

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

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Hon. Marvin H. Dukes, III, Master In Equity and Special Circuit Judge  
Appellate Case Number 2016-001899  
Case Number 2016-CP-07-1778

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SC Court of Appeals

A & B ASSOCIATES, L. P.,

Respondent,

vs.

FCRE REL, LLC, and TIDELAND REALTY, INC.,

Appellants.

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NOTICE OF MOTION AND MOTION TO STRIKE AND MEMORANDUM  
IN SUPPORT

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Curtis L. Coltrane  
COLTRANE & WILKINS, LLC  
South Carolina Bar Number 1344  
Post Office Box 6808  
Hilton Head Island, SC, 29938  
(843) 785-5551  
(843) 785-5552 (Facsimile)  
[curtis@coltraneandwilkins.com](mailto:curtis@coltraneandwilkins.com)

Other Counsel of Record:

Benjamin T. Coppage, Esq.  
COPPAGE LAW FIRM, LLC  
Post Office Box 2473  
Beaufort, SC 29901  
(843) 694-1696  
[ben@coppagelawfirm.com](mailto:ben@coppagelawfirm.com)

## MOTION TO STRIKE AND MEMORANDUM IN SUPPORT

In this case, FCRE REL, LLC, has filed appeals from two separate Orders of the Hon. Marvin H. Dukes, III. The Orders under appeal are an Order Granting Temporary Injunction dated August 26, 2016, and an Order Granting Motion for Contempt, dated September 23, 2016. By Order of this Court dated October 26, 2016, the two appeals were consolidated.

A & B Associate, L.P., moves to strike the following portions of the Initial Reply Brief of FCRE REL, LLC, filed on July 31, 2017:

- (a) The text beginning at Page 2, line 3, and continuing to Page 3, line 16;
- (b) The text beginning on Page 5, line 17, and continuing to Page 9, line 21;
- (c) The entirety of “Argument III” on Page 10; and,
- (d) The text beginning on Beginning on Page 11, line 16, and continuing to page 12, line 4.

The motion is made for the following reasons:

1. In the text beginning at Page 2, line 3, and continuing to Page 3, line 16, of its Initial Reply Brief, FCRE REL, LLC, makes arguments to the effect that Judge Dukes committed error by failing to consider loan documents. However, FCRE REL, LLC, did not enter or offer the loan documents at either of the hearings before the Hon. Marvin H. Dukes, by attaching the same to pleadings, having them identified by affidavit, by offering certified true copies of any of them from the public records for Beaufort County, South Carolina, making a proffer, or otherwise. FCRE REL, LLC, admits this in its Initial Brief. On page 20,

lines 3 and 4 of the Initial Brief of FCRE REL, LLC, the following text appears: “In this case, however, none of the loan documents were actually submitted to the Trial Court for its consideration.”<sup>1</sup> Further, FCRE REL, LLC, did not raise any of these arguments or issues in a motion under Rule 59, SCRCF.<sup>2</sup> Further, no proper proffer of the evidence was made by FCRE REL, LLC, on the record. In South Carolina, an appellate court will not review alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record. *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986); See also: *TNS Mills, Inc. v. S.C. Department of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998).

2. In the text beginning on Page 5, line 17, and continuing to Page 9, line 21, FCRE REL, LLC, recites what it contends various persons would have testified to at the August 24, 2016, hearing before the Hon. Judge Dukes. Again, there was no proffer of this testimony at the hearing. Having failed to make a record before Judge Dukes, FCRE REL, LLC, now attempts to insert purported testimony in its argument. Again, FCRE REL, LLC, made no proffer of the testimony at the hearing, no error has been preserved for review. *State v. Schmidt, supra.; TNS Mills, Inc. v. S.C. Department of Revenue, supra.* In addition, FCRE REL, LLC, did not raise any argument related to the testimony in a motion under Rule 59,

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<sup>1</sup> This admission by FCRE REL, LLC, likely accounts for the fact that FCRE REL, LLC, did not propose to include any of the loan documents in the Record on Appeal in its “Designation of Matters to Be Included in the Record On Appeal” filed on December 21, 2016, or in its “Supplemental Designation of Matters to Be Included in the Record On Appeal,” also filed on December 21, 2016.

<sup>2</sup> See: FCRE REL, LLC’s “Designation of Matters to Be Included in the Record On Appeal” filed on December 21, 2016, and FCRE REL, LLC’s “Supplemental Designation of Matters to Be Included in the Record On Appeal,” also filed on December 21, 2016. No reference to any Motion under Rule 59, SCRCF, is made in either of them.

SCRCP.<sup>3</sup>

3. The entirety of FCRE REL, LLC's "Argument III" is founded on the claim that Judge Dukes "disregarded" the loan documents. FCRE REL, LLC, admits, though, that the loan documents are not in the record. On page 20, lines 3 and 4 of the Initial Brief of FCRE REL, LLC, the following text appears: "In this case, however, none of the loan documents were actually submitted to the Trial Court for its consideration." The entirety of FCRE REL, LLC's "Argument III" is based on matters it admits are not in the record and which FCRE REL, LLC, did not offer into the record. FCRE REL, LLC, did not make a proffer of the loan documents in the hearings before Judge Dukes. FCRE REL, LLC, did not raise any of these arguments or issues in a motion under Rule 59, SCRCP.

4. Beginning on Page 11, line 16, and continuing to page 12, line 4, FCRE REL, LLC, makes arguments that are not supported by anything that is in the record. FCRE REL, LLC, argument is, again, founded on the loan documents which are not in the record. But, FCRE REL, LLC, made no effort to put into the record at the September 16, 2017, hearing on the Motion for Contempt. FCRE REL, LLC, failed to offer the loan documents at the September 16, 2016, hearing, and did not raise any of these arguments or issues in a motion under Rule 59, SCRCP.<sup>4</sup>

Each of the above arguments made by FCRE REL, LLC's include arguments and

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<sup>3</sup> A copy of the transcript from the August 24, 2016, hearing before the Hon. Marvin H. Dukes, III, is attached hereto as Exhibit "A". Following Judge Dukes' ruling on the evidentiary matter, FCRE REL, LLC, made no effort to proffer any testimony or evidence. See: August 24, 2016, Transcript, P. 24, l. 13 to P. 26, l. 19.

<sup>4</sup> A copy of the transcript from the September 16, 2016, hearing before the Hon. Marvin H. Dukes, III, is attached hereto as Exhibit "B".

statements based on loan documents that it did not put in the record, and on purported testimony that it did not submit or proffer to Judge Dukes. FCRE REL, LLC, did not file a Motion under Rule 59, SCRPC, to raise these matters. The arguments and statements are based on matters that are outside of the record. Rule 210, SCACR states that the Record on Appeal shall not include any matter which was not presented to the lower court.

There are four requirements to preserving issues for appellate review. The issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefler Toal, *et al.*, *Appellate Practice in South Carolina* 57 (2d ed. 2002). It is a litigants duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965). An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998).

FCRE REL, LLC, did not do these things, and cannot now present arguments that are based on matters not in the record, and which were not proffered, presented or ruled on by Judge Dukes.

#### CONCLUSION

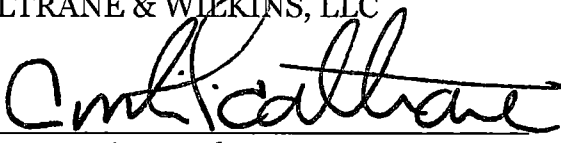
Because FCRE REL, LLC, has made arguments based on matters not in the record, A & B Associates, L. P., urges the Court to strike the following portions of the Initial Reply Brief of FCRE REL, LLC:

- (a) The text beginning at Page 2, line 3, and continuing to Page 3, line 16;

- (b) The text beginning on Page 5, line 17, and continuing to Page 9, line 21;
- (c) The entirety of "Argument III" on Page 10; and,
- (d) The text beginning on Beginning on Page 11, line 16, and continuing to page 12, line 4.

Respectfully Submitted:

COLTRANE & WILKINS, LLC

By: 

Curtis L. Coltrane  
South Carolina Bar Number: 1344  
Post Office Box 6808  
Hilton Head Island, SC 29938  
(843) 785-5551  
[curtis@coltraneandwilkins.com](mailto:curtis@coltraneandwilkins.com)

Hilton Head Island, South Carolina

This 3<sup>rd</sup> day of August, 2017.

**EXHIBIT "A" TO MOTION TO STRIKE**

IN THE COURT OF COMMON PLEAS  
STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT  
CIVIL ACTION NO.: 2016-CP-07-1778

A&B ASSOCIATES, L.P.,

Plaintiff,

vs.

FCRE REL, LLC, and  
TIDELANDS REALTY, INC.,

Defendants.

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**COPY**

HEARING

Before The Honorable Marvin H. Dukes, III  
Master-in-Equity  
Courtroom 2  
Beaufort County Courthouse  
102 Ribaut Road  
Beaufort, South Carolina

August 25, 2016

4:45 p.m.

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**APPEARANCES OF COUNSEL**

**FOR THE PLAINTIFF:**

CURTIS L. COLTRANE, ESQUIRE  
Coltrane & Wilkins, LLC  
Two Park Lane, Suite 200  
Hilton Head, South Carolina 29928  
(843)785.5551  
curtis@coltraneandwilkins.com

TIMOTHY J. GRANITZ, ESQUIRE  
(Pro Hac Vice)  
Mahany Law  
8112 West Bluemound Road, Suite 101  
Wauwatosa, Wisconsin 53213  
(414)777.0778  
tgranitz@mahanylaw.com

**FOR THE DEFENDANT:**

BENJAMIN T. COPPAGE, ESQUIRE  
Coppage Law Firm  
612 North Street  
Beaufort, South Carolina 29902  
(843)694.1696

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**I N D E X**

REPORTER'S CERTIFICATE ----- 27

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1 THE COURT: We're here in  
2 2016-CP-07-1778. This is A&B Associates  
3 versus FCRE, REL, LLC, and Tideland Realty.  
4 This matter comes before me pursuant to a  
5 Summons and Complaint heretofore filed  
6 August 15th, 2016, and the Order which was  
7 granted I believe that same day.

8 Thereafter, Mr. Coppage filed a motion  
9 to set that Order aside which was denied,  
10 and we moved on to today's hearing which was  
11 previously set.

12 I have the court file, which includes  
13 the Summons and Complaint and the Order and  
14 associated documents. It also includes  
15 defendant's brief in opposition to  
16 plaintiff's application for a temporary  
17 injunction.

18 If anything else has been filed, it has  
19 not yet made it to this file. Is there  
20 anything else I'm supposed to have in front  
21 of me?

22 MR. COLTRANE: There has been, Your  
23 Honor. Today, I filed a memorandum in  
24 support of the plaintiff's motion for a  
25 temporary injunction, a memorandum regarding

1 Rule 65, which is what we're here under.

2 There have been additional affidavits  
3 filed by the plaintiff that were filed on  
4 Monday pursuant to Rule 6(d).

5 There is an affidavit that I received  
6 today, which I regard somewhat as a reply to  
7 some of the things set out in the affidavits  
8 filed by FCRE, LLC.

9 THE COURT: I don't know if I have any  
10 of those things, but again, everything is  
11 delayed now that they scan everything.

12 MR. COLTRANE: Yes, Your Honor.

13 What I do have -- wait a minute, my  
14 file has been juggled around here -- I have  
15 the memorandum regarding Rule 65 and the  
16 brief I have, which I will hand to Ms. Saxon  
17 to pass to you.

18 THE COURT: Thank you very much.

19 MR. COLTRANE: And I have the  
20 additional affidavit of a Sheloria Rivers  
21 and a copy of that as well.

22 THE COURT: These have all been  
23 previously filed, it looks like?

24 MR. COLTRANE: Yes, Your Honor.

25 And then I have affidavits of a Sharon

1 Kettles, Christopher Kettles, a Sebenio  
2 Norris, and a Shetoria Rivers. These were  
3 previously delivered via email to  
4 Mr. Coppage on Monday, which I will hand up.  
5 These are copies of them. The originals  
6 have been sent for filing via mail to the  
7 clerk on Monday.

8 And seated with me, Your Honor, is  
9 Mr. Tim Granitz. He is a lawyer from  
10 Wisconsin who actually associated me on this  
11 case. As of yesterday, I sent his  
12 application for admission pro hac vice to  
13 the Supreme Court. I haven't gotten a  
14 letter back from them yet, but that process  
15 is underway, and so he is seated with me  
16 now, unless Your Honor has some objection to  
17 that.

18 THE COURT: No objection unless  
19 Mr. Coppage has some objection to that.

20 MR. COPPAGE: I have none.

21 THE COURT: Mr. Coppage, I thought I  
22 saw, maybe it didn't get filed, but some  
23 other document that someone dropped by on  
24 your behalf. You've been in court so much  
25 this week, maybe I'm thinking of a whole

1 other case, but was there not a notebook --

2 MR. COPPAGE: I dropped off -- after  
3 filing the brief, I dropped off a final copy  
4 of that with your office so that you  
5 wouldn't have to wait for the clerk of court  
6 to come over, so that might be what you're  
7 thinking about. I just walked one over.

8 THE COURT: That's what I was thinking  
9 about, and it's not here. Do you have  
10 another copy?

11 MR. COPPAGE: Do you not have the brief  
12 in opposition to this motion?

13 THE COURT: I have the one filed  
14 August 22nd. Is that the one? I thought I  
15 saw one that had --

16 MR. COPPAGE: August 22nd?

17 THE COURT: Is that the right one?

18 MR. COPPAGE: That's it, yes, sir.

19 THE COURT: Does that look familiar? I  
20 can't -- I think it's August 22nd. It's  
21 hard to read. At 4:33 p.m., is that the  
22 same one?

23 MR. COPPAGE: That's sounds right.

24 THE COURT: I've got that one.

25 I thought I saw some other document,

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1           though. I'm probably confusing it with some  
2           other one. All right. Then I have I guess  
3           a complete package. Okay.

4           So this is plaintiff's case essentially  
5           to continue or to grant the temporary  
6           injunction, right? So, Mr. Coltrane, I'm  
7           happy to hear from you, sir.

8           MR. COLTRANE: If Your Honor please,  
9           first as a procedural matter, following Your  
10          Honor's ruling of last week, a number of  
11          people have received subpoenas. As you can  
12          see, we have an assembled crowd here today.

13          Motions for temporary injunctions are  
14          governed by Rule 65, and Rule 65 states that  
15          the motions for temporary injunctions are  
16          heard based on affidavits or a verified  
17          complaint. And Rule 6(d) then says that  
18          where a motion is to be heard, thusly, that  
19          the opposing party should file affidavits  
20          two days ahead of the hearing, and reply  
21          affidavits can be filed after that.

22          In fact, FCRE did file two affidavits  
23          last week which are of record.

24          A motion for a temporary injunction is  
25          not a hearing on the merits. It is a

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 hearing for the court to determine whether  
2 or not the moving party has made a prima  
3 facie case as to the three elements for a  
4 temporary injunction, that being irreparable  
5 injury, lack of legal remedy and likelihood  
6 of success on the merits.

7 What you have before you in the form of  
8 the affidavits that have been filed is  
9 sufficient for Your Honor to do that.  
10 Again, the law in this state is clear that  
11 when ruling on a motion for a temporary  
12 injunction, the merits of the case are  
13 really not at issue except as someone may  
14 find them necessary to deal with the other  
15 things that must be proved with respect to a  
16 temporary injunction. Thus, I think that  
17 the -- you know, frankly, I think what  
18 you've got in front of you is what the rules  
19 require and dictate that the motion be  
20 decided on. And, well, I believe that's  
21 where we are.

22 THE COURT: Mr. Coppage, I'm happy to  
23 hear from you on that issue, sir.

24 MR. COPPAGE: I beg the court's  
25 indulgence for just a moment.

Theresa D. Saxon

6 Eagle Claw Drive, Hilton Head, SC 29926

843.341.5544 (C)843.338.6388 (F)843.341.3145 TheresaSaxon@Hargray.Com

1           Your Honor, with respect to a motion  
2           for a temporary restraining order,  
3           Mr. Coltrane is certainly right that it is a  
4           hearing on the affidavits.

5           That's not the case, however, in the  
6           ten-day hearing following the issuance of  
7           the temporary restraining order.

8           During this hearing, testimony,  
9           in-person testimony, is allowed, and has  
10          actually been encouraged when it's a  
11          contentious case like this one is today, so  
12          I would object to his assertion that you're  
13          not able to hear testimony today.

14          THE COURT: Let me ask you this,  
15          Mr. Coppage. Of course I've heard from both  
16          of you already in this case because we've  
17          had at least the one meeting with the three  
18          of us. I think maybe Mr. Coltrane was on  
19          the phone at that point. I'm trying to  
20          remember. It's been a long week.

21          MR. COLTRANE: Yes, Your Honor.

22          THE COURT: But the issue as I recall,  
23          and maybe there's more to it than this, is  
24          whether or not there's been a material  
25          breach that would permit the lender -- allow

1           them to come in and do what they've done. I  
2           guess not what they've allegedly done; I  
3           think there's no question but that they came  
4           in and took over the management office.

5                     What are all these witnesses going to  
6           tell me with regard to a material breach in  
7           the loan documents?

8                     MR. COPPAGE: That would be the crux of  
9           it, Your Honor. I'd start out by saying of  
10          course we're here on those elements that  
11          Mr. Coltrane just now said, that irreparable  
12          harm to the plaintiff, there not being a  
13          legal remedy available and likelihood of  
14          success on the merits.

15                    All the witnesses would go to both  
16          there not being any irreparable harm, no  
17          harm of any kind, and that there is very  
18          little likelihood for their success on the  
19          merits.

20                    Most of these folks are going to  
21          testify to the conditions on the property to  
22          show that those material breaches did exist.  
23          They were there. Some of them are tenants.  
24          Some of them are property managers. Some of  
25          them are police officers who have been very

1           closely involved with all this on the  
2           Southside Apartments, which is the property  
3           we're talking about today, and have  
4           witnessed firsthand the deplorable,  
5           deplorable conditions that the tenants there  
6           have been subjected to, and the physical  
7           waste, the deterioration, just the very poor  
8           treatment of the people on the property that  
9           is precluded by the loan documents and which  
10          does constitute a breach of them. And it  
11          goes to the likelihood of -- or there not  
12          being a likelihood of A&B's success on the  
13          merits.

14                 THE COURT: And that's the problem.  
15           Ordinarily, a case like this would have been  
16           brought by the lender, and they would have  
17           asked for a receiver, and they would have  
18           gone through all the things that we see in  
19           every case. The sort of upside down,  
20           backwards part of this is, is that the  
21           self-help issue here is unique in my  
22           experience.

23                 MR. COPPAGE: Well, and further on  
24           that, Your Honor, we have two very  
25           competent, two very understanding parties of

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*1843.341.5544 (C)843.338.6388 (F)843.341.3145 TheresaSaxon@Hargray.Com*

1 what they were getting into, what kind of  
2 contract they were signing. Both had very  
3 good counsel advising them. Both of them  
4 worked together in making this contract.

5 There's really no reason that this  
6 contract can be set aside. They are very  
7 aware of what the contract said. There was  
8 certainty meeting of the minds. They agreed  
9 to be bound by what the contract said.  
10 There's been a breach of it, and now FCRE  
11 has the ability to exercise the remedies  
12 that are set out in that contract.

13 THE COURT: Who determines if there's a  
14 breach? I mean, it's a unilateral decision  
15 you're saying under the contract.

16 MR. COPPAGE: It is. But it is very  
17 clear in this situation, Your Honor.

18 THE COURT: Any thoughts, Mr. Coltrane?

19 MR. COLTRANE: As Your Honor is aware  
20 from the conversations that the court has  
21 had with Mr. Coppage and from the documents  
22 that have been filed, the one thing that  
23 Mr. Coppage did not tell you a single  
24 witness would testify to is that a payment  
25 has ever been missed.

Theresa D. Saxon

6 Eagle Claw Drive, Hilton Head, SC 29926

843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com

1           And indeed, the affidavit before Your  
2 Honor shows that FCRE was in possession of  
3 the property, they collected rents, they  
4 were ordered to return it a week ago, they  
5 haven't done that yet, nor have they  
6 accounted for it.

7           And the effect of what they did was to  
8 put A&B Associates out of business. They  
9 threw them out of their own property, took  
10 over their property, took over their leases  
11 and took their money. And the courts in  
12 this state have been clear that the loss of  
13 your business is an irreparable harm,  
14 irrespective of whether or not there might  
15 be a claim for money damages.

16           And what you have here is a series of  
17 immaterial breaches related to the things  
18 set out in their affidavits, you know, the  
19 sign's dirty, there's a hole in the fence,  
20 complaints from tenants about this, that and  
21 the other thing, all of the things that in  
22 your own experience in your position here  
23 you would recognize as run-of-the-mill  
24 things that happen in an apartment complex.

25           But as of right now, the loan that was

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 made here is current. There's no doubt  
2 about it.

3 THE COURT: Ma'am, I'm going to have to  
4 ask y'all to be quiet or leave, okay? Can  
5 y'all do that for me? Thanks.

6 Go ahead, Mr. Coltrane.

7 MR. COLTRANE: And if you don't  
8 continue the Order, my client will be put  
9 out of business, period. That's what will  
10 happen. That is irreparable harm in this  
11 state. That means that there is no adequate  
12 remedy at law.

13 And with respect to the claim regarding  
14 your likelihood of success on the merits, I  
15 don't have to prove I can succeed. I only  
16 have to prove that there is a fair question  
17 about what has happened here.

18 And as Your Honor has heard, without  
19 filing a lawsuit, without seeking a motion  
20 for a receiver, FCRE showed up at the rental  
21 office on my client's property in the  
22 company of a police officer, the police  
23 chief of the town of Port Royal, and told  
24 them to get out.

25 The basis for that state action remains

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 unexplained. The basis for that state  
2 action in the face of what is undeniably a  
3 civil claim remains unexplained. But the  
4 effect of it until Your Honor's Order of  
5 last week was to put my people out of  
6 business in a situation where the only  
7 evidence you've got, and based on what we  
8 heard five minutes ago the only evidence  
9 you're going to get, is the loan's current.  
10 And they're in possession of somewhere  
11 between 50- and \$100,000 of his money.

12 THE COURT: I mean, sort of what  
13 bothers me a little bit this is I think  
14 we're probably all familiar with the line of  
15 cases that say a bond for title doesn't  
16 really work in South Carolina. I mean,  
17 there are lots of bonds for title, and you  
18 still have to foreclose. I mean, those  
19 bonds for title all say some things like,  
20 you know, if you miss a payment, the  
21 property goes back to the renter. And  
22 Magistrates Court actually enforced that for  
23 a while, and then they caught on to the fact  
24 that the law of South Carolina doesn't allow  
25 that. And I can't remember the name of the

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 case, but the main case in that with regard  
2 to those bond for titles made it clear that  
3 if a party has an equitable interest in real  
4 property, that self-help of this type isn't  
5 really permitted. It's not equitable.

6 And so, Mr. Coppage, what was your  
7 client's intent? Were they ever going to  
8 file a lawsuit? Were they -- what was their  
9 -- what was their end game?

10 MR. COPPAGE: Your Honor, to answer  
11 that and to answer Mr. Coltrane's  
12 allegations, NCRE's intent here was under  
13 the contract they are allowed the  
14 Power-of-Attorney to not go in, not ruin a  
15 business, not take over the business, not  
16 exclude A&B itself from the property, but to  
17 help remedy the situation, help to secure  
18 that piece of property that they have loaned  
19 this money on.

20 Now, the situation is exactly opposite  
21 what Mr. Coltrane is describing here. This  
22 is a property which was -- A&B applied for a  
23 loan here April of 2015. The appraisal at  
24 that time was I want to say five million  
25 something dollars.

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 Ms. Davenport here of FCRE visited the  
2 property in December of 2015, saw that the  
3 property had already appreciably declined in  
4 value, the place was basically falling  
5 apart, and kept trying to keep up with A&B,  
6 asked them what they're doing to come -- to  
7 make sure that they're in line with the loan  
8 documents, the requirements of those loan  
9 documents, the requirements that there not  
10 be physical waste, deterioration, that  
11 people be kept safe on the property.

12 A&B refused to do anything and  
13 continued to let the property become  
14 devalued. In addition, A&B kept on that  
15 property a property manager who did a  
16 horrible job, who really aided to the  
17 devaluation of the security for their loan,  
18 who wasn't even licensed by the South  
19 Carolina Real Estate Commission.

20 And at this point, A&B is looking at a  
21 property that if things aren't kept up, if  
22 things are allowed to keep going the way  
23 they've been going for the last year  
24 and-a-half, nobody's going to live here.  
25 Nobody will rent an apartment in these

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

843.341.5544 (C) 843.338.6388 (F) 843.341.3145 *TheresaSaxon@Hargray.Com*

1 conditions.

2 There are holes in the in the floor you  
3 can see straight through to the apartment  
4 below. There's mold in almost every  
5 apartment. There are doors that have big  
6 holes in them where you can go right in and  
7 out. The list goes on and on and on. These  
8 are terrible, terrible conditions.

9 If these fixes aren't made, which from  
10 A&B's posture and what they've done over the  
11 last year and-a-half, there is no indication  
12 that there'll ever be made, if that's  
13 allowed to go on, this property is going to  
14 be worthless. FCRE will have lent them a  
15 large amount of money and have nothing  
16 securing that.

17 What FCRE has done is seen how bad that  
18 situation is, how severe a breach of the  
19 loan documents there's been, and they have  
20 come in and done those things that needed to  
21 be done it make it habitable. They have put  
22 garbage cans around the property, and I'm  
23 speaking about FCRE done through its  
24 property manager Tideland Realty. They've  
25 put garbage cans around the property. The

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 property manager has been working seven days  
2 a week, often ten hours a day, just trying  
3 to get it so that these people weren't  
4 living in roach infested, moldy apartments  
5 where they're worried about the safety of  
6 themselves, their children, not only from  
7 the environmental factors going on in those  
8 apartments, but from the crime in the  
9 neighborhood that A&B has allowed to  
10 persist.

11 THE COURT: Well, let me say this. I  
12 mean, crime is bad, terrible. It would be a  
13 terrible way to live. You know, the  
14 conditions you've described, it's no way to  
15 live. I agree with all that.

16 It's the self-help that created this  
17 problem, though. I mean, this is not a  
18 unique problem. I mean, borrowers  
19 constantly violate the provisions of the  
20 lending documents that say keep properties  
21 up. The lender comes in, files a lawsuit,  
22 seeks a receiver -- you know, if everything  
23 that you're saying is true, a receiver would  
24 have been granted in a minute -- and do it  
25 that way.

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1           It's the self-help that created this  
2           problem, and I guess I'm trying to figure  
3           out what to do about it now.

4           MR. COLTRANE: If I might respond to  
5           one thing, Your Honor.

6           THE COURT: Yes, sir.

7           MR. COLTRANE: Mr. Coppage said that  
8           the loan documents have this irrevocable  
9           Power-of-Attorney and there's some text in  
10          there that suggests that, and what he said  
11          was, is, "but they haven't used that to  
12          exclude A&B from the property." Well,  
13          that's exactly what they did. They showed  
14          up with the police and threw them out. And  
15          so the notion that what is going on here is  
16          not going to destroy the business of A&B is  
17          simply untrue by the actions they have  
18          already taken.

19          And again, despite the litany of  
20          complaints and problems, the one thing he  
21          didn't say was that the loan has been  
22          unpaid. And what else -- and I'd like to  
23          add one thing. You know, what the lender is  
24          entitled to is to get paid back. And as of  
25          today, that has happened each and every

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C)843.338.6388 (F)843.341.3145 TheresaSaxon@Hargray.Com*

1 month.

2 THE COURT: I mean, the lender, you'd  
3 admit, Mr. Coltrane, does have a vested  
4 interest, a contractual interest, in keeping  
5 the collateral up. I mean, that's in all  
6 those loan documents. I mean, that --

7 MR. COLTRANE: Well, it does. But I  
8 would also suggest to Your Honor that I am  
9 unaware of any situation in this state where  
10 a person has been put out of their property  
11 in the absence of a monetary default. I  
12 mean, there might be other problems too, but  
13 in the absence of the monetary default, you  
14 don't destroy someone's business.

15 THE COURT: No, I agree.

16 MR. COLTRANE: I mean, if there's a  
17 monetary default, you know, game over, but  
18 -- but there's not.

19 THE COURT: The usual method is a  
20 receiver to solve a problem like this,  
21 assuming there is a problem. I understand  
22 you assert there's no problem.

23 MR. COPPAGE: And if I may, Your Honor.

24 THE COURT: Yes, sir.

25 MR. COPPAGE: And, Your Honor, in those

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C)843.338.6388 (F)843.341.3145 TheresaSaxon@Hargray.Com*

1 cases, I feel like they're a good bit  
2 different from this because we don't have  
3 those contractual provisions that allow for  
4 the lender's appointment of a property  
5 manager, not to take over the property, not  
6 to ruin the business, but just the  
7 appointment of a property manager. There,  
8 we've got immaterial breaches in which  
9 something needs to be done obviously, but  
10 there's not a contract provision to say  
11 exactly what it is that has to happen.

12 Here, we have that. And as I stated  
13 earlier, FCRE and A&B knew exactly what they  
14 were getting into.

15 THE COURT: Well, I mean every  
16 commercial -- of course, I've dealt with a  
17 lot of commercial foreclosures, and every  
18 commercial lease ever written in South  
19 Carolina has an assignment of rents  
20 provision, it has a receiver. I mean, they  
21 all have that. They all have the same  
22 language. I mean, it's written by the  
23 lender in favor of the lender. I don't  
24 blame them. They pay good money to good  
25 lawyers to do that, but, you know, some of

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 it is simply unconscionable in South  
2 Carolina, and they don't try to pursue it.  
3 And that's why we just don't see self-help.  
4 I mean, we see a motion, and again, look for  
5 a receiver; if all this is true and there's  
6 wasting of the collateral, done, there  
7 should be a receiver. But that's not what  
8 I've got today.

9 And what I've got today is no action  
10 whatsoever filed by the lender. And I don't  
11 know if the position now of the defendant is  
12 that they didn't do this, but I thought it  
13 was an undisputed position that the police  
14 department of the town of Port Royal came  
15 and assisted in taking the property manager  
16 and -- taking her out and installing their  
17 own property manager, and then not just  
18 using that property manager to run the  
19 place, but actually taking the money that  
20 came in and not turning it over to the  
21 owner. You know, that's -- that's  
22 worrisome.

23 And I don't know if -- we've' been here  
24 for a while. Y'all have been here a lot  
25 longer than I have, and I apologize.

*Theresa D. Saxon*

*6 Eagle Claw Drive, Hilton Head, SC 29926*

*843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com*

1 Well, you were involved in the previous  
2 case as well, Mr. Coppage. Have you and  
3 counsel had an opportunity to talk and see  
4 if there's any middle ground here today?

5 MR. COPPAGE: Not yet, Your Honor.

6 THE COURT: Why don't we take a  
7 five-minute break and talk for a minute.  
8 Maybe I can talk to counsel back here so  
9 this crowd doesn't have to leave.

10 We'll be off the record for a second.

11 (Whereupon, a break was  
12 taken.)

13 THE COURT: Back on the record in  
14 16-CP-07-1778, A&B Associates, L.P., versus  
15 FCRE, REL, et al.

16 First things first, Mr. Coltrane has  
17 brought up the issue of the live testimony.  
18 And think I'm going to grant his petition to  
19 not hear this or deal with the live  
20 testimony. If all of you were to come up  
21 and testify, we'd be here until 1 o'clock in  
22 the morning, I'm sure.

23 However, I understand your concerns,  
24 and I've listened to your concerns, and I've  
25 discussed your concerns with the attorneys

Theresa D. Saxon

6 Eagle Claw Drive, Hilton Head, SC 29926

843.341.5544 (C)843.338.6388 (F)843.341.3145 TheresaSaxon@Hargray.Com

1 and I'm going to handle this as follows.

2 I'm going conditionally grant the  
3 temporary restraining order that  
4 Mr. Coltrane's client has sought.

5 I'm going to order that the plaintiff  
6 have a licensed property manager in place by  
7 noon this coming Friday.

8 I'm going to order the defendant to  
9 return by noon Friday any of the money  
10 collected, any of the reserve account money,  
11 the books, the records, the leases, the  
12 files, the personal property, and also to  
13 account for any monies spent during the time  
14 that they had the books, records and the  
15 checkbook and the capital account or the  
16 reserve account, rather.

17 With regard to all of your concerns,  
18 I'm ordering the parties to meet, either  
19 individually or through their  
20 representatives, within ten days to discuss  
21 the concerns that brought most of you here  
22 today. And my hope is that they'll be able  
23 to come up with some sort of a list or a  
24 triage or something to take care of the most  
25 serious problems first and come up with a

Theresa D. Saxon

6 Eagle Claw Drive, Hilton Head, SC 29926

843.341.5544 (C) 843.338.6388 (F) 843.341.3145 TheresaSaxon@Hargray.Com

1 way that the parties can work together to  
2 resolve some of these problems.

3 I'm going to have a telephone  
4 conference with counsel after that ten-day  
5 meeting, and then I'll decide what to do if  
6 any further action is necessary at that  
7 point.

8 Mr. Coltrane, can I ask you to draft  
9 that order for me, please?

10 MR. COLTRANE: Yes, Your Honor.

11 THE COURT: Okay. Any questions,  
12 Mr. Coppage?

13 MR. COPPAGE: No, Your Honor.

14 THE COURT: Anything else from counsel?

15 MR. COLTRANE: Nothing, Your Honor.

16 THE COURT: All right. Thank you all  
17 for coming. I know you didn't get a chance  
18 to testify but your being here helped the  
19 situation, so thank you all very much.

20 (Whereupon, the hearing  
21 was concluded at  
22 5:45 p.m.)  
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## C E R T I F I C A T E

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STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Theresa D. Saxon, Court Reporter and Notary Public in and for the above county and state, do hereby certify that this is a true and correct transcript of the proceedings in this matter at the time and place herein-before set forth.

I am not of counsel to either party, nor interested in the event of this cause.

---

Theresa D. Saxon

**EXHIBIT "B" TO MOTION TO STRIKE**

1 State of South Carolina ) Court of Common Pleas  
2 County of Beaufort ) 14th Judicial Circuit  
3 ) No.: 2016-CP-07-1778

4 A & B Associates, L.P., )  
5 Plaintiff, ) HEARING  
6 vs. )  
7 ) September 16, 2016  
8 FCRE REL, LLC, and )  
9 Tideland Realty, Inc., )  
10 Defendants. )

11 Hearing reported by Deborah S. Thomas,  
12 Certified Verbatim Reporter and Notary Public in and  
13 for the State of South Carolina; said hearing held  
14 before the Honorable Marvin H. Dukes, III, Beaufort  
15 County Master in Equity and Special Circuit Court  
16 Judge in accordance with the South Carolina Rules of  
17 Civil Procedure, at the Beaufort County Courthouse,  
18 102 Ribaut Road, Room 212, Beaufort, South Carolina,  
19 on September 16, 2016, at the hour of 11:33 a.m.

20 \_\_\_\_\_  
21 THOMAS REPORTING SERVICES  
22 156 Argent Way  
Bluffton, South Carolina 29909  
(803) 206-7390

23

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♀

2

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Appearances

2

Representing the Plaintiff:

3

CURTIS LEE COLTRANE, ESQUIRE

Attorney at Law

4

P.O. Box 6808

Hilton Head Island, South Carolina 29938

5

curtis@coltraneandwilkins.com

6

TIMOTHY J. GRANITZ, ESQUIRE

Mahany Law

7

8112 W. Bluemount Road, Suite 101

Milwaukee, Wisconsin 53213-3356

8

tgranitz@mahanylaw.com

(Present telephonically)

9

Representing Defendant Tidelands Realty, Inc.:

10

JAMES ASHLEY TWOMBLEY, ESQUIRE

11

Twenge & Twombley, LLC

311 Carteret Street

12

Beaufort, South Carolina 29902

twombley@twlawfirm.com

13

Representing Defendant FCRE REL, LLC:

14

BENJAMIN TERRELL COPPAGE, ESQUIRE

15

Coppage Law Firm, LLC

P.O. Box 2473

16

Beaufort, South Carolina 29901

ben@coppagelawfirm.com

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(None were proffered)

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1                   This hearing is taken in accordance  
2 with the South Carolina Rules of Civil Procedure.

3                   JUDGE DUKES: Good morning. We are  
4 here on 2016-CP-07-1778. This is A & B Associates  
5 versus FCRE REL, LLC and Tidelands Realty. This is  
6 Plaintiff's motion for contempt. Mr. Coltrane,  
7 happy to hear from you, sir.

8                   MR. COLTRANE: If Your Honor please,  
9 on the 15th of July, 2016, Your Honor issued a  
10 temporary restraining order which required, among  
11 other things, for the Defendant FCRE REL, LLC, to  
12 return money to A & B Associates, LLC, that had been  
13 removed from reserve bank accounts into which  
14 FCRE -- which A & B had deposited money and to also  
15 return other funds swept from a Wells Fargo account

16 into which A & B had deposited money -- excuse me.  
17 The first time they had -- to return that certain  
18 money to them.

19 Subsequently Your Honor set a hearing on  
20 August the 24th -- excuse me. It was August the  
21 15th. I apologize. And there was money that had  
22 been collected by -- let me start over.

23 On August 15th Your Honor issued a  
24 temporary restraining order. The basis for the  
25 temporary restraining order was that the Defendant

♀

6

1 FCRE, LLC, had appeared at the property of A & B  
2 Associates, which is an apartment complex in the  
3 Town of Port Royal in the company of the police  
4 chief for the Town of Port Royal and had ordered the  
5 Plaintiff off of its own property.

6 Thereafter it collected money from tenants  
7 with whom A & B Associates had leases. And it also  
8 cleared money from reserve accounts that A & B  
9 Associates held. And the reserve accounts were for  
10 the purpose of paying taxes and insurance payments  
11 on the property.

12 FCRE, LLC, holds a mortgage on the  
13 property and had, under its interpretation of its

14 loan documents, declared a default based not on any  
15 failure to pay but rather on claims related to the  
16 condition of the property which have been and  
17 continue to be asserted are things such as chipped  
18 paint on a sign and similar matters.

19 Your Honor ordered that FCRE, LLC, return  
20 the money that had been taken to A & B. It had  
21 become apparent and is now undisputed that FCRE had  
22 collected in excess of \$77,000 of the money  
23 belonging to A & B and had done things such as pay  
24 an attorney in New York \$47,500. Had paid Tidelands  
25 Realty, whom it had installed after -- without any

♀

7

1 due process removing my client from its property  
2 9,500 or so dollars.

3 That it had taken money of approximately  
4 \$22,000 out of the reserve accounts. And that it  
5 had not paid the mortgage payment that was due on  
6 August 1. The undisputed evidence is that  
7 Mr. Kettles's company or Mr. Kettles rather paid  
8 that from his own personal funds.

9 And subsequently Your Honor held a --  
10 well, immediately following the issuance of the  
11 temporary restraining order there was a hearing held

12 via telephone at the instance of FCRE seeking relief  
13 from the temporary restraining order which Your  
14 Honor denied.

15 During that conversation again it was  
16 noted that there has been no monetary default, that  
17 the funds of A & B Associates had been removed and  
18 had not been returned. On August 24 there was a  
19 hearing held before Your Honor related to a motion  
20 for a temporary injunction. At that hearing Your  
21 Honor in clear terms required FCRE REL to return to  
22 A & B Associates any money that it had removed  
23 and/or collected that it could not document that it  
24 had spent on the improvement of the August on  
25 Southside property.

♀

8

1 Your Honor also ordered that the claimed  
2 default be rescinded and that the situation be  
3 returned to the status quo as it existed prior to  
4 the actions of FCRE REL, LLC, in removing my client  
5 from the property.

6 Following that there was yet another  
7 telephone hearing at the instance of FCRE REL, LLC,  
8 claiming that the temporary injunction order should  
9 be removed based on its claim of contempt by A & B

10 Associates due to their inability to immediately  
11 install a licensed property manager.

12 Your Honor heard that, found that there  
13 was no willful contempt, and ordered the parties to  
14 go forward. The fact that the money that had been  
15 taken by FCRE, LLC, had yet to be returned was  
16 discussed. Your Honor said, there is no motion for  
17 contempt on that before me. I'll deal with that  
18 when there is one. But Your Honor did reiterate to  
19 the parties on the telephone that your intention and  
20 your order was that the matter be returned to the  
21 status quo as it had existed prior to the actions in  
22 late July of FCRE, LLC, in taking control of the  
23 Plaintiff's property and in seizing the funds that  
24 are the Plaintiff's property.

25 Subsequently, I corresponded with Mr.

♀

9

1 Coppage and detailed -- they provided us an  
2 accounting of the money that was collected and  
3 spent. There is some discrepancies there, but that  
4 is not material to this hearing. And as it turned  
5 out there was \$56,000 or \$57,000 that were not used  
6 to improve the property.

7 I don't believe there is any dispute about

8 that because it comes from the accounting provided  
9 by FCRE REL. Mr. Coppage on the following Tuesday,  
10 which I believe was -- correspondence is attached to  
11 the motion -- September 1, 2016, detailed what was  
12 shown as having been removed from A & B, what was  
13 shown as having been spent on the property and other  
14 things. And as I mentioned, excuse me, I misstated.  
15 The legal bill to -- was \$37,500, not \$47,500.

16 The amount to Tidelands was \$9,761.03.  
17 There was an overpayment made on the August 1  
18 payment in the amount of \$5,669.89. And then there  
19 was a claimed error whereby the bank removed \$3,844  
20 from the account. It all came to about \$5,600 which  
21 is detailed in the letter.

22 Mr. Coppage advised he would discuss that  
23 with his client. And the following Tuesday, which  
24 was the day after labor day, he advised me that he  
25 had discussed it with his client and that FCRE REL,

10

♀  
1 LLC, would not return any money to A & B Associates  
2 based on its own interpretation of its loan  
3 documents.

4 I would note that at that time there was  
5 none of the matters asserted in the motion now

6 expressing some confusion as to what Your Honor had  
7 ordered. It was unequivocal that they simply  
8 refused to do it.

9 I have read the documentation, the  
10 motion -- rather the return provided by Mr. Coppage,  
11 and I would state simply again all they are doing is  
12 continuing to rely on the terms of their likely  
13 unconscionable loan documents and simply refusing to  
14 address the fact that they had been under an order  
15 now for more than 30 days to do these things. And  
16 that they have not done them.

17 You know, the contempt is -- yeah, there  
18 is no other way to look at this other than to  
19 suggest that it is willful. They have been told to  
20 do it. They have been told to do it on three  
21 separate occasions in my presence with Your Honor  
22 and Mr. Coppage. And the answer is simply that they  
23 will not do it.

24 I would note there are -- one thing  
25 asserted in Mr. Coppage's affidavit, he claims that

11

1 there is no licensed property manager on site. That  
2 is not true. The individual identified in his  
3 affidavits and in his brief as being a licensed

4 property manager indeed holds a property manager in  
5 charge license, you know. So that, if nothing else,  
6 is wrong, and provides no basis for Your Honor to  
7 suggest that A & B Associates has done anything at  
8 all.

9 I mean, as of this time -- the other thing  
10 that happened was is following Your Honor's  
11 direction that the matter be returned to the status  
12 quo as it existed prior to the actions of late July,  
13 a billing statement was sent out shown on  
14 Mr. Kettles's affidavit where, among other things,  
15 \$25,000 in default interest was charged. That money  
16 has been paid.

17 Once again, Your Honor, the monetary  
18 default does not exist. They are now in possession  
19 of nearly \$80,000 of money that by Your Honor's  
20 previous orders they should not be in possession of.  
21 And the only statement that we have received is that  
22 they believe their loan documents allow them to do  
23 the things they have done and therefore they are not  
24 going to return anything.

25 And based on that, I believe the record

♀

12

1 establishes that there is a contempt, there is a

2 willful contempt. The Plaintiff is entitled to  
3 relief from the willful contempt. I mean, there is  
4 no one here for Your Honor to incarcerate in order  
5 to enforce the Court's orders. I have suggested  
6 that the Court give them one more chance. And that  
7 on their failure to do so that Your Honor strike  
8 their pleadings, enter a default, and set a damages  
9 hearing.

10 I mean, I -- you know, again, they are 30  
11 days in contempt. There is no state of facts set  
12 out in Mr. Coppage's affidavit that would indicate  
13 that the contempt is anything other than willful and  
14 is simply not doing it. They are refusing to do it.

15 And based on that, you know, something  
16 needs to be done because Mr. Kettles has now made --  
17 been required to make from his own funds nearly  
18 \$90,000 in payments and, you know, what is happening  
19 here should be apparent which is that they believe  
20 that through their refusal to comply with the  
21 Court's orders that they can eventually generate a  
22 monetary default. Whether or not that would be  
23 effective to get them anywhere or not I don't know  
24 given the facts of this case, but what has happened  
25 is that through their, Number One, initial actions

1 and then through their subsequent refusal to comply  
2 with the Court's order they have increased the  
3 financial pressure to the point that it will cause a  
4 problem.

5 And that is precisely what Your Honor has  
6 advised everyone his order was designed to prevent.  
7 And what you have is an entity and likely an  
8 individual who simply have decided that they will  
9 not comply and that they will continue to not comply  
10 until they can create a problem that Mr. Kettles and  
11 his company will be unable to solve.

12 The law is clear that in order to  
13 enforce -- that one seeking the ability to enforce  
14 an order by contempt is also entitled to their  
15 attorneys fees. We have filed affidavits of  
16 attorneys fees both for me and Mr. -- for  
17 Mr. Granitz and I. Mr. Granitz and me. And those  
18 have been provided to Mr. Coppage and to Mr.  
19 Twombly.

20 Following receipt of the brief yesterday  
21 and the affidavit from Mr. White regarding the  
22 property manager, I did provide an -- I did get an  
23 affidavit from the property manager this morning

2016 09 16 Transcript from Contempt Hearing  
24 that says -- it's very brief. It simply says, my  
25 name is Allison Mealing. I have a property manager

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1 in charge license number of 79562. And a copy of  
2 the license is attached to it.

3 I don't want to beat this to death,  
4 although I already have, but Your Honor --

5 JUDGE DUKES: Just to be clear, you  
6 don't seek any relief against Tidelands. This is  
7 solely against --

8 MR. COLTRANE: This is solely against  
9 FCRE which has been in control of everything thus  
10 far. Certainly is in control of the money.

11 JUDGE DUKES: All right. Mr.  
12 Coppage, happy to hear from you, sir.

13 MR. COPPAGE: Thank you, Your Honor.  
14 This all comes out of a loan funded from FCRE to A &  
15 B Associates which was originated on April 15th,  
16 2015. It was no doubt a complex transaction. It's  
17 a large apartment complex of 96 units.

18 The loan was for \$3.9 million. There were  
19 various loan documents executed during that  
20 transaction. However, to say it is complex is not  
21 to say that it is somehow violative of equity, that

2016 09 16 Transcript from Contempt Hearing  
22 it --

23 JUDGE DUKES: Let me ask you this  
24 though.

25 MR. COPPAGE: Certainly.

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1 JUDGE DUKES: Complicated, not  
2 complicated, simple, it doesn't matter. I thought  
3 we had a court order that said, look, we've got a  
4 dispute here. Let's hit reset. Let's put  
5 everything right back where it was. Standard issue  
6 restraining order, injunctions, put it all back.

7 And at least I'm being told by Mr.  
8 Coltrane that that hasn't happened. Are you  
9 asserting that your client has set everything back  
10 or not?

11 MR. COPPAGE: I am. I'm asserting  
12 that they have set everything back and have complied  
13 with the order.

14 JUDGE DUKES: So you are saying the  
15 money is in the -- maybe we need to go -- obviously  
16 we've got a dispute of facts. Mr. Coltrane says  
17 that money was taken from an account. An account  
18 was changed. You are saying that didn't happen or  
19 it's been restored or what?

20 MR. COPPAGE: It bears an  
21 explanation. And I'll certainly get to that.

22 JUDGE DUKES: All right. Go ahead.

23 MR. COLTRANE: Well, I mean, if Your  
24 Honor please, if you read Mr. Kettles's affidavit,  
25 he spoke to Wells Fargo in the last 48 hours, was

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1 told that based on the instructions of FCRE they  
2 were not allowed to talk to him. And that the Wells  
3 Fargo lock box account had been changed so that any  
4 money in it sweeps to an account owned by FCRE.

5 I mean, they haven't returned the \$37,500  
6 that they paid to the New York lawyer. They haven't  
7 returned the \$9,700 that they paid to Tidelands.  
8 The \$22,000 that was removed from the reserve  
9 accounts is not back. They -- you know, they  
10 collected \$25,000 of default interest that they  
11 haven't returned.

12 So -- and that is all established by the  
13 affidavits. I mean, so --

14 JUDGE DUKES: All right. Well,  
15 that's, I guess, the part, Mr. Coppage, I was trying  
16 to get to is have they -- are you saying they have  
17 done these things? That Mr. Coltrane is in error

2016 09 16 Transcript from Contempt Hearing  
18 when he says they haven't returned this money or --

19 MR. COPPAGE: No, Mr. Coltrane is not  
20 incorrect about the facts, however the -- as to what  
21 has actually happened. However, I believe that his  
22 characterization of what is the Plaintiff's money is  
23 in error.

24 Now, back to the loan documents that were  
25 signed. One of the things was an assignment of

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1 rents which Mr. -- or A & B, the Plaintiff, assigned  
2 all rents, profits, any money coming out of the real  
3 property to FCRE which -- and, in turn, FCRE allowed  
4 a license to the Plaintiff to enjoy those, but that  
5 license could be revoked at any time.

6 So any rents, profits coming from that  
7 real property are not and have never been the money  
8 of the Plaintiff as the term is used in the order.  
9 And upon the event of default, that license was  
10 revoked. And the Plaintiff no longer enjoyed that  
11 license. It just went back to --

12 JUDGE DUKES: All right. But let me  
13 -- let's go back for a second because I understand  
14 they have an interpretation of the paperwork which  
15 may or may not be unconscionable. We haven't gotten

2016 09 16 Transcript from Contempt Hearing  
16 there, yet. But the purpose of the series of orders  
17 and motions that we've had before this were  
18 essentially to put the parties in the same position  
19 they were before your client came in and put their  
20 people out and changed all of these accounts and all  
21 of that. Okay?

22 And before that happened they weren't  
23 taking the rent. They were -- the rent was  
24 remaining with the Plaintiff. And this is confusing  
25 Plaintiff and Defendant because ordinarily I'm

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1 dealing with them reversed in a situation like this,  
2 but we all know how this started.

3 And so I guess my question is are you  
4 saying that they -- it sounds like you are saying  
5 they are not complying with the record, but they  
6 have some reason why they are not complying? Is  
7 that what you are saying? I guess I'm --

8 MR. COPPAGE: That's correct. And we  
9 can certainly talk about the purpose and what may  
10 have been intended, but from the reading of the  
11 order and any ambiguity created in the order and if  
12 there is any ambiguity relying on these documents  
13 that these two parties signed, the conclusion, and I

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14 certainly think a fair conclusion, that my client  
15 has come to is that all of the money that Mr.  
16 Coltrane is now talking about is not Plaintiff's  
17 money.

18 As the order says, it is FCRE's money and  
19 it can be applied to the debt owed by the Plaintiff  
20 in any manner that FCRE chooses.

21 JUDGE DUKES: That is a very unusual  
22 mortgage. Let's see. What else, Mr. Coppage, do  
23 you have?

24 MR. COPPAGE: And again, just we are  
25 certainly relying on the order. And really the two

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1 actions you require in that order are -- aside from  
2 business files, are to return Plaintiff's money.  
3 And without further explanation of what Plaintiff's  
4 money is or is not --

5 JUDGE DUKES: Let me make sure we are  
6 clear. Before your client came in in their  
7 self-help remedy and arrived with the police chief  
8 and all of that, the money that we are talking about  
9 was in the possession of A & B Associates?

10 MR. COPPAGE: The money we are  
11 talking about, some of it was in a Wells Fargo

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12 clearing account which the loan documents require.

13 When the Plaintiff receives rents from the tenants,  
14 all of those rents go into a clearing account which  
15 is under the control of the lender, FCRE.

16 If there is no reason to keep that account  
17 from sweeping back to the Plaintiff, then it sweeps  
18 back I think every day. Once there becomes a  
19 reason --

20 MR. COLTRANE: Wait. And that was  
21 the status quo.

22 JUDGE DUKES: Okay. Go ahead.

23 MR. COPPAGE: Once there becomes a  
24 reason for it not to sweep, those remain in the  
25 clearing account and they become FCRE's money and

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1 can either stay there or be swept to a deposit  
2 account belonging to FCRE and applied to the debt  
3 which is exactly what was done here.

4 And the other money that is at issue was  
5 money collected by Tideland's for rent.

6 JUDGE DUKES: Where is that money?

7 MR. COPPAGE: That was also either  
8 applied to the debt or was used for the maintenance  
9 and repair of the property.

10 JUDGE DUKES: All right. Now, I know  
11 we had spoken about -- there was a concern I think  
12 all around about making sure that some of the issues  
13 that -- I think some tenants showed up that day.  
14 And the lender had some concerns. And I asked the  
15 parties to get together I think within 10 days and  
16 try to come up with a list of some things that may  
17 or may not need to be done. And maybe we could talk  
18 about it further. And no one has ever asked me to  
19 get together with them to talk about it further. Is  
20 it safe to assume that you all have not been able to  
21 get together on the list?

22 MR. COLTRANE: We made that request.  
23 And FCRE has refused to do so.

24 MR. COPPAGE: We've talked about it  
25 and haven't come to a decision about how to get

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1 together. It's both parties that have not come to a  
2 decision about how to do it.

3 MR. COLTRANE: No, Your Honor. Mr.  
4 Coppage suggested he would go down and meet with  
5 someone and decide what needed to be done. And, you  
6 know, we asked -- told him -- reminded him of the  
7 deadline and have gotten the same stiff arm we've

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8 gotten on returning the money.

9 JUDGE DUKES: All right. Anything  
10 else from anyone?

11 MR. COPPAGE: Just a moment, Your  
12 Honor, if you will. Just again, I haven't really  
13 addressed the law, but it does require that the  
14 contemnor be found to have acted willfully which  
15 means with a bad purpose either to disregard or  
16 disobey the law.

17 Given the wording of the order I think  
18 that certainly hasn't been shown here. And to  
19 address Mr. Coltrane's request for sanctions, I  
20 believe his request that some of the pleadings be  
21 stricken is misplaced. That is a sanction that is  
22 appropriate for failure to comply with discovery,  
23 not here.

24 As I find it, if we are -- if the Court  
25 were to find FCRE in civil contempt, the only

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1 sanction they can impose is compliance to compensate  
2 A & B that is an actual loss of A & B, not  
3 additional fines or striking any pleadings.  
4 Again --

5 JUDGE DUKES: I'm not so sure about

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6 that. I know it's been done in other cases. Again,  
7 I would be happy to hear from both counsel maybe in  
8 post-trial memos about that, but I think for willful  
9 contempt striking the pleadings is available. I  
10 think there are a number of sanctions available, but  
11 anyway, go ahead.

12 MR. COPPAGE: And finally the issue  
13 of the Plaintiff coming to court with unclean hands.  
14 It does appear that they have now complied with the  
15 Court's order, but it does sound like it took over  
16 two weeks for them to do so. So having not complied  
17 with the Court's order itself, it would certainly be  
18 inequitable for the Plaintiff to now ask that FCRE  
19 be held in contempt when they have violated the  
20 order as well. And at the same time FCRE's  
21 contempt, if there was any, which of course we argue  
22 there is not, has only arisen because of their  
23 understanding of the text of the order.

24 JUDGE DUKES: Now, the text of the  
25 order is Paragraph 3, Page 6 of 7, I believe. Is

1 that the one we are talking about?

2 MR. COPPAGE: One and three, yes,  
3 sir.

4 JUDGE DUKES: So no later than noon,  
5 Friday August 26th, the Defendant shall return and  
6 turn over to Plaintiff all of Plaintiff's money  
7 including but not limited to all leases,  
8 applications, paperwork, files, tools as referenced  
9 in Christopher Kelly's affidavit, all money received  
10 from rents, and to return all money removed from any  
11 of Plaintiff's Bank accounts, including reserve  
12 accounts, and provide a full accounting of all such  
13 moneys, any expenses Defendants have paid or  
14 incurred with Plaintiff's money.

15 Has there been any sort of accounting  
16 done?

17 MR. COPPAGE: There has, Your Honor.

18 MR. COLTRANE: Yes, Your Honor. The  
19 accounting is set out in my letter which is the last  
20 exhibit to my motion. It shows based on what  
21 Mr. Kettles was able to find the amount of money  
22 removed and on Page 2 of it it shows the materials  
23 given back which were a series of bills. I mean, of  
24 the \$77,000 they gave him \$1,600 back.

25 And there is, as I've pointed out, there

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1 is a series of things showing work that apparently

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2 was done on the building. And Your Honor said that  
3 didn't count so we didn't claim it, but there is a  
4 bill of \$37,500 paid to a law firm in New York and  
5 \$9,761.03 paid to Tidelands Realty.

6 There was an overpayment of the August 1  
7 payment of \$5,669.89. And there was an additional  
8 \$3,844 that the records of FCRE showed that it took  
9 out of their account. I mean, so the total came to  
10 roughly -- well, it came to exactly 56,774.92. I  
11 mean, so that is what their accounting showed.

12 And as Your Honor will recall, you know,  
13 we discussed the -- there was a claim that they had  
14 done work on the buildings. You said, okay, if  
15 they've done work on the buildings, they have done  
16 work on the buildings. No claim is made for that.

17 JUDGE DUKES: Right.

18 MR. COLTRANE: There is also the  
19 \$25,000 in default interest.

20 JUDGE DUKES: What is that about, Mr.  
21 Coppage, \$25,000 in default interest? Any idea.

22 MR. COPPAGE: It's just --

23 MR. COLTRANE: Well, following your  
24 order, they sent him a bill that included \$25,000 in  
25 default interest. You know, again, Your Honor told

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1       them the matter was set back to what existed prior  
2       to their claim of default. And indirect  
3       contravention of that they sent them a bill for  
4       default interest that is attached to Mr. Kettles's  
5       affidavit.

6                   MR. COPPAGE: Your Honor, I don't  
7       believe that is correct. I believe the order gives  
8       them the instructions listed in those Paragraphs 1  
9       and 3 on Page 6. It does not rescind the event of  
10      default. It doesn't find that there was no event of  
11      default. It does not preclude FCRE from exercising  
12      any of its rights under the loan documents.

13                   MR. COLTRANE: I would argue that  
14      based on not only the language of the order, but  
15      what Your Honor said in the phone conversations with  
16      Mr. Coppage that is precisely what it did. And the  
17      effort to parse what is otherwise pretty plain  
18      language to suggest that Your Honor didn't order  
19      what Your Honor plainly ordered is --

20                   JUDGE DUKES: Mr. Coppage, I know you  
21      are here representing your client and doing the best  
22      job you can based on the situation as it is handed  
23      to you. Let me ask you -- Mr. Twombly, you don't  
24      have anything to add, do you?

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MR. TWOMBLEY: Well, I just had a

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1 question.

2 JUDGE DUKES: Yeah, go ahead.

3 MR. TWOMBLEY: The account that this  
4 money was in appears it was established according to  
5 the loan documents. It says it shall be under the  
6 sole dominion and control of the lender. So, I  
7 mean, it seems like the account was established for  
8 the sole purpose of so the borrower wouldn't have  
9 the money. So, you know, it's kind of a roadblock  
10 so the money does not get to the borrower.

11 JUDGE DUKES: I think Mr. Coltrane's  
12 concern with it is if it were still operating in the  
13 manner it were operating before whatever the date  
14 was that it was changed it would be in compliance,  
15 but there was a modification to which direction the  
16 broom went in the sweep part I think. Is that my  
17 understanding, Mr. Coltrane?

18 MR. COLTRANE: Yes, Your Honor. As  
19 of today it sweeps to an account controlled by FCRE,  
20 not A & B.

21 JUDGE DUKES: Yeah.

22 MR. TWOMBLEY: The only other point I

23 had or just a question was -- again, I wasn't here  
24 for any of this. I'm coming to the game late, but  
25 in this order it appears to me that there at least

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1 was some expectation that some of the money would  
2 have been spent on expenses of the Defendants. That  
3 is what it says. That in addition to returning the  
4 money, that -- to provide a full accounting of all  
5 such money and expenses Defendants have paid or  
6 incurred with Plaintiff's money.

7 So arguably there was a reasonable  
8 expectation that some of the money that had been,  
9 you know, taken control of would have been used or  
10 spent in some way towards the property. And  
11 arguably --

12 JUDGE DUKES: Well, that is true. As  
13 a matter of fact, there was a lengthy discussion  
14 probably on the record, and as you said you weren't  
15 here, about if they had to fix a railing or a smoke  
16 detector or paint or something like that. And as a  
17 matter of fact, I understand there is some -- that  
18 is not an issue today. I mean, I think you are  
19 right. And again that is -- but thank you for  
20 pointing that out.

21 Yes, Mr. Coppage, were you getting ready  
22 to say something?

23 MR. COPPAGE: I was not.

24 JUDGE DUKES: Okay. So thank you for  
25 that, Mr. Twombly. But, yeah, we've spoken about

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1 this and this has been the subject of a number of  
2 hearings. And I think at each hearing I restated,  
3 and I thought the understanding was crystal clear,  
4 the idea here was to reset this, put everything back  
5 exactly as it was prior to the Defendant asserting a  
6 default and coming in and taking over.

7 I can't imagine if one were to piece the  
8 records together, and these have all been on the  
9 record, and look at these orders that anybody could  
10 have any other idea. And so I think the Defendant  
11 is in willful contempt here.

12 I'm going to order them one more time.  
13 And if the order needs to be more specific, I don't  
14 see that it does, but the idea here is to put  
15 everything back the way it was. And I'm talking  
16 about how things sweep, putting money back, putting  
17 everything back the way it was prior to this  
18 happening.

19 I'm going to -- until that happens, I'm  
20 going to fine the Defendant \$10,000 a day starting  
21 this afternoon at 5:00 o'clock. And at 5:00 o'clock  
22 every day thereafter until it's done. I'm going to  
23 award the -- what are the attorneys fees? I haven't  
24 seen the attorneys fees.

25 MR. COPPAGE: Your Honor, I'm sorry

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1 to interrupt, but is that per business day or  
2 calendar day?

3 JUDGE DUKES: Calendar day. They  
4 should hurry and try to get it done this afternoon  
5 if they can.

6 MR. COLTRANE: Mine are \$6,284. Mr.  
7 Granitz is a little more than that. \$8,055.

8 JUDGE DUKES: Okay. Mr. Coppage, do  
9 you have any desire to cross examine either  
10 Mr. Granitz or Mr. Coltrane with regard to the  
11 attorneys fees they've sought in this matter?

12 MR. COPPAGE: I don't, Your Honor.

13 JUDGE DUKES: Okay. Well, then I  
14 will grant attorneys fees in favor of the Plaintiff  
15 in this matter as well. Mr. Coltrane, can you draft  
16 an order for me, please?

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17 MR. COLTRANE: Your Honor, I can.

18 JUDGE DUKES: All right. Anything  
19 else for this record?

20 MR. COLTRANE: Nothing from the  
21 Plaintiff, Your Honor.

22 MR. COPPAGE: Nothing from FCRE.

23 JUDGE DUKES: Thank you very much.  
24 That will conclude the record.

25 (Whereupon, the hearing was concluded

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1 at 12:07 p.m.)

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2016 09 16 Transcript from Contempt Hearing  
Office Box 22828, Charleston, SC 29413-2828.

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In witness whereof I set my hand and seal  
this 21st day of September, 2016.

My Commission  
expires 1/4/18

Deborah S. Thomas, CVRM  
and Notary Public for the  
State of South Carolina

♀

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

AUG 04 2017

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

Appellate Case No. 2016-001899  
Case No. 2016-CP-07-1778

A & B Associates, L.P. ....Plaintiff/Respondent

v.


FCRE REL, LLC; and TIDELAND REALTY, INC. ....Defendants,

Of Whom FCRE REL, LLC is the .....Appellant.

PROOF OF SERVICE

I, Curtis L. Coltrane, with the law firm of Coltrane & Wilkins, LLC, certify that I have this date, served one (1) copy each of two (2) Motions to Strike by depositing a copy of the same, with first class postage affixed thereto, and addressed as follows:

Benjamin T. Coppage, Esq.  
The Coppage Law Firm, LLC  
P.O. Box 2473  
Beaufort, SC 29901

COLTRANE & WILKINS, LLC  
  
Curtis L. Coltrane, SC Bar No. 1344  
Post Office Box 6808  
Hilton Head Island, SC 29938  
(843) 785-5551  
curtis@coltraneandwilkins.com  
Attorneys for Respondent A & B  
Associates, L.P.

Dated this 3<sup>rd</sup> day of August, 2017  
Hilton Head Island, South Carolina

COLTRANE & WILKINS, LLC  
ATTORNEYS AT LAW

POST OFFICE BOX 6808  
HILTON HEAD ISLAND, SC 29938  
(843) 785-5551  
(843) 785-5552 (FAX)

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AUG 04 2017

SC Court of Appeals

Curtis L. Coltrane  
E-Mail: [curtis@coltraneandwilkins.com](mailto:curtis@coltraneandwilkins.com)  
Certified Circuit Court Mediator  
Certified Circuit Court Arbitrator  
Certified Federal Court Mediator

Curtis L. Coltrane\*  
John W. Wilkins  
\*Also Member Virginia Bar

August 3, 2017

Hon. Jenny A. Kitchings  
S. C. COURT OF APPEALS  
Post Office Box 11629  
Columbia, SC 29211

RE: A & B Associates, L. P. V. FCRE REL, LLC  
Case 2016-1899

Dear Ms. Kitchings:

Enclosed, you will find an original and seven copies to two Motions to Strike in connection with the above case, together with a certificate of mailing. I also enclose my check in the amount of \$50.00 for the filing fee for the motions. Please make these a part of your file on this case, and return one clocked in copy of each motion to me in the enclosed envelope. Please let me know if anything further is needed at this moment. I am,

Sincerely,

COLTRANE & WILKINS, LLC

  
Curtis L. Coltrane

CLC/bms  
cc: Benjamin T. Coppage, Esq.