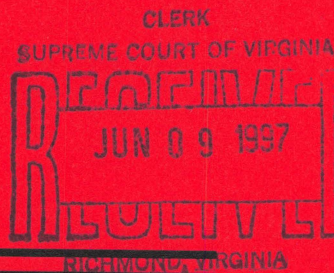
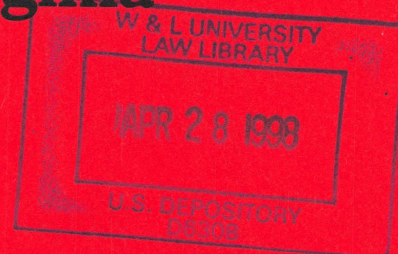


254 Va 356



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 970243



JOHN D. WARNER, JR. and MARY T. WARNER,

Appellants,

v.

LEWIS H. CLEMENTSON, ESQ., Substitute Trustee,

Appellee.

JOINT APPENDIX

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TABLE OF CONTENTS

Appendix Page

First Amended Bill of Complaint filed July 2, 1996	1
Transcript of Proceedings before the Honorable Christopher W. Hutton held on July 24, 1996	20
Demurrer and Special Plea in Bar of Lewis H. Clementson filed August 9, 1996	77
Warner Opposition to Clementson Demurrer filed August 26, 1996	81
Warner Opposition to Clementson Plea in Bar filed August 26, 1996	83
Memorandum in Support of Opposition to Demurrers, Pleas in Bar and Motion for Summary Judgment filed August 26, 1996	85
Memorandum in Support of Demurrer and Special Plea in Bar filed August 26, 1996	110
Transcript of Proceedings before the Honorable Christopher W. Hutton held on September 9, 1996	116
Letter Opinion dated October 11, 1996	191
Order filed November 8, 1996	192
Assignments of Error filed February 7, 1997	194

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

JOHN D. WARNER, JR,

and

MARY T. WARNER,

Plaintiffs,

V.

THE MONEY STORE INVESTMENT CORPORATION,
a New Jersey Corporation,

and

FOX TWO ACQUISITIONS, LC,
a Virginia Corporation,

and

LEWIS H. CLEMENTSON, ESQ.,
Substitute Trustee,

and

SORRY SARA'S LTD,
a Virginia Corporation,

Defendants.

Chancery No. 34948

FIRST AMENDED
BILL OF COMPLAINT

Plaintiffs, John D. Warner, Jr. and Mary T. Warner (the "Warners"), state as follows for their First Amended Bill of Complaint against The Money Store Investment Corporation

("The Money Store"), Fox Two Acquisitions, LC ("Fox"), Lewis H. Clementson, Esq. ("Clementson"), and Sorry Sara's, Ltd. ("Sorry Sara's"):

PARTIES

1. The Warners are citizens of the Commonwealth of Virginia who reside in Yorktown, Virginia.

2. The Money Store is a New Jersey corporation with its principal place of business in Union, New Jersey, but which is qualified and to and regularly does transact business in the Commonwealth of Virginia.

3. Clementson is an attorney licensed to practice law in the Commonwealth of Virginia who resides in Richmond, Virginia.

4. Fox is a Virginia limited liability corporation with its principal place of business in Hampton, Virginia.

5. Sorry Sara's is a Virginia corporation with its principal place of business in Hampton, Virginia.

FACTUAL BACKGROUND

6. Sorry Sara's is the record owner of certain real property located at 13 E. Queens Way in Hampton, VA (the "Property"). Since 1993, Sorry Sara's Restaurant and Pub, Inc. ("Sorry Sara's Restaurant") has operated a restaurant at the Property.

7. On June 23, 1994, Sorry Sara's executed a note in the original principal amount of \$327,000.00 ("the Note"). The Money Store at all times relevant herein has been the holder of the Note. A deed of trust encumbering the Property which secured the

note was also executed by Sorry Sara's on June 23, 1994 (the "Sorry Sara's Deed of Trust").

8. Upon information and belief, on June 23, 1994 the Warners executed a guarantee of Sorry Sara's obligations under the Note (the "Guarantee"). Upon further information and belief, a deed of trust securing the Warners obligations under the Guarantee and encumbering certain property owned by the Warners in Dare County, North Carolina (the "Warner Deed of Trust") was executed by the Warners on or about June 23, 1994 and has been duly recorded in Dare County, North Carolina.

9. At all relevant times herein, Warner has been a minority shareholder of Sorry Sara's, owning 45% of the stock of the corporation. Since approximately September 1994, Ronald D. Phillips has managed and operated Sorry Sara's and Sorry Sara's Restaurant as Executive Vice President and Chief Executive Officer. On March 3, 1995, John Warner resigned his positions as an officer or director of Sorry Sara's.

10. By letter dated September 15, 1995, The Money Store for the first time issued a notice to the Warners that the Note was in default and had been in default since January 1995.

11. Despite the Note being in default since January 1995, and despite The Money Store making its initial Notice of Default by letter dated September 15, 1995, no foreclosure proceedings were scheduled as to the Property until February 14, 1996.

12. The Money Store appointed Clementson the substitute trustee under the Sorry Sara's Deed of Trust. Thereafter, Clementson scheduled a foreclosure auction for February 14, 1996. For reasons satisfactory to Clementson and The Money Store, the

February 14, 1996 foreclosure auction was canceled and rescheduled for April 18, 1996.

13. Upon information and belief, Clementson never visited the Property prior to the foreclosure auction that occurred on April 18, 1996. Further, Clementson did not make arrangements to secure the Property by changing the locks or by any other method until on or about February 8, 1996.

14. Upon information and belief, prior to Clementson arranging to have the locks changed on or about February 8, 1996, significant assets owned by Sorry Sara's located in the Property, including furniture, fixtures and equipment, which served as collateral for the Note and Guarantee, were removed improperly from the Property.

15. On or about February 1, 1994, a real estate appraisal of the Property was conducted by Peter S. Eckert & Co., Inc. and provided to Mr. Don Foust of The Money Store (the "Appraisal"). According to the Appraisal, assuming certain renovations were made to the second story the Property as of February 1, 1994, had a value of \$525,000.00; \$450,000.00 attributable to the real property and \$75,000.00 attributable to the furniture, fixtures and equipment.

16. It is unknown whether Clementson or The Money Store obtained any other appraisals of the Property prior to the foreclosure auction.

17. The foreclosure auction was advertised in a local newspaper in the Newport News, VA on just four occasions: March 18, 19, 20 and 21, 1996. By letter dated March 29, 1996, counsel for the Warners advised Clementson that the advertising that had been conducted was insufficient given the nature and value of the Property.

18. The foreclosure auction occurred on April 18, 1996 at 12:00 p.m. at the Property. Prior to the auction, Clementson announced to all present that The Money Store would advise bidders at a point in the bidding that The Money Store's pre-determined bid figure had been reached. Clementson did not notify the potential bidders of the contingent liabilities or superior liens, if any existed, which would transfer with the Property.

19. At the foreclosure auction, an auctioneer hired by Clementson then began the bidding by asking for a price of \$125,000, a shockingly low initial bid given the appraised value of the Property. The auctioneer then asked for increased bids at just \$5,000 increments. When a bid of a \$175,000.00 was achieved, Clementson announced to all present that The Money Store's pre-determined bid price had been reached. The bidding effectively stopped at that point, and Clementson accepted a bid price of \$177,000.00 which was offered by Fox.

20. Upon information and belief, some potential bidders failed to bid because the furniture, fixtures, and equipment had been removed from the Property, thus making the Property less attractive as a viable, going restaurant concern, because Clementson failed to announce whether contingent liabilities or superior liens existed, because the bidding for the Property started so low and because Clementson announced such a low reserve on the Property.

21. Upon information and belief, The Money Store's Note and Guarantee were also secured by a UCC 1 Financing Statement and Security Agreement on the furniture, fixtures, and equipment in 13 E. Queens Way which was owned by Sorry Sara's.

22. In the months preceding the April 18, 1996 foreclosure, much uncertainty existed in the market regarding the Property as a result of actions brought by the City of Hampton against Sorry Sara's Restaurant regarding allegations of unpaid meals and/or sales taxes. Additionally, other federal and state tax liens, as well as judgment liens, exist with respect to the restaurant and the Property, causing further uncertainty in the market as to the contingent liabilities or superior liens that might transfer with the Property at foreclosure.

23. The foreclosure auction resulted in a commercially unreasonable bid price which was improperly accepted by Clementson and The Money Store. The foreclosure auction was improper in the following respects:

a. The Money Store did not inform the Warners for approximately nine (9) months that the Note was in default. Further, The Money Store did not initiate foreclosure proceedings for over one year after the Note became in default. The Money Store also failed to take possession of the Property adequately, resulting in the furniture, fixtures, and equipment being improperly removed and a general uncertainty about the status of the Property existing in the market. Accordingly, the Property was not properly preserved and protected causing diminution in its value.

b. The foreclosure auction was not properly and adequately advertised.

c. The announcement made prior to the sale that The Money Store would advise bidders at a point in the bidding that The Money Store's pre-determined bid figure had been reached chilled the bidding process and resulted in actual cessation of the bidding when Clementson announced that the pre-determined bid price had been reached.

d. The failure to announce whether contingent liabilities or superior liens would transfer with the Property, the low bid price initially asked by the auctioneer, and the low reserve placed on the Property by The Money Store, created an environment that failed to yield adequate bidding or a fair and commercially reasonable bid price.

e. The bid price accepted by Clementson and The Money Store did not represent a commercially reasonable price for the Property.

a. The Money Store did not inform the Warners for approximately nine (9) months that the Note was in default. Further, The Money Store did not initiate foreclosure proceedings for over one year after the Note became in default. The Money Store also failed to take possession of the Property adequately, resulting in the furniture, fixtures, and equipment being improperly removed and a general uncertainty about the status of the Property existing in the market. Accordingly, the Property was not properly preserved and protected causing diminution in its value.

f. The Money Store and Clementson failed to make proper arrangements to secure the furniture, fixtures, and equipment and return them for auction with the Property, thus causing diminished interest and inadequate bidding at foreclosure.

24. Sandra Campbell ("Campbell") is an investor who had previously loaned Sorry Sara's the sum of \$150,000.00.

25. Campbell's investment in Sorry Sara's was secured by a Deed of Trust, duly recorded, which was second in priority to Deed of Trust held by The Money Store.

26. Campbell had a substantial interest in the outcome of the foreclosure auction and, upon information and belief, was ready, willing and able to participate in the bid process.

27. Upon information and belief, representatives of Fox and Campbell discussed prior to the foreclosure auction arrangements whereby Fox and Campbell would not bid against each other at the auction.

28. Campbell and Fox ultimately entered into our arrangement prior to the foreclosure auction to quell the bid competition by agreeing that Campbell would refrain from bidding, that Campbell would pay a portion of the purchase price, that Fox and Campbell would own the Property jointly and that they would share in any profits realized through their ownership of the Property.

29. Upon information and belief, Clementson and The Money Store have turned over possession of the Property to Fox and Fox has commenced renovations to the Property.

COUNT I
DECLARATORY RELIEF

30. The Warners incorporate herein by reference the allegations contained in paragraphs 1-29.

31. An actual case and controversy exists regarding the rights, duties and obligations between the Warners, The Money Store, Clementson, and Fox as a result of the improper and commercially unreasonable foreclosure auction that occurred on April 18, 1996.

32. Because of the acts and omissions as alleged herein, if the Property is transferred to Fox pursuant to the price accepted by Clementson at the foreclosure auction, a significant deficiency will exist between the total amount of principal and the accrued interest on the Note, plus related costs of the foreclosure auction, and the bid price.

33. If Fox is permitted to acquire the Property for the bid price accepted by Clementson and The Money Store, the Warners are entitled to a declaration by this Court that they are relieved of any liability under the Guarantee for any deficiency that may exist between the total indebtedness under the terms of the Note and Guarantee and the purchase price paid by Fox.

34. Setting aside the foreclosure auction and ordering re-notice, re-advertisement and re-auction of the Property will not cure the damage caused by the acts and omissions of Clementson and The Money Store as alleged herein. The market for the Property has been so adversely affected by the acts and omissions as alleged herein that a fair, adequate and commercially reasonable price for the Property could not be obtained at a new auction.

WHEREFORE, the Warners pray for an Order declaring that upon the sale of the Property to Fox pursuant to the foreclosure auction, the Warner's obligations under the Guarantee and any related documents including the Warner Deed of Trust, are extinguished. The Warners further pray for an Order directing The Money Store, on behalf of itself or the SBA, to file appropriate documents to release the Warner Deed of Trust and to return to the Warners the original Guarantee marked "Satisfied in Full" upon the closing

and transfer of the Property to Fox. The Warners further pray for such other and further relief as the Court deems just and appropriate upon full review of the facts and circumstances presented in this matter.

COUNT II
BREACH OF FIDUCIARY DUTY

35. The Warners incorporate herein by reference the allegations contained in paragraph 1-34.

36. Clementson owed a fiduciary duty to the Warners by virtue of the relationship created by his serving as substitute trustee for the purposes of the foreclosure.

37. Clementson failed to secure the furniture, fixtures and equipment contained within and/or existing as a part of the Property by his failure to secure the locks or take any protective measures to preserve the Property's value and assets until on or about February 8, 1996.

38. Clementson failed to determine the lien status of the furniture, fixtures or equipment contained within and/or existing as a part of the Property prior to the foreclosure sale.

39. Clementson has yet to determine the lien status of the furniture, fixtures or equipment contained within and/or existing as a part of the Property.

40. Clementson failed to take any steps to compromise and settle any priority liens, if any, existing on the furniture, fixtures and equipment contained and/or existing as a part of the Property.

41. Clementson failed to sell the furniture, fixtures and equipment as a part of or in conjunction with the foreclosure sale.

42. Clementson's comments during the foreclosure sale that The Money Store had a pre-determined bid figure and that he would advise all present when that figure was reached, which he proceeded in fact to do, effectively quelled the bid process.

43. The acts and omissions of Clementson, acting as both counsel to The Money Store and as Substitute Trustee, including Clementson's participation in The Money Store's decision as to the amount to be bid violate Va. Code Ann. § 26-58.

44. The foregoing acts and omissions of Clementson constitute breaches of the fiduciary duty owed by Clementson to the Warners, directly resulting in a commercially unreasonable sale to Fox.

WHEREFORE, the Warners pray for an Order granting them judgment against Clementson in an amount to be shown at trial, but at a minimum for any deficiency obligations that the Warner's may have under the Note and the Guarantee, and such other and further relief as the Court deems just and appropriate.

COUNT III NEGLIGENCE

45. The Warners incorporate herein by reference the allegations contained in paragraphs 1-44.

46. Clementson owed a duty to the Warners to preserve the assets securing the Note and Guarantee, to conduct a commercially reasonable foreclosure auction and to accept a commercially reasonable bid price for the Property at the foreclosure auction.

47. Clementson was negligent in performing his duties to the Warners by his acts and omissions alleged herein.

48. Clementson's negligence has been the proximate cause of damages suffered by the Warners.

49. The Warners have been damaged by Clementson's negligence in an amount to be shown at trial, but a minimum of the amount of any deficiency obligations that the Warners may have under the Note and Guarantee.

WHEREFORE, the Warners pray for judgment against Clementson as pled herein, and for such other and further relief as the Court deems just and appropriate.

COUNT IV
VIOLATION OF VIRGINIA ANTITRUST STATUTE

50. The Warners incorporate herein by reference the allegations contained in paragraphs 1-49.

51. Fox's conduct as alleged in paragraphs 24 through 28 herein eliminateDor substantially lessened the bidding competition at the foreclosure auction. Fox's conduct was a contract, combination or conspiracy in restraint of trade or commerce in the Commonwealth of Virginia and constitutes a willful and flagrant violation of the Virginia Antitrust Act codified at Va. Code Ann. § 59.1-9.1, et seq. .

WHEREFORE, the Warners pray for an Order granting them judgment against Fox in the amount of three times their actual damages, as determined by the Court but at least in the amount of any deficiency that may exist under the Note and Guarantee, plus their

reasonable attorney's fees and costs, pursuant to Va. Code Ann. § 59.1-9.12, plus such further and other relief as the Court deems appropriate.

COUNT V
CONSTRUCTIVE FRAUD

52. The Warners incorporate herein by reference the allegations contained in paragraphs 1-51.

53. By registering to bid and by bidding at the foreclosure auction, Fox represented that it was bidding at the auction in good faith and as a bona fide bidder.

54. Foxs' act of bidding at the foreclosure auction when Fox had reached a secret agreement with Campbell not to bid constituted a negligent misrepresentation of material fact made with the intent that it be relied upon.

55. Fox's misrepresentation of material fact was relied upon by The Money Store and by Clementson, the Warner's fiduciary at the foreclosure auction, resulting in a commercially unreasonable sale.

56. The Warners were damaged by The Money Store's and Clementson's reliance upon Fox's misrepresentation of material fact.

WHEREFORE, the Warners pray for an Order granting them a judgment against Fox in the amount their actual damages, as determined by the Court, but at a minimum the amount of deficiency that may exist under the Note and Guarantee, plus such further and other relief as the Court deems appropriate.

COUNT VI
ACTUAL FRAUD

57. The Warners incorporate herein by reference the allegations contained in paragraphs 1-56.

58. By registering to bid and by bidding at the foreclosure auction, Fox represented that it was bidding at the auction in good faith and as a bona fide bidder.

59. Fox's act of bidding at the foreclosure auction when Fox had reached a secret agreement with Campbell not to bid constituted a knowing and intentional misrepresentation of material fact made with the intent that it be relied upon.

60. Fox's misrepresentation of material fact was relied upon by The Money Store and Clementson, the Warner's fiduciary at the foreclosure auction, resulting in a commercially unreasonable sale.

61. The Warners were damaged by The Money Store's and Clementson's reliance upon Fox's misrepresentation of material fact.

WHEREFORE, the Warners pray for an Order granting them a judgment against Fox in the amount of their actual damages as determined by the Court, but at a minimum in the amount of any deficiency that may exist under the Note and Guarantee, plus such further and other relief as the Court deems appropriate.

COUNT VII
TORTIOUS INTERFERENCE WITH CONTRACT

62. The Warner's incorporate herein by reference the allegations contained in paragraphs 1-61.

63. A valid contractual relationship existed between The Money Store and Sorry Sara's pursuant to the Sorry Sara's Note and Deed of Trust.

64. A valid contractual relationship existed between The Money Store and the Warners pursuant to the Guarantee of Sorry Sara's obligations.

65. At all times relevant to the allegations set forth herein, Fox was aware of the existence of the Sorry Sara's Note and Deed of Trust as well as the Warners' Guarantee of Sorry Sara's obligations.

66. By and through Fox's actions taken to reach a secret agreement with Campbell not to participate in the bidding at the auction and by Fox's bidding and becoming the successful bidder, Fox has intentionally interfered with the contractual relationships set forth above by causing a deficiency to exist under the Note and Guarantee that, but for Fox's tortious conduct, would not otherwise exist, or would not exist at the level it will exist if the Property is transferred to Fox for \$177,000.

67. The Warners have been damaged by Fox's intentional interference with the Warners' contract with The Money Store.

WHEREFORE, the Warners pray for an Order granting them a judgment against Fox in the amount of in the amount of their actual damages as determined by the Court, but at least in the amount of any deficiency that may exist under the Note and Guarantee, plus such further and other relief as the Court deems appropriate.

COUNT VIII
PUNITIVE DAMAGES

68. The Warners incorporate herein by reference the allegations contained in paragraphs 1-67.

69. Fox's conduct in arranging a secret agreement with Campbell to suppress bidding activity in violation of the Virginia Antitrust Statute, Va. Code Ann. § 59.1-9.1, et seq., constitutes a willful and want on disregard for the Warners' rights.

70. Fox's fraudulent conduct in arranging a secret agreement with Campbell to suppress bidding activity and thereby increase the deficiency balance owed by the Warners constitutes a wilful and wanton disregard for the Warners' rights.

WHEREFORE the Warners pray for an Order assessing punitive damages against Fox in the amount of \$100,000.00 and for such other and further relief as the Court deems just and appropriate upon full review of the facts and circumstances presented in this matter.

COUNT IX
INJUNCTIVE RELIEF

71. The Warners incorporate herein by reference the allegations contained in paragraph 1-70.

72. Alternatively, and only in the event that the Court concludes that the relief requested in Counts I through VII should not be granted, the Warners are entitled to an injunction precluding the transfer of the Property to Fox pursuant to the foreclosure auction conducted on April 18, 1996 and the bid price accepted by Clementson and The Money Store. The Warners are further entitled to an Order setting aside the foreclosure auction

and requiring Clementson and The Money Store to re-notice, re-advertise and re-auction the Property in a commercially reasonable manner.

73. The acts and omissions of Clementson and The Money Store as alleged herein resulted in a commercially unreasonable foreclosure auction and a commercially unreasonable bid price for the Property accepted by Clementson and The Money Store. The foreclosure auction should therefore be set aside and Clementson and The Money Store should be enjoined from transferring the Property to Fox at the bid price accepted by Clementson and The Money Store at the foreclosure auction.

74. The acts and omissions of Clementson, acting as both counsel to The Money Store and as Substitute Trustee, including Clementson's participation in The Money's Store's decision as to the amount to be bid disqualify him from exercising the powers conferred by the Deed of Trust and further renders the sale voidable pursuant to Va. Code Ann. § 26-58.

75. The Warners do not have an adequate remedy at law and they will be irreparably harmed if the injunctive relief sought herein is not granted.

WHEREFORE, the Warners pray that the Court enter an Order setting aside the foreclosure auction for the Property conducted on April 18, 1996 and enjoining Clementson and The Money Store from transferring the Property to Fox pursuant to that foreclosure auction. The Warners also pray for an Order requiring Clementson to re-notice, re-advertise and re-auction the Property in a commercially reasonable manner. The Warners further pray for such other and further relief as the Court deems just and appropriate upon full review of the facts and circumstances presented in this matter.

Respectfully submitted,
JOHN D. WARNER, JR.
MARY T. WARNER

By: Hugh M. Fain
Counsel

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J. Stephen Buis
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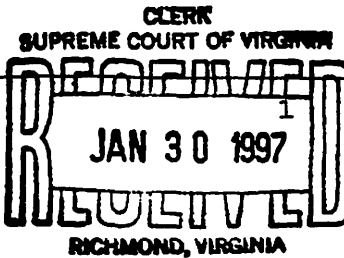
Certificate of Service

I certify that a true copy of the foregoing Amended Bill of Complaint was mailed, postage pre-paid, to Philip L. Hatchett, Esq. Cumming & Hatchett, 2236 Cunningham Drive, Hampton, Virginia 23666, Lewis H. Clementson, Esq., 8804 Patterson Avenue, Richmond, Virginia 23229, Donald Patten, Esq., Patten, Wormon & Watkins, 12350 Jefferson Avenue, Newport News, Virginia 23602, Ronald Phillips, 1003 High Dunes Quay, Hampton, Virginia 23664 on this 28th day of June, 1996.

James P. Bohnaker

JAMES P. BOHNAKER
CLERK OF THE DISTRICT COURT
56 JUL -2 PM 12:12
EX# _____ PG# _____
CITY OF HAMPTON, VA.

970243



1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART I

3
4 JOHN D. WARNER, JR.)

5 and MARY T. WARNER, (

6 Plaintiffs,)

7 v. (

CHANCERY NO.

8 THE MONEY STORE INVESTMENT CORPORATION,)

34948

9 a New Jersey Corporation, (

10 and FOX TWO ACQUISITIONS, L.C.,)

11 a Virginia Corporation, (

12 and LEWIS H. CLEMENTSON, ESQUIRE,)

13 and SORRY SARA'S, LTD., (

14 a Virginia corporation,)

15 Defendants. (

16 TRANSCRIPT OF PROCEEDINGS

17 Hampton, Virginia

18 July 24, 1996

19 Before:

20 THE HONORABLE CHRISTOPHER W. HUTTON, JUDGE

21

22 TAYLOE ASSOCIATES, INC.

23 Registered Professional Reporters

24 Telephone: (804) 461-1984

25 Norfolk, Virginia

1 **Appearances:**

2 On behalf of the Plaintiffs:

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10 On behalf of The Money Store:

11 DONALD N. PATTEN, ESQUIRE

12 ROBERT J. LLOYD, ESQUIRE

13 PATTEN, WORNOM & WATKINS

14 12350 Jefferson Avenue, Suite 360

15 Newport News, VA 23602

16 (757) 249-1881

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18 On behalf of Fox Two:

19 PHILIP L. HATCHETT, ESQUIRE

20 CUMMING & HATCHETT, P.C.

21 2236 Cunningham Drive

22 Hampton, VA 23666

23 (757) 827-9207

1 Appearances: . (Continuing)

2

3 Also present:

4 Lewis H. Clementson

5 Terry Doran

6 Ronald D. Phillips

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1 THE COURT: This is quite an august array
2 of counsel.

3 We are here today in the matter of John D.
4 Warner versus The Money Store and others. There are a
5 number of motions and pleadings that have been filed in
6 this matter.

7 I understand from various phone calls that
8 counsel, some counsel, were inquiring as to what matters
9 would be taken up today. I understand there's another
10 hearing set in this case several weeks from now. It was
11 my understanding that the motion to quash the lis
12 pendens was the major issue of today. Is that correct?

13 MR. FAIN: Yes, Judge, I believe that's the
14 only -- Mr. Hatchett's motion to quash is the only
15 motion to be brought today.

16 THE COURT: All right. Fine.

17 MR. PATTEN: I have also filed a motion on
18 that, too, Judge -- Don Patten.

19 MR. FAIN: Hugh Fain -- I failed to
20 introduce myself -- representing John Warner, who is
21 seated next to me at counsel's table.

22 THE COURT: All right. Fine.

23 And if that's the only issue and Mr. Patten
24 and Mr. Hatchett have filed that motion, let's proceed
25 on that.

1 MR. HATCHETT: Yes, sir, Your Honor. Since
2 it was my motion, I'd like to speak first.

3 Just to identify for Your Honor, I'm Philip
4 Hatchett. I represent Fox Two Acquisitions. Terry
5 Doran, a member of Fox Two Limited Liability Company, is
6 seated to my left.

7 So that the Court understands, the Trustee,
8 Lewis Clementson, is seated catty-corner to me. I
9 believe you have met the other parties.

10 We are here, Your Honor, specifically on
11 the motion that I filed to quash the lis pendens. The
12 lis pendens, as you know, Your Honor, is an unusual act
13 that can cloud title. It has clouded the title of the
14 property at 13 West -- East Queen Street.

15 That property was sold in a foreclosure
16 April 18, 1996. At that time the property was
17 owned -- and it's been pled by the Plaintiffs -- was
18 owned by Sorry Sara's, Ltd. One other party is here.
19 Ron Phillips, who was a principal in Sorry Sara's and
20 has been served in all of these pleadings, is also
21 present before Your Honor.

22 But specifically let's get down to what
23 we're here on.

24 Sorry Sara's, Ltd. owned the property.
25 Nobody disagrees with that. Plaintiffs have filed a

1 bill of complaint and recently filed an amended bill of
2 complaint. My arguments are based on either document so
3 that if you say, well, I'm going to enter the motion to
4 amend his bill of complaint, this argument will have no
5 effect on that.

6 The corporation or the limited liability
7 company which owned the property went into default.
8 Money Store was the noteholder. It had Substitute
9 Trustee Lewis Clementson file a foreclosure action.

10 Prior to that, on March 3, 1995, the note
11 or the corporation Sorry Sara's had Mr. Warner resign as
12 an officer and director of Sorry Sara's. So, from that
13 time forward he was not a part of this matter. He was
14 also not a director or a trustee. That comes into play
15 because Sorry Sara's is not in good standing before the
16 State Corporation Commission.

17 The corporation -- and I called it a
18 limited liability company. No, it is a regular
19 corporation. I didn't mean to say that.

20 So, Mr. Warner does not have an
21 involvement. He has filed a lawsuit asking for money
22 damages against Fox Two, for negligence against
23 Mr. Clementson, and breach of contract on the note
24 against The Money Store. He has asked that the
25 property, in the alternative or in conjunction, be

1 resold. He has never pled that he owns an interest in
2 the property or that Mrs. Warner owns an interest in the
3 property or that he is seeking an interest in the
4 property.

5 The lis pendens is not a common law action
6 but is a statutory action. The allowance of a lis
7 pendens is under 8.01-268. And, specifically -- and
8 I've got a copy for counsel; I think everybody has had
9 one.

10 Specifically, the language of 8.01-268,
11 paragraph (b), is completely on point. "No memorandum
12 of lis pendens shall be filed unless the action on which
13 the lis pendens is based seeks to establish an interest
14 by the filing party in the real property described in
15 the memorandum." The bill of complaint, the amended
16 bill of complaint, fails to meet this criteria.

17 I want to just go on and raise the next
18 question. Mr. Fain -- or the Plaintiffs are going to
19 say, well, you've heard Mr. Hatchett say that Sorry
20 Sara's, Ltd. is a defunct corporation, so shouldn't we,
21 the Warners, be able to rise to the position of Sorry
22 Sara's? We guaranteed the note. We promised to make
23 payment in the event of default.

24 There are two things. First, go back to
25 what I said about the March 3, 1995 incident when

1 Mr. Warner resigned as an officer and director of
2 corporation.

3 Secondly, you don't have the right to rise.
4 And I cite Keep v. Good Car Keeping, Incorporated. And
5 I'm not intending to steal the thunder of Mr. Patten, so
6 I'm going to let him tell you about that, but this man
7 couldn't rise, because he wasn't an officer or director
8 of that corporation, to this position, and the Court
9 does not allow you to rise to that.

10 Finally, the Court has before it an
11 interesting prayer. The prayer of the initial pleading,
12 the first pleading, says that -- it says in the document
13 that all of this litigation has chilled the property so
14 much we couldn't get a good sales price a second time.
15 I didn't see that in the amended pleading, but I think
16 under the principles of Firmstone v. Massey you cannot
17 rise above your own pleading, above your own testimony.
18 But, more importantly, he says in his prayer, under
19 Article 9 of the amended pleading, give me an
20 injunction.

21 Well, the Court knows that if Mr. Warner
22 wants an injunction he can come before this Court and
23 pray for a temporary injunction, and a temporary
24 injunction will put us all on an even foot because he
25 will have to post a performance bond.

1 If he asks for an injunction, which would
2 be his proper relief, I believe, if there's
3 anything -- and I don't believe he's entitled to
4 it -- then he has to post a bond. But he has
5 effectively gotten a temporary injunction by filing this
6 lis pendens. He has clouded the title. You cannot get
7 marketable title, title insurance.

8 For that reason, we have asked at this time
9 in our prayer that the motion to quash the lis pendens
10 be granted by this Court.

11 Thank you.

12 THE COURT: All right. Mr. Fain, I'm going
13 to give you an opportunity to respond to Mr. Hatchett,
14 and then after Mr. Patten makes his remarks you can
15 respond to him as well.

16 MR. FAIN: Thank you, Judge.

17 Again, for the record, Hugh Fain
18 representing John and Mary Warner.

19 Your Honor, I know we're here on a very
20 limited issue and that is the interpretation of 8.01-268
21 to the facts of the amended bill of complaint as amended
22 or the bill of complaint, whichever the Court's
23 preference is for purposes of today's hearing.

24 As the Court is aware, under Rule 1:4(k)
25 and under the Code as well we are permitted to plead in

1 the alternative -- the Warners are. The Warners have
2 pled a number of causes of action here, a number of
3 theories of relief, one of which includes a request by
4 this Court to find that the foreclosure auction was
5 improperly conducted, it was illegal, it's void, and
6 that it ought to be reaucted. That, in the amended
7 bill of complaint, is our last cause of action.

8 I'll be frank with the Court and tell the
9 Court that at trial that may not be our preferred
10 relief, but it is a relief that is available to us.

11 Another prayer for relief we've asked for,
12 another count we've brought, Your Honor, is for money
13 damages, and it argues that -- or it alleges that Fox
14 Two colluded with other bidders at the bid, at the
15 foreclosure auction, in a manner which was intended to
16 and in fact did stifle the bid price. That is illegal
17 under Virginia's anti-trust laws, as the Court -- well,
18 that is illegal, it is our position, under the Virginia
19 anti-trust law.

20 If we prevail on that cause of action, Your
21 Honor, that may be at trial our preferred remedy. That
22 would be the money damages we can prove by that
23 collusion, with the amount of damages permitted under
24 the statute plus attorneys fees and costs. And I'll be
25 frank with the Court in saying if we prevail that may be

1 what we want; however, for a variety of reasons we may
2 not prevail on that, and if we don't we will be asking
3 the Court in equity to set aside the void and illegal
4 foreclosure auction which is void, we allege, for a
5 number of reasons; the collusion that I've just
6 mentioned, as well as what we allege and I'm sure the
7 Court has seen in our pleadings, a number of improper
8 acts that occurred by the Trustee and by The Money Store
9 in proceeding with the foreclosure. And if we're right,
10 we believe the Court will set aside that foreclosure
11 auction and order that it be done again.

12 Now, if we look at the statute and look at
13 what a lis pendens is all about, it is not a lien.
14 Under the Greenhill case in 1988, the Virginia Supreme
15 Court made it clear that a lis pendens is not a lien, it
16 is merely an announcement to the world that there is
17 pending litigation that may affect the title to this
18 property. So, if you're going to buy it you buy it
19 subject to this notice that there's this litigation.
20 You know, whether it's going to prevail or not, whether
21 the Plaintiffs are going to prevail or not, it could
22 affect the title to this property.

23 So, it is usual that an owner of property
24 comes in to quash a lis pendens, because he says, you
25 know, I can't market my property. There's this notice

1 out here. It's not a lien, but it's a notice that is
2 scaring away buyers.

3 Well, Judge, this is an unusual situation
4 here, because the buyer of the property is in here
5 asking for the lis pendens to be quashed, and that's
6 really of no moment. If the buyer wants -- if Fox wants
7 to buy this property, it can do so. The lis pendens
8 doesn't prevent it from doing so. It can buy the
9 property pendente lite. And, in fact, it's pled
10 alternatively as well, but one of its pleadings is
11 there's nothing wrong with the foreclosure sale; we
12 ought to have the property, and, if they believe that,
13 they can buy it pendente lite and buy it and go forward
14 with life.

15 I'll also say, Your Honor, they've
16 effectively done that. Good Fellows is a business
17 that's operating in that property today, and we don't
18 know under what circumstances -- our discovery will show
19 that -- but it's our belief that it's under an
20 arrangement with Fox Two where they're leasing the
21 property from the Money Store and, in turn, leasing it
22 back to Good Fellows. So, effectively, the purchaser in
23 this case is doing what it wants to do with the
24 property, and if it wants to buy the property, it can
25 buy the property. The lis pendens doesn't prevent them

1 from doing that. All it does is put the world on notice
2 there's this litigation pending.

3 Now, Mr. Hatchett says if you look squarely
4 at subsection (b) of 268 it tells us that if you're the
5 Plaintiffs you have to be pleading that you personally
6 are going to own the property one day. And that's not
7 what subsection (b) says, and there's no Supreme Court
8 case interpreting subsection (b), which was passed in
9 1988 by the Legislature that says that. To the
10 contrary, all of the cases interpreting a lis
11 pendens -- the statute regarding lis pendens agree that
12 the issue is -- and in fact the statute by subsection
13 (b), goes to the point of whether an interest in the
14 real estate is going to be affected so that the
15 potential buyer knows that, knows that if they buy it
16 and this litigation is successful they're going to have
17 to disgorge it or there's going to be a reformation of
18 the deed and they're going to have to give it back.

19 It doesn't necessarily mean the Warners are
20 going to buy that property one day, it means if their
21 lawsuit is successful the title to that property is
22 going to be affected. And if we're successful it's
23 going to be reauctioned, and there could be another
24 owner.

25 So, does the Warners' lawsuit affect the

1 title to this property? It absolutely does. There's no
2 question about that. And for that reason alone we meet
3 the standards of subsection (b).

4 There is no case that says that the Warners
5 have to plead that they're going to buy it at the new
6 foreclosure auction; it's that they will affect this
7 title if they are successful. So, that really ends the
8 discussion.

9 But let me go beyond that, Your Honor, and
10 tell you two other ways in which the property is
11 affected by our lawsuit. I've just told you one, and
12 that is that the Warners as guarantors of this note have
13 standing and a right to complain about the way that
14 foreclosure auction occurred.

15 This property served as collateral for the
16 note between Sorry Sara's and The Money Store. The
17 Warners guaranteed that obligation. If that foreclosure
18 auction was done improperly, the Warners are absolutely
19 affected by the low sale price which creates a bigger
20 deficiency on their obligation. Now, if it was an
21 illegal sale, if it was a void sale, they have every
22 right to ask this Court to have it redone because
23 they're affected by the foreclosure.

24 Judge, I would cite the Court to Christian
25 v. American Cyanamid, 578 F.Supp. 63, which gives the

1 definition of -- or gives a very good definition of
2 "standing," and one would have standing to sue, the
3 Court said there, when he is said to have such a
4 personal stake in the outcome of the controversy as to
5 ensure the concrete adverseness on which the Court
6 depends for illumination of the questions in the case.
7 "Personal stake in the outcome" is the gist of the
8 standing doctrine.

9 Well, it's very plain that the Warners meet
10 that standard by the foreclosure auction having been
11 done by collusive anti-competitive bidding, and by the
12 negligence and improper conduct of the foreclosure
13 they've got a bigger deficiency, potentially, than they
14 would otherwise. So, they have a right to ask for it to
15 be done properly. That's one reason they're affected as
16 a guarantor of a loan that's had a bigger deficiency
17 than it would have but for this improper conduct.

18 But beyond that there are two other reasons
19 why the Warners have a right to affect the title to this
20 property. One is -- and I have to disagree with
21 Mr. Hatchett strongly on the issue of what happens when
22 Sorry Sara's, Ltd. becomes a defunct corporation. It
23 doesn't matter what John Warner's status is or was as an
24 officer or director of that corporation. That is not
25 the issue. He is a 45 percent shareholder of a

1 corporation -- or was. That corporation is defunct, so
2 guess what? Mr. Scott and Mr. Warner -- Mr. Scott, I'm
3 sorry, Judge -- is the 55 percent shareholder of Sorry
4 Sara's. They're sitting out there without the corporate
5 protection, but they own a business together, a
6 partnership, if you will, that owns a piece of property,
7 and Mr. Warner, sitting here today, is a 45 percent
8 shareholder of that building that was foreclosed upon.
9 So, he has a direct interest in that real estate, and it
10 doesn't matter that he resigned as an officer and
11 director of the corporation. That is -- I have to
12 disagree with Mr. Hatchett. That's irrelevant.

13 So, that's a second way in which he was
14 affected directly by the improper foreclosure, and he's
15 got a right to ask for this Court to have it redone so
16 that he, as the 45 percent owner of the property, will
17 get a better shake on the outcome.

18 Now, let me tell you how that could play
19 out. That property was appraised at one time with a
20 value of \$525,000. That would be our evidence at trial.
21 That included furniture, fixtures and equipment that we
22 also have alleged were improperly taken out of the
23 building.

24 THE COURT: You also indicated that certain
25 improvements were going to be made on the second floor.

1 Were they made?

2 MR. FAIN: That was going to be in the
3 range of \$12,000 or \$15,000 and they weren't while
4 Mr. --

5 THE COURT: So it would be a \$525,000 plus?

6 MR. FAIN: That's correct. If the
7 foreclosure auction is redone without an
8 anti-competitive scenario, it very well could be -- who
9 knows? We don't know this, but it very well could be
10 that the entire obligation of Sorry Sara's, which is now
11 defunct -- therefore, Mr. Warner and Mr. Scott could be
12 met and there could be an excess.

13 So, he stands to gain some money if a new
14 foreclosure is done without anti-competitive
15 environment, done with proper advertising, without the
16 announcements that were made, would yield a better sales
17 price.

18 Mr. Warner, as a 45 percent owner of that
19 building, is affected by it; not only by the reduced
20 deficiency but on the off chance -- and who knows what
21 could happen -- that there would be some surplus left
22 over. That's the second way in which he's directly
23 affected by the improper foreclosure and has standing to
24 ask it be redone. And that's a member as John Q.
25 Public. Anybody who attended a foreclosure

1 auction -- and several members of the audience were
2 there. They were there for a reason. They had an
3 interest in buying the property. As a member of John Q.
4 Public, if they find out that an auction was conducted
5 illegally with an anti-competitive environment, they
6 have a right to come and ask for it to be redone.

7 And Mr. Warner, as a member of the public,
8 has a right to ask for that auction to be redone. He
9 may, in order to try to get out of some of these
10 difficulties, be able to bid at that auction, put
11 together some investors in a proper environment and bid
12 right alongside Fox Two and Sandra Campbell, who is here
13 today, and some of other people that were there
14 interested to bid. So, as a member of the public, John
15 and Mary Warner have a right to ask that foreclosure
16 auction be set aside and redone.

17 Your Honor, there are a number of cases
18 that I can hand up to the Court -- and will at the
19 conclusion, if the Court would find it helpful -- on the
20 issue of the anti-competitive effect of a bidding at a
21 public foreclosure auction and how it can be illegal.
22 And that's our position in this case; that if the
23 primary purpose for Ms. Campbell getting together with
24 Fox Two was to not bid against one another and,
25 therefore, keep the price low, they have violated the

1 law. And it has damaged the public, and it has damaged
2 Mr. Warner as a member of the public; it's damaged him
3 as a guarantor and as a 45 percent shareholder of that
4 building.

5 So, to get back to the basic point, that is
6 that through all these three mechanisms John Warner has
7 a right, and so does Mary Warner, to file this lawsuit.
8 asking the Court to set aside the foreclosure auction.
9 Now, when that happens, and if we're successful, the
10 title to that property has been affected, and they have
11 a right to come here and ask for that to be done.

12 I will address a couple of other issues
13 Mr. Hatchett raised.

14 Number one, I think he cited the Keep v.
15 Good Car Keeping Company. Judge, I just was handed that
16 case before the hearing, and I took a look at it. I
17 haven't reviewed it carefully, but my cursory review of
18 it tells me it's inapposite for this reason:

19 That was a case involving damage done to a
20 business, as I understand it, and a guarantor of a loan;
21 that the business had brought a suit complaining of the
22 negligence that occurred that caused the damage to the
23 business. I think it was a gas station and some
24 gasoline was blown up and so forth and so on. It had
25 nothing to do with a foreclosure auction, it had nothing

1 to do with what we're here today about, and that is
2 whether or not, under 8.01-268, a memorandum of lis
3 pendens is appropriate in view of the amended bill of
4 complaint that's been filed here. It is inapposite,
5 number one, for the purposes of this hearing, the
6 interpretation of the statute, and also factually as to
7 whether or not a guarantor has standing to complain
8 about the way a foreclosure auction takes place.

9 Another thing I'd like to address -- and
10 this is anticipating and trying to steel the thunder of
11 Mr. Patten -- in reading his motion to quash, which I'm
12 not really sure is before the Court today, I think we're
13 hearing Mr. Hatchett's motion to quash, but to the
14 extent --

15 THE COURT: My understanding was we were
16 going to hear them both.

17 MR. FAIN: That's fine with me, Judge,
18 because I think it's the same issue.

19 Mr. Patten has, in addition to the Good Car
20 Company case, cited two other cases, the Anderson case,
21 I believe, and the Chrysler Corp. case, both of which
22 are for the proposition that a guarantor -- well, let me
23 back up.

24 The Judge is probably aware of the common
25 law that says that a guarantor of an obligation may be

1 released or discharged from his obligation if the lender
2 and the borrower change the terms of the deal without
3 his notice, they monkey around with the collateral or
4 they just renew the note or change the deal, you know,
5 without the guarantor's notice. He ought to be
6 discharged of his liability.

7 And the two cases that Mr. Patten has cited
8 stand for the proposition that -- you know what? If
9 there's a guarantee that's written, that would write out
10 that common law right that says that no matter what we
11 as the lender do with that collateral, if we release it,
12 if we renew the loan, you're still obligated to us. I
13 believe those cases stand for the proposition that under
14 the facts of those cases -- I'm not sure it would apply
15 in this case -- the guarantor is not discharged of his
16 liability. Well, I think Mr. Patten is going to try to
17 bootstrap those cases into arguing Mr. Warner doesn't
18 have a right, therefore, to come in and ask this
19 foreclosure auction be redone.

20 Those cases are inapposite for these
21 reasons: This is not a case where Mr. Warner is asking
22 for a discharge of his liability because of conduct by
23 The Money Store. We may do that if The Money Store ever
24 comes after us for a deficiency. That may be a defense
25 we've got, but that's not what this case is all about.

1 This case, as the Court is aware -- and I don't want to
2 beat a dead horse -- is, as we've pled, to ask for the
3 foreclosure to be redone so that our deficiency can be
4 reduced.

5 So, those cases don't apply to whether or
6 not a memorandum of lis pendens is appropriate under
7 these circumstances.

8 Finally, Your Honor, Mr. Hatchett mentioned
9 injunctive relief; that Mr. Warner could plead for
10 injunctive relief. I didn't quite follow what he meant
11 by that. We don't need a preliminary injunction.
12 That's not what we've prayed for.

13 THE COURT: His argument was that the lis
14 pendens acts as an injunction.

15 MR. FAIN: Well, first of all, it doesn't,
16 Your Honor, in our view, for the reasons I've said
17 before; it is nothing more than a notice to the world
18 that there's this litigation pending, and you buy the
19 property subject to that notice.

20 So, it is not intended to be, nor is it in
21 this case operating as, a temporary injunction. In
22 fact, it hasn't stopped Good Fellows from opening, and
23 it hasn't stopped them from using the property.

24 So, we don't need to meet the standards, I
25 guess, if that's what Mr. Hatchett was trying to get to,

1 for showing likelihood of success on the merits and all
2 the other elements of a preliminary injunction. We're
3 not asking for that or need to ask for that. We're
4 going to show you at trial after discovery is complete
5 all the reasons why all the things we've asked for in
6 our complaint ought to be granted. So, a preliminary
7 injunction is not something that we need to be filing,
8 it's not a part of our case, and, so, we have no
9 requirement to show likelihood of success on the merits
10 of at today's hearing.

11 So, for all of those reasons, for the
12 narrow purpose, 8.01-268, does the Warners' lawsuit
13 affect the title to real estate and, therefore, is the
14 lis pendens properly filed -- for all those reasons we
15 respectfully say that it is and the motion should be
16 denied.

17 THE COURT: All right. Thank you,
18 Mr. Fain.

19 Mr. Patten.

20 MR. PATTEN: Thank you, Judge. Judge,
21 before we begin I'd like to introduce Rob Lloyd, an
22 associate of my office. He's a graduate of William &
23 Mary Law School, he clerked last year for Justice
24 Whiting in the Supreme Court and he's with our firm, and
25 I'd like to present him to the Court.

1 THE COURT: Thank you, Mr. Patten.

2 Welcome. I look forward to seeing you here
3 today and back again soon.

4 MR. PATTEN: Judge, a lot of things have
5 been said here. I might tell the Court that in our
6 motion to quash the memorandum of lis pendens we did not
7 refer to the Anderson or the Chrysler case. We did
8 refer to those cases --

9 THE COURT: That was in your brief on the
10 demurrer, wasn't it?

11 MR. PATTEN: Yes, sir. And we, of course,
12 want to talk to the Court about those cases at that
13 time. I had assumed we were not discussing the demurrer
14 today, and, so, I will not address --

15 THE COURT: Well, you all are
16 double-teaming Mr. Fain. Maybe he jumped pages.

17 MR. FAIN: I do apologize.

18 THE COURT: That's all right.

19 MR. PATTEN: Judge, what we have here, in
20 short synopsis, is The Money Store, which is my client,
21 made a loan in 1994 which was an SBA-guaranteed
22 indebtedness. It was executed by Sorry Sara's, which
23 was the legal owner of the property over here on East
24 Queen Street. That loan went into default in early
25 1995. There was attempts to work things out during that

1 year through an assumption of that loan by another
2 party. It didn't work. The Money Store finally, at the
3 end of the year, engaged Mr. Clementson as substitute
4 trustee, who is here and is a defendant in this action,
5 to sell the property. The property was ultimately sold
6 at foreclosure in April of 1996, just a few months ago.

7 After the foreclosure occurred we received
8 this lawsuit in the mail. It contains nine different
9 counts. There are two counts only that apply to The
10 Money Store. The first count is a count which is for
11 declaratory relief, and it suggests that there are many,
12 many irregularities in connection with this sale,
13 anywhere from the advertising being improper to the
14 price that was obtained being insufficient, to the
15 manner in which the Trustee conducted the sale, to being
16 improper for all kinds of reasons.

17 The Plaintiffs suggest in count one that he
18 should be released from his guaranty, which he signed at
19 the time the loan was made in 1994. And he signed an
20 SBA guaranty, which is a standard form document that
21 makes him liable independently of whatever may happen
22 with regard to collateral, and that's all part of the
23 answer and will be part of the demurrer which we will
24 discuss at the next hearing.

25 In any event, that's count one, and that's

1 what we are involved in, and we're also involved in the
2 last count.

3 The last count deals with a suggestion that
4 if everything else fails, if we're unable to get a
5 release of our guaranty, if we can't get any damages
6 from counts two through eight, which, incidentally, do
7 not involve The Money Store, two of them involve
8 negligence on the part of the Trustee. And all of this
9 conspiracy and the interference with contract, all of
10 that, are matters between Fox Two and the Plaintiffs.
11 We're not involved in that. We're involved in the last
12 count which says, if everything else fails, we would
13 like for the sale to be reversed and thrown out and,
14 presumably, readvertised and resold.

15 Now, Judge, the problem that we have with
16 the lis pendens, which is, presumably, connected with
17 that last count, is that nowhere in this pleading is it
18 stated such as what is specified by the statute, that
19 the action on which the lis pendens is based is seeking
20 to establish an interest by the filing party in the real
21 property described in the memorandum.

22 The memorandum is silent as to any interest
23 that is sought to be obtained in this property, and I
24 would suggest that this is a case such as -- a
25 creditor's suit, a creditor's suit where I'm a creditor

1 and Mr. Jones or whoever owes me money and I file suit
2 against his property to subject it to the debt which I
3 claim I have, and then -- that is the type of case that
4 that is talking about, where there is an actual claim to
5 the real property involved. Here we have no claim
6 against the real property. Nowhere in this document
7 that's 20 pages long would there be any suggestion that
8 Mr. Warner has any claim to the real property.

9 Now, I've heard for the first time today
10 the suggestion that, well, since Sorry Sara's is now in
11 default or now defunct and it hasn't paid its fees at
12 the State Corporation Commission that he now has an
13 interest that, presumably, he would not otherwise have,
14 or at least the suggestion being that he stands in a
15 better position now than he would have had this
16 corporation been duly formed and duly organized and duly
17 operated.

18 Well, I think the statute, as I recall it,
19 says that in the event of a default of a corporation or
20 a corporation failing to pay its fees that the assets
21 enure to the directors of the corporation, who then are
22 charged with the responsibility of liquidating the
23 assets. He's not claiming that he's a director of the
24 corporation. As I recall the pleadings, they say he
25 resigned as a director, I believe, of the corporation

1 back in 1995.

2 We're concerned, and the reason that we're
3 concerned is that we are a noteholder. We, of course,
4 take issue with all these allegations that we didn't
5 advertise the sale right. As a matter of fact, it was
6 advertised in three newspapers. We'll show the Court
7 that.

8 THE COURT: Either it was or it wasn't.
9 It's going to be pretty easy to show.

10 MR. PATTEN: Yes, sir. And those are
11 issues which, obviously, we're going to take up at a
12 later date.

13 But all of these allegations and then the
14 lis pendens having been filed against us -- we are now
15 effectively prevented from the Trustee being able to
16 convey the property from the purchaser of this property.
17 And, so, the answer that you've got somebody in there
18 leasing -- we don't have the money that the property
19 sold for.

20 And we think that all of these allegations
21 about wrongdoing on the part of Fox Two, all of these
22 things -- there is an adequate remedy at law, because if
23 in fact Fox Two has committed all these horrible
24 suggestions about colluding with some other bidder and
25 all of these various things then they should be liable

2 r money damages for whatever the loss that's been
3 suffered is.

4 But in our case here we are prevented from
5 selling this property, and it does no good to say, well,
6 it's just a notice. The fact of the matter is this
7 buyer or any buyer cannot get title insurance for the
8 sale of this property or any piece of property that has
9 a lis pendens filed against it. The lis pendens ought
10 to be proper.

11 If there's a claim against this property, a
12 claim of interest in this property by the filing party,
13 then that's one thing, but this claim is to be released
14 from a guaranty, which we'll argue at a later date. And
15 in the alternative it's a claim to set aside a sale of
16 the property which was sold at a foreclosure auction.

17 Nowhere does this filing party say he
18 should have the property. He was at this auction, this
19 gentleman -- or at least his lawyer was, and he knew all
20 about it. There's no notice issues in the brief
21 presented by Mr. Fain. He cites some authorities, one
22 of which is Woodward v. Resource Bank. That is a
23 secured transaction matter. That involved a case where
24 the borrower was a guarantor of a debt, and that
25 guarantor was deemed to be a debtor as a result of the
ruling in that case, and that debtor was entitled to

1 notice of the sale of the secured property, which in
2 that case was personal property.

3 Well, we don't have any argument with that,
4 but that's not this case. We're talking about a
5 different statute, a different statute completely. It
6 has nothing to do with a secured transaction dealing
7 with whether a guarantor as a debtor is entitled to
8 notice. They had notice anyway.

9 So, we would submit this case to the Court
10 for the Court's consideration, which is the -- we'll
11 give it to the Court to take a look at at a later date,
12 but it says what I think the Court knows the law to be,
13 obviously, and that is a corporation is a separate and
14 independent entity separate and distinct from the
15 persons who own it, and the corporation as the alleged
16 owner and operator of the business in that case is the
17 person entitled to the profits and the person injured by
18 the wrongs alleged in the motion for judgment.

19 So, we say if Sorry Sara's filed this
20 claiming an interest in this property, that the sale was
21 wrong, was improper, then it may be a different story.
22 But in this case we have a minority stockholder making
23 this claim. The second part of this case says that the
24 individual in that particular case was a guarantor and
25 that guarantor had no property interest in the leasehold

1 of the business, either, so -- either as a guarantor or
2 as a stockholder had no interest.

3 If this lis pendens remains on the property
4 then I think the least that the Court should do is
5 require these Plaintiffs to post a bond to protect us
6 from the loss which we are suffering every day by virtue
7 of the fact that we are not able to convey this property
8 and have to sit and wait for -- now we have a hearing
9 next month on the demurrer, and this thing could go on
10 for months -- I mean, conceivably, when we take evidence
11 about the advertisement and all of these things. In the
12 meantime, we can't sell the property. We're stuck here
13 in a no-man's land not knowing whether to make some kind
14 of an arrangement with this purchaser on a lease
15 basis -- and there is no formal lease at this point;
16 it's very informal because we've been stuck waiting to
17 get into court.

18 So, we're going to have to say if we have
19 to be saddled with not being able to convey the property
20 let's be fair about it. Let's require them to post a
21 bond, and if they're wrong they'll pay us, and if
22 they're right then, presumably, we'll have an
23 obligation. But to make us sit here and wait for what
24 could be six months to try this case -- it really
25 doesn't enure to their benefit, either, because all it

1 does is cause a further decline in the property. So, we
2 would ask that you release the lis pendens or enter an
3 order releasing it. We don't think it applies, but, in
4 the alternative, we think they ought to post a bond to
5 protect us from the loss that we're suffering by virtue
6 of that.

7 THE COURT: Mr. Fain.

8 MR. FAIN: Briefly, Your Honor, just a
9 number of things in response.

10 First of all, Mr. Patten talks about the
11 fact that upon liquidation or dissolution of the
12 corporation the assets revert to the director who -- and
13 I think he finished my thought, and that is that he's
14 charged with liquidating the assets of the corporation,
15 and then what does he do? Pays off creditors and gives
16 the remaining to the shareholders.

17 So, Mr. Warner, again, as a shareholder of
18 the corporation, has an interest in disposition of the
19 assets, so he has a right, therefore, to come in and ask
20 for the foreclosure to be redone because the remaining
21 directors will then have assets to distribute to him.
22 So, that is how he has a direct right to come in and ask
23 for this relief.

24 Your Honor, the point is very narrowly.
25 They have not been able to show you one case that says

1 what they want the statute to say, and the Supreme Court
2 has never said this: That in order to have a proper
3 memorandum of lis pendens you've got to plead, I, one
4 day, will be the record owner of this property. That's
5 not what the statute requires. That's not what the
6 Supreme Court says.

7 What it says is you have to plead that you
8 are going to effect the title to this property, you have
9 an interest that will effect title to this property, and
10 that's absolutely what we'll have to have. The
11 property, as one of our remedies, could be transferred
12 to someone else. That could be John Warner. He does
13 have an interest -- he could have an interest in this
14 title to this property personally. At the resale he
15 could be the successful bidder.

16 So, he personally has got an interest in
17 the title to this property, but I don't think the
18 Supreme Court even requires that. I think the Supreme
19 Court requires that you're bringing the lawsuit; that if
20 you're successful you will have an effect on the
21 transfer of that title. And they haven't cited any case
22 that says anything contrary on that issue, Judge. The
23 Keep case they just handed up. I've only read it
24 cursorily, but I believe it has nothing to do with the
25 foreclosure auction, or the matter of lis pendens which

1 we're here on today. It does not say that a guarantor
2 doesn't have the right under this statute to bring a
3 lawsuit that may affect the interest in property if he's
4 right and, therefore, cause the transfer to go another
5 way. So, I don't think the Keep case is applicable,
6 Judge.

7 Your Honor, I also think it's very telling
8 in this case that Fox Two has pled a counterclaim
9 against Mr. Clementson and The Money Store. They've
10 said, well, gee whiz, you know what? The Warners were
11 right, and the property does revert, and we have to have
12 a resale; if we're damaged by the negligence of
13 Mr. Clementson and The Money Store, and, therefore, we
14 want damages from them. I think that speaks for itself,
15 Your Honor. It tells us that Fox has pled that there is
16 a possibility that the title to this property will
17 revert to someone else and they may be damaged by that.

18 So, again, Massey v. Firmstone -- Fox can't
19 rise above its pleadings, and it's pled that this title
20 could transfer back to someone else.

21 THE COURT: They're covering all their
22 bases, just like you are.

23 MR. FAIN: I didn't mean to cast any
24 aspersions, but -- I think I made my point on that.

25 There was also a reference by Mr. Patten as

1 to whether or not we have an adequate remedy at law. We
2 have pled in the alternative, and I'll be frank and say
3 probably our best remedy is a law damage for violation
4 of the anti-trust. I don't think we'll get that far,
5 and if we don't this is our other remedy.

6 Finally, Judge, the suggestion about bond.
7 Two things, Your Honor. Mr. Patten has not and cannot.
8 cite you any statutory authority for why the filer of a
9 lis pendens should post a bond. It's just simply --
10 there is no requirement that we have to post a bond.
11 We're not the ones, as we alleged in our complaint, that
12 caused this problem. We're not the ones, as we alleged,
13 that caused the foreclosure auction not to be conducted
14 properly or for collusion to occur at the bidding. And
15 we're sorry those things happened. Obviously we are;
16 we've been damaged by them.

17 So, you know, it rings hollow for the Money
18 Store to say, we're stuck here, we can't do anything
19 with our property, they're the ones that caused the
20 problem. There's no statute -- this isn't a prejudgment
21 tax lien which has a very clear statutory basis. They
22 cannot point you to any statute that requires us to post
23 a bond, and, therefore, you shouldn't order us to do
24 that.

25 And, secondly, there's no damage to post

1 against. He says, well, we don't have \$177,000, and, if
2 we're successful, they'll get that, and in the interim
3 they're being paid a lease payment by somebody -- that's
4 my supposition because Good Fellows is in there
5 operating.

6 So, they're not being damaged. So, number
7 one, no statutory requirement for bond and, number two,
8 no damage to bond against. So, for those reasons we
9 suggest that Mr. Patten's request for bond also be
10 denied.

11 THE COURT: Mr. Fain, given the substance
12 of the alternatives that you've pled in your amended
13 bill, what is the lis pendens doing for your clients
14 right now?

15 MR. FAIN: It does this, Judge:

16 If you release the lis pendens, as
17 Mr. Hatchett would want you to, he will have the comfort
18 of having the title pass to him during the pendency of
19 this lawsuit, and then if when we go to trial one of the
20 remedies we're seeking is now -- you've raised the bar
21 on us, because now we're going to ask you to -- while
22 we're asking you to set aside the foreclosure sale and
23 reset the auction, it makes it more difficult for you to
24 do that equitably because title has already passed, and
25 you're going to have to now rescind the deed that

1 shouldn't be rescinded. And we're going to be asking
2 you, Judge, we would like you to rescind this deed, this
3 property that's transferred, and put it back where it
4 was, and, as the Court knows, that's a high standard to
5 meet to ask for reformation or rescission of a deed.
6 Now, if they want to buy it pendente lite, that's their
7 right. They can run the risk that the Court will ask
8 them to set it aside and redo it.

9 But I think by taking away one of the
10 remedies that we've got in the Code, which is to put a
11 notice on the property when there's a lawsuit pending,
12 that could affect the title. It prejudices us because
13 it gives him the comfort to go buy it with a degree of
14 comfort he doesn't have now. We're going to be in here
15 asking you to rescind the deed, and it makes it a little
16 more difficult.

17 THE COURT: Of course, these other
18 allegations that you made in terms of the collusion --
19 that's a whole different --

20 MR. FAIN: We'll probably at the conclusion
21 of the case elect our remedy, and most likely, if we've
22 gotten that far and our evidence is as we expect it to
23 be, we'll be asking for money damages. But we're a long
24 way from knowing that yet.

25 THE COURT: Indeed. All right.

1 Mr. Hatchett, do you have something else?

2 MR. HATCHETT: Yes, sir. One of the things
3 I forgot to say was my client has already put out
4 \$25,000. The foreclosure held April 18th -- the hammer
5 came down at \$177,000. And we've heard quite a bit of
6 the opening argument, but one of the things is this
7 property was assessed at \$238,000. It sold for 74
8 percent of the assessed value. The Court knows that
9 under law when you offer to buy a piece of property you
10 become liable for that property. So, immediately
11 liability, if this place burns down, is in the hands of
12 Fox Two. They have to have insurance, and they've had
13 to have insurance. They've had to also be ready to come
14 up with the additional \$152,000 that was to be adhered
15 to.

16 Now, I have to raise a question here on one
17 matter. When I hear the plaintiffs say that they have
18 an interest in the property, it's not in the memorandum
19 that they are going to bid the property, and if there is
20 a future bid for more than \$177,000 or anything -- he's
21 saying it's speculative. We might come up with a group
22 of people. Well, those are not people who are parties
23 to this case, that would-be group of people who had a
24 purchase.

25 This is exactly the reason this is a very

1 difficult case for the Court to even allow to go
2 forward. We have a demurrer coming up, yes, but we
3 can't have another offer for sale and see if we can get
4 a better price this time.

5 If Mr. Warner and Mrs. Warner have met the
6 requirement under 8.01-268 -- I left my remarks strictly
7 to that -- then they have to come forth and say in their
8 filing that the filing party has an interest in the
9 property, and they don't do this.

10 There is a lot of speculation in this
11 matter. The Code is -- lis pendens is not at common
12 law, it is statutory, and we have to look at each word,
13 and it's just not met.

14 But the liability on maintaining the
15 property shifts to the buyer at the time.
16 Mr. Clementson took Fox Two's \$25,000, and the remaining
17 \$152,000 is ready to be paid.

18 We've heard from the Warners that they are
19 affected as guarantors to this property. That isn't an
20 interest. Keep v. Shell Oil explains that. I'm not
21 asking that there be -- in my motion to quash that there
22 be an injunction and substitute it with an injunction
23 and have them post a bond, I'm saying that they have not
24 met this Code section. And no argument has led this
25 Court to deny that charge. There is no finding that if

1 this suit is successful that Mr. Warner will have an
2 interest in that property.

3 I don't have the Code section memorized --
4 it's 18.1 and it's about 500. And, so, that says when a
5 corporation is defunct the trustees -- the directors
6 become the trustees to sell the property, not the
7 shareholders. That's the reason I went through that
8 pleading. That is when he withdrew in 1995 as a
9 director. He could not be a trustee in the future.

10 Finally, Your Honor -- I will only take
11 just a brief moment -- so much has been said about Fox
12 Two going in to buy a piece of property at a foreclosure
13 and being a bad guy, but I don't believe that the law is
14 that a prior agreement between two or more persons to
15 become jointly interested in the purchase of property at
16 the sale by a trustee in a deed of trust is void or
17 against public policy or would render such a purchase
18 and the deed from the trustee to the purchaser void.

19 And I'm citing for you Michie's, 13(a),
20 mortgages and deeds of trust, section 147, citing
21 Copeland v. Sohn, 75 West Virginia 83, 82, southeast
22 1016, 1914.

23 With all due respect to the Warners, I do
24 not believe there's been any violation of Virginia
25 anti-trust law, and we will prove that. But I just had

1 to make comment to that since so much was said bad about
2 a guy who was willing to put in a hundred -- or entity,
3 Fox Two -- \$177,000 to buy the property at this
4 foreclosure. And we are ready to go forward with our
5 purchase.

6 MR. PATTEN: Just three quick --

7 THE COURT: I'm not sure where I'm going to
8 stop here, but I'll give Mr. Fain one more shot after
9 you. You go ahead, and then I'll give him --

10 MR. PATTEN: Just three quick things.

11 We've heard a lot about this collusion, and
12 I want to emphasize to the Court that whatever collusion
13 there may or may not have been does not involve our
14 clients. We hear Mr. Fain say that most likely when we
15 get down to the end of the road, wherever that's going
16 to be, most likely we're going to be looking for these
17 money damages because of the anti-trust and all that.
18 That does not involve our clients. My clients went out
19 there and knocked down the property after much
20 advertisement. If they did something in collusion with
21 somebody else that's their problem.

22 In the meantime I hear that this Court
23 doesn't have a right to insist upon a bond. And it's
24 interesting count nine says "alternatively, the Warners
25 are entitled to an injunction precluding the transfer of

1 the property to Fox pursuant to the foreclosure auction
2 conducted..." on so and so date.

3 So, here we have Mr. Fain in his pleadings
4 asking for an injunction on the one hand and, on the
5 other hand, telling this Court that this Court has no
6 authority telling him to post a bond, and we should just
7 sit back and be content to wait until he can figure out
8 whether or not there's been collusion and whether or not
9 there's been violation of anti-trust, and, in the
10 meantime, we can't do anything with our property.

11 I would submit to the Court he's talking
12 out of both sides of his mouth when he suggests, on the
13 one hand, he's entitled to an injunction and, on the
14 other hand, he says nobody can make him put up an
15 injunction. His pleadings are not conforming with his
16 arguments, and I would respectfully submit this Court
17 has discretion to require in an equity proceeding that
18 injunction be posted for the plaintiffs to go forward on
19 at least count nine.

20 THE COURT: Well, I think what Mr. Fain was
21 suggesting was on the issue of the lis pendens that I
22 had no authority to require a bond. He was not arguing
23 the injunction alternative, nor is anybody arguing that
24 today. I think -- and maybe he misunderstood you. I
25 think he assumed that you were requesting a bond if the

1 lis pendens remained in effect.

2 MR. PATTEN: That's what I was requesting,
3 Your Honor, because I believe that if he's going to
4 proceed on this count nine he ought to -- the Court
5 ought to require him to do what he's asked for in his
6 complaint, which is to -- he says he's entitled to an
7 injunction. That's what he's pled.

8 We would submit to this Court that that is
9 the proper remedy for enjoining a sale. In order to
10 prevent a sale of real estate after the sale has already
11 been knocked down, the remedy is to ask for an
12 injunction. And, of course, if he asks for an
13 injunction he's got to post a bond.

14 So, we submit -- and what he's doing by
15 putting up this lis pendens is he's getting around the
16 obligation that I submit that he has, which is to post a
17 bond, if he wants to hold us up for the term of this
18 lawsuit.

19 THE COURT: All right, Mr. Fain.

20 MR. FAIN: Judge, I will make just a brief
21 point, and then I think we'll be done.

22 First, in response to Mr. Hatchett's
23 suggestion that I made an improper argument by telling
24 you that maybe Mr. Warner will bid at the new
25 foreclosure auction, that it's speculative to know who

1 is going to bid at the foreclosure auction, Your Honor,
2 respectfully, that's not the issue. The issue is if
3 we're right you're going to order that. We don't have
4 to tell you whether it's going to be Mr. Warner or
5 somebody else who will be successful; there's no way you
6 can.

7 What I'm saying is the title will be
8 affected thereby, and that's what the lis pendens is
9 for. They can't cite a case that will tell you what
10 they believe, and that's why we're here. I think we've
11 prevailed on that point.

12 Copeland v. Sohn is a West Virginia case,
13 and Mr. Hatchett referred you to that. And Mr. Patten
14 also talked about the issue of collusion. On the
15 collusion issue, that's not what we're here today for.
16 I would like to cite the Court, to the extent it does
17 bear on your ruling, to Jones v. Clary, which is found
18 at 194 Virginia 804, 1953, a Virginia Supreme Court
19 case, which we believe, unless I find something
20 different, is the dispositive case on the collusion.

21 The Supreme Court found under the facts of
22 that case that there was no collusion, but the primary
23 issue for the Court, and what will be the issue in this
24 case, is whether or not, as we allege, when Sandra
25 Campbell got together with Fox Two and made this deal

1 the primary purpose of their agreement was to stifle the
2 bid. And Jones v. Clary says that if that is the
3 primary purpose for your getting together, that's
4 illegal. And that's the authority on which we're
5 proceeding.

6 Finally, on the issue of a bond, injunctive
7 relief, Your Honor, we have not filed a motion for
8 preliminary injunction. I think that says it. I guess
9 we could have, and if we did I agree we would be
10 required to post a bond. We didn't, so we're wide open
11 to them transferring the property pendente lite subject
12 to our memorandum of lis pendens. But under the Code
13 there's no bond requirement for the memorandum of lis
14 pendens.

15 Thank you, Your Honor.

16 THE COURT: All right, gentlemen. I'm sure
17 I'll be hearing much more from both Mr. Hatchett and
18 Mr. Fain on the effect. Apparently, there was some
19 understanding and agreement between Fox Two and
20 Ms. Campbell, and the legal impact of that is something
21 that we'll talk about at some other date.

22 As for today's issue, the lis pendens,
23 gentlemen, the Court finds that the plaintiffs have not
24 met the statutory requirement anticipated by the Code
25 section, and the Court grants the motion of the

1 defendants to quash or to remove the lis pendens, noting
2 that the plaintiffs in this case do have another
3 equitable remedy, should he choose to seek that, and he
4 has a number of remedies at law which are already pled.

5 As regarding how far the bar is going to be
6 raised, Mr. Fain, should the Court ultimately find in
7 the plaintiffs' favor, I think the weight of the
8 evidence will have a lot to say about what that is, how
9 high it is. But as for today, on this narrow issue, I
10 rule in favor of the defendants on their motion.

11 MR. HATCHETT: Your Honor, could I bring up
12 just a couple of other motions -- do you want to go
13 ahead and note your objection?

14 MR. FAIN: I would.

15 THE COURT: All right. The objection on
16 behalf of Mr. and Mrs. Warner is noted for the record.

17 MR. FAIN: Thank you, Judge.

18 MR. HATCHETT: We have circulated an order
19 to allow a first amended bill of complaint. I think it
20 is down at that end of the table right now. I don't
21 know if Mr. Clementson has had the chance to read it and
22 sign it.

23 We've agreed that he can file an amended
24 bill of complaint. You've already gotten an answer to
25 the amended bill of complaint from The Money Store, and

1 Fox Two is prepared to file its answer to the first
2 amended bill of complaint and responsive pleading
3 thereto. I have a date in there that says it's going to
4 be -- the answer is going to be filed by -- and I think
5 I put the 19th. We can move that date, if we can agree
6 to it, if the Court will enter that order.

7 THE COURT: Would you like me just to put
8 the date in there?

9 MR. HATCHETT: Yes. Yes, sir.

10 MR. PATTEN: Perhaps a couple days from
11 now.

12 MR. CLEMENTSON: Give me some time to
13 answer.

14 MR. HATCHETT: Okay. Two weeks?

15 MR. CLEMENTSON: Yes.

16 THE COURT: What day are we here on the
17 demurrer?

18 MR. HATCHETT: The 26th.

19 THE COURT: Of August?

20 MR. HATCHETT: Yes, sir.

21 THE COURT: All right. And what is the
22 date that's set in there now, the 19th of July?

23 MR. HATCHETT: Yes. It's passed.

24 THE COURT: Well, how about the 9th of
25 August? Would you like to amend it to that date?

1 MR. PATTEN: Fine with me.

2 MR. HATCHETT: All right. Sorry Sara's,
3 Ltd. has never filed an answer on these matters. All of
4 us have been sending materials to Mr. Ronald D.
5 Phillips, who is here.

6 Do you want -- as a housekeeping matter, do
7 we have to continue to keep him as a party to this
8 matter?

9 THE COURT: Well, are you Mr. Phillips?

10 MR. PHILLIPS: Yes, sir, Your Honor.

11 THE COURT: You can keep your seat, sir.

12 Mr. Phillips has been here throughout the
13 proceedings, and he's had an opportunity to listen to
14 what's going on. I think it would probably be in the
15 best interest of everyone if Mr. Phillips continued to
16 receive copies of the pleadings and various responses in
17 this matter.

18 Again, given the seriousness of the
19 allegations in here -- and Mr. Phillips' name comes up
20 from time to time, too -- I think it's important that he
21 knows what's going on, so make sure he's continued to be
22 copied.

23 MR. HATCHETT: All right. What about
24 signatures on orders?

25 THE COURT: Mr. Phillips --

1 MR. HATCHETT: He has not filed an answer.

2 THE COURT: You have not filed an answer on
3 behalf of Sorry Sara's. Are you intending to request an
4 opportunity to do that?

5 MR. PHILLIPS: Your Honor, I haven't had
6 the opportunity to consult with counsel on that, and I
7 really am not prepared to even answer that at this time,
8 sir.

9 THE COURT: All right. Well, I did put you
10 on the spot there, Mr. Phillips. It's something you
11 probably want to talk with counsel about. And while I'm
12 going to instruct these counsel to continue to send you
13 correspondence and pleadings in this matters, I'm not
14 going to require Mr. Phillips' signature to any of the
15 orders.

16 Now, if you obtain an attorney and you
17 become actively involved in this case your attorney will
18 know what to do about that, but at this point you've not
19 filed an answer, and you will need leave of Court to
20 file an answer, and those are the things that you
21 probably need an attorney to assist you with.

22 You'll get notice of what's going on, but
23 these counsel are not going to be sending you copies of
24 orders until unless you do something to make that hoop.

25 Is that fair enough, gentlemen?

1 MR. HATCHETT: Yes, sir.

2 THE COURT: Is that order now ready?

3 MR. HATCHETT: Yes.

4 MR. PATTEN: Judge, I didn't realize the
5 order hadn't been entered by the 19th. I filed my
6 answer to the amended motion.

7 Could we have that stand as if it was
8 filed, or do I need to refile it?

9 THE COURT: No, you don't need to refile
10 it. It's noted in the record what you just said.

11 Let me just read this a moment.

12 (There was a pause in the proceedings.)

13 THE COURT: All right. I think it's clear
14 to counsel where we are on this, but, again, just for
15 the record, the first amended bill of complaint has been
16 filed and is the operative bill for the plaintiffs John
17 and Mary Warner.

18 The Money Store has responded to that
19 amended bill of complaint?

20 MR. PATTEN: Yes, I have, Your Honor.

21 THE COURT: All right.

22 MR. PATTEN: We filed a demurrer to that
23 amended bill of complaint.

24 THE COURT: All right. And Mr. Clementson
25 has not filed to that amended bill of complaint. Is

1 that correct?

2 MR. CLEMENTSON: Correct.

3 THE COURT: But you will have until August
4 9th to do so.

5 And how about Fox Two? Have they filed for
6 the amended bill of complaint?

7 MR. HATCHETT: I have it right here.

8 THE COURT: All right. Well, you can file
9 it at the end of this hearing.

10 All right. I will sign this, then, with
11 those understandings for this day, July 24th, 1996.
12 It's endorsed by all counsel as well as Mr. Clementson.
13 A signature block for Mr. Phillips is left blank at this
14 point because while Mr. Phillips is continued to be
15 informed of these proceedings, he has not chosen at this
16 point to become an active participant.

17 MR. HATCHETT: Your Honor, we are coming
18 before you on the 26th. Do you want this order to give
19 a date on which briefs are due on the motions to be
20 heard on the 26th, like a date certain?

21 THE COURT: Well, I believe Mr. Patten has
22 already filed his.

23 MR. PATTEN: I filed one on the demurrer.
24 We also filed a plea in bar, which we will get a little
25 brief to the Court as well.

1 THE COURT: Mr. Fain, would that be helpful
2 to you, to have some dates?

3 MR. FAIN: Judge, I think it's always a
4 good idea to do that.

5 THE COURT: Do counsel care to suggest to
6 the Court how they wish to structure that?

7 MR. FAIN: Perhaps, just a suggestion, ten
8 days before the 26th if I were to file my opposition,
9 and then five days after that if they were to file any
10 reply, if they wanted to file a reply, or we could back
11 that up more. I understand we have between now and the
12 26th, roughly about one month.

13 THE COURT: About 32, 33 days.

14 MR. FAIN: If I could have two weeks, then,
15 prior to the 26th to file my opposition brief, and if
16 they needed to file a reply to it they could do so.

17 THE COURT: All right. Let's do this:

18 Monday, August 12th, that would be your
19 date for filing, Mr. Fain; reply by Monday, August 19th.
20 That will give everybody a week in advance of the 26th.

21 MR. PATTEN: Judge, when should -- you
22 haven't filed, have you, a brief?

23 MR. HATCHETT: I haven't filed a brief, no.
24 I'm filing my motion for demurrer, too.

25 MR. PATTEN: So, when would the defendants

1 file their motions? I still have a motion to file -- I
2 mean, a brief to file -- excuse me -- on the plea in
3 bar, and I think Mr. Hatchett has a brief to file on the
4 demurrer.

5 MR. HATCHETT: Yeah, I do. Let's just say
6 that all briefs are due the 12th and response briefs are
7 due by the 19th.

8 MR. PATTEN: That will do it.

9 THE COURT: Will that give you enough time?

10 MR. FAIN: Yes, sir, to give me an
11 opportunity to reply again.

12 THE COURT: You would then have the
13 opportunity to respond to their briefs.

14 MR. FAIN: That's fine with me.

15 Just so I'm clear, on the 26th we're taking
16 up Fox Two's demurrer, which Mr. Hatchett filed today,
17 and The Money Store's demurrer and their plea in bar,
18 those three issues?

19 THE COURT: Yes, sir, and Mr. Clementson.

20 MR. CLEMENTSON: And a demurrer from me,
21 too.

22 MR. HATCHETT: I guess it would be any
23 pleading that was filed before the 9th under this order,
24 but if you're going to brief it you have to brief it by
25 the 12th and file it by the 9th.

1 THE COURT: Okay. Gentlemen, do we all
2 understand each other now?

3 MR. FAIN: Yes, sir.

4 THE COURT: All right. Anything else today
5 on this issue?

6 MR. HATCHETT: Do you want me to prepare
7 the order?

8 THE COURT: Please.

9 MR. HATCHETT: Yes, sir.

10 THE COURT: All right.

11 MR. HATCHETT: Your Honor, one last thing.

12 I had subpoenaed two witnesses to come
13 forth today when I thought we were going to be getting
14 into bigger and bigger issues and they were present.
15 And I apologize for having to have them come to court,
16 because I think I'm going to have to resubpoena them,
17 but I wanted that to be noted.

18 THE COURT: All right. I believe somebody
19 was subpoenaed from -- I won't get into that.

20 Are you going to resubpoena them for the
21 26th of August?

22 MR. HATCHETT: I haven't made that decision
23 yet, Your Honor.

24 THE COURT: All right. You can talk to
25 them about why they were here today and why they didn't

1 get to do anything.

2 MR. HATCHETT: Yes, sir.

3 MR. FAIN: Your Honor, I anticipate there
4 will be some discovery between now and the 26th. For
5 example, I've subpoenaed Ms. Campbell for a deposition,
6 for example, and I don't know if we have to discuss it
7 now or whether we ought to think about some discovery
8 schedule between now and the 26th.

9 THE COURT: Well, I'm certainly open to
10 doing that. I think it would be in everybody's interest
11 if they knew where they were. Have you already filed --

12 MR. FAIN: It asks for admissions,
13 interrogatories and document requests to Fox, and I've
14 received documents in response to subpoenas issued to
15 Mr. Hatchett and Mr. Clementson.

16 I anticipate taking the deposition of
17 Ms. Campbell and Mr. Doran and Mr. Bellek and, perhaps,
18 some others, which would, I think, shed light on the
19 hearing on the 26th. I suppose -- actually, now that I
20 say that, on the 26th we're really arguing on the
21 pleadings, are we not?

22 So, I take that back. I don't think we
23 need a discovery order between now and then.

24 MR. HATCHETT: I thought on the 26th if we
25 were not successful we would set a discovery agenda.

1 MR. FAIN: I think that's appropriate.

2 THE COURT: All right, gentlemen. We will
3 be in recess.

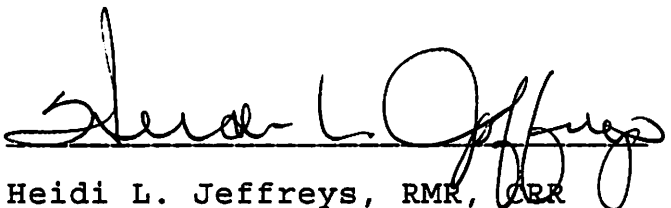
4 (The hearing concluded at 3:17 p.m.)
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1 COURT REPORTER'S CERTIFICATE

2
3 I, Heidi L. Jeffreys, RMR, CRR, a
4 Registered Merit Reporter, certify that I recorded
5 verbatim by Stenotype the proceedings in the captioned
6 cause before the Honorable Christopher W. Hutton, Judge
7 of said Court, Hampton, Virginia, on July 24, 1996.

8 I further certify that, to the best of my
9 knowledge and belief, the foregoing transcript
10 constitutes a true and correct transcript of the said
11 proceedings.

12 Given under my hand this 23rd day of
13 December, 1996, at Norfolk, Virginia.

14
15
16 
17 Heidi L. Jeffreys, RMR, CRR

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

JOHN D. WARNER, JR.

and

MARY T. WARNER,

Chancery No. 34948

Plaintiffs,

v.

THE MONEY STORE INVESTMENT CORPORATION, et al.

Defendants.

DEMURRER AND SPECIAL PLEA IN BAR

NOW COMES the defendant, Lewis H. Clementson, Substitute Trustee ("Clementson"), by counsel, pursuant to Section 8.01-273 of the Code of Virginia, 1950, as amended, and demurs to the bill of complaint ("Complaint") filed herein by the plaintiffs, John D. Warner, Jr. and Mary T. Warner (collectively "Plaintiffs"), on the grounds that it is insufficient at law and fails to state facts upon which relief can be granted; Clementson further specially pleads certain matters in bar of this proceeding, and in support thereof, states as follows:

DEMURRER

1. All of Plaintiffs' allegations in the Complaint, relating to Clementson, state acts and/or omissions by him solely in his capacity as substitute trustee under a certain deed of trust (the "Deed of Trust") from defendant, Sorry Sara's, Ltd. ("Sorry Sara's"), securing a note held by defendant, The Money Store Investment Corporation ("The Money Store"), which was guaranteed by Plaintiffs. In Count II of the Complaint, Plaintiffs allege that Clementson owed them a fiduciary duty by virtue of the relationship

created by his serving as substitute trustee for the purposes of the foreclosure, and further allege that Clementson's failure to take certain actions prior to the sale and his conduct of the sale constituted breaches of the fiduciary duties allegedly owed by him to Plaintiffs. Clementson, in his capacity as substitute trustee under the Deed of Trust, owed no duty to Plaintiffs, by virtue of Plaintiffs being guarantors of the Note.

2. Plaintiffs have failed to allege sufficient facts to state a cause of action against Clementson for breach of Clementson's fiduciary duties as substitute trustee, in Count II of the Complaint, in that a trustee is not required, by existing Virginia law, to take the action Plaintiffs allege that Clementson failed to take, nor do any of the alleged acts by Clementson amount to a breach of fiduciary duties, as a matter of law.

3. Plaintiffs have failed to allege sufficient facts to state a cause of action against Clementson for negligence in Count III of the Complaint, in that a trustee under a deed of trust is not required, under existing Virginia law, to take the actions which Plaintiffs allege Clementson failed to take, nor do any of the alleged acts taken by Clementson constitute negligence, as a matter of law.

4. Plaintiffs have failed to allege sufficient facts, rather than conclusions of law, to support their claim that Clementson's alleged acts and/or omissions were the proximate cause of any damages allegedly suffered by Plaintiffs.

5. Plaintiffs have failed to allege sufficient facts to establish that they have been damaged, as a matter of law. Allied Productions v. Duesterdick, 217 Va. 763 (1977).

SPECIAL PLEAS IN BAR

6. Counts II and III of the Complaint appear to seek a judgment by Plaintiffs against Clementson, as a matter of law, revealing that Plaintiffs have an adequate remedy at law against Clementson, and therefore Plaintiffs are barred from proceeding in equity against Clementson.

7. Plaintiffs, as guarantors of the Note owed by defendant Sorry Sara's to defendant The Money Store, have no standing to seek any judgment or relief against Clementson, in his sole capacity as substitute trustee under the Deed of Trust.

WHEREFORE, for all the reasons set forth herein, Clementson respectfully prays that the Complaint be dismissed with prejudice, and that he be awarded his costs and attorney's fees in this matter expended.

LEWIS H. CLEMENTSON

By 

Of Counsel

Charles M. Lollar, VSB #17009
HEILIG, MCKENRY, FRAIM & LOLLAR, P.C.
700 Newtown Road, Suite 15
Norfolk, Virginia 23502
(757) 461-2500

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer and Special Plea in Bar was mailed, postage pre-paid to the following counsel of record: Hugh M. Fain, III, Esquire, Post Office Box 1555, Richmond, Virginia 23218, counsel for Plaintiffs; Donald Patten, Esquire, counsel for The Money Store Investment Corporation, 12350 Jefferson Avenue, Newport News, Virginia 23602; Philip L. Hatchett, Esquire, counsel for Fox Two Acquisitions, L.C., 2236 Cunningham Drive, Hampton, Virginia 23666; and Sorry Sara's Ltd., c/o Ronald D. Phillips, 1003 High Dunes, Quay, Hampton, Virginia 23664, this 8th day of August, 1996.



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JAMES P. BOLLMAKER
1003 HIGH DUNES
96 AUG -9 11:28
PK# PG#
CITY OF HAMPTON, VA.

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

JOHN D. WARNER, JR.,)	
)	
and)	
)	
MARY T. WARNER,)	
)	
)	
Plaintiffs,)	
v.)	Chancery No. 34948
)	
THE MONEY STORE INVESTMENT CORPORATION,)	
FOX TWO ACQUISITIONS, L.C.,)	
LEWIS H. CLEMENTSON, ESQ.,)	
and)	
SORRY SARA'S LTD.,)	
)	
Defendants.)	

John D. Warner, Jr. and Mary T. Warner (the "Warners") oppose the Demurrer filed by Lewis H. Clementson ("Clementson") and state as follows:

- 81

5. The Warners further oppose the Demurrer for the reasons more fully articulated in their Memorandum of Law, filed herewith.

JOHN D. WARNER, JR.
MARY T. WARNER

By: 
Counsel

J. Stephen Buis
Hugh M. Fain, III
Brian R. M. Adams
Spotts, Smith, Fain & Rawls, P.C.
411 E. Franklin Street, Suite 601
P. O. Box 1555
Richmond, Virginia 23218-1555
(804) 788-1190

Counsel for John D. Warner, Jr.
and Mary T. Warner

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Opposition to Demurrer was mailed, postage pre-paid, to Philip L. Hatchett, Esq. Cumming & Hatchett, 2236 Cunningham Drive, Hampton, Virginia 23666, Charles M. Lollar, Esq., 700 Newtown Road, Norfolk, Virginia 23502-3999, Donald Patten, Esq., Patten, Wornom & Watkins, 12380 Jefferson Avenue, Newport News, Virginia 23602, Ronald Phillips, 1003 High Dunes Quay, Hampton, Virginia 23664 on this 23^d day of August, 1996.

CLERK OF COURT
JAMES P. BOHNAKER
AUG 26 AM 11:07
COUNTY OF HAMPTON, VA.



IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

JOHN D. WARNER, JR.,)	
)	
and)	
)	
MARY T. WARNER,)	
)	
Plaintiffs,)	
v.)	Chancery No. 34948
)	
THE MONEY STORE INVESTMENT CORPORATION,)	
FOX TWO ACQUISITIONS, L.C.,)	
LEWIS H. CLEMENTSON, ESQ.,)	
and)	
SORRY SARA'S LTD.,)	
)	
Defendants.)	

John D. Warner, Jr. and Mary T. Warner (the "Warners") oppose the Plea in Bar filed by Lewis H. Clementson ("Clementson") and state as follows:

1. Equity jurisdiction is appropriate in this matter.
2. The Warners have standing as Clementson owed certain duties to the Warners which Clementson breached.
3. The Warners further oppose the Plea in Bar for the reasons more fully articulated in their Memorandum of Law, filed herewith.

By: By Madam
Counsel

J. Stephen Buis
Hugh M. Fain, III
Brian R. M. Adams
Spotts, Smith, Fain & Rawls, P.C.
411 E. Franklin Street, Suite 601
P. O. Box 1555
Richmond, Virginia 23218-1555
(804) 788-1190

Counsel for John D. Warner, Jr.
and Mary T. Warner

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Opposition to Plea in Bar was mailed, postage pre-paid, to Philip L. Hatchett, Esq. Cumming & Hatchett, 2236 Cunningham Drive, Hampton, Virginia 23666, Charles M. Lollar, Esq., 700 Newtown Road, Norfolk, Virginia 23502-3999, Donald Patten, Esq., Patten, Wornom & Watkins, 12350 Jefferson Avenue, Newport News, Virginia 23602, Ronald Phillips, 1003 High Dunes Quay, Hampton, Virginia 23664 on this 23 day of August, 1996.

A handwritten signature in dark ink, appearing to read "B. M. Adams", is written over a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

JOHN D. WARNER, JR.,

and

MARY T. WARNER,

Plaintiffs,

v.

Chancery No. 34948

THE MONEY STORE INVESTMENT CORPORATION,

FOX TWO ACQUISITIONS, L.C.,

LEWIS H. CLEMENTSON, ESQ.,

and

SORRY SARA'S LTD.,

Defendants.

**MEMORANDUM IN SUPPORT OF
OPPOSITION TO DEMURRERS, PLEAS IN BAR
AND MOTION FOR SUMMARY JUDGMENT**

John D. Warner, Jr. and Mary T. Warner (the "Warners"), by counsel, state as follows for their opposition to the Demurrers filed by defendants, The Money Store Investment Corporation ("The Money Store"), Fox Two Acquisitions, L.C. ("Fox") and Lewis H. Clementson ("Clementson"), the Pleas in Bar filed by The Money Store, Fox and Clementson and the Summary Judgment Motion filed by Fox.

I. Factual Allegations

The following factual allegations have been asserted in or may be reasonably inferred from the Warners' First Amended Bill of Complaint (the "Complaint"):

John Warner owns 45% of the issued and outstanding shares of stock of Sorry Sara's, Ltd. ("Sorry Sara's"). Sorry Sara's is the record owner of 13 E. Queen's Way in Hampton, Virginia (the "Property").

Sorry Sara's owes a mortgage to The Money Store with a current outstanding principal balance in the amount of \$327,000 (the "Sorry Sara's Mortgage"). The Sorry Sara's Mortgage is secured by a first Deed of Trust (the "Sorry Sara's Deed of Trust") on the Property.

At the same time that the Sorry Sara's Mortgage was executed, the Warners executed certain written guaranty agreements (the "Warner Guarantees") relating to Sorry Sara's obligations under the Sorry Sara's Mortgage. The Warners were willing to execute the Warner Guarantees, in part, because the Property served as collateral to secure Sorry Sara's obligations to The Money Store under the Sorry Sara's Mortgage.

Although the Sorry Sara's Mortgage has been in default since January 1995, The Money Store has never initiated any action against the Warners under the Warner Guarantees. Instead, The Money Store foreclosed on the Sorry Sara's Deed of Trust and attempted to auction the Property to satisfy Sorry Sara's obligation under the Sorry Sara's Mortgage. Prior to the foreclosure auction, The Money Store had not substituted, exchanged or released the Property as collateral for the Sorry Sara's Mortgage.

For the reasons stated in the Complaint, the foreclosure proceedings, including the auction, were conducted improperly. In Count I of the Complaint, the Warners seek declaratory relief regarding their obligations under the Warner Guarantees, including such relief as the Court deems just and appropriate upon full review of the facts and

circumstances presented in this matter, as a result of the acts and omissions of The Money Store and its Substitute Trustee, Lewis H. Clementson. In Count II (Breach of Fiduciary Duty) and Count III (Negligence), the Warners seek relief arising out of the irregularities and manner in which the Trustee conducted the foreclosure sale. Count IV (Violation of Virginia Antitrust Statute), Count V (Constructive Fraud), Count VI (Actual Fraud), Count VII (Tortious Interference with Contract) and Count VIII (Punitive Damages) set forth the Warners' claims against Fox arising out of Fox's collusive and anti-competitive bidding scheme at the foreclosure auction. Finally, the Warners have pled alternatively in Count IX that the Court should set aside the auction and order a new auction.

II. Standard of Review

A. Demurrer

A demurrer admits the truth of all facts well pleaded. The facts admitted are those expressly alleged in the motion for judgment, those which fairly may be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. Van Deusen v. Snead, 247 Va. 324, 441 S.E. 2d 207 (1994) quoting CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 431 S.E. 2d 277 (1993) quoting Rosillo v. Winters, 235 Va. 268, 367 S.E. 2d 717 (1988); accord Dade v. Anderson, 247 Va. 3, 434 S.E. 2d 353 (1994).

"When a motion for judgment or a bill of complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to

withstand demurrer. And, even though a motion for judgment or a bill of complaint may be imperfect, when it is drafted so that the defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer....” CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24 (1993)(citations omitted).

B. Plea in Bar

“Unlike an answer, a plea in bar presents a distinct issue of fact.” Helen W. v. Fairfax Co., 12 Va. App. 877, 888 (1991). “Demurrers raise a question of law. Pleas raise a question of fact. The office of a plea is to present a simple issue of fact which operates as a bar to the plaintiff’s right of recovery.” Campbell v. Johnson, 203 Va. 43, 47 (1961).

C. Summary Judgment

Pursuant to Rules 2:21 and 3:18, summary judgment may be requested whether in law or chancery, at any time after the parties are at issue. However, “[s]ummary judgment shall not be entered if any material fact is genuinely in dispute.” Rule 3:18.

“The summary judgment rules and the discovery rules, while not intended to substitute a new method for trial when an issue of fact exists, were adopted to permit trial courts to end litigation at an early stage provided it clearly appears that one of the parties is entitled to a judgment in the case as made out by the pleadings and the parties’ admissions. But a trial court, in considering a motion for summary judgment, must adopt those inferences from the facts that are most favorable to the nonmoving party, unless such inferences are strained, forced, or contrary to reason. Conversely, the trial court is not permitted to adopt inferences from the facts that are most favorable to the moving

party.” Renner v. Stafford, 245 Va. 351, 353 (1993)(emphasis in original) citing Carson v. LeBlanc, 245 Va. 135, 139–40 (1993).

III. Argument and Authorities

A. The Demurrers filed by The Money Store, Fox and Clementson should be denied because the Warners have sufficiently pled claims arising out of the mishandling of the foreclosure sale

i. Count I

a. The Money Store

The Money Store bases its Demurrer entirely on the argument that under the language of the Warner Guarantees, The Money Store was free to substitute, exchange or release the collateral securing the Sorry Sara’s Mortgage, which included the Property. Accordingly, The Money Store posits that it was free to dispose of the Property without any duty to or affect upon the obligations of the Warners, and therefore no case or controversy can possibly exist as between The Money Store and the Warners as a result of the acts and omissions alleged in the Complaint.

In support of its Demurrer, The Money Store relies on Chrysler Credit Corp. v. Curley, 753 F. Supp. 611 (E.D. Va. 1990) and Small Business Administration v. Andresen, 583 F. Supp. 1084 (W.D. Va. 1984), cases which dealt with the issue of whether guarantors may be discharged from their guaranty obligations as a result of the release, substitution or exchange of collateral securing an obligation prior to any act of default. Thus, The Money Store argues that because of language in the Warner Guarantees to the effect that the lender may substitute, exchange or release any collateral securing the Sorry

Sara's Mortgage, the Warners cannot seek discharge of their obligations as a result of the mishandled foreclosure proceedings. The Money Store misconstrues the factual basis of the Complaint, and in so doing has relied on cases that are wholly inapposite.

The cases relied upon by The Money Store involve factual scenarios where the creditors had disposed of or otherwise substituted, exchanged or released certain collateral prior to any default by the primary obligor. Because of language in the guarantees in those cases, the guarantors could not raise as a defense to an action brought against them that disposition of the collateral discharged their guarantee obligations. Those facts are not present in this case.

Here, The Money Store had not disposed of the Property which served as collateral under the Sorry Sara's Mortgage prior to Sorry Sara's default, or indeed at any time prior to the foreclosure proceedings. Thus, on the date of the foreclosure auction, the Property still served as collateral for the Warners' obligations under the Warner Guarantees. Under the terms of the Sorry Sara's Mortgage, any price achieved for the Property at foreclosure is to be applied to any deficiency obligation. Because the Property had not been substituted, exchanged or released prior to default or even before the foreclosure auction, the Warners are entitled to rely on the Property to offset their obligation under the Warner Guarantees.

The Money Store made choices regarding the handling of its loan to Sorry Sara's with which it must now live. If during the course of its administration of the loan it made sense to substitute, exchange or release the Property which secured the loan, certain consequences would have naturally flowed from that decision. For instance, if the

Property had been released, Sorry Sara's would have had equity with which to infuse capital to make its restaurant business more profitable, or to leverage a workout with The Money Store. Had the Property been substituted, exchanged or released, the Warners would have recognized a weakness in the security underlying their guarantee obligations which may have influenced their decisions regarding capital contributions to allow Sorry Sara's to keep the loan current. But The Money Store never did substitute, exchange or release the Property, and the Warners, under the terms of the Sorry Sara's Mortgage, were entitled to rely on the Property as providing security for their obligations under the Warner Guarantees. Having made the decision to leave the structure of the loan intact, and thereby reap the benefits of the Property serving as collateral for loan, and having made the decision to foreclose on the Property to satisfy Sorry Sara's obligations under loan, The Money Store retained its obligation to Sorry Sara's and to the Warners to handle the foreclosure properly.

The Money Store simply turns logic on its head by arguing that the Warners have no vested interest in the outcome to the foreclosure proceedings. If the Property had been substituted, exchanged or released prior to any default under the Sorry Sara's Mortgage, the Complaint obviously never would have been filed. If the Property had been released, the Warners' obligations upon default, if default indeed would have even occurred under those circumstances, would have been determined by the collateral, if any, existing upon the date of default. Simply put, the Warner Guarantees permit the Warners to claim as an offset of their obligations any collateral available to The Money Store upon default under the Sorry Sara's Mortgage. Because the Property was still serving as collateral

upon default, and indeed through the date of the foreclosure auction, the Warners were very much affected by any mishandling of that auction and have stated proper claims for relief as a result of that mishandling.

b. Clementson

Clementson demurs to each and every allegation in the Warners' First Amended Bill of Complaint upon the belief that, as Trustee under the Sorry Sara's Deed of Trust, he owed no duty to the Warners to conduct the foreclosure sale in compliance with applicable law. Clementson's Demurrer fails for a number of reasons, the first of which is Clementson's common law duty of reasonable care.

The Money Store and the Warners are both parties to the Warner Guarantees. The Warner Guarantees are contracts which, along with general contract law duties such as the duty of good faith and fair dealing, allocate contractual duties to each party. Clementson, as Trustee foreclosing under the Sorry Sara's Deed of Trust, acted as the fiduciary and agent of Sorry Sara's, its guarantors the Warners and The Money Store. The Warners have alleged that Clementson was negligent and breached his fiduciary duties in his handling of the foreclosure resulting in the Warners' damages.

In Miller v. Quarles, 242 Va. 343 (1991), Quarles was the Vice President and agent of Commonwealth Capital, a loan brokerage firm. Commonwealth Capital, acting through Quarles, entered into a contract to provide brokerage services to the plaintiff. In the course of discharging those services, Quarles negligently caused the plaintiff to suffer a \$50,000 loss of an escrow deposit. Finding that an agent's negligent performance of his

principal's contract subjects the agent to tort liability to the other contracting party, the Court reasoned:

Both principal and agent are jointly liable to injured third parties for the agent's negligent performance of his common law duty of reasonable care under the circumstances. Thurston Metals and Supply Co. v. Taylor, 230 Va. 475, 483-84, 339 S.E. 2d 538, 543 (1986). Should such liability be imposed, the principal is entitled to indemnification from the agent. Restatement of Restitution, § 962, at 418-21 (1937). Furthermore, a principal is liable to the other contracting party who has been damaged by the agent's negligent performance of the principal's contract with the other party. Wood v. American National Bank, 100 Va. 306, 316, 40 S.E. 931, 934 (1902). And, we see no reason why the negligent agent's act should not impose upon him the same liability.

Id. at 347-48 (emphasis in original).

Here, by virtue of the Warner Guarantees, The Money Store owes certain duties to the Warners, and vice versa. "[T]he law imposes upon the creditor an obligation not to deal with the debtor or any security for the debt in a manner as to harm the interest of the guarantor." Dorsy v. Maryland National Bank, 344 So.2d 273, 274 (Fla. App. 1976). Clementson, as The Money Store's agent, negligently conducted the foreclosure auction, causing specific losses to the Warners under the guaranty agreements with The Money Store. Clementson owed the Warners a common law duty of reasonable care and subsequently breached it. Furthermore, that the Warners would be harmed by a defective auction sale was reasonably foreseeable.

Second, Clementson owed a direct duty to the Warners arising out the Warners' statutory right of subrogation. The Warners had, and still to this day have, a statutory right of subrogation wherein they, as guarantors, could pay, in whole or in part, the Note and

Deed of Trust or alternatively pay any subsequent deficiency judgment that may be obtained against Sorry Sara's, and thereby be assigned all of The Money Store's rights against Sorry Sara's. See Va. Code Ann. § 49-27 (Repl. Vol. 1996). (Upon payment to the creditor, the guarantor "shall, by operation of law, ... be substituted to and become the owner of all of the rights and remedies of the creditor") Id. Thus, the Warners at all relevant times possessed and still possess, a statutory right which by operation of law may subrogate them to all of The Money Store's rights. Thus, just as Clementson owed The Money Store the fiduciary duty to realize the highest return from the foreclosure auction and to conduct a foreclosure in compliance with applicable law, Clementson owes a corresponding duty to the Warners.

Third, as substitute trustee, Clementson clearly owed fiduciary and common law duties directly to both the mortgagor and mortgagee to obtain the best price possible for the Property at the foreclosure auction. The law is clear that a guarantor of a debt stands in the shoes of its primary obligor as to its rights and defenses. Accordingly, Clementson owed the same duties to the Warners that he owed directly to Sorry Sara's.

Clementson next posits that the Warners have not alleged sufficient facts to show that Clementson's conduct was the proximate cause of the Warners' damages. In their First Amended Bill of Complaint, the Warners plead that Clementson failed to secure the Property from damage and/or theft of furniture, fixtures and equipment that also served as security under ¶ 16 of the Deed of Trust, failed to visit the Property prior to the auction, failed to adequately advertise the foreclosure auction, improperly announced to all the bidders that he would tell them when the pre-determined bid price had been reached,

started the bidding at a shockingly low figure and in fact made an announcement when The Money Store's pre-determined bid price had been reached. ¶¶ 13-23, 32, 34, 37-44, 46-49, First Amended Bill of Complaint. The Warners further allege that the foregoing acts and omissions chilled the bidding at the sale and that Clementson's conduct was "the proximate cause of the damages suffered by the Warners." Proximate cause is a cause which in natural and continuous sequence produces the injury or damage. Beale v. Jones, 210 Va. 519, 522 (1970); Thomas v. Settle, 247 Va. 15, 20 (1994). Accordingly, the Warners have pled sufficient facts to overcome this basis for demurrer as they have clearly alleged factual events by which Clementson's conduct resulted in their damages.

Clementson's related argument that the Warners have not alleged sufficient facts to show that they have suffered actual damages must also fail. Clementson relies solely upon the holding in Allied Productions v. Duesterdick, 217 Va. 763 (1977). In Duesterdick, an attorney malpractice case, the plaintiff suffered a default judgment in a prior case because its attorney failed to appear and defend at trial. In suing the negligent attorney, Allied pled that it had been damaged in the amount of the default judgment, but admitted that it had not made any payments on that judgment. The Court held that "when a client has suffered a judgment for money damages ... it is recoverable in a suit for legal malpractice only to the extent such judgment has been paid." Id. at 766. The rationale behind the holding is that the client might enjoy a windfall in collecting its judgment against the attorney if the client fails to pay his own judgment creditor. Id. at 768 (Poff, J. dissenting). Clarifying the Duesterdick holding, the Virginia Supreme Court later said that "damages will be calculated on the basis of what is lost by the client. ... While the client

is not required to prove the exact amount of incurred damages, the client is required to show facts and circumstances from which the trier of facts can make a reasonably certain estimate of those damages.” Duvall, Blackburn, Hale & Downey v. Siddiqui, 243 Va. 494, 497 (1992) citing Allied Productions v. Duesterdick, 217 Va. 763, 764-65 (1977) and Goldstein v. Kaestner, 243 Va. 169, 173 (1992)(attorney malpractice).

The Court’s holding in Duesterdick is very tightly drawn and is inapposite to the present case for several reasons. First, Duesterdick and every case citing to it arise within the context of an attorney-client relationship, which the Warners do not claim to have established with Clementson. Second, Duesterdick is “in the nature of a claim for indemnity.” Duesterdick, 217 Va. at 766. The Warners do not ask Clementson to indemnify them, rather the Warners seek damages directly from Clementson. Lastly, none of the “windfall” concerns are present here. All of the parties affected by Clementson’s negligence are properly before the Court and declaratory and equitable relief is sought. “[T]here is no single formula for measuring damages in attorney malpractice cases. In large part, the appropriate measure of damages must be determined by the facts and circumstances of each case.” Duvall, Blackburn, 243 Va. at 498. Accordingly, this basis for demurrer too should be denied.

c. Fox

Fox demurs to the Warners’ claim for declaratory relief and in support alleges that the Warners have not stated a cause of action because denies any wrongdoing. Fox

specifically bases its Demurrer upon Fox's allegations that associations between potential bidders is allowed and that Fox denies having asked any other bidder to withdraw.

The Warners have pled that Fox entered into a collusive bidding scheme with Sandra Campbell which had an anti-competitive effect at the auction and that this bidding scheme was fraudulent and in violation of the Virginia Antitrust Statute. See First Amended Complaint ¶¶ 24, 26, 27, 28, 51, 53, 54, 55, 56, 58, 59, 60, 61, 65, 66, 67, 69 and 70. That Fox denies having done the acts which the Warners have alleged does not provide a basis for a Demurrer. A demurrer tests the sufficiency of the pleadings and cannot be granted upon the mere denial of alleged facts.

ii. **Count II (Breach of Fiduciary Duty)**
and Count III (Negligence)

Clementson demurs to Counts II and III upon the grounds that he was not required to take the actions which the Warners allege Clementson failed to take, nor do any of the alleged acts taken by Clementson constitute either a breach of fiduciary duty or negligence, as a matter of law. Like The Money Store, Clementson misapprehends the function of a demurrer, and instead appears truly to seek summary judgment under Rule 3:18. A demurrer tests the sufficiency of the pleadings. Instead, Clementson asks for a ruling as to his liability as a matter of law, which is improper in the context of a demurrer.

If the Court converted Clementson's arguments into a Motion for Summary Judgment, that motion too would fail. "Resolving conflicts in evidence is a prerogative of the jury. A court should not determine as a matter of law that a party is guilty of or free from negligence unless the evidence is such that reasonable men, after weighing the

evidence and drawing all just inferences therefrom, could reach but one conclusion." J&E Express, Inc. v. Hancock Peanut Co., 220 Va. 57, 62 (1979); Loving v. Hayden, 245 Va.. 441, 444 (1993). The Warners pled that Clementson owed them a common law duty of reasonable care and a fiduciary duty as guarantors of the Deed of Trust on which he foreclosing. The Warners pled that Clementson failed to secure the Property from damage and/or theft of furniture, fixtures and equipment that also served as security under ¶ 16 of the Deed of Trust, failed to view the Property prior to the auction, failed to adequately advertise the foreclosure auction, improperly announced to all the bidders that he would tell them when the pre-determined bid price had been reached, started the bidding at a shockingly low figure and in fact made an announcement when The Money Store's pre-determined bid price had been reached. ¶¶ 13-23, 32, 34, 37-44, 46-49, First Amended Bill of Complaint. The Warners further allege that Clementson's conduct quelled the bidding process and proximately caused the Warners' damages. Not only could reasonable minds differ based upon the facts as alleged, but a jury verdict that Clementson breached his duties and was negligent would be clearly supported. Moreover, a Court should view the evidence and all reasonable inferences therefrom in a light most favorable to the party opposing summary judgment. Renner v. Stafford, 245 Va.. 351, 353 (1993). Accordingly, Clementson has stated improper grounds for demurring to these Counts and even if viewed as motions for summary judgment, the issues of Clementson's negligence and breach of fiduciary duty should go to a jury and not be decided as a matter of law.

iii. Count IV (Violation of Virginia Antitrust Statute)

Fox demurs to the Warners' claim that Fox violated the Virginia Antitrust Statute on the basis that the Warners failed to plead that Fox either forced Sandra Campbell to withdraw from the bidding or limit any bid that she would have otherwise made. In Paragraph 28 of the First Amended Bill of Complaint, as well as elsewhere, the Warners allege that "Campbell and Fox entered into an arrangement prior to the foreclosure auction to quell the bid competition by agreeing that Campbell would refrain from bidding ..." In Paragraph 51 of the First Amended Complaint, the Warners allege that "Fox's conduct as alleged in paragraphs 24 through 28 ... was a contract, combination or conspiracy in restraint of trade or commerce in the Commonwealth of Virginia and constitutes a willful and flagrant violation of the Virginia Antitrust Act..." The Virginia Antitrust Act states that "[e]very contract, combination or conspiracy in restraint of trade or commerce in this Commonwealth is unlawful." Va. Code Ann. § 59.1-9.5 (Repl. Vol. 1992 & 1996 Cum. Supp.). The Warners have made a factual allegation that the Fox/Campbell association caused Campbell to refrain from bidding and have thus stated a claim under the Virginia Antitrust Act. Fox's denial of these allegations is simply insufficient to form the basis for a Demurrer.

iv. Counts V and VI (Constructive and Actual Fraud)

Fox demurs to the Warners' fraud claims upon the grounds that the Warners have not pled that Fox made any misrepresentations of material fact to the Warners. In

paragraphs 54, 55, 58, 59, 60 and 61, the Warners allege that by registering to bid, Fox represented that it was bidding in good faith and as a bona fide bidder. The Warners further plead that Fox's representation was false, material and either negligently or intentionally made. The Warners further plead in those paragraphs that Fox's misrepresentation was in fact relied upon by both Clementson, the Warners' fiduciary, and The Money Store in accepting Fox's bid and that the reliance has caused the Warners to be damaged. Because Clementson served as a fiduciary for the Warners, the Warners were adversely affected by any fraud committed upon Clementson by Fox. Accordingly, the Warners have sufficiently pled that Fox made a misrepresentation of material fact which was relied upon and which resulted in the Warners to be damaged.

v. **Count VII (Tortious Interference with Contract)**

Fox demurs to the Warners' claim that Fox tortiously interfered with the contractual relationship created by the Warner Guarantees upon the grounds that the Warners have not pled that a contractual relationship existed between the Warners and Fox. The Warners do not claim that they had a contract with Fox. The relief sought, as alleged, is based upon Fox's tortious interference with the contractual relationship between the Warners and The Money Store. Accordingly, Fox's demurrer to this Count should be denied.

vi. Count VIII (Punitive Damages)

Fox demurs to the Warners' claim for punitive damages upon the ground that the Warners have not pled that Fox knowingly or intentionally acted in violation of law. ¶¶ 15, 16 Fox Answer. However, in ¶ 51 of the First Amended Bill of Complaint, the Warners alleged that the bidding arrangement between Fox and Sandra Campbell was a contract, combination or conspiracy constituting a wilful and flagrant violation of the Virginia Antitrust Statute. Further, in ¶ 59 of the First Amended Bill of Complaint, the Warners alleged that Fox committed actual fraud by knowingly and intentionally misrepresenting a material fact at the foreclosure auction. Accordingly, the Warners have sufficiently pled that Fox knowingly and intentionally entered into an illegal bidding scheme with the intent to defraud and thus Fox's demurrer to this Count should be denied.

vii. Count IX (Equitable Relief)

In Count IX of the First Amended Bill of Complaint, the Warners seek several forms of relief. Specifically, the Warners ask the Court to enjoin the transfer of the Property to Fox, that Clementson be ordered to re-notice, re-advertise and re-auction the Property, and for such further and other relief as the Court deems just. The relief sought in this Count is directly affected by the Court's ruling on July 24, 1996 which quashed the lis pendens filed by the Warners. While the Warners may no longer be in a position to enjoin the transfer, they still seek the equitable remedy of having the sale declared void and the Property properly re-sold at auction.

It is well established that a foreclosure auction that is not in strict compliance with applicable law can be set aside. In Deep v. Rose, 234 Va. 631 (1988), the Court affirmed the trial Court's ruling that the trustee inadequately advertised the foreclosure sale and even though the trustee had already transferred the property, such transfer was void and "[n]o title, legal or equitable, passes to the purchaser." Id. at 637. See also, First Funding Corp. v. Birge, 220 Va. 326, 333 (1979)(trustees gave subordinations not in accord with deed of trust; held "void ab initio"); Turk v. Clark, 193 Va. 744, 749-50 (1952)(trustee failed to advertise and give notice as required by trust; sale held "wholly void") compare Wills v. Chesapeake Western Ry., 178 Va. 314, 320 (1941)(trustee allegedly sold without authority; sale held "not a nullity," purchaser obtains legal title which may be set aside in equity) and Presto v. Johnson, 105 Va. 238, 241 (1906)(trustee failed to advertise terms of sale as required by trust; sale held "invalid" and set aside) cited in Deep v. Rose, 234 Va. at 636-37.

Having the transfer of the Property to Fox set aside in equity is clearly one of the Warners' remedies arising out of the defects of the sale. Because the Warners are not seeking to enjoin transfer of the Property during the pendency of this case, the equitable relief they seek is non-injunctive in character. Accordingly, The Money Store's Demurrer to Count IX on the basis that the elements for injunctive relief are not present has no merit. While this litigation is in its earliest stages, not only do the Warners clearly have the right to be diligent in pursuing all of their remedies, they clearly may pursue alternative remedies. Va. Code Ann. § 8.01-281; Rule 1:4(k) of the Rules of the Supreme Court of Virginia. If The Money Store prevails in its argument that the Warners are not entitled to

declaratory relief regarding their obligations under their Guaranties, then they will seek the alternative remedy of having the transfer set aside and the Property re-auctioned.

viii. Conclusion

For the foregoing reasons, the Warners respectfully pray that the Demurrers be dismissed and that this matter proceed to trial on the merits.

B. The Pleas in Bar filed by The Money Store, Clementson and Fox should be denied

i. The Warners have standing to sue

"One would have 'standing' to sue when he is said to have '...such a personal stake in the outcome of the controversy as to insure the concrete adverseness upon which the court depends for illumination of the questions in the case.'" Richardson v. Ramirez, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed. 2d 551 (1974). "'Personal stake in the outcome' is the gist of the standing doctrine." Christman v. American Cyanamid Co., 578 F. Supp. 63, 67 (N.D. W.Va. 1983). As guarantors of the Sorry Sara's Note and Deed of Trust, the Warners' "personal stake in the outcome" of this matter is patent. "A comaker or guarantor may be held liable for a deficiency. The amount of a deficiency is determined by deducting the proceeds of sale or other disposition of collateral from the balance due on the obligation. Hence, a comaker or guarantor has a vital interest in maximizing the proceeds of sale or other disposition and in reducing his potential liability for a deficiency." Woodward v. Resource Bank, 246 Va. 481, 486 (1993)(U.C.C. context, but same "vital interest" applies). A review of the various Cross Bills to the First Amended Bill of

Complaint underscores the parties' "concrete adverseness" necessary to develop the issues. "Any party has standing to sue if it has sufficient interest in the subject matter to insure that the parties will be actual adversaries and to insure that the issues will be fully and faithfully developed." Weichert Co. of Va. v. First Commercial Bank, 246 Va. 108, 109 (1993).

The Money Store and Fox misconstrue the basis for the Warners' action. The Warners have not framed their Complaint as a shareholder derivative suit, but rather the Warners allege that they have been damaged in their individual capacities. The Warners have alleged damages that flow to them personally, not to Sorry Sara's. Due to the several acts and omissions of The Money Store, Fox and Clementson, the Warners seek relief from the guaranty agreement which would otherwise obligate them for payment of the deficiency balance. "The guarantor and the creditor are parties to the contract of guaranty and consequently any rights of the guarantor as against the creditor are determined in the first instance by the terms of the guaranty contract. Beyond these rights, however, the law imposes on the creditor an obligation not to deal with the debtor or any security for the debt in a manner as to harm the interest of the guarantor." Dorsy v. Maryland National Bank, 344 So.2d 273, 274 (Fla. App. 1976). See also Van Petten v. Oregon Bank, 600 P.2d 507, 510 (Or. App. 1979) ("We therefore hold ... that a guaranty of a loan to a corporation can be the basis for a personal cause of action against the lender to whom the guaranty was given when the guaranty is given in return for the contemporaneous promise to lend money.") (emphasis in original). Hence, that Sorry Sara's has not contested the foreclosure sale is not grounds for a Plea in bar as alleged

by Fox. ¶3, Fox Plea in Bar. The Warners certainly have standing as they literally “stand in the shoes” of Sorry Sara’s by virtue of their guarantor status. See Woodward v. Resource Bank, 246 Va. 481, 486, (1993); Hepworth v. Orlando Bank & Trust Co., 323 So.2d 41 (Fla. App. 1975)(“The guarantor stands in the shoes of the debtor ... with respect to liability for the payment or other performance of the general obligation...”) Id. at 42. Fox and The Money Store’s belief that the Warners seek relief on behalf of the co-defendant Sorry Sara’s in a derivative or representative capacity by virtue of their stock ownership is a mistaken one.

ii. The Warners need not allege a contract with Fox

Fox pleads to bar the Warners’ claims upon the ground that Fox has no contractual relationship with the Warners, Sorry Sara’s or with The Money Store. ¶ 1, Fox Plea in Bar. None of the Warners’ claims against Fox depend upon any such contractual relationship. Accordingly, this basis for Fox’s Plea in Bar should be denied.

iii. The Warners may resort to equity jurisdiction

Clementson seeks to bar the Warners’ claims because the Warners “appear to seek a judgment ... against Clementson, as a matter of law, revealing that [the Warners] have an adequate remedy at law....” ¶6, Clementson Plea in Bar. Clementson overlooks the cornerstones of the Warners’ Bill of Complaint, which are the plea for declaratory

judgment¹ of the several parties' rights and liabilities and the equitable relief of setting aside the foreclosure, to which Clementson is a necessary party. The Warners' remaining claims are ancillary to their equitable claims and this Court has equitable jurisdiction to resolve the whole controversy.

The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, a court of equity is without jurisdiction to settle disputes as to title and boundaries of land. But where the act done, or threatened to be done, would be destructive of the substance of the estate, or would result in irreparable injury, a court of equity will assume jurisdiction.... Equity having taken jurisdiction, it will then decide the whole controversy, though the issues are legal in nature and are capable of being tried by a court of law.

Patterson v. Saunders, 194 Va.. 607, 610 (1953).

Furthermore, an allegation in a bill in equity in which money damages are sought does not necessarily render the bill multifarious. See Grubb v. Starkey, 90 Va.. 831 (1894)(complaint for specific performance which also prays for money damages). "[W]hen a court of equity has once acquired jurisdiction of a cause, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority." Id. at 834. All of the Warners' claims arise out of the validity of the foreclosure auction, and to varying degrees, the claims are interrelated. "Where matters in controversy are not absolutely independent of each other, although distinct, and it will be more convenient to litigate and dispose of them

¹ A declaratory judgment action may be brought on the equity side of the Court. Carr v. Union Church, 186 Va.. 411 (1947) accord Sood v. Advanced Computer Technologies Corp., 308 F. Supp. 239 (E.D. Va.. 1969).

in one suit, the objection on the ground of multifariousness should not prevail." Collins v. Lyon, Inc., 181 Va.. 230, 244 (1943). Accordingly, the Warners pray that the Court dismiss this basis for Clementson's Plea in Bar.

C. The Fox Motion for Summary Judgment should be denied because there are material facts genuinely in dispute.

In the Warners' First Set of Request for Admissions to Fox, the Warners asked Fox to admit that Fox and Sandra Campbell had certain conversations and entered into certain agreements which would have an anti-competitive effect at the foreclosure auction. Fox admitted that it formed a relationship with Sandra Campbell on the day of the auction whereby she would become a member of Fox and thereby share in the ownership of the Property if Fox was the successful bidder. Fox denied that it influenced Sandra Campbell's decision not to bid at the auction. Based upon the denial of the Request for Admissions, Fox seeks summary judgment as to all counts pertaining to Fox.

While the admissions of a party may serve as the basis, in whole or in part, of a Motion for Summary Judgment under Rule 3:18, the denial of Request for Admissions provides no basis for summary judgment. If Fox had admitted the Warners' Request for Admissions, then the Warners may have a basis for summary judgment, but the denial thereof does not eliminate the existence of contested material facts. Indeed, Fox's denial of the Warners' Request for Admissions emphasizes that there are material facts genuinely in issue, i.e. the nature, character, intent and effect of the Fox/Campbell bidding

scheme. Accordingly, summary judgment is not appropriate and Fox's motion should be denied.

JOHN D. WARNER, JR.
MARY T. WARNER

By: 
Counsel

J. Stephen Buis
Hugh M. Fain, III
Brian R. M. Adams
Spotts, Smith, Fain & Rawls, P.C.
411 E. Franklin Street, Suite 601
P. O. Box 1555
Richmond, Virginia 23218-1555
(804) 788-1190

Counsel for plaintiffs John D. Warner, Jr.
and Mary T. Warner

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Memorandum of Law was mailed, postage pre-paid, to Philip L. Hatchett, Esq., Cumming & Hatchett, 2236 Cunningham Drive, Hampton, Virginia 23666, Charles M. Lollar, Esq., Heilig, McKenry, Fraim and Lollar, Stoney Point Center, 700 Newtown Road, Norfolk, Virginia 23502-3999, Donald Patten, Esq., Patten, Wornom & Watkins, 12350 Jefferson Avenue, Newport News, Virginia 23602, Ronald Phillips, 1003 High Dunes Quay, Hampton, Virginia 23664 on this 23^d day of August, 1996.



JAMES P. BOHNAKER
CLERK OF THE DISTRICT COURT
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CITY OF HAMPTON, VA.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

JOHN D. WARNER, JR.

and

MARY T. WARNER,

Chancery No. 34948

Plaintiffs,

v.

THE MONEY STORE INVESTMENT CORPORATION, et al.

MEMORANDUM IN SUPPORT

OF DEMURRER AND SPECIAL PLEA IN BAR

NOW COMES the defendant, Lewis H. Clementson, Substitute Trustee, ("Clementson"), by counsel, and respectively submits this memorandum in support of his demurrer and special in bar to the bill of complaint ("Complaint"), filed herein by the plaintiffs, John D. Warner, Jr., and Mary T. Warner (collectively the "Warners").

Facts Alleged in Complaint

In their Complaint, the Warners allege that Clementson was appointed substitute trustee under a deed of trust dated June 23, 1994, (the "Deed of Trust"), securing a note (the "Note") held by defendant, The Money Store Investment Corporation ("The Money Store"), the payment of which was guaranteed by the Warners. The Complaint further alleges that Mr. Warner was a minority shareholder in Sorry Sara's, Ltd., a Virginia corporation, owning 45% of the stock, which corporation was the maker of the Note secured by the Deed of Trust, and the owner of the property conveyed thereunder. Clementson originally scheduled a foreclosure

sale for February 14, 1996, which was rescheduled for April 18, 1996. The Complaint alleges that Clementson negligently breached his fiduciary duties as substitute trustee under the Deed of Trust, in the following respects: (1) Clementson never visited the Property prior to the foreclosure sale; (2) Clementson did not change the locks or make any other arrangement to secure the Property until or on about February 28, 1996; (3) Clementson advertised the Property for sale in a local newspaper on four occasions (even though the Deed of Trust only required advertising in three consecutive issues of a newspaper with a general circulation in the City of Hampton; (4) prior to the foreclosure sale, Clementson announced that he would advise bidders at the point that predetermined bid (written one price bid) of the secured lender (The Money Store) had been reached; (5) Clementson did not advise of anyone attending the sale of contingent liabilities or superior liens, although the Complaint failed to allege that any even existed; (6) Clementson began the bidding at \$125,000, which the Warners allege was a shockingly low initial bid, with just \$5,000 increments in the bidding, and when the bidding reached \$175,000, Clementson announced that the lender's one price bid had been reached; (7) Clementson improperly accepted a commercially unreasonable bid price of \$177,000.

ARGUMENT

I. Clementson Owed No Duty To The Warners.

Counts II and III of the Complaint allege that Clementson owed the Warners certain duties by virtue of the relationship created by

his serving as substitute trustee under the Deed of Trust, for the purposes of foreclosing. Clementson, in his capacity as substitute trustee under the Deed of Trust, owed no duty whatsoever to the Warners, by virtue of the Warners being guarantors of the Note secured by the Deed of Trust. A trustee under a deed of trust is chosen as an agent of both the grantor/borrower and beneficiary, to hold legal title as mere security for the debt owed by the borrower to the beneficiary. Dillard v. Serpell, 138 Va. 694 (1924). The powers and duties of a trustee in a deed of trust given to secure the payment of a debt are limited and defined by the instrument under which the trustee acts in the Deed of Trust. Powell v. Adams, 179 Va. 170 (1942). A trustee under a deed of trust owes no duty to bidders except to refrain actively from doing anything to hamper them in their search for information, and he owes no duty to make representation, announce whether contingent liabilities or superior liens exist, or to make any other representations, or answer any questions. Feldman v. Rucker, 201 Va. 11 (1959).

II. Clementson Conducted A Valid Foreclosure Sale, As Substitute Trustee.

Clementson was appointed substitute trustee under the Deed of Trust in late December of 1995 (the Instrument of Substitution of Trustee appointing Clementson as trustee under the Deed of Trust was recorded on December 28, 1995), and scheduled the foreclosure sale for April 19, 1996, after publishing the notice of trustee's sale four times in the *Daily Press*, and another notice an additional three times in the *Daily Press*, five times in the *Virginian-Pilot*, and three times in the *Richmond Times Dispatch*,

along with distributing large numbers of hand bills to respective purchasers and businesses located in the Hampton Roads area. The Property was sold in "as is" condition, and Clementson was not required by Virginia law to make any statement with regard to contingent liabilities or liens. The Deed of Trust was the first lien on the Property, and The Money Store, as beneficiary thereunder, was entitled to submit a written one price bid. Code of Virginia §55-59.4, 1950, as amended. Only if the trustee undertook to make representations and answer questions, would he be required to do so fully and accurately. Feldon v. Rucker, supra. The complaint states no allegations that Clementson made any representation or answered any question at the foreclosure sale, which was incomplete or erroneous. Under the facts alleged, the foreclosure sale is invalid, as a matter of law, and Counts II, III, and IX should be dismissed with prejudice.

III. The Warners Have Incurred No Damages.

In cases of negligence, the extent of the damages sustained by the complainant must be affirmatively shown in the pleadings. Allied Productions, Inc. v. Duesterdick, 217 Va. 763 (1977). Although the Complaint alleges that the Warners are guarantors of the Note, until they have paid monies under their guaranties, and allege such facts, they have failed to state any recoverable claim against Clementson. The extent of damages allegedly incurred by the Warners certainly has not been affirmatively set forth in the Complaint, and Clementson's demurrer should, therefore, be sustained.

IV. The Warners have An Adequate Remedy At Law.

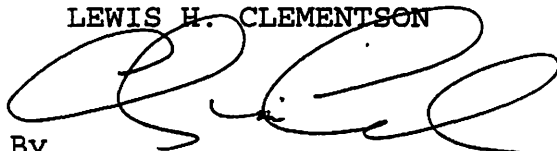
Counts II and III of the Complaint pray for an order granting the Warners judgment against Clementson in an amount to be shown at trial, but at a minimum for any deficiency obligations that the Warners may have under their guaranty. It is quite apparent, therefore, that the Warners have an adequate remedy at law, since they are seeking to recover money judgments against Clementson in Counts II and III. Having an adequate remedy at law, these Counts in this chancery proceeding should be dismissed.

V. The Warners Have No Standing To Obtain the Relief They Seek.

The Warners were merely guarantors of the indebtedness secured by the Deed of Trust, and as previously stated, Clementson, as trustee under the Deed of Trust, owed them no duties. Mr. Warner, as a stockholder in the debtor corporation, has no standing to pursue a claim of that corporation. Keepe v. Shell Oil Company, 220 Va. 587,591 (1979). Clearly, the Warners have no standing to obtain any relief as against Clementson, as substitute trustee under the Deed of Trust.

WHEREFORE, for all the reasons set forth herein, Clementson respectfully prays that the complaint be dismissed with prejudice, as against him, and that he be awarded his costs and attorney's fees in this matter expended.

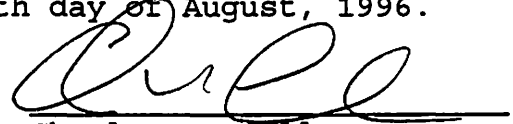
LEWIS H. CLEMENTSON

By 
Of Counsel

Charles M. Lollar, VSB #17009
HEILIG, MCKENRY, FRAIM & LOLLAR, P.C.
700 Newtown Road, Suite 15
Norfolk, Virginia 23502
(757) 461-2500

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Demurrer and Crossclaim was mailed, postage pre-paid to the following counsel of record: Hugh M. Fain, III, Esquire, Post Office Box 1555, Richmond, Virginia 23218, counsel for Plaintiffs, Donald Patten, Esquire, counsel for The Money Store Investment Corporation, 12350 Jefferson Avenue, Newport News, Virginia 23602, Philip L. Hatchett, Esquire, counsel for Fox Two Acquisitions, L. C. 2236 Cunningham Drive, Hampton, Virginia 23666; and Sorry Sara's Ltd., c/o Ronald D. Phillips, 1003 High Dunes Quay, Hampton, Virginia 23664, this 26th day of August, 1996.


Charles M. Lollar

\\NSM\\RESPONSE\\CLEMSON.MO.....61903.08C

JAMES P. BOHNAKER
CLERK OF THE DISTRICT COURT
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RICHMOND, VIRGINIA

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART 1

JOHN D. WARNER, JR.
and
MARY T. WARNER
vs
THE MONEY STORE INVESTMENT CORP.,
FOX TWO ACQUISITIONS, L.C.,
LEWIS H. CLEMENTSON, ESQ.,
and
SORRY SARA'S LTD.

Chancery No. 34948

Stenographic report of all the testimony,
together with all the motions, objections and exceptions on the
part of the respective parties, the action of the Court in
respect thereto, and all other incidents during motions in the
case of John D. Warner, Jr. and Mary T. Warner vs The Money
Store, et al., tried in the Circuit Court for the City of
Hampton, at Hampton, Virginia, on September 9, 1996, before the
Honorable Christopher W. Hutton, Judge of said Court.

PRESENT:

Mr. Hugh M. Fain, III, and
Mr. Richard B. Blackwell, Attorneys
for the Plaintiffs.

Mr. Donald N. Patten and
Mr. Robert J. Lloyd, III, Attorneys
for Defendant The Money Store.

Mr. Philip L. Hatchett, Attorney
for Defendant Fox Two Acquisitions.

Mr. Charles M. Lollar, Attorney
for Defendant Clementson.

- - - ooo - - -

MICHELLE BRADLEY
SCHNEIDER AND ASSOCIATES
107 TELFORD DRIVE
NEWPORT NEWS, VIRGINIA 23602

116
ORIGINAL

1 (The Court Reporter was duly sworn.)

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THE COURT: All right. We are here in the matter of Warner versus The Money Store and others on various motions filed by the Defendants in this matter.

Mr. Hatchett, you and Mr. Lollar have the bulk of the argument here today, I believe. Have you decided amongst yourselves any order that you would like to go in as far as presentation?

MR. LOLLAR: Your Honor, I have driven down from Richmond. I apologize for being late. I'm ready or he can go first. It doesn't matter.

MR. HATCHETT: Go ahead.

THE COURT: Mr. Patten, of course, has some, too, but a relatively small number compared to the other two gentlemen.

MR. LOLLAR: Your Honor, the primary objection that -- we have a demurrer and a special plea in bar. It addresses -- the demurrer addresses certain factual deficiencies and the special plea in bar addresses the standing issue and the adequate remedy-at-law issue. Let me focus on the special plea, if I could, first and then move into the demurrer. I think it's the easier to deal with.

The special plea in bar addresses first and foremost the issue of -- maybe the simplest issue is

1 the adequate remedy at law. This is an actual file In Chancery
2 seeking a multitude of remedies on various counts. The primary
3 remedy directed against Lewis Clementson, who I represent, is a
4 money judgment. In the response or memorandum in opposition to
5 the memorandum I filed in support of Mr. Clementson's demurrer
6 and special plea in bar on page 12 of that pleading, that
7 memorandum, the Plaintiffs have stated as they have stated in
8 the pleading that the Warners do not ask Clementson to indemnify
9 them. Rather, the Warners seek damages directly from
10 Clementson. Clearly they are seeking money damages from
11 Clementson. That's clear in the actual Amended Bill of
12 Complaint they are seeking money damages. So it's clear under
13 these circumstances that they are seeking money damages, that
14 they ought to file an action in law, not in equity.

15 Now, they have asked for other forms
16 of relief against the other parties and declaratory judgment
17 relative to the sale, but that still does not give them the
18 right to bootstrap that claim for money damages in a chancery
19 action. If they want a money judgment against Mr. Clementson,
20 which I will submit they are not entitled to obtain in any
21 event, but if they want that, they've got to do that in law.
22 They sue for damages.

23 With regard to the second issue of
24 standing, that's the more perplexing issue because the Warners
25 are guarantors of a note and deed of trust that Mr. Clementson

1 was trustee under. It's just another form of security for that
2 note. The guarantee can be viewed of one form of security, his
3 deed of trust another. The deed of trust just simply conveys
4 real property. I understand there was another deed of trust
5 that he wasn't trustee that relates to this transaction, but it
6 conveyed this building and land in trust to secure this note.
7 He is simply a trustee under that deed of trust which is a
8 contract, a security instrument, between Sorry Sara's and The
9 Money Store.

10 Now, Mr. and Mrs. Warner are in no way
11 a party to that transaction and to that contract. They may have
12 provided their own security to The Money Store in the form of
13 their personal guarantee. They may have provided their own
14 personal assets, pledged their own personal assets in another
15 deed of trust, but they don't have any contract or any privity
16 of contract between The Money Store and Sorry Sara's, the
17 restaurant, and Mr. Clementson as the trustee in this. He acted
18 as trustee for the benefit of the borrower under the deed of
19 trust and the lender, the beneficiary and the maker of the note.
20 His duties are set out in numerous Virginia cases that go back,
21 a lot of them, into the 1800's that deal with the duties that we
22 all are aware of to conduct, to act impartially, number one, as
23 between the parties to that security instrument, the borrower
24 and the lender, to act impartially, to conduct himself -- the
25 fiduciary duties between the trustee to the borrower and the

1 lender. If there's a request by the borrower, in this case
2 Sorry Sara's, the restaurant, to seek Court intervention, to
3 seek a judicial foreclosure, I think under those circumstances
4 he would have had a duty to Sorry Sara's to determine whether,
5 in fact, there was an impediment to a fair sale. All of the
6 allegations, which I haven't even addressed insofar as the merit
7 of those allegations relating to his conduct of this sale, all
8 of those allegations simply focus on duties he had to the
9 borrower and the lender, not the guarantor. You can't extend
10 those duties to the guarantor under these circumstances.

11 The Brief in Opposition refers to --
12 cites on page 8 the Miller v. Cross case as standing for the
13 proposition that an agent has duties to a party to a contract
14 that is principal, has contractual duties. That's a case
15 involving a loan brokerage firm. It really has no bearing at
16 all on this set of facts. It's completely different. That is a
17 contract between a loan brokerage firm. They held that the
18 vice-president of the company breached the duties that an agent
19 owes to its principal under those sets of facts.

20 This case involves, number one, a
21 completely different type of fiduciary relationship. That is
22 between a trustee under a deed of trust and his principals,
23 which I've already stated are the borrower and the lender. They
24 don't extend to any parties beyond that, the borrower and the
25 lender. There could be some potential -- I found some cases of

1 general liability of a trustee. When he conducts a sale, what
2 liability does the trustee have to people that attend the sale?
3 The cases I have found held that he has absolutely no duty to
4 state anything, make any representation at all about anything
5 relating to the property or the status of title. All he has to
6 do is to call the -- call down the sale and then conduct the
7 sale process of accepting bids. Anything that he does beyond
8 that -- in fact, the cases hold that if he makes any statements
9 or representations about the status of title or about the
10 condition of the property or anything else, he must do so
11 accurately. He can't misrepresent anything.

12 What we have here is not a question of
13 any sort of misrepresentation. That's not the issue here. The
14 Warners have alleged as guarantors that they have been damaged
15 by the way in which Mr. Clementson as trustee conducted this
16 sale. That goes well beyond -- really has no relevance at all
17 to the Miller v. Cross case. It doesn't relate in any way.
18 It's two entirely different sets of facts. Interestingly, they
19 didn't cite anywhere a deed of trust-trustee case in the Brief
20 in Opposition.

21 They continue on and talk about the
22 Florida case of Dorsy versus Maryland National Bank as imposing
23 a duty upon the creditor to deal with the debtor in a manner
24 that won't harm the security or the debtor. Well, again, I
25 think the trustee has a duty here to act impartially between the

1 two, his two principals who are the borrower and the lender.
2 But beyond that, that duty doesn't extend to anyone. Quite
3 frankly, the Warners have absolutely no standing to bring this
4 action against Clementson under any case that I'm aware of.

5 There's a case, Yields v. Kidd
6 (phonetically), where the Supreme Court dealt with legal
7 malpractice action, not similar to the facts at all in this
8 situation. The Supreme Court of Virginia clearly recognized a
9 privity of contract relationship between an attorney and a
10 client that's suing. That case was cited in Carlton v. Jolly,
11 Judge Williamson, District Court in Richmond, in a suit brought
12 by limited partners against an attorney that represented the
13 general partnership or maybe the partners as opposed to the
14 partnership. In other words, there has to be this privity of
15 contract. That's different from a trustee acting pursuant to a
16 deed of trust in executing a trust. The concept there is
17 analogous in that there has to be some duties created by
18 contract or law where the Warners can bring this action against
19 Clementson. I submit to Your Honor there's absolutely no
20 authority in Virginia that would extend these duties in
21 executing trustee or foreclosing trustee to a guarantor that
22 would expand the law and would make new law. They have cited
23 absolutely no cases to support that proposition.

24 The next issue relates to the -- that
25 I have raised on behalf of Mr. Clementson is one of damages.

1 The Warners allege -- in fact, in their Brief in Opposition they
2 suggest that they have a statutory right of subrogation.
3 Subrogation kicks in when you pay. I don't see any allegation
4 of a payment. I certainly wouldn't concede that they have any
5 rights, that they can be subrogated in any manner to the rights
6 of the borrower, Sorry Sara's, the restaurant. Even if they
7 were subrogated so if Sorry Sara's had a claim against
8 Clementson for doing anything that violated any fiduciary
9 duties, he had to -- the borrower, the Warners, would have to
10 make a payment in order to realize upon those rights as a
11 subrogee and they haven't done that. They haven't alleged that
12 anywhere here. In fact, what they want to do is get out from
13 underneath a deficiency claim altogether.

14 In the first count of their Bill of
15 Complaint, they've asked that the claim of The Money Store
16 against them be extinguished by virtue of this sale. They are
17 not subrogated in any way to the borrower, the restaurant. They
18 have no claim in that sense and they have incurred no damages as
19 of this point. This claim is entirely -- number one, it's
20 brought on the wrong side of the Court as against the trustee.
21 Number two, it's completely premature to seek money damages
22 against a trustee even in law because they allege facts which
23 don't support the money damage claim. They haven't incurred
24 anything. That's the reason I cited the Allied Productions
25 case.

1 Now, the Plaintiffs' brief tries to
2 distinguish that claim by suggesting that this is a case -- and
3 it is. Allied Productions is another legal malpractice case
4 where an attorney failed to -- at least the client alleged that
5 he allowed a default judgment to be rendered against the client
6 and, therefore, the client sued the attorney and demurrer was
7 filed and the Trial Court sustained the demurrer on appeal. The
8 Supreme Court found no error in sustaining that demurrer because
9 the client hadn't alleged any payment on that judgment.
10 Therefore, the client hadn't been damaged. In that sense, it's
11 very analogous. We have a claim that hasn't even been reduced
12 to judgment, a contract claim called the guarantee between The
13 Money Store and the Warners. That claim hasn't been reduced to
14 judgment. If it was reduced to judgment, there would still have
15 to be a payment before there would be any monetary damages.
16 It's premature under that Allied Productions case for the
17 Warners to bring this claim against Mr. Clementson.

18 Now, looking at the actual claims
19 relating to the sale, I have found -- I have looked long and
20 hard and I have found no case that would suggest under the facts
21 and circumstances of this foreclosure that Mr. Clementson has
22 done anything other than act prudently as more than most
23 trustees would do under these circumstances. The advertising
24 met the requirements of -- clearly met the requirements of the
25 two things that they must under Virginia law. That is, the

1 contract which is a deed of trust and the Virginia statute.
2 Those are the two things. If your contract, the deed of trust,
3 the security instrument, requires advertisement in a certain
4 manner, the Code simply says this is the minimum amount of
5 advertisement. And if the deed of trust is silent and doesn't
6 require this much, trustee must advertise this much. There's an
7 obvious reason. There needs to be some fairness in these power
8 of sale liquidations in the Code. The General Assembly has
9 found these minimum requirements to satisfy a minimum fairness
10 standard. You can have additional requirements in the contract.
11 The borrower and lender can enter into whatever agreement they
12 want to with regard to advertising a sale. If it requires the
13 trustee to advertise in five different newspapers, the trustee
14 would have to do that. But this deed of trust didn't require
15 the trustee to advertise anything near what he did advertise.
16 It required him to advertise in one newspaper and he satisfied
17 that and advertised an extra time. He advertised it in other
18 newspapers and also had an agent distribute handbills, again,
19 well beyond the actual requirement of the deed of trust.

20 I don't want to get off the four
21 corners of the pleading here, the Amended Bill of Complaint, but
22 just looking at those allegations of an inadequate
23 advertisement, it falls woefully short of what any case in
24 Virginia or elsewhere for that matter would require of a
25 trustee. In other words, Mr. Clementson did everything he's

1 required to do under Virginia law and more.

2 The second issue had to do with not
3 having the property secured so that the personal property would
4 not be removed or allegedly was removed. That would have been
5 available fixtures, whatever. Well, there's no requirement
6 unless it's set out in the deed of trust that a trustee do
7 anything along those lines. There's simply no requirement
8 whatsoever. The trustee -- if, in fact, the contract between
9 the parties would require the trustee to act a certain way
10 before he advertised the property sale, he would be duty-bound
11 to act that way. That controls what the trustee has to do in
12 executing the trust, the instrument itself. And the trustee's
13 duties are limited to that. The Powell v. Adams case is right
14 on point that a trustee's duties are limited to the instrument,
15 the security instrument itself. To suggest that he's got to go
16 and do things such as secure the property certainly goes well
17 beyond what a trustee has to do in Virginia. I found absolutely
18 no case that would suggest that a trustee has to secure the
19 property in any way.

20 That's a claim that the Warners can
21 bring, can raise, in defense to a deficiency suit. That's the
22 way this whole case should have been postured. These issues
23 that are being raised by the Warners -- you would expect issues
24 like this to possibly be raised in defense of a deficiency claim
25 but not in this manner, not in this form. There are absolutely

1 no cases that would support that. I think Your Honor can take
2 judicial notice that trustees rarely go out to the property,
3 rarely even see them when they are foreclosing under power of
4 sale in Virginia. They have absolutely no duty. And I don't
5 believe the Plaintiffs' attorney can cite any Virginia case that
6 would hold a trustee to that issue.

7 The third issue, the manner of bidding
8 -- I think there was even a suggestion that the increments of
9 bidding were too low. Now, we're really getting down to what I
10 would call dissecting the conduct of the sale, putting it under
11 a microscope, and trying to pick out some particular thing that
12 was done wrong. It was a claim that the increments of bidding
13 were too low. They should have been higher. Every case I have
14 found in Virginia would leave those matters to the sound
15 discretion of the trustee. And if, in fact, there was a problem
16 with this sale, it was the borrower's, the restaurant's,
17 responsibility to come in and either file an action to enjoin
18 the sale, which I know Your Honor is familiar with and has
19 entertained in the past, or at the very least go on record in
20 writing to the trustee demanding judicial intervention. None of
21 that was done here. None of that was done.

22 I believe it has been revealed from
23 the pleadings that the Plaintiffs were even present at the sale.
24 The sale goes on. Nothing is being done to insist on anything.
25 They are just taking notes as to what the trustee is doing. He

1 uses his discretion. There may be some factual differences if
2 we got into the evidence in this case about what they allege
3 happened and what happened, but I would submit to Your Honor
4 that what they allege happened insofar as the conduct of this
5 sale is concerned was reasonable and within his sound
6 discretion.

7 The upset bid by the lender,
8 announcing that at a point during the bidding, that -- again, I
9 have found no case anywhere. Even doing an OMNI search of every
10 state in the country, I can't find any case anywhere that
11 suggests that announcing a lender's bid at the beginning or end
12 or anywhere in between would invalidate that sale or chill the
13 bidding in any way. I think that's a fair stretch for argument.
14 I think that as a matter of law it fails.

15 The Code, 5559.4, permits lenders to
16 make written one-price bids, specified bids is what I call them,
17 written one-price bids. The Money Store could have handed him
18 that bid. He could have started the bidding with that written
19 one-price bid for \$270,000 or whatever the lender decided it
20 would be and then that's permitted under the Code. Then the
21 complaint by the Warners would have been that the trustee
22 started too high because he announced the one-price bid first.
23 He can't win under these circumstances. But certainly what he
24 has done is reasonable and within his sound discretion. He
25 could take that written one-price bid and at some point in time

1 when the bidding got up to it then offer that bid in the bidding
2 process or he could wait at the end and say, well, the written
3 one-price bid by the lender was this amount and read it off and,
4 of course, that would have been lower than the final bid so the
5 successful bidder would have been Fox Two. It wouldn't have
6 made any difference. That complaint has absolutely no merit
7 under these circumstances.

8 When you look at the allegations, the
9 factual allegations, the alleged breaches of fiduciary duties,
10 number one, they are not duties owed to the guarantors. Number
11 two, they aren't breaches of fiduciary duties. They are within
12 the sound discretion of the trustee and all the Virginia cases
13 support the sale and the manner in which Mr. Clementson
14 conducted it. There's absolutely nothing wrong that's been
15 alleged even taking their case in the light most favorable to
16 their allegations. There's nothing that would support even
17 setting aside the sale much less a money judgment against Mr.
18 Clementson. With regard to that money judgment, I've already
19 mentioned that they have an adequate remedy at law there. They
20 can sue in law and should. We should not be here in an equity
21 proceeding addressing a request against the trustee for a money
22 judgment. Thank you.

23 THE COURT: Mr. Fain, I will allow you
24 to respond to these one by one if you feel more comfortable
25 doing that.

1 MR. FAIN: Thank you, Judge. That
2 might help me.

3 Your Honor, on behalf of Mr. and Mrs.
4 Warner and my Co-counsel, Mr. Blackwell, as the Court knows,
5 this is a case about the disposition of collateral that the
6 Warners relied upon to discharge their contractual obligation to
7 The Money Store. Our allegation fairly read is that basically a
8 train wreck occurred at this foreclosure auction before, during
9 and after which damaged that collateral and damaged the Warners'
10 ability to rely upon that collateral thereby causing their
11 deficiency to balloon higher than it ought to be. We have
12 alleged direct tortious claims against the people we believe
13 that were responsible for this train wreck, including Mr.
14 Clementson.

15 I will turn now to ways in which Mr.
16 Clementson's conduct as alleged and which will obviously be
17 factual issues that we will have the burden of proof on caused
18 this train wreck to occur and caused the Warners to be damaged.

19 I believe Mr. Lollar's first point was
20 we've got an adequate remedy at law. Your Honor, we cited the
21 cases in our brief. The Court is well aware that the Court
22 sitting in equity can hear both equitable matters and legal
23 matters. We cited the Patterson v. Saunders case. The Court
24 said there that equity having taken jurisdiction it will then
25 decide the whole controversy though the issues are legal in

1 nature and are capable of being tried by a Court of law. That
2 only makes sense for efficiency of the judicial process. We
3 brought this case on the equitable side of the Court. We do ask
4 for some measures of equitable relief. My understanding of
5 Virginia procedure is if you've got a case that's got both
6 equitable and legal claims, you bring it on the equity side
7 because you're asking for equity along with your relief. You
8 may be asking for legal claims. A Court in equity, according to
9 the Patterson case, certainly has the ability to hear both of
10 those claims.

11 I find it interesting that Mr. Lollar
12 gives on the one hand and takes away with the other. He says we
13 have an adequate remedy of law and we shouldn't be here and then
14 he says later on we haven't been damaged and we have no adequate
15 remedy at law. He's arguing inconsistently, Judge.

16 THE COURT: He said he hasn't been
17 damaged because there's been no payment. You're trying to make
18 certain that that payment, if it ever be made, be made as small
19 as possible.

20 MR. FAIN: That's correct, Judge. I
21 will turn to that issue now with regard to his argument about
22 whether or not we've been damaged and what we have standing
23 based on the damage issue.

24 Your Honor, we have alleged numerous
25 prayers for relief as a result of this train wreck occurring and

1 the people responsible for it. First, we have alleged
2 declaratory relief, the Warners versus The Money Store, as to
3 what our deficiency ought to be, if any. There's a case in
4 controversy relating to that. The Money Store hasn't sent the
5 Warners any nice letters saying you don't owe us anything.
6 There's clearly a case in controversy about what that deficiency
7 ought to be. It could be as high as two or three hundred
8 thousand dollars depending on the accrued interest in the cost
9 of the foreclosure sale. There's clearly a case in controversy
10 about what the Warners ought to owe. We seek as one claim a
11 declaration that our deficiency is X or nothing based on what we
12 will be able to show the Court as to the true value of that
13 collateral.

14 Secondly, we have pled -- and this is
15 an alternative remedy. If the Court declines to give us
16 declaratory relief, we'd ask the Court to conduct a new sale.
17 That's the equitable relief that we are asking. By the way,
18 Your Honor, under the Carr versus Union Church case, a Court in
19 equity can hear declaratory judgment action at the same time as
20 an equitable action. Secondly, we'd ask for a resale. The
21 Court may find that that is the best remedy for the Warners.
22 Let's simply do it over and see if there's no anti-competitive
23 behavior and make sure that the trustee's announcements are
24 appropriate and let's do a resale.

25 We thirdly asked for a number of

1 direct damage claims, negligence by Mr. Clementson, breach of
2 fiduciary duty by Mr. Clementson, fraud by Fox and the
3 representations it made at the foreclosure sale that were relied
4 on by our fiduciary, Mr. Clementson, and the anti-trust
5 violations which we will have the burden of proof on and we will
6 easily be able to show. These are direct money damages.

7 Why is it appropriate for us to be
8 alleging these damages now? Number one, you may say, well, Mr.
9 Fain, The Money Store didn't do anything wrong. I'm not going
10 to give you the declaratory relief they seek. As against the
11 Warners and The Money Store, you do owe them the full amount.
12 But Fox Two and Mr. Clementson you may find were negligent or
13 did violate the anti-trust act or did commit fraud and,
14 therefore, did cause that deficiency to be higher than it ought
15 to be. There's your direct damage.

16 Your Honor, Mr. Lollar has relied on a
17 very narrow case, the Allied Productions case. It's a legal
18 malpractice case. I suspect Mr. Lollar has been guided in that
19 direction because he does a lot of work for the reciprocal, I
20 believe. That may be why he's representing Mr. Clementson now.
21 This is not a legal malpractice claim. The reason the Supreme
22 Court, I believe, ruled the way it did in Allied Productions is
23 the Court believed and all the cases say that a case against a
24 lawyer for legal malpractice arises in contract and indemnity.
25 You come to a lawyer and ask him to take care of a problem. If

1 he breaches that duty and causes you to suffer damage because of
2 that, you have a claim in the nature of an indemnity. That's
3 why the Allied Productions and the legal malpractice claims are
4 different from what we have here. We didn't hire Mr.
5 Clementson. We don't have a claim for indemnity against Mr.
6 Clementson. We have a direct claim for money damages which
7 caused our deficiency to be higher than it otherwise would have
8 been but for the negligent acts and breaches of fiduciary duty
9 that we have alleged.

10 Another reason the Warners' case
11 should proceed now, not only do we have a right to sue, we have
12 a duty to do that. Statute of limitations for negligence and
13 breach of fiduciary duty claims is less than what it could be
14 with respect to any obligation on their deficiency that they may
15 one day have to pay. It may be that The Money Store pursues its
16 claim for the deficiency and the process results in the amount
17 being paid at a point in time after the statute of limitations
18 has run on the negligence and breach of fiduciary duty claims
19 against Mr. Clementson. Our claims directly against Mr.
20 Clementson for damage caused by his negligence and his breaches
21 of fiduciary duty have arisen now. We have a duty to bring them
22 now. Your Honor, the train wreck has occurred. The damage was
23 to collateral we were entitled to rely upon.

24 I will tell you another reason why you
25 know that that damage has occurred. We were here on a motion to

1 quash lis pendens which you granted. You asked me at that time
2 how are the Warners damaged if I release this -- if I grant the
3 motion and release the lis pendens. To be honest, I wasn't
4 bright enough to think on my feet. Our collateral, the thing
5 that they are entitled to rely upon to meet their deficiency
6 obligation, has gone. It's gone at a price way too low. Now
7 that the lis pendens has been released, it's about to be
8 transferred to Fox Two and they can transfer it to somebody else
9 and to somebody else. Our collateral is down the stream. That
10 is our measure of damage. That's our collateral. We are
11 entitled to rely upon it and it's been damaged by the negligent
12 acts and the other acts we've alleged in the Bill of Complaint.

13 Your Honor, I would like to turn to
14 the standing argument now, if I could, because that will make
15 you understand why we are entitled right now to seek this
16 relief. The Warners do stand in privity to the contract
17 directly to The Money Store. We signed a guarantee with them.
18 We said we will guarantee this loan but we understand there's
19 going to be certain collateral guaranteeing our obligation.
20 Now, that collateral obviously is this building. The Money
21 Store hired Mr. Clementson to foreclose on that piece of
22 property. Obviously, Mr. Clementson in that regard is serving
23 as the agent of The Money Store. If he doesn't act
24 appropriately, if he acts negligently or breaches the fiduciary
25 duty to The Money Store or to the borrower, Sorry Sara's, we are

1 damaged by that and we're damaged by The Money Store's agent.
2 The Miller case we cited speaks directly to that proposition.
3 If an agent for a principal is negligent and thereby causes
4 damage to the person he deals with, the Miller case says you
5 have a cause of action directly against the agent as well as the
6 principal. Something we omitted in our Bill of Complaint would
7 be a claim directly against The Money Store for the negligence
8 committed by its agent, Mr. Clementson.

9 Now, why else do we have standing?
10 Mr. Lollar didn't address this. I think it bears discussion
11 right now. Mr. Patten is going to say that under the terms of
12 the guarantee The Money Store could have released, exchanged or
13 substituted that collateral prior to default. If they had done
14 that, we couldn't then stand up in a case where they might sue
15 us seeking a deficiency and say that our obligation had been
16 discharged because of their release, substitution or exchange of
17 collateral prior to default. Judge, that isn't what happened
18 here. As I cited in our brief, those aren't the facts of the
19 case here.

20 What has happened here is, for
21 whatever reason, The Money Store did not release, did not
22 exchange, did not substitute that collateral prior to default or
23 even a deed prior to the date of foreclosure. You have a
24 situation where we go down to foreclose on April 18th. That
25 collateral is sitting there. The Warners are entitled to rely

1 upon it. The train wreck occurs and we are hurt by that train
2 wreck, all the ways we have alleged in the Bill of Complaint,
3 all the problems that occurred with the sale. Had The Money
4 Store elected for whatever reason to release, discharge or
5 exchange that collateral at some point in time during the
6 administration of the loan, which I think under the guarantee
7 they were entitled to do, then the facts change. The landscape
8 changes. Then Sorry Sara's suddenly has about \$400,000 in
9 equity they can get a loan against and meet its obligation to
10 The Money Store because the lien on the building has been
11 released. Then the Warners understand at that point in time
12 that they have some weakness in their security. They may act
13 differently with respect to Sorry Sara's meeting its obligation
14 to The Money Store.

15 However, that didn't occur. The Money
16 Store elected to keep that collateral in place. The loan was
17 administered in that status quo and the Warners were entitled
18 right up to the date of foreclosure to rely on that collateral.
19 Then you come to the foreclosure and the train wreck occurs and
20 we don't get the full value of our collateral. Our deficiency
21 obligation has ballooned. It's been created. It's there right
22 now. We want a declaration primarily from the Court that it
23 ought to be reduced or eliminated. If the Court doesn't agree
24 with that, that The Money Store didn't do anything wrong, then
25 we have been directly damaged by the conduct of Fox Two in its

1 anti-trust behavior and its fraud and by The Money Store's
2 agent, Mr. Clementson, in the way in which he handled the
3 foreclosure auction.

4 I would also like to address the issue
5 of whether or not Mr. Clementson owes a duty directly to the
6 Warners. I argued in the brief and it's plain that he does. He
7 does through the agency relationship. I think I've described
8 that. Secondly, Mr. Lollar has admitted in his argument and his
9 brief, too, plainly a trustee owes a fiduciary duty to both the
10 lender and the borrower to bring the best price possible at a
11 foreclosure sale. That's his duty. Well, Your Honor, the duty
12 that Mr. Clementson owes to the borrower also extends to the
13 guarantor. We cited cases in our brief for the proposition that
14 the guarantor stands directly in the shoes of his primary
15 obligor as to his rights, duties and obligations. When Mr.
16 Lollar admits that Mr. Clementson owed a fiduciary duty to the
17 borrower, he's admitting by extension directly to the guarantor.

18 Your Honor, I did not cite this case
19 in the brief, Woodward versus Resource Bank. It's a case that
20 speaks to this issue. The facts aren't identical but are pretty
21 darn close and very illustrative to the duty owed to the
22 guarantor as well as the borrower. What happened in that case,
23 the guarantor was not given proper notice of the foreclosure
24 that was about to occur and the disposition of certain
25 collateral that the guarantor was entitled to rely upon. The

1 guarantee agreement said they waived the right to notice. The
2 bank said we owed no duty to the guarantor to give him this
3 notice because they waived the right to have notice in the
4 guarantee. The Court said no, no. The guarantor stands in the
5 shoes of the borrower with respect to the way that collateral is
6 disposed of. You've got a duty to treat that guarantor the same
7 way you would treat that borrower with respect to the
8 disposition of that collateral. So the Resource Bank case, Your
9 Honor, stands for the direct proposition that Mr. Clementson as
10 he owes a fiduciary duty to the borrower owes the same duty to
11 the guarantor who stands in the shoes of the borrower with
12 respect to his obligations to the borrower.

13 Your Honor, Mr. Lollar next argued
14 about what I thought were a bunch of factual issues that we're
15 going to have to deal with at trial, which is what did he do or
16 not do at the foreclosure auction that might give rise to a
17 claim of negligence or breach of fiduciary duty. I think that
18 will be our burden. I think the responsibility of a fiduciary,
19 a trustee, at a foreclosure auction is to act reasonably and
20 appropriately to bring the best price possible at the
21 foreclosure auction. We allege that he didn't do that for a
22 variety of reasons, that he was negligent in the advertising.
23 And, Your Honor, that's going to be a factual issue because you
24 have to look at the property that's involved, the community
25 that's involved and what is reasonable notice to give to a

1 community for a piece of property of this value, the fact that
2 Mr. Clementson did not take efforts to get back into the
3 property or even to deal with the City of Hampton with respect
4 to the priority of liens over some of the items that secured
5 this debt, the furniture and fixtures. And the fact that those
6 items were not auctioned at the same time as the building gives
7 rise to a negligence claim and it will be our duty to show why
8 under these circumstances it was not reasonable for him to act
9 the way he did to bring the best price possible.

10 The events of the auction itself, Your
11 Honor, Mr. Lollar relies on the Feldman case for the proposition
12 that the trustee does not owe a duty to all those bidders out
13 there to make or not make any certain announcements. Mr. Warner
14 and Mrs. Warner weren't bidders out in the audience. They were
15 there. Mr. Warner was there. The Feldman v. Rucker case is
16 inapplicable. We are here as guarantors who were damaged by the
17 way in which this collateral was handled, not as bidders who are
18 saying we weren't told what we should have been told at the
19 foreclosure auction. The Feldman case says that the parties are
20 dealing at arm's length, that is, the bidders, and gratuitous
21 disclosures by the trustee that they are not called upon to make
22 may chill the bidding to the detriment of the noteholder and the
23 owner of the equity, but you don't owe a duty to the bidding
24 public. Feldman helps our case, Your Honor, because it says
25 right there that the trustee may owe a duty to the noteholder

1 and the owners of the equity but not to the bidding public to
2 make certain announcements. He may chill the price that's
3 obtained which damages my client. So the Feldman versus Rucker
4 case supports our proposition that a trustee has a duty to not
5 chill the bidding in a manner that does not bring the highest
6 and best and most reasonable value for the piece of property.

7 Judge, we also cited in our Bill of
8 Complaint Virginia Code Section 26-58. That is a code section
9 that governs some of the conduct that is permissible of a
10 trustee and some that is not. It is impermissible for the
11 trustee to deal directly with the noteholder in arriving at and
12 contriving -- I won't say contriving -- deciding about what
13 should be bid or not bid. And 26-58 plainly makes that grounds
14 for setting aside the sale, if that has happened. We believe
15 and our evidence may show that that has happened. Mr.
16 Clementson and The Money Store -- Mr. Clementson advised The
17 Money Store and participated with The Money Store in the
18 determination about what the sale price ought to be. That is
19 violative of 26-58. That's a factual issue, whether or not that
20 occurred or not. We've alleged it occurred. It is our burden
21 to show it. We believe it occurred because during the bidding
22 process -- and Mr. Warner was there -- there was a point in time
23 when the bidding stopped and Mr. Clementson called a huddle with
24 his clients. They really weren't his clients. They were
25 representatives of the Money Store and the SBA. Heads were

1 nodded and Mr. Clementson came back and then announced that the
2 bid price had been met. The facts may reveal that Mr.
3 Clementson violated 26-58 in that conference at that point in
4 time and beforehand in deciding what that price would be and
5 what would be a reasonable price to accept.

6 Judge, I don't want to overstate my
7 arguments. I'm sure I'm going to have some responses to make to
8 the other arguments. I believe I've addressed all the points
9 that Mr. Lollar made in his argument.

10 THE COURT: Mr. Fain, if I were to
11 declare the sale void and order another sale, wouldn't the fact
12 that the bid price has already been disclosed chill any further
13 bidding upward?

14 MR. FAIN: That's one of the things we
15 have alleged, Judge. We have alleged -- that's why that is not
16 our primary theory of relief. We do think this property has
17 been tainted in the marketplace because of the events that have
18 occurred. A resale may not be our best remedy. This piece of
19 property is our -- the bidding price has already been chilled.
20 We think money damages or a declaration as to what our
21 deficiency obligation is or ought not be is our best remedy. If
22 for some reason we fail along the way in meeting our burdens,
23 then a resale is an alternative we will ask for.

24 THE COURT: Thank you. Mr. Hatchett?

25 MR. LOLLAR: Your Honor, do you want

1 me to wait to respond?

2 THE COURT: You can respond now or at
3 the end.

4 MR. LOLLAR: I will wait. Thank you.

5 MR. HATCHETT: Your Honor, as you
6 recall, I represent Fox Two. We are here today based on three
7 different motions of the different Defendants. One is a motion
8 on a demurrer. One is a motion on a summary judgment. One is a
9 plea in bar. The Court is aware that a motion on a demurrer is
10 a motion that the argument in the best light of the Plaintiff
11 does not meet the standard to which a jury could grant a
12 judgment for that Plaintiff. You are also aware, Your Honor,
13 that summary judgment under Rule 3:18 of the Supreme Court of
14 Virginia allows reference and reliance upon Answers to
15 Admissions. Finally, a plea in bar allows there to be evidence
16 offered at this time, irrebuttable evidence, to quash a Motion
17 for Judgment. This Defendant filed all three.

18 There was a question raised in the
19 reply memorandum in support of opposition in Fox Two's demurrer
20 saying that we had not filed, but I have referenced here that on
21 August the 9th I mailed to the Defendant and to the Court and it
22 was in the Court record where it says the Defendant, Fox Two
23 Acquisitions, L.C., prays that the -- let me get the right one
24 -- prays that it be granted summary judgment as to the
25 Plaintiff's first Amended Motion for Judgment on all counts

1 concerning this Defendant and they be granted its cost expended
2 herein. If that was not received -- it was also attached to the
3 plea in bar. That's still a concern. I want to address that
4 right off the bat procedurally.

5 Was that a concern to you? Did you
6 get the Motion for Summary Judgment?

7 MR. FAIN: That's fine.

8 MR. HATCHETT: Okay. With that said,
9 the merits of my point are to look at the Plaintiff's arguments,
10 paragraphs 24, 25, 26, 27 and 28. In those five paragraphs, he
11 has made certain allegations and from those allegations he has
12 sought -- the Plaintiff has sought Count 4 which was anti-trust,
13 5 which was constructive fraud, 6 which was actual fraud, 7
14 which was tortious interference of contract, 8 which was
15 punitive damages, and 9, he brings in this Defendant and
16 possibly in Count 1 asking for other relief, asking that the
17 sale be set aside.

18 In looking at this from the best light
19 of the Plaintiff, the Plaintiff has said that Sandra Campbell,
20 who by the way is not a Defendant, was an investor who had
21 previously loaned Sorry Sara's a sum of \$150,000 and that it was
22 secured by a deed of trust. There's no prohibition that I know
23 of that a second deed of trust holder cannot come forward and
24 participate in a foreclosure. Then paragraph 26 says Campbell
25 had substantial interest in the outcome of the foreclosure

1 auction and upon information and belief was ready, willing and
2 able to participate in the bid process. I don't believe that
3 that is a prohibition.

4 I will go to a point here and
5 specifically to a case that we heard in the previous hearing. I
6 will ask the Court, if I may approach it, to give you a copy of
7 Barnes v. Morrison. I have cited Barnes v. Morrison in my
8 brief. Barnes v. Morrison is an 1899 case that involves the
9 sale of barrels of whiskey and at the time of the sale Mr.
10 Barnes had an interest in approximately 60 barrels. That's 63
11 percent of the total amount of whiskey that there was a tax lien
12 on. The tax collector sells this at an auction and at that
13 auction Mr. Morrison is in attendance. Mr. Morrison makes a bid
14 of a dollar eleven per barrel. Unfortunately, Mr. Barnes didn't
15 get there on time and gets there late and says, Mr. Auctioneer,
16 stop. He goes over, as is shown in the paragraph that I have
17 identified for you as C, that he spoke to the collector who was
18 the auctioneer and asked him to hold up the sale and that he was
19 then introduced to the Defendant who had made the bid and that
20 they had a conversation with him in which he proposed that they
21 jointly purchase the whiskey and that he, the Plaintiff, be
22 allowed to take the barrels shown as originally purchased by
23 him. The Defendant declined this proposition but agreed that he
24 would buy the whiskey for himself and the Plaintiff jointly and
25 that they would divide it barrel about. This was overheard by a

1 third party.

2 Well, let's look at the case here.

3 All we have alleged taking it in the best light is that Campbell
4 had an interest in the property and through a deed of trust --
5 which I think is going to be found to be held by her husband who
6 is deceased but say it attributes to her. That seems to be very
7 much like the Plaintiff testifying that he was the owner of
8 about 2,500 gallons of the whiskey that was here for sale.
9 Campbell, as they say in 26, had a substantial interest in the
10 outcome of the foreclosure and upon information and belief was
11 ready, willing and able to participate.

12 As you see on page 94, it says on
13 cross-examination the Plaintiff testified that he had gone to
14 the sale for the purpose of protecting his interest and that if
15 the Defendant had refused to make the agreement which they did
16 make, he would have bid on the whiskey as he had made
17 arrangements to get money. So assuming that Mrs. Campbell is
18 ready, willing and able to bid, she fits within that paragraph
19 of this.

20 Then in paragraph 27, it says upon
21 information and belief representatives of Fox and Campbell
22 discussed prior to the foreclosure auction arrangements whereby
23 Fox and Campbell would not bid against each other at the
24 auction. Well, I just read for you reference in this case that
25 said he was introduced and that he proposed that they own it

1 jointly, not bid against each other. But if this Court has any
2 problems with that paragraph, then go to the answers to the
3 admissions where they specifically asked, Did Campbell and Fox
4 Two discuss prior to the foreclosure an arrangement whereby
5 Sandra Campbell would refrain from bidding? They said no. We
6 can rely on that here. Likewise, Fox did not make an
7 arrangement or one of the members of Fox did not make an
8 arrangement where it would not bid. Clearly within the
9 boundaries of Barnes, we didn't stop the foreclosure.

10 Then in paragraph 28, Campbell and Fox
11 ultimately entered into "our" arrangement -- I think it's
12 entered into "the" arrangement -- prior to the foreclosure
13 auction to quell the bid competition by agreeing that Campbell
14 would refrain from bidding, denied in Admission 2, and that
15 Campbell would pay a portion of the purchase price, that Fox and
16 Campbell would own the property jointly and that they would
17 share the profits realized through their ownership of the
18 property.

19 Letter C in this Court case is right
20 on point again where it says that they agree to own it jointly
21 and divide it barrel about. The denials in the Admissions in
22 Number 2, which I previously referenced to the Court and to
23 Number 3, it was denied that prior to the foreclosure auction
24 representatives of Fox Two offered to pay Sandra Campbell a
25 certain sum of money if she would refrain from bidding at the

1 foreclosure auction and that it was denied that prior to the
2 foreclosure auction a representative of Fox Two suggested that
3 Sandra Campbell pay to Fox Two a certain sum of money in
4 exchange for Fox Two's agreement to refrain from bidding and
5 that it was denied that the purpose of the agreement described
6 in the question and answer of Number 6 was to insure that Sandra
7 Campbell would not bid against Fox Two at the foreclosure
8 auction. It was denied. I can rely on it in my summary
9 judgment. Even without the summary judgment right now, I am
10 within Barnes v. Morrison.

11 I noticed in the reply brief that the
12 Warners have used words like collusion. They didn't use it in
13 their prayer.

14 Look what the Court says about two
15 parties coming together to buy something. On page 95 it is said
16 that there is -- and I make reference to it -- it is not
17 necessarily corrupt for two or more persons to agree that one of
18 them shall purchase for their joint benefit property sold at a
19 judicial or other public sale. Whether such combination is
20 lawful or otherwise depends on the intentions of the parties and
21 the effects of the arrangement. Well, I showed the Court -- and
22 I think this is under a plea in bar -- showed to the Court, to
23 His Honor, that there was a bid list which contains seven names.
24 There were other bidders. I made reference to the fact that Mr.
25 Fabbri was the other bidder who bid. I don't believe there's

1 any question about this. There were over a dozen bids. It
2 started at \$125,000, got to \$177,000. If there was collusion,
3 it was not with all of the bidders. There's no representation
4 here that there was an attempt to get all of the potential
5 parties interested to stifle the bids.

6 Now, the Court also heard reference to
7 Jones v. Clary which was 75 Southeast Second 504 which I made
8 reference in my brief. I noticed in this case without getting
9 too far into the details that the Court clearly says there is no
10 duty upon the appellees which were third party buyers to see
11 that the property brought its market value so long as they acted
12 in good faith and did nothing to suppress, stifle or chill the
13 bidding. They had a right to buy the property themselves or
14 through an agent as cheaply as possible. If the Courts will
15 look at the intention of the parties and if it is fair and
16 honest and the primary purpose is not to suppress the
17 competition but to protect their own rights and advance their
18 own interests, there is no fraudulent purpose to endure and
19 defraud others interested in the results of the sale.
20 Therefore, Your Honor, unless they have new testimony or new
21 evidence, they don't have now a right to sue these parties.

22 But let's look at these five
23 paragraphs in relation to the six counts I mentioned. The first
24 count was Count 4, the anti-trust violation. In the anti-trust
25 violation they said -- they made reference to 59.19.5 which says

1 every contract, combination or conspiracy in restraint of trade
2 or commerce of this Commonwealth is unlawful. But, Your Honor,
3 the Court has already said and we know -- excuse me. Let me
4 back up a second. I'm getting ahead of myself. The Court is
5 aware that this is a broad introductory paragraph to the police
6 powers that are being given by statute. Every contract is not
7 implied. Every contract would mean that you and your wife could
8 not go out and buy something. You and your brother could not go
9 and buy something together. You would have to disclose it.
10 That's not the law.

11 What the law is under Barnes is a
12 two-prong test, that there has to be a contract and its primary
13 purpose -- as the Court said, the primary purpose is to suppress
14 competition, the primary purpose of the two parties getting
15 together, two potential bidders in the whole scope of this
16 community. The Virginia anti-trust law has said, a conspiracy
17 that produces adverse anti-competitive effects within a relevant
18 product and geographic market. Contacting one person could not
19 establish this pre-foreclosure hearing. If it is, then we are
20 saying the statute supercedes Barnes, supercedes Jones. The
21 statute doesn't. The statute says -- and I cited the Net Realty
22 case -- that the law must be read with reasonableness. It's
23 already been established that it's permitted that parties get
24 together. That's how capital is raised. That's how people are
25 able to buy. Otherwise, corporations, partnerships, limited

1 liability companies could never bid on property because they are
2 more than one person. If there's a problem between Campbell and
3 Fox, there's a problem between all of the owners. Two of the
4 other members of the limited liability company were in
5 attendance.

6 There could not be an anti-trust
7 violation unless it is pled that there was an attempt that would
8 have been successful or could have been successful to stop all
9 of these other bidders. Obviously, nothing was done to Mr.
10 Fabbri or at least hasn't been pled. Nowhere could I find in
11 the law that two parties coming together, under Virginia
12 anti-trust or any other state, two parties coming together to
13 bid on a foreclosed piece of property, bona fide purchasers, were
14 held that this was an anti-competitive act. Now, somehow if
15 they were maybe selling Disney World and it cost a trillion
16 dollars there could be a limited number of potential buyers.
17 But property assessed at \$238,000 is not in that category.
18 There could be no idea from these -- from Fox Two that they
19 were, by talking to one person, taking within the scope all of
20 the potential bidders. I think the Court can take judicial
21 notice of the value of the property. If not, we will put on
22 testimony. But the standard in Barnes is two prongs. You've
23 got to have an agreement and its primary purpose is to quell the
24 bidding.

25 Under the fourth count, the contract,

1 the getting together of Fox and Campbell, is not a prohibited
2 act as stated in Barnes, as stated in Jones. They cannot rise
3 above it. The anti-trust evaporates for lack of having
4 assembled all of the parties or having shown the intent to
5 assemble all of the parties. They admit they only contacted
6 one.

7 The next count was a count of fraud.
8 It's basically -- five and six are applied together. One is
9 constructive fraud and one is actual fraud. The point of the
10 prayer is that because the parties got together, there was a
11 duty to announce this. Well, first of all, fraud is a
12 representation that is false that is relied upon. I don't see
13 how this could be actual fraud since nothing was said. Let's
14 just turn around and say they went out and said Campbell and Fox
15 Two have gotten together. That might have quelled the bidding.
16 They would have said, We're the big boys. We're going to stop
17 the bidding. We might have quelled the bidding if we had given
18 notice like that. The fact that they said nothing could not be
19 actual fraud. It could not be constructive fraud. There's no
20 duty to Mr. and Mrs. Warner to come forward to them. There's no
21 duty. There's no case in law in Virginia or any place else that
22 the potential buyers have to give notice to the trustee of who
23 they are. The Jones case which dealt with a gin house was where
24 they had assigned a person, Mr. Jones, as their agent to buy.
25 We don't have to have disclosure of agencies.

1 The next count was tortious
2 interference with contract. Frankly, I just don't see the tort.
3 If there is a tort in bidding at a foreclosure sale that can
4 trickle down to this Plaintiff without there being any physical
5 evidence or anything else, I don't know which contract it is.
6 If it is the contract of Fox and Campbell getting together,
7 there's no privity to contract there. If it is the contract
8 between the bidder and the trustee, the bidder is taken in its
9 light as the bidder on the property. I just don't see the tort.

10 The next claim was for the punitive
11 damages. They relied on the anti-trust section in their prayer.
12 It says in that count, Count 6 -- I'm sorry -- 8, punitive
13 damages, Fox's conduct in arranging a secret agreement with
14 Campbell to suppress bidding activity in violation constitutes
15 willful and wanton disregard of the rights. Under 59.112 you
16 have the right to give treble damages. I don't believe you get
17 treble damages and punitive damages on a claim of anti-trust.
18 But what do you get? What would be the damages? You go to 9.
19 Count 9 shows us -- and I was so interested in what Counsel for
20 Mr. and Mrs. Warner said, that it would be hard to have a fair
21 new bid. Here they say, well, what we ask for in that count is
22 to rebid to re-auction this. I'm adamantly opposed to that. In
23 cases where a trustee has acted for himself and for -- to buy
24 and as trustee, the Court has said it's a voidable contract and
25 the damages are defined as a voidable contract in both Barnes

1 and Jones. The Court says if they have committed this and if
2 they have stifled it, it is a voidable contract. It is not a
3 tort or a contract. It would be a voidable event. With all due
4 respect, I'm opposed to that. But these other counts do not
5 find any favor in law. The only relief that does find favor is
6 what I mentioned, that the contract be void.

7 I believe that based upon Barnes and
8 based upon Jones, Virginia law has stated that a combination of
9 two parties is well within the law, is acceptable. And if you
10 look at Barnes where he stopped the foreclosure, stopped the
11 auction, and he knew who the bidders were and he said he was
12 there to bid to protect his interest and they made an agreement
13 to own it jointly, the Court said no. That is not stifling
14 bids. That is to protect their own interest. There is no way
15 under those five sections of the Plaintiff's amended bill that
16 they are relying on as facts that a jury just on those could
17 grant judgment for the Plaintiff based on Barnes and based on
18 Jones. It is not the law in Virginia.

19 If they pled that the primary purpose
20 had been to stop the bidding, to stifle the bidding, then
21 there's a possibility they didn't. And if you want to hear
22 testimony that is irrefutable, both Mrs. Campbell and Fox Two --
23 everybody is here. My plea in bar -- is I will allow the
24 Plaintiff to ask them under oath right now -- you can see we
25 have seven lawyers. We're here all afternoon. I'm representing

1 a bona fide purchaser. We've got bounds of paper. This is
2 costing thousands. Mr. Bellack has flown in from California.
3 If they have any questions about what was the intent at the time
4 the parties got together, ask them now. Thank you, Your Honor.

5 THE COURT: Mr. Fain?

6 MR. FAIN: Your Honor, this is a
7 hearing on Demurrer and a Motion for Summary Judgment. We are
8 not here, with all due respect, to take evidence. With all due
9 respect, we are here to examine the pleadings and determine
10 whether or not a cause of action has been stated. If it has,
11 then we move forward and it's my burden of proof to put on
12 evidence at trial to convince the trier of fact whether or not
13 the primary purpose of these people getting together, Mrs.
14 Campbell and these two gentlemen right here, on the day of the
15 auction was because they didn't want to bid against each other.
16 That will be a question of fact for the trier of fact.

17 The Morrison case as well as the Jones
18 v. Clary case were not decided on demurrer. They were not
19 decided on summary judgment. They were decided after
20 cross-examination of the witnesses to determine what the primary
21 intent of the parties was. That is what the law in Virginia is.
22 In Jones versus Clary the Court found that a secret combination
23 in agreement amongst persons interested in bidding whereby they
24 stipulate to refrain from bidding in order to prevent
25 competition and to lower the selling price of the property is

1 illegal. The Court went on to say whether such agreement or
2 combination is lawful or otherwise depends upon the intention of
3 the parties and the character and effect of the arrangement as
4 ascertained from the evidence in each particular case. It's a
5 factual dispute.

6 Now, Mr. Hatchett, with all due
7 respect, is not entitled to rely on denials to request for
8 admissions in a summary judgment proceeding. He's entitled to
9 rely on admissions made by another party, Mr. Warner, for
10 example. That admission could be relied upon. That eliminates
11 a fact issue. I think Mr. Hatchett ought to know that you're
12 not entitled to rely on your own denials in response to a
13 request for admissions in a summary judgment hearing. All that
14 does, Your Honor, is create a classic factual dispute. We've
15 alleged it. They've denied it. The trier of fact determines
16 it.

17 Your Honor, the issue at trial is
18 going to be, as I just said, whether or not these two gentlemen
19 approached Mrs. Campbell or Mrs. Campbell approached them. We
20 don't know that yet. That's a factual issue we will get at,
21 what was said, why it was they made this agreement. Our belief
22 is very firmly based on evidence we know so far, that Mrs.
23 Campbell came to that auction prepared to bid at least up to
24 250, maybe more. These gentlemen were prepared to bid that much
25 or more. They realized they were each other's competitors.

1 There was no sense in bidding against one another. To do so
2 would cause them to pay more than what they did pay for this
3 piece of property. That's a factual issue, whether or not the
4 primary purpose of them getting together was to affect the bid
5 price. It's not something to decide on demurrer or summary
6 judgment. We pled it occurred. It is our burden to show it
7 occurred. The Jones versus Clary case is directly on point as
8 well as the Morrison case, Judge. That case was not decided
9 back in 1899 on demurrer. It was decided after
10 cross-examination of the witnesses to determine what the primary
11 intent of the parties was.

12 Your Honor, there are a number of
13 other cases in addition to Jones versus Clary and the Morrison
14 case that are even more on point. They are not in this
15 jurisdiction but I think they are very instructive to the Court.
16 I would like to hand them up for the Court's consideration if
17 the Court is inclined to take this under advisement. One is
18 United States versus Guthrie.

19 THE COURT: Do you have those copies
20 now?

21 MR. FAIN: Yes, sir. I will hand them
22 to you. In United States versus Guthrie, the Plaintiff was the
23 United States Government in an anti-trust case against Mr.
24 Guthrie. Mr. Guthrie was charged with a violation of the
25 anti-trust act, the criminal aspect of it, for having gone to

1 foreclosure auctions in the State of Washington and making
2 secret arrangements with people with respect to bidding, whether
3 or not he was going to bid or someone else would bid. It was
4 alleged he entered into arrangements to make sure that they
5 wouldn't bid against him. The issue in that case was whether or
6 not the jury was properly instructed as to what an anti-trust
7 violation is in this sort of a case. Those facts as you can see
8 are pretty analogous to what we have alleged here. The
9 instruction that the Court upheld and found was appropriate, in
10 essence, instructed the jury to determine whether or not any
11 other agreement with respect to the bidding that affects, limits
12 or avoids competition among them occurred. That was the issue
13 for the jury to look at in the Guthrie case. That is directly
14 on point. That is what we're going to be showing the Court in
15 our evidence, that an agreement was reached, the primary purpose
16 of which was to affect the bid price.

17 The Court went on to say that under
18 the Court's definition of bid-rigging as an agreement to
19 interfere with competition for a transaction conducted by a bid,
20 the Court finds that there was ample uncontested evidence from
21 which a rational juror could find beyond a reasonable doubt that
22 Guthrie entered into such agreements. That is going to be the
23 factual issue for the Court to determine at trial. I will hand
24 up this copy for the Court.

25 Your Honor, also interestingly, Mr.

1 Hatchett recited the Net Realty case, I believe, in his brief
2 for the proposition that you can decide summary judgment in a
3 per se case. As I think we pointed out in our reply brief, that
4 was a case where a Plaintiff was entitled to judgment as a
5 matter of law because there were no fact issues in dispute as to
6 whether or not a per se violation of the anti-trust statute had
7 occurred. A per se violation has been found to be one that
8 involves bid-rigging. Bid-rigging can be a per se violation of
9 the anti-trust act. If we are able to convince the Court -- and
10 I think we will -- that this is a per se violation of the
11 anti-trust statute because it involves bid-rigging, we won't
12 even have a duty to show damages. We won't have a duty to show
13 an impact on the market. You don't have to show that it was
14 anti-competitive or that it gave you more of a market share.
15 The law is if it's a per se violation of the anti-trust act, it
16 is violative of the anti-trust statute and that's conduct that
17 we don't want to happen and the Plaintiff is relieved of his
18 burden to even show the damaging effect. The issue of damages
19 may not be an issue at trial. We think this is a per se
20 violation of the anti-trust statute and the Net Realty case, in
21 fact, supports our position on that proposition.

22 Mr. Hatchett also questioned whether
23 or not fraud is an appropriate claim here. I will cite to the
24 Court and I will hand up a copy of the Barrett versus Christie,
25 Manson and Woods case. That's the famous Christie Auction

1 House. This is not in this jurisdiction either, Judge, but
2 nevertheless it's very instructive. In the Christie case, Your
3 Honor, the Defendants likewise at bids, at auctions, were
4 getting into private arrangements where they would get a group
5 together and they would agree to form this joint venture to go
6 to the bid auction and then one representative of the group
7 would buy the property at a depressed value because they knew
8 the others wouldn't be bidding against each other. They would
9 buy the property. Then they would go back to their private
10 offices and have a second auction, if you will. They would
11 divide it up in a private auction that benefited them. That was
12 found to be violative of the anti-trust statute. The primary
13 purpose of this arrangement was to depress the bid. Not only
14 was it found to be violative of the anti-trust statute, one of
15 the claims alleged was fraud. Tortious interference with a
16 contract was alleged. Fraudulent concealment was alleged, all
17 of the things we have alleged in this case. Frankly, Your
18 Honor, when I did my research this illuminated me as to what my
19 potential causes of action could be.

20 Let me relate what the fraud is here.
21 These gentlemen here and Mrs. Campbell stood up, in essence, and
22 made a representation to our fiduciary, Mr. Clementson, that
23 they were there bidding in good faith, that they were proper
24 bidders, that they weren't involved in any collusive behavior or
25 concealing the fact that they might be violating the anti-trust

1 statute or quelling the bid. It was a representation that was
2 made to someone that we're entitled to rely upon and it damaged
3 us because Mr. Clementson did rely upon that and went ahead and
4 accepted their bid and that's to our detriment. The same basic
5 thing was alleged in the Christie case and was found to survive
6 a motion to dismiss under the Federal 12-V6. The Court found in
7 sum when read together with the allegations contained in the
8 proposed counter-claim -- and that's where the fraud was raised
9 -- an inference by the Plaintiffs' superior knowledge of the
10 agreements adequately established a duty to disclose what they
11 were up to.

12 So, Judge, we think we have properly
13 alleged that fraud occurred in the way in which these folks got
14 together, stood up, made a bid to our fiduciary who didn't
15 reveal knowledge that was superior to them, and that was that
16 they were colluding to suppress the bid. Just as in the
17 Christie case, it states a cause of action for fraud here.

18 There are a number of other cases I
19 would like to hand up in the event the Court takes this under
20 advertisement, other cases where real estate auctions have
21 occurred and parties have gotten together and made secret
22 arrangements to join together and bid as a group. I have just
23 handed the Court District of Columbia versus Basilico
24 (phonetically). It occurred in the District Court of D.C. and
25 it involved a very similar situation where real estate auctions

1 were occurring with respect to foreclosed-upon property and the
2 Defendants were getting together and making secret arrangements
3 about a joint venture basically about how to bid and who would
4 bid. Once they got the property, they disposed of it in a way
5 that benefited them. Obviously, they got the bid at a
6 suppressed value.

7 Similarly, United States versus
8 Pook is another case where parties got together at an
9 auction, made a secret arrangement and thereby depressed
10 the value of the property that was being offered for sale.
11 Judge, this very plainly violates the anti-trust statute or
12 could, anyway, if our facts so show at trial. It also creates a
13 cause of action for fraud if our facts develop at trial as we
14 expect they will.

15 With respect to tortious interference
16 with contract, it is very plain. It is the contract that exists
17 between The Money Store and the Warners. We have a contractual
18 duty created by that contract. Fox Two knew about that or
19 should have known about that. Our evidence will be that they
20 were in contact with Mr. Warner prior to the sale. They knew he
21 had a contract, knew he had an obligation under that contract
22 and knew that a deficiency would occur if a certain price wasn't
23 brought at the foreclosure auction. They interfered with that
24 contract by the conduct we've alleged which has increased the
25 deficiency by reducing the sale price of the collateral so they

1 have interfered with the Warners contract with The Money Store.

2 Your Honor, finally, Mr. Hatchett has
3 suggested that with respect to damages our only recovery is to
4 void the sale and redo it. Plainly, Your Honor, we have pled in
5 the alternative. That is one method of recovery. The Court
6 pointed out one reason why that may not be the best method of
7 recovery. We've alleged direct tortious conduct giving rise to
8 a damage that the Court may find may be the ultimate best
9 recovery for this Plaintiff. I think we are entitled to treat
10 it alternatively. We've pled properly ways in which we were
11 directly damaged, one of which would be a violation of the
12 anti-trust statute which just happens to provide for treble
13 damages.

14 Mr. Hatchett suggests we can't also
15 plead for punitive damages. Judge, simply, that is not correct.
16 We also alleged fraud and tortious interference with contract,
17 both of which are torts. If we show the appropriate wanton and
18 reckless disregard of the rights of the Warners, it would
19 entitle us to punitive damages. We cited in our reply brief
20 cases where anti-trust as well as other tortious conduct has
21 been alleged and punitive damages were tried along with the
22 issue of treble damages in those cases. There's precedent in
23 our reply brief for how we've pled and, with all due respect, we
24 are entitled to plead punitive damages along with the treble
25 damages.

1 Finally, I just have to say it. Mr.
2 Hatchett has said we're sitting here wasting a lot of money.
3 It's irresponsible of us to cause seven lawyers to sit around
4 and argue about this thing. Judge, I suggest it was
5 irresponsible for his clients to get together and make the
6 arrangement that they made to buy this piece of property at a
7 price that was depressed. They knew it. They entered into that
8 arrangement for the purpose of depressing the price so they
9 could get a steal. They got a steal and it damaged my client
10 and we're going to find out about it at trial. We should be
11 allowed to do that. We didn't start this dance but we're going
12 to see it through because we've got a lot at stake. Thank you,
13 Judge.

14 THE COURT: Thank you. Mr. Patten?

15 MR. PATTEN: Let me tell you what I
16 have filed, Judge. I have filed a demurrer to the two counts
17 that I am involved in, Count 1 and Count 9. I also filed a plea
18 in bar on the standing issue that has been addressed to a
19 certain degree by Mr. Lollar. I filed another demurrer to a
20 cross-claim that was filed against The Money Store by Fox Two.
21 I will try to be brief.

22 THE COURT: Take your time.

23 MR. PATTEN: I want to start by saying
24 to the Court that for purposes of my comments I'm going to
25 assume that the facts that have been alleged by Mr. Warner and

1 his wife are accurate. As we know, on a demurrer we take those
2 facts in the best light to the Plaintiff. I need to set those
3 up in preparation for the comments that I wish to make to the
4 Court.

5 This is how I understand the argument
6 or the facts that have been presented to us for our
7 consideration. Mr. Warner was an officer and he was a
8 stockholder of this corporation and decided to go into a
9 restaurant business, Sorry Sara's Restaurant. This company
10 needed capital as any young company does. They decided they
11 were going to get an SBA guaranteed loan through The Money Store
12 which is not unusual.

13 When they go to a company like this
14 and they go to the SBA, the net worth of the company is such
15 that it's not able to get a loan without a personal commitment
16 on the part of the stockholders. He did what thousands and
17 thousands of people do every day. He agreed to sign a separate,
18 independent, unconditional guarantee. His wife also signed one
19 guaranteeing the loan which was to be obtained by Sorry Sara's
20 from the SBA and from The Money Store. He did this knowing full
21 well that he was going to be liable on this indebtedness if
22 anything went wrong. That was a risk he took as part of his
23 venture into this business world as a restaurateur. We've all
24 had these experiences, some better than others. In any event,
25 the restaurant was not successful. The loan goes into default.

1 The Money Store eventually instructs its substitute trustee, Mr.
2 Clementson, to sell the property. We go to this sale that we
3 have heard so much about.

4 Count 1 of the complaint says that,
5 well, there's been all these irregularities dealing with the
6 chilling of the sale and so forth caused by Mr. Clementson, and
7 The Money Store delayed asking Mr. Clementson to sell this so
8 they are at fault too. As a result of Mr. Clementson's errors
9 in conducting this sale and as a result of the collusion on the
10 part of Mr. Hatchett's client and this other lady in the
11 courtroom here, as a result of all these things, he's been
12 damaged because his guarantee is going to be higher in amount
13 and indebtedness than it would be if the collateral -- had the
14 property gone for a higher price. So he says, number one, we
15 ought to be released of our guarantee completely. But if that
16 doesn't work, we ought to have damages against Mr. Clementson or
17 against Fox Two and these damages ought to be whatever it's
18 going to cost us on this guarantee.

19 That's interesting because this case
20 is not going to determine -- unless the Court said this
21 guarantee -- he was completely free of this guarantee to walk
22 away, unless the Court said that, there's no way this Court is
23 going to be able to determine what damages could be assessed
24 against Mr. Clementson or Fox Two because there's been no suit
25 yet on this guarantee. As a matter of fact, as the Court knows,

1 there's additional collateral in North Carolina that will likely
2 be effectuated first. This could further reduce the amount that
3 would be remaining on the note and so we don't know and will not
4 know -- unless the Court says the guarantee is worthless, we
5 will not know as a result of this suit what kind of exposure
6 these other two people would have. That raises a question right
7 off the bat. I would submit to this Court that if there is
8 liability on the part of Mr. Clementson, if there is a duty, if
9 he owed this gentleman a duty, if he breached that duty, then
10 he's answerable in a Court of law for damages to be determined
11 when Mr. Warner is sued on his guarantee because that's the only
12 way he has any liability. This idea -- Mr. Fain made the
13 comment, and I wrote it down, about our collateral is gone.
14 Well, that's where we're mixed up here. That is not his
15 collateral. This collateral belonged to The Money Store.

16 I would like to give a copy of -- it's
17 part of the pleadings -- of the guarantee, if I might. I want
18 to review a few parts of this guarantee. I think it's critical
19 to Count 1 and, I believe, to the entire suit. There's two
20 identical guarantees. This is the one Mr. Warner signed and his
21 wife signed one that was identical as well. In this guarantee
22 when he signed it, and it's attached as Exhibit D to my response
23 to the pleading of Mr. Warner, you will note that it's an SBA
24 form guarantee, signed by thousands, maybe more than thousands,
25 of people across America and what he did is he unconditionally

1 guaranteed. Now, this was not conditioned upon the effectuation
2 or realization on monies, on collateral that SBA may have in
3 other places. This was an unconditional guarantee. In the
4 guarantee if you'll notice down in the second paragraph where it
5 has 9.7 percent, it says such note and the interest thereon and
6 all other sums payable called the liability. He guaranteed the
7 liability of Sorry Sara's. Then it talks about the collateral.
8 I would suggest when the Court reads that, the collateral is
9 this restaurant over here in Hampton and any other collateral to
10 include the collateral in North Carolina that the Court is aware
11 of.

12 Down at the next paragraph, it says
13 the undersigned waives any notice of the incurring by the debt
14 of any other liabilities and waives any and all presentment,
15 demand, protest or notice of dishonor. One of the comments that
16 was made in here is, well, The Money Store waited nine months
17 before it foreclosed. If it got to the evidence on this, we
18 would want to talk a lot about that. Nevertheless, how long we
19 might have waited before we actually asked Mr. Clementson to
20 foreclose, I would submit -- and he complains he didn't get
21 notice. He waived the right to notice. It says down here at
22 the end of that paragraph that the SBA and The Money Store have
23 authority to deal with this collateral in any manner that they
24 so see fit. It gives a number of items. It's more than just,
25 as Mr. Fain was talking about, substitution and exchange and

1 release. That's only one of the things they have a right to do.
2 They had a right to completely release this thing if they wanted
3 to. They could modify it or change the terms or grant
4 extensions or renewals. They could decide to forebear from
5 realizing on that collateral. They could do most anything they
6 want to do with that collateral, throw it in the trash can if
7 they wanted to. He waived any rights for them to effectuate on
8 that collateral prior to going after him. That's part of the
9 deal. Down at the end of that sentence, it says the obligations
10 of the undersigned hereunder shall not be released or discharged
11 or in any way effected nor shall the undersigned have any rights
12 of recourse against the lender by reason of the action lender
13 may take or admit to take under the foregoing powers, in other
14 words, that any of these things they want to do with regard to
15 this collateral.

16 Then down at the next paragraph -- and
17 this is very important for the Court to consider -- lender shall
18 not be required prior to any such demand on or payment by the
19 undersigned to make any demand upon or pursue or exhaust any of
20 the other rights or remedies against the debtor or others with
21 respect to the payment of any of the liabilities or to pursue or
22 exhaust any of its rights or remedies with respect to any part
23 of the collateral. Plainly and simply, we don't have to do
24 anything with regard to that collateral before we call upon this
25 gentleman to pay 100 percent of the debt that is outstanding as

1 a result of the debt of the Sorry Sara's default.

2 On the next page, it says the
3 obligations of the undersigned shall not be released by reason
4 of the fact that the collateral may be invalid or may be subject
5 to equities or defenses or claims. It further says it doesn't
6 make any difference if there's been deterioration, waste or
7 theft of the collateral. I know we've talked about the fact
8 that equipment and fixtures have disappeared. That's another
9 story. It doesn't make any difference. He's waived that right.
10 So in paragraph 1, I would suggest to the Court -- in Count 1,
11 our argument to the Court on our demurrer is on the basis that
12 even if all of this stuff is true, even if Mr. Clementson didn't
13 do this sale right -- and we submit that he did it in a very
14 professional manner -- but even if that were true and even if
15 these guys colluded and held down this price and that's all
16 actionable, it don't make any difference because this gentleman
17 is like anybody that signs an independent separate guarantee,
18 100 percent liable, and when there is a payment on that debt by
19 virtue of effectuating a claim against certain collateral, it
20 reduces his obligation, but it's not his collateral. It's The
21 Money Store's collateral.

22 We filed a plea in bar and the plea in
23 bar basically said that he doesn't have a right to make this
24 claim. He said, well, we're right in the shoes of Sorry Sara's.
25 He's not in the shoes of Sorry Sara's until he pays. If he

1 pays; then he does have the right of subrogation. Incidentally,
2 he has the right of subrogation only if he pays in full the
3 amount due on that debt. Then he would have the right of
4 subrogation, but not now. He hasn't been called upon yet and he
5 hasn't paid a dime. He's not in the shoes of Sorry Sara's at
6 this point.

7 There's a case we cited in our plea in
8 bar. It's Keepe versus Shell Oil. Basically, that was a case
9 where a service station company was -- let's see. The facts
10 escape me. I apologize. My mind has gone blank on this. Shell
11 contracted with a company called PSI to make modifications to
12 the underground storage tanks of one of its gas stations which
13 was leased to a corporation in which the Plaintiffs were
14 shareholders. One of the Plaintiff's shareholders also served
15 as the lessee corporation's guarantor. After PSI's negligence
16 allegedly damaged the corporation's property and business, the
17 lessee corporation and shareholder sued PSI and Shell under
18 several theories. I apologize for not being clear about this,
19 but the important thing is that the Court held that the
20 Plaintiff, the shareholders of a corporation, have no standing
21 to assert any of the claims of the corporation.

22 This gentleman is a shareholder of
23 Sorry Sara's. Sorry Sara's is the one that was foreclosed on,
24 not the guarantor. In this case, the shareholder had no claim.
25 It further added that a guarantor -- there was also a guarantor.

1 And as the guarantor, the guarantor had no authority to assert
2 the claim of Sorry Sara's. I would ask the Court to take a look
3 at that case of Keepe versus Shell.

4 In addition, I have cited in my brief,
5 and I will give copies to the Court in case the Court doesn't
6 have them, three cases that are federal cases. I didn't know if
7 the Court had access to those federal cases or not. But
8 basically they stand for the proposition that Mr. Warner could,
9 in fact, waive all these things that he's waived in the
10 guarantee, that these guarantees are valid. One of them deals
11 with the very same guarantee form, an earlier version of it.
12 That's the SBA versus Andresen case. In that case the Court
13 indicated that the Plaintiff in that case could, in fact, waive
14 his rights and did so waive those rights.

15 Judge, we take the position that
16 whatever Mr. Clementson may have done wrong, if he did anything
17 wrong, and whatever these people did wrong in terms of colluding
18 to hold down that bid -- we don't think they did and we don't
19 think he did anything wrong and we don't think we did anything
20 wrong -- but if that sale was improper, then he would have an
21 independent action against The Money Store. When we sue him on
22 that guarantee, then he could allege that we have -- if we did
23 have a duty and we breached that duty, he could claim that
24 against us at that time. At this time it's premature. He has
25 an adequate remedy at law. We submit that the demurrer should

1 be sustained. We submit that he has no standing to make this
2 argument.

3 As far as the last count, the count of
4 selling the property again, Count Number 9 says injunctive
5 relief. Now he says he doesn't want any injunctive relief. If
6 everything goes wrong, he wants to resell the property. We
7 submit that that would be at this stage of the game in nobody's
8 best interest. The grounds to enable him to sell -- to enable
9 the Court to reverse this and to sell the property would be
10 severe. It would be a failure of consideration, a failure of
11 the price or advertisement. The advertisement on the face of
12 the pleading is shown to be in accordance with the statute. It
13 was advertised, as he says in his own pleadings, four times and
14 both the statute and the deed of trust, which I have attached to
15 my pleadings, indicate that the advertisement was entirely
16 proper as provided by the statute. We think that the case ought
17 to be dismissed. If he sometime in the future gets sued on his
18 guarantee, then we can address all those issues at that time.

19 THE COURT: Mr. Fain?

20 MR. FAIN: Thank you, Your Honor.

21 Your Honor, Mr. Patten starts off by arguing that this is a
22 stand-alone guarantee and, therefore, the Warners have no
23 standing but to stand alone on their own guarantee at some point
24 in the future. He starts off by saying this is a company that
25 didn't have enough net worth, just like a lot of other

1 companies, and, therefore, required a separate guarantee of
2 these additional folks. He's exactly right. The company didn't
3 have enough net worth because they took a lien against the
4 company, the one asset that it owned, that building. They also
5 gave guarantors that collateral to serve against their
6 obligation. They also signed a guarantee that said we can
7 release or exchange or discharge or substitute this collateral
8 without notice to you and you will still be obligated on your
9 guarantee. You know what? They never did that. They never did
10 that. They could have done that but they didn't do that. Why
11 didn't they do that? They wanted that collateral just like the
12 Warners wanted that collateral to secure both of their
13 positions. Have they done that? Have they released,
14 substituted, exchanged that collateral? The administration of
15 that loan would have been handled in a different manner.
16 Suddenly, this young, fledgling corporation has about \$400,000
17 of net worth that it can use to work out a loan with another
18 company and pay off The Money Store. Suddenly, they can use
19 that line of credit against this newfound equity to get working
20 capital and make this operation work. Suddenly, the Warners,
21 recognizing a weakness in their security position, have a
22 different incentive with respect to Sorry Sara's, its primary
23 obligor, meeting its obligation under this guarantee.

24 The fact of the matter is The Money
25 Store didn't do that. The cases that Mr. Patten relies upon,

1 these three federal cases that he handed up, are totally
2 inapposite. Those are cases where the collateral was dealt with
3 in a manner like this prior to any default of the loan. There
4 was a default. That collateral wasn't available to be used to
5 apply toward the deficiency. It wasn't there anymore. The
6 guarantors said in a subsequent suit against them we are
7 discharged of our obligation because of the way you handled the
8 collateral. It changed our underlying contract. The Court
9 correctly read the contract and said they had a right to do
10 that. Those aren't the facts here.

11 The facts here are that The Money
12 Store elected to rely on that collateral right up to the date of
13 foreclosure and then they made some decisions and took some
14 actions, or their agents did or people totally unrelated to
15 them, that caused damage to the Warners and the Warners were
16 very clearly damaged by what happened at that foreclosure
17 auction. Having made the decision to not exchange or release or
18 substitute that collateral, The Money Store had to live with
19 that decision. Then on the date of foreclosure, we were all,
20 both The Money Store and the Warners, entitled to the benefit of
21 whatever was brought at the auction. If that auction was
22 handled improperly, we got damaged by that. We've got a direct
23 claim for relief for that. What he is arguing is not what the
24 facts are of this case.

25 Now, we have asked for in Count 1 a

1 declaration about what our deficiency obligation is or isn't as
2 a result of the collateral they left in place when they hired a
3 trustee to come foreclose on it and then it got screwed up.
4 Sitting here today, what are the Warners obligated to do or not
5 do with respect to that deficiency obligation? The Money Store
6 is a necessary party to that request for a declaration. We
7 don't have to wait until they actually pay on that deficiency.
8 We are entitled to come to Court today. Like I said, The Money
9 Store hasn't sent any nice letters to the Warners saying you're
10 released. You don't have any obligation. If they did that, we
11 wouldn't have a case for controversy. We wouldn't be here.
12 They have done that. We do have a case for controversy. The
13 Warners are entitled to find out today whether or not they have
14 any obligation with respect to this deficiency.

15 Why bring it today? One of our
16 remedies is to ask you to resell the property. We shouldn't and
17 can't wait until months, maybe years, later if there's ever any
18 payment by them on this deficiency or if they get their beach
19 house down in North Carolina foreclosed upon and they lose that
20 and then come in here and say, by the way, Judge, two or three
21 years ago we should have asked you to resell that property. You
22 are not going to listen to us then or if we start alleging
23 negligence or breach of fiduciary duty or violation of the
24 anti-trust statute. You're going to say the statute of
25 limitations has run on that. We have a duty. That's why we're

1 case is just not apposite. It is inapposite. The Court found
2 there that a guarantor doesn't have a right to bring what, in
3 essence, is a shareholder derivative suit for damage caused to a
4 corporation for a flat-out negligence claim, somebody putting in
5 some underground storage tanks that didn't work out and the
6 corporation was damaged. Therefore, the corporation had the
7 right to seek recovery. That isn't what we have here. Here we
8 have a corporation and a guarantor, both of which are being
9 called upon to pay on a deficiency obligation. The corporation
10 is defunct. It doesn't have any assets. The Warners are the
11 ones ultimately that The Money Store is going to look to. This
12 is a case dealing with the way in which their rights were
13 affected under their guarantee contract with The Money Store.
14 It's not at all what the Keepe versus Shell Oil case was. That
15 case did not involve their guarantee contract with the negligent
16 tort feature. Here The Money Store has a deficiency obligation
17 against the Warners and they have a right to come to this Court
18 and find out what their obligation is or isn't with respect to
19 that deficiency. Keepe versus Shell Oil simply is not on point.

20 For the reasons I said earlier, Judge,
21 this is not a premature case. We need to come to Court today
22 and ask for a declaration. One of our remedies may be to
23 resell. We may lose some of our claims if we don't bring them
24 right now.

25 Finally, Judge, we've heard that

1 advertising alone met the statutory requirements. We dispute
2 that. We think that the Court is going to find that each piece
3 of property is unique with respect to the advertising that is
4 required and what is reasonable advertising under the
5 circumstances is what is the issue. Beyond that, it's a
6 combination of a number of different events all put together
7 that result in the improper way in which this foreclosure was
8 handled. Advertising is one of those. You look at that and the
9 collateral not being in there, the furniture and fixtures not
10 being in there, the way the foreclosure auction itself occurred,
11 the length of time from default, which was January of '95 until
12 April of '96, that this property languished and was never
13 foreclosed upon. We have alleged them all, but it's the
14 combination of all of those items that tell you that this was
15 not reasonably handled.

16 One last point, Your Honor, and that
17 is there may be a factual issue at trial with respect to the way
18 in which this guarantee was entered into in the first place by
19 the Warners. It's our evidence that on the day of the closing
20 the commitment which had been given to them earlier was changed
21 and additional collateral was required, i.e., their beach house,
22 and they weren't told that before the closing and they basically
23 entered into that guarantee through duress. Just the very
24 essence of this guarantee agreement is going to be factually
25 challenged at the trial and that's another reason why we need to

1 proceed. For all these reasons, Your Honor, The Money Store is
2 a proper party. We've got proper claims asserted against them
3 and we respectfully request that their plea in bar and demurrer
4 be denied.

5 THE COURT: Mr. Lollar?

6 MR. LOLLAR: Your Honor, Mr.
7 Clementson needs to leave to go back to Richmond. I wonder if
8 you could excuse him to leave at this time.

9 THE COURT: I have no problem with
10 that.

11 MR. LOLLAR: Your Honor, the Amended
12 Bill of Complaint alleges in Count 3 a negligence cause of
13 action against Mr. Clementson. I wanted to hear what Mr. Fain
14 said or the cases he cited to support that. I have heard
15 absolutely no case that would support a cause of action against
16 a trustee for a duty implied in the law on a negligence claim.
17 A trustee's duties arise by virtue of contracts, the contract
18 they enter into when they become a trustee, not by virtue of
19 negligence law or any implied duty in law. It has to be an
20 agreement, an acceptance by a trustee, to act that's in
21 agreement with the beneficiaries. Based upon negligence, Count
22 3 should be dismissed with prejudice. It has absolutely no
23 merit whatsoever in this proceeding. There's no law I'm aware
24 of that would support a negligence claim against a trustee under
25 these facts and circumstances.

1 Count 2 for breach of fiduciary duty
2 focuses on a duty that arises by virtue of contract, a contract
3 a trustee enters into with his beneficiaries, a deed of trust,
4 if you will. Mr. Clementson in this case agreed to act as
5 trustee by virtue of substitution of trustee that was signed and
6 recorded in the Clerk's office of this Court. The duties that
7 arise by virtue of that acceptance to act -- and Mr. Clementson
8 was not the original trustee, he became a substitute -- clearly
9 only are to his beneficiaries, the borrower, the restaurant, and
10 The Money Store, the lender, to no one else.

11 The claim in Count 2 for breach of
12 fiduciary duty raised in this case by the guarantor, I have
13 heard no case cited that in this context where you have a
14 trustee acting under a deed of trust would hold a trustee liable
15 to a guarantor. The guarantor simply is not in privity of
16 contract with the trustee or -- and that's the key there. If
17 you're suing the party under a breach of contract theory, a
18 breach of fiduciary duty arising out of a contract, there has to
19 be privity. The Carlton v. Jolly case that I cited to you is
20 analogous in that context. The attorney in that case that was
21 being sued by the partners of a partnership raised by a motion
22 to dismiss the lack of privity between the attorney representing
23 the partnership and the partners in the partnership because they
24 were two different entities, very analogous to this corporation,
25 Sorry Sara's, and Mr. Warner as a principal or stockholder in

1 that. He maybe had an interest in the borrower but was not the
2 borrower just like the client in the Carlton v. Jolly case was
3 the partnership, not the individual partners.

4 In that case the Plaintiff's attorney
5 tried to fall back into an argument that if he wasn't the actual
6 client, he was a third-party beneficiary. That was responded to
7 with a \$12,500 sanction against both the attorney and the
8 Plaintiff for bringing that claim against someone which was no
9 privity of contract which is required. The Judge said Virginia
10 law is clear on this point. There's no room to even dispute it.
11 Privity of contract is required for a breach of contract action
12 and there was no contract there. Same here. There's no
13 contract between Mr. Clementson as a trustee and the Warners as
14 guarantors. He accepted a trusteeship for the benefit of a
15 lender and a borrower. At that time I'm sure he had no idea who
16 the Warners were and shouldn't have had any idea. That claim
17 should be dismissed for lack of privity and lack of standing on
18 the part of the Warners.

19 The comment that the Warners have
20 standing by virtue of the fact that they have been subrogated --
21 and they cite in their brief 49.7, Virginia Code Section 49.7.
22 They haven't paid the first cent. They can't benefit from that
23 statute and they have no rights. Even then their rights might
24 be by virtue of a claim against the principal but certainly not
25 against the trustee under these circumstances.

1 We would ask that the Amended Bill of
2 Complaint be dismissed with prejudice against Lewis Clementson
3 as trustee on the very simple and narrow grounds that there was
4 no privity of contract or breach of fiduciary duty. Thank you.

5 THE COURT: Mr. Hatchett?

6 MR. HATCHETT: Yes, sir, Your Honor.
7 I have to take exception here on a couple of things. First of
8 all, I filed a plea in bar. A plea in bar allows evidence to be
9 introduced. Those Answers to Admissions were under oath. If
10 there's any question about who were registered bidders, who were
11 able to bid, I don't think anyone has taken exception. I will
12 just file it with the Court now as to the list of bidders at the
13 auction.

14 THE COURT: You've already filed it,
15 haven't you?

16 MR. HATCHETT: Yes, sir. I haven't
17 heard any exception. I want to make sure that that is known.

18 THE COURT: This has been filed
19 already.

20 MR. HATCHETT: Yes, sir. I will take
21 it back. Let me finish up here. You heard Counsel say we have
22 evidence that Mrs. Campbell was going to bid and bid up to
23 \$250,000. Mrs. Campbell is not a Defendant in this case. That
24 isn't an allegation. It hasn't been pled anyhow. If it is, it
25 isn't against this Defendant. You have heard it said they did

1 not want to bid against each other. Parties can come together.
2 If the residuary effect is that they don't bid against each
3 other, it's not illegal in Virginia. I'm not familiar with some
4 of the cases that were cited here but I am very familiar with
5 U.S. v. Guthrie. U.S. v. Guthrie is not on point. It says here
6 the facts were virtually uncontested. The sales of real estate
7 were made in Spokane, Washington conducted by trustees who were
8 Washington residents. Guthrie himself was a Washington
9 resident. At these sales Guthrie contacted other potential
10 bidders for the properties on which he intended to bid. On both
11 occasions Guthrie entered into agreements with the other
12 potential bidders, that in return for his payment to them they
13 would not bid on the properties and he alone would bid. The
14 other bidders accepted Guthrie's payments on both occasions and
15 thereafter refrained from bidding. This was a bid scheme. We
16 don't have that, Your Honor.

17 You have to take the Admissions
18 answers as part of this hearing. I'm ready to put on Mrs.
19 Campbell. I ask that I be permitted to do it after Counsel has
20 spoken. U.S. v. Guthrie is not on point. Each one of these
21 other cases is a long scheme of parties getting together, known
22 bidders. They find out about who the bidders are from a
23 previous bid and come together. This was one act of coming
24 together. He cannot rise above Barnes v. Morrison. It says
25 right there a combination for the mutual convenience -- and I'm

1 reading from page 95 -- of the parties as with the view of
2 enabling them to become purchasers each being desirous of
3 purchasing a part of the property offered for sale and not an
4 entire lot or induced by other reasonable and honest purpose
5 such as agreement will be valid and binding. If this Court
6 allows this case to go forward, you are taking every partnership
7 -- every potential partnership is now excluded from bidding.
8 Any combination of parties getting together from husbands and
9 wives to bothers and sisters to anyone else cannot come together
10 based on the fact that Barnes has stated what the law is in
11 Virginia. His pleading doesn't rise above that. For that
12 reason, I am allowed summary judgment.

13 Now, I heard today that the tortious
14 interference with contract was the contract between Mr. Warner
15 and The Money Store. If you can find for me how a bidder at a
16 foreclosure has interfered with that contract relationship,
17 there is just no relationship there. Parties bidding have a
18 right to buy the property as cheaply as possible. That's the
19 Jones v. Clary case. There cannot be anti-trust here because
20 there is no ability of this party to have pled that he tried to
21 control the bidding. You see the bid list. There's no
22 allegation that he contacted any other party, that Fox Two spoke
23 to any of the other parties. For that reason they are not able
24 to bring this case.

25 One of the most important things is

1 where is Sandra Campbell's name on the bid list? I admit she
2 can have a representative or something, but there's no evidence
3 that she was going to bid \$250,000 pled in this thing, and if it
4 were, it wouldn't affect Fox Two. There's no evidence that Fox
5 Two has tortiously interfered with that contract. There's no
6 evidence of actual fraud. They didn't represent her. That's a
7 problem that he said. I do rely on the fact that in the
8 pleading he says under punitive damages that he relies on 59.95.
9 This Defendant is not a part of this case.

10 There is no Virginia case presented to
11 you today, Your Honor, that says that there is a claim when two
12 parties get together to buy a piece of property that it could
13 create a tortious interference, that it could create a
14 contractual fraud or an anti-trust. It's just not here. To
15 allow this to go -- Counsel says, well, we have the duty of
16 burden of proof. We know that we have to instruct the jurors on
17 what is the law. He cannot rise above Barnes. That's the law.
18 That's the facts. He hasn't pled the facts. There's a
19 mentality here that because two people got together, that
20 stopped the bidding process. Two people getting together for a
21 purpose which was answered in the Admissions is allowed if it
22 had the residuary effect of stopping the bids from each other.
23 That is not against Virginia law. That is not against Virginia
24 law. There is no case presented here today. I ask the Court to
25 give us summary judgment at this time. Thank you.

1 THE COURT: Mr. Patten?

2 MR. PATTEN: I just want to bring up
3 one point and that is the response on the Woodward versus
4 Resource Bank case. I call the Court's attention to the fact
5 that that is a UCC case. The statute that is referred to there
6 is 8.9-504. In that statute, the debtor is specifically
7 responsible for any deficiencies. What happened there is a
8 guarantor was released on a guarantee because the guarantor
9 didn't receive notice of the sale of equipment and fixtures in
10 that case. The Court held that pursuant to the statute under
11 the Uniform Commercial Code the guarantor was, in fact,
12 considered to be a person and a person had to have notice. They
13 didn't follow the statute. They didn't give notice. Since they
14 violated the statute, a guarantor in that case was let out.
15 That is completely different than our case. We're talking about
16 real property. The foreclosure here was on real property.
17 There's no comparable statute that would say the guarantor of a
18 note is liable for a deficiency upon the sale of real property.
19 Mr. Warner is liable not for a deficiency resulting from the
20 sale of this Sorry Sara's restaurant. He's liable because he
21 signed an independent guarantee in which he agreed to pay 100
22 percent of the outstanding amount due on that note. I would
23 submit that there's a distinction between that case which is for
24 personal property under the Uniform Commercial Code and what we
25 are talking about here which is real property.

1 THE COURT: Thank you, gentlemen. I
2 have read all the briefs one time. There's a number of
3 submissions here today that I want an opportunity to read. I
4 will take the matter under advisement. I understand that
5 everyone is anxious for a decision to be made. It is important
6 that that decision be made after my full and complete
7 consideration on your arguments here today as well as the
8 additional materials that have been submitted. I will read
9 those as well as consider your arguments in light of what I have
10 already read and render a decision as soon as possible. It's
11 highly unlikely that it would be more than 30 days, probably
12 much less.

13 Anything else, gentlemen?

14 MR. HATCHETT: Yes, sir. Did you
15 enter the order that was --

16 THE COURT: I got the order from Mr.
17 Lollar on Friday and entered it. It came in Friday afternoon.

18 Anything else, gentlemen?

19 MR. FAIN: No, sir.

20 THE COURT: We will be in recess.

21
22 (The Proceedings were concluded.)
23

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25

CERTIFICATE OF COURT REPORTER

I, M. Michelle Bradley, hereby certify that I, having been duly sworn, was the Court Reporter in the Circuit Court for the City of Hampton, at Hampton, Virginia, on the 9th day of September, 1996, at the time of the trial herein.

I further certify that the foregoing transcript is a true and accurate record of the testimony and other incidents of the trial herein.

Given under my hand this 17th day of December, 1996.

M. Michelle Bradley
Court Reporter

My Commission Expires: September 30, 2000.

- - - ooo - - -



City of Hampton
 OLDEST CONTINUOUS ENGLISH SPEAKING SETTLEMENT IN AMERICA
 Post Office Box 40
 Hampton, Virginia 23669



Circuit Court of the City of Hampton

WALTER J. FORD
 JUDGE
 WILFORD TAYLOR, JR.
 JUDGE

Eighth Judicial Circuit of Virginia

CHRISTOPHER W. HUTTON
 JUDGE
 WILLIAM C. ANDREWS, III
 JUDGE

October 11, 1996

Hugh M. Fain, III, Esq.
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 Richmond, VA 23218

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 700 Newtown Road
 Norfolk, VA 23502

Ronald Phillips
 1003 High Dunes Quay
 Hampton, VA 23664

Philip L. Hatchett, Esq.
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 Hampton, VA 23666

Donald Patten, Esq.
 12350 Jefferson Avenue
 Newport News, VA 23602

Re: John D. and Mary T. Warner v. The Money Store Investment Corp., and Fox Two Acquisitions, and Lewis H. Clementson, Esq., and Sorry Sara's Ltd.
 In Chancery No. 34948

Gentlemen:

After a thorough review of all pleadings, briefs, case law presented, and oral arguments, the Court sustains the demurrers of each defendant who has filed a demurrer.

While the Court is not without concern that the Money Store's pre-determined bid price was announced when reached at auction, the Court does not believe that the facts alleged constitute an improper and commercially unreasonable foreclosure auction.

The Court believes that the plaintiffs may pursue adequate remedies at law in this matter. Further, at this point, damage to the plaintiffs is so uncertain and speculative that to relieve the plaintiffs of their guaranties is unwarranted. The Court is not convinced that punitive damages would be appropriate in this case. Under some circumstances, a re-auction might be a reasonable alternative, but not in this case.

Defendant Fox's motion for summary judgment is denied.

Sincerely yours,

Christopher W. Hutton, Judge

CWH/lss

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART I

JOHN D. WARNER, JR., *et ux*

Plaintiffs,

v.

THE MONEY STORE INVESTMENT
CORPORATION, *et al.*,

Defendants. :

CHANCERY NO. 34948

ORDER

THIS DAY came the parties, by counsel, and argued the Defendants' Demurrers to the Amended Bill of Complaint filed herein.

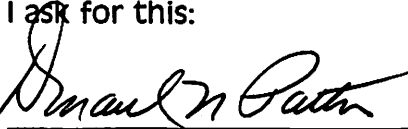
After a thorough review of all pleadings, briefs, case law presented, and oral arguments, the Court rendered its Memorandum Opinion on October 11, 1996.

UPON CONSIDERATION WHEREOF, the Court does hereby ORDER that the Demurrers of each Defendant be, and they hereby are, sustained, and does further ORDER that this equity action be, and it hereby is, dismissed with prejudice to the Plaintiffs reserving, however, unto them the right to bring an action or actions at law in this matter.


the cross-bills and counter-bills filed by the Defendant are dismissed with
ENTERED this 8th day of November, 1996. *prejudice.*


Christopher W. Hutton, Judge


I ask for this:


Donald N. Patten, Esq.
Robert J. Lloyd, III, Esq.
Patten, Wornom & Watkins, L.C.
12350 Jefferson Avenue, Suite 360
Newport News, VA 23602
Counsel for The Money Store Investment Corporation

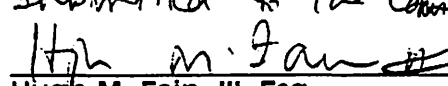
Seen and agreed: *except as to punitive damage counts with respect to punitive damages as defined in the Court letter ruling of 10-11-96.*


Philip L. Hatchett, Esq.
Cumming, Hatchett & Jordan
2236 Cunningham Drive
Hampton, VA 23666
Counsel for Fox Two Acquisitions, L.C.

Seen and agreed; *except as to ruling on punitive as stated before.*


Charles M. Lollar, Esq.
Heilig, Fraim, McHenry & Lollar
700 Newtown Road
Norfolk, VA 23502
Counsel for Lewis H. Clementson, Trustee

Seen and objected to: *on the reasons stated in the plaintiffs' briefs submitted to the Court and stated by counsel during oral arguments, including without limitation the objection that the plaintiffs' equitable claims have been dismissed as a matter of law in summary fashion over though claims have been alleged.*


Hugh M. Fain, III, Esq. *Buip*
Spotts, Smith, Fain & ~~Ravis~~
P. O. Box 1555
411 E. Franklin Street, Suite 601
Richmond, VA 23218
Counsel for John and Mary Warner

I. Assignment of Error

The trial court erred when it sustained Clementson's Demurrer because the Amended Bill of Complaint set forth sufficient allegations to state an actionable claim of breach of fiduciary duty by Clementson