

STATE OF INDIANA)
) SS:
COUNTY OF MARION)
 CAUSE NO. 49 _____

ELEMENTS FINANCIAL)
FEDERAL CREDIT UNION)
)
 Plaintiff,)
)
 v.)
)
LIBERTY OF LOCKERBIE, LLC,)
LITZ & EATON INVESTMENTS LLC,)
BRADLEY R. LITZ, and)
JOHNATHAN W. EATON,)
)
 Defendants.)

)

The subject real estate is commercial real estate and is not the primary residence of, or used by, the Defendants for personal, family, or household purposes. Therefore, this action is not subject to the requirements of Ind. Code § 32-30-10.5-8, *et seq.*

**COMPLAINT TO ENFORCE NOTE, LOAN AGREEMENT, AND GUARANTIES
AND FORECLOSE ON COMMERCIAL MORTGAGE AND ASSIGNMENT**

Elements Financial Federal Credit Union (“Elements”), by counsel, for its *Complaint to Enforce Note, Loan Agreement, and Guaranties and Foreclose Foreclose on Commercial Mortgage and Assignment* (the “Complaint”) against Defendant Liberty of Lockerbie, LLC (“Borrower”), Litz & Eaton Investments LLC (“L&E”), Bradley R. Litz (“Litz”), and Johnathan W. Eaton (“Eaton”) (Borrower, L&E, Litz, and Eaton collectively are the “Defendants”), alleges and states:

Parties:

1. Elements is federal credit union which maintains an office at 225 South East Street, Suite 300, Indianapolis, Indiana 46202.
2. The Borrower is an Indiana limited liability company with a last known place of

business of 1101 Central Avenue, Indianapolis, Indiana 46202.

3. According to the Indiana Secretary of State website, Litz is the registered agent for Borrower, and the registered agent's address is 1101 Central Avenue, Indianapolis, Indiana 46202.

4. L&E is an Indiana limited liability company with a last known place of business of 1101 Central Avenue, Indianapolis, Indiana 46202.

5. According to the Indiana Secretary of State website, Litz is the registered agent for Borrower, and the registered agent's address is 1101 Central Avenue, Indianapolis, Indiana 46202.

6. Litz is a resident of Marion County, Indiana. Litz's last known address was 25 W. 75th Street, Indianapolis, Indiana 46260.

7. Eaton is a resident of Marion County, Indiana. Eaton's last known address was 8192 Sycamore Road, Indianapolis, Indiana 46240.

Loan Documents

8. On April 19, 2019, the Borrower executed and delivered to Elements a *Construction Loan Note* dated April 19, 2019, in the original principal amount of \$5,844,126.00 (the "Note"). A true, correct and authentic copy of the Note is attached hereto as Exhibit A and by reference made a part hereof.

9. In connection with the Note, on April 19, 2019, the Borrower executed and delivered to Elements a *Construction Loan Agreement* which further established the terms and conditions to the Note ("the Loan Agreement"). A true, correct and authentic copy of the Loan Agreement is attached hereto as Exhibit B and by reference made a part hereof.

10. In order to secure the obligations of Borrower to Elements under the Note and

Loan Agreement, on April 19, 2019, Borrower executed and delivered to Elements a *Construction Mortgage, Security Agreement, Assignment of Rents and Leases and Fixture Filing* (the “Mortgage”) which granted Elements a security interest in the following described property, rights and interests (the “Mortgaged Property”):

- (a) real estate located in Marion County, Indiana and as more particularly described on Exhibit A attached to the Mortgage and incorporated herein by reference (the “Real Estate”);
- (b) all improvements of every nature whatsoever then or thereafter situated on the Real Estate, and all fixtures and personal property of every nature whatsoever then or thereafter owned by the Borrower and on, or used in connection with the Real Estate or the improvements thereon, or in connection with any construction thereon, including all extensions, additions, improvements, betterments, renewals, substitutions and replacements to any of the foregoing and all of the right, title and interest of the Borrower in and to any such personal property or fixtures together with the benefit of any deposits or payments then or thereafter made on such personal property or fixtures by the Borrower or on its behalf (the “Improvements”);
- (c) all easements, rights of way, gores of real estate, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances whatsoever, in any way then or thereafter belonging, relating or appertaining to the Real Estate, and the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, at law as well as in equity, of the Borrower of, in and to the same;
- (d) all rents, revenues, issues, profits, proceeds, income, royalties, letter-of-credit rights (as defined in the Uniform Commercial Code of the State of Indiana (the “Code”), escrows, security deposits, impounds, reserves, tax refunds and other rights to monies from the Mortgaged Property and/or the businesses and operations conducted by the Borrower thereon;
- (e) all interests of the Borrower in all leases then or thereafter on the Mortgaged Property, whether written or oral (“Leases”),

together with all security therefor and all monies payable thereunder;

- (f) all fixtures and articles of personal property then or thereafter owned by Borrower and forming a part of or used in connection with the Real Estate or the Improvements, including, but without limitation, any and all air conditioners, antennae, appliances, apparatus, awnings, basins, bathtubs, bidets, boilers, bookcases, cabinets, carpets, coolers, curtains, dehumidifiers, disposals, doors, drapes, dryers, ducts, dynamos, elevators, engines, equipment, escalators, exercise equipment, fans, sittings, floor coverings, furnaces, furnishings, furniture, hardware, heaters, humidifiers, incinerators, lighting, machinery, motors, ovens, pipes, plumbing, pumps, radiators, rangers, recreational facilities, refrigerators, screens, security systems, shades, shelving, sinks, sprinklers, stokers, stoves, toilets, ventilators, wall coverings, washers, windows, window coverings, writing, and all renewals or replacements thereof or articles in substitution therefore, whether or not the same are or shall be attached to the Real Estate or the Improvements in any manner; it being mutually agreed that all of the aforesaid property owned by Borrower and placed on the Real Estate or the Improvements, so far as permitted by law, shall be deemed to be fixtures, a part of the realty, and security for the Indebtedness;
- (h) all of Borrower's interests in "general intangibles" including "payment intangibles" and "software" (each as defined in the Code) then owned or thereafter acquired and related to the Mortgaged Property, including, without limitation, all of Borrower's right, title and interest in and to: (i) all agreements, licenses, permits and contracts to which the Borrower is or may become a party and which relate to the Mortgaged Property; (ii) all obligations and indebtedness owed to the Borrower thereunder; (iii) all intellectual property related to the Mortgaged Property; and (iv) all choses in action and causes of action related to the Mortgaged Property;
- (i) all of Borrower's accounts then owned or thereafter created or acquired as relate to the Mortgaged Property, including, without limitation, all of the following then owned or thereafter created or acquired by Borrower: (1) accounts, contract rights, book debts, Note drafts, and other obligations or indebtedness owing to the Borrower arising from the sale, lease or exchange of goods or other property and/or the performance of services; (ii) the Borrower's rights in, to and under all purchase orders

for goods, services or other property; (iii) the Borrower's rights to any goods, services or other property represented by any of the foregoing; (iv) monies due to become due to the Borrower under all contracts for the sale, lease or exchange of goods or other property and/or performance of services including the right to payment of any interest or finance charges in respect thereto (whether or not yet earned by performance on the part of the Borrower); (v) "securities", "investment property," "financial assets," and "security entitlements" (each as defined in the Code), and (vi) proceeds of any of the foregoing and all collateral security and guaranties of any kind given by any person or entity with respect to any of the foregoing; and all warranties, guarantees, permits and licenses in favor of Borrower with respect to the Mortgaged Property; and

- (j) all proceeds of the foregoing, including, without limitation, all judgments, awards of damages and settlements hereafter made resulting from condemnation proceeds or the taking of the Mortgaged Property or any portion thereof under the power of eminent domain, any proceeds of any policies of insurance, maintained with respect to the Mortgaged Property or proceeds of any sale, option or contract to sell the Mortgaged Property or any portion thereof.

The Mortgage was recorded on April 24, 2019, as Instrument No. A201900035341 in the Office of the Marion County Recorder. A true, correct and authentic copy of the Mortgage is attached hereto as Exhibit C and by reference made a part hereof.

11. In order to further secure the amounts due under the Note and Loan Agreement, on April 19, 2019, Borrower executed and delivered to Elements an *Assignment of Plans, Specifications, Construction Services Contracts, Licenses and Permits* (the "Assignment") which granted Elements a security interest in the following described property, rights and interests (collectively referred to as the "Collateral");

- (a) all plans, specifications, surveys, architectural renderings and drawings, soil test reports, other reports or examinations of the property, architectural contracts, engineering contracts, construction contracts, subcontracts and contracts with material suppliers;

- (b) all service contracts, maintenance contracts, management agreements, warranties, guaranties and the right to use all names now and hereafter used by the Borrower in connection with the property;
- (c) all permits, certificates, licenses, approvals, contracts, entitlements and authorizations, however characterized, issued or in any way furnished for the acquisition, construction, development, operation, use and occupancy of the property, including without limitation, certificates of occupancy;

which the Borrower has, may have, or may subsequently directly or indirectly enter into, obtain or acquire in connection with the improvement, ownership, operation, leasing or maintenance of the property, together with the proceeds of all of the foregoing. A true, correct and authentic copy of the Assignment is attached hereto as Exhibit D and by reference made a part hereof.

12. Elements perfected its security interest in the Collateral and further perfected its security interest in the Mortgaged Property by filing a UCC Financing Statement on May 14, 2019, as Filing No. 201900004062498 with the Indiana Secretary of State and with the Office of the Marion County Recorder on April 24, 2019, as Filing No. U201900000438 (collectively, the “Financing Statement”). A true, correct and authentic copy of the Financing Statement is attached hereto as collective Exhibit E and by reference made a part hereof.

13. In order to further secure the amounts due under the Note and Loan Agreement, on April 19, 2019, L&E, Litz, and Eaton each executed and delivered to Elements a *Guaranty of Payment and Completion* dated April 19, 2019 (the “Guaranty”). A true, correct and authentic copy of the Guaranty is attached hereto as Exhibit F and by reference made a part hereof.

14. The Note, Loan, Mortgage, Assignment, and Guaranty collectively are the “Loan Documents”.

15. By virtue of the chain of title set forth above, and there being no further transfers of the Loan Documents, Elements is a “person entitled to enforce” the Note within the meaning

of Ind. Code § 26-1-3.1-301(3), and is entitled to enforce the Note and thus the related Mortgage, Assignment, and the Guaranty under the provisions of Ind. Code § 26-1-3.1-309.

16. This is an action to foreclose a mortgage. As this foreclosure action involves commercial real estate, Elements is not required to comply with Ind. Code. §§ 32-30-10.5-1, *et seq.*

Count I - Enforcement of the Note

Elements for Count I of its Complaint to enforce the Note against the Borrower, states:

17. Elements incorporates by reference the preceding paragraphs of its Complaint as if fully repeated herein.

18. The Borrower is in default under the Note for failure to make payments as they become due (the “Default”).

19. All amounts owed with regard to the Note are due and payable in full by the Borrower to Elements.

20. As of October 24, 2019, the outstanding balance due by the Borrower under the Note was \$1,136,843.03, including principal in the amount of \$1,099,518.19, interest in the amount of \$33,399.76, late fees in the amount of \$1,275.78, collection costs (including costs, expenses, and attorneys’ fees) in the amount of \$2,649.30, plus interest which continues to accrue from and after October 24, 2019, at the *per diem* rate of \$198.52. Elements expressly reserves the right to additional default interest, additional late fees and additional collection costs (including costs, expenses, and attorneys’ fees) to the outstanding balance due by the Borrower under the Note.

21. All conditions precedent to Elements’ claims on the Note have been performed, have occurred or have been excused.

22. Elements has incurred costs, expenses, and attorneys' fees and will incur additional attorneys' fees and costs prior to and subsequent to judgment in this action.

23. All costs, expenses, and attorneys' fees in this action are recoverable from the Borrower by Elements pursuant to the terms of the Note.

WHEREFORE, Elements, respectfully requests that the Court:

- A. Enter judgment in favor of Elements against the Borrower, with regard to the Note as of October 24, 2019, in the amount \$1,136,843.03, including principal in the amount of \$1,099,518.19, interest in the amount of \$33,399.76, late fees in the amount of \$1,275.78, collection costs (including costs, expenses, and attorneys' fees) in the amount of \$2,649.30, plus interest which continues to accrue from and after October 24, 2019, at the per diem rate of \$198.52, plus additional costs and expenses of collection and reasonable attorneys' fees, all without relief from valuation and appraisal laws; and
- B. Grant Elements such other relief as may be just and proper.

Count II - Enforcement of the Guaranty

Elements for Count II of its Complaint to enforce the Guaranty against L&E, Litz and Eaton, states:

24. Elements incorporates by reference the preceding paragraphs of its Complaint as if fully repeated herein.

25. The Borrower has defaulted on its obligations due to Elements under the Loan Documents due to the Default.

26. As a result of the Default, the entire amount of the Guaranty is due and payable in full.

27. As of October 24, 2019, the outstanding balance owed by L&E, Litz and Eaton to Elements under the Guaranty was \$1,136,843.03. Elements expressly reserves the right to additional default interest, additional late fees and additional collection costs (including costs, expenses, and attorneys' fees) to the outstanding balance due by L&E, Litz and Eaton under the Guaranty.

28. Elements has incurred costs, expenses and attorneys' fees and will incur additional attorneys' fees and costs prior to and subsequent to judgment in this action.

29. All costs, expenses and attorneys' fees incurred by Elements in recovering on the Guaranty are recoverable pursuant to the terms of the Guaranty.

30. All conditions precedent to Elements' enforcement of the Guaranty against L&E, Litz and Eaton have been performed, have occurred or have been excused.

WHEREFORE, Elements respectfully requests that the Court:

- A. Enter judgment in favor of Elements against L&E, Litz and Eaton on the Guaranty as of October 24, 2019, in the amount of \$1,136,843.03, plus interest which continues to accrue from and after October 24, 2019, at the per diem rate of \$198.52, plus additional costs and expenses of collection and reasonable attorneys' fees, all without relief from valuation and appraisement laws; and
- B. Grant Elements such other relief as may be just and proper.

Count III – Foreclosure of the Assignment

Elements for Count III of its Complaint to foreclose the Assignment against Borrower, states:

31. Elements incorporates by reference the preceding paragraphs of its Complaint as if fully repeated herein.

32. The Borrower is in default under the Assignment due to the Default.

33. Pursuant to the terms and conditions of the Assignment, Elements is entitled to foreclose its interest in the Collateral.

34. All conditions precedent to Elements' enforcement of the Assignment against the Borrower have been performed, have occurred, or have been excused.

35. Elements has incurred costs, expenses, and attorneys' fees in its efforts to collect on the Assignment, and additional attorneys' fees will be incurred prior and subsequent to judgment in this matter.

36. All costs, expenses, and attorneys' fees incurred by Elements in this action are recoverable from the Borrower, pursuant to the terms and conditions of the Assignment.

37. The interests of Elements in the Collateral are superior to all claims, liens, and interests with respect to the Collateral asserted by the Borrower or any party claiming an interest,

by, through or under the Borrower and all other claims of the Borrower or any party claiming an interest, by, through or under the Borrower are junior, inferior and subordinate to the liens and security interest of Elements, which liens and security interest the Elements hereby requests be foreclosed in order to satisfy any judgment rendered herein in favor of Elements and against the Borrower.

WHEREFORE, Elements, respectfully requests that the Court:

- A. Enter judgment that Elements' security interest in the Collateral is a valid, perfected lien on the Collateral;
- B. Entered judgment declaring Elements' security interest in the Collateral to be superior to the Borrower and all other interests therein and foreclosing the security interests of Elements in the Collateral; thus forever foreclosing and barring any right of redemption of the Borrower and others claiming through the Borrower and terminating any and all interests of such parties in the Collateral;
- C. Enter judgment declaring that, pursuant to the Assignment, Elements is lawfully entitled to immediate possession of the Collateral and directing the Borrower to turn the Collateral over to Elements for the purpose of conducting a sale of the Collateral with the proceeds being applied to the payment of any judgment obtained by Elements as part of this action;
- D. In the alternative, enter an Order directing the Sheriff of Marion County, Indiana to seize the Collateral, conduct a public sale of the Collateral to satisfy the judgment rendered herein in favor of Elements, as provided by law; empowering Elements to bid at such sale for the Collateral, or any part thereof, with the

judgment rendered herein to be credited against any amount bid by Elements at such sale;

- E. Enter judgment directing the Borrower and all parties herein to surrender full and peaceful possession of the Collateral to the holder of such deed, bill of sale, or a copy thereof was results from a sale and that if the Defendants do not surrender full and peaceful possession of the Collateral, then the Sheriff of Marion County, Indiana is hereby directed to collect the Collateral from the Defendants or any other persons who may be in possession of the Collateral; and
- F. Grant Elements such other relief as may be just and proper.

Count IV - Foreclosure of the Mortgage

Elements for Count IV of its Complaint to foreclose the Mortgage against Borrower, states:

38. Elements incorporates by reference the preceding paragraphs of its Complaint as if fully repeated herein.

39. The Borrower is in default under the Mortgage due to the Default.

40. Pursuant to the terms and conditions of the Mortgage, Elements is entitled to foreclose its interest in the Mortgaged Property.

41. All conditions precedent to Elements' enforcement of the Mortgage against the Borrower have been performed, have occurred, or have been excused.

42. Elements has incurred costs, expenses, and attorneys' fees in its efforts to collect on the Mortgage, and additional attorneys' fees will be incurred prior and subsequent to judgment in this matter.

43. All costs, expenses, and attorneys' fees incurred by Elements in this action are

recoverable from the Borrower, pursuant to the terms and conditions of the Mortgage.

44. The lien and mortgage interests of Elements are superior to all claims, liens, and interests with respect to the Mortgaged Property asserted by the Borrower or any party claiming an interest, by, through or under the Borrower and all other claims of the Borrower or any party claiming an interest, by, through or under the Borrower are junior, inferior and subordinate to the liens and security interest of Elements, which liens and security interest the Elements hereby requests be foreclosed, and that the Mortgaged Property be sold by the Sheriff of Marion County, Indiana in accordance with all applicable laws, or via auction pursuant to Indiana Code § 32-29-7-4, at Elements' election, in order to satisfy any judgment rendered herein in favor of Elements and against the Borrower.

WHEREFORE, Elements, respectfully requests that the Court:

- A. Enter judgment declaring that Elements' security interest in the Mortgaged Property is a valid, perfected lien on the Mortgaged Property;
- B. Entered judgment against the Borrower that the Mortgage and all security interests of Elements in the Mortgaged Property be foreclosed against the Mortgaged Property in favor of Elements and declared superior to all right, title, and interest in and to the Mortgaged Property claimed by Borrower and anyone claiming by, through, or under the Borrower;
- C. Enter judgment foreclosing the liens and security interests of the Mortgage in favor of Elements, foreclosing and barring the Borrower's right of redemption and anyone claiming an interest in the Mortgaged Property by, through, or under the Borrower;
- D. Enter judgment directing the sale of the Mortgaged Property by the Sheriff of

Marion County, Indiana, or via auction pursuant to Ind. Code § 32-29-7-4, at Elements' election, with Elements permitted to bid in its judgment in this action, with the proceeds of such sale or auction to be applied to the cost of sale, then to the judgment of Elements, with the surplus, if any, to be paid as ordered by the Court and with the deficiency, if any, to be paid by the Borrower;

- E. Enter judgment directing the Borrower and all parties herein to surrender full and peaceful possession of the Mortgaged Property to the holder of such deed, bill of sale, or a copy thereof as results from the Sheriff's sale or auction of the Mortgaged Property and that if the Borrower does not surrender full and peaceful possession of the Mortgaged Property, then an Order directing the Sheriff of Marion County, Indiana to enter the Mortgaged Property and eject and remove therefrom the Borrower or any other persons who may be in unlawful possession of the Mortgaged Property; and
- F. Grant Elements such other relief as may be just and proper.

Dated: October 29, 2019

Respectfully submitted,

/s/ Kay Dee Baird

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