IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * *	C.A. NO. 10-328M
THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND *	
VS. *	OCTOBER 12, 2012 10:11 A.M.
BERNARD WASSERMAN, et al *	
* * * * * * * * * * * * * * *	PROVIDENCE, RI

BEFORE THE HONORABLE JOHN J. MCCONNELL, JR.

DISTRICT JUDGE

(Motion for Summary Judgment)

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THE COURT: Good morning, everyone.

We're here this morning for a hearing in the case of the Governor and Company of the Bank of Scotland v. Bernard, David and Richard Wasserman, 10-328, and we're here on Plaintiff's motion for summary judgment.

Could I have counsel's appearance?

MR. FRANCIS: Yes, Your Honor. Jeffrey Francis on behalf of the Bank of Scotland. Also with me is Ms. Gayle Ehrlich and Hinna Upal.

THE COURT: Good morning, everyone. Welcome back.

MR. RAMOS: Adam Ramos on behalf of the Defendants, along with Tony Traini.

MR. TRAINI: Good morning, Your Honor.

THE COURT: Good morning.

Mr. Francis.

MR. FRANCIS: Should I use the podium? Is that --

THE COURT: Oh, sure, yeah. The one right in the middle. Right there, yeah.

MR. FRANCIS: Thank you.

THE COURT: That's probably the best.

We also -- just for the record, we have an

attorney from, I think, Scotland listening in on the phone system?

MR. FRANCIS: That's correct, Your Honor.

THE COURT: Do you want to just identify him, Mr. Francis?

MR. FRANCIS: Mr. Ruari MacNeill who is our co-counsel with us from Scotland.

THE COURT: Great.

MR. FRANCIS: And he's here to address any issues that you may have on Scottish law.

Your Honor, we're here on behalf of the Bank of Scotland's motion for summary judgment. And we've moved for summary judgment on the Bank's breach of contract claim and breach of the guarantee claim. In addition, we'd move for summary judgment on all of the Defendants' counterclaims.

There are three Defendants here, Bernard, David and Richard Wasserman.

First, there are certain --

THE COURT: I'm surprisingly familiar with them.

MR. FRANCIS: There are certain basic brief background facts I'd like to go into, which I don't think are contested.

THE COURT: Sure.

MR. FRANCIS: Back in 2006, the Wassermans, as

well as approximately six of their business partners, decided to undertake a real estate development in Scotland. They hoped to acquire a building called Hamilton Hall, which was on -- in St. Andrews, on the old golf course in St. Andrews. It's a very prestigious golf course. It claims to be where golf was invented, whether that's true or not.

THE COURT: My niece was a -- graduated from St. Andrews in Scotland, but I never got a chance to go over there, nor am I a golfer, so this is all new to me.

MR. FRANCIS: Well, the building at one point was actually a dorm for St. Andrews University --

THE COURT: I saw that.

MR. FRANCIS: -- before they acquired it. So the Wassermans decided to a form business entities to undertake this investment. And if I may, Your Honor, we have a chalk which --

THE COURT: The courtroom's yours, Mr. Francis. Use it as you'd like.

MR. FRANCIS: Thank you.

THE COURT: That's in your brief. Is that the same one that's in the brief?

THE COURT: This is the same one that is in our brief, and this is a simplified version, a simplified

version of an organization chart, which was created by the Wassermans' transaction counsel, a fellow by the name of John Rogers over at Edwards -- was then Angell, Palmer & Dodge.

And as you can see, the Defendants have a 71 percent interest in WREC Hamilton Hall LLC, which had a 75 percent interest in St. Andrews Ventures LLC, which had 100 percent interest in Hamilton Ventures LLC.

Hamilton Hall actually owned the property. And then, again, we're talking about Hamilton Hall, the dormitory they wanted to develop into essentially multimillion-dollar time shares, and they were going to sell fractional ownership.

THE COURT: Fractional ownership.

MR. FRANCES: Fractional ownership interest in that, correct.

The six partners up above are Mr. Leahey, Charles Rogers, who was at one point managing partner for Edwards, Angell, Palmer & Dodge, at this time he was general counsel for the Wasserman Entities. Then you have Schultz and Cook who were businesspeople within their organization, and two other partners, Patrick Lyons and a Mike DeCarlo.

The Bank, Bank of Scotland, entered into a

facility agreement, a loan, with Hamilton Hall Ventures LLC. That facility agreement could have been for as much as 84 million pounds. The facility agreement --

THE COURT: What was the -- just out of curiosity, what was the rate back then? What is that -- about what is that in US dollars?

MR. FRANCIS: At the time of the loan, I believe the rate would have been something like 1.6 dollars to a pound, which I think is fairly close to where we are today.

So, again, they enter -- so Hamilton Hall Ventures enters into the facility agreement. The facility agreement was structured in tranches. The only tranche that was issued was the first tranche, which could have been up to 31 million pounds, and that's how much was loaned under the agreement to Hamilton Hall.

Hamilton Hall used that money to finish the acquisition of Hamilton Hall -- at that point they had only put a deposit on it -- also to refinance Kingsbarns Golf Links. They had a loan from Engle Irish Bank, which was essentially bought out through this transaction in 2006.

At that point, the loan had issued, Hamilton Hall owned the property, and Hamilton Hall had to then

undertake to start selling those fractional shares in the not-yet-started development. Under that arrangement, Hamilton Hall had to get 10 million pounds in deposits before the next tranche was released, Tranche B.

The prior -- if I can go back a little bit, prior to the transaction closing, again, we have two assets, Kingsbarns Golf Links and the property. There was an appraisal done on the property prior to the closing of the transaction, not surprising.

What was surprising is that the appraisal came back at 12 million pounds. They expected the appraisal to come back at significantly more than that. With the value for Kingsbarns Golf Links and the value for the property, there was a shortfall of 9.5 million pounds for security on the first tranche of the loan.

The Bank would not have gone forward at that point, except that the Wassermans at that point agreed to make up that lack of security for the loan by giving the personal guarantees.

Now, that personal guarantee was identified by Charles Rogers as Exhibit 6 to his affidavit, and I don't believe there's any genuine dispute that Exhibit 6 is the guarantee.

The guarantee was negotiated by Charles Rogers

on behalf of the Wassermans. The guarantee was negotiated on behalf of the Wassermans by Edwards, Angell, Palmer & Dodge at that time and by a Scottish law firm named McGrigors. They had all the lawyers they needed. The guarantee was signed by their Scottish counsel under power of attorney. Again, none of this is disputed.

THE COURT: No, but I'm sure I'll hear from -- that there is a little dispute about the effect of the nonsignature by the guarantees. At least the Defendants raise that issue.

MR. FRANCIS: They have not asserted, and if I may, they have not asserted that the guarantee is not a valid and enforceable contract.

THE COURT: I did not see that. No. They threw out the fact that they didn't sign it, but they don't tell me what the significance of that was.

MR. FRANCIS: This is from the Defendants' own brief, Your Honor.

THE COURT: I didn't realize lawyers -- when I was a younger lawyer practicing like you are, I used to use the blow-ups all the time, and I didn't think in today's modern electronic world that we still did blow-ups. I still like blow-ups. I'm a little old-fashioned. If you pull out the flip chart, you'll

really impress me.

MR. FRANCIS: Let me get my slide rule.

THE COURT: Right.

MR. FRANCIS: This is from the Defendants' own brief. They admit that the personal financial statements were issued, that Defendants did not sign the guarantee but instead that their attorney in Scotland, Alison Newton, signed it on their behalf.

They further go down on Page 14 and state, "The Bank asserts that it's entitled to summary judgment on its claim of breach of contract and breach of guarantee based solely on Defendants' acknowledgement that the guarantee is a valid contract and Defendants' refusal to pay the amount demanded by the Bank under the guarantee."

They don't dispute that the guarantee itself is a valid and binding contract. They have defenses that they assert, and I will speak of those later.

THE COURT: That's all that really is in dispute here -- right? -- are their defenses, whether you call them counterclaims or affirmative defenses?

MR. FRANCIS: That's exactly --

THE COURT: Or that that's what they're claiming are the genuine issues of material fact that are in dispute.

MR. FRANCIS: That's exactly right, Your Honor. The Bank -- I don't think there's any dispute that the Bank has made its *prima facie* case for breach of contract. We have a valid and binding conract. We have an obligation under the contract to pay 9.5 million pounds.

We have no dispute that they did not pay the 9.5 million pounds. There is no dispute that, under the facility agreement, that the principal owed far in excess of 9.5 million pounds, so 15.75 million pounds. So there's a huge spread between the amount due under the guarantee and the amount that was left unpaid on the loan.

Now, in the fall of 2006, Hamilton Hall was unable to reach the number of deposits that it needed, including 14 million pounds by the end of 2006, 14 million pounds of deposits by the end of 2006, which was one of the conditions which caused a default on the loan. At that point, Hamilton Hall also stopped paying interest on the loan and paid no principal payments on the loan.

I don't believe that it's disputed either that at that point in time, and I'll try to use Elmo, but I may need to use the blow-ups here.

THE COURT: Hold on one second.

(Pause)

THE COURT: Do we have a Plan B?

MR. FRANCIS: Well, I have additional copies if we need to go with a Plan B.

THE COURT: I think we might so that we don't prolong this, I think we might want to go that route.

MR. FRANCIS: It's up on my screen, but I guess it's your screen doesn't --

THE COURT: It's just mine. It doesn't appear to have the -- I've got lots of screens, but the one that I think is relevant doesn't seem to be working.

MR. FRANCIS: Well, I can hand this up, which is the copy -- this is David Wasserman, Exhibit 58, and this is as of March of 2007, default notice. And David Wasserman's testimony on this point is very clear, that he understood that, as of receiving this default notice, the Bank was then free and clear to foreclose on the property.

THE COURT: You cite that in your brief.

MR. FRANCIS: We do cite that in our brief.

So, again, as we get to this point, the Bank's motion for summary judgment on its breach of contract claim and its guarantee claim, the Bank has put its *prima facie* case in.

THE COURT: There's no real dispute --

MR. FRANCES: No real dispute.

THE COURT: Unless I hear from the Defendants, there doesn't appear to be any real dispute to that point.

MR. FRANCIS: Now we -- now the Defendants put forward essentially two arguments where they claim that they don't have to make payment under the guarantee.

In their summary judgment opposition, as you've noted, they go back and forth whether they want to call them counterclaims or affirmative defenses.

THE COURT: I'm not really sure it matters to the Court in what's presently before it. Maybe either of you will tell me that it does matter, but I don't currently perceive it as having -- as it matters. If they have affirmative defenses that have genuine issues of material fact, then the motion fails. If they have counterclaims that involve the same thing, a genuine issue of material fact, then the counterclaims live. So I'm not really sure, practically, it has much of an effect.

MR. FRANCIS: On the counterclaims, we do think there is a distinction because, if they are counterclaims in the true sense of the word, they have to have standing to assert them. And they may have standing to assert counterclaims that they -- they may

have standing to assert affirmative defenses but they don't have standing to assert as counterclaims, so --

THE COURT: I stand amended.

MR. FRANCIS: Thank you, Your Honor.

THE COURT: That is a point that you made in the brief.

MR. FRANCIS: We've taken to calling these two theories, the white-knight theory and the release theory.

THE COURT: Who would we be? You and the Defendants?

MR. FRANCIS: My co-counsel.

THE COURT: I had a feeling they weren't calling it that.

MR. FRANCIS: I don't know if they've adopted that, that terminology.

The white-knight theory goes like this: This is the Defendants' story. The story is that the Bank, for some unknown sinister purpose, frustrated Hamilton Hall's efforts to respin the development; that Hamilton Hall came forward with third parties ready, willing and able to buy the deal out and make everyone absolutely fabulously wealthy if they had been permitted to go forward with these purported transactions; that the Bank, again, for some reason decided not to pursue

those opportunities, for some unreasonable, some malicious purpose, chose not to pursue those opportunities.

THE COURT: Well, they don't have -- they don't have to get to that level, do they, Mr. Francis, in order for their two or three affirmative defense theories to hit? They don't have to get to the proving that the Bank acted sinisterly.

MR. FRANCIS: Well, they would have to show that the Bank acted unreasonably, and they have certainly not done that.

THE COURT: Correct.

MR. FRANCIS: And they have not made any showing from which one could find a finding of unreasonableness on the part of the Bank.

But again, their theory is, though, that the Bank made an irrational and unreasonable decision and decided they'd rather foreclose on the property, they'd rather pursue a default on the guarantee, they'd rather go to the time and trouble of having to deal with me to pursue that, which no one would rationally choose if they could avoid it, and so here we are today. That's their theory.

They cite to three individuals for this theory. Dermot Desmond, Donald Trump and then two Scottish

developers who ran one entity, Carmichael and McAllister. There was a fourth individual, a fellow by the name of Sean Whalen, who the Defendants don't mention in their papers, and we'll talk a little bit more about Mr. Whalen in a moment.

As to Dermot Desmond, Donald Trump, Carmichael and McAllister, David Wasserman admits that there was never a final term sheet. And if I may again, Your Honor?

THE COURT: Sure.

MR. FRANCIS: This is David Wasserman's deposition testimony, and he was asked, "So you never entered into a binding term sheet with Carmichael and McAllister in connection with Hamilton Hall?"

Mr. Wasserman: "I did not.

"You did not enter into a binding term sheet with Dermot Desmond in connection with Hamilton Hall?"

Mr. Wasserman: "I did not.

"You did not enter a binding term sheet with Donald Trump in connection with Hamilton Hall?

"No way."

That's Mr. Wasserman's testimony.

Now, as anyone understands --

THE COURT: David, just for the record, Mr. David Wasserman.

MR. FRANCIS: David Wasserman. David Wasserman.

As everyone understands, the term sheet is at the beginning of a potential transaction. They had never entered into due diligence with any of these parties. They never reached anything in the way of a final deal.

Again, and Mr. Wasserman admits that even as to whatever was being discussed with these three individuals, they would have required the Bank to do a significant refinancing for the loan. They would have required the Bank to take some long delay in payment. For Carmichael and McAllister, it would have been as long as 18 months. For Donald Trump, it required, if any of the discussions could even be credited, a two-year, interest-free loan and no payment term, at that time, a very large increase in the amount of the loan and no additional securety.

So we have essentially what one of the witnesses referred to as, one of the Bank's witnesses, jelly to the wall, that the Wassermans would come by with three individuals sniffing around this corpse of a deal, but they were never able to get anything agreed to.

As late as the end of 2008, Dermot Desmond, they're negotiating with Dermot Desmond, but he's continuously reducing his offer, reducing it. They

never get him even to agree, finally agree and sign a term sheet on a specific amount he was willing to offer for the property.

Now, as we referenced their counterclaims, Mr. Wasserman, David Wasserman, put forward a counterclaim as to these three transactions, and on the interrogatory response where he laid out his damages on these three potential transactions, which I have here, Your Honor, he put forward a chart explaining what his damages would have been had these transactions have closed.

And he identified Dermot Desmond as having damages of about 14 million pounds; Neil McAllister and Steven Carmichael, if this deal had gone forward, he claimed there would have been 10 million pounds in damages; Sean Whalen, he claimed 25 million pounds in damages; and Donald Trump, somewhere between 12 and 14 million pounds in damages.

Now, when asked about this, when asked what was your basis for calculating your damages on this, David Wasserman's testimony was clear, he didn't look at any paper. He had no deal terms to look at. He pulled these numbers directly from his head.

If I can, and again, this is David Wasserman's deposition testimony. If I don't lose the stand. If I

have a technology failure with the stand, then I'm really in trouble.

THE COURT: I think -- you know what? I think you need to tighten that one leg. Ms Ehrlich, do you want to give him a hand maybe? Perfect. Thank you.

MR. FRANCES: So Mr. Wasserman was asked, "When you created these calculations, were you reviewing any documents?"

And his answer: "Most of it was in my head. I can't recall looking at any documents to do so."

Well, that's telling. If you have a transaction, even a potential transaction and it's real, it's not in your head, you have deal documents to look at. There were no real transactions.

There was one deal that they did bring to a final -- to a signature of a term sheet, and that was the Sean Whalen deal, not mentioned in their papers. But Sean Whalen is listed in their interrogatory response with the same credibility, the same likelihood of success as Carmichael, McAllister and Trump.

Sean Whalen, at the time that he entered into the transaction, potential transaction, letter of intent, with the Wassermans -- sorry -- with Hamilton Hall, at that time, had to get $100 million in financing to close that transaction. At the time that

he undertook that responsibility, we now see from his bankruptcy filings he had to get his father-in-law to cosign so he could purchase a Nissan.

THE COURT: His father-in-law?

MR. FRANCIS: His father-in-law to cosign. He was just someone from out in Utah. At that time that the Wassermans were putting him forward with the same credibility they now put forward a Carmichael, McAllister, Desmond Dermot and Donald Trump, he was subject to a series of fraud actions out in the western part of the US. Sean Whalen was a fraud. He was running what was essentially the equivalent of the scam in the "Producers" from the Mel Brooks film where he would have failed developments, he'd run up a bunch of investments from individuals, he'd keep most of the investment money, he'd then sorrowly tell them the deal had gone bad.

Here, in connection with using the signed deal he had with Hamilton Hall, he managed to raise up about $2 million, and he sent the Wassermans a million dollars in the way of an additional deposit and then it essentially defaulted, couldn't close the deal because he had no capacity to do this development, he had no capacity to get the financing.

The Wassermans, though, did receive the million

dollars -- sorry -- Hamilton Hall did receive the million dollars, and at the time they received the million dollars, they were in default on interest on the loan. Hamilton Hall was in default on interest on principal payments. Instead of sending that on to the Bank in good faith, they kept the million dollars.

So this is the white-knight theory, that for some reason, the Bank, never seeing a deal that they could accept, never seeing anything credible, having already been burnt on the Sean Whalen transaction, so being reasonably skeptical, the Defendants putting forward no expert opinion as to what would have been reasonable actions by a lender here to try to make a lender liability case, a complete failure of proof on the Defendants' part, and that is the basis for essentially their white-mirror estoppel, their waiver defenses and also their counterclaims. And we think that is a complete and entire failure of proof. There's no substantial issue of fact for the Court to consider.

There's no case cited by the Defendants to say that a bank has an obligation, before they can collect on a guarantee, to forego significant rights under the loan agreements, to pursue endlessly transactions that never closed. And again, David Wasserman testified

that he knew the Bank could foreclose as of March of 2007. We're talking the end of 2008 into 2009, and he's still coming forward with the new people who he's trying to do a deal with he could never bring in with -- there's a reason for that.

We're talking about -- let's not forget our history. 2008, 2009, there was some financial turmoil going on in markets at that time, including real estate markets. It was very hard to get any deal done. It was very hard to get money lent to you by any bank. And here they're asking for significant refinancings. And the Bank was clear, very clear back in the early part, March of 2007, We're not going to take any equity risk. We're not going to refinance. If you come to us with someone who wants to buy you out, we will deal with that person. But they never came with someone who was simply willing to come up, put money on the table with a binding agreement, other than Sean Whalen, who was willing to put money on the table and buy them out, never happened.

Now, in addition, as to their counterclaims, their counterclaims are based almost entirely on this white-knight theory. And, again, Hamilton Hall owned the property. So to the extent that anyone suffered -- if you were going to credit this and find that there

was some dispute of fact even as to whether or not the Bank acted reasonably or not, Hamilton Hall owns these claims, not Bernard, David and Richard Wasserman. They're three levels of entities removed with six partners along the side who are not here as Plaintiffs today. Hamilton Hall would have held these claims. These claims are claims that the Wassermans simply have no standing to assert.

THE COURT: If they're counterclaims.

MR. FRANCIS: If they're counterclaims.

THE COURT: If they're affirmative defenses, then --

MR. FRANCIS: Well, they have asserted counterclaims, and they have put forward -- David Wasserman has put forward interrogatories seeking very substantial damages. As to the counterclaims, I think it's clear the Bank should be awarded summary judgment.

Now, for example, if we go back to the chart, again, the Bank has been left holding more than 15.5 million pounds of debt. If I were to stand here today and tell you, Your Honor, that the Bank should be able to collect the entire 15.5-million-pound debt against Bernard, David and Richard Wasserman, Bernard, David and Richard Wasserman would scream, No, no, no.

Your loan was with Hamilton Hall. Your relationship was with Hamilton Hall. We have a guarantee, you can collect the 9.5 million pounds, but we have three levels of corporate shields. You can't collect that extra 6 million pounds from us. And they'd be right. But they can't choose when to use the corporate shield, use it at some times as a shield and some times as a sword.

Also, our Scottish counsel who's available by phone has put forward two very substantial affidavits showing that, even under Scottish law, which does govern these contracts, these claims have no basis as a matter of law.

Now, there was one other theory put forward in the Defendants' papers to assert why we should not be able to collect on this guarantee. And this is out of a snippet of testimony from David Wasserman in his deposition where he states that an unnamed employee of the Bank said to him that, if you don't go to the press with our bad acts, undefined, we'll release you from the 9.5 million pounds.

THE COURT: I thought that was Ms. Smillie, Smillie?

MR. FRANCIS: Smillie. If you look at David Wasserman's testimony, he doesn't name any

individual. In his testimony, and I may have a -- I have it here. I don't think I have a chalk of this. His exact testimony is -- this is from Page 155, Lines 4-17, of his deposition transcript. He states -- and this is a series of questions, "Did you ever make an objection to the Bank?

"Absolutely."

Question: "Did anyone in writing?"

Answer: "In writing?"

Question: "Yes, sir, in writing."

Answer: "No, because any time that I offered to make an objection in writing, I was threatened by the Bank. They told me, 'If you cooperate with us, we will not pursue your personal guarantees and work with you. If you in any way put things in writing, speak to the press, we will come down as hard as we can on you.'

"That's why you will not see anything in writing from me, nor have you ever seen me speak to the press about this."

That is the sole source that the Defendants cite for their release claim.

Now, again, there are three Defendants here, Bernard, David and Richard Wasserman. Now, Bernard and Richard were asked in their depositions very specifically, if I can -- this is a question to

Richard: "Do you have any knowledge as to why you might not be responsible for payment of the guarantee?"

His answer: "No."

Second question to Richard: "Do you know any facts that would make you not responsible for payment of the guarantee?"

His answer: "I don't know."

Bernard Wasserman was asked, "Do you have any understanding as to why you have not made payment under the guarantee to date?"

Bernard's answer: "No, I don't recall."

So apparently neither Richard nor Bernard had any knowledge of this purported release, never told them or they've forgotten it. Now, if I were a party to a 9.5-million-pound guarantee and one of my co-guarantors had acquired a release for the three of us, to misquote Joe Biden, then clean it up, that would be a big deal. But apparently the news never got to Richard, never got to Bernard.

So certainly as to Richard and Bernard, they don't contend there was a release. They never relied on a purported release, from their deposition testimony, and summary judgment certainly should issue as to those individuals who were jointly and severally liable under the guarantee.

Now, going back to David's assertion of a release for which, again, he doesn't cite -- the Defendants in their papers say it's Angela Smillie, but there's no basis in the testimony. We've looked at the testimony. Angela Smillie was deposed, though. And if the Defendants wanted to put forward this release defense there, they could have asked Angela about it. They never asked Angela a single question about whether or not she ever discussed a release with David Wasserman, not a single question.

In the Defendants' answer, amended answer and counterclaim, which they submitted in July of 2010, substantially into discovery, you can look through all 14 pages, they never assert a release, no mention of a release. It's not asserted as an affirmative defense. It's not mentioned at any point. It's never alleged in their answer and affirmative defenses.

Now, again, if I were sued on a guarantee and I had received a release on that guarantee, the first thing I'd say in my answer and affirmative defenses is, I was released. You can't pursue this. I sent a Rule 11 letter. Not in there at all.

At the same time, in August of 2009, there is a series of correspondence between David and Angela Smillie. And in that correspondence, David --

and this is David Wasserman Exhibits 31, 32 and 33 -- and in that correspondence, David says, on an August 13th, 2009, letter, "We have discussed coming to an arrangement with the Bank relating to the basis for discharging the personal guarantees, and we've cooperated fully with the Bank and a number of parties interested in bidding for all parties' benefit with a view to agreeing that arrangement with you." Doesn't assert a release, says we've talked about trying to work out a deal on the guarantee.

Angela Smillie responds on August 20 in her letter, David Wasserman Exhibit 32, "I know your comments on the personal guarantee. As previously advised, under the terms of the guarantee, the joint and several obligations on yourself, Bernard and Richard Wasserman are as principal obligors, and as such, we're entitled to call it in at any time. We will, therefore, constantly monitor our position. Your previous and ongoing behavior will, therefore, be taken into account when we decide on the course of action under the personal guarantee."

And then David responds on August 24th, not screaming, We've got a release, but saying, "I would expect we can conclude discussions in a deal with respect to remaining personal guarantee obligations of

Bernard, Richard and myself." Again, the contemporaneous record, no assertion of a release.

In addition, on August 14th, 2009, when the Bank was in the process of foreclosing or doing an auction on the Hamilton Hall building and they were accepting bids, open bid, they received bids from 11 people, one of the bids they received was from David Wasserman with new partners now, completely different people.

That bid he offered was 6 million pounds. The property eventually sold at the auction for 11 million pounds, which is actually considerably good in that back in 2006 when the market was better, they had an appraisal for 12 million pounds, and in 2009 when the market was -- everyone -- and David uses the term "black swan moment," free fall in 2009, they still managed to get 11 million pounds for the property. But, again, we still have that original security gap of 9.5 million pounds that the guarantee was intended to cover, and that's what we're here today to collect.

On August 13th, 2009, David sends a letter of intent -- an offer, a bid in the foreclosure process he decided to participate in, didn't object to it, and in that he conditions his $6 million offer on -- "Purchase is contingent on release of the guarantees to Bernard, Richard and David." So, again, he's asking for release

as part of a potential transaction, not saying that I have -- that he has one.

So all we have is a bare face conclusory allegation, which does not create a substantial issue of fact such that would prevent entry of summary judgment on the Bank's claim. You need more than this. If a Defendant on any loan or any guarantee could avoid summary judgment by throwing into a deposition at some point, Oh, and they released me, just by not asserting it in their answer, despite not being a scrap of paper to support it, that type of conclusory allegation doesn't even really rise to a conclusory allegation because there's no facts behind it, there's no "there" there, then no bank could ever get summary judgment on a simple loan, a simple guarantee.

THE COURT: Implying that any deponent would be willing to lie under oath.

MR. FRANCIS: Well, I won't say whether or not someone is lying under oath. All I can do is point to answer in affirmative defenses, the paper record, the testimony of Bernard and Richard that there -- no knowledge of a release.

Now, in their answer and counterclaim they put forward a different theory, and the theory there is getting back to a white-knight theory, and they talk

about the Bank said aspirationally, We'll work with you, we'll try to work something out. And based on that statement, and they don't attribute it to any specific person or any specific conversation, that's the basis for their misrepresentation claim.

But -- and when David was asked -- and in their answer and counterclaim they say, The Bank had to give us reasonable time to work this out. And David was asked in his deposition, What would have been a reasonable period of time? Because the Bank had already given them over two years by the time they ended up foreclosing on the property.

The foreclosure sale took place in August of 2009. The -- David admits the Bank could have foreclosed as early as March of 2007. So over two years, and then still David couldn't come forward with a deal. And David's answer, which is very telling, is he thought he was entitled to unlimited time.

But there was -- in his estimation, David who was a lawyer who teaches apparently at New York -- different New York universities on finance law who is a sophisticated individual, the basis for his counterclaims is the assumption that the Bank had to give him unlimited time to find a buyer despite the fact that he wasn't even paying interest.

Banks make money on getting interest on money they loan out. If they have a defaulted loan that they're not getting interest on and they've given someone two and a half years to find a buyer and still in two and a half years they haven't found a buyer, there's no basis to find that the Bank acted unreasonably. And, again, the Defendants haven't put forward any expert to say what would be reasonable under these circumstances under lender liability theory, complete failure of proof on the Defendants' part.

But, again, even on that context, the Bank gave David numerous warnings that the time was up. For example, Charles Wighton writes in April of 2008, in a letter which is deemed a part of the finance documents that they would have till the end of May of 2008 to get a deal done, and David admits he had no deal done, couldn't get a deal done.

Charles Rogers, in April of 2008, when trying to negotiate at one of the many, many vendors who were left unpaid by Hamilton Hall in connection with this, millions and millions of dollars in unpaid vendors whom they are of course using the corporate shield now to protect, the Wassermans are, to protect themselves from those claims, he was dealing with counsel for

Phil Mickelson who was a creditor in this, he had signed a -- he was supposed to be part of the marketing team for this, and what Charles Rogers says at this point is, "This deal has turned into a disaster. While fingers can be pointed and global market changes have clearly had an impact, this is our deal, and the fact is we screwed this up."

This is Charles Rogers, their in-house counsel, former managing partner of Edwards, Angell, Palmer & Dodge. That's his understanding of what happened. The Bank -- not blaming the Bank, he's saying, "We screwed this up."

He goes on, "That said, the numbers about what they are and from what I know about the financial situation here, I don't see how we can get the project sold to Desmond without our creditors being willing to make some significant concessions. This would include Phil. What we owe and what we can't pay just aren't the same."

And this is what he's telling Phil Mickelson's counsel. And later on -- this is in April of 2008, in May of 2008, because they had entered into a settlement agreement with Phil Mickelson which was contingent upon a deal being finalized with Dermot Desmond, and that settlement fell through, Charles Rogers said, Look, I

told you we never had a deal with Dermot Desmond, so we couldn't perform the settlement. And then later in August and November, they say that Dermot's still trying to reduce the price. Jelly to the wall. There was never a deal there with any of these individuals.

And finally, Your Honor, we have the issue of the contracts. Now, the Defendants' theory again is that, through this course of dealing, the contracts were essentially amended. But these are integrated contracts, and there are provisions in the contract, specifically in the guarantee, Paragraph 7.1, which makes it very clear that the agreement cannot be amended through any -- and the Defendants are the guarantors, and the guarantors cannot assert your waiver and your estoppel.

If you read through 7.1, it cuts off every possible course-of-dealing defense that they're trying now to assert, their specific affirmative defenses. And, again, this was a negotiated document, and they were heavily represented by counsel, and David is a very sophisticated individual. So these provisions alone would bar their affirmative defenses and prevent the Bank -- 7.1, prevent the Bank from being able to receive summary judgment on their claims.

So you know, and in conclusion, Your Honor, and

if you want, Mr. MacNeill is available, under Scottish law, the obligations from a guarantor to the guarantee is very, very limited. It's simple honesty at the time of entering into the contract. And, again, there's been no assertion that there was any fraud at the time of entering into the contract. This is a binding obligation.

The Defendants took this obligation so that we would -- so that the Bank of Scotland would make this loan. 9.5 million pounds is owed to the Bank. There's no actual issue of fact to be decided. The money is owed, the money is unpaid, and there's nothing under the contracts or under the law which would allow them to avoid that obligation.

Thank you, Your Honor.

THE COURT: Great. Thanks, Mr. Francis.

Mr. Ramos, are you going to argue?

MR. RAMOS: Thank you, Your Honor. In listening to Mr. Francis's argument today, what strikes me most pointedly is how much he talks about all of the reasons why the evidence that's in the summary judgment record as to the existence of these potential deals that would have completely wiped out or substantially wiped out the obligation under the facility agreement shouldn't be believed.

But what we need to remember in the course of this summary judgment argument is that the standard on summary judgment is not whether the Court believes that the testimony of David Wasserman and the documentary evidence that's been supported to show that there were indeed deals that were ready to be made if the Bank would just agree to reasonable conditions is ultimately going to prevail.

It's whether there is a possibility here, a reasonable possibility, that the trier of fact, upon hearing all the evidence, could reach the conclusion that the arguments being made, the positions being stated, the facts being asserted by the Defendants in this case could be believed.

THE COURT: Can you get there, Mr. Ramos, without expert testimony? I mean, Mr. Francis pointed out that there is no -- and there is none, as I've seen, expert testimony that would assist a trier of fact in determining whether particular deals were or weren't reasonable within your counterclaim or affirmative defense argument.

MR. RAMOS: I don't know why we would need expert testimony to show that the Bank had -- I believe the evidence shows at this point that the Bank had options presented to it by the three groups that -- you

know, Trump, Carmichael, McAllister, Dermot Desmond, that were tangible and real and had real numbers attached to them that they could have accepted that would have made this -- that would have at the very least put the Bank in a much better position than they are today and not needing to recover 9.5 million pounds.

THE COURT: But how could a trier of fact determine that without expert testimony?

MR. RAMOS: Let me just give you one example.

THE COURT: Sure.

MR. RAMOS: I apologize. I don't have blow-ups and -- or even an extra copy of this, but I'll --

THE COURT: I thought for sure, after all my joking with Mr. Francis, you were going to pull a flip chart out, probably being more honest than that trick would have allowed you to do.

MR. RAMOS: This -- the document that I'm referring to right now is Exhibit EEE to our -- to my declaration in support of our opposition to the motion form summary judgment, and it was Exhibit 139 to the 30(b)(6) deposition of the Bank of Scotland. And this is an internal document from Bill Campbell to David Gibson, and it's addressing the potential deal that was proposed for Dermot Desmond to acquire the

property.

And if you take a look at this document, and I would encourage you to do so in your consideration, it indicates that the Dermot Desmond deal would allow for the Bank to receive 22.7 million pounds -- okay? -- and internally the Bank said, "The question we have to ask ourselves is: Could we recover more from a forced sale of this property in the current market? The answer is certainly not."

So what this document shows --

THE COURT: Who is that from? Who's the author of that?

MR. RAMOS: Bill Campbell, an internal Bank -- I believe he's a -- one of the -- in the Credit Department of the Bank. And it's to another person within the Bank, okay?

And what this document shows is that the Bank did its own analysis of this particular Dermot Desmond deal, saw that they could get 22.7 million pounds and concluded that they wouldn't get that much if they were to proceed to a liquidation of the property. But what we know is subsequent to that -- and the date on this, by the way, is August 13th, 2008. We know that subsequent to that, they ultimately decided not to go forward with this deal, and then they did liquidate it

and ended up taking less than half of what -- their own internal analysis.

Now, this document --

THE COURT: Mr. Ramos, hold on one second. I'm not sure it's relevant, but Mr. Francis raised it, and so I'm curious. What would the motivation be of the Bank if in fact that were that reasonable a deal and if in fact that person's opinion as you've just stated it were in fact true, what would be their motivation in not following that?

MR. RAMOS: That is not something that we're privy to. I suppose, you know, there are potential motivations out there. Perhaps rather than exercising their judgment to enter into the deal at that time, they were -- they wanted to hold out and see if they could get a better deal. Perhaps they just didn't want to deal with the Wassermans anymore, so they weren't willing to enter into a deal that involved them still. I don't know exactly what the motivation would be.

And quite frankly, I think that you hit the nail right on the head, Your Honor, in that I don't think it's relevant because what we're addressing here is the question of whether the Bank acted reasonably. And it simply wasn't reasonable for the Bank to continue to impose obligations that would materially hurt their

position with respect to the loan and ultimately cause them -- and harm to the Wassermans by making them ultimately liable under the guarantee for more money than they would have otherwise been liable for.

Now, I also wanted to point out here that Mr. Francis's argument and the position of the Bank has repeatedly been, Well, there was never a signed term sheet, and there was never -- there wasn't a signed deal from any of these people. Well, the important thing to explore is why there was never a signed term sheet and why there was never a signed deal.

The evidence amply shows that the Bank of Scotland was involved directly in the negotiations with both Dermot Desmond, Donald Trump and Carmichael and McAllister, that the Bank admits that it would have had to have signed off on any deal that the Wassermans entered into in order to, you know, move this property to a third party and that it was the Bank that was ultimately unwilling to agree to the terms that could have become the formation of an agreed term sheet or deal.

THE COURT: And walk me briefly through your legal analysis as to what would require them to act upon that.

MR. RAMOS: Absolutely, Your Honor. The

question here is not whether there is a standard legal obligation for a bank who has a guarantee to automatically allow for this type of time.

The question here is what the Bank agreed to do going forward once it became clear that there were some -- that there was a need to restructure in some way the arrangement between Hamilton Hall and the Bank under the facility agreement.

And the Bank I don't think even disputes that they agreed that they would work with the Wassermans to reach an appropriate resolution through a third party transaction or another investor or what it might be. And making that agreement --

THE COURT: Mr. Ramos, can you hold on a second? I am just feeling -- I hope counsel in the other Wasserman case know that we're obviously running late. We have an 11:00 -- Mr. Traini is here anyway, but I just noticed more counsel arrive, and I just want to make sure you know that, as soon as we're done here, we'll go back and do our conference. I apologize.

MR. RAMOS: That agreement of the Bank to work with the Wassermans gives rise to an obligation to work with them in good faith.

Now, this isn't a standard lender liability, you have to -- I mean, Mr. Francis is trying to frame this

in a different way than it's actually being framed in our arguments. This is about what the Bank agreed to do in connection with the Wassermans as they tried to work out the best resolution that would provide the best possible financial outcome for the Bank and for the Wassermans and for whatever third party came in.

The Bank ultimately didn't work -- they paid lip service to the idea of working with them, but then when concrete proposals were presented to them that involved, you know, their continued involvement with the property but that ultimately presented opportunities for them to recoup all of their loan and then some on top of it, they were -- they just rejected it without valid reason.

And that's what needs to get to the jury here. David Wasserman has ample testimony, and you've seen snippets of it that may be cut against him here, but he's provided ample testimony regarding the nature of these deals, what the type of negotiations were leading up to them, what the Bank's involvement in those negotiations were, how they were going to be structured and how ultimately the Bank would have made out better than they ultimately made out and the Wassermans would not have ended up having to pay the 9.5 million pounds under the guarantee.

The Defendants here are entitled to have that evidence heard by the jury regarding the Bank's lack of good faith as they moved forward on their agreement to work with the Wassermans in order to resolve this deal.

Now, Mr. Francis talked about the analysis of damages, and I think he's correct in some respects regarding what Mr. Wasserman set forth in the interrogatory responses. But I would point out that, in July of 2008, during the process of negotiating with Mr. Desmond, the Bank was actually sent a return analysis, and this is Exhibit CCC to my declaration, and that sets forth how the proposed Dermot Desmond transaction would ultimately produce more than -- more money than anybody needed in order to satisfy these obligations. And the Bank had eyes wide open as to what the possibilities were in connection with these deals. They just unreasonably refused to accept the conditions that were a part of them.

Let me speak briefly to the issue that Mr. Francis raised regarding waiver. That's Section 7.1 of the guarantee. I read it entirely differently than him, and I guess, you know, I believe that it's unambiguous in the way that I read it. There is nothing in that section that precludes the guarantors from asserting legal claims and defenses

about the validity of the enforcement of the guarantee.

That section speaks to, when making payments under the guarantee, whether the Defendants can unilaterally withhold portions of payments on the basis of claiming that there is some set-off obligation.

There's certainly nothing -- and I set this forth in the brief, and I just wanted to reiterate it because it was raised at the end. There's certainly nothing in there that prevents the guarantors from coming to a court and saying, I have legal claims that absolve my liability under this guarantee. And I think it's just a basic misreading of that section to interpret it the way that the Bank is interpreting it here.

I would also address the standing issues. You know, the counterclaims -- the counterclaims that are raised by the Defendants are not counterclaims that properly belong to Hamilton Hall. They are all based on the conduct that the Bank had with particularly David Wasserman individually in connection with the attempts to find third party buyers or investors for the property, you know, and particularly the intentional interference with advantageous business relations claim absolutely has nothing to do with Hamilton Hall Ventures LLC.

THE COURT: Mr. Ramos, am I wrong to think about the counterclaims as factual assertions that are mirrored in the Defendants' affirmative defenses to the underlying claim as well?

MR. RAMOS: You're not wrong at all, Your Honor.

THE COURT: Okay.

MR. RAMOS: You're not wrong at all. However, I think it's important that they be considered both as affirmative defenses and counterclaims because there is evidence that should get to a jury that there are damages that would flow to the Wassermans if they were to succeed in proving them to the trier --

THE COURT: But there's nothing in the counterclaim, the factual assertions, that would -- that you're not also asserting as affirmative defenses to the underlying action?

MR. RAMOS: No, there is not.

THE COURT: Do you want to address the choice-of-law issue at all, Mr. Ramos, and -- I was a little confused by what appeared to be some concession that Rhode Island and Scottish law were the same and then, as I started plotting out some of the issues as it relates to the affirmative defenses, it didn't appear that they were the same. What's the Defendants' position, first, on the choice-of-law question and then

the second issue?

MR. RAMOS: Certainly, Your Honor. We don't dispute that there's a choice-of-law clause in the guarantee. The -- I would state that the only claims that definitely apply to that choice-of-law clause are the breach of contract and breach of guarantee claims asserted by the Bank, and the affirmative defenses may very well also involve Scottish law.

However, I would point out, and we've cited this in our brief, that the obligation -- the Court is under no obligation to assert and apply the law of a foreign jurisdiction in circumstances where the principles of American jurisprudence would be obviated if Scottish law applied.

And I don't think that there's a huge amount of difference between Scottish law and Rhode Island law here. There is an asserted difference regarding the obligation of good faith in connection with contracts, and my analysis of that is as follows: There isn't a lot of -- there isn't a meaningful difference between having an obligation to enter into a contract with good faith and having an obligation of good faith and fair dealing going forward in that contract.

If you acted in good faith when you entered into that contract and the understanding of the purposes of

that contract as part of entering into that contract, and then you act contrary to those purposes in the way that you perform under that contract going forward, then the clear inference is that you didn't have good faith at the outset because you acted improperly in terms of the way that the agreement was as you moved forward in the -- as you moved forward in your performance under that contract.

You know, the obligation of -- and honestly, to the extent that Scottish law does not recognize that type of analysis, I think it's appropriate for the Court to not apply Scottish law to the obligation of good faith under the contract because that is a very deeply held principle of particularly Rhode Island jurisprudence but in many jurisdictions, if not all, in the United States, that there is an obligation implied in every contract to act in good faith in your performance of those obligations under the contract.

With respect to the estoppel claims, I don't think that there's a meaningful difference here, that they've cited the law of personal bar in Scotland. Now, that looks to me an awful lot like -- an awful lot like estoppel. They've got the elements of it on Page 19 of their reply brief. You know, A is that the Bank adopted a position materially inconsistent with

its rights under the guarantee; B, that Defendants relied upon that inconsistent conduct to their detriment; and, C, that an unfairness would arise if the Bank were entitled to depart from its prior inconsistent conduct and enforce the guarantee.

Well, you know, we have evidence presented by David Wasserman that the Bank agreed that it would forego its obligations -- forego its rights to pursue the guarantee if the Wassermans agreed that they would not publicly air what the Bank was doing in connection with the various third parties that they presented to the Bank.

And we've got, also, the Bank's continued position that they were not enforcing the guarantee; they were working with the Wassermans in order to bring about a resolution that wouldn't require them to bring an action or seek to recover under the guarantee.

The Defendants clearly relied on that, that they were trying diligently and continually communicating with the Bank in order to try and bring about the type of resolution that was contemplated by the Wassermans and the Bank in discussing how they were going to proceed.

And it would be unfair to -- in that last one, I think it's clearly going to be unfair if now, after

relying on what they thought was a good-faith participation of the Bank in these efforts, to now not hold the Bank to those representations. It's not really too much different from an estoppel, and I think if you analyze it under what the elements of personal bar are in Scotland, you've got a pretty clear amount of evidence at least that should survive a summary judgment motion to determine whether or not that affirmative defense should stand.

Let me just talk briefly about the not insubstantial amount of discussion about Sean Whalen that took place during the previous argument. You know --

THE COURT: I don't really much factor Mr. Whalen in. You're welcome to, but Mr. Francis made a lot of good points. I'm not quite sure legally how that one fits into it, although you're free to argue it if you'd like.

MR. RAMOS: Well, that is mostly my point is that we aren't asserting anything with respect to Mr. Whalen in the context of the summary judgment motion, and we would ask that the Court disregard the arguments with respect to Mr. Whalen. And it sounds like you, for the most part, are going to and I can leave --

THE COURT: It looks like he tried to dupe you like he tried to dupe a lot of people, and I'm not sure there's any relevance to that, but that's what the Court took away from the discussion.

MR. RAMOS: The only one point that I would like to make is that one of the things that Mr. Francis said, and to the extent that the Court picked up on this, I would like to refute that you should rely on it, is that the Bank was I believe his terminology was justifiably wary of the other potential deals because they had been burned once with Mr. Whalen.

That's not an argument that I'm aware of having been made prior to today. And, quite frankly, there isn't any evidence that the Bank's lack of willingness with respect to the other potential third party investors or buyers had anything to do with some concern about them not being real because Mr. Whalen wasn't a legitimate potential investor.

THE COURT: Mr. Francis talked quite a bit about the fact that the only piece of evidence about the agreement that you allege by Ms. Smillie on behalf of the Bank concerning this trade-off, hold-off and don't go to the press is a couple of sentences from Mr. David Wasserman's deposition.

Is that solely what you're relying upon for that

assertion? And if so, is that sufficient to defeat summary judgment?

MR. RAMOS: It is. It is -- yes, it is solely what we're relying on is David Wasserman's testimony regarding the agreement. And it is sufficient to defeat summary judgment.

The law is clear that the deposition testimony of a party that sets forth all of the elements of the claim or defense asserted is enough to create an issue of material facts sufficient to defeat summary judgment.

The evidence, while not voluminous, is clear and distinct in what it says. It says that the Bank said, If you put anything in writing or you talk about this and make it public, then we're going to come after you and that, therefore, I did not come after -- I did not talk about this to the press, I did not put anything in writing. You know, it's not -- just because it's short doesn't mean that it's insufficient. And just because it is from the Defendant doesn't mean that it might not be believed by the trier of fact.

And it has enough substance, although its breadth is not great, to defeat a claim for summary judgment in support of finding that there was indeed an understanding and an agreement that, in exchange for

not publicly airing or making a record of the Bank's behavior in connection with the attempted sale or investment in the Hamilton Hall property, that they would not enforce the personal guarantees against --

THE COURT: Ever? That they would not ever enforce it? What was -- I mean, what is the Defendants' assertion that, that agreement was?

MR. RAMOS: That they had foregone their rights to assert the -- to try and enforce the guarantees.

THE COURT: Forever?

MR. RAMOS: Yes.

THE COURT: Okay. And that it's your assertion that for -- that they gave up their rights to go after $9.5 million in exchange for David not going to the press with the way he alleges they would were treating him?

MR. RAMOS: Yes, that is the assertion. And whether that's believed by the trier of fact or not is an open question certainly, but it's certainly not out of the bounds of possibility.

You know, there are any number of reasons why a financial institution wouldn't want what it perceived to be negative press in the way that it's approaching particular transactions with particular people. This is a high-profile property. These are high-profile

people that the Bank -- that the Wassermans had been dealing with in connection with the Bank. You know, Mr. Trump and -- Mr. Trump we know in the United States to be a high-profile person.

THE COURT: We can take judicial notice of that.

MR. RAMOS: Mr. Desmond is, while maybe not a known entity in this country, is certainly -- you know, he's the sixth wealthiest person in Ireland, at least as of the time of the filing of our opposition motion, and is not somebody that it would be good for the Bank to have it known that they were not dealing with those types of people in good faith.

You know, that's the -- why the Bank would agree to that is not necessarily important, and maybe that's a question that the trier of fact will ask themselves in deciding whether or not that agreement actually occurred. But the fact is there is evidence that they did want to agree to that, and I think that, that defeats summary judgment on that point.

The one other point that I would like to make on that issue is that Mr. Francis certainly presented some argument that, because Bernard Wasserman and Richard Wasserman were not -- did not recall that agreement when they were asked about it, you know, reasons why they wouldn't have to pay under the

guarantee, couldn't recall any of those reasons, you know, the evidence in the record is apparent. The major player involved in all of the facts is David Wasserman. Bernard Wasserman--

THE COURT: That's because he was the golfer.

MR. RAMOS: Perhaps it's because he was the golfer. And David's a golfer, Richard's a body builder, and Bernie's their dad. The -- but David Wasserman ran --

THE COURT: You might not want on the record just describing Richard as the body builder, but that's okay. I'm sure they all collectively have more positive qualities than that snippet may represent.

MR. RAMOS: Oh, absolutely.

But the point here is that they may not have recalled, they may not have known, but Richard and Bernie relied on David to run everything associated with this deal. They were involved in bits and pieces at different times here and there, but they weren't part of it. And just because they weren't -- they don't remember something specifically doesn't mean that it didn't apply to them as well.

David's work on behalf of the deal applied with -- and the evidence shows there's never any discussion of a specific release or David is never

talking to anybody at the Bank, Ms. Smillie nor Mr. Wighton or anybody else, about just getting himself released from the guarantee. He's talking about everybody, all of them.

THE COURT: I assume, Mr. Ramos, it's your argument -- or it would be your argument to Mr. Francis that the other evidence that he presented where David did not assert the release is jury argument?

MR. RAMOS: Absolutely. Absolutely.

In closing, I just would encourage the Court to look at the voluminous documentary evidence that was --

THE COURT: Trust me, between my various Wasserman cases, the evidence is voluminous. They can take judicial notice of that as well.

MR. RAMOS: Because what you will find if you take that -- you know, if you look at the documents submitted in the opposition to summary judgment, is that the Donald Trump, Dermot Desmond and Carmichael and McAllister deals were deals with real substance, that if you look at -- there were various, you know, although unsigned, term sheets that were created for from Mr. Trump and from Mr. Desmond at different times.

From 2007 all the way up until the date that the sale to Kohler closed, there were ongoing negotiations of real substance with all three of them, and the

Bank -- and they were not only ongoing negotiations, but they were concrete with real numbers attached to them, and the Bank declined to entertain those offers on the terms that were presented and ultimately caused their own damages and ultimately accepted a price for millions of pounds less than what they could have gotten at numerous points earlier in the process.

THE COURT: Thanks, Mr. Ramos.

MR. FRANCIS: May I reply?

THE COURT: Yes, please. In fact, let me ask you a question -- I'll wait till you can get set up.

Address what you want to, Mr. Francis, but if you'd begin by addressing Mr. Ramos's argument that Exhibit EE to his affirmation; that is, the internal -- I forget the gentleman's name now. Campbell maybe?

MR. FRANCIS: Campbell, that is correct, Your Honor.

THE COURT: Campbell. -- that, that internal --

MR. RAMOS: It was EEE.

THE COURT: EEE. I'm sorry. I only wrote down two. -- that Exhibit EEE to Mr. Ramos's affidavit is sufficient evidence for a jury to determine on the issue of reasonableness without the need for expert opinion .

MR. FRANCIS: Well, first, Your Honor, what EEE

is an internal memo where they're taking what they're being told by David Wasserman was a potential deal and saying, What would happen if we were to take this deal?

But in fact there was no potential Dermot Desmond deal along these lines. What we have is an e-mail -- now, this internal memo's August of 2008. We have an internal -- we have an e-mail from David Wasserman to -- I'm sorry -- to counsel for -- counsel for Mr. Dermot Desmond and then back from counsel for Mr. Desmond, and they're still fighting over the terms of this potential deal. And this is in September of 2008, and this is David Wasserman 16.

THE COURT: Can you give me the cites to those?

MR. FRANCIS: Sure. It's Exhibit 16 to the David Wasserman deposition, and it's Bates stamped P00035S, 36S.

And what David was -- one of the conditions that Dermot Desmond had on any potential deal was that Hamilton Hall had to pay off all their vendors, and there were millions of dollars in vendors.

And David, in September of 2008, comes back to Dermot and says, We don't want to do that. We just want to try to work out a deal where we sell the asset and we stiff the vendors. And Dermot Desmond says, I'm not doing that. I have to do business in this

community.

So even between Dermot Desmond and David Wasserman, there was no meeting of the minds. Again, as David says, they never reached a final term sheet. David Wasserman got in the way of that deal, if there was one to be had.

In addition, again, August, 2008, where they're taking what David's telling them, they're saying there could have been a $26.5 million payment from Dermot. There is testimony, clear testimony in the record that he repeatedly reduced that $26.5 million number, was never willing to agree on a final number. The testimony is that Dermot Desmond just kept chipping.

THE COURT: And where does the Court find that testimony?

MR. FRANCIS: Your Honor, I can pull that out very quickly. There is -- if my co-counsel -- there is an e-mail where David admits that in -- if I can --

THE COURT: Take your time. Don't panic.

MR. FRANCIS: "Desmond was continuously trying to reduce the purchase price and never agreed to a final number," David deposition transcript Exhibit 19, Charles Rogers' deposition transcript, Pages 73, 1-7. So their own in-house counsel agreed they could never get Dermot Desmond to agree to final number.

This is William Schulz's deposition transcript, Pages 99, Line 6, to Page 100, Line 4. He was their internal financial modeler. And both of them said, Look, we just could never get Dermot Desmond to agree to a final number. And then they had this other issue where Dermot was saying, You gotta pay off all your vendors and David would refuse. They never agreed. His deposition testimony was he never agreed to that condition that Dermot Desmond insisted upon.

This is what we were dealing with. And if we would -- if we had to, we could deal with each one. But the point is, the question is: Was the Bank ever presented with a deal that they could accept or reject? And the answer is no. The undisputed evidence, we have to deal with the undisputed facts before us for summary judgment, is that there was never a final deal, anything solid that the Bank could ever put a financial metric to and decide, Does this make reasonable sense?

And if you're going to deal with whether or not a financial institution acted reasonably such that you could have any type of claims, again, it's a question of what would be reasonable on a lender liability status, and they put no effort in to establish that anything the Bank did was unreasonable or that there was anything real there for the Bank to do. There is

just a complete lack -- complete failure of proof.

On the issue of the release, which Bernard and Richard didn't know about, didn't rely on, to the extent that, as the Defendants are joint and severally liable, I don't think there is, even in David's snippet of testimony, there's nothing in there you could find that there was intention of a release for Bernard or Richard. They didn't know about it. They didn't rely on it.

THE COURT: Why would they need to rely on it if the Court were to accept the Defendants' argument, which is that there was a bargained-for exchange, you release us from the guarantee, I don't go to the press? Why is reliance relevant to that simple sort of contract? Hold on one second.

And second is: Aren't they third party beneficiaries even if one were to look at it as David speaking just on his own behalf?

MR. FRANCIS: If we look only at the snippet of testimony, that's all we have. And if we're going to call that a deal, we have to look at what the terms are, and there's nothing in his supposed description of that terms which shows that, that release is intended to be as to all parties.

THE COURT: Is that the David testimony on that

issue?

MR. FRANCIS: No.

THE COURT: Oh, okay.

MR. FRANCIS: This is a different David testimony on this issue, this issue of whether or not there was a release.

And David was clear in his deposition testimony, and this would be a further -- to the extent we're trying to define these terms of this supposed deal, "There was never to be a release until the Bank and the transaction came to a satisfactory conclusion."

THE COURT: And that's David's deposition testimony --

MR. FRANCIS: 206 --

THE COURT: -- 206, Lines 22-24.

MR. FRANCIS: Exhibit 34.

So even if you were to credit -- and I'm not asking you to make a finding of fact. But, again, the law is clear on summary judgment. Bare-face conclusory allegations are not enough to get beyond summary judgment, and that's all this assertion of a release is. It's a bold, bare-face allegation of a release, not enough.

THE COURT: Made under oath.

MR. FRANCIS: I'm sorry?

THE COURT: Made under oath.

MR. FRANCIS: It's made under oath, but it's the -- but some of the responses to interrogatories, and again, putting a -- putting or -- putting -- and of course your answer is made under Rule 11, which I take as seriously as putting something under oath, and there's no assertion of a release in the answer and counterclaim.

And David -- to the extent we're defining the terms of this potential transaction, it never happened. The release was never completed. And putting all of that aside, there's additional evidence that the Defendants would have to come forward if we're going to have this additional deal --

THE COURT: But, you know, I'll have to look at it in context, obviously, but I'm not sure that, that statement that you're showing me now relates to the releases as it is now alleged concerning the contract between Ms. Smillie and at least David.

MR. FRANCIS: Well, it does in fact.

THE COURT: It looks like it has to do with the, to use your term, the white-knight theory.

MR. FRANCIS: Well, no. It does in fact because that release, that language, Your Honor, if you take a look at it, and that's Exhibit 34, and we talked about

exhibits -- those exhibits previously --

THE COURT: Right.

MR. FRANCIS: -- 2, 3 and 4. That comes at the end of questioning about the letters. And my question to him was: "If you've got this release deal and you're talking with Angela Smillie, why didn't you say it in the letter?"

And he said, "No, there was no release until we reached a satisfactory deal."

THE COURT: Okay.

MR. FRANCIS: So it's specifically on point.

But even putting that aside, there's certain, again, failures of proof the Defendants have if they want to assert this. Again, they have not -- in David's deposition testimony, it doesn't say who the employee is, and we have to deal with, again, he's relying only on that snippet of testimony, so how can we tell that whoever that employee was had authority to bind the Bank and enter into this agreement?

They have made a complete failure of proof on showing it. Even if you take David's testimony as credible that the person who he says he spoke to, not identified, had authority to bind the Bank on a potential transaction, a complete failure of proof, putting even that aside, there's no reasonable reliance

because Paragraph 31 of the facility agreement, which is incorporated into the guarantee, that they're all integrated facility documents, all amendments have to be in writing, this would certainly -- giving up your $9.5 million obligations would certainly be the type of amendment to the guarantee that would have to be in writing. There's no writing.

Putting -- one other point as to the affirmative defenses, Mr. Ramos stated that he reads 7.1 differently than I do, and he talked about idea of it only dealing with set-offs of payments.

THE COURT: I hate to only harp on the arguments that -- of yours, Mr. Francis, that I don't agree with because there were -- you've made some -- many excellent, outstanding arguments, but I happen to agree with Mr. Ramos's reading of that particular section as well.

MR. FRANCIS: It's the wrong section, though. 9.1 is the section he's talking about.

THE COURT: The section that dealt with the --

MR. FRANCIS: Idea of set-off in payment?

THE COURT: Right, set-offs.

MR. FRANCIS: That's 9.1. And he's -- I don't dispute his reading that it has to do with whether or not you can make a settlement for payment.

THE COURT: Right.

MR. FRANCIS: But that's 9.1.

What I'm relying on is 7.1, Your Honor, and 7.1 reads, and it is a fairly long section, and I'd be happy to hand this up, 7.1 reads that, "Each guarantor agrees that its liability under this guarantee shall not be reduced, discharged or mitigated by any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy with BoS, which BoS may have now or in the future from or against the principal or any other person in respect to secured liabilities." That's A.

B, 7.1, "Each guarantor agrees that its liability under this guarantee shall not be reduced, discharged or mitigated by any act or omission by BoS or any other person in taking up, perfecting or enforcing any security or guarantee from or against the principal or any other person or the invalidity or unenforceability of such security or guarantee." And it goes on. It eliminates every one of their possible affirmative defenses, 7.1 does.

9.1, I agree with Mr. Ramos's reading, it deals with their not being permitted to take set-offs against payments. Different section, Your Honor.

Choice-of-law issue, Your Honor, again,

they've -- the Defendants chose not to put any Scottish law in the record, so if Scottish law does apply, I think the only evidence we have on Scottish law is what Mr. MacNeill put forward. And on his reading of Scottish law, again, the only obligation is of good -- is of simple honesty at the beginning of the contract, and there's no allegation there wasn't honesty there.

So any of these claims of good faith and fair dealing going forward would fail under Scottish law, and under the -- on to the choice-of-law analysis, the analysis is: Was there a rational reason for the parties to choose the law? And, two, was a nexus between the law chosen and the transaction?

Scottish property, Scottish bank, Scottish development. It's very clear why this was covered by Scottish law and why Scottish law should apply, and there's no reason to choose Rhode Island law. There is only right now one Defendant who lives in Rhode Island, according to the Defendants. Mr. David Wasserman has moved to New York. Bernard Wasserman, even at the time of the transaction, lived in Florida. So there's -- again, when you're choosing -- there's no -- there's nothing on the scale to benefit Rhode Island in being the governing choice of law.

And finally, Your Honor, that we're not -- our

issue is not with the -- with these deals, whether or not the Bank should have accepted deals or not. There's no dispute of -- and we're not alleging there's a dispute of fact there for that. What we're saying is there were no deals to accept, simply no deals to accept, and there's nothing in the record. They can -- and Mr. Ramos was up here, and he cannot point to one signed binding agreement that the Bank could have accepted or denied. And under those circumstances, we believe their affirmative defenses fail, and we ask for summary judgment.

Thank you, Your Honor.

THE COURT: All right. Thanks, Mr. Francis.

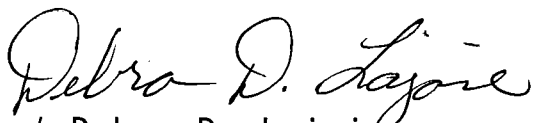
I'm not, obviously -- or maybe it's not so obvious. I'm not going to render a bench decision but will take it under advisement and will issue an opinion and on order from there.

Let's go off the record for a second.

(Adjourned at 11:39 a.m.)

CERTIFICATION

I, Debra D. Lajoie, RPR-FCRR-CRI-RMR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.



/s/ Debra D. Lajoie

11/27/12