23 and that is important, the context of the
24 circumstances that we have all lived in the last --
25 since 2008 -- dictate a different course of action

1 because of the special relationship that had
2 existed between the parties.

3 And for that reason, we believe we are
4 entitled to let the jury decide if there was, in
5 fact, bad faith, unfair dealing on behalf of TD
6 Bank in the context of this case.

7 I believe it is an unusual case. It is not a
8 normal -- it is not a normal case. It really
9 isn't. And that is why I believe we're entitled to
10 let the jury hear this and see what they say, what
11 a jury of 12 good people think about the conduct of
12 the bank. There has to be accountability for the
13 bank, or for every party through every agreement,
14 and let a jury decide if it was right, if it was
15 fair.

16 And that is our position, Your Honor. Thank
17 you.

18 THE COURT: Mr. Jordan?

19 MR. JORDAN: Thank you, Your Honor. I
20 certainly join Mr. Jowers' argument with regard to
21 the implied covenant of good faith and fair
22 dealing. The argument of the Plaintiff seems to be
23 that there is no fiduciary duty.

24 I'm certainly not arguing that there is a
25 fiduciary duty, my argument is that, as Mr. Jowers

1 has indicated, the bank's motives on the property
2 here.

3 The bank -- my client's loan has a 9 percent
4 interest rate now calculating. It has run up an
5 additional \$125,000 in extra interest, not pursuant
6 to the basic interest rate on this loan, but based
7 upon the fact it is a default rate of interest.

8 And instead of pushing this case along -- it
9 has provisions in its own document, like all the
10 legalese it has, it has a provision that the
11 Defendants waived the right to a jury trial. But
12 here we are today. And if they wanted to move this
13 case along quickly, they would have had it over and
14 done in six or eight months. But here we are two
15 years later, and we are still arguing about this
16 case.

17 And, you know, the reason for that is the bank
18 wanted it to go this way. The bank has got, you
19 know -- believed that my client and Mr. Jacobs had
20 the ability to pay this loan. The only missing
21 link there is the willingness to pay. So therefore
22 what they are going to do is basically string this
23 out and accrue interest at the extra -- you know,
24 extra interest based on the inflated principal in
25 the situation of Newberry. You know, they don't

1 have a default rate of interest on Newberry, but by
2 selling this property at a foreclosure sale, that
3 is probably close to \$200,000 off the interest
4 accrual, but certainly that doesn't prove to the
5 best interest of the bank. The bank's motive here
6 are totally greed. That is what it is. And,
7 again, you know, that is an issue that comes under
8 the implied covenant of good faith and fair
9 dealing.

10 We don't have that in this particular case.
11 This is, according to the Plaintiff's attorney, a
12 simple case. It is a simple case, but the fact is
13 that the bank has made, you know -- has used
14 tactics in this case to basically increase the
15 amount of money they know they will ultimately
16 collect. And that is the -- I think the Defense's
17 case has basically shown enough to get to the jury
18 on that. And we certainly -- at this point of the
19 game we are certainly one step away from the jury,
20 so in my mind there is just no reason not to
21 continue.

22 MR. COLLINS: Judge, could I briefly respond?

23 THE COURT: Yes, sir.

24 MR. COLLINS: And I don't want to waste the
25 Court's time. I find it a little bit disingenuous

1 for the Defendant, who asked for a jury trial, and
2 have delayed this case in every step they can to
3 get up and say it is the Plaintiff's fault they
4 have been delayed.

5 It was just last week we told Judge Manning we
6 would love to waive the jury trial. And the
7 Defendants are the one that said, No, we will not,
8 you know, waive our right to a jury trial. They
9 are going to stand up today and blame the
10 Plaintiffs for somehow delaying this case when the
11 Defendants filed for bankruptcy, contested the
12 foreclosure, made the foreclosure -- it had to be
13 two hearings instead of one. One of our attorneys
14 had to go back and testify to damages twice because
15 Mr. Jowers showed up.

16 I am not going to -- I am going to leave it at
17 that, but it was a little bit, I think, a
18 disingenuous argument for the Defendants to stand
19 up and say somehow the Plaintiffs have been
20 dragging their feet here. We have done everything
21 we can to get this case before the Court.

22 The other thing I want to mention, I heard two
23 different issues: The breach of implied duty of
24 good faith and breach of fiduciary duty. And they
25 are two different things.

1 The implied duty of good faith and fair
2 dealing only applies when there is a contract
3 missing a term. And there is an implied duty to
4 act in good faith when there is a term missing.
5 There is no term missing in this case. And I think
6 that is why case law is clear. That if you are
7 doing what your contract says you can do, there can
8 be no breach of the implied duty of good faith and
9 fair dealing.

10 So I think there should absolutely be a
11 directed verdict on that particular issue because
12 of controlling South Carolina case law.

13 Now, when we get to the breach of the
14 fiduciary duty, I think that is a different issue.
15 But that is somewhat of a personal and unique cause
16 of action. And I don't have the case in front of
17 me, but it is basically when one person interposes
18 trust and confidence in another so that the other
19 should act in good faith, then they should.

20 The problem we have here is, even if you take
21 Mr. Jacobs at his word, that there was a -- he had
22 a relationship with Carolina First and that he was
23 interposing trust in them, one, Carolina First
24 would have to accept that. It has to be actions
25 from them that create the fiduciary duty. But,

1 secondly, when there is a merger and an entirely
2 new party shows up, being TD Bank, that
3 relationship that you may have had with Carolina
4 First doesn't transfer to TD Bank, there has to be
5 reliance. You know, it says interposed trust and
6 confidence in another individual. He, by his own
7 admission, had no relationship with TD Bank until
8 there was a merger.

9 So I don't have the case in front of me to
10 define fiduciary duty, but I don't believe that is
11 the type of duty that transfers through a merger
12 and is created really between a relationship
13 between two parties.

14 And so, simply put, we believe at this point,
15 Judge, that the Plaintiff should be granted a
16 directed verdict on both the implied duty of good
17 faith and fair dealing and the fiduciary duty.

18 I would also point out, the Defendant
19 McFarland never raised any fiduciary duty in his
20 answer. The only thing they raised was that they
21 should have done a foreclosure before suing on the
22 personal guarantees.

23 And I will leave it at that, Judge. Thank
24 you.

25 MR. JORDAN: Your Honor, may I respond to his

1 comment about my comment? It appears the Plaintiff
2 wants to enforce the terms of a contract, but only
3 when that is convenient to the Plaintiff. Okay?
4 They have got terms of their contract that says
5 this case will be tried non-jury, it is a waiver by
6 the borrower to a jury trial.

7 THE COURT: Well, why can't I just enforce it
8 at this particular point?

9 MR. JORDAN: Well, they have never raised it,
10 Judge. Never. That is the problem. You know,
11 they keep saying they are blaming us. Of course we
12 are stringing the case out. We are trying to sell
13 the property all this time. You know? But just
14 because we're stringing it out doesn't mean they
15 can't try to enforce their own contract that says
16 it will be a non-jury trial. You know? But, I
17 mean, it is disingenuous of them to think they can
18 enforce the contract and ignore things and then
19 blame us on, you know, the fact that this case has
20 been strung out. They could have required this
21 case to be tried non-jury and it would be over six
22 or eight months after it was filed.

23 THE COURT: I'll allow the -- what I will do
24 over lunch is review it and look at it and make a
25 decision at that particular point. And what I'll

1 do is ask you all to come back at about 2:15. At
2 that time I'll have a decision for you. And then
3 if you are going forward, I will tell you what I'll
4 charge the jury. And I will let you know.

5 MR. JORDAN: Your Honor, can my client have
6 leave to go back to Wilmington?

7 THE COURT: I'm sorry, I didn't hear the last
8 part?

9 MR. JORDAN: Mr. McFarland is going to be
10 leaving to go back to Wilmington. Any objection to
11 that?

12 MR. COLLINS: No objection from the Plaintiff.

13 THE COURT: All right. I will see you back at
14 2:15.

15 Oh, before you all leave, let me place on the
16 record, I intend to make it perfectly clear to the
17 jury that the fact that there was not a foreclosure
18 that was begun before, it is not reflected on the
19 guarantees, is not an issue in this case. And it
20 is not something in which the Defendant can seek to
21 void the guarantee.

22 And to the extent that you all plan to make
23 those arguments, let me be perfectly clear, that is
24 not an argument. And I'll be more than happy to
25 stop you during your argument. I didn't do it

1 during the course of the questioning because I do
2 intend to tell the jury that that is not an issue
3 for them to consider. It should not be considered
4 by them in making these decisions. So I just want
5 that to be clear.

6 MR. JORDAN: Your Honor, may I inquire as to
7 whether or not your position goes to the point of
8 the calculation of the debt?

9 THE COURT: And what issue is there about
10 calculation of debt?

11 MR. JORDAN: Well, like the Newberry case, if
12 the foreclosure happened a year earlier the debt
13 would be approximately \$200,000 less. Selling at
14 the same price.

15 THE COURT: I don't know what evidence there
16 was about that, about whether it was a year before.

17 I understand that the last dates and when they
18 became due and when the lawsuits were filed in
19 2012, so to the extent that you are claiming they
20 had a certain value in 2012 and that value has been
21 established, you can make that argument.

22 But I still think the fact that -- or the case
23 law is very clear that the fact that they don't
24 foreclose and they decide to go on and guarantee is
25 not evidence of violation of the covenant or breach

1 of the covenant of good faith and fair dealing, it
2 is not a breach of fiduciary duty. And so that is
3 clearly off the table, anything related to a
4 foreclosure before proceeding on the guarantee.

5 MR. COLLINS: Thank you, Judge.

6 MR. JOWERS: Thank you.

7 (WHEREUPON, a lunch break was taken.)

8 THE COURT: I considered the motion for
9 directed verdict. And after considering all the
10 information, I am denying the request as it relates
11 to the covenant of good faith and fair dealing.

12 And to the extent that there is a claim -- it
13 is really unclear whether there is a claim for
14 breach of fiduciary duty, but to the extent they
15 are relying on some type of special relationship, I
16 will deny the Plaintiff's motion for a directed
17 verdict to that particular claim as well.

18 I think that those are possibly a few of the
19 issues, and I'll let it go to the jury as to those
20 issues.

21 Is there anything else I need to take up
22 before I talk about the charges?

23 MR. COLLINS: No, Your Honor.

24 THE COURT: I will charge the jury that they
25 have to determine the facts based upon the

1 evidence. In order to do that, they have to judge
2 the credibility of the witnesses.

3 I will also charge them on the burden of
4 proof.

5 I will charge them -- I consider this to be a
6 breach of contract claim, so I will charge them as
7 to the elements of a breach of contract.

8 The Plaintiff has to establish by a greater
9 weight or preponderance of the evidence there is a
10 binding contract, that the Defendants breached --
11 unjustifiably failed to perform the contract, and
12 that the Plaintiff suffered damages.

13 I will talk about determining the intentions
14 of the parties. In determining contracts you have
15 to determine the intention of the parties and put
16 those intentions into effect. You have to consider
17 only the outward expressions of the parties, not
18 any undisclosed or secret intentions of the
19 parties. Contracts should be liberally construed
20 to carry out the intention of the parties. And it
21 is the substance of the agreement not the form
22 which must control the construction of the
23 contract.

24 I will also talk to them a little bit about
25 interpreting the contract, and talking about when a

1 contract is in writing, and they have to determine
2 the intention primarily from the contents of the
3 document itself, and determine from the entire
4 agreement, not to any particular form or particular
5 cause or provision.

6 I always talk about the duty to read the
7 contract. The party has to read it. I will
8 discuss that in this particular case the parties
9 agreed that there was a contract that had been
10 entered into. The parties basically agree to the
11 terms of the contract. And so I will also discuss
12 with them that part of every contract there is
13 state law which may be applied to the contract. In
14 other words, the law becomes part of the contract
15 whether the contract states it or not.

16 There also exists in every contract an
17 unspoken but legally enforceable promise of good
18 faith and fair dealing and that the contract will
19 be performed in good faith and with fair dealing.

20 I will tell them that a guarantee is a
21 contract between the parties and independent --
22 under South Carolina law, guarantees of payment are
23 independent contracts that give rise to the
24 obligation separate and apart from the loan
25 agreement, and that they are separate obligations

1 and the parties have the right to bring a separate
2 action against a creditor under the guarantee
3 payment upon default without suing the debtor or
4 resorting to the collateral.

5 I will explain to them that the guarantee of
6 payment is an absolute unconditional promise to pay
7 a particular debt if it is not paid by the debtor
8 at maturity. But under the absolute guarantee of
9 payment the debtor again will maintain action
10 against the guarantor immediately upon default of
11 the debtor.

12 In talking about the covenant of good faith
13 and fair dealing, that the covenant is simple. It
14 requires that neither party to a contract impair
15 the right of the other party to receive the
16 benefits of the agreement.

17 That in this case, the Plaintiff -- the
18 Defendants have claimed that there was a breach of
19 the covenant of good faith and fair dealing, and so
20 they have the burden of proving that the Plaintiff
21 breached the contract by a greater weight or
22 preponderance of the evidence.

23 They also -- the Defendants also claim that
24 there was a fiduciary duty, a special relationship
25 resulting in a fiduciary duty between the bank and

1 the Defendant.

2 I'll explain to them that a fiduciary
3 relationship is founded on trust and confidence
4 imposed by one person and the integrity and
5 fidelity of another. Confidential fiduciary
6 relationship exists when one imposes a special
7 confidence in another and that the latter in equity
8 in good conscience is found to act in good faith
9 with due regard to the interest and the law
10 imposing confidence.

11 To constitute a fiduciary relationship, the
12 relationship must be more than a casual one.

13 The normal bank deposit arrangement creates a
14 creditor/debtor relationship rather than a
15 fiduciary one, and whether the circumstances of the
16 fiduciary relationship may be created between a
17 bank and a customer if the bank hesitates to advise
18 the customer and as part of the services the bank
19 offers.

20 Such a relationship charges the bank with a
21 duty to disclose material facts that may affect its
22 customers' interests.

23 On the other hand, no fiduciary relationship
24 between a bank and its depositor exists when a bank
25 is unaware of any special trust that is owed to it.

1 The term fiduciary implies that one party is
2 in a superior position to the other and that such a
3 position enables him to exercise influence over one
4 over the one who reposes the special trust and
5 confidence in him.

6 And the general rule, mere respect for
7 another's judgment or trust in his character is
8 usually not sufficient to establish a fiduciary
9 relationship.

10 The facts and circumstances must indicate that
11 the one reposing the trust has a foundation for his
12 belief, that the one giving the advice or
13 presenting the argument, acting not in his own
14 behalf, but in the interest of the other party.

15 I will explain to them that in this case both
16 the Plaintiff and the Defendant each claim that the
17 contract was breached and so they have to determine
18 who breached the contract.

19 Breach is just another way of saying that the
20 parties failed to perform as they were required to
21 perform under the terms of the agreement.

22 Once they have considered the contract and
23 they have considered which party breached the
24 contract, they will consider damages.

25 If they determine that the Defendant breached

1 the contract, the Plaintiff would be entitled to
2 recover the damages, which they would have received
3 had the contract been fully performed. And those
4 damages must be -- the natural consequence -- it
5 must flow as a natural consequence from the breach
6 of the agreement.

7 The Defendants in this case are claiming that
8 the Plaintiffs breached the contract. And in this
9 particular case there is a claim that the breach by
10 the Plaintiffs would prevent them from further
11 performance under the contract.

12 And so therefore they are seeking that they do
13 not have to pay under the guarantee agreement and
14 to have it declared void.

15 You have a copy of what I will tell them, that
16 there are two verdict forms, there are two separate
17 cases and you can treat each case separately.

18 One is TD Bank versus David Jacobs. We, the
19 jury, unanimously find for the Plaintiff, actual
20 damages, or, We find for the Defendant.

21 So they would award actual damages for the
22 Plaintiff if they find the Plaintiff has proven
23 that the Defendant breached the contract.

24 If they find the Defendant has proven that the
25 Plaintiff breached the contract, then they would

1 find for the Defendant.

2 On the other verdict form, TD Bank versus
3 David Jacobs and James McFarland. Again, We find
4 for the Plaintiff, actual damages, or, We find for
5 the Defendant.

6 Under that scenario, if they find the
7 Plaintiff -- the Defendants breached the contract,
8 that they would be entitled to damages.

9 And if they find that the Defendants proved
10 that the Plaintiff breached the contract, then they
11 would find for the Defendants.

12 And that their verdict has to be unanimous.

13 Anything additionally I need to charge the
14 jury?

15 MR. COLLINS: Your Honor, I have two
16 questions, or two points.

17 One, I believe we had submitted Defendant's
18 Charge Number 1 that asked for the jury to be
19 charged that a breach of implied covenant of good
20 faith can't lie.

21 THE COURT: I'm going to -- as a matter of
22 law, aside from the definition, that is part of
23 what I would instruct them.

24 MR. COLLINS: Yes, Your Honor. The other
25 issue we have with the charge, in the fiduciary

1 relationship charge, the Court used the language
2 "bank" and "depositer."

3 I don't think there has been any evidence in
4 this case of that. I am not rearguing our directed
5 verdict motion, but I believe that charge
6 improperly would let the jury find fiduciary
7 relationship in a situation that has not been
8 presented in this case.

9 I do think there is cases that say a
10 bank/depositer creates a fiduciary relationship. I
11 have been able to find one where a lender/borrower
12 like is present here, so that is our objection,
13 Your Honor.

14 THE COURT: And I can change it to
15 lender/borrower. That is not a problem.

16 MR. COLLINS: Thank you, Your Honor.

17 THE COURT: Anything from the Defendant?

18 MR. JOWERS: Nothing. Thank you.

19 THE COURT: Oh, I'm sorry. And I would also
20 intend to charge them that a lender is not in a
21 fiduciary capacity as the borrower and does not
22 have a heightened duty of dealing with the
23 borrower. Asking special circumstances of the
24 relationship between the lender and the borrower.
25 There would be no fiduciary relationship upon the

1 borrower.

2 I think that covers it.

3 If there is nothing else outside the jury's
4 presence, we can bring them in.

5 (WHEREUPON, the jury came into open
6 court at 2:34 p.m.)

7 THE COURT: Before I begin, I will tell you at
8 the conclusion of the evidence that was presented,
9 we had some legal issues which we took up. And you
10 have heard the attorneys talk about one of the
11 claims that is being made by the Defendant is that
12 the Plaintiff, the bank, should have pursued other
13 collateral or other forms of recovery before
14 seeking to sue on the guarantees that were signed
15 by the individual Defendants.

16 Under the documents that are presented under
17 the South Carolina law, there is no right to seek
18 payment -- I'm sorry, there is a right to seek
19 payment against the guarantors without resorting to
20 going after other collateral or pursuing other
21 remedies that may be available to the bank. So the
22 idea -- or the claim by the Defendants that there
23 was a breach of the covenant of good faith and fair
24 dealing by suing them on the guarantee without
25 pursuing the foreclosure is not supported by the

1 law. And as a result of that, I have ruled that
2 that is not an issue that they can discuss any
3 further, because the law allows them to do that
4 based upon the warranty and the subject of the
5 document. And so that is not an issue which you
6 all have to -- that you are required to discuss or
7 to make a decision about during the course of your
8 deliberation.

9 Let me repeat. You are not to consider any
10 issue relating to whether or not the bank should
11 have foreclosed on the property before seeking to
12 file a lawsuit against the individuals on their
13 personal guarantee.

14 Again, the documents specifically allow that,
15 and the case law in South Carolina indicates and
16 the law in South Carolina indicates that when the
17 documents contain that information it is not a
18 basis for seeking to make a claim under good faith
19 and fair dealing that there was a breach of that
20 covenant.

21 And so the Defendants of course may pursue any
22 other defenses which they have raised and they will
23 discuss those with you during the course of their
24 closing arguments.

25 So at this time we are now ready to hear the