

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2014-CP-07-0052
APPELLATE CASE NO.: 2018-001969

Lady Beaufort, LLC &
Tideland Realty, Inc.

Respondents/Appellants,

vs.

Hird Island Investments, Inc., Sherwood N. Fender,
Addison D. Fender, Martha B. Fender, William B. Bowen,
Lady Kemmerlin, LLC, Brickyard Holdings, Inc. and
A&K Holding Co., LLC,

Defendants,

AND

William M. Bowen,

Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps,

Third-Party Defendants,

Of Which Hird Island Investments, Inc.
and Sherwood N. Fender are

Appellants/Respondents.

RECORD ON APPEAL
VOLUME I

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INDEX

VOLUME I

Order of the Honorable Marvin H. Dukes, III dated October 26, 2018.....	1
Order Granting in Part and Denying in Part Hird Island’s Motion to Reconsider dated February 14, 2018	13
Order of the Honorable Marvin H. Dukes III filed on May 11, 2017.....	18
Order of Reference filed November 25, 2014	33
Notice of Appeal dated November 14, 2018	35
Notice of Appeal filed November 5, 2018.....	37
Summons and Complaint filed on January 7, 2014	39
Answer and Counterclaim of Inverness filed on February 5, 2014	44
Answer and Counterclaim of Hird Island filed on February 5, 2014	47
Amended Complaint filed on May 29, 2014	50
Answer and Counterclaim of Hird Island to the Amended Complaint filed on June 11, 2014.....	56
Second Amended Complaint filed on November 24, 2014	60
Answer to Second Amended Complaint of Hird Island and Sherwood Fender filed on November 13, 2014.....	66
Motion to Reconsider filed by Hird Island on May 19, 2017.....	70
Contract Between Lady Beaufort, LLC and Hird Island Investments, Inc. dated August 19, 2013	76
Transcript of Hearing held March 1, 2017.....	85

VOLUME II

Plaintiffs’ Exhibit 1	267
Plaintiffs’ Exhibit 1	269
Plaintiffs’ Exhibit 2.....	278
Plaintiffs’ Exhibit 3.....	281
Plaintiffs’ Exhibit 4.....	283

Plaintiffs' Exhibit 5.....	284
Plaintiffs' Exhibit 6.....	286
Plaintiffs' Exhibit 7.....	289
Plaintiffs' Exhibit 8.....	292
Plaintiffs' Exhibit 9.....	293
Plaintiffs' Exhibit 10.....	294
Plaintiffs' Exhibit 11.....	295
Plaintiffs' Exhibit 12.....	296
Plaintiffs' Exhibit 13.....	297
Plaintiffs' Exhibit 14.....	300
Plaintiffs' Exhibit 15.....	302
Plaintiffs' Exhibit 16.....	317
Plaintiffs' Exhibit 17.....	321
Plaintiffs' Exhibit 18.....	339
Plaintiffs' Exhibit 19.....	341
Plaintiff's Exhibit 20.....	342
 Plaintiffs' Exhibit 2.....	 343
 Defendants' Exhibit 1	 346
Defendants' Exhibit A	347
Defendants' Exhibit B.....	357
Defendants' Exhibit C.....	369
Defendants' Exhibit D	373
Defendants' Exhibit E.....	375
Defendants' Exhibit F	380
Defendants' Exhibit G	384
Defendants' Exhibit H	387
Defendants' Exhibit I.....	(does not exist)

VOLUME III

Transcript of Hearing held July 23, 2019	407
 Exhibit 1	 507
 Certificate of Service	 516

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

LADY BEAUFORT, LLC &
TIDELANDREALTY, INC.,

Plaintiffs,

vs.

HIRD ISLAND INVESTMENTS, INC.,
SHERWOOD N. FENDER, ADDISON D.
FENDER, MARTHA B. FENDER,
WILLIAM B. BOWEN, LADY
KEMMERLIN, LLC, BRICKYARD
HOLDINGS, INC. AND A&K HOLDING
CO., LLC,

Defendants.

AND

WILLIAM M. BOWEN,

Third Party Plaintiff,

vs.

JAMES S. KERR and MATT TRUMPS,

Third Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-07-0052

ORDER AMENDING JUDGMENT

This matter comes before me pursuant to a Motion to Reconsider filed on behalf of the Defendants requesting that I reconsider, among other things, that portion of my Order filed May 11, 2017 awarding attorney's fees and costs totaling \$53,924.41 against the Defendants Hird Island Investments, Inc. and Sherwood N. Fender in favor of the Plaintiff Lady Beaufort, LLC. This matter came to be heard before me in the Beaufort County Court of Common Pleas on July 23, 2018. Present at the hearing and appearing on behalf of the Plaintiff Lady Beaufort, LLC was its attorney, Jann G. Rannik, Esquire. Appearing on behalf of the Defendants Hird Island

Investments, Inc. and Sherwood N. Fender was their attorney, H. Fred Kuhn, Jr., Esquire. The Defendant Sherwood N. Fender was also present. Testimony was taken from Andrew K. Epting, Jr., Esquire, and various documents were placed into evidence. For the reasons set forth herein, I find and conclude that the attorney's fees and costs awarded to the Plaintiff Lady Beaufort, LLC in my Order filed May 11, 2017 should be reduced from \$53,924.41 to \$17,857.00, and my judgment amended accordingly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On August 19, 2013, Lady Beaufort, LLC ("Lady Beaufort") and Hird Island Investments, Inc. ("Hird Island") entered into a Contract whereby Hird Island was to sell to Lady Beaufort a 2.99 acre parcel of real estate located in Beaufort County at 9 Sams Point Road ("the Property").

2. The Contract provided that the closing was to occur seven (7) days after the expiration of the Due Diligence Period, with a provision allowing for an automatic extension of five (5) business days in the event of unsatisfied contingencies. Accordingly, the final closing date of the Contract was October 15, 2013.

3. Hird Island sold the Property to a third party, Inverness, LLC on October 10, 2013, while its Contract with Lady Beaufort was still in full force and effect.

4. On October 15, 2013 Lady Beaufort filed a lis pendens on the Property and on January 7, 2014 it filed this lawsuit, initially against Hird Island only, but subsequently adding its principal Sherwood Fender, alleging causes of action for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act.

5. Lady Beaufort resolved its dispute with Inverness by way of a settlement agreement that authorized Lady Beaufort to purchase the property from Inverness for \$25,000.00

more than Lady Beaufort's contract with Hird Island.

6. As a result of a trial held before me on March 1, 2017 I filed an Order on May 11, 2017 entering judgment in favor of Lady Beaufort against both Hird Island and Sherwood Fender in the amount of \$87,578.56.¹

7. I calculated the amount of the judgment entered in favor of Lady Beaufort by adding together the increase in the purchase price that Lady Beaufort had to pay to Inverness in order to obtain the Property and the attorney's fees and costs spent by Lady Beaufort to obtain the Property. More specifically:

"As a result of the Defendant's conduct, Lady Beaufort had to file suit in order to obtain the property that it was entitled to pursuant to its contract with Hird Island. Lady Beaufort filed suit against Hird Island and its principal Sherwood Fender as well as the third party that purchased the property from Hird Island, Inverness. Lady Beaufort was able to reach a settlement with Inverness. Pursuant to the settlement, Lady Beaufort paid Inverness \$285,000.00 to obtain the property. This represents a \$25,000.00 increase from Lady Beaufort's contract with Hird Island. Lady Beaufort has also expended \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct. Attorney's fees are provided for in the contract."

Order of May 11, 2017, pg. 8 (citations omitted and emphasis added).

8. I added prejudgment interest to the \$25,000.00 increase in the purchase price to arrive at the total judgment of \$87,578.56.

9. On May 19, 2017 the Defendants filed a Motion to Reconsider the May 11, 2017 Order. Among other things, the Defendants contended that the amount of attorney's fees and costs awarded to Lady Beaufort was excessive and the Court did not make any findings of fact as to the factors mandated in determining an award of attorney's fees, citing *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993) ("There are six (6) factors to consider in

¹ I also awarded judgment in favor of the Plaintiff Tideland Realty, Inc. against Hird Island and Sherwood Fender in the amount of \$17,500.17, representing actual damages and prejudgment interest on the real estate commission due on the Contract. This judgment in favor of Tideland Realty, Inc. is neither affected by, nor the subject of, this Order.

determining an award of attorney's fees: (1) Nature, extent, and difficulty of the legal services rendered; (2) Time and labor devoted to the case; (3) Professional standing of counsel; (4) Contingency of compensation; (5) Fee customarily charged in the locality for similar services; and (6) Beneficial results obtained.").

10. On February 14, 2018 I issued my Order granting in part and denying in part the Defendant's Motion to Reconsider. In this Order, I found that the foregoing ground had merit and concluded "that the appropriate remedy is to reopen the record so as to allow the parties to submit evidence in support of, or in opposition to, the claimed attorney's fees and costs of \$53,924.41 and the foregoing factors." Order of February 14, 2018, pg. 3. Accordingly, I ordered as follows:

"My Order of May 17, 2017 (sic, May 11, 2017) is reconsidered and amended so as to change the final sentence of the second paragraph of the section entitled "III. Damages," found on page 8 of the aforesaid Order to read as follows:

"In addition to the foregoing, Lady Beaufort also claims damages in the amount of \$53,924.41 in attorney's fees and costs which it claims it expended on account of Defendant's default. Attorney's fees are provided for in the contract. In order to award attorney's fees and costs I must consider the six (6) factors enumerated in *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). There is currently an insufficient evidentiary basis upon which I can consider the *Blumberg v. Nealco* factors. It is accordingly ordered that the record in this case should be reopened and the hearing reconvened, limited to the issue of that element of damages claimed by the Plaintiff Lady Beaufort consisting of attorney's fees and costs in the amount of \$53,942.41."

Order of February 14, 2018, pg. 4.

In accordance with my Order, the hearing was reconvened on July 23, 2018.

11. My finding in my May 17, 2017 Order that Lady Beaufort had expended \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct was based upon the testimony of James J. Kerr, Sr., the sole owner of Lady

Beaufort. Mr. Kerr testified that he had actually paid this amount in attorney's fees and costs. Tr., pg. 31, lines 21 - 24. Of this sum, Mr. Kerr testified that he paid \$7,857.00 to D. Carlyle Rogers, Jr., P.C. (the "Rogers Firm") and \$46,067.41 to Andrew K. Epting, Jr., LLC (the "Epting Firm").

12. At the re-convened hearing held on July 23, 2018 the only witness to testify was Andrew K. Epting, Jr., Esquire, the principal attorney of the Epting Law Firm. Mr. Epting testified that Lady Beaufort had not paid a total of \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct. His testimony on this point was corroborated by his firm's itemized billings, which were introduced into evidence. I find and conclude that Mr. Epting's testimony on this issue is credible.

13. Lady Beaufort obtained the subject property from Inverness pursuant to a closing which took place on May 30, 2014. I find and conclude that the attorney's fees and costs charged by the Epting Firm to Lady Beaufort up through that point in time were reasonably necessary in order to obtain the property Lady Beaufort lost because of the Defendants' conduct. The attorney's fees totaled \$15,560.00, while the costs totaled \$1,065.00, resulting in total attorney's fees and costs of \$16,625.00. I reviewed the itemized invoice for these attorney's fees and costs and I find them to be reasonable. The attorney's fees were earned by Attorney Michelle Nicole Endemann and Andrew K. Epting of the Epting Firm. Ms. Endemann spent 27.5 hours and charged a rate of \$250.00 per hour. She was a new attorney and I find her rate to be reasonable and consistent with that charged by attorneys of similar experience in the area. Mr. Epting spent 19.3 hours on the case charging a rate of \$450.00. Mr. Epting is a highly experienced and highly regarded attorney. I find his rate to be reasonable considering his experience and standing in the legal community.

14. Mr. Epting testified that Mr. Kerr and his various business entities were good clients of his firm and he voluntarily reduced his firm's bill by \$6,625.00, thereby charging Mr. Kerr only the balance of \$10,000.00, which Mr. Kerr paid on June 6, 2014.

15. Accordingly, with respect to the Epting Law Firm, Lady Beaufort incurred \$10,000.00 in attorney's fees and costs in order to obtain the Property it lost because of the Defendants' conduct.

16. In addition to the Epting Firm, Lady Beaufort also incurred attorney's fees and costs with the Rogers Firm. No witness testified with respect to the Rogers Firm nor were any of the firm's billings placed into evidence. At the original hearing, however, an Affidavit from D. Carlyle Rogers, Jr., Esquire the principal attorney of the firm, was introduced into evidence. From this Affidavit it appears that Mr. Rogers represented Lady Beaufort in the attempted closing with Hird Island, as well as the successful closing of the transaction between Lady Beaufort and Inverness. He also assisted Lady Beaufort with the filing of a Lis Pendens on the property, as well as with putting the Defendant on notice of its default under its contract with Lady Beaufort. The total attorney's fees and costs associated with the aforementioned legal services was \$7,857.00.

17. There are six factors to consider in determining an award of attorney's fees: (1) Nature, extent and difficulty of the legal services rendered; (2) Time and labor devoted to the case; (3) Professional standing of counsel; (4) Contingency of compensation; (5) Fee customarily charged in the locality for similar services; and (6) Beneficial results obtained. *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

18. With respect to the nature, extent, and difficulty of the legal services rendered, these services included preparing for the attempted closing with Hird Island, the successful

closing with Inverness, the filing of a lis pendens, putting the Defendant on notice of its default, and filing and pursuing litigation in order to obtain to the Property which is the subject of this litigation.

19. With respect to the time and labor devoted to the case, I find that the 19.3 hours spent by Mr. Epting and the 27.5 spent by Mrs. Endemann were reasonably necessary in order to obtain the subject property. While I do not know precisely the amount of time spent by Mr. Rogers, nor his hourly billing rate, considering the nature of the services he performed I find that the total attorney's fees and costs billed by him was reasonably necessary.

20. As previously noted, Mr. Epting is highly experienced and highly regarded in the legal community. Ms. Endemann was a new attorney. She was the principal trial attorney for the Plaintiff during the trial of this action and I found her to be professional and competent. With respect to Mr. Rogers, Mr. Epting testified that he is a highly competent and experienced real estate attorney, and I so find.

21. There is no contingency of compensation in this case.

22. These charges by the attorneys involved in this case on behalf of the Plaintiff are in line with the fees customarily charged in this locale for similar services.

23. The Plaintiff's attorneys have obtained a beneficial result for their client, having obtained the Property which is the subject of this action for their client.

24. I find and conclude that Lady Beaufort is entitled to recover from the Defendant the \$10,000.00 in costs and attorney's fees which it paid to the Epting Firm in order to obtain the Property which is the subject of this action.

25. Although there is no testimony that Lady Beaufort actually paid any part of the \$7,857.00 in attorney's fees and costs claimed by the Rogers Firm, there is no reason to believe

that it is not due and owing, or that any portion was forgiven. I accordingly find and conclude that Lady Beaufort is entitled to recover from the Defendant \$7,857.00 in attorney's fees and costs either paid or owed to the Rogers Firm.

26. I find and conclude that the Plaintiff has expended or incurred \$17,857.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct, and the Order filed on May 11, 2017 should be amended accordingly.

IT IS, THEREFORE, ORDERED:

a. Page 8 of the Order filed on May 11, 2017 shall be and is hereby amended so as to delete the sentence "Lady Beaufort has also expended \$53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendant's conduct." which shall be replaced with the sentence "Lady Beaufort has also expended or incurred \$17,857.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendant's conduct."

b. Page 9 of the Order filed on May 11, 2017 shall be and is hereby amended so as to delete the sentence "I further award judgment against Hird Island and Sherwood Fender in the amount of \$87,578.56, representing actual damages and prejudgment interest as described above in favor of Lady of Beaufort." which shall be replaced with the sentence "I further award judgment against Hird Island and Sherwood Fender in the amount of \$51,511.15, representing actual damages and prejudgment interest as described above in favor of Lady Beaufort."

AND IT IS SO ORDERED.

Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for the Beaufort County Court of
Common Pleas

_____, 2018
Beaufort, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-07-0052

Lady Beaufort, LLC &

Hird Island Investments, Inc.

Tideland Realty, Inc.

Sherwood Fender, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: H. Fred Kohn, Jr.

Attorney for: ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

This Order amends the Judgment amount against Hird Island and Sherwood Fender that was issued in the order filed May 11th, 2017.

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Lady Beaufort	Hird Island and Sherwood Fender	\$51,511.15
		\$

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

--

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

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

Jaan G. Rannik, Esquire

H. Fred Kuhn, Jr., Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(g), SCRPC.

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

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



Beaufort Common Pleas

Case Caption: Lady Beaufort Llc , plaintiff, et al VS Inverness Llc , defendant, et al
Case Number: 2014CP0700052
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

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000012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2014-CP-07-0052
LADY BEAUFORT, LLC & TIDELAND	)	
REALTY, INC.,	)	
	)	
Plaintiff,	)	
	)	ORDER GRANTING IN PART AND
vs.	)	DENYING IN PART DEFENDANTS'
	)	MOTION TO RECONSIDER
HIRD ISLAND INVESTMENTS, INC.	)	
AND SHERWOOD N. FENDER,	)	
	)	
Defendants.	)	
	)	

This matter came to be heard before me in the Beaufort County Court of Common Pleas on November 13 and December 14, 2017 for the purpose of hearing the Defendant's Motion to Reconsider filed pursuant to Rule 59, SCRCP, on May 19, 2017. In their Motion to Reconsider, the Defendants request that I reconsider or amend certain portions of my Order filed May 11, 2017, entering judgment in favor of Plaintiffs Lady Beaufort, LLC and Tideland Realty, Inc. After giving careful consideration to the arguments and authorities submitted by the parties, I find and conclude that the Motion to Reconsider should be granted in part and denied in part, as hereinafter set forth.

A. "PROFIT"

In my Order dated May 11, 2017 I made the following finding of fact:

As part of the transaction with Inverness, Mr. Fender required Inverness to purchase a second parcel of property owned by Fender personally. (Testimony of Fender). As a result of the sale of this second parcel, Mr. Fender obtained a \$60,000.00 profit in addition to what he made on the sale of the 9 Sams Point parcel. (Testimony of Fender). Mr. Fender needed the income from both parcels to satisfy his financial obligations. (Testimony of Fender). The profit from the sale of the 9 Sams Point parcel alone was not sufficient to do so. (Testimony of Fender, Fender Deposition Designation Pages 35:5 to 36:7, Pages 51:22 to 52:8).

Order, Finding of Fact No. 22.

In their Motion to Reconsider, the Defendants allege the following ground in support of their motion:

Defendant Fender did not make a \$60,000 "profit" from the sale of a second parcel to Inverness. (Order ¶ 22). Rather, that is an amount he received in exchange for conveying property. It was not a profit.

Motion to Reconsider, Ground No. 6.

Upon reconsideration, I find and conclude that the Defendant Fender did not make a \$60,000.00 "profit" from the sale of the second parcel to Inverness, and Finding of Fact No. 22 should be amended as is hereinafter set forth.

B. ATTORNEY'S FEES

In my Order filed May 17, 2017 I made the following finding with respect to attorney's fees and costs:

Lady Beaufort has also expended \$53,924.41 in attorney's fees and cost in order to obtain the property it lost because of the defendants' conduct. (See Plaintiffs' Exhibit 2). Attorneys' fees are provided for in the Contract. (See Plaintiffs' Exhibit 1).

Order, pg. 8. I included this figure in the judgment against the Defendants in favor of the Plaintiff Lady Beaufort in the total amount of \$87,578.56.

In their Motion to Reconsider, the Defendants request that I reconsider the award of attorney's fees on the following ground:

In the event the Court does not alter or amend its findings of Defendants' liability, Defendants contest the finding of damages. (Order pp. 8-9). Attorney's fees and costs should not be recoverable because the Court should not find in Lady Beaufort's favor. Alternatively, the amount is excessive and the Court did not make any findings of fact as to the factors in determining an award of attorney's fees. *See Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 ("There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained.").

Motion to Reconsider, Ground No. 16. Upon reconsideration, I find and conclude that the foregoing ground has merit with respect to the contention that the Court did not make any findings of fact as to the factors in determining an award of attorney's fees as required by *Blumberg v. Nealco*, supra. I find and conclude that the appropriate remedy is to reopen the record so as to allow the parties to submit evidence in support of, or in opposition to, the claimed attorney's fees and costs of \$53,924.41 and the foregoing factors.

C. REMAINING GROUNDS

I have given due and careful consideration to the remaining grounds set forth in the Defendant's Motion to Reconsider and I am declining to reconsider or amend my Order as to those grounds.

IT IS, THEREFORE, ORDERED:

a. My Order of May 17, 2017 shall be and is hereby amended by deleting Finding of Fact No. 22 set forth therein and substituting in its place and stead the following Finding of Fact:

"22. As part of the transaction with Inverness, Mr. Fender required Inverness to purchase a second parcel of property owned by Fender personally. (Testimony of Fender). As a result of the sale of the second parcel, Mr. Fender obtained \$60,000.00 in addition to what he made on the sale of the 9 Sams Point Parcel. (Testimony of Fender). Mr. Fender needed the income from both parcels to satisfy his financial obligations. (Testimony of Fender). The proceeds from the sale of the 9 Sams Point Parcel alone was not sufficient to do so. (Testimony of Fender, Fender Deposition Designation Pages 35:5 to 36:7, Pages 51:22 to 52:8).

b. My Order of May 17, 2017 is reconsidered and amended so as to change the final sentence of the second paragraph of the section entitled "III. Damages," found on page 8 of the aforesaid Order to read as follows:

In addition to the foregoing, Lady Beaufort also claims damages in the amount of \$53,924.41 in attorney's fees and costs which it claims it expended on account of

Defendants' default (See Plaintiff's Exhibit 2). Attorney's fees are provided for in the Contract. (See Plaintiff's Exhibit 1). In order to award attorney's fees and costs I must consider the six (6) factors enumerated in *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). There is currently an insufficient evidentiary basis upon which I can consider the *Blumberg v. Nealco* factors. It is accordingly ordered that the record in this case should be reopened and the hearing reconvened, limited to the issue of that element of damages claimed by the Plaintiff Lady Beaufort consisting of attorney's fees and costs in the amount of \$53,924.41.

c. The remaining grounds of the Defendants' Motion to Reconsider is denied.

AND IT IS SO ORDERED.

Honorable Marvin H. Dukes, III
Master in Equity and Special
Circuit Court Judge for Beaufort County

Beaufort, South Carolina

_____, 2018



Beaufort Common Pleas

Case Caption: Lady Beaufort Llc , plaintiff, et al VS Inverness Llc , defendant, et al

Case Number: 2014CP0700052

Type: Master/Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2018-02-14 15:09:12 page 5 of 5

000017

STATE OF SOUTH CAROLINA
COUNTRY OF BEAUFORT

LADY BEAUFORT, LLC. & TIDELAND
REALTY INC.,

Plaintiffs,

v.

HIRD ISLAND INVESTMENTS, INC. AND
SHERWOOD FENDER,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH CIRCUIT

Case No. 2014-CP-07-0052

ORDER

This matter came before me on March 1, 2017 for a non-jury trial. After hearing testimony and reviewing the evidence presented by the parties, I find in favor of the Plaintiffs against the Defendants as follows.

I. FINDINGS OF FACT

1. On August 19, 2013, Lady Beaufort, LLC ("Lady Beaufort") and Hird Island Investments, Inc. ("Hird Island") entered into a contract whereby Hird Island was to sell to Lady Beaufort a 2.99-acre parcel of property located in Beaufort county at 9 Sams Point Rd. (Plaintiffs' Exhibit 1, Contract).
2. Tideland Realty, Inc. ("Tideland") was the realtor representing the buyer in the transaction and was entitled to a 5% commission on the \$260,000.00 purchase price. (Plaintiffs' Exhibit 1, Contract, ¶ 33).
3. Sherwood Fender of Hird Island asked Mr. Trumps of Tideland to approach Mr. Kerr of Lady Beaufort about purchasing the parcel. Mr. Kerr had previously purchased a piece of property from Mr. Fender and he believed Mr. Kerr would have an interest in buying the property. (Testimony of Kerr, Fender, Trumps, and Fender Deposition Designations Pages 16:23 to 18:11).
4. The contract provided for a due diligence period of 30 "Business Days" to begin the day after the "Effective Date" of the Contract. (Plaintiffs' Exhibit 1, Contract ¶ 1.E and ¶ 12). The "Effective Date" as defined by the contract is the day the last signature appeared on the contract, August 19, 2013. (Plaintiffs' Exhibit 1, Contract ¶ 1.D) The due diligence period ended on October 1, 2013.
5. The contract provided the closing was to occur 7 days after the expiration of the Due Diligence Period (Plaintiffs' Exhibit 1, Contract ¶ 33) with a provision allowing an automatic extension of 5 Business Days for unsatisfied contingencies. (Plaintiffs' Exhibit 1, Contract ¶ 4). Accordingly, the "drop dead" date of the contract was October 15, 2013.
6. The buyer began its due diligence and its attorney, D. Carlyle Rogers, began his work to close the transaction and obtain the title insurance policy for the buyer. (Testimony of Rogers).

000018

7. Lady Beaufort secured financing through Palmetto State Bank, which was approved several weeks before the scheduled closing. Further, Mr. Kerr and Mr. Roger's testified that the transaction could have been funded by Mr. Kerr without the loan. (Testimony of Rogers and Kerr).
8. Mr. Rogers soon discovered that the seller entity, Hird Island, had been administratively dissolved in its state of incorporation, Georgia. (Plaintiffs' Exhibit 3, GA Sec. of State). Further, the company had not been domesticated in South Carolina, but was simply authorized to do business in South Carolina. (Plaintiffs' Exhibit 3, SC Sec. of State). The title insurance company was unwilling to write the policy unless this issue was remedied. (Testimony of Rogers).
9. The dissolution of the Seller entity and resulting refusal of the title insurance company to issue the title insurance policy constitute "unsatisfied contingencies" under ¶ 4 of the Contract.
10. Mr. Rogers contacted the Georgia Secretary of State to determine how this issue could be remedied and brought it to the attention of the Seller's principal, Sherwood Fender, several days before the closing. (Testimony of Rogers, Plaintiffs' Exhibit 3, Georgia Sec. of State notes).
11. Pursuant to S.C. Code Section 12-54-124, if a piece of property constitutes more than a majority of the assets of a company, a certificate of tax compliance must be obtained by the seller from the South Carolina Department of Revenue. Hird Island refused to provide the certificate, despite its attorney Derek Gilbert's assertion that the provision of the certificate is customary (See Gilbert Designations Page 12 lines 1-10) and despite the fact that the Section 22 of the contract required the parties to "comply with all local, state, federal laws, and any rules." (Plaintiffs' Exhibit 1).
12. Unbeknownst to Lady Beaufort or its attorney, the Seller's acquiring of the certificate of tax compliance was further complicated by the fact that a tax lien was filed on the property by the state of South Carolina on September 27, 2013. The lien was filed after the initial title search done by Mr. Rogers, and the lien was never disclosed by Hird Island or its lawyer. (See Exhibit 18, Testimony of Rogers, Testimony of Fender).
13. The unsatisfied requirement of the provision of a certificate of tax compliance and the unsatisfied tax lien constitute "unsatisfied contingencies" under ¶ 4 of the Contract.
14. These issues were raised with Hird Island and its attorney at least a week before the closing was scheduled. Hird Island set the closing for October 7, 2013 despite the outstanding issues. (See Plaintiffs' Exhibit 4, email, Testimony of Rogers).
15. In an effort to resolve the issues, Mr. Roger's provided several alternatives to the Seller, Hird Island: (1) the corporation could be reinstated; (2) Hird Island could sign a unanimous written consent that included language inserted by the title insurance company that Hird Island was selling the piece of property as a part of the winding up process (Plaintiffs' Exhibit 5); (3) that Mr. Fender of Hird Island sign an indemnity agreement in favor of Lady Beaufort; or (4) that the seller's attorney obtain the title insurance from his title insurance company, if it was willing to write the policy (Plaintiffs' Exhibits 10, 11). The seller was

- unwilling to take any of these actions, so the buyer did not fund the transaction on October 7, 2013. (Testimony of Fender, Kerr, Rogers).
16. Palmetto State Bank and a loan officer named Jan Malinowski had a mortgage on the property at issue, and it was in arrears. In his own words, Mr. Fender was "paranoid" that Lady Beaufort's principal, James Kerr, was in league with Mr. Malinowski to put him in financial ruin as Mr. Kerr and Mr. Malinowski were "citadel boys." (Testimony of Fender, Fender Deposition Designations Pages 11:10 to 12:25).
 17. Mr. Kerr had never met Mr. Malinowski, had never done any business with him before, and did not know he attended the citadel. (Testimony of Kerr).
 18. Negotiations between the buyer's attorney, Mr. Rogers, and the seller's attorney, Mr. Gilbert continued after October 7 through October 11, 2013 in an attempt to close the transaction. (Testimony of Rogers and Kerr, Plaintiffs' Exhibits 10, 11, 12).
 19. Negotiations ended abruptly when the buyer was alerted by Mr. Trumps that Hird Island had sold the property to a third-party, Inverness, LLC on October 10, 2013. Hird Island hired a different attorney, Ms. Eversole, to close the transaction with Inverness. (Plaintiffs' Exhibit 13, Testimony of Trumps, Fender, and Rogers).
 20. The sale of the property to Inverness on October 10, 2013 occurred while the contract between Lady Beaufort and Hird Island was still in full force and effect as the Lady Beaufort/Hird Island contract expired on October 15, 2013.
 21. The Seller never called a default under the contract or expressed that the contract was terminated. Mr. Rogers and Mr. Gilbert continued trying to resolve the issues even after, unbeknownst to them, the property had been sold to Inverness. (Plaintiff's Exhibit 12, Testimony of Fender and Rogers).
 22. As part of the transaction with Inverness, Mr. Fender required Inverness to purchase a second parcel of property owned by Fender personally. (Testimony of Fender). As a result of the sale of this second parcel, Mr. Fender obtained a \$60,000.00 profit in addition to what he made on the sale of the 9 Sams Point parcel. (Testimony of Fender). Mr. Fender needed the income from both parcels to satisfy his financial obligations. (Testimony of Fender). The profit from the sale of the 9 Sams Point parcel alone was not sufficient to do so. (Testimony of Fender, Fender Deposition Designation Pages 35:5 to 36:7, Pages 51:22 to 52:8).
 23. Weighing the evidence and considering the testimony of the witnesses, I find that the Lady Beaufort/Hird Island Contract failed to close because the Mr. Fender became in his own words "paranoid" about the Lady Beaufort's motives and because Mr. Fender was in financial trouble and saw a more lucrative deal with another buyer who would purchase a second parcel, the sale of which provided another \$60,000.00 to Mr. Fender. (Testimony of Fender).
 24. Mr. Rogers wrote a default letter to Inverness and its principal Robert Sample and Hird Island and filed a *lis pendens* on the property. Soon thereafter, this lawsuit was filed by Lady Beaufort to recover the property. (Plaintiffs' Exhibit 14).

25. Lady Beaufort resolved its dispute with Inverness by way of a settlement agreement that authorized Lady Beaufort to purchase the property from Inverness for \$25,000.00 more than Lady Beaufort's contract with Hird Island. (Plaintiffs' Exhibit 15, 16).
26. Plaintiffs sued Hird Island and its principal Sherwood Fender for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act. Hird Island counterclaimed for breach of contract.

II. CONCLUSIONS OF LAW

A. The Competing Claims for Breach of Contract

Plaintiffs sued Hird Island for breach of contract. In turn, Hird Island filed a counterclaim against Lady Beaufort for breach of contract. To establish a breach of contract, a party must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct and proximate result of the breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962).

Mr. Fender claimed that the "drop dead" date of the contract was October 7, 2013 as he claimed that a Federal Holiday, specifically Labor Day, is a "Business Day" and defined by the Contract. Further, Mr. Fender alleged that there were no written contingencies specified in the Contract, so the Contract provision allowing for an automatic extension of five Business Days is not applicable. However, "contingency" is not a defined term in the Contract. I find that the contract between Hird Island and Lady Beaufort expired on October 15, 2013, pursuant to the plain language of the agreement as: (1) contrary to Mr. Fender's assertion, the contract definition of "Business Days" does not include Federal Holidays; and (2) the automatic extension of five Business Days is applicable as there were unsatisfied contingencies, including resolution of the tax lien, provision of a certificate of tax compliance, resolution of the legal status of Hird Island, and resolution of the objections to the provision of title insurance raised by the title insurer. Therefore, Lady Beaufort was not obligated to close on October 7, 2013, especially considering the unresolved issues with the transaction that were raised by Mr. Rogers and the title insurance company.

Mr. Fender further testified that Hird Island was not required to provide a certificate of tax compliance or remedy the issue raised by the title insurance company with regard to the Seller entity's dissolution in its state of incorporation, Georgia. However, I find that the contract requires the passage of marketable title, (which necessitates a valid seller entity), as well compliance "with all local, state, federal laws, and any rules." (Plaintiffs' Exhibit 1). Pursuant to S.C. Code Section 12-54-124, if a piece of property constitutes more than a majority of the assets of a company, a certificate of tax compliance must be obtained by the seller from the South Carolina Department of Revenue. Hird Island refused to provide the certificate, despite its attorney Derek Gilbert's assertion that the provision of the certificate is customary (See Gilbert Designations Page 12 lines 1-10).

As Hird Island refused to take the steps necessary to close and instead sold the property to a third party on October 10, 2015, before the Hird Island Lady Beaufort Contract expired on October 15, 2015, I find that it was Hird Island and not Lady Beaufort that breached the contract. Further, I find that any reasonable seller acting in good faith would have agreed to one of the five different alternatives to remedy the issues with the transaction that were provided by Lady Beaufort's attorney, Carl Rogers, and that Lady Beaufort was ready, willing and able to close. Finally, I find that Plaintiffs have been damaged by Hird Island's breach of the Contract, as will be discussed further, *infra*.

B. Plaintiffs' Tort Claims

Plaintiffs sued Hird Island and its principal Sherwood Fender for negligent misrepresentation and breach of contract accompanied by a fraudulent act.

To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation;

and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010); *McLaughlin v. Williams*, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct.App.2008) (noting the elements of negligent misrepresentation must be established by a preponderance of the evidence). *Turner v. Milliman*, 708 S.E.2d 766, 769 (S.C. 2011).

Here, Mr. Fender represented to Plaintiffs that he was a willing seller and scheduled the closing to occur on October 7, 2013, with full knowledge of the dissolution of Hird Island and the issue it presented for the title insurance company. (Testimony of Rogers, Fender). The defendants had a pecuniary interest in making these representations to Plaintiffs, and had a duty to communicate truthful information. "So long as the defendant 'has a pecuniary interest in the transaction,' he has a "duty to exercise reasonable care in giving information...." 18 S.C. Jur. Negligence § 57 citing *Winburn v. Insurance Co. of North America*, 287 S. C. 435, 444, 339 S. E. 2d 142, 146 (Ct. App. 1985); see Restatement Second, Torts § 552 (1977); *Gilliland v. Elmwood Properties*, 301 S. C. 295, 302, 391 S. E. 2d 577, 580 (1990); *Lawlor v. Schepper*, 232 S. C. 94, 101 S. E. 2d 269 (1957); *First Federal Sav. Bank v. Knauss*, 296 S. C. 136, 370 S. E. 2d 906 (Ct. App. 1988).

As Mr. Fender's lawyer, Derek Gilbert, was negotiating with Mr. Roger's to resolve the issues raised by the title insurance company, and while Mr. Fender's lawyer was making representations about trying to getting the deal done, Mr. Fender was negotiating another deal with another buyer, Inverness. (Testimony of Fender, Rogers, Kerr, Plaintiffs' Exhibits 4, 10, 11, 12, 20). "Clients are bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority." *Koutsogiannis v. BB & T*, 616 S.E.2d 425, 428 (S.C. 2005). These false representations continued even after the deed transferred to the second buyer. (Testimony of Fender, Rogers, Kerr, Plaintiffs' Exhibits 4, 10, 11, 12, 20). Mr. Fender went to another lawyer to close the Inverness transaction, while Mr. Gilbert was still emailing and making calls to Lady Beaufort's counsel in an effort to resolve the issues and close. *Id.* See also Plaintiffs' Exhibit 13.

Plaintiffs relied to their detriment on these actions and representations, because had they known that Mr. Fender was in the process of selling the property to another buyer, they would have taken steps to protect their rights and filed a *lis pendens* to prevent the sale to Inverness – as Plaintiffs did once the sale was discovered. (Lis Pendens, Testimony of Rogers and Kerr, Plaintiffs' Exhibit 14). It is of no consequence that Mr. Fender was acting in a representative capacity as South Carolina courts have consistently held, “An agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity.” *Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 221–22, 227 S.E.2d 189, 193 (1976) (quoting *Lawlor v. Scheper*, 232 S.C. 94, 98–99, 101 S.E.2d 269, 271 (1957)). Finally, I find that Plaintiffs have been damaged by defendants' conduct, as will be discussed further, *infra*.

An action for breach of contract accompanied by a fraudulent act is not based on the same elements as the action in tort for fraud and deceit. *McCullough v. The American Workmen*, 200 S.C. 84, 20 S.E.2d 640 (1942). In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct.App.1985). It is not necessary to allege the elements of common law fraud and deceit. See *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). As the Court observed in *Sullivan v. Calhoun*, “fraud,” in this sense,

assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Harper v. Ethridge, 348 S.E.2d 374, 378 (S.C. App. 1986) citing *Sullivan*. As is discussed more fully above, Hird Island was in breach of the Contract when it failed to remedy the issues raised by Plaintiffs concerning dissolution of the corporation and tax compliance. While Mr.

Fender represented he would close and while his lawyer negotiated with Mr. Roger's to ensure the closing occurred, Mr. Fender saw a more lucrative deal with another buyer who would purchase not only the parcel at issue in this case, but a second parcel, netting him an additional \$60,000.00, per the testimony of Mr. Fender. The sale of the property to Inverness while the Contract was still pending and while the lawyers were still negotiating to close the transaction, constitutes dishonesty in fact and unfair dealing. Further, these actions relate directly to the breach of the Contract, and not merely to its making. *See Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 203 (4th Cir. 1988) (Proof that Goodyear granted an extension and intentionally concealed that information while claiming North Strand's failure to meet the initial completion date as justification for cancellation, would be a separate and distinct, but closely connected, dishonest act). Finally, I find that Plaintiffs have been damaged by the defendants' conduct.

III. DAMAGES

As a result of the defendants' conduct, Tideland was not paid the real estate commission that it earned and which was provided for in the contract. Accordingly, Tideland has suffered damages in the amount of \$13,000.00. (See Plaintiffs' Exhibit 1).

As a result of the defendants' conduct, Lady Beaufort had to file suit in order to obtain the property that it was entitled to pursuant to its Contract with Hird Island. Lady Beaufort filed suit against Hird Island and its principal Sherwood Fender as well as the third-party that purchased the property from Hird Island, Inverness. Lady Beaufort was able to reach a settlement with Inverness. Pursuant to the settlement, Lady Beaufort paid Inverness \$285,00.00 to obtain the property. This represents a \$25,000.00 increase from Lady Beaufort's Contract with Hird Island. (See Plaintiffs' Exhibits 15 and 16). Lady Beaufort has also expended \$53,924.41 in attorney's fees and cost in order to obtain the property it lost because of the defendants' conduct. (See Plaintiffs' Exhibit 2). Attorneys' fees are provided for in the Contract. (See Plaintiffs' Exhibit 1).

I find Plaintiffs are entitled to prejudgment interest; however, Lady Beaufort is entitled to prejudgment interest only as to the \$25,000.00 increase in purchase price and not its attorneys' fees as the amount of attorneys' fees was not certain or capable of being reduced to certainty by

conditions existing at the time the claim arose. The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty. *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. *Id.* The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. *Smith-Hunter Const. Co., Inc. v. Hopson*, 616 S.E.2d 419, 421 (S.C. 2005).

Accordingly, I award judgment against Hird Island and Sherwood Fender in the amount of \$17,500.17, representing actual damages and prejudgment interest in favor of Tideland Realty. I further award judgment against Hird Island and Sherwood Fender in the amount of \$87,578.56, representing actual damages and prejudgment interest as described above in favor of Lady Beaufort.

It is so ordered.

The Honorable Marvin H. Dukes, III
Master in Equity

On this ____ day of _____ 2017
Beaufort, SC



Beaufort Common Pleas

Case Caption: Lady Beaufort Llc , plaintiff, et al VS Hird Island Investments Inc ,
defendant, et al

Case Number: 2014CP0700052

Type: Order/Judgment and Form 4

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2017-05-10 14:18:46 page 15 of 15

000027

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-07-0052

Lady Beaufort, LLC and Tideland Realty, Inc.,

Hird Island, Investments Inc., and

PLAINTIFF(S)

Sherwood Fender

DEFENDANT(S)

Submitted by: Michelle N. Endemann, Andrew K. Epting,
Jr., LLC, 46A State St., Charleston, SC, 29401, P: 843-
377-1871

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit); ☐ Rule 43(k), SCRCF (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Tideland Realty, Inc.	Hird Island Investments, Inc. and Sherwood Fender	\$17,500.17
Lady Beaufort, LLC	Hird Island Investments, Inc. and Sherwood Fender	\$87,578.56
		\$

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

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

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ELECTRONICALLY FILED - 2017 May 11 9:38 AM - BEAUFORT - COMMON PLEAS - CASE#2014CP0700052

000030

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

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STATE OF SOUTH CAROLINA
COUNTRY OF BEAUFORT

LADY BEAUFORT, LLC. & TIDELAND
REALTY INC.,

Plaintiffs,

v.

HIRD ISLAND INVESTMENTS, INC. and
SHERWOOD N. FENDER,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH CIRCUIT

Case No. 2014-CP-07-0052

**CONSENT ORDER TO AMEND
COMPLAINT AND REFER TO THE
MASTER IN EQUITY**

2014 NOV 25 PM 11:02
CLERK OF COURT
SOUTH CAROLINA
COUNTRY OF BEAUFORT

WHEREAS counsel for Plaintiffs have sought to amend the complaint;

WHEREAS the Defendants do not object to Plaintiffs amending the complaint to add
Sherwood N. Fender; and

WHEREAS the parties desire to refer this case to the Master in Equity for final
determination pursuant to Rule 53(b) SCRPC;

IT IS ORDERED that the amended complaint shall be filed within fifteen (15) days of
the filing of this Order and the case is referred to the Master in Equity for final determination.

IT IS SO ORDERED.



Hon. Honorable Carmen T. Mullen,
Chief Administrative Judge

This 20 day of November, 2014

WE CONSENT:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.
Michelle N. Endemann
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ATTORNEYS FOR PLAINTIFFS

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bill@williambowenlaw.com

ATTORNEYS FOR DEFENDANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas for the Ninth Circuit

Marvin H. Dukes, Master in Equity and Special Circuit Court
Judge

Case No.: 2014-CP-07-0052

LADY BEAUFORT, LLC & TIDELAND REALTY, INC.,.....Plaintiffs/ Appellants,

v.

HIRD ISLAND INVESTMENTS, INC. SHERWOOD N. FENDER, ADDISON D. FENDER,
MARTHA B. FENDER, WILLIAM B. BOWEN, LADY KEMMERLIN, LLC, BRICKYARD
HOLDINGS, INC, AND A&K HOLDING CO., LLC, Defendants.

OF WHOM HIRD ISLAND INVESTMENTS and SHERWOOD N. FENDER are
the.....Defendants/Respondents.

AND

WILLIAM M. BOWEN.....Third Party Plaintiff,

AND

JAMES S. KERR and MATT TRUMPS.....Defendants,

NOTICE OF APPEAL

Plaintiffs/Appellants Lady Beaufort, LLC & Tideland Realty, Inc. appeal the order of the Honorable Marvin H. Dukes, III, dated October 26, 2018 (Exhibit A). Plaintiffs/Appellants received written notice of entry of Judge Dukes' order on October 26, 2018.

000035

November 14th, 2018

ANDREW K. EPTING, JR., LLC

By AKR

Andrew K. Epting, Jr.

Jaan G. Rannik

46A State Street, Charleston, SC 29401

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Attorneys For Plaintiffs/Appellants

Counsel of Record for Respondents:

William M. Bowen, Esquire

H. Fred Kuhn, Jr., Esquire

000036

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2014-CP-07-0052

RECEIVED

NOV 05 2018

SC Court of Appeals

Lady Beaufort, LLC &
Tideland Realty, Inc.

Respondents,

vs.

Hird Island Investments, Inc., Sherwood N. Fender,
Addison D. Fender, Martha B. Fender, William B. Bowen,
Lady Kemmerlin, LLC, Brickyard Holdings, Inc. and
A&K Holding Co., LLC

Of Whom Hird Island Investments, Inc. and Sherwood N. Fender are

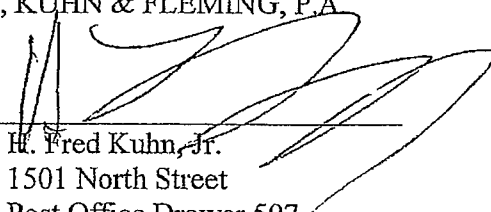
Appellants.

NOTICE OF APPEAL

The Appellants, Hird Island Investments and Sherwood N. Fender, hereby appeal the Orders of the Honorable Marvin H. Dukes, III entitled Order and the Judgment in a Civil Case (Form 4) dated May 11, 2017 and Order Amending Judgment and the Judgment in a Civil Case (Form 4) dated October 26, 2018 copies of which are attached hereto. Appellants received written notice of the entry of the Order Amending Judgment on October 26, 2018.

000037

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 - facsimile

Beaufort, South Carolina
October __, 2016

Other Counsel of Record:

Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
46A State Street
Charleston, South Carolina 29401
Attorneys for the Respondents
Tideland Realty and
Lady of Beaufort, LLC

000038

STATE OF SOUTH CAROLINA
COUNTRY OF BEAUFORT

LADY BEAUFORT, LLC. & TIDELAND
REALTY INC.,

Plaintiffs,

v.

INVERNESS, LLC and HIRD ISLAND
INVESTMENTS, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH CIRCUIT

CASE NO. 2014-CP-07-

COMPLAINT

14 JAN -7 PM 2:46
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Plaintiffs Lady Beaufort, LLC ("Lady Beaufort") and Tideland Realty, Inc. ("Tideland") file this action against Defendants Inverness, LLC ("Inverness") and Hird Island Investments, Inc. ("Hird Island"). In support of this action, Plaintiffs would show the Court the following:

1. This action arises out of the Agreement to Buy and Sell Real Estate ("Agreement") dated August 19, 2013 wherein Lady Beaufort contracted to buy and Hird Island contracted to sell 2.9 acres of real property located in Beaufort, SC, with an address of 9 Sams Point Road (TMS # 123 015 000 0605 0000) (the "Property").
2. Plaintiff Lady Beaufort is a limited liability company, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina.
3. Plaintiff Tideland is a licensed real estate agency, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina. Matt Trumps of Tidelands is the Buyer's agent in the transaction at issue and is entitled to a 5% commission from Defendant Hird Island pursuant to the Agreement.
4. Defendant Hird Island is a corporation organized and existing under the laws of the state of Georgia, doing business in Beaufort County, South Carolina.

5. Defendant Inverness is a limited liability company, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina. Inverness is the subsequent purchaser of the Property.
6. This Court has jurisdiction over the parties to this action and over the subject matter alleged herein.
7. Venue is proper in the Beaufort County.

**FOR A FIRST CAUSE OF ACTION
AS TO HIRD INVESTMENTS
(Breach of Contract)**

8. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.
9. Lady Beaufort entered into an Agreement with Defendant Hird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.
10. The Agreement is and was at all relevant times valid and enforceable.
11. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.
12. In breach of the Agreement, Hird Island failed and refused to sell and convey the Property to Lady Beaufort and instead conveyed the property to a third-party, Inverness.
13. In breach of the Agreement, Hird Island failed and refused to pay Tideland's the real estate commission of 5% as set forth in the Agreement.
14. As a result of Hird Island's breaches, Plaintiffs have been damaged.
15. Plaintiffs are entitled actual damages, interest, and attorneys' fees.

**FOR A SECOND CAUSE OF ACTION
AS TO INVERNESS
(Intentional Interference with a Contract)**

16. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.
17. The Agreement under which Hird Investments agreed to sell and Lady Beauport agreed to buy the Property is and was at all relevant times valid and enforceable.
18. Defendant Inverness had knowledge, both actual and constructive, of the Agreement and tortiously interfered with the Seller, causing Hird Island to refuse to convey the Property to Lady Beauport and instead to convey the Property to Inverness.
19. As a proximate result of Inverness' unjustified interference, Plaintiffs have been damaged.
20. Plaintiffs are entitled to actual and punitive damages, together with interest and attorneys' fees.

**FOR A SECOND CAUSE OF ACTION
AS TO INVERNESS & HIRD INVESTMENTS
(Action to Set Aside the Deed)**

21. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.
22. Lady Beauport entered into an Agreement with Defendant Hird Island whereby Lady Beauport would purchase the Property for the sum of \$260,000.00.
23. The Agreement is and was at all relevant times valid and enforceable.
24. Lady Beauport is and was at all relevant times ready willing and able to purchase the Property.
25. In breach of the Agreement, Hird Island failed and refused to sell and convey the Property to Lady Beauport and instead conveyed the property to a third-party, Inverness.

26. Defendant Inverness had knowledge, both actual and constructive, of the Agreement but purchased the Property from Hird Investments regardless of the Agreement and with complete disregard for the rights of Lady Beaufort.
27. The sale and conveyance of the Property from Hird Investments to Inverness was in bad faith and should be voided.

**FOR A SECOND CAUSE OF ACTION
AS TO INVERNESS & HIRD INVESTMENTS
(Specific Performance)**

28. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.
29. Lady Beaufort entered into an Agreement with Defendant Hird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.
30. The Agreement is and was at all relevant times valid and enforceable.
31. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.
32. Defendant Hird Island has failed and refused to sell and convey the Property to Lady Beaufort.
33. The Property is unique in character and in nature.
34. Lady Beaufort lacks an adequate remedy at law.
35. As a direct and proximate result of Defendant Hird Island's failure and refusal to sell and convey the subject property to Lady Beaufort, Lady Beaufort is entitled to a Court Order requiring Hird Island to perform under the Agreement and convey the property to Lady Beaufort.

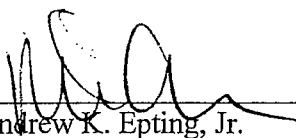
36. As a direct and proximate result of Defendant Hird Island's failure and refusal to sell and convey the subject property to Lady Beaufort, Lady Beaufort is entitled to recover attorneys' fees and costs.

WHEREFORE, Plaintiffs respectfully request the Court grant the following relief:

- a. Void the sale and set aside the deed to Inverness;
- b. Award Plaintiffs' their actual damages plus interest, attorneys' fees, and punitive damages;
- c. Order Hird Investments to specifically perform the Agreement; and
- d. For such other and further relief as this Court deems appropriate.

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street
Charleston, SC 29401
Telephone: 843.377.1871
Facsimile: 843.377.1310
ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR THE PLAINTIFFS

January 10, 2014
Charleston, SC

STATE OF SOUTH CAROLINA 5 AM 10: 33 IN THE COURT OF COMMON PLEAS
2014 FEB) FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT) Case No. 2014-CP-07-0052
SERIAL A-1059840
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Lady Beaufort, LLC & Tideland)
Realty, Inc.,)
Plaintiffs,) Answer and Counterclaim of Defendant
Hird Island Investments, Inc.
vs.)
Inverness, LLC and Hird Island)
Investments, Inc.,)
Defendants.)
_____)

Defendant, Hird Island Investments, Inc. (hereinafter referred to as "Hird"), answering Complaint of Plaintiffs, would respectfully show unto this Honorable Court that:

FOR A FIRST DEFENSE:

1. Each and every allegation of the Complaint not specifically admitted is denied.
2. Hird admits the allegations contained in Paragraph 1 of the Complaint.
3. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 2 of the Complaint, and therefore denies the same.
4. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 3 of the Complaint, and therefore denies the same.
5. Hird admits the allegations contained in Paragraph 4 of the Complaint.
6. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 5 of the Complaint, and therefore denies the same.
7. Hird admits the allegations contained in Paragraph 6 of the Complaint.
8. Hird admits the allegations contained in Paragraph 7 of the Complaint.
9. The allegations contained in Paragraph 8 have been admitted, denied, or qualified hereinbefore or hereinafter.
10. Hird admits the allegations contained in Paragraph 9 of the Complaint.
11. Hird admits the allegations contained in Paragraph 10 of the Complaint.

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12. Hird denies the allegations contained in Paragraph 11 of the Complaint.
13. Hird denies so much of the allegations contained in Paragraph 12 of the Complaint as allege it failed and refused to convey the property to Lady Beaufort, and admits the rest thereof.
14. Hird denies the allegations contained in Paragraph 13 of the Complaint.
15. Hird denies the allegations contained in Paragraph 14 of the Complaint.
16. Hird denies the allegations contained in Paragraph 15 of the Complaint.
17. The allegations contained in Paragraph 16 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
18. Hird admits the allegations contained in Paragraph 17 of the Complaint.
19. Hird denies the allegations contained in Paragraph 18 of the Complaint.
20. Hird denies the allegations contained in Paragraph 19 of the Complaint.
21. Hird denies the allegations contained in Paragraph 20 of the Complaint.
22. The allegations contained in Paragraph 21 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
23. Hird admits the allegations contained in Paragraph 22 of the Complaint.
24. Hird admits the allegations contained in Paragraph 23 of the Complaint.
25. Hird denies the allegations contained in Paragraph 24 of the Complaint.
26. Hird denies the allegations contained in Paragraph 25 of the Complaint.
27. Hird denies the allegations contained in Paragraph 26 of the Complaint.
28. Hird denies the allegations contained in Paragraph 27 of the Complaint.
29. The allegations contained in Paragraph 28 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
30. Hird admits the allegations contained in Paragraph 29 of the Complaint.
31. Hird admits the allegations contained in Paragraph 30 of the Complaint.
32. Hird denies the allegations contained in Paragraph 31 of the Complaint.

33. Hird denies the allegations contained in Paragraph 32 of the Complaint.

34. Hird denies the allegations contained in Paragraph 33 of the Complaint.

35. Hird denies the allegations contained in Paragraph 34 of the Complaint.

36. Hird denies the allegations contained in Paragraph 35 of the Complaint.

37. Hird denies the allegations contained in Paragraph 36 of the Complaint.

FOR A SECOND DEFENSE AND BY WAY OF A COUNTERCLAIM
AGAINST LADY BEAUFORT, LLC
(Breach of Contract)

38. Hird incorporates each and every allegation above as though specifically set out verbatim in this Counterclaim.

39. In breach of the Agreement, Lady Beaufort, LLC failed and refused to close on the sale of the Property.

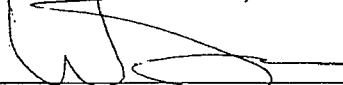
40. In breach of the Agreement, Lady Beaufort, LLC failed and refused to pay Hird the purchase price for the Property.

41. As a result of the breach of the Agreement by Lady Beaufort, LLC, Hird has been damaged.

42. Hird is entitled to actual damages, interest and attorney's fees.

WHEREFORE, having fully answered, Hird requests that this Court inquire into the matters raised by the pleadings and pass its Order as may be just and equitable under the circumstances.

WILLIAM M. BOWEN, P.A.

By: 

William M. Bowen

Attorney for Defendant Hird

P.O. Drawer 6128

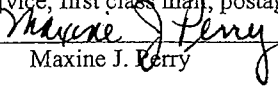
Hilton Head Island, SC 29938

T: (843) 842-5000; F: (843) 686-5990

Hilton Head Island, South Carolina
February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Answer and Counterclaim on Plaintiffs by personally depositing a copy addressed to their counsel of record this 4th day of February, 2014, by U.S. Postal Service, first class mail, postage prepaid.


Maxine J. Perry

000046

STATE OF SOUTH CAROLINA) AM 10:32
2014 FEB)
COUNTY OF BEAUFORT)
BEAUFORT COUNTY, S.C.)
CLEAR OF COURT)
Case No. 2014-CP-07-0052

Lady Beaufort, LLC & Tideland
Realty, Inc.,)

Plaintiffs,)

vs.)

Inverness, LLC and Hird Island
Investments, Inc.,)

Defendants.)

Answer and Counterclaim of Defendant
Hird Island Investments, Inc.

Defendant, Hird Island Investments, Inc. (hereinafter referred to as "Hird"), answering Complaint of Plaintiffs, would respectfully show unto this Honorable Court that:

FOR A FIRST DEFENSE:

1. Each and every allegation of the Complaint not specifically admitted is denied.
2. Hird admits the allegations contained in Paragraph 1 of the Complaint.
3. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 2 of the Complaint, and therefore denies the same.
4. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 3 of the Complaint, and therefore denies the same.
5. Hird admits the allegations contained in Paragraph 4 of the Complaint.
6. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 5 of the Complaint, and therefore denies the same.
7. Hird admits the allegations contained in Paragraph 6 of the Complaint.
8. Hird admits the allegations contained in Paragraph 7 of the Complaint.
9. The allegations contained in Paragraph 8 have been admitted, denied, or qualified hereinbefore or hereinafter.
10. Hird admits the allegations contained in Paragraph 9 of the Complaint.
11. Hird admits the allegations contained in Paragraph 10 of the Complaint.

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12. Hird denies the allegations contained in Paragraph 11 of the Complaint.
13. Hird denies so much of the allegations contained in Paragraph 12 of the Complaint as allege it failed and refused to convey the property to Lady Beaufort, and admits the rest thereof.
14. Hird denies the allegations contained in Paragraph 13 of the Complaint.
15. Hird denies the allegations contained in Paragraph 14 of the Complaint.
16. Hird denies the allegations contained in Paragraph 15 of the Complaint.
17. The allegations contained in Paragraph 16 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
18. Hird admits the allegations contained in Paragraph 17 of the Complaint.
19. Hird denies the allegations contained in Paragraph 18 of the Complaint.
20. Hird denies the allegations contained in Paragraph 19 of the Complaint.
21. Hird denies the allegations contained in Paragraph 20 of the Complaint.
22. The allegations contained in Paragraph 21 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
23. Hird admits the allegations contained in Paragraph 22 of the Complaint.
24. Hird admits the allegations contained in Paragraph 23 of the Complaint.
25. Hird denies the allegations contained in Paragraph 24 of the Complaint.
26. Hird denies the allegations contained in Paragraph 25 of the Complaint.
27. Hird denies the allegations contained in Paragraph 26 of the Complaint.
28. Hird denies the allegations contained in Paragraph 27 of the Complaint.
29. The allegations contained in Paragraph 28 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
30. Hird admits the allegations contained in Paragraph 29 of the Complaint.
31. Hird admits the allegations contained in Paragraph 30 of the Complaint.
32. Hird denies the allegations contained in Paragraph 31 of the Complaint.

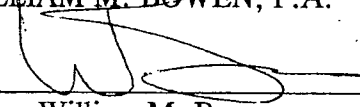
33. Hird denies the allegations contained in Paragraph 32 of the Complaint.
34. Hird denies the allegations contained in Paragraph 33 of the Complaint.
35. Hird denies the allegations contained in Paragraph 34 of the Complaint.
36. Hird denies the allegations contained in Paragraph 35 of the Complaint.
37. Hird denies the allegations contained in Paragraph 36 of the Complaint.

FOR A SECOND DEFENSE AND BY WAY OF A COUNTERCLAIM
AGAINST LADY BEAUFORT, LLC
(Breach of Contract)

38. Hird incorporates each and every allegation above as though specifically set out verbatim in this Counterclaim.
39. In breach of the Agreement, Lady Beaufort, LLC failed and refused to close on the sale of the Property.
40. In breach of the Agreement, Lady Beaufort, LLC failed and refused to pay Hird the purchase price for the Property.
41. As a result of the breach of the Agreement by Lady Beaufort, LLC, Hird has been damaged.
42. Hird is entitled to actual damages, interest and attorney's fees.

WHEREFORE, having fully answered, Hird requests that this Court inquire into the matters raised by the pleadings and pass its Order as may be just and equitable under the circumstances.

WILLIAM M. BOWEN, P.A.

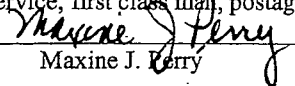
By: 

William M. Bowen
Attorney for Defendant Hird
P.O. Drawer 6128
Hilton Head Island, SC 29938
T: (843) 842-5000; F: (843) 686-5990

Hilton Head Island, South Carolina
February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Answer and Counterclaim on Plaintiffs by personally depositing a copy addressed to their counsel of record this 4th day of February, 2014, by U.S. Postal Service, first class mail, postage prepaid.


Maxine J. Perry

000049

STATE OF SOUTH CAROLINA
COUNTRY OF BEAUFORT

LADY BEAUFORT, LLC. & TIDELAND
REALTY INC.,

Plaintiffs,

v.

INVERNESS, LLC and HIRD ISLAND
INVESTMENTS, INC.,

Defendants.

INVERNESS, LLC,

Plaintiff,

v.

LADY BEAUFORT, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH CIRCUIT

Case No. 2014-CP-07-0052

AMENDED COMPLAINT

Case No. 2014-CP-07-00061

2014 MAY 29 PM 3:21
CLERK OF COURT
SOUTH CAROLINA

Plaintiffs Lady Beaufort, LLC ("Lady Beaufort") and Tideland Realty, Inc. ("Tideland") file this action against Defendants Inverness, LLC ("Inverness") and Hird Island Investments, Inc. ("Hird Island"). In support of this action, Plaintiffs would show the Court the following:

1. This action arises out of the Agreement to Buy and Sell Real Estate ("Agreement") dated August 19, 2013 wherein Lady Beaufort contracted to buy and Hird Island contracted to sell 2.9 acres of real property located in Beaufort, SC, with an address of 9 Sams Point Road (TMS # 123 015 000 0605 0000) (the "Property").

2. Plaintiff Lady Beaufort is a limited liability company, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina.

3. Plaintiff Tideland is a licensed real estate agency, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina. Matt

Trumps of Tidelands is the Buyer's agent in the transaction at issue and is entitled to a 5% commission from Defendant Hird Island pursuant to the Agreement.

4. Defendant Hird Island is a corporation organized and existing under the laws of the state of Georgia, doing business in Beaufort County, South Carolina.

5. Defendant Inverness is a limited liability company, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina. Inverness is the subsequent purchaser of the Property.

6. This Court has jurisdiction over the parties to this action and over the subject matter alleged herein.

7. Venue is proper in Beaufort County.

**FOR A FIRST CAUSE OF ACTION
AS TO HIRD INVESTMENTS
(Breach of Contract)**

8. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.

9. Lady Beaufort entered into an Agreement with Defendant Hird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.

10. The Agreement is and was at all relevant times valid and enforceable.

11. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.

12. In breach of the Agreement, Hird Island failed and refused to sell and convey the Property to Lady Beaufort and instead conveyed the property to a third-party, Inverness.

13. In breach of the Agreement, Hird Island failed and refused to pay Tidelands the real estate commission of 5% as set forth in the Agreement.

14. As a result of Hird Island's breaches, Plaintiffs have been damaged.

15. Plaintiffs are entitled actual damages, interest, and attorneys' fees.

FOR A SECOND CAUSE OF ACTION

AS TO INVERNESS

(Intentional Interference with a Contract)

16. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.

17. The Agreement under which Hird Investments agreed to sell and Lady Beaufort agreed to buy the Property is and was at all relevant times valid and enforceable.

18. Defendant Inverness had knowledge, both actual and constructive, of the Agreement and tortiously interfered with the Seller, causing Hird Island to refuse to convey the Property to Lady Beaufort and instead to convey the Property to Inverness.

19. As a proximate result of Inverness' unjustified interference, Plaintiffs have been damaged.

20. Plaintiffs are entitled to actual and punitive damages, together with interest and attorneys' fees.

FOR A THIRD CAUSE OF ACTION

AS TO INVERNESS & HIRD INVESTMENTS

(Action to Set Aside the Deed)

21. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.

22. Lady Beaufort entered into an Agreement with Defendant Hird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.

23. The Agreement is and was at all relevant times valid and enforceable.

24. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.

25. In breach of the Agreement, Hird Island failed and refused to sell and convey the Property to Lady Beaufort and instead conveyed the property to a third-party, Inverness.

26. Defendant Inverness had knowledge, both actual and constructive, of the Agreement but purchased the Property from Bird Investments regardless of the Agreement and with complete disregard for the rights of Lady Beaufort and Lady Beaufort's valid claim to the property and acted in concert with Hird Island to defraud Lady Beaufort.

27. The sale and conveyance of the Property from Hird Investments to Inverness was in bad faith, and Inverness was not a bona fide purchaser. Accordingly, Lady Beaufort's claim to the property is superior to that of Inverness.

28. At the time of the transfer to Inverness, Hird Island was contractually bound to convey the property to Lady Beaufort, and Lady Beaufort had a valid claim to the property as well as valid causes of action against the Defendants.

29. The transfer of the Property to Inverness was made to hinder and delay Lady Beaufort in exercising its claim to the property and to avoid Hird Island's liability to Lady Beaufort by attempting to put the Property beyond the reach of Lady Beaufort.

30. The transfer of the property to Inverness was made by Hird Island with the actual intent of defrauding Lady Beaufort and preventing Lady Beaufort from obtaining title to the property.

31. Hird Island's fraudulent intent is imputable to Inverness.

32. The transfer of the Property to Inverness is void pursuant to S.C. Code Ann. § 27-23-10 and should be set aside.

**FOR A FOURTH CAUSE OF ACTION
AS TO HIRD INVESTMENTS
(Specific Performance)**

33. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.

34. Lady Beaufort entered into an Agreement with Defendant Bird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.

35. The Agreement is and was at all relevant times valid and enforceable.

36. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.

37. Defendant Bird Island has failed and refused to sell and convey the Property to Lady Beaufort.

38. The Property is unique in character and in nature.

39. Lady Beaufort lacks an adequate remedy at law.

40. As a direct and proximate result of Defendant Bird Island's failure and refusal to sell and convey the subject property to Lady Beaufort, Lady Beaufort is entitled to a Court Order requiring Bird Island to perform under the Agreement and convey the property to Lady Beaufort.

41. As a direct and proximate result of Defendant Hird Island's failure and refusal to sell and convey the subject property to Lady Beaufort, Lady Beaufort is entitled to recover attorneys' fees and costs.

WHEREFORE, Plaintiffs respectfully request the Court grant the following relief:

- a. Void the sale and set aside the deed to Inverness;
- b. Award Plaintiffs' their actual damages plus interest, attorneys' fees, and punitive damages;

- c. Order Hird Investments to specifically perform the Agreement; and
- d. For such other and further relief as this Court deems appropriate.

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
46A State Street
Charleston, SC 29401
Telephone: 843.377.1871
Facsimile: 843.377.1310
ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR THE PLAINTIFFS

May 20, 2014
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

Lady Beaufort, LLC & Tideland
Realty, Inc.,)
Plaintiffs,)

vs.)

Inverness, LLC and Hird Island
Investments, Inc.,)
Defendants.)

Inverness, LLC)
Plaintiff)

v.)

Lady Beaufort, LLC,)

Defendant)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Case No. 2014-CP-07-0052

Answer and Counterclaim of Defendant
Hird Island Investments, Inc. to Amended
Complaint of Plaintiffs

2014 JUN 11 AM 10:22
CLERK OF COURT

Defendant, Hird Island Investments, Inc. (hereinafter referred to as "Hird"), answering Complaint of Plaintiffs, would respectfully show unto this Honorable Court that:

FOR A FIRST DEFENSE:

1. Each and every allegation of the Complaint not specifically admitted is denied.
2. Hird admits the allegations contained in Paragraph 1 of the Complaint.
3. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 2 of the Complaint, and therefore denies the same.
4. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 3 of the Complaint, and therefore denies the same.
5. Hird admits the allegations contained in Paragraph 4 of the Complaint.
6. Hird is without sufficient information to form a belief as to the allegations contained in Paragraph 5 of the Complaint, and therefore denies the same.
7. Hird admits the allegations contained in Paragraph 6 of the Complaint.
8. Hird admits the allegations contained in Paragraph 7 of the Complaint.

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9. The allegations contained in Paragraph 8 have been admitted, denied, or qualified hereinbefore or hereinafter.
10. Hird admits the allegations contained in Paragraph 9 of the Complaint.
11. Hird admits the allegations contained in Paragraph 10 of the Complaint.
12. Hird denies the allegations contained in Paragraph 11 of the Complaint.
13. Hird denies so much of the allegations contained in Paragraph 12 of the Complaint as allege it failed and refused to convey the property to Lady Beaufort, and admits the rest thereof.
14. Hird denies the allegations contained in Paragraph 13 of the Complaint.
15. Hird denies the allegations contained in Paragraph 14 of the Complaint.
16. Hird denies the allegations contained in Paragraph 15 of the Complaint.
17. The allegations contained in Paragraph 16 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
18. Hird admits the allegations contained in Paragraph 17 of the Complaint.
19. Hird denies the allegations contained in Paragraph 18 of the Complaint.
20. Hird denies the allegations contained in Paragraph 19 of the Complaint.
21. Hird denies the allegations contained in Paragraph 20 of the Complaint.
22. The allegations contained in Paragraph 21 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
23. Hird admits the allegations contained in Paragraph 22 of the Complaint.
24. Hird admits the allegations contained in Paragraph 23 of the Complaint.
25. Hird denies the allegations contained in Paragraph 24 of the Complaint.
26. Hird denies the allegations contained in Paragraph 25 of the Complaint.
27. Hird denies the allegations contained in Paragraph 26 of the Complaint.
28. Hird denies the allegations contained in Paragraph 27 of the Complaint.
29. Hird denies the allegations contained in Paragraph 28 of the Complaint

30. Hird denies the allegations contained in Paragraph 29 of the Complaint.
31. Hird denies the allegations contained in Paragraph 30 of the Complaint.
32. Hird denies the allegations contained in Paragraph 31 of the Complaint.
33. Hird denies the allegations contained in Paragraph 32 of the Complaint.
34. The allegations contained in Paragraph 33 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
35. Hird admits the allegations contained in Paragraph 34 of the Complaint.
36. Hird admits the allegations contained in Paragraph 35 of the Complaint.
37. Hird denies the allegations contained in Paragraph 36 of the Complaint.
38. Hird denies the allegations contained in Paragraph 37 of the Complaint.
39. Hird denies the allegations contained in Paragraph 38 of the Complaint.
40. Hird denies the allegations contained in Paragraph 39 of the Complaint.
41. Hird denies the allegations contained in Paragraph 40 of the Complaint.
42. Hird denies the allegations contained in Paragraph 41 of the Complaint.

FOR A SECOND DEFENSE AND BY WAY OF A COUNTERCLAIM
AGAINST LADY BEAUFORT, LLC
(Breach of Contract)

43. Hird incorporates each and every allegation and response above as though specifically set out verbatim in this Counterclaim.
44. In breach of the Agreement, Lady Beaufort, LLC failed and refused to close on the sale of the Property.
45. In breach of the Agreement, Lady Beaufort, LLC failed and refused to pay Hird the purchase price for the Property.
46. As a result of the breach of the Agreement by Lady Beaufort, LLC, Hird has been damaged.
47. Hird is entitled to actual damages, interest and attorney's fees.

000058

WHEREFORE, having fully answered, Hird requests that this Court inquire into the matters raised by the pleadings and pass its Order as may be just and equitable under the circumstances.

WILLIAM M. BOWEN, P.A.

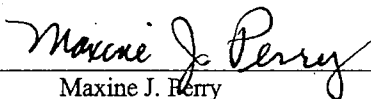
By: 

William M. Bowen
Attorney for Defendant Hird
P.O. Drawer 6128
Hilton Head Island, SC 29938
T: (843) 842-5000; F: (843) 686-5990
wilbowbb@hargray.com

Hilton Head Island, South Carolina
June 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Answer and Counterclaim to Plaintiffs' Amended Complaint by personally depositing a copy addressed to Plaintiffs' counsel of record this 10th day of June, 2014, by U.S. Postal Service, first class mail, postage prepaid.


Maxine J. Perry

STATE OF SOUTH CAROLINA
COUNTRY OF BEAUFORT

LADY BEAUFORT, LLC. & TIDELAND
REALTY INC.,

Plaintiffs,

v.

HIRD ISLAND INVESTMENTS, INC. and
SHERWOOD N. FENDER,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH CIRCUIT

Case No. 2014-CP-07-0052

SECOND AMENDED COMPLAINT

2014 NOV 25 AM 11:07

Plaintiffs Lady Beaufort, LLC ("Lady Beaufort") and Tideland Realty, Inc. ("Tideland") file this action against Defendants HIRD ISLAND INVESTMENTS, INC. ("Hird") and SHERWOOD N. FENDER ("Fender"). In support of this action, Plaintiffs would show the Court the following:

1. This action arises out of the Agreement to Buy and Sell Real Estate ("Agreement") dated August 19, 2013 wherein Lady Beaufort contracted to buy and Hird Island contracted to sell 2.9 acres of real property located in Beaufort, SC, with an address of 9 Sams Point Road (TMS # 123 015 000 0605 0000) (the "Property").

2. Plaintiff Lady Beaufort is a limited liability company, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina.

3. Plaintiff Tideland is a licensed real estate agency, organized and existing under the laws of the state of South Carolina, doing business in Beaufort County, South Carolina. Matt Trumps of Tidelands is the Buyer's agent in the transaction at issue and is entitled to a 5% commission from Defendant Hird Island pursuant to the Agreement.

4. Defendant Hird Island is a corporation organized and existing under the laws of the state of Georgia, doing business in Beaufort County, South Carolina.

5. Defendant Fender is an individual doing business in Beaufort County, South Carolina.
6. The events the subject of this suit concern real property in Beaufort County, South Carolina.
7. This Court has jurisdiction over the parties to this action and over the subject matter alleged herein.
8. Venue is proper in Beaufort County.

**FOR A FIRST CAUSE OF ACTION
AS TO HIRD INVESTMENTS
(Breach of Contract)**

8. Plaintiffs repeat and reallege the foregoing allegations as if they were fully set forth herein verbatim.
9. Lady Beaufort entered into an Agreement with Defendant Hird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.
10. The Agreement is and was at all relevant times valid and enforceable.
11. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.
12. In breach of the Agreement, Hird Island failed and refused to sell and convey the Property to Lady Beaufort and instead conveyed the property to a third-party, Inverness.
13. In breach of the Agreement, Hird Island failed and refused to pay Tideland's the real estate commission of 5% as set forth in the Agreement.
14. As a result of Hird Island's breaches, Plaintiffs have been damaged in that it was required to retain counsel and incur expense to acquire the property that Hird was legally obligated to sell to Lady Beaufort.
15. Plaintiffs are entitled actual damages, interest, and attorneys' fees.

**FOR A SECOND CAUSE OF ACTION
AS TO HIRD INVESTMENTS AND SHERWOOD FENDER
(Breach of Contract Accompanied by a Fraudulent Act/Fraud)**

16. Plaintiffs repeat and reallege each of the allegations of this complaint as if they were fully set forth herein verbatim.

17. The Agreement under which Hird Investments agreed to sell and Lady Beaufort agreed to buy the Property is and was at all relevant times valid and enforceable.

18. Lady Beaufort was at all relevant times ready willing and able to purchase the Property.

19. In breach of the Agreement, Defendants failed and refused to sell and convey the Property to Lady Beaufort and instead conveyed the property to a third-party, Inverness without informing Lady Beaufort.

20. Defendants sold the property to Inverness with complete disregard for the rights of Lady Beaufort and Lady Beaufort's valid claim to the property and acted in concert to defraud Lady Beaufort.

21. The selling of the property to Inverness constitutes an act characterized by dishonesty in fact or unfair dealing.

22. The sale and conveyance of the Property from Hird Investments to Inverness was in bad faith, and Inverness was not a bona fide purchaser.

23. Despite acting through a corporate entity, Fender is liable for his own torts.

24. The actions of the Defendants as set forth above were negligent, willful, and fraudulent.

25. As a result of Defendants' breaches and fraud, Plaintiffs have been damaged.

26. Plaintiffs are entitled to actual and punitive damages, together with interest and attorneys' fees.

**FOR A THIRD CAUSE OF ACTION
AS TO HIRD INVESTMENTS AND SHERWOOD FENDER
(Fraudulent Transfer)**

27. Plaintiffs repeat and reallege each of the allegations of this complaint as if they were fully set forth herein verbatim.

28. Lady Beaufort entered into an Agreement with Defendant Hird Island whereby Lady Beaufort would purchase the Property for the sum of \$260,000.00.

29. The Agreement is and was at all relevant times valid and enforceable.

30. Lady Beaufort is and was at all relevant times ready willing and able to purchase the Property.

31. In breach of the Agreement, Defendants failed and refused to sell and convey the Property to Lady Beaufort and instead conveyed the property to a third-party, Inverness.

32. Defendants sold the property to Inverness with complete disregard for the rights of Lady Beaufort and Lady Beaufort's valid claim to the property and acted in concert to defraud Lady Beaufort.

33. The sale and conveyance of the Property from Hird Investments to Inverness was a fraudulent conveyance as Hird Investments and Fender acted in bad faith, and Inverness was not a bona fide purchaser.

34. At the time of the transfer to Inverness, Hird Island was contractually bound to convey the property to Lady Beaufort, and Lady Beaufort had a valid claim to the property as well as valid causes of action against the Defendants.

35. The transfer of the Property to Inverness was made to hinder and delay Lady Beaufort in exercising its claim to the property and to avoid Defendants' liability to Lady Beaufort by attempting to put the Property beyond the reach of Lady Beaufort.

36. The transfer of the property to Inverness was made with the actual intent of defrauding Lady Beaufort and preventing Lady Beaufort from obtaining title to the property.

37. The transfer of the Property to Inverness is in violation of S.C. Code Ann. § 27-23-10 and Lady Beaufort is entitled to damages.

**FOR A FOURTH CAUSE OF ACTION
AS TO SHERWOOD FENDER
(Negligent Misrepresentation)**

38. Plaintiffs repeat and reallege each of the allegations of this complaint as if they were fully set forth herein verbatim.

39. Fender made false representations to the Lady Beaufort regarding the Property, including that Hird Island was ready willing and able to close its real estate contract with Lady Beaufort and that the Property would be conveyed to Lady Beaufort.

40. Fender had a pecuniary interest in making the aforementioned false statements to Lady Beaufort.

41. Fender owed Lady Beaufort a duty of care to see that he communicated truthful information to the Lady Beaufort.

42. Fender breached that duty by failing to exercise due care by making false and misleading statements to Lady Beaufort and then selling the property to a third-party.

42. Lady Beaufort justifiably relied on the representations made by Fender.

43. Lady Beaufort suffered a pecuniary loss as the proximate result of its reliance upon the representations of Fender and is entitled to damages.

WHEREFORE, Plaintiffs respectfully request the Court grant the following relief:

a. Award Plaintiffs' their actual damages plus interest, attorneys' fees, and punitive damages; and

b. Award such other and further relief as this Court deems appropriate.

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
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ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR THE PLAINTIFFS

November 11, 2014
Charleston, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
Lady Beaufort, LLC & Tideland)
Realty, Inc.,)
Plaintiffs,)
vs.)
Hird Island Investments, Inc., and)
Sherwood N. Fender)
Defendants.)

2014 NOV 13 AM 11:21
FOURTEENTH JUDICIAL CIRCUIT
Case No. 2014-CP-07-0052
CLERK OF COURT

Defendant, Hird Island Investments, Inc. ("Hird"), and Defendant, Sherwood N. Fender ("Fender") (collectively "Defendants"), answering Complaint of Plaintiffs, would respectfully show unto this Honorable Court that:

FOR A FIRST DEFENSE:

1. Each and every allegation of the Complaint not specifically admitted is denied by Defendants.
2. Defendants admit the allegations contained in Paragraph 1 of the Complaint.
3. Defendants are without sufficient information to form a belief as to the allegations contained in Paragraph 2 of the Complaint, and therefore deny the same.
4. Defendants are without sufficient information to form a belief as to the allegations contained in Paragraph 3 of the Complaint, and therefore deny the same.
5. Defendants admit the allegations contained in Paragraph 4 of the Complaint.
6. Defendants admit so much of the allegations contained in Paragraph 5 of the Complaint as allege Fender is an individual and a resident of Beaufort County.
7. Defendants admit the allegations contained in Paragraph 6 of the Complaint.
8. Defendants admit the allegations contained in Paragraph 7 of the Complaint.
9. Defendants admit the allegations contained in Paragraph 8 of the Complaint.
10. The allegations contained in Repeated Paragraph 8 (under First Cause of Action) have been admitted, denied, or qualified hereinbefore or hereinafter.

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11. Defendants admit the allegations contained in Paragraph 9 of the Complaint.
12. Defendants admit the allegations contained in Paragraph 10 of the Complaint.
13. Defendants deny the allegations contained in Paragraph 11 of the Complaint.
14. Answering Paragraph 12, Hird admits it conveyed the Property to a third party when Lady Beaufort defaulted under the Agreement.
15. Hird denies the allegations contained in Paragraph 13 of the Complaint.
16. Hird denies the allegations contained in Paragraph 14 of the Complaint.
17. Hird denies the allegations contained in Paragraph 15 of the Complaint.
18. The allegations contained in Paragraph 16 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
19. Hird admits the allegations contained in Paragraph 17 of the Complaint.
20. Hird denies the allegations contained in Paragraph 18 of the Complaint.
21. Hird denies the allegations contained in Paragraph 19 of the Complaint.
22. Answering Paragraph 20 of the Complaint, Hird admits it sold the property to Inverness.
23. Hird denies the allegations contained in Paragraph 21 of the Complaint.
24. Hird denies the allegations contained in Paragraph 22 of the Complaint.
25. Hird denies the allegations contained in Paragraph 23 of the Complaint.
26. Hird denies the allegations contained in Paragraph 24 of the Complaint.
27. Hird denies the allegations contained in Paragraph 25 of the Complaint.
28. Hird denies the allegations contained in Paragraph 26 of the Complaint.
29. The allegations contained in Paragraph 27 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
30. Hird admits the allegations contained in Paragraph 28 of the Complaint.
31. Hird admits the allegations contained in Paragraph 29 of the Complaint.

32. Hird denies the allegations contained in Paragraph 30 of the Complaint.
33. Defendants deny the allegations contained in Paragraph 31 of the Complaint.
34. Defendants deny the allegations contained in Paragraph 32 of the Complaint.
35. Defendants deny the allegations contained in Paragraph 33 of the Complaint.
36. Defendants deny the allegations contained in Paragraph 34 of the Complaint.
37. Defendants deny the allegations contained in Paragraph 35 of the Complaint.
38. Defendants deny the allegations contained in Paragraph 36 of the Complaint.
39. Defendants deny the allegations contained in Paragraph 37 of the Complaint.
40. The allegations contained in Paragraph 38 of the Complaint have been admitted, denied, or qualified hereinbefore or hereinafter.
41. Fender denies the allegations contained in Paragraph 39 of the Complaint.
42. Fender denies the allegations contained in Paragraph 40 of the Complaint.
43. Fender denies the allegations contained in Paragraph 41 of the Complaint.
44. Fender denies the allegations contained in Paragraph 42 of the Complaint.
45. Defendants deny the allegations contained in Paragraph 43 of the Complaint

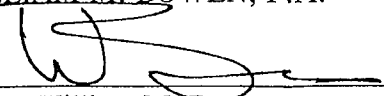
FOR A SECOND DEFENSE AND BY WAY OF A COUNTERCLAIM
AGAINST LADY BEAUFORT, LLC
(Breach of Contract)

46. Hird incorporates each and every allegation above as though specifically set out verbatim in this Counterclaim.
47. In breach of the Agreement, Lady Beaufort, LLC failed and refused to close on the sale of the Property.
48. In breach of the Agreement, Lady Beaufort, LLC failed and refused to pay Hird the purchase price for the Property.
49. As a result of the breach of the Agreement by Lady Beaufort, LLC, Hird has been damaged.

50. Hird is entitled to actual damages, interest and attorney's fees.

WHEREFORE, having fully answered, Hird requests that this Court inquire into the matters raised by the pleadings and pass its Order as may be just and equitable under the circumstances.

WILLIAM M. BOWEN, P.A.

By: 

William M. Bowen

Attorney for Defendant Hird

P.O. Drawer 6128

Hilton Head Island, SC 29938

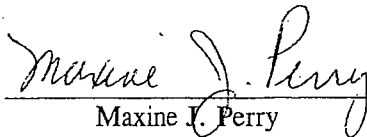
T: (843) 842-5000; F: (843) 686-5990

wilbowbb@hargray.com

Hilton Head Island, South Carolina
November 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Answer to Second Amended Complaint and Counterclaim on Plaintiffs by personally depositing a copy addressed to their counsel of record this 12th day of November, 2014, by U.S. Postal Service, first class mail, postage prepaid.


Maxine J. Perry

2014 NOV 13 AM 11:27
U.S. DISTRICT COURT
SOUTH CAROLINA
HILTON HEAD ISLAND

000069

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	Case No. 2014-CP-07-0052
	)	
Lady Beaufort, LLC & Tideland	)	
Realty, Inc.,	)	
Plaintiffs,	)	DEFENDANTS' MOTION TO RECONSIDER
	)	ORDER DATED MAY 11, 2017
vs.	)	
	)	
Hird Island Investments, Inc. and	)	
Sherwood N. Fender,	)	
Defendants.	)	
	)	

TO: MICHELLE ENDEMANN, ATTORNEY FOR THE PLAINTIFFS:

You will please take notice that William M. Bowen, attorney for Hird Island Investments, Inc. and Sherwood N. Fender ("Defendants"), will move before the Honorable Marvin H. Dukes III, Master-in-Equity, Special Circuit Court Judge for Beaufort County, at the Beaufort County Courthouse, Beaufort, South Carolina, at 10:00 AM on the tenth day after service hereof or as soon thereafter as this matter may be set, for a reconsideration or amendment of the Order of May 11, 2017 (the "Order"), a copy of which is attached. The Order was first received by Defendants or their attorney on May 11, 2017 through a Notice of Electronic Filing email from secourts.org dated May 11, 2017.

Defendants move this Court pursuant to Rule 59(e), SCRCP, to reconsider, alter, or amend its Order, filed May 11, 2017, entering judgment in favor of Plaintiffs Lady Beaufort, LLC, & Tideland Realty, Inc. (collectively "Plaintiffs"). This Motion is timely filed. This Motion is based on the memorandum of law below and any exhibits filed along with this Motion, the pleadings, and applicable law, as well as any other memorandum of law that Defendants may submit to the Court at or prior to a hearing on this Motion. For the reasons stated below, Defendants request the Court reconsider its Order and find in favor of Defendants.

The Court should reconsider, alter, or amend the following findings of fact:

1. The dissolution of Hird Island and refusal of Lady Beaufort's chosen title insurance company to issue title insurance are not unsatisfied contingencies. (Order ¶ 9). The contract was not contingent upon Lady Beaufort being able to obtain title insurance. There is no requirement in the contract that Buyer obtain title insurance as a precondition to closing. The Contract states only that "Brokers *recommend* Buyer have . . . appropriate insurance (including owner's title) effective at Closing." (Def. Exh. 1 ¶ 10). Therefore, the alleged inability of Lady Beaufort to obtain title insurance cannot form the basis of a ruling in Plaintiffs' favor. To the extent the Court relied on a supposed requirement for title insurance, it should reconsider its decision.
2. S.C. Code Ann. § 12-54-124¹ does not require a seller to obtain a certificate of tax compliance from the South Carolina Department of Revenue if a piece of property constitutes more than a majority of the assets of a company. (Order ¶ 11). It states that when a business transfers property that constitutes a majority of its assets, any tax due "constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid." § 12-54-124. However, no lien applies "*if the purchaser* receives a certificate of compliance from the department stating that all tax returns have been filed and all taxes generated by the business have been paid." *Id.* (emphasis added). There is no requirement for Hird Island to provide a certificate of tax compliance under § 12-54-124 or any term of the contract. To the extent the Court relied on this incorrect finding, it should reconsider its decision.
3. For the same reasons stated in paragraph 2, the Court erred in finding the absence of a certificate tax compliance constituted an unsatisfied contingency. (Order ¶ 4).

¹ Section 12-54-124 states in its entirety:

In the case of the transfer of a majority of the assets of a business, other than cash, whether through sale, gift, devise, inheritance, liquidation, distribution, merger, consolidation, corporate reorganization, lease or otherwise, any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid. Whether a majority of the assets have been transferred is determined by the fair market value of the assets transferred, and not by the number of assets transferred. The department may not issue a license to continue the business to the transferee until all taxes due the State have been settled and paid and may revoke a license issued to the business in violation of this section.

This section ~~does~~ not apply if the purchaser receives a certificate of compliance from the department stating that all tax returns have been filed and all taxes generated by the business have been paid. The certificate of compliance is valid if it is obtained no more than thirty days before the sale or transfer.

4. The contract at issue was not in full force and effect on October 10, 2013 when Hird Island sold the Property to Inverness. (Order ¶ 20).
5. Defendants did express that Lady Beaufort defaulted and the contract was terminated. (Order ¶ 21). On October 7, 2013, Defendants, through their closing attorney's office, indicated that Lady Beaufort failed to send the purchase funds and the closing should have occurred by 5pm that day. (Def. Exh. 3).
6. Defendant Fender did not make a \$60,000 "profit" from the sale of a second parcel to Inverness. (Order ¶ 22). Rather, that is an amount he received in exchange for conveying property. It was not a profit.
7. The contract did not fail to close due to any alleged paranoia of Mr. Fender or for the pursuit of a more lucrative deal. (Order ¶23). Rather, the contract did not close because Lady Beaufort attempted to add terms and requirements to the contract, such as a tax compliance certificate, that did not exist. *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2007) ("Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties.").

The Court should reconsider, alter, or amend the following conclusions of law:

8. The contract expired prior to October 15, 2013 because there were no "unsatisfied contingencies" that provided for a five-day extension. (Order p. 4). As noted above, there is no legal or contractual requirement for a certificate of tax compliance, for Lady Beaufort to obtain title insurance, or for Hird Island to obtain a certain legal status. None of those items are required by law or stated in the contract. If those items were so important to Lady Beaufort, it should have included them in the contract. The tax lien could have been satisfied at the closing. Accordingly, Lady Beaufort was obligated to close by October 7, 2013, and its failure to do so is a default and breach under the contract. The Court should reconsider its order on this issue and find in Defendants' favor that Lady Beaufort was obligated to close on October 7 and breached the contract by failing to do so. *See* (Def. Exh. 1 ¶1(G) (stating in contract, "Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods." (emphasis in original))); *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 653, 230 S.E.2d 715, 717-18 (1976) ("It is also well settled in this state that if the option requires performance in a certain manner, time is of the essence and *exact compliance* with the terms of the option are required." (emphasis added))).
9. Neither South Carolina law nor the contract require a certificate of tax compliance to pass marketable title. (Order p. 5). As explained above, S.C. Code Ann. § 12-54-124 states only that there may be a tax lien on the property and no lien would apply if the purchaser obtains a certificate of tax compliance. It does not require such a certificate from the seller. This is demonstrated by Mr. Gilbert's testimony that a certificate is merely "customary" but not a legal obligation or a contract term. If Lady Beaufort wanted to

include that as a contract term, it could have but chose not to and cannot now complain about it.

10. There is no factual or legal basis for the statement that “any reasonable seller acting in good faith would have agreed to” the alternatives presented by Lady Beaufort to resolve the alleged “issues with the transaction.” (Order p. 5). The “issues” were those of Lady Beaufort and did not involve any legal or contractual requirement. Therefore, a reasonable seller acting in good faith would not be required to agree to take any action that is not legally or contractually required.
11. Lady Beaufort was not ready, willing, and able to close on October 7 because it did not provide the purchase funds. (Order p. 5).
12. There is no basis to find for Lady Beaufort as to its negligent misrepresentation claim because there was no alleged misrepresentation. (Order pp. 5-6). The Court found Defendants misrepresented they were willing to sell the property on October 7 “with full knowledge of the dissolution of Hird Island and the issue it presented for the title insurance company.” (Order p. 6). The administrative dissolution of Hird Island in Georgia did not prevent it from selling the property, and Plaintiffs make no such allegation. Therefore, it is not misrepresentation. That Lady Beaufort allegedly could not obtain title insurance from its chosen insurer is not a misrepresentation by Hird Island because it did not prevent Hird Island from transferring the property and there was no legal or contractual requirement that it be able to obtain title insurance to purchase the property. Indeed, Lady Beaufort purchased the property from Inverness, who purchased it from Hird Island. Presumably, if Lady Beaufort perceived an inability to transfer property based on the dissolution then it could not have gotten clear title or title insurance as to the purchase from Inverness. “[I]f the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact.” *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010) (internal quotation marks omitted). Lady Beaufort knew that neither the contract nor South Carolina law required resolution of the “issues.” Defendants representation that they were ready to sell under the terms of the Contract on October 7, 2013 was not a misrepresentation. Rather, Lady Beaufort breached the contract by failing to timely close due to alleged extra-contractual and nonlegal “issues.”
13. There is no basis to find Lady Beaufort relied on any representations made after October 7, as the contract expired when the closing did not occur on time and there was no basis for an extension of the closing date. (Order pp. 6-7). *See Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996) (“Reliance can be justified only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made.”). Lady Beaufort had the same knowledge as Defendants with respect to the contract terms and the passage of the closing date. There is no basis for finding the reliance element of negligent misrepresentation satisfied under the circumstances of this case.

14. The finding of breach of contract accompanied by fraudulent act is not supported by the facts or the law. As an initial matter, there is no breach of contract by Defendants, to this cause of action necessarily fails. See *Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004) ("To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) a ***breach of contract***; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." (emphasis added) (internal quotation marks omitted)). The Court found Hird Island "was in breach of the Contract when it failed to remedy the issues raised by Plaintiffs concerning dissolution of the corporation and tax compliance." There is no fraudulent intent in not remedying issues that are not legally or contractually required. Therefore, there is no fraudulent intent relating to that breach and it cannot be the basis for imposing liability under this cause of action. Further, any actions taken after October 7 are irrelevant as the contract already expired and was breached by Lady Beaufort for its failure to timely close. (Order pp. 7-8). There is nothing fraudulent about selling a piece of property that is not under contract and when both parties to a previous contract know it did not timely close.
15. In the event the Court does not alter or amend its findings of Defendants' liability, Defendants contest the finding of damages. (Order pp. 8-9). Attorney's fees and costs should not be recoverable because the Court should not find in Lady Beaufort's favor. Alternatively, the amount is excessive and the Court did not make any findings of fact as to the factors in determining an award of attorney's fees. See *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 ("There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained.").
16. Tideland Realty is not entitled to a commission because the sale did not occur due to the fault of Lady Beaufort.

The undersigned hereby certifies that he, prior to filing the above motion, has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, or that such consultation would serve no useful purpose, or could not be timely held.

WILLIAM M. BOWEN, P.A.

By: S/ William M. Bowen

William M. Bowen
Attorney for the Defendants
Hird Island Investments, Inc.
and Sherwood N. Fender
P. O. Drawer 6128
Hilton Head, SC 29938
(843) 842-5000

May 19, 2017
Hilton Head Island, South Carolina



AGREEMENT/CONTRACT TO BUY AND SELL REAL ESTATE
(GENERAL USE AND LOTS/ACREAGE)

1. PARTIES: This legally binding Agreement ("Contract") To Buy and Sell Real Estate is entered into as of the Effective Date between:

Buyer(s), Lady Beaufort, LLC ("Buyer"), and
Seller(s), Hird Island Investments, Inc. ("Seller").

☒ BUYER ☐ SELLER IS A SOUTH CAROLINA REAL ESTATE LICENSEE

- (A) "Party" - defined as either Buyer or Seller, "Parties" defined as both Buyer and Seller
(B) "Brokers" are licensed South Carolina brokers-in-charge, their associated real estate licensees, and their subagents.
(C) "Closing Attorney" - is the licensed South Carolina attorney selected by Buyer to coordinate the transaction and Closing.
(D) "Effective Date" - the final date upon which a Party to the negotiation places the final and required signatures and/or initials and date on this Contract and Delivers Notice to cause this Contract to be binding on all Parties.
(E) "Business Day" - a 24 hour period starting at 10 AM (MTWTFr) and counted from 10 AM of the first Business Day following the Effective Date. Business Days shall not begin or end on a Saturday, Sunday, or Federal legal holiday.
(F) "Good Funds" - is the transfer of the required amount of United States Dollars (USD) within any required timeframe.
(G) "Time" - all time stated shall be South Carolina local time. Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods.

2. PURCHASE PRICE: \$260,000.00 (USD)
Payable by ☒ a combination of financing and cash or ☐ cash. Payment shall be good funds.
The sale of Buyer's real property ☐ is ☐ is not required for Purchase and this contingency forms ☐ are ☐ are not attached.

3. PROPERTY: Seller will sell and Buyer will buy for the Purchase Price any and all lot or parcel of land, appurtenant interests, improvements, landscape, systems, and fixtures if any thereon and further described below ("Property"). Seller agrees to maintain the Property and any personal property conveying in working order, including any landscaping, grounds and any agreed upon repairs or replacements, from the Effective Date through Closing subject to normal wear and tear. Buyer is solely responsible for inquiring about lease issues prior to signing Contract. Lending issues: (see Adjustments).
Licensed items on Property can include fuel tanks, alarm systems, satellite equipment, roll carts etc. and contain fuel, etc.

Address 9 Sams Point Road Unit # _____
City Beaufort State of South Carolina
Zip 29907 County of Beaufort
Lot _____ Block _____ Section/Phase _____ Subdivision _____
Other 2.9 +/- Acres Plat Attached as Exhibit TMS 123 015 000 0606 0000

Parties agree that no personal property will transfer as part of this sale, except described below and/or ☐ in attachment(s):

4. CONVEYANCE/CLOSING/POSSESSION: "Closing" occurs when Seller conveys Property to Buyer and occurs no later than 5 PM on or before see other ("Closing Date") with an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party. Conveyance shall be fee simple made subject to all easements, reservations, rights of way, restrictive covenants of record (provided they do not make the title unmarketable or adversely affect the use/value of the Property in a material way) and to all government statutes, ordinances, rules, permits, and regulations. Seller agrees to convey marketable title with a properly recorded general warranty deed free of encumbrances and liens except as herein stated; and in ownership type and name(s); TBD
or as stipulated by Buyer. The deed shall be delivered to the Closing Attorney's

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Hirdland Realty, Inc., 41 Sea Island Parkway Beaufort, SC 29907
Phone: 843.525.6131 Fax: 843.525.1390

Mail Transmittal

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Form 330 PAGE 1 of 0

Kerr Pender

000076

designated place on or before the Closing Date no later than 10 AM. Seller agrees to pay all statutory deed recording fees. Parties agree the Brokers shall have access to the closing and relevant documents; and the Brokers shall be given copies of the settlement statement prior to Closing for review. Seller shall convey possession of a vacant and reasonably clean Property, free of debts, along with all keys, codes, any remote controls, available documents (ex. manuals, equipment warranties, service info, etc.) and similar ownership items to Buyer at Closing.

5. **EARNEST MONEY: \$1,000.00** (USD) Earnest Money is paid as follows: \$1,000.00 accompanies this offer and \$_____ will be paid within _____ Business Days after Effective Date and Earnest Money is in the form of ☒ check ☐ cash ☐ other (wire, etc.) _____ to be a Credit to Buyer at Closing or disbursed only as Parties agree in writing or by court order or by Contract or as required for Closing by Closing Attorney. Buyer and seller authorize _____ Tideland Realty, Inc. as Escrow Agent to deposit and hold and disburse earnest money according to the terms of this Contract, the law, and any regulations. Broker does not guarantee payment of a check or checks accepted as earnest money. Parties direct escrow agent to communicate reasonable information confirming receipt and status of earnest money upon a Broker request.

THE PARTIES UNDERSTAND AND AGREE THAT: UNDER ALL CIRCUMSTANCES INCLUDING DEFAULT, ESCROW AGENT HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT OR AS OTHERWISE AGREED UPON IN THIS CONTRACT OR FIVE YEARS AFTER CLOSING DATE, ESCROW AGENT MAY DISBURSE EARNEST MONEY TO SC TREASURER. EARNEST MONEY WILL NOT BE DISBURSED UNTIL DETERMINED TO BE GOOD FUNDS. IF LEGAL ACTIONS OCCUR, NONPREVAILING PARTY AGREES TO INDEMNIFY ESCROW AGENT'S FEES, COURT COSTS AND ATTORNEY FEES. IF INTERPLEADER OR MEDIATION IS TO BE UTILIZED, PARTIES AGREE THAT \$_____ OF EARNEST MONEY SHALL BE RELEASED AND/OR PAID TO THE ESCROW AGENT PRIOR TO FILING INTERPLEADER OR MEDIATION AS COMPENSATION. ESCROW AGENT ACKNOWLEDGES DUTIES.

6. **TRANSACTION COSTS:** Buyer's transaction costs include all costs and closing costs resulting from selected financing, pre-paid recurring items, insurance (mortgage insurance, title insurance lender/owner, hazard) discount points, all costs to obtain information from or pertaining to any owners association (aka certificate of assessment), interest, non-recurring closing costs, title exam, FHA/VA allowable costs, fees and expenses of Buyer's attorney, contractually required real estate broker compensation, and the cost of any Inspector, appraiser, or surveyor. Seller's transaction costs include deed preparation, deed recording costs, deed stamps/tax/recording costs calculated based on the value of the Property, all costs necessary to deliver marketable title and payoffs, satisfactions of mortgages/loans and recording, property taxes pro-rated at Closing, contractually required real estate broker compensation, and fees and expenses of Seller's attorney.

Buyer will pay Buyer's transaction costs and Seller pay Seller's transaction costs unless otherwise agreed:

Private/public transfer fees and any costs similar to transfer fees (ex. capital contributions, conservancy fees, estoppel fees, or otherwise named but similar fees paid to the owners association, etc.) are the ☐ Seller's or ☒ Buyer's transaction costs.

☒ At Closing, Seller will pay Buyer's transaction costs not to exceed \$_____ OR _____ % of purchase price, whichever is higher, which includes non-allowable costs first and then allowable costs (FHA/VA). Buyer is responsible for any Buyer's transaction costs exceeding this amount. If the amount exceeds the actual amount of those costs or amount allowed by Lender, then any excess funds will revert to Seller. Seller will also provide or pay for all of Seller's transaction costs. If no Closing, Buyer is responsible for Buyer's transaction costs and Seller responsible for Seller's transaction costs.

BUYER ☐ ☐ DATE _____ TIME _____
SELLER ☐ ☐ DATE _____ TIME _____

7. **FINANCE:** Buyer's obligation under this Contract ☐ is ☒ is not contingent upon obtaining financing of a ☐ 15 year or ☐ 30 year or ☐ other _____ purchase money loan at reasonable prevailing market terms with loan(s) equal in amounts of minimum _____ % and maximum _____ % of the Purchase Price or Appraised Value whichever is lower. ("Financing Contingency"). Financing Contingency expires at Closing ("Financing Period"). Buyer must make timely good faith efforts to apply for and obtain financing while refraining from contrary actions ("Financing Effort"). In a timely manner, Buyer shall inform Seller and Brokers of pertinent financing issues and authorize their Lender to disclose pertinent loan information to Seller and Brokers ("Financing Disclosure"). If a Lender declines or fails to approve financing, the Buyer shall notify the Seller and Brokers as soon as possible. Buyer shall apply for financing within _____ Business Days from the Effective Date and shall provide the Seller with reasonable written loan pre-approval documentation within _____ Business Days from the Effective Date. If the Seller and Brokers are notified of inability to obtain financing during the

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000077

Financing Period, either Party may terminate this Contract by Notice and Earnest Money shall be returned to the Buyer.
Proposed Lender: _____ ☐ FHA ☐ VA ☐ Conventional ☐ Seller
☐ Other _____

An FHA VA Financing Addendum ☐ is ☐ is not attached. Additional financing terms ☐ are ☐ are not attached.

8. **INSPECTION/REINSPECTION RIGHTS:** Buyer and qualified/certified inspectors ("inspectors") can reasonably perform any reasonable ultimately non-destructive examination and make reasonable record of the Property with reasonable Notice to Seller through Closing including investigations of off-site conditions and any issues related to the Property at Buyer Expense ("inspections"). Buyer and persons they choose may make reasonable visual observations of Property.

Sellers will make the Property accessible for inspection and not unreasonably withhold access, unless otherwise agreed in writing by the Parties. Seller will keep all utilities operational through Closing unless otherwise agreed:

☒ Seller grants Buyer permission to connect utilities, pay for utilities, and hire professionals (electricians, plumbers, etc.) to safely connect and operate the utilities during the inspections

☐ Other _____

☐ see attached.

Buyer will hold harmless, indemnify, pay damages and attorneys fees to Seller and Brokers for all claims, injuries, and damages arising out of the exercise of these rights. Seller will hold harmless, indemnify, pay damages and attorneys fees to Brokers for all claims, injuries, and damages arising out of the exercise of these rights. Brokers recommend that Parties obtain all inspections as soon as possible. Brokers recommend that Parties and inspectors use insurance to manage risk.

9. **APPRAISED VALUE:**

☒ This Contract is contingent upon the Property being valued according to the Lender's appraisal or other appraisal as agreed upon by the Parties ("Appraised Value") for the Purchase Price or higher. If the Parties are made aware that the Appraised Value is less than the Purchase Price and the Seller Delivers Notice to the Buyer within 5 Business Days of Closing (whichever earliest) of an amendment to reduce the Purchase Price to the Appraised Value, the Parties agree to proceed to Closing under terms of this Contract with the Purchase Price amended to be the Appraised Value. Otherwise, Buyer may proceed to Closing or terminate this Contract by Delivering Notice of Termination to the Seller whereupon the Earnest Money will be returned to Buyer.

☐ This Contract is not contingent upon the Property being valued at an Appraised Value according to the Lender's appraisal or other appraisal as agreed upon by the Parties for the Purchase Price or more.

10. **SURVEY, TITLE EXAMINATION, INSURANCE:** Brokers recommend Buyer have Property surveyed, title examined, and appropriate insurance (including owner's title) effective at Closing. Seller to cancel existing insurance and Buyer to obtain new insurance policies by Closing unless otherwise agreed upon in writing by Parties. Flood Insurance, if required by Lender or at Buyer's option, shall be assigned to Buyer with permission of carrier and premium prorated to Closing. Buyers are solely responsible to investigate pricing and requirements of insurance for the property prior to signing Contract.

11. **SURVIVAL:** If any provision herein contained which by its nature or effect is required to be observed, kept, or performed after Closing, it will survive the Closing and remain binding upon for the parties hereto until fully observed, kept or performed.

12. **DUE DILIGENCE:**

The DUE DILIGENCE PERIOD ends no later than 30 Business Days after the original Effective Date unless the Parties agree in writing to extend the DUE DILIGENCE PERIOD.

During the Due Diligence Period, Seller agrees Buyer may choose any of the following:

- (1) Conduct/obtain Inspections
- (2) Deliver Repairs Request(s) Notice to Seller
- (3) Proceed under amended Contract
- (4) Proceed under As Is Contract
- (5) Terminate Contract by Delivering "Notice of Termination" and "Termination Fee" to Seller

 BUYER ☐ BUYER ☐ SELLER  SELLER HAVE READ THIS PAGE

000078

TERMINATION: During the Due Diligence Period, Buyer may unilaterally terminate this Contract by Delivering to the Seller both Notice of Termination and a Termination Fee of \$ _____ USD Good Funds. Termination Fee paid to Seller by payment or, by release to Seller an appropriate amount of Earnest Money or, by a combination of payment to Seller and an appropriate amount of Earnest Money (Escrow Agent shall timely disburse upon Buyer timely signing any required Earnest Money disbursement agreement for payment of the Termination Fee). If Seller receives the Delivered Notice of Termination and the full Delivered Termination Fee during the Due Diligence Period, any remaining Earnest Money shall be returned to the Buyer. Should Buyer not Deliver Notice of Termination and all of the Termination Fee to Seller prior to the end of the Due Diligence Period, Buyer agrees to purchase and Seller agrees to sell the Property in accordance with Contract.

SHOULD BUYER FAIL TO REACH A NEW/AMENDED CONTRACT OR TERMINATE THE CONTRACT: The Buyer agrees to buy and Seller agrees to sell the Property AS IS. Parties agree "As Is" means Buyer buys the Property for the Purchase Price while Seller maintains the Property from the Effective Date through Closing subject to normal wear without repair or replacement and sells the Property for the Purchase Price unless otherwise agreed upon in writing by the Parties in this Contract.

13. FIRE OR CASUALTY OR INJURY: In case the Property is damaged wholly or partially by fire or other casualty prior to Closing, Buyer will have the right for 0 Business Days after Notice of damage to Deliver Notice of Termination to the Seller. If Buyer proceeds according to the Contract, Seller is to be responsible to (1) repair all damage, (2) remit to Buyer an amount for repairs, or (3) assign to Buyer the right to all proceeds of insurance and remit any deductible amount applicable to such casualty. If Buyer or Inspections caused the damage, Buyer is responsible for indemnifying Seller for damages. Brokers and Parties should ensure that they are protected by appropriate risk management strategies such as insurance.

14. BUILDING PERMIT: This Contract ☐ is ☒ is not contingent upon Buyer's ability to acquire all required licenses and permits from the appropriate authorities to build on the Property. No later than _____ Business Days after the original Effective Date unless the Parties agree in writing to extend this Building Permit Period, Buyer may unilaterally terminate this Contract by Delivering to the Seller a Notice of Termination due to inability to acquire all required licenses and permits from the appropriate authorities to build on the Property. If Seller receives the Delivered Notice of Termination during the Building Permit Period, any remaining Earnest Money shall be returned to the Buyer. Should Buyer not Deliver Notice of Termination due to inability to acquire all required licenses and permits from the appropriate authorities to build on the Property to Seller during the Building Permit Period, Buyer agrees to purchase and Seller agrees to sell the Property in accordance with Contract.

15. REZONING: This Contract ☐ is ☒ is not contingent upon the Property being rezoned to _____ by full approval (without any appeal during the appeal period) by the appropriate authorities. No later than _____ Business Days after the original Effective Date unless the Parties agree in writing to extend this Rezoning Period, Buyer may unilaterally terminate this Contract by Delivering to the Seller a Notice of Termination due to inability to acquire rezoning from the appropriate authorities to build on the Property. If Seller receives the Delivered Notice of Termination during the Rezoning Period, any remaining Earnest Money shall be returned to the Buyer. Should Buyer not Deliver Notice of Termination due to inability to acquire rezoning from the appropriate authorities during the Rezoning Period, Buyer agrees to purchase and Seller agrees to sell the Property in accordance with Contract. The ☐ Buyer or ☐ Seller shall be responsible for pursuing rezoning and paying all associated costs. All rezoning applications shall be submitted to the Seller for Seller's approval prior to filing. Seller shall not unreasonably or untimely withhold approval. All Parties agree to cooperate, sign the necessary documentation, and make efforts to support the rezoning application.

16. WELL, SEPTIC, WATER LINE, SEWER AVAILABILITY: This Contract ☐ is ☒ is not contingent upon Buyer's ability to obtain from the South Carolina Department of Health and Environmental Control or other appropriate authorities all required permits for a well and septic system suitable for the Buyer's intended structure in the event a well or septic system is needed on the Property. No later than _____ Business Days after the original Effective Date unless the Parties agree in writing to extend this Well and Septic Permit Period, Buyer may unilaterally terminate this Contract by Delivering to the Seller a Notice of Termination due to inability to acquire all required permits from the appropriate authorities to install a conventional well and conventional septic system on the Property. If Seller receives the Delivered Notice of Termination during the Well and Septic Period, any remaining Earnest Money shall be returned to the Buyer. Should Buyer not Deliver Notice of Termination due to inability to acquire all required permits from the appropriate authorities to install a well and septic system on the Property to Seller during the Well and Septic Period, Buyer agrees to purchase and Seller agrees to sell the Property in accordance with Contract. If the Property is connected or capable of being connected to a water and/or sewer line maintained by a private or public utility for a customary tap fee not to exceed \$ _____, the Buyer agrees to waive any applicable portion of the Well and Septic Contingency. Seller represents the Property is connected to water system: ☐ county ☐ city ☐ private ☐ corporate ☐ community ☐ well ☐ other _____. Seller represents the Property is connected to water disposal system: ☐ septic ☐ sewer ☐ private ☐ corporate ☐ government ☐ other _____.

BUYER _____ BUYER _____ SELLER _____ SELLER HAVE READ THIS PAGE

000079

17. **CONDITION OF PROPERTY:** Seller shall not remove any timber, vegetation, dirt, minerals, or otherwise affect the condition of the property from the Effective Date through Closing. All timber, vegetation, dirt, minerals, or similar shall remain as part of the Property and be conveyed to the Buyer at Closing. The Seller shall not bring any trash, refuse, debris, dirt, fill, medical wastes, hazardous wastes, or other materials onto the Property. Seller shall Deliver Notice of any legal action or condemnation action to the Buyer as soon as possible. If Seller Delivers such Notice, Buyer may unilaterally terminate this Contract by Delivering to the Seller a Notice of Termination. If Seller receives this Delivered Notice of Termination at any time, remaining Earnest Money shall be returned to the Buyer. Should Buyer not Deliver this Notice of Termination, Buyer agrees to purchase and Seller agrees to sell the Property in accordance with Contract.

18. **SC RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT ("CDS")** (check one):

☐ Buyer and Seller agree that Seller has delivered prior to this Contract, a CDS to Buyer, as required by SC Code of Laws Section 27-50-10 et seq. If after delivery, Seller discovers a CDS material inaccuracy or the CDS becomes materially inaccurate due to an occurrence or circumstance; the Seller shall promptly correct this inaccuracy by delivering a corrected CDS to the Buyer or making reasonable repairs prior to Closing. Buyer understands the CDS does not replace inspections. Buyer understands and agrees the CDS contains only statements made by the Seller. Parties agree the Brokers are not responsible nor liable for any information in the CDS and the Brokers have met requirements of SC Code 27-50-70.

☒ Buyer and Seller agree that Seller will NOT complete nor provide a CDS to Buyer in accordance with SC Code of Law, as amended, Section 27-50-30, Paragraph (13).

19. **LEAD BASED PAINT/LEAD HAZARDS:** If Property was built or contains items created prior to 1978, it may contain lead based hazards and Parties agree to sign "Disclosure of Information of Lead Based Paint and/or Lead Hazards" forms and give copies to Brokers.

20. **MEGAN'S LAW:** Parties agree that Brokers are not responsible for obtaining or disclosing information in the SC Sex Offender Registry and no course of action may be brought against any Brokers for failure to obtain or disclose sex offender or criminal information. Buyer and Seller agree that they have sole responsibility to obtain their own sex offender, death, clandestine laboratory, and crime information from appropriate law enforcement officials or information sources.

21. **TRUST ACCOUNT INTEREST/CHARITABLE CONTRIBUTION:** According to the rules and regulations of the South Carolina Real Estate Commission and the Code of Laws of South Carolina, as amended, any interest earned on Buyer's earnest money deposit would belong to Buyer until the closing of the transaction referenced in this Contract. It is understood that Broker ☐ may ☒ may not place deposited earnest monies into an interest bearing trust account. If Buyer's earnest money deposit is deposited into an interest bearing trust account, Broker will retain all interest earned in said account and may contribute some or all to a charitable enterprise.

22. **SC INCOME TAX ON NON-RESIDENT GAIN AND COMPLIANCE AND USA FEDERAL INCOME TAX:** Seller and Buyer will comply with the provisions of the SC Code 12-8-580 (as amended) regarding state income tax withholding requirements if the Seller is not a resident or has not filed SC state income tax returns. Seller and Buyer will comply with United States of America federal income tax laws. Seller and Buyer should discuss tax laws and minimization actions with their qualified tax advisor. Parties will comply with all local, state, federal laws, and any rules.

23. **ROLLBACK TAXES (IF ANY):** The Parties agree that the ☒ Seller or ☐ Buyer shall pay any rollback taxes when rollback taxes are determined and billed.

24. **SPECIAL STUDIES AREA, WETLANDS, AND ENVIRONMENTAL MATTERS:** All reports and certifications required by the Lender, Buyer, or any government concerning any special study area, wetlands, or environmental issues shall be ordered by Buyer and paid for by Buyer.

All of these reports or certifications shall be completed no later than 30 Business Days after the original Effective Date, unless the Parties agree in writing or extend this period ("Environmental Period"). In the event repairs are necessary to address environmental concerns (Repair Requests); the Seller shall be Delivered Notice in writing of the specific defects or deficiencies no later than 2 Business Days after the Environmental Period. If the Buyer fails to notify the Seller within this timeframe, Buyer shall have waived any and all rights under terms of this section. If Lender's commitment requires any additional inspections or certifications, these are to be provided by the Buyer.

 BUYER ☐ BUYER ☐ SELLER  SELLER HAVE READ THIS PAGE

000080

Upon Delivered Notice of the Repair Requests, Seller has five Business Days to address the Buyer's Repair Requests. The costs of all repairs to address environmental concerns to be paid by Seller. If the Seller fails to agree to make these repairs within this timeframe, the Buyer shall have 2 Business Days to choose any of the following options (1) accept the Property in its present condition, (2) negotiate with the Seller for the payment of those repairs or (3) terminate this Contract and receive their Earnest Money. The repairs to any other items are the sole responsibility of the Buyer. The obligations of the Seller for repairs terminate upon Closing. If the Seller agrees to make the repairs, the Parties agree to proceed under Contract.

25. ENTIRE AND BINDING AGREEMENT (MERGER CLAUSE): Parties agree that this Contract expresses the entire agreement between the parties, that there is no other agreement, oral or otherwise, modifying the terms and this Contract is binding on Parties and principals, heirs, personal representatives, successors, and assigns. Illegal provisions are severable.

26. ADJUSTMENTS: Buyer and Seller agree to settle or prorate, annually or as appropriate; as of Closing Date: (A) utilities and waste fees issued after Closing which include service for the Property was owned/occupied by Seller (B) real estate taxes and owner association fees/assessments for the calendar year of Closing (C) any rents, deposits, fees associated with leasing (D) insurance, EMS service, fuel/consumables, and assessments. Closing Attorney shall make tax proration based on the available tax information deemed reliable by the Closing Attorney. Should the tax or tax estimate or proration later become inaccurate or change, Buyer and Seller shall make any financial adjustments between themselves once accurate tax information is available. This section survives Closing. Buyer is solely responsible for minimizing the Buyer's taxes and obtaining tax minimization procedural information including related legal counsel and financial counsel.

27. DEFAULT:

- (A) If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may:
- (i) Deliver Notice of Default to Seller and terminate Contract and
 - (ii) Pursue any remedies available to Buyer at law or equity and
 - (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller.
- (B) If Buyer defaults in the performance of any of the Buyer's obligations under this Contract ("Default"), Seller may:
- (i) Deliver Notice of Default to Buyer and terminate Contract and
 - (ii) Pursue any remedies available to Seller at law or equity and
 - (iii) Recover attorneys' fees and all other direct costs of litigation if Seller prevails in any action against Buyer.
- (C) If either/both Parties default, Parties agree to sign an escrow deposit disbursement agreement or release agreement.
- (D) Parties may agree in writing to allow a Cure Period for a default. If within the Cure Period, either Party cures the Default and Delivers Notice, Parties shall proceed under the Contract.

28. MEDIATION CLAUSE: Mediation is an alternative dispute resolution system and may help avoid potentially expensive and lengthy litigation. The mediation participants voluntarily decide their settlement with the mediator facilitating their decisions and documentation of the settlement. Mediation is not binding arbitration. The mediator does not decide the outcome. The mediation participants make their own decisions include reaching or not reaching a settlement. Any dispute, claim, breach, or services issues relating to this Contract shall be submitted to mediation in accordance with the Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS® (info@SCREALTORS.org 1-800-233-6301). Disputes include representations made by any Party, Broker, person or entity in connection with the sale, purchase, financing, condition or any other aspect of the Property, including without limitation allegations of concealment, misrepresentation, negligence or fraud. Any agreement signed by the Parties pursuant to mediation is binding. This mediation clause shall survive the Closing Date. The following matters are excluded from mediation herein: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; (e) the filing of a Interpleader action to resolve earnest money disputes. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

29. NON-RELIANCE CLAUSE (NOT A MERGER CLAUSE NOR EXTENSION OF A MERGER CLAUSE): Parties execute this Contract freely and voluntarily without reliance upon any statements, representations, inducements, promises, or agreements by Brokers or Parties except as expressly stipulated or set forth in this Contract. If not contained herein, such statements, representations, inducements, promises, or agreements shall be of no force or effect. Parties acknowledge that Brokers are being retained solely as licensed real estate agents and not as any attorney, tax/financial advisor, appraiser, surveyor, engineer, mold or air quality expert, home inspector, or other professional service provider.

30. BROKER DISCLAIMER: Parties acknowledge that Brokers give no warranties or representations of any kind, expressed or implied as to: (1) condition of the Property, including but not limited to termite, radon, mold, asbestos, moisture, environmental issues, water, waste, air quality, HVAC, utilities, plumbing, electrical or structure, etc. (2) condition of the Property, survey or legal matters, square footage (3) off site conditions (4) schools (5) title including but not limited to

 BUYER ☐ BUYER ☐ SELLER ☒ SELLER HAVE READ THIS PAGE

000081

31. **BROKERS COMPENSATION:** Parties direct Closing Attorney to use settlement funds to collect and disburse Brokers Compensation to Brokers in accordance with agreements and document compensation on the settlement statement. If a Party disputes Brokers Compensation, that Party agrees to retain a SC law firm to escrow only the disputed amount of Brokerage Compensation until the dispute is resolved by a written agreement signed by that Party and the Affected Broker, arbitration award, or court order. Party requesting the escrow shall pay all costs for escrow. If the dispute is not resolved within 100 days of Closing, the escrow shall be disbursed to the Broker. Parties agree that Brokers are third party beneficiaries to this Contract and have standing to seek remedies at law and equity. Parties represent that their only enforceable agency agreements are with the Brokers disclosed in this Contract. Parties consent to Brokers possibly receiving compensation from the HWC and/or others if compensation is paid by in accordance with laws and REALTOR® ethics. **NOTICE: THIS IS TO GIVE YOU NOTICE THAT BROKERS HAVE/WILL/MAY RECEIVE COMPENSATION FROM HWC/OTHERS FOR REFERRAL/PROCESSING. YOU ARE NOT REQUIRED TO PURCHASE A HWC OR SIMILAR RESIDENTIAL SERVICE CONTRACT AND IF YOU CHOOSE TO PURCHASE SUCH COVERAGE YOU ARE FREE TO PURCHASE IT FROM ANOTHER PROVIDER.**

33. ATTACHMENTS, OTHER CONTINGENCIES, TERMS, AND/OR STIPULATIONS: There may be attachments to this Contract. The most recent changes, amendments, attachments, contingencies, stipulations, addendum, additions, exhibits, or writings, agreed to by the Parties is evidence of the Parties' intent and agreement and shall control any Contract language conflicts. (Land Issues may include: restrictions and easements that may affect desired use, drainage issues, hazardous wastes, environmental issues, water rights, availability of water, sewer or septic waste water issues, soil tests, wetlands surveys and studies, subordination, lot releases, and other issues.) If any documents are attached as addenda, amendments, attachments, or exhibits considered part of this Agreement, they are further identified or described here: closing shall take place within 7 days of the end of the due diligence period, seller to pay a commission of 5% to Tideland Realty Inc. at closing. Seller to provide copies of all pertinent due diligence including but not limited to wetlands studies, land plans, surveys, zoning data, engineering, etc, within 40 hours of execution.

36. PARTIES ARE SOLELY RESPONSIBLE FOR OBTAINING LEGAL ADVICE PRIOR TO SIGNING THIS CONTRACT AND DURING THE TRANSACTION. REAL ESTATE LICENSEES RECOMMEND OBTAINING LEGAL COUNSEL.

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30. EXPIRATION OF OFFER: When signed by a Party and intended as an offer or counter offer, this document represents an offer to the other Party that may be rescinded any time prior to or expires at 5 ☐ AM ☒ PM on August 19, 2013 (unless accepted or counter-offered by the other Party in written form Delivered prior to such deadline).

IN WITNESS WHEREOF, this Contract has been duly executed by the Parties.
If signer is not a Party, appropriate legal documents (Power of Attorney, Corporate Authorization, etc.) are ☐ attached or ☐ to be Delivered within _____ Business Days.

Parties shall initial and date all changes in this Contract and initial all pages.

BUYER: [Signature] Date: 8/19/13 Time: 9:47 AM
Lady Benicoff, LLC

WITNESS: [Signature] Date: 8/19/13 Time: 9:48 AM

BUYER: _____ Date: _____ Time: _____

WITNESS: _____ Date: _____ Time: _____

SELLER: [Signature] Date: 8/19/13 Time: _____
Hird Island Investments, Inc.

WITNESS: [Signature] Date: _____ Time: _____

SELLER: _____ Date: _____ Time: _____

WITNESS: _____ Date: _____ Time: _____

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[Signature] BUYER ☐ BUYER ☐ SELLER [Signature] SELLER HAVE READ THIS PAGE

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Form 330 PAGE 0 of 0
Ken Bender

000083

ESCROW AGENT ACKNOWLEDGEMENT SIGNATURE: _____

ESCROW AGENT NAME: _____ Tideland Realty, Inc.

ESCROW AGENT'S LAW FIRM/COMPANY/BROKERAGE: _____ Tideland Realty, Inc.

ESCROW AGENT CONTACT INFO: 943-252-0996 95 Sea Island

Suite 104

INVOLVED AS: ☒ BUYER AGENT ☐ BUYER SUBAGENT ☐ DUAL AGENT ☐ BUYER DESIGNATED AGENT*

LICENSEE: _____ Matt Trumpa _____ SC LICENSE # _____ EXPIRES _____

BROKER IN CHARGE: _____ Matt Trumpa _____ SC LICENSE # _____ EXPIRES _____

BROKERAGE COMPANY NAME: _____ Tideland Realty

MEMBERS OF: _____ Beaufort _____ ASSOCIATION/BOARD OF REALTORS®

NOTICE ADDRESS: _____

NOTICE EMAIL/FAX: _____

MOBILE PHONE: (943) 252-0996 OFFICE PHONE: _____ OTHER: _____

INVOLVED AS: ☐ SELLER AGENT ☐ SELLER SUBAGENT ☐ DUAL AGENT ☐ SELLER DESIGNATED AGENT*

LICENSEE: _____ SC LICENSE # _____ EXPIRES _____

BROKER IN CHARGE: _____ SC LICENSE # _____ EXPIRES _____

BROKERAGE COMPANY NAME: _____

MEMBERS OF: _____ ASSOCIATION/BOARD OF REALTORS®

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Form 330 PAGE 0 of 0
Kurt Pender

000084

State of South Carolina) Court of Common Pleas

County of Beaufort) 14th Judicial Circuit
) Case 2014-CP-07-0052

Lady Beaufort, LLC &)
 Tideland Realty, Inc.,)

Plaintiffs,)

vs.)

Hird Island)
 Investments, Inc. and)
 Sherwood N. Fender,)

Defendants.)

HEARING

March 1, 2017

Hearing reported by Deborah S. Thomas,
 Certified Verbatim Reporter and Notary Public in and
 for the State of South Carolina; said hearing held
 before the Honorable Marvin H. Dukes, III, Beaufort
 County Master in Equity and Special Circuit Court
 Judge in accordance with the South Carolina Rules of
 Civil Procedure, at the Beaufort County Courthouse,
 102 Ribaut Road, Room 212, Beaufort, South Carolina,
 on March 1, 2017, at the hour of 10:07 a.m.

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000085

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22
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CONTENTS

Hearing

Page

Exhibit Index	3
Certificate of Reporter	182
Word Index	

* * * * *

EXHIBIT INDEX

Exhibits Marked at Page

(Exhibits retained by Clerk of Court.)

Plaintiff's Exhibit No. 1	
(Notebook containing Exhibits A-I)	7

Plaintiff's Exhibit No. 2	56
(Calendar)	

Defendant's Exhibits No. 1	7
(Notebook containing Tabs 1-20)	

* * * * *

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 2014-CP-07-0052. This is Lady Beaufort,
5 LLC, and Tideland Realty, Incorporated, versus Hird
6 Island Investments, Incorporated, and Sherwood
7 Fender.

8 This matter comes to me today for a final
9 hearing. I had a conference call yesterday, the
10 28th of February, I guess, with counsel regarding
11 two issues. And I want to make sure we get this on
12 the record. The first -- well, two potential
13 conflict issues that I discussed with counsel.

14 The first is one of the Plaintiffs,
15 Tideland Realty, is a competitor of Lowcountry Real
16 Estate. And Lowcountry Real Estate is owned in part
17 by my brother Edward. I think I discussed that with
18 both counsel. I know that you all or I think you
19 all had an opportunity to speak about that off the
20 record, not in my presence.

21 To the extent any conflict exists, is that
22 an issue for either counsel?

23 MS. ENDEMANN: Not for Plaintiffs,
24 Judge.

25 MR. BOWEN: No, sir. No, sir.

1 JUDGE DUKES: Okay. All right. The
2 second issue we discussed is Sherwood Fender is a
3 party. And this comes up of course in any small
4 town litigation or small town -- any small town I
5 suppose, everyone knows everyone.

6 Sherwood Fender is someone I know and have
7 known for years and most people in Beaufort know.
8 He has been a litigant in this courtroom. I think
9 I've probably ruled for him and against him in the
10 past.

11 He was once married to Jane Fender who is
12 now a retired Family Court judge. And Jane was once
13 a law partner of mine years ago, but that was after
14 she divorced Sherwood. I think that is all
15 accurate.

16 (Off the record interruption.)

17 JUDGE DUKES: Anyway, what have
18 the parties -- and I went into more detail just then
19 than I did other than telling you all that I knew
20 Sherwood Fender, but have you all had an opportunity
21 to consider -- talk about that?

22 MR. BOWEN: Not an issue.

23 MS. ENDEMANN: We have, Judge. And I
24 don't doubt your ability to be fair and impartial.
25 No issue.

1 JUDGE DUKES: All right. I think
2 those are the only two as I look at this thing that
3 would be an issue that was worth bringing up. And I
4 see this is regarding property on Sam's Point Road.
5 I drive up and down Sam's Point Road a lot, but I
6 don't know where this is. And I guess you all will
7 tell me at some point.

8 All right. Is there anything you all
9 wanted to discuss prior to beginning this trial?

10 MR. BOWEN: Other than the fact that
11 we just discussed that we've approved one another's
12 exhibits (inaudible) without objection.

13 JUDGE DUKES: So, wait, I've got the
14 notebook of exhibits. And -- well, we will just
15 take them one-by-one. You weren't going to
16 introduce just the notebook as Exhibit 1, were you?

17 MR. BOWEN: Whatever you want.

18 MS. ENDEMANN: I'm okay with moving
19 them all in. And I've got a notebook sort of for
20 the witnesses that I intended to sort of just keep
21 and each one just refer by tab depending on their
22 testimony, but however you prefer, Judge, is fine.

23 JUDGE DUKES: Let me find out. We
24 have some really specific exhibit rules now about
25 how they are put in and how they are marked and that

1 sort of thing. So we are going to go off the record
2 for a second and discuss with Deborah, our court
3 reporter, the best way to do that. So let's go off
4 the record.

5 (Off the Record 10:10 to 10:14.)

6 (MARKED PLAINTIFF'S EXHIBIT NO. 1.)

7 (MARKED DEFENDANT'S EXHIBIT NO. 1.)

8 JUDGE DUKES: Back on the record in
9 14-CP-07-0052. And I neglected to mention this
10 matter actually was referred to me back on November
11 25th, 2014, by order of the Honorable Carmen Mullen.

12 I also neglected to mention I also know
13 Mr. Trumps who is sitting in the back back there,
14 who is a principal or the principal perhaps in
15 Tideland Realty. I don't know if you all discussed
16 that, but it sort of falls in the same category --

17 MR. BOWEN: We have, but it's not a
18 problem.

19 JUDGE DUKES: -- as Tideland Realty.
20 So typical Beaufort litigation. All right.
21 Anything else we need to take up prior to hearing
22 from the Plaintiff by way of any kind of opening?
23 No?

24 MS. ENDEMANN: I don't think so,
25 Judge.

1 JUDGE DUKES: All right then. Happy
2 to hear from you.

3 MS. ENDEMANN: Okay. Good morning,
4 Judge. My name is Michelle Endemann. And I have
5 the pleasure of representing Lady Beaufort. With me
6 here is the principal of Lady Beaufort, Mr. Jimmy
7 Kerr, and also Tideland Realty. As you've
8 mentioned, you know Mr. Matt Trumps, and he's here
9 today as well. He's also a Plaintiff.

10 Judge, this case is the story of a
11 commercial real estate transaction that failed to
12 close. It failed to close because the seller became
13 in his own words paranoid about the motives of the
14 buyer. And because the seller was in some financial
15 trouble as many developers were at the time and saw
16 a more lucrative deal with another buyer who would
17 purchase not only the parcel at issue in this case,
18 but a parcel -- a second parcel.

19 And Mr. Bowen is going to argue that that
20 can't be true because the contract with the second
21 buyer was actually \$15,000 less than the contract
22 with my client, but, Judge, when you look at real
23 estate commissions that were owed to Tideland in my
24 client's contract and you factor that in, there was
25 no realtor commission in the second transaction.

1 So actually, Judge, the net to Mr. Fender
2 and Hird in that transaction and our transaction was
3 essentially the same. Mr. Bowen is also going to
4 say, well, this can't be true because Mr. Fender
5 lost money on the sale of this second parcel because
6 he had to fire sale it.

7 Well, Judge, Mr. Fender testified his
8 concern at the time was the money that he would get
9 from both deals because he needed the additional
10 funds to meet his obligation. His concern at the
11 time was not the money that he lost, whatever value
12 of that property may be.

13 But my client was not willing to buy the
14 additional parcel. He only was buying the parcel
15 that was under contract. Mr. Fender, according to
16 his own testimony, needed the profit from the
17 second. The facts will show that two issues arose
18 with regard to the closing of the Hird Island/Lady
19 Beaufort contract, the first being the seller's
20 failure to provide a certificate of tax compliance
21 for Hird Island.

22 The second issue concerned the dissolution
23 of Hird Island and its state of incorporation which
24 was Georgia. The title insurance company needed
25 these issues resolved in order to write the title

1 policy, but Lady Beaufort didn't believe these
2 issues were insurmountable, and it sought to close
3 in any event.

4 Mr. Bowen is going to say but time was of
5 the essence. And if the deal with Lady Beaufort
6 didn't close on October 7th, which was the date of
7 the scheduled closing, the contract expired because
8 the 7th was the drop-dead date.

9 First, counting the days per the contract
10 for due diligence and closing shows that this
11 calculation is wrong. The contract was valid at
12 least through October 9th, not including, Judge, a
13 provision that allows for an automatic extension of
14 five business days.

15 But second, the seller cannot refuse to
16 provide necessary documents on the day of the
17 closing and then claim that the time ran out. Mr.
18 Bowen will say, but Mr. Fender did sign closing
19 documents. And that is true. He did sign certain
20 documents, but he refused to sign the document that
21 would resolve the issues raised by the title
22 insurance company even when presented with multiple
23 alternatives to accomplish this.

24 Why? Because in Mr. Fender's words he had
25 a back door. As Mr. Fender's lawyer was negotiating

1 with my client's lawyer to resolve the issues that
2 were raised by the title insurance company, and
3 while Mr. Fender's lawyer was making representations
4 about trying to get the deal closed, Mr. Fender was
5 negotiating another deal with another buyer.

6 The facts will show that these
7 representations continued even after the deed
8 transferred to the second buyer because Mr. Fender
9 went to another lawyer to close the second deal.
10 And Mr. Gilbert, his initial lawyer, was still
11 emailing and still making calls to Lady Beaufort's
12 counsel on the first deal.

13 The facts will bear out that Lady Beaufort
14 relied to its detriment on these actions and
15 representations because if Lady Beaufort had known
16 that Mr. Fender was in the process of selling the
17 property to another buyer, Lady Beaufort would have
18 taken steps to protect its right to the property and
19 file a lis pendens to prevent the sale as it did as
20 soon as they found out about the deed to the second
21 buyer.

22 The facts will show that Lady Beaufort was
23 damaged as a result of this conduct. It had to hire
24 attorneys and sue Mr. Fender and Hird as well as the
25 second buyer to get back the property and ultimately

1 paid the second buyer \$25,000 more than its original
2 contract in a settlement with the second buyer to
3 obtain that property back.

4 Judge, I know I'm a young lawyer coming
5 down here trying her first by herself in
6 Beaufort asking --

7 JUDGE DUKES: I didn't know that.
8 You are doing great so far.

9 MS. ENDEMANN: I'm asking you to
10 enter a judgment against a very well-known and
11 respected local lawyer, but Hird Island is judgment
12 proof and dissolved. And I believe the facts show
13 that Hird was in breach of the contract, but also
14 the facts support a judgment against Mr. Fender for
15 at least negligent misrepresentation. Thank you,
16 Judge.

17 JUDGE DUKES: Okay. Thank you, so
18 much. Mr. Bowen, happy to hear from you.

19 MR. BOWEN: I think she did an
20 excellent job of presenting most of my arguments, so
21 I'm not sure that I need to say too much other than
22 the fact to point out to the Court as the Court will
23 find out as evidence is submitted that the
24 subsequent purchase from Mr. Sample or from
25 Inverness, they did not demand the same documents

1 that they did from my client to close. And, in
2 fact, it was not an impediment to title.

3 Beyond that, sir, I concur with just about
4 everything she said except the conclusions.

5 JUDGE DUKES: All right. Well, then,
6 call your first witness, please.

7 MS. ENDEMANN: Thank you, Judge.

8 MR. BOWEN: Let me ask you something
9 if I may, sir. We've got a situation where we have
10 a suit by the Tidelands for breach of contract. And
11 we had joined in with that -- I'm sorry. Lady
12 Beaufort for breach of contract. And we had joined
13 in with that -- a Plaintiff of Tidelands Realty.
14 The interests are not exactly identical, but it
15 would seem to me that if we should prevail, whoever
16 prevails on the -- what I call the main complaint,
17 the breach of contract action, then at that point in
18 time would be time to take up the entitlement, it
19 seems to me, to a real estate commission. I just
20 wonder if the two issues are severable.

21 JUDGE DUKES: Well, I mean, they are
22 definitely linked --

23 MR. BOWEN: Yeah.

24 JUDGE DUKES: -- I mean because if no
25 contract existed or the contract were -- well, I'll

1 tell you what, I'm happy to hear from you on that.

2 MR. BOWEN: Whatever suits Your
3 Honor. I don't care.

4 MS. ENDEMANN: Judge, I would take
5 the position that if the buyer brought by the
6 Realtor was in breach, if my client was in breach
7 and Mr. Bowen prevailed on that then I think it
8 would probably be resolved. I don't think there
9 would be a commission that would be required, but if
10 on the other hand Mr. Fender Hird was in breach then
11 a commission was owed. I think -- I think sort of
12 whoever prevails on the larger claim, that is also
13 sort of where the real estate commission goes.

14 MR. BOWEN: The only thing that I
15 differ with you in there a little bit, and I agree
16 with what you are saying, is that Tideland is
17 looking for some things that are above and beyond
18 just the breach. There are some allegations for
19 entitlement for punitive damages and things of that
20 nature which I think are a little bit separate.
21 Tideland is alleging some things that Lady Beaufort
22 is not necessarily alleging, but let's -- it suits
23 me fine to go ahead and just see how it all comes
24 out at the end and then we can deal with it.

25 JUDGE DUKES: Let's try that and just

1 make whatever objections you feel are required as we
2 go.

3 MR. BOWEN: Okay. Thank you.

4 JUDGE DUKES: All right. Thank you.

5 MS. ENDEMANN: Okay.

6 JUDGE DUKES: Call your first
7 witness. And we will -- in this room we put the
8 witness right there opposite our court reporter.

9 MS. ENDEMANN: Okay. Very good. I
10 would like to call Mr. James Kerr.

11 JUDGE DUKES: All right. Mr. Kerr,
12 can I get you to hold your right hand up for me,
13 please.

14 MR. KERR: Yes, sir.

15 JUDGE DUKES: Do you swear or affirm
16 to tell the truth, the whole truth, and nothing but
17 the truth?

18 MR. KERR: I do, sir.

19 JUDGE DUKES: Okay. Thank you. Have
20 a seat, please. State your full name for the
21 record.

22 MR. KERR: James Joseph Kerr, and I'm
23 a Senior.

24 JUDGE DUKES: Can you spell your last
25 name?

1 MR. KERR: K-e-r-r.

2 JUDGE DUKES: All right. Thank you
3 so much. Please answer any questions your attorney
4 may have.

5 WHEREUPON:

6 JAMES J. KERR, SR., being duly sworn
7 and cautioned to speak the truth, the whole truth
8 and nothing but the truth, testifies as follows:

9 DIRECT EXAMINATION

10 BY MS. ENDEMANN:

11 Q. Mr. Kerr, I'm going to hand you what has
12 been marked as Plaintiff's Exhibit 1. And as we go
13 forward, and I'll ask you to turn to specific tabs
14 and identify those documents.

15 But to begin, are you the sole owner of
16 Lady Beaufort, LLC?

17 A. Yes, I am.

18 Q. Okay. And Lady Beaufort, LLC, was the
19 buyer in this transaction, correct?

20 A. That's correct.

21 Q. Okay. And how old a man are you, Mr.
22 Kerr?

23 A. I'm 73 years old.

24 Q. Okay. And where were you born?

25 A. Charleston, South Carolina.

1 Q. Are you married?

2 A. I am. Just had my 50th anniversary.

3 Q. Well, congratulations. Do you have any
4 children?

5 A. Two. Son Jamie, he's a Junior, and my
6 daughter Lisa. Jamie works with me. And my
7 daughter is at the Medical University of South
8 Carolina. She's a Ph.D. in the Writing Center.
9 She's up for a professorship I'm proud to say.

10 Q. Very nice. And where were you educated,
11 Mr. Kerr?

12 A. I ended up at The Citadel graduating in
13 1965 with a B.S. in Business Administration having
14 gone to school in Charleston all of my life in
15 parochial schools.

16 Q. Very good. Did you attend any business
17 school subsequent to that?

18 A. I did. I took a certificate program I
19 guess it's best described as at Wharton. It was in
20 a real estate endeavor back in '86 when the tax laws
21 were changing. We had to operate in real estate
22 knowing the new -- the existing laws as well as the
23 proposed laws. And we had to learn both to be able
24 to stay in business during that period of time. And
25 I did that up at Wharton in a certificate program.

1 Q. Great. And so your career has been in the
2 real estate industry?

3 A. Yes. I started out shortly after I got
4 out of The Citadel. Went to work for my brother
5 Francis in Kerr Realty. And that was in sales.
6 That was '67. And I went to Arthur Ravenel --
7 Arthur Ravenel Junior Company. And we did a lot of
8 Farmer's Home 502 throughout Charleston County.

9 Worked with Arthur for a couple of years.
10 Left him. Went to work for myself building houses.
11 And that was what I always refer to as my advanced
12 degree. My advanced education was doing that. And
13 as a result of that, having some houses that I had
14 to start renting, some townhouses, I became
15 interested in the rental property business.

16 And went and associated with Buck
17 Limehurst at Limehurst Properties for a couple of
18 years. About five years after that I guess I went
19 with Gordon Darby. And in 1990, I opened up -- that
20 was 26 years ago. In 1990, I opened up my current
21 company which is A.M.C.S., Asset Management
22 Consulting Services. And have been operating that
23 successfully, thank God, for the last 26 years.

24 Q. Very good. And so you still work in
25 acquisition and development as well?

1 A. Acquisition, development. Apartment
2 communities mainly. All though, I do some what I
3 call proprietary investments in commercial real
4 estate in some cell towers and some other things
5 mainly in the Charleston area. However, we have
6 holdings that we own down in Florida. And we manage
7 some stuff in Georgia and throughout the state of
8 South Carolina we own and manage.

9 Q. Very good. And you do these what you call
10 proprietary developments, you do those sometimes
11 through other companies?

12 A. Yes. I form LLCs. Like Lady Beaufort
13 would be an example or what I call Arrowhead down in
14 Hilton Head. I built a Sherwin Williams store down
15 there on Manitros or Hickory Nut. Those are all I
16 did Sherwin Williams stores through, but they are
17 single-asset entities, generally. And Lady Beaufort
18 would follow that pro forma operational method of
19 mine.

20 Q. Very good. And so Lady Beaufort, LLC, was
21 opened to purchase this property?

22 A. Yes. It was specifically opened to
23 purchase a -- not this property, but a .34-acre
24 property I believe I bought back in 2007, 2004,
25 somewhere in there. The date escapes me, but it was

1 in the early 2000s.

2 Q. Okay. And was the second parcel that is
3 at issue in this case, that is the only other parcel
4 that Lady Beaufort purchased?

5 A. Yes, that's correct. That's correct.

6 Q. And let's turn to the property at issue in
7 this case at 9 Sam's Point Road.

8 A. Which tab, Michelle?

9 Q. You are going to go to Tab Number 1 for
10 the contract.

11 A. Okay.

12 Q. Why did you have an interest in this
13 parcel at 9 Sam's Point Road?

14 A. Having bought the .34 acres previously,
15 and having Sherwin Williams not do what we had done
16 before, they tell me they want me to buy a piece of
17 property. And foolishly in this case I bought it
18 without having the final lease signed.

19 I ended up with a piece of property that I
20 was able to -- when this was brought to me by Matt
21 Trumps to look at it and say, okay, if I can get a
22 good deal on this adjacent property the average cost
23 of the acreage drops.

24 And I have a better chance of succeeding
25 in the future and coming out of it whole. I, quite

1 frankly, paid too much for the first piece. And by
2 buying the second parcel, two-plus acres, it allows
3 me -- as you do in the stock market. You average
4 your investment over time by making a series of
5 investments. So it reduced my cost.

6 Q. Very good. And you said a moment ago that
7 Matt Trumps brought this deal to you?

8 A. Yes. Yes. Matt I met. He was involved
9 in the first transaction. Mayor Chambers was
10 representing me at that time. And after I closed
11 the first time on the first parcel, Matt was very
12 available and open. And I was putting the property
13 on the market to sell. And as a result of that, we
14 developed a relationship of sorts. And he came to
15 me and says, this property, 2.9 acres, Mr. Fender
16 has asked me to see if you are interested in it. He
17 needs to sell it. And right away I said yes, let's
18 enter a contract.

19 Q. Okay.

20 A. At that price.

21 Q. Very good. And is that contract that you
22 were just referring to, is that the contract that
23 has been marked as Tab 1?

24 A. I'm looking for the -- yes.

25 Q. Okay. And when was the contract signed?

1 A. I signed it on the 19th, the day after
2 Mr. Fender had signed it on the 18th of August in
3 '13.

4 Q. Okay. And what was the purchase price
5 agreed to in the contract?

6 A. \$260,000.

7 Q. Okay. And was there anything unusual in
8 this contract?

9 A. I've seen this contract many times in
10 buying things, buying and selling. And it's a
11 fairly standard contract the Realtors produced at
12 that time.

13 Q. Was the contract contingent upon Lady
14 Beaufort obtaining financing?

15 A. No.

16 Q. Okay. Could you have closed without the
17 loan?

18 A. No question.

19 Q. Okay. But you chose to obtain a loan; is
20 that correct?

21 A. I did.

22 Q. Okay. And do you know who the loan
23 officer was that handled the mortgage for you?

24 A. A man named Jan Malinowski.

25 Q. Did you know Mr. Malinowski prior to his

1 being assigned by Palmetto State Bank as the loan
2 officer for the mortgage?

3 A. Did not. Never had met him.

4 Q. Okay. Had no prior dealings with him?

5 A. No prior dealings. In fact, didn't know
6 him. Didn't know of him.

7 Q. Okay. Were you even aware at that time
8 that Palmetto State Bank held the mortgage on this
9 property for Mr. Fender or that Mr. Fender was in
10 arrears on that mortgage?

11 A. Was not. That wasn't part of what I knew.

12 Q. Okay. Mr. Kerr, were you ready, willing,
13 and able to close this transaction?

14 A. Yes, ma'am.

15 Q. You had the purchase money available?

16 A. Purchase money is available.

17 Q. You wanted the property?

18 A. I did. In fact, I think the fact that I
19 signed this contract in August of '13, and it took
20 me a year, August of '14 after a lot of hoops and
21 heartache to actually buy it, I don't think the
22 motive of me wanting the property is in dispute here
23 because I ended up with it. But, yes, I wanted it.

24 I was prepared. I was at the closing.

25 And the only thing I needed to do was to have my

1 attorney -- in my business I conceive a deal if you
2 will. I go find it, negotiate it, put it under
3 contract. And my attorney Carl Rogers helps me do
4 that, but once I get it under contract I give it to
5 him. And Carl and I have closed I can't tell you
6 how many and how many millions of dollars worth of
7 apartment communities and other real estate and
8 estate planning and what have you.

9 So he knows what I want. So I give it to
10 him. And he knows that I want him to look out for
11 my interests. And he moves forward. And I don't
12 get involved in all the minutiae of moving towards
13 closing once I negotiate it. That is up to Carl to
14 say, Jimmy, we are ready to close. Your interests
15 are protected. I want you to sign these documents.

16 Q. Very good. And did you sign the closing
17 documents in this case?

18 A. I did at Carl's office.

19 Q. Very good. And when was the closing
20 between Hird Island and Lady Beaufort scheduled, do
21 you recall?

22 A. October 7th of 2014.

23 Q. Okay.

24 A. '13. '13.

25 Q. That's correct. But the contract didn't

1 close on that date, did it?

2 A. Did not.

3 Q. Okay. And why not?

4 A. Carl had indicated that he was not
5 recommending that I close because there were some
6 issues of title. And that he could not get title
7 insurance based on some of the things that had
8 surfaced during that period of time. He can explain
9 all the details about that, but he did not advise me
10 to close. I signed the papers in his office as I do
11 many times. And it is predicated on the fact that
12 you get the issues at that you've raised cleared up,
13 let the paperwork move forward. The money is there.
14 Close when you are ready to close.

15 Q. When the transaction did not close on
16 October 7th, did you believe that the contract was
17 ended?

18 A. No. Uh-uh. My attorney, Carl Rogers, and
19 Mr. Fender's attorney, Mr. Gilbert, were emailing
20 back and forth trying to resolve the issue. We had
21 time on the contract, so I was not -- this was --
22 every time you go to a closing, there is always
23 something that comes up that has to be cleared up.
24 And with both parties willing to do it, it happens
25 most of the time. In this case it did not.

1 Q. Okay.

2 A. But we had time. I was not worried about,
3 oh, I've got to close it on the 7th. We had time.
4 That was the date of closing. That wasn't the date
5 of the drop-dead date in the contract.

6 Q. Very good. So when did you learn that the
7 property had been sold to another buyer?

8 A. After it failed to close, several days
9 later, Matt called me and says, are you aware of the
10 fact that the property has been sold to somebody
11 else? I said, no, I'm not aware of it. We are
12 still working on trying to get Mr. Gilbert and so
13 forth to -- with Carl Rogers to get the issues
14 cleared up.

15 Q. And Mr. Gilbert was Mr. Fender's attorney?

16 A. Yes. That's correct.

17 Q. Okay. And so Mr. Gilbert never told you
18 that the property was sold to another buyer?

19 A. No way, no.

20 Q. Mr. Fender --

21 A. He didn't. Mr. Fender didn't. Nobody --
22 I was prepared to close. Nobody said that it wasn't
23 going to close or it was -- the deal was dead.
24 Nobody said that.

25 Q. Would you turn with me to Exhibit 14 or

1 Tab 14. I'm sorry.

2 A. Okay.

3 Q. Do you recognize this document?

4 A. Yes, I do.

5 Q. Okay. And what did you instruct
6 Mr. Rogers as the attorney for Lady Beaufort to do
7 when you learned that Mr. Fender had sold the
8 property to another buyer?

9 A. I asked Carl, I said, what are my options
10 here? He said, well, we need to put the other side
11 on notice that you are not happy with this. And he
12 -- I think the term was lis pendens. He said, let's
13 file a lis pendens to put the world on notice that
14 you object to that transaction. And that is what he
15 was doing.

16 Q. Okay. And so ultimately a lawsuit was
17 filed?

18 A. That's correct. That's correct.

19 Q. Okay. And what was --

20 A. This suit, in fact, I believe was
21 ultimately filed.

22 Q. Yes, sir. And what was the goal of this
23 suit when you filed it?

24 A. I wanted -- I wanted the property because
25 it fit the plan that I described earlier where it

1 helped me reduce my cost per acre. And as a side
2 note, as it turns out, with having gotten the
3 property and having sold two of the parcels, and I
4 have a third piece of this still left, it appears
5 that I'm going to be able to come out of this as I
6 originally planned when I decided to -- had the
7 opportunity presented to me to buy it.

8 My instincts were right, and I'm going to
9 end up not losing money on a deal that started out I
10 overpaid for a piece of land. I'm going to be all
11 right.

12 Q. So you testified that you did get the
13 property. So you were successful in obtaining that
14 property?

15 A. Yes.

16 Q. And who did you obtain it from?

17 A. From Mr. Sample --

18 Q. Okay.

19 A. -- who purchased it from Mr. Fender.

20 Q. Okay. Very good. And can you turn with
21 me to Exhibit 15, please. Or Tab 15.

22 A. Uh-huh.

23 Q. Do you recognize this document, Mr. Kerr?

24 A. Yes.

25 Q. Okay. And tell me what this document is.

1 A. Once the lis pendens became public then I
2 was asked what it would take for me to remove the
3 lis pendens. And I'm being asked this by
4 Mr. Sample, essentially. And I told him I wanted to
5 buy the property. He made two proposals to me. The
6 first was if you remove -- if you remove the lis
7 pendens, I will sell you this portion of the
8 property that I just got from Mr. Fender that I do
9 not need for what I'm going to do. And you can add
10 it to the piece you have.

11 And he was going to sell that to me for
12 like \$135,000. And it just didn't work, so I wasn't
13 happy with that.

14 Continuing the dialogue with him, he
15 proposed that if he paid me -- he was going to do a
16 tax credit deal. He was going to sell the property
17 to a developer that was going to do a tax credit
18 deal on that property with a number of rental units
19 under the State Housing Authority's Low Income
20 Housing Tax Credit Program.

21 That would have been clouded by my lis
22 pendens. He suggested, and I agreed, and this is
23 what this I believe evidences is that he would pay
24 me \$200,000 if I would release the lis pendens and
25 if he or the people he was selling it to were

1 awarded tax credits by July 31st, end of July, I
2 think, that year, of '13 was the date that -- July
3 of '14. If the tax credits were awarded to that
4 property. It's competitive bid and you have to
5 submit, and you are scored. And it's all public
6 information.

7 And if he was successful as people were
8 successful in doing that, then he would have to
9 close by December 31st of that year, but I would get
10 \$200,000 in that process if he was successful in
11 getting the tax credits. So I agreed to that.

12 Part of the agreement was that if he was
13 unsuccessful, I had the right to refile that suit
14 and place the lis pendens back on the property.

15 Q. So how did you end up obtaining the whole
16 property?

17 A. In July, the tax credits award to this
18 property or this developer were not made to this
19 property. And that left Mr. Sample then as it
20 appears with a piece of property that he had no use
21 for. So he asked me if I wanted to buy it. And
22 after a period of discussions, I agreed to buy it
23 from him for the \$285,000.

24 Q. And can you turn with me to Tab 16,
25 please.

1 A. Yes, ma'am.

2 Q. Okay. Do you recognize this document, Mr.
3 Kerr?

4 A. This is the settlement statement, yes,
5 ma'am.

6 Q. And this settlement statement reflects
7 that you paid \$285,000 for the property from
8 Inverness; is that correct?

9 A. That's correct. Which when I say
10 Mr. Sample, his company was Inverness. I think he
11 does what I do. He uses single asset entities I
12 suspect.

13 Q. Okay. And this is more than the purchase
14 price of the contract with Hird Island, correct?

15 A. That's correct.

16 Q. Okay.

17 A. It's \$25,000 more.

18 Q. Okay. All right. Turn with me to Tab 2
19 if you would, please.

20 A. Yes, ma'am.

21 Q. And can you tell me how much you have paid
22 in attorneys fees?

23 A. Approximately 54,000. 53,924.21 in
24 attorneys fees.

25 Q. Okay. And that is represented in

1 Exhibit 2?

2 A. That's correct. With two affidavits.

3 Q. So if your goal was to obtain the property
4 in the lawsuit and you were able to do that, why did
5 the lawsuit continue after you received the property
6 in the settlement with Inverness?

7 A. Well, I don't know that I can answer that
8 because I was sued for breach of contract by
9 Mr. Fender.

10 MS. ENDEMANN: All right. I think
11 that is all I have, Mr. Kerr. Thank you very much.

12 JUDGE DUKES: All right. Would you
13 please answer any questions Mr. Bowen may have?

14 THE WITNESS: Yes, sir.

15 MR. BOWEN: Yes, sir.

16 CROSS EXAMINATION

17 BY MR. BOWEN:

18 Q. I have just a few. First of all we do
19 agree on the closing date was supposed to be the 7th
20 of October of 2013? I believe that is what you
21 testified to.

22 A. Yeah. That is what we had agreed to.

23 Q. That is fine. I just wanted to make sure
24 we didn't have an issue about that.

25 A. Yes, sir.

1 Q. I want to call your attention to the
2 contract which -- and ask you to look at the first
3 page. And specifically --

4 A. Which exhibit was that? I'm sorry.

5 MS. ENDEMANN: Exhibit 1. I'm sorry.

6 BY MR. BOWEN:

7 Q. That is your Exhibit 1, yes, sir.

8 A. I'm sorry. All right, sir.

9 Q. Specifically the first page which says in
10 D, the effective date of the contract which I
11 believe we agree is the 19th of August. That was
12 the date that you signed it?

13 A. Correct.

14 Q. Then look at the E that speaks of business
15 days. And we agree, do we not, that that says that
16 business days are specifically designed as Monday,
17 Tuesday, Wednesday, Thursday, and Friday?

18 JUDGE DUKES: Which paragraph are you
19 on, Mr. Bowen?

20 THE WITNESS: Echo.

21 MR. BOWEN: Yeah, E. I'm sorry. If
22 I said B, I should have said E.

23 JUDGE DUKES: Okay. I see it. I've
24 got it.

25 BY MR. BOWEN:

1 Q. Do we agree on that, sir?

2 A. Yes, sir.

3 Q. And do we agree that it also says business
4 days shall not begin or end on Saturday, Sunday, or
5 a Federal legal holiday?

6 A. Yes, sir.

7 Q. Okay. Did you ever transfer the purchase
8 price to your attorney's trust account, the proposed
9 purchase price of the agreement?

10 A. Carl -- you would have to ask him -- have
11 to ask him that question. The Bank had the funds.
12 They were poised to transfer it at -- which is
13 fairly pro forma that the funds are available. And
14 whether they were transferred into his account or
15 not, I quite frankly don't know.

16 Q. You don't --

17 A. That didn't matter to me because if I
18 needed to, I could have written a check.

19 Q. Well, isn't it true that you never
20 tendered funds to, I'm going to say, Mr. Fender or
21 Hird Island, they are one in the same?

22 A. Sir, I had the funds available.

23 Q. But you --

24 A. And you would have to ask Carl that, where
25 the funds were.

1 Q. No, I'm asking you to the best of your
2 knowledge were funds ever tendered to Mr. Fender on
3 behalf of Hird? Either you know or you don't know.
4 I'm not trying to trick you. I'm just --

5 A. In my mind they were. Now, if I'm wrong
6 in that Carl will have to tell me that because in my
7 mind I was prepared to close. Whether they were
8 tendered or not, I'm not fully conversant with the
9 legal meaning of that, but I was prepared to close.

10 Q. Did they ever leave your account and into
11 your attorney's account for transfer to Mr. Fender,
12 if you know? If you don't know -- if you don't
13 know, you don't know.

14 A. Yeah, I don't know that. I don't know
15 that.

16 Q. Okay. That is fair enough. Do you know
17 when the lis pendens was filed had the property
18 already been transferred?

19 A. It was after the 10th because I think the
20 10th was the date the property transferred.

21 Q. Okay. And the lis pendens was filed
22 sometime after that?

23 A. After that.

24 Q. And do you know who the lis pendens was
25 filed against? Was it filed against Hird?

1 A. I don't know.

2 Q. Okay.

3 A. I don't know.

4 Q. Fair enough.

5 A. Because Hird --

6 Q. You can only tell me what you know.

7 A. Yeah, I understand that, but remember what
8 I said earlier that sign the contract, give it to my
9 attorney.

10 Q. Right.

11 A. I was dealing with Mr. Fender. Whether it
12 was Hird, Fender, it's all the same to me.

13 Q. Okay. I understand that, but my question
14 to you was do you know who the lis pendens was
15 addressed to? Was it addressed to Mr. --

16 A. I think it was everybody.

17 Q. To Mr. Sample?

18 A. I believe he might have been included.

19 Inverness might have been included.

20 Q. Again, sir, I'm not trying to trick you.
21 If you know, you know.

22 A. I don't. I don't. My attorney knows.

23 Q. That's fine. That's fine. When you
24 closed on the sale or the purchase from Inverness,
25 are all documents that you were involved with or

1 acquired with the sale, are those as contained in --
2 bear with me a second. In Exhibit 16? Plaintiff's
3 Exhibit 16?

4 A. . This 16 is a closing statement.

5 Q. Yes, sir. I should have said 16 and 17.
6 I just want you to review those documents.

7 A. They appear to be documents that were part
8 of that closing. Again, my attorney is the one that
9 said, Jimmy, I'm happy with this. You can close.
10 It appears to be documents that are involved in the
11 closing.

12 Q. Do you believe there were any other
13 documents involved?

14 A. I don't know.

15 Q. Okay. That's fine.

16 A. I don't know.

17 Q. That's fine. What evidence do you have
18 other than the fact that the matter didn't close
19 that Hird Island was acting in bad faith in its
20 dealings with you?

21 A. I think that the fact that it closed
22 during the period of time that I still had a valid
23 contract on it in itself is acting in bad faith.

24 Q. Well, let me ask you this, sir. If, in
25 fact, it no longer had an obligation to close with

1 you, if in fact. I'm not asking you to admit that
2 it didn't, but if it did not have any obligation to
3 close with you, did it do anything that you
4 consider -- that you would have considered to be in
5 bad faith?

6 A. Mr. Fender is a very affable fellow. I
7 enjoyed --

8 Q. We would agree to that.

9 A. Yeah. I've enjoyed knowing Mr. Fender.
10 This is an unpleasant circumstance to be in. This
11 isn't what I do to make a living.

12 Q. Oh, I know that, sir. You have an
13 excellent reputation and I'm aware of that.

14 A. Well, I think that the core statement that
15 I made is the fact that from my perspective it did
16 not close because it was sold to somebody else. And
17 during the period of time that I had it under
18 contract I don't know that I need to know anything
19 else about bad faith. And I can't think of anything
20 right now that would be an, oh, yeah, I remember
21 that he said something on March 2nd that led me to
22 believe that he really didn't want to close that. I
23 don't have that. I just know that it didn't close
24 during the period of time I had it under contract.

25 Q. But my question to you is -- I think

1 you've answered it. If, in fact, the contract was
2 dead on October the 7th and he closed with somebody
3 else -- if, in fact, it was dead. And I'm not
4 asking you to admit that. Would you have any claim
5 of bad faith against him?

6 A. No, sir.

7 Q. All right, sir.

8 A. Not that I'm aware of.

9 MR. BOWEN: I think that is all, but
10 I'd like just to speak to my client for a minute or
11 two.

12 JUDGE DUKES: That would be fine. Go
13 ahead. And we will take a break and wait right here
14 unless you just need to walk around or something.

15 THE WITNESS: No, I'm fine.

16 JUDGE DUKES: Unless he's got
17 something else, we will take a five-minute break.

18 (Off the Record 10:51 TO 10:53.)

19 JUDGE DUKES: All right. Back on the
20 record. Mr. Bowen, any further questions?

21 MR. BOWEN: Yes, sir, please.

22 BY MR. BOWEN:

23 Q. I want to get to my documents now. I'm
24 going to hand you what has been marked as
25 Defendant/Cross Plaintiff's Exhibit 1-B. Take a

1 look at those, please, sir.

2 JUDGE DUKES: These are emails; is
3 that correct?

4 MR. BOWEN: Sir?

5 JUDGE DUKES: If I'm looking at the
6 right thing, this is an email October 4th, 2013.

7 MR. BOWEN: Well, it's the closing
8 documents that attended the closing with Inverness.
9 I'm sorry. Not with Inverness. With Hird. The
10 closing documents with Hird.

11 JUDGE DUKES: If that becomes too
12 noisy back there, you all can just knock that wedge
13 out of the door and let it close.

14 BY MR. BOWEN:

15 Q. All right, sir. Now, call your attention
16 to the closing documents that were signed by Sample
17 in your Exhibit 17.

18 A. Sixteen?

19 Q. Sixteen is the closing statement and 17 is
20 the seller's affidavit.

21 A. Sample's, right? Okay.

22 Q. Okay. Go through those, sir, please.

23 A. Specifically the seller's affidavit?

24 Q. Yes, sir, that's correct. Aren't they
25 substantially the same documents as Sherwood Fender

1 signed? I mean, they are a slightly different
2 format.

3 A. Again, I defer to my attorney on this.
4 I'm not --

5 Q. He's not here so I've got to ask you, sir.

6 A. I defer to him when he is here.

7 Q. Is he coming?

8 MS. ENDEMANN: He's coming. I think
9 he is here. He's just -- I just got word he's here.

10 MR. BOWEN: Okay.

11 MS. ENDEMANN: He will be here.

12 THE WITNESS: With all due respect --

13 MR. BOWEN: I understand.

14 MS. ENDEMANN: -- that is why I hire
15 lawyers, to help me.

16 BY MR. BOWEN:

17 Q. I understand, sir. If I had known he was
18 here, I wouldn't be asking you this question. So
19 I'll withdraw that question and address it with him.

20 A. Yes, sir.

21 JUDGE DUKES: Anything else for this
22 witness?

23 MR. BOWEN: I think not. Give me
24 just a moment to review my notes quickly. Thank you
25 very much, sir.

1 THE WITNESS: Thank you, sir.

2 REDIRECT EXAMINATION

3 BY MS. ENDEMANN:

4 Q. Just very briefly. Mr. Kerr, you've
5 pretty well already covered this, but you are not a
6 lawyer, are you?

7 A. I am not.

8 Q. Okay. And you testified that you
9 negotiate a deal and then Mr. Rogers, as your
10 lawyer, handles all the details?

11 A. That's correct.

12 Q. And in this case it was Mr. Rogers that
13 dealt with Mr. Fender and Mr. Gilbert about the
14 issues that came up at the closing; is that correct?

15 A. That's correct.

16 Q. Okay. And Mr. Rogers is there in a better
17 position to talk about bad faith; is that right?

18 A. Yes, sir. Yes, ma'am.

19 Q. And a better position to talk about
20 representations made by Mr. Fender and Mr. Gilbert?

21 A. Yes, he is.

22 MS. ENDEMANN: Okay. Thank you.

23 JUDGE DUKES: Anything associated
24 with that question, Mr. Bowen?

25 MR. BOWEN: No, sir. I have no

1 further questions. Thank you.

2 JUDGE DUKES: Thank you so much, sir.

3 All right. Let's take a five-minute break and we
4 will begin with your next witness.

5 MS. ENDEMANN: Thank you, Judge.

6 (Off the Record 11:00-11:09.)

7 JUDGE DUKES: Let's see. Call your
8 next witness, please.

9 MR. BOWEN: Judge, during the break,
10 Michelle and I agreed that the issue of punitive
11 damages is not for Mr. Trumps.

12 JUDGE DUKES: Okay.

13 MS. ENDEMANN: I will stipulate to
14 that, Judge.

15 MR. BOWEN: In other words, if the
16 contract is valid, he's entitled to a commission.
17 If it's not, he's not.

18 JUDGE DUKES: I understand. Yes,
19 it's strictly contract. There is no punitive
20 damages in a contract case.

21 MR. BOWEN: Right.

22 JUDGE DUKES: Okay. Makes sense.
23 All right. Call your next witness, please.

24 MS. ENDEMANN: Thank you, Judge. I
25 would like to call Mr. Trumps.

1 JUDGE DUKES: All right. How are
2 you, sir?

3 MR. TRUMPS: This chair?

4 JUDGE DUKES: Yes. If I can get you
5 to hold your right hand up for me, please. Do you
6 swear or affirm to tell the truth, the whole truth,
7 and nothing but the truth so help you God?

8 MR. TRUMPS: I do.

9 JUDGE DUKES: Okay. Please state
10 your full name for the record.

11 MR. TRUMPS: Matt Anthony Trumps.

12 JUDGE DUKES: Okay. Please answer
13 any questions your attorney may have.

14 MS. ENDEMANN: Thank you very much.

15 WHEREUPON:

16 MATT. A. TRUMPS, being duly sworn and
17 cautioned to speak the truth, the whole truth and
18 nothing but the truth, testifies as follows:

19 DIRECT EXAMINATION

20 BY MS. ENDEMANN:

21 Q. Hello, Mr. Trumps.

22 A. Hi.

23 Q. Can you give us a little bit of background
24 about your personal life, family?

25 A. I've been married for 20 -- almost 24

1 years. My wife is Lisa. We have three children;
2 Henry, Lou, and Jane. One is in college. One is on
3 the way, hopefully. And my youngest child is in
4 high school, a sophomore.

5 Q. Great. And can you tell us about your
6 education?

7 A. I've got a Bachelor of Arts in Political
8 Science at the College of Charleston in 1991. I
9 grew up here in Beaufort. Graduated from Beaufort
10 Academy High School.

11 Q. Very good. And how about your
12 professional experience?

13 A. I got my real estate license in 1995.
14 Received a real estate broker's license three years
15 thereafter. I've been practicing real estate ever
16 since. Pretty much all facets; commercial, land,
17 real estate, residential.

18 Q. Very good. And how did you come to be
19 aware that this property located at 9 Sam's Point
20 Road was for sale?

21 A. Well, as Mr. Kerr said earlier, I had been
22 involved with him in the prior transaction. I had
23 at the time Mr. Kerr's property listed for sale.
24 The property had been on the -- Sherwood's property,
25 the remaining property, had been off and on the

1 market for a long time, but at the immediate time of
2 this negotiation Mr. Fender and a gentleman named
3 Avery Cleveland came into my office one day and
4 Sherwood told me that he needed to sell this
5 property. He asked if I would contact Mr. Kerr to
6 buy the property at a particular price. I believe
7 at the time it was around 275,000. It got
8 negotiated back and forth a bit. So that is how I
9 was made aware.

10 Q. Okay. Can you turn with me to Tab 1 in
11 Plaintiff's Exhibit 1?

12 A. Uh-huh.

13 Q. And do you recognize this document?

14 A. I prepared it.

15 Q. Okay. Very good. And is this a contract
16 form that you are familiar with?

17 A. This is the contract form that we use --
18 pretty much any Realtor in South Carolina would use
19 this document for a raw land conveyance. It's put
20 out by the South Carolina Association of Real
21 Estate. It's approved by L.L.R. And it's just what
22 we use.

23 Q. Okay. Very good. As you are aware, much
24 has been made about the timeline and the deadlines
25 in this contract.

1 A. Uh-huh.

2 Q. And I would like to go over some of these
3 provisions with you --

4 A. Okay.

5 Q. -- as you testified that you are very
6 familiar with the form. If you would, look for me
7 first at what the effective date means which is
8 Paragraph 1-D there on the first page.

9 A. Right. The effective date -- do you want
10 me to read this or do you want me to tell you my
11 interpretation of an effective date?

12 Q. I would like you to tell us in your
13 experience.

14 A. My experience with an effective date is
15 the effective date is in effect at the time that the
16 last party initials and the contract becomes fully
17 executed.

18 Q. Okay.

19 A. Initials and/or signs.

20 MR. BOWEN: Judge, I would object to
21 his interpretation of the contract. It says what it
22 says?

23 JUDGE DUKES: Let me ask counsel if
24 you all -- maybe you disagree what it -- is there
25 disagreement as to what the effective date is?

1 MR. BOWEN: I don't think so.

2 MS. ENDEMANN: Your Honor, there is a
3 disagreement about the definition of business days.
4 Plaintiffs take the position that a business day is
5 just what it says; Monday, Tuesday, Wednesday,
6 Thursday, Friday, not a Federal holiday, not a
7 Saturday and Sunday.

8 I think Defense is taking the position
9 that a Federal holiday is, in fact, a business day.
10 And so that is sort of why we are going to go
11 through some of these. If we can agree then maybe
12 we can dispense with it.

13 MR. BOWEN: I thought -- I'm sorry.
14 I didn't mean to interrupt you.

15 MS. ENDEMANN: No, go ahead.

16 MR. BOWEN: I thought that he
17 testified that October 7 was the date of closing,
18 your client did.

19 MS. ENDEMANN: I believe Mr. Kerr
20 testified that October 7th was the scheduled date of
21 the closing, but that he had additional time. He
22 wasn't worried about closing on that day.

23 MR. BOWEN: I didn't recall that, but
24 in any event can we agree that that was the --
25 October 7th was the contractual obligation date to

1 close on?

2 MS. ENDEMANN: I don't think we agree
3 on that, Bill, no.

4 MR. BOWEN: Okay.

5 JUDGE DUKES: Well, let me ask you
6 all this though. I mean, these contracts are pretty
7 basic. They sort of say what they say. Mr. Bowen,
8 is it your client's assertion that a Federal legal
9 holiday is a business day?

10 MR. BOWEN: Yes, sir. If you read
11 the definition, it shall not begin or end on a
12 Federal legal holiday.

13 JUDGE DUKES: Right. Business days,
14 and that would mean any day that is considered a
15 business day, can't begin or end. So a business day
16 can't be from 10 a.m. to whatever on a Federal legal
17 holiday, right?

18 MR. BOWEN: On the first day or the
19 last day, but it does not say in the interim. It
20 says not begin or end. It doesn't say shall not be
21 counted.

22 JUDGE DUKES: I'm not sure that is
23 what that means, but anyway, okay, we can work that
24 out later. So that is the basis of the dispute
25 between the parties. Okay.

1 MS. ENDEMANN: Yes, sir, Judge.

2 MR. BOWEN: That and I think there
3 was one other issue that she raised about the
4 extension.

5 MS. ENDEMANN: Yes. There is a
6 Paragraph 4 calls for an automatic extension of five
7 business days. I think that is another one.

8 MR. BOWEN: For an unsatisfied
9 contingency through no fault of either.

10 MS. ENDEMANN: Uh-huh.

11 MR. BOWEN: I don't see where we've
12 got an unsatisfied contingency because this was
13 really a contingency-free contract for the most part
14 except --

15 MS. ENDEMANN: Well, contingency is
16 not a defined term. And that is one of the things
17 that I think Mr. Rogers and Mr. Trumps will discuss.
18 The use of that term is not a defined term saying
19 contingency as there is a listed contingency like,
20 for example, lenders --

21 MR. BOWEN: But isn't that a legal
22 question for the Court to determine, what is a
23 contingency and what is not a contingency?

24 MS. ENDEMANN: I think that probably
25 is. And so is the entire interpretation of the

1 contract, but I think we are allowed on present
2 evidence on the contract itself.

3 MR. BOWEN: The contract is the --
4 the contract is itself.

5 JUDGE DUKES: Well, let me do this.
6 I think it's probably my job to interpret the
7 contract. And -- but so if you all will just point
8 out at some point, perhaps even in closing, but the
9 differences of opinion in what it means, I'll try to
10 figure it out. So --

11 MS. ENDEMANN: Thank you, Judge. We
12 might be able to establish those differences right
13 now with Mr. Trumps' testimony.

14 MR. BOWEN: Yeah, we can do that
15 right now.

16 JUDGE DUKES: All right. I think
17 your objection though is valid. It would be
18 inappropriate for me to have -- take legal advice
19 from Mr. Trumps in this as an expert; although, I'm
20 sure he's well-skilled in this. I don't mean that
21 as a slight on Mr. Trumps.

22 MR. BOWEN: Or from me or any other
23 lawyer.

24 JUDGE DUKES: But I think the
25 objection is valid, but I'm happy to here the

1 testimony with regard to calculations and that sort
2 of thing.

3 MR. BOWEN: So my position on that is
4 that the Labor Day did not begin or end. And my
5 other objection is that contingency refers to if
6 there were any specific contingencies in the
7 contract. And there were no specific contingencies
8 in the contract. And that is my argument.

9 MS. ENDEMANN: I understand. And,
10 Your Honor, what I would propose to do is simply
11 have Mr. Trumps -- he actually has done this
12 calculation. He did it at the time of the closing.
13 And there are emails that we will go over that --

14 JUDGE DUKES: If he's just doing math
15 on a calendar that everybody can agree was the
16 calendar that year, no objection to that I assume.
17 Is that right?

18 MR. BOWEN: Well, let's -- maybe.
19 Tell me what our differences is. I say it's the
20 7th. And I say that if you follow the wording as I
21 interpret the contract it is the 7th.

22 MS. ENDEMANN: Right.

23 MR. BOWEN: If you have another date
24 that you want to claim it is, then just go ahead and
25 put it in and we can -- let's argue that with the

1 Court.

2 JUDGE DUKES: I think that is what
3 they are doing, right?

4 MS. ENDEMANN: Yeah.

5 JUDGE DUKES: I think that is the
6 plan.

7 MS. ENDEMANN: Exactly.

8 MR. BOWEN: But I mean if you
9 could -- instead of going through --

10 MS. ENDEMANN: Well, it's in our
11 trial brief as well. I think that under this
12 definition it's clear that a business day cannot
13 start or end on a Saturday, Sunday, or Federal legal
14 holiday. So a Federal legal holiday is not a
15 business day. When you add in Labor Day that takes
16 us -- the contract is valid through the end of the
17 day on the 8th. So it expired on the 9th. So that
18 is Number 1.

19 Plus when you add in then you have the
20 seven days to close after that and then you have an
21 automatic extension of five days for an unsatisfied
22 contingency. I was going to have Mr. Trumps and Mr.
23 Rogers testify to their experience in what sort
24 of -- what contingency are unsatisfied.

25 MR. BOWEN: Well, if you would just

1 tell me what the day is, I don't care how you got
2 there. If you will just tell me what the date you
3 are claiming.

4 MS. ENDEMANN: I believe the date,
5 because Columbus Day factors in as well, I believe
6 it goes to October 15.

7 MR. BOWEN: So it's either the 9th
8 or --

9 MS. ENDEMANN: And I have a calendar
10 here.

11 MR. BOWEN: It's either the 9th or
12 the 15th? Okay.

13 JUDGE DUKES: All right.

14 MS. ENDEMANN: Let me look real quick
15 and make sure I didn't tell you the wrong thing.
16 That's correct. It's the 15th because October 14th
17 is Columbus Day, a Federal legal holiday. And
18 September 2nd is Labor Day, a Federal legal holiday.
19 Okay?

20 MR. BOWEN: I'll stipulate to that.

21 MS. ENDEMANN: Okay.

22 JUDGE DUKES: All right. Now we are
23 getting somewhere. All right. Go ahead then,
24 please, if you would.

25 BY MS. ENDEMANN:

1 Q. Okay, Mr. Trumps. Looking at the
2 definition of effective date, it is as you say that
3 it is the last day a party signs the document.
4 Could you turn with me to the last page of the
5 contract and tell me what the effective date is?

6 A. The 19th.

7 Q. Okay. Very good. And this contract calls
8 for a due diligence period of 30 business days; is
9 that correct?

10 A. Correct.

11 Q. Okay. And looking at the definition of
12 business days, we've just had much discussion about
13 it, but how you calculate the time period and
14 when -- first of all, when do you start counting
15 business days? Do you start counting on the
16 effective date pursuant to this contract?

17 A. It's the first business day after the
18 effective date.

19 Q. Okay. Very good.

20 A. I guess the effective date is zero.

21 Q. Okay. Very good. And so in this contract
22 we would be talking about Tuesday the 20th of
23 August, 2013, as the first due diligence business
24 day?

25 A. Correct.

1 Q. Okay. Very good. I'm going to hand
2 you -- we'll show it to Bill first because I haven't
3 marked this as an exhibit. This is a calendar,
4 August through September, of 2013, that reflects
5 Federal legal holidays. I want to show it to Bill
6 and make sure he's in agreement with that.

7 MR. BOWEN: Which I probably will be.
8 Let me just look at it.

9 JUDGE DUKES: Is that one of the
10 exhibits?

11 MS. ENDEMANN: It's not, Your Honor.
12 I'm sorry.

13 JUDGE DUKES: That's all right. It
14 is what it is.

15 MR. BOWEN: Just give me a second.
16 I'm sure that is correct, but let me just verify.

17 MS. ENDEMANN: No problem.

18 MR. BOWEN: It's without objection.

19 MS. ENDEMANN: Okay. Very good. We
20 will mark this as Plaintiff's Exhibit 2.

21 (MARKED PLAINTIFF'S EXHIBIT NO. 2.)

22 MS. ENDEMANN: Thank you very much.

23 BY MS. ENDEMANN:

24 Q. Okay. Mr. Trumps, I see you have a pen
25 with you. Would you please circle the effective

1 date of the contract on the calendar.

2 A. (Witness complied.)

3 Q. Okay. And would you please then count 30
4 business days after the effective date.

5 A. Okay.

6 Q. And tell me which date that takes us to.

7 MR. BOWEN: Hold on. Is he circling
8 the 19th?

9 MS. ENDEMANN: Yes, sir.

10 THE WITNESS: If I counted right, and
11 I'm not the best, I believe that takes me to October
12 the 1st.

13 BY MS. ENDEMANN:

14 Q. Very good. That is my calculation as
15 well. So October the 1st would represent the end of
16 the due diligence period pursuant to this contract,
17 correct?

18 A. Correct.

19 Q. Okay. Very good. If you would turn with
20 me to Tab 1, Paragraph I believe it's 33?

21 A. Yes.

22 Q. And it says closing shall take place
23 within seven days of the end of the due diligence
24 period; is that correct?

25 A. Correct.

1 Q. Okay. Very good. Can you calculate then
2 seven days after the end of the due diligence
3 period?

4 A. I believe that would take us to the 10th.

5 Q. Okay. And we've discussed this a little
6 bit before your testimony, but if you would look at
7 Paragraph 4, please.

8 A. Yes.

9 Q. Okay. And does this paragraph allow for
10 an automatic extension of five business days for an
11 unsatisfied contingency?

12 A. Yes.

13 Q. And in your experience with this form of
14 contract in your experience as a Realtor who uses
15 this form of contract, what is a typical contingency
16 that might come up that would allow for this
17 automatic extension of five business days?

18 MR. BOWEN: Object. The contract
19 speaks for itself, but you can go ahead and answer.

20 JUDGE DUKES: Well, what are your --
21 happy to hear it.

22 MS. ENDEMANN: I mean, Judge,
23 essentially custom and usage in the industry as per
24 this form I think is relevant to help your
25 interpretation of when a -- when this provision

1 kicks in.

2 JUDGE DUKES: I mean, the contract
3 sort of speaks for itself. I mean, I'm happy to
4 hear what the contingency was, if any, in this case.
5 I mean, as a fact witness I think he can testify,
6 but as to the legal meaning of this particular
7 paragraph I think Mr. Bowen is probably correct on
8 the law. So sustained, but, again, was there a
9 contingency? If so, what it was, I'm happy to hear.

10 MS. ENDEMANN: Okay. Your Honor.

11 BY MS. ENDEMANN:

12 Q. Matt, in your experience in other closings
13 where this provision has been invoked, what type of
14 contingencies have arisen?

15 MR. BOWEN: Again, I object. It
16 relates to this transaction only. What he may have
17 experienced in others is really not relevant. And I
18 apologize, Your Honor, because I don't object when
19 it's a non-jury matter because you can sift through
20 what -- but still my D.N.A. requires me to.

21 JUDGE DUKES: Yeah, you know, I think
22 he's right, I mean, unless within the contract it
23 has a list of what contingencies typically are.

24 MS. ENDEMANN: Okay.

25 JUDGE DUKES: I think that is

1 probably (inaudible).

2 MS. ENDEMANN: Okay.

3 BY MS. ENDEMANN:

4 Q. Are you aware of any issues --
5 contingencies that came up in this closing?

6 A. I was made aware by both attorneys and
7 paralegals that there were some -- what I was told
8 was that there were some manageable title issues
9 with regards to Hird Island's, I guess, standing
10 that needed to be dealt with.

11 MR. BOWEN: This is all hearsay, Your
12 Honor.

13 JUDGE DUKES: All right. And I think
14 we have a lawyer coming to testify as to all of that
15 anyway, don't we?

16 MS. ENDEMANN: We do, Your Honor, but
17 I would also say attorneys for either buyer, their
18 agents, I mean, it's essentially a representation of
19 one of the parties. And so admission by a party
20 opponent is not hearsay. But we can move on and Mr.
21 Rogers can handle that answer.

22 JUDGE DUKES: All right. Let's move
23 on then.

24 MS. ENDEMANN: Okay.

25 BY MS. ENDEMANN:

1 Q. So when you add on -- if you were to add
2 on the five-business-day extension to your
3 calculation, what date does that take us to?

4 A. I believe it takes us to the 18th.

5 Q. Of October?

6 A. Uh-huh.

7 Q. Okay. Thank you very much. And, Mr.
8 Trumps, just a couple other questions for you. If
9 you would turn with me to Exhibit or Tab 20 in
10 Exhibit 1.

11 A. Okay.

12 Q. Do you recognize this email?

13 A. Yes.

14 Q. Okay. And I'm looking at the first one in
15 the train which is your email to Mr. Fender; is that
16 correct?

17 A. Yes.

18 Q. Okay. And so this represents your present
19 sense impression of what was going on, correct?

20 A. Let me -- can I reread it?

21 Q. Absolutely. Take a look at it.

22 A. I believe that sums up my mind set at that
23 point in time.

24 Q. And as a witness and participant in this
25 transaction, was it your belief that October 7th was

1 the drop-dead date of this contract?

2 A. Was it my belief that October 7th was the
3 drop-dead? I believe that was the date that
4 everybody was working towards to close on.

5 Q. So -- go ahead.

6 A. But I don't know that it was theoretically
7 a drop-dead date.

8 Q. Had the contract -- well, I'll leave it at
9 that. October 7th was the date of the scheduled
10 closing where all parties were available, correct?

11 A. Correct.

12 Q. Okay. Look at Tab Number 20, please. Or
13 19, please. I'm sorry. Do you recognize this
14 email?

15 A. Yes.

16 Q. Okay. And this is an email from you to
17 Mr. Gilbert, the attorney for Hird and Mr. Sample --
18 or, I'm sorry, Mr. Fender, correct?

19 A. Correct.

20 Q. Okay. And why did you send this email?

21 A. You know, again, when these transactions
22 are all closings I'm often involved with paralegals
23 and the attorneys, whatever, if there are, you know,
24 issues as to how everybody can work together to
25 resolve those issues. So this was something that I

1 researched after being told that what I thought
2 needed to be done. And so I was asking Mr. Gilbert
3 if that was, in fact, something that would solve the
4 issues so that we can move to close.

5 Q. Very good. And the date of that email is?

6 A. October the 8th.

7 Q. And that is a day after the scheduled
8 closing, correct?

9 A. Yes.

10 Q. And you were still speaking with
11 Mr. Gilbert about resolving issues?

12 A. Yes.

13 MS. ENDEMANN: Very good. I think
14 that is all I have.

15 JUDGE DUKES: Mr. Bowen, anything?

16 MR. BOWEN: Yes.

17 CROSS EXAMINATION

18 BY MR. BOWEN:

19 Q. I just want to ask because I got confused,
20 you said the due diligence period in your opinion
21 ended on October 1st is what you testified --

22 A. Can I have my calendar?

23 Q. That is what you testified to a moment
24 ago.

25 A. Yeah, if that is what I said. Yeah.

1 Q. And in arriving at that date you
2 subtracted the Labor Day as a business day?

3 A. I did or I skipped Labor Day as a business
4 day.

5 Q. Okay. And you started counting on the
6 20th?

7 A. Yes, sir.

8 Q. I don't get the same -- so you knocked out
9 two days, but you took October 7th to October the
10 10th. Why wouldn't it have gone to October the 9th
11 if you just subtracted two days?

12 A. Wait. Are we on the 7 or are we on the
13 30?

14 Q. What I'm on is you said that the -- you
15 believe that the closing date should have been on
16 October the 10th?

17 A. Correct.

18 Q. And I'm saying if you subtract two days or
19 add two days to October the 7th doesn't that just
20 get you to the 9th?

21 A. I'm not following what the two days is.

22 Q. Well, because you took out Labor Day and
23 you started counting the day after the 19th.

24 A. Well, I started on the 20th which took me
25 to the 1st.

1 Q. Okay.

2 A. And then I added seven and then we added
3 five, correct? Skipping Columbus Day and Labor Day.

4 Q. Columbus Day didn't fall in that period.
5 Columbus Day is on the 12th, is it not?

6 A. No, not Columbus -- well, in the five days
7 that we were discussing that I was asked about.

8 Q. I'm trying to get to what you think should
9 have been the closing date.

10 A. The closing -- the closing date would have
11 been the 10th as the way I just calculated it.

12 Q. Okay. All right. Are you aware at any
13 time that cash was available in the purchaser's
14 attorney's account or elsewhere to close this
15 transaction?

16 A. Can you -- I didn't hear the very first
17 part of your question.

18 Q. I said do you know if at any time cash was
19 actually available --

20 A. I can't speak to that.

21 Q. All right. You don't know?

22 A. I don't know, no.

23 MR. BOWEN: Okay. I don't have any
24 questions. Thank you.

25 JUDGE DUKES: Anything else?

1 MS. ENDEMANN: Nothing further.

2 JUDGE DUKES: All right. Thank you
3 so much, sir.

4 THE WITNESS: Thank you.

5 JUDGE DUKES: Now, are we all in
6 agreement about maybe not what the terms of the
7 contract, but how many days there are for instance
8 in August and September and when the holidays are?
9 For instance, the effective date. Is it stipulated
10 the effective date is the 19th?

11 MS. ENDEMANN: Yes.

12 MR. BOWEN: Yes, sir.

13 JUDGE DUKES: Okay. All right. So
14 that would mean -- and let me -- is it stipulated
15 then the business days would begin counting on the
16 20th? And I'm talking the 20th of August, 2013.

17 MS. ENDEMANN: Yes, Judge.

18 JUDGE DUKES: Is that right?

19 MS. ENDEMANN: Let me -- Plaintiffs,
20 yes. -

21 JUDGE DUKES: Okay.

22 MR. BOWEN: I thought the 20th was
23 counted -- should be counted?

24 MS. ENDEMANN: I think that if you
25 start counting, that is --

1 JUDGE DUKES: I am. I begin counting
2 on the 20th.

3 MR. BOWEN: Okay. Okay.

4 MS. ENDEMANN: Yeah.

5 JUDGE DUKES: All right. So we
6 say -- because there seems to be some confusion,
7 20th, 21st, 22nd, 23rd is four days. What day is
8 Labor Day?

9 MS. ENDEMANN: The 2nd of September.

10 JUDGE DUKES: The 2nd of September.
11 All right. So then we go 26th, 27th, 28th, 29th,
12 30th of August. All right. We begin on the 3rd of
13 September because Labor Day is the 2nd. So we go
14 3rd, 4th, 5th, 6th. Then we go --

15 MR. BOWEN: Well, that is where a
16 point of disagreement is because we are saying that
17 Labor Day should not come out because of --

18 JUDGE DUKES: I understand. I'm
19 trying to get to where he got to because there seems
20 to be some disagreement.

21 MR. BOWEN: Okay. All right. Excuse
22 me.

23 JUDGE DUKES: I understand the nature
24 of the disagreement.

25 MR. BOWEN: Okay.

1 JUDGE DUKES: I'm just trying to make
2 sure the math is correct.

3 MR. BOWEN: Okay.

4 JUDGE DUKES: So then we've got 9th
5 10th, 11th, 12th, 13th. All right? Then we have
6 16, 17, 18, 19, 20. We have 23, 24, 25, 26, 27.
7 And then what are we up to now? So that is 28,
8 right? My phone is going away. We've got 30 and
9 then October 1st, 2nd, 3rd, 4th. And then we get
10 into that final week. So at that point we've got --
11 let's see. That would be 28. That would be 33 --
12 I'm sorry. 28 -- anyway. Probably shouldn't do
13 this on the record. We will probably calculate it,
14 but I think we can probably -- the nature of the
15 dispute is to begin with the Labor Day holiday. And
16 then the question on the contingency.

17 And the contingency issue would include
18 the Columbus Day holiday --

19 MS. ENDEMANN: Yes.

20 JUDGE DUKES: Is that right?

21 MS. ENDEMANN: I think that is right.

22 JUDGE DUKES: Okay.

23 MR. BOWEN: That's correct.

24 JUDGE DUKES: All right. I just
25 wanted to make sure we are all on the same page on

1 that thing. Call your next witness, please.

2 MS. ENDEMANN: Your Honor, at this
3 point I think I would like to publish some of the
4 testimony that was taken in depositions. And I
5 don't know that -- I've got the original depositions
6 here. I'm not sure how you would prefer to do it.

7 Bill has some of the designations. And I
8 think he was willing to just -- rather than have me
9 read it. It's really, Judge, however you would
10 prefer.

11 JUDGE DUKES: If we are talking about
12 a few paragraphs, I would prefer you read it.

13 MS. ENDEMANN: Okay.

14 JUDGE DUKES: If you have dozens and
15 dozens of pages, I would prefer to submit it, so --

16 MS. ENDEMANN: I think I maybe have
17 four or five from Mr. Gilbert's and maybe seven or
18 eight from Mr. Fender. They are not long.

19 JUDGE DUKES: All right. Then you
20 are permitted to open the sealed ones and hand them
21 up.

22 MS. ENDEMANN: Thank you, Judge.

23 MR. BOWEN: I guess let me ask you
24 this, suppose you just put Mr. Gilbert's entire
25 deposition in? And then you can call the Court's

1 attention to whatever pages you want to, but I mean
2 rather than just put specific things in --

3 MS. ENDEMANN: I think I would prefer
4 to just designate them. And then if you want to
5 counter designate just so that -- it's a little
6 cumbersome, but again I'll defer to the Court.

7 JUDGE DUKES: Why don't we do that.
8 If it's just a little bit she wants to read in, no
9 problem. If you want to then introduce the whole
10 thing, so be it. Again, Deborah looked at me like
11 there is some E-filing issue on putting one of these
12 in, and we'll figure it out. But anyway, so Derek
13 Gilbert's deposition has been unsealed. And we'll
14 hear a little bit on that one, I guess.

15 MS. ENDEMANN: Okay.

16 JUDGE DUKES: Or whichever one you
17 want to start with.

18 MR. BOWEN: How about if I just move
19 to have the entire deposition in and then she can
20 read what she wants to of it?

21 JUDGE DUKES: Suits me. It sounds
22 like sort of the same thing we are doing, but --

23 MR. BOWEN: I'm looking at the court
24 reporter to see if that is what she wants.

25 JUDGE DUKES: Well, let's -- Deborah,

1 will that work? Okay.

2 MS. ENDEMANN: Okay, Judge. In the
3 deposition of Derek C. Gilbert, attorney for
4 Mr. Fender and Mr. -- and Hird Island taken
5 August 16, 2016, Plaintiffs would like to designate
6 Pages 10, Line 17 to Page 11, Line 4.

7 This is pertinent to the issue at hand.
8 Let's look at the definition. Answer, that you
9 can -- that you can read as well as I can. It says
10 that business days shall not begin or end on a
11 Saturday, Sunday, or Federal legal holiday.

12 Okay. And so is it your understanding
13 then that business days, Federal legal holidays, are
14 not included under this definition as a business
15 day? Answer. That -- that would be my
16 understanding of what it says, yes. Okay. But I
17 think you read it -- that is what it says. Okay.

18 Page 12, Line 1, to Page 12, Line 10.
19 Okay. Fair enough. Is it customary in the industry
20 in South Carolina to obtain a certificate of tax
21 compliance if a piece of property is substantially
22 more than 50 percent of what an entity owns?

23 I believe that is done quite frequently.

24 Okay. So would you say it's customary in
25 South Carolina to provide that form? Answer. If

1 the buyer wants it, if the buyer asks for it, yes.

2 Pages 26, Line 14, to Page 27, Line 17.

3 Was there a time when you learned of the sale to
4 Inverness from Hird? Answer. Yes.

5 When did you learn of the sale? Answer.

6 It was after -- sometime after the 7th of October.
7 I don't exactly remember -- I don't remember exactly
8 when, but it was after.

9 Okay. Answer. The -- Question. Do you
10 know when that closing occurred? How many days
11 after? Answer. No.

12 Question. If I represent to you that it
13 was October 10th, three days after the scheduled
14 closing would that refresh your recollection?
15 Answer. No. I mean, I -- I did not -- I was not
16 involved in that transaction.

17 Question. Okay. How did you learn that
18 the property had been sold to Inverness? Answer. I
19 believe that I -- I don't recall specifically, but I
20 may have learned that fact from Matt Trumps.

21 Question. Okay. Answer. But I don't
22 know. Honestly, that is really speculation. And I
23 don't know that I can answer that.

24 Question. Okay. Answer. I'm just trying
25 to -- well, certainly I found out about it once the

1 lawsuit had been filed.

2 Pages 29, Lines 12, to Page 30, Line 17.

3 Okay, why did you ultimately not close that
4 transaction? Answer. Well, we were very busy
5 around that time. And it's not as though, you know,
6 I think that it's -- people outside the real estate
7 closing business, you know, you think of this person
8 as my client. And they are always my client, but I
9 think, for example, I've got a lot of clients that
10 sometimes use me and sometimes use other attorneys
11 so it's not unusual. It doesn't hurt my feelings
12 if, you know, some transactions I close for Sherwood
13 and other times he goes to other attorneys.

14 Okay. Do you know who closed the contract
15 between Hird and Inverness? Answer. I don't know,
16 but I believe it was Alysoun Eversole.

17 Question. Okay. So you wouldn't have
18 referred that business over to her? Answer. No.
19 No.

20 Question. Okay. Would you have had any
21 issue concerning the closing -- would you have had
22 any issue concerning closing that second transaction
23 between Hird and Inverness with your background in
24 the first contract with Lady Beaufort and Hird?
25 Answer. Well, I -- I mean it -- like I say, we were

1 busy. It sounds like they were wanting to close
2 fast. And -- and like I say, I have plenty else to
3 do. And it just -- in some ways, you know, I --
4 it -- in some ways it just didn't feel right closing
5 it so quickly after the other deal follow thorough.

6 MS. ENDEMANN: And that is all that I
7 would designate from Mr. Gilbert.

8 JUDGE DUKES: All right. Thank you
9 so much. Have you got a second?

10 MS. ENDEMANN: The deposition of
11 Mr. Fender, Your Honor.

12 JUDGE DUKES: Okay. Mr. Bowen, are
13 you going to want to put both of those in total in
14 as well; is that correct.

15 MR. BOWEN: I have no objection to
16 the portion that she read in regarding -- he said
17 what he said.

18 JUDGE DUKES: Okay. But just to make
19 sure, you had mentioned earlier -- I understand she
20 was going to publish some things. And then you
21 wanted to introduce in totality as exhibits both of
22 the depositions. Is that accurate with regard to
23 Mr. Fender as well?

24 MR. BOWEN: Well, having heard what
25 she's read, it makes no difference to me if the

1 whole does not go in. It's just whatever the court
2 reporter wants for her records.

3 JUDGE DUKES: All right. Well, she's
4 going to do whatever you would want to put in,
5 right? I mean, do you want the -- I'll tell you
6 what, why don't we do this. Let's publish, and then
7 you can at your -- whatever you would decide you can
8 put on the record. So --

9 MR. BOWEN: With respect to
10 Mr. Gilbert's, it suits me for just the portions
11 that she read to go in.

12 JUDGE DUKES: All right. So you are
13 not going to introduce in total the balance of --

14 MR. BOWEN: Correct.

15 JUDGE DUKES: -- the deposition?
16 Okay. All right. No problem. Go ahead please with
17 Mr. Fender's.

18 MS. ENDEMANN: Thank you, Your Honor.
19 This is from the deposition of Sherwood N. Fender
20 taken December 16, 2016, pages 11, Line 10, to
21 Page 12, Line 25. Okay. How did you ultimately
22 come to the purchase price with Lady Beaufort?

23 The market just -- answer. I -- no -- I
24 had gotten crosswise financially, personally. I
25 had -- I had some loans mainly with Jan Malinowski

1 at Palmetto State. And he -- he had a different
2 story, but I found him to be a horrible, horrible
3 dishonest person. And I wanted to get away from him
4 because I -- at any cost.

5 And so I had one piece of property that he
6 commenced foreclosure. And I did a deed in lieu.
7 And that is the building right up to here, on the
8 corner over here. And I knew what he was like. I
9 had a number of people wanting to collectively take
10 him to the regulatory authorities and to sue him.
11 We have not done that yet, but anyway that may still
12 be in the making as soon as we get all of these
13 other cloudy issues out of the way.

14 And I knew that Jan had one thing. He
15 wanted to get me crosswise. And I just was not
16 going to try to not let that happen.

17 Okay. So you were willing to -- you
18 were -- sorry. So you were trying to -- this is
19 kind of -- this is probably my horribly worded
20 question, first deposition, but okay.

21 So you were to selling to try to get out
22 from underneath Jan and whatever was going on?
23 Answer. Well, my whole situation. I needed to pay
24 taxes. I had -- I had -- I had this. Jan had it on
25 a mortgage on this property. When I say Jan I meant

1 Palmetto State. And it was already in arrears, so I
2 knew it was just a matter of time before he did what
3 I thought he would do.

4 And what made me even more concerned was
5 when I found out that he was making a loan on this
6 property. And my paranoia also spilled over to the
7 fact that I'm dealing with a bunch of Citadel boys,
8 I think Matt and Jimmy and Jan. I'm convinced had I
9 not sold it to somebody it would not have closed.
10 It didn't -- and maybe some paranoia there, but I
11 think Jan had a program whereby he was going -- he
12 was going to foreclose on it.

13 Pages 31, Line 11, to 32, Line 2. Okay.
14 And so that is the reason why this deal did not
15 close? Answer. Well, I thought it was stupid. And
16 it all played in with this thing. I thought to drag
17 out and get it in default so Jan could foreclose.
18 I'm just not really sure about what was going on,
19 but there was something very weird, something very
20 strange.

21 Question. So you had some suspicion about
22 the motivations of Mr. Kerr and Lady Beaufort?
23 Answer. No doubt about it. No doubt. Well, I
24 don't know that it was -- I'm not sure how much
25 Jimmy Kerr knew about what was going on. I think he

1 put in calls and he was just relying on him. Okay.
2 I give him the benefit. I've never found any reason
3 to think Jimmy did anything.

4 Page 32, Line 3, to Page 32, Line 5.

5 Okay. By the way, and Matt is probably right, too,
6 about he's entitled to a commission.

7 Page 34, Line 23, to 34, Line 8. Okay.

8 All right. And if you needed to sell this property
9 quickly, why weren't you willing to remedy some of
10 the issues that Mr. Rogers had? Answer. Because
11 remember the back door. Okay? Let me tell you the
12 back door. Okay. There is a gentleman by the name
13 of Robert Sample who I had met once or twice. He
14 approached me about buying this property up on the
15 corner here.

16 Page 38, Line 15 to Page 38, Line 18.

17 Okay. But there was no real estate commission with
18 Mr. Sample's deal, was there? No, it was a
19 discounted price, so there is not much difference.
20 And the purchase price with Mr. Kerr and Lady
21 Beaufort was 260, correct? I think that is correct,
22 yes. Okay. And there was no real estate commission
23 paid as a result of the closing with Mr. Sample?
24 That's correct. Okay. And you were required to pay
25 a commission of five percent of the 260 to Tideland

1 Realty, correct? Yeah. He had produced a willing
2 buyer.

3 Pages 35, Line 5, to 36, Line 7. There is
4 a gentleman by the name of Robert Sample who I had
5 met once or twice. He approached me about buying
6 this property. When -- okay. When did he approach
7 you to your recollection? Oh, months and months and
8 months before this. Before this contract? Right,
9 before this. All right. He was in the process of
10 buying what we call the Rod and Gun Club property,
11 one of the nicest pieces of property left in
12 Beaufort County. Ain't but one way to get there and
13 that is to come in our roads and cross that lot.
14 And he knew that. And I -- I had bought that -- I
15 kept the land for that reason.

16 Page 51, Line 22 to Page 52, Line 8.
17 Okay. All right. Okay. And so in the two-day
18 period, the 8th or 9th, before you close with
19 Mr. Sample but after the failed closing with Lady
20 Beaufort, you had to sell this additional tract at a
21 reduced price in order to pay debts? That's
22 correct. Okay. And keep in mind those are
23 together. The only reason I would take a reduced
24 price on that is because I have the other sale. And
25 even though it was reduced, it produced X number of

1 dollars, and that was my focus.

2 47, Line 25 to 49, Line 8. Okay. So the
3 purchase price with Mr. Sample was 245? That's
4 correct. Okay. Was the mortgage with
5 Mr. Malinowski more than 245 or less? I think it
6 was a little less than that. A little less. Okay.
7 So why would you need -- if this transaction would
8 cover that debt, why would you need to fire sale
9 another property in order to make the deal with Jan
10 work if he was getting his money from the sale with
11 Sample? Because I'm trying to pay off other debts.

12 Okay. All right. And so in the span of
13 the three days, in two or three days in which Lady
14 Beaufort -- the Lady Beaufort sale did not go
15 through and the Sample -- the deed to Sample was
16 already transferred. On the 10th, right. So on the
17 8th or 9th of October you were required to pay
18 additional debts to someone? Oh, no. They were due
19 way before that. I was in arrears with the I.R.S.,
20 already in arrears with Jan. It was a matter of
21 time I figure with days before Jan and the moment he
22 filed that foreclosure you could add another 5, 10,
23 15 percent.

24 Okay. So did you pay off any debts on the
25 8th or 9th? As a result of these sales I got caught

1 up on all of it.

2 And that is all, Your Honor.

3 JUDGE DUKES: All right. Thank you.

4 Mr. Bowen, anything?

5 MR. BOWEN: No, sir. And I don't
6 object to just the portions going in. No need to
7 put the entire one in.

8 JUDGE DUKES: All right.

9 MR. BOWEN: The entire deposition.

10 JUDGE DUKES: Deborah, you held your
11 hand up. Do you have a concern?

12 COURT REPORTER: Ms. Endemann just
13 pushed these -- the entire transcripts up here,
14 but --

15 MS. ENDEMANN: Do you want me to pull
16 the portion?

17 COURT REPORTER: I understand that
18 you just want the portions in?

19 MR. BOWEN: Yes.

20 COURT REPORTER: Or she has read the
21 portions? I'm not understanding.

22 JUDGE DUKES: Yeah. I mean, just the
23 portions are now on the record. We don't
24 necessarily have to do anything. You can submit
25 those if you want, however you would like to do it,

1 but I think we've got what we need on the record.

2 MS. ENDEMANN: Okay. Very good.

3 JUDGE DUKES: All right. Call your
4 next witness then, please.

5 MS. ENDEMANN: Okay. I would like to
6 call Mr. Carl Rogers who I believe is in the hallway
7 here. If I could just run and grab him.

8 JUDGE DUKES: All right. Do we need
9 a five-minute break before he starts?

10 MS. ENDEMANN: I would appreciate
11 that, Judge. Thank you.

12 JUDGE DUKES: All right. Let's do
13 that.

14 (Off the Record 11:49-11:54)

15 JUDGE DUKES: Back on the record in
16 14-0052. Call your next witness, please.

17 MS. ENDEMANN: I'd like to call
18 Mr. Carl Rogers.

19 JUDGE DUKES: All right. Can I get
20 you to hold your -- do you swear or affirm to tell
21 the truth, the whole truth, and nothing but the
22 truth so help you God?

23 MR. ROGERS: I do.

24 JUDGE DUKES: Please state your full
25 name for the record.

1 MR. ROGERS: Dargan, D-a-r-g-a-n,
2 Carlyle, C-a-r-l-y-l-e, Rogers, R-o-g-e-r-s, Junior.

3 WHEREUPON:

4 CARL ROGERS, being duly sworn and
5 cautioned to speak the truth, the whole truth and
6 nothing but the truth, testifies as follows:

7 DIRECT EXAMINATION

8 BY MS. ENDEMANN:

9 Q. Hello, Mr. Rogers.

10 A. Hello.

11 Q. Would you please tell the Court a little
12 bit about yourself. Are you married?

13 A. Yes.

14 Q. Children?

15 A. Yes. I have one child, a son, who is 23
16 going on 12.

17 Q. And tell me a little bit about your
18 education.

19 A. I was educated in Charleston, Middleton
20 High School. Undergraduate degree University of
21 South Carolina. And then a law degree from the
22 University of South Carolina.

23 Q. Very good. And when were you admitted to
24 the bar?

25 A. November of '86. I think November 14th.

1 That should be a date that stands out in my mind so
2 hopefully I got it right.

3 Q. And has your career always been focused on
4 the real estate industry?

5 A. Yes. And notice we say focused and not
6 specialized because you can't specialize in real
7 estate in South Carolina.

8 Q. And tell me about your commercial real
9 estate experience.

10 A. I have been engaged in commercial real
11 estate ever since Day One, basically. I started out
12 doing a mix of residential and commercial and still
13 do to this day, but I've always stayed in the
14 commercial arena. And commercial real estate is
15 more of my practice these days than residential.

16 Q. Okay. And tell me about your professional
17 relationship with Mr. Kerr.

18 A. Mr. Kerr is obviously a client of mine
19 through Lady Beaufort, LLC. And I also represent
20 him through various other LLCs.

21 Q. Very good. And you represented Lady
22 Beaufort, the buyer, in the transaction with Hird
23 Island; is that correct?

24 A. Yes.

25 Q. Okay. And what in your estimation is your

1 responsibility as a buyer's attorney?

2 A. Well, we examine title and coordinate the
3 preparation of certain closing documents. The
4 practice can vary a little, you know, from
5 jurisdiction to jurisdiction. Normally I would not
6 prepare the seller's deed. Oftentimes the seller's
7 deed and the typical documents that are required
8 from a seller are prepared by his or her attorney.
9 We prepare the closing statement and the various
10 affidavits and documents that are part of the
11 transaction.

12 Q. Very good. Would you walk me through your
13 procedures in a typical commercial real estate
14 closing?

15 A. Starting when?

16 Q. Starting when the contract comes in.

17 A. The contract comes in. And then we will
18 do a pre-closing title search that we would then
19 follow up with a final title search once the
20 documents have been signed and delivered to update
21 title right before recording. We would also check
22 to see what the status is of the seller if, in fact,
23 it is not an individual or a proprietorship,
24 basically if it's a corporation, a limited liability
25 company, things of that nature.

1 Q. Why is checking the status of the seller
2 entity important?

3 A. Well, because you don't know who is in
4 charge of that entity. You don't know why -- if, in
5 fact, it's not in existence what were the terms of
6 it not being in existence. There are just -- it can
7 lead to a number of questions. And so it's always
8 been required that the seller -- that you confirm
9 that they are in good standing in the state that
10 they were formed in and in the state where they are
11 selling the property.

12 Q. Very good. And this closing was no
13 exception. You followed the procedures that you
14 just discussed?

15 A. Right.

16 Q. Okay. Is it unusual for an issue to pop
17 up at closing?

18 A. No. You know, that is just the nature of
19 the real estate transaction world. It seems like
20 there are, you know, always issues or questions that
21 will come up.

22 Q. As part of your representation I think you
23 talked about title insurance. Are you a title
24 insurance agent?

25 A. Yes.

1 Q. Okay. For which company?

2 A. First American Title Insurance Company.

3 Q. Okay. And as the agent for the title
4 insurance company, do you have sole discretion to
5 issue the policy?

6 A. No. No.

7 Q. Okay.

8 A. We can issue policy based upon, you know,
9 a standard transaction and complying with the
10 typical conditions. If there is an issue with title
11 or a question, I then need to contact my state
12 office, and there are underwriters there.

13 Q. Okay. Very good. Let's look if you would
14 at the notebook in front of you, Tab 1, please.
15 Okay. Do you recognize this document?

16 A. Yeah. It appears to be the signed
17 contract between Hird Island Investments, Inc., as
18 the seller, and Lady Beaufort, LLC, as the buyer.

19 Q. Okay. Very good. When you were going
20 through your regular closing procedures after you
21 received this contract, did any issues arise?

22 A. Yes. We contacted the South Carolina
23 Secretary of State's Office regarding Hird Island
24 Investments, Inc., and saw where they were qualified
25 to do business in South Carolina, but that they were

1 a Georgia corporation.

2 So we then contacted the Georgia Secretary
3 of State to confirm that the corporation was in
4 existence in good standing. And we couldn't get --
5 I think there were several phone calls that were
6 made and, also, an online inquiry. And they would
7 not release information to me -- well, let me back
8 up.

9 We found that Hird Island Investments
10 had -- basically was in forfeiture. And they -- so
11 we then called back, again, and said, you know, why,
12 what needs to be done. And they said, we can't
13 discuss this with you. And, you know, I understand
14 the procedure can vary from state to state. And
15 I've been through this in South Carolina, and they
16 would do the same thing in South Carolina.

17 So they said that the authorized party
18 from that corporation would have to contact them to
19 inquire as to what would need to be done to
20 reinstate the corporation. And so after that, I --
21 I believe I got Mr. Sherwood Fender's phone number
22 from Matt Trumps, the broker, and I called him about
23 it.

24 And told him that, you know, we had found
25 this and that, you know, it was an issue that we

1 needed to deal with.

2 Q. And what was Mr. Fender's response?

3 A. He was very frustrated with me and said, I
4 don't know why you needed to contact Georgia. You
5 know, we are here in South Carolina. And I told
6 him, well, we needed to deal with this as part of
7 the closing. And he hung up the phone on me.

8 Q. Okay. If you would turn with me to Tab
9 Number 3, please. And is this the Georgia Secretary
10 of State dissolution you were just speaking about?

11 A. Yes.

12 Q. Okay. And those are your handwritten
13 notes at the bottom?

14 A. Yes.

15 Q. Okay.

16 A. And I would have printed this out from the
17 online search.

18 Q. Okay. And turn with me to the second
19 page.

20 A. Okay.

21 Q. And this is a printout from the South
22 Carolina Secretary of State's Office?

23 A. Yes.

24 Q. Okay. And it shows that Hird Island was
25 granted authority to do business in the State of

1 South Carolina in November of 2000; is that correct?

2 A. Yes, according to this.

3 Q. Is there a difference between authority to
4 do business and being domesticated in South
5 Carolina?

6 A. Well, I mean, it's kind of like the
7 pronunciation of tomato, tomato. I mean, you are
8 a -- I always considered that you are domesticated
9 in South Carolina means that you are formed in South
10 Carolina.

11 Q. Okay.

12 A. Okay? And if you are qualified to do
13 business in South Carolina that means that you were
14 formed in another jurisdiction and you've then
15 qualified to do business in South Carolina.

16 Q. Okay. And so why was the issue with the
17 seller's dissolution of Georgia an important
18 consideration in this closing?

19 A. Because that is the proper procedure
20 for -- that we are instructed by my title insurance
21 company to follow to determine what the status is of
22 the corporation.

23 Q. Okay. And you said that you had spoken
24 directly with Mr. Fender. Was his attorney,
25 Mr. Gilbert, involved at that point?

1 A. No. As I recall Mr. Gilbert became
2 involved shortly thereafter.

3 Q. Okay.

4 A. I can't give you the exact time, but I had
5 never been contacted by Mr. Gilbert and, you know,
6 it was my understanding that Mr. Fender was a real
7 estate lawyer in Beaufort County.

8 Q. Okay. After receiving Mr. Fender's
9 response to your inquiry, were you -- did you
10 believe that when Mr. Gilbert became involved you
11 might receive a different response?

12 A. Yes. When Mr. Gilbert became involved I
13 explained to him that -- well, explained to him my
14 findings and indicated I'm not a Georgia lawyer.
15 I'm not licensed to practice in Georgia, so I don't
16 know what is required in Georgia and what would need
17 to be done in this situation.

18 And as I recall Mr. Gilbert, you know,
19 contacted his title insurance company, Chicago
20 title --

21 MR. BOWEN: Hearsay.

22 JUDGE DUKES: Exception to that?

23 MS. ENDEMANN: Again, Judge, he is
24 the attorney representing the buyer. First it goes
25 to notice and state of mind -- present state of mind

1 of the parties, but also I think it's attributable
2 as a statement by a party opponent.

3 JUDGE DUKES: I'm not so sure about
4 that one, but the question was what Mr. Gilbert had
5 said in the context of attempting to close this
6 transaction. Is that where we are?

7 MS. ENDEMANN: I think that is
8 correct, Your Honor. And we've already agreed to
9 Mr. Gilbert's deposition testimony and all of the
10 email correspondence between all of these parties,
11 including Mr. Gilbert. So I'm a little taken aback
12 by the objection here.

13 JUDGE DUKES: Well, that is true, Mr.
14 Bowen. You all have already introduced e-mails
15 a plenty including all of these things --

16 MR. BOWEN: Well, if it's contained
17 in the email that is fine.

18 THE WITNESS: I believe that there is
19 an email somewhere.

20 MR. BOWEN: It is contained -- do you
21 have the email?

22 BY MS. ENDEMANN:

23 Q. Okay. Mr. Rogers, turn with me to Tab 4,
24 please.

25 A. Okay.

1 MR. BOWEN: I admitted that. That is
2 a communication with Mr. Rogers to Mr. Gilbert, but
3 it doesn't have anything to say what Mr. Gilbert had
4 to say.

5 MS. ENDEMANN: Okay. I mean, Bill,
6 you admitted Exhibit 12 which is --

7 MR. BOWEN: Show me. My memory is
8 not that good. And, again, this is from Carl Rogers
9 saying what Gilbert said.

10 MS. ENDEMANN: What Mr. Gilbert said,
11 and that is essentially what we are doing here now
12 so I'm a little just surprised by the objection.

13 MR. BOWEN: Well, it doesn't -- that
14 does not address the specific question that you
15 asked him.

16 JUDGE DUKES: Well, why don't we do
17 this. What was the question again? The question
18 was -- please restate. And I apologize for having
19 you do that. You don't have to get it exactly the
20 same, but I'm just trying to remember what the
21 question was.

22 MS. ENDEMANN: Honestly, Judge, so am
23 I. And I don't even know that it was a question
24 that he was objecting to. Rather I think he was
25 objecting to an answer that was given.

1 JUDGE DUKES: No. No. I understand.
2 But I was just trying to first set it up with the
3 question so I could -- the question had something to
4 do with something Mr. Gilbert said.

5 MS. ENDEMANN: Uh-huh. I think it
6 was when did Mr. Gilbert enter into this transaction
7 since he had had a personal discussion with
8 Mr. Fender directly who would be the client of Mr.
9 Gilbert.

10 JUDGE DUKES: That would just be a
11 date, and I'm not sure if that necessarily would be
12 objectionable. It seemed like it was maybe more
13 than that, but that's all right. Proceed on and we
14 will -- it will come back up if it comes back up.

15 MS. ENDEMANN: Okay. Very good.

16 BY MS. ENDEMANN:

17 Q. Okay. Looking back at Tab Number 4, Mr.
18 Rogers. This is an email that you sent to Mr.
19 Gilbert. And it begins with saying, per our
20 conversation this past Friday afternoon and earlier
21 today. And so is it fair to say this email
22 memorializes conversations that you had had with Mr.
23 Gilbert about the issues that came up at the
24 closing?

25 A. Yes.

1 Q. Okay?

2 JUDGE DUKES: Is there an objection
3 or --

4 MR. BOWEN: The problem that I have
5 with that is it says what it says. It says the
6 seller needs to. This is Mr. Rogers saying the
7 seller needs to. That is not Mr. Gilbert saying
8 that he needs to. He is telling Mr. Gilbert this is
9 what needs to be done from the purchaser's
10 standpoint. And it says what it says.

11 MS. ENDEMANN: I don't --

12 JUDGE DUKES: The question so far is
13 does this memorialize the conversation. So I'm
14 going to let him proceed on and then we will take it
15 up.

16 MR. BOWEN: Okay.

17 JUDGE DUKES: So far I don't think
18 the question has been asked what did he say back to
19 you or anything, but anyway. So you can answer. I
20 think you probably already answered, but proceed on,
21 please.

22 MS. ENDEMANN: Okay.

23 BY MS. ENDEMANN:

24 Q. So this email memorializes previous
25 discussions with Mr. Gilbert. And in this email you

1 are sending various closing documents that need to
2 be signed as a result of this issue that has come
3 up, correct?

4 MR. BOWEN: I don't see any
5 enclosures in there.

6 JUDGE DUKES: It's under Attachments.
7 It's got P.D.F. right there.

8 MS. ENDEMANN: And it says --

9 MR. BOWEN: See, I don't understand
10 all of that stuff.

11 MS. ENDEMANN: -- additional closing
12 documents are attached hereto along with the
13 proposed closing statement.

14 THE WITNESS: Yeah. It does refer to
15 the attachments.

16 MR. BOWEN: I beg your pardon. I
17 stand corrected.

18 THE WITNESS: And it may be that --

19 MR. BOWEN: I stand corrected.

20 THE WITNESS: -- not necessarily
21 additional -- well, let's see. There may have been,
22 yeah, some additional documents included as
23 indicated in the email.

24 BY MS. ENDEMANN:

25 Q. Okay. Very good. And if you would turn

1 with me to Tab 5, please. Is this document one of
2 those additional documents that would have been
3 required as a result of the issue that came up with
4 the dissolution of this other corporation?

5 A. Yeah. This document appears to be my
6 rewrite of the seller resolutions that were
7 initially sent to me by Mr. Gilbert's office. And
8 if you will notice in the whereas clauses it makes
9 reference to the fact that the corporation had been
10 administratively dissolved, but is still authorized
11 to do business in South Carolina. And that, you
12 know, this sale is in connection with the winding up
13 of its affairs following that dissolution.

14 And where this language came from is, you
15 know, again, I'm not a Georgia lawyer. So I -- and
16 this was an unusual situation. So I had to go back
17 to my title insurance company and I had asked Mr.
18 Gilbert to go to his title insurance company to find
19 out what they would require. And after talking to
20 the underwriter at First American it was agreed
21 that --

22 MR. BOWEN: Hearsay.

23 JUDGE DUKES: He's going to --

24 THE WITNESS: I was instructed to
25 handle it in the following manner. That we weren't

1 going to require them to reinstate the corporation
2 in Georgia. That this could be characterized as
3 liquidating its affairs, winding up its business
4 and, you know, have him confirm the usual things.
5 He's the sole shareholder, director, et cetera.

6 So in my mind that resolved, you know,
7 Issue Number 1.

8 BY MS. ENDEMANN:

9 Q. Okay. And so this document was initially
10 drafted by Mr. Gilbert. And I'll note for the
11 record that it's Bates numbered out of Mr. Gilbert's
12 file GLF 000008 through 0009; is that correct?

13 A. Yes.

14 Q. Okay. And so it was revised in the manner
15 that you just discussed?

16 A. Yes.

17 Q. And that revision would satisfy the title
18 insurance company's issue with regard to the seller
19 entity dissolution?

20 A. Yes.

21 Q. Okay. And this email would or this
22 document was presented to Mr. Fender and Mr. Gilbert
23 with your revisions?

24 A. It was presented to Mr. Gilbert as
25 attorney for the seller. You know, it was his

1 responsibility to present to his client.

2 Q. Very good. And you said that this would
3 have taken care of Issue Number 1. Was there
4 another issue?

5 A. Yeah. I found out I believe in the
6 previous phone call that is referred to in the email
7 that is -- I believe was Exhibit 4.

8 Q. Okay.

9 A. That Hird Island -- that basically the
10 inquiry was did this constitute more than a majority
11 of its assets? And the reason why is we'd been
12 given a directive by our title insurance company
13 that there is a statute on the books that the South
14 Carolina Department of Revenue, I sometimes call
15 them the Tax Commission, was enforcing against real
16 estate transactions now. And it was originally
17 written to apply to business assets. And the
18 interpretation had been in recent years to make sure
19 that, you know, people were current in their tax
20 payments. And basically the statute indicates --
21 can I -- I have a copy of the statute with me. Can
22 I refer to it?

23 JUDGE DUKES: Sure. No objection I
24 assume?

25 MR. BOWEN: The statute is certainly

1 what it says. I'm concerned a little bit about the
2 directive and firsthand, but I'll cover that later.

3 THE WITNESS: It's South Carolina
4 Code Section 12-54-124. And basically it indicates
5 that in the case of the transfer of a majority of
6 the assets of a business other than cash whether
7 through sale, gift, device, inheritance, et cetera,
8 lease or otherwise. Any tax generated by the
9 business which was due on or before the date of any
10 part of the transfer constitutes a lien against the
11 assets in the hands of a purchaser. Okay?

12 And the second paragraph of this indicates
13 that this section does not apply if the purchaser
14 receives a certificate of compliance from the
15 department stating that all tax returns have been
16 filed and all taxes generated by the business have
17 been paid. The certificate of compliance is valid
18 if it is obtained no more than 30 days before the
19 sale or transfer.

20 So I indicated to Mr. Gilbert that if, in
21 fact, this was more than a majority of the assets of
22 the seller, that the seller either needed to obtain
23 that certificate of tax compliance or, if it could
24 qualify, sign an affidavit indicating that it wasn't
25 a majority of the assets or it wasn't a business

1 asset, you know, and there was a form affidavit that
2 we have that is based upon our instructions from the
3 title insurance company.

4 So that was Problem Number 2. And the
5 problem is if, in fact, we were to close, we meaning
6 Lady Beaufort, on this purchase and didn't follow
7 these steps and the Department of Revenue was to
8 file a tax lien against Hird Island post-closing,
9 that that would be a lien against the property that
10 the buyer would be required to pay.

11 Okay? Which would be, you know, a lien or
12 encumbrance on the property which is contrary to
13 good and marketable title. You know, the analogy
14 here is, for example, mechanic's liens. You know,
15 if somebody has done work on the property or
16 supplied materials then, you know, it can create an
17 issue post-closing for the buyer even though they
18 didn't authorize those.

19 So, you know, there is an affidavit -- a
20 separate affidavit that is signed to cover that
21 issue. And, you know, that is the analogy that I
22 use with this is it's much like that. It's a risk
23 that the buyer is not required to take, that that
24 lien would be against the property.

25 And even though we didn't know it at the

1 time because we hadn't updated or title for purposes
2 of recording and disbursement, there was already a
3 tax lien that had been filed against this seller in
4 Beaufort County. So if we had gone to the point
5 where the seller delivered the deed and delivered
6 the documents as required by the contract, we would
7 have then updated title and discovered that there
8 would have been -- there was a tax lien there. And
9 we would have had to stop the transaction.

10 BY MS. ENDEMANN:

11 Q. Turn with me, Mr. Rogers, to Tab 18.

12 A. Okay.

13 Q. Is this a copy of the tax lien that you
14 were just referring to?

15 A. Yes. It was -- according to the stamp put
16 on it by the Beaufort Registrar of Deeds Office it
17 was filed on September 27th of 2013. And that was
18 after we had done our initial title search or the
19 effective date of it.

20 Q. Was this tax lien disclosed to you by Mr.
21 Gilbert?

22 A. No.

23 Q. Was it disclosed to you by Mr. Fender?

24 A. No.

25 Q. Okay. And so if everything had gone to

1 plan and the documents had been transferred and
2 then, like you said, you updated title and found
3 this lien would you have been able to close on
4 October 7th?

5 A. No.

6 Q. Mr. Rogers, if you would turn with me to
7 Tab 10, please. Do you know recognize this email?

8 A. Yes.

9 Q. Okay. And I'm going to direct your
10 attention specifically to the email, the first in
11 the string, from yourself to Mr. Kerr.

12 MR. BOWEN: Which is this, please?

13 MS. ENDEMANN: 10.

14 BY MS. ENDEMANN:

15 Q. And does this appear to be a
16 memorialization of a call, again, with Mr. Gilbert?

17 A. Yes.

18 Q. Okay. And there seems to be a discussion
19 about Chicago Title writing to cover the title
20 insurance for this property; is that correct?

21 A. Yes. You know, I've been doing this a
22 long time. At this point 30 years, so subtract a
23 few at this time. And so, you know, I've always
24 taken the position that if my title insurance
25 company can't or won't insure title to the property

1 then there is always the possibility that somebody
2 else's title insurance company would be willing,
3 that they may see it differently.

4 And so I made the offer that find out if
5 Chicago Title will go ahead and issue the title
6 insurance, an owner's policy and a lender's policy
7 in this situation, same cost. You know, if that
8 gets it done -- I'm just trying to look -- you know,
9 to find a way to get the transaction closed and
10 closed where my client has title insurance coverage.

11 Q. Very good. And so you've discussed
12 several alternatives then that you've provided to
13 Mr. Fender and Hird Island; is that correct?

14 A. Yeah. I mean, you know, we continued
15 to -- we. I continued to have conversations with
16 Mr. Gilbert beyond, you know, this infamous
17 October 7th that they claim is the deadline.

18 And I believe that those conversations
19 continued all the way until October 10th, at least,
20 in trying to figure out a way to get this done. So
21 I had said to him, as memorialized in that email,
22 why don't you see if Chicago Title will insure this.

23 And if Chicago Title will insure this for,
24 you know, the same rate and amount and not take
25 exception to these issues that we've talked about,

1 you know, we will look at having them write the
2 title insurance.

3 Q. And so the first issue, the first
4 resolution you proposed was have the dissolution
5 taken care of in the State of Georgia, correct?

6 A. Yeah.

7 Q. And that didn't seem like the seller was
8 willing to do that?

9 A. Right. Yeah, he wasn't. And then so we
10 came back and after talking to our respective title
11 insurance companies we came back and said, okay,
12 based on the input we've received -- I've received
13 and Mr. Gilbert had received that they can treat it
14 as the sale of a property in connection with winding
15 up its affairs.

16 Q. And so the second alternative proposed
17 would be the document that we discussed as Tab 5,
18 unanimous written consent of the shareholder and
19 sole director of Hird with the additional language
20 that you had added in --

21 A. Right.

22 Q. -- because this document was actually
23 drafted by the seller's attorney?

24 A. No, this document was not drafted by the
25 seller's attorney. This is a new version of

1 unanimous written consent resolutions of the seller
2 that I put together based --

3 Q. Well, this is the initial document with
4 your revisions that you added?

5 A. This is my revised version of their
6 initial document basically, yeah.

7 Q. Okay. Very good. Very good. And so the
8 third resolution you proposed was providing the
9 certificate of tax compliance?

10 A. Well, that is a separate--

11 Q. Okay. So -- I'm sorry. The third
12 resolution you proposed was some sort of affidavit
13 of indemnity or does that go with the tax
14 compliance? That is another alternative for that?

15 A. That is another alternative on the tax
16 compliance.

17 Q. Okay.

18 A. We were not requiring Mr. Fender to sign
19 personally initially, you know. That was a possible
20 solution to the fact that he didn't have a
21 certificate of tax compliance and he wasn't willing
22 to go with the first alternative of providing an
23 affidavit that would exempt the seller from that
24 compliance. So then we -- you know, I kept going
25 back trying to find a solution to make this thing

1 work.

2 Q. And yet another alternative was proposed
3 to have Chicago Title if they would do it --

4 A. Right.

5 Q. -- cover the transaction?

6 A. Right.

7 Q. Okay. And did you ever receive
8 confirmation that Chicago Title would write a title
9 policy for this transaction?

10 A. No.

11 Q. Okay. In this email -- we might get an
12 objection here, but you are writing to Mr. Kerr
13 memorializing this conversation with Mr. Gilbert.
14 And you say, he responded with skepticism that
15 Chicago Title would require any less than what we
16 presented to Mr. Fender yesterday. Is that an
17 accurate summation?

18 A. That's correct.. That is an accurate
19 summation memorializing that conversation.

20 Q. Very good. And Mr. Rogers, if you would
21 look at Tab 11, please. Do you recognize this
22 email?

23 A. Yes. This is an email from me to Derek
24 Gilbert on October 9th.

25 Q. And it appears clear from this email that

1 you have not received that confirmation as you just
2 recall that you did not about Chicago Title writing
3 coverage, correct?

4 A. Right. Right.

5 Q. Okay. And then it appears here that you
6 also are listing once again and reiterating the
7 various different alternatives proposed to resolve
8 the issues that came up with the closing, correct?

9 A. Right. That's correct.

10 Q. Okay. It also even looks like you attach
11 to this the proposed form to request certificate of
12 tax compliance and provide that to the seller; is
13 that correct?

14 A. Yeah. I was trying to again make it as
15 easy and quick as possible to get this thing
16 resolved. You know, if, in fact, everything was
17 current all you have to do is send in that form and
18 a \$60 check and, you know, they would turn it around
19 and give us a response.

20 Q. Except for with a tax lien of record,
21 would they have been able to send this form?

22 A. No, but I had no knowledge of the tax lien
23 of record at that point.

24 Q. Right. Right. And you were never told by
25 the seller --

1 A. Never.

2 Q. -- the existence of the lien?

3 A. Never. And it's my understanding that
4 when those tax liens are mailed out to the County
5 for recording that a copy goes to the taxpayer.

6 Q. Very good. Okay. If you would turn with
7 me to Tab 12.

8 A. Okay.

9 Q. Okay. This again appears to be an email
10 from you memorializing a conversation with Mr.
11 Gilbert?

12 A. Correct.

13 Q. And it says that Mr. Gilbert is going to
14 call Mr. Fender again in the morning. This email is
15 dated what?

16 A. It's dated Thursday, October 10th.

17 Q. And at 5:08 p.m., correct?

18 A. Correct.

19 Q. Okay. And so this suggests that Mr.
20 Gilbert is going to call Mr. Fender again on the
21 11th of October, correct?

22 A. Well, he may have been going to call him
23 that night.

24 Q. Okay.

25 A. I don't know.

1 Q. Yeah. And you have -- it says, he's going
2 to call Mr. Fender again in the morning and try to
3 talk some sense into him?

4 A. Yes.

5 Q. Okay. Very good. And turn with me now to
6 Tab 13, please.

7 A. Okay.

8 Q. Okay. Do you recognize this document?

9 A. This is the deed from Hird Island
10 Investments, Inc., the seller in my transaction to
11 Inverness, LLC, conveying the subject property to
12 Inverness, LLC. And the deed is dated October 10th,
13 2013. And it was recorded according to the notation
14 at the top on Page 1 on October 10, 2013, at
15 4:48:04 p.m.

16 Q. Okay. Very good. And did you ever see a
17 copy of this deed?

18 A. No. I wasn't even aware of this deed. I
19 was, you know, still talking to Mr. Gilbert until
20 Matt Trumps sent me an email. Apparently he had
21 found out about it. And, you know, at this juncture
22 we had no reason to check the title, you know. I
23 was still in conversations with the seller's
24 attorney.

25 Q. Very good. And it seems as you just read

1 this deed was recorded at 4:48 p.m. on October 10th,
2 correct?

3 A. Correct.

4 Q. Okay. And the email memorializing the
5 conversation with Mr. Gilbert is October 10th at
6 5:08 p.m., correct?

7 A. Correct.

8 Q. And the email that suggests Mr. Gilbert
9 would still be talking about resolving these issues
10 on the 11th of October, correct?

11 A. Correct.

12 Q. Okay. Would you please turn to Tab 14.
13 Do you recognize this document?

14 A. Yes. This is a letter from me dated
15 October 14th of 2013, to Hird Island Investments,
16 Inc., attention Sherwood N. Fender, president. And
17 this is my letter to Mr. Fender indicating that, you
18 know, we had found out basically given the history
19 and what we found out and that Hird was in default
20 for not performing under our contract and also in
21 default for selling the property to somebody else.
22 And therefore Lady Beaufort is going to file -- is
23 filing the enclosed lis pendens with the Beaufort
24 County Clerk of Court's Office.

25 Q. Very good.

1 A. And the reason why I did this is the
2 contract itself says that if somebody is in default
3 you send them a notice of default. And so that is
4 what I did on behalf of Lady Beaufort.

5 Q. Very good. Did you ever receive such a
6 notice from the seller?

7 A. No.

8 Q. Okay.

9 A. Never. I did not -- I never was notified
10 that the buyer was in default. That term was never
11 used with me. And I was never notified nor -- well,
12 I can't speak to Mr. Kerr, but I know based on our
13 conversation -- I was never notified that the seller
14 had terminated the contract. You know, I was never
15 told that it was terminated.

16 Q. Very good. And so after you sent this
17 letter and filed the lis pendens, a lawsuit was
18 filed?

19 A. Yes, eventually. I was involved for a
20 period of time. I believe we had to file the lis
21 pendens several times. I was then contacted by an
22 attorney. And all of a sudden my mind has gone
23 blank. I believe it's Mathison is his last name.
24 You know, saying that we didn't have a right to file
25 a lis pendens on this property, et cetera.

1 Q. And Mr. Mathison represented the second
2 buyer, Inverness, correct?

3 A. Yes.

4 Q. Okay.

5 A. Yes. And eventually after discussing this
6 with Mr. Kerr I referred him to your office to
7 commence litigation.

8 Q. Very good. And you are aware that a
9 settlement was reached between Inverness and Lady
10 Beaufort, correct?

11 A. Yes.

12 Q. In which Lady Beaufort was able to obtain
13 the property?

14 A. Yes.

15 Q. Okay. And you closed that transaction,
16 correct?

17 A. Yes.

18 Q. Okay. If you would turn with me to
19 Tab 16.

20 A. Okay.

21 Q. And this is the closing statement for that
22 transaction, correct?

23 A. Correct.

24 Q. Okay. And as part of the settlement Mr.
25 Kerr or Lady Beaufort had to pay an additional

1 \$25,000 to recover that property, correct?

2 A. Yes. The purchase price in this
3 transaction was 285,000.

4 Q. Okay. Very good. And turn with me,
5 please, to Tab 17.

6 A. Okay.

7 Q. Okay. And so this is the seller's
8 affidavit, Inverness, LLC, correct?

9 A. Correct.

10 Q. Okay. And did the seller affidavit -- if
11 you turn with me to the last page of that document
12 which is a certificate of existence from the State
13 of South Carolina. You didn't have the same issue
14 with Inverness, did you, that you had with Hird
15 Island?

16 A. No.

17 Q. Because Inverness was a new corporation
18 just incorporated on October 10th, the very day that
19 it bought -- that it bought the property, correct?

20 A. It was organized I guess is the term of
21 art we use as a limited liability company instead of
22 a corporation, yes. This certificate of existence
23 confirms that -- it's issued by the South Carolina
24 Secretary of State to confirm that the entity is in
25 existence as of that date. And that it was formed

1 on October 10th, 2013.

2 Q. Very good. And so the requirements in
3 this transaction would not have been the same, would
4 they, as the requirements in the transaction between
5 Hird Island and Lady Beaufort?

6 A. Well, you know, every transaction is
7 different.

8 Q. Uh-huh.

9 A. And so it can vary from transaction to
10 transaction depending upon the circumstances.

11 Q. Very good. I think I'm going to back up a
12 little bit with you, Mr. Rogers.

13 A. Okay.

14 Q. And we are almost finished. Are you aware
15 if Lady Beaufort was ready, willing, and able to
16 close this transaction with Hird Island?

17 A. Yes. Yes. As a matter of fact, I believe
18 that in one of my e-mails to Mr. Gilbert I indicated
19 that. You know, I know now that there is a
20 disagreement about what the last day is to close.
21 You know, I believe that the contract specifies
22 worst case scenario to the buyer's side that it
23 would have been Tuesday, October 8th, but we had
24 arranged to have it done on the 7th. Okay?

25 Mr. Kerr came to my office and signed all

1 of his loan documents. And I then submitted those
2 to the bank. And the banker on the loan, Mr. Jan
3 Malinowski said, okay, I'll go ahead and email --
4 email? Wire you the money. And I said, no, don't
5 wire me the money because I haven't worked out, you
6 know, all the -- we are having an issue with the
7 seller as far as what the seller is willing to sign
8 and provide. But he was willing to do that at that
9 point.

10 So we were ready, willing, and able. And
11 in my conversation with Mr. Kerr when we were at the
12 closing he said, you know, if the bank has got a
13 problem with this, I can fund it if need be. You
14 know, the loan is just basically a business benefit.
15 So he had access to funds that if we needed to pull
16 the trigger, sure, we could do it.

17 Q. Very good. Just take one minute here.

18 (Discussion off the record.)

19 BY MS. ENDEMANN:

20 Q. And, Mr. Rogers, you just brought up an
21 issue that we've been discussing somewhat here all
22 day, and that is whether the 7th is the drop-dead
23 date as the seller put it. And I think you just
24 indicated that it is not.

25 And were there any contingencies in your

1 mind that came up in this closing that prevented the
2 closing from proceeding?

3 A. Well, you know, contingency is not a
4 defined term in this contract. I mean, you can say
5 that, you know, them -- the seller providing the
6 proper documentation would be a contingency.

7 Q. Would you say that a title insurance
8 company exception might be a contingency?

9 A. Yes, that is possible.

10 Q. Would you say that a tax lien being filed
11 on the property may be a contingency?

12 A. Could be.

13 Q. Okay.

14 A. You know, to clearly answer your question
15 about the date, okay, if necessary we could have --
16 meaning me, my office, and Mr. Kerr, we could have
17 funded this transaction on the 7th. It was still --
18 it was possible but for the fact that we had an
19 impasse with the seller regarding the documentation.
20 You know, I don't agree that the 7th was the last
21 day to do that, but we could have up until -- going
22 to the courthouse and discovering that there was a
23 filed tax lien against the seller, then we would
24 have had to have stopped. And I wouldn't have been
25 able to get any information out of the South

1 Carolina Department of Revenue about what amount was
2 due in order to have that tax lien satisfied.

3 In my years, you know, you find that even
4 though an amount is specified on the face of the tax
5 lien, you don't know what kind of penalties and late
6 fees and all are added to that. And they are not
7 going to give me that kind of information. They
8 would only give that to an authorized representative
9 of the seller.

10 MS. ENDEMANN: I think that is all I
11 have, Mr. Rogers. Thank you very much.

12 THE WITNESS: Okay.

13 EXAMINATION

14 BY MR. BOWEN:

15 Q. Let's go back to the tax lien. Doesn't it
16 say that it is \$480.01 with court costs of \$34?

17 A. Yes, but --

18 Q. Doesn't it say that?

19 A. It does.

20 Q. Okay. And isn't it -- when is it dated?

21 A. Hold on. Let me find it.

22 MS. ENDEMANN: Tab 18.

23 THE WITNESS: Okay. Where are you
24 referring to the date, Mr. Bowen?

25 BY MR. BOWEN:

1 Q. I'm just asking you to tell me where -- if
2 you see a date on there.

3 A. I see the date that it was filed in
4 Beaufort County.

5 Q. And what date was it filed, sir?

6 A. September 27, 2013.

7 Q. And is it not a common situation
8 frequently in your experience as a real estate
9 dealer or attorney who deals in real estate to find
10 satisfactions -- I mean to find minor liens on a
11 piece of property prior to closing which would be
12 satisfied from closing proceeds? Isn't that fairly
13 common?

14 A. Tax liens aren't fairly common.

15 Q. No, sir, that is not my question. My
16 question is isn't it fairly common for find small
17 liens on a property which are satisfied from loan
18 closing proceeds -- not from loan closing proceeds.
19 From closing proceeds?

20 A. Liens that have been disclosed.

21 Q. Well, or not disclosed. Do you do an
22 update on title the day of closing?

23 A. Yes.

24 Q. And if you had seen that wouldn't you have
25 insisted that that be -- that that be paid at

1 closing?

2 A. Yes.

3 Q. Okay. But whether it's the 8th, 9th,
4 10th, 11th, 12th, or 27th, did you ever have funds
5 in your account to tender to the seller? I don't
6 care what you could have had or what you might have
7 had. Did you actually --

8 A. That were actually in my account, no.

9 Q. Okay. Fine. So you didn't have --

10 A. But I'm not required to do that.

11 Q. I'm not asking you what you are required
12 to do. We are talking about whether or not you were
13 ready, willing, and able to close. If you didn't
14 have --

15 A. You are only required -- excuse me, Mr.
16 Bowen. You are only required to tender that money
17 if, in fact, the seller has properly performed. And
18 in this case the seller had not.

19 Q. In your opinion?

20 A. Correct.

21 Q. All right. Now, let me ask you this. Did
22 you issue a title insurance when he purchased the
23 property? When Lady Beaufort purchased the property
24 with First American?

25 A. When they purchased it subsequently?

1 Q. Yes.

2 A. From Inverness?

3 Q. Yes.

4 A. Yes.

5 Q. Were there any exceptions taken in there?

6 A. Well, I'm sure there were exceptions
7 taken.

8 Q. Were there any exceptions taken in there
9 as to the flaws in the title that you allege existed
10 when Mr. Fender tried to sell the property?

11 A. If you are referring to the fact that --
12 the certificate of tax compliance?

13 Q. I'm referring to everything.

14 A. Okay. Well, we had resolved the issue as
15 far as the administrative dissolution or forfeiture
16 in Georgia.

17 Q. How would you resolve that?

18 A. Simply that they weren't -- and it's
19 documented in my email. You don't have to -- the
20 title insurance company says after checking with
21 them, not required to reinstate it. It can be part
22 of the corporation's winding up of its affairs.

23 Q. All right. And why couldn't that have
24 happened in the sale to Lady Beaufort?

25 A. That is what we had offered.

1 Q. No. I mean why couldn't you get that
2 independently of Mr. Fender?

3 A. We tried. That document --

4 Q. Well, how did you get it -- how did you
5 get it in the subsequent sale but you don't get it
6 in the first sale?

7 A. I don't have to get that in the subsequent
8 sale.

9 Q. Well, let me ask you this, sir. If title
10 was flawed in Inverness, would it not have been
11 flawed in acquiring it from Inverness?

12 A. Not in all cases. Okay?

13 Q. I'm asking you in this case.

14 A. No, it wasn't.

15 Q. Why wasn't it?

16 JUDGE DUKES: Well, let him finish,
17 Mr. Bowen.

18 THE WITNESS: This statute,
19 12-54-124, applies to the purchaser from that
20 taxpayer. At that point Lady Beaufort was
21 purchasing from Inverness, LLC. I had to go back to
22 the title insurance company and say, okay. I need,
23 you know, an interpretation on this. And they said
24 because we weren't in privity of contract with Hird
25 Island our seller is Inverness. Therefore it was

1 not an issue in the transaction between Inverness
2 and Lady Beaufort.

3 BY MR. BOWEN:

4 Q. So you are saying if there was a flaw in
5 the transaction between Hird and Inverness, it
6 didn't affect you in way, shape, or form?

7 A. Not this type of flaw.

8 Q. When you say this type of flaw, which type
9 of flaw are you talking about?

10 A. The failure to comply with 12-54-124.

11 Q. I don't see where that was ever cured, but
12 be that as it may, I just don't see where it was
13 cured. I don't see -- I don't see --

14 A. It's not a cure situation.

15 Q. I don't see where the issues with respect
16 to the suspended authorization, I don't see where
17 any of that was cured. It seems to me that you
18 closed with Inverness basically on the same
19 documents that Mr. Fender presented you with the
20 exception of not -- with the exception of his
21 representation as to the percentage of ownership of
22 property?

23 A. No.

24 Q. Well, tell me what was different.

25 A. We are dealing with a different seller.

1 Q. I understand that.

2 A. Okay. So the issue that we had with Hird
3 Island, Number One issue, was resolved in our
4 opinion. We had confirmed that based upon Georgia
5 law that you could sell the real estate after the
6 administrative dissolution as a part of winding up
7 its affairs.

8 That problem -- that issue was solved.
9 The issue that wasn't solved was, well, where do you
10 stand as far as the taxes being paid to the South
11 Carolina Department of Revenue and the risk that the
12 buyer is running -- let me finish. Let me finish.

13 Q. I haven't said anything.

14 A. You were leaning like you were going to
15 ask me a follow-up question.

16 Q. Don't anticipate me. Don't anticipate me
17 because I'm not anticipatable.

18 JUDGE DUKES: Go ahead and finish.

19 THE WITNESS: So -- I'm sorry. I
20 forgot where I was. The issue as far as Hird Island
21 and its non-payment of taxes to the Department of
22 Revenue, it could not affect the title that
23 Inverness is giving to my client, Lady Beaufort,
24 LLC.

25 That was the directive I was given based

1 on this language because we weren't the purchaser
2 from Hird Island. We were at that time the
3 purchaser from Inverness, LLC.

4 BY MR. BOWEN:

5 Q. I'm not concerned about the small tax lien
6 because that could have been satisfied at closing,
7 could it not have been?

8 A. It depends upon how quickly the seller
9 would move on it. You know, I would not be able to
10 disburse the transaction without written
11 confirmation that the lien had been paid and that
12 the Department of Revenue would have released the
13 lien.

14 Q. But you never got there, did you, because
15 you never had funds to release, did you?

16 A. That doesn't have anything to do with why
17 I never got to that point.

18 Q. My question to you is you just said you
19 couldn't release funds without that authorization.
20 I'm saying you never had funds to release to begin
21 with, did you?

22 A. Well, that is your opinion.

23 Q. Well, were they in your account?

24 A. I'm not required to have them in my
25 account --

1 Q. I'm asking --

2 A. -- if I've got a seller that is in
3 default.

4 Q. I'm asking you a question. Were they in
5 your account?

6 A. No.

7 Q. Were they ever in your account?

8 A. Subsequently.

9 Q. For this transaction?

10 A. No. For the Inverness transaction.

11 Q. Okay. My question is as to this
12 transaction.

13 A. Okay.

14 Q. Now, you say you never heard that -- let
15 see if I can recall the question correctly. You
16 said that you had no idea that the 7th was a
17 drop-dead date or that Mr. Fender wasn't willing to
18 close on that or about that date.

19 A. I didn't say that.

20 Q. Oh, I thought you did, sir.

21 A. I didn't say I never heard that.

22 Q. When did you first learn it?

23 A. There is some -- I do recall that there
24 was some email that was sent to me by a paralegal in
25 Mr. Gilbert's office relaying a message from

1 Mr. Fender, something about the 7th.

2 Q. Was that not sent to you on the 7th?

3 A. It may have been. I don't -- if you will
4 show me the email you are talking about.

5 Q. I call your attention to --

6 MR. BOWEN: I don't know. Was it in
7 yours?

8 BY MR. BOWEN

9 Q. Defendant's Exhibit Number 1, Item D, I
10 believe. C.

11 A. Is it C?

12 Q. They are marked at the bottom of the
13 Page. Isn't it C?

14 A. There are three pages to C?

15 Q. That's correct.

16 MS. ENDEMANN: It's C-1 at the
17 bottom.

18 MR. BOWEN: There is a lot of -- it's
19 marked gmail, October 7th up at the top. This one
20 right here.

21 MS. ENDEMANN: Right. You are
22 looking for this one, right?

23 MR. BOWEN: The lower one.

24 MS. ENDEMANN: Yes.

25 THE WITNESS: Are you talking about

1 the last sentence at the bottom of Page 1 in Exhibit
2 C? He also acquired if we had funds for the
3 purchase?

4 BY MR. BOWEN:

5 Q. I'm talking about you said -- I thought
6 you said that you did not know about the problem
7 with the closing or non-closing until after --
8 sometime after the 7th, the 8th, or the 9th. And
9 I'm saying that --

10 A. No, I didn't say that.

11 Q. -- you were told that -- I stand
12 corrected. Then you knew there was a problem on the
13 7th?

14 A. No. All I know is that I had gotten this
15 email from Christina Wilson saying that Mr. Fender
16 had inquired if we had funds for the purchase and
17 when I advised that we did not he stated he wasn't
18 signing anything as closing was supposed to occur by
19 5:00 p.m. today.

20 Q. Okay. All right.

21 A. There is no mention anywhere in there of
22 the word that the contract is terminated, buyer is
23 default. And Mr. Gilbert never used those terms
24 with me in our conversation.

25 Q. But you were told he wasn't signing the

1 documents necessary to close?

2 A. That is what that email indicates.

3 Q. Okay. That is what it said. It said what
4 it said.

5 A. Let me follow up our -- can I supplement
6 my response to that question, Mr. Bowen?

7 Q. Sure.

8 A. If you will look at Section 27 of the
9 contract, default.

10 Q. I will look at it, but I'm not really
11 concerned what the contract says as much as what you
12 said. Okay?

13 A. You ready?

14 Q. Not yet. All right.

15 A. In Subsection B, if buyer defaults in the
16 performance of any of the buyer's obligations under
17 this contract, and that is defined as a default,
18 seller may, Roman Numeral I, deliver notice of
19 default to buyer and terminate contract.

20 Q. Okay.

21 A. There was no notice of default delivered
22 to anybody and no notice of termination of contract.

23 Q. It says the seller may, right?

24 A. Well, how else are you going to --

25 Q. It says the seller may. Is that not what

1 it says?

2 A. It does use the word may.

3 Q. Okay. That is all I'm reading. I'm just
4 reading the contract.

5 A. But this provides how you do it.

6 Q. You asked me to read --

7 JUDGE DUKES: You all one at a time.

8 So Mr. Bowen ask a question if you will, please.

9 Sir, if you would just wait until he --

10 MR. BOWEN: You asked me to read it
11 and I read it.

12 JUDGE DUKES: Okay. Anything else?

13 MR. BOWEN: Let me take just a quick
14 break with my client. And I think I'm about done.

15 (Off the Record 12:51 TO 12:52)

16 JUDGE DUKES: Okay. Back on the
17 record. Mr. Bowen, any further questions?

18 MR. BOWEN: No, sir. I have no
19 further questions. Thank you.

20 JUDGE DUKES: Okay. Any redirect?

21 MS. ENDEMANN: I have just one very
22 simple question.

23 REDIRECT EXAMINATION

24 BY MS. ENDEMANN:

25 Q. If you would look back at Exhibit C,

1 Page 1, Defendant's -- Defendant's Exhibit.

2 A. Okay.

3 Q. And you responded to Ms. Wilson's email,
4 didn't you? You responded on October 7th at
5 4:45 p.m., the email right above that?

6 A. Yes.

7 Q. And what is your response?

8 A. The buyer has signed all of its closing
9 documents and the lender is ready, willing, and able
10 to fund upon receipt of the signed deed and seller
11 closing documents. Derek, please give me a call to
12 discuss this further. Thanks.

13 Q. Mr. Fender says it has to occur by
14 5:00 p.m. today, correct, in his email below that
15 Mr. Bowen --

16 A. That is what his -- the paralegal says.

17 Q. Okay. And your email is sent at 4:45,
18 correct?

19 A. Right.

20 Q. You testified that Mr. Kerr had signed all
21 of his closing documents, correct?

22 A. Yes.

23 Q. You testified that the wire could be
24 received, Mr. Malinowski was ready to send it?

25 A. Immediately.

1 Q. You and Mr. Kerr also testified that he
2 could write a check to fund?

3 A. Correct.

4 Q. So if you would have received those
5 documents at 4:37 when Christina sent that email,
6 could you have funded on that day?

7 A. Yeah. We would have immediately updated
8 the title because we -- the people that we --

9 Q. Setting aside that the tax lien was filed?

10 A. Right. Right.

11 Q. But you could have funded that day?

12 A. Sure.

13 Q. Okay. And Ms. Christina Wilson is a
14 paralegal to Derek Gilbert, correct?

15 A. Correct.

16 Q. And how many conversations, ballpark --
17 and we can go back through all of these exhibits,
18 and I've marked them 10, 11, 12, and 19 -- e-mails
19 and telephone calls did you have with Mr. Gilbert
20 who is Ms. Wilson's boss continuing the negotiations
21 and discussions about a closing?

22 A. There were numerous. I will say at least
23 between 5 and 10 conversations plus the emails.

24 MS. ENDEMANN: That is all I have.

25 Thank you.

1 JUDGE DUKES: Anything related to
2 that question?

3 BY MR. BOWEN:

4 Q. Financing was not a contingency, was it?

5 A. No.

6 Q. So what import was it that the lender is
7 ready?

8 A. They were actually going to fund.

9 Q. That wasn't a contingency, was it?

10 A. No.

11 MR. BOWEN: Okay. Thank you.

12 JUDGE DUKES: All right. Is that
13 Plaintiffs case or do you want to wait until after
14 lunch to rest?

15 MS. ENDEMANN: I believe -- why don't
16 we wait and then I might have just a quick motion.

17 JUDGE DUKES: All right. Let's do
18 that then. Let's take a break and --

19 MR. BOWEN: What time did you tell me
20 to tell the witness to come back?

21 JUDGE DUKES: 1:45. And let's stick
22 with 1:45.

23 MR. BOWEN: That is what I told him.

24 JUDGE DUKES: If we can do that, and
25 everybody grab a sandwich or something and try to

1 come back at 1:45. Is that do-able? That will
2 conclude the record for right now.

3 (LUNCH RECESS 12:58 TO 2:00)

4 JUDGE DUKES: Back on the record in
5 14-CP-07-0052 after a lunch break. I think we were
6 still on the Plaintiff's case. Does the Plaintiff
7 rest?

8 MS. ENDEMANN: Your Honor, Plaintiff
9 rests and would like to make a motion pursuant to
10 Rule 41 for a nonsuit concerning the Hird Island
11 counterclaim. We would like the dismissal to be
12 with prejudice. I think we have shown through our
13 case that we were ready, willing, able to close the
14 contract and that it was the Defendant's,
15 unwillingness to simply sign two documents one of
16 which was even prepared by his own lawyer and then
17 revised by ours in order to make the deal work.

18 JUDGE DUKES: All right. Let me find
19 the counterclaim itself here. All right. Mr.
20 Bowen, happy to hear from you, sir. Off the record
21 a second.

22 (Discussion off the Record.)

23 JUDGE DUKES: Back on. Mr. Bowen,
24 any thoughts on --

25 MR. BOWEN: Judge, the only thing I

1 would say is to quote an old friend of ours, a very
2 old friend, Mr. Joe Abdullah, he told me the story
3 about going by the ball field one time and the
4 baseball game was going on. And he asked the guy on
5 the infield, he said, what is the score? He said 45
6 to nothing. He said, man, that is terrible. And he
7 said, yeah, but we ain't had our turn at bat, yet.
8 And that is my position here.

9 JUDGE DUKES: Wow, I'm going to have
10 to use that in an order sometime.

11 MS. ENDEMANN: That's a pretty good
12 one.

13 JUDGE DUKES: But you are correct, I
14 think there is probably enough here to continue on
15 with it. So I appreciate the motion, but it's
16 denied. And we will head on. So anything else from
17 the Plaintiff?

18 MS. ENDEMANN: No, Judge.

19 JUDGE DUKES: Okay. Thank you so
20 much.

21 (Discussion off the record.)

22 JUDGE DUKES: All right, Mr. Bowen.
23 Mr. Fender, can I get you to hold your right hand up
24 for me, please?

25 MR. FENDER: Yes, sir.

1 JUDGE DUKES: Do you swear or affirm
2 to tell the truth, the whole truth, and nothing but
3 the truth so help you God?

4 MR. FENDER: I do.

5 JUDGE DUKES: All right. Please
6 state your whole name for the record.

7 MR. FENDER: My name is Sherwood
8 Fender, F-e-n-d-e-r. And I do not speak plain. So
9 if you will hold your hand I will know that I have
10 not communicated properly. I'm old and I don't have
11 teeth. Deadly combination.

12 JUDGE DUKES: All right. Well, we
13 will take all of that into account as need be.

14 MR. BOWEN: I think I'm going
15 to abbreviate the testimony considerably because I
16 think we've all discussed and rediscussed the
17 meaning of the contract, the terms of the contract,
18 the deadlines. And I don't think there would be any
19 purpose served in going over any of that from the
20 standpoint of the Court unless the Court feels
21 differently because I think it's clear what
22 differences there are that we have. And I don't
23 think that we can enlighten the Court any further on
24 that.

25 JUDGE DUKES: All right. In response

1 to that I think the only thing I can say is please
2 put whatever you think appropriate on the record.

3 MR. BOWEN: I understand. I
4 understand. I think -- let me say this, I think
5 it's already on the record.

6 JUDGE DUKES: Okay.

7 WHEREUPON:

8 SHERWOOD FENDER, being duly sworn and
9 cautioned to speak the truth, the whole truth and
10 nothing but the truth, testifies as follows:

11 DIRECT EXAMINATION

12 BY MR. BOWEN:

13 Q. You are familiar with the contract, of
14 course?

15 A. Yes, sir.

16 Q. And you are familiar with the transaction?

17 A. Yes, sir.

18 Q. Now, it's your position, is it not, that
19 you did not close because you felt they were in
20 default and you were not?

21 A. Correct.

22 Q. Would you elaborate on that for the Court?

23 A. Well, all along I think there had been
24 some confusion. Very little communication with the
25 lawyer. Most of my communication was done with

1 Christina Wilson who is a paralegal, a good one by
2 the way.

3 And so I don't know whether I even talked
4 two or three times, but I was --- but anyway, be that
5 as it may for clarification, Matt came to my office.
6 I can tell you under the circumstances which and
7 said, look, do you want to contract? And here is a
8 contract. Because I had asked for his help. I
9 said, Jimmy is a natural person. And I'm glad he
10 got it because he -- it means more to him than
11 anybody.

12 And he had some collateral expenses that
13 he was going to pay us if he didn't buy it because
14 under the contract he had bought half of it and he
15 had an obligation to put in a storage area, water,
16 storm water, all kinds of things. I would suspect
17 there was 75,000 to a \$100,000. So it was my
18 feeling that it was good and beneficial. And that
19 is why I asked Matt to contact him.

20 In the beginning I told Matt, I said,
21 Matt, here is my dilemma. I am being foreclosed on
22 by Jan whom I'm at great odds with. And it's
23 neither here nor there, but I didn't trust him and
24 still don't.

25 But anyway, I've got to get rid of this.

1 His mortgage is coming up. And I know what he will
2 do. I am already in default. And I got to close.
3 So when he came back and he says, well, how about a
4 30-day due diligence. Well, my first reaction was
5 why would you need 30-day due diligence?

6 The man who is buying it already owns the
7 other half. He knows more about this property than
8 I do. I said okay. Thirty-day. But I got to go
9 with it. Time has got to be of the essence because
10 I've got other -- I had income tax with the Feds and
11 everything else was fixing -- but anyway, so some
12 discrepancy about price, but we finally worked that
13 out.

14 And I thought we was in good shape. Well,
15 I suddenly notice -- it was fairly obvious to me,
16 nobody was doing the abstract work because the
17 proper questions were not being asked. And I'm well
18 aware how a lawyer can postpone things at the end.
19 And that -- then we got into a session where we were
20 picking fly droppings out of pepper. All little
21 dit, dats. I said, they don't want to close. I
22 don't know what the reason, they don't want to
23 close.

24 They would ask for things -- for instance
25 this title issue. I'd had 10 or 15 good lawyers,

1 two or three title companies who had passed on that.
2 It had never been an issue. I'd be glad to give you
3 those if you want them, but anyway Wally signed a
4 couple lawyers up in Columbia. The Harvey Law Firm
5 had closed on this and had also furnished title
6 insurance through Chicago.

7 So when he approached me for that dang
8 thing I -- it didn't sit very well. Well, that
9 would have been okay. We might could have worked
10 through that, but then these other things that just
11 kept popping up and popping it up. And it became
12 obvious that someone -- and I don't think it's
13 Jimmy. I think Matt -- I think Matt is entitled to
14 his money. He did his work, but it got fouled up.

15 And somewhere between Jimmy and the
16 closing, it got fouled up. And I'm sorry. I got no
17 reason to not want to sell. I wanted him to buy it.
18 I'm glad he finally ended up with it. And I wish we
19 could have closed. It served me no useful purpose
20 to not close.

21 As a matter of fact, I was very upset that
22 it wouldn't. So we get down and we get to the
23 closing date. Everybody agreed. It was the 7th.
24 Nobody -- that wasn't an issue. So Christina wrote
25 and said, hey, you're supposed to be here with the

1 money. You ain't here with the money.

2 Well, the bank said it may be releasing
3 the principal. I said, whoa. We are not dealing
4 with a bank. This man is paying cash. Why -- it's
5 fairly obvious to me that the lawyer hadn't read the
6 contract when he says that about financing and
7 stuff.

8 And I'm really -- I'm really getting
9 paranoid at this point in time. And -- but I wanted
10 to close. And nothing would have suited me better
11 than to close it. I would have been over with and
12 had it gone and -- but anyway -- there is a lot of
13 other minutiae in it, but anyway -- and I got my
14 lawyer. I got a paralegal. I got everybody to tell
15 me when was the drop-dead date. And they said it's
16 the drop-dead date. So I didn't worry about it. I
17 just tell them -- no.

18 The other thing Matt says, and I have no
19 doubt about it, says, look, my man can close in
20 cash. He can probably close before the time is up.
21 I said fine. That is good. I don't doubt that. He
22 has always been good to his word. I have no problem
23 with that.

24 And then the eve of the wedding the wife
25 says to the bank there is a loan involved and they

1 may be releasing the funds. And I said whoa, whoa,
2 whoa, whoa. This thing is -- somebody is
3 unilaterally trying to change this thing. I had
4 enough to greatly suspect that it didn't close. I'm
5 not sure it ever would have.

6 It might have would. I don't know the
7 reasons. I can only tell you I wanted to close.
8 And, Jimmy, please believe that. I wanted to close.
9 I got no reason to not. Why would I want to drag it
10 out? It doesn't make sense. Nothing about it.

11 Q. So tell me about your transaction with
12 Robert Sample.

13 A. Robert had been in my office ages before
14 that. Robert had bought a small piece of property
15 and was buying another piece called the Rod and Gun
16 Club property. A beautiful piece of property that
17 has no access other than the little old road that
18 comes out which you could never develop it.

19 But I own a storm water drain site over
20 there which would have afforded access to that site.
21 Not only would it have done it, that would have give
22 him about a quarter -- half a mile of paving that
23 was already done. The storm water -- he could use
24 my storm water. There was a lift station in the
25 corner he could attach to for his sewer. The water

1 lines were right there.

2 So it would have been a significant
3 savings to anyone who developed that. And I knew
4 very well that he could not get it -- the only other
5 place they could go was across the church property.
6 And the church had made it emphatically we are not
7 coming across them.

8 And the only other place was the Trask
9 family, John -- Big John I think it was. And I knew
10 if they got a deal with them they would pay dearly.
11 So I knew that that site over there was worth
12 something. And so when Robert approached me, I
13 said, Robert, if you are going to do it you almost
14 got to have this piece because of the development
15 type and everything.

16 And he said, well, if you want to sell it
17 I want a \$100,000. And I don't have to sell it, and
18 I didn't at that time I said because whoever
19 develops that property has got to come across me.

20 So that went by the side. And then he
21 come and approached me about buying this piece here
22 sometime. And I had a pretty good number on it at
23 that point in time. And he said -- of course, he
24 couldn't pay it. And then when I got the contract
25 with Jimmy he saw something or -- something and knew

1 that it was under contract. And he come back and
2 said, I thought you were going to let me know. And
3 I said, no, I never promised you that.

4 I told you if you want it to bring a
5 contract. He said, man, I need that. I said, well,
6 you waited too late. It's sold. He said, would you
7 do me a favor? And I said, what is that Robby? He
8 said, if it doesn't close, will you let me buy it?
9 I said, sure.. It's for sale. It always has been.

10 And I said, but you got to be able to move
11 in a hurry because I got financial issues I got to
12 deal with. So you got to be ready. He said, okay.
13 I'll be ready. And so that was the preliminary to
14 everything happening. And then when he found out it
15 had been sold or he thought it was sold and closed.
16 And then when it didn't close he came back to me,
17 again.

18 Oh, I made one other agreement with him.
19 I said, Robert, I will not extend the contract
20 beyond the closing date. I can help you that much.
21 I hope it closes and everything, but if it doesn't I
22 won't extend it. You better be ready to close.

23 Q. Was the only reason that you closed with
24 Robert was for expediency purposes because you knew
25 that you could get the money right there and then

1 and that would be the end of the story?

2 A. Right. He was a buyer. He was a buyer.
3 See the property had been on the market a good
4 while. There was a buyer in hand who had the
5 resources. And even though he was less than that, I
6 said I'll tell you what I do, you wanted the other
7 piece. I got to have X number of dollars. And I
8 told him that, that I got to have X number of
9 dollars to take care of these things.

10 So I said if you buy that one, you have to
11 buy the other one, too. So he said let me see. So
12 that is how all of that happened.

13 Q. Was there any advantage to you in selling
14 to Robert other than a quick sale?

15 A. No.

16 Q. Did Robert --

17 A. A quick sale in hand, yeah.

18 Q. Did Robert require any of the
19 documentation from you that the purchaser was --
20 that Lady Beaufort was in terms of the
21 indemnifications and things of that nature?

22 A. No. No.

23 Q. And what concerns about executing the
24 documents that they were --

25 A. Some of those documents -- and it

1 progressively got incredibly more insane I would say
2 for lack of a better word, insane. One of which --
3 I speak my mind, but anyway. One of which was a
4 personal guarantee that, this, that and the other.
5 I said, whoa, whoa, whoa. I wouldn't personally --
6 that would jeopardize everything I've ever done with
7 that corporation. It would put me in a very
8 unfavorable tax advantage and everything else.

9 To do that would make me pierce the
10 corporate veil. And I'm not going to do that. And
11 I got cute. I said Henry Ford don't sign no damn
12 title to a car when I buy them from him, so why
13 would you ask a president of a corporation for a
14 personal guarantee? Ain't going to happen.

15 Q. So what documents did you deliver to
16 Robert other than a deed, a closing statement, and
17 the typical sort of affidavit of --

18 A. All of the traditional documents that are
19 used which were prepared by the law firm. And I'm
20 like Jimmy, I don't -- I do a lot of things, but I
21 am not going to represent myself. When they put
22 them in front of me, I sign them.

23 Now, I'll tell you what, I'll do it from
24 now on because now I found that 30 days -- Matt
25 didn't tell me this, and he probably thought I ought

1 to know, but I ain't practiced law in ages. That 30
2 days really became 38 plus 7, another 15 days. So
3 now it became 45 days instead of 30.

4 Q. But you don't --

5 A. That will make you --

6 Q. You don't dispute that is what the
7 contract says?

8 A. No. No.

9 Q. You just over looked it when you read the
10 contract?

11 A. Right.

12 Q. Okay.

13 A. Oh, and that would -- once again, there
14 was a million reasons why this thing was not going
15 to close. And if it wanted to close, Matt had
16 assured me and I believe it, that Jimmy could write
17 a check for it. I bet he can, but he didn't. And I
18 don't know why. If he did we wouldn't be here.

19 MR. BOWEN: I have no further
20 questions.

21 CROSS EXAMINATION

22 BY MS. ENDEMANN:

23 Q. Mr. Sherwood --

24 A. Sherwood is fine.

25 Q. You spoke a little bit about your

1 relationship with Jan Malinowski and your feelings
2 towards him?

3 A. Right.

4 Q. And you talked about your suspicions of
5 the buyer in this transaction because they were
6 getting a loan through Palmetto State Bank?

7 A. Right.

8 Q. Okay. And you mentioned that the contract
9 was not contingent on financing?

10 A. That's correct.

11 Q. Okay. So just because the contract is not
12 contingent on financing, that doesn't mean a buyer
13 can't get a loan if he wants to?

14 A. Oh, no. He can do it, but to be
15 contingent on it I had to wait until the loan come
16 through. If it wasn't contingent it didn't affect
17 me. Kid, let me show -- let me give you the
18 background. Henry Lafitte, Monty Lafitte, Charlie
19 Lafitte, I was raised with them. I've double-dated
20 with Henry and his wife Libby with a girl I was
21 dating.

22 They were -- Monk, the father of Jan's
23 wife. And I mean, I was raised in there, so I know
24 those people. All right. I had the problem and I
25 called Charlie. Well, Charlie is was getting on and

1 didn't want any big thing. So he couldn't resolve
2 my issue with Jan. Jan got mad because I made an
3 off collar comment. And I don't mind telling you
4 what it is.

5 Monk and Lib wasn't really happy when
6 their daughter went -- came by their son Sterling
7 who is now dead. Young fellow. Brought home a
8 Citadel man by the name of Malinowski and was going
9 to introduce him into the Lafitte family.

10 You got to know snobbish small town. And
11 you would know that is why (inaudible). And then I
12 made the comment that Monk -- the only way Monk put
13 his name on it was he agreed to go back to banking
14 school, but -- and he knows I know that, and that
15 makes him feel uncomfortable.

16 Q. Okay. Mr. Fender, you mentioned that
17 there was some notion that we had to wait for the
18 bank to fund the money. Where did you come by that
19 notion?

20 A. I didn't come by any notion. I come by
21 the notion they had my deeds. They were ready to
22 close. And I -- I'll tell you what I told somebody
23 a long time ago, I'm driving to Hardeeville. One
24 day I stopped the car. And there is three people in
25 the back seat. And I kicked them out; could have,

1 should have, and would have. I don't deal with
2 those people.

3 My life has been significantly better.
4 They could have closed. I don't know if they could
5 have or not. I don't deal with that. I deal with,
6 did I. Nobody else -- hey, four years later nobody
7 has ever come into Beaufort with the money and said
8 let's close.

9 Q. Mr. Fender --

10 A. Nobody has ever appeared and said we got
11 the money, let's close.

12 Q. Mr. Fender, did you receive a call from
13 Mr. Rogers personally telling you --

14 A. I don't remember that. I don't remember
15 that call.

16 Q. Okay.

17 A. But his answer was probably something how
18 I would have responded. So I won't dispute it.

19 Q. Okay. So you were made aware that there
20 were two issues that came up. The first concerned
21 the dissolution of the company, right?

22 A. He had all kind of things. He was picking
23 fly droppings out of pepper. And, you know what, he
24 hadn't done his abstract work.

25 Q. With respect, Mr. Fender, I have to

1 disagree with you there because I know Carl, and
2 he's very conscientious.

3 A. Well, good.

4 Q. But he raised two issues. And it's clear
5 throughout all of the documents, and we can go
6 through them all, that one was the dissolution of
7 the company. If you turn with me to three?

8 A. All right.

9 Q. Exhibit 3 here.

10 A. All right.

11 Q. Do you dispute that the company was
12 dissolved in Georgia?

13 A. No. I don't know what happened there.

14 Q. Okay.

15 A. It wasn't relevant. Mr. White -- you know
16 Mr. White in Charleston? He closed three large
17 tracts, several million dollars with me called Caw
18 Caw Plantation. The Harvey Law Firm had certified
19 title. The boy up in Allendale, two lawyers up --
20 nobody ever had an issue with this but Carl.

21 Q. Okay. And you understand that it was an
22 issue with Carl. And so he provided you with
23 alternatives, right? You could --

24 A. No.

25 Q. -- solve the dissolution in Georgia? That

1 wasn't presented to you?

2 A. No. He said I could go get the
3 corporation in Georgia back in good standing.

4 Q. Okay.

5 A. Which probably would have taken two years.

6 Q. Okay. And as an alternative to that he
7 provided you, if you turn with me to Tab 5, please?

8 A. Tab 5?

9 Q. Yeah.

10 A. Uh-huh.

11 Q. Okay. And as an alternative to that, he
12 provided you with this -- well, actually your
13 lawyer, Mr. Gilbert, drafted the first draft of
14 this, but Mr. Rogers added some language to it. He
15 revised it and sent it back. And the language that
16 he added concerned this second whereas Paragraph
17 which as he testified to that says that the
18 corporation is carrying out its business to wind up
19 and liquidate and that this was language that would
20 have just resolved the problem. That the title
21 insurance company would have accepted this language.
22 And this is -- you agree with me that this, save
23 that addition, is a standard closing document with a
24 corporation?

25 A. I've never seen this. For your benefit,

1 I've never seen this.

2 Q. Okay.

3 A. Now, he may have sent it to my lawyers.

4 I've never seen this.

5 Q. So your testimony is that your lawyer
6 never presented this to you?

7 A. I never saw this.

8 Q. Okay. Well, this would have resolved --

9 A. But I'm not sure. I would have saw it if
10 my lawyer told me to sign it.

11 Q. Okay. Well, this would have resolved the
12 issue. And so you didn't sign it because it was
13 never presented to you? That is your testimony?

14 A. I can't answer because I don't even
15 remember that document.

16 Q. Okay.

17 A. But I would have thought, once again, it
18 was part of this minutiae of -- Sanders and Fairfax
19 didn't need it. The Harvey Law Firm didn't need it.
20 Chicago Title didn't need it. Mr. White up in
21 Charleston didn't need it.

22 Q. Well, you mentioned Chicago Title. There
23 is e-mails in here, and you heard the testimony of
24 Mr. Rogers discussing Chicago Title writing it, yet
25 another alternative if you didn't want to sign this

1 document. Yet another alternative was that Chicago
2 Title would write and cover this?

3 A. Those were matters with the lawyers. Let
4 me tell you this --

5 Q. But that never happened, did it?

6 A. Let me tell you something. I was the
7 largest title insurance producer in the State of
8 South Carolina other than the law firm up in
9 Greenville for two or three years. I got all kinds
10 of pretty little silver trophies. I'm pretty
11 familiar with title insurance policies. They take
12 or reject what the producer puts in there. You can
13 make a big issue out of something, and they will
14 make a big issue out of it. So -- but at this point
15 in time there were so many little -- if you took
16 this isolated it might be one thing, but the
17 cumulative effect of all of that craziness --

18 Q. Well, Mr. Fender, there were two issues,
19 right? There was -- the first issue was this that
20 we just discussed, the dissolution. And the second
21 was your provision pursuant to the South Carolina
22 code of a certificate of tax compliance, correct?

23 A. No, ma'am. That never was presented. Let
24 me tell you why. That was a matter which was being
25 handled by Mims, Mellon and something, C.P.A.s.

1 What happens is the tax commission will
2 file against you a lien for labor. Well, that
3 corporation never had any labor, never. So if they
4 don't, they make up their own numbers and send you a
5 bill. And I didn't know this was in the making, but
6 that was being handled. And if somebody would have
7 brought it up and made it significant the C.P.A.s
8 over there could have handled that in two seconds.
9 As a matter of fact, I just got a check the other
10 day for them for wrongfully charging me.

11 Q. Well, Mr. --

12 A. But it was -- it was \$500 and something.
13 He escrowed the money. He had a lot of options on
14 it. That had nothing to do with it. Never brought
15 up.

16 Q. Well, irrespective of the lien, this was a
17 separate issue because they didn't discovery the
18 lien because that wasn't disclosed, right?

19 A. Well, that's right because I didn't know
20 about it either.

21 Q. Okay.

22 A. The C.P.A.s are working on it. I assumed
23 they had it under control. Why they filed, I don't
24 know, but it got resolved. There is no lien. The
25 lien is gone.

1 Q. The lien is gone as we sit here today?

2 A. Right.

3 Q. But that was another issue that was not
4 even brought up at this point because we weren't
5 aware of it, but Mr. Rogers was talking about
6 pursuant to the statute that he read that if an
7 asset is more than 50 percent of a company's assets
8 you need to provide a certificate of tax liability
9 to protect the buyer.

10 A. I don't know. I've never seen that. I
11 never -- it may well be.

12 Q. Was that presented to you?

13 A. No.

14 Q. Your lawyer never presented that to you?

15 A. No.

16 Q. Okay.

17 A. I probably wouldn't have signed it anyway,
18 but anyway it never was.

19 Q. Well, what is involved -- and if you look
20 at -- let's see. I'm going to refer you to the tab,
21 but all it is is simply requesting a form and paying
22 a \$60 fee. And that would be Tab Number 11.

23 A. You are absolutely right. Had it not been
24 these other little minutiae things all over, the
25 total cumulative effect of all of that was getting

1 me to wonder do they really want to close or are
2 they installing for time.

3 Q. But, Mr. Fender, wasn't it just those two
4 things? Wasn't it --

5 A. No. No. No. Every day it was something
6 new. Go back and look at Christina's documents.
7 Carl was coming up with something every day, every
8 day it was something.

9 Q. Well, Mr. Bowen has put in Christina's
10 emails. And you can go through them if you like,
11 but I've never seen another issue raised.

12 A. Well, you may not.

13 Q. And so --

14 A. But from your intonation there you look
15 like I was motivated -- I was not motivated to not
16 close. I wanted to close.

17 Q. Well, you've talked about your suspicions
18 with Lady Beaufort and your concern that they
19 weren't ever going to close it; is that right?

20 A. I was because you know why, had they
21 waited another week and Jan filed the lis pendens it
22 was out of my hands. And it was that close.

23 Q. Was there any indication -- what gave you
24 the impression that they didn't want to close?

25 A. I couldn't understand it no more than you

1 can understand it here today. I got a theory. And
2 I got a feeling that Carl sat on his behind and
3 didn't do what he was supposed to, but that is my
4 feeling.

5 Q. Well, let's --

6 A. You asked me and I told you.

7 Q. All right. Fair enough. Exhibit 3 shows
8 that Mr. Rogers -- he's got dated notes here. This
9 is before the closing. We did the initial title
10 search before the 27th of September because they
11 didn't discover the lien. So it's clear that they
12 were doing the work. And it's clear that you were
13 presented with multiple alternatives. And you
14 mentioned something I wanted to ask you about. You
15 said they asked for a personal guarantee?

16 A. Yeah.

17 Q. Did you mean a personal indemnity?

18 A. Well, what's the difference?

19 Q. Okay. Well --

20 A. What's the difference?

21 Q. Mr. Fender, wasn't that yet another
22 alternative that was proposed and you --

23 A. No, not for me it wasn't and let me tell
24 you why. The moment I become personally guaranteed
25 on a corporate anything, they have totally pierced

1 the corporate veil.

2 Q. I understand.

3 A. They can go back against an \$11 million
4 deal down on Hird Island. They go to a \$13 million
5 deal up in North Carolina or they can go to a
6 \$9 million deal down here on Bluffton.

7 Q. Okay.

8 A. And I was not about to get that kind of
9 exposure.

10 Q. I understand.

11 A. And I thought it was totally unrealistic
12 that somebody would ask that.

13 Q. But that was yet another alternative. So
14 the first was to resolve the issue with Georgia.
15 That didn't work. The second was to simply sign the
16 document that was prepared by your own lawyer and
17 just revised to add some language about winding up.
18 That wasn't acceptable.

19 Provide a certificate of tax compliance.
20 That wasn't acceptable. So yet another alternative
21 was simply an indemnity agreement?

22 A. Why didn't we close? We got all of these
23 alternatives. Tell me why am I not closed?

24 Q. Hold on. I'm sorry, Mr. Fender.

25 A. I'm not stupid.

1 Q. Just let me finish the question real
2 quick. Okay?

3 A. All right.

4 COURT REPORTER: I need one at a
5 time, please.

6 THE WITNESS: Okay.

7 COURT REPORTER: I can't keep up.

8 MS. ENDEMANN: I'm sorry.

9 THE WITNESS: Go ahead. I'm sorry.

10 BY MS. ENDEMANN:

11 Q. Okay. So we've gone through the
12 alternatives. Provide a certificate of tax
13 compliance. That didn't work. So the next one was
14 an indemnity agreement for you to sign. You didn't
15 want to sign that personally. So Exhibit 11, Mr.
16 Rogers sends another indemnity agreement which has
17 been revised to delete the personal indemnification.
18 So that is yet a fifth alternative, but none of
19 these things were done. You could have done --

20 A. There was a sixth one you didn't mention.
21 To show up on the 7th with the money or even the
22 morning of the 8th.

23 JUDGE DUKES: Mr. Fender, let her
24 finish.

25 THE WITNESS: All right. Okay.

1 JUDGE DUKES: Okay.

2 THE WITNESS: She's testifying
3 though. She ain't asking questions. And she's a
4 good lawyer. Very good.

5 MS. ENDEMANN: Well, I'm trying to
6 summarize --

7 JUDGE DUKES: Okay. Well, just let
8 her finish.

9 THE WITNESS: All right.

10 BY MS. ENDEMANN:

11 Q. Okay. Mr. Fender, so my question is
12 various alternatives were provided. And your only
13 objection that I can see that was raised is that
14 there is a personal indemnity. That was deleted and
15 yet still you wouldn't sign any of these. Why not?
16 Why wouldn't you take any steps to remedy the issue
17 raised by the buyer?

18 A. I had advice of counsel. That is what my
19 lawyers told me to do and not do.

20 Q. Okay. If you turn with me to Tab 12,
21 there is an email where Mr. Rogers is summarizing a
22 conversation with Mr. Gilbert and says that Mr.
23 Gilbert says he was going to call you and try to
24 talk some sense into you. Does that sound like a
25 lawyer is telling you not to sign these thing?

1 A. I never talk with him. I talk with
2 Christina Wilson. Christina is -- I only talk with
3 Derek Gilbert when it got to the point where he
4 realized that Matt was involved. And Matt he does a
5 lot of work for. And he came to me with his hand in
6 hand and says, can you help me, sir? I've sort of
7 crossed wires here.

8 I said, look, you probably ain't going to
9 ever handle anymore stuff for me. If you do, it
10 ain't going to be affected by it. But stay with
11 Matt. He means more to you. And I turn you loose
12 with no ill feelings. So you go from this point on
13 and you don't have to be involved with it.

14 Q. So you were dealing with Christina Wilson.
15 Was Christina not sending you the documents that
16 were provided by the buyer?

17 A. She sent me most of them, but she also
18 sent me what she told me I ought to sign.

19 Q. You are an attorney, Mr. Fender, correct?
20 A very experienced real estate attorney?

21 A. Well, I've been there.

22 Q. And you hired a real estate attorney?

23 A. I hired my friend Bill Bowen because I
24 have the utmost trust in him.

25 Q. Mr. Bowen, yeah. But you also hired Derek

1 Gilbert?

2 A. Not really. I hired Christina, but to
3 tell you the truth that is between us.

4 Q. Okay, Mr. Fender.

5 A. Let me tell you, Christina worked for me.
6 She has a Masters Degree from Clemson. She has
7 never gotten anything less than an A in her life.

8 Q. I don't dispute --

9 A. I got rid of her because she was really
10 too smart to be working in my law office. And that
11 is the honest to God's truth.

12 Q. I don't doubt that at all.

13 A. Okay.

14 Q. And it appears --

15 A. By the way, all the rest of them girls in
16 that office worked for me.

17 Q. It appears from the correspondence that
18 Christina was sending you the documents from the
19 buyer?

20 A. Probably so.

21 Q. Okay. But still you wouldn't take any
22 steps to resolve it?

23 A. I never had to do it in about 8 or 10
24 other good transactions with other good lawyers
25 involved.

1 Q. I understand that, but what was so
2 offensive about --

3 A. And why? Why in the world would I want to
4 go out on a limb with Carl and these crazy requests?

5 Q. Why would it put you out on a limb? I
6 understand --

7 A. Personal liability.

8 Q. I understand that. I understand the
9 personal indemnity. I do.

10 A. And secondly, I would violate what my
11 lawyer told me. Isn't that a good enough reason?

12 JUDGE DUKES: Well, you all try one
13 at a time, please.

14 THE WITNESS: Okay.

15 JUDGE DUKES: She's trying to keep up
16 here.

17 THE WITNESS: Well, she asks a
18 question and then she wants an answer. I was told
19 by lawyers I didn't have to sign them. And I don't
20 know what happened with Chicago, the Harvey Law
21 Firm, all of them. Somebody could have produced
22 that and you could have wrote the policy off of that
23 one.

24 BY MS. ENDEMANN:

25 Q. You didn't talk to Mr. Gilbert. What

1 lawyer told you not to sign the documents?

2 A. No lawyer. Christina Wilson who was
3 communicating with Derek. Christina was Derek's --
4 she's not anymore. Was Derek's Number One
5 paralegal. And say this, she's very knowledgeable.

6 Q. I don't doubt that she is, but I don't see
7 anything in the record --

8 A. That is because you get paid not to. You
9 are a hired gun. And you are doing a good job.

10 Q. Your attorney has put in the email
11 correspondence with Mr. Gilbert. And I don't see
12 anything where she advises you not to --

13 A. Why didn't the money come on the 7th or
14 the 8th?

15 JUDGE DUKES: Mr. Fender, just let
16 her finish the question.

17 THE WITNESS: All right. Go ahead
18 and ask the question.

19 JUDGE DUKES: So, I'm sorry. Go
20 ahead and finish your question if you would please.

21 THE WITNESS: Go ahead.

22 BY MS. ENDEMANN:

23 Q. Okay. I don't see anything in the
24 documents -- if you could point me to anything where
25 Christina told you not to sign any of these?

1 A. You can't see conversations.

2 Q. Okay. Fair enough. Do you believe that a
3 buyer should fund a transaction if the closing
4 documents that its attorney deems are necessary are
5 not provided?

6 A. I did in this incident because I had
7 closed many, many times without all that craziness.
8 Let me tell you what, Matt -- Matt and Jimmy has got
9 hung out on a limb here. I feel for both of them.
10 They shouldn't be here.

11 Q. And you testified that when you had the
12 deal with Inverness, they were willing to buy the
13 second piece of property that you knew they would
14 have an interest in that access --

15 A. They cut my guts out though on that as
16 part of it. They hurt me bad. Only paid like 50 or
17 60, but I had no choice. The default on this one
18 had put me in such a dilemma I had to do something
19 to cover myself.

20 Q. So when you say on this one, you are
21 referring to the Lady Beaufort contract, the default
22 on the mortgage? What are you referring to?

23 A. Your client.

24 Q. Okay. And the Inverness sale closed three
25 days after this --

1 A. That's correct.

2 Q. Two days --

3 A. We didn't even have time to draw a
4 contract.

5 Q. Okay.

6 A. He came in and said -- he said, what is
7 happening? I said it did not close. Said they
8 could have the money in two days. I said, well
9 good. Derek said let's don't go there. Go get
10 somebody else. Get Alysoun. She's been involved
11 with it before. Go get her. And I'll sign whatever
12 is necessary.

13 Q. Do you remember your conversations with
14 Mr. Sample? When did you call him?

15 A. I never called Sample.

16 Q. You never called him?

17 A. Uh-uh. He always came by or called me.

18 Q. I believe he testified in his deposition
19 that you called him.

20 A. Well, I may have. And I don't recall. If
21 I did -- if I said that I must have called him, but
22 I don't remember that.

23 Q. Mr. Sample testifies at Page 9 that, one
24 day he call me, referring to you, and said -- asked
25 if I was still interested. And he said it didn't

1 close. And would you like to buy it. And I said
2 sure. Do you remember when that conversation took
3 place?

4 A. No, but that may well have happened. I
5 won't argue that that didn't happen.

6 Q. And you don't remember when that happened?

7 A. Uh-uh. Well, I can tell you when it was.

8 Q. When was it?

9 A. It would not have happened until we got
10 the default.

11 Q. Okay. So was it the same day as you
12 closed with Inverness or was it prior to that?

13 A. Oh, no. No. No.

14 Q. It was prior to that?

15 A. I'm still sitting around and hoping that
16 they've shaken up the lawyer enough to get on the
17 bicycle and come on down here on the 8th and let's
18 close it. I would have loved to have closed it on
19 the 8th.

20 Q. So you didn't -- so then it must have been
21 the 9th because that is the only other day; is that
22 right?

23 A. No, ma'am. I said it was not the 7th.

24 Q. So if it didn't --

25 A. I would have worked with them on the 8th.

1 Q. So it didn't --

2 A. They didn't show up on the morning of the
3 8th.

4 Q. Okay.

5 A. So I probably told him at that point in
6 time it appears they are not going to close.

7 Q. Okay.

8 A. I don't know. I'm guessing. I'm
9 speculating.

10 Q. Okay. So either the 8th or the 9th you
11 had conversations with Mr. Sample about selling the
12 property to him?

13 A. It was after the 7th, yes.

14 Q. Okay. And you also had conversations
15 about him buying an additional parcel from you?

16 A. I told him he had to.

17 Q. Okay. You told him he had to buy it?

18 A. Well, I told him what he was going to pay
19 for this land wouldn't solve my problems.

20 Q. And you needed a sale on the second piece?

21 A. I needed a sale on the second piece.

22 Q. Okay. Very good. And let's talk about
23 your damages quickly if we could. Okay? You have
24 claimed that the difference in the contract price is
25 damages that Hird sustained. And when I say the

1 difference in the price, Lady Beaufort's contract
2 was 260,000, correct?

3 A. Uh-huh.

4 Q. Okay. And Inverness' contract was
5 245,000, correct?

6 A. Uh-huh.

7 Q. Okay. But there were no real estate
8 commissions --

9 A. Yeah.

10 Q. -- in the deal with Sample, right?

11 A. There was.

12 Q. There were?

13 A. I've got -- my wife is a Realtor and works
14 for Pat Harvey. There was a commission on the first
15 one. I didn't want to bring this up about Matt, but
16 Matt violated every rule when he brought me a
17 contract. A brokerage can't deal with another
18 person's thing. You got to go broker to broker.

19 Q. Okay. Which contract are we talking
20 about? I'm sorry. I just want to clarify.

21 A. I'm talking about the initial contract
22 with Jimmy.

23 Q. So there were real estate commissions on
24 Mr. Kerr's contract, correct?

25 A. It was written in there.

1 Q. Right. And that was --

2 A. And it's listed. A big sign when they
3 look at it when they go by saying it's listed.

4 Q. Right.

5 A. And I think with a reduced price sign on
6 it.

7 Q. Okay. And so the contract price was
8 260,000, right, with Jimmy?

9 A. That is what we -- I think that is right,
10 yeah.

11 Q. Okay. And we can look at Tab 1, and it
12 shows that it's 260. And there was a commission of
13 five percent; is that right? And you can look at --

14 A. That was written in the contract, that's
15 correct.

16 Q. -- Tab 1, Paragraph 33.

17 A. And you mentioned that. I had no idea.
18 Had the commission come out, I would have netted
19 about the same thing.

20 Q. Okay. Very good. Thank you.

21 A. That's assuming I was going to pay the
22 commission.

23 Q. Well, I think -- okay.

24 A. Because, you see -- but that is a
25 different issue altogether. That is a Matt issue.

1 Q. Okay.

2 A. As a matter of fact, their waiting for
3 resolution of this to decide what they are going to
4 do about that.

5 Q. Okay.

6 A. Let me back up so you will know what -- I
7 was introduced to Jimmy by Henry Chambers.

8 Q. Uh-huh.

9 A. He brought him in, and that is who we
10 worked for. Matt showed up at the tail end for some
11 reason thought he was entitled to a commission. My
12 friend Charles came to me and said, look, do me a
13 favor. We've done a lot of stuff. Please let us
14 pay him. I know it's blood money, but let's do it.
15 So Matt got a commission on that one even though I
16 would not have paid it. I did it for a friend,
17 Charles Osmond. He asked me and we did it.

18 Q. So you had suspicions of Mr. Trumps --

19 A. No doubt about it.

20 Q. -- as well as Mr. Malinowski --

21 A. No doubt about it.

22 Q. -- and as well as the buyer in this
23 transaction?

24 A. No. I ain't worried about the buyer. I
25 got no suspicion about the buyer. I think the buyer

1 is being led down the primrose path by his hired
2 people.

3 Q. Well, didn't you testify in your
4 deposition, Mr. Fender, that you are paranoid
5 because they were all Citadel boys and you were
6 worried that Mr. Kerr was in on this deal?

7 A. Malinowski is Citadel. Jimmy is Citadel.
8 I got a loan with -- I got a loan with Jan. And to
9 end up down with Jan getting a loan on this property
10 when you --

11 Q. You became suspicious?

12 A. Yeah. Yeah, I did --

13 Q. Do you know what you've paid in attorneys
14 fees?

15 MS. ENDEMANN: Bill, I seem to
16 have -- I'm sorry. I only have through G. I don't
17 have H and I which is your affidavit.

18 THE WITNESS: Feels like a million.
19 You won't accept that answer?

20 BY MS. ENDEMANN

21 Q. Okay. Why don't I just hand this to you,
22 Mr. Fender. And can you tell me what you are
23 claiming as damages for attorneys fees?

24 A. Can I consult with my attorney on that?

25 Q. I think he's --

1 A. He can come right to it and he can go to
2 the parts.

3 Q. I think if you turn to -- he's got an
4 affidavit at Exhibit H.

5 A. All right.

6 MR. BOWEN: The affidavit is --
7 there's also a retention agreement.

8 MS. ENDEMANN: Okay. All I have is
9 through G.

10 THE WITNESS: I'll agree to whatever
11 is on that affidavit.

12 BY MS. ENDEMANN:

13 Q. Okay. Great.

14 A. I don't find it.

15 Q. Okay. Fair enough?

16 A. I don't know where that ends. I'm sure
17 it's not through trial time.

18 JUDGE DUKES: I tell you what, let's
19 take a quick break while you all look for that for a
20 second.

21 (Off the Record 2:40 TO 2:45.)

22 JUDGE DUKES: All right. Back on the
23 record. Go ahead. I think you had a few more
24 questions?

25 MS. ENDEMANN: Just a couple more.

1 BY MS. ENDEMANN:

2 Q. Mr. Fender, it appears from your -- the
3 exhibit your attorney has just handed me that you
4 are claiming just over \$44,000 in attorneys fees; is
5 that correct?

6 A. If he's happy, I am.

7 Q. Okay. And that might be all I have. Let
8 me just run through real quick. These are the only
9 damages that you are claiming, correct?

10 A. Well, whether it's legitimate or not, I
11 had to sacrifice another piece of property because
12 somebody didn't do what they said they was going to
13 do. And I sold it in my opinion like 40,000 to
14 \$50,000 under market price because I had depended on
15 this thing to close.

16 Q. Okay. Is there any evidence of this sale
17 on the record?

18 A. Yeah. There is deeds and everything on
19 record.

20 Q. In the record in this case? Has that
21 been --

22 A. Well, I don't know about that. I tell you
23 what, I'm not being cute. You can punch it up on
24 your computer though. You know how to do that? You
25 are kind of around the corner, aren't you? They

1 will give it to you.

2 Q. You agree, Mr. Fender, that if you sold
3 this property to Inverness while the Lady Beaufort
4 contract was still in effect then you were in
5 breach, do you agree?

6 A. Well, that's pretty clear cut. If the
7 contract was still in effect and I sold it to
8 somebody else I was in breach, absolutely.

9 MS. ENDEMANN: All right. I think
10 that is all I have, Judge.

11 JUDGE DUKES: Do you have anything
12 else, Mr. Bowen?

13 MR. BOWEN: I've got just a couple
14 quick questions. And I'm looking for a document. I
15 want to make sure it is in the record. And that is
16 the closing documents that Hird Island signed in its
17 sale to -- in anticipation of the sale to Lady
18 Beaufort.

19 MS. ENDEMANN: Is that your Exhibit
20 B, Bill?

21 MR. BOWEN: Did I give it back to you
22 by chance?

23 MS. ENDEMANN: I've got -- is it
24 this?

25 MR. BOWEN: Which is that exhibit?

1 Yes. Thank you. I just want to call the Court's
2 attention to Exhibit B. And I'm going to show these
3 to Sherwood right now.

4 REDIRECT EXAMINATION

5 BY MR. BOWEN:

6 Q. These are the documents that you signed.
7 Let me do this so you don't get them all -- how
8 about take a look at Exhibit B -- Exhibit 1.
9 Exhibit B to Exhibit 1 and ask you if these are
10 documents that you signed in anticipation of the
11 sale to Lady Beaufort? Just identify them by title
12 as you go through them. You don't need to read
13 them.

14 A. There is a -- I'm lost.

15 Q. Go to Exhibit B.

16 A. B? Look in B? And B is what?

17 Q. Is there not a deed there that you signed
18 conveying the property to --

19 A. There is a deed there, but -- Hird Island
20 to Lady Beaufort, that's correct, yes, sir.

21 Q. Okay. You signed that?

22 A. All right.

23 Q. And what is the date of that signature?

24 A. That was done back on the 4th of October.

25 Q. And you delivered that to your attorney's

1 office?

2 A. Yes, I did.

3 Q. All right. And what other documents are
4 attached?

5 A. Seller's affidavit.

6 Q. And is that a fairly standard seller's
7 affidavit used in sales?

8 A. Yes, sir.

9 Q. With respect to liens and things of that
10 nature?

11 A. Yes, sir, uh-huh.

12 Q. And you signed that?

13 A. All right.

14 Q. And you delivered that to your attorney.
15 What date did you --

16 A. All of this was done the same day. I
17 anticipated going out of town on this closing. And
18 I went ahead of time and got them closed.

19 Q. All right. What other documents did you
20 submit?

21 A. 1099-S.

22 Q. Okay.

23 A. A short-form affidavit allowing Derek
24 Gilbert or Melissa Wicker to sign anything that
25 needed to be signed on my behalf.

1 Q. Okay.

2 A. There is a meeting and resolution of Hird
3 Island.

4 Q. A corporate resolution approving the sale?

5 A. Approving the sale, uh-huh.

6 Q. Okay. And I think that is it?

7 A. Right.

8 Q. Did you ever receive any assurance from
9 Mr. Malinowski or his bank that the loan had been
10 approved and funds would be disbursed immediately
11 upon closing?

12 A. No, sir.

13 Q. Did you -- I believe you said Mr. Rogers
14 told you that?

15 A. You know, the loan issue -- the first time
16 it came up was either like on the day or day before
17 closing.

18 Q. I understand.

19 A. When he says the bank is going to
20 authorize, I said, what in the hell is this about?
21 There ain't no bank involved. Wasn't no loan
22 involved. That scared me, again.

23 Q. So that added to your concern --

24 A. Absolutely.

25 Q. -- that it was not going to close?

1 A. Right. Absolutely.

2 Q. And if it didn't close they were going to
3 file a lis pendens against the property and that
4 would effectively shut you down?

5 A. Right.

6 Q. Is that true? Is that correct? Not true.

7 A. Right.

8 MR. BOWEN: I have no further
9 questions.

10 JUDGE DUKES: Anything else for this
11 witness?

12 MS. ENDEMANN: No, Judge.

13 JUDGE DUKES: All right. Anything
14 else from the Defendant?

15 MR. BOWEN: No, sir, I'm sorry.

16 JUDGE DUKES: Does the Defense rest?

17 MR. BOWEN: We rest.

18 JUDGE DUKES: All right. Anything
19 from counsel?

20 MS. ENDEMANN: One housekeeping
21 matter, Your Honor. He provided fee affidavits as
22 Exhibit 2. I also have for your in camera review
23 all of our invoices. We held them as privileged
24 just because some of the billings are rather
25 detailed that I can provide to the Court.

1 JUDGE DUKES: I tell you what --

2 MR. BOWEN: I don't need that, sir.

3 JUDGE DUKES: All right. Hang on to
4 them then.

5 MR. BOWEN: Whatever the affidavit
6 says, it says.

7 MS. ENDEMANN: Okay. All right.

8 JUDGE DUKES: It sounds like it's an
9 all or nothing situation. All right. Well, if
10 there is nothing else from counsel. That will
11 conclude the matter.

12 (Whereupon, the hearing was concluded
13 at 2:52 p.m.)

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Certificate of Reporter

I, Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the hearing of Lady Beaufort, et al vs. Hird Island, et al, on the 1st day of March, 2017: and that the foregoing 181 pages constitute a true and correct transcription of the said hearing.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter delivered to Michelle N. Endemann, Esquire, Andrew K. Epting, Jr., LLC, 46-A State Street, Charleston, South Carolina 29401.

In witness whereof I set my hand and seal this 2nd day of November, 2017.

My Commission
expires 1/4/18

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